

**THE RIGHT TO FREEDOM OF EXPRESSION AND ITS ROLE IN POLITICAL  
TRANSFORMATION IN KENYA**

by

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### Declaration of Originality

I, the undersigned, hereby declare that this thesis, which I submit for the degree Doctor Legum (LLD) in the Faculty of Law at the University of Pretoria, is my own work and has not previously been submitted for a degree at another university. I have correctly cited and acknowledged all my sources.

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## Dedication

To my mother Elizabeth Cheron Koromicha

-and-

My son Immanuel Bethel Morusoi who was born while this research project was midway

## Acknowledgements

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## Acronyms and Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AG	Attorney General
AU	African Union
CORD	Coalition for Reform and Democracy
CAK	Court of Appeal of Kenya
CJ	Chief Justice
CPRs	Civil and Political Rights
DCJ	Deputy Chief Justice
DFRD	District Focus for Rural Development
DPP	Director for Public Prosecutions
EACC	Ethics and Anti-corruption Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
eKLR	Electronic Kenya Law Reports
EU	European Union
GA	General Assembly
HCK	High Court of Kenya
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Convention on Economic Social and Cultural Rights
ICT	Information and Communication Technology
IPPG	Inter-Party Parliamentary Group
IT	Information Technology
KANU	Kenya Africa National Union
KADU	Kenya Africa Democratic Union
KBC	Kenya Broadcasting Corporation

KDF	Kenya Defence Forces
KFCB	Kenya Film and Classification Board
KICA	Kenya Information and Communication Act
KLR	Kenya Law Reports
KPU	Kenya People’s Union
LSK	Law Society of Kenya
NARC	National Rainbow Coalition
NCIA	National Cohesion and Integration Act
NCIC	National Integration and Cohesion Commission
OAU	Organisation of African Unity
SADC	Southern African Development Community
SCJ	Supreme Court Judge
SCK	Supreme Court of Kenya
SERs	Social and Economic Rights
SLAA	Security Laws Amendment Act
SONU	Student Union of Nairobi University
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
US	United States
USD	United States Dollars
VOK	Voice of Kenya
WUS	World University Service

## Abstract

Enacted after a protracted review process characterised by many false starts, tensions and at times violence, the Constitution of Kenya 2010 envisions a radical break from a politically repressive past. It envisages extensive political transformation; a momentous shift in the political configuration of the polity in terms of its governance structures and the equilibrium of power among its institutions. It also entails a change in the normative arrangements, culture, attitudes and practices that surround politics and the exercise of public power. Crucially, as part of the transformation project, the Constitution has made a resolute commitment to fundamental rights and freedoms. Key among these is the right to freedom of expression.

Freedom of expression enjoys protection in democratic constitutions around the world and in international law, albeit in different formulations. The right has repeatedly received affirmation in apex courts, including in Kenya, as the ‘bedrock of democratic governance,’ and similar praises. Except for jitters raised by the recent enactment of a plethora of expression-restricting laws and increased controversial prosecutions, there has been a general assumption that the protection of the right in Kenya is solid. This study aims, in part, at evaluating and deconstructing that assumption. In particular, the thesis answers the following research questions: (a) what is the nature and scope of the right to freedom of expression and its limitations in Kenya? (b) what are the transformative goals of Kenya’s 2010 Constitution? (c) what is the role of the right to freedom of expression in Kenya’s project of transformation?, and (d) do the limitations of freedom of expression under Kenyan law meet the standards of the 2010 Constitution?

The thesis concludes that the transformation envisaged in the Constitution cannot be complete without fundamental changes in the law, practice and attitudes that surround freedom of expression. This is because, as the thesis shows, freedom of expression has the role of legitimating, facilitating, and defending the envisioned change. While the Constitution has created a framework with the potential to support transformation, freedom of expression restrictions contained in statutes, English common

law and judicial precedents undercut the protection of the right. In other words, while some of these restrictions serve legitimate purposes, the constitutional validity of others is suspect. This situation, in turn, undermines the transformative aspirations of the 2010 Constitution.

**Keywords:** freedom of expression, the right to freedom of expression, political transformation, 2010 Constitution, Kenya's Constitution, human rights, political expression, limitation of rights, freedom of expression restrictions, article 33

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## Chapter One

### Introduction and Background

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## 1.1. Introduction and Background

Since its inception through the declaration of protectorate status by Britain in 1895, Kenya has undergone three major constitutional moments:<sup>1</sup> (a) independence from decades of colonial rule in 1963, (b) the defeat of the independence party KANU in 2002, and (c) the promulgation of a new Constitution in 2010.<sup>2</sup> Similarly, the country has had three major historical periods: the British colonial rule (1895-1963), the KANU regime under Jomo Kenyatta and Moi (1963-2002), and the post-KANU era (2003 to date).<sup>3</sup>

The decades of the existence of the polity (both the colonial and post-colonial state) has yielded a body of laws, social and political institutions, political practices and attitudes that characterise the Kenyan legal system and its culture. The enactment of the 2010 Constitution as the third constitutional moment was intended, at least in part, to reverse the uninspiring legacy and failures of the first and second periods as well as fulfill the failed promises of the second constitutional moment, the defeat of KANU.<sup>4</sup> Thus, the

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<sup>1</sup> “Constitutional moments” is a term used by Bruce Ackerman to refer to milestones in the constitutional developments of a country during which previous understandings of the character of the constitutional order are renounced and replaced with new understandings that are widely accepted as legitimate. See generally, Bruce Ackerman, *We the People: Volume 2: Transformations*, Cambridge: Harvard University Press

<sup>2</sup> The succession from Jomo Kenyatta to Daniel arap Moi in October 1978 following the death of the former is not considered here as a significant transition or constitutional moment. This is because the takeover by Moi who had been Kenyatta’s deputy for eleven years since 1967 was still under the independence party Kenya African National Union (KANU) and continued more or less the same style of politics. In fact, Moi himself promised upon succession that he would ‘follow in the footsteps of his predecessor,’ hence his philosophy, ‘*Nyayo*.’ *Nyayo* is Kiswahili word for footsteps.

<sup>3</sup> The post-KANU era was presided over by President Mwai Kibaki (later with Prime Minister Raila Odinga as a co-principal in a power-sharing arrangement following disputed presidential elections in 2007, and currently under President Uhuru Kenyatta).

<sup>4</sup> Beth Elise Whitaker & Jason Giersch ‘Voting on a constitution: Implications for democracy in Kenya,’ (2009) 27 *Journal of Contemporary African Studies* 1: DOI:10.1080/02589000802576657. See also Eric Kramon and Daniel N. Posner, ‘Kenya’s New Constitution’ (2011) 22 *Journal of Democracy* 89. In 2002, Mwai Kibaki, then in opposition entered into a secret power-sharing agreement with a group that split from Moi’s KANU. The group, led by Raila Odinga united with the aim of defeating Uhuru Kenyatta, Moi’s preferred successor. Kibaki and Odinga and their respective affiliates formed the National Rainbow Coalition Narc (NARC) which defeated Uhuru Kenyatta paving way for Kibaki to become Kenya’s third President. As part of the commitment to implement the secret bargain, Kibaki government upon assuming office promised that a new Constitution would be adopted within 100 days to address political grievances and provide for power sharing with Odinga’s group. These and other promises were largely unfulfilled leading to a fallout with the Odinga-led faction. The fallout led to the defeat of the government in 2005 in a referendum over a proposed Constitution prepared unilaterally by Kibaki’s government. In the aftermath, President Kibaki sacked Raila Odinga and his faction from the cabinet. This partly built up the tensions that engendered the 2007-08 election violence. As it turned out Kibaki and Raila Odinga would later find

third historical phase, which began with the exit of Moi, Kenya's second President and embellished by the enactment of a much celebrated Constitution in 2010, has been about building a new and more inspiring constitutional and political order.<sup>5</sup>

The promulgation of a new Constitution in August 2010 is arguably the most significant event in the country's post-colonial history. Enacted after a protracted review process characterised by many false starts, tensions and at times violence, the Constitution envisions a break from a repressive past characterised by despotism, corruption, and a near-collapse of ethics in public service and politics.<sup>6</sup> It envisages an open, free and democratic society undergirded by equality, freedom, equity, social justice, human dignity, human rights, integrity, inclusiveness, and public participation, among other values.<sup>7</sup> In other words, it envisages momentous constitutional and political transformation in terms of the configuration of the governance structure and the equilibrium of power among its institutions.<sup>8</sup> It entails widespread democratisation at various levels of governance; and a change in the normative arrangements, culture, attitudes and practices that surround politics and the exercise of public power.<sup>9</sup> The shift also touches on the orientation of the relationship between the state on the one hand, and

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themselves as co-principals in a coalition government formed as a compromise following the disputed 2007 presidential elections. See for example Susanne D. Mueller 'The Political Economy of Kenya's Crisis,' (2008) 2 *Journal of Eastern African Studies*, 185, DOI: 10.1080/17531050802058302.

<sup>5</sup> Eric Kramon and Daniel N. Posner, 'Kenya's New Constitution,' *supra*.

<sup>6</sup> Kenya's Constitution has actually reconstituted the State. The reforms brought about by the Constitution have introduced new public institutions, new state and public offices, changed the system of governance, delimited the country into new administrative units, reorganised key organs such as the Legislature, Executive and Judiciary, introduced new constitutional rights and freedoms, outlined crucial national values, and set standards of leadership among other changes.

<sup>7</sup> See the preamble and article 10 of the Constitution of Kenya, 2010. These values are a narrative that is evident throughout the text of the Constitution.

<sup>8</sup> Under the previous constitutional dispensation, power was concentrated in the executive to the extent that other institutions such as the legislature, the judiciary, the civil service and the Police were subjugated and weakened greatly. See discussions in See also Susanne D. Mueller 'The Political Economy of Kenya's Crisis,' (2008) 2 *Journal of Eastern African Studies*, 185, DOI: 10.1080/17531050802058302. See also Joshua Kivuva, 'Restructuring the Kenyan State, Society for International Development (SID).

<sup>9</sup> See generally, Jill Cottrell & Yash Ghai (2007) 'Constitution Making and Democratisation in Kenya,' (2000-2005), 14 *Democratisation*, 1, DOI: 10.1080/13510340601024272.

the individual on the other.<sup>10</sup> As it will become clear later in this study, the core of the envisaged transformation is the transition from a politically repressive order or an inchoate democratic system to a more solid democracy tailored to meet the highest social and political aspirations of its members.<sup>11</sup>

The bill of rights, contained in chapter four, is a charter of expanded rights and fundamental freedoms.<sup>12</sup> The Constitution sets the bill of rights apart as ‘an integral part of Kenya’s democratic state and...the framework for social, economic and cultural policies.’<sup>13</sup> This prominence accorded to human rights and fundamental freedoms, the Constitution says, is so as ‘to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.’<sup>14</sup> Key among these rights is the right to freedom of expression.<sup>15</sup> General Comment 34 (on article 19 of the International Convention on Civil and Political Rights (ICCPR))<sup>16</sup> adopted by the

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<sup>10</sup> Political repression in colonial and post –colonial Kenya also took the shape of alienation of citizens through abuse of human rights, exclusion of citizens from participating in political processes and nepotism and patronage in public service opportunities. See generally Korwa G. Adar and Isaac M Munyae, *Human Rights Abuse In Kenya Under Daniel arap Moi, 1978-2001*, (2001) *African Studies Quarterly*; Makau Wa Mutua, ‘Human Rights and State Despotism in Kenya: Institutional Problems,’ (1994) 41 *Africa Today* 50.

<sup>11</sup> Ruti Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation,’ (1997) 106 *Yale Law Journal*, 2009 (arguing that transformation entails, among other things, a change in the conception of justice in the society undergoing transformation). Klare, describing his concept of transformative constitutionalism says it entails a reconfiguration of political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. See Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146, p. 150.

<sup>12</sup> The Constitution guarantees civil and political rights as well as economic and social rights. In contradistinction to the previous Constitution which admitted elaborate limitations, the current Constitution makes specific provisions to ensure that rights are enforced and implemented through both legal and political means. For instance, legal technicalities, costs and lack of procedural rules cannot bar vindication of rights, see also the Constitution of Kenya, 2010, article 22(3) and 159 (2)(d).

<sup>13</sup> The Constitution of Kenya, 2010, Article 19(1).

<sup>14</sup> *Ibid*, article 19 (2).

<sup>15</sup> ‘Expression’ rather than ‘speech’ is appropriate in this study because it is the terminology used in modern Constitutions and international human rights instruments. ‘Speech’ is a terminology of the First Amendment of the American Constitution. Interpretations of the United States Supreme Court have expanded the meaning of ‘speech’ beyond written and vocalised forms of human language to cover varied forms of expression such as picketing and demonstrations, burning flags and effigies, academic freedom, scientific expression, and so forth,-the same elements covered in conceptions of the freedom of expression.

<sup>16</sup> Kenya is party to the ICCPR. See <http://www1.umn.edu/humanrts/research/ratification-kenya.html>. <Accessed 22 February 2016>.

United Nations Human Rights Committee<sup>17</sup> underscores the importance of the right to freedom of expression in a democracy both in the development of individuals and the society. The Comment reads in part:

2. Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.

3. Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.

4. The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, and the exercise of the right to vote.<sup>18</sup>

This passage is just one example that emphasises the role of freedom of expression in fostering democracy and its values of freedom, transparency, and accountability. It is also essential for the realisation of the full potential of the members of the society both collectively and individually, and for the enjoyment other fundamental rights such as the freedom of assembly, freedom of association, and the right to vote.<sup>19</sup>

Freedom of expression typifies the political struggles and the clamour for democracy, freedom, the rule of law, constitutionalism and respect human rights in

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<sup>17</sup> The Human Rights Committee is a United Nations organ created under the ICCPR receives reports from states party to the Convention regarding realisation of obligations under the Convention and may issue general comments regarding the obligations arising under it. See article 28 and 40 of the Convention. As a treaty organisation mandated to perform these roles, its pronouncements on the understanding of the provisions of the ICCPR are very important.

<sup>18</sup> United Nations Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, /U.N.Doc.CCPR/C/GC/34, available at: <http://www.refworld.org/docid/4ed34b562.html>. <Accessed 11 August 2016>. See paragraphs 2, 3 and 4.

<sup>19</sup> Ibid.

Kenya's colonial and post-colonial history.<sup>20</sup> As it will emerge in this study, the country's historical political struggles and agitations can be understood through the lens of freedom of expression experiences. The clamour for political change in the 1990s was partly a struggle for genuine democracy and expanded freedom of expression, and so was the quest for a new Constitution.<sup>21</sup> Similarly, contemporary legal disputes and heated political controversies have also tended to revolve around freedom of expression and its limitations.<sup>22</sup> Thus the political transformation project of the 2010 Constitution must necessarily entail a fundamental shift in the law, practices, culture and attitudes affecting or surrounding freedom of expression.

Freedom of expression, understood in the terms of the Universal Declaration of Human Rights<sup>23</sup> as the "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers,"<sup>24</sup> enjoys protection in democratic constitutions around the world and in international law, albeit in different formulations. Apex courts in leading democracies such as the United States,<sup>25</sup> South Africa,<sup>26</sup> Canada,<sup>27</sup> India<sup>28</sup> and the United Kingdom<sup>29</sup> have all affirmed the

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<sup>20</sup> Charles Muiro Ngugi, *Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya* (2008)(Unpublished PhD thesis) available online on-  
<https://etd.library.emory.edu/browse/author/value/Ngugi%252C%2BCharles%2BMuiro>. <Accessed 6 March 2014>.

<sup>21</sup> *Ibid.*

<sup>22</sup> For instance, the enactment of Kenya Information and Communication (Amendment) Act, 2013, the Media Council Act, 2013, and Security Laws Amendment Act, 2014 provoked street protests and court disputes, some of which are still going on. Security Laws Amendment Act in particular sought to restrict reporting of terrorism attacks. It was enacted amidst a brawl and fist fights in Parliament and precipitated heated litigation before the High Court in *Coalition for Reform & Democracy (CORD), Kenya National Commission on Human Rights & Samuel Njuguna Ng'ang'a v Republic of Kenya & another* [2015] eKLR. See news reports, 'Brawls, House Chaos as Police Laws Passed - VIDEO' (18 December 2014) available on: <http://www.nation.co.ke/news/politics/Parliament-Security-Bill-Chaos-MPs-Senators/-/1064/2561754/-/kiibxoz/-/index.html>. <Accessed 3 June 2016>.

<sup>23</sup> G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), available at: <http://www.refworld.org/docid/3ae6b3712c.html>. <Accessed 16 June 2016>.

<sup>24</sup> The Constitution of Kenya, article 19 (1).

<sup>25</sup> See for instance Justice Brennan in *Texas v Johnson* (491 U.S. 397 (1989)) "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," or Justice Thurgood Marshall in *Police Department of Chicago v Mosley* 408 U.S. 92 (1972) noting: "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.

special value of freedom of expression in democratic politics, and so have international tribunals such as the African Court of Human Rights,<sup>30</sup> the African Commission on Human and Peoples' Rights,<sup>31</sup> the Human Rights Committee,<sup>32</sup> and European Court of Human Rights.<sup>33</sup> In Kenya, the High Court has recognised the freedom of expression as the 'bedrock of democratic governance.'<sup>34</sup> Quoting the Supreme Court of Canada in *Edmonton Journal v Alberta (Attorney General)*,<sup>35</sup> the Court noted that the concept of 'free and uninhibited speech' is a defining feature of all 'truly democratic societies and institutions.' Thus, the Court went on to note, this freedom may only be 'restricted in the clearest of circumstances.'<sup>36</sup>

Why should the right to freedom of expression enjoy such strong protection? A number of justifications have been advanced from both 'constitutive' and 'instrumental' perspectives.<sup>37</sup> It has been argued that freedom of expression enables discovery of truth,<sup>38</sup>

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<sup>26</sup> See for instance *Khumalo and Others v Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002) in which the Constitutional Court of South Africa noted: "The importance of the right of freedom of expression in a democracy has been acknowledged on many occasions by this Court, and other South African courts. Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled."

<sup>27</sup> See for instance *Edmonton Journal v Alberta (Attorney General)*, (1989) 2 SCR 1326.

<sup>28</sup> See for example *Romesh Thapar v State of Madras*, AIR 1950 SC 124.

<sup>29</sup> See for example *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

<sup>30</sup> William Edward Adjei, 'The Protection of Freedom of Expression in Africa: Problems of the Application and Interpretation of Article 9 of the African Charter of Human and Peoples' Rights,' (Unpublished PhD thesis, 2012).

<sup>31</sup> *Ibid.*

<sup>32</sup> See for instance General Comment No. 34 (On ICCPR), U.N. Doc. CCPR/C/GC/34/CRP.2 (2010)

<sup>33</sup> See for instance *Handyside v the United Kingdom*, (5493/72) [1976] ECHR 5 (7 December 1976) and *Lingens v Austria* (1986) 8 EHRR 407.

<sup>34</sup> *Chirau Ali Mwakwere v Robert Maberu & 4 others* [2012] eKLR, p.4 [20].

<sup>35</sup> See note 27 above.

<sup>36</sup> *Ibid.*

<sup>37</sup> Dworkin uses the words 'constitutive' and 'instrumental' to describe justifications for free speech. Constitutive implies the notion that free speech is an intrinsic component of a democratic society, independent of the value that free speech adds. 'Instrumental' implies the justification for free speech because of its function in ensuring that a democracy can thrive and survive as it allows competition of ideas and enable people to make informed choices and participate effectively. See generally Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, Cambridge: Harvard University Press. Pages 195-209

<sup>38</sup> See generally, John Stuart Mill, *On Liberty*, in John Gray, ed., *John Stuart Mill on Liberty and Other Essays*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 1998

protects and affirms individual autonomy,<sup>39</sup> aids individual self-fulfillment,<sup>40</sup> supports democracy,<sup>41</sup> and preserves human dignity.<sup>42</sup> In the Kenyan context in particular, the right is indispensable if the vision of the country's relatively new Constitution is to be realised. Under the current Constitution, the country has a new (and complex) system of direct, representative and participatory democratic governance.<sup>43</sup> The country also has a catalogue of constitutional values and principles that must characterize public affairs;<sup>44</sup> and other accountability mechanisms intended to restore public confidence in public institutions. To keep public institutions responsive to the demands of the Constitution and the people, and the citizenry engaged in public affairs, a robust protection of the right to freedom of expression is crucial.

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<sup>39</sup> See Thomas Scanlon, 'A Theory of Freedom of Expression,' *Philosophy and Public Affairs* Vol 1, No. 2. (Winter, 1972), pp204-226. The autonomy theory posits that allowing freedom of speech is recognition of individual autonomy. That is, when members of a democratic system are allowed to freely express themselves, that it the highest affirmation of their autonomy as free individuals.

<sup>40</sup> Marty Redish, 'The Value of Free Speech,' (1982) 130 *University of Pennsylvania Law Review* 59. See also Thomas Emerson, 'Towards a General Theory of the First Amendment,' (1963) 72 *Yale Law Journal* 877.

<sup>41</sup> Democratic participation theory is associated with Alexander Meiklejohn. See generally A Meiklejohn (1948) *Free Speech and Its Relation to Self-Government*, New York: Harper Bros. Democratic participation theory posits that free speech enables citizens in a democracy to access information, make decisions and effectively participate in democratic governance. Democratic systems ought to be participatory, and freedom of expression makes participation of members in a democratic society possible.

<sup>42</sup> This is a less developed theory as compared with the others. While it has been used as a justification for the freedom of expression, critics reject it since the concept of human dignity can be used as a justification for limitation of freedom of expression. Others reject the concept of human dignity for being too broad or too fluid in its interpretation as to be a helpful theory in free speech discourse. See generally, GE Carmi, 'Dignity, The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification' (2006-2007) 9 *University of Pennsylvania Journal of Constitutional Law* 957. An analysis of human dignity as a justification for freedom of expression in this study is a must since in Kenya's Constitution, human dignity is both a right (article 28) and an undergirding value (article 10, 6<sup>th</sup> preambular paragraph.) In human rights discourse, the concept of human dignity is central as a source of human rights. Human rights is a crucial value of Kenya's Constitution.

<sup>43</sup> The Constitution has introduced a devolved system of government. The government has two levels; national and county. Like the national government, each county government has its own legislative and executive arms. The two levels of government are distinct yet interrelated. During general elections voters elect a total of six different office bearers. The county's democracy is direct to the extent that the people directly elect top members of the executive and legislature and certain constitutional changes must involve the people voting directly in a referendum. It is representative as elected legislators exercise power on behalf of the people to enact law and keep the executive in check. It is participatory in that the state (and its organs) is required to encourage and facilitate public participation in public affairs such as legislative processes (articles 118 and 196), management of public finance (article 201), and environmental management (article 69), among others.

<sup>44</sup> The Constitution of Kenya, article 10 and Chapter Six.

Except for a few non-derogable guarantees, rights including freedom of expression are not absolute.<sup>45</sup> They may be limited to safeguard countervailing values or interests such as national security, public order, public safety, public morals and the rights of others, or similar collective goals.<sup>46</sup> Striking the appropriate balance between these countervailing values or interests on the one hand and freedom of expression protection on the other is difficult.<sup>47</sup> It is difficult because their objectives pull in different directions.<sup>48</sup> The difficulty of defining the contours of protected expression and the extent of legitimate limitations is a major problem and preoccupation of freedom of expression discourses.<sup>49</sup>

Except for jitters raised by the recent enactment of the Kenya Information and Communication (Amendment) Act, 2013 and the Media Council Act, 2013,<sup>50</sup> and Security

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<sup>45</sup> For example no restrictions are permitted on the right to fair trial, freedom from torture, slavery, cruel and inhuman form of treatment or punishment. See generally, H Steiner, P Alston, *et al International Human Rights in Context: Law, Politics, Morals*, 3<sup>rd</sup> edn, (New York, Oxford University Press, 2007). See also article 25 of the Constitution of Kenya, section 37 of the Constitution of South Africa and article 4 of the ICCPR. South Africa's Constitution and German Basic Law adds to this list the right to human dignity.

<sup>46</sup> See for example article 19 (3)(a)(b) of the ICCPR and article 10 (2) of the European Convention on Human Rights.

<sup>47</sup> Thomas Emerson, 'Towards a General Theory of the First Amendment,' *supra*.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid*.

<sup>50</sup> The enactment of Media Council Act, 2013 and Kenya Communications and Information (Amendment) Act, 2013 enacted at the close of 2013 were greeted with protests and litigation that is still pending in court. The Media Council Act introduces heavy penalties for journalists and media operators found guilty of violating the code of conduct established for journalists and media operators. For instance a media house can be fined as much as Kenya Shillings twenty million (about USD 240,000) for violating the code of conduct. This is way beyond reach of small media houses, which can bring their businesses to an abrupt end. The important point here is heavy penalties serve to instill fear among journalists and entrench intimidation, thereby leading to self-censorship. On the flip side, it also serves to limit information available to the ordinary citizens, thereby limiting their right to receive information. Transparency and openness is the ultimate victim. The Kenya Information and Communication Act creates a body with the mandate to, among other things, enforce content of broadcasts regulations, protect privacy of persons, promote competition of ideas in the media and enforce media standards including making necessary regulations relating to freedom of expression. The powers are broad enough and the Authority's powers will have significant impact on freedom of expression and media depending on how the powers are exercised. Some of the provisions in the two laws have been seen as knee jerk reactions to a recent terror attack in Westgate Shopping Mall in Nairobi in which the government was unhappy with investigative journalism that revealed confusion and poor response by the country's security forces. In the aftermath, the government sought to arrest journalists and media owners for the coverage. It quickly backed off due to public discontent and the lack of legal backing for its intentions. The examples used here show how freedom of expression and media are inseparable to the extent that both concern dissemination of information.

Laws Amendment Act, 2014,<sup>51</sup> there has been a general assumption that the freedom of expression and its kin, media freedom, enjoy solid protection in Kenya's legal and constitutional edifice.<sup>52</sup> This study aims, in part, at evaluating and deconstructing that assumption. The thesis argues that while the Constitution has created a framework with a potential to support political transformation, the legal regime contained in statutes and judicial precedents relating to, limiting or affecting the freedom of expression in Kenya undermines its protection. This in turn threatens the transformative aspirations of the Constitution.

## **1.2. Problem Statement, Objectives and Justification of the Study**

### **1.2.1. Problem Statement**

The enactment of a very elaborate bill of rights in the Constitution represents Kenya's strong commitment to fundamental rights and fundamental freedoms, and genuine political transformation. However, the continued retention of laws received from the pre-2010 period and the enactment of new ones that unjustifiably restrict freedom of expression is a stark contradiction to this commitment.

The Constitution envisages a massive project of law reform to bring pre-existing laws in conformity with its provisions.<sup>53</sup> In response, numerous legislations have been enacted to reconfigure the law to the dictates of the Constitution. However, as far as the laws limiting freedom of expression is concerned, not much reforms have taken place.

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<sup>51</sup> See note 22 above.

<sup>52</sup> This assumption is evidenced by a lack of effort towards reforming the laws on the right to freedom of expression even after the enactment of a new Constitution. Agitations by media, civil society and politicians have focused on recent legislation and ignored pre-existing laws that continue to be a real threat to freedoms of expression and media. Since the promulgation of the current Constitution in 2010, there have been no attempts to deliberately overhaul pre-existing laws that posed a threat to freedom of expression and media. Instead, legislative efforts have focused on enactment of new laws some of which seeking to further suppress freedom of expression and expand government's control over media.

<sup>53</sup> A common feature throughout the Constitution is a requirement for Parliament to enact legislation to give effect to the provisions of the Constitution. The Fifth Schedule as mandated by article 261 (1) of the Constitution has a long list of legislation to be enactment in a span of up to five years. See article 10 of the Constitution of Kenya, 2010 and 6<sup>th</sup> paragraph of the preamble. The Constitution envisages a political system based on equality, equity, social justice, human dignity, human rights, democracy, inclusiveness, and public participation. The background against which the Constitution was enacted after many years of clamour for change further support the transformation intentions of the Constitution.

As a matter of fact, the situation has been compounded by the enactment of more expression-hostile legislation in the post-2010 period motivated mainly by the traumas of terrorism attacks and misconceived concerns of the dignity of political institutions and personalities.<sup>54</sup>

A bulk of current freedom of expression restrictions contained in statutes, English common law and judicial precedents emerged during the colonial era and before the commencement of the current Constitution. Some of these laws were bluntly calculated to perpetrate the repressive agenda of the colonial and postcolonial regimes.<sup>55</sup> The fact that these laws are still in force despite the enactment of a transformative Constitution presents theoretical problems. In Kelsenian terms, the replacement of the Constitution meant a change in the grundnorm. Thus, from a constitutional perspective, questions of their validity or congruence with the letter and spirit of the Constitution, including its commitment to create an “open and democratic” society, arise.”<sup>56</sup>

Kwasi Prempeh decries the notable general absence of African scholarship (with exception of South Africa) in mainstream comparative constitutional law discourses.<sup>57</sup> As concerns freedom of expression, the concept has attracted generous attention in comparative constitutional law scholarship. However, most literature on the subject is written in the context of Western democracies such as United States, Canada and

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<sup>54</sup> See clause 32 read with 33 of the Parliamentary Powers and Privileges Bill, 2014. This bill proposed to make it a crime to defame or scandalize Parliament. Since 2013 there has been an increase in the use and abuse of the offence of ‘undermining the authority of a public officer’ under section 132 of the Penal Code and ‘improper use of a licensed telecommunications system under section 29 of Kenya Information and Communication Act. The offence of ‘undermining the authority of a public officer’ is a 1950 law which makes it an offence to say or do anything that brings a public officer (including the President) to disrepute or ridicule. Section 64 of Security Laws Amendment Act, 2014 (SLAA) sought to prohibit (and punish) broadcasting of “any information which undermines investigations or security operations” and the publication of photographs of victims of terrorism attacks “without the consent of the National Police Service and of the victim.” In addition, it also prescribed hefty penalties for anyone who “publishes or utters a statement that is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism.”

<sup>55</sup> Morris Kiwinda Mbondenyei, Evelyne Owiye Asaala, Tom Kabau and Attiya Waris, (2007) *Human Rights and Democratic Governance in Kenya: A post-2007 Appraisal*, Pretoria University Law Press.

<sup>56</sup> The Constitution of Kenya, article 24 (1) for instance.

<sup>57</sup> H Kwasi Prempeh, *Africa's “Constitutionalism Revival”: False Start or New dawn?* (2007) Oxford University Press.

the United Kingdom. While the promulgation of Kenya's transformative Constitution was a milestone in Africa's constitutional developments since the enactment of South Africa's 1996 Constitution, it has not been followed by as much scholarly commentary.<sup>58</sup> Thus, this research aims at reducing this gap with a special focus on the relationship between the constitutional guarantee of freedom of expression and political transformation.

### 1.2.2. Objectives and Justification

Kenya's Constitution has now gone through a full cycle of implementation as envisioned by the Constitution itself.<sup>59</sup> Since 2010, the superior courts of record in Kenya have witnessed an unprecedented increase in constitutional and human rights litigation.<sup>60</sup> A number of these disputes concern the right to freedom of expression and its relative, media freedom. This suggests ongoing discourses in Kenya's attempts to comprehend and conceptualize the new constitutional and political order. However, the right to freedom of expression and the controversies that surround it are generally under-theorised in the country, and are yet to receive the attention of the Supreme Court.<sup>61</sup> Thus, this study has an important opportunity to contribute to the emerging and ongoing constitutional and rights discourses, with a specific focus on the right to freedom of expression.

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<sup>58</sup> Willy Mutunga, 'Elements of Progressive Jurisprudence in Kenya: A Reflection.' Speech delivered on 31 May 2012, available on <http://www.judiciary.go.ke/portal/assets/downloads/speeches/Elements%20of%20Progressive%20Jurisprudence%20in%20Kenya-%20A%20Reflection.pdf> <Accessed 31 May 2015>. (In which the retired Chief Justice Dr Willy Mutunga remarked that the 'quality and quantity of Kenya legal literature is disappointing.')

<sup>59</sup> The current Constitution of Kenya came into effect on 27 August 2010 following approval in a nationwide referendum held on 4 August 2010. The Fifth Schedule and section 5 (7) of the Sixth Schedule contemplates an implementation timeline of five years and also recognises a possibility of the process taking longer.

<sup>60</sup> See 'Judiciary Case Audit and Institutional Capacity Survey 2014' available online on: [http://www.judiciary.go.ke/portal/assets/filemanager\\_uploads/reports/National%20Case%20Audit%20Report.pdf](http://www.judiciary.go.ke/portal/assets/filemanager_uploads/reports/National%20Case%20Audit%20Report.pdf). <accessed 17 June 2016>.

<sup>61</sup> The Supreme Court is the final arbiter on constitutional and human rights issues. See the Constitution of Kenya, article 163. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR the Supreme Court had the opportunity to pronounce itself on freedom of expression and media freedom. This case however, focused on the media and the right of media houses to distribute their broadcast signals *viz-a-viz* the government's power to regulate. The controversy of the balance between these freedoms and countervailing values and interests was not in issue.

The Constitution envisages a massive project of law reform to bring pre-existing laws in conformity with its provisions.<sup>62</sup> Moreover, it demands that the provisions of the pre-existing laws must be ‘construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with [the] Constitution.’<sup>63</sup> Law reform through Parliament and judicial construction entails conceptualising the demands of the new Constitution and testing the provisions of the pre-existing laws against those demands. This study aims at contributing to that enterprise. It seeks to first, explore the nature and scope of the right to freedom of expression under Kenya’s Constitution. Second, it aims at demonstrating the centrality of the freedom of expression in the achievement of the goals of Kenya’s Constitution. Third, it evaluates the legal regime on freedom of expression in Kenya with a view of testing how compatible or consistent it is with the demands of the Constitution. Finally, it will suggest ways in which the legal framework relating to the right to freedom of expression could be reformed and construed in a manner that is compatible with the guarantees and aspirations of the Constitution.

### 1.3. Research Questions

The key research questions in this study are:

- a) What is the nature and scope of the right to freedom of expression and its limitations in Kenya?
- b) What are the transformative goals of Kenya’s 2010 Constitution?
- c) What is the role of the right to freedom of expression in Kenya’s project of political transformation?
- d) Do the limitations of freedom of expression under Kenyan law meet the standards of the 2010 Constitution?

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<sup>62</sup> A common feature throughout the Constitution is a requirement for Parliament to enact legislation to give effect to the provisions of the Constitution. The Fifth Schedule as mandated by article 261 (1) of the Constitution has a long list of legislation to be enacted in a span of up to five years.

<sup>63</sup> The Constitution of Kenya, 2010, section 7 of the Sixth Schedule.

To answer these key research questions, the following supplementary questions are important:

- a) What is the historical foundation of freedom of expression?
- b) What are the theoretical justifications for freedom of expression?
- c) What has been Kenya's historical experience with freedom of expression?
- d) What are the motivations and implications of protection of freedom of expression under Kenya's current Constitution?
- e) What threats do the right to freedom of expression in Kenya face?
- f) What reforms are necessary in order to bring Kenya's legal regime in conformity with the Constitution?

#### **1.4. Methodology and Assumptions**

In answering the research questions posed in this study, a combination of doctrinal, legal reasoning and analytical approaches were deployed. The study primarily took the form of 'desk-review' or 'library-based' research. It reviewed and analysed primary and secondary sources such as constitutions, statutes, treaties and conventions, judicial opinions, official reports, and records of *travaux préparatoires* of relevant treaties. Secondary sources such as books, monographs, dissertations and scholarly publications were also reviewed extensively and analysed.

To cover the topic, the study analysed the freedom of expression guarantee to unpack its meaning, nature, scope and components of the right. The concept is not unique to Kenya's Constitution. It is protected by constitutions around the world, albeit in different formulations. As will be seen later, parts of the provision on freedom of expression under Kenya's Constitution are similar with provisions found in international human rights instruments and in foreign constitutions. Thus, literature on international human rights law and comparative constitutional law touching on the right to freedom of

expression in the context of jurisdictions such as South Africa, Canada, Europe,<sup>64</sup> and the United States were considered in this research to enrich the understanding of the concept, as well as its limitations and theoretical justifications.

This research, however, is not a comparative study.<sup>65</sup> It is also not an interdisciplinary study. Rather, it is a study in the areas of constitutional law and human rights broadly, assessing the right to freedom of expression and its role in political transformation in terms of the changes ordained by the Kenya's 2010 Constitution relating to the political organisation of the country. These changes first entail the democratisation of the country's political system from the grassroot to the highest levels,<sup>66</sup> including dispersal of power to sub-national units to enhance efficiency and accountability of government.<sup>67</sup> Second, they entail widespread institutional reforms to reduce despotism and enhance checks and balances.<sup>68</sup> Third, they regard the reconfiguring the relationship between citizens on the one hand and the state on the other through enhancing respect for human rights and dignity, and public participation.<sup>69</sup> The agenda is to put an end to an uninspiring past and create a more open, democratic and progressive society that is committed to the rule of law, constitutionalism and respect for human rights.<sup>70</sup>

The study evaluated the limitations of the right to freedom of expression in Kenyan law as contained in statutes, applicable English common law and judicial precedents as well as within the Constitution itself. In addition, it dedicated space to trace

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<sup>64</sup> 'Europe' here refers to the legal system, and focus is on European Convention on Human Rights and its adjudication by the European Court of Human Rights.

<sup>65</sup> For details about steps in comparative study in law see for example Ralf Michaels, 'Comparative Law,' in *Oxford Handbook of European Private Law*, (Oxford University Press forthcoming) available at: [http://scholarship.law.duke.edu/faculty\\_scholarship/2388](http://scholarship.law.duke.edu/faculty_scholarship/2388). <Accessed 25 August 2016>.

<sup>66</sup> Jill Cottrell & Yash Ghai (2007) 'Constitution Making and Democratisation in Kenya,' *supra*.

<sup>67</sup> Yash Ghai 'Devolution: Restructuring the Kenyan State,' (2008) 2 *Journal of Eastern African Studies*, 211, DOI: 10.1080/17531050802058336. See also Joshua Kivuva, 'Restructuring the Kenyan State,' *supra*.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid*. See also Eric Kramon and Daniel N. Posner, 'Kenya's New Constitution,' *supra*.

<sup>70</sup> Kenya's post-independence era after British colonial rule was characterised by political repression, violation of human rights, lack of transparency and openness in government, tribalism, nepotism, pandemic corruption, and related ills. The Constitution advocates for a human rights approach to all public matters see for example the prominence of the bill of rights as a foundation for social, political and economic policies, and its place as a core constitutional value. See the Constitution of Kenya, preamble, article 10 and 19.

the history of freedom of expression and explored historical experiences of political expression in Kenya. Thus, some parts of this thesis take the form of historical analyses and narratives in so far as these are necessary in establishing the historical foundations of the topic. The study also undertook an analytical examination of the transformation goals of Kenya's Constitution to sketch out what it seeks to achieve in the new dispensation. It then explored the role of freedom of expression in Kenya's new constitutional edifice and assessed the freedom of expression restrictions to demonstrate their faults in terms of undermining the ideals and aspirations of the 2010 Constitution.

This study proceeded from two premises or assumptions: First, is that Kenya's Constitution has a clear agenda for political transformation as described above. Second, is that the right to freedom of expression has a central role to play in bringing about the intended transformation.

### 1.5. Scope and Limitations

This study focuses on the right to freedom of expression as a concept with roots in liberal political ideology and relates it to political transformation in Kenya.<sup>71</sup> Therefore, this research will analyse freedom of expression as theorised in democratic contexts. The research excludes discourses on African traditional or pre-colonial conceptions of freedom of expression.<sup>72</sup> Although the right to freedom of expression is closely connected to the freedom of media and most literature address the two subjects together, this study limits itself to the freedom of expression. The freedom of media is, however, discussed only in as far as is necessary or incidental to the analysis of the freedom of expression. As it will be seen in the thesis, many of the illustrations touching on freedom of expression are incidentally connected to media freedom.

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<sup>71</sup> It is becoming common for scholarly debates in East Africa to take a comparative approach to cover situations in the rest of East Africa Community (EAC) comprising of Kenya, Uganda, Tanzania, Rwanda and Burundi. This is because legal and political realities in one partner state often have direct implications in the other partner states. The EAC now has a functioning common market since 1 July 2010 and is working towards establishing a political federation by 2015.

<sup>72</sup> See William Edward Adjei, 'The Protection of Freedom of Expression in Africa: Problems of the Application and Interpretation of Article 9 of the African Charter of Human and Peoples' Rights,' *supra* for discussion on African conception of human rights and freedom of expression.

Since the concern of this study is the relationship between freedom of expression and political transformation in Kenya, it is further limited to political expression. Political expression generally, is speech or expressive conduct that is related to, targets or affects the government, its officers, policies, decisions actions or inactions.<sup>73</sup> Thus, information that is critical of government and its organs, institutions or officers, government policy, governmental action or inaction, or that has a bearing on the electoral process, or other political processes can be described as being political.<sup>74</sup> In this regard, the analysis of freedom of expression restrictions are biased towards those that are grounded on national security and public order, the rights and reputation of others, and the authority and independence of the judiciary. This is because these rationales are the most commonly applied to restrict political expression and political freedom as this thesis will show.

## 1.6. Literature Review<sup>75</sup>

As an important civil and political right in liberal political thought, freedom of expression has attracted a lot of scholarly attention spanning close to four centuries. It has been the subject of many publications since John Milton's '*Areopagitica: A Speech for the Liberty of Unlicensed Printing*',<sup>76</sup> in 1644 in which he protested against censorship of free press in England. The socio-political value of freedom of expression in democratic or

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<sup>73</sup> See 'Defining Defamation Principles on Freedom of Expression and Protection of Reputation INTERNATIONAL STANDARDS SERIES,' London: ARTICLE 19, 2000:  
<<https://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf>> accessed 20 May 2016: Indiana Court of Appeals defined political expression in *Wells v State*, 848 N.E.2d 1133 (Ind. Ct. App. 2006) in these terms: "...Expressive activity is political if its point is to comment on government action, including criticising the conduct of an official acting under color of law...[i]n contrast, where an individual's expression focuses on the conduct of a private party – including the speaker himself or herself - it is not political."

<sup>74</sup> Ibid.

<sup>75</sup> The concept of freedom of expression has attracted very wide scholarly attention. The literature review here is limited only to what is connected or relevant to freedom of expression and its role in political transformation in Kenya. As noted above, political transformation touch on democratisation, democratic processes, governance, protection of human rights, and the promotion of human rights and democratic culture.

<sup>76</sup> See John Milton, (1992) "*Areopagitica*," in Ravitch, Diane, and Abigail Thernstrom, 1992. *The Democracy Reader. Classic and Modern Speeches, Essays, Poems, Declarations and Documents on Freedom and Human Rights Worldwide*. New York: Harper Collins Publishers.

pluralistic societies has generally received a lot of scholarly attention in discourses on theories of freedom of expression.

John Stuart Mill, in his classic book *On Liberty*,<sup>77</sup> for example defends freedom of expression as being indispensable in the discovery of truth. Alexander Meiklejohn defends freedom of expression for its role in facilitating collective decision making in a democracy.<sup>78</sup> On his part, Robert Post defends freedom of expression in a democracy for its role in facilitating people to participate in authorship of the law, hence supporting democratic self-governance.<sup>79</sup> Martin Redish and Thomas Emerson justify freedom of expression for its role in aiding self-fulfillment of the individual.<sup>80</sup> Similarly, Frederick Schauer defends freedom of expression for its role in advancing individual self-attainment.<sup>81</sup>

Edwin Baker and Thomas Scanlon argue that freedom of expression should be protected because doing so is recognition of individual autonomy.<sup>82</sup> Individual autonomy is an important premise of liberal political thought. Mathew D. Bunker adds to this individual-centred value of freedom of expression. He observes that the right should be protected because “it contributes to individuals’ opportunities to develop their rational faculties and make critical decisions about the pursuit of a good life.”<sup>83</sup> Dworkin argues that freedom of expression should be protected because of its ‘instrumental’ and ‘constitutive’ values.<sup>84</sup> Instrumental value refers to the role of freedom of expression in facilitating democracy and democratic processes such as public debate, elections and so

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<sup>77</sup> See generally, John Stuart Mill, *On Liberty*, *supra*.

<sup>78</sup> Alexander Meiklejohn (1948) *Free Speech and Its Relation to Self-Government*, *supra*.

<sup>79</sup> Robert Post, ‘Participatory Democracy and Free Speech,’ (2011) 97 *Virginia Law Review* 477, p.482.

<sup>80</sup> Marty Redish, ‘*The Value of Free Speech*,’ *supra*. See also Thomas Emerson, ‘*Toward a General Theory of the First Amendment*’ *supra*.

<sup>81</sup> See for example Frederick Schauer, (1982) *Free Speech: A Philosophical Enquiry* (1982): Cambridge University Press.

<sup>82</sup> C. Edwin Baker, ‘Autonomy and Free Speech’ (2010-11) 27 *Constitutional Commentary* 251 and Thomas Scanlon, ‘A Theory of Freedom of Expression’ *supra*.

<sup>83</sup> Mathew D. Bunker, (2001) *Critiquing Free Speech: First Amendment theory and the Challenge of Interdisciplinarity* Mahwah: Lawrence Erlbaum publishers.

<sup>84</sup> Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, Cambridge: Harvard University Press.

forth.<sup>85</sup> From a constitutive perspective, freedom of expression is important not for its functions but for its sake as a building block of a democratic society.<sup>86</sup> Dworkin also defends freedom of expression for its role in advancing human dignity. He argues that the idea of dignity requires a democratic society to treat its members with “equal respect and concern.”<sup>87</sup> This, he argues, requires guaranteeing freedom of expression as a means of allowing all members to participate and contribute to public discourse without discrimination.<sup>88</sup>

Richard Moon, in his social theory of freedom of expression argues that freedom of expression is important because of its role in facilitating social interactions.<sup>89</sup> He argues that freedom of expression protects the right of members of a society to communicate with each other. Communication, he notes, is a deeply social engagement, involving the use of socially constructed language. On his part, Vincent Blasi argues that freedom of expression should be protected because of its ‘checking value.’<sup>90</sup> He argues that all classical freedom of expression justifications has a common underlying premise: to prevent abuse of power by guaranteeing the right of people to speak out against excesses of those in power.<sup>91</sup>

Kwadwo Appiagyei-Atua, while acknowledging other theoretical justifications for freedom of expression such as autonomy, self-attainment or self-fulfillment, and democracy, argues that development theory best explains protection of freedom of expression in emerging democracies especially in Africa.<sup>92</sup> He argues freedom of expression plays the role of facilitating individuals and communities to organise

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Richard Moon (2009-10) ‘The Social Character of Freedom of Expression’ 2 *Amsterdam Law Forum* 43.

<sup>90</sup> Vincent Blasi in Vincent Blasi, ‘The Checking Value in First Amendment Theory’ (1977) 2 *American Bar Foundation Research Journal* 521.

<sup>91</sup> Ibid.

<sup>92</sup> Kwadwo Appiagyei-Atua, ‘Review of the Theories of Expression in the Context of the Development Argument’, (2005-2007) 23 *University of Ghana Law Journal* 197.

themselves so as to achieve their individual and collective goals and aspirations.<sup>93</sup> Therefore, rights, including freedom of expression act as agents of development to meet the development needs of the individual and the community.<sup>94</sup>

The works cited above relate to the role of freedom of expression generally, and its theoretical justifications. They are not focused on Kenya. Since 2010, a number of publications in the nature of general expositions and others addressing specific aspects of Kenya's Constitution such as devolution and governance structure, the electoral system, realisation of socio-economic rights, and the role of the judiciary, have emerged.<sup>95</sup> However, these works have not addressed freedom of expression and its role in Kenya's project of political transformation under the 2010 Constitution in particular. Thus, this study is relevant in filling this existing gap.

Obonyo and Nyamboga in their 2011 publication give a descriptive account of the laws that affect the freedoms of expression and media in Kenya.<sup>96</sup> This work highlights the legal regime regulating these freedoms in the context of journalism. Since its focus is on journalism, it is not concerned with in-depth legal analyses neither does it go beyond discussions on freedom of expression in the context of journalism. Charles Muiru Ngugi in his unpublished PhD thesis of 2008 has addressed the contest between freedom of expression and authority that has existed in Kenya in both colonial and post-colonial

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<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> See for example PLO Lumumba, K Mbondenyi et al, eds. (2012) *Constitution of Kenya, Contemporary Readings*, Nairobi: LawAfrica, PLO Lumumba & L Franceschi, (2014) *The Constitution of Kenya, 2010: An Introductory Commentary*, Nairobi: Strathmore University Press, Mbondenyi & Ambani (2012) *The New Constitutional Law of Kenya: Principles, Government and Human Rights*, Nairobi: Claripress, John Mutakha Kangu (2015) *The Constitutional Law of Kenya on Devolution*, Nairobi: Strathmore University Press, Cottrell & Yash Ghai, (2011) *Kenya's Constitution: an instrument for change*, Nairobi: Katiba Institute, Nicholas W Orago, "Poverty, inequality and socio-economic rights: a theoretical framework for the realisation of socio-economic rights in the 2010 Kenyan Constitution," (Unpublished LLD thesis 2013), Joshua Kivuva, 'Restructuring the Kenyan State,' *supra*, Eric Kramon and Daniel N. Posner, 'Kenya's New Constitution,' *supra*, and Godfrey M Musila (2013) *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence*: Nairobi, Law Society of Kenya.

<sup>96</sup> L Obonyo and E Nyamboga 'Journalists and the Rule of Law' Kenya Chapter of International Commission of Jurists Report (2011)

periods.<sup>97</sup> The thesis focuses on the tension that has existed between the clamour for freedom of expression on the one hand and state restrictions on the other. The thesis is written from a social science and communication perspective in the pre-2010 period. It therefore lacks legal analysis and does not address themes arising under the 2010 Constitution or the post-2010 dispensation. It is however useful as it gives a comprehensive historical account of freedom of expression experiences in Kenya.

Makau Mutua's *Kenya's Quest for Democracy: Taming Leviathan*<sup>98</sup> gives a detailed diagnosis of the social and political ills that plague the country. The book contextualizes Kenya's struggles for freedom and democracy and shows how colonial, post-colonial and external factors such as globalisation and globalism interacted to shape the past and present political landscape. Written soon after the rejection of a draft constitution in 2005 and at a time when the clamour for a new constitution was still ongoing, this book is valuable in the understanding of the nature of political transformation envisaged by the 2010 Constitution.<sup>99</sup>

The concept of freedom of expression is not unique to Kenya's Constitution. Constitutions in liberal democracies around the world protect it, albeit with scope and conceptions that vary significantly.<sup>100</sup> Parts of the provisions relating to rights to freedom of expression under Kenya's Constitution are similar to provisions found in international human rights instruments and in foreign constitutions. Thus, as a study in constitutional law and human rights law broadly, literature in these areas is relevant to this research. The right to freedom of expression also has perspectives that are rooted in political science and philosophy. Literature drawn from these disciplines is therefore relevant not for interdisciplinary analysis but only in so far as is necessary to enrich the understanding of the themes of this study.

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<sup>97</sup> See Charles Muiiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya' *supra*.

<sup>98</sup> Makau Mutua (2008) *Kenya's Quest for Democracy: Taming Leviathan*, Lynne Rienner Publishers.

<sup>99</sup> See note 4 above.

<sup>100</sup> See Larry Alexander, 'Is Freedom of Expression a Universal Right?' (2013) 50 *San Diego Law Review* 707 (arguing that the conceptions of freedom of expression in different jurisdictions are too wide to sustain a claim that freedom of expression is a universal right).

## 1.7. Organisation of Chapters

To cover the topic and the research questions, this thesis is organised into seven chapters. The description of each chapter is given below.

### **Chapter One: Introduction and Background**

This is chapter one: The chapter has laid down the foundation for the entire study. It introduces the theme of the thesis and sets out the research questions as well as the assumptions that underlie the research. The chapter also explains the problem statement, the objectives and justification as well as the scope and limitations of the study.

### **Chapter Two: The 2010 Constitution and its Transformative Agenda**

Political transformation as ordained by Kenya's 2010 Constitution and the role of freedom of expression is the central theme of this essay. This chapter sets the background and context of Kenya's Constitution and narrates its transformative agenda. It traces the history of the Kenyan state from the advent of British colonialism to present. The chapter introduces transformative constitutionalism as the philosophical underpinning of the 2010 Constitution, and demonstrates that it has created a framework that seeks to ordain a shift from past ethical crises, repression, despotism, and citizen subjugation to a future characterised by renewed ethical values, respect for human rights, citizen emancipation, and revitalised and accountable institutions. The chapter lays a basis for the assessment of freedom of expression and political transformation which follows in later chapters.

### **Chapter Three: Theoretical Foundations of the Protection of Freedom of Expression**

This chapter explores the theoretical foundations for the protection of the right to freedom of expression generally. Crucially, it relates these theories to the protection of freedom of expression in Kenya.

#### **Chapter Four: Evolution, Nature and Scope of Freedom of Expression**

This chapter answers the research question on the nature, scope and content of the right to freedom of expression. In doing this, it addresses the sub questions on the historical foundation of freedom of expression and the historical experiences with freedom of expression in colonial and post-colonial Kenya. The chapter historicizes freedom of expression by tracing the evolution of its modern understanding, including the inclusion of the right in international human rights law and Kenya's independence constitution. Moreover, it situates the protection of freedom of expression under Kenyan law within global developments, and examines international legal obligations relating to the right. In addition, it highlights Kenya's historical experiences with freedom of expression and shows how internal and external factors shaped legal responses. The chapter also clarifies the nature, scope and constituent elements of freedom of expression protection and its relationship with other rights.

#### **Chapter Five: Analysis of Freedom of Expression Limitations in Kenya**

This chapter analyses freedom of expression limitations with a special focus on those that have a direct effect on political expression, political freedom and political transformation, the central themes of this thesis. In particular, the analysis is limited to the freedom of expression restrictions that are especially grounded on national security and public order, the rights and reputation of others, and the authority and independence of the judiciary. These rationales are singled out because most limitations that threaten political expression and political freedom are grounded on them as the chapter will show. The chapter selects representative expression-restricting laws that fall under these rationales and illustrations of their application to demonstrate the threats that face freedom of expression and the Constitution's grand aspirations for political transformation.

## **Chapter Six: Evaluating the Goal of Political Transformation and the Role of Freedom of Expression: Towards a New Approach**

This chapter revisits the goal of political transformation as discussed in chapter two and theorises the role of law and the right to freedom of expression in particular. It then evaluates practices and freedom of expression restrictions contained in the law against the ideals and aspirations of the 2010 Constitution. In addition, the chapter theorizes Kenya's goal of political transformation and the role of the law. In particular, the chapter demonstrates the centrality of the legal protection of the right to freedom of expression in Kenya's transformation ambition, and asserts the need for stronger protection of the right.

## **Chapter Seven: Conclusion**

Chapter seven summarizes the study and draws conclusions. It synthesizes its key findings and makes recommendations on the reforms that are necessary in order to accord Kenya's freedom of expression legal framework to the letter and spirit of the 2010 Constitution.

## Chapter Two

### The 2010 Constitution and its Transformative Agenda

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#### 2.2. The 2010 Constitution in Context

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## 2.5. Conclusion

## 2.1. Introduction

Chapter one noted that Kenya has had three major constitutional moments namely (a) independence from colonial rule in 1963, (b) the defeat of the independence party KANU in 2002, and (c) the promulgation of a new Constitution in 2010. It also noted that the interludes between these moments have been three major historical periods, namely the colonial era (1895-1963), the KANU regime under Presidents Jomo Kenyatta and Daniel arap Moi (1963-2002) and the post-KANU era (2002 to present).

Independence in December 1963 was a milestone because it formally marked the end of decades of British colonial imperialism. To African inhabitants, the moment evoked hope that the repression, disenfranchisement, economic and political marginalization that was the policy of the colonial administration would be replaced with freedom, dignity, equality and prosperity.<sup>1</sup> The moment marked the start of what Robert H. Jackson and Carl Rosberg have described as the ‘juridical state;’ that is, a state by virtue of international law.<sup>2</sup> Its constitutional and political significance was that Kenya formally separated from the British in the eyes of international law, stood to be counted among members of the international community, and was now competent to shape its destiny and character both internally and externally.

The second constitutional moment was the defeat of KANU in December 2002. KANU had been in power since independence, and had almost become synonymous with the state. As will be seen later, the party under Jomo Kenyatta and later Moi took over power from the colonial administration together with its laws and culture. Rather than dismantling the colonial scheme and psyche, the party undertook far reaching legal and constitutional changes that served to perfect the colonial machinery to serve the ends

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<sup>1</sup> H Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New dawn?* (2007) Oxford University: I.CON pp. 1-38: DOI 10.1093/icon/mom016.

<sup>2</sup> Robert H. Jackson and Carl Rosberg, ‘Sovereignty and Underdevelopment: Juridical Statehood and the African Crisis (1986) 24 *Journal of Modern African Studies* 1

of the ruling African elite.<sup>3</sup> Thus, the second constitutional moment, the defeat of KANU signaled hope for a reversal of the systemic despotism and political repression.

The third constitutional moment was the promulgation of a new Constitution in August 2010. This was the height of two decades of clamour for a new constitution and a search for legitimate constitutional dispensation that had gone on since independence.<sup>4</sup> Thus, this third event, as will be seen in this chapter, aimed at reversing the wrongs of colonial imperialism and the KANU regime, making up for the failures of post-KANU regimes and laying a foundation for a better future. The words of its text as well as the political context in which the 2010 Constitution was enacted clearly shows that it was intended to remedy the wrongs of these historical periods and restore the squandered opportunities of the first and second constitutional moments.

This chapter provides a background and context of Kenya's 2010 Constitution and demonstrates its transformative agenda. It traces the history of the Kenyan state from the advent of British colonialism to present. The chapter introduces transformative constitutionalism as the philosophical underpinning of the 2010 Constitution, and highlights the nature of the political change that it contemplates. In particular, it demonstrates that it has created a framework that seeks to ordain a shift from past ethical crises, repression, despotism, and citizen subjugation to a future characterised by renewed ethical values, respect for human rights, citizen emancipation, and revitalised and accountable institutions. The chapter lays a basis for the assessment of freedom of expression and its role in political transformation which follows in later chapters.

## 2.2. The 2010 Constitution in Context

The Constitution of Kenya was promulgated in August 2010 following a nationwide referendum in which over 60% of the electorate voted in approval.<sup>5</sup> The

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<sup>3</sup> Jill Cottrell & Yash Ghai (2007) 'Constitution Making and Democratisation in Kenya,' *supra*, p. 2.

<sup>4</sup> *Ibid.*

<sup>5</sup> Jacob Mwathi Mati (2013) 'Antinomies in the struggle for the transformation of the Kenyan constitution (1990-2010),' 31 *Journal of Contemporary African Studies*, 235, DOI:10.1080/02589001.2013.785145, p. 235.

enactment of the new Constitution was a culmination of over two decades of clamour for change which began in the 1990s with demands for repeal of Section 2A of the previous Constitution.<sup>6</sup> Section 2A, which was introduced through a constitutional amendment in 1982, made Kenya a *de jure* one-party state, outlawing all political activity outside the ruling Kenya African National Union (KANU) party.

The promulgation of the new Constitution is perhaps the most significant event in the history of the country. The event was a milestone in Kenya's quest for a legitimate constitutional dispensation since the advent of British colonialism some 115 years earlier. The adoption was momentous, first because it was the height of a protracted attempt to write a constitution in the country's post-colonial history.<sup>7</sup> Second, it was the first time that the people were formally involved on a wide scale in the authorship of the constitution.<sup>8</sup> Third, the enactment came after a major failed attempt in November 2005 and the crisis of post-election violence of 2007-08 triggered by disputed presidential election and fueled by pent up political, social, and economic crises.<sup>9</sup> Fourth, the promulgation of the constitution heralded the most ambitious project of social, political, legal and institutional reforms, evoking unprecedented enthusiasm and hope about the country's future.<sup>10</sup>

Kenya's Constitution must be understood in the context of internal and external historical developments. While constitutions are often seen as documents crafted

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<sup>6</sup> Ibid.

<sup>7</sup> A referendum to adopt a constitution proposed by the government in 2005 was defeated. The clamour for a new Constitution started in earnest in the 1990s spanning over two decades. See generally, Jill Cottrell & Yash Ghai (2007) 'Constitution Making and Democratisation in Kenya,' (2000-2005), 14 *Democratisation*, 1, DOI: 10.1080/13510340601024272.

<sup>8</sup> Constitution of Kenya Review Act provided the framework through which the new constitution would be enacted. Part of that framework was a requirement to collect and incorporate views from the public. See generally Jill Cottrell & Yash Ghai (2007) 'Constitution Making and Democratisation in Kenya,' *supra*.

<sup>9</sup> Susanne D. Mueller 'The Political Economy of Kenya's Crisis,' (2008) 2 *Journal of Eastern African Studies*, 185, DOI: 10.1080/17531050802058302.k

<sup>10</sup> Constitution of Kenya, article 261 (1): This provision requires Parliament to enact statutes to implement the reforms mandated by the Constitution. The Fifth Schedule contains a long list of statutes that need to be enacted and the timelines within which the enactment should be complete.

to respond to local political situations, evidence suggests that constitutions especially in modern times are anything but *sui generis*.<sup>11</sup> Global dynamics are a serious influence. For Kenya, the internal factors can be seen along a prism of different facets. These are: (a) the disruptions and injustices of colonial legacy, (b) the illegitimacy of the independence constitution, (c) the unfinished business at Lancaster and illegitimate unmaking of the independence constitution, and (d) the emergence of imperial presidency. External factors include (a) the collapse of the Soviet Union and attendant consequences, (b) globalisation and globalism, and (c) decline in classical liberal ideology. These factors not only fueled the quest for a new constitution but also influenced its content. Each of these is described in detail below.

### 2.2.1. Internal factors

#### 2.2.1.1. The Disruptions and Injustices of Colonial Legacy

European colonialism occasioned a major disruption in Kenya, and Africa as a whole. The artificial boundaries set by the European powers in the scramble for the continent ignored the pre-existing social and political organisations, resulting in fragmentation of pre-colonial states and separation of communities and families.<sup>12</sup> Africans were not involved in the demarcation of colonial territories; neither did they participate in the establishment of the colonial state.<sup>13</sup> European colonial rule was established through conquest and dubious agreements with leaders of African societies.<sup>14</sup> Decolonisation of Africa, which began in late 1950s, saw the establishment of independent

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<sup>11</sup> Heinz Klug, (2000) *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*: Cambridge Studies in Law and Society, p. 6-7.

<sup>12</sup> Makau W. Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995) 16 *Michigan Journal of International Law* 1113, p. 1119.

<sup>13</sup> *Ibid.*

<sup>14</sup> The Maasai, a pastoralist community of Kenya, for instance, entered into 'treaty' with the British in 1904 and 1911 through their leader Lenana. Under the treaty, the Maasai 'agreed' to cede almost all their fertile land to the British for settler farming. This illustrates the dubious nature of some of the agreements made. The Maasai leaders were illiterate and could neither read nor write. Additionally, the signing of the agreement came at a time when the community had been weakened by famine; inter clan rivalry and cattle diseases. Lenana was involved in a power struggle with his brother Ole Sendeiyo. The British exploited the rivalry to dispossess the community of their land.

African states.<sup>15</sup> These states, consistent with the doctrine of *uti possidetis*, retained the colonial boundaries and structures established by European powers. This arbitrary fixing of boundaries and disruption of pre-colonial political and social organization has been a serious cause of instability and struggles in post-colonial Africa.<sup>16</sup> Makau Mutua has argued that both the colonial state and its successor at independence are moral and legal nullities.<sup>17</sup> This illegitimacy, he argues, continues to plague African states and challenge their viability.<sup>18</sup>

Colonialism brought with it many disruptions: first, the British passed laws that dispossessed African societies of thousands of hectares of land especially in agriculturally rich areas that came to be known as the 'white highlands.'<sup>19</sup> This effectively disrupted the African agrarian economy, and ensured poverty among African communities who were displaced to overcrowded settlements known as 'reserves.'<sup>20</sup> Agriculture was the mainstay of the colonial economy. Thus, the British gave attention to the agriculturally rich areas and neglected others. This set the stage for marginalisation and underdevelopment of outlying areas of the country, a fact which remains to date.<sup>21</sup>

Second, the British exploited ethnic differences and intra ethnic tensions in a 'divide and rule' strategy that ensured effective administration.<sup>22</sup> This strategy was presided over by the Governor backed by a system of provincial administration comprising of British district commissioners and district officers, assisted by native chiefs and village headmen. This system would later be used in the administration of independent Kenya, with the President replacing the colonial Governor at the helm. These disruptions would

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<sup>15</sup> Ghana became the first African country to gain independence in March 1957.

<sup>16</sup> Makau W. Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry,' *supra*.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid*.

<sup>19</sup> See Karuti Kanyinga (2009) 'The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya,' 27 *Journal of Contemporary African Studies*, 325, p. 327.

<sup>20</sup> *Ibid*.

<sup>21</sup> The outlying regions to the North West (West Pokot and Turkana counties), North (Turkana, Samburu, Isiolo and Marsabit counties), North East (Wajir, Mandera, Garissa, and Tana River) are grossly underdeveloped with poor or lacking infrastructure and grim statistics such as high poverty index, high infant mortality rate and low life expectancy.

<sup>22</sup> *Ibid*.

later inform political bargains for the independence constitution at Lancaster House conference and post-independence constitutional review. To date, land injustices, marginalisation and ethnic divisions continue to inform Kenyan politics.<sup>23</sup>

### 2.2.1.2. The Illegitimacy of the Independence Constitution

Legitimacy is the notion that 'a rule, institution, or leader has the right to govern.'<sup>24</sup> Quite apart from the illegitimacy of the colonial state and its successor,<sup>25</sup> the independence constitution was largely an illegitimate document.<sup>26</sup> Constitutions, particularly in democratic contexts, derive legitimacy from the process of enactment that involves participation by the people, or through subsequent acceptance and efficacy.<sup>27</sup>

The independence constitution was a product of bitter and fruitless negotiations held in Lancaster House in London in the run up to independence.<sup>28</sup> It was negotiated in London by a few elites representing various ethnic groups and interests, and adopted by the colonial power rather than a political forum in the soon-to-be independent state.<sup>29</sup> Because of inability of the African delegates to agree about contentious issues, most of the provisions ended up being imposed by the colonial secretary as a compromise.<sup>30</sup> In the end, Kenya received independence under a 'Westminster model' of a constitution that

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<sup>23</sup>See Karuti Kanyinga, 'The Legacy of the White Highlands: Land Rights, Ethnicity and the Post-2007 Election Violence in Kenya,' *supra*, p.325-344. Land is an ever recurring election campaign topic, see Eric Kibet, 'The Land Question Should be addressed with More Debate,' *Daily Nation*, February 2013.

<sup>24</sup> Fabienne Peter, 'Political Legitimacy', *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition), Edward N. Zalta (ed.),  
URL=<<http://plato.stanford.edu/archives/sum2016/entries/legitimacy/>>.

<sup>25</sup> Makau W. Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry,' *supra*. (Arguing that the colonial states in Africa were illegitimate because of the way in which they were constituted by European colonial powers and so were their post-colonial successors.)

<sup>26</sup> PLO Lumumba, MK Mbondenyi and SO Odero, (eds)(2012) *Constitution of Kenya, Contemporary Readings: LawAfrica*, p. 23.

<sup>27</sup> James Thuo Gathii, 'Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya,' 49 *William & Mary Law Review* 1109.

<sup>28</sup> Robert Maxon, *Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century*, (2009) 1 *Kenya Studies Review* 11, p. 17.

<sup>29</sup> PLO Lumumba, MK Mbondenyi and SO Odero, (eds) (2012) *Constitution of Kenya, Contemporary Readings: supra*, p. 23.

<sup>30</sup> Robert Maxon, *Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century, supra*, p. 17.

had little input from the African majority.<sup>31</sup> This very fact presented legitimacy issues that formed the basis of numerous amendments that began soon after independence.

The constitution contained preferences of the British authorities and European settlers. These preferences included fundamental rights and freedoms with strong property rights guarantees, a federal system of government, a dual executive in which the British Monarch would remain head of state while an elected Prime Minister would be the head of government.<sup>32</sup> The delegates representing majority African populations mainly the Luo and Kikuyu preferred a centralised presidential system of government.<sup>33</sup> In the end, the minority positions and the British preferences carried the day.<sup>34</sup> It is therefore not surprising that drastic constitutional amendments began soon after independence. As seen below, these amendments, some of which very fundamental, would continue until the run-up to constitutional change in 2010.<sup>35</sup>

### **2.2.1.3. The Unfinished Business at Lancaster and Illegitimate Unmaking of the Independence Constitution.**

Maxon contends that there was hardly any agreement reached by the African delegation during negotiations for the independence Constitution at Lancaster.<sup>36</sup> Ghai also describes the independence Constitution as “bitterly negotiated” because of the deep divisions among the African delegations.<sup>37</sup> As a result of inability to compromise and have a united front, their grievances and interests such as land redistribution were largely ignored. On the contrary, the European minority group had their interest safeguarded. A

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<sup>31</sup> Ibid.

<sup>32</sup> Joshua Kivuva, ‘Restructuring the Kenyan State,’ Society for International Development (SID), p. 4.

<sup>33</sup> PLO Lumumba, MK Mbondenyi and SO Odero, (eds) (2012) *Constitution of Kenya, Contemporary Readings: supra*, p. 25.

<sup>34</sup> The Colonial Secretary had devised a rule that should the delegates fail to agree, he would make the final decision and impose provisions into the final document.

<sup>35</sup> For a full account of constitutional amendments since independence see PLO Lumumba, MK Mbondenyi and SO Odero, (eds)(2012) *Constitution of Kenya, Contemporary Readings, supra*.

<sup>36</sup> Robert Maxon, *Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century, supra*, p.14.

<sup>37</sup> Jill Cottrell & Yash Ghai (2007) ‘Constitution Making and Democratisation in Kenya,’ *supra*, p.2.

liberal bill of rights with strong protection of private property was adopted,<sup>38</sup> as was a federal system of government.<sup>39</sup> Incidentally, the interests of Kenya African Democratic Union (KADU) party which represented the interests of minority ethnic groups such as Kalenjin, the Miji Kenda and Maasai coincided with those of the European settlers. The outcome of the Lancaster House conference was that the interests of KANU which represented the majority tribes such as Kikuyu and Luo did not find much space in the constitution.<sup>40</sup> The ignored interests of the majority groups as well as of most of other African constituencies represented the 'unfinished business' of the Lancaster House conference.

KANU won elections and formed the independence government. Top on the agenda was a plan to amend the Constitution to achieve its wishes for a unitary system of government.<sup>41</sup> Many more amendments followed which reorganised the state and in a big way distorted the independence constitutional arrangement. As noted elsewhere, majority of these amendments were intended to consolidate power in the hands of the President. Significant as they were, the amendment processes were carried out by parliament largely without the participation of the people. This fact and the ulterior motives behind many of these post-independence amendments make them illegitimate. By the time the 1963 Constitution was replaced in August 2010, it had been amended over 40 times. It is interesting that while colonial land injustices were a critical element of African grievances, the numerous post-independence amendments did not touch on land. No attempt was made to reverse the colonial land injustices so as to address the needs or demands of

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<sup>38</sup> Section 75 of the repealed Constitution protected private property irrespective of how it was acquired. It safeguarded the rights of land owned by Europeans and made no attempts to address African land grievances. It did not matter that Africans had been forced out of their land a few decades earlier. Curiously, first title to land was protected even if the land was acquired by fraud. Article 40 of the 2010 Constitution attempts to reverse this by denying protection to property acquired by unlawful means.

<sup>39</sup> Jill Cottrell & Yash Ghai (2007) 'Constitution Making and Democratisation in Kenya,' *supra*.

<sup>40</sup> PLO Lumumba, MK Mbondenyi and SO Odero, (eds)(2012) *Constitution of Kenya, Contemporary Readings: supra*, p. 25.

<sup>41</sup> *Ibid*.

communities dispossessed by the colonial land policy.<sup>42</sup> The result is that land has remained a highly emotive issue in the country and has resulted in bloody clashes. It has also been a defining factor of Kenyan politics.<sup>43</sup>

The numerous constitutional amendments to the independence constitution were largely illegitimate. They were illegitimate because as fundamental as some of them were,<sup>44</sup> they were carried out at the behest of the President and the ruling elite with very minimal or no debate at all. No attempts were made to involve the people in the process. At times these crucial constitutional changes were enacted in violation of legal procedures governing constitutional amendments.<sup>45</sup>

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<sup>42</sup> Article 67 of the 2010 Constitution of Kenya creates the National Land Commission and vests it with powers to address historical land injustices.

<sup>43</sup> See Karuti Kanyinga, 'The Legacy of the White Highlands: Land Rights, Ethnicity and the Post-2007 Election Violence in Kenya,' *supra*, p.325-344. Andrew Morton, in his book Andrew Morton (1998) *Moi: the Making of an African Statesman*, Michael O'Mara Books has noted that land and tribe are the "two mighty rivers of Kenya's political landscape."

<sup>44</sup> For instance Kenya changed from a dominion to a republic, adopted a presidential system in place of Westminster parliamentary system, abolished the bicameral parliament and security of tenure for judges, the Attorney General and the Auditor General, and became a *de jure* one party state. All these constitutional changes were made without public participation. The High Court decries this illegitimacy in *Njoya & 6 others v Attorney General & 3 others* [2004] eKLR; (2008) 2 KLR (EP) 658.

<sup>45</sup> PLO Lumumba, MK Mbondenyi and SO Odero, (eds)(2012) *Constitution of Kenya, Contemporary Readings: supra*, p. 28-31.

#### 2.2.1.4. Emergence of 'Presidential Imperialism: Politics of Patronage and Centralised Governance

Most constitutional amendments in post-independent Kenya aimed at strengthening the executive while weakening other arms and institutions of government.<sup>46</sup> At first, those amendments were motivated by KANU's unfulfilled wishes at Lancaster, and later by the need to consolidate power in accordance with the schemes of the ruling political elite.<sup>47</sup> By 1988, the presidency had almost unbridled control over the legislature, the judiciary, the public service and all organs of the state.<sup>48</sup>

The first constitutional amendment came in 1964.<sup>49</sup> The change fused the offices of head of state and head of government and vested their powers in a powerful unaccountable executive President.<sup>50</sup> This effectively transformed Kenya from the monarchy or dominion that it was to a republic.<sup>51</sup> The powers that vested previously in the Queen and exercised on her behalf by the Governor General were now vested in the President.<sup>52</sup> Aside from entailing real powers in the hands of the President, the move was thoroughly symbolic: the colonial administrative structures were now in the hands of a new master.<sup>53</sup>

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<sup>46</sup> Susanne D. Mueller 'The Political Economy of Kenya's Crisis,' (2008) 2 *Journal of Eastern African Studies*, 185, DOI: 10.1080/17531050802058302, p. 195.

<sup>47</sup> PLO Lumumba, MK Mbondenyi and SO Odero, (eds) (2012) *Constitution of Kenya, Contemporary Readings: supra*, p. 24.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Jomo Kenyatta who was the Prime Minister and head of government automatically became President, Head of State and Commander in Chief of the Armed Forces by operation of law. No election was held to elect the occupant of the new office of the President.

<sup>53</sup> The action of vesting powers of the British Monarch, and those of the colonial Governor in the President was symbolic in the sense that it could be seen as almost literal replacement of the colonial master with a new one, this time an African.

In the same year, the President received powers to appoint the Chief Justice without approval of regional authorities.<sup>54</sup> Furthermore, he could appoint judges without consulting the Judicial Service Commission as well as initiate the process of their removal.<sup>55</sup> This was the first attempt at subjugating the judiciary. Later in 1988, the security of tenure for judges was scrapped altogether.<sup>56</sup> This coupled with the practice of the executive getting directly involved in terminating contracts of judges and even speaking on behalf of the judiciary completely eroded the independence of the judiciary.<sup>57</sup>

The federal system of government established under the independence constitution was meant to ensure participation of local people in the affairs that pertain to them specifically. Regional governments had legislative and executive authority in the affairs of their jurisdictions. This system became one of the first victims of constitutional amendments.<sup>58</sup> The regional government lost power to levy local revenue, forcing them to be dependent on the central government. This was the first blow. The final blow followed in 1965 when the federal system was completely scrapped and replaced with provinces and councils controlled by the central government and without accountability to the people.<sup>59</sup>

The 1965 amendment gave the President the power to declare a state of emergency with only a simple majority approval by Parliament.<sup>60</sup> These powers were later

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<sup>54</sup> PLO Lumumba, MK Mbondenyi and SO Odero, (eds) (2012) *Constitution of Kenya, Contemporary Readings: supra*, p. 26.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid. p. 35. This was effected through Constitution of Kenya (Amendment) Act No. 4 of 1988. The security of tenure was restored two years later via Constitution of Kenya (Amendment) Act No. 2 of 1990. As James Gathii has argued in James T. Gathii, 'The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya's Judicial Process (1994) *Thoughts on Democracy Series*, that the damage was already done and the judiciary never regained its independence even after the restoration of security of tenure. The 2010 Constitution is alive to these past afflictions on the judiciary and tries to enhance its independence.

<sup>57</sup> For a full account of executive interference with judicial processes, patronage and outright disregard for the judiciary in Kenya in the 1980s and 90s see James T. Gathii, 'The Dream of Judicial Security of Tenure, *supra*.

<sup>58</sup> PLO Lumumba, MK Mbondenyi and SO Odero, (eds) (2012) *Constitution of Kenya, Contemporary Readings: supra*, p.26.

<sup>59</sup> Ibid, p. 26-27. This was effected through Constitution of Kenya (Amendment) Act, No. 16 of 1965.

<sup>60</sup> Ibid, p. 26-29.

expanded to give the President power to rule by decree in some outlying districts such as Lamu, Isiolo, Marsabit, and Tana River.<sup>61</sup> These powers were further broadened to remove the requirement for parliamentary approvals for declarations of emergency.<sup>62</sup> The President could now declare an emergency and rule by decree without seeking parliamentary approval. These powers were augmented with preventive detention powers. The President could order detention of suspects without trial on grounds of threatening national security. This set the stage for a spate of detention of political dissidents which continued until early 1990s.<sup>63</sup>

While it was intended to silence political dissent, the state-sponsored systemic repression added to the impetus for change, and created a conglomeration of civil society, political activists, trade unionists, university students and others fed up with the regime and determined to ensure change.<sup>64</sup>

## 2.2.2. External Factors

### 2.2.1.4. The Collapse of the Soviet Union

The collapse of the Soviet Union in 1990 was a very significant historical event. It signified the defeat of Eastern socialist ideology and the triumph of liberal democratic ideology and capitalism pursued by Western powers.<sup>65</sup> The former Eastern bloc comprising of countries especially in Eastern Europe began to embrace some form of democracy as illiberal socialist systems disintegrated.<sup>66</sup> The collapse of the Soviet Union signified the end of the Cold War, leaving the United States, the patron of the Western bloc, as the only super power.<sup>67</sup> With this event, it was no longer necessary for the West to

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Ben Nwabueze, (2003) *Constitutional Democracy in Africa. Vol. 5, The Return of Africa to Constitutional Democracy*: Spectrum Books, Ibadan, p. 49-67. Nwabueze argues that popular dissatisfaction with authoritarian regimes in the 1990s could still have brought about democratisation even without external factors.

<sup>65</sup> Ibid, p.27-36.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

support dictators in Africa and elsewhere in return for loyalty. As a consequence, the 1990s witnessed a wave of change in Africa characterised by multi-party politics, liberalisation of economies and in some places the fall of dictators.<sup>68</sup> Kenya was not spared by this wave. Pressure from donor countries such as the United States, France and Britain as well as from the World Bank and the International Monetary Fund for political and economic reforms forced President Daniel arap Moi to accept multi-party democracy and structural adjustment programme that aimed at liberalising the economy and downsizing the public service.<sup>69</sup> Pushed by the threats of withdrawal of donor funds, Moi reluctantly accepted multiparty democracy through the repeal of section 2A of the Constitution.

### 2.2.2.2. Globalisation and Globalism

The period between 1945 until the fall of the Berlin wall in 1989 was characterised by the Cold War. It was a period of ideological separation of the world into the Western and Eastern blocs, accompanied by irreconcilable suspicion, and at times real conflict playing out especially in the 'Third World.'<sup>70</sup> While the post-World War II period was marked by the Cold War, globalisation is perhaps the defining feature of the present time.<sup>71</sup>

Globalisation has attracted different definitions. The 'big idea' of our time is open to varying understandings, perhaps a reflection of the fact that its variables are constantly shifting. On the whole, it entails the interconnectedness of the world in social, cultural, political and economic aspects, thanks to technological advances in information, communication and transport. While globalisation has gone on for centuries, the pace and scope have increased tremendously in the recent past.<sup>72</sup> Thus, developments in other parts of the world now have greater local impact or ripple effect across the globe. This has given

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid, p. 112.

<sup>70</sup> Ibid.

<sup>71</sup> David Held et al., 'Globalization' (1999) 5 *Global Governance* 483, p. 483.

<sup>72</sup> Ibid.

rise to globalism defined by Ulrich Beck as “the ideology of rule by the world market, the ideology of neoliberalism.”<sup>73</sup>

Commerce and technology are undoubtedly, the drivers of globalisation.<sup>74</sup> In this regard, there are now near-universal standards regulating commercial airlines, the internet, and television (ongoing global digital migration). In the same breath, uniformisation of standards in banking and finance has made it possible to make payments and transfer money around the world within seconds at the click of a button as if national boundaries did not matter.<sup>75</sup>

Parallel to these developments in business and technology, law has moved towards convergence around certain concepts. The trend is more evident in developments in constitutional law. David Law and Mila Versteeg observe that there is an emergence of global constitutionalism, and constitutions are becoming more and more similar to each other.<sup>76</sup> Globalisation and globalism has produced a global constitutional and political culture that is evident in post-1989 Constitutions.<sup>77</sup>

The post-Cold War era has seen a wave of political reconstruction involving significant constitutional reforms around the world.<sup>78</sup> The period witnessed the emergence of new constitutions as states previously in the Eastern bloc undertook reconstruction following the end of socialism.<sup>79</sup> A common feature of this reconstruction has been a

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<sup>73</sup> Ulrich Beck, (2000) *What is Globalization?* Cambridge: Polity Press. See also Benjamin Arditi, ‘From Globalism to Globalization: The Politics of Resistance,’ (2004) 26 *New Political Science* 5, p. 6.

<sup>74</sup> *Supra* n. 62, p. 490-491.

<sup>75</sup> Payment and money transfer systems such as visa, mastercard, western union, moneygram and others enable payment around the world seamlessly in different currencies making differences in time and space across global regions almost irrelevant.

<sup>76</sup> David Law and Mila Versteeg, ‘The Evolution and Ideology of Global Constitutionalism,’ (2011) 99 *California Law Review* 1163, p. 1170.

<sup>77</sup> Heinz Klug, (2000) *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, *supra*, p. 7.

<sup>78</sup> *Ibid*, p. 10-12.

<sup>79</sup> David Law and Mila Versteeg, ‘The Evolution and Ideology of Global Constitutionalism,’ (2011) 99 *California Law Review* 1163, p. 1170. Countries undergoing reconstruction in the post-socialism period also include those that had experienced years of political or ethnic conflict or struggles against repressive regimes related or totally unrelated to the end of socialism.

convergence of contents of constitutions. This global democratic constitutionalism is characterised by incorporation of doctrines of separation of powers, rule of law, constitutionalism, constitutional supremacy and independence of the judiciary.<sup>80</sup> Crucially, strong protection of human rights is the fulcrum and the state's primary responsibility.<sup>81</sup> Additionally, post-Cold War constitutions have generally provided for democratic elections, constitutional courts with judicial review powers, and enforceable bills of rights in an apparent emergence of international constitutional hegemony.<sup>82</sup> It is almost to be assumed that any new 'progressive' constitution in this century should at minimum embrace these features. Moreover, some have specifically created frameworks for free market economies and provided for central banks to regulate monetary policies and issue currency, a response largely attributed to the influence of the Breton-Woods Institutions.<sup>83</sup> In addition to strong human rights protections, others have embraced environmentalism and incorporation of international law norms as part of domestic law. This constitutional conformity is more evident in marginal states that have previously not enjoyed the favour or support of global powers.<sup>84</sup>

Ben Nwabueze attributes this global constitutional momentum and its features to the role of the International Labour Organization as an instrument of global democratisation.<sup>85</sup> The labour movement, he argues, has caused a diffusion of democratic norms around the world in the cause of advancing the welfare of workers who constitute

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<sup>80</sup> Heinz Klug, (2000) *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, *supra*, p. 11-15. See also Charles M. Fombad, *Constitutional Reforms and Constitutionalism in Africa: Reflection on Some Challenges and Future Prospects*, 59 *Buffalo Law Review*, 1007, p. 2011.

<sup>81</sup> David Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism', *supra*, p. 1180.

<sup>82</sup> Heinz Klug, (2000) *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, *supra*, p. 11-15.

<sup>83</sup> *Ibid*, p. 12.

<sup>84</sup> David Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism', *supra*, p. 1181. South Africa and Kenya are good examples. Their constitutions have responded to years of criticisms about human rights record by embracing human rights and international law.

<sup>85</sup> Ben Nwabueze, (2003) *Constitutional Democracy in Africa. Vol. 5, The Return of Africa to Constitutional Democracy*: Spectrum Books, Ibadan, p. 27-36.

the majority of the world's population.<sup>86</sup> This is because the ILO constitution, which is binding on all member states, and the Philadelphia Declaration of 1944 require the promotion of social justice, equality of opportunity, and respect of human rights in employment contexts.

The labour movement however, is not the only agent of internationalisation of constitutional law. Other factors such as shared crises and challenges have also motivated internationalisation. The phenomena of globalisation and regionalization as well as challenges such as climate change and threats to international peace and security require common solutions.<sup>87</sup> Thus, states have resorted to internationalization of domestic constitutions through adoption of certain common norms.<sup>88</sup> These norms have their roots either in foreign law or in international law.<sup>89</sup> Domestication of international human rights standards in particular, which has become a feature of modern constitutions, is motivated by the horrors of World War II.<sup>90</sup> Failure of states during the World War II to protect its own citizens and the atrocities that some states committed against its own people has made international human rights norms a prominent feature of global constitutionalism.<sup>91</sup> It is an obvious fact that in this era of globalisation, the world is coalescing around certain constitutional values. While there are still wide variations in contents of constitutions around the world, there is clearly an emerging ideological hegemony.

Kenya's Constitution reflects a response to these post-Cold War and post-World War II developments. It embraces democracy characterised by free and regular elections, separation of powers, constitutional supremacy, and an enforceable bill of rights.<sup>92</sup> Moreover, it makes firm commitment to international law generally, and

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<sup>86</sup> Ibid.

<sup>87</sup> Charles M. Fombad, 'Internationalization of Constitutional Law and Constitutionalism in Africa,' (2012) 60 *American Journal of Comparative Constitutional Law* 439, p. 440.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid, p. 444.

<sup>91</sup> Ibid.

<sup>92</sup> See generally the Constitution of Kenya, 2010.

international human rights in particular.<sup>93</sup> It is an outstanding example of ‘cross-fertilisation’ of constitutional ideas. In it, one can see Montesque’s idea of separation of powers that is now accepted in many democracies, American presidentialism embodied in the US constitution; a bill of rights that mirrors South African and international bill of rights.<sup>94</sup> Moreover, it reflects the proportionality criteria for limitation of rights contained in the Canadian Charter on Rights and Freedoms and South African constitution.<sup>95</sup> It embraces sustainable development,<sup>96</sup> the defining feature of modern environmentalism, as well as establishing a central bank and a framework for a free market economy.<sup>97</sup>

### 2.2.2.3. Decline of Classical Liberal Ideology

Liberalism as a political ideology, attributed mainly to John Locke, has held sway in the West for centuries.<sup>98</sup> However, the ideology, which is premised mainly in formal autonomy and abstract equality, has been on the decline.<sup>99</sup> The decline has been characterised by a corresponding rise in social democracy or liberal egalitarianism.<sup>100</sup> As a twenty first century legal-political document, Kenya’s Constitution reflects this trend, and makes effort to counter-balance liberal political ideology with socio-democratic tenets.

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<sup>93</sup> The Constitution of Kenya, 2010, article 2 (5) (6), 21 (4), 58 (6) (a) (ii), 132 (1) (c)(ii), for instance.

<sup>94</sup> Some rights are lifted word-for-word from international instruments such as the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, the International Convention on Economic Social and Cultural Rights, Convention on the Elimination of all forms of Discrimination against Women, and the African Charter on Human and Peoples’ Rights.

<sup>95</sup> Article 1 of Canadian Charter of Rights and Freedoms, 1982 and Section 36 of Constitution of South Africa, 1996. Compare with article 24 of Kenya’s 2010 Constitution.

<sup>96</sup> The Constitution of Kenya, 2010, article 10(2)(b). Chapter 5 in particular makes detailed provisions for the protection of the environment.

<sup>97</sup> *Ibid*, article 231.

<sup>98</sup> Makau W. Mutua, *The Transformation of Africa: A Critique of The Rights Discourse*, (2009) *Human Rights and Diversity: International Human Rights Law In A Global Context* 899, p.902.

<sup>99</sup> Allen, T, Liberalism, ‘Social Democracy and the Value of Property under the European Convention on Human Rights,’ (2010) 59 *International and Comparative Law Quarterly* 1055: The trend here is one of counter-balancing of classical liberal ideals with social democratic ideals, not death of classical liberalism ideology. The labour movement and labour law as a transitional project have contributed greatly to rise in social democratic ideals in Europe and the rest of the world.

<sup>100</sup> *Ibid*.

At the core of classical liberalism is the individual as the central subject of politics. Individual liberty is a key objective, and the morality of political action is judged on the basis of whether or not it advances freedom. At the core of liberal political theory is a strong presumption of individual liberty.<sup>101</sup> That is, human beings are free to order their lives as they deem fit, and any restrictions on this liberty must be justified.<sup>102</sup> The burden of justifying restrictions rests with whoever is seeking to restrict liberty, namely the state and the society.<sup>103</sup> Liberal theory assumes formal equality, and sees the role of the state as that of protecting life, liberty and property. Therefore, the rule of law becomes crucial in securing individual liberty and private property from the assaults of the society and the state.<sup>104</sup>

Political liberalism gave rise to democracy and human rights.<sup>105</sup> As such, the three concepts are frequently considered to be intertwined. Liberalism has however faced severe criticisms especially from the second half of the twentieth century from communitarians, socialists and feminists, among others.<sup>106</sup> While these criticisms are diverse, their gist is that liberalism is obsessed with atomism, over emphasises the importance of the individual, and ignores the social, cultural and political context in which the individual is situated and nurtured.<sup>107</sup>

Communitarian critiques of liberal theory, for instance, fault liberalism for misrepresenting the nature of life. Liberalism, the criticism goes, is too individualistic.<sup>108</sup> This emphasis distorts reality. It ignores the fact that individuals are borne into, live and

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<sup>101</sup> See Chapter I of John Stuart Mill, *On Liberty*, in John Gray, ed., *John Stuart Mill on Liberty and Other Essays*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 1998.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> Brian Z. Tamanaha, 'The Dark Side of the Relationship between the Rule of Law and Liberalism,' *St. John's Legal Studies Research Paper No. 08-0096*. Available at SSRN: <http://ssrn.com/abstract=1087023>, p. 4.

<sup>105</sup> Makau W. Mutua, *The Transformation Of Africa: A Critique Of The Rights Discourse*, *supra*, p. 902.

<sup>106</sup> Will Kymlicka, 'Liberalism and Communitarianism' (1988) 18 *Canadian Journal of Philosophy* 181, p. 181.

<sup>107</sup> *Ibid.*

<sup>108</sup> Craig James Powell, 'The Other Double Standard: Communitarianism, Federalism, And American Constitutional Law' (1996) 7 *Seton Hall Constitutional Law Journal* 69, p. 71-73.

form identities within societies, and more often than not distort and constrain personal choice.<sup>109</sup> As a political and social philosophy, communitarianism places emphasis on community in the analysis of politics, human identity and well-being, as well as in the evaluation of political institutions.<sup>110</sup> Communitarian arguments criticise liberalism on two fronts: liberal assumptions on individual self-identity or self-perception, and second, its political doctrines.<sup>111</sup> On liberal assumptions of individual identity, communitarians fault liberalism for too much emphasis on the individual.<sup>112</sup> On political doctrines, communitarians charge that liberalism has yielded bad public policies since they are premised on a wrong conception of individual identity in a social context.<sup>113</sup> Liberal political theory exalts individual rights, and presumes personal liberty. The morality or otherwise of state coercion is judged on the basis of whether or not it advances liberty. Since liberty is presumed, any limitation must be justified. Communitarians fault this approach. Instead, they propose assessment of political action on the basis of whether or not it advances the 'common good.'<sup>114</sup> That is, a formulation of policies that express the society's view of public good, rather than a focus on individual rights in ways that ignore the community and its interests.

Makau Mutua, while not rejecting the core of liberalism, doubts the appropriateness of Western political liberalism and human rights tradition for non-Western societies such as Africa.<sup>115</sup> He argues that human rights (and political liberalism) as applied in Africa are conceptually and philosophically problematic.<sup>116</sup> He argues for an enrichment of these Western traditions with norms that resonate with African concepts such as the

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<sup>109</sup> Michael Walzer, *Communitarian Critique of Liberalism*, *op cit* p. 9-10; Will Kymlicka, *Liberalism and Communitarianism*, *op cit* p. 1-2.

<sup>110</sup> Kraig James Powell, 'The Other Double Standard: Communitarianism, Federalism, And American Constitutional Law' (1996) 7 *Seton Hall Constitutional Law Journal* 69, p. 71-73.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> Makau Mutua, *The Transformation Of Africa: A Critique Of The Rights Discourse*, (2009) *Human Rights and Diversity: International Human Rights Law In A Global Context* 899, p. 902.

<sup>116</sup> *Ibid.*

African Charter on Human and Peoples' Rights has attempted to do.<sup>117</sup> Mutua is suspicious about the idea of universalism that underlies both political liberalism and human rights. He notes that if political liberalism is to be of use to Africa, it has to be modified in ways that will be beneficial and functional in African contexts.<sup>118</sup>

Scholarship since the 1970s has attempted to respond to criticisms of classical liberalism. Part of the response has been modification of liberal political theory to accommodate social concerns that classical liberalism ignores. This has given rise to what has variously been described as modern liberalism, egalitarian liberalism or social democratic liberalism.<sup>119</sup> This modern liberalism goes beyond classical liberalism to accommodate the needs of the disadvantaged members of the society. What distinguishes modern liberalism is its more collectivist or communitarian approach, and the belief that it is the duty of the state to guarantee certain minimum conditions that will ensure all citizens, including the less endowed, live a decent life to be able to enjoy meaningful freedom.<sup>120</sup> This response in reality has yielded social democratic systems in Europe and elsewhere where the state is not only obligated to respect 'negative rights' but to also take an active part in nurturing the welfare of its citizens through protection of socio-economic rights.<sup>121</sup>

It is clear that Kenya's Constitution has taken these intellectual discourses into account. It accommodates liberal ideals as evidenced in its protection of civil and political rights. Key among these rights are the right to freedom of expression, property, assembly, association, conscience, belief, and opinion, movement, as well as political rights.

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<sup>117</sup> The African Charter on Human and Peoples' Rights incorporates the protection of collective or 'peoples' rights beyond individual negative rights that is the concern of classical liberal constitutions.

<sup>118</sup> Makau Mutua, 'Human Rights in Africa: The Limited Promise of Liberalism,' (2008) 51 *African Studies Review* 17, p. 19-21.

<sup>119</sup> Heinz Klug, (2000) *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, *supra*, p. 24.

<sup>120</sup> Kraig James Powell, 'The Other Double Standard: Communitarianism, Federalism, And American Constitutional Law' (1996) 7 *Seton Hall Constitutional Law Journal* 69, p. 1005.

<sup>121</sup> *Ibid.* See also Gavin W. Anderson, 'Social Democracy and the Limits of Rights Constitutionalism,' (2004) 17 *Canadian Journal of Law and Jurisprudence* 31.

These rights are affirmed as ‘belong[ing] to each individual and are not granted by the State’ and ‘do not exclude other rights and fundamental freedoms not in the bill of rights.’<sup>122</sup>

The Constitution goes beyond classical liberal ideals to embrace egalitarian devices to ensure meaningful equality beyond formal or abstract equality. For instance it provides for equality of opportunity between men and women in economic, cultural, political and social spheres.<sup>123</sup> To ensure this goes beyond aspiration, it enjoins the state to enact legislation and adopt affirmative action policies to ensure equality is achieved and past inequality is reversed.<sup>124</sup> While outlawing discrimination on the basis of grounds such as sex, race, ethnicity, or religion in public spheres, the Constitution extends this demand into private spheres. Clauses 4 and 5 of article 27 are instructive:

(4) The State may not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A *person* may not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).  
[Emphasis added]

These provisions, read together with Article 3 (1) have led the Courts to conclude that the Constitution extends some obligations that have previously been public law in nature, to the private spheres.<sup>125</sup> In *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others*, for instance,<sup>126</sup> the High Court of Kenya held that a private golf club

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<sup>122</sup> Constitution of Kenya, article 19(1).

<sup>123</sup> *Ibid*, article 27 (3).

<sup>124</sup> *Ibid*, article 27 (5)(6)(7)(8).

<sup>125</sup> The term ‘person’ is defined under article 260 of the Constitution to include private persons, be they individual or an organization, corporate or otherwise. Article 27 (5) prohibits all persons (including private persons) from discriminating any person on any ground. Article 3(1) reads: “[e]very *person* has an obligation to respect, uphold and defend this Constitution.” [Emphasis added].

<sup>126</sup> [2014] eKLR.

cannot discriminate against women in its membership, neither can it deny women positions in its leadership. The Court went on to note that being a private club is no excuse since the Constitution imposes an obligation upon all persons ‘to respect, uphold and defend th[e] Constitution’ generally, and ‘not to discriminate on any ground.’<sup>127</sup>

This extension of public law obligations to private affairs clearly recognises that discrimination happens in private spheres. In fact for women and other historically disadvantaged groups, discrimination in private spheres such as cultural contexts, home and family is often more visible and more harmful.<sup>128</sup>

Another response to the inadequacies of liberalism is the incorporation of justiciable socio-economic rights such as food, water, housing, healthcare, sanitation, social security and education.<sup>129</sup> In addition, the state is directed to formulate laws and policies for the progressive realisation of these rights.<sup>130</sup> The Constitution also enjoins the state and public officers to “address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.”<sup>131</sup>

This goes beyond the minimum demands of liberal political ideology. It is a radical egalitarian shift that requires a caring, benevolent and proactive state. In claims of socio-economic rights before a court of law, the presumption is that the state has the resources to provide.<sup>132</sup> The burden of proof is upon the state to show that it does not have

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<sup>127</sup> This decision recognised horizontal applicability of the Constitution of Kenya. The import of article 3 (1) and 27 (5) in the Court’s view, is that Kenya’s Constitution imposes obligation on private persons not to discriminate in the same way that it does on the state.

<sup>128</sup> This is to be contrasted with section 82 (1) (4) (b) (c) of the repealed Constitution of Kenya.

While this Constitution prohibited discrimination generally, it allowed an exception in matters such as adoption, marriage, divorce, burial, inheritance and ‘other matters of personal law.’

<sup>129</sup> Constitution of Kenya, 2010, article 43.

<sup>130</sup> *Ibid*, article 21 (1) (2).

<sup>131</sup> *Ibid*, article 21 (3).

<sup>132</sup> *Ibid*, article 20 (5).

the resources to provide.<sup>133</sup> It is not for a claimant to show that the state has the resources. This rebuttable presumption and placing of the burden of proving inadequate resources upon the state has huge implications. It raises the chances of success in claims against the state, and puts pressure upon the state to take socio-economic rights seriously.

