

THE LIMITATION OF RIGHTS UNDER THE KENYAN CONSTITUTION

By

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DEDICATION

This dissertation is dedicated to my parents Prof. Tom Ojienda and Dr. Ruth Aura and my sisters Tracy Germaine and Tessy Aura and my friends Henry Opondo and Dan Okumu as they have been and continue to be my source of inspiration.

It is also dedicated to all the citizens of Kenya as we implement and enjoy the fundamental rights and freedoms enshrined in our Constitution 2010 with the greatest hope that freedom and liberation have finally come upon us with the dawn of Kenya's new era.

DECLARATION

I, ODHIAMBO BRIAN PATRICK, the undersigned, do declare that this dissertation is my original work, an honest and true effort of my personal research in substance and style except where stated otherwise in the acknowledgement or text. I further declare that the dissertation has never been presented in whole or part for an award in any Academic institution, or institution at all.

DATED at the UNIVERSITY OF PRETORIA this Day of 2015

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ACRONYMS

African Charter on Human and Peoples Rights	<i>ACHPR</i>
Broadcast Signal Distributors	<i>BSD</i>
Communications Commission of Kenya	<i>CCK</i>
Human Immunodeficiency Virus	<i>HIV</i>
Human Rights Committee	<i>HRC</i>
International Covenant for Civil and Political Rights	<i>ICCPR</i>
International Covenant on Economic, Social and Cultural Rights	<i>ICESCR</i>
International Labour Organization	<i>ILO</i>
Organization of African Unity	<i>OAU</i>
South African Airways	<i>SAA</i>
Seventh Day Adventist	<i>SDA</i>
Security Law (Amendment) Act	<i>SLAA</i>
United Nations	<i>UN</i>

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ABSTRACT

This study set out to assess the provisions of Kenya's 2010 Constitutional framework in providing safeguards to the limitation of rights and fundamental freedoms vis-à-vis the international legal instruments protecting human rights. Concepts and purpose of limitation of fundamental rights and freedoms and notes that underlie limitation of rights is discussed. Limitation must take into account the protection of public interest and the rights of individuals. The structures of limitation clause are in general form and limit all set of rights or in specific form which limits specific rights. ICCPR does not have a general limitation clause and instead opts for a right-specific limitation clause. The limitation clause in CESCR allows for rights to be limited along the lines of progressive realization and not of immediate application since the rights are resource based. The African Charter embodies three types of limitations: right specific norm-based limitation; right specific claw-back clauses and the general limitation clause. Kenya's 2010 Constitution uses a single clause in limiting the rights under article 24 and grounded on article 24(1). The study reveals that in order to limit rights, the state must balance the rights and interests of the individual with that of the state; the limiting measures taken should not outweigh the actual circumstances necessitating the restriction; be non-discriminatory; and not make a country avoid her obligation under international law.

CHAPTER ONE – GENERAL INTRODUCTION

1.1 Introduction

The acknowledgment and protection of human rights has taken centre stage of the world and no state or government in this contemporary world would consider human rights as a bad concept or an unpopular theme.¹ In spite of this, it sparks a debate over what rights ought to be protected and in what manner thus resulting to justifiable criteria for the limitation of rights.

The legal protection of human rights undergoes its classification into social, economic, cultural and political rights. Civil and political rights protect the individual from arbitrary political power when individuals are exercising the political rights while social, economic and cultural rights require the state to ensure people share wealth of the country and participate in their social and cultural life.² Therefore, the importance of human right partly lies on how individuals interact with other people at all levels of the society in relation to equality, tolerance and respect in order to lessen friction in the society.

The idea of lessening conflict within a society is backed up by the mandate of a state in limiting the rights of an individual if they prejudice the rights of another since the state acts as a duty bearer of rights. According to Alschuler,³ the state has the authority to limit rights bargained by the society upon appropriate legal criteria that meets the general advantage of the public. Blackstone views on limitations is similar to the Hobbesian principle, whereby the main aim of the society is to protect an individual's enjoyment of right based on prime end of human law to preserve and regulate rights of beings.⁴

The idea behind limitations is that a right can be optimized as a matter of degree and not a fixated point: “a right is a ground in practical reasoning and not the conclusion of a further

¹ Zhipeng He, 'The derogation of human rights: Reasons, purposes and limits' (2003)

² PLO Lumumba & Franceschi Lewis, *The Constitution of Kenya, 2010: An introductory commentary* (2014)

³ W Alschuler Albert, 'Rediscovering Blackstone', (1996) 1 *Penn Law Review* Vol.145 at http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3469&context=penn_law_review (Accessed 5th November 2014), also see Kiss, *Permissible Limitations on Rights* in Louis Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political rights* (1981) 290: “Every legal system has its own express or implied limitation clauses for balancing the right of the individual against the demands of a society.”