Another response can be seen in the proportionality criteria applied in determining whether or not a limitation of rights meets the constitutional muster:

“A right or fundamental freedom in the Bill of Rights may 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....”<sup>134</sup>

The test set out here favours non-interference with constitutional rights. The burden is upon the state to show that a limitation is justifiable. In discharging that burden, the state is required to show the interests intended to be served by the limitation. Invariably, these interests are collective interests such as national security, public morality, public health and safety, social cohesion, national unity, dignity, freedom and equality of others-as individuals or community.<sup>135</sup> These are communitarian interests. A court would be weighing individual claims of rights against communitarian interests or values.<sup>136</sup>

What is described above, that is, the protection of individual rights and freedoms, protection of the vulnerable or disadvantaged groups, and guarantee of socio-economic rights especially for the poor, and communitarian proportionality criteria in the

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<sup>133</sup> Ibid.

<sup>134</sup> Ibid, article 24 (1).

<sup>135</sup> The repealed Constitution specifically recognised public safety and security, public health, defense, public order and public morality as grounds for limitation of rights. See sections 75, 76 and 81 for example.

<sup>136</sup> The grounds for limitation here are comparable to those admitted under articles 12, 18, 19, 21, and 22 of the ICCPR. These include national security, public order, public health or morals or the rights and freedoms of others. By virtue of article 2(6) of Constitution of Kenya, 2010, the ICCPR is part of Kenya’s laws since Kenya has ratified the Convention. These grounds for limitation are also specifically recognised as grounds for limitation for the right to freedom of expression and media under article 33 and 34.

limitation of rights, is a very comprehensive balance. It tries to accommodate the liberal idea of negative rights, while at the same time recognising the need to protect and promote the interests of community and vulnerable or disadvantaged members of the community. Furthermore, it takes rights beyond the liberal conception to protect 'positive' or 'welfare' socio-economic rights. Included also in the catalogue of rights are solidarity rights such as the right to a clean environment.<sup>137</sup> This elaborate blend and careful balancing resonates with the aspirations communicated in the fifth preambular paragraph of the constitution: "committed to nurturing and protecting the well-being of the individual, the family, communities and the nation." These are some of the ways through which the bill of rights and the constitution as a whole has attempted to manage and achieve this multifaceted commitment.

### **2.3. Evolution of the Kenyan State: Pre-colonial Period to Present**

The territory that is today Kenya was occupied by different tribes that form part of the country's population. These communities did not however conceive themselves as one society or belonging to one polity. Instead, each tribe was a state in itself complete with its own social and political organisation.

The declaration of the protectorate over Kenya by the British in 1895 marked the first steps in the creation of the state.<sup>138</sup> The advent of colonial administration was both a destructive and constructive process. It heralded a destruction of preexisting social, cultural and political systems and concurrent construction of an English legal system. The sixty eight years of colonialism saw the development of a predominantly agrarian economy dominated by white European settlers with Africans supplying labour. The colony was administered on behalf of the British crown by a Governor General with the assistance of British district administrators aided by African chiefs and village headmen. The system by design was repressive, and was calculated to ensure the success of British imperial

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<sup>137</sup> Constitution of Kenya, 2010, article 42.

<sup>138</sup> Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya,' (2001) 23 *Human Rights Quarterly* 96, p. 97

agenda.<sup>139</sup> There was no legal protection of fundamental rights and freedoms.<sup>140</sup> As a matter of fact violation of rights was a feature of British colonial administration, with the worst happening during the emergency period in the 1950s.<sup>141</sup> The judiciary was subservient to the executive, and there to serve imperial interests.<sup>142</sup>

Kenya gained independence from the British in December 1963.<sup>143</sup> The 1963 constitution was generally liberal, guaranteeing fundamental rights and freedoms including the freedom of expression. It also provided for a federal system of government popularly known as *majimbo* and an independent judiciary.<sup>144</sup>

The evolution of the Kenyan state to date can be described in the following phases: (a) colonial Imperialism- 1895-1963, (b) post-independence presidential imperialism-1963-1992 (c) minimal liberal democracy-1992-2010, and (d) post- 2010 era. These phases are examined in detail below:

### **2.3.1. Colonial Imperialism: 1895-1963**

This period was characterised by gross violation of human rights, racial segregation, and exclusion of African majority from political representation and participation. During this period, the country was administered under different legal instruments. These included Royal Instructions and the Orders-in-Council enacted in London by the British colonial authorities.<sup>145</sup> Locally, the Commissioner, later the Governor

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<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> For a detailed historical account of executions, forced labour, extrajudicial detentions, displacement and other atrocities committed by the British colonial authorities especially in the 1950s, see Caroline Elkins, (2005) *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*: New York, Henry Holt & Company Publishers.

<sup>142</sup> Chief Justice Dr. Willy Mutunga, Keynote Remarks on the occasion of celebrating 200 years of Norwegian Constitution, Nairobi, 19 May 2014.

<sup>143</sup> Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya,' (2001) 23 *Human Rights Quarterly* 96, p. 97

<sup>144</sup> Ibid.

<sup>145</sup> PLO Lumumba, MK Mbondenyei and SO Odero, (eds) (2012) *Constitution of Kenya, Contemporary Readings: supra*, p. 18.

as well as the Legislative Council made laws for the country. These locally made laws were, however, subject to veto by the imperial authorities in England.<sup>146</sup>

The East Africa Order-in-Council of 1897 was the first legal instrument to provide for the administrative structure for Kenya.<sup>147</sup> It established the office of the Commissioner as the Chief Executive Officer of the Protectorate and created a judicial mechanism. The East Africa Order-in-Council of 1902 made further provisions, and created a more elaborate administrative framework. The Order-in-Council of 1905 replaced the Commissioner with a Governor and established an Executive Council and a Legislative Council. With political agitations, reforms were introduced to broaden racial representation in the Legislative and Executive Council. Other constitutional instruments that governed the colony during this period are the Lyttleton Constitution of 1954, the Lennox Boyd Constitution of 1957, and the first Lancaster House Constitution of 1960.<sup>148</sup>

### 2.3.2. Post-Independence Presidential Imperialism: 1964-1992

As earlier explained, the period after independence was characterised by a powerful President who had huge powers over the legislature and the judiciary. This period was also characterised by one party system following the dissolution of independence opposition party KADU in 1964.<sup>149</sup> Between 1964 and 1969 Kenya was a *de facto* one-party state since although the Constitution allowed multipartyism, KANU remained the only party. In 1966, Kenya's Vice President Jaramogi Oginga Odinga broke ranks with KANU and formed the Kenya Peoples Union (KPU), returning Kenya to multiparty politics.<sup>150</sup> This was, however, short-lived. President Jomo Kenyatta banned the party and detained some of its leaders, including Odinga.<sup>151</sup> In 1982, Parliament, at the

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<sup>146</sup> Ibid, p. 19.

<sup>147</sup> Ibid, p. 19.

<sup>148</sup> Robert Maxon (2009) 'Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century,' *supra*.

<sup>149</sup> Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya,' (2001) 23 *Human Rights Quarterly* 96, p. 97

<sup>150</sup> Makau Mutua, 'Human Rights and State Despotism in Kenya: Institutional Problems,' (1994) 41 *Africa Today* 50, p.50.

<sup>151</sup> Ibid.

behest of President Daniel arap Moi, amended the Constitution to make Kenya a de jure one-party state.<sup>152</sup> Accompanying this development were extrajudicial detentions, restriction of media, and abuse of human rights and control of state organs including the judiciary.<sup>153</sup>

### 2.3.3. Minimal Liberal Democracy: 1992-2010

The reintroduction of multiparty politics in 1991 restored some semblance of democracy.<sup>154</sup> In the following year, multiparty elections were held. For the first time, Moi, who had been in power since 1978 faced real political competition.<sup>155</sup> Although presidential, parliamentary and local government elections were now open to multiparty contest, the state both under Moi and later Mwai Kibaki continued to exhibit the same old illiberal and undemocratic tendencies.<sup>156</sup> Under Moi, dubious prosecution of opposition politicians continued while induced defection of opposition politicians into the ruling party to weaken the opposition became the order of the day.<sup>157</sup> Abuse of human rights and state sponsored ethnic violence and displacements increased dramatically.<sup>158</sup> The outcome of the re-introduction of multipartyism was a paradox of an 'illiberal democracy' in which although multiparty elections were guaranteed by law, the culture of repression and abuse of human rights went on unabated.<sup>159</sup> Multipartyism was grafted onto the pre-existing repressive legal, constitutional and political framework.<sup>160</sup>

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<sup>152</sup> Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya,' (2001) 23 *Human Rights Quarterly* 96, p. 98.

<sup>153</sup> Ibid, p.98.

<sup>154</sup> Makau Mutua (2008) *Kenya's Quest for Democracy: Taming Leviathan*, Lynne Rienner Publishers.

<sup>155</sup> Ibid.

<sup>156</sup> Makau Mutua, 'Human Rights and State Despotism in Kenya: Institutional Problems,' *supra*, p.50. Although Mwai Kibaki was elected on a platform of reforms, his era witnessed extrajudicial killings and disappearance of *Mungiki* criminal suspects, raid of the premises of The Standard Newspapers by security officers. The government was also accused of being complicit in killings and displacement of people during the 2007-08 post-election violence.

<sup>157</sup> Makau W. Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya,' (2001) 23 *Human Rights Quarterly* 96, p. 98.

<sup>158</sup> Korwa G. Adar and Isaac M Munyae, 'Human Rights Abuse In Kenya Under Daniel arap Moi, 1978-2001,' (2001) *African Studies Quarterly*, p. 6-7.

<sup>159</sup> Fareed Zakaria, 'The Rise of Illiberal Democracy,' (1997) 76 *Foreign Affairs* 22, p. 22-23.

<sup>160</sup> Makau Mutua (2008) *Kenya's Quest for Democracy: Taming Leviathan*, *supra*.

Although the Kibaki era (2002-2013) was more liberal and allowed free press, free expression and other ‘democratic rights,’ it was also during this period that two leading media houses were raided by security agents to intimidate them from publishing damning stories about the President and his family.<sup>161</sup> This period also witnessed massive extra-judicial killings and disappearances.<sup>162</sup> It was also during this period that the worst political and ethnic clashes in the country’s history happened.<sup>163</sup> The violence, triggered by disputed presidential elections in December 2007, brought the country to the precipice of a civil war, and shattered the myth that Kenya was ‘an island of peace in a troubled continent.’<sup>164</sup>

#### 2.3.4. The Post-2010 era

The post-2010 era needs no detailed description since this thesis focuses on developments in this period. It suffices to say however that experiences in this period are mixed. It has been a period of learning, radical changes accompanied by a myriad of mistakes and teething problems. The period between August 2010 and April 2013 saw the creation of new institutions. At the judiciary, a new apex court, the Supreme Court, was established. Other new courts, namely, the Environment and Land Court and the Industrial Court were constituted.<sup>165</sup> Moreover, the High Court and the Court of Appeal which existed under the previous Constitution were reconstituted. The reconstitution entailed appointment of new judges, election of the Presiding Judge for the High Court and the President of the Court of Appeal. The judges appointed under the previous Constitution renewed oaths of office under the new Constitution. Additionally, the judges

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<sup>161</sup> Ibid,

<sup>162</sup> Ibid. Organisations such as Kenya National Commission on Human Rights, Human Rights Watch, Amnesty International and the United Nations Rapporteur on Extrajudicial Killings have damning reports about extrajudicial killings and other human rights abuses that occurred during this period.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid. This was a common description of Kenya before 2007 because of Kenya’s relative peace while most of Africa had been ravaged by civil wars and military coups.

<sup>165</sup> This two courts are contemplated under article 162 (2) of the Constitution, and established under Environment and Land Court Act and the Industrial Court Act respectively.

and magistrates appointed before August 2010 had to undergo a vetting process to determine their suitability to serve in the new dispensation.<sup>166</sup>

Other state offices and organs established under the Constitution were constituted and office holders appointed. These included Office of the Director of Public Prosecutions, Inspector General of Police, as well as Commissions and Independent Offices created under Chapter 15 of the Constitution. As a crucial procedural step, the President, the Vice President, the Prime Minister and his deputies, cabinet ministers and Members of Parliament also had to renew oaths of office under the new Constitution. It should also be recalled that this was a transitional period in which there was power-sharing between President Kibaki and Prime Minister Raila Odinga in a deal to end the 2007-08 post-election violence.<sup>167</sup> The agreement was entrenched in the Constitution and secured in the 2010 Constitution until March 2013 when the first elections were held under the new Constitution.<sup>168</sup>

This period also ushered in a new bicameral Parliament consisting of an expanded National Assembly, and the Senate.<sup>169</sup> In addition, it saw the establishment of forty seven county governments complete with executive and legislatures.<sup>170</sup> The disputed presidential elections in March 2013 in particular put to test the new Supreme Court. For the first time there was a real trial of a case involving a dispute in presidential elections.<sup>171</sup>

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<sup>166</sup> The framework for the vetting process is provided for under the Vetting of Judges and Magistrates Act. The exercise is conducted by the Vetting of Judges and Magistrates Board established under the Act. The celebrated Justice Albie Sachs, retired judge of the Constitutional Court of South Africa was among the founding members of this Board.

<sup>167</sup> The deal was signed in February 2008 following negotiations chaired by Kofi Anan and a panel supported by African Union and United Nations. See 'Kenya rivals agree to share power,' available on <http://news.bbc.co.uk/2/hi/africa/7268903.stm> <accessed 31 August 2016>.

<sup>168</sup> Section 3(2) of the Sixth Schedule read with articles 262 and 264 of the Constitution of Kenya, 2010.

<sup>169</sup> The Constitution of Kenya, 2010, articles 93, 97 and 98.

<sup>170</sup> *Ibid*, Chapter 11.

<sup>171</sup> There were criticisms however over the manner in which the Supreme Court decided the dispute. The Court rejected evidence introduced late by the opposition. In the end, the court decided in favour of the president-elect Kenyatta. Allegations of bribery were leveled against the Court, but none were substantiated.

Past challenges in presidential elections such as in *Matiba v Moi*<sup>172</sup> and *Kibaki v Moi*<sup>173</sup> were dismissed on technicalities at preliminary stages. These cases are an enduring example of past impotence of the judiciary, which led to lack of faith in the institution. This mistrust connected to judicial weakness and subservience was seen in the disputed elections of 2007 where the opposition refused to take grievances to the courts, opting instead for mass demonstrations.<sup>174</sup> The result was bloody violence that will forever remain a scar in the country's history.

The Post-2010 era also represents real hope for the restoration of constitutionalism and the rule of law in the country. There are many examples where the courts invalidated actions of the executive and the legislature on grounds of violation of the Constitution and the law. In 2012 for instance, the High Court invalidated the decision of the President with the approval of the National Assembly, to appoint Mumo Matemu as the head of Ethics and Anti-Corruption Commission.<sup>175</sup> Earlier in 2011, President Kibaki

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<sup>172</sup> In *Matiba v Moi*, (Election Petition No.27 of 1993), the case was dismissed because Matiba, a presidential candidate who disputed the election result, had not signed the election petition personally as required by the Election Act. Instead his wife had signed it on his behalf under a power of attorney donated to her by Mr. Matiba. Matiba could not write because of a stroke he had suffered.

<sup>173</sup> Election Petition No. 1 of 1998. This petition filed by Mwai Kibaki, a presidential candidate challenging the election of President Moi in 1997 elections was dismissed by the High Court because the petition had not been served personally on Moi as required by section 20(1) (1)(b) of the National Assembly and Presidential Elections Act. The reality is that attempts to serve the President personally were frustrated by Moi's security detail. Although these frustrations were brought to the attention of the Court, it still dismissed the petition thereby allowing Moi to escape justice. On appeal (civil appeal no. 172 of 1999) the Court of Appeal upheld the decision of the High Court. See also Korwa G. Adar and Isaac M Munyae, 'Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001,' *supra*.

<sup>174</sup> Susanne D. Mueller 'The Political Economy of Kenya's Crisis,' (2008) 2 *Journal of Eastern African Studies*, 185, DOI: 10.1080/17531050802058302, p. 194.

<sup>175</sup> *Trusted Society of Human Rights Alliance v Attorney General & others* [2012] eKLR. This decision was later overturned on appeal, but remains a relevant illustration of how things have changed. Since then, there are numerous examples in which courts have invalidated the decisions of the executive such as on police recruitment, and so on. Courts too have recently issued orders to stop 'unconstitutional' parliamentary proceedings as well as invalidating many laws enacted by Parliament.

was forced by political pressure to revoke unilateral appointments of a Chief Justice, Deputy Chief Justice, Attorney General and Director of Public Prosecutions.<sup>176</sup>

## 2.4. The Constitution's Vision for Transformation

### 2.4.1. Constitutions as Ideology and Agents of Change

Throughout history, constitutions and constitution-making have had different objectives depending on the contexts in which they are enacted. Objectives have invariably been to reconstitute the state after a crisis such as war, or to mediate transition from repression to independence or democracy.<sup>177</sup> The prevailing political environment and goals often determine the nature of the constitution that results. The American Constitution, for instance, was enacted to 'form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty....'<sup>178</sup> It was intended to bring together different states to form a common union and establish an effective government to ensure political stability, set the stage for development and secure individual liberty. This is so especially given the lessons from America's experiences under 'the articles of confederation' which failed to ensure effective governance.<sup>179</sup> Because of the experiences of colonial rule as expressed in the Declaration of Independence, the authors of the US constitution were wary of a powerful central government. Thus, the objective was to retain power at the state level and create a federal government that would secure interstate interests such as interstate

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<sup>176</sup> In appointing the Chief Justice and Deputy Chief Justice, the President purported to rely only on section 24 (2) of the Sixth Schedule and did not involve the Judicial Service Commission as required under article 166 (1)(a). In making these appointments, the President also failed to consult the Prime Minister as required by the National Accord and Reconciliation Act, No. 4 of 2008. The presidential appointments were later faulted by the Court in a case filed by the Judicial Service Commission.

<sup>177</sup> Ben Nwabueze, (2003) *Constitutional Democracy in Africa. Vol. 1*: Spectrum Books, Ibadan, p. 36-58.

<sup>178</sup> See the preamble to the Constitution of the United States.

<sup>179</sup> Eric Freedman, 'Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation.' (1993) 60 *Tennessee Law Review* 783, p. 785-786.

commerce and matters that needed the intervention of the federal government such as defence and foreign relations.<sup>180</sup>

In transitional societies or emergent democracies, constitutions tend to have the vision of marking a break from a sad past, and setting a framework for a better future.<sup>181</sup> The constitution often has a paradoxical role of mediating change while at the same time ensuring order and stability.<sup>182</sup> South Africa's constitution provides a good illustration in this regard. It devised radical but delicately balanced mechanisms to end an immoral and oppressive legal and political regime and usher in a more inspiring future. The goal was to end apartheid and institute a democratic regime founded on freedom, multiculturalism, equality, equity, respect for human dignity and human rights.<sup>183</sup> At the same time, it was careful to avoid resort to radical measures that would undermine the relative stability that the Interim Constitution had achieved during the transition period.<sup>184</sup>

Kenya's independence Constitution was modest in its ambitions. It was intended to ensure transition of Kenya from British colonial administration to independence. While the African political elite wanted independence, power and protection of the interests of their various constituencies, the colonial administration was concerned about ensuring orderly transition and protection of the interests of European

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<sup>180</sup> Amendment X of the Constitution of the United States reserves unallocated power to the states and not the federal government. The constitution prescribes limited powers to the federal government leaving majority of interior functions to the states.

<sup>181</sup> Ruti Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation,' (1997) 106 *Yale Law Journal*, 2009 (arguing that transformation entails a change in normative arrangements, including new conception of justice).

<sup>182</sup> Heinz Klug, (2000) *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, *supra*, p. 6.

<sup>183</sup> Dikgang Moseneke, 'A Journey from the Heart of Apartheid Darkness towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa,' 101 *The Georgetown Law Journal* 749: The 32nd Hart Memorial Lecture, available on: <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1000&context=hartlecture>

<sup>184</sup> *Ibid.* The peaceful transition was made possible partly by Truth and Reconciliation Commission. Under this transitional justice mechanism, some perpetrators of atrocities were granted amnesty on condition that they would appear before the Commission, admit their roles and ask for forgiveness. The Interim Constitution of 1994 abolished apartheid and provided a framework for democratic elections and governance during the transition period before the current Constitution came into effect in 1996.

settlers who had invested in the country.<sup>185</sup> A chaotic transition would obviously have been an indictment on the part of British government and a mess that it would have to deal with later on.

The independence Constitution was however potentially transformative as it established structures to support democratic self-governance, among them an independent judiciary, a bill of rights, and an executive under a Prime Minister accountable to a democratically elected Parliament.<sup>186</sup> These structures were absent during colonial rule and would have supported genuine democracy if there was political good will. The transformational potential was, however, never realised. The state was autocratic from the start largely due to laws, culture and practices inherited from the colonial authorities, and political elite keen on consolidating power.<sup>187</sup> In addition, Makau Mutua argues that the independence Constitution was a complicated political compromise that was too difficult to implement, besides lacking in a unifying ideology.<sup>188</sup>

It is against the traumatic experiences of post-colonial Kenya, ranging from despotic executive, weak or failed state institutions, systemic human rights abuses, and despair among citizenry that the 2010 Constitution is transformative in design. The constitution's blueprint is to entrench constitutionalism in the traditional sense of limited government while at the same time realising social and political change. This is to be achieved through an elaborate system of checks and balances among the conventional arms of government, powerful commissions and independent offices, and a citizenry empowered to hold government accountable through the right to seek judicial intervention, present petitions, demonstrate or picket, participate in governance, recall non-performing elected representatives, and vote, among other mechanisms. This accountability of government through an empowered citizen is itself a key aspect of the transformative character of Kenya's Constitution.

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<sup>185</sup> See generally Robert Maxon, 'Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century,' *supra*.

<sup>186</sup> Makau Mutua (2008) *Kenya's Quest for Democracy: Taming Leviathan*, *supra*.

<sup>187</sup> *Ibid*.

<sup>188</sup> *Ibid*.

### 2.4.2. Transformative Constitutionalism and the 2010 Constitution

Constitutionalism in its simplest conception is the notion of government limited by law. It posits that it is possible, and indeed, desirable, that government should be limited by law, the constitution sitting at the top in the hierarchy of law.<sup>189</sup> To this traditional notion, Okoth-Ogendo adds that it also entails a culture or commitment by the political elite to respect and abide by constitutional limits, since it is possible, in his words, to have “constitutions without constitutionalism.”<sup>190</sup> This traditional notion of constitutionalism is inadequate in meeting peculiar needs of transitional societies emerging from traumatic pasts characterised by war, deep divisions or political repression. In such societies, constitutions have to do more than merely allocating and limiting public power.<sup>191</sup> It has to commit to addressing past injustices and crises as well as inspire hope for a better future.<sup>192</sup> Inevitably, the law and politics divide faces the greatest challenge as the law is engaged in mediating political change.<sup>193</sup> South Africa’s interim Constitution of 1993 and the ‘final’ 1996 Constitution provides a good illustration in this regard. It devised radical but delicately balanced mechanisms to end an immoral and oppressive legal and political regime and usher in a more inspiring future.<sup>194</sup> The goal was to end apartheid and institute a democratic regime founded on freedom, multiculturalism, equality, equity, respect for human dignity and human rights.<sup>195</sup> At the same time, they were careful to

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<sup>189</sup> A W Bradley and K D Ewing, (2010) *Constitutional and Administrative Law*, New York: Pearson Longman.

<sup>190</sup> HWO Okoth-Ogendo, "Constitutions without constitutionalism: an African political paradox" in Douglas Greenberg S.N. Kartz, B. Oliviero and S.C. Wheatley (Eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (Chapter 4) New York: Oxford University Press.

<sup>191</sup> Ruti Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation,’ *supra*.

<sup>192</sup> Heinz Klug, (2000) *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, *supra*, p. 6.

<sup>193</sup> Ruti Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation,’ *supra*.

<sup>194</sup> Heinz Klug, (2000) *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, *supra*.

<sup>195</sup> Dikgang Moseneke, ‘A Journey from the Heart of Apartheid Darkness towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa,’ (2012) 101 *The Georgetown Law Journal* 749: The 32nd Hart Memorial Lecture, available on: <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1000&context=hartlecture> <accessed 23 June 2015>.

avoid resort to radical measures that would undermine the relative stability that was prevailing in the transition period.<sup>196</sup> This necessitated a constitution designed to not only limit governmental powers but also institute social and political transformation, hence the idea of transformative constitutionalism.<sup>197</sup>

Writing in the context of South Africa's 1996 Constitution, Karl Klare, defines 'transformative constitutionalism' as 'a long-term project of constitutional enactment, interpretation, and enforcement committed (...in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.'<sup>198</sup> Other scholars have also commented extensively on transformative constitutionalism in the context of South Africa. Langa recognises the difficulty of defining the concept in juridical terms and sees the need for social and political change as its bottom-line.<sup>199</sup> He sees it as a social and economic revolution through law whose chief objective is the attainment of substantive equality. While its meaning and scope is contested, the concept entails a number of elements. First, is a focus on substantive justice. Substantive justice goes beyond formal equality to a deliberate effort to empower previously excluded sections of the society.<sup>200</sup> It focuses on social justice through devices such as the protection of socio-economic rights. It is an enterprise of imagining the progressive society that the Constitution envisages and deploying appropriate tools, including, for lawyers, methods of legal reasoning to create

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<sup>196</sup> Ibid. The peaceful transition was made possible partly by Truth and Reconciliation Commission. Under this transitional justice mechanism, some perpetrators of atrocities were granted amnesty on condition that they would appear before the Commission, admit their roles and ask for forgiveness. The Interim Constitution of 1994 abolished apartheid and provided a framework for democratic elections and governance during the transition period before the current Constitution came into effect in 1996.

<sup>197</sup> Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, p. 150.

<sup>198</sup> Ibid.

<sup>199</sup> Pius Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.

<sup>200</sup> Karl Klare 'Legal Culture and Transformative Constitutionalism, *supra*, p. 150-151.

it.<sup>201</sup> These methods, Klare argues, entail postliberal reading of the Constitution as one plausible approach, since the constitution itself is postliberal.<sup>202</sup>

Second, it involves a change in legal culture. The term 'legal culture' is complex and its understanding highly contested.<sup>203</sup> Klare simplifies it to mean lawyers' 'professional sensibilities, habits of mind, and intellectual reflexes.'<sup>204</sup> These include understandings and assumptions about politics, social life and justice, which influence the lawyers' thinking about the law and the justifications offered for positions taken.<sup>205</sup> It determines what legal arguments count as persuasive, what authorities are binding, and outcomes in adjudication of practical issues.<sup>206</sup> Like culture generally, legal culture is influenced by socialization through education, practice and other factors in a legal system.<sup>207</sup>

Klare and Langa see transformative constitutionalism as an unending process; a journey not a destination.<sup>208</sup> In their view, perpetuity is what distinguishes transformation from transition.<sup>209</sup> Transformative constitutionalism, as Klare explains, entails three processes: enactment, interpretation and enforcement of law.<sup>210</sup> The idea places a lot of faith in law as an instrument of social and political change. Since in democratic societies courts bear the ultimate mandate of determining the position of the law, transformative constitutionalism necessarily places immense faith in the judiciary as

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<sup>201</sup> Theunis Roux, 'Transformative Constitutionalism and the Best Interpretation of South African Constitution: Distinction without a Difference?' (2009) 2 *Stellenbosch Law Review* 258, p. 260.

<sup>202</sup> Karl Klare 'Legal Culture and Transformative Constitutionalism, *supra*, p. 150-151. Roux, *supra*, sees the interpretative approach advocated by Klare as the critical legal studies approach and adds that the approach advocated by Ronald Dworkin in his theory of interpretation is another plausible approach.

<sup>203</sup> Nelken David, 'Thinking About Legal Culture,' (2014) *Asian Journal of Law and Society*, (Cambridge University Press (2014), pp. 1-20, Forthcoming; King's College London Law School Research Paper No. 2014-33. Available at SSRN: <http://ssrn.com/abstract=2466424>.

<sup>204</sup> Karl Klare, 'Legal Culture and Transformative Constitutionalism, *supra*, p. 166-167.

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.* See also Pius Langa 'Transformative Constitutionalism' *supra*.

<sup>209</sup> *Ibid.*, p. 354.

<sup>210</sup> Karl Klare, 'Legal Culture and Transformative Constitutionalism, *supra*, p. 150.

agents of the change anticipated by the constitution. This entrenches judicialism as a component of transformative constitutionalism.<sup>211</sup>

Popularised in the context of post-apartheid South Africa, the idea of transformative constitutionalism has received commendation and criticism in equal measure. For example, it has been criticised for blurring the law and politics divide.<sup>212</sup> This is because the concept inevitably involves the courts in policy decision making in the course of enforcing rights such as socio-economic or welfare rights, and in deciding disputes that are political in nature. This inevitably puts courts on a collision path with the political arms of government who have traditionally enjoyed monopoly in policy decision making including control of resources.<sup>213</sup> In addition the concept has been criticised as being unsuitable or inadequate to eradicate poverty, which remains one of the greatest challenges of post-colonial Africa.<sup>214</sup> This, the criticism goes, is because while the concept is touted as “post-liberal” it sits comfortably within liberal discourses and fails to place poverty eradication at the centre of constitutional discourses.<sup>215</sup>

### **2.4.3. Transformative Constitutionalism: The Central Ideology of the 2010 Constitution**

There is wide consensus among scholars that transformative constitutionalism is the fulcrum of South Africa’s quest for social and political transformation in the post-apartheid era. As noted above, while they try to respond to

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<sup>211</sup> J.B. Ojwang’, (2013) *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order*, *supra*. (defining judicialism as the idea that the courts have the final say on the meaning of the constitution and the law, including in political matters that are entrenched in law) See also Alec Stone Sweet (2000) *Governing With Judges: Constitutional Politics in Europe* Oxford University Press, and John Ferejohn, ‘Judicializing Politics, Politicising Law,’ (2002) 65 *Law and Contemporary Problems* 41.

<sup>212</sup> Theunis Roux, ‘Transformative Constitutionalism and the Best Interpretation of South African Constitution: Distinction without a Difference?’ *supra*.

<sup>213</sup> An order for the enforcement of socio-economic rights such as food, healthcare and housing requires deployment of financial resources and effort, for example.

<sup>214</sup> Sanele Sibanda, ‘Not Tailor-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty (2011) 22 *Stellenbosch Law Review* 482.

<sup>215</sup> *Ibid*.

local politics, modern constitutions inevitably carry external influences.<sup>216</sup> Kenya's Constitution is not different. South Africa's 1993 and 1996 Constitutions were enacted at a time when the quest for a new Constitution in Kenya was already underway.<sup>217</sup> The formal review process started soon after the adoption of the 1996 Constitution.<sup>218</sup> Thus, South Africa's constitutional transformation provided the model for Kenya. As a result, the 2010 Constitution took a transformative stance, ordaining unprecedented radical social and political changes in a clear departure from the *status quo*. The supreme law mandates massive legal, institutional and political reforms. To support this mandate, it creates a viable framework to support transition from a dark past characterised by political repression, executive despotism, and human rights abuses, and usher in an era of genuine democracy, accountability, respect for human rights and citizen emancipation.

Indeed, the Supreme Court has repeatedly recognised these transformative aims and sought to enforce its purposes in various contexts. In *Speaker of the Senate & another v Hon. Attorney-General & another & 3 others*,<sup>219</sup> for instance, the Court held as follows:

"Kenya's Constitution...is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy*."<sup>220</sup> [Emphasis added by the court]

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<sup>216</sup> Heinz Klug, 'Towards a Sociology of Constitutional Transformation: Understanding South Africa's Post-Apartheid Constitutional Order' (2016) *University of Wisconsin Legal Studies Research Paper No. 1373*. Available on: <http://dx.doi.org/10.2139/ssrn.2729460>. <Accessed 23 June 2016>.

<sup>217</sup> The agitations for a new constitution began in earnest in the early 1990s. See Makau Mutua (2008) *Kenya's Quest for Democracy: Taming Leviathan*, *supra*.

<sup>218</sup> The formal review process began with the enactment of the Constitution of Kenya Review Act in 1998. This law provided the framework for the process including timelines to guide the process.

<sup>219</sup> Advisory Opinion Reference No. 2 of 2013; [2013] eKLR.

<sup>220</sup> *Ibid*, paragraph 51.

It follows that if the purpose of Kenya's Constitution is to mediate social and political transformation, then transformative constitutionalism is its driving ideology. The Supreme Court asserted this point when it held as follows:

....Transformative constitutions are new social contracts that are committed to fundamental transformations in societies. They provide a legal framework for the fundamental transformation required that expects a solid commitment from the society's ruling classes. The Judiciary becomes pivotal in midwifing transformative constitutionalism and the new rule of law. As Karl Klare states, "*Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.*" Such transformative constitutions as the ones of India, South Africa, Colombia, Kenya and others reflect this vision of transformation.<sup>221</sup> [Emphasis added by the Court]

This position taken by the Supreme Court resolves the question of the place of transformative constitutionalism in the Kenyan context. In holding that the judiciary is the 'midwife' of transformative constitutionalism, the Supreme Court in other words was affirming that courts have the obligation to ensure the realisation of the concept. This obligation extends to other state and non-state actors since courts through the judicial process intervene in the end to assert that which other actors ought to do.<sup>222</sup> As the central ideology of the 2010 Constitution, transformative constitutionalism calls on all actors to collaborate in a concerted enterprise of building a better society in order to realise, in the

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<sup>221</sup> *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR (Petition 14 as Consolidated with Petitions 14A, 14B and 14C of 2014) para 377.

<sup>222</sup> The obligation to uphold the Constitution and its transformative aspirations is vested on all state organs and even non-state actors. See for example article 3 (1) "[e]very person has an obligation to respect, uphold and defend this Constitution;" and article 10 (1) "[t]he national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them."

words of Mutunga, the Constitution's vision for a better future that is "very different from [the] past in its values and practices."<sup>223</sup>

#### 2.4.4. Transformative Constitutionalism and Kenya's Post-2010 Experiences

Makau Mutua argues that the key question for Africa including Kenya is "how to transform the constitution-as the basic instrument of state governance-from rhetoric to reality, from formalism to substance."<sup>224</sup> This transformation entails democratisation of all structures of governance, vesting power in institutions rather than individuals, entrenching constitutionalism as a national consciousness, reorganising politics in a way that de-emphasises on ethnicity and cronyism, and entrenching a culture of respect for human rights.<sup>225</sup> Indeed, the 2010 Constitution as will be seen below makes several attempts to achieve this. It asserts the need for value-based or transformation-conscious enactment, interpretation, and enforcement of law and policy. It also envisages massive legislative changes, first to implement the demands of the constitution, second to repeal pre-existing legislation that do not accord with the new Constitution and to bring pre-existing legislation in conformity with the current Constitution.<sup>226</sup> On Interpretation, the Constitution has mandated progressive interpretation that will ensure that the objects and purposes of the Constitution are fulfilled.<sup>227</sup> In addition, it necessarily requires formulation and implementation of policies that resonate with its letter and spirit. It follows, therefore, that the call is for a radical change in the consciousness of those who

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<sup>223</sup> See Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions,' speech delivered at the Inaugural Distinguished Lecture Series Speech, University of Fort Hare, 16 October 2014 available on: <http://www.judiciary.go.ke/portal/blog/post/cj-mutunga-gives-inaugural-distinguished-lecture-at-university-of-fort-hare> <accessed 29 August 2016>.

<sup>224</sup> Makau Mutua (2008) *Kenya's Quest for Democracy: Taming Leviathan*, *supra*, p. 263

<sup>225</sup> *Ibid*, p.263-288.

<sup>226</sup> Constitution of Kenya, article 261 (1) and the Fifth Schedule.

<sup>227</sup> *Ibid*, article 20, 259 and Section 7 of Sixth Schedule.

exercise public power as well as in private spheres.<sup>228</sup> A change to a new consciousness that is directed towards advancing the values of the Constitution and the new order that it decrees. Transformative constitutionalism assumes an uninspiring past and the desirability of a better future. Furthermore, it conceives the law as a means to ending that past and ushering in a new future.

The Constitution lays down a framework for social and political transformation through law or political means mandated by law. This necessarily gives prominent roles to the legislature as a law maker and the judiciary as the interpreter and a potential law maker.<sup>229</sup> It would follow that transformation is therefore dependent on the level that lawmakers and judges appreciate the demands and aspirations of the Constitution. Additionally, it is also dependent on their commitment and courage to overturn the *status quo* and institute a new order, however disruptive that might be. In view of this, therefore, political and legal culture poses the greatest threat to transformation.

As noted above, legal culture entails how lawyers, including judges, think about law, society and politics and their relationship. To address the threat posed by legal culture, Kenya's Constitution uniquely prescribes the interpretative approach that courts ought to take. It recognises that judicial conservatism and hangover attitudes of the past could undermine the realisation of the aspirations of the Constitution. Thus, the Constitution under articles 10, 20, 159 and 259 prescribes a theory of interpretation. The aim is to ensure that the judiciary as the vindicator of rights, the final arbiter of the meaning and purposes of the constitution, and the guardian of transformation, lives up to the task. The import of the guidance on interpretation given in these provisions can be summarised as follows: first, interpretation must seek to advance constitutional values and principles. Second, the process of adjudication should develop the law to accord with fundamental rights and freedoms and the purposes of the Constitution.

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<sup>228</sup> Ibid, article 2, 19, 21, and 27 (4)(5).

<sup>229</sup> Courts, of course, have a greater prominence in light of their mandate as the final arbiters of the meaning of the law and the constitutionality of laws and political action.

The power to develop the law entails construing the law in a way that aligns it with the spirit of the Constitution.<sup>230</sup> This takes the role of the judge beyond the common law conservative position that judges do not make law. It essentially makes judges surgeons in the procedures of correcting the past and shaping the future. Third, judges are obliged to prefer an interpretation that favours protection of a fundamental right where there are competing interpretations. Fourth, in determining claims of socio-economic rights, the presumption is that the state has the resources. This is a rebuttable presumption. The burden of proving that there are not enough resources is upon the state. Fifth, a preferred interpretation must be one that contributes to good governance. Finally, justice must be based on merits of a case. In other words, substantive justice must not be sacrificed at the altar of procedural technicalities.<sup>231</sup>

It is not enough to have a transformative constitution. The constitution must be complemented by a change in legal culture. Change is often neither easy nor convenient. Demands of rule of law, constitutionalism and respect for human rights are not always convenient for the political elite. There are constraints in the exercise of political power. Thus, there is always the temptation to ignore these demands or violate them altogether. The post-2010 era is not short on examples of violations. A few laws enacted in this period illustrate this point. In 2014, the National Assembly enacted Security Laws Amendment Act<sup>232</sup> (SLAA) in which it sought to restrict the right to freedom of expression and media in very general terms.<sup>233</sup> The amendment sought, *inter alia*, to make it a serious offence to publish any information including pictures of the injured and the dead that 'are likely to cause fear or alarm in the general public or disturb public peace.'<sup>234</sup> In addition, the law prohibited journalists from publishing or broadcasting any story that would undermine security operations by the security agencies. This would effectively create prior

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<sup>230</sup> Section 10 of Sixth Schedule of the Constitution.

<sup>231</sup> *Ibid*, articles 20, 159 and 259. The High Court in *Trusted Society of Human Rights Alliance v Attorney General & others* [2012] eKLR emphasised the need to downplay focus on procedural technicalities for the sake of achieving the purposes of the Constitution.

<sup>232</sup> Act No. 19 of 2014.

<sup>233</sup> Section 12 of Security Laws Amendment Act, 2014.

<sup>234</sup> *Ibid*.

ensorship on the media and the public, therefore undercutting constitutional freedoms.<sup>235</sup> Earlier, the National Assembly through Order of Precedence Bill, 2014<sup>236</sup> had sought to make it a serious offence to fail to refer to state officers such as the President, Deputy President, their spouses, and Members of Parliament by their official titles.<sup>237</sup> Additionally, severe penalties would follow any attempts to 'defame' Parliament. The passing of this law would be self-aggrandizement by Parliament at the price of citizens' freedom. In essence, Parliament was seeking to insulate itself against criticism from the public and the media in a fashion that is inconsistent with the ideals of an open and democratic society.<sup>238</sup>

The executive has also often attempted to act in violation of the Constitution. For instance in the wake of terror attacks in northern Kenya in April 2015, the President ordered recruitment of ten thousand police officers in violation of a court order.<sup>239</sup> These examples illustrate how the political elite are frequently inclined to undermine the new constitutional order. Having a constitution alone is not sufficient to secure constitutionalism.<sup>240</sup> Similarly, having a transformative constitution is not sufficient to ensure transformation.<sup>241</sup> A culture and practice that is supportive of the transformational

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<sup>235</sup> This will discourage investigative journalism and any stories that are likely to paint security agencies in bad light. The fines for these offences are up to Kenya Shillings five million (about 60,000 USD) or three years in prison or both. The result would deal a serious blow to accountability among security agencies as demanded by the Constitution.

<sup>236</sup> Available online

<http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/TheOrderofPrecedenceBill2014.pdf>. <Accessed 18 June 2015>.

<sup>237</sup> These titles include 'Your Excellency' for President, Deputy President and their spouses. 'Honourable' for MPs, 'Your Lordship the Chief Justice,' for the Chief Justice and and 'Your Lordship' for judges.

<sup>238</sup> Eric Kibet, 'Law on Official Titles: Why Kenya Must be On Guard,' *Daily Nation*, 11 August 2014. See chapter 3 of this theses for discussion on theoretical foundations of the right to freedom of expression especially truth and democracy theories.

<sup>239</sup> Business Daily, 9 April 2015, 'Uhuru defies court, orders enrolment of police recruits,' news report available on <http://www.businessdailyafrica.com/Uhuru-defies-court--orders-enrolment-of-police-recruits/-/539546/2674560/-/yeo9h1/-/index.html>. <Accessed on 19 June 2015>.

<sup>240</sup> HWO Okoth-Ogendo, "Constitutions without constitutionalism: an African political paradox" *supra*.

<sup>241</sup> Karl Klare, 'Legal Culture and Transformative Constitutionalism, *supra*.

aspirations of the Constitution is needed.<sup>242</sup> In a constitutional democracy such as Kenya, courts and not Parliament have the final say on the meaning and requirements of the constitution.<sup>243</sup> Thus, a change in legal culture, particularly in how judges and lawyers appreciate the spirit of the constitution is necessary so as to safeguard constitutional aspirations from being subverted for political convenience.

The question of how the courts have appreciated the demands of the Constitution on its role in driving the envisaged change becomes important. As the philosophy underpinning the 2010 Constitution, transformative constitutionalism advocates for a more pragmatic approach towards the realisation of constitutionalism and the protection of fundamental rights and freedoms. This is particularly crucial for emergent democracies such as Kenya where the culture of human rights and constitutionalism is either nascent or fragile. There is little doubt that the post-2010 Kenya is better off than under the previous constitutional dispensation as far as the protection of human rights, the rule of law and constitutionalism is concerned. Landmark cases from the courts such as the affirmation of the freedom from discrimination on grounds of sex including sexual orientation,<sup>244</sup> affirmation of prisoner's right to vote,<sup>245</sup> invalidation of various security laws seeking to restrict freedom of expression,<sup>246</sup> and invalidation of various decisions of the President and Parliament for failing to comply with the Constitution<sup>247</sup> are unprecedented, and best illustrate this point. These cases portend hope for better prospects for constitutionalism and the enforcement of human rights and are a

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<sup>242</sup> This necessarily require a change in orientation of legal education to produce lawyers whose thinking and approach about the law resonates with transformative aspirations of the new constitutional order.

<sup>243</sup> *CORD Case*, [2015] eKLR, para 168, citing the Supreme Court of Zimbabwe in *Biti & anor v The Minister for Justice, Legal and Parliamentary Affairs & anor* (2002) AHRLR 266 (2w SC 2002). See articles 2 (4), 159, 165 and Chapter 10 generally, Constitution of Kenya, 2010.

<sup>244</sup> *Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others* [2015] eKLR

<sup>245</sup> *Kituo Cha Sheria v. Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR

<sup>246</sup> *Coalition for Reform & Democracy (CORD), Kenya National Commission on Human Rights & Samuel Njuguna Ng'ang'a v Republic of Kenya & another* [2015] eKLR.

<sup>247</sup> *Trusted Society of Human Rights Alliance v Attorney General & others* [2012] eKLR (HCK) (this decision was later overturned on appeal but the appointments made by the President and approved by the National Assembly were ineffectual for months while the appeal was pending) See also *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR in which the Court invalidated a popular law passed by the National Assembly and directed it to remedy its faults.

clear indication that courts have a special role to play in breathing life to the 2010 Constitution and in anchoring its transformative ideals. An analysis of the transformative aims of the 2010 Constitution follows below.

#### 2.4.5. The Transformative Aims of Kenya's Constitution

One central question in this study concerns the nature of the political transformation anticipated in the Constitution. Yash and Cotrell Ghai argue that the constitution review process in Kenya was motivated by the chief aim of instituting political reforms in the country through democratisation.<sup>248</sup> The idea was to replace the despotism of the colonial and KANU regimes with a legitimate system that embraces a democratic culture and respect for human rights.<sup>249</sup> In other words, political reforms became synonymous with constitutional change since many of the country's political woes were linked to the Constitution and the laws enacted under it.<sup>250</sup> As seen above, political repression in the form of a ban on formation of competing political parties, detention without trial and so forth were carried out under the colour of law.<sup>251</sup> Thus, Kenya's project of political transformation aims at restructuring the state in terms of its institutions and sub-national divisions,<sup>252</sup> and the equilibrium of power among them, reconfiguring power relationship between the state and the citizen, and rethinking the ethics that

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<sup>248</sup> Jill Cottrell & Yash Ghai (2007) 'Constitution Making and Democratisation in Kenya,' *supra*, p. 1-5.

<sup>249</sup> Makau Mutua (2008) *Kenya's Quest for Democracy: Taming Leviathan*, *supra*.

<sup>250</sup> *Ibid*.

<sup>251</sup> This does not rule out other unconstitutional devices used by the regime such as extrajudicial killings and torture of political dissidents. See for instance 'We Lived to Tell the Nyayo House Story' (2003) *Friedrich-Ebert-Stiftung*, available at <http://library.fes.de/pdf-files/bueros/kenia/01828.pdf>, p. 4-50. <Accessed 21 October 2015>. Bishop Alexander Kipsang Muge, a critic of the regime and foreign affairs minister Dr. Robert Ouko were killed. Government critics such as Otieno Makonyango, Koigi Wamwere, Shem Ogola, George Anyona, and others were tortured in what is now infamously called 'Nyayo torture chambers.'

<sup>252</sup> Sub-national divisions here are the forty seven counties and the county governments established under the devolved system of government. See the Constitution of Kenya, chapter 11.

undergird governance, politics and state-citizen relationship.<sup>253</sup> This multifaceted transformation project can be summed up as ordering transition from-

- (a) ethical crises to renewal of values,
- (b) political repression and human rights abuses to democracy, human rights protection and citizen empowerment,
- (c) failed dysfunctional state organs to revitalised institutions, and
- (d) highly centralised governance to devolution, and (e) despotism to accountable government.

A detailed discussion of these aspects follows below.

#### **2.4.5.1 From Ethical crises to renewal of values**

Part of the transformative aims of the constitution is to reverse numerous ethical crises of the past. The ethical crises of post-colonial Kenya can be seen through a prism of faded nationalism, corruption, negative ethnicity and mistrust of public institutions. The struggle for independence in Kenya was characterised by strong nationalistic politics.<sup>254</sup> Soon after independence, power struggles and ideological difference intervened. Nationalism as the fuel of politics was replaced by ethnic mobilisation.<sup>255</sup> Merit ceased to be criteria for public appointments. Instead, patronage, nepotism and tribalism became key criteria as a strategy of the political elite to consolidate

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<sup>253</sup> Joshua Kivuva, 'Restructuring the Kenyan State,' *supra*, p. 1.

<sup>254</sup> Jaramogi Oginga Odinga's (from Luo community) insistence that there will be no independence without Kenyatta (Kikuyu) is a good illustration. At the time, the common enemy was the colonial administration and independence from colonial rule was the common objective.

<sup>255</sup> Abdalla Bujra, *Liberal Democracy and the Emergence of a Constitutionally Failed State in Kenya*, p. 22-23. See also Rok Ajulu, 'Politicised Ethnicity, Competitive Politics and Conflict in Kenya: A Historical Perspective,' (2002) 61 *African Studies*, 251, DOI: 10.1080/0002018022000032947.p. 260-265.

power.<sup>256</sup> With nationalism in shambles, patriotism lost its appeal. The stage was set for national self-destruction that continue to express itself through perennial ethno-political violence, plunder of public resources, destruction of forests, and other forms of environmental degradation, and so on.

Corruption, ranging from petty bribery to high level grand scams such as Goldenberg,<sup>257</sup> Anglo-Leasing,<sup>258</sup> and massive land grabbing<sup>259</sup> remains a national catastrophe. The list of corruption scandals is long and depressing. This high-level corruption inevitably led to the collapse of many state-run corporations such as the Kenya National Assurance, Kenya Cooperative Creameries, Kenya Farmers Association, and Pyrethrum Board of Kenya, among others. The collapse of these institutions meant poverty for many people whose livelihoods depended on them.

These vices that have bedeviled the country for long have led to marginalisation and exclusion of certain communities with corresponding underdevelopment and resentment. The drafters of the Constitution were alive to this situation. The enactment of chapter 6 titled 'Leadership and Integrity' as well as article 10 of the 2010 Constitution which sets out national values and principles is an attempt to respond to these crises. Public institutions, officers and even private persons are obliged to infuse these values in their affairs.<sup>260</sup> The President has a specific responsibility to annually

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<sup>256</sup> Korwa G. Adar and Isaac M Munyae, 'Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001,' *supra*, p. 188. See also Rok Ajulu, 'Politicised Ethnicity, Competitive Politics and Conflict in Kenya: A Historical Perspective,' *supra*, p. 260-265.

<sup>257</sup> See generally 'Report of the Judicial Commission of Inquiry into the Goldenberg Affair (2005), available on:  
[http://books.google.co.ke/books/about/Report\\_of\\_the\\_Judicial\\_Commission\\_of\\_Inq.html?id=JH4IAQAAIAAJ&redir\\_esc=y](http://books.google.co.ke/books/about/Report_of_the_Judicial_Commission_of_Inq.html?id=JH4IAQAAIAAJ&redir_esc=y). In this scandal an estimated Kenya Shillings 60 Billion (USD 850 million) were looted from the national treasury through dubious export compensation scheme.

<sup>258</sup> James Forole Jarso, 'The Media and the Anti-Corruption Crusade in Kenya-Weighing the Achievements, Challenges and Prospects' (2010-2011) 26 *Amsterdam University International Law Review* 33, p. 61. In Anglo Leasing scam, an estimated USD 1 billion was lost through security-related contracts with fictitious companies.

<sup>259</sup> Report of the Commission of Inquiry into the Illegal and Irregular Allocation of Public Land, (Ndungu Report) published by Government Printer, Nairobi, 2004 for a detailed account of illegal and irregular land allocations since independence.

<sup>260</sup> The Constitution of Kenya, 2010, article 10 (1)(a)(b)(c)

report in an address to the nation on the status of realisation of national values embodied under article 10.<sup>261</sup> This means the highest office in the land is enjoined to give an annual account of whether the Kenyan society is reforming as envisioned in the Constitution. Whether this will reverse the ethical crises and infuse hygiene and ethics in politics as well as in private and public affairs remains to be seen. That said, these provisions which are further developed elsewhere in the Constitution and in statutes add to the viable framework for change.

The framework devised to fix the ethical crises highlighted above is multi-faceted. First, it begins with symbolic casting of a national vision. Second it demands that appointments be based on merit. Third, it requires that gender, regional and ethnic balance is achieved. To augment this requirement, it decrees affirmative action to ensure equality, and inclusion of previously marginalised or excluded groups including women. Fourth, electoral thresholds and political activity are designed to discourage ethnic mobilisation.

#### **2.4.5.1.1 Symbolic Casting of a National Vision**

To address the crisis of decline in nationalism and increased pessimism about politics as a means to progress, the Constitution attempts to cast a national vision for the country. It does this through the commitments of the preamble which are further developed in the operative parts of the Constitution.

The preamble is an elaborate epic story featuring a supreme God 'of all creation,' past victims of oppression, heroes of liberation and justice, as well as present and future players and beneficiaries of the new order. It also embodies aspirations and deep commitments of a people wishing to work together for common good.<sup>262</sup>

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<sup>261</sup> Ibid, article 132 (1) (c) (i).

<sup>262</sup> We, the people of Kenya, acknowledging the supremacy of the Almighty God of all creation: honouring those who heroically struggled to bring freedom and justice to our land: proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation: respectful of the environment, which is our heritage,

It is widely accepted that preambles are generally not operative parts of legal instruments.<sup>263</sup> They often attempt to affirm the legitimacy of political transition, articulate purposes or intentions of the constitution, and declare the general ideology of a political community.<sup>264</sup> They often play a symbolic role of capturing the history and aspirations of a nation. They frequently however, provide a reference point for constitutional interpretation by setting out its purposes. In this way, the preamble becomes a justiciable component of the constitution.<sup>265</sup> The connection between the preamble and the operative parts of Kenya's constitution is evident. It sets out the philosophical framework and crucial themes that the operative parts address in detail. These are recognition of ethnic, religious and cultural diversity, a commitment to a shared national life, welfare of the individual, family and communities, and environmental responsibility and values of human rights, equality, freedom, democracy, social justice and the rule of law. Thus, as a statement of general state policy, the preamble must be borne in mind in the processes of interpreting and applying the constitution and other laws.<sup>266</sup>

This is further augmented by a creed of national values and principles intended to guide "all State organs, State officers, public officers and all persons whenever

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and determined to sustain it for the benefit of future generations: committed to nurturing and protecting the well-being of the individual, the family, communities and the nation: recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law: exercising our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution: adopt, enact and give this Constitution to ourselves and to our future generations. God bless Kenya.

<sup>263</sup> Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the Australian Constitution,' 24 *University of New South Wales Law Journal* 382, p. 382.

<sup>264</sup> *Ibid*, p. 382.

<sup>265</sup> *Ibid*, p. 382. The High Court of Kenya has recognised the importance of the preamble in *CORD Case supra*, affirming that the preamble is one of the places to look to in discerning the purposes of the Constitution in order to achieve purposive interpretation mandated by the Constitution.

<sup>266</sup> *Kenya Small Scale Farmers Forum & 6 Others v Republic Of Kenya & 2 Others* [2013] eKLR cited and adopted in *Coalition for Reform & Democracy (CORD), Kenya National Commission on Human Rights & Samuel Njuguna Ng'ang'a v Republic of Kenya & another* [2015] eKLR.

any of them- (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.”<sup>267</sup>

These values and principles are patriotism, national unity, sharing and devolution of power, the rule of law, democracy, and participation of the people. Others are human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, inclusiveness and protection of the marginalised, good governance, integrity, transparency and accountability; and sustainable development.

This catalogue of values can be seen as a vision of healing past injustices, ending divisions and legitimising the post-colonial state. Kenya is a diverse and pluralistic society. As such, ethnic nationality, culture and religion cannot be uniting factors in the national building endeavour. The rationale of these values and principles, it can be argued, is to identify and articulate a faith that is acceptable across the diversities. This, it is hoped, would be the cement for the ‘new nation.’

#### **2.4.5.1.2 Regional, Gender and Ethnic Balance and Merit in appointments**

For the very first time in Kenya’s history, there is a legal rule demanding merit and disapproving nepotism and tribalism in public appointments. The supreme law decrees that “the guiding principles of leadership and integrity include...selection on the basis of personal integrity, competence and suitability....”<sup>268</sup>

Rather than ignore or downplay ethnic and other diversities, Kenya has chosen to recognise and create a framework through which negative sentiments can be diffused. Ethnic affiliations and diversity in the society are facts.<sup>269</sup> What creates tension is

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<sup>267</sup> Constitution of Kenya, 2010, article 10 (1).

<sup>268</sup> Ibid, article 73 (2)(a)(b). The Court emphasised this criteria in *Trusted Society of Human Rights Alliance v Attorney General & others* [2012] eKLR (HCK)

<sup>269</sup> Rok Ajulu, ‘Politicised Ethnicity, Competitive Politics and Conflict in Kenya: A Historical Perspective,’ *supra*, p. 252.

when treatment, privilege, or access to opportunities is pegged on them in a fashion that cannot be rationally justified.

It is now a rule that appointments in public institutions, state corporations, security services and others should strive to achieve ethnic and regional balance. Nepotism and favoritism are proscribed.<sup>270</sup> The standard is that national security forces,<sup>271</sup> the executive and public service,<sup>272</sup> parliament,<sup>273</sup> commissions and independent offices,<sup>274</sup> and other state institutions must reflect the 'the regional and ethnic diversity of the people of Kenya.'

Ethnic balance means that they should as much as possible strive to ensure no ethnic group is disproportionately given positions of employment. As much as possible, ethnic numbers should correspond with national demographics. Regional balance means public institutions should have people from across different regions in the country so as to truly reflect the 'face of Kenya.'<sup>275</sup>

The need to ensure gender, regional and ethnic balance is so crucial that requirements of merit are subject to its realisation. In other words, candidates who emerge top in a competitive recruitment process need not be the ones to be appointed automatically to public positions. The need to achieve this balance is important, and comes before merit.<sup>276</sup> The same principle also extends to persons with disability; a group largely ignored or discriminated against previously in law, policy and practice. It is now a legal

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<sup>270</sup> Constitution of Kenya, 2010, article 73 (2) (b).

<sup>271</sup> Ibid, article 241 (Kenya Defence Forces), article 246 (4)-on the National Police Service, and article 232 on the public service.

<sup>272</sup> Ibid, article 130 (2) and 232 (1) (h).

<sup>273</sup> Ibid, article 94 (2).

<sup>274</sup> Ibid, article 250 (4).

<sup>275</sup> *Community Advocacy and Awareness Trust & 8 others v Attorney General* [2012]eKLR.

<sup>276</sup> The Constitution of Kenya, 2010, article 232 (1) (h). This subjection of merit to ethnic, regional and gender considerations has raised a lot of controversy. While intended to ensure inclusion and fairness, it could undervalue merit and raise ethnic consciousness in ways that could undermine national cohesion.

requirement that at least 5% of jobs in public service should be reserved for persons with disability.<sup>277</sup>

To ensure this principle does not become merely symbolic, there is established a Gender and Equality Commission.<sup>278</sup> This Commission is created by law as contemplated under the Constitution.<sup>279</sup> Its mandate includes championing gender inclusion and the attainment of equality in different aspects of life. The National Integration and Cohesion Commission (NCIC) also has a related mandate. Recognising that nepotism, tribalism and similar vices threaten national cohesion, this Commission is mandated to monitor ethnic equilibrium generally, and in public service in particular.<sup>280</sup>

This standard of gender, ethnic and regional balance speaks volumes about the trauma that the country has suffered in the past. It portends hope that the country is set to take a better path into the future; a path of inclusivity and fairness. It remains to be seen, however, how soon this dream will be realised. Statistics are grim about the actual situation on the ground.<sup>281</sup> While more women, youth, persons with disabilities, and members of previously disadvantaged communities are better represented than anytime in Kenya's history, there is still a long way to go.<sup>282</sup>

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<sup>277</sup> Constitution of Kenya, 2010, articles 232 (1) (i), 98(1) (d) and 54(2). Article 54 (2) specifically requires that all public service jobs, both elective and appointive should have at least 5% per cent membership being persons with disabilities. This requirement is, however, subject to progressive realisation.

<sup>278</sup> Ibid, article 59 (1)(2)(4).

<sup>279</sup> Ibid. The Gender and Equality Commission Act established the Commission with specific mandate of gender mainstreaming and promotion of equality.

<sup>280</sup> National Cohesion and Integration Act, 2008 creates the National Cohesion and Integration Commission with a mandate to promote national cohesion and regional, ethnic and other forms of balance in the Kenyan society. The Commission publishes regular reports about the status of the nation on matters relating to cohesion and integration.

<sup>281</sup> Recent NCIC Survey shows communities such as Kikuyu and Kalenjin have more than a fair share of public jobs while Kamba, Luo, Luhya and minority communities are underrepresented. According to a September 2016 report by the NCIC, six communities out of 42 in the country hold 70 per cent of jobs in the 31 public universities and university colleges. See <http://www.nation.co.ke/news/six-communities-hold-nearly-three-quarters-of-jobs-universities/1056-3352304-icxnu0z/>. <Accessed 30 September 2016>.

<sup>282</sup> For instance despite constitutional minimum of one third, the National Assembly and the Senate still has less than one third of membership being women. There proposed changes to the gender rule to subject it to progressive realisation. If the proposal succeeds, the pressure

Affirmative action is generally a good thing. It however has its problems. For instance, it could lead to unfairness for individual members of groups thought to be 'advantaged.'<sup>283</sup> Its application could also result in irrational outcomes or failing to achieve its intended purpose.<sup>284</sup> Moreover, the fact that the Constitution of Kenya permits considerations of affirmative action to rank above merit is potentially problematic.<sup>285</sup> To achieve the intended purposes, affirmative action will require good faith on the part of political decision makers so as to avoid situations of patronage and mediocrity under its guise.

#### 2.4.5.1.3 Mechanisms Designed to Discourage Ethnic Mobilisation.

In a multiparty democracy, political parties are important because political activity is organised within and around them. They are vehicles for public power since they produce governments and the opposition as alternatives to government. In recognition of this, the political parties enjoy formal constitutional recognition and state funding.<sup>286</sup> The same standard on gender, ethnic and regional diversity and inclusion of disadvantaged

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on the state to comply will reduce and under representation of women in Parliament could continue.

<sup>283</sup> Individual members of political dominant communities for instance could lose out in appointments because of historical advantage enjoyed by their communities and not them as individuals. While affirmative action helps to achieve equality on a macro scale, it could result in unfairness at individual level. See for instance *Community Advocacy and Awareness Trust & 8 others v Attorney General* [2012]eKLR.

<sup>284</sup> For example not all women have suffered marginalization in terms of access to opportunities. The poor and uneducated women are the most affected. Some women could also be more advantaged by virtue of coming from privileged backgrounds than men from poor backgrounds. Affirmative action will in effect empower the empowered and result in continued marginalisation of the marginalised.

<sup>285</sup> See article 232 (1)(h) of the Constitution of Kenya. In *Community Advocacy and Awareness Trust Case*, supra the candidate who emerged top on the basis of merit criteria applied by the selection panel was not appointed. The President instead picked a candidate who was third on the list. The court refused to invalidate the appointment noting that merit alone is not a determinative criterion. The court went on to say the President was free to consider other factors such as regional and ethnic balance even though there are no guidelines as to how that is to be achieved.

<sup>286</sup> This is a response to what many have argued about the need to recognize, strengthen and constitutionalise the status of political parties if democracy and constitutionalism is to thrive in Africa. See for instance, Charles M. Fombad, 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa,' (2007) 55 *The American Journal of Comparative Law* 1, p. 36-38.

groups extend to them. They must have 'national character.'<sup>287</sup> Ethnic, racial, regional, religious or other sectarian mobilisation is frowned upon.<sup>288</sup>

In what may be seen as an effort to ensure that the President of the republic has wide national appeal beyond a regional or ethnic constituency, the threshold in presidential elections has been raised. To be elected President, a candidate must receive more than half of all votes cast and at least twenty-five per cent of votes cast in twenty four out of forty seven counties.<sup>289</sup> In the past, the candidate who garnered the highest number of votes would be declared President even if the votes were less than half the total votes cast.<sup>290</sup>

It is evident that the idea behind all these mechanisms is to discourage ethnic mobilisation. As a result of the higher threshold for election of the president, political coalitions now seem to be an inevitable strategy. Political parties find it necessary to enter into coalitions to seek support across ethnic groups or regions.<sup>291</sup> While there is still the threat of continued ethnic mobilisation, there are now better prospects for cross-ethnic and cross-regional political alliances. In return, this is expected to result in increased legitimacy of the winning party or coalition and, hopefully, greater national cohesion.

#### **2.4.5.2 From Political Repression to Human Rights Protection and Citizen Emancipation**

Political repression and gross violation of human rights was rampant in most of post-colonial Kenya, much the same way as it was during colonial times.<sup>292</sup> Political

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<sup>287</sup> Constitution of Kenya, 2010, article 91 (1)(a), 91 (2)(a).

<sup>288</sup> Ibid, article 91 (2)(a).

<sup>289</sup> Ibid, article 138 (4)(a)(b).

<sup>290</sup> Moi was elected in the first post-independence multiparty elections in 1992 with only 36% of the total votes cast. The other 64% of the votes were shared by a divided opposition. This means that those who did not prefer Moi as president outnumbered those who elected him, yet he was still constitutionally declared elected. See [http://www.iri.org/sites/default/files/fields/field\\_files\\_attached/resource/kenyas\\_1992\\_presidential\\_parliamentary\\_and\\_local\\_elections.pdf](http://www.iri.org/sites/default/files/fields/field_files_attached/resource/kenyas_1992_presidential_parliamentary_and_local_elections.pdf) <accessed 19 June 2015>

<sup>291</sup> The ruling Jubilee Alliance is predominantly a coalition of Kikuyu, Meru, Embu, and Kalenjins. The opposition coalition brings together Kambas, Luos and Luhya communities.

<sup>292</sup> Makau Wa Mutua, 'Human Rights and State Despotism in Kenya: Institutional Problems,' *supra*.

repression expressed itself through state intolerance of divergence of political opinion and political competition.<sup>293</sup> Although Kenya was constitutionally a multiparty state from 1963 until 1982, political opposition was virtually absent, edged out by the ruling party.<sup>294</sup> KADU was coerced to dissolve in 1964 while President Jomo Kenyatta banned KPU in 1969, just less than three years after its formation. The height of this intolerance was the amendment of the Constitution in 1982 to officially outlaw multiparty politics.<sup>295</sup>

Going hand in hand with political repression was citizen marginalisation or exclusion from democratic processes. Citizens had little or no role to play beyond elections. Far reaching constitutional amendments such as those taking away political rights to form or be members of political parties other than KANU, scrapping federalism, shifting from a dominion to a republic and the removal of security of tenure of judges were all done without the involvement of the people.

There was also widespread torture and extrajudicial detention of political dissidents, sham trials and imprisonment of opposition politicians, media control and intimidation, and assassination of political personalities.<sup>296</sup> The period after the re-introduction of multiparty politics also witnessed an upsurge of politically instigated ethnic violence in cosmopolitan areas, widely seen as state strategy to punish or displace opposition supporters so as to influence election outcomes.<sup>297</sup>

Human rights abuses also took the form of political marginalisation and dispossession of minority or indigenous communities such as Ogiek and Endorois of land.<sup>298</sup> Moreover, there have been rampant extrajudicial killings and forced

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<sup>293</sup> See generally Korwa G. Adar and Isaac M Munyae, 'Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001,' *supra*.

<sup>294</sup> Makau Wa Mutua, 'Human Rights and State Despotism in Kenya: Institutional Problems,' *supra*.

<sup>295</sup> PLO Lumumba, MK Mbondenyi and SO Odero, (eds)(2012) *Constitution of Kenya, Contemporary Readings: supra*, p.33.

<sup>296</sup> Korwa G. Adar and Isaac M Munyae, 'Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001,' *supra*, p.10. Makau Wa Mutua, 'Human Rights and State Despotism in Kenya: Institutional Problems,' *supra*, p. 52.

<sup>297</sup> *Ibid*, p. 8-9.

<sup>298</sup> Albert Kwokwo Barume, (2014) *Land Rights of Indigenous Peoples in Africa*: Copenhagen, International Work Group for Indigenous Affairs, p.89-126.

disappearances.<sup>299</sup> Amidst this repression and abuse of rights, courts were largely powerless to intervene. This inability of the judiciary to intervene can be attributed mainly to lack of independence, apathy and at times outright connivance with violators.<sup>300</sup> Because of the control that the executive had over the judiciary in the form of power to appoint and at some point lack of security of tenure, the judiciary was powerless in enforcing the bill of rights against the state.<sup>301</sup>

The bill of rights itself also contained extensive limitations that rendered many of the rights nugatory. Procedural technicalities especially touching on *locus standi* and ripeness were another hindrance. For instance, to have a right to bring a complaint, a petitioner needed to have been directly and personally aggrieved as an individual.<sup>302</sup>

The 2010 Constitution has tried to address these shortcomings in a number of ways. First, it has created a social democratic system that is direct, representative and participatory. Second, it has ensured robust protection of fundamental rights and freedoms through a justiciable bill of rights. The bill guarantees civil and political rights, social-economic rights, and solidarity rights. Third, it has reorganised the logic of politics from citizen marginalisation or subjugation to politics of citizen emancipation.

Kenya's democracy is direct in at least two ways. First, elections for President, Members of Parliament, as well as members of the executive and legislature in devolved units are held by universal suffrage. This gives every eligible voter the opportunity to participate in choosing those engaged in running government in the executive and legislative arms. The electoral system is structured to ensure citizen's participation and is premised on the citizen's political rights guaranteed under article 38 of the Constitution.

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<sup>299</sup> Makau Wa Mutua, 'Human Rights and State Despotism in Kenya: Institutional Problems,' *supra*, p. 51.

<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid.*

<sup>302</sup> Section 84 (1) of repealed Constitution as compared with articles 258(1) (2) and 22 (1)(2) of the 2010 Constitution. Under the 2010 Constitution the rule on *locus* has been broadened so that one does not have to be directly affected by a violation to be allowed to bring a case, see *Trusted Society of Human Rights Alliance v Attorney General & others* [2012] eKLR (HCK).

The democratic system is also direct to the extent that certain constitutional amendments that go to the core of the Constitution may only be made with the approval of the citizens in a nationwide referendum. These amendments include those affecting the bill of rights, presidential term, independence of the judiciary, the functions of Parliament, national values and principles, supremacy of the Constitution and sovereignty of the people, among others.<sup>303</sup> In addition, constitutional amendments may also be initiated by citizens through popular initiative,<sup>304</sup> besides being empowered to recall non-performing elected representatives.<sup>305</sup>

The democratic system in Kenya is also representative. It is representative because legislation, oversight of government and representation of political interests is vested in elected legislators at national and county levels of government.<sup>306</sup> The theory behind state organs at both levels of government is that they exercise their functions on behalf of the people, in whom sovereignty resides.<sup>307</sup>

Kenya's democracy is also participatory. In a sharp break from the past constitutional dispensation, public participation is a prominent value that runs throughout the Constitution.<sup>308</sup> It is a constitutional demand that all state organs including the

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<sup>303</sup> Constitution of Kenya, 2010, article 255 (1).

<sup>304</sup> Ibid, article 257. Citizens may initiate amendments by collecting at least one million signatures from registered voters in support of a proposal for amendment. That proposal must receive approval by at least half of county assemblies. If approved, it will only need simple majority in both houses of Parliament to pass. If it concerns amendments that must be approved in a referendum under article 255, the proposals must be subjected to a referendum. A referendum is also necessary if Parliament fails to approve the amendments.

<sup>305</sup> Constitution of Kenya, 2010, article 104. Similarly, non-performing county governments may be suspended and fresh elections called in a process involving the President, the Senate and a commission appointed to inquire into complaints made against a county government.

<sup>306</sup> Kenya has two levels of government: National and County (local governments).

<sup>307</sup> Constitution of Kenya, 2010, article 1 (1) "All sovereign power belongs to the people of Kenya....(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.(3) Sovereign power under this Constitution is delegated to the following State organs... (a) Parliament and the legislative assemblies in the county governments; (b) the national executive and the executive structures in the county governments; and (c) the judiciary and independent tribunals. (4) The sovereign power of the people is exercised at:(a) the national level; and (b) the county level."

<sup>308</sup> Ibid, article 10 (2)(a).

executive and legislatures both at national and county levels of government must facilitate public participation in its decision-making processes.<sup>309</sup>

On the protection of rights, the reforms ordained are far-reaching. Unlike the bill of rights in the previous constitution which admitted extensive limitations that rendered many protections ineffectual, the new constitution has not only expanded rights but also eliminated most of the limitations that existed in the previous one.<sup>310</sup> Chapter four, which contains the bill of rights, is the longest chapter of the Constitution. The chapter contains a catalogue of civil and political rights, socio-economic rights and group rights. These rights are borrowed from South African Constitution, International human rights instruments such as the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, and the International Convention on Economic Social and Cultural Rights, among others. There are also a few autochthonous provisions to address local circumstances.<sup>311</sup>

Perhaps the most important addition as far as protection of fundamental rights and freedoms is concerned are the enforcement and application mechanism set out in the bill.<sup>312</sup> Moreover, the constitution contains a theory of interpretation. The

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<sup>309</sup> Ibid, articles 69 (1), 118 (b), 174 (c), 184 (1)(c), 196 (1)(b), and 201. These provisions are evidence of a strong commitment to ensure participation of citizens in all spheres of public affairs. The challenge that remains is how to ensure citizen participation is effective and influence policy rather than being merely symbolic.

<sup>310</sup> Except for the right to freedom of expression and media under article 33 and 34, rights generally do not have limitations contained within the provisions that guarantee them. This is a departure from the previous Constitution in which almost every right had claw back clauses. Rights under Kenya's 2010 Constitution are subjected to general limitation clause under article 24. The presumption is that every limitation is illegitimate unless show by the state to be 'justifiable in an open and democratic society.'

<sup>311</sup> Unique specific provisions such as those defining life as beginning at conception (article 26 (2), restricting abortion to cases of medical emergency (article 26(4), or qualification of equality when it comes to applicability of Muslim law before Kadhi's (Muslim) courts on matters of personal status, marriage, divorce and inheritance(article 24(4). These specifically address concerns of religious groups.

<sup>312</sup> Constitution of Kenya, articles 20, 21, 22, and 23, Constitution of Kenya, 2010.

Constitution further decrees a human rights and human dignity approach in public and private affairs,<sup>313</sup> and the protection (and empowerment) of disadvantaged groups.<sup>314</sup>

The preamble to the Constitution, as well as the history and process of enactment of the Constitution reveals that the Constitution was intended to be an instrument to inspire and guide social, economic and political development.<sup>315</sup> In particular, the bill of rights, which guarantees freedom of expression among other rights, occupies a pivotal place in Kenya's constitutional edifice.

Article 19 is instructive in this regard:

(1) The bill of rights [Articles 19-59] is an integral part of Kenya's democratic state and is the *framework for social, economic and cultural policies*.

(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. [Emphasis added].

From these, it is evident that the bill of rights is intended to inform social, economic, cultural and political affairs. While private citizens, be they individual or

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<sup>313</sup> In *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others* [2014] eKLR and *Satrose Ayuma & 11 others v and Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others* [2011] eKLR the High Court of Kenya adjudicating on articles 2(1) and 27(5) held that the Constitution and the bill of rights in particular imposes obligations on private persons to respect rights. Thus, a petitioner can make claims of breach of fundamental rights and freedoms against a private person. This formally entrenches horizontal application of the bill of rights. Additionally, the Constitution formally recognises family, defines marriage and decrees equality of parties. This is further evidence of how the Constitution extends democratic principles, rights and public law obligations into the family as a private enclave.

<sup>314</sup> See the Constitution of Kenya, 2010, articles 21 (3), articles 27, 54, 55, 56, 57 and so on. The Constitution makes a strong commitment to reverse the plight of politically disadvantaged groups such as women, children, persons with disabilities, the elderly, and marginalised or minority communities, among others.

<sup>315</sup> Unlike many constitutions, Kenya's Constitution is 'comprehensive' as it covers development-related matters ranging from rights and governance, land and environmental, internationalism, and public finance management, among others.

corporate, have the liberty to engage in social, economic, cultural and political affairs, the role of formulating and guiding policy remains largely with the state.

This system of protection and promotion of individual and community rights and public participation in governance and political processes takes the citizens' role beyond elections. It places the citizens at the centre of the polity and makes them real stakeholders. It affirms 'the people' as the repository of the constituent power of the state.<sup>316</sup> This is a radical shift in the politics of the system. It is a shift from citizen subjugation and authority-centred politics to politics of citizen emancipation. This is to be contrasted with the previous constitutional dispensation in which the citizen had almost no role beyond the ballot. It is a mark of an empowered citizenry, a feature that is still uncommon in many democracies around the world.

### **2.4.5.3 From Despotism, Failed Dysfunctional State Organs to Revitalised Accountable institutions**

As already noted, most amendments to the independence Constitution aimed at concentrating power in the President with a corresponding weakening of institutions such as parliament, the judiciary and the civil service.<sup>317</sup> For instance, parliament which initially enjoyed relative independence had become subservient to the President.<sup>318</sup> The President had absolute powers to prorogue, adjourn or dissolve Parliament at will.<sup>319</sup> While Parliament could impeach the President this power was undermined by a provision

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<sup>316</sup> The concept of popular sovereignty was recognised before the 2010 Constitution in *Njoya and others v Attorney-General and others* [2004] 1 EA 194 (HCK). The Court held that in a democratic society such as Kenya, Parliament alone could not replace the Constitution with a new one without involving the people in a referendum. This principle has since been formally incorporated in the 2010 Constitution under article 255. References to 'sovereign power of the people,' appears more than eight times in the Constitution.

<sup>317</sup> Susanne D. Mueller 'The Political Economy of Kenya's Crisis,' (2008) 2 *Journal of Eastern African Studies*, 185, DOI: 10.1080/17531050802058302, p. 195.

<sup>318</sup> Korwa G. Adar and Isaac M Munyae, *Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001*, *supra*.

<sup>319</sup> Section 59 (1) (2) of the repealed Constitution of Kenya.

to the effect that Parliament stood automatically dissolved following a successful impeachment vote.<sup>320</sup> As such, Parliament could not impeach the President because such an act would also be self-impeachment. In the end Parliament became a rubber stamp for the wishes of the executive.

The judiciary was the worst affected in the power equilibrium. First judges owed their appointments to the President.<sup>321</sup> Although the Judicial Service Commission was empowered to make recommendations, the Commission was made up of the President's appointees who worked at his behest.<sup>322</sup> The Chief Justice as the head of the judiciary was also a presidential appointee. In 1988, the security of tenure of judges was removed, severely affecting the independence of the judiciary. Although, the security of tenure was later restored, the judiciary did not fully recover from the assault.<sup>323</sup>

Similarly, the independence that the civil service enjoyed at independence became eroded through amendments. Consequently, civil servants held their offices at the pleasure of the President.<sup>324</sup> This severely made the civil service ineffective as it existed to serve the political interests of the executive rather than provide impartial service.<sup>325</sup>

Part of the reform plan of the 2010 Constitution is to restore the strength and integrity of state institutions. It does this through a mechanism aimed at ensuring that state institutions have the necessary power to be effective, but at the same time accountable in the exercise of authority. It is a balancing act of ensuring that state organs are powerful but responsible and accountable at the same time.<sup>326</sup> The mechanisms for revitalization of state

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<sup>320</sup> Section 59 (1) (3) of the repealed Constitution of Kenya.

<sup>321</sup> Korwa G. Adar and Isaac M Munyae, 'Human Rights Abuse In Kenya under Daniel Arap Moi, 1978-2001,' *supra*.

<sup>322</sup> *Ibid*.

<sup>323</sup> James Thuo Gathii, 'Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya,' 49 *William & Mary Law Review* 1109, available on <http://scholarship.law.wm.edu/wmlr/vol49/iss4/4>. < Accessed December 13, 2014>.

<sup>324</sup> Section 25 (1) of the repealed Constitution of Kenya.

<sup>325</sup> Korwa G. Adar and Isaac M Munyae, 'Human Rights Abuse in Kenya under Daniel arap Moi, 1978-2001,' *supra*.

<sup>326</sup> See generally, thoughts on constitutionalism expressed in Charles M. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra*.

institutions can be grouped into a number of headings: (a) trimming presidential powers, enhancing executive accountability and corresponding restoration of parliaments' authority (b) independent and revitalised judiciary, and (c) accountability through independent offices and commissions.

#### **2.4.5.3.1 Trimming Presidential Powers, Enhancing Executive and Legislative Accountability and Corresponding Restoration of Parliaments' Authority**

Parliament is no longer under the control of the President. The Constitution has stripped the President of power to prorogue or dissolve it. Parliament now operates on its own determinate calendar.<sup>327</sup> Secondly, Parliament's power to impeach the President for violation of the Constitution or poor performance no longer results in automatic dissolution of the legislature.<sup>328</sup> The effect of this is to ensure the effectiveness of this parliamentary power. Third, a number of presidential powers are subjected to approval of Parliament. For instance, appointment of cabinet secretaries, Attorney General, ambassadors, the Chief Justice and Deputy Chief Justice, head of the National Police Service, and the National Intelligence Service must receive the approval of the National Assembly.<sup>329</sup>

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<sup>327</sup> The Constitution of Kenya, 2010, articles 126 (2) and 102 (1). The date of the first sitting, election date, expiry date of term are all fixed by the Constitution. An independent Parliamentary Service Commission provides support to enhance performance of Parliament. This is to be contrasted with section 59 (1)(2) of the repealed Constitution where the President could at any time prorogue or dissolve Parliament.

<sup>328</sup> *Ibid*, article 145 of the 2010 Constitution as contrasted with section 59 of the repealed Constitution of Kenya. A vote of no confidence in the government would result in dissolution of Parliament unless the President opted to resign within three days of such a vote. He still retained the power to order dissolution of Parliament. It was thus impossible to impeach the President since a successful motion of impeachment would mean Parliament threatening its own existence. As an alternative strategy, the President could dissolve Parliament to defeat a forthcoming vote-of-no confidence against him.

<sup>329</sup> Article 132 (2) of the Constitution of Kenya 2010 illustrates this subjection of key presidential appointments to the approval by the National Assembly.

It is also significant that the President, Deputy President and other members of the cabinet are no longer Members of Parliament.<sup>330</sup> In contrast with the independence Constitution, the 2010 Constitution adopts the American model of separation of powers in which the cabinet is appointed from outside the legislature. This is bound to free the legislature from undue influence of the executive, hence further enhancing the independence and power of Parliament. Additionally, Parliament now has the power to summon Cabinet Secretaries and any state or public officer to answer questions or require a report on matters pertaining to their jurisdiction.<sup>331</sup> This is further augmented with the power of the National Assembly to compel removal of a cabinet secretary following a vote-of-no confidence.<sup>332</sup>

In an interesting twist, the Constitution gives the National Assembly power to participate in the budgetary process. Its role includes appropriating funds and goes beyond the minimal role of approving budgetary estimates as presented by the executive as was the case under the previous constitutional dispensation.<sup>333</sup>

The legislative authority of Parliament has been further enhanced such that a bill passed by Parliament can no longer be held hostage by the executive by failing to gazette it. A bill becomes law automatically upon the expiry of fourteen days following its publication in the Gazette.<sup>334</sup> Publication in the Gazette must happen within seven days of presidential assent.<sup>335</sup> Even a failure by the President to assent to a bill does not jeopardize the enacted law. It becomes law without the presidential assent.<sup>336</sup> In addition, Parliament now has the role of approving ratification of treaties and enactment of delegated

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<sup>330</sup> Constitution of Kenya, article 152 (3).

<sup>331</sup> *Ibid*, article 153 (3)(4).

<sup>332</sup> *Ibid*, article 152 (10), 152 (5)(c).

<sup>333</sup> *Ibid*, article 221. The Cabinet Secretary for Finance, Chief Registrar of the Judiciary and the Parliamentary Service Commission submit estimates to the National Assembly. The National Assembly then considers the budgets, reviews and may make adjustments as it deems fit.

<sup>334</sup> *Ibid*, article 116 (2)

<sup>335</sup> *Ibid*, article 116 (1).

<sup>336</sup> *Ibid*, article 115 (1) (5) (6). The President is required to assent within fourteen days of receiving the bill from Parliament or in case of Parliament passing the bill a second time following rejection by the President; he is required to assent within seven days. Should he fail to assent within these timelines, the bill will be deemed to have been assented to.

legislation.<sup>337</sup> These reforms secure the authority of Parliament as the supreme law-making organ of the state.

One of the greatest motivations for constitutional reforms (at least for pro-reformists) was the need to end presidential despotism. To do this, deconstructing imperial presidency created by a series of amendments to the independence constitution was an important starting point. The strengthening and broadening of Parliament's powers as discussed above is key in this agenda. Additionally, the creation of forty-seven counties complete with their own democratically constituted executives serves to further disperse executive power from the presidency.

One of the notable reforms of the Constitution is the reintroduction of a bicameral parliament consisting of Senate and the National Assembly.<sup>338</sup> Senate is empowered to protect the political interests of county governments and devolved system of government.<sup>339</sup> It also has a role in investigating allegations made against the President or his deputy should the National Assembly initiate a motion of impeachment.<sup>340</sup> The National Assembly on the other hand has broad powers of a general nature beyond devolution matters.<sup>341</sup>

#### **2.4.5.3.2 Independent and Revitalised Judiciary**

The 2010 has given the judiciary a facelift. The structure of the court system is expanded, with the creation of a Supreme Court as well as specialised environmental and land court and employment disputes court.<sup>342</sup> The President no longer has a free hand in the appointment of the Chief Justice, Deputy Chief Justice and judges of superior courts of record.<sup>343</sup> Instead, a more independent Judicial Service Commission selects qualified

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<sup>337</sup> Ibid, article 94 (5) read together with Treaty Making and Ratification Act, 2012 and Statutory Instruments Act, 2012.

<sup>338</sup> Ibid, article 93.

<sup>339</sup> Ibid, article 96.

<sup>340</sup> Ibid, article 145(2)(3) and 150 (1)(2).

<sup>341</sup> Ibid, article 95.

<sup>342</sup> Ibid, article 162 (2) and 163.

<sup>343</sup> Ibid, article 166.

individuals through a competitive process before recommending them to the President for appointment.<sup>344</sup> This is a radical shift from the past, as the process gives room to merit rather than patronage, and allows the public to participate by submitting representations on candidates seeking judicial appointments.<sup>345</sup>

The courts also enjoy an enhanced role in enforcing and protecting a justiciable constitution.<sup>346</sup> Furthermore, the courts have a more structured administrative system under a Chief Registrar<sup>347</sup> and prospects of better funding with the establishment of the judiciary fund.<sup>348</sup>

The attainment of the transformative vision of the Constitution will depend heavily on the degree to which the judiciary asserts its authority in enforcing constitutionalism and the rule of law, and developing the law in a direction that resonates with the constitution's vision. The Constitution recognizes this fact, which is why it mandates the courts to 'develop the law.'<sup>349</sup> In addition, it gives courts power to invalidate any threats of violation of the Constitution or fundamental rights and freedom.<sup>350</sup> Furthermore, it empowers courts to settle political disputes.<sup>351</sup> Despite vesting the courts

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<sup>344</sup> Of the 12 members of the Judicial Service Commission (including the Chief Registrar of the Judiciary), only two are appointed by the President with the approval of the National Assembly. The others are members by virtue of their offices or as representatives of interest groups such as the legal profession. The process of appointment of judges involves advertising for vacancies through the media, shortlisting and interviewing of eligible candidates. The Chief Justice and Deputy Chief Justice must be approved by the National Assembly before the President appoints them.

<sup>345</sup> Dr. Willy Mutunga became the first Chief Justice to be appointed following a competitive process in which several candidates were interviewed. His appointment came after President Kibaki's attempt to unilaterally appoint a Chief Justice was thwarted. Mutunga's appointment is symbolic because he is a former political prisoner under the Moi regime.

<sup>346</sup> Constitution of Kenya, articles 159, 23, 70, and 165, for instance.

<sup>347</sup> Ibid, 161 (2)(c).

<sup>348</sup> Ibid, 173 (1).

<sup>349</sup> Ibid, article 20 (3) (a) and 259.

<sup>350</sup> Ibid, article 2 (4), 23(3) and 165. The Courts have power to invalidate both offending laws as well as offending actions. Judicial review power of courts that predated the 2010 Constitution have now been brought within the purview of the constitution by virtue of article 23 (3)(f).

<sup>351</sup> The jurisdiction of the Supreme Court to render advisory opinions under article 163 (6) and presidential election petitions are good illustrations. In rendering an advisory opinion affirming the role of the Senate in division of national revenue in *Speaker of the Senate v Attorney General*, for instance, the Court effectively settled a political duel that had been going

with a huge responsibility of protecting its aspirations, enforcing rights, and developing the law, the Constitution also takes a skeptical view of the courts. For instance, it clearly sets out the criteria that courts ought to adopt in the interpretation of the Constitution generally, and fundamental rights and freedoms in particular. This detailed nature of the criteria outlined by the Constitution is both unique and interesting. In many jurisdictions, it is assumed that competent judges know the theories and approaches that guide interpretation and adjudication. The cynicism is informed by past experiences.<sup>352</sup>

Until 2004, Kenya was not used to situations where courts could invalidate executive or legislative action.<sup>353</sup> Broad and purposive interpretation of the Constitution to give effect to its meaning and conceived purposes was generally absent as evidenced by the much criticised High Court decision in *Republic v El Mann*.<sup>354</sup> The situation was more

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on since March 2013 between the Senate and the National Assembly. The National Assembly has since dropped its contention about the role that the Senate plays in division of national revenue between the two levels of government.

<sup>352</sup> See for instance *Gibson Kamau Kuria v Attorney General*, High Court Miscellaneous Application No. 279 of 1985 (unreported). In this case Gibson Kamau Kuria had been awarded the Robert F. Kennedy Human Rights Award from the Robert F. Kennedy Center for Justice and Human Rights in the United States for defending human rights in Kenya. He received an invitation to travel to the US to receive the award. In response, the Kenya government confiscated his passport. He sued to compel the state to return his passport so that he could travel to the USA. The High Court dismissed the case on the pretext that although the right to freedom of movement was guaranteed, the Court could not enforce it since the Chief Justice 'had not made rules' to guide the litigation process. Section 84 (6) of the repealed Constitution empowered the Chief Justice to make rules on the enforcement of fundamental rights and freedoms. It is surprising that no rules were made subsequently until 2001. In effect, the bill of rights could not be enforced prior to 2001 for technical reasons, judicial apathy and the inaction of the Chief Justice. See generally, Muthomi Thiankolu, 'Landmarks from El Mann to the Saitoti Ruling; Searching a Philosophy of Constitutional Interpretation in Kenya,' (2007) *Kenya Law Journal*, available [http://www.kenyalawreports.or.ke/Downloads\\_Other/Landmarks\\_from\\_El\\_Mann\\_to\\_the\\_Saitoti\\_Ruling.pdf](http://www.kenyalawreports.or.ke/Downloads_Other/Landmarks_from_El_Mann_to_the_Saitoti_Ruling.pdf) <Accessed 20 June 2015>.

<sup>353</sup> There were a few cases of invalidation of unconstitutional laws especially after the return of multiparty politics in 1992. The trend has risen tremendously since 2010. See generally Makau Mutua (2008) *Kenya's Quest for Democracy: Taming Leviathan*, *supra*.

<sup>354</sup> [1969] EA 357. In this case, the High Court rejected arguments that the Constitution is to be given broad and purposive interpretation. Instead, the Court held that the Constitution is to be interpreted in the same way as a statute and refused to protect a petitioner who the state was compelling to fill a form that would lead to self-incrimination.

serious when matters before courts touched on the President, powerful politicians or had the potential to unsettle the *status quo* in the politics of the day.<sup>355</sup>

Since 2010, constitutional and rights litigation have increased tremendously. Today like never before, courts are bolder in enforcing the rule of law, and fundamental rights, and in standing up to the political arms of government. For instance, courts have on several occasions issued orders barring Parliament from conducting business in a fashion that offends the Constitution,<sup>356</sup> invalidated appointments made by the President,<sup>357</sup> ordered compensation to victims of state abuses, and so forth.<sup>358</sup>

### 2.4.5.3.3 Accountability Through Independent Offices and Commissions

To enhance constitutionalism and respect for the rule of law, the Constitution creates a number of commissions and independent offices. Commissions include the Judicial Service Commission, Kenya National Commission on Human Rights, Gender and Equality Commission, Salaries and Remuneration Commission, and Commission on Revenue Allocation, among others.<sup>359</sup> The independent offices are the Controller of Budget<sup>360</sup> tasked with approving expenditure and the Auditor General<sup>361</sup> whose responsibility is to audit and report on the probity of use of public funds. Although the Office of the Director of Public Prosecutions (DPP) is constituted under the Chapter on the executive, this office enjoys the same independence as independent offices, meriting its

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<sup>355</sup> Korwa G. Adar and Isaac M Munyae, *Human Rights Abuse In Kenya Under Daniel arap Moi, 1978-2001*, *supra*, p. 5.

<sup>356</sup> See Law Society of Kenya news item on <http://www.lsk.or.ke/index.php/component/content/article/1-latest-news/404-lsk-government-must-respect-court-orders>

<sup>357</sup> *Trusted Society of Human Rights Alliance v Attorney General & others* [2012] eKLR (HCK) (later reversed by the Court of Appeal).

<sup>358</sup> See reports on: [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205402120\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402120_text)

<sup>359</sup> Chapter 15 of the Constitution gives a longer list of commissions and two independent offices.

<sup>360</sup> Constitution of Kenya, Article 228 and 248.

<sup>361</sup> *Ibid*, article 229 and 248.

classification as such.<sup>362</sup> Perhaps locating the office of the DPP under the executive is because traditionally in Kenya and elsewhere prosecutorial functions are seen as part of the executive's role of maintaining law and order. Powers of public prosecution were vested in the Attorney General under the previous constitution.<sup>363</sup> There was an outcry in the lack of independence of the AG's office especially in prosecution of cases implicating prominent personalities.<sup>364</sup> In response, the Constitution has taken away prosecution powers and vested them in a DPP who enjoys security of tenure and operational independence.<sup>365</sup> The powers of the DPP, however, to terminate private criminal prosecutions or terminate cases at will is now subjected to the consent of the courts.<sup>366</sup> This is clearly in an attempt to guard against abuse of prosecution powers witnessed in the past.<sup>367</sup>

These commissions and independent offices enjoy independence that is analogous to that enjoyed by the judiciary. Article 249 is instructive:

The commissions and the holders of independent offices-(a) are subject only to this Constitution and the law; and (b) are independent and not subject to direction or control by any person or authority.

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<sup>362</sup> Ibid, article 157 (10) (11) secures the independence of the DPP while 258 gives the DPP security of tenure.

<sup>363</sup> Section 26, of the repealed Constitution of Kenya.

<sup>364</sup> The case of Clifford Richard Otieno is a classic case. Mr. Otieno, a journalist who had been assaulted and his camera damaged by the President's wife reported to the police. The police failed to investigate and refused to charge the first lady. He sought court's permission and was allowed to commence private prosecution. The Attorney General took over the private prosecution and terminated the case. Mr. Otieno appealed to the High Court. The Court dismissed the case, saying that the Attorney General had a constitutional and statutory right to take over and terminate charges and the court could not fault him for doing that. See *Otieno Clifford Richard v Republic*, Misc Civil Suit No. 720 of 2005 [HCK]. The Constitution of 2010 responded to this obvious injustice through article 157 (8)(11) by subjecting the power of the DPP to discontinue a case to the court's permission bearing in mind the need to ensure administration of justice, safeguard public interest and avoid abuse of the legal process.

<sup>365</sup> Constitution of Kenya, article 157 (10) and 158.

<sup>366</sup> Ibid, article 157 (8)(11).

<sup>367</sup> Such as in Clifford Richard Otieno's case, *op cit*.

Except for the requirement to submit regular reports or as requested by the President or Parliament,<sup>368</sup> these commissions and independent offices are not subject to the direction of anyone in the performance of their mandates. Because of this institutional and operational autonomy, some have described them as ‘a fourth arm’ of government.<sup>369</sup> Their role is to ensure observance of democratic values and constitutionalism by the state.<sup>370</sup> It can be seen from the roles assigned that these institutions are intended to act as a check on the state. The aim is to ensure that the demands of the constitution are upheld and that the state is accountable in aspects such as respect for human rights, public spending and sharing of national revenue.<sup>371</sup> These institutions largely mirror those provided for under chapter 9 of the Constitution of South Africa, 1996.

#### 2.4.5.4 From Highly Centralised Governance to Devolution

Yash Ghai has observed that the system of government that existed before 2010 was too centralised and inappropriate for a country as diverse and large as Kenya.<sup>372</sup> The federal system of government provided for under the independence constitution envisaged devolution of certain executive and legislative functions to regional governments.<sup>373</sup> This would also disperse political activity to national and regional levels. As noted, this system was replaced with a system in which provinces and districts created by the central government became the units of administration. The heads of the provinces and districts were appointees of the executive and were accountable to the president and not the people or their representatives.<sup>374</sup> The Local governments that existed under the

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<sup>368</sup> Ibid, article 254 (1)(2).

<sup>369</sup> PLO Lumumba & L Franceschi, (2014) *The Constitution of Kenya, 2010: An Introductory Commentary*: Nairobi, Strathmore University Press, p. 641.

<sup>370</sup> Constitution of Kenya, 2010, article 249(1)(2).

<sup>371</sup> Kenya National Commission on Human Rights and Gender and Equality Commission drives the human rights, gender and equality agenda, Commission on Revenue Allocation proposes a formula for sharing revenue among counties while the Judicial Service Commission recommends judges for appointment.

<sup>372</sup> Yash Ghai (2008) ‘Devolution: Restructuring the Kenyan State,’ *supra*.

<sup>373</sup> Ibid, p. 213.

<sup>374</sup> Ibid.

Local Government Act<sup>375</sup> were also weak and subservient to the national government by design.<sup>376</sup>

In the run-up to independence and throughout post-colonial Kenya, the question of how the country should be divided for administrative purposes has always been on the table. At Lancaster House, the minority communities including European settlers saw federalism as key to protecting their interests including safeguarding against dominance by majority communities.<sup>377</sup> KANU, the voice of the majority communities at Lancaster wanted a centralised system in the belief that this would foster national unity and speed up development.<sup>378</sup> In the end, the minority voice carried the day. A federal system popularly known as '*majimbo*' was adopted. This was to last until 1965 when it was scrapped.<sup>379</sup>

With the abolition of *majimbo*, Kenya now had a centralised system of administration. However, once political control was centralised, the desire to decentralise to sub-national units continued. The search was for decentralisation of matters such as planning and development while retaining political power at the centre. In October 1982, President Moi launched the 'District Focus for Rural Development,' (DFRD) programme. This programme aimed at decentralising planning and implementation of economic development to district level. The objective was to have people at the grassroots getting involved in identifying their development priorities, as well as speeding up decision making.<sup>380</sup> Public funds intended for development would be channeled through the

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<sup>375</sup> Chapter 265, Laws of Kenya.

<sup>376</sup> PLO Lumumba, MK Mbondenyi and SO Odero, (eds) (2012) *Constitution of Kenya, Contemporary Readings: supra*, p.211-212.

<sup>377</sup> Robert Maxon, 'Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century,' *supra*.

<sup>378</sup> Ibid. see also PLO Lumumba, MK Mbondenyi and SO Odero, (eds) (2012) *Constitution of Kenya, Contemporary Readings: LawAfrica*, p. 25.

<sup>379</sup> Ibid, p. 26.

<sup>380</sup> Joel D. Barkan and Michael Chege, 'Decentralising the State: District Focus and the Politics of Reallocation in Kenya,' (1989) 27 *Journal of Modern African Studies*, 431, p. 431.

districts.<sup>381</sup> While not much has been written about the success of the policy, it can be deduced that the DFRD was inadequate in meeting the development needs of the country. It was inadequate because in the 1990s there were concerted efforts by Parliament to decentralise funds. This came in the form of District Roads Fund, Constituency Development Fund, and Local Government Transfer Fund, among others.<sup>382</sup> These efforts were fragmented and did not follow any policy guidelines. It is noteworthy that the forty seven counties which are now units of devolved system of government are by and large the districts that existed during the colonial era.<sup>383</sup> Thus, the DFRD could be said to have been revived; but this time endowed with political, economic and fiscal decentralisation, and firmly secured under the Constitution.

During the constitutional review process, the desire for devolution was strongly expressed.<sup>384</sup> Different drafts of the constitution, from Bomas to Wako had different models of decentralisation. In the end, the devolved system provided for under Chapter 11 was adopted. This model, as is clear from the design, is not a full federal system. It is a quasi-federal system that incorporates elements of federal and unitary systems.

Under this system, executive and legislative powers are exercised by both the national and county government.<sup>385</sup> County governments have executive and legislative powers over matters of local concern such as health, agriculture, water, and other social services and amenities.<sup>386</sup> National government on the other hand deals with matters such as national security, defence, foreign affairs, education (other than early childhood

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<sup>381</sup> 'District' was the name given to sub-national administrative units before 2010 Constitution came into effect. This administrative units are now called counties.

<sup>382</sup> Joshua Kivuva, 'Restructuring the Kenyan State,' *supra*, p. 18.

<sup>383</sup> *Ibid*, p. 19.

<sup>384</sup> Yash Ghai (2008) 'Devolution: Restructuring the Kenyan State,' *supra*. See also Robert Maxon, *Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century*, *supra*, p. 12 contends that devolution enjoyed the support of only a section of the political elite but has never been popular with majority of the Kenyan people including top religious leaders in the country.

<sup>385</sup> Constitution of Kenya, article 1 (3)(a)(b)(c).

<sup>386</sup> *Ibid*, Fourth Schedule, Part II.

education), referral health services as well as policy in matters such as health, agriculture and so on.<sup>387</sup> Each county has its own executive headed by an elected Governor, assisted by a county cabinet and a county civil service.<sup>388</sup> County governments are distinct and autonomous from the national government.<sup>389</sup> The two levels of government are however interdependent and are enjoined to work on the basis of mutual cooperation.<sup>390</sup> Their interdependence plays out in a number of facets. First county governments depend on national government for revenue to fund their programmes. Second, Parliament as an organ of national government may legislate in ways that affect county governments within constitutional limits.<sup>391</sup> Third, county governments may be suspended by the President upon recommendation of the Senate and a commission of inquiry following a petition by residents.<sup>392</sup> Fourth, both county and national government are subject to the same accountability institutions namely, the Auditor General and Controller of Budget. The power of the Senate to summon Governors to account before it remains contentious and has been a subject of litigation.<sup>393</sup>

The anticipated benefits of devolution can be discerned from the objects set out under the Constitution.<sup>394</sup> The list under article 174 is long. These objectives can however be summarised as follows:

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<sup>387</sup> Ibid, Fourth Schedule, Part I.

<sup>388</sup> Ibid, article 176, 177 and 179.

<sup>389</sup> Ibid, article 6(2).

<sup>390</sup> Ibid.

<sup>391</sup> Ibid, article 186 (4).

<sup>392</sup> Ibid, article 191.

<sup>393</sup> By virtue of article 125 (1) of the Constitution, the Senate can summon anyone to provide information. The Senate contends that this power read together with Senate's power to safeguard devolution under article 96 empowers it to summon governors. Governors reject this position saying they account to the county assemblies and not the Senate.

<sup>394</sup> Article 174 of the Constitution of Kenya, 2010 sets out the objects of devolution as:

- “(a) to promote democratic and accountable exercise of power;
- (b) to foster national unity by recognising diversity;
- (c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- (d) to recognise the right of communities to manage their own affairs and to further their development;
- (e) to protect and promote the interests and rights of minorities and marginalised communities;
- (f) to promote social and economic development and the provision of proximate, easily

#### 2.4.5.4.1 Expansion of Democratic Space and Accountability

Administrators in the previous centralised system were not accountable to the local people. Instead, they reported to the capital in Nairobi. Devolution has made it possible for local people to hold leaders accountable at local level. In other words, answers to their grievances on development and service delivery for instance, lie with the county executive and legislature. Since county executive and legislatures are elected by the people, this has widened the democratic space. Moreover, the residents have the power to hold the county governments accountable through their elected representatives, vote them out during an election, or petition the President for the dissolution of non-functioning governments. Coupled with the principle of public participation demanded in the affairs of these county organs, self-governance is a closer dream than ever before.

#### 2.4.5.4.2 Inclusiveness and National Cohesion

As already argued elsewhere, exclusion of certain communities in national politics and public affairs has been a great threat to national cohesion. By recognising diversity and ensuring participation through devolved units, this is expected to create a sense of belonging. Allocation of resources guaranteed under the Constitution through objective formulae rather than arbitrariness of those in power should also help diffuse feelings of discrimination. An equalisation fund is established for use in supporting development in counties that have suffered marginalisation since independence.<sup>395</sup> The rationale is to reverse historical marginalisation so as to try and speed up development in marginalised areas to bring them at par with the rest of the country.<sup>396</sup> What is described so far is at a macro-level. At a micro-level, the Constitution is alive to the fact that there are

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accessible services throughout Kenya;  
(g) to ensure equitable sharing of national and local resources throughout Kenya;  
(h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and  
(i) to enhance checks and balances and the separation of powers.”

<sup>395</sup> Ibid, article 204.

<sup>396</sup> The Commission on Revenue Allocation earmarked outlying districts such as Mandera, Turkana, Wajir, Garissa, Marsabit and Samburu to benefit from the equalisation fund. Some of these areas do not have road network. Work on the first kilometer of tarmac road in Wajir county for instance commenced in 2013 after 50 years of Kenya’s independence.

minorities within counties, and has made provisions for their representation and inclusion.<sup>397</sup>

#### 2.4.5.4.3 Foster Economic Development

Counties are bound to be units that will form the basis for infrastructural and other forms of investment by both national and county governments. Counties are bound to compete for favourable rankings such as cost and ease-of-doing business, social services and so on. Given that political decision makers in counties are elected, this is bound to motivate competition that will foster development. Development in counties, it would follow, will contribute to national development.

#### 2.4.5.4.4 Equitable Distribution of National Resources

Public resources in Kenya have never depended on objective equitable criteria. Instead, political connection and patronage has been the criteria.<sup>398</sup> It is not surprising, therefore that the former Central and Rift Valley provinces are ahead of the other regions in terms of development. All presidents of Kenya since independence have hailed from these regions. Politicised ethnicity, described as use of ethnic mobilisation to access political power has characterised politics in Kenya for a long time.<sup>399</sup> Underlying political competition has been the objective of acquiring political power as a means to accessing public resources.

Devolution seeks to dismantle this by pegging distribution of resources to scientific formulae and set constitutional minimums. For instance, no less than 15 per cent of annual national revenue must be allocated to county governments.<sup>400</sup> This share is further divided among counties using a scientific formula adopted by the Senate with the

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<sup>397</sup> Ibid, article 197.

<sup>398</sup> Yash Ghai (2008) 'Devolution: Restructuring the Kenyan State,' *supra*, p. 217; Rok Ajulu, 'Politicised Ethnicity, Competitive Politics and Conflict in Kenya: A Historical Perspective,' *supra*.

<sup>399</sup> Ibid.

<sup>400</sup> Constitution of Kenya, article 203 (2).

recommendation of the Commission on Revenue Allocation.<sup>401</sup> This formula takes into account population, geographical size, poverty index, infrastructural needs and fiscal responsibility. The equalisation fund is set at one half percent of the total national revenue.<sup>402</sup>

#### **2.4.5.4.5 Enhanced Service Delivery**

The ability to provide essential services such as health, water, is a defining feature of any functioning government. These services mean so much to the people. A core objective of devolution is to ensure decentralisation of service delivery from Nairobi to county levels. There is a demand that service delivery should be decentralise further from county capitals to local levels as far as it is feasible to do so. In this regard, counties are further divided into urban areas and cities, sub counties, wards and village units.<sup>403</sup> The national government also runs a parallel system of administration modeled after the same sub-units.<sup>404</sup>

### **2.5. Conclusion**

This chapter discussed the background, context and transformative goals of Kenya's 2010 Constitution. It has demonstrated how the Constitution ordains a transition from past ethical crises, political repression, despotism and highly centralised governance to renewed ethical values, democracy, respect for human rights, revitalised institutions, devolution and accountability in government. In addition, the chapter has traced the evolution of the Kenyan state from the advent of British colonial imperialism through the phases of post-independent presidential imperialism, the minimal liberal democracy of the 1990s, to the present.

The chapter has shown how the enactment of the Constitution was motivated by both internal and external factors. Internal motivations include the disruptions and

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<sup>401</sup> Ibid, article 216.

<sup>402</sup> Ibid, article 204.

<sup>403</sup> County Government Act, 2012, Laws of Kenya, section 48 (1).

<sup>404</sup> National Government Coordination Act, 2012.

injustices of the colonial legacy, the illegitimacy of the independence constitution, the unfinished business at Lancaster and the illegitimate unmaking of independence constitution, and the emergence of presidential imperialism. External factors include the collapse of the Soviet Union and the attendant consequences, globalisation and globalism, and the decline in classical liberalism and the corresponding rise in social democracy, modern liberalism or egalitarian liberalism. The chapter has argued that these internal and external factors not only motivated the enactment of the 2010 Constitution but also informed its contents.

The chapter introduced transformative constitutionalism as the philosophy that undergirds Kenya's Constitution. It has discussed the idea of transformative constitutionalism in the South African context, and argued that Kenya's 2010 Constitution is a modern postliberal constitution that seeks to institute social and political transformation. In other words, it not only sets a framework for a government limited by law, but also one with an obligation to ensure a progressive society characterised by freedom, social justice, equality, equity, accountability, inclusiveness, non-discrimination, good governance, and integrity among other values. In this regard, the chapter highlighted the constitutional mechanisms aimed at infusing national values and principles, ensuring gender, regional and ethnic balance, respect for human rights, and inclusion of disadvantaged groups such as persons with disabilities, minorities and the youth.

The chapter has also demonstrated how the Constitution has sought to revitalise state institutions such as the legislature, the executive and the judiciary to ensure that they are powerful enough to be effective, but at the same time accountable. It has done this through enhancement of separation of powers, checks and balances and accountability through chapter fifteen commissions and independence offices. In addition, the chapter has shown how the devolved system of government has decentralised power and governance with the objective of expanding the democratic space, fostering service delivery and economic development, and enhancing fair distribution of national resources and accountability. This, it is hoped, will foster national integration and cohesion.

The examples of progressive post-2010 constitutional experiences is evidence that there are now better prospects of genuine democracy, social and national cohesion, respect for human rights, rule of law and constitutionalism in Kenya. One avenue of past political repression in Kenya was through suppression of the right to freedom of expression. This thesis argues that real political transformation will necessarily entail a genuine protection of this right. Thus, this chapter lays a basis for a later assessment of the right to freedom of expression and its role in political transformation in the country.

## Chapter Three

### **Theoretical Foundations of the Protection of Freedom of Expression**

- 3.1. Introduction
- 3.2. Theoretical Justifications for the Protection of Freedom of Expression
  - 3.2.1. Truth Theory
  - 3.2.2. Democracy Theory
  - 3.2.3. Human Dignity Theory
  - 3.2.4. Autonomy Theory
  - 3.2.5. Self-fulfillment theory
- 3.3. Conclusion

### 3.1. Introduction

It was noted in chapter one that freedom of expression enjoys protection in democratic societies and in international law. Apex courts in various jurisdictions have insisted on the need to safeguard the right as a precondition for the sustenance of the democratic system of government and the realisation of individual and collective human potential, among other reasons. In other words, the right is to be valued for its socio-political values.

Eric Barendt argues that to understand the nature and scope of freedom of expression, one has to engage with its theoretical justifications.<sup>1</sup> This is because of the open-texture nature of the language of the law, including rights, which leaves a lot of questions unanswered.<sup>2</sup> In addition, freedom of expression as a legal right draws its meaning in practical situations from social and political contexts.<sup>3</sup> As Dworkin observes, abstract constitutional concepts such as dignity and equality, for instance may only be understood through an engagement in theory.<sup>4</sup> Similarly, to understand the contours of freedom of expression as well as its socio-political values, it is necessary to explore its theoretical foundations.<sup>5</sup> Thus, this chapter explores various theories of freedom of expression. Importantly, the chapter examines how these theoretical justifications resonate with the 2010 Constitution and how courts in Kenya have applied them in the adjudication of the right to freedom of expression.<sup>6</sup>

### 3.2. Theoretical Justifications of Freedom of Expression

Despite its origins in Western liberal thought, the right to freedom of expression now enjoys protection, albeit in different formulations, in constitutions of democratic societies around the world, and in international and regional human rights

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<sup>1</sup> Eric Barendt (2005) *Freedom of Speech*, Oxford University Press, p. 6.

<sup>2</sup> Ibid. See also Ronald Dworkin (1986) *Law's Empire*, Cambridge: Harvard University Press.

<sup>3</sup> Ronald Dworkin, R (1977) *Taking Rights Seriously*: Cambridge: Harvard University Press.

<sup>4</sup> Ronald Dworkin, "Hart's postscript and the character of political philosophy," *Oxford Journal of Legal Studies* 24.1 (2004): 1-37.

<sup>5</sup> Eric Barendt (2005) *Freedom of Speech*, *supra*.

<sup>6</sup> Theories of freedom of expression have received in-depth analysis in scholarly literature. Therefore, this chapter is only limited to highlighting the essential premises of these theories, showing how they have been applied in freedom of expression adjudication, and how they resonate with Kenya's Constitution.

instruments. Several theories have been advanced to justify this protection. Some of these theories defend the right for its instrumental value while others justify its protection as a matter of principle because of its role in constituting democracy, quite independent of its functions. The major theories of freedom of expression are: (1) truth theory, (2) democracy, (3) autonomy theory, (4) self-fulfillment or self-realisation and (5) human dignity.<sup>7</sup> The first three are commonly referred to as 'the classical model' theories and are arguably the most invoked justifications for the protection of the right to freedom of expression.<sup>8</sup>

### 3.2.1. Truth Theory

Truth theory as a justification for the freedom of expression is associated with John Stuart Mill. Mill makes his classical liberal defence of free speech in chapter two of his book, *On Liberty*.<sup>9</sup> Titled '*Of the liberty of thought and Discussion,*' chapter two of Mill's book posits that the protection of expression of opinion is necessary so as to assure humanity of 'the discovery of the truth and elimination of error.' The assumption here is that the search for truth is a constant individual and societal endeavour that leads to social good.<sup>10</sup>

Mill argues that freedom of expression must be defended first, because it creates an environment in which people can discover the truth. The discovery of the truth, the theory goes, is possible in an environment in which all ideas, including unpopular ones have a chance to compete for acceptance. Second, Mill defends even 'false' opinions because they may contain some truth. The argument holds that it is difficult, if not impossible; to suppress 'false' opinion without suppressing what is true.<sup>11</sup> Thus for the sake of the truth, both deserve protection. Mill accepts that opinion that is perceived to be

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<sup>7</sup> Marty Redish, 'The Value of Free Speech,' (1982) 130 *University of Pennsylvania Law Review* 591 discusses self-fulfillment or self-realisation theory in detail.

<sup>8</sup> Guy Carmi, 'Dignity, The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification' (2006-2007) 9 *University of Pennsylvania Journal of Constitutional Law* 957, p. 969-970.

<sup>9</sup> John Stuart Mill, *On Liberty*, in John Gray, ed., *John Stuart Mill on Liberty and Other Essays*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 1998.

<sup>10</sup> Irene T. Cate, 'Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses' (2010) 22 *Yale Journal of Law and Humanities* 35, p. 39

<sup>11</sup> Thomas Emerson, 'Toward a General Theory of the First Amendment' (1963) *Yale Law Journal* 877, p. 882.

false may later turn out to be true, and vice versa. Therefore, it is illegitimate to suppress an opinion in the belief that it is an error since nobody is infallible. Furthermore, giving audience to all opinions including unpopular ones, Mill argues, helps to clarify the truth. Put figuratively, Mill's point is that it is in knowing darkness that we can appreciate the value of light.

Mill's theory must be understood in the context of the classical liberal ideas that he puts forward in chapter one, titled *'Introductory.'*<sup>12</sup> In this chapter, Mill offers a very strong defence of individual liberty, of which freedom of expression or, 'the liberty of thought and discussion,' as he calls it, is part. In his defence of liberty, Mill is concerned with what he refers to as 'the nature and limits of the power which can be legitimately exercised by society over the individual.' As a liberal account, this theory favours individual freedom except in limited circumstances that are justifiable in liberal theory. To Mill, liberty is the sphere of rights into which the state and individuals in the society may not interfere.<sup>13</sup> His concern is interference from 'political functionaries' and the state through its instruments, and the society imposing its own wishes and restrictions against individuals. To him, individual liberty, including the freedom to express opinion may not be fettered except where it presents harm to others. This is the so called 'harm principle' as the only justification (according to Mill) for constraints on freedom of expression. Mill's defence of liberty and justification for its limitation is best captured in the quotation below:

That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him

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<sup>12</sup> The relationship between chapter one and chapter two of *On Liberty* has been a subject of scholarly disagreement. Others, for instance Vincent Blasi in *'Shouting "Fire!" in a Theater and Vilifying Corn Dealers,'* (2011) 39 *Capital University Law Review* 535, see chapter two as an instantiation of chapter one. Frederick Schauer, in *'On the Relation between Chapters One and Two of John Stuart Mill's on Liberty'* (2011) 39 *Capital University Law Review* 571, holds a different view. He sees chapter two as an exception to chapter one. I take the position that chapter two is related to chapter one such that chapter two further develops Mill's liberal thoughts as far as freedom of expression in particular is concerned.

<sup>13</sup> J.S Mill, *On Liberty*, Chapter I, *supra*.

happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.<sup>14</sup>

This is a classical liberal (or libertarian as some consider it) defence of individual freedom generally.<sup>15</sup> First, it is premised on a strong presumption of liberty. Thus, in a liberal society, individuals are free to determine their lifestyle since in Mill's words, "over himself, over his own body and mind, the individual is sovereign."<sup>16</sup> Second, the society as well as the state or 'political functionaries'<sup>17</sup> may limit individual liberty. However, the scope within which the state or society may do so is limited. It is only when expression of individual liberty may cause 'harm to others' that constraints through legal means or social coercion may be legitimate.<sup>18</sup> This defence of opinion is strong as it admits only 'harm to others' as a justification for limitation. Expression may only be limited in extreme situations where it is bound to result in chaos or real harm to other people as illustrated in the corn dealer example that Mill gives in chapter three of his book.<sup>19</sup>

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<sup>14</sup> Ibid, p. 14. Verbatim quotation, ignore any inconsistencies with modern English language.

<sup>15</sup> See for instance Frederick Schauer, in 'On the Relation between Chapters One and Two of John Stuart Mill's on Liberty' (2011) 39 *Capital University Law Review* 571

<sup>16</sup> J.S Mill, *On Liberty*, Chapter I, *supra*, p. 14 .

<sup>17</sup> Ibid, p.8. The term 'political functionaries' is used to refer to political players or decision makers

<sup>18</sup> Ibid, p. 9.

<sup>19</sup> In his defence, Mill accepts that a statement made before or issued in form of a placard saying that 'corn dealers are starvers of the poor' to an angry mob gathered in front of a corn dealer's premises can indeed be restricted and the maker punished. However, Mill explains, if the same statement is merely circulated in the press, it is protected.

Third, Mill's account rejects paternalism.<sup>20</sup> Since the individual is 'sovereign' over his own affairs, any restrictions for reasons that individual choice and action may cause the individual moral or physical harm are illegitimate. The society and the state may only advise, persuade, plead with or encourage the individual to change.<sup>21</sup> Any use of coercion, according to Mill, would be unacceptable.<sup>22</sup>

Mill advances his rejection of paternalism by dividing expression into 'self-regarding' and 'other regarding.'<sup>23</sup> 'Self-regarding' expression is that which does not affect other people (but may harm the person expressing an opinion) and therefore belongs to the private sphere, in which interference is illegitimate. "Other regarding" expression is that which can affect other people and therefore belongs to the public sphere.<sup>24</sup> According to Mill, restrictions are legitimate only if they target expressions that affect other people in harmful ways.<sup>25</sup>

Thomas Emerson gives a good summary of the truth theory.<sup>26</sup> To Emerson, allowing free expression and competition of ideas is "the best process for advancing knowledge and discovering truth."<sup>27</sup> This is because knowledge changes constantly and so is what is regarded as the 'truth.' Protection of opinion, including what seems to be false or unpopular is necessary if human beings, either as individuals or societies are to refine beliefs and come to understand the truth.<sup>28</sup> Invoking human infallibility like Mill, Emerson argues that there is no way of suppressing what is thought to be false without rejecting the truth because the false could contain some truth or what is thought to be false could later turn out to be true.<sup>29</sup> Furthermore, allowing false opinion still has another value according to Emerson: that of enabling the rethinking and refinement of what is accepted

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<sup>20</sup> This is the classical liberal idea of 'self-ownership;' that an individual is the only morally competent person to determine what is good for him and to come to his own conclusion of what amounts to a 'good life.'

<sup>21</sup> Ibid, p. 21.

<sup>22</sup> Ibid, p.21.

<sup>23</sup> Ibid, Chapter I.

<sup>24</sup> Ibid, Chapter II, generally.

<sup>25</sup> Ibid.

<sup>26</sup> Thomas, 'Toward a General Theory of the First Amendment' (1963) *Yale Law Journal* 877-956, p. 881-882.

<sup>27</sup> Ibid, p. 881.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid, p.881.

as true.<sup>30</sup> To find knowledge, therefore, a seeker has to consider all facts or sides of a story.<sup>31</sup> Put differently, a society that values truth must allow competing, conflicting or diverse opinions to circulate if its members are to discover the truth.

Truth theory (as espoused by both Mill and Emerson) is utilitarian. It values freedom of expression for its benefits towards the society's quest for knowledge and in meeting the "needs and aspirations of its members."<sup>32</sup> In other words a society that tolerates even "false or pernicious" ideas stands a better chance of benefiting itself and its members.<sup>33</sup> Applied to a democratic political system, it assumes that citizens will be better placed to make political choices in an environment in which freedom of expression is unfettered. As highlighted above, the theory favours very strong protection of freedom of expression that extends to false or even offensive information for as long as it does not cause harm.<sup>34</sup> It extends protection to offensive and morally doubtful forms of speech such as hate speech and pornography.<sup>35</sup>

The truth theory of freedom of expression has endured for centuries and its influence is immense as illustrated by the United States free speech jurisprudence discussed below. It has however received a fair share of criticisms mainly for the assumptions that it makes. For example, the theory assumes that free expression of opinions automatically leads to the discovery of truth.<sup>36</sup> It also presupposes rational individuals and societies such that in a contest of truth and lies, truth will emerge victorious. Yet, history shows that individuals and societies can be swayed by propaganda,

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<sup>30</sup> Ibid, p. 881-882.

<sup>31</sup> Ibid, p. 882.

<sup>32</sup> Ibid, p. 882.

<sup>33</sup> Ibid, p.882.

<sup>34</sup> The idea of 'harm' that Mill seems to have in mind is physical as suggested by his corn dealer metaphor in chapter three of his book. Other forms of harm such as psychological seem not to meet the threshold. The Supreme Court of the U.S shows the same bias in setting down its "clear and present danger" exception to freedom of speech protection.

<sup>35</sup> This follows from Mill's liberal-libertarian defence of freedom chapter I of *On Liberty*.

<sup>36</sup> Irene M. Ten Cate, 'Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses,' (2010) 22 *Yale Journal of Law and the Humanities* 35.

half-truths and outright lies.<sup>37</sup> Second, the theory presumes that there is one objective truth, whose discovery is the subject of human truth seeking enterprise.<sup>38</sup> Third, it is also vilified for favouring protection of forms of expression whose value in the individual or societal quest for truth is doubtful.<sup>39</sup> Finally, the theory has been criticised for admitting very limited restrictions on the basis of 'harm.' Yet there are many offensive forms of speech which may not be physically harmful but have serious consequences on the society or individuals.<sup>40</sup>

Despite these criticisms, truth theory has endured the times and still forms the core of liberal thought as far as the freedom of expression is concerned. Mill's influence can be seen in a number of decisions of apex courts in many democratic societies. In the United States for instance, truth rationale permeates a number of key First Amendment decisions of the Supreme Court. In *Abrahams v. United States*,<sup>41</sup> Justice Oliver Wendell Holmes justified strong protection of freedom of speech under the US First Amendment on the basis of truth. The judge in his dissenting opinion, noted that the theory of the US Constitution (First Amendment in particular) is that the ultimate good "is better reached by free trade in ideas; that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."<sup>42</sup>

Justice Holmes used the imagery of a free market in economic terms to demonstrate how a 'free market of ideas' is a better model to ensure that a political society

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<sup>37</sup>Nazi propaganda and similar racial prejudices that led to genocide in Rwanda and other places are good historical accounts.

<sup>38</sup> Irene M. Ten Cate, 'Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses,' *supra*.

<sup>39</sup> Richard Vernon, 'John Stuart Mill and Pornography: Beyond the Harm Principle,' (1996) 106 *Ethics* 621

<sup>40</sup> *Ibid.* See also Jill Gordon, 'Stuart Mill and "The Marketplace of Ideas"' (1997) 23 *Social Theory and Practice*, 235, Irene T. Cate, 'Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses' *supra*; Harry H. Wellington, 'On Freedom of Expression,' (1979) 88 *Yale Law Journal*, 1105 and Marty Redish, 'The Value of Free Speech,' *supra* for more criticism on the truth theory.

<sup>41</sup> 250 U.S. 616 (1919).

<sup>42</sup> *Ibid.*

arrives at the 'truth' and achieve 'the ultimate good.'<sup>43</sup> He argued that a political society, just like a market, is better placed to discover truth and safeguard its liberty if competition of ideas, including unpopular ones, is allowed. The only exception that Holmes' 'marketplace of ideas' argument admits is where ideas 'so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.'<sup>44</sup>

It is evident that Holmes' 'marketplace of ideas' theory coincides with Mill's in at least two ways. First, is that freedom of speech needs to be protected as it is essential for the discovery of the truth. Second, is that even unpopular ideas deserve protection, except in very limited circumstances speech presents a "clear and present danger."<sup>45</sup> Holmes' 'clear and present danger' test is similar to Mill's harm principle.<sup>46</sup>

In summary, truth theory connects freedom of expression with its function of aiding in discovery of truth and elimination of error. It justifies a strong protection of expression, including unpopular ideas, and even those thought to be 'false.' The theory admits limited exceptions to the protection of freedom of expression. In particular, according to the theory, freedom of expression may be limited where there is real danger of harm. The theory assumes a rational audience that is capable of distinguishing between truth and error. It is a consequentialist argument as its value rests on its benefits to politics or the human process of discovering the 'truth.'

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<sup>43</sup> Ibid.

<sup>44</sup> This is the "clear and present danger" test as a ground for interference with freedom of speech. Since 1919, the jurisprudence of the First Amendment emerging from the US Supreme Court has yielded such a strong defense of freedom of speech. For instance hate speech in the US is protected (unless there is a 'clear and present' danger of it resulting in violence).

<sup>45</sup> Critics of this test fault it in terms of its usefulness. For instance it is difficult to really determine when a statement poses a 'clear and present danger.' Waiting for the danger (violence) to occur would be useless since law that is in tune with policy should be helpful in forestalling breakdown of law and order.

<sup>46</sup> US Supreme Court judge Louis Brandeis in a later decision, *Whitney v. California* (274 U.S. 357 (1927)) noted the importance of freedom of speech in the discovery of truth. He observed that American founding fathers 'believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth....' Irene Cate in, 'Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses' (2010) 22 *Yale Journal of Law and Humanities* 35, identifies differences in Mill's and Holmes truth theories.

The truth theory of freedom of expression has attracted the attention of courts in Kenya in the post-2010 dispensation. In the case of *Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others*,<sup>47</sup> for example, the Supreme Court emphasised the benefits of freedom of expression in the discovery of truth. Rawal, Deputy CJ in a concurring opinion, held as follows:

‘Freedom of expression and the right to information...guarantee debate and provide an opportunity for citizens to know what their Government is doing.’<sup>48</sup>

The Deputy CJ cited with approval the Supreme Court of India in *Indian Express Newspapers v. Union of India & Others*,<sup>49</sup> in which the Indian Court held that:

Freedom of speech presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. It rests on the assumption that the widest possible dissemination of information from as many diverse and antagonistic sources as possible is essential to the welfare of the public....<sup>50</sup>

These remarks by the Supreme Courts of Kenya and India attach value to freedom of expression for its role in aiding the society increase its awareness of social and political affairs which in turn leads to improved welfare. This endorsement of truth rationale is also evident in the decisions of the High Court of Kenya. In *Chirau Ali Mwakwere v. Robert Mabera & 4 others*,<sup>51</sup> the Court citing the Supreme Court of Zimbabwe<sup>52</sup> recognised the function of the freedom of expression in ‘assist[ing] in the discovery of truth.’ The point here is not that free expression will automatically lead to ‘discovery of

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<sup>47</sup> [2014]eKLR.

<sup>48</sup> Ibid, Paragraph 162.

<sup>49</sup> (1986) AIR 515

<sup>50</sup> Ibid.

<sup>51</sup> [2012] eKLR.

<sup>52</sup> *Mark Gova Chavunduka and Another v The Minister of Home Affairs* Supreme Court Civil Appeal No. 156 of 1999.

truth.’ Rather, it increases the chances of emergence of truth. Put differently, an environment in which freedom of expression thrives is more conducive for the discovery of truth. It is important to note, however, that the discovery of truth requires more than freedom of expression. It also requires a rational process of interrogating available information and refining it until ‘truth’ emerges.

In *Coalition for Reform & Democracy (CORD), Kenya National Commission on Human Rights & Samuel Njuguna Ng’ang’a v Republic of Kenya & another (CORD case)*,<sup>53</sup> the High Court cited with approval General Comment No. 34 on the provisions of Article 19 of the International Convention of Civil and Political Rights.<sup>54</sup> In this Comment, the United Nations Human Rights Committee connects freedom of expression with transparency and accountability of government. The Committee noted the following:

Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.<sup>55</sup>

Transparency connotes openness and truth in the sense what is “factual.” It is clear that truth as a freedom of expression justification occupies an important place in Kenya. The democratic system assumes citizen-centred politics, responsible and accountable government that operates on the basis of integrity, transparency and openness. It is for this reason that courts have consistently linked freedom of expression with the citizen’s right to receive information held by the state, and by private persons if necessary for the protection of individual’s rights.<sup>56</sup>

A political society, in which free exchange of ideas including on public affairs is fettered, cannot be said to value transparency and openness. In the end, accountability

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<sup>53</sup> [2015] eKLR.

<sup>54</sup> Article 19 of the ICCPR guarantees the right to freedom of expression.

<sup>55</sup> See paragraph 3 of General Comment No. 34(CCPR/C/GC/34).

<sup>56</sup> *Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company Limited* [2013] eKLR & article 35 and article 33 (1) of the Constitution of Kenya.

and integrity in the exercise of public power will be lost. To realise these values, it follows necessarily, that freedom of expression must be valued as a necessary condition for their attainment. In other words, freedom of expression, which entails both the right to communicate ideas and to receive ideas freely, is necessary if people, as the central subject of democratic politics, are to be aware of how the government is operating. The importance of this is twofold: First, the public has access to information about how public power is exercised. Second, with information, the public is able to reach informed conclusions and make political choices, including holding the government accountable and renewing or terminating its mandate, if necessary.

It is important however to make a few observations that are important for the Kenyan context regarding Mill's truth defence and its derivative, "marketplace of ideas" theory. These theories are founded on liberal or libertarian ideology that places individual liberty and autonomy above collective interests. As a result, liberty, including freedom of expression may only be limited in situations where harm is imminent or where there is "clear and present danger." Chapter two demonstrated that much as Kenya's bill of rights has liberal origins, it also embraces strong egalitarian and communitarian ideals. In other words individual liberty and autonomy is balanced against collective goals such as safeguarding the rights, interests and welfare of other individuals and communities. The upshot is that truth theory remains a compelling justification for freedom of expression in Kenya especially because of the role of the right in the societal quest for truth in individual self-discovery, or in the democratic processes and the realisation of political values such as integrity, openness, transparency and accountability of government. These values necessarily require a shift from opaqueness in governmental affairs to transparency.

In spite of the aforesaid, however, it is argued that the version of truth theory that is apt for the Kenyan situation must be more restrictive than Mill's or Holmes.' While truth theory has been recognised and applied as a justification for freedom of expression in Kenya, its conception must admit broader exceptions to address the social and political realities of the country. The Constitution recognises this need when it specifically excludes

from the freedom of expression guarantee forms of speech that violate the rights or reputation of others, advance discrimination and marginalisation of sections of the population, or incite ethnic hatred or tensions and possible violence.<sup>57</sup> This position is supported by the rationale behind defamation laws and those that proscribe hate speech and incitement to violence. The High Court in *Chirau Mwakwere* for instance rejected calls to declare hate speech laws unconstitutional and held that both the Constitution of Kenya and the International Convention of Civil and Political Rights obliges the state to exclude certain forms of speech from protection.<sup>58</sup> This includes those that incite hatred against disadvantaged groups, impinge on reputation or dignity of others, or incite violence. The prohibition of these forms of negative speech as well as the attitude that the courts have had in upholding them suggests that they are excluded from protection regardless of their truth, or their benefits in the discovery of truth.<sup>59</sup>

Kenya's Constitution obligates the state to take positive steps to ensure that rights are protected and enjoyed by citizens and especially the disadvantaged sections of the citizenry.<sup>60</sup> It would follow that this includes limiting certain rights through hate speech and anti-discrimination laws in order to protect vulnerable groups. The outcome of this constitutionally sanctioned approach is certainly more restrictive than Mill's classical liberal theory that rejects state paternalism and gives the state a limited role in private affairs.<sup>61</sup> It is certainly more restrictive than the scope of Mill's 'harm principle' or Holmes' 'clear and present danger' test. The fragility of Kenya's democracy and ethnic relations,

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<sup>57</sup> Article 33 (2) of Kenya's Constitution prohibits propaganda for war, hate speech, vilification of others, incitement to violence, advocacy for hatred on grounds such as ethnicity, race, sex, dress, language, and so on. This is clearly very restrictive in contrast to the strong protection of free speech, including hate speech, which Mill's truth ideas have produced in the United States.

<sup>58</sup> *Chirau Mwakwere Case* [2012]eKLR.

<sup>59</sup> The balancing act between what ought to be protected and what should not is delicate. The limitation must not encroach on the right to freedom of expression in a manner that is inconsistent with the Constitution and its transformative intentions. The discussion on limitations of freedom of expression is reserved for chapter five.

<sup>60</sup> See for example Article 21 (1), and Article 43 of Kenya's Constitution.

<sup>61</sup> See Chapter I of John Stuart Mill, *On Liberty*, in John Gray, ed., *John Stuart Mill on Liberty and Other Essays*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 1998.

and the unpleasant experiences of past political violence,<sup>62</sup> is the reason for this more restrictive scope.<sup>63</sup>

### 3.2.2. Democracy Theory

Democracy is intimately connected with freedom of expression. Freedom of expression relates with democracy in at least two ways: first, it is an integral part of a democratic system, independent of the value it contributes.<sup>64</sup> This implies that a political system that does not guarantee the freedom of expression in some way cannot be said to be genuinely democratic. Second, aside from being a component of democracy, freedom of expression is the ‘lifblood of democracy.’<sup>65</sup> That is, it is a necessary condition for the functioning of a democratic political system. This underlying assumption makes democracy a justification for the protection of freedom of expression.

At the centre of a democratic political system, at least in theory, is ‘the people.’ This is the idea in the famous Lincoln’s definition of democracy as ‘government of the people, by the people, for the people.’ It follows that democracy imports a number of basic components: sovereignty of the people or popular sovereignty<sup>66</sup>, self-government

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<sup>62</sup> Since the return of multiparty politics in 1992, Kenya has experienced a perennial cycle of politically instigated ethnic violence. The worst happened in 2007-2008 following disputed presidential elections. In 2007-08, over 1100 people died, over 3500 injured and more than 600,000 displaced.

<sup>63</sup> The Canadian Supreme Court rejected ‘clear and present’ danger test in American jurisprudence, choosing a more speech restricting approach that takes into account Canada’s commitment to equality, multiculturalism and respect for diversity as enshrined in the Canadian Charter of Rights and Freedoms, 1982. See Kathleen Mahoney, ‘The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography’, (1992) 55 *Law and Contemporary Problems* 77, 85. South African Constitutional Court has, for similar reasons, also rejected the American approach to protection of freedom of expression. See for instance, *S. v. Mamabolo* (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001).

<sup>64</sup> See for example Alexander Meiklejohn (1948) *Free Speech and Its Relation to Self-Government*, New York: Harper Bros, p.26-27.

<sup>65</sup> See for example High Court of Kenya decision in *Chirau Mwakwere* [2012] eKLR, p.4 [20]. Also Ronald Dworkin’s ‘instrumental’ justifications in Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, Cambridge: Harvard University Press. Pages 195-209.

<sup>66</sup> Refers to the power of the people in a democratic state to constitute and reconstitute the state and its organs as well as determine occupants of political offices.

in Lockenean understanding of state-citizen relationship,<sup>67</sup> collective and participatory decision making, and accountability of government.

Democracy theory diverges to arguments of democratic self-government and democratic participation. The versions of the theory advance different roles that freedom of expression play in supporting democracy. For example some accounts value freedom of expression for its role in supporting democratic processes such as voting;<sup>68</sup> others for enabling citizens' to hold governments accountable and check power abuse,<sup>69</sup> or for the mere reason that a democratic system should accommodate freedom of expression as an integral component.<sup>70</sup>

Aside from truth argument, democracy is arguably the other most powerful justification offered in defence of the right to freedom of expression in many democracies including Kenya, South Africa, the United Kingdom, the United States and Canada.<sup>71</sup> Proponents of democracy as a justification for freedom of expression include Alexander Meiklejohn, Robert Post, and Vincent Blasi.

According to Meiklejohn, free speech is protected first because it forms the basis for democratic decision making.<sup>72</sup> Second, it is vital to protect freedom of expression so that citizens may have access to necessary information so as to make 'wise decisions' and participate in political processes such as voting.<sup>73</sup> This suggests an importance attached not only to the citizens' right to speak but also to listen to available views on public issues. Third, it follows therefore, that citizens must have access to necessary information. This makes the right to receive information an important element of the right to freedom of

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<sup>67</sup> See generally Locke, John. *Two Treatises on Government*. London: Printed for R. Butler, etc., 1821; Bartleby.com, 2010. [www.bartleby.com/169/](http://www.bartleby.com/169/) <accessed on 14 January 2015>.

<sup>68</sup> Alexander Meiklejohn (1948) *Free Speech and Its Relation to Self-Government*, New York: Harper Bros.

<sup>69</sup> Vincent Blasi in Vincent Blasi, 'The Checking Value in First Amendment Theory' (1977) 2 *American Bar Foundation Research Journal* 521.

<sup>70</sup> See Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, *supra*.

<sup>71</sup> A look through judicial decisions of the highest courts in these countries show that democracy features as a prominent ground for the protection of the right to freedom of expression and its corollary, media freedom.

<sup>72</sup> Alexander Meiklejohn (1948) *Free Speech and Its Relation to Self-Government*, New York: Harper Bros.

<sup>73</sup> *Ibid*.

expression just as the right to impart or disseminate information is.<sup>74</sup> This conception of democracy as a free speech justification focuses on the right of the audience who ultimately are the political decision makers in a democracy.

Robert Post believes that accounts of freedom of expression (such as Meiklejohn's), which focus on the audience rather than the speaker, are mistaken.<sup>75</sup> To Post, democracy is about self-rule rather than collective decision making. He emphasises the relationship between the government and the citizens as the core premise in the connection between democracy and freedom of expression.<sup>76</sup> In a democratic system, Post argues, the citizens, as subjects of the law, are also its potential authors.<sup>77</sup> Thus, authorship in this sense is the central idea in a democracy. Elections and other democratic processes of collective decision making are merely mechanisms that exist to facilitate and maximise authorship and the relationship that exist between citizens and the government.<sup>78</sup>

The citizen-government relationship is executed through participation in democratic processes through which citizens elect representatives who in turn author the law on their behalf. Free speech affords the citizen an opportunity to participate in and influence public discourse. Law is a product of that public discourse made possible by an environment in which freedom of expression is protected. This is an instrumental justification to the extent that it is premised on the functions that freedom of expression plays in a democracy.

Regardless of which view of the democracy theory one accepts, freedom of expression plays both 'constitutive' and 'instrumental' functions in a democracy. Dworkin uses the words 'constitutive' and 'instrumental' to describe justifications for freedom of

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<sup>74</sup> Article 33 of the Constitution of Kenya, ICCPR and other international human rights instruments define freedom of expression to include the right to receive information. This suggests a connection between the process of dissemination of ideas and receiving information.

<sup>75</sup> Robert Post, 'Participatory Democracy and Free Speech,' (2011) 97 *Virginia Law Review* 477, p.482.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

speech.<sup>79</sup> As a 'constitutive' element, freedom of speech is an intrinsic component of a democratic society, independent of its functions or benefits. As an 'instrumental' ingredient, freedom of expression is valued because of its function in ensuring that a democracy can thrive and survive as it allows competition of ideas. Furthermore, it enables people to make informed choices and participate effectively.<sup>80</sup>

The United Nations Human Rights Committee through General Comment No. 34<sup>81</sup> emphasised the importance of the right to freedom of expression to a democracy. The Comment reads in part:

Freedom of opinion and freedom of expression... are essential for any society. They constitute the foundation stone for every free and democratic society... [F]reedom of expression provide[s] the vehicle for the exchange and development of opinions.<sup>82</sup>

As a justification for freedom of expression, democratic theory enjoys support. In democratic societies, there is almost a consensus that freedom of expression is indispensable both for its 'constitutive' and 'instrumental' rationales.<sup>83</sup> As was demonstrated in chapter two, Kenya's Constitution makes very strong commitments to democracy and democratic governance. Democracy is one of its foundational values, definitive frameworks and goals. It places 'the people' at the centre of politics. The 'people' are the stakeholders, participants and beneficiaries of the system.

For Kenya's democracy to function as envisaged, the Constitution is built around certain key pillars. These pillars are (1) sovereignty of the people (2) accountable

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<sup>79</sup> See generally Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, Cambridge: Harvard University Press, p. 195-209.

<sup>80</sup> *Ibid.*

<sup>81</sup> CCPR /C/GC/34.

<sup>82</sup> *Ibid.*, paragraph 2.

<sup>83</sup> Marty Redish & Abby Mollen, 'Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression,' (2009) 103 *Northwestern University Law Review* 1303, p. 1303.

and responsible government, (3) human rights and human dignity, and (4) supremacy of the Constitution.<sup>84</sup>

The bill of rights, which protects the right to freedom of expression, is described by the Constitution as ‘an integral part of Kenya’s democratic state.’ The Constitution of Kenya is founded upon certain values and principles as embodied in article 10 and paragraph 6 of the Preamble. Key among these values and principles is ‘democracy and participation of the people,’ accountability of government, integrity and transparency.

Superior courts of record<sup>85</sup> have recognised this connection during the previous constitutional dispensation, and more strongly in the present since August 2010. In *The Very Right Rev Dr. Jesse Kamau & Others vs The Hon. Attorney General & Another*,<sup>86</sup> for instance, the High Court recognised the instrumental role that fundamental rights (including freedom of expression) play in a democracy. The Court observed as follows:

“The provisions touching fundamental rights[including freedom of expression] have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that ...our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions ... must be strictly construed.”

In *Chirau Mwakwere*, the High Court affirmed democracy as a crucial defence for the freedom of expression. The Court, citing decisions of the Supreme Courts of Canada<sup>87</sup> and Zimbabwe<sup>88</sup> observed that democracy is the ‘bedrock of democracy.’ The Court went on to note that it is through freedom of expression that people participate in democratic processes. Additionally, expounding on article 19 (1) of Kenya’s Constitution,

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<sup>84</sup> See for example the Constitution of Kenya, 2010, the Preamble, articles 1, 2, 10, 19, and others.

<sup>85</sup> These are, from the lowest to the highest-High Court, Court of Appeal and the Supreme Court, see article 162 (1).

<sup>86</sup> Nairobi HCMCA No. 890 of 2004 (unreported)

<sup>87</sup> *Edmonton Journal v Alberta (Attorney General)*, (1989) 2 SCR 1326

<sup>88</sup> *Mark Gova Chavunduka and Another v The Minister of Home Affairs* Supreme Court Civil Appeal No. 156 of 1999

the court recognised that ‘the Bill of Rights (which includes freedoms of expression) is an integral part of Kenya’s democratic state.’

More recently in *CORD Case*,<sup>89</sup> the High Court cited democracy as a key basis for freedom of expression in Kenya. It quoted the Supreme Court of Uganda in *Charles Onyango-Obbo and Anor vs Attorney General*,<sup>90</sup> in which the Ugandan Court, (Mulenga SCJ) stated that:

Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. (Emphasis added)

The court went on to quote Odoki CJ in the same decision:

“The importance of freedom of expression including freedom of the press to a democratic society cannot be over-emphasised. Freedom of expression enables the public to receive information and ideas, which are essential for them to participate in their governance and protect the values of democratic government, on the basis of informed decisions. It promotes a market place of ideas. It also enables those in government or authority to be brought to public scrutiny and thereby hold them accountable.”<sup>91</sup>

The Supreme Court of Kenya in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*<sup>92</sup> had the chance to adjudicate on the right to freedom of expression as guaranteed under the Constitution. In this case, the Court

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<sup>89</sup> [2005] eKLR.

<sup>90</sup> Constitutional Appeal No.2 of 2000.

<sup>91</sup> The justifications cited by the court in this decision range from democracy, truth, self-fulfillment and human dignity.

<sup>92</sup> [2014] eKLR.

recognised the connection between democracy and freedom of expression when it remarked that:

Freedom of expression and the right to information, therefore, guarantee debate and provide an opportunity for citizens to know what their Government is doing, but also to contribute to it by voicing support or opposition. Support and dissent are essential because they indicate levels of public involvement and participation in how societies are run ....<sup>93</sup>

In a concurring opinion, Rawal, DCJ, noted as follows:

“Read within the word and spirit of Article 4(2), the whole gamut of human rights, and citizens’ participation in affairs of their country, divergent views and dissenting opinions nurture democracy.”<sup>94</sup>

All these cases testify to the fact that Kenyan courts readily justify freedom of expression for its role in promoting democracy. The prominence that democracy justification enjoys can be attributed to the fact that it is a central value and principle of Kenya’s Constitution.<sup>95</sup> In addition, democracy is, indeed, one of the top goals of the transformation process.<sup>96</sup> It can be seen that courts are persuaded about democracy as a freedom of expression justification from both constitutive and instrumental perspectives. Instrumentally, freedom of expression plays a number of roles. First it enables people to become aware of how public power is being exercised. That awareness alone is important, as it validates the idea of sovereignty of the people as a key ingredient of a democratic system. Second, it enables people to debate public issues freely, and have a chance to

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<sup>93</sup> Ibid, paragraph 162. Article 4 (2) of the Constitution of Kenya declares the country to be a multi-party democratic state.

<sup>94</sup> Ibid, paragraph 370.

<sup>95</sup> See for example the Constitution of Kenya, article 10 which lists democracy and public participation among the values and principles of the Constitution. Independent offices and commissions created under article 15 of the Constitution are tasked with, among other things, the role of promoting the “observance by all State organs of democratic values and principles.”

<sup>96</sup> Jill Cottrell & Yash Ghai *‘Constitution Making and Democratisation in Kenya: 2000–2005,’* (2007) 14 *Democratisation*, 1: DOI: 10.1080/13510340601024272 (arguing that democratisation was a central objective of Kenya’s constitution making process. See also the preamble of the Constitution of Kenya, 2010.

influence public opinion and public policy. This second notion is consistent with Robert Post's idea of authorship as the central element of democracy. Third, it facilitates people's participation in democratic processes such as elections and referenda, consistent with Meiklejohn's idea of democratic participation as already described. Fourth, it enables people to criticise government and its policies, and hold it accountable. This reflects what Vincent Blasi calls 'the checking value' of free speech.<sup>97</sup> Blasi asserts that the real reason why freedom of expression should be valued is because of its value in checking abuse of public power.<sup>98</sup>

As a form of democracy theory, Blasi's proceeds from a standpoint of mistrust of government. His view is that those in power are bound to abuse public power.<sup>99</sup> Therefore, freedom of speech, which includes the people's power to discuss public policy and criticise government, is a vital instrument in checking the exercise of public power.

### 3.2.3. Human Dignity

The idea of 'human dignity' is now a common feature in international human rights discourse and many post-World War II constitutions.<sup>100</sup> Rhetorically, the concept is appealing, yet there seem to be no consensus as to its meaning and content.<sup>101</sup> The concept takes the shape of a positive right and a fundamental value or principle as well as a source

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<sup>97</sup> See generally, Vincent Blasi, 'The Checking Value in First Amendment Theory' (1977) 2 *American Bar Foundation Research Journal* 521.

<sup>98</sup> *Ibid*, p. 529.

<sup>99</sup> *Ibid*.

<sup>100</sup> See Daron Shultziner & Guy E. Carmi, 'Human Dignity in National Constitutions: Functions, Promises and Dangers,' (2004) 62 *American Journal of Comparative Law* 461. The United Nations Charter, International Covenant on Civil and Political Rights, European Convention on Human Rights, African Charter on Human and Peoples Rights, International Convention on Economic Social and Cultural Rights, Universal Declaration of Human Rights and other international instruments incorporate 'dignity.' Constitutions of Germany, Kenya, and South Africa, among others recognise 'dignity.'

<sup>101</sup> See generally Guy Carmi, 'Dignity, The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification' (2006-2007) 9 *University of Pennsylvania Journal of Constitutional Law* 976.

or basis of the idea of human rights.<sup>102</sup> Of significance here is how the concept relates to the right to freedom of expression as its justification. Before discussing this connection, a brief outline of the meaning of this concept is necessary.

In scholarly discourse the concept has received three meanings.<sup>103</sup> The first is the conception of human dignity as the inherent worth of every human being independent of intelligence, morality or social status.<sup>104</sup> That is, every human being is inherently endowed with dignity for the mere reason of being human. Thus, all human beings, irrespective of their status enjoy equality of dignity.<sup>105</sup> It follows then, that dignity in this sense cannot be taken away nor can it be earned.

The second meaning is *substantive* dignity.<sup>106</sup> Human dignity may require human beings and the state to behave and treat people in certain ways that is consistent with the social and political idea of what is 'dignified.'<sup>107</sup> This conception is not inherent but depends on the society's view of what is respectable, good and worthy of pursuit individually or through government policy. Thus, this conception of human dignity accepts moral paternalism, and the state may enforce that which is socially and politically 'dignified'.<sup>108</sup> It follows that the state, as the guardian of public moral space, may proscribe behaviour that is seen as socially or politically inconsistent with the society's conception of dignity. For instance the state may ban certain utterances and forms of expression that it sees as unacceptable or offensive even if they do not result in any harm or offence to anyone specifically.<sup>109</sup>

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<sup>102</sup> For various uses of 'dignity' see Neomi Rao, 'On the Use and Abuse of Dignity in Constitutional Law,' (2008) 14 *Columbia Law Review*, 201.

<sup>103</sup> Neomi Rao, 'Three Concepts of Dignity in Constitutional Law,' (2011) 86 *Notre Dame Law Review* 183, p. 186.

<sup>104</sup> *Ibid*, p. 187

<sup>105</sup> *Ibid*.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid*.

<sup>108</sup> *Ibid*.

<sup>109</sup> France banned dwarf tossing as a form of entertainment for the reason that it violated the dignity of dwarfs and the community. The matter went to the UN Human Rights Committee, where it was held that such a ban was consistent with France's obligations under the ICCPR. See *Wackenheim v France*, UN Doc

The third conception of dignity is related to individual's respect and recognition in a community context.<sup>110</sup> Its concern is the attitude of the community and the state towards the individual. The conception recognises the role of the community in building the esteem or dignity of an individual member. On the basis of this conception, defamation and hate speech laws find justification. Defamation laws safeguard the reputation, self-image and standing of the individual as a member of the community.<sup>111</sup> Similarly, hate speech laws protect disadvantaged or minority groups from being disparaged. Thus, the state may legitimately adopt policies that accord respect and recognition to all members of the community, and prevent discrimination and persecution of minorities or politically disadvantaged groups such as women, and ethnic, racial and religious minorities.<sup>112</sup>

The conception of human dignity that one assumes has practical implications.<sup>113</sup> This is especially because as an interpretative principle, it is bound to influence the meaning assigned to a right.<sup>114</sup> It will also determine whether dignity as a principle would lead to outcomes that expand or limit the right to freedom of expression.

Ronald Dworkin argues that human dignity entails the idea of the intrinsic worth of human beings as 'competent moral agents.' He observes that, 'we retain our dignity as individuals when we insist that no official and no majority has the right to withhold opinion from us on the ground that we are unfit to hear and consider it.'<sup>115</sup> To Dworkin the idea of dignity requires a legitimate political system to treat its subjects with

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CCPR/C/75/D/854/1999(2002). The ban was upheld despite the fact that dwarfs supported the practice and engaged in it as a source of livelihood.

<sup>110</sup> Ibid, p. 188.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid. In *Islamic Unity Convention v Independent Broadcasting Authority*, 2002 4 SA 294 (CC) [32], Langa DCJ noted that labeling people by their innate identities especially in light of South Africa's history of official racism undermines human dignity, among other values.

<sup>113</sup> Ibid, p. 186.

<sup>114</sup> Ibid, p. 186.

<sup>115</sup> Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, Cambridge: Harvard University Press, p.197-198.

‘equal concern and equal respect.’<sup>116</sup> Individuals must be seen as independent moral agents and the means through which they make judgment on political (and other issues) must remain independent of state control or influence. Therefore, for the state to dictate or restrict the information that people can access because it does not think it is good for them or for the society is inconsistent with ‘respecting citizens as responsible moral agents.’<sup>117</sup> Such a proscription denies them access to information that they need in order to determine for themselves what ‘counts as a good life.’<sup>118</sup>

In the same way that people have the right to vote for parties that have racial, ethnic or religious biases (as long as those parties are not proscribed), racists, anti-Semites, anti-Catholics, and anti-gays have the right to express their thoughts and disseminate their ideas.<sup>119</sup> To deny them the right to speak for reasons that their speech incites hatred or discrimination against blacks, people of certain ethnicity, nationality or religious persuasion amounts to denying them equal right to participate in public discourse. The end result, the argument goes, is a violation of their dignity, and that may make it hard to hold them to comply with discrimination laws.<sup>120</sup>

Dworkin’s idea of dignity bears the marks of American liberalism. Carmi describes it as ‘the minimalist’ account as it focuses chiefly on the interests of the speaker and ignores the consequences that speech may have on sections of a population such as the victims of hate speech.<sup>121</sup> Seen in the narrow perspective of the speaker’s right to express their thoughts, the dignity argument, Carmi correctly argues, is indistinguishable from autonomy.<sup>122</sup> While Dworkin’s concept is founded on American liberalism, the idea of

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<sup>116</sup> Ibid.

<sup>117</sup> Ibid, p.208.

<sup>118</sup> Ibid.

<sup>119</sup> Eric Barendt, Lecture on Hate Speech, Hull, November 2013. Available online on: <http://www2.hull.ac.uk/fass/pdf/Eric%20Barendt-HATE%20SPEECH.pdf>, p.5.

<sup>120</sup> Ibid.

<sup>121</sup> Guy Carmi, ‘Dignity, The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification’ (2006-2007) 9 *University of Pennsylvania Journal of Constitutional Law* 976.

<sup>122</sup> Ibid.

human dignity is not premised on the liberal ideology.<sup>123</sup> It is a communitarian concept with European origins based on Kantian, Judeo-Christian, or Hegelian ideas.<sup>124</sup>

The three conceptions of dignity highlighted above can be interrelated or intertwined. The South African Constitutional Court (cited frequently by Kenyan courts) has consistently invoked the concept of human dignity in human rights adjudication in a fashion that implicates these different conceptions. The words of Justice O'Regan in *Khumalo and Others v Holomisa*,<sup>125</sup> are a good example:

The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual.

The Court has also taken human dignity to encompass human capacity to exercise free will in making choices about life and politics. That is, seeing this capacity as being central to 'what it means to be human.' This can be seen for instance in *Barkhuizen v Napier*<sup>126</sup> and more recently in *Mayelane v Ngwenyama and Another*.<sup>127</sup> In *Barkhuizen v Napier*, the Court noted that:

"Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity."<sup>128</sup>

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<sup>123</sup> Ibid.

<sup>124</sup> See generally, Guy Carmi, 'Dignity versus Liberty: The Two Western Cultures of Free Speech,' 26 *Boston University International Law Journal* 277. See also Guy Carmi, *The Enemy Within*, Ibid, p. 966.

<sup>125</sup> 2002 [5] SA 401 [CC] at para [22].

<sup>126</sup> (CCT72/05) [2007] ZACC 5, paragraph 57.

<sup>127</sup> (CCT 57/12) [2013] ZACC 14.

<sup>128</sup> Ibid paragraph 57.

In *Mayelane v Ngwenyama and Another*, the Constitutional Court of South Africa further connected human dignity (and autonomy), to the right to make life choices. The Court held:

“...The right to dignity includes the right-bearer’s entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one’s personal circumstances is a fundamental aspect of human dignity.”

As a freedom of expression justification, human dignity faces numerous criticisms. First, as noted above, the concept is not distinguishable from autonomy theory particularly when seen from the standpoint of the speaker.<sup>129</sup> Second, seen from the audience rights or interests (which the ‘minimalist account’ ignores), dignity can be and has been used to restrict freedom of expression.<sup>130</sup> For instance, defamation and hate speech laws, which limit expression, have often been justified as safeguarding the dignity of victims.

The dignity argument posits that hate speech offends the dignity of its targets and denies them the right to be treated as equal with others in the society. To the extent that dignity in this sense becomes a double edge sword that also justifies restriction of freedom of expression, Carmi argues that its standing as a free speech justification is

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<sup>129</sup> Guy Carmi, ‘Dignity, The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification’ (2006-2007) 9 *University of Pennsylvania Journal of Constitutional Law* 957, p. 978-979.

<sup>130</sup> See *ibid*, p. 979. Although it is a basis and the objective of the protection of fundamental rights and freedoms under Kenya’s Constitution (article 19 (1)), ‘human dignity’ is also a factor that the courts are required to weigh under article 24 of the Constitution in determining the constitutionality of a limitation of rights. This, in my view, suggests that a freedom of expression-restricting outcome will almost always result. The proportionality criterion under article 24 seeks to balance a range of community values and interest and rights of others. It is hard to see how individual claims of freedom of expression will triumph over communitarian values and interest under such a criterion. This presents a grave danger to freedom of expression, and will be discussed in more detail later in this thesis. In *Islamic Unity Convention v Independent Broadcasting Authority*, 2002 4 SA 294 (CC) [32], Langa DCJ found that qualifications of freedom of expression in the South African Constitution are intended to safeguard other foundational values such as human dignity.

compromised.<sup>131</sup> Third, the concept of dignity is criticised as being too abstract and open to manipulation as to offer any meaningful justification for freedom of expression.<sup>132</sup> The upshot is that human dignity is too slippery, too ambiguous and too amorphous a concept to be a meaningful basis for freedom of expression protection.<sup>133</sup>

Like other modern transformative constitutions, Kenya's Constitution has given preeminence to human dignity. The concept assumes the position of (1) a positive right, (2) a foundational value, and (3) an interpretative principle.<sup>134</sup> Article 28 lists human dignity as one of the civil and political rights: "every person has inherent dignity and the right to have that dignity respected and protected." As a fundamental principle and value that undergird the Constitution, articles 10 and 19 are instructive:

Article 19 (2) reads in part:

"The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the *dignity* of individuals and communities and to promote social justice and the realisation of the potential of all human beings." [Emphasis added].

On its part, article 10 identifies 'human dignity' as a fundamental principle binding upon "all State organs, State officers, public officers and all persons whenever any of them- (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions."

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<sup>131</sup> Ibid, note 118, p. 981-982.

<sup>132</sup> See Ibid, p. 979. Frederick Schauer in "Speaking of Dignity," in M. Meyer & W. Parent, eds., *Human Dignity, the Bill of Rights, and Constitutional Values* (Cornell University Press, 1992), 178-191, also raises similar doubts about the value of human dignity as a free speech justification.

<sup>133</sup> In fact Carmi suggests that dignity free speech arguments are adequately covered under autonomy. He suggests that's arguments of 'dignity' should be used when making a case for restricting freedom of expression and 'autonomy' for protection. See Guy Carmi, *The Enemy Within*, p. 986.

<sup>134</sup> The Constitution of South Africa assigns the same functions to human dignity. See *Dawood and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; also Sections 1, 7, 10 and 36 of the Constitution of South Africa.

The import of this is that human dignity ought to inform and benchmark all legal and policy steps of the state. Additionally, the obligation is also extended to private persons in the course of policy decisions making or application of relevant law.<sup>135</sup> The approach of this demand is akin to Dworkin's position that state policy decisions are legitimate if they meet the condition of treating all people 'with equal concern and respect.' As an interpretative principle, courts must consider implications on human dignity when interpreting the Constitution or determining the validity of a limitation of fundamental rights.<sup>136</sup> It would follow that the interpretation that advances human dignity, whatever its conception, is to be preferred.

The jurisprudence on human dignity and freedom of expression is in a nascent stage in Kenya. Courts have frequently invoked the concept of dignity to protect rights. In a similar vein, they have invoked human dignity to limit individual rights so as to protect the rights of others or to promote other countervailing values and interests. For instance, dignity has been used to uphold the right to privacy including privacy of communication,<sup>137</sup> social economic rights such as housing,<sup>138</sup> to stop arbitrary evictions,<sup>139</sup> as well as to protect the right to life and abolish the death penalty.<sup>140</sup>

In *CORD Case*,<sup>141</sup> the High Court invoked Dworkin's idea of human dignity and its relationship with freedom of expression to invalidate various security laws seeking to limit freedom of expression and media in the interest of fighting terrorism. The Court cited Dworkin extensively to invalidate laws prohibiting publication of images of the dead

<sup>135</sup> See Articles 2, 19(2), and 27 (5) of Kenya's Constitution. These articles impose constitutional obligations on all persons including private persons. The High Court affirmed this position in *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others* [2014] eKLR.

<sup>136</sup> See Article 24 and 259 of Kenya's Constitution. The relevant part of article 24 reads: "A right or fundamental freedom in the Bill of Rights may 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...*" [Emphasis added].

<sup>137</sup> *CORD case* [2015] eKLR.

<sup>138</sup> *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others* [2011] eKLR.

<sup>139</sup> *Ibid.*

<sup>140</sup> *S v Makwanyane and another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.

<sup>141</sup> [2015] eKLR.

or injured persons, or statements which are likely to cause fear, encourage or induce acts of terrorism. The court emphasised that human dignity requires a presumption of the right to freedom of expression except in limited circumstances which must be justified strictly under the Constitution. The burden of justifying limitation, the Court noted, is upon the state.

Post 2010 experience shows the use of human dignity by Kenyan Courts to justify limitation of freedom of expression. For instance in *Chirau Mwakwere*,<sup>142</sup> the High Court recognised that hate speech laws are constitutional if carefully tailored to protect the dignity of members of the society identified on the basis of ethnicity and other grounds recognised in the Constitution.<sup>143</sup> Similarly, human dignity has been applied to curtail freedom of expression in other jurisdictions. In Canada for example, the Supreme Court upheld criminal law proscribing racial hate propaganda for the reason that they are intended to uphold 'dignity,' of racial and other minorities.<sup>144</sup>

Apart from its application in defense of certain rights, human dignity has been used to resolve conflicts between freedom of expression claims and values or interests such as security, equality, non-discrimination, and national cohesion. Such conflicts have almost always been resolved in favour of these countervailing values and interests.<sup>145</sup> It is clear that human dignity as a freedom of expression defence is a double-edged sword. It operates as a basis for protecting the freedom of expression and also for limiting it.<sup>146</sup> Taking into account the need to diffuse ethnically and culturally instigated political tensions and promote cohesion as part of a greater nation-building project, it is likely that any conflict between individual claims of freedom of expression would lose in a contest

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<sup>142</sup> [2012] eKLR.

<sup>143</sup> These grounds include 'race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.' See the Constitution of Kenya, 2010, article 27 (4).

<sup>144</sup> *R. v. Keegstra* [1996] 1 S.C.R. 458.

<sup>145</sup> Guy Carmi, 'Dignity, The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification' (2006-2007) 9 *University of Pennsylvania Journal of Constitutional Law* 976.

<sup>146</sup> See Carmi's 'minimalist account' discussion in Guy Carmi, *ibid.*

against broader interests of national security, equality, non-discrimination and national cohesion.<sup>147</sup>

### 3.2.4. Autonomy Theory

The autonomy theory of freedom of expression was popularised by Thomas Scanlon, and other scholars.<sup>148</sup> Scanlon defends Mill's truth theory of freedom of expression and characterises his own theory as 'Millian.'<sup>149</sup> Autonomy theory posits that freedom of expression is a necessary condition for human agents 'in deciding what to believe and in weighing competing reasons for action.'<sup>150</sup> In other words, for human beings to reach conclusions and form their own beliefs, freedom of expression is necessary. As Baker sees it, autonomy is important because it determines the legitimacy of a legal order.<sup>151</sup> A legal order is legitimate if it respects the autonomy of those it expects to obey its laws.<sup>152</sup>

Autonomy, it would seem, is the idea that informed Justice Brandeis' remarks in *Whitney v. California*<sup>153</sup> decided by the Supreme Court of the United States. The judge, concurring with the court's majority opinion, and speaking of the foundations of American free speech protection noted:

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government; the deliberative forces should prevail over the arbitrary. They valued liberty both as an end, and as a means. They believed

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<sup>147</sup> The High Court of Kenya noted the same in *Chirau Mwakwere Case* [2012]eKLR later affirmed in *Uhuru Muigai Kenyatta v. Nairobi Star Publications Limited* [2013] eKLR. The Court emphasised that limitation of freedom of expression is legitimate if the objective is promote human dignity, equality, equity, inclusiveness, social justice, non-discrimination, national cohesion and protection of minorities.

<sup>148</sup> Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 2 *Philosophy and Public Affairs* 204, p. 213.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

<sup>151</sup> Edwin Baker, 'Autonomy and Free Speech' (2010-11) 27 *Constitutional Commentary* 251, p. 251.

<sup>152</sup> *Ibid.* p 251.

<sup>153</sup> 274 U.S. 357 (1927).

liberty to be the secret of happiness, and courage to be the secret of liberty.”<sup>154</sup>

This observation has had a huge influence in America’s free speech jurisprudence. Its import is that liberty (of which freedom of speech is part) is the framework within which human beings (at least in American sense) develop and realise their potentials.<sup>155</sup> As Mathew D. Bunker observes, it is protected because “it contributes to individuals’ opportunities to develop their rational faculties and make critical decisions about the pursuit of a good life.”<sup>156</sup>

Vincent Blasi notes that the guarantee of the freedom to speak and to express opinion is essential in affirming part of what it means to be human.<sup>157</sup> He argues that the concept of autonomy rests upon libertarian ideals and is therefore largely irreducible, resulting in absolute protection. That is, human beings must enjoy a basic minimum of autonomy in the choices they make (including speech). Thus, he argues, they cease to be “individuals” the moment that minimum is interfered with.<sup>158</sup> The outcome of applying autonomy as a basis for freedom of expression, it would follow, is very strong protection. The only legitimate restrictions are those which citizens will recognise and accept and still regard themselves as ‘equal, autonomous, rational agents.’<sup>159</sup>

The gist of autonomy theory is that recognising the autonomy of human beings necessarily requires that their choice to speak or receive speech from others is unfettered.<sup>160</sup> To allow people to speak their minds and listen to whatever others have to

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<sup>154</sup> Ibid.

<sup>155</sup> This idea reflects the premises of self-fulfillment or self-development arguments of Frederick Schauer and others who see the importance of freedom of expression in its usefulness in aiding an individual in the intellectual and spiritual development.

<sup>156</sup> Mathew D. Bunker, (2001) *Critiquing Free Speech: First Amendment theory and the Challenge of Interdisciplinarity* Mahwah: Lawrence Erlbaum publishers, p.12.

<sup>157</sup> Vincent Blasi, ‘The Checking Value in First Amendment Theory’ (1977) 2 *American Bar Foundation Research Journal* 521, p.545.

<sup>158</sup> Ibid, p.547.

<sup>159</sup> Thomas Scanlon, ‘A Theory of Freedom of Expression’ (1972) 2 *Philosophy and Public Affairs* 204, p. 214.

<sup>160</sup> Guy Carmi, ‘Dignity, The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification’ (2006-2007) 9 *University of Pennsylvania Journal of Constitutional Law* 957, p.972.

say is to recognise and respect their autonomy.<sup>161</sup> This justification seems to value free speech not for its extrinsic worth or external benefits but for its intrinsic worth.<sup>162</sup>

Proponents of autonomy insist that freedom of speech must be protected not for its instrumental benefits such as its role in democratic self-governance or in attainment of truth, but as a basic liberty that a democratic government must not interfere with.<sup>163</sup> This is a constitutive justification that does not focus on the benefits of freedom of expression. In other words, it is a necessary condition for human beings to develop their personality or humanity,<sup>164</sup> and for them to just be human.<sup>165</sup>

Unlike democracy and human dignity, autonomy as a freedom of expression defence has not been explored in detail in Kenya's constitutional and human rights jurisprudence. It is evident that the concept has often also been used synonymously with human dignity.

In *Samson Mumo Mutinda v Inspector General National Police Service & 4 others*,<sup>166</sup> the High Court of Kenya affirmed that a violation of the right to privacy violates individual autonomy. Through this, the Court implied that the protection of privacy is intended to safeguard individual autonomy. The Court, however, did not develop this concept neither did it describe what 'individual autonomy' entails.

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<sup>161</sup> Ibid.

<sup>162</sup> Paul Martin Wragg, (2009) *Critiquing the UK Judiciary's Response to Article 10 Post-HRA: Undervaluing the Right to Freedom of Expression?* Durham theses, Durham University. Available at Durham E-theses online at: <http://etheses.dur.ac.ke/68> p. 82/385. See similar comments by Vincent Blasi in Vincent Blasi, 'The Checking Value in First Amendment Theory' (1977) 2 *American Bar Foundation Research Journal* 521, p. 544.

<sup>163</sup> Mathew D. Bunker, (2001) *Critiquing Free Speech: First Amendment theory and the Challenge of Interdisciplinarity* Mahwah: Lawrence Erlbaum publishers, p.14.

<sup>164</sup> This part is a consequentialist argument as it refers to the products of freedom of expression. The part that follows on just being human is non-consequentialist as it is independent of consequences. Limitation would still be illegitimate even if freedom of speech does not assist in the development of human personality.

<sup>165</sup> Mathew D. Bunker, (2001) *Critiquing Free Speech: First Amendment theory and the Challenge of Interdisciplinarity* Mahwah: Lawrence Erlbaum publishers, p.13.

<sup>166</sup> [2014] eKLR.

In *A.N.N v. Attorney General*,<sup>167</sup> the High Court of Kenya, elaborated on the concept of autonomy, linking it to human dignity. Citing the Constitutional Court of South Africa in *Dawood and Another v Minister of Home Affairs and Others*,<sup>168</sup> *S v Makwanyane and Another*,<sup>169</sup> *Barkhuizen v Napier*<sup>170</sup> and *Mayelane v Ngwenyama and Another*,<sup>171</sup> the Court applied the concepts of human dignity and autonomy to uphold the rights of a petitioner who had been stripped naked and searched in public by police officers. In upholding the petitioner's rights to privacy, freedom and security, and human dignity, the Court invoked human dignity and autonomy as a foundation for fundamental rights, and a reason to limit state action against an individual. In doing this, the Court considered autonomy as being the same thing as human dignity or, at least, a component of it. The Court rightly noted however that claims for recognition or violation of human dignity would usually be related to other rights such as privacy, life, equality, and housing, among others.

This use of human dignity and autonomy interchangeably by the High Court of Kenya and the Constitutional Court of South Africa, finds support in Carmi's assertion that the minimalist account to human dignity is indistinguishable from autonomy.<sup>172</sup> Understood as the same concept as human dignity, autonomy then becomes a freedom of expression justification with similar implications as human dignity as discussed above. Seen as a different concept as presented by Scanlon, autonomy becomes problematic as far as its use as a freedom of expression justification in Kenya is concerned. Autonomy as a libertarian justification over emphasises on individual liberty at the expense of collective goals that are important in the Kenyan context such as non-discrimination and national cohesion. Its premises and outcomes are inconsistent with the aspirations as well as the egalitarian and communitarian ideals of Kenya's Constitution, as was discussed in chapter two. The consequence of its application would result in freedom of expression protection

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<sup>167</sup> [2013] eKLR.

<sup>168</sup> (CCT35/99) [2000] ZACC 8.

<sup>169</sup> (CCT3/94) [1995] ZACC 3.

<sup>170</sup> (CCT72/05) [2007] ZACC 5.

<sup>171</sup> (CCT 57/12) [2013] ZACC 14.

<sup>172</sup> Guy Carmi, 'Dignity, The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification' *supra*.

that is too strong to be acceptable in Kenya's context.<sup>173</sup> As noted above, courts, such as in *Chirau Mwakwere* case, would not hesitate to invalidate individual freedom of expression claims in favour of protecting countervailing interests such as individual and community dignity, public security and national cohesion.<sup>174</sup>

### 3.2.5. Self-fulfillment Theory

Self-fulfillment (also self-attainment or self-realisation) theory is widely associated with Marty Redish.<sup>175</sup> While not rejecting other free speech theories such as democracy, truth, and autonomy, he describes these theories as 'sub values' of self-fulfillment.<sup>176</sup> He argues that these other theories fail to recognise that the underlying premise in all of them is the value that freedom of expression plays in individual self-fulfillment. Self-fulfillment is the ultimate human goal and is the crucial value that freedom of expression protection seeks to achieve.<sup>177</sup> Self-realisation, in Redish's terms, is the realisation of 'individual's powers and abilities' or full potential, or 'control of the individual personal destiny 'through making life-affecting decisions' to achieve personal goals.<sup>178</sup>

Redish makes a very bold claim to reject authorities that do not accept that self-realisation is the only value that free speech protection plays, and that all the other

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<sup>173</sup> As demonstrated in chapter two, Kenya's Constitution retains liberal ideas of individual rights but modifies the liberal conception and admits a limitation criterion that is based on communitarian concerns for the 'common good' as seen in the preamble, Articles 24, 33, 34 and elsewhere. This is in response to criticisms of western liberal concept of rights as being too individualistic, and ignores the 'moral significance of social interaction in forming identity or in developing notions of "right" and "good." It also responds to criticisms by communitarians that liberalism fails to take into account the need to consider differences among different communities in defining the scope of rights, including the freedom of expression. See also Langa DCJ (as he then was) in *Islamic Unity Convention v Independent Broadcasting Authority*, 2002 4 SA 294 (CC).

<sup>174</sup> The Canadian Supreme Court also rejected the strong free speech protection in American jurisprudence in favour of an approach that takes into account Canada's commitment to equality, multiculturalism and respect for diversity as enshrined in the Canadian Charter of Rights and Freedoms, 1982. See Kathleen Mahoney, 'The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography', (1992) 55 *Law and Contemporary Problems* 77, p. 85

<sup>175</sup> Marty Redish, 'The Value of Free Speech,' *supra*.

<sup>176</sup> *Ibid*.

<sup>177</sup> *Ibid*.

<sup>178</sup> *Ibid*, p. 593.

justifications are its subsets or 'sub values.'<sup>179</sup> He goes on to demonstrate the connection between democracy, truth and autonomy theories and his self-fulfillment theory. He persuasively demonstrates the inadequacies of democracy as a free speech justification. While it is a legitimate justification, Redish argues, democracy theory is focused on the role of free speech in the democratic process.<sup>180</sup> This, it would follow, does not explain the protection extended to forms of expression that have little or no relevance in the democratic processes.<sup>181</sup> Redish argues that democratic theories (such as Meiklejohn's) do not go to the logical conclusion of why a democratic political system is important, and relatedly, why freedom of expression would be important.<sup>182</sup> To Redish, the reason why democracy is to be preferred over other forms of political systems is because a 'belief in the worth of the individual' is implicit in it.<sup>183</sup> That is, democracy would permit individual self-realisation as explained above. Thus, to Redish, freedom of expression as well as democracy and its political processes are not the ultimate value.<sup>184</sup> Rather, they are only a means to the end; and the end is individual self-fulfillment.<sup>185</sup> This argument is persuasive first in that it does not reject or distinguish itself from the other freedom of expression arguments. It seeks to show how these justifications presuppose individual self-fulfillment as the ultimate goal. This is consistent with democratic ideals which place the individual at the centre of politics, at least in theory. The self-fulfillment argument is also compelling because it offers justification for the protection of non-political expressions. It explains why non-political expressions deserve protection. Similarly, it would explain why freedom of expression of people who are least interested in politics or political expression should equally be protected.

A closer look at autonomy and self-fulfillment arguments shows that they are similar to the extent that both rationales focus on individual's goals of personal

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<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid, p. 601.

<sup>185</sup> Ibid.

advancement. Redish's self-fulfillment theory is however broader; first because it does not distinguish itself from the other theories. Rather, it sees them as 'sub values' and itself as the ultimate 'value.' Second, self-fulfillment theory values freedom of expression both for its intrinsic and instrumental worth. Autonomy theory as noted above defends freedom of expression for its intrinsic worth.<sup>186</sup>

Thomas Emerson also identifies 'self-fulfillment' as a key freedom of expression justification, and describes it in similar terms.<sup>187</sup> He explains that freedom of expression derives from two notions in Western thought. The first focuses on the individual in the pursuit of personal self-development goals. The second is on the role of the individual as a member of the society. On the first notion, Emerson argues that self-fulfillment entails the development of one's mind and formation of personal beliefs and opinions. This aspect necessarily requires an entitlement to express those beliefs and opinions. The process of forming beliefs, understanding the 'self' and developing a sense of identity also requires access to information since the process is influenced by many factors, including fellow human beings.<sup>188</sup> The second notion, Emerson argues, entails an individual understanding and defining their role as members of the society. Freedom of expression is necessary in the realisation of both aspects.<sup>189</sup>

The right of the individual to express their beliefs and opinion, Emerson argues, arises from two principles: that the society or state in which the individual is a member exists to promote his welfare. Second, is equality in the sense that members of the society are entitled to share equally in making collective decisions that affect them. To deny the individual the right to express views or access information necessary for formation of personal views is to 'elevate the society and the state to despotic command

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<sup>186</sup>Paul Martin Wragg, (2009) Critiquing the UK Judiciary's Response to Article 10 Post-HRA: Undervaluing the Right to Freedom of Expression? Durham theses, Durham University. Available at Durham E-theses online at: <http://etheses.dur.ac.ke/68> p. 84/387.

<sup>187</sup> Thomas Emerson, 'Toward a General Theory of the First Amendment' (1963) *Yale Law Journal* 877, p. 879 .

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

and to reduce the individual to the arbitrary control of others.’<sup>190</sup> The individual owes a duty of cooperation to the society. In return, the society owes the individual the right of self-expression.<sup>191</sup>

The South African Constitutional Court (Mokgoro, J) in *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others*<sup>192</sup> considered self-fulfillment as a more superior rationale for freedom of expression than “marketplace of ideas” or truth. The judge observed as follows:

It is useful to relate that reasoning to the foundational purposes for the existence of the right to freedom of expression. The most commonly cited rationale is that the search for truth is best facilitated in a free “marketplace of ideas.” That obviously presupposes that both the supply and the demand side of the market will be unfettered. But of more relevance here than this “marketplace” conception of the role of free speech is the consideration that freedom of speech is a *sine qua non* for every person’s right to realise her or his full potential as a human being, free of the imposition of heteronomous power. Viewed in that light, the right to receive others’ expressions has more than merely instrumental utility, as a predicate for the addressee’s meaningful exercise of her or his own rights of free expression. It is also foundational to each individual’s empowerment to autonomous self-development.<sup>193</sup>

Like Redish, the Court considered self-fulfillment to be more important as it focuses on the development of the human person, in contrast with democracy or truth justifications. Self-fulfillment has also found similar support in Canadian free speech jurisprudence as well as before the United Nations Human Rights Committee.<sup>194</sup> At paragraph 2 of General Comment No. 34, the Committee noted that freedom of opinion

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<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> (CCT20/95, CCT21/95) [1996] ZACC 7; 1996 (3) SA 617; 1996 (5) BCLR 608 (9 May 1996).

<sup>193</sup> Ibid, paragraph 26.

<sup>194</sup> *R v. Keegstra* [1996] 1 S.C.R 458; *R v, Sharpe* [2001]194 DLR (4<sup>th</sup>) 1 paragraph 141 (Canada).

and expression are ‘*are indispensable conditions for the full development of the person.*’ [Emphasis added].

The gist of self-fulfillment theory is its relevance to the development of human personality and identity, the attainment of personal goals, and its role in integrating an individual into membership of the society. The theory focuses on the advancement of the human person and not the collective or political aims of truth and democracy rationales. This is what distinguishes self-fulfillment and gives it a unique appeal. This appeal is further augmented by Redish’s assertion that all other theories aim at aiding the self-fulfillment of the individual.<sup>195</sup>

The High Court, in *Chirau Mwakwere* case,<sup>196</sup> citing the Supreme Courts of Canada<sup>197</sup> and Zimbabwe<sup>198</sup> recognised self-fulfillment as a key objective of the protection of freedom of expression. The Court however, did not expound on the concept. Quoting the Supreme Court of Uganda<sup>199</sup> with approval, the High Court in *CORD Case* recognised self-fulfillment (as aid to human advancement) as a reason for the protection of freedom of expression. Citing Rousseau’s social contract theory, the court noted that ‘...the state has the duty to facilitate and enhance the individual’s self-fulfillment and advancement, recognising the individual’s rights and freedoms as inherent in humanity....’<sup>200</sup>

Self-fulfillment as described here coincides with the objective of Kenya’s bill of rights. Article 19 (2) reads in part:

“The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the *dignity* of individuals and communities and to promote social justice and the realisation of the *potential* of all human beings.” [Emphasis added].

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<sup>195</sup> Marty Redish, ‘The Value of Free Speech,’ (1982) 130 *University of Pennsylvania Law Review* 591, p. 595.

<sup>196</sup> [2012] eKLR.

<sup>197</sup> *Edmonton Journal v Alberta (Attorney General)*, (1989) 2 SCR 1326.

<sup>198</sup> *Mark Gova Chavunduka and Another v The Minister of Home Affairs* Supreme Court Civil Appeal No. 156 of 1999.

<sup>199</sup> *Charles Onyango-Obbo and Anor vs Attorney General* (Constitutional Appeal No.2 of 2002)(unreported).

<sup>200</sup> *CORD Case* [2015] eKLR.

This constitutional commitment to the advancement and realisation of human potential is clearly a self-fulfillment objective in Redish's and Emerson's terms. It follows that the protection of rights, including freedom of expression, is first and foremost for the advancement of people as individuals and as communities. The goals of autonomy, democracy, attainment of truth, and human dignity rationales are not for their own sake. They are for the sake of developing the human person and enhancing their participation in the society. This is the core premise of transformative aspirations of Kenya's Constitution as discussed in chapter two.

### **3.3. Conclusion**

This chapter has discussed freedom of expression theories; namely truth, democracy, autonomy, self-fulfillment and human dignity. It has examined how courts in Kenya have applied these theories to freedom of expression adjudication. Importantly, the chapter has explored how these theories resonate with Kenya's Constitution.

Democracy and truth theories value freedom of expression for its role in individual and collective endeavours. For democracy, these endeavours include participation in political decision making, contributing to and influencing public debate and policy, as well as ensuring accountability and transparency of government. For truth, the value of freedom of expression is its role in the discovery of truth.

Autonomy, self-fulfillment and human dignity rationales focus principally on the individual and individual interests, worth, competence and aspirations. These three theories are closely related, and Courts have often invoked them synonymously. Seen as the same concepts, autonomy, self-fulfillment and human dignity resonate with Kenya's Constitution especially in the context of its commitment to the emancipation and empowerment of the individual.

Autonomy, self-fulfillment and human dignity can, however, be seen as distinct concepts. Scanlon's libertarian autonomy is distinct from self-fulfillment in that the

latter values freedom of expression for its intrinsic worth, while self-fulfillment cherishes it for both its intrinsic and instrumental worth. Self-fulfillment is also a broader concept to the extent that it encompasses all the other rationales and sees them as its 'subvalues.' The appropriateness of Scanlon's libertarian conception is doubted as a freedom of expression rationale in Kenya. It is doubted because its foundations and goals are inconsistent with the egalitarian and communitarian ideals of Kenya's Constitution. Human dignity on the other hand is a very broad concept with different understandings and implications.

While Kenyan courts, particularly the High Court and the Supreme Court have invoked the theories discussed above, democracy emerges as the most cited rationale for freedom of expression protection. Human dignity rationale occupies a paradoxical position as a justification for freedom of expression protection as well as for its limitation in favour of countervailing values and interests such as the rights and reputation of others, equality and non-discrimination, national security, and national cohesion.

## Chapter Four

### Evolution, Nature and Scope of Freedom of Expression

#### 4.1. Introduction

#### 4.2. Historicity of the Freedom of Expression Protection

##### 4.2.1. Origin of Freedom of Expression Generally

##### 4.2.2. The Elevation of Freedom of Expression to the International Law Realm

##### 4.2.3. Freedom of Expression and the Independence Constitution

#### 4.3. Freedom of Expression Experiences in Kenya

##### 4.3.1. Freedom of Expression Practices in the Colony: 1895-1963

##### 4.3.2. Freedom of Expression in Post-Colonial Kenya: the Years of KANU Dominance 1963-2002

##### 4.3.3. Freedom of Expression in Post-Colonial Kenya: 2002 to present

#### 4.4. Kenya's International Legal Obligations Relating to Freedom of Expression

#### 4.5. Nature, Scope and Components of Freedom of Expression

##### 4.5.1. Structure and Architecture of Freedom of Expression Protection

##### 4.5.2. Components of Freedom of Expression Protection

###### 4.5.2.1. Freedom to seek, receive or impart information or ideas

###### 4.5.2.2. Freedom of artistic creativity

###### 4.5.2.3. Academic freedom and freedom of scientific research

###### 4.5.2.4. Commercial Expression

#### 4.6. Relationship between Freedom of Expression and other Rights

#### 4.7. Conclusion

#### 4.1. Introduction

The right to freedom of expression is assumed to be a constituent element of any democratic society.<sup>1</sup> In fact, it is inconceivable that a society can be described as being democratic if it does not commit to some form of freedom of expression guarantee.<sup>2</sup> However, the extent of protection varies from one democratic society to another.<sup>3</sup> This chapter historicizes freedom of expression by tracing the evolution of its modern understanding, including the inclusion of the right in international human rights law and Kenya's independence constitution.

Furthermore, the chapter situates the protection of freedom of expression under Kenyan law within global developments, and examines international legal obligations relating to the right. In addition, it highlights Kenya's historical experiences with freedom of expression and shows how internal and external factors shaped legal responses. The chapter also clarifies the nature, scope and constituent elements of freedom of expression protection and its relationship with other rights.

The chapter answers one key research question: what is the nature, scope and content of the right to freedom of expression? It will also address two sub research questions. These are (a) the historical foundation of freedom of expression, and (b) the historical experiences with freedom of expression in colonial and post-colonial Kenya.

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<sup>1</sup> Martin Redish, 'Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory,' (1992) 11 *Criminal Justice and Ethics* 29, p. 31-34. (arguing that a society that claims to be democratic without a corresponding commitment to freedom of expression is a contradiction).

<sup>2</sup> Charles M. Fombad, 'Freedom of Expression in the Cameroonian Democratic Transition,' *The Journal of Modern African Studies*, 33, 2 (1995), 211, p. 211

<sup>3</sup> The United States features the strongest freedom of expression guarantee, protecting what in Europe, Canada, South Africa or Kenya would amount to hate speech. These variations depend so much on historical experiences, structure of freedom of expression provisions and the socio-political contexts of different jurisdictions.

## 4.2. Historicity of the Freedom of Expression Protection

### 4.2.1. Origin of Freedom of Expression Generally

Although some have traced early articulations of freedom of expression to ancient Greek civilisation, especially to Socrates and Plato,<sup>4</sup> the modern concept of freedom of expression is attributable to Locke's ideas of natural law and rights, the emergence of classical liberalism and significant political developments in Europe and America.<sup>5</sup> Religious reformations in Europe during the sixteenth century, Locke's ideas of natural law and natural rights, classical liberalism as articulated by Mill (and others), the emergence of parliamentary privilege and the Second World War, all shaped the contemporary concept of freedom of expression.

The freedom of expression and its kin, freedom of thought, trace their origin in the sixteenth-century turmoil that accompanied protestant reformations in Europe.<sup>6</sup> It is during this time that dissidence against the religious conformity that was at the heart of Catholic Church-dominated Europe began and spread.<sup>7</sup> Understood in this way, the history of freedom of expression is tied to that of religious freedom.<sup>8</sup>

John Locke's idea of natural law and natural rights is a significant foundation of civil liberties. In his work, *Two Treatises of Government*<sup>9</sup> and *'A Letter Concerning*

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<sup>4</sup> 'Tributes to the Ideal of Freedom of Expression,' *American Academy of Political and Social Science*, (1938) 200 *Freedom of Inquiry and Expression* 292, p. 292. Available on <http://www.jstor.org/stable/1022355> <Accessed 14 February 2016>.

<sup>5</sup> Elizabeth Zoller, 'Freedom of Expression: "Precious Right" in Europe, "Sacred Right" in the United States?' (2009) 84 *Indiana Law Journal* 803, p. 803. This is not to suggest that freedom of expression was absent in non-Western societies. Rather, western conceptions are well articulated and are a huge influence in modern understandings of freedom of expression. This thesis is not concerned with whether freedom of expression was recognised in pre-colonial Kenya. There is no consensus in the literature about the protection of human rights in pre-colonial African societies. The concern of the thesis is the modern understanding of freedom of expression as embodied in modern constitutions and human rights instruments.

<sup>6</sup> Elizabeth Zoller, 'Freedom of Expression: "Precious Right" in Europe, "Sacred Right" in the United States?' (2009) *supra*, p. 803

<sup>7</sup> *Ibid.*

<sup>8</sup> Martin Luther, the spread of printing press as a channel for Christian reformation in Europe.

<sup>9</sup> John Locke, *Two Treatises on Government*. London: Printed for R. Butler, etc., 1821; Bartleby.com, 2010. [www.bartleby.com/169/](http://www.bartleby.com/169/) <accessed on 14 January 2016>.

*Toleration*<sup>10</sup> Locke argued that human beings were naturally endowed with certain “natural rights” that are independent of political and legal institutions. These included life, liberty and property.<sup>11</sup> His idea of natural rights became the foundation of modern concept of human rights as moral claims that are universal and inherent to man. In ‘A Letter Concerning Toleration,’ Locke defended freedom of belief, arguing that rulers had no power to coerce people into certain beliefs.<sup>12</sup> Similarly, he urged religious toleration, saying that no church could legitimately compel people to subscribe to its beliefs.<sup>13</sup> The idea of natural rights and freedom of belief (or religion) fundamentally influenced the idea of freedom of expression. The two freedoms, however, are conceptually different, and freedom of expression received its current dominance much later.<sup>14</sup>

It was during the 19<sup>th</sup> century that freedom of expression, including its theoretical basis, was well articulated and firmly established as a key component of liberal political ideology. John Stuart Mill articulated his truth theory of freedom of expression in his book *On Liberty*; <sup>15</sup>making a very strong liberal or libertarian defence of freedom of expression. As was discussed in chapter three, Mill argued that an individual has the freedom to express his opinion even if that opinion is unpopular or offensive, for as long as it does not cause harm to others.<sup>16</sup> In his view, such a strong defence is necessary if individuals and the society are to come to the discovery of truth. Mill’s defence became

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<sup>10</sup> John Locke and William Popple, (1690) *A letter concerning toleration*. London: Printed for Awnsham Churchill.

<sup>11</sup> Ibid. This concept is seen in the American Declaration of Independence, later in the US Constitution. The idea of inherent nature and universality of human rights is reflected in the UN Charter, the UDHR, and subsequent human rights instruments. Locke’s ideas of separation of powers also influenced the design of the US government under the Constitution.

<sup>12</sup>Alex Tuckness, "Locke's Political Philosophy", *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/win2012/entries/locke-political/>>.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> John Stuart Mill, *On Liberty*, in John Gray, ed., *John Stuart Mill on Liberty and Other Essays*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 1998.

<sup>16</sup> Ibid, p. 14.

hugely influential in first amendment freedom of expression jurisprudence in the United States and other democracies.<sup>17</sup>

Earlier in England, John Milton, through his famed work called '*Areopagitica*' protested licensing for printed work on the basis of freedom of expression and press rationales.<sup>18</sup> The English Parliament had enacted the Licensing Order in June 1643 which required all printed work to be submitted to state officials for approval before publication.<sup>19</sup> Milton saw this requirement for approval as prior censorship by the state, and thereby a restriction on freedom of thought and expression.<sup>20</sup> His protest added to the momentum against censorship of publications. As history records, prior censorship was subsequently abolished in England.<sup>21</sup>

Parliamentary privilege, which protects speech made within the precincts of parliament or in the course of parliamentary proceedings, was among the first class of expression to enjoy firm protection under the law.<sup>22</sup> In England, for instance, after protracted conflict between Parliament and the Monarch over control of speech made in Parliament, the Bill of Rights of 1689 finally entrenched parliamentary privilege.<sup>23</sup> The relevant provision reads in part:

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<sup>17</sup> See for instance Justice Oliver Wendell Holmes in the US Supreme Court decision in *Abrahams v United States* (250 U.S. 616 (1919)). As was demonstrated in chapter three, subsequent decisions of the US Supreme Court also invoked Mill's theory.

<sup>18</sup> Vincent Blasi, 'John Milton's *Areopagitica* and the Modern First Amendment,' 14 *Constitutional Lawyer* 1, p. 1-19

<sup>19</sup> It is thought that Milton's objection to this prior approval law was motivated by the refusal of state authorities to publish his own work 'the Doctrine and Discipline of Divorce.' see Frederick Schauer, 'Facts and the First Amendment (2010)' 57 *University of California Los Angeles Law Review* 897. Available at SSRN: <http://ssrn.com/abstract=1486145>, p.903.

<sup>20</sup> Ibid.

<sup>21</sup> David S. Bogen, 'The Origins of Freedom of Speech and Press,' (1983) 2 *Maryland Law Review* 429, p. 430-431.

<sup>22</sup> David S. Bogen, 'The Origins of Freedom of Speech and Press,' (1983) 2 *Maryland Law Review* 429, p. 431.

<sup>23</sup> Ibid, p. 433.

“That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.”<sup>24</sup>

From England, parliamentary privilege subsequently spread to British colonies such as Massachusetts and Virginia.<sup>25</sup> The Massachusetts Declaration of Rights of 1780 made the following provision:

“The freedom of deliberation, speech and debate in either house of legislature is so essential to the rights of the people that it cannot be the foundation of any accusation, prosecution, action or complaint in any other court or place whatsoever.”<sup>26</sup>

This privilege of speech made in the legislature is seen in the Articles of Confederation, the first constitutional instrument for the thirteen British colonies that first made up the United States of America.<sup>27</sup> It provided as follows:

“Freedom of speech and debate in the Congress shall not be impeached or questioned in any court or place outside Congress.”<sup>28</sup>

This same privilege was finally entrenched in the Constitution of the United States.<sup>29</sup> Parliamentary privilege is a limited form of free speech protection as it covers only what legislators say within the precincts of the Legislature. The rationale for the protection of parliamentary privilege can be seen in the words of the Massachusetts Declaration of Rights of 1780 which pronounced that speech or debate in the legislature is ‘so essential to the rights of the people.’

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<sup>24</sup> Article 9 of the (England) Bill of Rights, 1689, available on <http://www.publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4306.htm> <accessed 29 September 2015>.

<sup>25</sup> David S. Bogen, ‘The Origins of Freedom of Speech and Press,’ *supra*, p. 434-435.

<sup>26</sup> *Ibid.*

<sup>27</sup> Eric Freedman, ‘Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation.’ (1993) 60 *Tennessee Law Review* 783, p. 785-786.

<sup>28</sup> See text on: <https://history.state.gov/milestones/1776-1783/articles> <accessed 13 October 2015>

<sup>29</sup> See article 1 section 6: “The Senators and Representatives shall...be privileged...for any speech or debate in either House, they shall not be questioned in any other place.”

The link that the Massachusetts Declaration of Rights makes between free debate and the advancement of individual rights, it can be seen, resonates with self-fulfillment, human dignity, and democracy theories articulated in chapter three. This justification implies that unfettered freedom of the people's representatives to speak in the legislature is necessary for the advancement of rights and interests of the people. In other words, without it, the role of the legislature in the representation of people's interests and in checking the powers of the executive would be ineffective. Importantly, the rationale links freedom of speech to its role in the political process and the idea of democratic self-governance.<sup>30</sup> Therefore, this means that if democratic self-governance and collective democratic decision-making among legislators requires freedom of speech, then it follows that in a democratic system that values public participation and sovereignty of the people, freedom of expression is essential. That is, the proper functioning of a direct, participatory or representative democracy inevitably requires freedom of expression.<sup>31</sup>

From the historical account set out above, the connection between religious reformation in Europe, Locke's, Milton's and Mill's ideas, and the spread of parliamentary privilege on one hand and the modern understanding of freedom of expression on the other becomes clear.<sup>32</sup> They influenced early constitutional documents such as the French Declaration of the Rights and Duties of Man (1789), the Virginia Declaration of Rights (1776) and the Constitution of the United States (1791).<sup>33</sup> All these documents asserted the freedom of the individual as inherent to being human. Among the constituent elements of individual freedom cited in all these instruments is freedom of expression. With the entrenchment of the right to freedom of expression in the constitutional instruments in America and Europe, the stage was set for the right to take on a transnational or international character.

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<sup>30</sup> David S. Bogen, 'The Origins of Freedom of Speech and Press,' *supra*, p. 435.

<sup>31</sup> As noted in chapter two, Kenya's democracy fits these descriptions: it is direct, representative and participatory.

<sup>32</sup> *Ibid.* Locke's ideas of social contract and natural rights can be clearly seen in the American Declaration of Independence, American Constitution and the French Declaration of Rights and Duties of man. The ideas of equality of all, the inherent nature of rights such as life and liberty, are evident in these instruments.

<sup>33</sup> Although the Constitution of the United States came into effect in 1789, the Bill of Rights (amendment I to X) came into effect later in 1791.

#### 4.2.2. The Elevation of Freedom of Expression to the International Law Realm

The protection of freedom of expression in international human rights law is attributed to the devastations of World War II.<sup>34</sup> The atrocities committed during the Second World War by states, and their inability to protect people from the ravages of the war was a glaring failure of the Westphalian model of international law.<sup>35</sup> This debacle necessitated an international approach to human rights protection as a means of ensuring justice and international peace and security.<sup>36</sup> Against the background of the carnage of the war, the world was desperate to secure future international peace and security. This objective is seen in the United Nations Charter.<sup>37</sup> Among the important elements of the Charter is the link it makes between respect for human dignity and fundamental rights and freedoms to international peace and security.<sup>38</sup> The same connection can be seen in President Roosevelt's 'four freedoms speech' that preceded the Charter.<sup>39</sup> In this speech, the war-time US President cited universal respect for freedom of speech (among other rights) as essential for world peace. This connection between human rights generally and freedom of expression in particular catapulted the right to its current status as an

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<sup>34</sup> Nsongurua J. Udombana, 'Mission Accomplished? As Impact Assessment of the UDHR in Africa,' (2008-2009) 30 *Hamline Journal of Public Law and Policy* 335, p. 335-336.

<sup>35</sup> Eric A. Engle. "Universal Human Rights: A Generational History" (2006) 12 *Annual Survey of International & Comparative Law* 219, p 220-221

<sup>36</sup> *Ibid.*

<sup>37</sup> The connection that the Charter makes between international peace and security and respect for human rights and dignity can be seen, for instance in the preamble and in article 55. The preamble notes: "WE THE PEOPLES OF THE UNITED NATIONS DETERMINED-

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations."