⁴ PLO Lumumba & Franceschi Lewis (n 2 above) 143

debate hence no reason for narrowly defining the scope of interest protected as a right.”⁵ Therefore, the optimization of a right maybe maximized or minimized subject to its value (utility or happiness); it is value which is maximized or minimized and not the right. Moreover, for a right to be suitably a right under the scope of limitation; it has to undergo the delimitation process for its scope and content to be properly constructed. Thus, creation of a limitation clause in a Constitution sets out conditions aforementioned to which limitation of rights will be assessed.⁶

Limitation clause limits guaranteed rights, therefore for it to be operational; the rights set forward in the national constitution ought to be ascertainable. The distinct feature between a limitation clause and a derogation clause is its operation in situation unrelated to war or state of emergency unlike the latter.⁷ Moreover, a limitation clause further specifies the manner in which rights ought to be restricted: “restrictions of rights are to be done through enacting a law and the said law must be reasonable or necessary to accomplish a specified goal.”⁸ Therefore it is appropriate for national constitutions to guarantee certain rights and attach reasonable limitation to them subject to creating a balance between the interests of the individual with that of state when conflicts crop up.

Consequently, human rights in national constitutions ought to be entrenched in the bill of rights for the aforementioned limitation to apply. The bill of rights seems to be an essential requirement in setting up a framework for the enjoyment and protection of rights and freedom and it is necessary to any given state that seeks to further protect and promote human rights.⁹

1.2 Background of the study

This study is aimed at highlighting and analysing the distinct features that arise from the framing of the limitation clauses in the repealed constitution of Kenya and the current

⁵ CN Webber Gregoire, *The Negotiable Constitution: On the limitation of rights* (2009)

⁶ CN Webber Gregoire (n 5 above)

⁷ Abiola Sarah, ‘Limitation clauses in national constitutions and international human rights documents: Scope and judicial interpretation’, Harvard University, 26th April 2010 at <https://litigation-essentials.lexisnexis.com/.../app?...31...Int'l+L...Pol.+535> (Accessed 6 November 2014)

⁸ Abiola Sarah (n7 above) 2, also see Rautenbach, *General Provisions of the South African Bill of Rights: the provisions of a constitution concerning the way and conditions in which rights are limited determine the effectiveness of the protection of human rights and for this reason, these provisions are often contentious provisions in a bill of rights.*

⁹ Hugo Black, *The Bill of Rights* (1960) 35 *NYU Law Review* 865-869: Hugo defines a bill of right as a document setting forth the liberties of the people, also see *Hamil v Hawks C.C.A 58 F.2d,47* the bill of rights was defined as a portion of the Constitution guaranteeing rights and privileges of individuals

constitution of Kenya. The Bill of Rights under the repealed constitution of Kenya was subject to claw-back clauses which caused interference and confusion with the exercise of rights protected in the constitution.¹⁰ Furthermore, Lumumba states that the claw-back clauses watered down the essence of provisions of fundamental rights and freedoms.¹¹ Limitations were delineated in terms that highly prioritized public interest through presence of subsequent sections in the constitution that outlined the content of each right and circumstances of its limitation. The result of claw-back clauses was erosion of the content of rights thus leading to creation of exceptions to rights rather than protection to them.¹² Moreover the limitations were subject to rights of civil and political nature due to the limited scope on the nature of rights the constitution seemed to protect.

By contrast, the Bill of Rights in the Kenya's 2010 Constitution makes use of a single clause in explicitly identifying the limitation of rights under article 24.¹³ This represents a huge step forward in the protection of rights compared to its predecessor reason being, a comprehensive limitation clause that takes into account socio-economic rights that were hitherto absent.¹⁴ Moreover the current constitution categorically outlines rights that are not subject to limitation i.e. right to fair trial; right to order of habeas corpus; torture, cruel, inhuman or degrading punishment; and slavery.¹⁵ Furthermore, limitation of rights under this dispensation prohibits limitation by extra-judicial procedures that would negate the protection of fundamental rights and freedoms.¹⁶

Based on the distinct positions in the repealed constitution of Kenya and the current constitution of Kenya, this study scrutinizes the aspect of limitation of rights with an attempt to pin-point a suitable standard in limiting rights with minimal negation to the human rights discourse.