<sup>38</sup> *Ibid.*

<sup>39</sup> State of the Union address delivered to the 77<sup>th</sup> Congress on 6 January 1941 by President Franklin Delano Roosevelt. Available online on: <http://www.history.com/this-day-in-history/franklin-d-roosevelt-speaks-of-four-freedoms>. This speech is relevant in light of the role that the USA played in the formation of the UN later in October 1945 in San Francisco, and the role of the widow of President Roosevelt, Eleanor Roosevelt who chaired the committee on Universal Declaration on Human Rights and steered it to its adoption in 1948. See <http://www.un.org/en/documents/udhr/history.shtml>

ingredient of international human rights law. Subsequently, the aspirations expressed in the UN Charter for protection of fundamental rights and freedoms were finally embodied in the Universal Declaration of Human Rights (UDHR) adopted by the UN General Assembly in December 1948.<sup>40</sup> Among these rights is freedom of expression under article 19. As the name suggests, the UDHR was not intended to be a legally binding instrument.<sup>41</sup> The universal acceptance of the instrument and subsequent steps taken by states concerning the UDHR has elevated its status.<sup>42</sup> Importantly, the UDHR became the foundation upon which the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on Economic Social and Cultural Rights (ICESCR) were built.<sup>43</sup> In addition, the UDHR influenced the content of the bills of rights in many post-1948 constitutions.<sup>44</sup> The ICCPR guarantees the right to freedom of expression under article 19.

Additionally many regions, following the same logic of the UN Charter, have adopted regional human rights instruments with the right to freedom of expression as a key ingredient. These regional instruments include the African Charter of Human and Peoples' Rights (ACHPR), European Charter of Human Rights (ECHR), and the American Convention on Human Rights (ACHR).<sup>45</sup>

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<sup>40</sup> The Article 19 Freedom of Expression Handbook: International and Comparative Law, Standards and Procedures (August 1993) ISBN 1 870798 17 1, p. 8-9. Available online on <http://www.article19.org/pdfs/publications/1993-handbook.pdf>. <Accessed 21 July 2015>.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid. See for instance the Proclamation of Tehran in 1968, later adopted by the UN General Assembly in which the UDHR was declared to be "stat[ing] a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community."

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid, p 8-13. See also Kurt Wimmer, *Toward a World Rule of Law: Freedom of Expression*, (2006) 603 *Law, Society, and Democracy: Comparative Perspectives* 202, p. 203.

### 4.2.3. Freedom of Expression and the Independence Constitution

The formal legal protection of the right to freedom of expression in Kenya was introduced through the independence Constitution in 1963.<sup>46</sup> The independence constitution introduced a democratic system of governance with a liberal constitution that guaranteed freedom of expression among other rights.<sup>47</sup> Before the adoption of the Human Rights Act in the United Kingdom in 1998, English law did not formally recognise the right to freedom of expression.<sup>48</sup> Similarly, the British colonial legal instruments in Kenya were not concerned with fundamental rights and freedoms. The colonial imperial mission was simply to institute order necessary for the exploitation of the country's resources and open up new markets for British industries.<sup>49</sup> Guaranteeing the civil and political interests or rights of the natives was not part of the colonial agenda. The colonial regime was brutal and its massive violation of human rights is well documented.<sup>50</sup> It was therefore a major departure that the independence constitution contained features that were unfamiliar in British constitutional order both in Britain and in the colony; that is to say, a written document, constitutional supremacy (as contradistinguished with parliamentary supremacy), a unified justiciable bill of rights, and courts vested with power to invalidate legislative excesses.

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<sup>46</sup> See s.14 (b) and s. 23 (1) of the Independence Constitution, 1963, later renumbered to s. 70 and s. 70 of the repealed Constitution of Kenya (1969). As was seen in chapter 2, the colonial constitutional instruments such as the Order-in-Councils, the *Lyttleton* Constitution, and *Lennox-Boyd* was concerned mainly with administrative structures for the colony and later political representation of racial groups.

<sup>47</sup> Makau W. Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subsistence in Kenya,' (2001) 23 *Human Rights Quarterly* 96, p. 97.

<sup>48</sup> Eric Barendt, "Freedom of Expression in the United Kingdom Under the Human Rights Act 1998," (2009) 84 *Indiana Law Journal* 851, p. 851. (Barendt however notes that notwithstanding the absence of legal guarantee of freedom of expression, the right has always enjoyed more protection in the UK than in many countries in Europe). The protection was secured through the idea of the rule of law expressed well in the words of Sir John Donaldson in *Attorney General v Observer Ltd* [1990] 1 AC 109; "the starting point of our domestic law is that every citizen has the right to do what he likes unless restrained by the common law or by statute" This expresses the liberal (or libertarian) idea that all things are lawful unless restricted by law.

<sup>49</sup> Makau W. Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subsistence in Kenya,' (2001) 23 *Human Rights Quarterly* 96, p. 97

<sup>50</sup> See Mary Dudziak, 'Working Toward Democracy: Thurgood Marshall and the Constitution of Kenya' (2006) 56 *Duke Law Journal* 721. The most comprehensive account of the atrocities committed by the colonial government in response to Mau Mau insurgency is found in Caroline Elkins, (2005) *Britain's Gulag: The Brutal End of Empire in Kenya* (2005) Pimlico Publishers; Also Caroline Elkins, (2005) *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*, Holt Publishers; and David Anderson, (2013) *Histories of the Hanged: The Dirty War in Kenya and the End of Empire* W. W. Norton Publishers

This unique development can be attributed to local concerns as well as emerging global constitutionalism in the post- World War II period. The inclusion of a bill of rights enforceable through courts was necessary to allay the fears of minority groups such as European settlers who had economic might but were about to lose political power to African majority rule.<sup>51</sup> It was obvious that the decolonisation process favoured retention of colonial boundaries and the coexistence of diverse communities in the colonies. In Kenya, deep mistrust among different groups, namely, Africans, Europeans, Asians and Arabs characterised pre-independence constitutional politics. As a compromise, one of the necessary devices to secure peaceful transition to independence was a bill of rights guaranteeing among other things, property rights. The idea of a bill of rights was readily appealing to all groups.<sup>52</sup>

Aside for local concerns, the inclusion of a bill of rights was also inevitable in the context of global legal and political developments. The constitution was drafted in London under the patronage of the Britain at a time when international human rights law was taking root with the adoption of the UN Charter, the UDHR, and regional instruments such as ECHR and the ACHR for Europe and the Americas respectively. Britain was already a signatory of the UDHR and a party to the UN Charter and the European Convention of Human Rights.<sup>53</sup> Article 63 of the ECHR enabled European colonial powers to make declarations extending the obligations of the Convention to its colonies.<sup>54</sup> Britain filed a declaration in 1953 under this “colonial provision” applying the Convention to most of its colonies in Africa including, Kenya.<sup>55</sup> These international instruments placed human

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<sup>51</sup> Mary Dudziak, *Working Toward Democracy: Thurgood Marshall and the Constitution of Kenya* *supra* p. 721-726 and Robert Maxon, ‘Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century,’ (2009) 1 *Kenya Studies Review* 11.

<sup>52</sup> *Ibid.* Earlier, the process of negotiating the independence constitution for Nigeria, another British colony, had already resolved to incorporate a bill of rights to secure the fears of minority groups and ensure peaceful transition. With the sectarian politics at play in Kenya’s negotiations, the idea of a bill of rights was a worthy compromise.

<sup>53</sup> See <http://www1.umn.edu/humanrts/research/ratification-greatbritain.html>. <Accessed 25 February 2016>.

<sup>54</sup> Christof Heyns, ‘African Human Rights Law and the European Convention’ (1995) 11 *South African Journal of Human Rights* 252, p. 254-255.

<sup>55</sup> *Ibid.*

rights at the centre of post-World War II governance, and many constitutions enacted in the period incorporated bills of rights as an expected ingredient.<sup>56</sup>

The provisions of Kenyan bill of rights in particular can be traced directly to the ECHR.<sup>57</sup> The 1950s and 1960s were constitutional moments as many British (and other) colonies gained independence under new constitutions.<sup>58</sup> The colonial office in London readily exported the Westminster model of constitution incorporating a bill of rights.<sup>59</sup> Since unlike France, Britain did not have a written constitution, the ECHR was a ready model for bills of rights for the soon-to-be-independent African states.<sup>60</sup> Nigerian independence constitution became the first to adopt the provisions of the ECHR.<sup>61</sup> This was necessary so as to allay the fears of its numerous minority groups and to preserve it from fragmenting along ethnic lines.<sup>62</sup> The Nigerian bill of rights soon became the template for other Anglophone African countries such as Kenya, Swaziland, Malawi, Zambia, Lesotho, Botswana, Sierra Leone and Botswana as they received independence from Britain.<sup>63</sup> Thus, the constitutionalisation of freedom of expression protection, among other rights, in Kenya should be seen as a legacy of the ECHR and a process of political compromise among various delegations to the Lancaster House conference for constitutional talks. This assertion is further supported by the striking similarity between the provisions of the ECHR and Kenya's independence bill of rights as contradistinguished with the phrasing of rights in constitutions of other former British colonies such as India and Ghana,<sup>64</sup> or older documents such as the US Constitution.<sup>65</sup>

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<sup>56</sup> Nsongurua J. Udombana, 'Mission Accomplished? An Impact Assessment of the UDHR in Africa,' *supra*.

<sup>57</sup> Christof Heyns, 'African Human Rights Law and the European Convention,' *supra*.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid*, 257.

<sup>62</sup> *Ibid*, 257.

<sup>63</sup> *Ibid*, p.257- 258.

<sup>64</sup> *Ibid*, 256.

<sup>65</sup> David Law & Mila Versteeg, 'The Declining Influence of the United States Constitution' 87 *New York University Law Review*, 762, p. 850-855, showing how the US Constitution's influence on constitutional jurisprudence and new constitutions around the world has significantly declined as India, Canada and South Africa have become increasingly influential. The authors attribute this to many factors including the influence of the UDHR and America's laxity in embracing global international human rights trends. Mary Dudziak in '

### 4.3. Freedom of Expression Experiences in Kenya

Freedom of expression has always been at the centre of clamour for genuine freedom, democracy, rule of law and respect for human rights in both colonial and post-colonial Kenya. This section examines the experiences of freedom of expression both in terms of the legal situation and actual practice in three phases: the colonial period, post-colonial era until 2002, and post-2002 period. As will be demonstrated, prevailing political struggles, ethnic tensions, national security challenges such as terrorism, and radical changes in culture and in information and communication technology have influenced these experiences and shaped legal responses.

At the height of the agitations for independence from colonial rule, the quest by Africans to have their grievances and interests addressed placed freedom of expression at the centre of the struggle. Similarly, the clamour for political pluralism and inclusion in the decades before the return of multipartyism in 1992 was another test for freedom of expression.

#### 4.3.1. Freedom of Expression Practices in the Colony: 1895-1963

The colonial government's enactment of repressive laws and the brutal response to African struggle for independence depicts the colonial administration's policy of intolerance towards political expression.<sup>66</sup> In response to the Mau Mau uprising, the colonial government declared a state of emergency in 1952 followed by massive arrests,

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Thurgood Marshall's Bill of Rights for Kenya . ' (2008) 11 *Green Bag* 2D 307, (Available at SSRN: <http://ssrn.com/abstract=1134026>) also attributes the text of Kenya's bill of rights in the 1963 independence constitution to the UDHR and the independence constitution of Nigeria.

<sup>66</sup> As noted in chapter 2, the state that is today called Kenya did not exist before the declaration of protectorate status by the British in 1895. What existed were micro states made up of many small ethnic communities present in the country at the time. Formal organisation of social and political affairs of the country as a single state began with the advent of British colonial administration. To facilitate governance and the maintenance of law and order, English Common Law, Doctrines of Equity, English statutes of general application and procedures and practices in the High Court of Justice applicable in England as at 12 August 1897 were adopted as a source of law for the territory.<sup>66</sup>

imprisonment, execution, and extra-judicial detention of perceived leaders of African nationalist struggle.<sup>67</sup>

While the colonial government seemed initially tolerant of freedom of expression by publication of newspapers and magazines by Africans, Europeans and other races, this attitude only lasted for as long as its authority was not under serious threat.<sup>68</sup> When African nationalism and criticism of British imperialism gained momentum, the colonial government responded with a campaign of terror that resulted in death, massive arrests and imprisonment or detention of thousands.<sup>69</sup>

To suppress African political activities, the colonial administration announced a raft of repressive measures. For instance, the colonial Governor took charge of all public gatherings called for political purposes, maintained control over African villages, imposed requirements for permit to hold meetings and for registration of political parties.<sup>70</sup> In addition, nation-wide political activities were banned, hence fragmenting and limiting African political campaigns.<sup>71</sup>

To provide a legal basis for these emergency measures, the colonial authorities enacted a number of laws. These included the Public Order Act, the Preservation of Public Security Act, Detained Persons Act, and Detention Camps Act.<sup>72</sup> Others included amendments to the Penal Code to introduce or strengthen sedition laws,

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<sup>67</sup> Caroline Elkins, (2005) *Britain's Gulag: the Brutal End of Empire in Kenya* (2005), *supra*. The 'Mau Mau' refers to insurgents drawn mainly from Kikuyu community of central Kenya. The insurgency was a struggle for return of land taken by the British and for freedom.

<sup>68</sup> Charles Muiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya' (2008, unpublished PhD thesis), p. 19-21.

<sup>69</sup> Caroline Elkins, (2005) *Britain's Gulag: The Brutal End of Empire in Kenya* (2005) *supra*. The most prominent person to be imprisoned was Jomo Kenyatta, who later became Kenya's founding president. Others were Bildad Kaggia, Kung'u Karumba, Fred Kubai, Paul Ngei, and Achieng' Oneko.

<sup>70</sup> Mary Dudziak, *Working Toward Democracy: Thurgood Marshall and the Constitution of Kenya'* *supra* p 738.

<sup>71</sup> *Ibid*.

<sup>72</sup> *Ibid*. See also Charles Muiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya' (2008, unpublished PhD thesis), *supra*.

criminal libel laws, insult laws and others relating to public order, security or public authority.<sup>73</sup>

These laws provided legal justification for colonial government to take drastic action to obliterate African political activity. As expected, a majority of them targeted utterances, publications, political mobilisation, assembly or association, and other forms of political expression. While the arrest, trial and detention of many African nationalists have historically been seen as being connected to membership or support to the Mau Mau movement, it is instructive that many of those arrested were or had been journalists and editors.<sup>74</sup> Moreover, the accusations against them by the colonial authorities focused on what they had written, published or said.<sup>75</sup> This fact, as well as the focus of colonial laws on political activity demonstrates that freedom of expression was at the centre of the struggle for independence and the colonial response to it.<sup>76</sup>

#### **4.3.2. Freedom of Expression in Post-Colonial Kenya: the Years of KANU Dominance 1963-2002**

The period between independence in 1963 and end of 2002 was under KANU rule. The dawn of independence began with Jomo Kenyatta at the helm, and later Daniel arap Moi.<sup>77</sup> The experiences of this period indicate that just like the colonial predecessor, Kenyatta and Moi regimes were not prepared to tolerate political pluralism and freedom of political expression in the country. First, Kenyatta presided over substantial amendments to the independence constitution. As noted in chapter 2, the

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<sup>73</sup> Ibid.

<sup>74</sup> Charles Muiro Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya' (2008, unpublished PhD thesis), *supra*, p. 47-48. For example Kenyatta had edited the first African newspaper, *Muigithania*, and had published many articles championing African interest while he was in England, Paul Ngei had been a journalist with *Uhuru wa Africa* (African Freedom), Achieng' Oneko was the editor of *Ramogi* and *Nyanza Times*, Fred Kubai edited *Sauti ya Mwafrica*, (African Voice) and Bildad Kagia the Kikuyu publication *Inooro ria Gikuyu*. Other editors and journalist who were arrested but were not part of the Kenyatta group dubbed the 'Kapenguria six' are Victor Wokabi (*Muthamaki*), JD Kali (*Sauti ya Mwafrica*), and Gakaara Wanjau.

<sup>75</sup> Ibid, p. 45-48.

<sup>76</sup> Ibid.

<sup>77</sup> Jomo Kenyatta became the Prime Minister in 1963 and President from 1964 until his death in August 1978. Daniel arap Moi succeeded Kenyatta in 1978 until December 2002.

amendments were calculated to weaken the legislature and the judiciary to a point of being unable to check the excesses of the executive. Second, and as regards freedom of expression in particular, the Preservation of Public Security (Amendment) Act, 1966 was enacted to empower the state to censor or prohibit communication of ideas.<sup>78</sup> Additionally, the state could ban any assembly or procession.<sup>79</sup> It is also through this law that the state was given power to detain without trial.<sup>80</sup> Around the same time, the Penal Code was amended to make it an offence of treason punishable by death to ‘imagine’ the death of the President or to make utterances, expressions, or declarations connected or alluding to the death of the President.<sup>81</sup> To protect “state secrets” and “state security” the Official Secrets Act<sup>82</sup> was enacted. While the extent to which this has helped promote state security cannot be empirically established, the effect has been to restrict the public’s access to information, and shield governmental actions from scrutiny. These drastic legal developments institutionalised political repression and facilitated state intolerance towards political freedom and political expression as the occurrences detailed below bear witness.

In practice, the first three decades of independence were replete with acts of state intolerance towards political dissent. Some have argued that journalists, publishers and politicians enjoyed some level of freedom to criticise government officials.<sup>83</sup> Evidence, however, shows that the freedom depended on the target of the criticism. Criticising the

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<sup>78</sup> Preservation of Public Security (Amendment) Act, No. 18 of 1966, section 4 (2)(d).

<sup>79</sup> Ibid, section 4 (2)(e).

<sup>80</sup> Ibid, section 4 (2) (a). This sanctioned preventive detentions without trial. Political dissidence was unwelcome both under Kenyatta and Moi regimes. Under this law, many politicians who were critical of the government such as Jaramogi Oginga Odinga, Achieng’ Oneko, Patrick Ooko, Koigi wa Wamwere, and many others were detained. This provision was later repealed vide Act No. 10 of 1997, 4<sup>th</sup> Schedule.

<sup>81</sup> Penal Code, chapter 63, section 40 (1) (2) (3). The crime of treason was expanded through Act No. 24 of 1967, section 2 to include “imagining” or merely alluding to the death of the President. The history behind it was that at the time, President Jomo Kenyatta was advanced in age and his health was deteriorating. This triggered anxiety over succession, different factions making efforts to influence succession, including trying to bar Vice President Daniel arap Moi from being the automatic interim successor. To stop these political maneuvers, the Attorney General Charles Njonjo drafted an amendment to the Penal Code. Parliament passed the amendment with the aim of stopping discussions about the death of President Jomo Kenyatta. The rule still remains in the Penal Code.

<sup>82</sup> Chapter 187, cap Laws of Kenya.

<sup>83</sup> Charles Muiro Ngugi, ‘Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya’ (2008, unpublished PhD thesis), *supra*, p. 136.

president and those close to him attracted serious consequences.<sup>84</sup> The assassination of JM Kariuki, a populist youthful politician who had become a fierce critic of the Kenyatta government and the subsequent detention of former Vice President Oginga Odinga best illustrate this point, and so does the killing of his confidante Pio Gama Pinto, and Bishop Alexander Kipsang Muge, a fierce critic of Moi's government.<sup>85</sup> Criticisms directed at the government were interpreted as sedition that would provoke serious consequences such as detention without trial or even death.<sup>86</sup>

Persecution of political dissenters and those perceived to be a potential threat to the regime were detained without trial, imprisoned, and expelled from KANU, tortured, forced into exile or even killed.<sup>87</sup> Many university students and lecturers were jailed for allegedly being members of subversive underground movements<sup>88</sup> or for distributing or being in possession of seditious materials, while others had to flee into exile.<sup>89</sup> Many publications were declared to be seditious and their editors hunted down by the police. These included *Pambana*, *the Nairobi Law Monthly*, and *Mpatanishi* among others.<sup>90</sup> University lecturers and civil servants were banned from forming trade unions, while university students were not allowed to form associations. In particular, the Nairobi University Academic Staff Union, Civil Servants Union and Student Union of Nairobi

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<sup>84</sup> Ibid.

<sup>85</sup> Ibid, p. 116-117. Pio Gama Pinto, a youthful politician of Asian origin was believed to be a socialist and the brain behind Jaramogi Oginga Odinga's socialist leanings.

<sup>86</sup> Ibid. Yet, in most cases, criticism of government was interpreted by the majority as unnecessary nuisance. The government enjoyed support and legitimacy as a result of the role the leaders of the time had played in the struggle for independence. See Charles Muiiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya' (2008, unpublished PhD thesis), *supra*, p.34.

<sup>87</sup> See details on '*We Lived to Tell the Nyayo House Story*' (2003) *Friedrich-Ebert-Stiftung*, available at <http://library.fes.de/pdf-files/bueros/kenia/01828.pdf>, p. 4-50. <Accessed 21 October 2015>. University dons such as Micere Mugo, Ngugi wa Thiong'o, Francis Imbuga all went into exile during this time. Bishop Alexander Kipsang Muge, a critic of the regime and foreign affairs minister Dr. Robert Ouko were killed. Government critics such as Otieno Makonyango, Koigi Wamwere, Shem Ogola, George Anyona, and others were tortured in what is now infamously called 'Nyayo torture chambers.' Dr Willy Mutunga (now Kenya's Chief Justice) and many others were imprisoned for allegedly being in possession of seditious materials and being members of subversive movements.

<sup>88</sup> *Mwakenya* and the *December Twelve Movement* (DTM) were the main movements that the state cited in most cases. With the ban of opposition parties, any organisation with political motives was potentially a subversive underground movement.

<sup>89</sup> Ibid.

<sup>90</sup> '*We Lived to Tell the Nyayo House Story*' *Friedrich-Ebert-Stiftung*, *supra*.

University (SONU) were banned for “overindulgence in politics.”<sup>91</sup> The effect of this was that civil servants, university lecturers and students could not voice their interests. Participating in politics, other than in support of KANU was dangerous and at times, deadly. Members of the police intelligence unit known as the *Special Branch*, were deployed at the University of Nairobi to monitor any dissenting political activity and to remove books written by authors such as Karl Marx, Ngugi wa Thiong’o, Che Guevara, Vladimir Lenin, Maina wa Kinyatti, Frantz Fanon, Fidel Castro and others considered by the regime to be too radical.<sup>92</sup>

The restriction on political freedom and freedom of expression was compounded by the fact that the airwaves were also fully controlled by the state. Only the state-owned Kenya Broadcasting Corporation (KBC) (later renamed Voice of Kenya (VOK) and then back to KBC) was allowed to operate radio and television.<sup>93</sup> As a result press freedom was under the control of the state; and only information found acceptable by the state could be broadcast.<sup>94</sup>

As concerns the enforcement of fundamental rights especially in the 1980s and 1990s, it is important to take note of certain developments that severely compromised the courts’ ability to intervene against the excesses of the executive. As already noted, the 1963 constitution had a bill of rights that sufficiently protected rights, and there is evidence of litigation of rights in the first 25 years of independence.<sup>95</sup> In 1988, judicial independence suffered a major blow. Parliament amended the constitution to remove security of tenure for judges and vested the power of their removal in the President.<sup>96</sup> This in essence meant that the judiciary’s ability to stand up to the executive was grossly compromised as some

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<sup>91</sup> Korwa Adar, ‘Human Rights and Academic Freedom in Kenya's Public Universities: The Case of the Universities Academic Staff Union (1999) 21 *Human Rights Quarterly* 179, p. 187.

<sup>92</sup> *We Lived to Tell the Nyayo House Story* Friedrich-Ebert-Stiftung, *supra*, p. 18.

<sup>93</sup> Charles Muiru Ngugi, ‘Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya’ (2008, unpublished PhD thesis), *supra*, p. 228-234. The airwaves were liberalised in Kenya in the late 1990s. It is only then that private TV and radio operators were allowed.

<sup>94</sup> *Ibid*, p. 231-232. Later, Kenya Broadcasting Corporation became both a radio and TV broadcaster as well as a regulator of the airwaves in a clear situation of conflict of interest.

<sup>95</sup> James T. Gathii, ‘The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya's Judicial Process (1994) *Thoughts on Democracy Series*, p. 15.

<sup>96</sup> *Ibid*, p.14. This was achieved through the Constitution of Kenya (Amendment) Act, No. 4 of 1988.

post-1988 High Court decisions indicate. In *Maina Mbacha v Attorney General*<sup>97</sup> and *Kamau Kuria v Attorney General*,<sup>98</sup> for example, the High Court declared that the bill of rights was incapable of enforcement since the Chief Justice had not made rules of procedure governing constitutional litigation.<sup>99</sup> This surprising decision sacrificed substantive constitutional protection of fundamental rights on the excuse of technical procedures and the inaction of the Chief Justice. The decisions were rather surprising because constitutional litigation had been going on before the High Court for years.<sup>100</sup> The fact that the two cases concerned matters in which the executive had a direct interest suggests a lack of independence occasioned by the removal of security of tenure.<sup>101</sup> With these developments eroding the power of the Courts to uphold rights, there was little hope for vibrancy of freedom of expression during this period. This explains, at least in part, the impunity of the state in suppressing freedom of expression and political dissent in the post-1988 period.

The 1990s began with a wave of democratisation sweeping across Africa, thanks to the fall of the Berlin Wall and the emergence of the United States as the sole super power. This wave did not spare Kenya. A constitutional amendment to return Kenya to political pluralism was passed, paving way for multiparty elections in December 1992.

The transition from nearly three decades of KANU's monopoly on the political sphere to multipartyism promised a change in the political landscape. Although Moi's KANU won the elections, it now had to contend with rival political players both inside and outside Parliament. It is common for political transitions to multipartyism to be accompanied by improved record of respect for political freedom and respect for human rights generally.<sup>102</sup> Kenya's transition in 1992 however did not result in a radical change as

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<sup>97</sup> [1989] 17 *Nairobi Law Monthly* 38.

<sup>98</sup> [1989] 15 *Nairobi Law Monthly* 33.

<sup>99</sup> James T. Gathii, 'The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya's Judicial Process, *supra*, p. 15.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> Basil Emeka Ogochukwu, "Adjudicating Human Rights in Transitional Contexts: A Nigerian Case Study, 1999-2009," (2014 unpublished PhD thesis, Osgood Hall Law School), p. 1.

regards political freedom.<sup>103</sup> Apart from the repeal of section 2A to allow for the formation of other political parties, the repressive mechanisms that existed prior to 1992 continued to exist.<sup>104</sup> In particular, all the laws suppressing freedom of expression and other political freedoms remained intact. The colonial laws and those enacted at the height of KANU despotism continued to be at the disposal of the authorities, and many journalists, political activists and politicians continued to face harassment and charges under these laws for criticising the state or the President.<sup>105</sup>

This situation shows that the 1992 change to multipartyism was an incomplete transition. It was incomplete because while political opposition was now legal, the infrastructure and psyche that perpetuated repression was still intact. The record of respect for freedom of expression and human rights generally remained poor, a contradictory situation that Fareed Zakaria has described as “illiberal democracy.”<sup>106</sup> This inchoate transition can be attributed to a number of factors: first, the transition was directed solely by KANU and President Moi. There were no political consultations with stakeholders outside KANU to work out the details of a comprehensive transition. Second, Moi was not persuaded about the merits of multiparty politics. He was only responding to internal and external pressure. In the absence of a real interest in change from the establishment, only minimum change could be expected.

The elections of 1997, second since the return of multipartyism, were preceded by a package of minimum constitutional and legal reforms. The change came in

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<sup>103</sup> Makau Wa Mutua, ‘Human Rights and State Despotism in Kenya: Institutional Problems,’ 41 *Africa Today* 50 (noting that although multiparty politics was now legal, the government continued to harass, arrest and imprison the opposition).

<sup>104</sup> Charles Muiro Ngugi, ‘Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya’ (2008, unpublished PhD thesis), *supra*.

<sup>105</sup> Njehu Gatabaki for instance, a journalist, opposition political activist and later Member of Parliament, was charged with criminal libel contrary to s. 194 of the Penal Code. He is alleged to have claimed that President Daniel arap Moi had ordered politically instigated ethnic clashes in which dozens of opposition supporters were killed and thousands displaced in Moi’s Rift Valley Province. Also Journalists such as Jonah Wandeto and Mohamed Sheikh and Member of Parliament George Kapten are among those charged with criminal defamation during this period: See an in-depth account in Charles Muiro Ngugi, ‘Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya’ (2008, unpublished PhD thesis), *supra*, p.246

<sup>106</sup> Fareed Zakaria, ‘The Rise of Illiberal Democracy,’ (1997) 76 *Foreign Affairs* 22, p. 22-24.

the form of the Inter-Party Parliamentary Group (IPPG) reforms.<sup>107</sup> The IPPG reforms were intended to level the playing field for all political parties.<sup>108</sup> A number of these reforms were relevant to freedom of expression. They included the repeal of sedition laws in the Penal Code, and section 52 of the Preservation of Public Security Act (which empowered the minister for security to ban publications if he believed they undermined certain state interests).<sup>109</sup> The power of the state to detain without trial was also removed.

It should not however be assumed that the IPPG reforms meant true freedom of political expression in the post-1997 period. The repeal of sedition and detention laws did not automatically change the attitude of the state. The state remained largely intolerant to political dissent and criticism. Although the period was characterised by a bolder opposition and media due to more state restraint because of the repeal of sedition and detention laws, the government devised new ways of silencing political dissent and punishing critics.<sup>110</sup> This period is awash with incidences such as the banning of public display of plays with political overtones, forceful dispersal of political rallies on the disguise of failure to give notice to the police, to outright threats on political dissenters.<sup>111</sup> For instance in the run-up to 2002 elections, President Moi ordered the police to monitor all speeches made by politicians in public rallies.<sup>112</sup> He went on to warn dissenters in his party that “he would use all means at his disposal to silence them.”<sup>113</sup> Expression and mobilisation that hinted, even in the slightest, that one was not loyal to the party would attract dire consequences.

On the legal front, there were a few developments that further constrained media freedom. For instance, the Statute Law (Miscellaneous Amendments) of 2001

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<sup>107</sup> Charles Muiru Ngugi, ‘Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya’ (2008, unpublished PhD thesis), *supra*, p. 240.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*, p. 171, 172, 238. For instance Ngugi wa Thiong’o’s play in Kikuyu language ‘*Ngaahika Ndeenda*’ later translated ‘*I will marry when I want*’ was banned in the 1980s. Kamirithu Village theatre where the play was acted was also closed down. Others are Wahome Mutahi’s *Ngoma Cia Aka* and Richard Mutahi’s *Katiba* banned in 2002. The last two were banned on grounds of national security and public morality.

<sup>112</sup> *Ibid.*, p. 238.

<sup>113</sup> *Ibid.*, p. 238.

increased bonds payable by publishers and increased penalties for distributors of publications that had not paid the requisite bonds.<sup>114</sup> These sweeping measures demonstrated the state's reluctance to allow unfettered freedom of expression especially as concerns political affairs even in the multiparty era.

As the executive and the legislature continued to carry on suppression of political freedom, another trend was emerging at the courts. It was during this period that the High Court awarded hefty damages against media houses and publishers in defamation suits brought by prominent personalities. Award of hefty damages in defamation suits was not new in Kenya. What is ironical, however, is that the trend rose sharply in a period in which democratisation was supposedly taking root since the return of multi-party democracy. The hefty sums were also awarded in favour of pro-government personalities. Between 2000 and 2002 alone, the courts awarded a total of Kenya Shillings 110 million (1.4 million dollars) to four litigants who were either public officials or were political and business associates of President Moi.<sup>115</sup>

Defamation law is intended to vindicate claimants for injury to their reputation.<sup>116</sup> It seeks to balance freedom of expression and the protection of reputation.<sup>117</sup> The objective should be no more than to compensate the claimant for harm caused by defamation except where the award of punitive and aggravated damages is warranted. It should be recalled that although the defendant may have erred, the starting point is that they enjoy the right to freedom of expression up to a certain extent where the dividing line between permitted speech and defamation lies. Therefore, any awards of hefty damages that have the potential of crippling the media or occasioning self-censorship should be

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<sup>114</sup> Ibid, 241-242.

<sup>115</sup> Ibid, p.238. See also [http://www.newsfromafrica.org/newsfromafrica/articles/art\\_593.html](http://www.newsfromafrica.org/newsfromafrica/articles/art_593.html) <accessed 21 October 2015>. For instance, Joshua Kulei, the President Moi's confidante and business associate was awarded damages of Kenya Shillings 10 million (USD 133, 000) against the *People Daily*, while Moi's powerful cabinet minister Nicholas Biwott was awarded Kenya Shillings 67.5 million (USD 1,000, 000) against *The People Daily*, an author Dr. Ian West and Bookpoint- a Nairobi bookshop over allegations of corruption and involvement in the murder of foreign affairs minister Dr. Robert Ouko.

<sup>116</sup> Sanette Nel, Reputation versus Freedom of Speech and Media (1996) 4 *The Quarterly Law Review for People in Business* 97.

<sup>117</sup> Ibid.

subjected to heightened scrutiny. This is especially so for criticism directed at the government or public officials.<sup>118</sup> For the examples given above, the defendants were the media while the plaintiffs were public officials or prominent personalities associated with the establishment, while the offending expression concerned matters of public interest such as corruption and the conduct of public officials.<sup>119</sup> A discussion on defamation of public officials and public debate on public interest matters will follow in chapter five. For now, it is sufficient to observe that the law on defamation and its effect on freedom of expression and media in Kenya deserve deeper analysis. Aside from discouraging investigative journalism and causing self-censorship among media players, such suits have had the effect of hindering transparency in government, hence fuelling corruption.<sup>120</sup>

Granted, the reputation of claimants is important. But so is the media freedom to publish fair comment, and the people's right to receive information. Values such as transparency and accountability in public affairs are also equally important. Therefore, the approach taken in deciding what will prevail among these competing values becomes crucial. In *Sunday Times v The United Kingdom*,<sup>121</sup> the European Court of Human Rights noted that in matters of public interest, the approach is not determining what value will triumph. Rather, it is about assessing whether a restriction on the freedom of expression meets the necessary criteria; that is, it is provided by law, is necessary, and achieves a legitimate aim.<sup>122</sup> This approach gives primacy to the right and ensures that it is the starting point in any attempt at balancing competing rights and values.

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<sup>118</sup> In the case of *Rajagopal and others vs. State of Tamil Nadu and Others*, Petition (C) No. 422 of 1994, JT 1994 (6) SC 514, the Supreme Court of India held that public officials cannot recover damages for defamation unless where the defendant acted in wanton recklessness as to the truth of the statements. In other words, the defendant does not need to prove truth in order to avoid liability. It is enough to show that reasonable attempts were made to verify the truth. In this holding, the Court adopted the 'actual malice' standard set by the United States Supreme Court in *New York Times v Sullivan* (376 US 254 (1964))

<sup>119</sup> This trend of public officials in Kenya receiving hefty award of damages for defamation is a sharp contrast with the position established by the Supreme Courts of the United States and India as highlighted above.

<sup>120</sup> It should be recalled that it is also around this time and soon after that the Goldenberg and Anglo Leasing corruption scandals, detailed in chapter 2, occurred. It is common for public officials in Kenya mentioned in connection with corruption to threaten to sue for defamation.

<sup>121</sup> Application No. 6538/74 (26 April 1979)

<sup>122</sup> *Ibid.*

As for implications on freedom of expression, the zeal to clamp down on government critics using defamation laws, including the award of hefty damages against journalists and publishers meant that the freedom to impart, receive and share information was hindered significantly, hence undermining the constitutional guarantees.<sup>123</sup>

It is reasonable to expect that after years of colonial oppression, the ruling African political elite would be committed to fostering democracy, political freedom and respect for human rights. Ironically, this was not to be. Most post-colonial regimes were autocratic and presided over human rights abuses in proportions that rivaled the colonial authorities.<sup>124</sup> In Kenya, the post-independence government retained the provincial administration system and the repressive colonial laws, and enacted new ones.<sup>125</sup> This system of administration and other state organs were then used to enforce repressive laws and mete out terror on political dissenters.<sup>126</sup>

Jomo Kenyatta and Moi, the two leaders during the period under consideration were at the centre of the struggle for African liberation. It is therefore paradoxical that their regimes showed little or no commitment to democracy and freedom, but instead presided over repression.<sup>127</sup> This paradox, it can be deduced, is directly connected to colonialism.<sup>128</sup> The colonial regime passed on a legacy of repressive laws, undemocratic and unaccountable provincial administration, an ethnically divided society, a culture of brutal abuse of human rights, a judiciary lacking experience of judicial review

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<sup>123</sup> The Defamation Act, chapter 36 was amended in 1992 to introduce section 16A. The new section allowed unfettered discretion to the courts to award damages as 'it deems just.' It also set a lower limit for damages that may be awarded for alleged defamatory statements such that any allegations touching on an offence punishable by death would attract a minimum of Kenya shillings one million (USD 10000) in damages and a minimum of Kenya shillings four hundred thousand (USD 4000) in respect of allegations of an offence punishable by a jail term of not less than three years. This changes set the stage for the huge sums of damages that courts have awarded since then, as noted in chapter one and five.

<sup>124</sup> Sabelo J. Ndlovu-Gatsheni, (2013) *Coloniality of Power in Postcolonial Africa: Myths of Decolonization* Dakar: CODESRIA, ISBN: 978-2-86978-578-6: p. 86.

<sup>125</sup> Ibid.

<sup>126</sup> David Throup and Charles Hornsby, (1998) *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Election* Oxford: James Currey Publishers:

<sup>127</sup> Sabelo J. Ndlovu-Gatsheni, (2013) *Coloniality of Power in Postcolonial Africa: Myths of Decolonization, supra.*

<sup>128</sup> Ibid.

and adjudicating rights, and political elite engaged in ideological contests. These factors colluded to create the post-colonial experiences.

This paradox of Kenya's post-colonial experience can be explained in light of the socio-political realities of the time.<sup>129</sup> First, the independence constitution contained claw-back clauses which justified wide restrictions on fundamental rights.<sup>130</sup> For instance, it gave the state a *carte blanche* to enact laws to restrict the freedom of expression in the interest of public safety, public policy, public morality and public order.<sup>131</sup> It also allowed restrictions for purposes of protecting the rights, reputation, and freedoms of other people, or the integrity of telecommunications.<sup>132</sup> In addition, public officers could be restricted from exercising freedom of expression for as long as such a restriction could be seen as 'justifiable in a democratic society.'<sup>133</sup> With a weak subservient judiciary that had no experience in rights adjudication or judicial review, the claw-back clauses severely undermined freedom of expression. This legitimised pre-independence laws, and arguably paved the way for the enactment of more expression-restricting laws contained in the Penal Code,<sup>134</sup> Books and Newspapers Act,<sup>135</sup> The Preservation of Public Security Act,<sup>136</sup> and the Public Order Act<sup>137</sup>, among others.<sup>138</sup>

Second, is the enormity of the task that awaited the post-colonial administration, and for which it was largely unprepared: the task of nation building and economic development. The consciousness of oneness as a Kenyan nation came to the fore

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<sup>129</sup> The intention is not to provide an excuse for the ruling political elite. Rather, it is to explain the prevailing socio-political context that is useful in understanding the contradiction.

<sup>130</sup> See section 79(1) which provided: "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication is to the public generally or to any person or class of persons) and freedom from interference with his correspondence."

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Chapter 63, Laws of Kenya.

<sup>135</sup> Chapter 111, Laws of Kenya.

<sup>136</sup> Chapter 57.

<sup>137</sup> Chapter 56.

<sup>138</sup> A more detailed discussion on the legal regime of limitation of freedom of expression is deferred until chapter five.

only in the years preceding independence with the rise of African nationalism.<sup>139</sup> The colony was simply a conglomeration of ethnic micro-states loosely glued together by colonial imperialism. Consistent with the doctrine of *uti possidetis*, the decolonisation process entailed retention of colonial boundaries. Thus, the task of cementing the micro-states into a 'nation' was cut out for the independence regime. There was also the task of continuing the economic development initiated by the settlers, this time for the benefit of the newly independent country and its people. Both President Kenyatta and Moi believed that national cohesion and faster economic development needed political unity.<sup>140</sup> Political unity meant concentrating political activity under a single party.<sup>141</sup> As a result, difference of political opinion meant subversion of development and nation-building agenda that justified state drastic response.<sup>142</sup>

Third, the political intolerance of the post-independence era can also be connected to cold war politics at the global scene at the time. In Africa and elsewhere, cold war politics instigated internal political duels, military coups, assassinations and even

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<sup>139</sup> Felicia A. Yieke, 'Ethnicity and Development in Kenya: Lessons from 2007 General Elections (2011) 3 *Kenya Studies Review*, 8.

<sup>140</sup> This explains the position that his party KANU took at the Lancaster House conference regarding the question of whether to adopt federal or unitary systems of government. It also explains the move soon after independence to replace federalism with a unitary system and to coalesce opposition party KADU to join KANU. These persuasions about the appropriate model needed for accelerated development and national cohesion had implications on freedom of expression. For one, voices of political dissent were seen as a nuisance and unwelcome recalcitrance in the path of development and nation building. President Kenyatta led from the front, coining the slogan 'harambee' understood to mean "pulling together" in the African socialist sense. This call became a greeting in national and political gatherings during Kenyatta and Moi regimes and the official national motto. This philosophy of national unity and single-party under a powerful leader is not unique to Kenya. The same, under the guise of African socialism was witnessed in most parts of Africa including Tanzania under Julius Nyerere, Ghana under Kwame Nkrumah, Malawi under Kamuzu Banda, and Zambia under Kenneth Kaunda. See William Edward Adjei, 'The Protection of Freedom of Expression in Africa: Problems of Application and Interpretation of Article 9 of the African Charter on Human and Peoples' Rights' (2012) (Unpublished PhD thesis), p.78-98.

<sup>141</sup> Daniel T. Moi, (1986) *Kenya African Nationalism: Nyayo Philosophy and Principles*, Macmillan Publishers.

<sup>142</sup> Both Kenyatta and Moi detained political dissenters at will. Opposition party KPU leader Jaramogi Oginga Odinga, Martin Shikuku, Achieng Oneko, Koigi wa Wamwere, and Bildad Kaggia were detained by Kenyatta. Moi detained Raila Odinga, Kenneth Matiba, Charles Rubia, and others.

war.<sup>143</sup> This heightened suspicion and feelings of insecurity that not only incited intolerance towards political dissent but also provided justification for repression.

Fourth, external pressure to respect human rights and allow political pluralism was absent at the time. There are two reasons for this: first, cold war politics ensured that the West could not reprimand oppressive regimes without political risks.<sup>144</sup> Second, the Organisation of Africa Unity (OAU) at the time pursued a policy of strict “non-interference” in internal affairs, while most of African states were preoccupied with wars of liberation, internal strife, or were under military regimes or one-party dictatorship.<sup>145</sup> In other words, political repression and authoritarianism in Africa under the umbrella of African socialism and single-party rule was the norm.<sup>146</sup>

Moi’s political insecurities added fuel to the situation. Upon succeeding Kenyatta following his death in 1978, he pledged to “follow the footsteps of his predecessor.”<sup>147</sup> This was understood as a promise to Kenyatta’s supporters especially his populous Kikuyu community that their political situation would be assured under the new regime. Coming from minority Tugen community, Moi’s political base was weak. Therefore, he was keen to devise means of consolidating his political power base.<sup>148</sup> At his disposal was both carrot and stick: appointments, jobs, cash and land for supporters and potential supporters; and state-sponsored terror, for opponents. In August 1982, there was an attempted coup by junior air force officers.<sup>149</sup> This happened at a time when military coups and assassination of incumbents was rampant in Africa. This failed coup further

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<sup>143</sup> The rivalry between President Kasavumbu and Prime Minister Lumumba in Congo, and the assassination of the later is a good example. See generally, Carole Collins, ‘The Cold War Comes to Africa: Cordier and the 1960 Congo Crisis.’ (1993) 47 *Journal of International Affairs* 243.

<sup>144</sup> Makau Mutua, ‘Human Rights in Africa: The Limited Promise of Liberalism,’ (2008) 51 *African Studies Review* 17.

<sup>145</sup> William Edward Adjei, ‘The Protection of Freedom of Expression in Africa: Problems of Application and Interpretation of Article 9 of the African Charter on Human and Peoples’ Rights’ (2012)(Unpublished PhD thesis), p. 47-49.

<sup>146</sup> Ibid. A similar trend of dictators ruling with the support or acquiescence of the super powers was also common in other parts of the world such as South America, Asia and Eastern Europe.

<sup>147</sup> This promise was coined into a national philosophy and slogan, in Swahili, ‘*Nyayo*.’

<sup>148</sup> Charles Muiru Ngugi, ‘Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya’ (2008, unpublished PhD thesis), *supra*, p.207-279

<sup>149</sup> Ibid.

motivated Moi on the path of political insecurity and repression.<sup>150</sup> In the same year, the constitution was amended to make Kenya a single-party state,<sup>151</sup> hence outlawing political activities outside KANU. Expressing alternative political opinion and mobilising politically outside the KANU framework was officially subversive with dire consequences. Although the amendment was intended to institute a one-party state, it in effect curtailed political choices and the freedoms of expression, association, and assembly.

#### 4.3.3. Freedom of Expression in Post-Colonial Kenya: 2002 to present

As was noted in chapter 2, a number of significant political moments and transitions as well as political instabilities and tensions characterise this period. These include the end of Moi and KANU era in 2002, two nation-wide referenda on constitutional review, the 2007-2008 post-election violence, the promulgation of a new constitution in August 2010, the exit of President Kibaki and the election a new government under the new constitution. In addition, this period also saw a wave of systematic terrorist attacks posed by Al-Qaeda inspired *Al Shabab* extremist group.<sup>152</sup> It is also a period which witnessed a meteoric rise in the use of mobile phones, internet and social media as well as a massive increase in radio and TV stations. These events shaped freedom of expression experiences and legal responses over this period as will be demonstrated below.

From the outset, it is clear that the ouster of KANU and Moi brought in a new wave of freedom. Elected on a platform of reform, the regime of President Kibaki largely tolerated press freedom and freedom of expression, and many believed that the much

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<sup>150</sup> Ibid. It should also be recalled that this was a period of instability in Africa and the world at large. Military coups and assassination of leaders were common in the 1970s and 80s. This partly explains Moi's keenness to establish a firm grip on power.

<sup>151</sup> Makau W. Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya,' (2001) *supra*, p.98.

<sup>152</sup> Since October 2011 when Kenya sent troops to Somalia to fight *Al Shabaab* terrorist group, the country has suffered over 100 terrorist attacks killing over 370 people and injuring over 1000. See new reports on: <http://www.standardmedia.co.ke/article/2000131848/kenya-has-experienced-100-terror-related-attacks-in-three-years>. <Accessed 19 February 2016>.

awaited “second liberation” had finally come.<sup>153</sup> Anyone could criticise the government and the President without fear.<sup>154</sup>

While it is widely acknowledged that Kibaki’s regime was largely tolerant of freedoms of expression and media, a few incidences scar the narrative and indicates its ambivalence. One such incidence was the raid of the Standard Group, one of the leading print and electronic media houses in the country, in which newspapers and equipment were destroyed.<sup>155</sup> The raid believed to have been carried out by or with the blessing of the government, was allegedly intended to prevent the circulation of damaging information written about President Kibaki and members of his family.<sup>156</sup> The state defended this incident, arguing that it was necessary for national security.<sup>157</sup> Another was the raid of Kenya’s leading media house, Nation Media, by the First Lady Lucy Kibaki and her security detail to protest unfavourable coverage of the President’s family.<sup>158</sup>

The 2007-2008 post-election violence, the country’s lowest moment since *Mau Mau* emergency period, directly influenced the enacted National Cohesion and Integration Act, 2008, which, among other things, criminalised hate speech. This law was enacted in response to the need to monitor utterances that could stir ethnic or racial emotions and undermine peace and national cohesion. As a result, the post-2008 period saw the beginning of hate speech charges against politicians, artists and social media enthusiasts

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<sup>153</sup> Charles Muiru Ngugi, ‘Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya’ (2008, unpublished PhD thesis), *supra*, Ibid, p. 238.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid, p. 1.

<sup>156</sup> Ibid, p.1.

<sup>157</sup> See the state’s arguments in *Standard Newspapers Limited & another v Attorney General & 4 others* [2013] eKLR. Commenting on the raid, the minister for Internal Security at the time, John Michuki remarked, “if you rattle a snake, you must be prepared to be bitten by it.” See <http://www.nation.co.ke/news/-/1056/830858/-/view/printVersion/-/rfgyf1z/-/index.html>. <Accessed on 19 February 2016>.

<sup>158</sup> <http://news.bbc.co.uk/2/hi/africa/4512435.stm>. During the raid journalist Clifford Richard Otieno was assaulted and his camera damaged by the President’s wife. The police failed to investigate or record his complaint. The Attorney General stopped his efforts to institute private prosecutions against the First Lady. See *Otieno Clifford Richard v Republic*, Misc Civil Suit No. 720 of 2005 [HCK].

for political comments tending to whip ethnic emotions.<sup>159</sup> An analysis of the legitimacy of hate speech crime is deferred until chapter 5. It is important to note however that despite noble intentions, the offence of hate speech, depending on how prosecutors and courts conceptualise it, could pose a serious (and potentially illegitimate) threat to freedom of expression.

Despite these mixed experiences, the Kibaki era was perhaps the beginning of an era of openness and real tolerance to freedom of expression and the press in the country's history. If the much anticipated "second liberation"<sup>160</sup> had not arrived, its prelude, it seemed, was already underway.<sup>161</sup>

Uhuru Kenyatta's succession of Kibaki in early 2013 happened at a time when the implementation of the 2010 Constitution, resulting in massive institutional and legal reforms, was at a climax. As was noted in chapter 2, the promulgation of the 2010 Constitution was a commitment to radical social and political transformation: a new dispensation characterised by openness, democracy, and respect for fundamental rights and freedoms. As regards freedom of expression, the provision in the independence constitution was replaced with one that is similar to the South Africa provision, and situated within a very strong and justiciable bill of rights.<sup>162</sup>

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<sup>159</sup> Politicians Chirau Ali Mwakwere and Moses Kuria have faced charges of hate speech. University student Allan Wadi was convicted and jailed for two years for hate speech. Social media enthusiast Robert Alai, political analyst Mutahi Ngunyi, and many politicians have been summoned or charged with hate speech.

<sup>160</sup> Since the 1990s struggle for political and legal reforms were championed by the opposition as being intended to bring the "second liberation." It was a way of saying independence from colonial rule had failed to bring real freedom to the country, and a "second liberation" was needed, this time, from post-independence regimes.

<sup>161</sup> As evidenced by the motivations behind the enactment of this law, Kenya's experiences with freedom of expression have not been rosy even in post-Moi era. It should be recalled that the Kenyan case before the International Criminal Court against the Deputy President William Ruto and radio journalist Joshua arap Sang involved allegations of radio propaganda. It was alleged that the radio journalist uttered coded words broadcast through Kass FM radio which fanned the violence that erupted following disputed presidential elections in December 2007. Thus, it can be said that freedom of expression and media was at the heart of the crimes against humanity cases against the two suspects.

<sup>162</sup> The South African (and Kenya's) provision adopts the ECHR and develops it by incorporating internal limits such as hate speech, incitement to violence, vilification of others and propaganda for war. It omits the list of countervailing grounds that the ECHR has, opting only to subject limitations to a more elaborate limitation clause under section 36 and article 24 of South Africa's and Kenya's Constitution respectively.

The adoption of a strong justiciable bill of rights and a new structure of freedom of expression guarantee under the 2010 Constitution should not, however, be mistaken with a concomitant respect for the right. The state's attitude towards freedom of expression can be said to be largely equivocal, and at times hostile. Three reasons support this assertion. First, Parliament, the first under the 2010 Constitution has enacted a few media-unfriendly laws. Second, it is now frequent for the government to arrest, harass, and prosecute those who criticise or paint the government in bad light on social media and blogs. Finally, many laws that undermine freedom of expression and the media, some dating back to the colonial, Kenyatta and Moi regimes continue to be retained and enforced. These reasons are further explained in detail below.

The post-2010 Parliament has enacted or attempted to enact a few expression and media restricting laws. For instance, in October 2015, Parliament approved a bill that made it a serious offence for any person to speak words that are "defamatory of Parliament" or "publish false or scandalous libel" against Parliament, its committees or proceedings."<sup>163</sup> Administratively, the National Assembly ejected the media from the media centre, citing space constraints.<sup>164</sup>

These moves were a direct response to media and civil society activism criticising parliamentarians for awarding themselves (or demanding) huge salaries.<sup>165</sup> The activism resulted in mass protests and turned the public perception against Parliament. In the same vein, Parliament proposed a rule requiring journalists to obtain the Speaker's

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<sup>163</sup> Section 32 (1)(2) of the Parliamentary Powers and Privileges Bill, 2014 available at: <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/ParliamentaryPowersandPrivilegesBill2014.pdf> <accessed 17 October 2015>. See story on <http://www.businessdailyafrica.com/MPs-gang-up-to-pass-anti-media-law/-/539546/2913950/-/r3nclk/-/index.html> <accessed 17 October 2015>.

<sup>164</sup>See news item on <http://www.nation.co.ke/News/politics/Journalists-locked-out-of-Parliament-media-centre/-/1064/1872960/-/robxspz/-/index.html>.

<sup>165</sup> Unlike in the previous Constitution, Parliament cannot increase its salaries under the current Constitution. That power is vested in Salaries and Remuneration Commission. See *Okiya Omtatah Okiiti & 3 others v Attorney General & 5 others* [2014] eKLR (HCK Petition 227 of 2013). As soon as its tenure began, Parliament passed a law awarding itself huge pay increase in violation of the Constitution. This attracted public outcry, media campaign and litigation.

permission before covering debates.<sup>166</sup> The proposals were later dropped. These proposals would have in effect subjected the public's right to know and the journalists' right to disseminate information, to the discretion of the Speaker. These self-serving legal and administrative measures would have effectively violated the freedom of expression and undermined the constitutional values of transparency and accountability by insulating the legislature from public scrutiny. In *Gauthier v Canada*,<sup>167</sup> the Human Rights Committee (HRC) observed that denying a journalist access to media space to be able to effectively cover parliamentary debates violated freedom of expression to the extent that it limited the journalist's right to impart and the public's right to receive information.

It is easy to see that journalists have the right to report and the public the right to receive information of happenings in parliament since that is the core of freedom of expression and media. There is, however, a secondary but important question: do journalists have the right to be facilitated so as to be able to report effectively? This seemingly peripheral question is important especially given that access to the precincts of parliament is restricted. The Human Rights Committee decision in *Gauthier v Canada highlighted above* offers some guidance. The relevant highlight of this decision is that accredited journalists, unless there are legitimate justifications, may not be denied full access to press facilities necessary for effective reporting. It may be argued that the constitutional values of transparency, accountability, public participation as well as the right to freedom of expression and media necessarily requires Parliament to facilitate journalists to report effectively. As a state organ, Parliament is a guarantor (and potential violator) of rights and constitutional values. Given its immense powers and responsibilities as well as access and command over state resources, there is a corresponding duty to facilitate coverage of its proceedings. A contrary position would defeat these fundamental rights and constitutional values. This position is supported by the constitutional requirement that Parliament must conduct its business in an open manner;

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<sup>166</sup> See news item on: <http://radiocitizen.co.ke/index.php/news/item/33236-media-owners-oppose-draconian-bill>. This requirement was later deleted.

<sup>167</sup> Communication No 633/1995, U.N. Doc. CCPR/C/65/D/633/1995 (5 May 1999)

allow public access and participation, and media coverage.<sup>168</sup> The argument here is that the right of the media to cover and the public to know imposes a duty on Parliament to facilitate coverage because in the absence of such an obligation, the right will be greatly compromised. It follows that media coverage and the public's right to be informed of parliamentary proceedings is not subject to the Speaker's or Parliament's discretion. It is a constitutional demand.

In the aftermath of Westgate Mall terror attack in September 2013 in Nairobi, and several similar incidences, Parliament enacted the Kenya Information and Communication (Amendment) Act, 2013 and the Media Council Act, 2013. These two laws were greeted with protests and litigation because of their potential effects on freedom of expression and media. For instance, the Media Council Act introduced heavy penalties for journalists and media operators found guilty of violating the media code of conduct.<sup>169</sup> The fear among media and freedom of expression defenders is that the fines are beyond the ability of small media houses, and could bring their businesses to an abrupt end. Importantly, the perpetual threat of heavy penalties instills fear among journalists and entrench intimidation, thereby leading to self censorship. On the flip side, it also serves to limit information available to the ordinary citizens, thereby limiting their right to receive information. In the end, transparency and accountability in government affairs, is the ultimate victim.

On its part, the Kenya Information and Communication (Amendment) Act created a body with the mandate to, among other things, enforce content of broadcasts regulations, protect privacy of persons, promote competition of ideas in the media and enforce media standards including making necessary regulations relating to freedom of expression. These far-reaching powers in the hands of state-controlled institutions do not

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<sup>168</sup> Article 118 (1) Parliament shall- (a) conduct its business in an open manner, and its sittings and those of its committees are open to the public; and (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees. (2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.

<sup>169</sup> The fines for violating media code of conduct are upto Kenya Shillings twenty million (about USD 240,000). This is way too high for many individuals and companies.

augur well with the freedom of expression and media depending on how the powers are exercised.<sup>170</sup>

At the height of more terror attacks around the country, more media and expression-restricting laws were passed. In December 2014, Security Laws (Amendment) Act, 2014 (SLAA) was passed amidst chaos in the National Assembly. Majority of security laws in Kenya date to colonial times. This Act contains the most comprehensive reforms on security-related laws in post-colonial Kenya. These legal amendments, some of which affecting freedom of expression and media are a direct response to terrorist attacks by *Al-shabab group* and violent extremism that is now a transnational or global phenomenon. A few examples are appropriate: one, SLAA prohibited the publishing of photographs of victims of terrorism without the consent of the National Police Service and the victims.<sup>171</sup> Second, it prohibited broadcast of any information that could undermine security operations against terrorism without the consent of the Police.<sup>172</sup> Third, it made it a serious offence for anyone to publish or utter words that could induce others to commit acts of terrorism, irrespective of whether or not anyone is actually induced.<sup>173</sup>

The post-2010 era opened new frontiers of state-citizen conflict around the idea of freedom of expression. Since 2008, many of those charged with expression-related offences have been as a result of messages sent through the internet and mobile phones. This situation is connected to revolutions in information and communication technology (ICT) that has empowered people to communicate in unprecedented ways. Government statistics show that mobile phone connectivity is at over 80 percent of the country's population, translating to about 33 million people, with half of this number accessing

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<sup>170</sup> Some of the provisions in the two laws were seen as knee jerk reactions to the terror attack in Westgate Shopping Mall in Nairobi in which the government was unhappy with investigative journalism that revealed confusion and poor response by the country's security forces. In the aftermath, the government sought to arrest journalists and media owners for the coverage. Fortunately for the journalists, the law was not on the government's side.

<sup>171</sup> Security Laws (Amendment) Act, 2014, section 64.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid. In a petition filed by the opposition coalition CORD, *Coalition for Reform & Democracy (CORD), Kenya National Commission on Human Rights & Samuel Njuguna Ng'ang'a v Republic of Kenya & another* [2015] eKLR, these provisions were invalidated for offending freedom of expression guaranteed under the Constitution. A deeper analysis of the proportionality and balancing applied by the Court is deferred until chapter 6.

internet via mobile phones.<sup>174</sup> This development has resulted in a huge number of bloggers and social media users. The internet has expanded the audience that individuals can access. Through facebook, twitter, instagram and other social media platforms, individuals can instantly communicate with a global audience inexpensively via text, photographs, audio and video messages. This has placed immense power in the hands of individuals in unprecedented ways, making anyone to potentially be a journalist with a global reach as the events of the 'Arab spring' demonstrated.<sup>175</sup>

Mainstream media has similarly undergone radical changes. Through online news portals, internet radio and TV, and other avenues, media operators have a world-wide audience that can be reached instantly. While this empowerment is also available to governments, the revolution has also meant significant loss of power and control. Every government however 'open' it may be, has strategic reasons to control information that goes to the public domain. The radical shift brought about by the internet has grossly weakened the ability of government to control circulation of information. The embarrassment suffered by the United States with WikiLeaks is a good example.<sup>176</sup> The fact that the US government was totally powerless in stopping the revelations or obliterating them from the cyberspace represents a significant loss of power. In this era of online newspapers and news posts, the Standard Group raids in Kenya described earlier would be futile.

The radical shift in power in the information age has increased government unease, opening up new fronts for struggle between the state and individuals. In frantic efforts to control flow of information that it is uneasy with, the government has on several occasions arrested social media enthusiasts, journalists, bloggers, politicians and political

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<sup>174</sup> <http://ca.go.ke/index.php/what-we-do/94-news/285-kenya-s-mobile-penetration-hits-80-per-cent>

<sup>175</sup> In places that are too dangerous for journalists to operate freely such as Libya, Syria and Egypt a lot of information comes through ordinary people posting messages and videos on the internet, which may then be authenticated through audio and video analysis.

<sup>176</sup> Julian Assange, the person at the centre of the controversy published classified information through the website of his organisation WikiLeaks. The website released details of secrets of the Afghan war, Iraqi war, Guantanamo Bay prison and diplomatic communications of the US State Department. The information embarrassed the United States government and continues to cause discomfort.

activists for sending unpopular messages.<sup>177</sup> It is now common for the police and the National Cohesion and Integration Commission (NCIC) to summon or arrest bloggers and social media users for ‘undermining the authority of a public officer,’<sup>178</sup> hate speech,<sup>179</sup> and improper use of telecommunication system.<sup>180</sup> One pattern that emerges in these cases is that the offending messages have tended to touch on government action, the President or other prominent public figures, ethnic slur, and national security or anti-terrorism operations. These indicate new tensions arising from expanded democratic space and corresponding erosion of government’s authority, a more engaging citizenry, the revolutions in ICT, and the complexity of the fight against terrorism.

That all the post-colonial regimes, especially post-Moi era have not shown a serious commitment a comprehensive review of laws that are hostile to freedom of expression is an interesting subject of inquiry. The 2010 Constitution envisages a massive review of pre-existing laws to bring them to conformity with its letter and spirit. Yet the legislative process has avoided overhauling freedom of expression laws. On the contrary, the evidence highlighted above shows that Parliament has, in fact, enacted some more controversial laws with potentially adverse effects on freedom of expression and media.

This failure to review the law, together with enactment of more adverse laws and increased prosecution or harassment of critics suggests a lack of commitment on the part of the post-2002 regimes to genuine freedom of expression, or a failure by the political elite to appreciate the demands of the 2010 Constitution. The fact that Parliament could propose to enact or enact laws insulating itself from criticism, subjecting journalism to the discretion of the Speaker or the Police, or that journalists and bloggers could be arrested,

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<sup>177</sup> Robert Alai, Yasin Juma, Abraham Mutai, Eddy Reuben Illah, and Allan Wadi are some of the people who have been summoned, arrested or charged for crimes ranging from criticising government officials including the President, or posting information about the failures of Kenya’s military campaigns in Somalia.

<sup>178</sup> Under section 132 of the Penal Code. This is a 1950 law which makes it an offence to say or do anything that brings a public officer (including the President) to disrepute or ridicule.

<sup>179</sup> Under section 62 of the National Cohesion and Integration Act, 2008. Ordinary people and prominent politicians and media personalities including Chirau Ali Mwakwere, Johnstone Muthama, Moses Kuria and Mutahi Ngunyi have faced charges for utterance made in public and on social media.

<sup>180</sup> Section 29 of Kenya Information and Communication Act, chapter 411, Laws of Kenya. The charges under this section have specifically targeted those sending insults or threats through short message service (sms) using a mobile phone and similar devices.

detained or harassed with or without criminal charges for reporting adversely against public officials or security agents also suggests that the political elite is yet to fully appreciate the transformative agenda of the 2010 Constitution as was demonstrated in chapter 2. This makes political culture<sup>181</sup> (besides legal culture as was discussed in chapter 2) an enduring threat to freedom of expression and media in Kenya.

#### 4.4. Kenya's International Legal Obligations Relating to Freedom of Expression

The obligations relating to freedom of expression in Kenya are both domestic and international. Aside from the guarantees set out under the Constitution, the country is party to a number of international instruments that protect freedom of expression. Notable among these are the International Convention on Civil and Political Rights<sup>182</sup> and the African Charter on Human and Peoples' Rights.<sup>183</sup>

As a twenty first century document, Kenya's Constitution is a cocktail of ideas from foreign constitutions, international legal instruments, and some homegrown inventions. The influence of international human rights law and foreign constitutions is more prominent in the bill of rights generally, and freedom of expression in particular.

Since the promulgation of the Constitution in 2010, international law as a source of legal norms for the Kenyan legal system has assumed a greater significance. This is because of the implications of article 2 (5) (6) which provide that:

“(5) The general rules of international law form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya forms part of the law of Kenya under this Constitution.”

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<sup>181</sup> Political culture has been defined as “the set of attitudes, beliefs, and sentiments which give order and meaning to a political process and which provide the underlying assumptions and rules that govern behavior in the political system.” It determines political responses in a polity. See generally, “Political Culture.” *International Encyclopedia of the Social Sciences*. 1968. *Encyclopedia.com*. 19 Feb. 2016 <<http://www.encyclopedia.com>>.

<sup>182</sup>See <http://www1.umn.edu/humanrts/research/ratification-kenya.html>. <Accessed 22 February 2016>.

<sup>183</sup> Ibid.

The question that deserves analysis is the domestic applicability of these instruments and how they relate to domestic instruments that guarantee or limit freedom of expression. It is argued that by virtue of article 2 (6) of its Constitution, Kenya is now a monist state as far as the relationship between international and domestic law is concerned.<sup>184</sup> The implication of this is that a treaty does not have to be domesticated through a domestic statute before it can have legal effect domestically.<sup>185</sup> This is however put to doubt as far as the bill of rights is concerned since under article 21(4) the state is obligated to enact statutes to give effect to its international legal obligations. This ambiguity, some have argued, is intended to recognise that there are bound to be non-self executing human rights treaties which will need domestic action before they can be effective in domestic contexts.<sup>186</sup> The apparent ambivalence brings into play the question of how to resolve conflicts among provisions of the Constitution. The apex courts in East Africa have reached a consensus in this matter in the form of the principle of harmonisation. This principle requires that the provisions of the Constitution must be interpreted in a manner that ensures harmony. In setting out this rule of interpretation, the Court of Appeal of Uganda in *Tinyefuza v Attorney General of Uganda*<sup>187</sup> held that interpretation must proceed from the standpoint that no part of the constitution destroys the other. In adopting this principle, the High Court of Kenya in *Nancy Makokha Baraza v Judicial Service Commission & 9 others*<sup>188</sup> held that interpretation must ensure that constitutional provisions are read together against the context of the entire Constitution, and not in isolation. Thus, the Court noted, no provision of the Constitution may be found to be invalid or “unconstitutional.” In so holding, the Court affirmed articles 2(3) of the

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<sup>184</sup> Makumi Mwagiru, ‘From Dualism to Monism: The Structure of Revolution in Kenya’s Treaty Practice.’ (2011) 4 *Journal of Language, Technology and Entrepreneurship in Africa* 144, p. 150.

<sup>185</sup> Contrast with the position in *Okunda v Republic* (1970) EA 453 (where the High Court held that a treaty may only be application domestically as a source of law after domestication by Parliament.)

<sup>186</sup> Tom Kabau and Osogo Ambani, ‘The 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism?’ (2013) 1 *Africa Nazarene University Law Journal*, 36, p. 44. This position is convincing since the intention of article 21 (4) of Kenya’s Constitution cannot have been to introduce a conflict with article 2 (6) or to diminish the concept of internationalism that is prominent in the Constitution.

<sup>187</sup> Petition No. 1 of 1997 (1997 UGCC 3).

<sup>188</sup> [2012] eKLR

Constitution,<sup>189</sup> and departed from a previous High Court decision in *Rev Dr Jesse Kamau and others v Attorney General*<sup>190</sup> which held that the provisions of the previous constitution establishing the Kadhi's courts were "unconstitutional." This principle of harmonisation has become a well settled rule in resolving conflicts in interpretation and is frequently invoked by the Courts.<sup>191</sup> It has since been endorsed by the Supreme Court of Kenya in *Commission for the Implementation of the Constitution v Attorney General & another*.<sup>192</sup>

It should be noted however that the validity of any rule, including international law is subject to the supremacy of the Constitution.<sup>193</sup> Thus, any inconsistency with the Constitution would be reconciled in favour of the Constitution if the demands of both the Constitution and a treaty cannot be mutually achieved.<sup>194</sup> This means that if by virtue of article 2 (5)(6) Kenya has become a monist state, it remains dualist with respect to the Constitution.

The incorporation of international law in the domestic sphere without the need for domestication is important for a number of reasons. It ensures human rights protection in international law can be vindicated internally through domestic courts. The pre-2010 position as was set in the case of *Okunda v Republic*<sup>195</sup> was that international law only became applicable domestically upon domestication by Parliament. This was a conservative dualist approach pursued by many commonwealth common law jurisdictions.<sup>196</sup> It should be noted, however, that despite the *Okunda* doctrine, Courts

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<sup>189</sup> Article 2(3) of the Constitution of Kenya, 2010 provides that: "The validity or legality of this Constitution is not subject to challenge by or before any court...."

<sup>190</sup> [2010] eKLR.

<sup>191</sup> See for instance *Ndyanabo v Attorney General* [2001] EA 495, *Centre for Human Rights and Awareness v John Harun Mwau & 6 Others* Civil Appeal No. 74 & 82 of 2012; [2012]eKLR and *Olum & anor v Attorney General* [2002] EA 508.

<sup>192</sup> [2013] eKLR.

<sup>193</sup> Tom Kabau and Osogo Ambani, 'The 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism?' *supra*, p. 47.

<sup>194</sup> *Ibid*.

<sup>195</sup> (1970)EA 453.

<sup>196</sup> Makumi Mwangiru, 'From Dualism to Monism: The Structure of Revolution in Kenya's Treaty Practice,' *supra*.

especially from the 1990s had already begun applying international law as a matter of judicial activism or as an aid to interpreting retrogressive domestic laws.<sup>197</sup>

Post-2010 experiences show that courts are more willing to apply international law norms in domestic situations than ever before. While the question of conflict between international law and the constitution seems to favour a resolution in favour of the Constitution, the approach to resolution of conflict between international law and Acts of Parliament remains unsettled.<sup>198</sup>

The important question to answer here is what obligations do the international instruments to which Kenya is party impose? The provisions of the UDHR will be considered as subsumed under those of the ICCPR because in strict positivistic terms, the latter is a legal instrument while the former is not; and also that the ICCPR essentially incorporate the aspirations of the UDHR. So what obligations does the ICCPR impose as far as freedom of expression is concerned? To answer this question, a consideration of article 19 of the ICCPR is necessary:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may

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<sup>197</sup> Court of Appeal in *Rono v Rono* Civil Appeal No 66 of 2002; (2008) 1 KLR (G&F) 803. In this case, the Court of Appeal (the highest court at the time) recognised the *Okunda* doctrine but went on to apply the equality provisions under the Universal Declaration of Human Rights, the Covenant on economic, social and cultural rights, the Covenant on civil and political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and the African Charter of Human and Peoples' Right to distribute the estate of a diseased person equality between sons and daughters contrary to discriminatory provisions of African Customary law on inheritance matters.

<sup>198</sup> Tom Kabau and Osogo Ambani, *The 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism?*, *supra* p. 35. The High Court in *Beatrice Wanjiku and another v Attorney General and another* [2012] eKLR opined that in the event of conflict, a Kenyan statute would prevail. In a previous decision in *Zipporah Wambui Mathaara* (BC Cause No. 19 of 2010) the Court gave pre-eminence to an international treaty (ICCPR) over a conflicting statute (the Civil Procedure Act, chapter 21).

therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

From these, it can be seen that the ICCPR obliges states to not only respect but to also take positive steps to ensure respect for the right to freedom of expression.<sup>199</sup> This right attaches to “everyone,” without distinctions as to “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>200</sup>

Broken down, this right entails a number of components: one is the right of individuals to receive or impart information. It can be deduced that this rule enjoins the state to respect the citizens’ freedom to hold opinions, and relatedly express their thoughts and ideas and communicate through various media. Communication may take various forms including art, and may relate to politics, science, and other topics. General comment 34 (on article 19 of the ICCPR)<sup>201</sup> provides useful guidance about the components, nature and scope of this right. It notes that freedom of expression covers a wide range of expressions such as politics, discussion of personal or private matters, commentary on public affairs, and human rights.<sup>202</sup> It also includes the right to publish, practice journalism and to receive information published by journalists,<sup>203</sup> and artistic expression.<sup>204</sup> It also

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<sup>199</sup> The ICCPR at article 40 establishes a reporting mechanism for purposes of monitoring fulfillment of its obligations. A party state is required to submit a report every five years detailing steps taken to fulfill ICCPR obligations, including any challenges and measures taken to address them. For states party to the first optional protocol, individuals in those states may file individual complaints before the Human Rights Committee. For a complaint to be admissible, it must be demonstrated that creates a mechanism under which citizens of states party to the protocol may seek redress before the Human Rights Committee. The Committee is not a court, and its decisions are not binding. They provide an avenue for diplomatic engagement with the concerned state to address the complaint. Kenya is not party to the first (and second) optional protocol, see <http://www1.umn.edu/humanrts/research/ratification-kenya.html>. <Accessed 19 February 2016>.

<sup>200</sup> Article 2 (1) of the ICCPR.

<sup>201</sup> U.N. Doc. CCPR/C/GC/34/CRP.2 (2010).

<sup>202</sup> U.N. Doc. CCPR/C/GC/34/CRP.2 (2010).

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

covers teaching,<sup>205</sup> religious discourse,<sup>206</sup> and commercial advertising.<sup>207</sup> The state's obligation to guarantee freedom of expression extends to expressions that may be regarded as deeply offensive or controversial.<sup>208</sup>

The obligation to respect freedom of expression extends to freedom of the press since the media enables members of the public to receive information in exercise of their own freedom of expression. This is in addition to freedom of media players exercising freedom of expression in collecting and disseminating information. In *Gauthier v Canada*,<sup>209</sup> for instance, the Human Rights Committee held that the denial of the applicant of permanent membership to the Canadian Parliamentary Press Gallery amounted to a restriction of his right to freedom of expression. The applicant was a publisher of a newspaper and the denial of the membership meant that he wouldn't be able to access full privileges enjoyed by other journalists, and would be therefore be disadvantaged in his reporting. The case is also relevant as it emphasised the importance of the media in facilitating the public to engage in public affairs.<sup>210</sup> The right may however be restricted on grounds contemplated under article 19, paragraph 3 and article 20.<sup>211</sup> These grounds include national security, public order, health or morals. For a limitation to be valid under the ICCPR, grounds must be tailored to satisfy a three part test: namely, provided for in law, legitimate aim, and necessity.<sup>212</sup>

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<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Communication No. 633/1995 (7 April 1999).

<sup>210</sup> <https://www.article19.org/resources.php/resource/3234/en/hrc:-gauthier-v.-canada>.

<sup>211</sup> Article 20 imposes a positive obligation upon party states to prohibit propaganda for war and hate speech motivated by sectarian hostility based on nationality, race or religion. This is of interest as it not only requires protection of rights in the negative liberal sense, also certain measures to prohibit negative forms of expression.<sup>211</sup> The ICCPR was enacted as part of giving effect to the aspirations of the UDHR and the UN Charter in the post-World War II dispensation. Prohibition of these negative expressions that were partly responsible for the atrocities of the war must therefore be understood in this context. True to its liberal orientation on freedom of expression, the United States ratified the ICCPR with a reservation as to the obligation to prohibit propaganda for war.

<sup>212</sup> Michael O'Flaherty, 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34' (2012) 12 *Human Rights Law Review* 627.

The obligation to protect freedom of expression extends beyond frontiers.<sup>213</sup> In addition the protection covers all forms of expression and the means of transmission, be they books, newspapers, magazines, banners, posters, dress, legal submission, video, audio, electronic channels and the internet.<sup>214</sup>

Kenya is also party to the ACHPR. At article 9, the Charter guarantees freedom of expression in the following terms:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

Adopted in 1981, it is strange that the Charter's choice of language is a marked difference from human rights instruments in force at the time; namely the ECHR, ACHR, UDHR and ICCPR. The language of the charter has been criticised as being too weak as to impose reasonable pressure on African states to take freedom of expression and human rights generally, seriously.<sup>215</sup> The phrase "within the law" for instance has been criticised as failing to set the parameters within which restriction of expression may be permitted.<sup>216</sup> Article 19 (3) of the ICCPR for instance sets out a three-part test that restrictions must meet for them to be considered legitimate. This test constrains the discretion of states to ensure that restrictions contained in law are not only necessary but also rationally connected to a legitimate aim sought to be achieved.

Against the background of these criticisms, the African Commission has made certain pronouncements that clarify the implication of the apparent equivocal character of article 9 of ACHPR. Kenya's jurisprudence on freedom of expression is in a nascent stage. While there have been many incidences challenging the freedom as was

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<sup>213</sup> General Comment No. 34, *supra*.

<sup>214</sup> *Ibid*, paragraph 12.

<sup>215</sup> William Edward Adjei, 'The Protection of Freedom of Expression in Africa: Problems of Application and Interpretation of Article 9 of the African Charter on Human and Peoples' Rights' (2012) (Unpublished PhD thesis), p. 8.

<sup>216</sup> *Ibid*, 106-107.

highlighted above, these have generally not resulted in serious constitutional litigation in the apex courts. Thus, the jurisprudence of the African Commission and the Human Rights Committee are useful on providing guidance concerning the direction that freedom of expression jurisprudence should take.

In addressing limitations of freedom of expression, the African Commission in *Amnesty International v Zambia*<sup>217</sup> noted that any law purporting to limit rights under article 9(2) “claw-back” provision must meet “international standards.” The international standards here should be understood to mean the parameters defined under the ICCPR which sets out the test for determining the validity of a restriction as already described. In addition, the African Commission has held that the legitimate limitations under article 9(2) are those contemplated in article 27 (2). These are “the rights of others, collective security, morality and common interest.”<sup>218</sup> In other words, the Commission was emphasising that the grounds for limitation of freedom of expression are not open-ended: they must be tailored strictly to meet only legitimate aims.

The Commission has also held that a blanket prohibition of publication of newspapers,<sup>219</sup> harassment of journalists by government officials,<sup>220</sup> failure to take action against those harassing journalists<sup>221</sup> and the seizure of newspapers to prevent circulation violate the Charter.<sup>222</sup> In addition, the Commission has held that overly stringent conditions for registration of newspapers<sup>223</sup> or for accreditation of journalists also violate the ACHPR,<sup>224</sup> and so is state monopoly on broadcasting.<sup>225</sup>

It is discernible that the Constitution of Kenya offers stronger protection to freedom of expression than does the ICCPR or the ACHPR. This position is supported by a

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<sup>217</sup> Communication No. 212/98 (1999).

<sup>218</sup> The Africa Charter of Human and Peoples’ Rights, article 28 and 29.

<sup>219</sup> William Edward Adjei, ‘The Protection of Freedom of Expression in Africa: Problems of Application and Interpretation of Article 9 of the African Charter on Human and Peoples’ Rights’ (2012) (Unpublished PhD thesis), p. 279-309.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

number of reasons: First, except for the pronouncements of the African Commission as highlighted above, the wording of the ACHPR in protecting the right leaves a lot to be desired. Second, although the provisions of the ICCPR are elaborate and comparable to Kenya's article 33, the enforcement mechanism of the convention depend entirely on the voluntary cooperation of the country.<sup>226</sup> On the contrary, enforcement mechanisms under the Constitution are very elaborate. As was noted in chapter 2, the bill of rights is a comprehensive chapter that has its own theoretical underpinning, enforcement mechanism including available remedies, guidance as to interpretation, and provisions designed to ensure its aspirations are realised to the fullest and protected from being undermined.<sup>227</sup> For instance, limitation of rights is subject to strict proportionality criteria under article 24. A comprehensive analysis of these criteria is deferred to chapter six. It can be deduced that under this provision, a limitation is suspect until justified by the state to be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." An inexhaustive list of factors that must be taken into account in the process of limiting rights is also set out, allowing little room for inexcusable restriction.<sup>228</sup> This

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<sup>226</sup> This is a common weakness for all treaties. For ICCPR, the situation is compounded by the fact that Kenya is not party to the first optional Protocol, and therefore individual communications may not be referred to the HRC. It is arguable that article 2(6) making a ratified treaty part of domestic law could remedy or mitigate the weaknesses of domestic enforcement of the convention. But where local courts fail to uphold rights a complaint may not be referred to the HRC.

<sup>227</sup> See article 19 (which gives the theoretical and philosophical underpinnings), article 20 (prescribing a robust liberal interpretation criteria), article 21 (imposing positive obligations to ensure enjoyment of rights), article 22 (expanding justiciability by giving *locus standi* to anyone wishing to petition the court and relaxing technical barriers such as fees and restrictive rules of procedure), article 23 (prescribing remedies for violation of rights), article 24 (restricting limitations of rights unless they conform to strict criteria), and article 25 (listing non-derogable rights).

<sup>228</sup> Article 24 (1) A right or fundamental freedom in the Bill of Rights may 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 (a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation; (b) may not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and (c) may not limit the right or fundamental freedom so far as to derogate from its core or essential content. (3) The State or

implies that in proceedings challenging the constitutionality of a limitation of a right, there is a rebuttable presumption that the limitation is suspect until demonstrated to be “reasonable and justifiable.”<sup>229</sup> It is clear that the criterion under article 24 is more comprehensive than the three-part test under article 19 (2) of the ICCPR and article 1 of the Canadian Charter of Fundamental Rights and Freedoms. It is obviously a contrast of the “within the law” clause under the ACHPR, and is to be contrasted with the doctrine of margin of appreciation in international law which gives states some latitude to determine the scope of reasonable limitations.<sup>230</sup>

#### 4.5. Nature, Scope and Components of Freedom of Expression

This part analyses the nature, scope and content of freedom of expression. That is, the character of the right and the different forms that expression takes; and its boundaries. An assessment of the protection of freedom of expression shows that different forms of expression enjoy varied levels of protection. Commercial expression is a good example. Although it is a form of expression that would rightfully fall within the purview of freedom of expression guarantees, it is often subject to stricter restrictions, and therefore lesser freedom.<sup>231</sup> Political expression, on the other hand enjoys greater protection, and forms the basis of much of freedom of expression analyses.<sup>232</sup>

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a person seeking to justify a particular limitation must demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

<sup>229</sup> These limitation criteria can be seen in article 1 of the Canadian Charter of Rights and Freedoms (1982) and article 36 of the South African Constitution (1996).

<sup>230</sup> The European Court of Human Rights developed the doctrine of margin of appreciation, and has since been cited with approval by other international tribunals such as the European Court of Justice, the Inter-American Court of Human Rights and the UN Human Rights Committee. The doctrine allows states flexibility in determining the scope of implementing treaty obligations in municipal context. The margin of appreciation varies from one right to another. The margin is narrow for rights about which there is wide consensus, and wide for those over which there is little agreement. The doctrine attempts to strike a balance between state power to determine the scope of rights consistent with their sovereignty on the one hand and the application of international legal obligations on the other. See Arai, Y., & Arai-Takahashi, Y. (2002). *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*. Intersentia nv, p 2-12. See also Onder Bakircioglu, ‘The Application of the Margin of Appreciation Doctrine to Freedom of Expression and Public Morality Cases,’ (2007) 8 German Law Journal 211.

<sup>231</sup> See Daniel A. Farber, ‘Commercial Speech and First Amendment Theory,’ (1979) 74 *North Western University Law Review*, 372, p.373-374 (arguing that the US Supreme Court accords commercial expression lesser

Freedom of expression has always been about boundaries.<sup>233</sup> Unlike other communicative rights, permissible freedom of expression is a constant balance between what is legally permissible and what is not. Indeed, at times the boundary may not be discernible until it has been exceeded. This is part of what makes freedom of expression unique. While excluded forms of speech may be easy to declare, say for example hate speech or incitement to violence and so forth, prior censorship is frowned upon by the guarantee. Thus, freedom of expression will in most instances protect the speaker's right to speak, and only permit imposition of penalties once the limits have been exceeded.<sup>234</sup>

For this reason freedom of expression has to be understood in terms of the freedom to speak one's thoughts, including those that 'shock, offend, or disturb, freely without the fear of repercussions.'<sup>235</sup> The European Court of Human Rights in *Handyside v the United Kingdom*<sup>236</sup> emphasised that the right "...is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."<sup>237</sup> Popular, uncontroversial or accepted expression would usually not present any freedom of expression challenge. Thus, the chief concern of freedom of expression guarantee is the protection of expression that may not enjoy popular or state support.<sup>238</sup>

As a right with liberal origins, it is usually seen as attaching mainly to the individual; creating an enclave of liberty into which the state may not encroach. But as Richard Moon argues, there is a crucial social component to freedom of expression that is

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protection). See also Caroline Reid, 'Freedom of Expression, Commercial Expression and Tobacco in Canada,' (2008) 39 *Victoria University of Wellington Law Review* 343, (arguing that the Supreme Court of Canada has similarly accorded commercial expression lesser protection than other forms of expression.)

<sup>232</sup> Ibid.

<sup>233</sup> Frederick Schauer, 'The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience,' 117 *Harvard Law Review*, 1765, p. 1765-1766.

<sup>234</sup> Ulrich Karpen, 'Freedom of Expression as a Basic Right-A German View.' (1989) 37 *American Journal of Comparative Law* 395, p.398.

<sup>235</sup> Elizabeth Zoller: Freedom of Expression: Precious in Europe sacred in America, p. 803, quoting ECtHR in *Handyside v United Kingdom*, *supra*.

<sup>236</sup> Application No. 5493/72.

<sup>237</sup> Ibid.

<sup>238</sup> Larry Alexander, 'Is Freedom of Expression a Universal Right?' (2013) 50 *San Diego Law Review* 707, p. 709.

often ignored. Freedom of expression is, arguably, the foremost of communicative rights. It concerns itself with communication of ideas, thoughts and opinion. To this extent, it has a social component. Moon argues that the social relevance of freedom of expression is the underlying (but unstated) premise in all the major free speech justifications, that is, truth, democracy and autonomy.<sup>239</sup> This is because freedom of expression protects communication, a deeply social act, which involves the use of socially constructed language.<sup>240</sup> The thought process is natural to human beings. It is also natural for human beings to hold opinions. Similarly, it is human to want to express thoughts and opinions. The right to freedom of expression concerns itself with the protection of communication of ideas or information.<sup>241</sup> In short, freedom of expression protects the right of individuals to communicate with each other in a social context, and by extension the right of societies to engage and interact with each other.<sup>242</sup>

At the centre of freedom of expression discourse is the persuasive power of expression.<sup>243</sup> Expression has the effect of influencing the opinions and possibly action of those who listen. Speech appeals to reason or emotions of its listeners. This power of speech is the motivation behind the state and society's interest to control freedom of expression.<sup>244</sup> Expression can influence people's political choices and outcomes, shape opinions on morals and social behaviour, and direct people's actions in ways that can be positive or detrimental to law and order. Thus, while the individual element is central in expression, the social component is also important.<sup>245</sup> Expression would usually take place, and its consequences experienced, within a social context.

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<sup>239</sup> Richard Moon, 'The Social Character of Freedom of Expression' (2009-10) 2 *Amsterdam Law Forum* 43, p. 43-44.

<sup>240</sup> Ibid.

<sup>241</sup> David E. Guinn, 'Philosophy and Theory of Freedom of Expression. THE ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES,' Routledge Reference Taylor & Francis Group, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=801344> <accessed 14 October 2015>

<sup>242</sup> Ibid.

<sup>243</sup> David A. Strauss, 'Persuasion Autonomy and Freedom of Expression,' 91 *Columbia Law Review* 334, p. 334-336.

<sup>244</sup> Ibid.

<sup>245</sup> Richard Moon, 'The Social Character of Freedom of Expression' (2009-10) *supra*, p. 43-44.

As a right that is civil and political in nature, freedom of expression is a negative right. It is a negative right because it is often expressed as a restraint on state authority. That is, a sphere of private space into which the state and its coercive power may not intrude.<sup>246</sup> There is, however, a case to be made for freedom of expression as a positive right. Freedom of expression entails both a speaker's right to communicate information and the listener's right to receive information.<sup>247</sup> The latter aspect is related to the citizen's right to access information.<sup>248</sup> As Abdullahi An-Naim has argued, positive conception of freedom of expression enables the inarticulate individual and societies or communities to have self-expression.<sup>249</sup> This necessarily requires facilitation of the individuals to be able to receive information and to express themselves in a social context. This understanding of freedom of expression as a positive right defies the liberal conception of rights. It does, however, resonate well with the socio-democratic theory underpinning Kenya's bill of rights as was seen in chapter two.<sup>250</sup>

Freedom of expression in many jurisdictions and in international law is protected as a legal right.<sup>251</sup> That is, as a guarantee in constitutions or similar legal instruments and in treaties. This gives the right the normative support that is necessary for its protection since law imposes obligations upon its subject, be they state or non-state actors.

But freedom of expression is also a moral and political right.<sup>252</sup> In fact, it is its moral and political character that informs its protection as a legal right.<sup>253</sup> As a moral right,

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<sup>246</sup> Ulrich Karpen, 'Freedom of Expression as a Basic Right-A German View.' (1989) *supra*, p.398. See also the liberal or libertarian concept of liberty espoused by John Stuart Mill in chapter one and two of his book "*On Liberty*," *op cit*.

<sup>247</sup> Constitution of Kenya, Article 33 (1) (a).

<sup>248</sup> *Ibid*, article 35, guarantees the right to access information.

<sup>249</sup> Abdullahi An-Naim, 'The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts' (1997) 11 *Emory International Law Review*, 29, p.38.

<sup>250</sup> The Constitution of Kenya at article 21 in particular imposes positive obligations on the state to take policy and legislative steps to ensure full enjoyment of rights.

<sup>251</sup> Ronald Dworkin, R (1977) *Taking Rights Seriously*: Cambridge: Harvard University Press.

<sup>252</sup> *Ibid*.

<sup>253</sup> Peter Jones, 'Moral Rights, Human Rights and Social Recognition,' (2013) 61 *Political Studies* 267, p. 267-281.

freedom of expression has its foundations in morality.<sup>254</sup> The near-universal protection that freedom of expression has received in domestic laws of democratic societies as well as in international law affirms the moral character of the right.<sup>255</sup> This is the idea behind the inherent and universal nature of human rights. That is, rights are inherent, and exist independent of legal and political institutions such as the state.<sup>256</sup> States and law in a social contract sense only guarantee rights which attach to every human being by virtue of being human.<sup>257</sup> As was shown in chapter three, autonomy and human dignity as freedom of expression justifications defend freedom of expression from a moral perspective. This means individuals must be seen as competent moral agents, and the means through which they make judgment on issues must be independent of state control. In other words, their autonomy to receive and communicate information must be unfettered. As Dworkin has argued, a legitimate political system that is committed to treating its members with 'equal concern and equal respect' must recognise their dignity and moral competence to judge what opinion to accept.<sup>258</sup> When the state acts paternalistically to withhold opinion from the people, it offends their dignity and moral competence.<sup>259</sup>

#### 4.5.1. Structure and Architecture of Freedom of Expression Protection

The structure of freedom of expression guarantees vary from one jurisdiction to another. Similarly, in international human rights instruments, the architecture of freedom of expression protection varies. The difference in the structure of freedom of

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<sup>254</sup> Ibid.

<sup>255</sup> Larry Alexander in 'Is Freedom of Expression a Universal Right?' (2013) *supra*, concludes that there is no such thing as universal right to freedom of expression. In other words, there is no moral right to freedom of expression. He bases this conclusion on the relativity that the right suffers as there is no universal consensus on the scope and limits of freedom of expression.

<sup>256</sup> This is Locke's idea of natural rights existing independent of state and its institutions: <sup>256</sup> See generally, John Locke, *Two Treatises on Government*, *supra*.

<sup>257</sup> This idea is seen in Article 19 (3) of the Constitution of Kenya which provides that- "The rights and fundamental freedoms in the Bill of Rights-(a) belong to each individual and are not granted by the State."

<sup>258</sup> Ronald Dworkin (1996) *Freedom's Law: The Moral Reading of the American Constitution*, Cambridge: Harvard University Press, p.197-198.

<sup>259</sup> Ibid.

expression provisions are important in that they influence the process of adjudication and how its scope and limits are conceptualised.<sup>260</sup>

An assessment of freedom of expression provisions reveals that they take two broad forms: the American ‘absolute’ model and the international human rights model adopted by many state constitutions. The American First Amendment structure takes the form of restriction on legislative power of Congress. It simply states: “Congress shall make no law ...abridging the freedom of speech, or of the press.”<sup>261</sup> This is perhaps, the most abstract phrase, among freedom of expression provisions. It is written in absolute terms, restricting the power of US Congress to limit the right. This led Alexander Meiklejohn<sup>262</sup> and other prominent first amendment scholars to conclude that the protection is absolute. Yet, experience has shown that freedom of speech cannot be absolute. In the course of time, the United States Supreme Court has created exceptions to the rule. It has for instance, held that obscenity, child pornography and “fighting words” enjoy no protection under the First Amendment.<sup>263</sup> It has also decided that commercial expression, defamation, speech that may affect children, radio and TV broadcasts and speech by public servants enjoy less-than-full protection.<sup>264</sup>

The abstract wording that seem to allow no discretion explains the approach of free speech adjudication that the United States Supreme Court has taken since the first free speech cases were decided in 1919.<sup>265</sup> The approach, as Schauer posits, has always been

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<sup>260</sup> Frederick Schauer, ‘Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture’ (February 2005). KSG Working Paper No. RWP05-019. Available at SSRN: <http://ssrn.com/abstract=668523> or <http://dx.doi.org/10.2139/ssrn.668523> <accessed 2 October 2015>.

<sup>261</sup> Amendment I, Constitution of the United States of America.

<sup>262</sup> Alexander Meiklejohn, ‘The First Amendment Is an Absolute,’ (1961) *The Supreme Court Review*, 245. Available at <http://www.jstor.org/stable/3108719>.< Accessed 27 February 2016>.

<sup>263</sup> Kathleen Ann Ruane, Freedom of Speech and Press: Exceptions to the First Amendment, Congressional Research Service Report, September, 2014, p. 1-4. Available at: <https://www.fas.org/sgp/crs/misc/95-815.pdf> <accessed 17 October 2015>.

<sup>264</sup> Ibid.

<sup>265</sup> Denise Meyerson, ‘The legitimate extent of freedom of expression,’ (2002) 52 *University of Toronto Law Journal* 331, p. 331

about boundaries and categorisation.<sup>266</sup> That is, first determining whether a restriction affects or concerns free speech.<sup>267</sup> If it does, then a process of subjecting the restriction to a strict scrutiny follows. Part of the process involves determining whether an expression in controversy falls within the conceivable boundaries of the first amendment.<sup>268</sup> As a result, the Supreme Court has concluded that ordinary communication, flag desecration, “fighting words,” academic freedom, and pornography are covered (not necessarily protected) under the First Amendment.<sup>269</sup>

The international human rights model is found in international human rights instruments and modern constitutional instruments. This model proclaims freedom of expression in almost absolute terms, and proceeds to permit limitations based on general criteria of necessity and proportionality.<sup>270</sup> The criteria feature countervailing interests such as national security, public safety, defence, public health and public morals.<sup>271</sup> This is the approach that is seen in the ICCPR<sup>272</sup> and the European Convention on Human Rights.<sup>273</sup> It is the approach that the constitutions of South Africa (1996) and Kenya (2010)<sup>274</sup> as well as the Canadian Charter of Rights and Freedoms (1982) take.<sup>275</sup> ICCPR and

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<sup>266</sup> Frederick Schauer, ‘The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience,’ *supra*, p. 1765-1770.

<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid.*

<sup>269</sup> Kathleen Ann Ruane, ‘Freedom of Speech and Press: Exceptions to the First Amendment, Congressional Research Service Report,’ *supra*.

<sup>270</sup> Frederick Schauer, ‘Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture’ (February 2005).

<sup>271</sup> *Ibid.*, p. 5.

<sup>272</sup> Article 19 (2) “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

<sup>273</sup> Article 10 (1) “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

<sup>274</sup> 33. (1) Every person has the right to freedom of expression, which includes –

(a) freedom to seek, receive or impart information or ideas;

(b) freedom of artistic creativity; and

(c) academic freedom and freedom of scientific research.

<sup>275</sup> The Canadian Charter is however brief in its structure. It simply sets out freedom of expression as a protected right without enumerating its contents as the ICCPR, ECHR or the Kenyan and South African constitutions do. It simply provides at article 2 (b): “[e]veryone has the following fundamental freedoms:

the European Convention specifically recognise rights or reputations of others, national security, public order, public health or morals as legitimate grounds upon which restrictions to freedom of expression may be based.<sup>276</sup> The ICCPR, Kenya and South African approaches go further to make a list of specifically excluded forms of expression which enjoy no protection such as propaganda for war and hate speech.<sup>277</sup> In doing this, they limit freedom of expression at two levels: first, through the exclusions contained within the freedom of expression guarantee and second, through the general limitation clause.<sup>278</sup>

It can be deduced from these instruments that freedom of expression protection encompasses the following elements:

- a) Freedom to seek, receive or impart ideas
- b) Freedom of artistic expression, and
- c) Freedom of scientific research and academic freedom.

A detailed discussion on each of these components of freedom of expression follows below:

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(a) ...;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” This is similar to the structure of the ACHPR provision under article 9 which provides

(1) Every individual shall have the right to receive information.

(2) Every individual shall have the right to express and disseminate his opinions within the law.

<sup>276</sup> Article 19 (2) of the ICCPR. Article 10 (2) of the ECHR recognises additional grounds such as territorial integrity, privacy of confidential information, and for maintaining the authority and impartiality of the judiciary.

<sup>277</sup> 33(2) The right to freedom of expression does not extend to –

(a) propaganda for war;

(b) incitement to violence;

(c) hate speech; or

(d) advocacy of hatred that –

(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or

(ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

<sup>278</sup> Steve Gardbaum describes the limits found within the definition of freedom of expression guarantee as “internal limits” and those imposed on public policy grounds as “external limits.” See Steve Gardbaum, *Limiting Constitutional Rights* 54 *University of California Law Review*, 789, p. 807.

## 4.5.2. Components of Freedom of Expression Protection

### 4.5.2.1. Freedom to seek, receive or impart information or ideas

Central to freedom of expression guarantee is the freedom ‘to seek, receive or impart ideas.’ This component of the protection appears in international human rights instruments and in many post-UDHR constitutions in identical or similar terms. Even in those instruments that do not break down the components of freedom of expression such as the US or Canadian provisions, freedom to communicate opinions, ideas or information to at least one other person, class of persons or the public is the most obvious component of freedom of expression.<sup>279</sup> It also protects access to information or freedom to receive ideas expressed by others. In short, the right to freedom of expression protects communication of information or ideas irrespective of the medium used. The communication may be in spoken or written form or in more complex forms such as audio-visual channels, gestures, art or music.<sup>280</sup>

Understood as the protection of the individual’s right to “seek, receive, and impart information,” it becomes clear that freedom of expression is related to the right of access to information. The latter protects the right of individuals to access information. In this respect, it relates to freedom of expression which guarantees, among other things, the individual’s right to receive information. In this regard, the values that justify the protection of freedom of freedom of expression such as democracy, truth, autonomy, and self-fulfillment as discussed in chapter three would similarly apply to access to information. A review of scholarly literature shows that the right to access to information is less featured and is assumed to be covered under the freedom of expression guarantee. In Kenya and South Africa’s context, their Constitutions give special attention to this right

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<sup>279</sup> Richard Moon, ‘The Social Character of Freedom of Expression’ (2009-10) 2 *Amsterdam Law Forum* 43, p. 43-44.

<sup>280</sup> Article 19 of ICCPR for example is categorical that freedom of expression is protected irrespective of the medium used: Article 19(2): “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas *of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*” [Emphasis added].

and makes provisions for them separately under article 35 and section 32 respectively. Article 35 of the Constitution of Kenya reads thus:

- (1) Every citizen has the right of access to-
  - (a) Information held by the State; and
  - (b) Information held by another person and required for the exercise or protection of any right or fundamental freedom
- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person
- (3) The State shall publish and publicise any important information affecting the nation.

From this provision, a number of elements become clear. First, the right of access to information protects the rights of a “citizen” rather than “persons” generally. This is a departure from the general phrasing of rights under the bill of rights which focus on “persons” irrespective of citizenship.<sup>281</sup> The High Court in *Nairobi Law Monthly Limited v Kenya Electricity Generating Company Limited & 2 others*<sup>282</sup> had the opportunity to explore this distinction. The Court held that article 35 is categorical that the right attaches to ‘citizens’ and not persons generally. It clarified that the right specifically apply to natural persons and not juridical persons such as companies. Secondly, the right necessarily imposes an obligation on the state to allow access to information. The obligation on the state is broad and seemingly admits no exception. It would however be subject to the general limitation clause under article 24 in the same way as other rights from which derogations may be permitted. The obligation to facilitate access to information is also extended to private persons where such information is necessary for the protection of other rights and fundamental freedoms. In other words, the duty upon private persons to allow access to information held by them arises once it is shown that an individual

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<sup>281</sup> Few rights are specific to citizens. Aside from this right, the other is political rights including the right to vote guaranteed under article 38 of the Constitution of Kenya.

<sup>282</sup> (2013) eKLR

claiming the right needs the information for the protection of rights.<sup>283</sup> These would for example cover where an individual need to access information so as to advance rights such as labour rights, fair trial, equality rights and other personal rights.<sup>284</sup> Kay Mathiesen argues that the right to access to information presupposes that the information must be accurate.<sup>285</sup> This point is recognised by Kenya's constitution as it safeguards the right of an individual to seek correction or deletion of misleading or inaccurate information concerning them. In addition, the guarantee obligates the state to publish information that is of national importance consistent with constitutional values of transparency and accountability.

To give effect to the right to access to information under article 35 of the Constitution, Parliament enacted the Access to Information Act 2016.<sup>286</sup> This law is important as it provides a legal framework through which the right can be actualized. It does so through setting out procedures to facilitate access to information held by the state as well as granting powers to the Commission on Administrative Justice to oversee the realisation of the right.<sup>287</sup> This is significant because the guarantee in the Constitution alone is not enough unless clear procedures are set and persons responsible for ensuring this obligation is met are designated. This further emphasises the point that Kenya's Constitution is postliberal, imposing an obligation on the state to not only guarantee rights but to also take positive steps to ensure enjoyment of rights.<sup>288</sup>

If the freedom of expression concerns itself with individual's right to seek, receive and impart" information as already noted, it follows then that the right to access of information supplements it. In other words, the protection of access to information promotes freedom of expression including media freedom. This was emphasised by the High Court of Kenya in *Nairobi Law Monthly* case. The Court cited with

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<sup>283</sup> *Cape Metropolitan Council v Metro Inspection Services Western Cape and Others* (10/99) [2001] ZASCA 56

<sup>284</sup> *Shabalala and 5 others v Attorney General of the Transvaal and the Commissioner of South African Police* CCT/23/94 [1995].

<sup>285</sup> Kay Mathiesen, *Access to Information as a Human Right* (September 2008) available online at SSRN:<https://dx.doi.org/10.2139/ssrn.1264666>.

<sup>286</sup> No 31 of 2016 (date of assent 31 August 2016, date of commencement 21 September 2016)

<sup>287</sup> See sections 3, 7, 8, 9 and 10 and the long title of the Access to Information Act, 2016.

<sup>288</sup> See discussions in chapter 2 and also the Constitution of Kenya 2010, article 21(1)(2)(3)(4).

approval the Constitutional Court of South Africa in *Brümmer v Minister for Social Development and Others*<sup>289</sup> in which the Court (Ngcobo, J) held that-

*'... access to information is fundamental to the realisation of the rights guaranteed in the bill of rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.'* [Emphasis added].

The implication of this is that the protection of access to information advances the right to freedom of expression and media freedom, among other rights. This further asserts the idea of indivisibility and interdependence of rights discussed in section 4.6 below. Thus, the Official Secrets Act<sup>290</sup> in its previous form undermined these rights and the values of transparency and accountability to the extent that it gave the state blanket powers to withhold information thought to be prejudicial to state security and 'interests.'<sup>291</sup> The amendment of this law to specifically note that its provisions are subject to article 35 of the Constitution and the Access to Information Act, 2016 is a welcome development.<sup>292</sup>

#### 4.5.2.2. Freedom of artistic creativity

The strong sentiments and violence provoked by the Mohammed cartoons in Denmark, Charlie Hebdo cartoons in France, and the law suits that followed Zapiro's cartoons or Brett Murray's painting of President Jacob Zuma in South Africa is evidence that artistic expression cannot be ignored in the freedom of expression discourse. Communication through works of art has been part of human endeavour since time immemorial. Artistic creativity is an integral part of human expression and life. Art can

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<sup>289</sup> (CCT 25/09) [2009] ZACC 21; 2009

<sup>290</sup> Chapter 187, Laws of Kenya.

<sup>291</sup> 'Towards Promoting Access to Information in Kenya' (Cape Town, 2011) Africa Network for Constitutional Lawyers, available online on <http://www.right2info.org/resources/publications/publications/towards-promoting-access-to-information-in-kenya-2011> <accessed 11 January 2017>.

<sup>292</sup> See Access to Information Act, 2016, section 29 and clause 4 of the Schedule.

entertain, persuade, dissuade, provoke and influence public opinion. Indeed, its importance in modern times continues to increase. Artistic expression takes many forms. It can be in form of painting, drawing, pictures, poem, books, cartoons, and music among others. What distinguishes artistic expression from ordinary communication may not always be clear. It suffices to say that it is the communication of a message through creative means that is laden with aesthetic value.<sup>293</sup>

In Kenya, artistic expression has often been at the centre of political struggle. It should be remembered for instance that in the 1980s, the government banned the public display of George Orwell's *Animal Farm* and Ngugi Wa Thion'go's play ' *I will marry when I want,*' for their heavy political overtones.<sup>294</sup> Even after the return of multi-party democracy, the police would frequently interrupt public display, especially in pro-government regions, of plays which carried political themes that were not approved by the ruling party.<sup>295</sup> Adjudicating in post-2010 constitutional dispensation, the High Court of Kenya recalled past repression of artistic expression laden with political overtures. In *Okiya Omtatah Okoiti v Attorney General & 2 others*,<sup>296</sup> the Court ordered the Ministry of Education and organisers of national drama festivals to allow display of a stage play titled *Shackles of Doom*. The organisers of the national event had banned the play for containing 'hate statements targeting communities and personalities ...' In recognising the protection of art under the freedom of expression clause, the Court emphasised that art is by nature intended to provoke and challenge conventional thought. The Court noted as follows:

Plays are a medium of expression of ideas which are sometimes subversive of accepted ideas. Plays may challenge long held beliefs and conventional wisdom. Artistic expression is not merely intended to gratify the soul. It also stirs our conscience so

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<sup>293</sup> John Hospers, 'The Concept of Artistic Expression,' (1954-1955) 55 *Proceedings of the Aristotelian Society New Series*, p. 313-344.

<sup>294</sup> Charles Muiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya' (2008, unpublished PhD thesis), *supra*, p. 114, 196, and 207. See also examples in note 111, *supra*.

<sup>295</sup> *Ibid*, 237.

<sup>296</sup> [2013] eKLR.

that we can reflect on the difficult questions of the day. The political and social history of our nation is replete with instances where plays were banned for being seditious or subversive. This is the country of Ngugi wa Thiong'o, Micere Mugo, Francis Imbuga, Okoth Obonyo and other great playwrights who through their writings contributed to the cause of freedom we now enjoy. Some plays were banned because they went against the grain of the accepted political thinking. Kenya has moved on and a ban, such as the one imposed by the Kenya National Drama Festival must be justified as it constitutes a limitation of the freedom of expression.

From the Court's decision, a number of conclusions can be drawn. That artistic expression is firmly protected as matter of the right to freedom of expression. Second, art is intended to provoke thoughts and the expectation is that more often than not it will cause discomfort. This suggests that under certain circumstances, artistic expression may enjoy broader protection to the extent that it is by nature intended to communicate in unconventional ways. Finally, the Court was in essence declaring that a democratic society committed to protecting political rights must exhibit tolerance towards artistic expression that carry messages that cause political discomfort. This resonates with the position that the Human Rights Committee took in *Shin v Republic of Korea*.<sup>297</sup> The applicant was a professional artist. He was alleged to have done a painting that depicted the South Korean government as "corrupt and militaristic" and the traditional farming North Korea in good light. This was interpreted by the authorities as calling for communism in the South and therefore threatening the security of the state. He was charged and convicted under National Security Laws for authoring "enemy-benefiting expression."<sup>298</sup> In finding a violation of the ICCPR, the Committee affirmed that artistic expression is firmly protected under article 19 (2). A limitation in law may only be valid if the state can demonstrate that it rationally serves a legitimate aim and is necessary. The implication of the High Court of Kenya and the Human Rights Committee decisions is that artistic expression, by its very

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<sup>297</sup> Communication No. 926/2000 (16 March 2004)

<sup>298</sup> Ibid.

nature may cause social and political discomfort. As a form of protected expression, any attempt to restrict it must be viewed with suspicion and put to strict scrutiny.

The move to specifically name artistic expression for protection under Kenya's Constitution promises better protection especially in light of the history highlighted above. This move also reflects modern trends in freedom of expression guarantees.<sup>299</sup>

#### 4.5.2.3. Academic freedom and freedom of scientific research

Academic freedom and freedom of scientific research as components of the right to freedom of expression are relatively recent entrants in freedom of expression protection. This category of freedom of expression is unique as it pertains to members of academic or research community, rather than the general public.<sup>300</sup> As part of accountability, this freedom is subject to peer review by members of the academy or scientific community.<sup>301</sup> Other members of the academic community have the right to judge whether one has fulfilled the requirements of professional responsibility as a scholar.<sup>302</sup> In this sense, academic freedom and freedom of scientific research is narrower than general freedom of expression protection. When looked at from the perspective that it obliges universities to continue retaining and even supporting academic staff even when the outcomes of their research presents them with discomfort, academic freedom is broader than freedom of expression in its ordinary sense.<sup>303</sup> It is also special as it is specifically tied

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<sup>299</sup> South Africa's Constitution under Section 16 (1)(c) also protects artistic expression. The ICCPR does the same. The older ECHR (from which the text of the bill of rights in Kenya's independence constitution was borrowed does not).

<sup>300</sup> Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, Cambridge: Harvard University Press, p. 244-247.

<sup>301</sup> David Rabban, 'Does Academic Freedom Limit Faculty Autonomy' (1987-1988) 66 *Texas Law Review* 1405, p. 1412 (noting that there is tension between these two aspects of academic freedom: the freedom of individual professor to research and teach and that of peers in academic to judge whether the individual scholar has fulfilled professional responsibility).

<sup>302</sup> *Ibid.*

<sup>303</sup> Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, Cambridge: Harvard University Press, p. 247.

to intellectual inquiry and the development of knowledge rather than freedom of expression for its sake.<sup>304</sup>

Very few domestic constitutions and international instruments make specific mention of academic freedom and freedom of scientific research. In Africa, they include the Constitutions of Namibia, South Africa and Kenya.<sup>305</sup> In those instances where the freedom of expression guarantee does not specifically mention academic freedom and freedom of scientific research, it is presumed to be included.<sup>306</sup>

What does academic freedom entail? The Declaration on Academic Freedom and Autonomy of Institutions of Higher Learning<sup>307</sup> defines academic freedom as-

“the freedom of members of the academic community, individually or collectively, in the pursuit of development and transmission of knowledge, through research, study, discussion, documentation, production, creation, teaching, lecturing and writing.”

This definition does not set out what the freedom entails. It however, distinguishes academic freedom as attaching to universities and university academic community or staff in a research institution.<sup>308</sup> What is also clear is that academic freedom

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<sup>304</sup> Ibid.

<sup>305</sup> Article 33 (1) (c) of the Constitution of Kenya, section 16 (1) (d) of Constitution of South Africa and Article 21 (1) (b). Namibia’s Constitution cites academic freedom but not freedom of scientific research. Interestingly, it ties academic freedom to freedom of thought, conscience and belief and not expression. This further augments the interconnection between these rights to freedom of expression.

<sup>306</sup> For instance the European Convention of Human Rights and the ACHPR do not specifically refer to academic freedom as a component of freedom of expression. The ECtHR and the African Commission in a number of cases have held that academic freedom is protected under general freedom of expression guarantee. William Edward Adjei, ‘The Protection of Freedom of Expression in Africa: Problems of Application and Interpretation of Article 9 of the African Charter on Human and Peoples’ Rights’ (2012) (Unpublished PhD thesis), p. 251-256

<sup>307</sup> Adopted by the General Assembly of the World University Service (WUS) in 1988 in response to challenges of increasing suppression of academic freedom and autonomy of institutions of higher learning especially in Third World countries. The full text is available at: <http://www.ace.ucv.ro/pdf/lima.pdf>.

<sup>308</sup> It distinguishes universities and higher research institutions as places of research and pursuit of knowledge rather than merely the impartation of knowledge. The mere impartation of knowledge and information in the education process, without the duty to generate new knowledge is the business of lower learning institutions such as primary and secondary schools.

has two aspects to it. One is the freedom of the individual scholar, and second is the independence of the institution in its academic pursuits. At the individual level, members of the academic community have the freedom to carry out research, teach and publish without interference.<sup>309</sup> Accompanying this freedom is the obligation of the academic to adhere strictly to the “methods and spirit” of a professional scholar.<sup>310</sup> Thus, research outcomes must arise from following orthodox methods of inquiry. Future research may, of course, lead to contrary conclusions. The emphasis is that the methods applied must be orthodox, and the process undergirded by integrity. It follows from this that processes that are manipulated or falsified to achieve a desired outcome do not merit protection.

To guarantee academic freedom and freedom of scientific research, there is need to insulate members of the academic and scientific community from internal and external threats.<sup>311</sup> Internal threats include intellectual rigidity and pressure for intellectual conformity among members of the academic or research community, careerist rivalry, political and personal differences amongst faculty, among others.<sup>312</sup> Although quite often ignored, the internal threats are real and often more powerful than external ones.<sup>313</sup> Other significant internal threats include the wishes of trustees and administrators of the university.<sup>314</sup> External threats include government agenda and temptations such as research funds from economic powerhouses.<sup>315</sup>

On its part, institutional freedom is the autonomy of the institution of higher learning to define the character of its programs and its membership. It entails four

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<sup>309</sup> David Rabban, ‘Does Academic Freedom Limit Faculty Autonomy’ (1987-1988), *supra*, p. 1410.

<sup>310</sup> Rabban, D ‘Functional Analysis of Individual and Institutional Academic Freedom under the First Amendment’ (1990) 53 *Law and Contemporary Problems* 227, p.242-243. This intellectual autonomy is also provided for under the ‘The Dar Es Salaam Declaration on Academic Freedom and Social Responsibility of Academics,’ adopted in April 1990 under the auspices of Council for the Development of Social Science Research in Africa (CODESRIA). Full text available at: <http://www.codesria.org/spip.php?article351&lang=en> <accessed 16 October 2015>. See also ‘The Kampala Declaration on Intellectual Freedom and Social Responsibility’ (Nov 1990) available on: <http://www.codesria.org/spip.php?article350&lang=en> <accessed 16 October 2015>.

<sup>311</sup> David Rabban, ‘Does Academic Freedom Limit Faculty Autonomy’ (1987-1988), *supra*, p. 1411.

<sup>312</sup> *Ibid.*

<sup>313</sup> *Ibid.*

<sup>314</sup> *Ibid.*

<sup>315</sup> *Ibid.*, p. 1409.

elements: the freedom of the university to decide (a) what may be taught, (b) who will teach (c) how it will be taught and (d) who may be admitted to study.<sup>316</sup> It is a restraint against the potential sources of threat to the autonomy of the institution. The threats to institutional academic freedom are often external ones such as the government, local politics, corporations, and the public; as well as internal ones such as trustees and sponsors whose objectives may have the effect of undermining the autonomy of the institution.<sup>317</sup>

Why does academic freedom and freedom of scientific research deserve protection as elements of freedom of expression?<sup>318</sup> The answer to this question lies in the truth theory as a justification for freedom of expression discussed in chapter three. Millian truth theory justifies the protection of freedom of expression as essential to the 'discovery of truth and elimination of error.'<sup>319</sup> It proceeds from a standpoint of human fallibility and the collective search for truth that is supposedly an important human endeavour.<sup>320</sup> The willingness to allow free dissemination of ideas and information, it is argued, fosters an environment in which new knowledge is generated while old positions are affirmed, reformed or discredited.<sup>321</sup> This assumes a relationship between knowledge through the education experience and the advancement of individual human beings and the society. This premise connects with the core functions of universities as centres for research and intellectual inquiry. Dworkin describes this rationale as an instrumental justification for

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<sup>316</sup> Ibid.

<sup>317</sup> David Rabban, 'Does Academic Freedom Limit Faculty Autonomy' (1987-1988) 66 *Texas Law Review* 1405, p. 1405.

<sup>318</sup> Freedom of scientific research and academic freedom are conceptually the same with a few exceptions. Academic freedom extends to both individual academics and universities as institutions. For universities it covers their competence to recruit staff and students and direct the curriculum independently. Scientific research also attaches to universities and university staff but goes beyond to cover the freedom of scientific community that may not be attached to a university.

<sup>319</sup> See John Stuart Mill, *On Liberty*, in John Gray, ed., *John Stuart Mill on Liberty and Other Essays*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 1998, chapter II.

<sup>320</sup> Ibid.

<sup>321</sup> Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, Cambridge: Harvard University Press, p. 244-260. Dworkin, however, is quick to point out the inadequacies of truth justification as a rationale for academic freedom. While it offers the best defence for academic freedom, it does not explain why universities are obligated to retain academics even when their research outcomes are controversial.

academic freedom as it is connected to its function.<sup>322</sup> While accepting the validity of this justification, he sees it as inadequate.<sup>323</sup> He argues that freedom of expression as a right that enjoys special protection should be based on a deeper and more personal justification. He explains that academic freedom especially in a liberal political context should be defended as it is the core of ethical individualism or individual conviction.<sup>324</sup> That is people must come to a conclusion of what amounts to the 'truth' on their own as a matter of personal conviction.<sup>325</sup> Academic freedom underscores ethical individualism as it promotes personal conviction against collective conformity.<sup>326</sup> Ethical individualism is crucial for universities because of their influence. Universities can be effective vehicles for a culture of conformity. Similarly, they also can be engines of a culture of personal conviction and integrity.<sup>327</sup> Academic freedom is crucial for universities and academics because their core professional responsibility is to 'find, tell and teach' the truth as they see it.<sup>328</sup>

The specific protection of academic freedom and freedom of scientific research is crucial for Kenya especially when understood in light of the history of university education in post-independence era. During the years of political repression in Kenya, academic freedom came under serious threat. First, universities were almost exclusively owned and sponsored by the state.<sup>329</sup> Second, the President was the Chancellor of all public universities.<sup>330</sup> In this capacity, he was the ultimate authority in the institution. His powers included directing and inspecting of teaching programs.<sup>331</sup> This power in practice came to include the power to approve Masters and PhD theses, hence taking

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<sup>322</sup> Ibid.

<sup>323</sup> Ibid.

<sup>324</sup> Ibid.

<sup>325</sup> Ibid.

<sup>326</sup> Ibid.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

<sup>329</sup> In 1970, Unites States International University based in the USA opened a campus in Nairobi. This was before there was a framework to enable private universities to operate. The campus finally became a full-fledged university recognised by the government of Kenya. In the 1990s, more private universities such as Daystar University, African Nazarene University, Catholic University and University of Eastern Africa, Baraton were established. There have been more since then, and the number continues to rise.

<sup>330</sup> Adar, KG 'Human Rights and Academic Freedom in Kenya's Public Universities: The Case of the Universities Academic Staff Union (1999) 21 *Human Rights Quarterly* 179-206.

<sup>331</sup> Ibid.

control of the nature and direction of any intellectual inquiry.<sup>332</sup> Third, the President appointed the Vice Chancellors who were the administrative heads of the institutions.<sup>333</sup> Additionally members of university governing councils were appointed directly by the President.<sup>334</sup> Fourth, the senate and heads of faculties and institutes within the University were appointed by the Vice Chancellor, who owed his appointment entirely to the President. Fifth, and perhaps of more concern was persecution of academic staff on suspicion of being involved in subversive activities. Quite often, lecturers perceived as anti-establishment were harassed and would not be allowed to deliver lectures.<sup>335</sup> As already noted, detention, sham trials and imprisonment of academics was common; while others were forced into exile.<sup>336</sup> For academic freedom, this meant the universities were not free to determine the character of its programs. Second, universities were not free to determine its administrators. Third, members of the academic staff were not free to determine the content of teaching, or at least had to second-guess what the political establishment could tolerate. As a matter of fact, lecturers were under constant self-censorship that was inimical to vibrant intellectual culture because classrooms were not insulated from state's spies and its repressive machinery.<sup>337</sup> Third, researchers in the university would have their research proposals approved only if the political establishment of the day found them acceptable.<sup>338</sup>

Despite these glaring violations of academic freedom, there is no record of serious litigation around this concept. This is explained by the prevailing political situation

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<sup>332</sup> Ibid.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

<sup>336</sup> University professors such as Ngugi wa Thiong'o, Micere Mugo, Dr. Willy Mutunga, and Francis Imbuga were detained, imprisoned, and forced into exile at the height of political repression in Kenya. See Charles Muiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya' (2008, unpublished PhD thesis) *supra*.

<sup>337</sup> Ibid.

<sup>338</sup> It is curious that "preserving academic freedom" which was identified as the core function of the University under the pre-independence University of East Africa Act, 1962 was omitted in the 1985 University of Nairobi Act, chapter 210. This explains the attitude of the state towards university academic freedom and its tight control of the universities in the 1980s and 1990s. The state wanted full control of university business and academic freedom was an unwelcome claim. At the time, University of Nairobi, the successor of the University of East Africa, was the only university in Kenya.

at the time as it has already been described. There was no promise that the courts would censor an aggressively repressive executive to protect academic freedom. For affected academics, instituting legal proceedings would be tantamount to courting trouble. Many dissenting university professors who survived imprisonment or detention without trial opted to go into exile as the account given above shows.

This history of state control of university affairs makes the specific protection of academic freedom and freedom of scientific research crucial if the aspirations of the new constitutional and political dispensation are to be secured. While Kenya is now more open and democratic than in any other time in its history, the risk of interference with universities still exists, albeit in different forms. Although the role of the government under the Universities Act, chapter 210B is now limited to promoting and expanding university education,<sup>339</sup> recent demands by communities and political leaders that universities must employ people from the communities where they are situated pose a new and serious threat to the autonomy of universities.<sup>340</sup> The threat of local politics and infiltration of negative ethnicity is a real threat.<sup>341</sup>

The specific guarantee of academic freedom and freedom of scientific research under the 2010 Constitution secures intellectual inquiry either in response to Kenya's history highlighted above, or as a reflection of trends in modern constitutions, or both. This specific provision removes doubt as to the protection of academic freedom and freedom of scientific research in Kenya. What may be open to debate, however, is the scope

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<sup>339</sup> Universities Act, chapter 210B, section 9.

<sup>340</sup> See for instance the riots at University of Eldoret and demonstrations led by local political leaders demanding jobs, including academic positions, for local communities. Story available at: <http://www.nation.co.ke/news/politics/Senator-leads-varsity-students-demo/-/1064/2622186/-/oboeeoz/-/index.html>. It has become common for locals to demand that universities be staffed by people from the community.

<sup>341</sup> Rivalry along ethnic lines in student politics has also led to serious divisions and violence. See for instance an account by Ishmael Munene on: [http://www.huffingtonpost.com/the-conversation-africa/ethnic-tensions-at-kenyas\\_b\\_8952358.html](http://www.huffingtonpost.com/the-conversation-africa/ethnic-tensions-at-kenyas_b_8952358.html).

of this freedom, its legitimate restrictions, and how it can be reconciled with other national values and policies.<sup>342</sup>

#### 4.5.2.4. Commercial Expression

Commercial expression is not specifically identified for protection in both international human rights instruments and in constitutions. However, commercial advertisements in most democratic societies dominate TV, radio, internet, newspapers, bill boards and other media, leaving vivid messages and influence in the minds of listeners and viewers. The advertising industry is a multi-billion dollar enterprise<sup>343</sup> that is the primary source of funding for the media.<sup>344</sup> In other words, commercial advertising is what enables media to operate and fulfill its other tasks such as facilitating discourse on public affairs in exercise of the right to freedom of expression.<sup>345</sup> Thus, commercial expression is an important aspect of modern life which cannot be ignored.<sup>346</sup>

Commercial expression entails communication of information with business motive. It communicates information about a product or service with the view of creating

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<sup>342</sup> Values such as equality, national cohesion, ethnic, regional and gender balance (and government policy on the same) could potentially come into conflict with academic freedom to the extent that they may limit the expression of personal convictions.

<sup>343</sup> Global advertising spending for 2016 is projected at over 503 billion US dollars. See [http://www.nytimes.com/2015/12/07/business/media/digital-ad-spending-expected-to-soon-surpass-tv.html?\\_r=0](http://www.nytimes.com/2015/12/07/business/media/digital-ad-spending-expected-to-soon-surpass-tv.html?_r=0). <Accessed 20 February 2017.> In Kenya, advertising spending for 2016 is projected at 1 billion US Dollars. See <http://www.businessdailyafrica.com/Corporate-News/kenya-firms-spend-Sh85-billion-in-ads/-/539550/2639692/-/31gxjx/-/index.html>. <Accessed 20 February 2016>.

<sup>344</sup> Roger A. Shiner, 'Advertising and Freedom of Expression,' 45 *University of Toronto Law Journal* 179

<sup>345</sup> *Ibid.*

<sup>346</sup> Commercial expression has received the attention of the highest courts in the United States, Canada, and South Africa, as well as the European Court of Human Rights. In the United States, see for instance *Central Hudson Gas & Electric Corp. v Public Service Commission Of New York*, 447 U.S. 557 (1980) reversing its previous decision in *Valentine v Chrestensen*, the court affirmed that commercial expression is protected under the first amendment. The subsequent decision in *Edenfield v Fane* (91-1594), 507 U.S. 761 (1993), while affirming protection of freedom of commercial expression, the Court nonetheless suggested that commercial expression enjoys "less-than-full" protection under the first amendment. In Canada the Supreme Court decisions in *Ford v Quebec (AG)*, [1988] 2 S.C.R. 712, *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 S.C.R. 927, *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, *RJR – MacDonald Inc. v Canada (Attorney General)*, [1994] 1 S.C.R. 311 have all affirmed the protection of commercial expression. In South Africa, the Constitutional Court decision in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another, infra*, affirmed the right to freedom of commercial expression.

market awareness, and influencing consumers to buy.<sup>347</sup> Other commentators define commercial expression from the perspective of the advertiser or sponsor of advertisement rather than content of the communication.<sup>348</sup> Under this approach, advertisement made or sponsored by any for-profit corporation is commercial even when the message does not seem to directly convey a commercial motive.<sup>349</sup> This broad definition covers messages which though not appearing to appeal to consumers to buy, may nonetheless, have the same effect. Third party endorsements of products or services, is a good example.<sup>350</sup>

While there has been no judicial adjudication in reported cases concerning the position of commercial expression in Kenya, it is logical to conclude that it falls within freedom of expression guarantee since this right protects the “freedom to seek, receive or impart information or ideas.” Except for the settled exclusions such as hate speech, incitement to violence, advocacy of hatred, and propaganda for war, the clause ‘information or ideas’ is couched in general terms to include a wide range of expressions. It is therefore logical to conclude that the guarantee covers commercial expression, subject only to legitimate exclusions that are justifiable under the Constitution.<sup>351</sup> Canadian and American Courts have come to a conclusion that commercial expression falls within freedom of expression guarantees to the extent that first, “commercial expression” is expression.<sup>352</sup> The Constitutional Court of South Africa took a similar position in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another*.<sup>353</sup> In this case, the Court held that unless a form of communication is specifically excluded, then it follows that it is protected.<sup>354</sup>

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<sup>347</sup> Keith Dubick, ‘Commercial Expression: “A Second-Class Freedom?” (1996) 60 *Saskatchewan Law Review* 91, p. 93.

<sup>348</sup> Ailbhe O’Neil, ‘Corporate Freedom of Expression,’ (1985) 27 *Dublin University Law Journal* 184.

<sup>349</sup> *Ibid.*

<sup>350</sup> *Ibid.*

<sup>351</sup> For example hate speech, propaganda for war, incitement to violence, vilification of others, or other restrictions that may be justified on grounds of public morality or other forms of public interest. False, misleading, or ‘obscene’ advertising may be limited on such grounds.

<sup>352</sup> Keith Dubick, ‘Commercial Expression: “A Second-Class Freedom?” *supra*.

<sup>353</sup> (CCT42/04) [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) (27 May 2005)

<sup>354</sup> *Ibid.*

Commercial expression communicates ideas and information much the same way as political speech or other forms of expression. In addition, it sometimes serves some of the values of free speech such as the advancement of self fulfillment and autonomy,<sup>355</sup> or adding to the marketplace of ideas, thus enabling informed choices among individuals.<sup>356</sup> Chapter three explored the theoretical justifications for freedom of expression. It was noted that freedom of expression deserve protection for reasons that it advances (and constitutes) democracy, autonomy, the search for truth, individual self-fulfillment and dignity. Commercial expression sometimes contains information that resonates with these political, social and moral values.<sup>357</sup> While the democracy rationale is remote, truth, autonomy and self-fulfillment values may be derived from commercial expression.<sup>358</sup> This can be said for instance of a broad range of adverts such as those on contraceptives or hygiene and disease prevention products, or luxury goods, among others. It has also been noted that it is often difficult or impossible to conceptually distinguish between commercial expression and other forms of expression. Commercial expression, it is argued, may well contain information that has political, social, cultural and moral importance.<sup>359</sup>

But, it should not be lost that commercial expression lends itself to the autonomy, self-fulfillment and the quest for truth by the consumer rather than the advertiser or invariably, the provider of goods and services.<sup>360</sup> The focus shifts to the listener rather than the speaker. Conceptually, freedom of expression focuses more on the speaker than the audience.<sup>361</sup> But as it has already been noted, the guarantee also attaches to audience much the same way as it does to the speaker. More importantly, the social theory advanced by Richard Moon sees freedom of expression as protecting the right of

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<sup>355</sup> Caroline Reid, 'Freedom of Expression, Commercial Expression and Tobacco in Canada,' (2008) 39 *Victoria University of Wellington Law Review*, 343.

<sup>356</sup> *Ibid*, 351.

<sup>357</sup> *Ibid*, 351.

<sup>358</sup> *Ibid*, 351.

<sup>359</sup> *Ibid*, 351.

<sup>360</sup> Roger A. Shiner, 'Advertising and Freedom of Expression,' *supra*, p. 191.

<sup>361</sup> *Ibid*.

persons to communicate with each other in a social context.<sup>362</sup> The need for people to receive information necessary to make informed choices not just in politics but also in economic matters and consumption in a free market economy offers a powerful rationale why commercial expression merits some form of protection.<sup>363</sup>

The conclusion, however, that information of a commercial nature falls under the freedom of expression protection has serious implications. Once it becomes a form of protected communication, it assumes an elevated normative value as a constitutional right, and a presumption arises to the effect that any limitation is invalid unless shown to be 'reasonable and justifiable in an open and democratic society.'<sup>364</sup> In other words, the balance tilts in favour of the advertiser, and the burden of proof to find fault under the Constitution rests with the state.

This has deeper implications: First, it reduces the ability of the state to regulate commercial expression in the interest of public health or morals, or similar collective rationales.<sup>365</sup> Once accepted as a constitutional right, it would be difficult to reverse, yet it is quite clear that advertising requires regulation in the interest of the public.<sup>366</sup>

Second accepting freedom of commercial expression and putting it at par with other forms of expression raises the question of whether non-natural persons such as companies can be appropriate holders of rights. This is because advertising is dominated by corporations rather than individuals.<sup>367</sup> The discussion about whether corporations in Kenya have rights in the same way as individuals seems to be settled, albeit controversially. Except with a few rights such as access to information, movement and

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<sup>362</sup> Richard Moon, 'The Social Character of Freedom of Expression,' *supra*.

<sup>363</sup> Tamara R. Piety, 'Against Freedom of Commercial Expression,' (2007-2008) 29 *Cardozo L. Rev.* 2583, p. 2648

<sup>364</sup> *Ibid*, p. 2584. This presumption arises from the implication of limitation clause under section 36 and article 24 of South Africa's and Kenya's Constitution respectively. Detailed analysis of the proportionality criteria under these provisions will follow in chapter 6.

<sup>365</sup> *Ibid*, p. 2584

<sup>366</sup> *Ibid*, p. 2584

<sup>367</sup> Ailbhe O'Neil, 'Corporate Freedom of Expression,' *supra*.

political rights, other rights attach to 'every person.'<sup>368</sup> The Constitution proceeds to define "person" to include natural persons as well as companies, associations and other bodies irrespective of whether they are incorporated or not.<sup>369</sup> This suggests that fundamental rights and freedoms also attach to companies. The controversy that this obviously raises is twofold: first, from the theory of human rights (from which constitutional rights in Kenyan context arise), "human rights" attach to human beings. The historicity of human rights in general, and freedom of expression in particular has always been tied to natural persons in recognition of inherent dignity, autonomy and membership to a political society.<sup>370</sup> Its evolution from antiquity to its modern understanding in human rights law supports the same position. The second controversy is the question of who exactly a company or any other corporation for that matter is. It is an artificial person created and recognised by law. Thus, it expresses its will and wishes only through human agents such as directors. Thus, how can a person who cannot express itself independent of its human agents be said to enjoy rights? How can those rights be said to pertain to the corporation and not claims of its human agents? These are questions that led Justice Rehnquist of the US Supreme Court to take the position that it would be absurd to ascribe intellect and attach rights to corporate persons.<sup>371</sup> His position that corporations could not be said to hold rights in the same way as human beings do has received both support and opposition from commentators.<sup>372</sup> As the Constitution of Kenya has not made a distinction between natural and artificial persons as far as rights are concerned (except for the few cited above), it will remain to be seen how emerging jurisprudence will resolve these questions. The discourse has already been set in motion by the concept of horizontal applicability of rights which, as

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<sup>368</sup> For access to information under article 35, every citizen has the right to access information held by the state, or any other person if that information is necessary for the protection of their rights. As for deletion of untrue or misleading information pertaining to a person, the right extends to all without distinction as to citizenship. Freedom of movement and residence under article 39, the right extends to 'every person' except that citizens have the right to "enter, remain in and reside anywhere in Kenya," which does not extend to everyone. Political rights, which include the right to make political choices, vote, form or join a political party, participate in political activities and hold public office, are exclusively reserved for citizens.

<sup>369</sup> Constitution of Kenya, article 260.

<sup>370</sup> Appiagyei-Atua, K 'Review of the Theories of Expression in the Context of the Development Argument' (2005-2007) 23 *University of Ghana Law Journal* 197.

<sup>371</sup> *Pacific Gas & Electric Co. v Public Utilities Commission*, 475 U.S. 1 (1986)

<sup>372</sup> Tamara R. Piety, 'Against Freedom of Commercial Expression,' *supra*, p.2585.

was noted in chapter 2, imposes the duty to respect rights and other constitutional obligation upon private persons, including corporations.

In *Nairobi Law Monthly Limited v Kenya Electricity Generating Company Limited & 2 others*,<sup>373</sup> the High Court held that where the Constitution ascribes a right to “every citizen” as it does concerning the right to access information held by the state or any other person but necessary for protection of a fundamental right, only natural persons may enjoy the right. The court specifically rejected arguments that corporations such as companies are citizens even if they are incorporated in Kenya and all its directors are Kenyan citizens. This implies that a corporation is a person that may rightfully make claims under the bill of rights except those that attach specifically to ‘citizens’ since a body corporate is not a ‘citizen’ within the meaning given under the Constitution.<sup>374</sup>

Despite having accepted that commercial expression falls within freedom of expression guarantee, courts elsewhere, particularly in Canada and the United States have held that commercial expression deserve less-than-full protection.<sup>375</sup> This second-rate protection has been justified on the basis of the fact that unlike politically, socially or culturally motivated expression, commercial expression is not self-expressive.<sup>376</sup> Rather, it is motivated by economic or business interests. That is, they are intended to influence the public to buy for the benefit of the communicator or its sponsors.

There have been many missed opportunities that should have clarified, or at least allowed debate on constitutional position on commercial expression in Kenya. The government quite often imposes sweeping restrictions on advertising which go unchallenged legally. For instance, tobacco advertisements are completely prohibited. Promotion of alcoholic drinks is severely restricted to outside watershed hours, and adverts must not create impression that drinking has any social, sexual or health benefits.<sup>377</sup>

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<sup>373</sup> [2013] eKLR.

<sup>374</sup> Ibid. Chapter 3 of the Constitution of Kenya makes provisions relating to citizenship.

<sup>375</sup> Keith Dubick, ‘Commercial Expression: “A Second-Class Freedom?” *supra*.

<sup>376</sup> Ibid.

<sup>377</sup> Kenya Information and Communications (Consumer Protection Regulations), 2010; also Alcoholic Drinks Control Act, 2010, section 43-49; Tobacco Control Act, 2012, section 22-31.

In addition, tobacco manufacturers are required to print clear messages on cigarette packets about the harmful effects of smoking.<sup>378</sup> Recent regulations limit the time that advertisements may take during prime time news to no more than seven minutes for every thirty minutes even for private TV operators.<sup>379</sup> In addition, there is a blanket ban on adverts during live airing of national celebrations.<sup>380</sup> These are sweeping restrictions with serious revenue implications to advertisers, business people and media operators. These players have, as in the past, opted to lobby politically than to seek legal redress.<sup>381</sup>

The freehand with which the government restricts commercial advertising, the lack of protest from the civil society, weak resistance from the affected business community and the apparent public support that it enjoys suggest that commercial expression is given a lesser political importance. This, however, is at a political level in terms of how the government deals with commercial expression and how the public and other players respond to the actions. It would be interesting to see how the courts react should these restrictions be challenged legally. The approach that the courts have taken recently on limitation of rights suggests that they are likely to weigh the legitimate interests of the state as a regulator of public space against the individual claims of those asserting the right to commercial expression.<sup>382</sup> This of course will be on a case by case basis depending on the products and reasons for restriction, among other relevant considerations.

Consumer rights are an emerging dimension that adds to the constraints on commercial expression. Consumer rights include the right of consumers to reasonable quality of goods and services, information necessary for them to reap full benefits from goods and services, protection of their health, safety and economic interests, compensation

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<sup>378</sup> Tobacco Control Act, 2012, section 29.

<sup>379</sup> See the Programming Code for Free-to-Air Radio and Television Services in Kenya, 2016.

<sup>380</sup> Ibid.

<sup>381</sup> The restrictions on trade and advertisements in alcohol and tobacco products have not seriously attracted litigation in Kenya. Instead, the manufacturers have preferred to lobby policy decision makers.

<sup>382</sup> See for instance CORD case, *supra*, in which the High Court of Kenya applied a proportionality test derived from article 24 to determine the validity of limitations on fundamental rights and freedoms. A detailed discussion on the proportionality criteria will follow later in chapter 6.

for harm resulting from defects and to honest and fair advertising.<sup>383</sup> The constraint on commercial expression is that advertising must be “fair, honest and decent.”<sup>384</sup> The debate of whether consumer rights are human rights is unsettled and is likely to go on for a while.<sup>385</sup> What is obvious though is that the main human rights instruments did not incorporate consumer rights at the start.<sup>386</sup> Thus, incorporation will be a case for reform once there is consensus in international human rights discourse. It is noteworthy that the Kenyan Constitution is ahead of the debate. Consumer rights are guaranteed under article 46 of the Constitution, and enjoy the same prominence as other rights in the bill of rights.<sup>387</sup>

#### 4.6. Relationship between Freedom of Expression and other Rights

The question of relationship between rights has attracted a considerable amount of scholarship. The concept of indivisibility and interdependence of rights is central to the United Nations human rights system.<sup>388</sup> It is a doctrine that is espoused by the Office of the UN Human Rights Commissioner and affirmed by the General Assembly.<sup>389</sup> This is the idea that rights support and reinforce one another.<sup>390</sup> Due process or the right to fair trial for instance is what ensures that the rights to life, liberty, property

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<sup>383</sup> See for instance the Constitution of Kenya, article 46.

<sup>384</sup> The Supreme Courts of US and Canada have for long held that false advertising do not enjoy protection. In Kenya, disguising an advertisement as a news item or use of prominent media personalities to advertise is prohibited. The rationale is to avoid misleading consumers or exerting undue influence using celebrated media personalities. Alcohol must not be advertised in a way that sends a message that its consumption is desirable.

<sup>385</sup> Sinai Deutch, ‘Are Consumer Rights Human Rights?’ (1994) 32.3 *Osgoode Hall Law Journal* 537.

<sup>386</sup> *Ibid.*

<sup>387</sup> Article 46 (1) Consumers have the right

(a) to goods and services of reasonable quality;

(b) to the information necessary for them to gain full benefit from goods and services;

(c) to the protection of their health, safety, and economic interests; and

(d) to compensation for loss or injury arising from defects in goods or services.

(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.

<sup>388</sup> Craig Scott, "Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights." (1989) 27 *Osgoode Hall Law Journal* 769, 769-770. Available at: <http://digitalcommons.osgoode.yorku.ca/ohlj/vol27/iss3/8>

<sup>389</sup> Lanse Minkler and Shawna Sweeney, ‘On the Indivisibility and Interdependence of Basic Rights in Developing Countries,’ (2011) 33 *Human Rights Quarterly* 351, p. 351-354.

<sup>390</sup> *Ibid.*

and others are vindicated and protected.<sup>391</sup> In the absence of due process most other rights will collapse; and the same can be said of other rights. Thus, the idea holds, for the full realisation of human rights and human dignity, it is not tenable to maintain artificial distinctions and categorizations.<sup>392</sup>

At a conceptual level, human rights as a discipline has traditionally worked on the basis of categorisation of rights. The main categories are civil and political rights (CPRs) or first generation rights and social and economic rights (SERs) or second generation rights.<sup>393</sup> The idea of interdependence and indivisibility of rights hold that these two categories of rights are interconnected.<sup>394</sup> As such it is not possible to realise human dignity as an objective of human rights without an approach that intertwines the two. Arguments in support of indivisibility of CPRs and SERs have in recent time become strong, giving hope for better realisation of SERs which in many jurisdictions were taken to be non-justiciable and merely aspirational.<sup>395</sup> The Indian Supreme Court in particular has held that the right to life, which is a civil and political right, incorporates the right to food, access to food and protection against malnutrition and starvation.<sup>396</sup>

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<sup>391</sup> James Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights,' (2008) 30 *Human Rights Quarterly*, 984, p. 984-985.

<sup>392</sup> Lanse Minkler and Shawna Sweeney, 'On the Indivisibility and Interdependence of Basic Rights in Developing Countries, *supra*, p. 352-353. The idea of indivisibility has, however, attracted criticism. Minkler & Sweeney for instance argue that insistence that rights ought to be implemented holistically is impractical because of constraints of resources that force states to prioritise rights or because of outright unwillingness to implement rights.

<sup>393</sup> More recent entrants into categories of rights are the Third Generation (group or solidarity rights) and more recently gender and special rights such as those relating to women, children, youth, and persons with disability and so on.

<sup>394</sup> Craig Scott, "Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights." (1989) 27 *Osgoode Hall Law Journal* 769, 769-770. Available at: <http://digitalcommons.osgoode.yorku.ca/ohlj/vol27/iss3/8>. See also Hamlyn Victoria, 'The Indivisibility of Human Rights: Economic, Social and Cultural Rights and the European Convention on Human Rights, (2008) 40 *Bracton Law Journal* 13, p.13-16.

<sup>395</sup> *Ibid*.

<sup>396</sup> For details see the Supreme Court of India in *People's Union for Civil Liberties v Union of India*, (2003) 4 SCC 399; in which the Court held that the right to life includes the right to food, access to food and protection against malnutrition and starvation. Also *Kesavananda Bharati Sripadagalvaru and Others. v State of Kerala and Anor.*(1973) 4 SCC 225), in which the Supreme Court of India noted that civil and political rights are complementary with SERs traditionally seen as policy directives rather than justiciable rights. See also Stanley Ibe, 'Beyond Justiciability: Realising the Promise of Socio-economic Rights in Nigeria, (2007) *African Human Rights Journal*, 225, p.233-243.

The conceptual division of rights goes beyond the CPR and SERs dichotomy and the other categories based on the nature of rights. Within CPRs category, the understanding usually is that each right has its own elements distinguishable from others within the category. But a closer look reveals that it is often challenging or even impossible to distinguish between some rights. For example, Martin Redish argues that the freedom of expression and freedom of thought are virtually indistinguishable.<sup>397</sup> This, he argues, is because the theoretical justifications for freedom of expression apply with similar force to freedom of thought. Second, protection of freedom of expression is meaningless without a corresponding protection of freedom of thought. In other words, the two rights are inseparably connected. This inseparability of civil and political rights is best illustrated by the decision of the Supreme Court of India in *Maneka Gandhi v Union of India*.<sup>398</sup> In this case, the Court connected the right to liberty<sup>399</sup> to the right to practice a profession<sup>400</sup> and the right to equality, equal protection and equal benefit of the law.<sup>401</sup> It observed that these rights are not distinct but inter-connected.

Similarly, freedom of expression is directly related to the cluster of rights that have often been described as “communicative rights.”<sup>402</sup> These include the right to hold opinions, thought, conscience or belief, and the right to access information, and the media. Of importance is how freedom of expression facilitates the exercise of these rights such that in its absence, these rights will be compromised. As noted in 4.5.2.1. above, freedom of expression is also connected to the right to access information to the extent that freedom of expression is defined to include the right to receive information without restriction.<sup>403</sup> Freedom of expression is also crucial in the exercise of other rights such as freedom of

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<sup>397</sup> Martin Redish, ‘Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory,’ (1992) 11 *Criminal Justice and Ethics* 29, p. 32-33.

<sup>398</sup> [1978 AIR 597, 1978 SCR (2) 621].

<sup>399</sup> The Constitution of India, article 21.

<sup>400</sup> *Ibid*, article 19(1)(g).

<sup>401</sup> *Ibid*, article 14.

<sup>402</sup> “Communicative rights” because they are concerned with human interaction and communication.

<sup>403</sup> Freedom of expression includes the right to receive information. This is directly related to the right to access information. In Kenyan law, every citizen has a right to access information held by the state. Additionally, citizens have the right to receive information held by private persons if the information is necessary for the protection of his rights.

association, assembly, political rights, and the right to demonstrate or picket, and labour rights.

The relationship between freedom of expression and media freedom is of particular importance to the theme of this thesis, and deserves a more detailed analysis. The connection between these two rights is so intimate that quite often reference to one is assumed or specified to include the other. Section 16(1) of South Africa's Constitution which provides that '[e]veryone has the right to freedom of expression, which includes- (a) freedom of the press and other media,' is a good example. Kenya's Constitution provides for these two rights separately. Media freedom is guaranteed under article 34 and is defined in terms of the independence of print, electronic and other forms of media from state censorship or control.<sup>404</sup> It protects the freedom of media houses and journalists to disseminate information through avenues such as newspapers and other print media, radio and TV broadcast as well as digital media. The guarantee specifically excludes state patronage and requires regulation of the media industry by an independent regulator. The right to disseminate information is however subjected to the same limitations as the general freedom of expression guarantee in article 33. Thus, it can be concluded that media freedom is indeed the right to freedom of expression as pertains to media players. Thus,

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<sup>404</sup> (1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).

(2) The State may not

(a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or

(b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that

(a) are necessary to regulate the airwaves and other forms of signal distribution; and

(b) are independent of control by government, political interests or commercial interests.

(4) All State-owned media

(a) is free to determine independently the editorial content of their broadcasts or other communications;

(b) is impartial; and

(c) affords fair opportunity for the presentation of divergent views and dissenting opinions.

(5) Parliament enacts legislation that provides for the establishment of a body, which

(a) is independent of control by government, political interests or commercial interests;

(b) reflects the interests of all sections of the society; and

(c) sets media standards and regulate and monitor compliance with those standards.

the two carry the same elements and the media facilitates dissemination of information to a broader audience.<sup>405</sup> For this reason, discussions on freedom of expression are often taken to include media freedom and vice versa.

Aside from the inseparable or indivisible nature of rights, the relationship among rights also has another dimension. Although all are, at least in theory, thought to be for the realisation of human dignity, rights quite often conflict. The enjoyment of a right by one person may lead to a violation of the rights of others.<sup>406</sup> This tension is evident under article 24 (1) (d)<sup>407</sup> and 33 (3) of Kenya's Constitution, section 16 (2) of South Africa's Constitution, article 20 of the ICCPR and article 10 (2) of the ECHR.<sup>408</sup> The exercise of freedom of expression by one person, for instance may collide with another's right to reputation, privacy, dignity or equality. The right to reputation is the concern of the law of defamation that remains a legacy of English common law in many jurisdictions around the world. Through the tort of defamation, the law protects a person's reputation from harm. Reputation is a crucial aspect of any individual. Injury to it could result in loss of income, employment, position in society and so forth. The right to privacy on the other hand protects certain aspects of a person's private life. It covers a number of facets including the freedom of thought, autonomy over one's body, the right to be left alone, solitude in one's home, control over personal information, protection from surveillance, protection of personal reputation, protection from arbitrary search and interrogation, protection of private correspondence, among other things.<sup>409</sup> Freedom of expression comes into collision with the right to reputation and privacy as expression concerns the liberty to express one's thoughts, communicate information as well as the right to receive information.

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<sup>405</sup> As seen from note 392 above, however, media freedom in the Kenyan context extends to technical aspects of the regulation of media freedom and the airwaves.

<sup>406</sup> Stijn Smet, 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict,' (2011) 26 *American University International Law Review* 184, p. 184-185.

<sup>407</sup> Article 24 (1)(d) reads: "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...."

<sup>408</sup> Article 33 (3) of the Constitution of Kenya reads: "In the exercise of the right to freedom of expression, every person must respect the rights and reputation of others." This is the same message echoed in the other cited instruments. All these provisions recognise that the exercise of freedom of expression may offend other people's welfare and rights such as reputation and privacy.

<sup>409</sup> Daniel Solove, *Understanding Privacy*, (2008) Harvard University Press, Cambridge, p.1

Freedom of expression may be at variance with the right to equality to the extent that it may expose members of a group such as gender, race, and nationality to ridicule, contempt and discriminatory treatment.<sup>410</sup> The enjoyment of certain rights may also be at variance with certain interests or values such as national security, public morality, public safety, public order and the authority of the judiciary and integrity of the judicial process.<sup>411</sup>

#### 4.7. Conclusion

This chapter briefly traced the history of the modern concept of the right to freedom of expression. As an idea rooted in Western liberal political thought, the right as understood today was shaped by different developments such as religious reformation in Europe, the ideas of the enlightenment period, the rise of parliamentary privilege in England, and its spread to the United States, as well as the French and American revolution in the eighteenth century.

John Locke's idea of natural law and natural rights influenced the incorporation of civil liberties in early constitutional documents such as the French Declaration of the Rights and Duties of Man, the Virginia Declaration of Rights, and the Constitution of the United States. The incorporation of freedom of expression guarantee in these instruments set the stage for the right to assume an international and transnational character.

The elevation of freedom of expression to modern international human rights law was a consequence of the Second World War. In response to the devastations of the War and the need to secure future international peace and security, the international community committed to respect for human rights through the adoption of the UN Charter, the UDHR and the ICCPR. Following the same pattern, Europe and the Americas

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<sup>410</sup> Carmi, GE 'Dignity, The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification' (2006-2007) 9 *University of Pennsylvania Journal of Constitutional Law* 957, p. 957-1001.

<sup>411</sup> These tensions are captured in article 20 of the ICCPR, article 33 of the Constitution of Kenya. Detailed discussions will follow in chapter five.

adopted the ECHR and the ACHR respectively.<sup>412</sup> This elevated human rights, including freedom of expression, to the realm of international law. These instruments, in turn, aided the spread of international human rights norms and freedom of expression in particular, in constitutions around the world.

The chapter showed that the formal protection of the right to freedom of expression in Kenya was introduced through the independence constitution. Britain, Kenya's former colonial master neither had a written constitution nor a bill of rights. The incorporation of the bill of rights in the independence Constitution was a compromise to secure the rights of minority groups and ensure a peaceful transition to independence. The contents of the bills were heavily borrowed from the Nigerian bill of rights, which in turn replicated the ECHR. Thus, the independence bill of rights should be seen as a legacy of the decolonisation process and the ECHR. The bill of rights, however, admitted very wide limitations that largely undercut the protection.

The chapter highlighted different freedom of expression experiences in Kenya's history. It discussed these experiences in various phases and showed how legal developments and the state's attitude towards freedom of expression have been uninspiring. While the 2010 Constitution promises a more robust protection of freedom of expression, the continued retention of pre-existing laws and the enactment of new ones that undermine freedom of expression cast doubt about the commitment of the state towards the right. It suggests that political culture, which determines political responses and priorities, remains a continuing threat to freedom of expression.

Furthermore, this chapter demonstrated how the system of administration and laws inherited from the colonial era, the quest to consolidate political power by the post-colonial regimes, the post-independence African socialism ideology, the Cold War politics, global fight against terrorism, revolutions in ICT, and the expanding democratic

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<sup>412</sup> The African Charter on Human and Peoples' Rights (ACHPR) was adopted more recently in June 1981, and entered into force in 1986.

space in the post-KANU dispensation have all influenced and shaped the conception of freedom of expression in Kenya.

The chapter showed that freedom of expression has always been at the centre of the struggle for independence, democracy, the rule of law and respect for human rights in both colonial and post-colonial Kenya. The chapter further explored the nature, scope and components of the right to freedom of expression. It demonstrated that freedom of expression takes the nature of a moral, legal, and political right. Freedom of expression is also a negative right, concerned with safeguarding the individual's liberty to communicate. Although it is a liberal freedom that primarily attaches to the individual, the right also has a social component that is the unstated premise in every freedom of expression theory. It may also be seen as a positive right since its full enjoyment would necessarily require positive steps to facilitate individuals and the society to exchange ideas and receive information.

The chapter explored in detail the components of freedom of expression guarantee; namely the freedom to seek, receive or impart ideas, freedom of artistic expression, freedom of scientific research and academic freedom and commercial expression. Additionally, it discussed the architecture of freedom of expression guarantees such as the "absolute" American model and the international human rights model adopted by the constitutions of many countries such as South Africa, Kenya, and Canada.

The chapter also assessed the relationship between the right to freedom of expression and other rights. It concluded that freedom of expression supports and is in turn supported by communicative rights such as freedom of thought, opinion, belief, association and assembly. Its exercise however, sometimes conflicts with other people's rights such as privacy and reputation. It can also be potentially at variance with countervailing values and interests such as national security, public order, and equality. Finally, Kenya's domestic and international legal obligations relating to freedom of expression were discussed. The chapter concluded that both the Constitution and international conventions applicable to Kenya guarantee the right to freedom of expression.

Its enjoyment must however respect the rights and reputation of others, and steer clear of hate speech, propaganda for war, incitement to violence or vilification of others. The state retains the power to restrict freedom of expression on grounds such as national security, defence, public safety, public health and public morals, among other similar legitimate interests. The balance between permitted and restricted expression is delicate, and sometimes hard to strike. An assessment of the legitimate limits to freedom of expression generally, and how Kenyan law has limited the right will follow in chapter five.

## Chapter Five

### Analysis of Freedom of Expression Limitations in Kenya

- 5.1. Introduction
- 5.2. The Nature of Freedom of Expression Limitations
  - 5.2.1. Internal and External limits
  - 5.2.2. Prior Restraints and Subsequent Punishment
- 5.3. Walking the Tight Rope: Theorising Freedom of Expression Limitations
- 5.4. Political Expression, Limitations and their Justifications
  - 5.4.1. National Security and Public Order
  - 5.4.2. Rights and Reputation of Others
    - 5.4.2.1. Public Officials, Libel and Freedom of Expression
    - 5.4.2.2. Hate Speech, Dignity and Equality, and Political Expression
  - 5.4.3. The Authority and Independence of the Judiciary, The *Sub Judice* Rule, Contempt of Court and Political Expression
- 5.5. Conclusion

## 5.1. Introduction

It is well settled in human rights discourse that with the exception of a few non-derogable guarantees such as fair trial, protection from slavery, torture, and cruel and inhuman treatment or forms of punishment, rights, including freedom of expression, are not absolute.<sup>1</sup> They may be qualified in the interest of certain public policy objectives. This chapter analyses freedom of expression limitations with a special focus on those that have a direct effect on political expression, political freedom and political transformation, the central themes of this thesis. In particular, the analysis is limited to the freedom of expression restrictions that are especially grounded on national security and public order, the rights and reputation of others, and the authority and independence of the judiciary. These rationales are singled out because most limitations that threaten political expression and political freedom are grounded on them as the chapter will show.

The chapter begins by analysing the general nature of freedom of expression limitations and proceeds to theorize limitations as attempts to balance competing individual claims on the one hand, and community or public policy interests on the other. The chapter goes on to evaluate the legal regime limiting freedom of political expression in Kenya from a comparative perspective. Using illustrations of law, and practice evidenced by state prosecutions, the chapter claims that while they are supposed to safeguard legitimate interests, freedom of expression restrictions are often manipulated to suppress criticism against the government and public officials. This in turn hinders accountability and transparency in government and undermines the transformative aims of the Constitution.

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<sup>1</sup> Non-derogable rights are those rights on which no limitation is permitted. They include the right to fair trial, freedom from torture, slavery, cruel and inhuman form of treatment or punishment. See generally, H Steiner, P Alston, *et al International Human Rights in Context: Law, Politics, Morals*, 3<sup>rd</sup> Edn., (New York, Oxford University Press, 2007). Kenya's Constitution under article 25 adds to this list the right to an order of *habeas Corpus*. South Africa's Constitution and the German Basic Law include the right to human dignity as non-derogable.

## 5.2. The Nature of Freedom of Expression Limitations

In the century that Kenya has existed as a polity, spanning from the British colonial era to the present, an extensive system of laws that have direct and incidental adverse effects on freedom of expression has emerged.<sup>2</sup> These laws are premised on different rationales and contained in different pieces of legislation such as the Penal Code,<sup>3</sup> Public Order Act,<sup>4</sup> the Preservation of Public Security Act,<sup>5</sup> Kenya Information and Communications Act,<sup>6</sup> Defamation Act<sup>7</sup> and the National Flags and Emblems Act,<sup>8</sup> among others. English common law is also relevant to the extent that the substantive law of libel is derived from it.<sup>9</sup> While some of them can pass the constitutional muster, the validity and justifiability of others under the 2010 Constitution is doubtful as will be seen later. These expression-limiting laws include libel,<sup>10</sup> incitement to violence and disobedience of the law,<sup>11</sup> unlawful assembly,<sup>12</sup> wounding religious feelings,<sup>13</sup> undermining authority of a public officer,<sup>14</sup> sedition,<sup>15</sup> subversive activities,<sup>16</sup> alarming publication,<sup>17</sup> perjury,<sup>18</sup> defamation of foreign princes,<sup>19</sup> and treason.<sup>20</sup> Others are the law empowering the state to seize or prohibit publications prejudicial to public security or order,<sup>21</sup> and ban or control

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<sup>2</sup> A restriction is explicit if by definition, it targets expression and has the direct effect of suppressing it. Incidental restrictions on the other hand are those which, although not targeting freedom of expression, still affect the right incidentally.

<sup>3</sup> Chapter 63, Laws of Kenya.

<sup>4</sup> Chapter 56, Laws of Kenya.

<sup>5</sup> Chapter 57, Laws of Kenya.

<sup>6</sup> Chapter 411A, Laws of Kenya (as amended in 2013).

<sup>7</sup> Chapter 36, Laws of Kenya.

<sup>8</sup> Chapter 99, Laws of Kenya.

<sup>9</sup> Judicature Act, Chapter 8, Laws of Kenya, section 3 (1) (c).

<sup>10</sup> Penal Code, Chapter 63, Laws of Kenya, section 194.

<sup>11</sup> *Ibid*, section 96.

<sup>12</sup> *Ibid*, section 78

<sup>13</sup> *Ibid*, section 138

<sup>14</sup> *Ibid*, section 132.

<sup>15</sup> *Ibid* section 57, repealed by Act No. 10 of 1997.

<sup>16</sup> *Ibid*, section 77.

<sup>17</sup> *Ibid*, section 66.

<sup>18</sup> *Ibid*, section 108.

<sup>19</sup> *Ibid*, section 67.

<sup>20</sup> *Ibid*, section 40.

<sup>21</sup> *Ibid*, sections 52, 53 and 54.

any assembly, association or procession.<sup>22</sup> Others are the offences of inducing terrorism,<sup>23</sup> hate speech,<sup>24</sup> misusing a telecommunications system,<sup>25</sup> and desecrating the national flag and other symbols.<sup>26</sup> The President's power to detain without trial may also be seen as a sanction against political expression.<sup>27</sup> As it turned out many victims of this law, now repealed, were political dissidents who had expressed sentiments that the President or the ruling party was uncomfortable with. The arrest and detention of Members of Parliament Martin Shikuku and Jean Seroney who were harsh critics of the Kenyatta government in the 1970s are good examples.<sup>28</sup>

A dissection of the anatomy of these restrictions reveals that they fall into two broad categories. These are: (a) internal limits and external limits, and (b) prior restraints and subsequent punishment. A detailed discussion of these forms follows below.

### 5.2.1. Internal Limits and External Limits

Steve Gardbaum has categorised freedom of expression limitations into two broad groups: "internal limits" and "external limits."<sup>29</sup> Internal limits, he explains, are those that go to the definitional scope of permitted expression. Certain forms of expression do not deserve protection even in the classical liberal and libertarian sense and are

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<sup>22</sup> Ibid, section 78, 79 and 80.

<sup>23</sup> Security Laws Amendment Act (SLAA), 2014, section 64 (introducing section 30A to the Prevention of Terrorism Act).

<sup>24</sup> Nation Cohesion and Integration Act, 2008, section 13 and 62.

<sup>25</sup> Kenya Information and Communications Act, Chapter 114A, section 29.

<sup>26</sup> National Flags and Emblems Act, Chapter 99, Laws of Kenya.

<sup>27</sup> PLO Lumumba, MK Mbonyeni and SO Odero, (eds)(2012) *Constitution of Kenya, Contemporary Readings: LawAfrica*, p.26-29. These powers were provided for under the Preservation of Public Security Act. The enabling provision was repealed during the Inter Party-Parliamentary Group (IPPG) reforms of 1997 as discussed in chapter two of this thesis.

<sup>28</sup> Charles Muiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya' (2008, unpublished PhD thesis), p. 184.

<sup>29</sup> Stephen Gardbaum, 'Limiting Constitutional Rights,' (2007) 54 *University of California Los Angeles Law Review* 789.

excluded from the guarantee.<sup>30</sup> Internal limits are constitutional as they are found within the free speech guarantee itself.

Although the scope of freedom of expression varies from one jurisdiction to another, all endeavor to exclude forms of speech which undermine socio-political values of freedom of expression discussed in chapter three. For instance, hate speech, propaganda for war, incitement to violence and defamation, are generally expressly excluded or treated less favourably in the freedom of expression guarantee. In American's First Amendment, which seems to give freedom of expression absolute protection for instance, the Supreme Court has held that "fighting words," obscenity, fraud or words that constitute 'clear and present danger' fall outside the guarantee.<sup>31</sup> Thus, when the state takes action to suppress hate speech or incitement to violence or other internal limits, it is understood that there is no infringement since it is beyond the scope of freedom of expression. The disagreement that remains, however, will be about whether the expression in question amounts to hate speech, incitement to violence, or some other form of excluded expression.

External limits, Gardbaum explains, extend beyond what is covered by internal limits.<sup>32</sup> While internal limits are principally anchored in constitutional definition of rights, internal limits are legislative limits. They are restrictions imposed by the legislature and aimed at achieving public policy objectives such as national security, public order, public health, morality or the protection of the rights of others.<sup>33</sup> When rights are limited in order to safeguard these collective goals, there is a resulting interference. In a democratic context, an interference with fundamental rights generally, and freedom of expression in particular must be consistent with democratic ideals.<sup>34</sup>

Gardbaum's analytical framework of the nature of limitations of rights is very useful in understanding freedom of expression restrictions in Kenya and elsewhere. He

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid, 807.

<sup>32</sup> Ibid, p. 801-802.

<sup>33</sup>Ibid. See also article 19(3) of the International Convention on Civil and Political Rights and article 10 (2) of the European Convention on Human and Rights.

<sup>34</sup> Stephen, Gardbaum, 'Limiting Constitutional Rights,' *supra*, p.796. Detailed discussion on justification of legislative limits on freedom of expression and rights generally, is deferred until chapter six.

offers a framework that best explains the definitional scope of freedom of expression as well as permissible limits under Kenya's Constitution. As seen in chapter four, the Constitution of Kenya, much like South Africa's and the International Covenant on Civil and Political Rights (ICCPR) declares the protection of freedom of expression in abstract terms, then proceeds to exclude hate speech, propaganda for war, incitement to violence and vilification of others.<sup>35</sup> These limits, found within the constitutional text, are what Gardbaum describes as "internal limits." Thus, one may say that Kenya's freedom of expression guarantee protects the individual and collective right to "seek, receive or impart information or ideas." These covers artistic expression, academic or scientific inquiry, commercial expression and other kinds of communication irrespective of the media used. By definition, however, the freedom excludes hate speech, propaganda for war, incitement to violence, defamation, vilification of others and advocacy for hatred on prohibited grounds of discrimination.

The terms and phrases used to exclude negative expressions from the freedom of expression guarantee are broad and imprecise. For instance, the meaning of what amounts to hate speech or "vilification of others" is arguable and could be open to manipulation.<sup>36</sup> While it is readily acceptable (may be with exception of the United States) that hate speech ought to be prohibited, it is difficult to reach a consensus on the definition of hate speech.<sup>37</sup> Notwithstanding the disagreement, there is a consensus as evidenced by the definition of freedom of expression guarantee in many jurisdictions including Kenya, South Africa, Canada and Europe that negative expressions such as hate speech fall or should fall outside the definitional scope of freedom of expression.<sup>38</sup>

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<sup>35</sup>Article 33 (2) the right to freedom of expression does not extend to- (a) propaganda for war; (b) incitement to violence; (c) hate speech; or (d) advocacy of hatred that (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or (ii) is based on any ground of discrimination specified or contemplated in Article 27 (4). (3) In the exercise of the right to freedom of expression, every person must respect the rights and reputation of others.

<sup>36</sup> Ryan F. Haigh 'South Africa's Criminalization of "Hurtful" Comments: When the Protection of Human Dignity and Equality Transforms into the Destruction of Freedom of Expression' (2006) 5 *Washington University Global Studies Law Review* 187.

<sup>37</sup> Ibid

<sup>38</sup> Ibid.

## 5.2.2. Subsequent Punishment and Prior Restraints

Freedom of expression limits may take the form of subsequent punishment or prior restraints.<sup>39</sup> Freedom of expression theory generally abhors prior censorship.<sup>40</sup> The preferred approach to dealing with unprotected expression in most cases is by way of subsequent punishment.<sup>41</sup>

The concept of subsequent punishment is structured in a way that allows the freedom to express ones thoughts and opinions without advance censorship.<sup>42</sup> Once the limits of permissible expression are exceeded, sanctions-after-the-fact may be imposed on the offender following due process. These sanctions may include imprisonment or fines. The words of Blackstone put this aptly:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.<sup>43</sup>

This approach, conceivably, offers a better protection to freedom of expression.<sup>44</sup> To prefer the reverse, Emerson notes, risks making freedom of expression the exception, and censorship the rule.<sup>45</sup> In spite of this perception, the system of prior

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<sup>39</sup> Ivan Hare and James Weinstein, (eds), *Extreme Speech and Democracy* (2010) OUP Oxford, ISBN 0199601798, 9780199601790.

<sup>40</sup> Thomas Emerson, 'The Doctrine of Prior Restraint' (1955) 20 *Law and Contemporary Problems* 648, p.651.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*, p. 651.

<sup>44</sup> Ivan Hare and James Weinstein, (eds), *Extreme Speech and Democracy*, *supra*. (arguing that in fact the system of subsequent punishment may also have chilling effects on freedom of expression especially given the severity of punishments prescribed for some expression-related offences)

<sup>45</sup> Thomas Emerson, 'The Doctrine of Prior Restraint,' *supra*, p.651.

restraints is an integral part of freedom of expression practice.<sup>46</sup> Prior restraints operate to freeze communication before the actual publication or conveyance to an audience happens.<sup>47</sup> This may take one of two forms: a requirement that information is submitted to a governmental authority for licensing or approval before it is disseminated<sup>48</sup> or a court injunction issued to restrain a speaker from making an offending expression.<sup>49</sup> The power of the courts to punish for contempt provides the coercive mechanism for the enforcement of injunctions.<sup>50</sup>

Prior restraints as a form of freedom of expression restriction have generally received adverse commentary both in scholarship and judicial determinations.<sup>51</sup> In England, the doctrine of prior restraint, against which John Milton vehemently protested in *Areopagitica* in 1643<sup>52</sup> as was noted in chapter four, was finally abolished in 1695.<sup>53</sup> Since the 1931 decision of the Supreme Court in *Near v Minnesota*<sup>54</sup> prior restraints are generally treated with a presumption of constitutional invalidity in the United States.<sup>55</sup> *Near v Minnesota* assessed the constitutionality of the Minnesota Gag Law which outlawed “malicious, scandalous and defamatory” information against state officials.<sup>56</sup> Under the law, the courts were empowered to issue a temporary or permanent injunction prohibiting a publisher from publishing offending stories. Disobedience of the injunction would attract a fine of up to one thousand US Dollars or a jail term of one year.<sup>57</sup> In effect, the law empowered the state to prohibit publication of information that scandalised public officials or exposed corruption and other impropriety. The Supreme Court struck down the statute, emphasising that freedom of the press excludes prior restraints except in very exceptional

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<sup>46</sup> Thomas Emerson, ‘The Doctrine of Prior Restraint.’

<sup>47</sup> Thomas Emerson, ‘The Doctrine of Prior Restraint.’

<sup>48</sup> Thomas Emerson, ‘The Doctrine of Prior Restraint.’

<sup>49</sup> *Ibid.*

<sup>50</sup> Ivan Hare and James Weinstein, (eds), *Extreme Speech and Democracy*, *supra*.

<sup>51</sup> *Ibid.*

<sup>52</sup> Thomas Emerson, ‘The Doctrine of Prior Restraint’ *supra*, p. 658.

<sup>53</sup> Thomas Emerson, ‘The Doctrine of Prior Restraint’, *supra*, p.651.

<sup>54</sup> 283 U.S. 697(1931)

<sup>55</sup> Vincent Blasi, ‘Toward a Theory of Prior Restraint: The Central Linkage,’ (1981-1982) 66 *Minnesota Law Review* 11, p.11-12. See also Thomas Emerson, ‘The Doctrine of Prior Restraint’ (1955) *supra*, p.649.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

circumstances such as to protect information on movement of troops in times of war or the circulation of obscenity.<sup>58</sup>

The objections to the doctrine of prior restraints are mainly procedural. The criticism faults the requirement for prior governmental approval.<sup>59</sup> This state power of approval institutes legal and moral paternalism that is inimical to liberal political thought.<sup>60</sup> In contrast, the system of subsequent punishment allows the speaker the liberty to communicate and face penal consequences afterwards should they exceed the limits of permissible expression.<sup>61</sup> This resonates well with liberal political thought as it respects the individual's right to expression, and their moral competence to direct their conduct and communication.<sup>62</sup>

Prior restraints are problematic in liberal democratic theory for a number of reasons: one is that the supposedly offensive communication is gagged before it reaches the public.<sup>63</sup> Thus, the value assessment of the message is done by a government official and the public is denied the chance to make the same judgment to appraise or criticise it.<sup>64</sup> Two, the opportunities for judicial review of the powers of restraint are either lacking or limited,<sup>65</sup> and, three, the effect of prior restraint is to completely extinguish communication or withhold it until its value is lost.<sup>66</sup> This is usually at the behest of one person or a few people, and is sometimes driven by ulterior motives.<sup>67</sup> These objections are best summarised by Blackstone in the quote below:

The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraint upon publications and not in freedom from censure for criminal matter

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<sup>58</sup> Prior Restraint: The Constitutional Question 42 *Boston University Law Review*, 357, p. 358.

<sup>59</sup> Ivan Hare and James Weinstein, (eds), *Extreme Speech and Democracy*, *supra*.

<sup>60</sup> *Ibid.* See also Panos Mavrokonstantis, 'Critical Evaluation of Mill's Proposed Limits on Legitimate Interference with the Individual,' (2008-2009) 8 *Law and Society Journal*, UCSB 87.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> Ivan Hare and James Weinstein, (eds), *Extreme Speech and Democracy*, *supra*.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Prior Restraint: The Constitutional Question, *supra*, p. 364.

when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.<sup>68</sup>

Freedom of expression limitations in Kenya is dominated by a system of subsequent punishment. However the regulation of exhibition of films takes the form of prior restraints. The regulatory framework for motion pictures requires that films, movies, TV shows (including advertisements) should be submitted to the Kenya Film and Classification Board (KFCB) for classification and approval before they can be displayed for public consumption.<sup>69</sup> KFCB has the power to refuse to allow public display.<sup>70</sup> Such a refusal would mean the show or film may not be shown on TV and theatres, and may not be sold or distributed to the public. This regulatory framework is a system of prior restraints at work. Pursuant to these regulations, public display and distribution of Hollywood movies such as *Fifty Shades of Grey* and *Wolf of Wall Street*<sup>71</sup> were banned for reasons of ‘moral ambiguity’ even before the Kenyan audience had the opportunity to view and make their own judgment.<sup>72</sup>

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<sup>68</sup> Ibid, 362. The majority opinion of the US Supreme Court in *Near v Minnesota*, *supra*, used similar words to express its exception to prior restraints.

<sup>69</sup> See section 12 and 14 of Films and Stage Plays Act, Cap 222 and Film Classification Guidelines 2012, and The Programming Code for Free-to-Air Radio and Television Services in Kenya, 2016. In reality, the KFCB relies mainly on self-regulation for advertisements and TV shows. The Board expects the media houses to apply the regulations and rate their shows accordingly.

<sup>70</sup> Ibid.

<sup>71</sup> These films were banned for what the Kenya Film Classification Board termed as ‘obscene content and moral ambiguity.’ See news items on [http://www.the-star.co.ke/news/2014/01/17/film-board-bans-the-wolf-of-wall-street\\_c883470](http://www.the-star.co.ke/news/2014/01/17/film-board-bans-the-wolf-of-wall-street_c883470); and <http://edition.cnn.com/2015/02/12/africa/kenya-fifty-shades-ban/> <accessed 8 June 2016>.

<sup>72</sup> The Kenya Film and Classification Board focuses its controls on ‘national values,’ and the objective is to preserve morals and shield the society from content that is violent, ‘obscene,’ or that is inappropriate such as display of dead bodies.

These regulations arise from the need to shield the society from morally prurient materials and to protect vulnerable sections such as children.<sup>73</sup> They find their justification on the ‘public morality’ rationale of freedom of expression limitations.<sup>74</sup> As noted above, the legal and moral paternalism that underlie these regulations is problematic especially in light of the lack of consensus that plagues questions of morality, and the tendency of officials to be overzealous, or to simply impose their own perspectives. As Sorabjee puts it, ‘sin’ or ‘morality’ is geographical.<sup>75</sup> Its conception varies from time to time, person to person and is incapable of a common objective standard since it varies with social and cultural contexts.<sup>76</sup> While the underlying objective of obscenity laws is sound, they ought to be subjected to strict accountability because of their malleable nature.<sup>77</sup>

Similarly, injunctions issued to restrain future libel can also be viewed as a form of prior restraint. Apart from injunctions and the regulation of films, TV and radio content as noted above, the mechanism of prior restraints is generally rarely applied in the control of freedom of expression and media in Kenya. However, at the height of the trauma from a series of terrorist attacks in 2014, Parliament enacted the Security Laws Amendment Act (SLAA) 2014, which among other things, instituted a system of prior restraint for terrorism-related information. Section 64 of the Act introduced controversial sections 30A and 30F to the Prevention of Terrorism Act. Section 30A imposed a requirement for prior police approval before the publication of “*any information which undermines investigations or security operations relating to terrorism.*” On its part, section 30F (2) sought to prohibit the publication or broadcast “of photographs of victims of a terrorist attack without the consent of the National Police Service and of the victim.”<sup>78</sup>

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<sup>73</sup> David A.J. Richards, ‘Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment,’ (1974) 123 *University of Pennsylvania Law Review*, 45, p. 45-46.

<sup>74</sup> *Ibid.*

<sup>75</sup> Stefan Braun, *Freedom of Expression v Obscenity Censorship: The Developing Canadian Jurisprudence (1985-1986)* 50 *Saskatchewan Law Review* 39

<sup>76</sup> Soli Sorabjee, ‘Freedom of Expression,’ (1993) 19 *Commonwealth Law Bulletin* 1712, p. 1719.

<sup>77</sup> *Ibid.*

<sup>78</sup> This provision prescribed a jail term of upto three years, a fine of USD 50,000 or both for a violation of this restraint.

These provisions effectively instituted a system of prior restraints such that anyone including journalists would have to seek the approval of the police and victims before circulating or publishing pictures of terror attacks. In effect, this would make it extremely hard to publish terrorism-related information, and in certain instances impossible especially given that the law did not set out mechanisms to facilitate the approval and the timelines within which it should be granted. It would also be unreasonable that contrary to rules of natural justice, interested parties, namely the police and victims would be charged with the task of granting approval. It is difficult for instance, to imagine that the police would license the publication of “*any information which undermines investigations or security operations relating to terrorism.*” [Emphasis added]. It is also, perhaps too heavy and unfair to place the task of imagining what might conceivably undermine investigations or security operations on journalists whose job is to disseminate information. In the highly contentious litigation that followed in the case of *Coalition for Reform & Democracy (CORD), Kenya National Commission on Human Rights & Samuel Njuguna Ng’ang’a v Republic of Kenya & another*<sup>79</sup> ( *CORD case*), the High Court invalidated these provisions, thus reversing these prior restraints as will be seen later.

Injunctions barring defendants from perpetually or temporarily publishing alleged defamatory information are a frequent and integral part of remedies in defamation law. The injunction, in effect, becomes an enduring restraint whose violation is enforceable through criminal contempt of court.<sup>80</sup> The *sub judice* rule, which bars individuals and the media from commenting on the substance of pending judicial proceedings is another form of prior restraint that continually plagues journalists and public commentators alike. The rule, (which will be discussed in detail later) is intended to protect the independence of the judiciary by prohibiting public discussions on the merits of a pending case.<sup>81</sup> The rule is

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<sup>79</sup> [2015] eKLR.

<sup>80</sup> Justice Henchy, *Contempt of Court and Freedom of Expression*, (1986) 33 *Northern Ireland Legal Quarterly* 326.

<sup>81</sup> Wing-Wah Mary Wong, *The Sunday Times Case: Freedom of Expression versus English Contempt of Court Law in The European Court of Human Rights* 17 *N.Y.U. Journal of International Law and Politics* 35, p. 43.

presumably intended to insulate the court from extrinsic influences in the course of deciding cases before them.<sup>82</sup>

### 5.3. Walking the Tight Rope: Theorising Freedom of Expression Limitations

Chapter four of this thesis demonstrated that despite the doctrine of indivisibility and interdependence, rights sometimes conflict with each other, or undermine certain countervailing values and interests such as national security, public order, and public morality, among others.<sup>83</sup> These tensions are evident in both domestic and international human rights instruments, and it is beyond question that rights may be qualified in order to protect countervailing values and interests. Even in the United States where the First Amendment is seemingly cast in absolute terms, the history of adjudication since 1919 has resulted in certain exceptions mainly based on collective goals similar to those in other jurisdictions.<sup>84</sup> In *Nebraska Press Association v Stuart*<sup>85</sup> for instance the US Supreme Court admitted this reality and noted that “the Court has frequently insisted that the First Amendment rights are not absolute.”<sup>86</sup> On its part, the ICCPR identifies national security or public order (*ordre public*), public health or morals, and respect of the rights or reputations of others as possible grounds upon which rights may be limited.<sup>87</sup> The European Convention on Human Rights (ECHR) adds to this list the purpose of securing territorial integrity, prevention of crime and the maintenance of integrity and independence of the judiciary.<sup>88</sup> Kenya’s independence Constitution under section 79 included all the grounds under the ICCPR and ECHR, and added defence, protecting the lives of persons involved in court proceedings, protecting information communicated in

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<sup>82</sup> Ibid.

<sup>83</sup> See for instance James Nickel, ‘Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights,’ (2008) 30 *Human Rights Quarterly*, 984, p. 984-985.

<sup>84</sup> Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, (2009) *Wake Forest Law Review* 497.

<sup>85</sup> 427 US 539, 570 (1976)

<sup>86</sup> 427 U.S. 539(1976), p. 570.

<sup>87</sup> ICCPR, article 27 (2)

<sup>88</sup> ECHR, article 10 (2)

confidence, securing the integrity of telecommunications, radio and TV broadcasts.<sup>89</sup> In addition, it legitimised a general restriction imposed on public servants.<sup>90</sup>

These wide 'claw-back' clauses received a lot of criticism in scholarly commentary for the reason that they had the effect of rendering the protection of fundamental rights nugatory.<sup>91</sup> The wide latitude allowed for limitations by the state together with the institutional weaknesses of the judiciary such as lack of independence during the KANU regime as noted in chapter two greatly undermined the protection of fundamental rights and freedoms, including the freedom of political expression.<sup>92</sup> It is instructive that freedom of expression provision under article 33 of the 2010 Constitution omits these grounds for limitations. Instead it defines freedom of expression to exclude hate speech, propaganda for war, incitement to violence, and advocacy for hatred.<sup>93</sup> In

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<sup>89</sup> The repealed Constitution of Kenya, section 79 (2)(a)(b)(c).

<sup>90</sup> Ibid, section 79 (2)(c) of the repealed Constitution of Kenya. As it turned out, President Moi banned trade unions formed by civil servants and public university lecturers. Trade union activities by public servants (including academics) was seen as "overindulgence in politics." Section 79 provided that- "(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or

(c) that imposes restrictions upon public officers or upon persons in the service of a local government authority, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

<sup>91</sup> Morris Kiwinda Mbondenyei, Evelyne Owiye Asaala, Tom Kabau and Attiya Waris, (2007) *Human Rights and Democratic Governance in Kenya: A post-2007 Appraisal*, Pretoria University Law Press. The term "claw-back" clauses is commonly used in scholarly commentary in Kenya to refer to these grounds for limitation.

<sup>92</sup> Ibid. See also Charles Muiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya,' *supra*. Korwa Adar, 'Human Rights and Academic Freedom in Kenya's Public Universities: The Case of the Universities Academic Staff Union (1999) 21 *Human Rights Quarterly* 179 (showing how Moi's government suppressed political expression by university students and lecturers, denying them the right to form unions and carry on any political activities).

<sup>93</sup> Article 33(2) "the right to freedom of expression does not extend to-  
(a) propaganda for war;

addition, it imposes an obligation on everyone to respect the rights and reputation of others while exercising the right.<sup>94</sup> This should be understood as was noted in chapter four, the exclusion of defamation and expression that violates other people's privacy and other rights. In addition, like all other derogable rights, freedom of expression is subject to the general limitation clause.<sup>95</sup> This departure from constitutional recognition of broad grounds for limitation suggests a clear intention for a better protection of the right to freedom of expression and human rights generally.<sup>96</sup> This conclusion is supported by the commitment of the 2010 Constitution to robust protection of human rights and political change as was discussed in chapter two.<sup>97</sup> In addition, the High Court held *CORD case*<sup>98</sup> that any purported limitation to the freedom of expression that is based on grounds beyond those contemplated under article 33 must be strictly justified.

It is easy to accept a general proposition that the right to freedom of expression may be subject to limitations on various grounds. The connection between negative expression and historical tragedies such as the Nazi holocaust, Rwanda genocide, or Kenya's post-election violence of 2007-2008 is beyond argument.<sup>99</sup> The greatest difficulty is in establishing the legitimate boundaries for limitation. Emerson observes that it is arguably one of the most daunting tasks in human rights and constitutional law

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- (b) incitement to violence;
  - (c) hate speech; or
  - (d) advocacy of hatred that
  - (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
  - (ii) is based on any ground of discrimination specified or contemplated in Article 27 (4)."

<sup>94</sup> Article 33 (3) "In the exercise of the right to freedom of expression, every person must respect the rights and reputation of others."

<sup>95</sup> The Constitution of Kenya, article 24.

<sup>96</sup> As was seen in chapter four, the 2010 Constitution of Kenya does not list similar grounds for limitation. Rather it has a general limitation under article 24. The freedom of expression guarantee excludes hate speech, incitement to violence, vilification of others, and propaganda for war.

<sup>97</sup> See for instance the Constitution of Kenya, article 19 and the preamble.

<sup>98</sup> [2015] eKLR *supra*.

<sup>99</sup> Julie Debeljak, 'Balancing Rights in A Democracy: Problems with Limitations and Overrides of Rights Under The Victorian Charter Of Human Rights and Responsibilities Act 2006,' (2008) *Melbourne University Law Review* 422, p. 424.

discourses.<sup>100</sup> Thus, to strike a sound balance in reconciling claims of freedom of expression and competing public policy aims, a sound theory of limitation is necessary.

Freedom of expression and its limitations are generally undertheorised in Kenya. The jurisprudence on legitimate limits is in its nascent stage, and is yet to receive the attention of the Supreme Court. Since the promulgation of the Constitution in 2010, the legal framework restricting freedom of expression inherited from the colonial and KANU regimes have largely remained intact. The 2010 Constitution overturned the philosophical foundations of the previous legal and political dispensations. In Kelsenian terms, the 'grundnorm' has changed. Yet, not much has taken place in terms of the articulation of the theoretical shifts or actual law review touching on freedom of expression. This study is therefore a forerunner in this regard, and will make the effort to sketch out the contours of a sound freedom of expression theory.

Chapter three considered various theoretical foundations of freedom of expression protection. It was established that freedom of expression deserves protection because of its social and political values. For instance, it is essential to a democracy both from a constitutive and functional perspective.<sup>101</sup> Second, freedom of expression is the agent of discourse in the individual and societal quest for the discovery of 'truth.'<sup>102</sup> In Emerson's view, freedom of speech is an agent of discourse that is necessary for the attainment of truth, and a community that is both adaptable and stable.<sup>103</sup> It is also crucial for individual self-fulfillment.<sup>104</sup> Moreover, respect for individual dignity and autonomy requires respect for freedom of expression.<sup>105</sup> In light of this, one would assume that unfettered guarantee of the right to freedom of expression would automatically mean more

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<sup>100</sup> Thomas Emerson, 'Towards a General Theory of the First Amendment,' (1963) 72 *Yale Law Journal* 877, p. 893.

<sup>101</sup> Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, Cambridge: Harvard University Press, p.197-198. (see discussions in chapter three of this thesis for detail).

<sup>102</sup> Thomas Emerson, 'Toward a General Theory of the First Amendment' (1963) *Yale Law Journal* 887-956, p. 881-882.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, Cambridge: Harvard University Press, p.197-198. (see chapter three of this thesis for details)

of these values. But that is not and has not always been true. For certain collective or public policy reasons already identified, limitation of freedom of expression is necessary.

The need to balance between freedom of expression on one hand and countervailing values and interests on the other presents practical challenges as the two goals pull in different directions. The problem is one of striking the appropriate balance and setting legitimate boundaries. It is a task that must happen at various points and involves various stakeholders such as constitutional drafters, legislators who set external limits, administrators and law enforcers who determine what conduct to prosecute, and magistrates and judges who have the final say about the scope of the freedom and the validity of limitations.

The most practical problems arise at the enforcement stage. The players at this stage are administrators and law enforcers who have to deal with practical realities of achieving public policy goals while bearing in mind that freedom of expression protection extends to information that is 'shocking, disturbing, or unpopular.'<sup>106</sup> The dividing line is not always easy to discern, and the task is not merely bureaucratic.<sup>107</sup> It is also interpretative.<sup>108</sup> The officers have to determine on a preliminary basis that an offending expression discloses the elements of a free speech restriction founded in law. The tendency, Emerson notes, is more often than not for officials to be overzealous in enforcing restrictions because the success of bureaucrats is often measured in terms of how much 'work' gets done.<sup>109</sup> 'Work,' as regards enforcement of free speech restrictions often translates into more prosecutions, which in turn means limitation on freedom of expression.<sup>110</sup>

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<sup>106</sup> Thomas Emerson, 'Toward a General Theory of the First Amendment' (1963) *supra*, p. 881-882.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

A sound theory should set out the general principles that can be applied to resolve freedom of expression conflicts.<sup>111</sup> It should provide an objective means of assessing the validity of restrictions and set out various rules of law to govern the practical freedom of expression challenges in the society.<sup>112</sup> Every conflict of freedom of expression involves a clash of ideology.<sup>113</sup> Limitations are the platform on which the clash of ideology plays out. The clash is more evident in the political process of law making and during judicial adjudication of claims concerning rights.<sup>114</sup> A judicial determination of a case of hate speech or possession of pornographic materials for instance, would typically entail a clash of claims of individual autonomy and liberty contesting against state interests of protecting equality and dignity of others and the society from moral decadence. This exemplifies tension between classical liberalism and libertarianism on the one hand and communitarianism and egalitarianism on the other.<sup>115</sup> Classical liberalism and libertarianism reject state paternalism.<sup>116</sup> These ideologies elevate the right to freedom of expression above other rights and interests.<sup>117</sup> The ideologies are founded on the concepts of liberty, autonomy, and individualism.<sup>118</sup> The preference is maximum liberty in recognition of individual autonomy except where there is real danger of harm to others. Thus, the validity of a limitation is assessed on the basis of a “public order test” such as Mill’s “harm principle” or the “clear and present danger” test established by the US Supreme Court as was discussed in chapter three.<sup>119</sup> Therefore, harm to self and other

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<sup>111</sup> Ibid.

<sup>112</sup> Thomas Emerson, ‘Toward a General Theory of the First Amendment’ (1963) *supra*, p. 878-882.

<sup>113</sup> Ronald Dworkin, *Laws Empire* (1986) Harvard University Press Cambridge.

<sup>114</sup> Ronald Dworkin, *Taking Rights Seriously* (1977) Cambridge: Harvard University Press.

<sup>115</sup> Amitzai Etzioni, *On Protecting Children From Speech*, (2004) 79 *Chicago-Kent Law Review* 3. See also Amitzai Etzioni Response to comments on the same paper on (2004) 79 *Chicago-Kent Law Review* 299, p. 299-304.

<sup>116</sup> See for instance chapter I of John Stuart Mill, *On Liberty*, in John Gray, ed., *John Stuart Mill on Liberty and Other Essays*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 1998 (suggesting that ‘harm to others’ is the only legitimate ground for limitation of individual liberty)

<sup>117</sup> Frederick Schauer, *Must Speech Be Special* (1983) *Faculty Publications. Paper 878*.

<sup>118</sup> Guy Carmi, ‘Dignity versus Liberty: The Two Western Cultures of Free Speech’ 279 *Boston University International Law Journal* (2008) p. 372.

<sup>119</sup> Panos Mavrokonstantis, ‘Critical Evaluation of Mill's Proposed Limits on Legitimate Interference with the Individual,’ *supra*.

collective goals are not sufficient reasons for state interference with liberty.<sup>120</sup> Societal good, the model assumes, results from an aggregation of maximum individual liberty.<sup>121</sup>

Communitarian ideology on the other hand prefers community interests over claims of individual right to impart or receive information.<sup>122</sup> Communitarians prefer politics of 'public good' rather than the individualism advocated by the liberals and libertarians.<sup>123</sup> As such, freedom of expression may legitimately be limited to preserve public morality.<sup>124</sup> The state is assigned the function of regulating public moral space, and may therefore restrict information that may have the effect of corrupting public morals.<sup>125</sup> As was shown in chapter two, Kenya's Constitution adopts both liberal and communitarian ideals in the protection of rights. The fundamental rights and freedoms in the bill of rights have their origin in liberal political ideology. As a matter of fact, with exception of a few, the constitutional rights are not *sui generis*. They are borrowed from foreign constitutions and international human rights instruments.<sup>126</sup> As Makau Mutua posits, liberalism gave rise to democracy, which is now presented as the ideology of international human rights.<sup>127</sup> As chapter two demonstrated, the Constitution, especially the bill of rights, also has deep communitarian commitments that potentially create conflict with the liberal foundations of human rights. In addition, the Constitution manifests competing visions. For instance, its commitment to the individual potentially competes with its corresponding commitment to community.<sup>128</sup> The other dichotomy of competing

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<sup>120</sup> Panos Mavrokonstantis, 'Critical Evaluation of Mill's Proposed Limits on Legitimate Interference with the Individual,' *supra*.

<sup>121</sup> See generally Michael Walzer, *Communitarian Critique of Liberalism*, (1990) 18 *Political Theory* 6, Will Kymlicka, 'Liberalism and Communitarianism' (1988) 18 *Canadian Journal of Philosophy* 181, p. 181.

<sup>122</sup> Kraig James Powell, 'The Other Double Standard: Communitarianism, Federalism, And American Constitutional Law' (1996) 7 *Seton Hall Constitutional Law Journal* 69, p. 71-73

<sup>123</sup> *Ibid*.

<sup>124</sup> *Ibid*.

<sup>125</sup> *Ibid*.

<sup>126</sup> See Chapter two of this thesis for details.

<sup>127</sup> Makau Mutua, 'Human Rights in Africa: The Limited Promise of Liberalism,' (2008) 51 *African Studies Review* 17, p. 20.

<sup>128</sup> See for instance paragraph 5 of the Preamble:

"COMMITTED to nurturing and protecting the well-being of the individual, the

vision is that of a poignant past *viz-a-viz* a dream for a better, freer and more progressive future.<sup>129</sup>

For Kenya, a sound theory of limitations must take cognizance of these competing ideologies and visions in order to be useful in resolving real practical situations.<sup>130</sup> As Dworkin observes, law is an 'enterprise in argument' and a competition of theories.<sup>131</sup> Therefore, when a judge decides a matter in a certain way, they, in essence, are preferring one theory over another.<sup>132</sup> On his part Van Der Walt conceives law as sacrifice.<sup>133</sup> Adopting Kant's understanding of law as a "socio-political endeavour to maintain or preserve plurality," he disputes the common assumption that law seeks to balance competing interests.<sup>134</sup> In his view, law is not a reconciliation of competing interests as we often imagine it to be. Rather, whenever there is a clash of two interests, the law resolves it by sacrificing one and preferring another. Despite Van Der Walt's position, there is evidence that law, especially when it comes to rights, seeks to genuinely reconcile competing interests and to uphold rights. This is the essence of the proportionality balancing instituted by limitation clauses in many instruments as will be seen in chapter six.<sup>135</sup> It must be admitted however that rights do not always prevail. Where circumstances call, they must give way to more compelling countervailing interests in a fashion consistent with Van Der Walt's position.

Sorabjee admits that there can be no 'hard and fast rule' in setting out a theory of limitations.<sup>136</sup> The theory must take into account social, cultural, political and

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family, communities and the nation." The interests of individual and community interests sometimes compete and may be difficult to reconcile as claims of rights such as freedom of expression or gays rights show.

<sup>129</sup> See the generally, the Preamble to the Constitution of Kenya, 2010 and chapter 2 of this thesis.

<sup>130</sup> Thomas Emerson, 'Towards a General Theory of the First Amendment,' (1963) 72 *Yale Law Journal* 877

<sup>131</sup> Ronald Dworkin, *Laws Empire* (1986) Harvard University Press Cambridge.

<sup>132</sup> *Ibid.*

<sup>133</sup> Johan Van Der Walt, 'Law as Sacrifice,' (2001) 4 *Journal of South African Law* 710.

<sup>134</sup> *Ibid.*

<sup>135</sup> Julie Debeljak, 'Balancing Rights in A Democracy: Problems with Limitations and Overrides of Rights under the Victorian Charter Of Human Rights and Responsibilities Act 2006,' (2008) *Melbourne University Law Review* 422.

<sup>136</sup> Soli Sorabjee, 'Freedom of Expression,' (1993) 19 *Commonwealth Law Bulletin* 1712, p. 1720.

historical contexts.<sup>137</sup> In *Speaker of the Senate & another v Hon. Attorney-General & another & 3 others*<sup>138</sup> the Supreme Court of Kenya recognised that a proper approach to the interpretation of the Constitution must take into account the historical and other non-legal contexts against which it was enacted and in which it operates. To this, one can add that a theory of freedom of expression adjudication must appreciate sociological changes and modern technological revolutions in ICT and the peculiar challenges and opportunities that they present.<sup>139</sup> These revolutions matter because they have radically changed the way people and societies interact and express themselves.

Logically, a theory of limitations should begin from the standpoint that limitations are the exception.<sup>140</sup> Emerson adds that such a theory must rest upon the strongest presumption for the right and submit restrictions to strict scrutiny.<sup>141</sup> This essentially means that it should acknowledge the theoretical justifications of free speech and seek to preserve them within the limitation doctrine. The aim is to ensure that the right to freedom of expression is insulated from manipulation by subjecting restrictions to the strictest test.<sup>142</sup> It follows that the burden of demonstrating justifiability of restrictions must rest with the state for at least two reasons: first, these rights are moral or inherent in nature.<sup>143</sup> As seen earlier, the theory of human rights (including freedom of expression) is to the effect that rights are not granted by the state.<sup>144</sup> They predate the state, law and its institutions.<sup>145</sup> Thus it is for the state to show why a limitation of this natural liberty is

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<sup>137</sup> Ibid.

<sup>138</sup> [2013] eKLR.

<sup>139</sup> Erik S. Knutsen, *Techno-neutrality of Freedom of Expression in New Media Beyond the Internet: Solutions for the United States and Canada*, (2000-01) 8 *UCLA Entertainment Law Review* 87. (Modern media enables virtually anyone to reach millions of people around the globe instantly through multimedia, rendering national boundaries and controls almost irrelevant)

<sup>140</sup> Soli Sorabjee, 'Freedom of Expression,' (1993) 19 *Commonwealth Law Bulletin* 1712, p. 1719.

<sup>141</sup> Ibid, 889.

<sup>142</sup> Ibid.

<sup>143</sup> Ronald Dworkin, (1977) *Taking Rights Seriously*: Cambridge: Harvard University Press.

<sup>144</sup> See for instance the Constitution of Kenya, article 19.

<sup>145</sup> Ibid. Jeremy Bentham, was however critical of the idea of natural rights, describing it as "nonsense on stilts." See for instance, Philip Schofield (2003). *Jeremy Bentham's 'Nonsense upon Stilts'*. *Utilitas*, 15, pp 1-26. doi:10.1017/S0953820800003745.

necessary.<sup>146</sup> Again, the reasons upon which freedom of expression may be limited vary depending on philosophical inclinations. Second, the individual is the weaker party in the state-citizen relationship. In contrast, the state almost always has the power, the resources and the motivation to limit rights. Thus, it is only fair that the burden of justification is placed upon the state.<sup>147</sup>

Dworkin argues that a government must justify its decisions, especially the limitations of liberty.<sup>148</sup> He insists that a government must reach correct conclusions concerning the rights of its citizens or at the very least, it should try.<sup>149</sup> This, he notes, entails following a coherent theory of the nature and scope of rights and to act in a consistent fashion.<sup>150</sup> Thus, whereas it is beyond argument that right may be limited, limitations cannot be open-ended. It cannot be a *carte blanche* for whimsical restriction of rights. Thus, a plausible theory of limitations that is desirable must constrain limitations following a coherent doctrine of justification of governmental action.

According to Dworkin, the limitation doctrine must, at least in part, be founded on equality.<sup>151</sup> In other words the benefits and burdens must be distributed equally among all members of the society, unless there are legitimate reasons for variation.<sup>152</sup> In short, restrictions should apply equally to the powerful and the not-so-powerful in the society. Failure to strike the intuition for justice and equal application of freedom of expression restrictions validates Marxist criticism that freedom of expression restrictions is a tool of the powerful for the oppression of the weak.<sup>153</sup> A theory that

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<sup>146</sup> Ronald Dworkin, (1977) *Taking Rights Seriously*: Cambridge: Harvard University Press. See also Julie Debeljak, 'Balancing Rights in A Democracy: Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006,' (2008) *Melbourne University Law Review* 422, p. 424.

<sup>147</sup> Ibid.