¹⁰ Mbondenyei et al, *The New Constitution of Kenya: Principles, Government and Human Rights*, LawAfrica Publishing Ltd, 2014

¹¹ PLO Lumumba & Franceschi Lewis (n 2 above) 144

¹² KNCHR, *Making the bill of rights operational: Principles, legal and administrative priorities and considerations*, October 2011 at

<http://www.knchr.org/Portals/O/Reports/MAKING THE BILL OF RIGHTS Operational.pdf> (Accessed 3 November 2014)

¹³ Waruguru Kaguongo, 'Introductory note on Kenya' at

http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf (Accessed on 5 November 2014)

¹⁴ PLO Lumumba & Franceschi Lewis (n 2 above)

¹⁵ Article 25, Constitution of Kenya, 2010

¹⁶ Mbondenyei et al (n 10 above)

1.3 Conceptual framework

This study is premised on the models of limitation of rights, which explores jurisprudential assumptions within judiciaries and academia with the aim of illustrating a suitable approach to limiting rights. The study on limitations outlines rights as not being absolute but rather subject to contemplated limitations as advanced by several scholars including, Gregoire Webber, R. Alexy and D.M.Beatty, who posit that limitation of rights should be subject to reasonable causes through legislation in demonstrably justifiable free and democratic society.¹⁷ Furthermore the limitation clause is premised on democracy in a society for the purposes of evaluating the validity of what is suitable in the public interest.¹⁸ The values underpinning a free and democratic society as the ultimate standard for interpreting the limitation clause ought to enhance the exercising of rights by both the individual and the society at large.¹⁹

According to Beatty,²⁰ it is suitable to adopt the principle of proportionality where the limitation of rights is subject to social science and statistical evidence. Reason behind her analogy is that the principle of proportionality is not self-enforcing rather it provides a framework that structures the analysis to be performed. Therefore it is not a mind-numbing framework since limitations are based on a factual basis and not value of a right. On the other hand, Alexy disputes her concept and claims that the principle of proportionality ought to be influenced both by facts and value since these two elements to him cannot be separated.²¹

The inquiry to the limitation clause is by its very nature a fact-specific inquiry as established by the Supreme Court of Canada in the case: *MacDonald v Canada* that the validity of rights limitation ought to be established with statistical evidence and social practices i.e. commission reports; experience of other countries; expert witness reports.²²

¹⁷ CN Webber Gregoire (n 5 above) 55-87: The considerations taken into account under the principle of received approach to the limitation of rights, also see Beatty M David, Ultimate rule of law (2004) 98.

¹⁸ This approach has been taken by the South African bill of rights, New Zealand bill of rights, the Canadian Charter and the Legislative of rights in Australia.

¹⁹KNCHR (n 12 above): The criteria suitable for codifying the limitation clause would the Canadian jurisprudence in *R v Oakes*, whereby the Court interpreted the limitation clause to be based on reasonable limitations taking account of the values underpinning a free democratic society i.e. respect for human dignity; commitment to social justice and equality; respect for group identity and cultural values; faith in political and social institutions.

²⁰ Beatty M David, Ultimate rule of law (2004) 98

²¹ CN Webber Gregoire (n 5 above) 78

²² CN Webber Gregoire (n 5 above) 81

Though limitation clauses provide direction on the mode of justifying rights limitation, it is important to assess the balance between the harm and benefit of the limitation. As a result this study will assess Kenya's constitutional limitations with a purpose of identifying whether the limitation clause is in consonance with the international standards and principles protecting human rights.