<sup>148</sup> Ronald Dworkin, (1977) *Taking Rights Seriously*: Cambridge: Harvard University Press.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> See for instance 'Communism: Censorship and Freedom of Speech' <<http://cs.stanford.edu/people/eroberts/cs201/projects/communism-computing-china/censorship.html>> accessed 20 May 2016.

validates such a perception obviously undermines the system of freedom of expression, and the legitimacy of law.

Chapter four demonstrated how both the colonial and post-colonial regimes applied criminal and civil sanctions to crackdown on critics, and agitators of political freedom.<sup>154</sup> In many ways, the law as well as the institutions of the state such as the courts and the police became connivers in repression. Despite the numerous legal and political reforms that have taken place, the same risks still lurk even today.

A system of limitations, through sanctions or otherwise, must resonate with the society's sense of justice.<sup>155</sup> David Richards argues that the legitimacy of the criminal justice system rests on the "conception of public morality that a society regards as justly enforceable."<sup>156</sup> This entails the society's instinctive sense of what is considered as morally wrong and therefore acceptably legally wrong, and the attendant blame or punishment for it. Applying this to freedom of expression, the catalogue of expressions that a legal system considers to be illegal or offensive, as well as the attendant sanctions must resonate with the society's instincts about what conduct is wrong and what penalty is reasonable. This is because many legal rules and decisions also have a moral angle.<sup>157</sup> It is this moral angle that often offers powerful deterrence and retribution in criminal law as Henry Hart demonstrates. In his theory of criminal law, Hart observes that it is the 'hatred, fear or contempt' for the convict that makes the deprivations of punishment severe and distinct from deprivations under different circumstances.<sup>158</sup> In other words it is the social disapproval and moral condemnation that makes criminal sanctions drastic.<sup>159</sup> This heightens the need for balance in setting criminal sanctions for speech-related wrongs. Casual application of sanctions on expression-related offences is hard to justify in an open

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<sup>154</sup> Charles Muiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya,' *supra*, p. 237-247.

<sup>155</sup> Ronald Dworkin, (1977) *Taking Rights Seriously*: Cambridge: Harvard University Press.

<sup>156</sup> David A. Richards, *Liberalism, Public Morality, and Constitutional Law: Prolegomenon to a Theory of the Constitutional Right to Privacy*, (1988) 51 *Law and Contemporary Problems* 123, p. 123.

<sup>157</sup> Ronald Dworkin, *Laws Empire* (1986) Harvard University Press Cambridge.

<sup>158</sup> Henry M. Hart Jr, 'The Aims of the Criminal Law,' (1958) 23 *Law and Contemporary Problems* 401, p. 405

<sup>159</sup> *Ibid.*

and democratic society.<sup>160</sup> It appears illogical for instance that the offence of ‘undermining the authority of a public officer’ by uttering words that disparage a government official or expose them to contempt or public ridicule should carry three years in prison;<sup>161</sup> the same punishment prescribed for theft<sup>162</sup> and conspiracy to defile a woman.<sup>163</sup>

Emerson notes that the task of maintaining a sound system of freedom of expression is “one of the most complicated any society has to face.”<sup>164</sup> This is because the task entails ‘powerful forces of self-interest,’ and a long list of social, cultural and political nuances.<sup>165</sup> Amidst these challenges, different criteria (by no means perfect) have emerged to infuse objectivity in the limitations of freedom of expression and human rights generally. In the United States for instance, the Supreme Court applies the “strict scrutiny” test to evaluate first amendment limitations.<sup>166</sup> Under this test, restrictions may be allowed if they are intended to advance a “compelling state interest” and that the “least restrictive means” have been chosen to pursue the interest.<sup>167</sup> Courts in Germany and most of Europe, Canada, Israel, South Africa, and most recently in Kenya as well as the Human Rights Committee and European Court of Human Rights have adopted proportionality balancing of rights against grounds for limitation.<sup>168</sup> The proportionality criteria adopted under the limitation clause will be discussed in detail in chapter six. It is sufficient to note here that to determine the validity or otherwise of a limitation, the test requires at least three things: that a limitation is enshrined in law, is necessary, and is aimed at achieving a legitimate

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<sup>160</sup> See for instance, The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996).

<sup>161</sup> Penal Code, Chapter 63, Laws of Kenya, Section 132.

<sup>162</sup> *Ibid*, section 275.

<sup>163</sup> *Ibid*, section 157 (1).

<sup>164</sup> Thomas Emerson, ‘Towards a General Theory of the First Amendment,’ (1963) 72 *Yale Law Journal* 877, p. 889.

<sup>165</sup> *Ibid*.

<sup>166</sup> Kathleen Ann Ruane, Freedom of Speech and Press: Exceptions to the First Amendment, Congressional Research Service Report, September, 2014, p. 1-4. Available at: <https://www.fas.org/sgp/crs/misc/95-815.pdf> <accessed 17 October 2015>.

<sup>167</sup> *Ibid*.

<sup>168</sup> Alec Stone Sweet & Jud Matthews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transitional Law*, 72, p. 81. It is important to emphasise that proportionality balancing is criteria to ensure that limitations of rights aimed at achieving state countervailing interests are objectively balanced against rights so as to ensure that the substance of the rights is maintained.

purpose.<sup>169</sup> The first limb derives from the principle of legality and the rule of law.<sup>170</sup> Under this principle, the government, in the exercise of its powers including limiting individual liberty, may not act arbitrarily.<sup>171</sup> Governmental powers must be derived from the law.<sup>172</sup> In turn, the law must be clear, stable and predictable, such that a citizen is able to fashion their conduct without the risk of breaking the law without knowledge.<sup>173</sup> The second limb of necessity requires that a limitation is demonstrated as being necessary to achieve the intended purpose.<sup>174</sup> The third limb limits the public policy grounds for limitation to “legitimate aims.”<sup>175</sup> This emphasises that the grounds for limitation are not open-ended. They must be grounds that are specifically recognised or contemplated in law as set out above.<sup>176</sup> From a political perspective, these limitations must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”<sup>177</sup>

For Kenya especially, the theory must recall the constitutional commitment to create an “open and democratic” society.<sup>178</sup> It must, at the same time, be mindful of the threats to national cohesion and social well-being. To be forthright, in the course of reconciling Kenya’s liberal democratic ambitions and its egalitarian-communitarian

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<sup>169</sup> Ibid.

<sup>170</sup> Frank Michelman ‘The Rule of Law, Legality and the Supremacy of the Constitution,’ in S. Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2005).

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> Alec Stone Sweet & Jud Matthews, ‘Proportionality Balancing and Global Constitutionalism’ *supra*, p. 75.

<sup>175</sup> Ibid.

<sup>176</sup> Kenya’s Constitution (article 33(2)), South Africa’s Constitution (section 16) and the International Convention on Civil and Political Rights (Article 19(3)) specifically exclude hate speech, propaganda for war, incitement to violence and so forth from the freedom of expression protection. The state may therefore proscribe and punish deviations in the exercise of the right. However, what words or conduct amount to these prohibited forms of expression constantly remain a subject of debate.

<sup>177</sup> The Constitution of Kenya, article 24(1).

<sup>178</sup> Ibid.

commitments noted above, it must be mindful of the fragility of the country's democracy and society, and the Constitution's efforts to address them.<sup>179</sup>

#### 5.4. Political Expression, Limitations and their Justifications

In chapter one, we saw that political expression is communication that touch on public affairs, governmental action or inaction, public officials, elections and political choice, and matters of public interest generally.<sup>180</sup> Thus, communication that is critical of the government or its policies, action or inaction, organs, institutions or officers, or that has a bearing on the electoral or other political processes, is political expression.<sup>181</sup>

Political expressions and their limitations are of particular importance to this thesis because of their significance to the political process and political transformation. As was noted in chapter two, Kenya's political struggles in both colonial and post-colonial periods have always placed the right to freedom of expression at the centre.<sup>182</sup> Thus, as will be argued later in chapter six, political transformation must necessarily entail a radical shift in the law and culture surrounding the right to freedom of expression. Evidently, political expression enjoys preferential protection in many democratic societies.<sup>183</sup> The Supreme Courts of the United States and Canada, the UK's House of Lords (now renamed the Supreme Court) as well as the European Court of Human Rights have all expressed heightened protection for political expression.<sup>184</sup> Similarly, political expression suffers

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<sup>179</sup> Ibid. The criminalisation of hate speech under article 33 (2) of Kenya's Constitution and the enactment of National Cohesion and Integration Act, 2008 to "encourage national cohesion and integration by outlawing discrimination on ethnic grounds," is a strong indication of this aim.

<sup>180</sup> 'Defining Defamation Principles on Freedom of Expression and Protection of Reputation INTERNATIONAL STANDARDS SERIES,' London: ARTICLE 19, 2000: <<https://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf>> accessed 20 May 2016.

<sup>181</sup> Ibid.

<sup>182</sup> Charles Muiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya,' *supra*.

<sup>183</sup> Margaret Tarkington, 'The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation,' 97 *Georgetown Law Journal* 1567.

<sup>184</sup> Stefan Sottiaux and Stefan Rummens, 'Concentric Democracy: Resolving the Incoherence in the European Court of Human Rights' Case Law on Freedom of Expression and Freedom of Association,' (2012) 10 *International Journal of Constitutional Law* 106.

the highest assault from state coercive mechanisms.<sup>185</sup> History of freedom of expression shows that governments have always been keen to suppress expressions that are critical of its officers and policies, or that undermine its schemes or the perpetuity of power.<sup>186</sup>

We have seen that the legal grounds for freedom of expression limitations are many. All of them have the potential to affect political expression in the same way as other forms of expressions. The potential danger that these rationales pose to political expression is however, not uniform. In Kenya and elsewhere, national security and public order, reputation and rights of others, and judicial independence and authority have tended to have more effect on political expression than other rationales. Criminal sanctions falling within the ambit of these three heads have had the greatest effect on political freedom.<sup>187</sup> The discussions in chapter four demonstrated that the political repression and human rights abuses by both colonial and post-colonial regimes were carried out in the name of public security and public order.<sup>188</sup> Contemporary challenges, particularly the resurgence of expression-restricting legislation and expression-related prosecutions have also tended to focus on national security in light of current terrorism challenges as well as misconceived concerns of the dignity of political institutions and personalities.<sup>189</sup> In addition, the period after the 2007-2008 election violence period have also tended to focus on the protection of the rights to equality in an attempt to foster national cohesion through prosecution of hate speech.

This study will now turn to detailed analysis of the limitations of political expression in the name of national security and public order, the rights and reputation of others, and the independence and authority of the judiciary.

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<sup>185</sup> Margaret Tarkington, 'The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation,' *supra*.

<sup>186</sup> *Ibid*.

<sup>187</sup> See detailed discussion and examples on this point in chapter two and chapter four of this thesis.

<sup>188</sup> The enabling laws were the Preservation of Public Security Act, Public Order Act, the Penal Code, Detention Camps Act, among others.

<sup>189</sup> See clause 32 read with 33 of the Parliamentary Powers and Privileges Bill, 2014 making it a crime to defame or scandalize Parliament. See also the analysis in the use and abuse of the offence of 'undermining the authority of a public officer' later in this chapter.

### 5.4.1. National Security and Public Order<sup>190</sup>

The application of national security and its relative, public order as grounds for limitation of freedom of expression has been both pervasive and pernicious. Its pervasiveness arises from the fact that the term is usually broad in scope and therefore susceptible to manipulation.<sup>191</sup> Its pernicious nature is attributable to personal or self-interest since adverse expression that administrative officials can interpret as being ‘threats’ to national security often touch on the exercise of governmental powers and the conduct of public officials.<sup>192</sup> Thus, national security rationale is often abused and cited as an excuse to suppress political expression beyond acceptable limits.<sup>193</sup> This makes national security and related rationales to be one of the greatest threats to freedom of expression.<sup>194</sup> As a matter of fact, many violations of human rights such as detention without trial, extra judicial killings, systematic denial of freedom of expression and access to information have been done in the name of national security and public order.<sup>195</sup>

The tendency for states to over restrict freedoms on grounds of national security arise from the fact that this is one of the foremost (if not the foremost) of state interests since it goes to the core of its survival. The kind of expression targeted for suppression on national security grounds usually touch on governmental action (or inaction) and conduct of public officials. Consequently, such expression causes political unease, making it attractive for the state to pull the ‘national security’ card in response.<sup>196</sup>

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<sup>190</sup> National Security and public order are not conceptually distinguished in this thesis. The two terms are related and this thesis takes these terms to also encompass ‘public safety’ and ‘public security.’

<sup>191</sup> See ‘Office of the United Nations High Commissioner for Human Rights Human Rights, Terrorism and Counter-Terrorism’ (2008) <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>. <Accessed 3 June 2016>.

<sup>192</sup> See for example the analysis of the use and abuse of the offence of ‘undermining the authority of a public officer,’ ‘improper use of a telecommunications system, later in this chapter. See also the decision of the High Court of Kenya in *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR (finding the offence of ‘improper use of a licensed telecommunications system,’ unconstitutional for being broad and vague).

<sup>193</sup> Ibid. See also Soli Sorabjee, ‘Freedom of Expression,’ *supra*.

<sup>194</sup> Sandra Coliver, ‘Commentary to the Johannesburg Principles on National Security, Freedom of Expression and Access to Information,’ (1998) 20 *Human Rights Quarterly* 12.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

The question at the heart of rights-national security debate is whether national security interests are reconcilable with human rights especially in the context of organised terrorism.<sup>197</sup> Human rights defenders insist that the two interests are reconcilable.<sup>198</sup> That is, the fight against terrorism can be won within the confines of the rule of law and respect for human rights.<sup>199</sup> Skeptics disagree.<sup>200</sup> Aside from these debates, what is clear is that human rights generally, and freedom of expression in particular have faced and will continue to face serious onslaughts in the name of national security.<sup>201</sup>

There have been several guidelines developed to reconcile national security interests with freedom of expression. These guidelines aim at, among other things, delimiting the definitional scope of national security in order to forestall the subversion of the right. Key among these guidelines are the Johannesburg Principles on National Security, Freedom of Expression and Access to Information,<sup>202</sup> and the United Nations, Economic and Social Council's Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.<sup>203</sup>

The Siracusa Principles set out the most authoritative parameters of what amounts to national security interests. Articles 29 to 32 are of interest and are reproduced below:

"29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

30. National security cannot be invoked as a reason for imposing limitations to prevent

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<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

<sup>202</sup> U.N. Doc. E/CN.4/1996/39 (1996).

<sup>203</sup> U.N. Doc. E/CN.4/1985/4, Annex (1985), available on

<http://www1.umn.edu/humanrts/instreet/siracusaprinciples.html> <accessed 26 January 2016>.

merely local or relatively isolated threats to law and order.

31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.

32. The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.”

From these guidelines, a number of parameters are clear on restrictions in the name of national security. First, restrictions may only be imposed if there is real force or threat of force threatening the very survival of the nation, or its territorial integrity or political independence. Second, for threats to public order to justify restrictions on national security grounds, they must extend to the whole country. Local or isolated incidences are not sufficient unless their effects are felt throughout the country. Third, the guidelines recognise the temptation to use national security as a pretext for abuse of rights. Thus, they require that restrictions must be couched in clear terms. Fourth, there is an additional requirement to ensure that there are sufficient safeguards and redress in the event of abuse.

The Johannesburg Principles further develop and clarify the parameters set in the Siracusa Principles. Principle 2 is instructive:

### **Principle 2: Legitimate National Security Interest**

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an

internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

These provisions of the Johannesburg Principles develop the Siracusa Principles in three ways: first, it uses the term “country” in place of “nation.” This is in recognition of the political nature of the term “nation,” which is susceptible to abuse.<sup>204</sup> The term may, and is often, used for political reasons to impose the cultural or political hegemony of the majority national or ethnic group in diverse societies.<sup>205</sup> Second, the Principles extend national security grounds to include the country’s “capacity to respond to the use or threat of force” by both internal and external sources.<sup>206</sup> This addition recognises the need by states to safeguard information about its defence and security capabilities. Third, a restriction must have a “genuine purpose and demonstrable effect” in safeguarding national security. This requires states to act in good faith, and also ensure that any restrictions taken must have a direct rational connection with safeguarding national security.<sup>207</sup> Therefore, unnecessary restrictions that do not as a matter of fact contribute to national security are not legitimate.<sup>208</sup> Fourth, principle 2 (b) expressly rejects the use of national security reasons for unrelated purposes such as shielding “a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to

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<sup>204</sup> Sandra Coliver, ‘Commentary to the Johannesburg Principles on National Security, Freedom of Expression and Access to Information,’ *supra*.

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

suppress industrial unrest.”<sup>209</sup> This recognises the reality that vague claims of ‘national security’ are often used as a disguise to carry on suppression, stifle transparency and accountability of government, and to protect public officials from embarrassment.<sup>210</sup>

An objective framework for the assessment of the legitimacy of limitations on the basis of national security can be deduced from the Siracusa and Johannesburg Principles. The framework covers two components: the definitional scope, and guidelines governing the application of national security restrictions.

In definitional terms, ‘national security’ refers to a continuum of interests. The first is the ability of the state to respond to internal and external security threats against its interests or citizens.<sup>211</sup> These include military aggression by foreign powers, terrorism posed by both internal and external actors, real threats of secession, massive breakdown of law and order, or threats to overthrow the government by unlawful means.<sup>212</sup> The Preservation of Public Security Act adds to this list steps necessary to secure the administration of justice, supply of commodities essential for life, protection of the rights of others, restoration of order in times of emergency, and so on.<sup>213</sup>

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<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

<sup>211</sup> Ronald G Atkey, ‘Reconciling Freedom of Expression and National Security,’ (1991) 41 *University of Toronto Law Journal* 38, p. 50-51.

<sup>212</sup> Ronald Atkey, *supra*, adds to this list threat of non-violent but subversive activities or information that may be perpetrated by a foreign state, and the need to protect certain information that is necessary for the effective participation of the state in the global political arena such as trade negotiation strategies.

<sup>213</sup> In this Act, “the preservation of public security” includes –

- (a) the defence of the territory and people of Kenya;
- (b) the securing of the fundamental rights and freedoms of the individual;
- (c) the securing of the safety of persons and property;
- (d) the prevention and suppression of rebellion, mutiny, violence, intimidation, disorder and crime, and unlawful attempts and conspiracies to overthrow the Government or the Constitution;
- (e) the maintenance of the administration of justice;
- (f) the provision of a sufficiency of the supplies and services essential to the life and well-being of the community, their equitable distribution and availability at fair prices; and
- (g) the provision of administrative and remedial measures during periods of actual or apprehensible national danger or calamity, or in consequence of any disaster or destruction arising from natural causes.

Second, the scope of national security excludes motives such as saving the government or public officials from embarrassment, or disguising malpractices, or concealing the operations of public institutions. It also excludes reasons that are unrelated to national security such as suppressing industrial unrest, or promoting the preferred political (or other) ideology.

In addition, for any limitation to be legitimate it must be demonstrable that it is indeed advancing national security. In other words, there has to be a rational connection between the restriction and the goal of safeguarding national security. This is a continuing requirement; hence the need to constantly review a limitation to ensure it is serving the purpose.<sup>214</sup> It would follow that when it is no longer achieving the purpose, it ceases to be legitimate and should be dropped.

The state proposing a restriction must act in good faith and the proposed action must be for genuine national security interest.<sup>215</sup> Therefore, it cannot be used to shield public officials from responsibility or criticism, or to prop their egos. Finally, for a society committed to constitutional democracy, the exception is not intended to subordinate other essential values such as responsibility, transparency and accountability of the government, sovereignty of the people, and respect for human rights and other democratic ideals. As noted in section 5.3 above, a sound theory of freedom of expression limitations must accommodate and safeguard these values.

True to Emerson's assertion that freedom of expression restrictions tend to increase in 'an atmosphere of public fear and hysteria,'<sup>216</sup> it is discernible that the national security and public order restrictions in Kenya are informed mainly by three major moments of distress. First, is the colonial response to African nationalism and the Mau Mau insurgency towards the end of colonial rule. Second is the quest by the post-colonial political elite to consolidate power by suppressing political dissent. Third, is the state

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<sup>214</sup> Ibid.

<sup>215</sup> Ibid.

<sup>216</sup> Thomas Emerson, 'Towards a General Theory of the First Amendment,' (1963) 72 *Yale Law Journal* 877, p.891.

response to terrorism motivated by religious extremism since the last decade of the twenty first century.

The colonial response to African nationalism and the Mau Mau insurgency towards the end of the Empire in Kenya left a legacy of a wide range of repressive or speech-restricting laws. While a few have been repealed, the bulk remains in force as highlighted above and in chapter four. It will be recalled from chapter two and four that colonial-time offences such as criminal libel, sedition and possession of seditious publications for instance, were notoriously used to prosecute and imprison many political dissidents especially in the 1980s and 90s.<sup>217</sup> It was sufficient for purposes of prosecution to be found with materials that advocated for regime change, or any information that the ruling party KANU was unhappy with.<sup>218</sup>

The challenges of contemporary religious extremism and terrorism have also produced laws with potential adverse effect on freedom of expression. The frequent terrorism challenges that the country has faced in the last ten years have resulted in the adoption of several anti-terrorism laws. These laws have targeted the privacy of communication, movement, publication of terror-related information, expressions likely to be understood as inducing acts of terrorism or membership of terror groups, among others.<sup>219</sup>

While there are examples that show legitimate use of national security and public order for limitation of freedom of expression, these grounds have also been used to perpetrate political repression and to unjustifiably interfere with the right. Restrictions such as prohibition of incitement to violence and disobedience of the law, prohibition of alarming publications, propaganda for war, and hate speech among others are obviously intended to safeguard peace, security and national cohesion from the effects of negative

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<sup>217</sup> Ibid.

<sup>218</sup> Charles Muiro Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya,' *supra*, p. 242-246.

<sup>219</sup> See Security Laws Amendment Act, 2014, section 64 (introducing section 30A to the Prevention of Terrorism Act), and section 56 (amending section 42 of the National Intelligence Service Act), for instance.

expressions. In addition, some of these prohibitions facilitate Kenya's fulfillment of its international legal obligations.<sup>220</sup> The challenge, however, arise at the enforcement level in how law enforcers, prosecutors and judicial officers interpret these restrictions given that some of them are open-textured, lending themselves to broad interpretation and possible abuse.<sup>221</sup>

The enactment of the controversial SLAA in December 2014 in response to numerous terrorist attacks carried out by *Al Shabab* on Kenyan soil best illustrates the hysteria and lack of objectivity that often accompany responses to national security and public order threats.<sup>222</sup> Aside from the chaos and the fist-fights that characterised the legislative process,<sup>223</sup> these reforms introduced far-reaching restrictions on freedom of expression and media freedom. For instance, SLAA amended the Penal Code to make it a serious offence punishable by up to three years in prison, a fine of five million shillings (USD 50,000) or both to '*publish or broadcast 'insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace.'*'<sup>224</sup> [Emphasis added]. Similarly, the amendments also made it a serious offence to publish or broadcast "*any information which undermines investigations or security operations by the National Police Service or the Kenya Defence Forces....*"<sup>225</sup> [Emphasis added]. In addition, the Prevention of Terrorism Act was amended to make it an offence punishable by up to fourteen years in prison to publish or make a statement that is '*likely to*

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<sup>220</sup> In particular, obligations arising under article 20 of the International Convention of Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination.

<sup>221</sup> The High Court in *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR recognised this fact.

<sup>222</sup> Between October 2011 and October 2014 when Kenya sent troops to Somalia to fight *Al Shabab*, the terrorist group has carried out more than one hundred terrorist attacks in Kenya leaving hundreds dead and others injured.

<sup>223</sup> 'Brawls, House Chaos as Police Laws Passed - VIDEO' (18 December 2014)

<<http://www.nation.co.ke/news/politics/Parliament-Security-Bill-Chaos-MPs-Senators/-/1064/2561754/-/kiibxoz/-/index.html>> accessed 3 June 2016.

<sup>224</sup> SLAA section 12, (inserting section 66A to the Penal Code, Chapter 63)

<sup>225</sup> SLAA section 64 (inserting section 30A to the Prevention of Terrorism Act, 2012). The phrasing of these laws is too broad to enable a person to reasonably estimate what is permitted and what is not. The principle of legality frowns upon such vagueness because they result in situations where people may commit offences without their knowledge or intention. For instance, it is not easy for journalists whose core business is to find and disseminate news to determine that information '*undermines investigations or security operations.*'

*be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism.*<sup>226</sup> [Emphasis added]. The offence would be complete irrespective of whether or not anyone is, in fact, induced to engage in terrorism.<sup>227</sup>

SLAA also sought to give the Police and victims of terrorism control over the publication of information that could be seen as being prejudicial to the fight against terrorism. In essence any person, including media, would have to seek the approval of the Police to publish information relating to terrorism. The relevant section read thus:

30F. (1) Any person who, without authorization from the National Police Service, broadcasts any information which undermines investigations or security operations relating to terrorism commits an offence and is liable on conviction to a term of imprisonment for a term not exceeding three years or to a fine not exceeding five million shillings, or both.

(2) A person who publishes or broadcasts photographs of victims of a terrorist attack without the consent of the National Police Service and of the victim commits an offence and is liable on conviction to a term of imprisonment for a period not exceed three years or to a fine of five million shillings, or both.

(3) Notwithstanding sub-section (2) any person may publish or broadcast factual information of a general nature to the public.<sup>228</sup>

SLAA also empowered national security organs to “intercept communication in order to detect, prevent and disrupt terrorism.”<sup>229</sup> These laws elicited widespread public protests from opposition politicians, human rights activists and the media, and became the subject of litigation in *CORD case*.<sup>230</sup> This case considered a wide range of issues among them the violation of the right to freedom of expression and media as guaranteed under article 33 of the Constitution. The petitioners faulted the provisions as offending the right

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<sup>226</sup> Ibid.

<sup>227</sup> This provision is similar to section 1 of the Terrorism Act 2006 of the Act of the United Kingdom.

<sup>228</sup> Security Laws Amendment Act, section 30F (1)(2)(3).

<sup>229</sup> Ibid, section 69 (introducing a new section 36A to the Prevention of Terrorism Act)

<sup>230</sup> [2015] eKLR.

to freedom of expression and media by instituting a system of prior restraints contrary to the spirit of freedom of expression, setting vague standards for permissible broadcasts or publication of terrorism related information, and imposing limitations that were beyond permissible constitutional limits set out under article 33 (2) of the Constitution.

In impugning these provisions, the court first noted that a system of prior restraints such as what SLAA introduced violates the right to freedom of expression and media. Second, the court castigated these laws for their vagueness, holding that, “a law that limits a fundamental right and freedom must not be so vague and broad, and lacking in precision, as to leave a person who is required to abide by it in doubt as to what is intended to be prohibited, and what is permissible.” The court here was emphasising the principle of legality which requires that law must be sufficiently precise as to enable an individual to determine what is permissible and eliminate a situation where one violates the law unintentionally. In so holding, the Court set a standard that freedom of expression limitations must be carefully tailored so as to make their constraints easily ascertainable. Third, the Court emphasised that there has to be a rational connection between a limitation and its aim. The court concluded that the state had not established a rational connection between national security and counter-terrorism proposals contained in sections 30A and 30F of SLAA. Moreover, the court emphasised that any limitation beyond hate speech, incitement to violence, propaganda for war, and vilification of others on prohibited grounds as contemplated under article 33 (2) must be justified strictly. The standards pronounced by the court on limitation of freedom of expression on national security grounds resonate well with the Siracusa and Johannesburg Principles, and adds to the development of freedom of expression doctrine in Kenya.

These drastic laws touching on freedom of expression and media were obviously informed by a number of things: First is the psychology of terrorism. In addition to causing actual harm such as death, injury and destruction of property,

terrorism aims at instilling fear.<sup>231</sup> Therefore, it would seem, this law aimed at suppressing the secondary aims of terrorism by prohibiting the circulation of pictures of scenes of terrorism through various media. It is instinctive to think that in an open and democratic society, there cannot be a blanket ban on the coverage of terrorism as this would violate the right to freedom of expression and media freedom. In addition, the observance of this law presents certain obvious practical challenges. For instance, it would be difficult for the media to determine what factual information is “likely to cause fear and alarm to the general public or disturb public peace.” The vagueness of the test set here exposes journalists to arbitrary prosecutions since any information connected to terrorism potentially fits into the ambit of this restriction. Most information, whether terrorism-related or not may cause fear. That alone is not sufficient reason to prohibit publication.

In *Handyside v the United Kingdom*,<sup>232</sup> the European Court of Human Rights held that freedom of expression protects information that “offend, shock or disturb the State or any sector of the population.”<sup>233</sup> As noted in chapter four, freedom of expression guarantee would be worthless if it were to cover only convenient or uncontroversial information. In the light of this, therefore, media ethics ought to govern how disturbing information may be relayed so as to mitigate its effects on the public. A total ban accompanied by sanctions obviously interferes with freedom of expression and media freedom. It in effect institutes a situation where the public is insulated from receiving information or receiving only the kind of information that the state approves. This kind of paternalism and censorship is inimical to openness and democracy and to freedom of expression.

The amendments introduced by SLAA raised at least two issues that are pertinent to the theory of freedom of expression and national security as analysed above.

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<sup>231</sup> Raphael F. Perl, *Terrorism, The Media, And The Government: Perspectives, Trends, and Options For Policymakers* (1997), Washington D.C., USA. UNT Digital Library. Available online on <http://digital.library.unt.edu/ark:/67531/metacrs419/>. <Accessed 21 January 2016>.

<sup>232</sup> (5493/72) [1976] ECHR 5 (7 December 1976)

<sup>233</sup> *Ibid.*

These are prior restraints and vagueness. As already noted, the system of freedom of expression abhors prior-censorship. The requirement that one would have to obtain the consent of the Police and victims of terrorism before publishing terrorism-related information, in effect, created a system of prior restraint. It is noteworthy that this provision did not set out the mechanism on how the authority of the Police and victims may be sought and obtained, the timelines within which the authority may be granted, and how disputes relating to the approval may be addressed. It is also unreasonable that interested parties, namely the Police and victims, would be charged with the authority to determine what may or may not be published.

This administrative power vested on the Police and victims would effectively constrain the exercise of the constitutionally guaranteed rights to freedom of expression and media. This in itself would interfere with the rights since the theory upon which the bill of rights is founded does not contemplate an administrative constraint of this nature. In other words, while the right to freedom of expression is subject to certain internal and external limits as already discussed, they are not subject to administrative approval of this kind. In addition, the rules of natural justice require the exercise of administrative power to be guided by administrative fairness and impartiality.<sup>234</sup> This arises from the '*Nemo iudex in causa sua*,' rule which require that no one may be a judge in his own cause.<sup>235</sup> The rules of natural justice require that an administrative system must be clear and predictable while the decision maker must be objective in decision making.<sup>236</sup> These two elements were missing under the rule of prior approval of publication of terrorist attacks provided by SLAA. There were no procedures to facilitate speedy approval before publication, the decision makers (the Police and victims) were interested parties, and there were no safeguards to ensure that approvals are administered in a fair and timely fashion. This was further complicated by the involvement of victims as licensors of publications. In terrorism

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<sup>234</sup> PLO Lumumba, PO Kaluma, (2007) *Judicial Review of Administrative Actions in Kenya: Law and Procedure*: Nairobi, Jomo Kenyatta Foundation.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

situations, victims may be unknown, unreachable, seriously wounded, or dead. Ordinarily, the victims may also be many, raising the question of whether the consent of one, some or all the victims is needed. In these circumstances, the idea that journalists must seek the approval of victims and the Police would effectively extinguish the right to freedom of expression and media freedom in terrorism situations. Consequently, the corollary right of the public to be informed would also be restricted. The High Court in *CORD case* noted this fact, terming the laws a 'blanket ban' on freedom of expression and media, and accordingly struck down the offending provisions. In a further appeal, the Court of Appeal rejected the state's contentions and upheld the decision of the High Court.<sup>237</sup>

Although the intervention of the two superior courts offered some relief to freedom of expression defenders, the SLAA example and its mistakes is a clear indication of the difficulty that plagues the balancing of national security interests and freedom of expression not only in Kenya but also in other democracies as well.<sup>238</sup> We now turn to two other offences which, although not as recent in their enactment, have recently become commonly applied to punish government critics or disseminators of communications that displeases the state. These offences are (a) undermining the authority of a public officer and (b) improper use of a telecommunications gadget. A discussion of these offences follows below.

The offence of 'undermining the authority of a public officer,' dates back to 1952, the same year that the colonial administration declared a state of emergency and

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<sup>237</sup>See 'Court of Appeal declines to reinstate contentious clauses in security laws,' *The Daily Nation*, 23 January 2015, available on:

<http://www.nation.co.ke/news/Appeal-court-declines-to-reinstate-security-clauses/-/1056/2599576/-/yhamnjz/-/index.html> <accessed 9 June 2016>.

<sup>238</sup> Michael Mandel, 'Freedom of Expression and National Security,' (1985) 23 *University of Western Ontario Law Review* 205, p. 209. Responses to 9/11 terrorist attacks in New York caused the United States to respond with legally doubtful methods such as indefinite detentions without trial and torture of suspected terrorists. See also Chapter 4 'Freedom of Expression and National Security,' in Douglas Fraleigh and Joseph Tuman, (2010) *Freedom of Expression in the Marketplace of Ideas*: SAGE publications, p. 87 (showing how in the United States freedom of speech has always come under threat in times of crises such as the civil war, world war I & II, the Vietnam war, the cold war and in the aftermath of 11 September 2001 attacks in New York).

commenced a crackdown on Mau Mau insurgents.<sup>239</sup> The offence remained in the Penal Code long after the end of emergency and colonial reign. In the Penal Code, the offence belongs to a category of crimes labeled “offences against public authority.” The same law and related ones under different headings were introduced by both the French and British colonial powers in their colonies in Africa and elsewhere.<sup>240</sup>

In essence, this law, whose application is only for the benefit of public officials, belongs to a category of laws commonly described as insult or *desacato* laws.<sup>241</sup> The public policy rationale behind insult or *desacato* laws is twofold: One is that public officers must be protected from insults so that they can carry out their functions without hindrance. This creates an environment in which government can operate smoothly. Two, is that they protect public order since disruption of public officials may destabilize the government.<sup>242</sup> These laws trace their origin to the Middle Ages during which government was founded on authoritarian theory.<sup>243</sup> Government was founded on the theory that rulers were divinely ordained, and therefore beyond question.<sup>244</sup> The philosophy also placed rulers above ordinary citizens, hence creating a hierarchical order. After the age of revolutions and reform in Europe, these laws were retained to protect the dignity of public office holders as well as flags, emblems and other national symbols.<sup>245</sup> Contemporary democratic theory has completely altered the political and philosophical foundations of government. Modern democracies are premised on a theory of dignity and equality of all.<sup>246</sup> In addition, democratic politics places the people at the centre. Thus, those in positions of public

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<sup>239</sup> Caroline Elkins, (2005) *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*: New York, Henry Holt & Company Publishers.

<sup>240</sup> Badala T. Balule, ‘Insult Laws: A Challenge to Media Freedom in the SADC's Fledging Democracies? 41 *Comparative and International Law Journal of Southern Africa* 404, p. 408.

<sup>241</sup> See ‘Defining Defamation Principles on Freedom of Expression and Protection of Reputation,’ *supra* (noting that insult laws, *desacato* laws, and libel laws are conceptually similar and have been used in the same way to unjustifiably suppress freedom of expression).

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*, p. 407.

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

<sup>246</sup> Ivan Hare and James Weinstein, (eds), *Extreme Speech and Democracy*, *supra*.

authority hold office in trust for the people.<sup>247</sup> This position is different from the philosophy that informed insult or *desacato* laws when they emerged. Therefore, this philosophical shift casts doubt on the political justifiability of the retention and application of these laws in the modern democratic era.

In Kenya's post-colonial period, especially after the introduction of multiparty politics in 1992, this provision was largely dormant as public prosecutors preferred not to apply it. Since 2013, however, its application has increased tremendously, and is now one of the most commonly applied provisions to prosecute freedom of expression-related offences. Politicians, bloggers and social media enthusiasts have in recent times been charged under this law for making comments critical of or plainly insulting to the President and other public officers. The facts relating to the charges that have received publicity range from insults such as calling the President Kenyatta "an adolescent president,"<sup>248</sup> or insinuating that he smokes marijuana,<sup>249</sup> or claiming that the head of the Ethics and Anti-Corruption Commission does not hold a university degree.<sup>250</sup> The fact that the targets of prosecution have almost invariably been fierce critics of the government making disparaging comments about powerful individuals demonstrates how this law presents real challenges to freedom of political expression and chilling power dynamics. The law providing for the crime reads as follows:

Any person who, without lawful excuse, the burden of proof whereof shall lie upon him, utters, prints, publishes any words, or does any act or thing, calculated to bring into contempt, or to excite defiance of or disobedience to, the lawful authority of a public officer or any class of

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<sup>247</sup> Ibid.

<sup>248</sup> John Karume, 'Blogger Robert Alai Charged for Allegedly Undermining the Presidency' *The Standard*, 17 December 2014 available on <http://www.standardmedia.co.ke/article/2000145081/blogger-robert-alai-charged-for-allegedly-undermining-the-presidency>. <Accessed 3 June 2016>.

<sup>249</sup> County Rep Denies Uhuru Bhang Slur' (30 April 2014) <<http://www.nation.co.ke/news/politics/Samuel-Aboko-Onkwani-Uhuru-Kenyatta-Bhang/-/1064/2299782/-/qiejyh/-/index.html>> accessed 3 June 2016.

<sup>250</sup> Blogger Charged over Offensive Post' (5 January 2016) <<http://www.nation.co.ke/news/Robert-Alai-offensive-Twitter-post/-/1056/3021930/-/7ita2m/-/index.html>> accessed 3 June 2016.

public officers is guilty of an offence and is liable to imprisonment for a term not exceeding three years.<sup>251</sup>

A number of constituent elements of the offence are evident from this provision: First, there has to be utterances, words or publication, or action. Second, the words must be calculated to disparage or incite disobedience against the authority of a public officer. Unlike criminal libel, truth of the offending statements is irrelevant. It cannot afford a defence, a fact which makes this law potentially more pernicious than similar or related laws.

The wordings of the offence as well as its recent application by the police and prosecution authorities show that the scope of this law can be broad. As seen from the examples cited above, the last two years show that plain insults or aspersions of substance abuse, or lack of requisite qualifications to hold office is enough to trigger action of prosecuting authorities and even conviction. Evaluating this against the Siracusa and Johannesburg Principles set out above, it becomes clear that the application falls foul of these guidelines. First, the law offers special protection to public officials, which is not available to ordinary citizens. Second, the application has tended to target government critics hence shielding government and public officials from criticism. Third, the rational connection between the elements of the crime as set out above and the objective of public order is doubtful. There are other ways of ensuring public order and the authority of a public officer than punishing people for uttering words that 'bring into contempt...the lawful authority of a public officer,' for instance.<sup>252</sup> That the pattern of trials show that prominent government officials have benefitted from this law without an attempt to clarify or disprove outrageous claims made by critics vindicates the danger of this law to political expression as well as the democratic culture of openness and accountability.

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<sup>251</sup> Penal Code, chapter 63, Laws of Kenya, section 132.

<sup>252</sup> For example the concerned officers could institute libel suits, the government or concerned officials could also clarify any misconceptions and set the record straight.

Insult laws and others that seek to insulate public officials from criticism have received various challenges in freedom of expression and democracy discourses. In democratic systems, public officials are accountable to the people.<sup>253</sup> That necessarily means they must be open to public scrutiny and criticisms.<sup>254</sup> Of course protection from harassment, personal harm and obstruction in the course of duty is necessary. Doing so protects their personal security, dignity and ensures performance of their duty.<sup>255</sup> However, protection beyond these objectives is suspect. For the insults cited above, one wonders why a blogger making substantiated claims that the head of a public institution does not have a university degree would be prosecuted for “undermining the authority of a public officer.” Besides questions of how the authority of the concerned officer was undermined by such a statement, it is difficult to justify why this merits expenditure of state prosecutorial resources. An approach that recognises accountability and transparency in public affairs as well as the citizen’s right to freedom of expression would be to let the implicated officer disprove the claim (by displaying the degree for example), dismissing (and ignoring) the blogger, and if that would still be insufficient, institute private civil proceedings. The same could be said of the casual insult against the President.<sup>256</sup>

The use of insult or *desacato* laws and criminal libel to protect politicians and public officials has generally received unfavourable treatment before the African Commission on Human and People’s Rights, the European Court of Human Rights, the Inter- American Commission on Human Rights, the Human Rights Committee, as well as in domestic courts as will be seen later in this chapter.<sup>257</sup>

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<sup>253</sup> Ibid.

<sup>254</sup> Ibid.

<sup>255</sup> Ivan Hare and James Weinstein, (eds), *Extreme Speech and Democracy*, *supra*.

<sup>256</sup> Compare with how President Obama dealt with Donald Trump’s allegations that he was not born in the United States and therefore constitutionally unqualified to be the President. He simply displayed his birth certificate and the matter was resolved. See-  
[https://www.whitehouse.gov/sites/default/files/rss\\_viewer/birth-certificate-long-form.pdf](https://www.whitehouse.gov/sites/default/files/rss_viewer/birth-certificate-long-form.pdf) <accessed 8 June 2016>.

<sup>257</sup> William Edward Adjei, ‘The Protection of Freedom of Expression in Africa: Problems of the Application and Interpretation of Article 9 of the African Charter of Human and Peoples’ Rights,’ (Unpublished PhD thesis, 2012), p. 348-351.

We now turn to a discussion on controversial prosecutions of expression-related offences under the Kenya Information and Communication Act (KICA). KICA was enacted in 1998 in response to revolutions in the information and communication technology (ICT) sub-sector in the last two decades of the 20 century. The law was intended to create a framework that would facilitate growth through liberalization, as well as regulate it to ensure order.<sup>258</sup> The law anticipated that with ICT revolutions availing efficient and inexpensive means of communication to a wide population, mischief was bound to increase. Thus, section 29 of the Act provided for the offence of improper use of a telecommunication system. Under this law, it is an offence to use a licensed telecommunication system to send messages that are “grossly offensive, or of an indecent, obscene or menacing character,” or to send a false message “for purposes of causing annoyance, inconvenience or needless anxiety to another person.” The mischief that this rule is intended to curb, it can be discerned, is the misuse of telecommunication gadgets to send threats or cause panic or nuisance to others or the public, or breach personal security. Such aims are of course legitimate as it is the responsibility of the state to ensure that the use of telecommunications does not disrupt public order or the peace and security of others. This is tied to public security, safety and order rationales for limitation of fundamental rights. Limiting the use of telecommunications media in this sense brings into play concerns of freedom of expression to the extent that it restricts the information that one may communicate.

On the face of it, the words of the offence appear innocent and intended to genuinely advance legitimate interests of security and order. However, the manner in which this law has been applied in the era of counter-terrorism is of serious concern. It can be argued that rather than being restricted to advancing the legitimate interests noted above, this law has in recent times been misapplied to shield government and public

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<sup>258</sup> These objectives are evident in the long title of Kenya Information and Communications Act:

“ An Act of Parliament to provide for the establishment of the Communications Commission of Kenya to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce, to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telkom Kenya Limited and the Postal Corporation of Kenya, and for connected purposes.”

officials from criticism and accountability and to suppress freedom of expression. It is now the most commonly used law to prosecute those who expose government malpractices using social media platforms such as facebook, twitter and WhatsApp. A few examples illustrate this point. These are only a few representative cases as the list of similar charges and trials has increased tremendously in the recent past. They are highlighted below:

Robert Alai, a controversial blogger and government critic was charged with the offence of misusing telecommunications system. The same facts used to charge him with the offence of ‘undermining the authority of a public officer’ as highlighted above were used to prefer charges of improper use of a telecommunications system. The particulars of the offence were that he misused a telecommunication system to disseminate adverse information through his Twitter account about a public officer with the intention to cause annoyance. The Charge sheet read as follows:

On the 18th day of November at unknown place within the Republic of Kenya, using Twitter account RobertAlai @RobertAlai posted “How do you expect EACC to arrest anyone for corruption when its head (Waqo) used a forged UON degree certificate to get into office” knowing it to be false and intended to cause annoyance to the said Halakhe D. Waqo.

The Ethics and Anti-corruption Commission (EACC) is a state organ tasked with fighting corruption. The commission had come under criticism because of how it had handled corruption cases implicating prominent personalities. The allegation that the head of the commission had used forged certificates is potentially damaging to the person named. But preferring criminal charges of ‘improper use of a telecommunications system’ and deploying state coercive power to the defence of the officer in the circumstances, was in bad taste especially given that the concerned officer had options for redress: to produce his certificates to disprove the claims and discredit his accuser, sue for defamation, or take both actions.

In another case, a journalist and blogger Yassin Juma was arrested on allegations under the same law for posting photos of Kenyan soldiers killed by Al Shabab militia in Somalia.<sup>259</sup> Similarly, Eddy Reuben Illah was charged with the offence of misusing a telecommunications gadget for circulating photos of bodies of Kenyan soldiers killed in Somalia via a WhatsApp group called “a *young people’s union*.”<sup>260</sup> It is concerning that posting photographs of a factual happening would be interpreted as ‘misusing a telecommunications gadget.’ What is more concerning about the latter case is that it not only affects freedom of expression but also the right to privacy because of the nature of communication through WhatsApp groups. The right to privacy of communication is an essential component of the right to privacy.<sup>261</sup> Unlike facebook or twitter, WhatsApp is principally mobile-phone based. To receive a message circulating in a WhatsApp group, one has to belong to a group created by him or invited by an administrator. The message will be restricted to the group (but may however be forwarded to others). In addition, a member of a WhatsApp group can exclude themselves if they do not wish to receive communications circulating in a group.<sup>262</sup> To base prosecutions on information circulating on a closed media such as a WhatsApp group not only violate freedom of expression but also the right to privacy which protects privacy of communications.<sup>263</sup> That the accused could be arrested and charged for circulating a message through a mobile phone to a willing audience or recipients who have the option to exclude themselves offends the tenets of an ‘open and democratic society.’ To put it plainly, it is both overly restrictive and invasive.

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<sup>259</sup> ‘Police Fail to Charge Blogger Yassin Juma’ *Daily Nation*, 25 January 2016.

<<http://www.nation.co.ke/counties/Kiambu/Police-fail-to-charge-Yassin-Juma/-/1183274/3048154/-/aa434w/-/index.html>> accessed 3 June 2016. The police, however, dropped the charges against the journalist.

<sup>260</sup> Nation Media Group, ‘Man in Court for Sharing Photos of “Slain” KDF Soldiers on WhatsApp’ (Also featured online on 19 January 2016 at <http://nairobinews.nation.co.ke/news/man-in-court-for-sharing-photos-of-slain-kdf-soldiers-on-whatsapp/> <accessed 3 June 2016>.

<sup>261</sup> Daniel Solove, *Understanding Privacy*, (2008) Harvard University Press, Cambridge, p.1.

<sup>262</sup> See WhatsApp tutorial on <https://www.howdoesappingwork.com/whatsapp/>

<sup>263</sup> Privacy of communication is specifically protected under Article 31 (d) of the Constitution of Kenya, 2010.

Accompanying this crackdown on terrorism-related information was a clear three fold intention: to conceal the failures of security agencies; minimise publicity of the destruction left behind by attacks so as not to give “credit” to *Al Shabab* terrorists, and to urge the media to report ‘patriotically’ so as to safeguard public confidence.<sup>264</sup> These objectives present the dilemma that dealing with modern terrorism presents to the media, government and policy makers. The Court in *CORD* case, citing Raphael F. Perl<sup>265</sup> recognised this challenge. Terrorist groups depend on the fear that they inflict and the ensuing publicity as a measure of their ‘success.’<sup>266</sup> This motivates states to suppress the circulation of negative terrorism-related information in the hope of preserving public confidence in their counter-terrorism abilities. In the ensuing contest for control of information between the state and terrorist groups, the media often come under pressure and may be manipulated by either side.<sup>267</sup> In an open and democratic society, a government can at best wish for ‘patriotic’ or favourable reporting. It cannot legitimately demand or decree it. Similarly, reporting in a fashion that advances the objectives of terrorists and terrorism is unacceptable in light of its threats on peace, security and democratic order. For policy makers, striking the balance that will preserve freedom of expression without advancing terrorism agenda is crucial. On this, Raphael Perl observes:

The media and the government have common interests in seeing that the media are not manipulated into promoting the cause of terrorism or its methods. But policymakers do not want to see terrorism, or anti-terrorism, eroding freedom of the press--one of the pillars of democratic societies. This appears to be a dilemma that cannot be completely reconciled--one with which societies will

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<sup>264</sup> These aims were evident in the response of the government and the admonition of the media to report ‘patriotically.’ See for instance Muthoni Kamau, ‘Kenya Police Issue Countrywide Alert after *Al Shabaab* Attack in Somalia’ (16 January 2016) <<http://www.standardmedia.co.ke/article/2000188297/kenya-police-issue-countrywide-alert-after-al-shabaab-attack-in-somalia>> accessed 3 June 2016; and ‘Media Council Tables Findings on Westgate Coverage’ (10 February 2014) <<http://www.mediacouncil.or.ke/en/mck/index.php/news/101-media-council-tables-findings-on-westgate-coverage>> accessed 3 June 2016.

<sup>265</sup> Raphael F. Perl, *Terrorism, The Media, and The Government: Perspectives, Trends, and Options For Policymakers* (1997), Washington D.C., USA. UNT Digital Library, *supra*.

<sup>266</sup> *Ibid.*

<sup>267</sup> *Ibid.*

continually have to struggle. The challenge for policymakers is to explore mechanisms enhancing media/government cooperation to accommodate the citizen and media need for honest coverage while limiting the gains uninhibited coverage may provide terrorists or their cause. Communication between the government and the media here is an important element in any strategy to prevent terrorist causes and strategies from prevailing and to preserve democracy.<sup>268</sup>

The government has the duty to protect national security. It may do so through different mechanisms including applying coercive power in form of prosecution and punishment. In doing so, however, caution must be exercised in order to avoid eroding freedom of expression and instituting widespread censorship under the guise of national security.<sup>269</sup> To be clear, discussions on security and military defeats cannot be 'no go zones' for the media and ordinary citizens. Neither can public officials be shielded from criticism or public denigration in the name of preserving 'public authority.'

#### 5.4.2. Rights and Reputation of Others

Central to the idea that rights are not absolute is the need to safeguard the rights and reputation of others. While liberal ideology recognises the moral competence to exercise individual rights, it is also true that unbridled claims of rights may mean an interference with the personal reputation, privacy, dignity and equality of others.<sup>270</sup>

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<sup>268</sup> Ibid.

<sup>269</sup> Sandra Coliver, 'Commentary to the Johannesburg Principles on National Security, Freedom of Expression and Access to Information,' *supra*.

<sup>270</sup> Neomi Rao, 'Three Concepts of Dignity in Constitutional Law,' (2011) 86 *Notre Dame Law Review* 183, p. 186. See also Robert Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986). *Faculty Scholarship Series*, Paper 217: [http://digitalcommons.law.yale.edu/fss\\_papers/217](http://digitalcommons.law.yale.edu/fss_papers/217), p.693-708.

Therefore, freedom of expression may be limited in order to safeguard personal reputation and the rights of others.<sup>271</sup>

In his libertarian defence of freedom of expression, Mill recognised harm to others as a legitimate reason to limit individual liberty.<sup>272</sup> Although unbridled freedom of expression does not always result in physical harm, this ground is defensible because other forms of injury be they social, emotional or psychological are equally detrimental.<sup>273</sup> For instance hate speech may advance discrimination against population groups, and foment ethnic or racial tensions that could eventually explode into violence.<sup>274</sup> On its part, injury to personal reputation could mean loss of social standing, income, employment, or esteem.

Libel law developed as a legal mechanism for the protection of reputation.<sup>275</sup> As an aspect of private law, it enables a victim of defamation to recover damages for injury to reputation. In addition a claimant may obtain an order requiring publication of an apology and an injunction to restrain further defamation. Criminal libel in public law seeks to vindicate the victim of defamation through punishment such as fine or imprisonment. On its part, hate speech law developed to protect the equality of targeted communities and individuals. Both laws are premised on the concept of the dignity of the human person.<sup>276</sup>

Evidently, the aims of the protection of reputation as well as the right to dignity and equality directly conflicts with those of freedom of expression guarantee. While freedom of expression defends the right to 'seek, receive or impart information,' libel and hate speech laws seek to penalise or suppress certain offending statements.

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<sup>271</sup> Reputation is an interest that has received legal protection in diverse jurisdictions and in international law. Although not listed as a core right, it is recognised as an important value such that fundamental rights and freedoms may be limited in its interest. See generally, 'International and Comparative Defamation Standards,' London, ARTICLE 19, 2004, p.1.

<sup>272</sup> Chapter I of John Stuart Mill, *On Liberty*, in John Gray, ed., *John Stuart Mill on Liberty and Other Essays*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 1998.

<sup>273</sup> Panos Mavrokonstantis, 'Critical Evaluation of Mill's Proposed Limits on Legitimate Interference with the Individual,' *supra*. (2008-2009) 8 *Law and Society Journal*, UCSB 87.

<sup>274</sup> Jean Marie Kamatali, *Freedom of Expression and its Limitations: The Case of the Rwandan Genocide*, (2000) 38 *Stanford Journal of International Law* 57.

<sup>275</sup> Robert Post, "The Social Foundations of Defamation Law: Reputation and the Constitution," *supra*.

<sup>276</sup> *Ibid*. See also Jeremy Waldron, 'Dignity and Defamation: The Visibility of Hate,' (2009) 123 *Harvard Law Review* 1596.

The reputation of public officials and the dignity and equality of others are two subjects that are of particular relevance to the theme of this thesis to the extent that they affect political expression. It is recognised that libel of a public official is political expression.<sup>277</sup> As will be seen later, hate speech law often implicates political expression especially in societies such as Kenya where ethnicity is a key political factor. A detailed analysis of these heads follows below.

#### 5.4.2.1. Public Officials, Libel and Freedom of Expression

Libel law is a platform for tension between the right to freedom of expression and reputation rights. Besides implicating the right to freedom of expression, libel of public officials also brings into play core democratic values such as accountability and transparency of government. Both reputation and the right to reputation are legally recognised in the democratic world making their reconciliation a key problem in freedom of expression discourse.<sup>278</sup> The protection of reputation, however, is a much older concept in law, founded on the concept of dignity and honour of the human person.<sup>279</sup>

To succeed in a libel claim at common law, a plaintiff has to prove three things: a defamatory statement, reference to the claimant either expressly or by innuendo, and publication.<sup>280</sup> The defining factor is the falsity of the defamatory statement, such that proof of truth absolves the defendant of liability.<sup>281</sup> For Kenya, the key question is whether public officials may succeed in a case of libel. In the absence of a position equivalent to that taken by the US Supreme Court in *New York Times v Sullivan*,<sup>282</sup> the right to recover damages for libel is available to public officials, politicians and public figures.<sup>283</sup> The cases

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<sup>277</sup> Ivan Hare and James Weinstein, (eds), *Extreme Speech and Democracy*, *supra*.

<sup>278</sup> *Ibid*.

<sup>279</sup> *Ibid*.

<sup>280</sup> Edwin Peel and James Goudkamp, (2014) *Winfield and Jolowicz on Tort*, 19<sup>th</sup> Ed.: Sweet and Maxwell.

<sup>281</sup> *Ibid*.

<sup>282</sup> 376 U.S. 264, 283 (1964).

<sup>283</sup> The numerous successful claims of libel involving public officials such as cabinet ministers, Members of Parliament, judges and so on illustrate this point. See for instance *Francis Ole Kaparo v The Standard Media and 3 others*, Nairobi Civil Case No. 1230 of 2004 (where the Speaker of the National Assembly was awarded seven million (USD 70000) for libel), *Arthur Papa Odera v Peter O. Ekisa* [2016] eKLR, (where a Member of Parliament was awarded five million shillings (USD 50000) against his constituent, *Kipyator Nicholas Kiprono*

of Nicholas Biwott, Joshua Kulei, Evan Gicheru cited in the previous chapter illustrate this position.<sup>284</sup> From these examples, it is clear that public officials may recover damages for libel even where the matters in question are matters of public interest.<sup>285</sup> In *New York Times v Sullivan*, the United States Supreme Court firmly established that a public official may not recover damages for defamation unless actual malice is established. In *Nicholas Biwott* case for instance, the plaintiff was a cabinet minister at the time that the alleged defamatory statements were made. The defendant had made allegations of corruption relating to procurement and development of a government-funded power plant carried out under the department headed by the plaintiff. The defendant, a newspaper publisher failed to prove the truth of its allegations to the satisfaction of the court and was found liable in tort for libel.<sup>286</sup>

Civil libel is a vibrant area of law in Kenya. Consistent with English common law position, unsuccessful plea of the defence of truth leads to the award of aggravated damages against an unsuccessful defendant. This obviously discourages defendants from attempting to prove the truth of their allegations, and no doubt, has a chilling effect on political expression and press freedom.<sup>287</sup> Since 1992, defamation law in Kenya sets minimum amount of damages that may be awarded to successful claimants in respect of defamatory allegations touching on commission of offences.<sup>288</sup> Under section 16A of the

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*Biwott v George Mbuguss and Kalamka Limited* [2002] eKLR (where a cabinet minister was awarded 20 million shillings (USD 200000) against a newspaper publisher, and *Johnson Evan Gicheru v Andrew Morton & another* [2005] eKLR where a judge of the High Court (later of Court of Appeal and Chief Justice) was awarded 6 million shillings against an author of a book and the distributors. All these cases involved claims of corruption on the part of the plaintiffs who were high-ranking public officials.

<sup>284</sup> Charles Muiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya,' *supra*, p.242-246.

<sup>285</sup> The phrase 'matters of public interest,' have been defined to include issues touching on all the three arms of government, other public institutions, public figures, public officials, politics including elections, public health and safety, law enforcement, the administration of justice, social interests, consumer interests, the environment, economy, art and culture. See for instance, 'Defining Defamation Principles on Freedom of Expression and Protection of Reputation,' *supra*, p.10.

<sup>286</sup> Charles Muiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya,' *supra*.

<sup>287</sup> Charles Muiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya,' *supra*.

<sup>288</sup> See the schedule to Act 11 of 1992.

Defamation Act,<sup>289</sup> the courts are allowed unfettered discretion to award damages as ‘it deems just.’ In addition, the law also sets a lower limit for damages that may be awarded for alleged defamatory statements in respect of an offence punishable by death at Kenya shillings one million (USD 10000) and Kenya shillings four hundred thousand (USD 4000) in respect of an offence punishable by a jail term of not less than three years. This amendment which was introduced at a time when Kenya was shifting from one-party era to multiparty politics set the stage for the pattern of hefty damages awarded by the courts for defamation. This change is to be contrasted with developments in other jurisdictions where the tendency has been to set maximum awards so as to moderate courts’ discretion.<sup>290</sup>

Besides libel in private law, the state may also bring charges of criminal libel even where the complainant is a public officer. The trial, conviction and imprisonment of Njehu Gatabaki for criminal libel is a good example. Njehu Gatabaki, a journalist, opposition activist and later opposition Member of Parliament had alleged that President Daniel arap Moi had planned and executed ethnic violence in which opposition supporters were killed and thousands displaced in the Rift Valley Province.<sup>291</sup> There are other examples of journalists and government critics who became victims of criminal libel especially during the Moi-KANU regime.<sup>292</sup>

Despite the numerous criticisms that criminal libel has faced, Kenya retains criminal libel as an offence in the Penal Code. Criminal libel law is however rarely applied, suggesting its diminished importance in modern Kenyan society. It however deserves scrutiny because of how it has been used in the past to suppress freedom of expression and

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<sup>289</sup> Chapter 36, Laws of Kenya.

<sup>290</sup> See for example Australia’s Uniform Defamation Act, 2005 which sets the maximum award recoverable in damages as a means of checking huge awards.

<sup>291</sup> Ibid. Subsequent official government investigation reports implicated Moi’s regime for instigating the violence.

<sup>292</sup> Charles Muiro Ngugi, ‘Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya,’ *supra*, p. 246. Journalists such as Jonah Wandeto and Mohamed Sheikh and opposition Member of Parliament George Kapten are among those who were charged with criminal libel during this period.

punish government critics. In addition, the law remains an enduring threat to freedom of expression for as long as it remains in force.

Criminal libel is similar in all respects with civil libel. As an aspect of criminal law, however, there is an additional requirement for *mens rea* of intention for the offence to be complete.<sup>293</sup> Although the intention to defame is irrelevant in tort, the state must establish it in order to succeed in a criminal prosecution.<sup>294</sup>

Criminal libel law in Kenyan law provides absolute immunity to state officials such as the President or members of the cabinet. They may not be found liable for criminal libel for any defamatory statements they make. It does not matter that the defamation was intended, or that one had no reasonable excuse.<sup>295</sup> In theory, ordinary citizens may make complaints of criminal defamation to the police and hope for prosecution. In practice, however, it is difficult for such a complaint to be accepted in light of the availability of civil remedies and more pressing criminal matters that deserve more state attention.

The law and practice surrounding civil and criminal libel discussed here raise a very important political and legal question. The pertinent political question is whether the law and practice is justifiable in an open and democratic society. From a legal perspective, the question is whether the position as it stands passes the validity test under the 2010 Constitution.

The previous chapter observed that the application of defamation law has had a significant adverse effect on freedom of expression in Kenya.<sup>296</sup> The impact of the

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<sup>293</sup> Penal Code, Chapter 63, Laws of Kenya, section 194 specifically requires intention to defame.

<sup>294</sup> Ibid. There is also the critical constitutional question of presumption of innocence and burden of proof. In criminal law theory, the burden of proving allegations made against an accused person rests with the state. Thus, ideally, the falsity of a defamatory statement ought to be established by the state since the state bears the burden of proving every element of the offence. However, this does not always happen. Njehu Gatabaki was convicted after failing to absolve himself from the charges. Yet, the common believe even to date is that Moi's government planned the violence as a way of disrupting the opposition. See for example Makau Mutua (2008) *Kenya's Quest for Democracy: Taming Leviathan*, Lynne Rienner Publishers.

<sup>295</sup> Ibid, section 198 (1)(2).

<sup>296</sup> Charles Muiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya,' *supra*, p. 242-246.

letter and spirit of 2010 Constitution on the prevailing position is yet to receive the attention of the Supreme Court. Since the courts continue to follow the common law pattern in entertaining libel cases brought by or in favour of politicians and public officials, this study will make a few observations in this regard. First, the reputation of public officials is important. Holding public office does not divest one of the legal protections of personal reputation. In fact, any system that downplays reputational interests of public officials risks discouraging deserving individuals from taking up public office.<sup>297</sup> On the flipside, public officials should expect heightened scrutiny, and should not expect to be shielded from public criticism.<sup>298</sup> For public officials, there is the additional obligation for accountability as holders of public office. This gives members of the public a corollary right to criticise and hold the officials to account.<sup>299</sup> As the UK Court of Appeal recognised in *R v Metropolitan Police Commissioner ex parte Blackburn*,<sup>300</sup> criticism is often unstructured, lacking in objectivity and laced with error.<sup>301</sup> Nevertheless, as Lord Denning MR observed, honest but mistaken criticism ought to be tolerated.

Crucially, the fact that high-ranking officials such as the president and cabinet secretaries enjoy absolute privilege under the law from prosecution for criminal libel is problematic in a democratic context. First, this means they enjoy an advantage that ordinary citizens do not enjoy. Second, while these public figures may bring complaints of criminal libel the same is not available to ordinary citizens libeled by the President or a cabinet minister. A complaint by powerful individuals such as the President in the *Gatabaki* example given above would obviously elicit state response in a way that one from ordinary citizens would not. This lop-sidedness is inimical to the idea of equality before the law as a distinct or an integral concept of the rule of law.<sup>302</sup>

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<sup>297</sup> Dario Milo, 'Cabinet Ministers have no Right to Sue for Defamation: *Mthembi-Mahanyele-v-Mail Guardian Limited* (2003)120 *South African Law Journal* 282.

<sup>298</sup> *Ibid.*

<sup>299</sup> Vincent Blasi, 'The Checking Value in First Amendment Theory' (1977) 2 *American Bar Foundation Research Journal* 521.

<sup>300</sup> (No. 2) [1968] 2 Q.B. 150, 154 (Court of Appeal)

<sup>301</sup> *Ibid.*

<sup>302</sup> George P Fletcher, 'Equality and the Rule of Law,' (1990) 10 *Tel Aviv University Studies in Law* 71.

Third, the uneven treatment of ordinary citizens and top political elite exemplifies a situation of citizen subordination and subjugation contrary to the spirit of the 2010 Constitution as was demonstrated in chapter two. Its susceptibility to abuse and its potential chilling effect on freedom of expression undermines the values of openness, freedom, democracy and accountability enshrined in the Constitution. In the words of Vincent Blasi, it is an enduring threat to the 'checking value' of freedom of expression.<sup>303</sup>

The application of criminal libel has received negative attention in various forums. The African Court of Human Rights, for instance, in *the Matter of Lohe Issa Konate v Burkina Faso*<sup>304</sup> held that "to criminalise matters that have a civil remedy in defamation would...have a chilling effect on the exercise of freedom of the media, and would consequently have a deleterious effect on the right of the public to information."<sup>305</sup> The High Court in the *CORD case*<sup>306</sup> cited this position with approval suggesting a preference that matters of personal reputation should be protected through private law. As shown by the examples of criminal libel trials, the offence is susceptible to abuse to protect the powerful from criticism and punish government critics. In setting out principles of freedom of expression and protection of reputation, Article 19 is emphatic that criminal libel should be abolished altogether.<sup>307</sup> As already noted, the offence of criminal libel was introduced to Kenya by the British during the colonial era. It is instructive to note that in the United Kingdom, criminal libel has since been abolished through the Coroners and Justice Act, 2009.<sup>308</sup>

Defamation of public officials and politicians has received the attention of apex courts in various jurisdictions with varying outcomes. As noted above, the position in

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<sup>303</sup> See note 285, *supra*.

<sup>304</sup> Application No. 004/2013.

<sup>305</sup> *Ibid*.

<sup>306</sup> [2015] eKLR, *supra*, para 278.

<sup>307</sup> 'Defining Defamation Principles on Freedom of Expression and Protection of Reputation,' *supra*. Article 19 is a London based global NGO that focuses on promotion of freedom of expression and reduction of censorship. See <https://www.article19.org>. <Accessed 2 June 2016>.

<sup>308</sup> Section 73 (abolishing offences of sedition, seditious libel, defamatory libel and obscene libel in England and Wales and Northern Ireland)

United States is clear when an allegation of defamation is by a public official. The *New York Times v Sullivan*<sup>309</sup> position restricting the right of public officials to recover damages is founded mainly on the status of the plaintiff.<sup>310</sup> The first inquiry is whether the claimant is a public official.<sup>311</sup> If the answer is in the affirmative, then the claim fails unless the public official can show that the defendant acted with malice.<sup>312</sup> In other words, that the defendant was reckless as to the truth of the defamatory statements.<sup>313</sup> This position offers a very strong protection to freedom of political expression and has no equal in democratic societies.<sup>314</sup> It has received a fair amount of criticism because of its narrow focus on the character of the plaintiff rather than the defamatory words.<sup>315</sup> Furthermore, critics object to the position for failing to give fair attention to the interests of public officials who are sometimes victims of unwarranted attacks.<sup>316</sup> In addition, critics argue that the public has an interest to receive accurate information or information whose veracity the communicators can defend.<sup>317</sup> In other words, the criticism holds that false information which merely assassinate the character of public officers have no redeeming social value and deserve no protection under the guise of freedom of expression, or any other banner.<sup>318</sup> These criticisms are valid and offer insight into how Kenya's law in the new constitutional dispensation can address libel of public officials. Libel of public officials brings into tension the right to freedom of expression, its checking value, and accountability on the one hand the reputation of public officers and accuracy of information that the public consumes, on the other. These competing interests are all important, and the discussion on how they may be balanced generally, will follow in chapter six. A few principles are important to note particularly concerning claims of defamation by public officials and public bodies.

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<sup>309</sup> 376 U.S. 264, 283 (1964).

<sup>310</sup> Ivan Hare and James Weinstein, (eds), *Extreme Speech and Democracy*, *supra*.

<sup>311</sup> *Ibid.* The United States Supreme Court decision in *Gertz v Robert Welch, Inc.*, 418 U.S. 323 (1974) extended this rule to public figures such as celebrities and other prominent personalities who are not public officials.

<sup>312</sup> *Ibid.*

<sup>313</sup> *Ibid.*

<sup>314</sup> *Ibid.*

<sup>315</sup> *Ibid.*

<sup>316</sup> *Ibid.*

<sup>317</sup> Dario Milo, 'Cabinet Ministers have no Right to Sue for Defamation: *Mthembi-Mahanyele-v-Mail Guardian Limited*, *supra*.

<sup>318</sup> *Ibid.*

First, in recognition of the right to freedom of expression and its values in the democratic context, public bodies should not have the right in law to bring claims of defamation. This position was firmly established by the UK's House of Lords (now Supreme Court) in *Derbyshire County Council v Times Newspapers Limited*.<sup>319</sup> In dismissing a claim of defamation by a local government authority, the Court held that it is against public interest that an organ of government should have the right to sustain a suit in defamation.<sup>320</sup> It follows from this principle that the application of criminal defamation to punish government critics offends public interest, the right to freedom of expression, and the constitutional values of transparency and accountability.

In 2014 the National Assembly in Kenya proposed to enact the crime of 'defamation against Parliament.' The law was intended to punish anyone who publishes "any false or scandalous libel on Parliament, its committees or its proceedings," or "speaks words defamatory of Parliament, its committees or its proceedings." This proposal, which was dropped as a result of public pressure, clearly falls foul of the principle espoused in *Derbyshire County Council*.<sup>321</sup> The fact that such a proposal could be made and formally tabled in Parliament is an indication of how political culture can be slow to change in spite of the radical constitutional and political reforms demanded in the new constitutional dispensation.

Second, in claims of defamation arising from matters of public concern, the burden to prove falsity should lie with the plaintiff.<sup>322</sup> In other words, it is for the plaintiff to prove that the alleged defamatory statements are false; it is not for the defendant to establish truth. Third, an attempt to prove truth should not attract additional penalty for the defendant in the form of aggravated damages.<sup>323</sup> Fourth, in matters of public concern, a

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<sup>319</sup> [1993] A.C. 534.

<sup>320</sup> *Ibid.*

<sup>321</sup> See clause 32 read with 33 of the Parliamentary Powers and Privileges Bill, 2014.

<sup>322</sup> See 'Defining Defamation Principles on Freedom of Expression and Protection of Reputation,' *supra*.

<sup>323</sup> *Ibid.*

defence of reasonable publication ought to be admitted to absolve the defendant.<sup>324</sup> Where a prima facie case of defamation is made, the defendant should benefit from the defence of reasonable publication if they can demonstrate that they made an honest mistake despite acting with diligence and good faith.<sup>325</sup>

For now, it can be said that the American approach is inappropriate for an egalitarian context such as Kenya. It ignores public officials who also have rights, and protects expression without demanding enough effort towards verifying truthfulness. The prevailing common law position however, does not give political expression the seriousness that it deserves in a democratic context. Public servants are in an exalted position of trust. Members of the public as the beneficiaries of that trust ought to have the right to criticise. That necessarily must entail toleration of a certain degree of error given that individuals and public officials do not enjoy the same degree of power. Usually, individuals are in a position of weakness and may not have all the power and resources to verify information or even have access to information held by the state, hence the need for tolerance. This calls for a middle ground between the prevailing common law position and the American position laid down in *New York Times v Sullivan*.<sup>326</sup> As a matter of principle, defamation laws must only be used to protect reputation, and not to advance other interests such as maintenance of public order or friendly foreign relations.<sup>327</sup> This principle impugns the offence of defamation of foreign princes<sup>328</sup> and disrespect to the flag and other national symbols contained in Kenya's criminal law.<sup>329</sup>

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<sup>324</sup> Ibid.

<sup>325</sup> Ibid.

<sup>326</sup> Ivan Hare and James Weinstein, (eds), *Extreme Speech and Democracy*, *supra* (fronting the Australian or New Zealand position as a probable compromise).

<sup>327</sup> 'Defining Defamation Principles on Freedom of Expression and Protection of Reputation,' *supra*.

<sup>328</sup> Penal Code, Chapter 63, Laws of Kenya, section 67.

<sup>329</sup> See the National Flags and Emblems Act, Chapter 99, Laws of Kenya.

### 5.4.2.2. Hate Speech, Dignity and Equality, and Political Expression

The idea of dignity and equality is central to human rights theory.<sup>330</sup> The concept posits that all human beings are born equal and endowed with inherent dignity. At a theoretical level, human rights assigns all human beings equal worth irrespective of distinctions such as race, colour, ethnicity, religion, sex and other social status. Therefore, dignity and equality are central foundational concepts in human rights which take the shape of both an end, and a means to an end.<sup>331</sup> From a moral and political perspective, a legitimate political system ought to treat all human beings with “equal respect and concern.”<sup>332</sup> Against this realisation, hate speech laws emerged to protect dignity and equality, prohibit discrimination, and punish hate propaganda. Since the Second World War, hate speech laws have become a common feature in racially or ethnically diverse societies in many parts of the world. This phenomenon developed and spread as part of the post-World War II global human rights commitment, the adoption of the Convention for the Elimination of All forms of Racial Discrimination, and historical traumas such as the Jewish holocaust.<sup>333</sup> Subsequent local tragedies such as the genocide and ethnic cleansing in the former Yugoslavia and Rwanda, *apartheid* in South Africa and Kenya’s post-election violence of 2007-08 ensured the adoption of hate speech laws in these countries.<sup>334</sup> Canada and the United Kingdom have also adopted hate speech laws based on similar rationales.<sup>335</sup> In this regard, the United States stands isolated among other Western democracies.<sup>336</sup> Hate

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<sup>330</sup> Shulztiner & Guy E. Carmi, ‘Human Dignity in National Constitutions: Functions, Promises and Dangers,’ (2004) 62 *American Journal of Comparative Law* 461.

<sup>331</sup> *Ibid.*

<sup>332</sup> Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, Cambridge: Harvard University Press, p.197-198.

<sup>333</sup> Onder Bakircioglu, Freedom of Expression and Hate Speech, (2008-2009) 16 *Tulsa Journal of Comparative & International Law* 1, p. 3.

<sup>334</sup> *Ibid.*

<sup>335</sup> Kent Greenawalt, ‘Free Speech in the United States and Canada,’ (1992) 55 *Law and Contemporary Problems* 5, p. 6. See also Eric Barendt, ‘Hate Speech: Speech given at Hull, November 2013. Available online on: <<http://www2.hull.ac.uk/fass/pdf/Eric%20Barendt-HATE%20SPEECH.pdf>> accessed 21 May 2016.

<sup>336</sup> Kent Greenawalt, ‘Free Speech in the United States and Canada,’ *supra*.

speech is not unlawful unless it constitutes ‘fighting words’ occasioning a ‘clear and present’ danger of violence.<sup>337</sup>

Hate speech laws affect freedom of expression to the extent that they aim at suppressing expressions that vilify individuals or communities on the basis of race, ethnicity, religion, nationality or citizenship. Recent developments outside Kenya have extended these categories to include sexual minorities such as gays.<sup>338</sup>

The regulation of hate speech has proponents and opponents with reasonable justifications in defence of their positions. Opponents of hate speech regulations, for instance, argue that banning hate propaganda contradicts its very basis.<sup>339</sup> The measure of excluding hate speech is discrimination against the hate monger or hate speech as a form of expression.<sup>340</sup> Makers of hate speech, they argue, deserve to be treated equally and their expressions allowed in the ‘marketplace of ideas’ just like other speech.<sup>341</sup> Other arguments say proscribing hate speech does not cure the problem.<sup>342</sup> Banning hate speech may cause hate-mongers to go underground or to be craftier, hence becoming more lethal.<sup>343</sup> Thus, they argue, the antidote for hate speech is to counter it with alternative speech.<sup>344</sup>

A number of arguments have been advanced in support of hate speech laws. First is that hate speech is an act of verbal discrimination against a targeted group.<sup>345</sup> To the extent that it singles out the target group with insults or other forms of unpleasant remarks, hate speech is harmful. The second argument is related to the first. It rejects the protection of hate speech on the grounds that hate speech indeed may evoke actual harm of the target group.<sup>346</sup> That is, it may expose them to ridicule, hatred, discrimination, or even violence. The third argument says that hate speech undermines freedom of expression in

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<sup>337</sup> Ibid.

<sup>338</sup> Eric Barendt, ‘Hate Speech: Speech given at Hull, November 2013, *supra*.

<sup>339</sup> Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, *supra*.

<sup>340</sup> Ibid.

<sup>341</sup> Ibid.

<sup>342</sup> Ibid.

<sup>343</sup> Ibid.

<sup>344</sup> Ibid.

<sup>345</sup> Eric Barendt, ‘Hate Speech: Speech given at Hull, November 2013 *supra*.

<sup>346</sup> Ibid.

that it suppresses contributions from members of the targeted groups who may find it difficult to express their opinions either because of bruised esteem or an already hostile audience.<sup>347</sup> It would be impractical in many instances to say that victims of hate speech can counter it with alternative views since quite often than not they are minority groups with little or no power to do so.<sup>348</sup>

Andrew Morton, the author of the biography 'Moi: the Making of an African Statesman' noted in the 1990s that land and tribe are the "two mighty rivers of Kenya's political landscape."<sup>349</sup> He was right. Half a century after independence, unresolved land questions and ethnicity continue to exert significant influence on Kenyan politics. The height of this political ethnicity was the 2007-2008 politically motivated ethnic violence following disputed presidential elections. The role of ethnic hate propaganda and historical grievances of ethnic exclusion and political persecution is well established.<sup>350</sup> In response, Parliament enacted the National Cohesion and Integration Act (NCIA)<sup>351</sup> with the objective of addressing ethnic discrimination so as to foster national unity. This objective is evident in the long title of the legislation as it describes itself as "[a]n Act of Parliament to encourage national cohesion and integration by outlawing discrimination on ethnic grounds...." As was seen in chapter two, Kenya's history is replete with traumatic experiences caused by negative ethnicity. These experiences have and continue to pose serious challenges on the nation's survival. The need to uphold dignity of communities and ensure ethnic equality is crucial in the nation building project. It is against this background that the National Cohesion and Integration Act was enacted to create a socio-political framework through which ethnic tensions could be diffused. Part of the response was to criminalise hate speech.

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<sup>347</sup> Ibid.

<sup>348</sup> Ibid.

<sup>349</sup> Andrew Morton, (1998) *Moi: The Making of an African Statesman* : Michael Omara

<sup>350</sup> World Policy Institute, 'Hate Speech Leads to Genocide' (2013) available on <http://www.worldpolicy.org/blog/2010/11/11/hate-speech-leads-genocide>. <Accessed 21 May 2016>.

<sup>351</sup> Act No. 12 of 2008.

The legal definition of hate speech under Kenya's law is found in section 13 and 62 of NCA.<sup>352</sup> The upshot of the definition in these provisions is that the crime targets expression that is 'threatening, abusive or insulting' irrespective of its form or media. This could be spoken words, printed materials, as well as artistic expressions such as plays. Second, the expression has to be targeted at protected groups. Kenya's law limits these groups to 'colour, race, nationality (including citizenship) or ethnic or national origins.' It is instructive that groups such as religious minorities or sexual minorities such as gays are left out. Third, in addition to the words being "threatening, abusive or insulting," the speaker must have intended the words to stir up ethnic hatred or considering the circumstances, 'ethnic hatred is likely to result.' The test on incitement of ethnic hatred is both objective and subjective. The intention to stir ethnic hatred is objective while the alternative that 'ethnic hatred is likely to be stirred,' is a subjective one. It is not necessary that hatred is indeed stirred. It is sufficient that the decision maker (magistrate, judge) believes that hatred is likely to result. This anti-hate propaganda law is further supplemented by media regulations. For instance, media operators are required to deny coverage to hate propaganda.<sup>353</sup>

The criminalisation of hate speech in a diverse society that has suffered the consequences of ethnic discrimination and hate propaganda is obviously a noble step. The problem that arises however is on the interpretation and application of the law in political situations. As noted above, Kenyan politics run along ethnic contours such that political expression inevitably touches on ethnic sensitivities. This reality makes suppression of hate speech to potentially come into conflict with political expression and political freedom.

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<sup>352</sup> Similarly, the Penal Code, section 77 also proscribes 'subversive activities' which include utterances likely to stir up ethnic hatred.

<sup>353</sup> See the Media Act No. 3 of 2007, Second Schedule: "Code of Conduct for the Practice of Journalism in Kenya." Regulation 25 for instance provides that, "quoting persons making derogatory remarks based on ethnicity, race, creed, colour and sex shall be avoided. Racist or negative ethnic terms should be avoided. Careful account should be taken of the possible effect upon the ethnic or racial group concerned, and on the population as a whole, and of the changes in public attitudes as to what is and what is not acceptable when using such terms"

As was noted in chapter two, Kenya's struggles have, at least in part, been about political inclusion of all ethnic groups. The history of post-independent Kenya was one of exclusion, nepotism and tribalism. These grievances still exist and constitute everyday political rhetoric. Kagwanja,<sup>354</sup> Morton,<sup>355</sup> Mueller,<sup>356</sup> Rok Ajulu,<sup>357</sup> Murunga,<sup>358</sup> and other scholars agree that Kenyan politics is inextricably ethnic. Political mobilisation happens around ethnic identity, and elections are more often than not a contest of ethnic populations. Many political grievances and historical injustices are also centred on ethnic-related issues such as marginalisation, exclusion, and dominance along ethnic lines. With this reality, it is difficult to see how politics and political venting can avoid offending ethnic feelings. Therefore, ethnic slur spoken in a political context should be understood as political expression. In fact, in *R. v Keegstra*,<sup>359</sup> the Supreme Court of Canada recognised and characterised hate speech as political speech.<sup>360</sup>

Yet with this reality, law enforcement agencies may view such expressions as hate speech deserving prosecution and punishment. Thus, the offence of hate speech, well intended as it may be, is bound to be problematic, and potentially threatening to political expression and political freedom. Two examples illustrate this point. In July 2011, and later in November of the same year, Hassan Omar, a commissioner with the Kenya National Commission on Human Rights wrote stinging articles in the *Standard*, one of Kenya's leading dailies.<sup>361</sup> In the articles, he criticised the Kibaki regime for ethnic favouritism.

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<sup>354</sup> Peter Kagwanja, *Courting genocide: Populism, ethno-nationalism and the Informalisation of violence in Kenya's 2008 post-election crisis*, 27 *Journal of Contemporary African Studies* 365.

<sup>355</sup> Andrew Morton, *Moi: The Making of an African Statesman: Michael Omara* (1998), *supra*.

<sup>356</sup> Susanne D. Mueller 'The Political Economy of Kenya's Crisis,' (2008) 2 *Journal of Eastern African Studies*, 185, DOI: 10.1080/17531050802058302.

<sup>357</sup> Rok Ajulu, 'Politicised Ethnicity, Competitive Politics and Conflict in Kenya: A Historical Perspective,' (2002) 61 *African Studies*, 251, DOI: 10.1080/0002018022000032947.p. 260-265.

<sup>358</sup> Godwin Murunga, 'Spontaneous or Premeditated? Post-Election Violence in Kenya (2011), Nordiska Afrikaninstitutet.

<sup>359</sup> [1990] 3 S.C.R. 697.

<sup>360</sup> Stefan Sottiaux and Stefan Rummens, 'Concentric democracy: Resolving the incoherence in the European Court of Human Rights' case law on freedom of expression and freedom of association,' (2012) 10 *International Journal of Constitutional Law* 106.

<sup>361</sup> See Hassan Omar, 'Every Kenyan must take a stand against Kibaki's tribalism,' *Sunday Standard*, 17 July 2011 available on: <http://www.standardmedia.co.ke/article/2000039043/every-kenyan-must-take-a-stand->

Using official statistics, he condemned the fact that over 22 % of all public servants and 50% of state house staff were members of Kibaki's ethnic community. He criticised how heads of security organs were all from the President's community, and so were top officials in some state departments.<sup>362</sup> In 2015, a top political analyst Mutahi Ngunyi wrote a piece in which he criticised opposition leader Raila Odinga and his Luo community.<sup>363</sup> The two scenarios are typically political and largely factual. For Hassan Omar in the first, his article received widespread condemnation, but was lucky to escape prosecution. For Mutahi Ngunyi, he was arrested and charged with hate speech for insulting Raila Odinga and the Luo community.<sup>364</sup>

The criminalisation of hate speech is legitimated by both the Constitution and international law.<sup>365</sup> What is controversial, however, is what state officials perceive (and punish) as hate speech. Administrative officials and subordinate courts make the ultimate decision as to what kinds of statements will be punished as hate speech. Where the prohibition of hate speech is applied to suppress political grievances, or even truths, or to censor any political rhetoric that carry ethnic themes, it becomes suppression that offend the tenets of an open and democratic society. To be forthright, political satire, references to ethnic communities and similar rhetoric cannot be subjected to a blanket ban. Such a ban would be inimical to democracy and fail to appreciate the realities of Kenya's political landscape. Such suppression can also incubate ethnic emotions that could be counter-productive to equality and national cohesion which hate speech laws aim to achieve. Genuine political freedom means that people can still exercise freedom of political expression; ventilate political grievances even with ethnic content. The coercive power of

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against-kibaki-s-tribalism <accessed 2 June 2017>, and Hassan Omar, 'What do Kibaki men know or what are they planning?' *Sunday Nation*, 27 November 2014, available on:

<http://www.standardmedia.co.ke/article/2000047361/what-do-kibaki-men-know-or-what-are-they-planning> <accessed 2 June 2017>.

<sup>362</sup> Ibid.

<sup>363</sup> Fred Makana, 'NCIC opposes Mutahi Ngunyi bid to settle case out of court,' *The Standard*, 2 March 2016, available online on: <http://www.standardmedia.co.ke/article/2000193540/ncic-opposes-mutahi-ngunyi-bid-to-settle-case-out-of-court> <accessed 8 June 2016>.

<sup>364</sup> Ibid. The accusation was to the effect that he suggested that Raila's Luo community were 'his slaves,' while the former Prime Minister and opposition leader was thriving politically on the poverty of his community.

<sup>365</sup> ICCPR, article 20 and the Convention on the Elimination of All Forms of Racial Discrimination.

the law should be deployed sparingly only where there is real threat to national cohesion and peace.<sup>366</sup> Overzealous prosecution of hate speech would be counter-productive.<sup>367</sup>

### 5.4.3. The Authority and Independence of the Judiciary, the *Sub Judice* Rule, Contempt of Court and Political Expression

Courts are institutions of government entrusted with public power.<sup>368</sup> Thus, criticism directed at the courts is political expression.<sup>369</sup> The rule of restricting commentary regarding pending proceedings, with the aim of safeguarding the independence of the courts has existed for centuries.<sup>370</sup> The coercive power of the courts is frequently applied to advance this objective and others such as safeguarding their authority and the rights of litigants.<sup>371</sup> This restriction takes the form of the *sub judice* rule and contempt of court proceedings. The law of contempt of court in Kenya is one of the many transplants of English law adopted through various statutes.<sup>372</sup> As a matter of fact, the application of the *sub judice* rule and contempt of court in Kenya is vibrant in Kenya today as courts seek to assert their authority and litigants endeavour to enforce compliance with orders issued in their favour.

The law empowers courts to punish offenders with the aim of asserting the authority of the court for the purpose of securing the administration of justice. The *sub judice* rule requires that once a matter has been transmitted to a court of law for determination, there should be no public commentary or discussion on its merits.<sup>373</sup> The aim is to ensure that the court reaches an objective determination free from undue extrinsic

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<sup>366</sup> Sandra Coliver, 'Commentary to the Johannesburg Principles on National Security, Freedom of Expression and Access to Information,' *supra*.

<sup>367</sup> Soli Sorabjee, 'Freedom of Expression,' *supra*.

<sup>368</sup> Justice Henchy, 'Contempt of Court and Freedom of Expression, (1986) 33 *Northern Ireland Legal Quarterly* 326.

<sup>369</sup> Margaret Tarkington, 'The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation,' *supra*. See also the US Supreme Court decision in *Garrison v Louisiana*, 379 U.S. 64 (1964).

<sup>370</sup> Justice Henchy, 'Contempt of Court and Freedom of Expression, *supra* (dating the law of contempt to as early as 12<sup>th</sup> Century, making it almost as old as English common law)

<sup>371</sup> *Ibid*.

<sup>372</sup> The Judicature Act, chapter 8, Laws of Kenya, enacted in 1967.

<sup>373</sup> Justice Henchy, 'Contempt of Court and Freedom of Expression, *supra*, p.331 (citing Lord Diplock in *Attorney-General v Times Newspapers Ltd*, [1974] AC 273, 294.)

influence.<sup>374</sup> Equally important is the need to be seen by both the litigants and the public to be objective and independent. Thus, the rule is an enduring restraint on public commentary for as long as a matter is pending before court.<sup>375</sup> Consequently, individuals and the media may not comment in public about the merits of a case pending before a court, try to predict the outcome, or speak in any other way that may influence the decision. Violating the rule attracts contempt of court proceedings in which a contemnor may be imprisoned or fined.<sup>376</sup>

Contempt of court also goes beyond the enforcement of the *sub judice* rule. It empowers courts to impose punishment as a means of enforcing its orders such as injunctions issued in civil proceedings. An applicant in favour of whom an injunction has been issued may apply to the court to have a respondent cited for contempt if it can be shown that the respondent received the order, is capable of complying but has refused or neglected to obey.<sup>377</sup>

Defining contempt of court in exact terms is not easy and may be undesirable. Broadly, any conduct that impedes access to justice through the courts, or undermines the fairness or impartiality of legal proceedings, or the objectivity (and perceived objectivity) of a court decision, or the ability of the courts to administer justice and secure the rule of law, amounts to contempt of court.<sup>378</sup> Contrary to what the name might suggest, the purpose of contempt of court is the broader value of administration of justice and the legitimacy of the courts in their role in ensuring the rule of law, rather than the judge's dignity or ego. Thus, for this reason the term 'contempt of court' could be seen as a misnomer.<sup>379</sup>

Contempt of court proceedings may be civil or criminal in nature.<sup>380</sup> Civil contempt empowers courts to enforce their orders where a respondent has refused or

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<sup>374</sup> Ibid.

<sup>375</sup> Ivan Hare and James Weinstein, (eds), *Extreme Speech and Democracy*, *supra*.

<sup>376</sup> Ibid.

<sup>377</sup> Justice Henchy, 'Contempt of Court and Freedom of Expression, *supra*, p.327.

<sup>378</sup> Ibid, 327.

<sup>379</sup> Ibid.

<sup>380</sup> See *Republic v Tony Gachoka*, Criminal Application 4 of 1999 (CAK) (1999) eKLR.

neglected to comply.<sup>381</sup> This is important in securing the authority of the courts since a court that cannot enforce its orders renders both the orders and the justice system ineffectual.<sup>382</sup> Criminal contempt targets misconduct committed in court or out of court.<sup>383</sup> The misconduct may include offensive expressions such as public discussion on the merits of a pending matter, uncalled for criticism directed at the courts, and so forth.<sup>384</sup>

Criminal contempt is of particular relevance to freedom of expression as its effect is to suppress certain forms of expression that may be seen to be in contempt of court. Of particular relevance to the theme of this study is its application to punish critics of the judiciary, its officers or decisions as this implicates political expression and political freedom. Similarly, civil contempt may become relevant where it is applied to enforce an injunction issued to prohibit publication of libelous statements or political debate in ways that undermine political expression and political freedom.

Contempt of court powers and the *sub judice* rule are a fertile ground for tension between two fundamental legal principles: the fair administration of justice on the one hand, and the right to freedom of expression on the other.<sup>385</sup> The first limb concerns the right to fair trial and the fundamental public confidence in the judiciary that is essential for the preservation of rule of law. The second implicates the constitutionally guaranteed freedom of expression and media freedom and ramifies into the socio-political values of freedom speech such as democracy, as well as accountability of the judiciary as a public institution.

As a matter of public policy, the application of the *sub judice* rule and contempt of court remains relevant for purposes of protecting the interests of litigants and insulating the judicial process so as to ensure public confidence and effectiveness. As a country trying to nurture nascent democracy, fragile political stability, the rule of law and

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<sup>381</sup> Justice Henchy, 'Contempt of Court and Freedom of Expression, *supra*.

<sup>382</sup> Justice Henchy, 'Contempt of Court and Freedom of Expression, *supra*.

<sup>383</sup> *Ibid*.

<sup>384</sup> *Ibid*.

<sup>385</sup> Justice Henchy, 'Contempt of Court and Freedom of Expression,' *supra*, p.327.

constitutionalism, a strong effective judicial system is indispensable.<sup>386</sup> Thus, any force that threatens the ability of the judiciary to exercise its judicial mandate ought to be resisted.<sup>387</sup>

The reconciliation of the interests of administration of justice on the one hand, and freedom of political expression on the other, presents real practical problems. In addition, the application of the *sub judice* rule to exclude political debate or expression presents a similar tension. In *Garrison v Louisiana*,<sup>388</sup> the US Supreme Court firmly established that courts as public institutions are not immune to public criticism. Yet, unbridled criticism of the judiciary as an institution that occupies a position of trust could have serious implications on the administration of justice and the rule of law. This is particularly so if the criticism undercuts the respect and authority that courts should command in order to function effectively.<sup>389</sup> Secondly, the application of the *sub judice* rule and the power to punish for contempt could have restrictive consequences on political expression and ultimately on values such as accountability, transparency and good governance. This presents the dilemma of how the authority and independence of the judiciary can be preserved without compromising freedom of expression and its values.

Two cases illustrate this dilemma, and show how the law intended to protect independence and authority of the judiciary is often plagued by mistakes and portends danger to freedom of expression and its values. These are the pre-2010 case of *Republic v Tony Gachoka*<sup>390</sup> and *International Centre for Policy and Conflict and 5 others v Attorney General and 4 others*<sup>391</sup> (*Uhuru Kenyatta- Ruto* eligibility case). In *Tony Gachoka*, the accused was an editor and publisher of a magazine known as *The Post on Sunday*. In one publication, he wrote a story alleging that the then Chief Justice Mr. Zaccheus Chesoni had received a huge bribe to ensure that the Court of Appeal ruled in favour of a litigant in a dispute concerning ownership of Kenya Duty Free shops. The Chief Justice and the Court of

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<sup>386</sup> Basil Emeka Ugochukwu, "Adjudicating Human Rights in Transitional Contexts: A Nigerian Case-Study, 1999-2009" (Unpublished *PhD Theses*, 2014), p. 11-15. <http://digitalcommons.osgoode.yorku.ca/phd/1>

<sup>387</sup> Justice Henchy, 'Contempt of Court and Freedom of Expression,' *supra*.

<sup>388</sup> 379 U.S. 64 (1964)

<sup>389</sup> Justice Henchy, 'Contempt of Court and Freedom of Expression,' *supra*.

<sup>390</sup> Criminal Application 4 of 1999 (CAK) (1999) eKLR

<sup>391</sup> [2013] eKLR.

Appeal judges were obviously displeased. The Attorney General brought charges of contempt of court against Mr. Gachoka before a panel of seven judges of the Court of Appeal, the highest court in Kenya at the time. The Court found Mr. Gachoka guilty of contempt of court and sentenced him to six months in prison without the option of a fine. In addition, his magazine was fined one million shillings (USD 10,000) with an order that it was not to resume circulation until the fine is paid. During the trial, the Court refused to allow the accused to testify in his defence or call witnesses. Moreover, three of the seven judges who tried the case had been mentioned adversely in the bribery allegations.

Clearly, this trial did not meet the imperatives of a fair trial. First, the judges mentioned adversely in the bribery allegations sat to decide the matter, in violation of the rules of natural justice. Second, the accused was not allowed to testify in his defence. This further contradicted natural justice rule that no one may be condemned without a hearing. Third, the commencement of a trial in the highest court meant that the accused had no opportunity to appeal the conviction and sentence.<sup>392</sup>

In an interlocutory application made under the *Uhuru Kenyatta-Ruto* eligibility case, the High Court issued an injunction barring the media from holding public debates about whether presidential candidate Uhuru Kenyatta and his running mate William Ruto are eligible to run in presidential elections in the light of their indictment before the International Criminal Court.<sup>393</sup> This injunction, issued a few months to a general election, sought to enforce the *sub judice* rule and prevent discussions on the matter since there was a pending court case that sought to have the two barred from vying.

Besides its glaring injustices, the *Tony Gachoka case* raises a number of pertinent questions from the freedom of expression and democracy perspective. One is whether the accused had the right to criticise the courts. To ask the question in

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<sup>392</sup> The Court noted that this is the practice in the United Kingdom and simply followed precedence.

<sup>393</sup> See news item on Paul Ogemba, 'Court Bars Debate Over Whether ICC Pair Will Run for Presidency,' *Daily Nation*, 2 February 2012, available on:

<http://www.nation.co.ke/News/politics/Court+gags+debate+on+Uhuru+Ruto+bid+for+top+seat/-/1064/1318564/-/61bw90/-/index.html> <accessed 2 June 2016>.

contemporary terms, does a citizen have the right to criticise the courts? Two, is the question of how the courts can be criticised and held accountable without undermining their authority and the administration of justice. The third relevant question is whether there are circumstances under which public interest outweighs the interests that the *sub judice* rule is intended to serve.

In a society that is committed to openness and democracy, the answer to the first question would instinctively be in the affirmative. Courts are presided over by fallible human beings and as public institutions; they are not immune from criticism.<sup>394</sup> The crucial question is whether there is need for a different approach given the nature of judicial office and the role of the courts as guardians of the rule of law. The decision of the Court of Appeal of the United Kingdom in *R v Metropolitan Police Commissioner ex parte Blackburn*<sup>395</sup> offers an exhaustive treatise on the application of the law of contempt especially where criticism of the court is the subject. In this case, Lord Denning MR refused to make a finding of contempt of court against Mr. Quintin Hogg QC who had written a harsh and inaccurate article criticising the Court of Appeal.<sup>396</sup> In his characteristic eloquence, he held as follows:

“This is the first case, so far as I know, where this court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter.

Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament

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<sup>394</sup> Justice Henchy, ‘Contempt of Court and Freedom of Expression,’ *supra*.

<sup>395</sup> (No. 2) [1968] 2 Q.B. 150, 154 (Court of Appeal)

<sup>396</sup> Justice Henchy, ‘Contempt of Court and Freedom of Expression,’ *supra*, p. 334-336.

or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.

Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.”<sup>397</sup>

The essence of this holding is that the power to punish for contempt is not for the courts to uphold its own dignity or take revenge against its critics. Its exercise calls for caution especially given that courts would more often than not have an interest in the matter since they often are the target of the alleged contempt. Second, the power is not intended to shield courts from criticism; not even from unfair and inaccurate attacks such as those made by Mr. Hogg.<sup>398</sup>

Lord Denning recognised a few important points as far as criticism directed at judges is concerned. First, he observes that everyone has the right to make fair comment and even outspoken comments on matters of public interest. In other words, he defends political expression even when such expression is outspoken and directed at judges for as long as it is made in good faith.<sup>399</sup>

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<sup>397</sup> Ibid.

<sup>398</sup> Ibid.

<sup>399</sup> Ibid. (suggesting that where criticism directed at the judiciary is laced with malice and ill will or is intended to interfere with the administration of justice, then action against it is necessary)

Lord Denning in this passage recognises the limitations that judges by virtue of their offices suffer. Judges, he notes, may not respond to criticism as they may not engage in public or political controversy. Engaging in such controversy, one may assume, would undercut the dignity of the court and place the authority of its decision on a slippery platform. Second, Lord Denning alludes to the administration of justice as a value that all, including well-meaning critics, must be concerned about. These two concerns are crucial and relate to the dilemma of how the independence and authority of the courts can be preserved without suppressing political expression. The flipside of this question is how can political expression including the right to protest and criticise courts be exercised without undermining the authority of the courts and ultimately, the administration of justice and its values.