1.4 Statement of the problem

The limitation clause acts as contentious provision on human rights since it seeks to curtail the exercise of rights guaranteed in a national constitution. In this regard, while referring to Kenya's repealed constitution, Mutakha notes that the problems relating to the protection of human rights in Kenya stems from the structure of limiting rights.²³ Unlike Kenya's 2010 Constitution, Kenya's repealed Constitution lacked a general limitation clause and as a result, the limitation of rights was only qualified if it was in public interest.²⁴

Overall, constitutional control is achieved by providing a general limitation clause but the task as a rule is pursued through legislation.²⁵ The limitation clause under Kenya's 2010 Constitution permits limitation on only certain constitutionally recognized grounds.²⁶ Moreover, the constitution is laudable for providing a general limitation clause with qualifications which not only limits rights but also the power to limit rights.²⁷ Stemming from this provision is requirement that imposes a duty on the state or a person who wants to impose limitation to demonstrate to the court or a tribunal that they have complied or satisfied conditions set for such an exercise. Kenya seems to have undergone a progressive step towards human rights based on the changes made in its constitutional dispensation. In spite of Kenya's 2010 Constitution offering a better framework to limitation of rights there are still issues that need to be addressed pertaining to human rights. The question therefore remains whether Kenya's 2010 constitution offers a detailed effective approach to the the limitation of rights vis-à-vis the human rights discourse.

²³Mutakha Kangu, 'The theory and design of limitation of fundamental rights and freedoms' (2008) 1 *The Law Society of Kenya Journal*

²⁴Section 70, repealed Kenyan constitution

²⁵ Article 94(1), Constitution of Kenya: The legislative powers are vested in parliament.

²⁶Article 24, Constitution of Kenya, 2010

²⁷Article 24(3), Constitution of Kenya, 2010, also see Reaume G. Denise, Limitation on constitutional rights: The logic of proportionality, Legal research paper series Paper no. 26/2009' at <http://ssrn.com/abstract=1463853> (Accessed on 11th November 2014): "There is no doubt about the need to limit rights and the necessity to limit the power to limit rights."

1.5 Objective of the study

1.5.1 Broad Objective

The broad objective of this study is assessing Kenya's 2010 Constitutional framework in providing safeguards to the limitation of rights and fundamental freedoms vis-à-vis the international legal instruments protecting human rights.

1.5.2 Specific objectives

- a) The study is guided by the following specific objectives
- b) To establish the concepts and principles underlying the limitation of rights.
- c) To assess the extent to which the Kenya's 2010 Constitution provides a proper formula in limiting rights.
- d) To assess Kenya's limitation clause vis-à-vis the international instruments protecting human rights.

1.6 Key research question

- a) Does Kenya's 2010 constitution approach the limitation of rights appropriately?
- b) What principles underlie the limitation of rights?
- c) What differences are met towards the limitation of rights under Kenya's constitutional dispensation?
- d) What reforms ought to be considered in Kenya's 2010 constitutional framework to enhance the protection of rights vis-à-vis the human rights discourse?

1.7 Significance of the study

This study will be useful to legal scholars for it shed lights on the jurisprudential principles underlying the limitation of rights with a purpose of reaffirming what entails a proper approach towards it. This research will identify the loopholes in limitation of rights in the Kenyan constitutional dispensation with a view of integrating practices from other countries to address them. As a result, policy makers may find the research relevant in making appropriate limitation to rights without defeating the essential purpose of rights.

1.8 Research Methodology

This is a desk and library based research study that relied mainly on published and unpublished materials. Materials on international, regional and national legal and policy frameworks in Kenya were examined and analysed. The method was also used to review the

national government position papers, reports to the various human rights monitoring bodies, Non-Governmental Organisation reports and publications. Review of books, articles and journals in the subject area was also undertaken through this method as well as analysis of the case law. Internet sources were also used to access some selected journals, articles and reports from international organisations. Some case law and research papers were also accessed through the internet.

1.9 Chapter Outline

The study is divided into five chapters as follows:

Chapter one contains the proposal to the study which highlights the objectives of the study; and the research methodology.

Chapter two introduces the concept and purpose of limitation of fundamental rights and freedoms. It notes that: limitations take into account the protection of public interest and the rights of individuals. The structure of limitation clause is usually in general form and limits all set of rights or in specific form which limits specific rights. This chapter is premised on jurisprudential works of various scholars and judicial reviews relevant to the study on limitation of rights.