To address these questions, a few suggestions are offered. First, abstract criticism of the judiciary poses little or no adverse effect to the authority and independence of the courts.<sup>400</sup> It is fair that people in a democratic society should have the right to voice criticism about public institutions including the courts. Thus, general and abstract criticism ought to remain unfettered.<sup>401</sup>

Specific accusations such as those made in the *Tony Gachoka* case are serious. They are serious in that they point to specific misconduct and are potentially damaging to individual judges and to the judiciary as an institution. This in turn threatens public trust in the courts, which in turn undermine the administration of justice and the rule of law. The gravity of such specific accusations also deserves serious action from authorities and cannot start and end in newspapers. Thus, it is necessary that such criticisms are expressed responsibly in a fashion that preserves the effectiveness of the system. Kenya's

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<sup>400</sup> Bright, Stephen B., *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?* (1997) 72 *New York University Law Review* 308, available at SSRN: <http://ssrn.com/abstract=2768815>

<sup>401</sup> *Ibid.* In *Republic v David Makali*, Application NAI 4 & 5 of 1994 (Consolidated)(1994) eKLR, a journalist was imprisoned for voicing general criticism on how the courts dealt with cases involving the refusal of the Moi regime to allow registration of trade unions formed by university dons. He suggested that courts had failed to decide independently and were inclined to please the executive, especially the President who had publicly expressed his objection to the trade unions.

Constitution for instance provides for mechanisms for removal of a judge for misconduct. Impeachment may subsequently be followed by criminal proceedings. The theory here is that a judge holds office during good behaviour, and being implicated in misconduct attracts impeachment. The harsh consequences provided by law correspond with the high trust that judges enjoy in the administration of justice. Given that the nature of judicial office as Lord Denning notes does not permit judges to respond to criticism, it becomes necessary that judges are shielded from unwarranted attacks that they may not respond to. For this reason it is unparliamentary for legislators to criticise judges in parliamentary proceedings or outside. The options available to an aggrieved person are to lodge an appeal or seek review of the judgment. This is particularly where the grievance is founded on allegations of errors of law or fact. In the event of allegations of misconduct or impropriety such as bribery or outright bias, pressing for the removal of the judge through established constitutional mechanism is provided for. As Denning observed in *R v Metropolitan Police Commissioner ex parte Blackburn*, the power to punish for contempt should be exercised sparingly. Thus, where attacks on a judge do not connect directly to a case or do not have real effect on the administration of justice, an aggrieved judge has the option of ventilating grievances through libel proceedings.<sup>402</sup>

The question of whether compelling public interest may override the objectives of the *sub judice* rule in certain circumstances is a crucial one. There may be circumstances under which public interest outweighs the need to suppress expression in the interest of enforcing the independence and authority of the courts. The decision of the European Court of Human Rights in *Sunday Times v United Kingdom*<sup>403</sup> as well as an earlier decision of the UK Court of Appeal in the same matter exemplify this point. In the court of first instance, an injunction was issued barring the publication of an article that intended to put pressure on Distillers (Biochemicals) Ltd to pay more compensation to the victims of its product. In 1958, Distillers began selling a sedative product that contained a chemical

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<sup>402</sup> Evan Gicheru, 'Independence of the Judiciary: Accountability and Contempt of Court,' address by the Chief Justice of Kenya (now retired) available on [http://www.kenyalaw.org/Downloads/Other/gicheru\\_judiciary.pdf](http://www.kenyalaw.org/Downloads/Other/gicheru_judiciary.pdf).

<sup>403</sup> 2 EHRR 245, 26 April 1979; Application No. 6538/74 (European Court of Human Rights), *supra*.

known as Thalidomide. In the course of time, hundreds of children were born with deformities to mothers who had consumed the drug during pregnancy. The defects were linked to the drug and parents sued on behalf of the children. The pending suit became dormant as Distillers entered into out-of-court settlement with hundreds of parents. However, a few parents refused. Times Newspapers published an article in the *Sunday Times* criticising Distillers for failing to take proper responsibility. The Attorney General, at the instigation of the company, brought charges of contempt against the newspaper and successfully applied for an injunction. The newspaper appealed against the injunction. In the Court of Appeal, the injunction was set aside. In setting aside the injunction, the court held *inter alia* that the public interest that the matter had elicited far outweighs the prejudice that Distillers would suffer from the publication of the article and the ensuring public debate. On further appeal to the House of Lords, the Court of Appeal's decision was reversed. The House of Lords found the Times Newspaper to be in contempt in trying to influence the outcome of compensation in a matter that was already pending in court. The court said allowing the publication by Times Newspaper would amount to 'trial by newspaper.' Aggrieved by the House of Lord's decision, Times Newspaper took the matter to the European Court of Human Rights (ECtHR). The ECtHR found the decision of the House of Lords to violate article 10 of the European Charter of Human Rights which guarantees the right to freedom of expression. The European Court took cognizance of the contempt of court proceedings as serving the social need of ensuring impartiality of the judiciary. However, the Court observed that the Thalidomide tragedy was of peculiar public importance that people needed to understand all the underlying facts. Thus, the court noted, the need to ensure impartiality of the judiciary could not outweigh the public interest in the matter, concluding that the injunction was not justifiable.

In the *Uhuru Kenyatta-Ruto* eligibility case, the ban on public debate regarding the eligibility of candidates for election was rather peculiar because it essentially meant the media and the public could not discuss whether the two were fit to hold office in light of their indictments before the International Criminal Court. Coming in the run up to a general election, discussions on eligibility of candidates who had declared interest in the

presidency was obviously a matter of public interest and huge political importance. Granted, the two aspirants enjoyed the right to have a court case concerning them decided impartially, and to enjoy the presumption of innocence. The flipside was that media freedom and freedom of expression were at stake. Connected to these rights were constitutionally guaranteed political rights which include the right to make political choices. In the absence of open debate about the eligibility of certain candidates and their baggage of ICC indictments, the rights of citizens, who were not party to the suit, to make informed political choices, would be severely compromised. Amidst protestations of this kind, the court later lifted the ban, allowing public debate to go on despite the pendency of the matter.<sup>404</sup> The right of the public to receive information would also be hindered and so would the political freedom to engage in debate.

It is clear that the *sub judice* rule and the power of the courts to punish for contempt will remain. There is clearly no political impetus to blot them from the legal system. As a matter of fact, the process of consolidating the law of contempt through the Contempt of Court Bill that is currently underway in Parliament. It can be deduced, however, that there are certain circumstances in which public interest may prevail over the stated objectives of these legal figments. These include where restrictions on debate could undermine democratic values and the democratic process, the rights of third parties or affects a matter of grave public concern such as in the Thalidomide case. The predisposition of the Court in *R v Metropolitan Police Commissioner ex parte Blackburn* affirm that in a democratic context, courts as public institutions must be open to criticism. In addition, they must tolerate error or honest but mistaken public disapproval. The application of drastic contempt powers should be reserved for incidences of malice or ill will calculated to undermine public confidence in the courts and to obstruct the administration of justice and the rule of law.

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<sup>404</sup> See news item on:

[http://www.standardmedia.co.ke/mobile/?articleID=2000052302&story\\_title=Court%20lifts%20gag%20order%20on%20Uhuru,%20Ruto%20presidency%20bid](http://www.standardmedia.co.ke/mobile/?articleID=2000052302&story_title=Court%20lifts%20gag%20order%20on%20Uhuru,%20Ruto%20presidency%20bid). <Accessed 23 June 2016>.

## 5.5. Conclusion

This chapter has analysed freedom of expression limitations with a special focus on those that have a direct effect on political expression. These are limitations grounded on national security and public order, rights and reputation of others as well as the independence and authority of the judiciary.

The chapter began by describing the nature of freedom of expression restrictions in two dichotomies: (a) internal limits and external limits, and (b) prior restraints and subsequent punishment. Internal limits are restrictions found within the freedom of expression guarantee. They are definitional in nature such that freedom of expression protection should be understood as excluding them *ab initio*. These include hate speech, propaganda for war, incitement to violence and vilification of others. Since they are definitional and constitutional exclusions, their proscription does not amount to interference with freedom of expression, except where the limiting law exceeds its reasonable scope. External limits on the other hand are restrictions found outside the constitution and the definitional scope of freedom of expression guarantee. They include statutory restrictions imposed for purposes of achieving public policy objectives such as national security, public order, public health, public morals and similar collective goals. Since they are generally contained in legislation external limits result in an interference with the constitutional right to freedom of expression. In a constitutional democratic context such restrictions must be justifiable in political and constitutional theory.

Freedom of expression sanctions may take the form of prior restraints or subsequent punishment. The prior restraints doctrine entails a requirement that information is submitted to a governmental authority for approval or licensing before it can be disseminated. Subsequent punishment on the other hand permits communication of information and only imposes sanctions on the communicator should they exceed the legitimate limits of freedom of expression. The chapter noted that the bulk of freedom of expression restrictions take the form of subsequent punishment. In Kenya and elsewhere, prior restraints are applied in the regulation of films or moving pictures including TV

advertisements. The chapter showed how in the wake of heightened terrorist attacks in Kenya, the Security Laws Amendment Act, 2014 introduced a system of prior restraints for terrorism related information. The Act required that all terrorism related coverage should be submitted to the Police and in some instances victims, for approval before the information could be broadcast. Although the offending provisions of these security laws were invalidated by the High Court and the Court of Appeal, their enactment is a clear indication of the difficulty that plagues the balancing freedom of expression and countervailing interests such as national security.

In the chapter, it was noted that balancing between forms of expression that merit protection and those that do not presents the greatest challenge to policy decision makers and courts of law. It is therefore necessary to develop an objective theory of limitations if an appropriate balance is to be struck. This theory should entail a number of features. First, it should take cognizance of and accommodate the theoretical values and justifications of freedom of expression as discussed in chapter three. Second, the theory should proceed from the standpoint that freedom of expression is the central value while limitations are the exception. In connection with this, it should seek to preserve the right to freedom of expression by subjecting exceptions to the strictest test. Third, the theory should resonate with and advance constitutional values such as equality, human rights, human dignity, accountability and transparency. Fourth, and crucially, it should resonate with Kenya's socio-political situation, the aspirations of the Constitution as well as the fragility of the country's democracy.

The Chapter noted how national security and public order rationales were used by both colonial and post-colonial regimes to stifle democracy and carry out political repression. In this regard, it was noted that the law as well as state institutions such as the courts and security services were connivers in the scheme of political repression. The chapter also showed how the rationale of 'rights and reputation of others' portends serious challenge to freedom of political expression in contemporary times. While it is accepted that this is a legitimate ground for limitation, the law and practice surrounding the

application of libel and hate speech laws has and continues to pose a serious threat to freedom of expression.

The limitation of freedom of expression for reasons of safeguarding the authority and independence of the courts was also discussed. This aim is achieved through the *sub judice* rule and contempt of court proceedings. It was noted that this rationale aims at preserving the administration of justice and the rule of law which depend largely on the respect and authority that the courts command. The chapter highlighted and discussed the dilemma of preserving the independence and authority of the courts while at the same time respecting freedom of expression and its values such as transparency and accountability of the judiciary as a public institution.

While there are positive interventions especially by the High Court towards securing freedom of expression in Kenya, the right still faces serious threats. The heightened prosecutions and the legislative steps taken in the recent past to restrict freedom of expression for reasons of safeguarding national security, public order or the rights and reputation of public officials as well as national cohesion are of particular concern. The enactment of SLAA and increased prosecution of bloggers, social media enthusiasts and government critics in the wake of increased terrorist attacks carried out by *Al Shabab* indicate how freedom of expression is often a victim of fear and hysteria.

The chapter noted that the theory of freedom of expression and its limitations is generally underdeveloped in Kenya. While the 2010 Constitution anticipates radical legal and political shift on various facets, not much has changed regarding the statutory and common law position on freedom of expression. The legal framework, which sanctions suspect limitations and dates back to the colonial era, remains largely intact. The increased use of these laws by state prosecutors and the enactment of more constitutionally doubtful restrictions indicate that the political culture is also yet to adjust to the dictates of the new constitutional dispensation. The next chapter is dedicated to evaluating the law and practice around freedom of expression in Kenya against the Constitution's dream of political transformation.

## Chapter Six

### Evaluating the Goal of Political Transformation and the Role of Freedom of Expression: Towards a New Approach

- 6.1. Introduction
- 6.2. Theorising Political Change and the Law in Kenya: a Shift from 'Authority to Justification'
  - 6.2.1. Dismantling the vestiges of the colonial and post-colonial despotism
  - 6.2.2. Objectivity in Interpretation and Adjudication of Rights
    - 6.2.2.1. Proportionality Balancing in Limitation of Rights
- 6.3. The Role of Freedom of Expression in Kenya's Democratic Edifice
  - 6.3.1. Freedom of Expression as a Legitimizing Factor
  - 6.3.2. Freedom of expression as a Facilitating Factor
  - 6.3.3. Freedom of Expression as a Defence Factor
- 6.4. Freedom of Expression and the Enduring Paradox
- 6.5. The Quest for a Plausible Approach
- 6.6. Conclusion

## 6.1. Introduction

We saw in chapter two that Kenya's Constitution is explicit about its transformative agenda. Indeed, superior courts of record including the Supreme Court have repeatedly affirmed this feature.<sup>1</sup> The chapter noted that the Constitution aims at ordaining political transformation on at least four fronts: first by replacing despotism and institutional dysfunction with revitalised accountable institutions. It does this through trimming presidential powers, and enhancing executive, legislative and judicial independence and accountability. Second, it replaces the highly centralised colonial-era administrative structures with the devolved system of government. Devolution, which is essentially a dispersal of power from the centre, is intended to bring about expanded democratic space and political accountability at the grassroot level, as well as promote inclusiveness, national cohesion, economic development, equitable distribution of national resources and enhanced service delivery.<sup>2</sup> Third, by instituting a shift from past ethical crises such as corruption and bad governance, regional, gender and ethnic exclusion, to a culture of principles and values. These ethical and political values demanded of public affairs include patriotism, national unity, sharing and devolution of power, the rule of law, democracy, and participation of the people.<sup>3</sup> Others are human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalised, good governance, integrity, transparency, accountability; and sustainable development.<sup>4</sup> Fourth, the Constitution seeks to replace the past culture of political repression and subjugation with one of respect for human rights, and citizen emancipation

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<sup>1</sup>See for example Supreme Court of Kenya in *Speaker of the Senate & another v Hon. Attorney-General & another & 3 others*; Advisory Opinion Reference No. 2 of 2013 [2013] eKLR.

<sup>2</sup>The Constitution of Kenya, article 174. See also John Mutakha Kangu (2015) *The Constitutional Law of Kenya on Devolution*, Nairobi: Strathmore University Press. ISBN 978-9966-054-08-1.

<sup>3</sup>See the Constitution of Kenya, article 10, chapter six and the preamble, for instance.

<sup>4</sup>See the Constitution of Kenya, article 10 and the Preamble.

through inclusion and participation in public affairs beyond elections, such as in policy decision-making.<sup>5</sup>

This chapter assesses the law and the prevailing practice on freedom of expression as was highlighted in chapters four and five in light of the ideals and aspirations of the Constitution as was demonstrated in chapter two. Importantly, it assesses and theorizes on the role of the right to freedom of expression in Kenya's transformation ambition. It contends that a number of cited freedom of expression restrictions fall short of the constitutional muster, and suggests that there is need for a radical change in the law and practice surrounding freedom of expression. This change, the chapter concludes, is a prerequisite for the full realisation of the constitutional aspirations.

## **6.2. Theorising Political Change and the Law in Kenya: a Shift from 'Authority' to 'Justification'**

The much celebrated independence from colonialism was largely a failed project in most parts of Africa.<sup>6</sup> In place of freedom, democracy and prosperity that many colonised people including Kenyans hoped independence would bring,<sup>7</sup> Africa's post-colonial era especially in the early years of independence was characterised by political instability, military coups and counter-coups, dictatorship, civil strife, massive violation of human rights and misery.<sup>8</sup> While some independence constitutions such as Kenya's created frameworks for multiparty democracy and the protection of human rights,<sup>9</sup> the post-colonial epoch quickly changed and took the shape of single-party rule, personal presidential dictatorships or military juntas.<sup>10</sup> Many post-colonial regimes perfected the repression of the colonial masters and failed to institute meaningful social, political and

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<sup>5</sup> Eric Kramon and Daniel N. Posner, 'Kenya's New Constitution' (2011) 22 *Journal of Democracy* 89.

<sup>6</sup> H Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New dawn?* (2007) Oxford University: I.CON pp. 1-38: DOI 10.1093/icon/mom016.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid. See also HWO Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya since Independence, 1963-1969' (1972) 71 *Africa Affairs* 9.

<sup>9</sup> H Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New dawn?* (2007) Oxford University

<sup>10</sup> Ibid.

economic change.<sup>11</sup> To put it figuratively, independence became largely a case of replacing Mr. Jones with Napoleon in George Orwell's famed '*Animal Farm*' classic.<sup>12</sup> For Kenya in particular, the first four decades of independence were under KANU domination and characterised by Jomo Kenyatta's and Moi's personal rule, political repression and widespread disregard for human rights.<sup>13</sup>

Freedom and democracy are some of the central political values of the 2010 Constitution.<sup>14</sup> At the centre of agitations for constitutional change in Kenya was the desire for a new political dispensation characterised by genuine freedom and democracy.<sup>15</sup> One aspect of Kenya's quest for political transformation that becomes clear from the Constitution is the need for a shift from past repression to democracy characterised by genuine freedom and accountability of the state and the political elite.<sup>16</sup> Simone Chambers has observed that with the triumph of democracy over all its alternatives, the focus has shifted from justifying democracy to efforts at ensuring it 'lives up to its good name.'<sup>17</sup> As a result, contemporary discourses focus on matching different variations of democracy to different socio-political contexts in order to maximize its success.<sup>18</sup> In other words,

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<sup>11</sup> Ibid. See also Makau Wa Mutua, 'Human Rights and State Despotism in Kenya: Institutional Problems,' (1994) 41 *Africa Today* 50; Yash Ghai 'Devolution: Restructuring the Kenyan State,' (2008) 2 *Journal of Eastern African Studies*, 211, DOI: 10.1080/17531050802058336.

<sup>12</sup> George Orwell, (1956) *Animal Farm*, New York: Penguin.

<sup>13</sup> Makau Mutua, 'Human Rights and State Despotism in Kenya: Institutional Problems,' *supra*. See also Makau Mutua, 'Why Kenya is a Nation in Embryo,' in *50 Years since independence: Where is Kenya?; and* Makau W. Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subsistence in Kenya,' (2001) 23 *Human Rights Quarterly* 96, p. 97. The opposition party KADU dissolved to join KANU in 1964. Another opposition party KPU formed in 1967 was banned by Kenyatta in 1969. In 1982 the Constitution was formally amended to outlaw multipartyism. See detailed discussion on these developments in chapter two.

<sup>14</sup> See the Constitution of Kenya, articles 4(2), 10 and the preamble.

<sup>15</sup> Jill Cottrell & Yash Ghai 'Constitution Making and Democratisation in Kenya: 2000-2005,' (2007) 14 *Democratisation*, 1: DOI: 10.1080/13510340601024272.

<sup>16</sup> Ibid. See also Joshua Kivuva, 'Restructuring the Kenyan State, Society for International Development (SID).

<sup>17</sup> Simone Chambers, (1996) *Reasonable Democracy: Jurgen Habermas and the Politics of Discourse*, Cornell University Press.

<sup>18</sup> Ibid. See also Will Kymlicka, 'Introduction: An Emerging Consensus?' (1998) 1 *Ethical Theory & Moral Practice* 143.

democracy is no longer understood simply as liberalism or majority rule.<sup>19</sup> As seen in chapter two, Kenya's democratisation process, while embracing liberal features, has tailored a socio-democratic system designed to resonate with egalitarian or communitarian ideals and local circumstances.<sup>20</sup>

Margaret Canovan argues that democracy as a political concept has two faces: redemptive and pragmatic.<sup>21</sup> The redemptive face of democracy "promises salvation through politics."<sup>22</sup> It places popular power or people power at the centre and evokes faith in the ability of human beings to create a better world through politics.<sup>23</sup> As such, redemptive politics and democracy appeal to spontaneity, directness in the practice of politics and the "overcoming of alienation."<sup>24</sup> The pragmatic face of democracy, Canovan argues, is simply a system of rules and practices that enable societies to cope with conflicts and tensions peacefully.<sup>25</sup> Democracy is also a system of government that enables the running of a polity in a complex world, and a collection of institutions to constitute and limit public power, to make its exercise effective, and to balance competing political interests.<sup>26</sup>

Canovan argues that these two faces of democracy are inseparable and important.<sup>27</sup> The tension and gap that exists between these two faces gives room for populist politics to thrive.<sup>28</sup> While the pragmatic face is about the effective exercise of public power to run the affairs of the state, the redemptive face evokes feelings of

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<sup>19</sup> Makau Mutua, 'Human Rights in Africa: The Limited Promise of Liberalism,' (2008) 51 *African Studies Review* 17, p. 19-21. See also Crawford B. Macpherson (1973) *Democratic Theory: Essays in Retrieval*, Oxford: Clarendon Press.

<sup>20</sup> See discussions in chapter two on the origins of the bill of rights in international human rights instruments, and the constitution's commitment to egalitarianism, welfare of families and communities and vulnerable groups.

<sup>21</sup> Margaret Canovan, 'Trust the People! Populism and the Two Faces of Democracy,' (1999) 47 *Political Studies* 2.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid. Canovan describes populist politics as politics of appeal to "the people" against established power structures and dominant ideas and values.

belonging and faith in a better society through organised politics.<sup>29</sup> Thus, the redemptive face is necessary in sustaining democracy and ensuring peace and stability amidst politics, contests and conflicts. To emphasise the point, Canovan applies Weber's religion or church analogy, noting that the redemptive face gives democracy the faith that it needs in order to function in the pragmatic sense as an idea of government.<sup>30</sup> Thus, the analogy posits, democracy in the pragmatic sense without the redemptive face is like a church operating without faith.<sup>31</sup>

It is clear that Kenya's Constitution has deliberately embraced these two faces of democracy in recognition of its past and present realities. In a redemptive sense, one can see the effort to restore hope for a better future for the polity through a political system ordained under the Constitution. The preamble tells this epic story elaborately.<sup>32</sup> It recognises the frustrations and failures of the past, the price paid by heroes of 'freedom and justice,' the diversity of the Kenyan society that provides the seeds of fragility and potential for strength in equal measure, protection of human rights and dignity, the centrality of 'the people' as well as a hope for a responsible and accountable government.

Etienne Mureinik described South Africa's transformation from apartheid to constitutional democracy as a shift from a culture of authority to one of justification.<sup>33</sup> A culture of authority, Mureinik argued, is what facilitated apartheid, without which the

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> "We, the people of Kenya, acknowledging the supremacy of the Almighty God of all creation: honouring those who heroically struggled to bring freedom and justice to our land: proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation: respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations: committed to nurturing and protecting the well-being of the individual, the family, communities and the nation: recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law: exercising our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution: adopt, enact and give this Constitution to ourselves and to our future generations. God bless Kenya."

<sup>33</sup> Etienne Mureinik, 'A Bridge to Where - Introducing the Interim Bill of Rights, '(1994) 10 *South African Journal of Human Rights* 31.

policy of racial segregation would not have flourished.<sup>34</sup> It was a culture in which the state did not need to explain or justify its decisions.<sup>35</sup> Premised on the doctrine of parliamentary supremacy, whatever parliament enacted became law and could not be challenged by the courts.<sup>36</sup> At the core of the system was a culture of obedience by both public and private actors. Parliament enacted laws that could not be challenged. The ruling party commanded parliament, parliament commanded the bureaucracy, and the bureaucrats commanded the people to implement the apartheid policy.<sup>37</sup> The result was a very powerful system of racial segregation oiled and perpetrated by both the government and private machinery.<sup>38</sup> Since the black majority was not politically represented, it meant the system not only perpetrated discrimination against the majority but also ruled without the concurrence of the majority.<sup>39</sup>

South Africa's Interim Constitution of 1993 and the 1996 Final Constitution were compromise documents intended to create a new country founded on equality and human dignity out of the ravages of apartheid.<sup>40</sup> Mureinik described the Interim Constitution as a "bridge" from authority to a culture of justification. A culture of justification, Mureinik explains, is one in which the exercise of public power must be justified.<sup>41</sup> The authority of the state rests on persuasion rather than coercion.<sup>42</sup> In other words, the state must offer reasons for its decisions and appeal to consensus rather than force and fear, while placing the people as the central focus of its policies.<sup>43</sup>

The colonial system pursued by the British administration in Kenya was very similar to South Africa's apartheid regime to the extent that it was based on ideas of white

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

racial supremacy and exploitation.<sup>44</sup> The law was skewed to serve the interests of minority colonial settlers and the colonial administration while subjugating and alienating the black majority.<sup>45</sup> Under the system, state authority was unchallengeable and unaccountable.<sup>46</sup> Except for a new independence Constitution that was soon to be amended, the system was inherited intact by the African political elite at independence. Ngugi gives a detailed account of the tension that has existed between liberty and authority throughout the history of Kenya.<sup>47</sup> He notes that colonial and post-colonial authorities until the mid-2000s did not welcome dissent or criticism.<sup>48</sup> As detailed in chapters four and five, criticising the government often attracted dire legal and extra-legal consequences.<sup>49</sup> The hostility towards political expression and especially criticism meant that the state could question individual conduct and punish the exercise of liberty but was itself beyond question or criticism. This asymmetry was (and still is) inimical to the idea of democracy, sovereignty of the people, accountability and the freedom of expression. It did not help that the judiciary in the colonial era was designed to serve colonial interests<sup>50</sup> while their post-colonial counterpart was severely hampered by legal and institutional designs.<sup>51</sup>

As chapter two demonstrated, a majority of the amendments to the independence Constitution were calculated to increase the powers of the executive and correspondingly weaken those of the legislature and the judiciary.<sup>52</sup> Furthermore, a majority of these amendments were made solely by parliament without public

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<sup>44</sup> Elspeth Huxley (1968) *White Man's Country: Lord Delamere and the Making of Kenya*, Chatto & Windus.

<sup>45</sup> Morris Kiwinda Mbondenyei, Evelyne Owiye Asaala, Tom Kabau and Attiya Waris, (2007) *Human Rights and Democratic Governance in Kenya: A post-2007 Appraisal*, Pretoria University Law Press.

<sup>46</sup> Charles Muiiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya' (2008, unpublished PhD thesis).

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> See James T. Gathii, 'The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya's Judicial Process (1994) *Thoughts on Democracy Series*. See also Susanne D. Mueller 'The Political Economy of Kenya's Crisis,' (2008) 2 *Journal of Eastern African Studies*, 185, DOI: 10.1080/17531050802058302.

<sup>52</sup> Makau Mutua (2008) *Kenya's Quest for Democracy: Taming Leviathan*, Lynne Rienner Publishers.

participation.<sup>53</sup> This was possible because KANU dominated parliament such that whatever parliament (and the president as party chairman) wished became law.<sup>54</sup> Although the notion of constitutional supremacy was entrenched in the independence Constitution and the courts had powers to review actions of the political arms of government, a combination of factors hindered the judiciary in the exercise of its powers. These factors included lack of sufficient safeguards to enable it to act independently.<sup>55</sup>

In the South African context, as Mureinik explains, a shift from the pernicious culture of authority to one of justification entailed at least two things: First is the undoing of the system of laws upon which apartheid was founded and operated.<sup>56</sup> Second, the establishment of new standards set out in the bill of rights. The bill of rights, Mureinik argued, not only set out the new standards for 'new South Africa' but also empowered citizens to demand justification for state action.<sup>57</sup> Drawing analogically from South Africa's example and taking into account Kenya's historical situation as detailed in this thesis, it can be argued that Kenya's transformation must necessarily entail a shift in at least two dimensions: first, the dismantling of the vestiges of colonialism and post-colonial despotism, and secondly, the institution of a new culture and philosophy that reflects and supports the anticipated change. A detailed discussion of these elements follows below.

### 6.2.1. Dismantling the vestiges of the colonial and post-colonial despotism

Prempeh decries the retention in post-colonial Africa of the "full panoply of coercive legislation, orders, ordinances, by-laws and judicial precedents upon which colonial authority had been based."<sup>58</sup> This perfectly describes the Kenyan state as regards

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<sup>53</sup> J. B. Ojwang', (1990) *Constitutional Development in Kenya: Institutional Adaptation and Social Change*, Nairobi: ACTS Press.

<sup>54</sup> HWO Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya since Independence, *supra*.

<sup>55</sup> J.B. Ojwang', (2013) *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order*, Nairobi: Strathmore University Press; James T. Gathii, 'The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya's Judicial Process, *supra*; see also Abdul M. Cockar (2012) *Doings, Non-Doings and Mis-Doings by Kenya's Chief Justices 1963-1998*, Zand Graphics.

<sup>56</sup> Etienne Mureinik, 'A Bridge to Where - Introducing the Interim Bill of Rights, *supra*.

<sup>57</sup> *Ibid*.

<sup>58</sup> H Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New dawn?* (2007) Oxford University

the foundations of its political organisation generally, and the situation of fundamental rights and freedoms, including the freedom of expression in particular. As we saw in chapter two, independence from Britain in 1963 installed an African majority government on a thriving repressive system of laws, culture and attitudes that propped up the colonial administration.<sup>59</sup> After the departure of the colonial authorities, amendments to the independence Constitution eroded the power of state institutions such as parliament, the judiciary, the police and civil service, and made them subordinate to an all-powerful presidency, in a pattern consistent with developments in other countries in post-colonial Africa.<sup>60</sup> This paved the way for despotism centred on the powerful presidency, institutional incapacity of other state organs,<sup>61</sup> systematic social and political exclusion, and human rights abuses.<sup>62</sup> While the colonial policy was one of racism and racial subjugation, post-independence regimes perpetuated a similar policy, replacing racism with ethnicity, patronage, nepotism and classism.<sup>63</sup> Colonial imperialism was designed for exploitation of resources in the conquered lands for the benefit of the European powers.<sup>64</sup> The post-independence regime carried on the plunder of national resources for patronage, personal gain and political survival.<sup>65</sup> The repression and marginalisation that was at the core of the colonial policy continued in post-colonial Kenya through despotism and autocracy, human rights abuses, political exclusion, and disregard for the rule of law.<sup>66</sup>

The critical question that merits inquiry is the role of law in this entire uninspiring situation. Law is a powerful instrument of coercion. As Dworkin explains, it makes us and defines who we are.<sup>67</sup> Through it, we become citizens or aliens, prisoners or

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<sup>59</sup> Charles Muiiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya' *supra*.

<sup>60</sup> Susanne D. Mueller 'The Political Economy of Kenya's Crisis,' *supra*. See H Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New dawn?* (2007) Oxford University

<sup>61</sup> *Ibid*.

<sup>62</sup> Makau Mutua, 'Human Rights and State Despotism in Kenya: Institutional Problems,' *supra*.

<sup>63</sup> H Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New dawn?* (2007) Oxford University.

<sup>64</sup> Eric Kramon and Daniel N. Posner, 'Kenya's New Constitution' *supra*.

<sup>65</sup> Makau Mutua, 'Why Kenya is a Nation in Embryo,' *supra*.

<sup>66</sup> Makau Mutua, 'Human Rights and State Despotism in Kenya: Institutional Problems,' *supra*.

<sup>67</sup> Ronald Dworkin, (1986) *Law's Empire*. Cambridge, Massachusetts

free people, rich or poor.<sup>68</sup> In his idea of law as integrity, he argues that legislators ought to make laws that are morally coherent, conforming to the political morality of the society.<sup>69</sup> In the same way, integrity as an adjudicative principle aims at ensuring that law is interpreted in a fashion that coheres with political morality as far as possible.<sup>70</sup> As seen in the previous chapters, the law during colonial and KANU eras was tailored to foment state despotism and applied to perpetrate human rights abuses through suppression of freedom of expression and detention without trial, for example.<sup>71</sup> As chapters four and five demonstrated, a considerable number of laws that are actively applied today to restrict freedom of expression were enacted during the colonial era for imperial purposes. In addition, others that emerged at the height of KANU's single-party era for repressive purposes have continued to be in force. The freedom of expression position has been further reinforced by the enactment of new expression-restricting laws (and the revival of the application of old ones) amidst the panic occasioned by contemporary terrorism<sup>72</sup>

It can be concluded therefore that the 2010 Constitution with its transformative ambitions was superimposed on a system of expression-restricting laws that had served the British colonial and post-colonial repressive agenda. It should be recalled that state institutions such as the police, special branch (intelligence service), the prosecution (situated under the Attorney General (AG) at the time), and the courts were used to carry out state repression through arbitrary arrests, sham trials, detention without trial, disappearance, torture and assassinations of political dissidents.<sup>73</sup> The outcome of this situation is that in becoming a conniver in repression in a fashion that is consistent

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid, p. 176-275.

<sup>70</sup> Ibid.

<sup>71</sup> Kevin Konboy, 'Detention without Trial in Kenya,' (1978) 8 *Georgia Journal of International and Comparative Law* 441. See also Charles Muiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya,' *supra*.

<sup>72</sup> Security Laws Amendment Act, 2014 was motivated by a spate of terror attacks in Kenya since 2011. As seen in chapter five a bulk of prosecutions for 'improper use of a licensed telecommunications system' under section 29 of the Kenya Information and Communication Act are mainly terrorism-related, especially relating to exposure of mistakes of the security agents that embarrassed the government.

<sup>73</sup> 'We Lived to Tell the Nyayo House Story' (2003) *Friedrich-Ebert-Stiftung*, available at <<http://library.fes.de/pdf-files/bueros/kenia/01828.pdf>> p. 4-50, accessed 21 October 2015.

with Marx's idea of the law as a tool of the powerful,<sup>74</sup> the law was emptied of its moral weight. Similarly, state institutions lost the badge of being defenders of liberty and the rule of law.<sup>75</sup> Instead, they became conspirators in state repression.<sup>76</sup> While some of the aforementioned deplorable acts were carried out in wanton disregard of the law, others such as detention without trial and sham trials were done under the banner of the law through established state institutions.<sup>77</sup>

It is therefore reasonable to conclude that the core of the transformation project in the post-2010 dispensation must entail sanitization of the law from this tainted history so that the law can be a collaborator in fostering individual liberty and legitimate state interests as opposed to carrying on repression. At its core, the transformation project must necessarily entail the dismantling of this scheme of repressive laws as well as the attending culture and attitudes handed down from previous constitutional and political dispensations. In the same vein, it must entail rebuilding state institutions to inspire public confidence as agents of the rule of law and freedom.<sup>78</sup> In short, it must entail deconstruction of the state's instruments of repression and building a social and political environment in which freedom and democracy can thrive. This shift must begin with the law and proceed to affect the culture, attitudes and practices of the state. In other words, it must entail a change in both the law and the philosophy that undergirds the deployment of the law's coercive force and governmental action.

It is against this backdrop that the 2010 Constitution aims as part of its grand transformation agenda, to reconfigure the equilibrium of power among these institutions as

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<sup>74</sup> See for instance 'Communism: Censorship and Freedom of Speech' available on <http://cs.stanford.edu/people/eroberts/cs201/projects/communism-computing-china/censorship.html> <accessed 20 May 2016>.

<sup>75</sup> Jill Cottrell & Yash Ghai 'Constitution Making and Democratisation in Kenya: 2000-2005,' *supra*. See also 'We Lived to Tell the Nyayo House Story,' *supra*.

<sup>76</sup> Ibid. See also James T. Gathii, 'The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya's Judicial Process on judiciary,' *supra* (narrating incidences where the judiciary failed to stand up to the executive to protect human rights and the rule of law).

<sup>77</sup> Kevin Konboy, 'Detention without Trial in Kenya,' *supra*. See also 'We Lived to Tell the Nyayo House Story,' *supra*.

<sup>78</sup> Joshua Kivuva, 'Restructuring the Kenyan State,' *supra*. See also the Constitution of Kenya, articles 20 and 159.

was detailed in chapter two.<sup>79</sup> The reforms entail redesigning the arms of government to make them more accountable and efficient.<sup>80</sup> In addition, it seeks to enhance the capacity of various state institutions to not only deliver on their mandate but also to act as checks and balances on each other in the pragmatic sense of democracy. Furthermore, the transformation entails infusion of a culture of respect for human rights and the development of institutional arrangements for their promotion and enforcement.<sup>81</sup>

Importantly, the transformation entails a revival of faith in a better or caring society undergirded by values of dignity, freedom, non-discrimination and inclusion, among others. The upshot of the narrative is that whereas the past was presided over by despotic regimes, the present and the future is about responsible and accountable government. If the past is a picture of frustrated hopes and squandered opportunities, the future is about progress and stability. If the past was characterised by the alienation and exclusion of citizens, the present and the future should be inclusive and participatory, with ‘the people’ as the central subject of politics. It is therefore no wonder that the bill of rights, whose primary subject is the individual, is the longest and most elaborate chapter of the Constitution. It is also telling that the phrase ‘sovereign power belongs to the people’ and similar phrases is a central mantra, appearing more than eight times in the text of the Constitution.<sup>82</sup> Thus, it can be said that if British colonial politics was for the advancement of the imperial agenda, and the post-colonial politics about the interests of the political elite, then politics in the context of the 2010 Constitution is (or should be) about ‘the people.’ This ‘feel good’ or inspirational face of democracy is essential for Kenya especially in the light of the socio-political grievances and frustrations that partly engender

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<sup>79</sup> J.B. Ojwang’, (2013) *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order*, *supra* (arguing that the judiciary is the greatest beneficiary in the reconfiguration of the equilibrium of power under the 2010 Constitution)

<sup>80</sup> Joshua Kivuva, ‘Restructuring the Kenyan State’, *supra*.

<sup>81</sup> Justice Willy Mutunga’s speech titled, ‘The Vision of the 2010 Constitution of Kenya’ delivered on the occasion of celebration of 200 years of Norwegian Constitution, Nairobi, May 19, 2016 (noting that the 2010 Constitution has made Kenya a ‘human rights country’).

<sup>82</sup> A physical count reveals that the phrase appears more than eight times in the text of the 2010 Constitution.

perennial violence that beleaguer the country.<sup>83</sup> If matched with real governmental action in the pragmatic sense, then there is hope for a free, democratic and more caring society as envisaged in the Constitution.

At the core of the transformative vision of the Constitution of Kenya are four essential elements: public participation, sovereignty of the people, constitutional supremacy and accountability of the government.<sup>84</sup> Before the revolutions of the nineteenth century in Europe and America, the dominant orientation of government-citizen relationship was predicated on the belief in “divine right.”<sup>85</sup> This philosophy held that rulers have divine right from God to rule.<sup>86</sup> Thus, governmental authority was beyond question. The relationship between citizens and the rulers was hierarchical, and the rulers were entitled to homage or respect of the citizens. Thus, it was proper to have laws aimed at enforcing homage of the citizens towards rulers.<sup>87</sup> Colonialism helped to spread insult or ‘*desacato*’ laws to other parts of the world including Kenya through colonialism.<sup>88</sup>

Aside from the *desacato* or insult laws bestowed through colonialism, the post-colonial period in Africa was also bogged down by dominant presidents around whom the affairs of the state were organised.<sup>89</sup> Prempeh describes this period under the first generation of African leaders as one characterised by the reign of “founding fathers” who enjoyed “founders’ rights” and therefore above challenge or accountability by citizens and indeed state institutions.<sup>90</sup> They also either inspired or commanded homage from the citizens and the question of being subjects of the law and the Constitution in the same way

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<sup>83</sup> Ron Hope, ‘Bringing in the Future in Kenya: Beyond the 2010 Constitution,’ (2015) 7 *Insights on Africa* 92. See also Margaret Canovan, ‘Trust the People! Populism and the Two Faces of Democracy,’ *supra*. See also Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146 (noting that transformative constitutionalism is a ‘caring’ egalitarian concept whose objective is to achieve substantive justice).

<sup>84</sup> Jill Cottrell & Yash Ghai, (2011) *Kenya's Constitution: an instrument for change*, Nairobi:Katiba Institute.

<sup>85</sup> Badala T. Balule, ‘Insult Laws: A Challenge to Media Freedom in the SADC's Fledging Democracies? 41 *Comparative and International Law Journal of Southern Africa* 404, p. 407-408.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.* This is not to suggest that there were no norms to enforce respect for rulers in pre-colonial societies. The point is that many rules enshrined in penal laws can be traced to colonial administration.

<sup>89</sup> H Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New dawn?* (2007) Oxford University, p. 13-14.

<sup>90</sup> *Ibid.*

as ordinary people was unimaginable.<sup>91</sup> The description of Presidents Jomo Kenyatta and Daniel arap Moi as 'Mzee,'<sup>92</sup> 'baba wa taifa,'<sup>93</sup> 'Mtukufu,'<sup>94</sup> 'father of the nation,' and similar praises illustrate this point. So idolised had these two presidents become that there was a common belief among some of their loyalists that they were constitutionally above the law.<sup>95</sup>

The 2010 Constitution seeks to reverse this situation and reconfigure the relationship between the citizens on the one hand and the state and the political elite on the other. The larger-than-life personality that the president under KANU rule had acquired was largely extra-constitutional deriving mainly from charisma and personality.<sup>96</sup> As already noted, the pre-2010 Constitution vested the president with immense powers over parliament, the judiciary, civil service, the police and the distribution of national resources such as public land. These vast powers were complemented by extra-constitutional factors such as charismatic or autocratic disposition of the incumbents as well as "founders' rights" that gave them a messianic character.<sup>97</sup> In theory, the 2010 Constitution elevates the citizen from subordination and places them at the centre of politics. Article 1 of the Constitution opens with a resounding statement:

(1)All sovereign power belongs to the people of Kenya and are exercised only in accordance with this Constitution. (2) The people may exercise their sovereign power either directly or through their democratically elected

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<sup>91</sup> Ibid.

<sup>92</sup> Meaning the 'revered elder.'

<sup>93</sup> Meaning 'father of the nation.'

<sup>94</sup> Meaning 'most excellent one.'

<sup>95</sup> See for instance official parliamentary Hansard record, 4 December 1991 recording the assistant minister for Manpower Development and Employment Mr. Lugonzo saying that the president is 'constitutionally above the law.' In his inaugural speech, the newly appointed Attorney General Amos Wako in 1991 is also on record to have told parliament that the idea of the rule of law in Kenya was to the effect that "nobody, except the president, is above the law." See news item: Alphonse Shiundu, 'After 20 years, Wako serves last days as Kenya's AG' (The Daily Nation, 14 August 2011) available on <http://www.nation.co.ke/News/politics/After+20+years+Wako+serves+last+days+as+Kenyas+AG+/-/1064/1218988/-/1410vbd/-/index.html>. <Accessed 7 August 2016>.

<sup>96</sup> Andrew Morton, (1998) *Moi: the Making of an African Statesman*, Michael O'Mara Books.

<sup>97</sup> This 'founder' character extends to President Moi. Although Moi was the second president, he belongs to the first generation of politicians who served in the pre-independence legislature, negotiated the independence Constitution at Lancaster House, London and joined the cabinet soon after independence.

representatives. (3) Sovereign power under this Constitution is delegated to the following State organs, which perform their functions in accordance with this Constitution: (a) Parliament and the legislative assemblies in the county governments; (b) the national executive and the executive structures in the county governments; and (c) the Judiciary and independent tribunals. (4) The sovereign power of the people is exercised at: (a) the national level; and (b) the county level.<sup>98</sup>

The notion that all governmental authority, be it legislative, judicial or executive is vested in the people is repeated several times in the Constitution. This in itself is a strong political statement that emphasises the reconfigured state-citizen relationship. The idea that government organs and officers exercise sovereign power as delegated by the people is a powerful one. Drawing from the law of agency, the concept here is that if state organs and officers are delegates, then ‘the people’ are the principal. This is a clear departure from the ‘divine right’ logic of the medieval times, the imperial policy of the colonial era or the systematic repression of the single-party KANU era. The High Court captured this constitutional call on all state organs and officers to exercise power only in the interest of the public in *Trusted Society of Human Rights Alliance v Attorney General & others* [2012] eKLR (HCK).<sup>99</sup> In this case the court dealt with the constitutionality of the appointment of the chairperson of the Ethics and Anti-Corruption Commission. The petitioners contended that the chairperson did not meet the integrity requirement set for state officers under chapter six of the Constitution since he had pending investigations on corruption and abuse of office which the president and parliament had failed to inquire into before making the appointment. The court accepted the petitioners’ argument and faulted the political arms of government for failing to take into account the demands of the

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<sup>98</sup> There is no equivalent provision under the previous Constitution ascribing sovereignty to the ‘people.’ Instead the state and its politics were organised around the executive, and especially the President. See generally Makau Mutua (2008) *Kenya’s Quest for Democracy: Taming Leviathan*, *supra*.

<sup>99</sup> It is important to note that this decision was later overturned by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR (CAK). However, the reasoning of the High Court remains relevant in illustrating the emphasis that the Constitution places on probity in public affairs and in safeguarding public interest.

Constitution on integrity. In annulling the appointment, the court also faulted the Director of Public Prosecutions (DPP) for failing to disclose any adverse information they had regarding the chairperson.

The Court observed that since the DPP bears the responsibility for criminal prosecutions, he is instrumental in the vetting of public officials. It noted that since the DPP's is a public office, its powers must be exercised in public interest. It observed that the DPP "bore responsibility to properly inform the appointing authorities about the investigations facing [the candidate for chairperson]." It would logically follow from this statement that all other public bodies or officers such as the police, the Attorney General and others who may be privy to certain adverse information about applicants to public offices would be obliged to inform appointing authorities. The Court's reasoning here suggests a duty on public offices and officers to proactively inform and act in the interest of the public. The implication of this reasoning is that in the new constitutional dispensation, public power does not exist for the sake of the interests of the political elite. It exists for the common good and must be exercised for its sake. In other words, the Constitution has sought to displace the culture of patronage and personal rule that dominated the previous dispensation especially under Presidents Kenyatta and Moi and vest power in accountable institutions and officers.<sup>100</sup> The emphasis is that public office and public power must be exercised for public good. Concomitant to this demand is the vesting of power in institutions rather than in individuals while at the same time reducing discretion. The decision of the High Court in *Law Society of Kenya v Attorney General*<sup>101</sup> best illustrates this point. Under article 166 of the Constitution, the President appoints the Chief Justice in accordance with the recommendation of the Judicial Service Commission. The relevant provision reads:

The President shall appoint (a) the Chief Justice  
and the Deputy Chief Justice, in accordance

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<sup>100</sup> J.B. Ojwang', (2013) *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order*, *supra*.

<sup>101</sup> [2016] eKLR.

with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly.<sup>102</sup>

Pursuant to this, whenever there is a vacancy in the office of the Chief Justice and Deputy Chief Justice, the practice has been that the Judicial Service Commission advertises to invite qualified and interest candidates to apply. It then conducts interviews, and forwards one name to the president for appointment. To allow the president more discretion in the appointment process, parliament introduced an amendment to the Judicial Service Act, 2011 to require the Judicial Service Commission to present names of three nominees for each office from which the president may pick one.<sup>103</sup> In ensuing litigation in *Law Society of Kenya v Attorney General & 10 others*<sup>104</sup> the petitioners faulted the amendment and contended that the Constitution does not contemplate such discretion. The Court agreed and invalidated the amendment, and affirmed that the design and philosophy of the 2010 Constitution was to limit the discretion of the Executive in judicial appointments and vest the power on an independent institution, the Judicial Service Commission. The fact that parliament and indeed, the President can be faulted and their decisions annulled by the courts at the instigation of ordinary people, the civil society or other state organs is a powerful illustration of the reconfigured relationships and enhanced constraints on the exercise of public power.<sup>105</sup>

The democracy theory of freedom of expression espoused by Robert Post as was seen in chapter three emphasises on the state-citizen relationship as the core of democratic politics.<sup>106</sup> Post observes that in a democracy citizens are not only subjects of

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<sup>102</sup> The Constitution of Kenya, article 66 (1) (a).

<sup>103</sup> See Statute Law (Miscellaneous Amendment) Bill, 2015 available on <http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2015/StatuteLawMiscellaneousAmendmentAct2015.PDF>. <Accessed 8 August 2016>.

<sup>104</sup> [2016] eKLR.

<sup>105</sup> Ibid. See also for example *Trusted Society of Human Rights Alliance v Attorney General & others, supra*, in which the High Court nullified an appointment made by President Kibaki with the approval of the National Assembly. There are many other examples of the courts invalidating actions of the president and parliament in the post-2010 period.

<sup>106</sup> Robert Post, 'Participatory Democracy and Free Speech,' (2011) 97 *Virginia Law Review* 477.

the law but also its authors. The process of authorship is a political process which according to Meiklejohn requires guarantee of freedom of expression for citizens to participate effectively and have access to the necessary information to do so.<sup>107</sup> Inherent in this idea of authorship, one can conclude is notion that restrictions to liberty as contained in law are legitimate only if they are intended to advance public or collective goals rather than the personal interests of the ruling elite. It is clear from the letter and spirit of the Constitution that its goal is to elevate public interest, probity in public affairs and respect for human rights and individual dignity above the self-aggrandizement of the ruling elite.<sup>108</sup>

In chapter four, it was noted that the emergence of parliamentary privilege in England, and its subsequent spread to the United States and elsewhere was a significant step in the growth of the modern concept of right to freedom of expression.<sup>109</sup> The absolute privilege extended to speech made in parliament was indispensable for the protection and advancement of the rights of the people in a representative democracy.<sup>110</sup> This made it possible for the people's representatives to champion the rights and interests of the people effectively and without fear.<sup>111</sup> This connection between parliamentary privilege and representation of interests is a very crucial logic for Kenya's democracy. As noted in chapter two Kenya's democracy is not only representative but also direct and participatory or deliberative. For the representative aspect of Kenya's democracy, parliamentary privilege retains its age-old rationale. As a direct and participatory democracy, robust protection of freedom of expression becomes crucial for citizen's participation in

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<sup>107</sup> Alexander Meiklejohn (1948) *Free Speech and Its Relation to Self-Government*, New York: Harper Bros.

<sup>108</sup> The Constitution of Kenya, article 73 is a good illustration of this point. It reads in part: "(1) Authority assigned to a State officer (a) is a public trust to be exercised in a manner that- (i) is consistent with the purposes and objects of this Constitution; (ii) demonstrates respect for the people; (iii) brings honour to the nation and dignity to the office; and (iv) promotes public confidence in the integrity of the office; and (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

<sup>109</sup> David S. Bogen, 'The Origins of Freedom of Speech and Press,' (1983) 2 *Maryland Law Review* 429, p. 430-431.

<sup>110</sup> Article 9 of the (England) Bill of Rights, 1689, available on <http://www.publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4306.htm>. <Accessed 29 September 2015>.

<sup>111</sup> David S. Bogen, 'The Origins of Freedom of Speech and Press,' *supra*.

democratic processes. If parliamentary privilege as an aspect of freedom of expression is essential for parliamentarians in a representative democracy, then it follows that freedom of expression of individual citizens is absolutely necessary in a composite democracy that is representative, direct and participatory.<sup>112</sup> It is necessary as it enables the citizens to advance their individual and collective interests and rights. The robust protection of freedom of expression secures public debate and enables citizen to engage the state and those in political power not only as subjects but crucially as principals.

Kenya's Constitution is explicit that in place of the repressive colonial order and the post-colonial despotism, the political system in the new dispensation is 'open and democratic,'<sup>113</sup> and undergirded by certain values and principles.<sup>114</sup> The creed of national values and principles builds both the pragmatic and redemptive faces of Kenya's democracy as Canovan describes. This doctrine of values and principles is the foundation of Kenya's democratic state, the canon around which government must operate and a standard that all interpretation of the constitution and the law must strive for.<sup>115</sup> In the pragmatic sense, government operations and decisions must be guided by these values. In a redemptive sense, they are a creed that must permeate the psychology of all ranks of the society. The Constitution's limits on public power and demands for accountability and transparency as well as its procedures for redress of violations adds to its legitimacy and

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<sup>112</sup> Open Society Foundations (OSF), *Kenya: Democracy and Political Participation*, March 2014, ISBN: 978-1-920677-47-3, available at: <http://www.refworld.org/docid/53aa8a954.html> <accessed 19 July 2016>.

<sup>113</sup> See for instance the Constitution of Kenya, 2010, article 24 and the preamble.

<sup>114</sup> These values are enumerated under article 10 (1) which reads:

- “ The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them
- (a) applies or interprets this Constitution;
  - (b) enacts, applies or interprets any law; or
  - (c) makes or implements public policy decisions.
- (2) The national values and principles of governance include:
- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
  - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
  - (c) good governance, integrity, transparency and accountability; and
  - (d) sustainable development.”

<sup>115</sup> See detailed discussions in chapter two. See also articles 10 and 259 for instance.

bolsters public hope in the system.<sup>116</sup> The vision painted in the preamble to the Constitution and the institution of a democratic people-centred devolved system of government in place of the colonial provincial administration further affirms the transformation goal.

The constitutional commitment to Kenya being an “open and democratic” society is a significant political shift. This commitment, supported by a canon of political values such as equality, inclusiveness, freedom, human rights and human dignity, is potentially upsetting to the previous style of politics in both colonial and post-colonial eras. This shift necessarily signifies a culture of tolerance towards divergent opinion as part of what “open and democratic” mean instinctively. In a pluralistic society, views on politics, religion, morality, how to live and so forth are divergent.<sup>117</sup> Some of these differences are so deep that they cannot be resolved easily through politics or other means. Thus, coexistence is possible through tolerance, in addition to structuring the political system to accommodate multiculturalism.<sup>118</sup> Democracy presupposes pluralism.<sup>119</sup> As Canovan observes, it is a system that enables pluralistic societies to deal with and resolve conflicts amicably.<sup>120</sup> These include conflicts of opinion on various issues including religion, politics, morality, culture and so forth.<sup>121</sup> It follows that a genuine democracy must embrace and accommodate diversity.<sup>122</sup> As a matter of necessity, this requires humility of government, acceptance of its own fallibility and a politics that is not insistent on its dogma

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<sup>116</sup> Jack Balkin, ‘Respect-worthy: Frank Michelman and the Legitimate Constitution’ 39 *Tulsa Law Review* 485.

<sup>117</sup> Kris Dunn and Shane P. Singh, ‘Pluralistic conditioning: social tolerance and effective democracy,’ (2014) 21 *Democratization* 1. DOI:10.1080/13510347.2012.697056. See also John Sullivan, James Piereson, and George E. Marcus, ‘An Alternative Conceptualization of Political Tolerance,’ 73 *American Political Science Review* 781.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> Margaret Canovan, ‘Trust the People! Populism and the Two Faces of Democracy,’ *supra*.

<sup>121</sup> Kris Dunn and Shane P. Singh, ‘Pluralistic conditioning: social tolerance and effective democracy,’ *supra*. See also John Sullivan, James Piereson, and George E. Marcus, ‘An Alternative Conceptualization of Political Tolerance,’ *supra*.

<sup>122</sup> See for instance the preamble of the Constitution of Kenya. See also Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ *supra*.

as to impose hegemony. Mill espouses the same concept in his idea of liberty.<sup>123</sup> As seen in chapter three, he argues against silencing of opinion for the reason that it is false or undesirable because “We can never be sure that the opinion we are endeavouring to stifle is a false opinion.”<sup>124</sup> To suppress opinion in the belief that it is false is to assume infallibility yet nobody is infallible.<sup>125</sup> The upshot of Mill’s idea of liberty is that a society committed to individual liberty must recognise its fallibility, practice tolerance towards diversity of opinion except where interference is necessary to safeguard against direct social harm.<sup>126</sup>

In describing Kenya as an “open and democratic” society, the Constitution makes a firm commitment to liberal ideals of freedom and equality. It mandates a culture of openness and toleration of divergence of opinion. This is compounded by the corresponding (even contradictory) need to protect the fragility of Kenya’s society and democracy through measures such as the exclusion of hate speech from the spectrum of permitted expression.<sup>127</sup> These divergent aims suggest that tolerance, which, as argued above, is concomitant with democracy, is a double-edged sword. To build a truly free and democratic society, tolerance is necessary. Yet a culture of tolerance cannot mean tolerating everything including conduct that undermines democracy and social cohesion. The implication of this is that a democratic system must endure constant tension between conflicting interests, and continually seek to balance them objectively. As Van Der Walt argues, this entails sacrificing certain interests using coercive means when circumstances so require.<sup>128</sup>

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<sup>123</sup> Stuart Mill, *On Liberty*, in John Gray, ed., *John Stuart Mill on Liberty and Other Essays*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 1998.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> Toni M. Masaro, ‘Equality and Freedom of Expression: the Hate Speech Dilemma (1991) 32 *William and Mary Law Review* 211. (Demonstrating how constitutional objectives such as equality and individual liberty may be contradictory. For example, protecting hate speech in recognition of individual freedom of expression may mean offending the right to equality of hate speech victims)

<sup>128</sup> Johan Van Der Walt, ‘Law as Sacrifice,’ (2001) 4 *Journal of South African Law* 710.

From a pragmatic perspective, the 2010 Constitution is also about the reorganization of government to ensure efficiency and accountability. The creation of numerous accountability institutions, the strengthening of parliament and the judiciary and other institutions such as the civil service, the police, the electoral commission, Director of Public Prosecutions (DPP) as well as the corresponding dismantling of the imperial presidency, serves to illustrate this point. The idea is to fundamentally reconfigure the constitutional and political order from the colonial imperial design and the postcolonial despotism as well as the ‘minimum reforms’ undertaken as part of the democratisation process in the 1990s.

It is instructive that the Constitution specifically mandates parliament to enact a substantial number of pieces of legislation to implement the reforms that require a legislative framework.<sup>129</sup> It begins from the standpoint of lending validity to all pre-existing laws and proceeds to require that they should be construed with necessary qualifications to bring it into conformity with the Constitution.<sup>130</sup>

This task is not exclusively for the courts. While the courts have the final say as to what the meaning of the law is, other arms of government, and sometimes non-state institutions are constrained by law in a society that is committed to the rule of law.<sup>131</sup> Thus, while the courts are mandated to interpret the law, the exercise of public power by the other institutions involves conceptualising the law and applying it in practical situations.<sup>132</sup> Bureaucratic tasks, Dworkin notes, involve a degree of interpretation of the law.<sup>133</sup> Thus, in practical situations, law enforcers such as police and prosecutors must commit to evaluating the validity and justifiability of pre-2010 laws before applying them. The culture and attitudes that supported past repression resided in courts and bureaucratic

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<sup>129</sup> The Constitution of Kenya, 2010, Schedule Five (listing Acts of Parliament that must be enacted in support of the implementation of the Constitution as mandated by article 261 (1))

<sup>130</sup> Ibid, section 7 (1) of the Sixth schedule (providing for transition and consequential provisions)

<sup>131</sup> Nicholas W Orago, “Poverty, inequality and socio-economic rights: a theoretical framework for the realisation of socio-economic rights in the 2010 Kenyan Constitution,” (Unpublished LLD thesis 2013).

<sup>132</sup> Ronald Dworkin, (1986) *Law's Empire*, *supra*.

<sup>133</sup> Ibid.

ranks.<sup>134</sup> It cannot be assumed that the culture vanished at the stroke of the pen with the enactment of the 2010 Constitution. Thus, Prempeh notes, Africa's constitutional transformation cannot be complete if the bureaucracy is left unaffected.<sup>135</sup> He goes on to caution that common law thinking among common law judges could undermine the development of a "robust jurisprudence of rights," and "jurisprudence of constitutionalism."<sup>136</sup> For this reason, section 7 of the sixth schedule on transitional and consequential provisions should be understood as imposing obligations upon administrative and law enforcement officers as well as the courts to be conscious about the letter and spirit of the Constitution in their dealings with the law.<sup>137</sup> This expectation is fraught with challenges because administrative work and law enforcement is generally bureaucratic in character. Similarly, the nature of business before courts of first instance is primarily fact-finding.<sup>138</sup> The nature and pressure of work does permit much analysis and theorization of the law. As Emerson notes, the "success" of bureaucratic officers is measured in terms of volume of "work" done.<sup>139</sup> While bureaucrats may in theory be committed to upholding the constitutional aspirations, meeting this commitment amidst competing societal interests may be elusive. Thus, the buck must stop with the courts as they are mandated to assess the constitutional validity of law.<sup>140</sup>

It is clear that the overall aim of the radical reconfiguration of the state and its institutions under the Constitution is to ensure that politics and government are

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<sup>134</sup> H Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New dawn?* (2007) Oxford University

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Section 7 (1) of the Sixth Schedule (Transitional and Consequential Provisions) provides that "All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."

<sup>138</sup> The magistrate courts focus principally on administering trial process, taking evidence and assessing whether the elements of the law have been satisfied before delivering a verdict. The focus is not on assessing the constitutionality of the law. Article 165 of the Constitution of Kenya vests the power to assess constitutionality on the High Court.

<sup>139</sup> Thomas Emerson, 'Towards a General Theory of the First Amendment,' (1963) 72 *Yale Law Journal* 877, p. 881-882.

<sup>140</sup> See for example Ronald Dworkin, (1986) *Law's Empire*, supra. See also Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, supra, and Ronald Dworkin, 'Law as Interpretation,' (1982) 60 *Texas Law Review* 527.

accountable and embrace a democratic culture.<sup>141</sup> As noted elsewhere, the law was by and large an instrument in the political repression and despotism that characterised both the colonial and the post-colonial regimes. Similarly, state institutions such as the security agencies and the courts were instrumental in supporting the colonial and KANU repressive agenda. For instance abuses such as detention without trial, as well as controversial prosecutions for insults, criminal libel, and sedition among others were carried out under the banner of the law and enforced by state institutions.<sup>142</sup> Thus, political transformation, whatever its conception, must of necessity overturn laws that are repressive, susceptible to abuse, or inimical to democracy and the values espoused under the 2010 Constitution. The reforms must invariably entail legislative, interpretative and administrative adjustments to bring these laws and practices to conformity with the demands of the Constitution. Since law is a product of political processes while its interpretation depends on legal culture as Klare has argued, this change in law must be accompanied, preceded or complemented by a shift in both political and legal culture. This shift is necessary for purposes of sanitising the law and state institutions and lending them legitimacy in the new dispensation. To be specific, the shift must necessarily affect the law, practices and attitudes surrounding the freedom of expression as a political right that typifies Kenya's struggle for freedom, democracy, rule of law, human rights, constitutionalism and good governance.

### **6.2.2. Objectivity in Interpretation and Adjudication of Rights and the Constitution Generally**

The shift from authority to justification is perhaps most evident in the Constitution's prescription for objective interpretation and adjudication of constitutional issues generally, and the bill of rights in particular. This prescription takes the form of a self-contained theory of interpretation of the Constitution and the bill of rights, directive on the treatment of procedural technicalities and proportionality balancing in the limitation of

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<sup>141</sup> Jill Cottrell & Yash Ghai 'Constitution Making and Democratisation in Kenya: 2000–2005,' *supra*.

<sup>142</sup> James T. Gathii, 'The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya's Judicial Process,' *supra*. See also Kevin Konboy, 'Detention without Trial in Kenya,' *supra*. See also 'We Lived to Tell the Nyayo House Story,' *supra*.

rights. Each of these elements deserves detailed treatment. Never in the history of Kenya has there been a positive directive on the judiciary on how it ought to exercise its mandate. Uniquely, the 2010 Constitution has a self-contained theory on how the judicial mandate is to be exercised in the interpretation of the bill of rights, the Constitution and the law generally. This is unique because many constitutions around the world assume judicial propriety and competence and do not go the long way to prescribe how judicial powers are to be exercised. As noted in chapter two, this is indicative of skepticism of the judicial institution based on the history of its past weaknesses and failures especially during the KANU regime. In chapter two, this thesis showed that transformative constitutionalism is the central philosophical underpinning of Kenya's Constitution. Transformative constitutionalism relies heavily on the law to achieve its ambitions for social and political change.<sup>143</sup> Thus, the efficacy of the concept depends on the reliability of the judiciary as the final arbiter of the law to deliver on its expectations.<sup>144</sup>

One feature of global constitutionalism in the post-World War II era, discussed in chapter two is the sharp increase in judicial power and role in the scheme of governing. Alec Stone Sweet has described this phenomenon as 'judicialization.'<sup>145</sup> In many democratic societies today, courts enjoy powers of judicial review of acts of the political arms of government.<sup>146</sup> This includes nullifying legislation and other political outcomes, and reviewing policy decisions or even getting involved in policy making.<sup>147</sup>

As a twenty first century constitution, Kenya's has embraced features of global constitutionalism, key among these being 'judicialization.' Ojwang' has argued that constitutionalism and judicialism are the two defining features of Kenya's new constitutional dispensation.<sup>148</sup> Judicialization is related to 'judicialism' since the latter is the

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<sup>143</sup> Karl Klare, 'Legal Culture and Transformative Constitutionalism' *supra*.

<sup>144</sup> Theunis Roux, 'Transformative Constitutionalism and the Best Interpretation of South African Constitution: Distinction without a Difference?' (2009) 2 *Stellenbosch Law Review* 258.

<sup>145</sup> Alec Stone Sweet (2000) *Governing With Judges: Constitutional Politics in Europe* Oxford University Press.

<sup>146</sup> John Ferejohn, 'Judicializing Politics, Politicizing Law,' (2002) 65 *Law and Contemporary Problems* 41.

<sup>147</sup> *ibid*

<sup>148</sup> J.B. Ojwang', (2013) *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order*, *supra*.

notion that courts bear the ultimate power to declare the meaning of the law such that all other state organs must submit to their determinations.<sup>149</sup> Through the notion of constitutionalism, all arrangements of government must be rationally organised around the demands and limits of the Constitution and the law.<sup>150</sup> Thus, the idea of judicialism supports constitutionalism.<sup>151</sup> Ojwang' argues that the judiciary is the greatest beneficiary of the changing political philosophy ordained under the 2010 Constitution.<sup>152</sup> This is because contrary to its previous weak form, the judiciary under the 2010 Constitution enjoys immense powers as the final arbiter of legal and constitutional matters, including some that are political in nature, thanks to the ideology of judicialism.<sup>153</sup>

In embracing judicialism as an element of modern global constitutionalism, the drafters of the Constitution were cognizant of the history of judicial failure in Kenya. As noted elsewhere, the imbalance of power among the arms of government in the era of presidential imperialism tilted steeply against the judiciary and greatly hindered its capacity to stand up to the executive in the course of enforcing the rule of law constitutionalism and human rights. Prempeh and other African scholars assert that the judiciary cannot escape blame for the failure of constitutionalism in post-colonial Africa.<sup>154</sup> Although the executive in post-colonial Africa was determined to entrench its rule at all costs including ignoring constitutionalism and the rule of law, there are examples of many squandered opportunities where courts simply failed to stand up to defend these values, and even connived in their subversion.<sup>155</sup>

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<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> H Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New dawn?* (2007) Oxford University. See also Basil Emeka Ugochukwu, "Adjudicating Human Rights in Transitional Contexts: A Nigerian Case-Study, 1999-2009" (Unpublished *PhD Theses*, 2014).

<sup>155</sup> To be fair, the real situation and the political environment in which courts operated especially in the early years of Africa's independence cannot be simplified in this fashion. Judicial courage sometimes had tragic, even fatal consequences as some regimes were prepared to go to whatever lengths to rule while ignoring constitutionalism and the rule of law. It is also common sense rule that it does not help for courts to issue orders in an environment in which the political elite is not prepared to comply. As one judge observed at

It is against this background that the 2010 Constitution supplemented judicialism with directives on how judicial power must be exercised. Rather than leave the interpretation and adjudication of rights to chance or judicial common sense, the supreme law sets out a detailed theory of interpretation to guide the exercise of judicial power under articles 20, 159 and 259. This striking feature justifies detailed treatment, and the relevant provisions are set out below.

Concerning the interpretation of the Constitution, article 259 (1) provides as follows:

“This Constitution must be interpreted in a manner that-

- (a) promotes its purposes, values and principles;
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- (c) permits the development of the law; and
- (d) contributes to good governance.”

A number of points that indicate the transformative aims of the Constitution can be deduced from this requirement: first, in requiring that interpretation be value-centred, it emphasises on the place of constitutional values and principles as set out under article 10 and the preamble. As was noted, values and principles are a creed aimed at reversing the ethical crises of the past and instituting a new socio-political order. Dworkin argues that an interpretation of law is based on values is necessarily political.<sup>156</sup> This is because some values (such as dignity and equality) are abstract in nature such that assigning meaning to them inevitably requires an understanding of the socio-political context.<sup>157</sup> The Supreme Court (Mutunga CJ) recognised this fact in *Speaker of the Senate & another v Hon. Attorney-General & another & 3 others*<sup>158</sup> when it held that the Supreme Court

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the height of Nigeria’s notorious military rule, doing so opens the court to embarrassment and further erodes the already shaky authority. See for example Basil Emeka Ugochukwu, "Adjudicating Human Rights in Transitional Contexts: A Nigerian Case-Study, 1999-2009," *supra* for an account of the situation during military rule in Nigeria; for Kenya, see James T. Gathii, "The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya's Judicial Process," *supra*.

<sup>156</sup> Ronald Dworkin, (1986) *Law's Empire*, *supra*. See also Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, *supra*, and Ronald Dworkin, 'Law as Interpretation,' *supra*.

<sup>157</sup> *Ibid*.

<sup>158</sup> [2013] eKLR (Advisory Opinion Reference No. 2 of 2013), para 157.

Act<sup>159</sup> gives the Court “a near-limitless and substantially-elastic interpretive power. It allows the Court to explore interpretive space in the country’s history and memory....” The Court said this while commenting on the implications of section 3 of the Act which gives the Court the final authority to, among other things, “develop rich jurisprudence that *respects Kenya’s history and traditions and facilitates its social, economic and political growth.*” [Emphasis added]. This responsibility vested on the highest court is onerous. Accomplishing it requires judges who engage intellectually with and understand the history, sociology, economics, politics and other crucial features of the country.

Second is the requirement that interpretation ought to promote human rights. As noted in chapter two, the prominence given to human rights makes Kenya a ‘human rights country.’<sup>160</sup> The bill of rights is touted as ‘the framework for social, economic and cultural policies.’<sup>161</sup> This is further developed through several enforcement and implementation mechanisms provided for in the Constitution and statutes.<sup>162</sup> Third is the requirement for an interpretation that permits ‘the development of the law.’ Fourth is an interpretation that promotes good governance. This is a prescription for probity and ethics in leadership and governance. It is apparent from this prescription that a court of law is obligated to be cognizant of rights, governance, and values even where they are not directly in issue. In spite of what is in controversy before the court, the outcome of interpretation ought to reflect this standard. This is a powerful prescription of policy approach to interpretation and application of the Constitution and the law which elevates the role and power of the courts in policy decision making.

As regards the interpretation and application of the bill of rights in particular, the Constitution makes elaborate provisions. Article 20 reads as follows:

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<sup>159</sup> Chapter 9A, Laws of Kenya.

<sup>160</sup> Chief Justice Willy Mutunga’s speech titled, ‘The Vision of the 2010 Constitution of Kenya’ *supra*.

<sup>161</sup> The Constitution of Kenya, article 19, for example.

<sup>162</sup> See for instance the establishment, powers and responsibilities of the Kenya National Commission on Human Rights (established under article 59 of the Constitution), National Gender Equality Commission (established under article 59 of the Constitution, and mandated by articles 27 and 43 of the Constitution and National Gender Equality Act, 2011) and Commission on Administrative Justice (established under article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011).

20 (3) In applying a provision of the Bill of Rights, a court must (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom. (4) In interpreting the Bill of Rights, a court, tribunal or other authority must promote (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

The bill of rights is, of course, an integral part of the Constitution so that the principles applicable to construing the Constitution apply to the interpretation of rights. Thus, the two provisions, on interpretation of the Constitution and of the bill of rights in particular ought to be read together in determining the principles applicable to the adjudication of rights.<sup>163</sup> These provisions recognise the open-ended nature of constitutional interpretation. It is generally accepted that because of the open-textured nature of language, legal provisions are often capable of different interpretations.<sup>164</sup> This problem becomes more acute especially in transformative constitutions because of their political goals and nature.<sup>165</sup> These guidelines on the exercise of judicial power are further supplemented by article 159 (2)(d) that requires courts to focus on substantive justice and not permit procedural technicalities to stand in the way.<sup>166</sup> Article 159 (2)(d) reads in part: “In exercising judicial authority, the courts and tribunals are guided by the following principles...justice is administered without undue regard to procedural technicalities.” Procedural rules are the ‘handmaid of justice.’<sup>167</sup> They are intended to facilitate access to justice and enable litigants to vindicate their rights. Litigants often exploit procedural

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<sup>163</sup> *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others* [2011] eKLR.

<sup>164</sup> Ronald Dworkin, (1986) *Law's Empire*, *supra*.

<sup>165</sup> Theunis Roux, ‘Transformative Constitutionalism and the Best Interpretation of South African Constitution: Distinction without a Difference?’ *supra*.

<sup>166</sup> The Constitution of Kenya, 2010, article 159 (2).

<sup>167</sup> The phrase is associated with Charles E. Clark, see Charles E. Clark, ‘The Handmaid of Justice,’ (1938) 23 *Washington University Law Quarterly* 297. Available at: [http://openscholarship.wustl.edu/law\\_lawreview/vol23/iss3/1](http://openscholarship.wustl.edu/law_lawreview/vol23/iss3/1). < Accessed 8 August 2016>.

technicalities to prevail over their opponents in adversarial litigation that characterise common law jurisdictions. For human rights litigation in Kenya in particular, there was a time in history when the High Court declared that it could not enforce the bill of rights because the Chief Justice had not made the necessary rules of procedure.<sup>168</sup> The drafters of the Constitution were alive to this history in enacting this rule. In enforcing the bill of rights in particular, the Constitution makes elaborate provisions to emphasise the need to ensure realisation of substantive rights. Article 22 (3) reads in part:

The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which must satisfy the criteria that (a) the rights of standing provided for in clause (2) are fully facilitated; (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court must, if necessary, entertain proceedings on the basis of informal documentation; (c) no fee may be charged for commencing the proceedings; (d) the court, while observing the rules of natural justice, *may not be unreasonably restricted by procedural technicalities*; and (e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court. (4) *The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.* [Emphasis added]

It is clear that the Constitution has gone a long way to de-emphasise on procedural technicalities and to ensure substantive justice is attained in constitutional and human rights litigation. The High Court appreciated this goal in the case of *Trusted Society of Human Rights Alliance v Attorney General and others*.<sup>169</sup> The respondents contended that the petition did not frame the issue clearly to the required legal standard.<sup>170</sup> While agreeing

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<sup>168</sup> Maina Mbacha v Attorney General (1989) 17 *Nairobi Law Monthly* 38. See generally James T. Gathii, 'The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya's Judicial Process', *supra*, p. 15.

<sup>169</sup> Nairobi, High Court Petition 229 of 2012 [2012] eKLR.

<sup>170</sup> The legal standard was established in the High Court decision in *Anarita Karimi Njeru v The Republic* (1976-1980) 1 KLR 1272. The court held that a petitioner alleging breach of constitutional provisions must set out

that the petition did not frame the issues in controversy in the most precise fashion, the Court nonetheless accepted the petition since it pointed out a constitutional fault for which the Court could order a remedy.<sup>171</sup> The court held as follows:

The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.<sup>172</sup>

The theory of interpretation set out under the Constitution is intended to empower the courts to vindicate rights and uphold constitutionalism and the rule of law. As much as it is empowering, it is also constraining on the exercise of judicial power in the sense that for a judgment to be sound it must conform to its demands. Thus, the correctness or otherwise of a judicial decision hinges on how well it meets the objective criteria contained in this theory. Perhaps the most empowering and potentially controversial element of this theory of interpretation of both the Constitution generally and the bill of rights in particular is the provision that courts should “develop the law.” The question that arises is what the implication of this mandate is. Does it require an adjustment in the judicial approach, or is it simply superfluous? If indeed it requires judges to do more than interpret the law in a positivistic fashion, then more questions arise. For instance, what are the contours of this power to “develop the law,” how does it fit with the concept of separation of powers, and how can it be reconciled with the age-old countermajoritarian difficulty.<sup>173</sup> Mutunga has argued that in mandating the courts to

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with reasonable precision the provisions alleged to have been breached and the manner in which they have been infringed. In other words the dispute placed before the court must be set out with reasonable precision.

<sup>171</sup> In overturning this decision as noted above, the Court of Appeal criticised the generosity of the High Court in accepting the petition without ordering the petitioner to amend petition.

<sup>172</sup> Nairobi, High Court Petition 229 of 2012 [2012] eKLR, para 46.

<sup>173</sup> In a democratic context, essential political decisions are made through the majoritarian premise either directly or through elected and accountable representatives. As far as fundamental rights are concerned,

“develop the law,” the Constitution “tears away the last shreds of the perhaps comforting illusion” that judges do not make law.<sup>174</sup> This argument is best captured by Musila when he notes that state actors such as judges must “appreciate the true nature of our Constitution and the multiple paradigm shifts it introduces.”<sup>175</sup> In summary, courts can no longer find excuse in the concept of ‘judicial restraint,’<sup>176</sup> or the common belief that common law judges do not make law.<sup>177</sup> It is beyond argument that under the scheme of the 2010 Constitution, judges, in addition to the traditional roles and powers, are also vested with the task of ‘developing’ the law.<sup>178</sup> This should be understood as a mandate to refine the law where it falls short of the constitutional standards rather than permitting any law to subvert the Constitution. To put it differently, judges are not merely nurses of the new dispensation; they are also a surgeon with the power to clip existing law to bring it into conformity with the aspirations of the Constitution. This shift to judicialism is, indeed, radical and new to Kenya. As Klare observes, it requires a change in legal culture; a reorientation in the understanding of judging and the role of the judge.<sup>179</sup> The contours of this power are not easy to define. Nonetheless, it is a constitutional mandate, and failure to live to its expectations is tantamount to abdication of duty by the courts. The effect of this cannot however be oversimplified. The doctrine of separation of powers is firmly entrenched under the Constitution. There is an obvious conflict between the courts’ power

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this difficulty is justified by the theory of human rights. Because of the inherent nature of rights, it follows logically that they are or should be insulated from the whims of the majority or majoritarian politics. That is the essence of a bill of rights: to safeguard fundamental rights and freedoms from all assaults including the state while giving the state including the courts the obligation to protect. See generally Alexander Bickel (1962) *The least dangerous branch: The Supreme Court at the bar of politics*. Indianapolis: Bobbs-Merrill (describing countermajoritarian difficulty as the contradiction in democratic societies where judges who are few and unelected can overrule the decisions of elected officials or political arms of government in exercise of the power of judicial review).

<sup>174</sup> Justice Willy Mutunga’s speech titled, ‘The Vision of the 2010 Constitution of Kenya’ *supra*.

<sup>175</sup> Godfrey M Musila, ‘Realizing the Transformative Promise of the 2010 Constitution and New Electoral Laws,’ in Godfrey M Musila (2013) *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence*: Nairobi, Law Society of Kenya, p. 4.

<sup>176</sup> *Ibid*. See also Chief Justice Willy Mutunga’s speech, ‘The Vision of the 2010 Constitution of Kenya’ *supra*.

<sup>177</sup> S.B. Sinha, ‘Creative Interpretation of the Constitution: Role of the Supreme Court of India’ (2004) *Delhi Judicial Academy Journal* 26.

<sup>178</sup> *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others, supra*.

<sup>179</sup> Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ *supra*.

to make law and the doctrine of separation of powers which reserves that task to the legislature. The reconciliation of this conflict is beyond the scope of this study. However, it suffices to note that the development of the law is squarely a judicial mandate. This mandate gives the courts the weapons necessary to safeguard the aspirations of the Constitution from being subverted. In other words, should the country slip back to failed constitutionalism and disregard for human rights, the courts cannot have an excuse.

### 6.2.2.1. Proportionality Balancing in Limitation of Rights

With regards to fundamental rights and freedoms, the theory of objective adjudication and interpretation discussed above is further supplemented by the proportionality balancing embodied in the limitation clause in article 24 of the 2010 Constitution. Carlos Pulido and other scholars see proportionality balancing as “one of the most successful legal transplants” and a key feature of global constitutionalism.<sup>180</sup> With roots in German administrative law, the concept has found acceptance across Europe, Australia, New Zealand, Canada, and South Africa.<sup>181</sup> It has also found acceptance beyond public law where it was first applied, to other areas of law, and in international tribunals such as the European Court of Justice, European Court of Human Rights and the dispute settlement mechanism of the World Trade Organisation.<sup>182</sup>

As already noted, Kenya’s bill of rights is a patchwork of provisions found in various instruments, chief among them being South Africa’s bill of rights. The limitation clause contained in article 24 replicates section 36 of South Africa’s Constitution almost word-for-word.<sup>183</sup> To this extent, the limitation clause and the proportionality test under it

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<sup>180</sup> Carlos B Pulido, ‘The Migration of Proportionality Across Europe,’ (2013) 11 *New Zealand Journal of Public and International Law* 483. The terms ‘proportionality’ or ‘proportionality balancing’ are not found in the instruments that incorporate limitation clauses. They were developed by the courts and scholarly literature to describe the test set under the limitation clauses.

<sup>181</sup> Alec Stone Sweet and Jud Matthews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transitional Law*, 72, p. 81.

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.* The history and evolution of the proportionality concept is beyond the scope of this study.

did not evolve with experiences as is the case in jurisdictions such as Canada, South Africa or Israel.<sup>184</sup> Its history is simple in that it was imported as it is from South Africa's bill of rights. The courts in Kenya have since begun to apply it in the assessment of the validity of legislative attempts to limit rights. The decision of the High Court in *Coalition for Reform & Democracy (CORD), Kenya National Commission on Human Rights & Samuel Njuguna Ng'ang'a v Republic of Kenya & another*<sup>185</sup> analysed in detail in chapter five is a good example.<sup>186</sup> It was settled in chapter five that important as rights may be, it becomes necessary to limit them for public policy reasons. As a consequence of this reality, modern constitutions as well as a few international human rights instruments incorporate limitation clauses.<sup>187</sup> In light of competing state interests that provide motivation for limitation, to proceed without objective criteria risks the destruction of the right. As Sorabjee puts it, "limitations may become the rule rather than the exception."<sup>188</sup> Thus, as was noted in chapter five, a sound theory of limitation, must begin from the standpoint that limitations are and must remain the exception. Thus, an approach to limitation must be objective enough so as to preserve the substance of the right. Proportionality balancing seeks to achieve this aim by constraining limitations in an objective fashion so as to maximize the protection of fundamental rights and only allow restrictions that pass strict scrutiny under the clause.

The test is set in motion the moment it is established *prima facie* that a law in question interferes with a fundamental right. It is important to note that, to be legitimate, any purported limitation of rights must be grounded in law consistent with the idea of the rule of law as a mechanism to check arbitrariness. Although there are variations in the

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<sup>184</sup> For details on proportionality balancing see for example Alec Stone Sweet & Jud Matthews, 'Proportionality Balancing and Global Constitutionalism,' *supra*; Aharon Barak, (2012) *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press, and Moshe Cohen-Eliya and Iddo Porat, (2013) *Proportionality and Constitutional Culture*, Cambridge University Press.

<sup>185</sup> [2015] eKLR.

<sup>186</sup> The jurisprudence on proportionality balancing is in its nascent stage in Kenya. The courts were at first unconcerned with it even in cases involving limitation of rights. See for example *Mwaura & 2 others v Republic* Civil Appeal No. 5 of 2008 where the Court of Appeal in October 2013 upheld the constitutionality of the death penalty for robbery with violence without engaging in article 24 balancing or even mentioning it.

<sup>187</sup> See for example section 36 of the Constitution of South Africa, article 1 of the Canadian Charter of Rights and Freedoms (1982), and the strict scrutiny test developed by the United States Supreme Court.

<sup>188</sup> Soli Sorabjee, 'Freedom of Expression,' (1993) 19 *Commonwealth Law Bulletin* 1712, p. 1719.

elements of the proportionality test, its most comprehensive version consists of four components.<sup>189</sup> The first component is the legitimacy of the objective that the state seeks to achieve through the limitation.<sup>190</sup> Countervailing values or state interests such as national security, public order, public safety, public morality, the rights of others and similar goals would be legitimate if the circumstances justify.<sup>191</sup> In other words, the judge has to confirm that the interest that the state seeks to advance is constitutionally legitimate.<sup>192</sup> Some of the legitimate goals include the public policy reasons identified in chapter five including public security, public safety, public morality, and the rights and reputation of others.<sup>193</sup> The second step is an assessment of the suitability of the measure taken.<sup>194</sup> Under this component, the critical question is whether the step or measure taken is rationally connected to the stated objective.<sup>195</sup> There has to be a rational connection between the measures taken or sought to be taken with the overall objective.<sup>196</sup> The third is necessity.<sup>197</sup> Under this component the assessment focuses on whether the government has imposed more restriction than is necessary to achieve the objective. The rule is that the least restrictive method must be preferred in the course of limiting rights.<sup>198</sup> As it is often put figuratively, one does not need a sledge hammer if a nutcracker can do the job.<sup>199</sup> If a measure taken or proposed by the state does not pass these three tests, the outcome is that it is unconstitutional and therefore invalid.<sup>200</sup> However, if a restriction of a right passes the three tests, the inquiry does not end there. The fourth step is balancing in the strict sense or proportionality in the narrow sense sets in.<sup>201</sup> The assessment here takes the form of a cost-

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<sup>189</sup> Alec Stone Sweet & Jud Matthews, 'Proportionality Balancing and Global Constitutionalism,' *supra*, p. 75-89. See also Francisco Urbina, 'A Critique of Proportionality,' (2012) 57 *American Journal of Jurisprudence* 49.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

<sup>192</sup> Francisco Urbina, 'A Critique of Proportionality,' *supra*.

<sup>193</sup> *Ibid.* See for example grounds listed in article 19 of the International Covenant on Civil and Political Rights.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.*

benefit analysis. The government measure that is already found to be narrowly tailored and has passed the first three tests is subjected to a balancing. This balancing inquires into the cost of the restriction measured against the competing right or the countervailing state interest or value.<sup>202</sup> This step weighs the anticipated benefit arising from the restriction against the weight of the right that is sought to be limited to determine what is more constitutionally valuable and what should be upheld.<sup>203</sup> This cost-benefit inquiry is very political in nature as it seeks to reconcile competing political interests.<sup>204</sup> The process is an analysis of policy considerations that is typical of the legislative process.<sup>205</sup>

To sum up, the limitation criteria under the limitation clause in article 24 entrenches complex proportionality balancing that puts every restriction of a fundamental right through a strict test. The approach demands first; that a limitation to a right ought to be one that is '*reasonable and justifiable in an open and democratic society.*' (Emphasis added) This legal inquiry requires the assessment of various policy considerations in order to determine reasonableness and justifiability.<sup>206</sup> Secondly, the limitation must be consistent with human dignity, equality and freedom.<sup>207</sup> Again, to determine this, the court has to engage in a value-laden assessment.<sup>208</sup>

The upshot of this test is that rights are important and must therefore be taken seriously. Therefore, the political arms of the state may not limit them arbitrarily. Any attempts to do so will be thwarted by the courts in exercise of the judicial mandate. While the proportionality criteria guide courts in assessing the validity of a limitation of rights, it is in fact a policy scale for the legislature since the power to enact limitation of

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<sup>202</sup> Ibid.

<sup>203</sup> Ibid.

<sup>204</sup> Stephen Gardbaum, 'Limiting Constitutional Rights,' (2007) 54 *University of California Los Angeles Law Review* 789. See also Cohen-Eliya, Moshe and Porat, Iddo, 'Proportionality and the Culture of Justification' (2010) *American Journal of Comparative Law*, available on <http://ssrn.com/abstract=1623397>.

<sup>205</sup> Ibid.

<sup>206</sup> Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, *supra*.

<sup>207</sup> Francis G. Jacobs, 'Recent Developments in the Principle of Proportionality in European Community Law,' in *the Principle of Proportionality in the Laws of Europe*, Evelyn Ellis (1999) Hart Publishing.

<sup>208</sup> Francisco Urbina, 'A Critique of Proportionality,' *supra*. See also Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, *supra*.

rights belongs to it.<sup>209</sup> Thus, the criteria should be seen as a yardstick for the legislature in the course of limiting rights, and a tool of assessment of validity for the courts in the event of a claim of illegitimate restriction.<sup>210</sup> As a matter of fact, the Constitution contemplates this in the words of article 24 (2). The provision reads in part:

“...a provision in legislation limiting a right or fundamental freedom...in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation.”

From this, it is clear that the limitation clause is first and foremost a guideline for the legislature before it is a scale for the courts during the adjudication of rights. Like in all kinds of litigation, contestation about the validity of a limitation (and court intervention) comes at the end once there is already a grievance. As noted above, the history of proportionality balancing indicate that the concept is largely a judicial construct arising out of courts' efforts to balance claims of rights against state interests.<sup>211</sup> For Kenya much like for South Africa, this concept that began as a judicial innovation is legally mandated under their respective Constitutions. Thus, judges are obliged to engage in proportionality balancing whenever a dispute entails limitation of fundamental rights and freedoms. This necessarily means that the soundness of any decision that upholds limitation of a right without proportionality balancing to determine its justifiability or constitutional validity is doubtful. Similarly, any legislation that limits rights without a conscious effort by the legislature to justify it in terms of proportionality balancing risks failing the test should it be subsequently challenged in court. For freedom of expression in particular, the right would typically be weighed against countervailing collective values such as national security and public morality, or as was noted by the Constitutional Court of South Africa in

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<sup>209</sup> Stephen Gardbaum, 'Limiting Constitutional Rights,' *supra*.

<sup>210</sup> *Ibid*.

<sup>211</sup> Alec Stone Sweet & Jud Matthews, "Proportionality Balancing and Global Constitutionalism," *supra*.

*Khumalo and Others v Holomisa*,<sup>212</sup> values such as human dignity and personal reputation. Also on the weighing scale would be the need to safeguard the values of transparency, democracy and accountability of government.<sup>213</sup>

Chapter four and five laid bare some of the laws enacted under the previous constitutional dispensation that restricted freedom of expression. These laws, which include libel laws, sedition, contempt of court, the offence of ‘undermining the authority of a public officer,’ and media regulations were applied by previous regimes to carry on political repression and abuse of human rights. The bulk of these laws still remain in force and it is doubtful that some of them would pass the proportionality test properly applied against the transformative ideals of the 2010 Constitution. Given that proportionality balancing of rights is now prescribed under the Constitution to the effect that any limitation that does not meet the test is invalid, there is a pending task for the legislature and the judiciary, as the guardian of the rule of law and constitutionalism, to take the necessary review action at opportune moments. The transformative aims of Kenya’s 2010 Constitution have become clear throughout this study. Every constitutional discourse, be it concerning governance, politics, or the protection of fundamental rights and freedoms must be understood against the backdrop of the Constitution’s transformative aspirations. The socio-political values of the right to freedom of expression became clear in chapter three and throughout this thesis. It emerged generally that democracy theory is the most invoked justification for the protection of freedom of expression because of its constitutive and instrumental value in a democracy. We now turn to an analysis of the value and role of freedom of expression in Kenya’s grand scheme of political transformation.

### **6.3. The Role of Freedom of Expression in Kenya’s Democratic Edifice**

We revisit the initial question raised in chapter one of this study. What then is the role of freedom of expression in the grand scheme of Kenya’s political transformation? We have concluded in chapter four and five that freedom of expression was one of the chief victims of colonial and post-colonial repression. Throughout the

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<sup>212</sup> 2002 [5] SA 401 [CC].

<sup>213</sup> Ibid.

history of organised politics, it seems, political repression is inconsistent with freedom of expression. In the face of political repression, freedom of expression is often the chief victim.<sup>214</sup> On the flipside, freedom of expression goes hand in hand with political freedom such that it cannot be claimed in situations where freedom of expression is not respected or given preeminence. We have also concluded that Kenya's project of political transformation cannot be complete without genuine respect for freedom of expression and a real shift in position.

This study has endeavoured to expound on Kenya's democratic system instituted under the 2010 Constitution, and its complex nature. It has also situated the system within its historical social and political context. In addition, it has demonstrated the sad experiences of freedom in the country and the redemptive aspirations of the Constitution. In chapter three we explored the theoretical justifications of freedom of expression, among them democracy, truth, autonomy, self-fulfillment and human dignity. Connecting these justifications to Kenya's social and political experiences, past treatment of the right to freedom of expression and the transformative ambitions of the 2010 Constitution, leads to a conclusion that the right plays at least three roles in the Kenyan context. These are (a) legitimating factor, (b) facilitating factor, and (c) defence factor. The next section will expound on each of these roles.

### **6.3.1. Freedom of Expression as a Legitimizing Factor**

The legitimacy of Kenya's post-2010 dispensation will hinge largely on the treatment of the right to freedom of expression. To succeed, Kenya's project of political

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<sup>214</sup> See for instance the dissenting opinion of Oliver Wendell Holmes in *Abrams v United States*, 250 U.S 616 (1919) where he observed as follows:

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises."

transformation as sketched out in this thesis must embrace reforms to reflect greater respect for freedom of expression as its defining feature. If the suppression of freedom of expression is part of what supported past repression and diminished the legitimacy of past regimes, then its respect and protection is what will legitimatise the new dispensation. It follows that freedom of expression must be a central legitimating factor of the post-2010 dispensation.

Legitimacy is the notion that ‘a rule, institution, or leader has the right to govern.’<sup>215</sup> Normatively, the notion of legitimacy can be seen in two perspectives: the first relates to the justification of the exercise of coercive power or the establishment of political authority.<sup>216</sup> The second is as relates to the justification of prevailing political authority.<sup>217</sup> The related concept of authority, speaks of the right to govern, impose commands and enforce them through coercive means such as punishment.<sup>218</sup> A system will be legitimate if indeed it recognizes and respects individual autonomy; and as Dworkin notes, it treats its members with “equal concern and respect.”<sup>219</sup> This is because democracy as a form of government is premised on membership and participation of the citizens.<sup>220</sup> It does not run on brute force such as in authoritarian regimes. Rather, it is based on dialogue, accountability for use of coercive power and the political equality of its members.<sup>221</sup> Similarly, it will be legitimate if it recognises the collective right of its members to freedom of expression.<sup>222</sup> This recognizes the idea of popular sovereignty and the people’s right to

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<sup>215</sup> Fabienne Peter, ‘Political Legitimacy’, *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/sum2016/entries/legitimacy/>>.

<sup>216</sup> Ibid.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

<sup>219</sup> Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, *supra*.

<sup>220</sup> Amy Gutmann, (1993) *Democracy*. In *A Companion to contemporary political philosophy*. Oxford, UK: Blackwell.

<sup>221</sup> Richard E. Flathman (1993) “Legitimacy.” In Robert E. Goodin and Philip Pettit eds. *A Companion to Contemporary Political Philosophy*. Cambridge MA: Blackwell.

<sup>222</sup> Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, *supra*.

engage in free political debate not just as subjects but as members and the creators of the political order.<sup>223</sup>

Hardin argues that coercion is a necessary component of government, without which government will fail.<sup>224</sup> Coercion includes the power of the state to impose commands or legal restrictions and penalize violations.<sup>225</sup> This preserves the effectiveness of the government and social order.<sup>226</sup> As we saw in chapter five, freedom of expression restrictions are aimed at achieving certain public policy goals for the sake of social order. From a liberal democratic perspective, since the seventeenth century when the notion of ‘divine right’ of some to rule over others was challenged, every exercise of coercive power over the individual, including limitation of rights must be justified.<sup>227</sup> Thus, any exercise of coercive power or authority that cannot be rationalised either because of its excesses or doubtful objectives, is illegitimate.<sup>228</sup> For freedom of expression in particular, restriction on the right and the imposition of penalties for expressions-related offences must be justifiable.<sup>229</sup> As noted in chapter five, the legitimacy of the restrictions that a state may impose through the criminal justice system depends on the “conception of public morality that a society regards as justly enforceable.”<sup>230</sup> In other words, the exercise of coercive power must be justifiable and must resonate with certain tenets that are instinctive in constitutional democratic such as freedom, dignity and equality of the individual and accountability and fairness of the government. Thus, as Mill, Russell, Dworkin, Richards and other theorists have argued,<sup>231</sup> the general standard is that the use of coercive force and the restriction of individual liberty in a democratic society must be justified.

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<sup>223</sup> Robert Post, ‘Participatory Democracy and Free Speech,’ *supra*.

<sup>224</sup> Russell Hardin, ‘Rationally Justifying Political Coercion,’ (1989-90) 15 *Journal of Philosophical Research* 79.

<sup>225</sup> *ibid*

<sup>226</sup> *ibid*

<sup>227</sup> John Stuart Mill, *On Liberty*, *supra*.

<sup>228</sup> *Ibid*.

<sup>229</sup> David A. Richards, *Liberalism, Public Morality, and Constitutional Law: Prolegomenon to a Theory of the Constitutional Right to Privacy* (1988) 51 *Law and Contemporary Problems* 123, p. 123.

<sup>230</sup> *Ibid*.

<sup>231</sup> The works of these theorists have been referred to and cited at various points in this chapter.

The Constitution of Kenya has embraced this standard of justification for all state actions generally and for limitation of fundamental rights in particular. The proportionality test embodied in article 24, already discussed, requires that any limitation to a fundamental right must be enshrined in law and be adjudged to be 'reasonable and justifiable in an open and democratic society.'<sup>232</sup> Democracy, seen in a narrow sense simply refers to majority rule.<sup>233</sup> In a broader sense, it goes beyond majority rule to refer to 'all that is humanly good for the development of the highest human potential.'<sup>234</sup> The reference to democracy in article 24 is clearly in the broad sense. It is clear that there is an appeal to rationality, human virtue and the values of 'human dignity, equality and freedom,'<sup>235</sup> rather than the simple idea of majority rule or giving effect to the wishes of the majority.

There can be no genuine democracy without freedom of expression.<sup>236</sup> Instinctively, freedom of expression enjoys an intimate connection with democratic politics. In chapter three, it was seen that democracy is indeed a powerful theoretical justification for freedom of expression.<sup>237</sup> The right is a defining feature of democracy so that a political system that does not offer serious protection to freedom of expression cannot be said to be genuinely democratic.<sup>238</sup> This means freedom of expression has a constitutive function as one of the building blocks of a democratic political system.<sup>239</sup> In the absence of a commitment to freedom of expression, democracy collapses.<sup>240</sup>

This is the implication of Dworkin's constitutive theory of freedom of expression; that the right is valued because it is a building block of a democratic system of

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<sup>232</sup> The Constitution of Kenya, 2010, article 24.

<sup>233</sup> Russell Hardin, (1999) *Liberalism, Constitutionalism, and Democracy*, Oxford University Press.

<sup>234</sup> Crawford B. Macpherson (1973) *Democratic Theory: Essays in Retrieval*, *supra*.

<sup>235</sup> See for instance the Constitution of Kenya, article 24.

<sup>236</sup> Ivan Hare and James Weinstein, (eds), (2010) *Extreme Speech and Democracy*, Oxford: Oxford University Press: ISBN 0199601798, 9780199601790.

<sup>237</sup> Alexander Meiklejohn (1948) *Free Speech and Its Relation to Self-Government*, *supra*, p. 26-27.

<sup>238</sup> *Ibid*.

<sup>239</sup> *Ibid*. see also Ronald Dworkin (1996) *Freedoms Law: The Moral Reading of the American Constitution*, Cambridge: Harvard University Press. Pages 195-209.

<sup>240</sup> Ivan Hare and James Weinstein, (eds), (2010) *Extreme Speech and Democracy*, *supra*.

government.<sup>241</sup> Robert Post in his democracy theory of freedom of expression emphasises that the defining feature of democracy is that citizens are not only subjects of the law but are also its potential authors.<sup>242</sup> Freedom of expression, Post argues, is the instrument that enhances the citizen's relationship with the state and enables their participation in authorship of the law.<sup>243</sup> It follows therefore that in the absence of freedom of expression, the citizen is alienated from participation in democratic processes that aim at maximising their authorship of the law.<sup>244</sup> This empties democracy of its defining feature as, in Abraham Lincoln's words, 'government of the people, by the people for the people,' thereby delegitimising the system.<sup>245</sup>

For Kenya, it has now become clear that the colonial and post-colonial repression entailed, among other things, systematic suppression of freedom of expression. Part of what characterised the colonial, Jomo Kenyatta and Moi regimes as repressive was their crackdown on freedom of expression. It can be said that their policy of alienating the citizen, which in part robbed these regimes of legitimacy is connected to its policy towards freedom of expression. Thus, the legitimacy of the political system in the post- 2010 era will largely depend on its policy of freedom of expression. The Constitution is categorical that respect for human rights, human dignity and freedom are the defining features of the post-2010 dispensation. The foremost of these rights, it can be deduced is freedom of expression as a core political right. In short, the country's project of transformation from political repression to genuine democracy means that the political system must place freedom of expression at its core as a constitutive and legitimating factor.