Chapter three contains an analysis of the International and regional human rights instrument more specifically the ICCPR, the ICESCR and the African Charter. The main aim is to identify the nature and scope of limitation under these legislative instruments. It analyses how the limitation clauses in the ICCPR, the ICESCR and the African Charter are structured. Analysis is done to highlight the extent to which rights can be limited and the impacts of such limitations. Further, a discussion is going to be conducted to show how states are made to comply with the provisions of such legislative instruments.

Chapter four analyses the nature and structure of the limitations imposed on the fundamental rights and freedoms in the Kenyan Constitution 2010. Here, the aim is to reveal how Kenya implements the provisions of international and regional human rights frameworks - the ICCPR, the ICESCR and the African Charter to limit rights within the Constitution. Further, the objective of this chapter is to show the manner in which the courts in Kenya have interpreted the provisions of the bill of rights and the extent to which Kenya has been allowed to restrict such rights and fundamental freedoms.

Chapter Five provides a general conclusion and determination on the whole dissertation to highlight whether the objectives of the study have been met and to what extent. It serves as a conclusive summary of all the chapters of the thesis.

CHAPTER TWO - CONCEPT OF THE LIMITATION OF RIGHTS AND THE PRINCIPLES UNDERLYING THE FRAMING OF LIMITATION CLAUSES

2.1 Introduction

As discussed in the previous chapter, the state has the authority to limit rights bargained by the society upon appropriate legal criteria that meets the general advantage of the public. The aim of the society is to protect an individual's enjoyment of the right based on prime end of human rights law to preserve and regulate rights of others. The creation of a limitation clause in a Constitution sets out conditions upon which limitation of rights must be assessed. This chapter therefore is focused to expound and analyze the concepts and principles that underlie the limitation of rights. It begins by discussing, in detail, the mechanism of limiting rights and freedoms focusing on the abstract methods of restraining such rights. After explaining this concept, it then analyzes the approach of a general limitation clause, where the objective is to find out how the limitation clauses are interpreted in various laws. It also looks at the features of general limitation clauses and the principles that belie them.

It is important to discuss the application and interpretation of the general limitation clause and this may be achieved through making distinctive comparison between the two methodological methods of limitation. In light of the above, this classification situates a detailed analysis of what constitutes an ideal limitation in the modern Bill of Rights.

2.2 Purpose of limiting rights

The quarrelsome nature of man cannot allow for his peaceful co-existence with the rest of his kind without setting up laws that limit his personal rights.²⁸ The Bill of rights takes into account the protection of public interest and the rights of individuals and thus strikes a balance by making it possible for the authorities to limit rights under specified circumstances.²⁹ Usually the limitations in the Bill of Rights are in form of general limitation clauses applicable to all set of rights or specific limitation clauses applicable to specific rights.³⁰ Therefore it is safe to say that the purpose of limiting rights is to enable the self-preservation of mankind in peace and order.

²⁸ Thomas Hobbes, Social contract

²⁹ IM Rautenbach & EFJ Malherbe, Constitutional law, (2008) 342

³⁰ IM Rautenbach & EFJ (n 29 above) 343

2.3 Concept of limitation of rights

Allowing rights to be restricted is neither new nor wrong but it is in cognizance with the fact that not all rights are absolute. Both regional and international human rights instruments ensure that rights are balanced and limited against other protected rights, values and communal needs. As a result, it is necessary to establish suitable contemporary techniques that can be used to limit right within a mode which best ensures it limits both the rights and the power to limit those rights.

In light of the above, through the test of proportionality it is easier to identify the concepts that come to play in order to establish an acceptable harm done by the law and the benefits it is designed to achieve. The following concepts to be discussed include: *nature of the right; importance of purpose of the limitation; nature and extent of the limitation; relation between the limitation and its purpose; and the less restrictive means to achieve the purpose.*

2.3.1 Nature of the rights

Under this principle, limitations of rights are based on the weight rights hold and this makes it difficult to justify the infringement of a right that weighs more than a lesser right. In this case, the catch lies on assessing the importance of a certain right in the overall constitutional scheme in order to justify its limitation. A South African case illustrating this is *S v Makwanyane*.³¹ Brief facts of the case is, the accused persons were convicted in the Witwatersrand Local Division of the Supreme Court on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances. They were sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts. They appealed to the Appellate Division of the Supreme Court against the convictions and sentences. The Appellate Division dismissed the appeals against the convictions and came to the conclusion that the circumstances of the murders were such that the accused should receive the heaviest sentence permissible according to law as stipulated under section 277(1) (a) of the Criminal Procedure Act 51 of 1977 that prescribes for death penalty. When the matter was referred to the Constitutional Court for interpretation on the constitutionality of the death penalty, the Court held that the death penalty was inconsistent

³¹ Case No. CCT/3/94

with the commitment to human rights expressed in the Interim Constitution of South Africa. Justice A. Chaskalson, President of the Constitutional Court posited as follows³²:

“The rights to life and dignity are the most important of all human rights and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the state in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.”

In essence the right to life and the right to dignity acted as the base of all other human rights in that in their absence all other human rights automatically cripple. Therefore the death penalty in this instance was not a reasonable measure in limiting both the right to life and dignity of an individual.³³

Moreover, it is important for the laws on limitation to draw a distinction between the objective and subjective contents of a right.³⁴ The objective content refers to the values and practices that are typical of a free, democratic, and constitutional state. If this essence of the objective content of a right is negated, the objective content is lost. The subjective content of a right refers to those values and practices which particular individuals and groups enjoy. Once they are barred from enjoying such rights as a consequence of limitation, the essence of the subjective content of the right is lost.³⁵

2.3.2 Importance of the purpose of the limitation

Every measure of a limitation ought to serve a specific purpose that will appear reasonable to the citizens of a state due to compelling circumstances. Consequently the moral preference of a specified community fails to qualify as one of the justifiable grounds for limiting rights of individuals based on what only constitutes positive cultural practices even if the right to culture is invoked.³⁶

³² Case No. CCT/3/94 Para 144

³³ Iain Currie & Johan De Waal, *The Bill of Rights Handbook*, (2005) 178-179

³⁴ Gerhard Erasmus, *Limitation And Suspension in Dawid Van Wyk et al, Rights and Constitutionalism: The New South African Constitutional Legal Order*, (1994)

³⁵ Gerhard Erasmus (n 34 above) 650

³⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)* Para 37

Therefore the question that may arise would be what purposes should a court consider as a justifiable ground of limitation? In answering this, the ideal approach would be for the court to subject the purposes to the rule of judicial notice. It is through judicial notice that the purposes serving as important object of government may be authoritatively attested and hence cannot be reasonably doubted. Such purposes may include: protection of the administration of justice; protection of rights of others; compliance with constitutional obligations; prevention of illegal entry to a country; and complying with a states international obligation.³⁷

Similar to the above, is the stricter test that addresses the issue of limiting illimitable rights that cannot be subjected to the laws of general application other than legal rules laid down in the constitution and the Bill of Rights.³⁸ Limiting illimitable rights is usually through interpretive clauses subject to strict scrutiny review.³⁹ The notion of strict scrutiny arises from equal protection jurisprudence, where its application is based on legislations involving nationality or basic human rights; intermediate review (usually consists of legislations pertaining to gender, alienage and illegitimacy); and rationality review (for all general legislations).⁴⁰ Therefore for a law limiting a right to be justifiable, it has to show that a compelling state interest is involved and secondly, the said law was narrowly tailored to serve that interest.⁴¹

2.3.3 Nature and extent of the limitation

Great importance lies in assessing the manner in which limitation affect the exercise of rights. The reason behind this is that the limitation should not be more excessive than what is warranted by the purpose that the limitation seeks to achieve. A good example would be assessing the harm the death penalty would have if it were used to achieve deterrence and the prevention of crimes; yes it would have achieved one purpose but fails to achieve the other due to its irreparable effect towards the right to life and the right to dignity.⁴²

³⁷ Iain Currie & Johan De Waal (n 33 above) 180-181

³⁸ Lourens Du Plessis & Hugh Corder, *Understanding South Africa's Transitional Bill of Rights*, (1994) 126

³⁹ Lourens Du Plessis & Hugh Corder (n 38 above)

⁴⁰ Lourens Du Plessis & Hugh Corder (n 38 above) 127

⁴¹ Lourens Du Plessis & Hugh Corder (n 38 above)

⁴² *S v Manamela 2000 (3) SA 1 (CC)* Para 34

2.3.4 The relation between the limitation and its purpose

Proportionality has to lie between the harm done by the limitation and the beneficial purpose that the said law is meant to achieve. If the said law fails to serve the desired purpose it may not be termed as a reasonable limitation to right. The death penalty would make a good example in this point, since it is meant to further deter and prevent crime, it however fails to achieve the goal of deterrence (as aforementioned) and it ends up putting the lives of people at a stake based on a mere possibility of good arising from it.⁴³