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<sup>241</sup> Ibid.

<sup>242</sup> Robert Post, 'Participatory Democracy and Free Speech,' *supra*.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid.

<sup>245</sup> Alexander Meiklejohn (1948) *Free Speech and Its Relation to Self-Government*, *supra*. See also Robert Post, 'Participatory Democracy and Free Speech,' *supra*.

### 6.3.2. Freedom of expression as a Facilitating Factor

Democracy is a dialogical system of government.<sup>246</sup> It is about engagement, debate and persuasion in the course of mediating divergent political interests in a polity.<sup>247</sup> As the famous definition offered by Abraham Lincoln goes, it is a government 'of the people, for the people by the people.'<sup>248</sup> This connotes both horizontal and vertical relationship. The horizontal dimension relates to people as amongst themselves as stakeholders of the system. The vertical dimension connotes the relationship between the people on the one hand and the government on the other. As President Woodrow Wilson of the United States once said-

“[g]overnment is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton.”<sup>249</sup>

This connotes relationships. The operations of government, from the political processes of constituting and reconstituting it, to its operations entail complex interactions. Aside from the classical theoretical justifications of freedom of expression such as truth, democracy and autonomy, Richard Moon in his social theory of freedom of expression argues that communication is a deeply social action that entails the use of socially constructed language.<sup>250</sup> The right protects the freedom of people to communicate with each other using socially contextual language. The upshot of all these is that freedom of

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<sup>246</sup> Viorel Tutui, 'Dialogical Democracy and the Problem of Deep Politics' available on: [http://www.fssp.uaic.ro/argumentum/Numarul%2010/06\\_Tutui\\_tehno.pdf](http://www.fssp.uaic.ro/argumentum/Numarul%2010/06_Tutui_tehno.pdf) <accessed 20 July 2016>.

<sup>247</sup> James Weinstein, 'Participatory Democracy as a basis for America's Free Speech Doctrine: A Reply (2011) 97 *Virginia Law Review* 633.

<sup>248</sup> President Abraham Lincoln, Gettysburg Address (19 November 1863) in William E. Gienapp (ed) (2002) *This Fiery Trial: The Speeches and Writings of Abraham Lincoln*, Oxford University Press, p.184.

<sup>249</sup> Peter A. Lawler and Robert M. Schaefer (eds) (2016) *American Political Rhetoric: Essential Speeches and Writings*, Rowman and Littlefield, p. 188.

<sup>250</sup> Richard Moon (2009-10) 'The Social Character of Freedom of Expression' 2 *Amsterdam Law Forum* 43, p. 43.

expression is the agent of the deep interactions that make democracy work.<sup>251</sup> As Canovan argues, democracy is a system that enables a society to cope with conflicts and tensions peacefully.<sup>252</sup> A democratic society is a pluralistic society.<sup>253</sup> Divergent interests exist and decision making on many issues is made by majoritarian premise preceded by a contest of views.<sup>254</sup> As a political organization, democracy enables competition of interests in a peaceful fashion and rationalizes outcomes for those who oppose them.<sup>255</sup>

In a pluralistic society that must live in harmony despite differences of opinion on key issues, freedom of expression becomes instrumental as the agent that facilitates social and political engagement.<sup>256</sup> The theories of freedom of expression put forward by Mill and Holmes as was discussed in chapter three defend the right for being indispensable in the society's incessant search for truth; truth about life, politics, choices, and so forth. The pluralistic society is a 'marketplace of ideas' and freedom of expression is the agent that facilitates exchange, bargains, compromise and settlement. It enables persuasion and compromise in place of force, while allowing people to vent amidst deep and emotive socio-political debate. Emerson argues that freedom of expression is what ensures maintenance of a balance between stability and change.<sup>257</sup>

Applying these to the Kenyan situation, it is evident that the country's democratic system is complex. As chapter two demonstrated, the system is direct, representative, and participatory. Direct democracies, arguably, sit at the apex of democratic models because it makes room for the direct involvement of the people in

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<sup>251</sup> Ibid. See also James Weinstein, 'Participatory Democracy as a basis for America's Free Speech Doctrine: A Reply,' *supra*, Alexander Meiklejohn (1948) *Free Speech and Its Relation to Self-Government*, *supra*; Robert Post, 'Participatory Democracy and Free Speech,' (2011) 97 *Virginia Law Review* 477.

<sup>252</sup> Margaret Canovan, 'Trust the People! Populism and the Two Faces of Democracy,' *supra*.

<sup>253</sup> Kris Dunn and Shane P. Singh, 'Pluralistic conditioning: social tolerance and effective democracy,' *supra*.

<sup>254</sup> Amy Gutmann, 1993. Democracy. In *A Companion to contemporary political philosophy*, *supra*.

<sup>255</sup> Ibid.

<sup>256</sup> Wojciech Sadurski, (2012) *Constitutionalism and the Enlargement of Europe*, Oxford University Press, p. 127-128 (noting that freedom of expression facilitates social and political processes. Since democracy is about a clash of ideas and views, extreme expression should promote understanding and tolerance in the society rather than cause divisions).

<sup>257</sup> Thomas Emerson 'Toward a General Theory of the First Amendment' *supra*.

governance.<sup>258</sup> It is hard to think of a subsisting purely direct democracy as was the case in ancient Greece.<sup>259</sup> With the complexities of modern societies, democracies have tended to become representative especially to ensure they function in light of large populations and divergent or limitless interests of modern societies. Kenya's constitution is emphatic that the sovereign power of the people may be exercised directly or through representatives.<sup>260</sup> As one would expect, the system works largely through representation. A few core events however are exercisable directly by the people. These are the election of political office holders such as president, members of parliament, county governors and members of regional assemblies.<sup>261</sup> In addition, people may initiate amendments to the Constitution by popular initiative.<sup>262</sup> Constitutional amendments that touch on core provisions of the Constitution also require the involvement of the people through referenda.<sup>263</sup>

The democratic system is also representative. In this sense the people's role entail electing representatives, holding them to account and conveying their sentiments for effective representation. Finally, the system is also participatory.<sup>264</sup> The principle of public participation enjoins government, especially the political arms to facilitate the people to participate in political decisions such as policy formulation and enactment of laws, among others. These are fairly sophisticated roles especially if taken seriously by the citizenry. The underlying assumption is that the citizens are sufficiently prepared to make informed and effective contribution. In a general election for instance, a voter is presented with an opportunity to vote for six (or eight) representatives with divergent job descriptions for the

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<sup>258</sup> Wojciech Sadurski, (2012) *Constitutionalism and the Enlargement of Europe*, *supra*.

<sup>259</sup> Amy Gutmann, 1993. Democracy. In *A Companion to contemporary political philosophy*, *supra*.

<sup>260</sup> Constitution of Kenya, 2010, article 1 (2) "The people may exercise their sovereign power either directly or through their democratically elected representatives."

<sup>261</sup> *Ibid*. See for instance the Constitution of Kenya, article 89 read with article 97 (1) (a) (on the election of Members of the National Assembly, article 136 (on the election of the president and deputy president), Article 180 (on the election of county governor and deputy county governor), article 177 (on the election of members of county assemblies).

<sup>262</sup> The Constitution of Kenya, article 257.

<sup>263</sup> *Ibid*, article 255.

<sup>264</sup> *Ibid*, articles 69 (1), 118 (b), 174 (c), 184 (1)(c), 196 (1)(b), and 201. These provisions are evidence of a strong commitment to ensure participation of citizens in all spheres of public affairs. The challenge that remains is how to ensure citizen participation is effective and influence policy rather than being merely symbolic.

two levels of government at ago.<sup>265</sup> Such a complex system requires a well informed citizenry if it is to function effectively. This makes freedom of expression crucial as a facilitator of the democratic system. As the High Court of Kenya has held in *Chirau Ali Mwakwere v Robert Mabera & 4 others*,<sup>266</sup>(quoting the Supreme Court of Canada in *Edmonton Journal v Alberta (Attorney General)*,<sup>267</sup> freedom of expression is the “lifeblood of democracy.” Any constriction in the free flow of information and freedom of inquiry will hamper the system and possibly lead to its collapse. This fact was also recognised by the Inter-American Court of Human Rights in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* when it observed that:

“Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade union, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its opinions, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.”<sup>268</sup>

This shows that a democratic system presupposes an ongoing engagement that entails deep exchange of ideas, formation (and reformation) of public opinion, political responses to public opinion and articulated interests. Ideally, it is a dialogical (though not always coherent) system that engages the people in governance and those in political offices responding to the needs of the people. Therefore, freedom of expression and its corollary freedom of the press make this engagement possible. This was captured by the European Court of Justice in *Castells v Spain* when it held as follows:

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<sup>265</sup> See note 258, *supra*. The candidates are eight if one counts Deputy President and Deputy Governors who are also listed on the ballot papers alongside the principal candidates for President and Governor respectively.

<sup>266</sup> [2012] eKLR, p.4 [20].

<sup>267</sup> (1989) 2 SCR 1326.

<sup>268</sup> Advisory Opinion OC-5/85, 13 November 1985, Inter-American Court of Human Rights (Ser. A) No 5 (1985), (Arts 13 and 29 American Convention on Human Rights).

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.<sup>269</sup>

As was seen in chapters one and three, Dworkin argues that freedom of expression is to be defended not only for its constitutive value but also for its instrumental role in a democracy.<sup>270</sup> He argues that freedom of expression facilitates political engagement in a democracy and makes it function.<sup>271</sup> In other words, freedom of expression is the fuel that runs the engine of democracy. This functional value could be both in facilitating democratic self-governance as in Post's democracy theory<sup>272</sup> or democratic collective decision-making as in Meiklejohn's democracy theory as was seen in chapter three.<sup>273</sup>

The courts in Kenya in the post-2010 period have recognised this instrumental value of freedom of expression as the facilitating factor of democracy. In *Chirau Mwakwere* for example, the High Court of Kenya, citing the Supreme Courts of Canada<sup>274</sup> and Zimbabwe<sup>275</sup> observed that it is through freedom of expression that people participate in democratic processes. More recently in *CORD case*,<sup>276</sup> the High Court recognised democracy as a key basis for freedom of expression in Kenya. It quoted the

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<sup>269</sup> European Court of Human Rights in *Castells v Spain*, 24 April 1992, Application No. 11798/85, para. 43.

<sup>270</sup> Ronald Dworkin (1996) *Freedom's Law: The Moral Reading of the American Constitution*, *supra*.

<sup>271</sup> *Ibid*.

<sup>272</sup> Robert Post, 'Participatory Democracy and Free Speech,' *supra*.

<sup>273</sup> Alexander Meiklejohn (1948) *Free Speech and Its Relation to Self-Government*, *supra*.

<sup>274</sup> *Edmonton Journal v Alberta (Attorney General)*, (1989) 2 SCR 1326

<sup>275</sup> *Mark Gova Chavunduka and Another v The Minister of Home Affairs*, Supreme Court Civil Appeal No. 156 of 1999.

<sup>276</sup> [2005] eKLR.

Supreme Court of Uganda in *Charles Onyango-Obbo and Anor v Attorney General*,<sup>277</sup> in which the Ugandan Court, (Mulenga SCJ) stated that:

The importance of freedom of expression including freedom of the press to a democratic society cannot be over-emphasised. Freedom of expression enables the public to receive information and ideas, which are essential for them to participate in their governance and protect the values of democratic government, on the basis of informed decisions. It promotes a market place of ideas. It also enables those in government or authority to be brought to public scrutiny and thereby hold them accountable.<sup>278</sup>

This role was also recognised by the Supreme Court of Kenya in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*<sup>279</sup> when the Court held that-

Freedom of expression and the right to information... guarantee debate and provide an opportunity for citizens to know what their Government is doing, but also to contribute to it by voicing support or opposition. Support and dissent are essential because they indicate levels of public involvement and participation in how societies are run ....<sup>280</sup>

These comments demonstrate the centrality of freedom of expression as a facilitator of the complex engagements that occur in a democracy both in a horizontal and vertical dimension. It enables people to engage with each other on social and political

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<sup>277</sup> Constitutional Appeal No.2 of 2002.

<sup>278</sup> The justifications cited by the court in this decision range from democracy, truth, self-fulfillment and human dignity.

<sup>279</sup> [2014] eKLR.

<sup>280</sup> Ibid, paragraph 162. Article 4 (2) of the Constitution of Kenya declares the country to be a multi-party democratic state.

issues as members of a democratic society. It also enables people to engage individually and collectively with the government as stakeholders in the political organisation.

Taking into account Macpherson's idea of democracy in the broad sense as being concerned about 'all that is humanly good'<sup>281</sup> it is also clear that freedom of expression empowers individuals to realise their potential as human beings and as members of the society. The liberal idea of democracy takes individual success as a contributor of social success.<sup>282</sup> The prosperity of the society is the aggregate of the prosperity of its individual members.<sup>283</sup> Democracy in this sense is not just concerned with governance and other political matters but also the welfare of individual members of the polity in terms of the realisation of their full potential. Freedom of expression plays a role in this objective. Emerson argues that the right to freedom of expression is justified first and foremost because it relates to the individual in a private capacity.<sup>284</sup> He goes on to note that the ultimate end of a human being is the realisation of their fullest potential.<sup>285</sup> This process entails the development of their mind and personality which necessarily includes the right to hold thoughts and opinion and to express them.<sup>286</sup> As was seen in chapter three, Mill, in his truth theory of expression expresses similar ideas when he argues that freedom of expression enables the individual to refine their thoughts in the quest for the attainment of truth.<sup>287</sup> This quest is what defines a democracy as a system that values consensus or engagement and participation of its members as well as their welfare.<sup>288</sup> The spirit of Kenya's Constitution is consonant with this concept. As a transformative constitution, it is not only concerned with governance but also the welfare of its members individually and collectively. This, one can discern, is the implication of the commitment contained in the preamble to "nurtur[e] and protect...the well-being of the individual, the

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<sup>281</sup> Amy Gutmann, (1993), 'Democracy,' In *A Companion to contemporary political philosophy*, *supra*.

<sup>282</sup> *Ibid*.

<sup>283</sup> *Ibid*.

<sup>284</sup> Thomas Emerson 'Toward a General Theory of the First Amendment' *supra*.

<sup>285</sup> *Ibid*.

<sup>286</sup> *Ibid*.

<sup>287</sup> *Ibid*.

<sup>288</sup> Viorel Tutui, 'Dialogical Democracy and the Problem of Deep Politics,' *supra*.

family, communities and the nation.” Article 19 (2) is even more explicit. It recognises that “the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.”

The role of freedom of expression in the realisation of self-fulfillment was recognised by the High Court in Kenya in *CORD case*.<sup>289</sup> The Court emphasised the importance of freedom of expression in a democratic society and observed that “*the State has the duty to facilitate and enhance the individual’s self-fulfillment and advancement*” through the protection of fundamental rights including freedom of expression.<sup>290</sup> [Emphasis added].

### 6.3.3. Freedom of Expression as a Defence Factor

We have so far seen that the Constitution’s project of political transformation aims at democratisation of governance, dispersal of power to diminish the risk of despotism, institutionalisation of values such as human rights, rule of law, constitutionalism, accountability and transparency as well as the emancipation of citizens. The process of constitutional and political transformation in Kenya did not receive unanimous support of the citizenry and the political class. The results of the 2010 referendum in which the current constitution was adopted suggest that there was a sizable opposition and it would be naïve to assume the euphoria that greeted its promulgation means undivided support. While choices during the referendum were informed mainly by the politics of the moment, current opposition is based mainly on the fact that the changes challenge the executive’s monopoly of power and unsettles the *status quo*.<sup>291</sup> Like any other form of change, the transformation envisaged in the 2010 Constitution is bound to meet resistance. As Prempeh observes, the ambitions and impulses of the political elite as well as deep-seated vices such as corruption pull in different direction with the idea of

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<sup>289</sup> [2015] eKLR, *supra*.

<sup>290</sup> *Ibid*, para 242.

<sup>291</sup> Makau Mutua (2008) *Kenya’s Quest for Democracy: Taming Leviathan*, *supra*.

transformation.<sup>292</sup> The demands of the rule of law, constitutionalism, transparency and accountability of government and good governance can be inconveniencing to the political elite in the exercise of power. The temptation to ignore the demands of these values always exists, and constantly threatens democracy and the ideals of transformation.<sup>293</sup>

In this regard, freedom of expression occupies a crucial role as the defender of democratic governance and the transformation project. This role of defender assumes a skeptic perception of government. It assumes that government and those who exercise power will be tempted to abuse it and thereby undermine higher ideals of democracy. Vincent Blasi develops what he calls the ‘checking value’ of freedom of expression that is quite distinct from the main freedom of expression justifications.<sup>294</sup> He argues that the underlying premise of freedom of expression theories, including truth, democracy, autonomy, human dignity and self-fulfillment, is the assumption that those who occupy positions of public power constantly face the temptation to abuse public trust.<sup>295</sup> The abuse of public trust, Blasi demonstrates, is a very pernicious thing for a number of reasons. First because government wields so much power which if deployed irresponsibly can cause widespread harm to people.<sup>296</sup>

Secondly, since the state ideally enjoys monopoly of legitimate use of violence, there is no equivalent checking force to counter this power. The recourse that citizens have (or should have) against the state is unfettered public opinion and criticism, the power to vote out the government, and the choice to cooperate or withdraw their cooperation.<sup>297</sup> Blasi also notes that the system of checks and balances that exist function effectively in an environment in which freedom of expression and the press thrives. This is

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<sup>292</sup> H Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New dawn?* (2007) Oxford University

<sup>293</sup> See for instance attempts by President Kibaki to unilaterally appoint the Chief Justice, Deputy Chief Justice the Attorney General and the Director of Public Prosecutions in 2011 in disregard of the Constitution cited in chapter two.

<sup>294</sup> Vincent Blasi, ‘The Checking Value in First Amendment Theory’ (1977) 2 *American Bar Foundation Research Journal* 521, p. 529-530.

<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.*

so because for government institutions to act as checks on each other, they often rely on the press and ordinary citizens for information. This way, freedom of expression and the press facilitates the citizen to hold the government accountable, and also empowers state institutions to perform their role as checks on each other.<sup>298</sup>

In addition, Blasi bolsters his checking value theory by highlighting a vital characteristic of human nature that is of interest to Kenya and similarly situated countries. He notes that since public officials in a democracy have the moral approval of the public, either because they are elected or trace their appointments to a process that ultimately rests on elections, they face the temptation to lose humility and assume an 'inflated sense of self-importance.'<sup>299</sup> This arrogance, Blasi observes, is usually a prerequisite to other forms of misconduct. Yet, in bestowing public trust upon public officials, people have expectations. They expect that public officials will advance the general welfare of the public and observe some level of decorum.<sup>300</sup> However, these expectations are often frustrated by the imperfections of public officials and what Blasi describes as the general tendency of human beings to harm each other, including those in power acting in ways that undermine public welfare.<sup>301</sup>

Modern governments have become very huge bureaucracies. In light of pessimistic view of humanity highlighted above, the enormity and complexity of modern governments, and the enduring faith in their virtue, freedom of expression and press becomes more crucial. It is more crucial as a necessity in checking the misconduct of public officials and the government, thereby defending the virtues that a government should ideally espouse.<sup>302</sup> Blasi, in fact, suggests that there is a need for professional critics to keep governments in check. The residual power of the people to speak freely and criticise government presents a very crucial function of accountability, which in turn preserves the

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<sup>298</sup> Ibid.

<sup>299</sup> Ibid.

<sup>300</sup> Ibid.

<sup>301</sup> Ibid.

<sup>302</sup> Ibid.

system.<sup>303</sup> This is the point that Justice Hugo Black of the US Supreme Court emphasised in his concurring opinion in *New York Times Co. v United States*.<sup>304</sup> The judge remarked that “the press was to serve the governed, not the governors.... The press was protected so that it could bare the secrets of government and inform the people.”<sup>305</sup>

As noted earlier, the Constitution of Kenya has placed a lot of faith in democratic governance as a means to a more cohesive, stable and economically progressive society. Through what it seeks to address by its normative prescriptions, one can discern the enemies of democratic ideals that the Constitution recognises. This includes lack of transparency and corruption, deficient accountability and bad governance, and self-aggrandizement of public officials. While the values of transparency, good governance, rule of law, and constitutionalism are evident throughout the text of the Constitution, articles 10 and 73 are more explicit:

Article 10 reads in part:

- (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them-
  - (a) applies or interprets this Constitution;
  - (b) enacts, applies or interprets any law; or
  - (c) makes or implements public policy decisions.
- (2) The national values and principles of governance include:
  - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
  - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised
  - (c) good governance, integrity, transparency and accountability; and
  - (d) sustainable development.

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<sup>303</sup> Ibid.

<sup>304</sup> 376 U.S. 264, 283 (1964).

<sup>305</sup> Ibid.

Article 73 reads:

“(1) Authority assigned to a State officer (a) is a public trust to be exercised in a manner that- (i) is consistent with the purposes and objects of this Constitution; (ii) demonstrates respect for the people; (iii) brings honour to the nation and dignity to the office; and (iv) promotes public confidence in the integrity of the office; and (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include: (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections; (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices; (c) selfless service based solely on the public interest, demonstrated by: (i) honesty in the execution of public duties; and (ii) the declaration of any personal interest that may conflict with public duties; (d) accountability to the public for decisions and actions; and (e) discipline and commitment in service to the people.”

Klug argues that new constitutional dispensations are ‘the product of particular histories.’<sup>306</sup> He suggests that an understanding of the historical and sociological processes surrounding constitution-making processes is necessary for the understanding of a new constitutional order.<sup>307</sup> Applying Klug’s suggestion to Kenya’s situation, the provisions cited above reveal a society traumatised by failed ethics in public affairs, and desperate for restoration. These provisions must be understood against the backdrop of Kenya’s history of leadership failures and massive corruption discussed in chapter two. They underscore the need for good governance, respect for human rights and dignity,

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<sup>306</sup>Heinz Klug, ‘Towards a Sociology of Constitutional Transformation: Understanding South Africa’s Post-Apartheid Constitutional Order’ (2016) *University of Wisconsin Legal Studies Research Paper No. 1373*. Available at SSRN: <http://ssrn.com/abstract=2729460> or <http://dx.doi.org/10.2139/ssrn.2729460>.

<sup>307</sup> Ibid.

integrity, transparency and accountability in governance. In short, they demand the practice of the highest virtue in public affairs. This requires more than just legal provisions. First it requires ethical commitment on the part of public officials. Secondly, and most importantly, it requires the involvement of citizens as individuals or organised as civil society and the media to hold the public officials accountable, including the freedom to expose any impropriety without fear. This is because these virtues, as Blasi observes, are not humanly instinctive.<sup>308</sup> The temptation to depart from them is always present.

These arguments make a strong case for the protection of public debate on matters of governance or public interest generally. They justify freedom of expression not just as a negative right that requires government to refrain from interfering, but also as a positive obligation to enable citizens to engage in holding the government to account and to operate within the prescribed ethical tenets. This is because the values of transparency, good governance, and accountability among others are constitutionally prescribed. Therefore, it is logical to conclude that the state should lead the way in championing them even if this does not seem to be consonant with self-preservation instincts.

John Locke's social contract theory and idea of government contemplates a scenario where people vests power in the government for the protection of their interests such as life, liberty, and property.<sup>309</sup> Citizens in turn, retain the power to replace a government that abuses public trust.<sup>310</sup> Although Locke did not address himself to the role of freedom of expression in governance, it is clear that the idea of consent of the governed and its renewal or withdrawal assumes politics of engagement and public debate.<sup>311</sup> Thus, freedom of expression preserves the power of the governed to speak out, criticise and demand responses, as well as expose the failings of government. This power, it can be concluded, affirms the people as the repository of sovereign power and validates the demands for accountability of the political elite.

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<sup>308</sup> Vincent Blasi, 'The Checking Value in First Amendment Theory,' *supra*.

<sup>309</sup> John Locke, *Two Treatises on Government*. London: Printed for R. Butler, etc., 1821; Bartleby.com, 2010. [www.bartleby.com/169/](http://www.bartleby.com/169/). Accessed 8 August 2016.

<sup>310</sup> *Ibid*.

<sup>311</sup> Vincent Blasi, 'The Checking Value in First Amendment Theory,' *supra*.

In the Kenyan situation, the 2010 Constitution has introduced an elaborate system of checks and balances on the exercise of power as was detailed in chapter two. These mechanisms include an enhanced system of separation of powers, introduction of a two-level system of government through devolution; creation of new independent offices and commissions and strengthening of pre-existing ones. These institutional reforms, one can say, are aimed at ensuring good governance and ultimately, the welfare of the people as the beneficiaries of a functional democratic system.<sup>312</sup>

Government and public officials will be accountable, transparent and selfless in an environment in which criticism is welcome. Despite the enactment of the Constitution with all its grand prescriptions for probity in public affairs, corruption and embezzlement of public resources remains rampant. Mega scandals continue to plague the country even in the new constitutional dispensation. Freedom of expression is crucial in exposing corruption and demanding remedial action. It therefore becomes necessary that freedom of expression is preserved. This necessarily means the power of the government to shield itself and its officers from criticism especially on matters of public interest must be severely limited. In addition, the legal and administrative structures that foster opaqueness in public affairs must be demolished. In this regard, the need to replace the Official Secrets Act<sup>313</sup> with a law that facilitates access to information held by the state rather than foster opaqueness in public affairs is more urgent.<sup>314</sup> The Official Secrets Act which gives the state too broad and undefined powers to censor information is obviously at variance with the values of transparency, openness, accountability and good governance entrenched in the Constitution.<sup>315</sup> It is also inimical to democracy since participation of the citizens in

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<sup>312</sup> The Constitution of Kenya, article 73 (1)(b).

<sup>313</sup> Chapter 187, Laws of Kenya.

<sup>314</sup> This is not to suggest that the public should have access to all information held by the state. There are mechanisms for safeguarding sensitive information on matters such as national security as was discussed in chapter five.

<sup>315</sup> The long title to the Official Secrets Act declares that it was enacted to protect “state secrets and state security.” The Act prohibits a number of activities that are of interest to freedom of expression. For instance, it prohibits photography in protected places such as military barracks and state house, as well as the release of information prejudicial to state security and passage of information to foreigners. Under section 3(2) violation of this law attracts a jail term of up to 14 years in prison.

democratic processes such as elections, participation in policy and legislative formulation, and so forth requires a well informed citizenry. The High Court recognised this checking value as an aspect of defending democracy and the aspirations of the Constitution in its decision in *CORD case*.<sup>316</sup> Quoting the Supreme Court of Uganda (Odoki CJ) in *Charles Onyango-Obbo and Anor v Attorney General*,<sup>317</sup> the Court held that freedom of expression “enables those in government or authority to be brought to public scrutiny and thereby [held] accountable.”<sup>318</sup> [Emphasis added].

The upshot of all these is that freedom of expression must be seen as the defender of the new democratic system that is contemplated under the Constitution. The right is residual from the inherent powers that the citizens retain in terms of Locke’s idea of democracy.<sup>319</sup> It empowers the citizen to exercise oversight over those who wield public power to ensure that it is exercised with probity and good faith as contemplated in the Constitution. Thus, freedom of expression is the defender of the democratic system such that its suppression will leave public officials with no checks. This in turn will undermine the democratic system and the ideals enshrined in the 2010 Constitution.

#### 6.4. Freedom of Expression and the Enduring Paradox

It has become clear that the 2010 Constitution envisions a democratic society undergirded by freedom, respect for human rights, openness, transparency and accountability of government. We have seen that at the core of the Constitution’s agenda is to overturn the colonial and post-colonial repressive system with an order that places the people at the centre of politics. We have also seen that freedom of expression is indispensable in the realisation of constitutional aspirations. We have seen that freedom of expression is important as it plays the roles of legitimating, facilitating and defending the new constitutional order.

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<sup>316</sup> [2005] eKLR.

<sup>317</sup> Constitutional Appeal No.2 of 2002.

<sup>318</sup> The justifications cited by the court in this decision range from democracy, truth, self-fulfillment and human dignity.

<sup>319</sup> John Locke, *Two Treatises on Government*, *supra* (this refers to Locke’s idea of government in the design of his social contract theory).

When legal restrictions and state practices regarding the freedom of expression discussed in chapter four and five are assessed against the aspirations of the 2010 Constitution, stark contradictions become clear. First, Kenya retains a variety of “insult” or *desacato* laws calculated to or whose effect is to shield public officials from criticism. These include the offence of ‘undermining the authority of a public officer’ and criminal libel as was seen in chapter five. Similarly, the country retains other insult laws such as the crime of defamation of foreign princes and the crime of disrespecting the national flag and other national symbols or emblems. On the civil front, it was shown that the country retains common law position on libel such that a public officer can recover damages for defamation even where the alleged defamatory statement relates to the exercise of public duty, or matters of public concern such as corruption and abuse of office. This is compounded by the fact that the defence of reasonable publication is not available for an honest but mistaken defendant who acted in good faith and exercised diligence to verify their claims.<sup>320</sup> In addition, an unsuccessful attempt by a defendant to rely on the defence of truth exposes the defendant to aggravated damages. This further discourages defendants from trying to prove the truth of their claims. This, in effect, undermines the values of accountability as it has a chilling effect on the media and citizens. Moreover, it unjustifiably undermines media freedom and the citizen’s right to freedom of expression understood in this sense to include the right to make honest mistakes in public discourses that concern matters of public interest. State or public officers are usually not on the same level of power regarding access to information about the goings-on in public institutions. To hold the media and private citizens to high standards of proof and deny them the benefit of the doubt even in situations of asymmetry of access to information is clearly unfair in a society that is constitutionally committed to being “open and democratic.” It is also clear that the prevailing precedents favour the award of huge sums of damages for

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<sup>320</sup> ‘Defining Defamation Principles on Freedom of Expression and Protection of Reputation,’ *supra*.

libel even in matters of public concern, which has had and continues to have a chilling effect on freedom of expression.<sup>321</sup>

The second paradox is the enactment (and proposed enactment) of more controversial speech-restricting laws as detailed in chapter five of this thesis. These include sections 12 and 64 of Security Laws Amendment Act, 2014 (SLAA) which sought to restrict publication of images of terrorism attacks and institute prior censorship in terror related reporting, the Media Council Act 2013 which prescribed very high penalties for journalists and media houses breaching the media code of conduct, and the proposed offence of 'defamation of parliament' under clause 32 and 33 of the Parliamentary Powers and Privileges Bill, 2014. The aforementioned provisions of SLAA were invalidated by the High Court while defamation of parliament was dropped due to public pressure. The provisions of the Media Council Act are still being litigated before the Court of Appeal.<sup>322</sup>

The third contradiction is the increased prosecution of government critics for expression-related offences and those exposing government blunders especially on security matters and the revival of application of dormant insult laws such as the offence of undermining the authority of a public officer as we saw in the previous chapter. These recent prosecutions were detailed in chapter five. Ugochukwu has argued that it is 'intuitive and reasonable' to expect that human rights would improve when a country makes a transition to a more democratic rule.<sup>323</sup> He notes that transitional regimes are usually more tolerant and respectful of human rights than their dictatorial predecessors.<sup>324</sup> As demonstrated in chapter five, the law and state practice unjustifiably restricting freedom of expression has remained largely unchanged in Kenya, while more 'expression-

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<sup>321</sup> See detailed discussions on this point in chapter five.

<sup>322</sup> The decision of the High Court in *Nation Media Group Limited & 6 others v Attorney General & 9 others* [2016] eKLR is pending before the Court of Appeal.

<sup>323</sup> Basil Emeka Ugochukwu, "Adjudicating Human Rights in Transitional Contexts: A Nigerian Case-Study, 1999-2009" *supra*, p. 1.

<sup>324</sup> *Ibid.*

unfriendly' laws have continued to be enacted.<sup>325</sup> This is a stark contradiction at a time when the country should be experiencing expansion rather than shrinking of the democratic space in the post-2010 dispensation especially as concerns freedom of political expression.

This paradox, as argued in chapter four, suggests a lack of political will to embrace the demands of the 2010 Constitution and a political culture that is yet to fully appreciate the transformative demands of the country's new dispensation. It has become clear that freedom of expression typifies Kenya's struggles for political freedom such that the transformation project cannot be complete without significant change in the law and practice surrounding freedom of expression. There is an urgent need for a shift in the freedom of expression situation in Kenya. There is need for a change in philosophy towards a more plausible approach to freedom of expression restrictions.

### **6.5. The Quest for a Plausible Approach**

The position of the law on the right to freedom of expression as demonstrated in chapters four and five is indefensible in the new constitutional dispensation. To retain and continue to apply laws that are unfriendly to freedom of expression which were enacted for political expediency by colonial and post-colonial regimes is at variance with constitutional aspirations and therefore untenable. This paradox needs urgent redress for the sake of coherence in the law and congruence between the ideals of the Constitution and bureaucratic practices. It is obvious now that the fact of change in the Constitution alone is not enough to bring about transformation. For as long as statutes that undermine constitutional ideals continue to exist, the Constitution will remain impotent and altogether unable to protect against repression or unjustified prosecution. This is because the chief concern of bureaucrats such as police officers and prosecutors as discussed above is to apply the law to meet the expediencies of the day rather than to imagine what the ideals of the Constitution are. The revival of prosecutions of the crime of 'undermining the

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<sup>325</sup> For examples of these 'expression-unfriendly' laws see discussions in chapter four and five. The continued retention of some of these laws is, as argued in this chapter, because of lack of the political impetus to make their reform a priority.

authority of a public officer,' after years of disuse is a clear indication that for as long as an oppressive law remains valid, there is nothing that can stop bureaucrats from enforcing it. While the High Court retains the power to invalidate laws that fall short of constitutional ideals, trial of most offences, and most certainly speech-related ones, occurs at the subordinate courts. In addition, the High Court may only intervene if moved to do so by an aggrieved party. This reality, coupled with the slow nature of litigation-driven change, makes the need for statutory reform of freedom of expression restrictions through parliament urgent.

There have been significant strides in the right direction on freedom of expression driven especially by the courts. These have been in the nature of invalidation of unconstitutional provisions unjustifiably restricting freedom of expression. The invalidation of sections 12 and 64 of Security Laws Amendment Act, 2014 and sections 3(2) and 6 (2) of the Media Council Act highlighted in chapter five are good examples. However, more needs to be done to bring the legal regime governing the right to freedom of expression in consonance with the Constitution.

As was noted in chapter two, Klare explains that transformative constitutionalism entails three processes: enactment, interpretation and enforcement of the law.<sup>326</sup> The 2010 Constitution anticipates change on these three fronts.<sup>327</sup> Enactment of law is the province of the legislature. This avenue is the most powerful because at the stroke of the pen, parliament can institute desired reforms by repealing the offending legislation and enacting new ones. This is mandated under the Constitution as part of the law reform programme aimed at realigning the pre-2010 laws to the dictates of the new Constitution. However, this avenue suffers from severe setbacks. Given that it is a political process, the legislative reform agenda may only be moved forward if there is sufficient political impetus. In the absence of such impetus and constitutional timelines, the desirable reforms

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<sup>326</sup> Karl Klare, 'Legal Culture and Transformative Constitutionalism' *supra*, p. 150.

<sup>327</sup> The Constitution of Kenya, article 261 (1) and the Fifth Schedule (on enactment of law), article 20, 259 and Section 7 of Sixth Schedule (on interpretation or construing the Constitution), article 2, 19, 21, and 27 (4)(5), (on the application generally).

will not be prioritised. As noted elsewhere, the lack of political will to prioritise freedom of expression reforms explains why legislative adjustments on this subject are yet to commence. That said, it must be emphasised that the repeal of insult or *desacato* laws such as criminal libel, undermining the authority of a public officer, defaming a foreign prince, and disrespecting the national flag and emblems, is long overdue. It is long overdue because they are premised on obsolete logic and are out of sync with trends in democratic societies.<sup>328</sup> Considering the problems associated with civil libel law in Kenya as analysed in this chapter and chapter five, there is need for reforms to balance the justifications of defamation law with the right to freedom of expression and its values. There is also an urgent need to clarify the contours of commonly applied but controversial criminal laws such as hate speech and improper use of a licensed telecommunication system. While the latter was recently invalidated by the High Court,<sup>329</sup> parliament is yet to take legislative steps to reform or repeal it.<sup>330</sup>

While legislative reforms are pending, courts will need to take the lead in driving the change as far as freedom of expression is concerned. As a matter of fact, the High Court has already made certain declarations as highlighted above, and the courts are likely to be presented with more opportunities for reform as expression-related litigation increase. While it is hoped that parliament will exercise its constitutional mandate to abolish laws that violate freedom of expression or desist from enforcing them, there can be no guarantees.<sup>331</sup> As noted elsewhere in this chapter, a comprehensive review of laws affecting freedom of expression will obviously require huge political good will and political capital. In addition, such reforms are not always attractive to the state and the

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<sup>328</sup> Badala T. Balule, 'Insult Laws: A Challenge to Media Freedom in the SADC's Fledging Democracies? *Supra*, and Defining Defamation Principles on Freedom of Expression and Protection of Reputation,' *supra* (noting the undesirability of insult laws and criminal libel in modern democratic societies)

<sup>329</sup> See *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR (the High Court in April 2016 found the definition of the offence of 'improper use of a licensed telecommunications system,' unconstitutional for being broad and vague)

<sup>330</sup> Its continued retention in the books in its present form as was discussed in chapter five deepens the incoherence in the law relating to freedom of expression in Kenya.

<sup>331</sup> The recent revival of prosecutions under section 132 of the Penal Code for 'undermining the authority of a public officer' when the Jubilee Coalition of President Uhuru Kenyatta came to power as detailed in chapter five is a good example.

political elite who often find use for such laws.<sup>332</sup> Thus, the courts who by nature of their mandate must decide objectively once properly presented with a legal controversy, hold the hope for reforms.

It should be recalled that the idea of transformative constitutionalism places immense faith in the law and the courts as agents of change. This necessarily demands a reorientation of the courts in order to meet the heightened expectations under the 2010 Constitution.<sup>333</sup> Despite the past failures of the judiciary, the institution is vested with the profound duty of safeguarding the supreme law and its transformative agenda.<sup>334</sup> Hutchinson has noted that “judges need to recognise that they are democracy’s supporting cast, not its star performers.”<sup>335</sup> Transformative constitutionalism challenges this traditional notion, and elevates the role of the courts in the transformation mission. In the scenes of transformative constitutionalism, no single institution is the protagonist. However, the courts are not merely the supporting cast. They are more. To put a twist to Hutchinson’s euphemism, the judiciary, of necessity, must play a greater role, acting as democracy’s supporting cast in some scenes, and its star performer in others.<sup>336</sup>

In chapter two, it was noted that the courts and judicial pronouncements are critical in anchoring the transformative ideals of the 2010 Constitution, and in bridging the gap between theory and praxis. In the absence of the political impetus to push reforms through parliament, the change regarding the situation of the right to freedom of expression in Kenya will involve the judiciary significantly. Courts, by nature, may not intervene to resolve a situation unless it is moved by aggrieved litigants. Thus, for

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<sup>332</sup> See change of attitude by some pro-reform politicians when Kibaki came to power in 2003. Once in government some politicians who pressed for constitutional change was Moi was in power relented on the quest and even opposed reforms. See Jill Cottrell & Yash Ghai ‘Constitution Making and Democratisation in Kenya: 2000–2005,’ *supra*.

<sup>333</sup> Godfrey M Musila, ‘Realizing the Transformative Promise of the 2010 Constitution and New Electoral Laws,’ *supra*.

<sup>334</sup> See discussions in chapter two of this thesis. See also J.B. Ojwang’, (2013) *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order*, *supra*.

<sup>335</sup> Allan Hutchinson "Judges and politics: an essay from Canada" (2004) *Legal Studies* 275, p. 284.

<sup>336</sup> *Ibid.* (arguing that any court that tramples too often on the policy-making prerogative of parliament and legislatures is asking for trouble: judges need to recognise that they are part of democracy's supporting cast, not its star-performers.)

judiciary-driven reforms to succeed, a vigilant and reform-minded citizenry, civil society, and the media is necessary. Reforms introduced by the 2010 Constitution touching on *locus standi*, ripeness of disputes, as well as the powers that the courts enjoy in the exercise of their mandate support public interest litigation and judiciary-driven reforms.<sup>337</sup> The examples already cited such as *CORD case*<sup>338</sup> and *Geoffrey Andare v Attorney General & 2 others*,<sup>339</sup> in which the courts in the post-2010 period intervened to strike down laws that restrict the freedom of expression unjustifiably, are good examples. In the light of the ideologies of transformative constitutionalism and judicialism, courts are empowered to develop what Prempeh calls “rights-friendly jurisprudence.” The mandate and the expectation to develop “rights-friendly jurisprudence” are explicit in the Constitution.<sup>340</sup>

Courts in comparable jurisdictions that have embraced transformative constitutionalism have been exemplary in developing jurisprudence that supports social and political change through the law. The apex courts of South Africa and India stand out in this regard and offer useful lessons.<sup>341</sup> It should be emphasised that in a constitutional democracy such as Kenya, the judiciary and not parliament, has the final say on the meaning and implications of the Constitution.<sup>342</sup> However, for courts to live up to this task, a change in legal culture, particularly in how judges and lawyers appreciate the spirit of the

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<sup>337</sup> See discussions in chapter two. Under article 22 (1) (2) and 258 (1) of the Constitution of Kenya, anyone may institute a suit on their own behalf or on behalf of another person claiming that a right and the Constitution generally has been infringed or is threatened with violation. This has effectively broadened and relaxed the technical rules on *locus standi* and ripeness of cases. The High Court affirmed this in *Trusted Society of Human Rights Alliance v Attorney General & others* [2012] eKLR (HCK).

<sup>338</sup> [2015] eKLR.

<sup>339</sup> [2016] eKLR

<sup>340</sup> The Constitution of Kenya, article 19, 20, 159, 259.

<sup>341</sup> Daniel Bonilla Maldonado, (2004) *Constitutionalism of the Global South: the Activist Tribunals of India, South Africa and Colombia*, Cambridge University Press. For example, in *People's Union for Civil Liberties v Union of India*, (2003) 4 SCC 399, the Supreme Court of India held that the right to life includes the right to food, access to food and protection against malnutrition and starvation. In *The State -v- Makwanyane* CCT/3/94, [1995] 1 LRC 269, the Constitutional Court of South Africa found the death penalty to be unconstitutional and invalidated it. The usefulness of lessons from these courts was recognised by the former Chief Justice of Kenya Dr Willy Mutunga in his speech “Elements of Progressive Jurisprudence in Kenya: A Reflection,” delivered to Kenyan judges on 12 May 2012.

<sup>342</sup> *CORD Case*, [2015] eKLR, para 168, citing the Supreme Court of Zimbabwe in *Biti & anor v The Minister for Justice, Legal and Parliamentary Affairs & anor* (2002) AHRLR 266 (2w SC 2002). See articles 2 (4), 159, 165 and Chapter 10 generally, Constitution of Kenya, 2010.

constitution is necessary so as to safeguard constitutional aspirations from being subverted for political convenience.<sup>343</sup> Indifference, lack of courage or outright connivance by the judiciary will sound a death knell on the transformative aspirations of the Constitution.

In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*,<sup>344</sup> the Supreme Court recognised that “the judiciary has been granted a pivotal role in midwifing transformative constitutionalism and the new rule of law in Kenya.”<sup>345</sup> While the text itself is the vehicle for political, economic and egalitarian social transformation, the judiciary enjoys the powerful and influential position of being the driver of this vehicle. As of necessity, it is demanded of judges to engage in deeper analysis and take into account other factors such as the history of the country so as to discover deep meaning of values and the socio-political aims of the Constitution.<sup>346</sup> Importantly, they must be ready to strike down contravening laws and actions so as to safeguard constitutional aspirations. As of necessity, transformative constitutionalism abhors hasty deference and rejects undue attention to technicalities and cursory approach to adjudication.<sup>347</sup> As Danie Brand has remarked, judicial deference becomes pernicious when it “operates as an obstacle to effective judicial enforcement of rights.”<sup>348</sup>

## 6.6. Conclusion

This chapter evaluated Kenya’s goal for political transformation and the role of freedom of expression in this ambition. It began by revisiting the transformative ambitions of Kenya’s 2010 Constitution and theorised the nature of envisioned political change and the role of law. Crucially, the chapter assessed the prevailing law and practice

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<sup>343</sup> H Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New dawn?* (2007) Oxford University. Godfrey M Musila, ‘Realizing the Transformative Promise of the 2010 Constitution and New Electoral Laws,’ *supra*, and Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ *supra*.

<sup>344</sup> [2014] eKLR (Petition 14 as Consolidated with Petitions 14A, 14B and 14C of 2014).

<sup>345</sup> *Ibid*, para 377.

<sup>346</sup> The terminology of ‘historical self-consciousness’ is borrowed from Klare at page 155 in *S v Zuma* 1995 (2) SA 642 (CC) para 15, per Kentridge J. See also (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995); see also the Supreme Court of Kenya in *Speaker of the Senate & another v Attorney-General & 4 others*; Advisory opinion reference no. 2 of 2013; [2013] eKLR.

<sup>347</sup> Danie Brand, *Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa* (2011) 22 *Stellenbosch Law Review* 614, p.637.

<sup>348</sup> *Ibid*.

on freedom of expression as was discussed in chapters four and five against the aspirations of the 2010 Constitution.

It was reiterated that the 2010 Constitution and its grand ambitions for transformation was superimposed mainly on a pre-existing body of laws, attitudes and practices inherited from the colonial and post-colonial regimes and designed for political repression. Thus, it is argued, the agenda for change must begin with dismantling the vestiges of the colonial and post-colonial despotism and repression. Since the law generally, and freedom of expression restrictions in particular, were applied in the past as instruments of repression, reforms in the post-2010 dispensation are necessary in sanitising and refashioning it so as to advance the aspirations of the Constitution such as freedom, democracy, human rights and dignity as well as transparency and accountability of the government.

The change, it is argued, must entail a shift to a new philosophy and attitudes that resonate with the change anticipated and ordained under the 2010 Constitution. Importantly, following Mureinik's argument in the South African context, the shift entails a move from a culture of authority to one of justification. This move is specifically prescribed under the Constitution as is evident throughout the text, and especially articles 1, 10 and 73. This standard of justification is more apparent in the Constitution's prescription of objectivity in interpretation and adjudication of fundamental rights, and the Constitution generally. Uniquely, Kenya's Constitution provides for an internal theory of how it is to be interpreted and applied. The objective of this prescription, it is noted, is to safeguard constitutional aspirations from subversion. This theory of interpretation is further supplemented by proportionality balancing embodied in the limitation clause in article 24. Proportionality balancing is an important aspect of modern constitutionalism aimed at enhancing objectivity of limitation of rights in the face of competing values or state interests.

Assessing the theoretical justifications of freedom of expression, Kenya's social and political context, its past experiences with freedom of expression, and the

transformation goals of the 2010 constitution, the chapter argued that the right plays at least three roles in Kenya's constitutional and democratic edifice. These are; one as legitimating and constitutive element, two, as facilitating agent, and three, as the defender of the system.

The chapter highlighted the paradox that continues to exist in Kenya regarding the law on freedom of expression. It is paradoxical that the expression-restricting laws that supported colonial and post-colonial repression remain generally unchanged, and indeed, continue to be applied. Furthermore, the fact that a few more laws that unjustifiably restrict freedom of expression have been enacted in the post-2010 era is a stark contradiction at a time when the democratic space and freedom of expression should be expanding under a new constitutional dispensation. There is therefore an urgent need for reform to repeal repressive laws and revise others so as to make the legal framework of freedom of expression to be in consonance with the letter and spirit of the Constitution. This change, the chapter concludes, is a prerequisite for the full realisation of the transformative aspirations of the 2010 Constitution.

## **Chapter Seven**

### **Conclusion**

7.1. Introduction

7.2. Key findings and conclusions

7.3. A call for reform of freedom of expression law in Kenya

7.4. Concluding remarks

## 7.1. Introduction

This study set out to investigate the right to freedom of expression and its role in Kenya's project of political transformation as envisaged under the 2010 Constitution. While the enactment of Kenya's Constitution represents one of the most significant constitutional developments in Africa in recent times, it has not been followed by commensurate amount of scholarship.<sup>1</sup> In particular, the role of freedom of expression in political transformation has not been adequately explored.<sup>2</sup> Similarly, the constitutional validity of freedom of expression restrictions in Kenya under the 2010 Constitution has not been addressed. Thus, this study aimed at addressing this gap. To cover the topic, this research sought to answer the following major research questions: (a) what is the nature and scope of the right to freedom of expression and its limitations in Kenya? (b) what are the transformative goals of Kenya's 2010 Constitution? (c) what is the role of the right to freedom of expression in Kenya's project of political transformation?, and (d) do the limitations of freedom of expression under Kenyan law meet the standards of the 2010 Constitution?

This concluding chapter synthesizes key findings and highlights the conclusions of the study. Finally, it suggests a number of reforms that are necessary in order to accord the law on the freedom of expression with the letter and spirit of the Constitution so as to safeguard its aspirations.

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<sup>1</sup> Willy Mutunga, 'Elements of Progressive Jurisprudence in Kenya: A Reflection.' Speech delivered on 31 May 2012, available on: <http://www.judiciary.go.ke/portal/assets/downloads/speeches/Elements%20of%20Progressive%20Jurisprudence%20in%20Kenya-%20A%20Reflection.pdf> <Accessed 31 May 2015>. (In which the retired Chief Justice Dr Willy Mutunga remarked that the 'quality and quantity of Kenya legal literature is disappointing.'). See also H Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New dawn?* (2007) Oxford University (noting that with the exception of South Africa, African constitutional scholarship is generally not well developed)

<sup>2</sup> The literature review in chapter one shows that some publications have discussed the nature of transformation that the 2010 Constitution anticipates. The depth of post 2010 reforms, the right to freedom of expression and its role in the transformation process remains unexplored.

## 7.2. Key findings and conclusions

Since its inception in 1895 as a British protectorate, the Kenyan polity has experienced a number of defining constitutional moments ranging from independence in 1963, the defeat of the independence party KANU in 2002, to the promulgation of the current Constitution in August 2010.<sup>3</sup> The interludes between these moments have been significant historical phases, namely the colonial era (1895-1963), the KANU regime under Presidents Jomo Kenyatta and Daniel arap Moi (1963-2002) and the post-KANU era (2002 to present). Kenya gained independence from Britain with a liberal democratic Constitution that provided for, among other things, a Westminster-model of parliamentary system of government, a bill of rights, federalism, multi-party democracy, and an independent judiciary.<sup>4</sup>

The potential of the independence Constitution to institute a viable democratic order in post-colonial Kenya was however undermined by a number of factors, such as the desire of the ruling political elite to consolidate power, the weakness of the federal system of government, a lack of a unifying ideology for the new nation, and a repressive system of administration that was inherited almost intact from the colonial authorities.<sup>5</sup> Soon after independence, the Constitution was amended in fundamental ways such that by 1982, Kenya had become a highly centralised unitary *de jure* one-party state with an ‘imperial presidency,’ and with institutions too weak to safeguard human

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<sup>3</sup> As noted in chapter one, the term “Constitutional moments” was coined by Bruce Ackerman to refer to milestones in the constitutional developments of a country during which previous understandings of the character of the constitutional order are renounced and replaced with new understandings that are widely accepted as legitimate. See generally, Bruce Ackerman, *We the People: Volume 2: Transformations*, Cambridge: Harvard University Press. There are, of course, other possible constitutional moments in Kenya; these three are the most significant for purposes of this study.

<sup>4</sup> Makau Mutua (2008) *Kenya’s Quest for Democracy: Taming Leviathan*, Lynne Rienner Publishers.

<sup>5</sup> Ibid. (Mutua for instance argues that the independence Constitution was a compromise document that established complex relationship between the central government and regional governments and lacked a unifying ideology)

rights, the rule of law and constitutionalism.<sup>6</sup> As shown in the thesis, the first three decades of Kenya's independence were characterised by despotism, refusal by the state to institute land reforms, and widespread human rights abuses.<sup>7</sup> Opposition political activities were suppressed, and later officially outlawed.<sup>8</sup> At the height of KANU repression, political dissidents, who mainly consisted of journalists, opposition activists, parliamentarians, clergymen, artists, university students and dons, were tortured, jailed following sham trials, detained without trial, forced into exile or killed.<sup>9</sup> The reintroduction of multipartyism in 1992 did little to change the human rights situation in the country or the state's attitude towards political opposition.<sup>10</sup>

While the defeat of KANU in 2002 by Mwai Kibaki and Raila Odinga-led opposition raised hopes for reforms, it was not until eight years later that the Constitution that had supported the KANU repression was repealed. The repression by the KANU regime and the failure of independence from colonialism to yield significant socio-political progress catalysed the agitations for constitutional reforms beginning in the 1990s, and culminating in the adoption of a new Constitution in August 2010.<sup>11</sup> As a result of the constitutional, legal and institutional changes ordained under the Constitution, this thesis

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<sup>6</sup> Ibid. See also Makau Wa Mutua, 'Human Rights and State Despotism in Kenya: Institutional Problems,' (1994) 41 *Africa Today* 50 (showing how the Kenyan state under Jomo Kenyatta and Daniel Moi presided over a despotic government that carried out widespread human rights abuse). See also Susanne D. Mueller 'The Political Economy of Kenya's Crisis,' (2008) 2 *Journal of Eastern African Studies*, 185, DOI: 10.1080/17531050802058302 (arguing that the political crisis in Kenya in the aftermath of the 2007 disputed presidential elections was a consequence of a deliberate scheme in the post-independence period to weaken state institutions to appoint where they could not be trusted to act as credible mediators). It should be recalled that in 1988, the security of tenure of judges was removed. Although, it was later restored, the judiciary remained largely weak in relation to the executive arm of government. See for example Makau W. Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subsistence in Kenya,' (2001) 23 *Human Rights Quarterly* 96 and James T. Gathii, 'The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya's Judicial Process (1994) *Thoughts on Democracy Series*. See also Susanne D. Mueller 'The Political Economy of Kenya's Crisis,' (2008) 2 *Journal of Eastern African Studies*, 185, DOI: 10.1080/17531050802058302.

<sup>7</sup> Makau Mutua (2008) *Kenya's Quest for Democracy: Taming Leviathan*, *supra*.

<sup>8</sup> See chapter two for details.

<sup>9</sup> Ibid. See also Korwa G. Adar and Isaac M Munyae, 'Human Rights Abuse in Kenya under Daniel arap Moi, 1978-2001,' (2001) *African Studies Quarterly*.

<sup>10</sup> Ibid. (see also Charles Muiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya' *supra*)

<sup>11</sup> Makau Mutua (2008) *Kenya's Quest for Democracy: Taming Leviathan*, *supra*.

concludes that there are now better prospects for genuine democracy, social and national cohesion, respect for human rights, the rule of law and constitutionalism than in any other time in Kenya's history.

Chapter two traced the history of the country from the advent of British colonial imperialism, post-independence presidential imperialism, the minimal liberal democracy of the 1990s, to the present. It was noted that the content and design of the 2010 Constitution was influenced by both internal and external factors in existence during these periods. Internal motivations include the disruptions and injustices of the colonial legacy, the illegitimacy and inadequacies of the independence Constitution and subsequent illegitimate amendments which created an imperial presidency, weakened state institutions and set the stage for post-independence political repression. External factors include the collapse of the Soviet Union which triggered a wave of democratisation in the third world, the spread of global constitutionalism and the decline in classical liberalism with the corresponding rise in social democracy, modern liberalism or egalitarian liberalism. Thus, the 2010 Constitution can be seen as a response to both external and internal factors. Enacted amidst ongoing frustrations over failed or shaky constitutionalism in Africa and Kenya in particular, it was necessary that the Constitution takes a thoroughly transformative stance.<sup>12</sup>

Heinz Klug argues that modern constitutions are far from being *sui generis*.<sup>13</sup> Rather, they carry external influences and incorporate features of 'global constitutionalism' such as enforceable bills of rights, constitutional courts with power to enforce the constitution, and the doctrine of separation of powers, among others.<sup>14</sup> He further argues that while external influences are real, constitutions also seek to respond to prevailing local

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<sup>12</sup> H Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New dawn?* (2007) Oxford University: I.CON pp. 1-38: DOI 10.1093/icon/mom016 (for constitutional challenges in post-colonial Africa generally) and Makau Mutua (2008) *Kenya's Quest for Democracy: Taming Leviathan, supra* (for an account of constitutional and political challenges of post-colonial Kenya)

<sup>13</sup> Heinz Klug, (2000) *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*: Cambridge Studies in Law and Society, p. 6-7.

<sup>14</sup> Ibid.

politics.<sup>15</sup> In this regard, it was shown in chapter two that the 2010 Constitution incorporates these features of modern global constitutionalism. In addition, it seeks to institute reforms in response to the socio-political struggles of Kenya's post-independence history, as well as correcting the wrongs of its colonial past.<sup>16</sup>

It is clear that the reforms instituted under the Constitution, including the redesigning of the socio-political relationships within the state follow a pattern that is by and large similar to the transformative constitutionalism model of post-apartheid South Africa under its 1996 Constitution. Drawing from the South African context, Kenya's 2010 Constitution, it is argued, is a modern post-liberal constitution that seeks to institute social and political transformation. In particular, the thesis argued that the Constitution not only creates a framework for a government limited by law, but also institutes radical shifts in a number of political aspects. First, it ordains a momentous shift in the configuration of the governance structures and the equilibrium of power among state institutions. This is aimed at enhancing separation of powers and accountability through ensuring that state organs act as checks and balances on each other. In this regard, the Constitution introduces a number of commissions and independence offices that enjoy independence from other organs with a view of promoting accountability, constitutionalism, democracy and other constitutional values.<sup>17</sup> This reconfiguration, it was argued, is intended to reverse the executive despotism and systemic institutional weaknesses of the previous dispensation, and ultimately restore public confidence in the state and its institutions.

Second, the change instituted by the 2010 Constitution also entails widespread democratisation at various levels of governance, and a change in the normative arrangements, culture, attitudes and practices that surround politics and the exercise of

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<sup>15</sup> Heinz Klug, 'Towards a Sociology of Constitutional Transformation: Understanding South Africa's Post-Apartheid Constitutional Order' (2016) *University of Wisconsin Legal Studies Research Paper No. 1373*. Available at SSRN: <http://ssrn.com/abstract=2729460> or <http://dx.doi.org/10.2139/ssrn.2729460>.

<sup>16</sup> For example land injustices, marginalisation and skewed economic development occasioned by the colonial policy.

<sup>17</sup> These institutions are similar to those found in chapter 9 of South Africa's Constitution, 1996. Klug notes that these institutions are perhaps the most important contribution of South Africa's Constitution to constitutionalism. See Heinz Klug, *Constitutional Law*, (1995) Annual Survey of South African Law, 11.

public power. This is achieved through various mechanisms such as devolution, an expanded system of representation, and citizens' power to recall elected representatives, among others. In addition, while under the previous Constitution citizens had minimum role in governance beyond elections, the 2010 Constitution firmly enshrines the principle of public participation and enjoins all state organs at the two levels of government to facilitate it in policy decision making and legislative processes.<sup>18</sup> These provisions further underscore the doctrine of sovereignty of the people as a defining feature of the 2010 Constitution, and illustrates the shift in the orientation of the relationship between the state on the one hand, and the individual on the other.

Third, the reforms shift state-citizen relationship in an egalitarian direction through an expanded bill of rights with mechanisms to ensure its justiciability and enforceability through the courts as well as political means.<sup>19</sup> The Constitution specifically decrees a change in the conduct of public affairs to ensure gender, ethnic and regional balance in public service appointments, and the promotion of the rights of special groups such as women, children, persons with disability, youth, and minorities and marginalised communities.<sup>20</sup> In addition there are elaborate mechanisms for equitable distribution and redistribution of national resources through devolution and other mechanisms.<sup>21</sup>

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<sup>18</sup> See chapter two and six for details on this point.

<sup>19</sup> Article 21 provides that-

“(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.

(2) The State takes legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

(4) The State enacts and implements legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.”

<sup>20</sup> Ibid. See chapter two for detailed discussions.

<sup>21</sup> As shown in the thesis, see for instance distribution of national revenue based on an equitable formula adopted by the Senate on recommendations of the Commission on Revenue Allocation, and the establishment of equalisation fund to help areas that are underdeveloped to accelerate development. See the Constitution of Kenya, 2010, articles 202, 203, 204, 216 and 217.

Through a robust and enforceable bill of rights, it was argued, the Constitution makes Kenya a 'human rights' country through a firm commitment to a human rights culture.<sup>22</sup>

The upshot of the transformation is that whereas the past was characterised by despotism and failed state institutions, the present and the future ought to be defined by devolution of power as well as effective, transparent and accountable government. While the country's past is a picture of frustrated hopes, corruption, poor governance, and squandered opportunities, the future envisaged by the Constitution holds a promise of progress and stability founded on a commitment to constitutional values and principles. While the past political arrangement alienated, excluded or subjugated citizens, the present and the future should be characterised by inclusivity, public participation, human rights protection and citizen emancipation generally.

Eric Barendt argues that to understand the nature and scope of freedom of expression, one has to engage with its theoretical justifications.<sup>23</sup> This is because of the abstract nature of language of the law, which leaves a lot of questions unanswered. In addition, freedom of expression as a legal right draws its meaning in practical situations from a social and political context.<sup>24</sup> Thus, to understand the contours of freedom of expression necessarily requires a deep engagement in difficult questions of political philosophy.<sup>25</sup> Thus, before discussing the nature and scope of the right to freedom of expression as well as its role in Kenya's political transformation, this study dedicated space

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<sup>22</sup> See Justice Willy Mutunga's speech titled, 'The Vision of the 2010 Constitution of Kenya' delivered on the occasion of celebration of 200 years of Norwegian Constitution, Nairobi, and 19 May 2016 (describing Kenya under the 2010 Constitution as a 'human rights state.' See also the Constitution of Kenya, 2010, the preamble and article 10 (recognising human rights as a constitutional value), article 19 (making human rights the framework of government policy), 21 (4) requiring the state to ensure fulfillment of its international human rights obligations, article 51 (2) (b) requiring prisons to conform to international human rights standards, article 58 (requires that declaration of state of emergency must conform with human rights standards, article 59 (establishing a commission tasked with promotion human rights), 91 (1)(f) (requires political parties to promote human rights), article 131(2)(e) enjoins the President to promote human rights, article 238 (2) (b) (requires national security policies to conform to the utmost standards of human rights), article 244 (c) (requires the National Police Service to uphold human rights in training and operations), article 259 (requires courts to interpret the Constitution in manner that promotes human rights).

<sup>23</sup> Eric Barendt (2005) *Freedom of Speech*, Oxford University Press, p. 6.

<sup>24</sup> Ronald Dworkin, R (1977) *Taking Rights Seriously*: Cambridge: Harvard University Press.

<sup>25</sup> Eric Barendt (2005) *Freedom of Speech*, *supra*.

in chapter three to explore its various theoretical justifications in detail. It discussed truth, democracy, autonomy, human dignity, and self-fulfillment theories of freedom of expression, and examined how courts in Kenya have applied them to freedom of expression adjudication. In exploring how these theories resonate with the 2010 Constitution, the thesis noted that the courts have recognised democracy, human dignity and self-fulfillment as justifications for freedom of expression in Kenya. The thesis concluded that democracy emerges as the most cited justification for the protection of freedom of expression in Kenya. This can be explained by the fact that of all theoretical justifications for freedom of expression, democracy is a central value and principle of Kenya's Constitution.<sup>26</sup> In addition, democracy is indeed, one of the top goals of the transformation process.<sup>27</sup>

The study went on to investigate the nature, scope and components of the right to freedom of expression as well as its historical foundations in liberal political thought. It briefly traced the history of the modern concept of freedom of expression from its Western liberal political roots. Noting that the right to freedom of expression as understood in Kenya is founded on the Western conception; chapter four traced how different developments especially in the West shaped the modern understanding of the concept. These developments include the religious reformation in Europe, the ideas of the enlightenment period, the rise of parliamentary privilege in England, and its spread to the United States, the French and American revolutions in the eighteenth century as well as the emergence of modern international human rights system in response to the devastations of the Second World War.

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<sup>26</sup> See for example the Constitution of Kenya, 2010, article 10 which lists democracy and public participation among the values and principles of the Constitution. Independent offices and commissions created under article 15 of the Constitution are tasked with, among other things, the role of promoting the "observance by all State organs of democratic values and principles."

<sup>27</sup> Jill Cottrell & Yash Ghai 'Constitution Making and Democratisation in Kenya: 2000-2005,' (2007) 14 *Democratisation*, 1: DOI: 10.1080/13510340601024272 (arguing that democratisation was a central objective of Kenya's constitution making process. See also the preamble of the Constitution of Kenya, 2010.

Chapter four went on to show how the protection of freedom of expression in the bill of rights of the independence Constitution can be traced to Nigeria's independence bill of rights which in turn drew from the European Convention on Human rights and the Universal Declaration of Human Rights.<sup>28</sup> Thus, the formal protection of freedom of expression (and rights generally) in Kenya's independence Constitution can be seen as a product of British decolonisation process which fused the Westminster design of government with a bill of rights replicating the provisions of the European Convention on Human rights and the Universal Declaration of Human Rights.

It became clear that the concept of the right to freedom of expression under the 2010 Constitution can similarly be traced to Western liberal political thought. As a twenty-first century instrument, the study concludes, Kenya's Constitution especially the bill of rights is a product of global constitutionalism whose content derives from international human rights instruments such as the European Convention on Human Rights, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and recent domestic instruments such as the South Africa's bill of rights. In particular, the freedom of expression guarantee under article 33 of Kenya's Constitution combines the phrasing section 16 of South Africa's Constitution and article 19 of the International Covenant on Civil and Political Rights.

An analysis of Kenya's freedom of expression guarantee from a comparative perspective in chapter four reveals that it covers the freedom to impart or receive information of any kind regardless of the media used. Thus, the right protects the interests of both the speaker and the audience and supplements press freedom as well as the right of access to information. It protects the communication of information of various kinds including artistic expression, politics, scientific research, personal or private communication, and commentary on public affairs. It also covers the right to publish,

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<sup>28</sup> Christof Heyns, 'African Human Rights Law and the European Convention' (1995) 11 *South African Journal of Human Rights* 252, p. 254-255. See also Nsongurua J. Udombana, 'Mission Accomplished? An Impact Assessment of the UDHR in Africa,' (2008-2009) 30 *Hamline Journal of Public Law and Policy* 335, p. 335-336.

practice journalism and to receive information published by journalists, academic freedom including teaching, and religious discourse. The right also covers commercial advertising. Commercial advertising is however given lesser protection as suggested by the jurisprudence from various courts such as the Supreme Court of the United States, the Supreme Court of Canada, and the European Court of Human Rights and the free hand with which state agencies in Kenya interfere with it without attracting much resistance or protest.

The state's obligation to guarantee freedom of expression extends to expressions that may be regarded as deeply offensive or controversial. This was acknowledged by the High Court of Kenya in *Okiya Omtatah Okiiti v. Attorney General & 2 others*.<sup>29</sup> Indeed, controversial or unpopular expression requires more protection since uncontroversial expression would usually face little or no threats of censorship.<sup>30</sup> The Constitution of Kenya, however, specifically excludes hate speech, incitement to violence, propaganda for war, and vilification of others. Notably, unlike section 79 of the repealed Constitution, it does not admit the claw-back clauses that justified wide limitations on various grounds thereby severely negating the right.<sup>31</sup> This change suggests an intention for a departure from the previous weak protection to a more robust guarantee.<sup>32</sup> The study however pointed out that the definitional exclusions, especially hate speech and vilification

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<sup>29</sup> [2013] eKLR. The European Court of Human Rights in *Handyside v. the United Kingdom* (Application No. 5493/72), also held that the right to freedom of expression extends to speech that 'shock offend or disturb.'

<sup>30</sup> Larry Alexander, 'Is Freedom of Expression a Universal Right?' (2013) 50 *San Diego Law Review* 707, p. 709.

<sup>31</sup> Section 79 (1) (2) of the repealed Constitution of Kenya gave the state wide discretion to enact laws to restrict the freedom of expression in the interest of public safety, public policy, public morality and public order. It also allowed restrictions for purposes of protecting the rights, reputation, and freedoms of other people, or the integrity of telecommunications. In addition, public officers could be restricted from exercising freedom of expression for as long as such a restriction could be seen as 'justifiable in a democratic society.'

<sup>32</sup> The bill of rights under the previous Constitution of Kenya guaranteed rights, and then incorporated claw-back clauses that limited the rights. This attracted many criticisms as the claw-back clauses severely limited the enjoyment of the right. See for example the inability of the courts in the 1990s to protect the right of university lecturers to associate and form trade unions. Although the freedom of association protected the freedom of association including the right to form trade unions, the claw-back clause attaching to the freedom allowed the state to limit the rights on grounds such as the existence of other unions that applicants could join. See Korwa Adar, 'Human Rights and Academic Freedom in Kenya's Public Universities: The Case of the Universities Academic Staff Union (1999) 21 *Human Rights Quarterly* 179, p. 187.

of others, can be vague in practical situations as evidenced by recent hate speech prosecutions. Unless the contours of these exclusions are strictly clarified, they pose a threat to political expression and the right to freedom of expression generally.

It was also noted that the limitation clause under article 24 contemplates limitations of fundamental rights generally, including the freedom of expression. This means the Constitution validates restrictions beyond the exclusions stipulated under the freedom of expression guarantee in article 33 (2) for as long as the proportionality criteria under the limitation clause are satisfied. Thus, limitations premised on grounds such as national security, public morality, public safety, public order and the authority of the judiciary and integrity of the judicial process are valid provided they meet the proportionality criteria under the clause.<sup>33</sup> It is instructive to note that the High Court in *Coalition for Reform & Democracy (CORD), Kenya National Commission on Human Rights & Samuel Njuguna Ng'ang'a v Republic of Kenya & another*<sup>34</sup> emphasised that any limitation premised on a ground outside the grounds of hate speech, incitement to violence, propaganda for war, and vilification of others as contemplated under article 33(2) must be strictly justified. Thus, it can be concluded that any restrictions premised on the exclusions listed under article 33 (2) will be upheld readily for as long as it can be shown that the expression in question constitutes hate speech, incitement to violence, propaganda for war, and vilification of others. Restrictions beyond these grounds will be subjected to stricter scrutiny under the proportionality criteria provided for under article 24 as was analysed in detail in chapter six.<sup>35</sup>

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<sup>33</sup> These grounds for limitation are recognised and listed in article 20 of the International Covenant on Civil and Political Rights and article 10 (2) of the European Convention on Human Rights. Section 79 of the repealed Constitution of Kenya also listed the same grounds.

<sup>34</sup> [2015] eKLR.

<sup>35</sup> See article 24 (1): A right or fundamental freedom in the Bill of Rights may 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

Chapter four also dedicated space to highlight how the experiences, legal developments and the state's attitudes in various phases of the country's history have been unsupportive of political expression generally. It became clear that the unwillingness of the KANU regime in independent Kenya to embrace democracy and respect for human rights was quite often expressed through laws, attitudes and practices that suppressed freedom of expression.<sup>36</sup> It showed how the KANU repression and persecution of political dissidents and government critics highlighted above was largely connected to their political statements or publications that upset the state and the ruling elite.<sup>37</sup> At the same time, the state maintained a tight control over the airwaves, refusing to allow private radio and TV broadcasters until the 1990s.<sup>38</sup> This makes it clear that freedom of expression typifies the country's political struggles for democratisation and respect for human rights.<sup>39</sup>

Although the defeat of KANU in 2002 resulted in significant improvement in the freedom of expression situation in the country,<sup>40</sup> expression-unfriendly laws have remained unreformed. Similarly, in spite of the far-reaching legal reforms that have been going on inspired by the 2010 Constitution, freedom of expression restrictions remain largely unchanged. As a matter of fact, a few more controversial expressions-restricting laws have been enacted, triggering public discontent and litigation.<sup>41</sup> This situation is a stark contrast to the transformative aims of Kenya's Constitution and poses a threat to

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(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

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) may not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

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

(3) The State or a person seeking to justify a particular limitation must demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

<sup>36</sup> Makau Wa Mutua, 'Human Rights and State Despotism in Kenya: Institutional Problems,' *supra*.

<sup>37</sup> Charles Muiiru Ngugi, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya' *supra*, p. 228-234.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid*.

<sup>41</sup> See chapter four and five for details and examples.

these aspirations. The continued retention of pre-2010 laws, including some that date back to the colonial era and the enactment of new ones that undermine freedom of expression undercuts the Constitution's foundational values of freedom, democracy, transparency, accountability, and respect for human rights and dignity. This situation, the thesis concludes, suggests that political culture, which determines political responses and priorities, remains a continuing threat to freedom of expression in the new constitutional dispensation. The increased prosecution of government critics and social media enthusiasts on charges based on constitutionally doubtful pre-2010 (including colonial) laws after exposing the mistakes of security agencies in the wake of increased terror attacks in the country is proof that for as long as such laws remain in the books, they pose an enduring threat to freedom of expression and to constitutional values and aspirations.

Freedom of expression discourse is incomplete without an assessment of limitations. It is well settled that rights, including freedom of expression are not absolute. With the exception of a few non-derogable rights such as fair trial, protection from slavery, cruel, inhuman and degrading treatment,<sup>42</sup> they may be limited for purposes of securing certain countervailing values and interests such as national security, public order, public health, morality or the protection of the rights and reputation of others and the independence and authority of the judiciary. Freedom of expression discourses are preoccupied with the limitation of the right. This is because the guarantee, as noted above, not only protects uncontroversial speech, but also shocking, disturbing, or unpopular expression. The chief concern is how to strike the appropriate balance between permitted and prohibited expression. Thus, this thesis dedicated space to investigate freedom of expression restrictions and experiences in Kenya. Drawing from the theoretical values of freedom of expression developed in chapter three, chapter five examined freedom of expression restrictions with a focus on those that are grounded on rationales that have the

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<sup>42</sup> Article 25 lists the rights that are non-derogable in Kenya, and includes the right to *habeas Corpus*. See also article 4 (2) of the International Covenant on Civil and Political Rights. South Africa's Constitution and German Basic Law adds the right to human dignity to this list. See generally, H Steiner, P Alston, *et al International Human Rights in Context: Law, Politics, Morals*, 3<sup>rd</sup>Edn., (New York, Oxford University Press, 2007)

greatest adverse effects on political expression. These restrictions are those premised on national security and public order, the rights and reputation of others, and the authority and independence of the judiciary. Political expression generally refers to communication that relates to public affairs, governmental action or inaction, public officials, elections and political choice, and matters of public interest generally.<sup>43</sup>

In summary, some of the restrictions to political expression contained in Kenyan law include insult laws such as ‘improper use of telecommunications system,’ ‘undermining the authority of a public officer,’ hate speech, criminal libel and defamation of foreign princes. These laws have been used in the past to punish citizens who criticise the government, or expose the failings of government thus subjecting it and its officials to embarrassment. On the civil front, the right of public officers to claim hefty damages for defamation even where the defamatory allegations touch on matters of public interest remains a serious limitation on the freedom of political expression and media.

It became clear that most of the laws restricting political expression in Kenya emerged in response to crises such as the Mau Mau emergency in the 1950s, KANU’s single-party dictatorship, or panic kindled by contemporary transnational terrorism. In view of this, this thesis suggested that the distress during these periods divested the freedom of expression restrictions of objectivity as illustrated by the enactment of the constitutionally doubtful provisions of the Security Laws Amendment Act, 2014, which were later invalidated by the High Court in ensuing litigation.<sup>44</sup>

The thesis noted that balancing between permitted and prohibited speech is one of the most daunting tasks for any democratic society. There is always the risk of the balance tipping in the wrong direction with potentially devastating consequences.<sup>45</sup>

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<sup>43</sup> ‘Defining Defamation Principles on Freedom of Expression and Protection of Reputation INTERNATIONAL STANDARDS SERIES,’ London: ARTICLE 19, 2000:

<<https://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf>> accessed 20 May 2016.

<sup>44</sup> *CORD Case* [2015] eKLR.

<sup>45</sup> For example unbridled negative expression could incite hatred and possible violence and undermine peace, security and social cohesion. Censorship undermines democracy, alienates people from public affairs, and leads to lack of transparency and accountability in government resulting in corruption.

Therefore, a sound theory of limitation is necessary to strike a sound balance. It was concluded that whatever the justifications for freedom of expression limitations, restrictions must proceed from the standpoint that the protection of the right is the norm and limitations are the exception. In this connection, this study articulated the essential elements that a sound theory of freedom of expression limitations in the Kenyan context should exhibit. For instance, the theory must take into account the socio-political aspects that are peculiar to the country, the aspirations of its Constitution and people, and the fragility of its society and democracy. In particular, the theory must take into account the aspirations of the 2010 Constitution for a society undergirded by freedom, democracy, openness and respect for human rights and dignity. In addition, it should support the Constitution's vision for a culture of transparency, accountability and probity in public affairs as well as its commitment to the realisation of societal and individual potential. The theory should also be cognizant of the cycle of ethnic tensions, perennial violence and political instability that beleaguers the country, and the role of irresponsible exercise of freedom of expression in the menace. In short, the theory ought to be cognizant of the dual potential of freedom of expression in terms of its ability to foster democracy, social cohesion and development as well as its ability to undermine them if not exercised responsibly. Crucially, the theory should reconcile these conflicting consequences of freedom of expression so as to foster an environment in which the right is solidly protected in order to enhance its social and political values as articulated in this thesis while keeping negative forms of expression and their consequences in check.

Chapter five also demonstrated that the right to freedom of expression has always been and continue to be at the centre of Kenya's political struggles for freedom, rule of law, good governance and accountability, and respect for human rights. To achieve this, the chapter highlighted various examples of laws limiting political expression as well as criminal and constitutional litigation that illustrate the difficulty that plagues the balancing between the right on the one hand, and competing or countervailing state interests on the other. Thus, the thesis concludes that Kenya's quest for political freedom cannot be complete without an overhaul in the law, practices and attitudes surrounding the right.

It became clear that the 2010 Constitution has, in Kelsenian terms altered the *grundnorm* and reconfigured the philosophical underpinnings of the constitutional order. As an attempt to reverse past wrongs, the Constitution envisages widespread legal and institutional reforms to give effect to its letter and spirit. While the enactment of some laws is specifically mandated, there is a general call for adaptation and review of pre-2010 laws in order to bring them into conformity with the letter and spirit of the Constitution through both legislative and judicial means.<sup>46</sup> In spite of this, the pre-2010 freedom of expression limitations remain largely unreformed while new (and constitutionally doubtful) restrictions have continued to emerge. The judiciary has however taken steps to strike down laws that are inconsistent with the freedom of expression guarantee as shown in chapter four and five. While it is encouraging that the judiciary has on several occasions intervened to protect the right to freedom of expression against assaults, the continued retention of past repressive laws and the enactment of new expression-unfriendly ones constitute an enduring paradox that is untenable in the new constitutional dispensation.

The study concludes that a robust protection of the right to freedom of expression is indispensable to the success of the new constitutional dispensation. It showed that the right to freedom of expression must be a defining feature of Kenya's transformation project playing at least three roles. That is, first as legitimating factor; second as a facilitating factor; and third as a defence factor. As a legitimating factor, it was shown that freedom of expression typifies Kenya's political struggles in that past political repression took the form of its suppression. Laws that suppress freedom of expression were enacted and frequently applied against government critics. As a result, the law became a conspirator in the repressive scheme of the state. Thus, transformation in the new dispensation cannot be complete without a change in the laws that subvert freedom of expression and the democratic values of openness, transparency, and accountability of government. The framework of freedom of expression restrictions has in the past advanced repression and undermined democracy. Thus, reforms are necessary so as to

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<sup>46</sup> See the Constitution of Kenya, 2010, article 20 and section 7 of Sixth Schedule, for example.

sanctify it from the previous badge of repression and make it an agent of freedom, democracy and democratic values in the new dispensation. In other words, one way through which the new dispensation can break ranks with the past is through a robust protection of freedom of expression. This way, it was concluded in chapter six, freedom of expression becomes a legitimating factor for the new dispensation.

Second, as a facilitating factor, the thesis concludes that the success of the democratic system instituted under the 2010 Constitution will by and large depend on how seriously the right to freedom of expression is taken. It was noted that Kenya has a complex democratic system that places the people at its centre and mandates their participation not only in elections but in legislative and policy decision making, and governance generally. General elections for instance entail people electing candidates to fill six different positions on a single day of voting. The positions belong to two levels of government with divergent job descriptions. Effective citizen participation in such a complex system requires robust protection of freedom of expression as a precondition for robust public debate, free flow of information and informed choices. It was also argued in chapter six that the ultimate aim of democracy as a political system and a form of government is to facilitate an ideal environment in which there will be full realisation of human potential. As seen in chapter three, freedom of expression deserves protection for, among other reasons, its role in aiding the realisation of individual and societal self-fulfillment. It follows therefore that freedom of expression is the facilitating agent that aids the democratic processes as well as the realisation of individual and societal self-fulfillment as the ultimate goal of democracy.

Third, as a defence factor, it was noted in chapter two and six that the transformation envisaged in the Constitution has its threats. These threats include corruption and other forms of impropriety which are fostered by a lack of transparency and accountability in government. Thus, freedom of expression fosters and facilitates public debate that keeps government in check, thereby serving as a defender of the system.

### 7.3. A call for reform of freedom of expression law in Kenya

The upshot of the findings of this study is that a number of the freedom of expression restrictions contained in Kenyan law are at variance with the constitutional aspirations for political transformation. Their continued existence in the repertoire of the law as well as their application undercuts the spirit and aspirations of Kenya's 2010 Constitution. This contradictory situation is untenable in the new dispensation and the aspirations of the 2010 Constitution cannot be fully realised unless reforms are instituted. It is against this backdrop that this thesis offers a number of suggestions that are necessary so as to accord the freedom of expression legal framework with the letter and spirit of the Constitution.

There is need for a comprehensive review to assess the constitutional validity of all the laws that restrict or potentially restrict freedom of expression. This study has highlighted the laws that particularly limit political expression and pointed out where they undermine the spirit of the Constitution and its values. This study concluded that the right of citizens to criticise government and public officials is an inherent feature of democracy.<sup>47</sup> It follows that in the absence of the citizens' right to engage in unfettered public debate and criticise the government, democracy as a political system is severely negated. Thus, the state, the government and its organs and officials must be divested of the power to insulate themselves from criticism. In this regard, insult laws that protect public officials from criticism such as the offences of 'undermining the authority of a public officer,' and criminal libel should be repealed. As the High Court emphasised in *CORD case*, public officials offended by criticism on matters of public interest should have recourse in private law such as civil defamation rather than criminal law.<sup>48</sup> The deployment of public resources to prosecute critics of public officials and the government or to shield them from embarrassment resulting from their mistakes or misdoings clearly undermines

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<sup>47</sup> Australia for instance does not have a bill of rights. But the courts in Australia have held that since the constitution contemplates a representative democratic society, the guarantee of the right to freedom of expression is inherent or incidental. See for example *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106; and *Unions NSW v New South Wales* [2013] HCA 58.

<sup>48</sup> [2015] eKLR.

constitutional values. Thus, the repeal of these insult laws is both necessary and urgent to not only conform to the letter and spirit of the 2010 Constitution but also accord with modern trends in democratic societies as was noted in the thesis.<sup>49</sup>

The law of civil defamation also requires urgent attention especially as concerns matters of public interest. As noted above, the right of citizens to criticise and express displeasure on the conduct of the government and its officials is integral to the idea of democracy. Thus political expression or information that is critical of government and its organs, institutions or officers, government policy, governmental action or inaction, or that has a bearing on the electoral process, or other political processes ought to enjoy protection not only for the sake of the citizen's expression rights but also for the sake of safeguarding democratic values such as transparency, accountability, and good governance. Thus, there is an urgent need for reform of the law, as suggested in chapter five, to admit the defence of reasonable publication where a case concerns matters of public interest. The defence of reasonable publication would absolve a defendant from liability if it can be shown that first, the alleged defamation concern matters of public interest, and second, that the defendant took steps to verify the veracity of the statements.<sup>50</sup>

As was seen in chapter four and five, the award of hefty damages to public officials against individuals and the media has had and continues to have a chilling effect on freedom of political expression and media freedom.<sup>51</sup> This is because journalists and media houses choose to avoid exposing impropriety in fear of libel suits and subsequent orders to pay hefty damages. This in turn undermines the values of transparency and accountability in government, and offends the right to freedom of expression. Thus, it is

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<sup>49</sup> See 'Defining Defamation Principles on Freedom of Expression and Protection of Reputation,' *supra* (arguing that there is a trend around the world to move away from criminalisation of libel). See also *Cord Case supra*, suggesting that criminal sanctions for speech-related grievances are inappropriate where civil remedies are adequate)

<sup>50</sup> The reforms in Canada (Supreme Court in *Grant v Torstar* [2009] 3 SCR 640) and the United Kingdom (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 and section 4 of the Defamation Act, 2013) as highlighted in chapter five offers some useful lessons. These jurisdictions admit the defence of 'reasonable publication' or 'public interest' where the publication concerns a matter of public interest.

<sup>51</sup> As seen in chapter five, success in defending defamation suits is difficult and also costly.

recommended that damages payable to successful claimants should be capped by law for non-economic losses.<sup>52</sup> This will moderate the amount of awards in recognition of the right to freedom of expression and its value in a democratic society.<sup>53</sup>

It was noted that Kenya's libel law penalizes a defendant who pleads the defence of truth but fails to successfully establish it. The unsuccessful defendant is liable to pay aggravated damages as a penalty even in cases where the plaintiff is a public officer or where the alleged defamation touches on matters of public interest. This discourages defendants from proving the truth of their allegations, and further undermines constitutional values. Therefore, reform of defamation law is recommended with respect to libel cases concerning matters of public interest to remove aggravated damages in the list of remedies for defamation touching on matters of public interest. This is especially so given that quite often public officials have control over information held by the state while private parties including the media have little or no control or even access. It was emphasised that unfettered public debate on matters of public interest is crucial in a democracy. Thus, any law or practice that interferes with it such as the threat of aggravated damages is inimical to democracy and democratic culture and values.

Reforms in this fashion offer prospects for a sound balance between the competing interests of freedom of expression, transparency and accountability on the one hand, and the reputation of public officials on the other. As was noted in chapter five, the starting point is the recognition that the right to freedom of expression is the rule while limitations are the exceptions that must be strictly justified.

As the organ with the legislative mandate under the Constitution, Parliament is best placed to undertake the reforms suggested in this study. Thus, this thesis

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<sup>52</sup> Under Australia's Uniform Defamation Act, 2005, the maximum award recoverable as damages is capped as a means of checking huge awards.

<sup>53</sup> Section 16A of Kenya's Defamation Act, chapter 36 allows unfettered discretion to the courts to award damages as 'it deems just.' It also sets a lower limit for damages that may be awarded for alleged defamatory statements in respect of an offence punishable by death at Kenya shillings one million (USD 10000) and Kenya shillings four hundred thousand (USD4000) in respect of an offence punishable by a jail term of not less than three years.

underscores the need for legislative intervention to institute the needed reforms. It is, however, recognised that the legislative process is plagued with challenges. Matters receive priority in the legislative calendar depending on the political impetus. Political impetus to prioritise a matter depends on many factors including what is at stake politically and sometimes personal interest of the legislators. In the absence of sufficient impetus, reforms on an issue will not be prioritised regardless of how important it is. The fact that reforms on freedom of expression restrictions have not taken place in the post-2010 period despite glaring flaws pointed out in this thesis suggests a lack of political will to carry out reforms. The enactment of new laws having a negative impact on freedom of expression in the same period further suggests a political culture that is yet to fully appreciate the spirit and aspirations of the 2010 Constitution.

In view of this situation, it becomes apparent that the courts, particularly the superior courts of record, will bear the responsibility of articulating a sound theory of freedom of expression to guide the enjoyment of this right as noted above. The theory should clarify the contours of the right and its limitations grounded on various rationales. Such a balance is necessary because both the right to freedom of expression and the countervailing values and interests upon which limitations are based, are important. As shown in chapter six, the Constitution vests the courts with the responsibility of safeguarding fundamental rights and developing the law where it is deficient. Thus, the responsibility to develop a coherent theory of freedom of expression is well within the constitutional mandate of the courts. It is instructive to note, however, that the development of such a theory will take time and will have to wait for the appropriate opportunities to be presented through litigation.

There is also need for the formulation of policy guidelines to guide the Office of the Director of Public Prosecution (DPP) in making decisions on what expression-related complaints merit prosecution and which ones do not. As seen in this study, the law may proscribe certain conduct and prescribe punishment for violation. However, the decision of whether or not an alleged violation merits prosecution is largely for the law enforcers

such as the police and prosecutors to make.<sup>54</sup> These officers, it was noted, quite often are not concerned with theorising about the law and its fairness.<sup>55</sup> Their chief task is the enforcement of the law.<sup>56</sup> This leaves room for possible abuse. As it happened during the Moi era, prosecution processes were often used to harass government critics.<sup>57</sup> The same danger still lurks today as evidenced by the increased prosecution of government critics in the wake of increased terrorism and the embarrassment of prominent public officials as was seen in chapter four and five.<sup>58</sup> To insulate prosecution processes from such abuse, it is therefore necessary that clear policy guidelines should be developed to guide decisions on what expression-crimes merit prosecution and which ones do not. Complaints on commission of crimes are usually recorded by the National Police Service and the National Cohesion and Integration Commission in the case of hate speech. Prosecution is, however, the responsibility of the DPP.<sup>59</sup> Such policy guidelines recommended here will ensure objectivity of decisions on prosecution by excluding those that would undermine constitutional values and public interest generally, as well as those driven by malice. The formulation of such guidelines is well within the competence of the DPP since constitutionally, the office enjoys exclusive independence to decide on criminal

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<sup>54</sup> Article 159 (10) provides that “The Director of Public Prosecutions may not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, may not be under the direction or control of any person or authority.” On his part, the Inspector General of Police enjoys powers of investigation and enforcement of the law. Article 245 (4) provides that “...no person may give a direction to the Inspector-General with respect to: (a) the investigation of any particular offence or offences; (b) the enforcement of the law against any particular person or persons.” The implication of these provisions is that it is up to the police and the DPP to decide whether or not an alleged violation of law will be prosecuted or not. See also Thomas Emerson, ‘Towards a General Theory of the First Amendment,’ (1963) 72 *Yale Law Journal* 877, p. 881-882 (arguing that bureaucrats indeed determine whether or not prosecutions will be instituted and that the task is administrative in nature. The concern is not questions of theory of law such as whether the law is fair or whether its enforcement undercuts rights). See also Ronald Dworkin, (1986) *Law's Empire*. Cambridge, Massachusetts (arguing that decisions on law enforcement are not merely bureaucratic. They also entail a certain level of interpretation of the law)

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *We Lived to Tell the Nyayo House Story*’ (2003) *Friedrich-Ebert-Stiftung*, available at <http://library.fes.de/pdf-files/bueros/kenia/01828.pdf>. <Accessed 21 October 2015>.

<sup>58</sup> Complaints have recently arisen over a trend where the police have been summoning bloggers and social media enthusiasts who criticise the government. The police often prefer expression-related charges only to abandon the cases after causing a lot of anxiety to those arrested. See examples in chapter four and five.

<sup>59</sup> The Constitution of Kenya, 2010, article 159.

prosecutions.<sup>60</sup> The proposed guidelines will boost the credibility of criminal prosecutions especially in light of past history where they were used as a means of harassing government critics and members of the opposition.<sup>61</sup>

#### 7.4. Concluding remarks

This thesis has shown that Kenya's 2010 Constitution is a transformative instrument with grand ambitions to institute far-reaching political change in the country. It envisions a radical break from a politically repressive past, and mandates a momentous shift in the country's political configuration in terms of its governance structures and the equilibrium of power among state institutions. The change also touches on the normative arrangements, culture, attitudes and practices that surround politics and the exercise of public power. In particular, the Constitution sets out a catalogue of national values and principles to undergird the new dispensation. These values demand a strong commitment to ethics in public affairs, democracy and constitutionalism, equity and equality, inclusivity and non-discrimination, as well as a culture of respect for human rights and the rule of law.

The thesis has argued that for the envisaged transformation to succeed, a firm commitment to the right to freedom of expression is crucial. In other words, the anticipated change cannot be complete without fundamental reforms in the freedom of expression legal framework. This is because, first, as was shown in the thesis, freedom of expression typifies Kenya's political struggles in that political repression largely took the shape of laws, attitudes and practices that suppressed freedom of expression. Second, as the thesis argued, the Constitution creates a complex direct, representative and participatory

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<sup>60</sup> Ibid.

<sup>61</sup> See for example Korwa G. Adar and Isaac M Munyae, 'Human Rights Abuse in Kenya under Daniel arap Moi, 1978-2001,' *supra*. In July 2016, a court in Nairobi dismissed charges of hate speech brought against an opposition Member of Parliament terming the charges as "an abuse of the court process." The politician is a vocal critic of the government. The charges were based on statements alleged to have been made by the legislator more than a year before he was charged alongside others whose alleged offences were based on recent statements. See Maureen Kakah, 'Hate speech charges against Muthama dismissed,' *Daily Nation*, 28 July 2016, available on <http://www.nation.co.ke/news/Hate-speech-charges-against-Muthama-dismissed/1056-3319522-fsmm7t/index.html> <accessed 30 July 2016>.

democratic system, which makes citizen empowerment indispensable for its success. Third, the envisioned transformation faces real threats in the form of corruption, poor governance and frequent temptations by the ruling elite to ignore constitutionalism and the rule of law. It follows, therefore, that in Kenya's project of political transformation, freedom of expression is central as a legitimating factor, a facilitating agent, and a defender of the new dispensation.

The thesis concludes that while the Constitution has created a framework with the potential to support transformation, freedom of expression restrictions contained in statutes, English common law and judicial precedents undercut the protection of the right as well as the constitutional values of freedom, democracy, good governance, transparency and accountability of government. In other words, while some of these restrictions serve legitimate purposes, the justifiability and constitutional validity of others is suspect.<sup>62</sup> This situation, in turn, undermines the transformative aspirations of the 2010 Constitution. Therefore, there is need for reforms to conform the legal framework of freedom of expression to the letter and spirit of the Constitution so as to secure constitutional aspirations.

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<sup>62</sup> For example criminal libel and the offence of 'undermining the authority of a public officer,' and similar insult laws as well as the award of hefty damages for defamation of public officials.

## List of Instruments

### National (Kenya and other jurisdictions)

#### Australia

Uniform Defamation Act, 2005

#### India

Constitution of India

#### Kenya

Access to Information Act, 2016

Books and Newspapers Act, CAP 111

Constitution of Kenya Review Act, 2008

Constitution of Kenya, 2010

Defamation Act, CAP 36

Films and Stage Plays Act, CAP 222

Industrial Court Act, 2011

Judicature Act, CAP 8

Kenya Information and Communication (Amendment) Act, 2013

Kenya Information and Communication (Amendment) Act, Chapter 411 A

Media Act, 2012 (repealed)

Media Council Act, 2013

National Cohesion and Integration Act, 2008

National Flag, Emblems and Names, CAP 99

National Gender and Equality Commission Act, 2011

Official Secrets Act, CAP 187

Penal Code, CAP 63

Preservation of Public Security Act, CAP 57

Prevention of Terrorism Act, 2012

Public Order Act, CAP 56

Security Laws Amendment Act, 2014

Tobacco Control Act, 2012

Universities Act, 2012

## **Nigeria**

Constitution of Nigeria

## **South Africa**

Constitution of South Africa

Promotion of Equality and Prevention of Unfair & Discrimination Act, 2000

## **United Kingdom**

Coroners and Justice Act, 2009

Defamation Act, 2013

Human Rights Act, 1998

Public Order Act, 1986

Racial and Religious Hatred Act, 2006

Terrorism Act 2006

## United States

Constitution of the United States

### International (Treaties, Declarations and other Instruments)

African Charter on Democracy, Elections and Governance (2007)

African Charter on Human and People's Rights (1981) adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986

Declaration of Principles on Freedom of Expression in Africa (2002), adopted by the African Commission on Human and Peoples' Rights, at its 32nd Ordinary Session, 17 - 23 October, 2002: Banjul, The Gambia. G.A. res. 217A (III), U.N. Doc A/810 (1948).

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Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996).

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The European Convention on Human Rights, (*as amended by Protocols Nos. 11 and 14*) 4 November 1950, ETS 5.

United Nations Human Rights Committee (HRC), General comment no. 34, *Article 19, Freedoms of opinion and expression*, 12 September 2011, /U.N.Doc.CCPR/C/GC/34.

Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

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*Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106

*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1

*Unions NSW v New South Wales* [2013] HCA 58

#### Canada

*Edmonton Journal v Alberta (Attorney General)*, (1989) 2 SCR 1326.

*Ford v Quebec (AG)*, (1988) 2 S.C.R. 712

*Grant v Torstar* [2009] 3 SCR 640

*Irwin Toy Ltd v Quebec (AG)*, (1989) 1 S.C.R. 927

*MacDonald Inc. v Canada (Attorney General)*, (1994) 1 S.C.R. 311

*R. v Keegstra* (1996) 1 S.C.R. 458; (1990) 3 S.C.R. 697

*Rocket v Royal College of Dental Surgeons of Ontario*, (1990) 2 S.C.R. 232

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*Indian Express Newspapers v Union of India & Others*, (1986) AIR 515

*Kesavananda Bharati Sripadagalvaru and Others. v State of Kerala and Anor.*(1973) 4 SCC 225)

*Maneka Gandhi v Union of India*, (1978) AIR 597, 1978 SCR (2) 621.

*People's Union for Civil Liberties v Union of India*, (2003) 4 SCC 399

*Rajagopal and others vs. State of Tamil Nadu and Others, Petition (C) No. 422 of 1994, JT 1994 (6) SC 514*

*Romesh Thapar v State of Madras*, AIR 1950 SC 124.

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*Anarita Karimi Njeru v The Republic* (1976-1980) 1 KLR 1272

*Arthur Papa Odera v Peter O. Ekisa* (2016) eKLR

*Beatrice Wanjiku and another v Attorney General and another* (2012) eKLR

*Centre for Human Rights and Awareness v John Harun Mwau & 6 Others* Civil Appeal No. 74 & 82 of 2012; (2012) eKLR

*Chirau Ali Mwakwere v Robert Mabera & 4 others* (2012) eKLR

*Coalition for Reform & Democracy (CORD), Kenya National Commission on Human Rights & Samuel Njuguna Ng'ang'a v Republic of Kenya & another* (2015) eKLR.

*Commission for the Implementation of the Constitution v Attorney General & another* (2013) eKLR

*Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR

*Community Advocacy and Awareness Trust & 8 others v Attorney General* (2012) eKLR

*Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others* [2015] eKLR

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*Kamau Kuria v Attorney General*, (1989) 15 *Nairobi Law Monthly* 33

*Kenya Small Scale Farmers Forum & 6 Others vs Republic of Kenya & 2 Others* (2013) eKLR

*Kibaki v Moi* Election Petition No. 1 of 1998

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*Law Society of Kenya v Attorney General* (2016) eKLR

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*Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR (CAK)

*Mwaura & 2 others v Republic* Civil Appeal No. 5 of 2008

*Nairobi Law Monthly Limited v Kenya Electricity Generating Company Limited & 2 others* (2013) eKLR

*Nancy Makokha Baraza v Judicial Service Commission & 9 others* (2012) eKLR

*Nation Media Group Limited & 6 others v Attorney General & 9 others* (2016)

*Ndyanabo v Attorney General* (2001) EA 495

*Njoya and others v Attorney-General and others* (2004) 1 EA 194 (HCK)

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

*Okunda v Republic* (1970) EA 453

*Olum & anor v Attorney General* (2002) EA 508.

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*Brummer v Minister for Social Development* (2009) (II) BCLR 1075(CC)

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*Tinyefuza vs Attorney General of Uganda*, Petition No. 1 of 1997 (1997 UGCC 3).

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