2.3.5 Less restrictive means to achieve the purpose

The purpose of a limitation fails the test of proportionality if there is the presence of other means to achieve the same ends with the limitation with or without restricting the rights in a minimal manner. Therefore the presence of a less restrictive means (but equally effective) would act as suitable alternative to achieve the same intended purpose as the prior limitation.⁴⁴

2.4 Models of limitation

The limitation of rights may be through two models namely, an approach that does not have a stand-alone limitation and the approach that has a general limitation clause-it is through this classification that one can be able to identify the distinctive elements of a particular model of limitation.

2.4.1 The approach that does not have a stand-alone limitation clause

This model of limitation adopts a haphazard approach towards limiting its rights. It lacks consistency in its limitation hence some of its rights may be subject to detailed limitations while other may lack a scope of limitation.⁴⁵

However the problem with this approach is that its interpretation highly depends on the activism of the state organs in setting up justifiable limitation grounds.⁴⁶ It is a matter of fact that state organs under this circumstance may easily abuse their power to limit rights since

⁴³ *S v Makwanyane 1995 (3) SA 391 (CC)* Para 184

⁴⁴ Iain Currie & Johan De Waal (n 33 above) 176

⁴⁵ S Andrew Butler, Limiting rights at <http://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/pdf/vol-33-2002/issues-3-4/butler.pdf>. (Accessed on 15th March 2015)

⁴⁶ S Andrew Butler (n 45 above) 540

they have the free rein to abrogate rights in a manner they like without justifying their compellable reasons.⁴⁷

For instance, the International Covenant on Civil and Political Rights (ICCPR), lacks a general limitation clause, but rather adopts this model of outlining the rights and then assign a particular limitation clause to each of the rights provided. This pattern is similar to that of Kenya's Repealed Constitution, the Namibian Constitution and The Zimbabwean Constitution.

2.4.2 The approach that has a general limitation clause

In contrast to the first model, the second approach takes cognizance of the fact that limitations are part and parcel of the primary function and purpose of declared rights. As a result, possibilities of limiting rights become widely uncontested in light of the impossibility to exercise all conceivable rights without societal conflicts emerging.⁴⁸

Rights under this approach function within a wider reality that result to striking a balance between competing individual interest vis-à-vis general societal interest with a purpose of justifying the exercise of fundamental rights in a limited or unlimited state.⁴⁹ Therefore with this demystification, the answer lies not in the complete negation of the possibility of limitations but rather in the manner which fundamental rights are responsibly limited.⁵⁰

In light of the above, most modern Bill of Rights adopt this approach by explicitly providing for limitations through a general limitation clause applying to all rights and specific limitation clauses applying to certain rights.⁵¹ Therefore it is of relevance to expound on this second model of limitation as to what constitutes a general limitation clause under various sub-topics.

⁴⁷ Danwood Mzikenge Chirwa, Human Rights under the Malawian constitution, 2011

⁴⁸ IM Rautenbach & EFJ Malherbe, General provisions of the South African Bill of Rights, 81

⁴⁹ Eugene Gressman, "Bicentennializing freedom of expression," (1990) 20 *Seton Hall Law Review* 378, 387

⁵⁰ Van Der Schyff, Limitation of rights: A study of the European Convention on Human Rights and the South African Bill of Rights, 2005

⁵¹ The German Bill of Rights; the South African Bill of rights; the Canadian Bill of Rights and Kenya's 2010 Bill of rights contain both general and specific limitation clauses.

2.5 Features of a general limitation clause

The idea behind phrasing a limitation clause as ‘general’ is in light of its application to some set of rights in the Bill of Rights that may be limited in the same set of criteria.⁵² For instance article 24 of the Kenyan 2010 Constitution, makes provision of limitations of rights and fundamental freedoms where such limitations is permissible by law, reasonable and justifiable in a democratic society based on human dignity, equality and freedom. To this end the general limitation clause acts as a key provision in interpreting the Bill of Rights through two justifiable criteria: an interpretation through the laws of general application and the requirement that the limitation clause ought to be reasonable and justifiable within an open and democratic society founded on the principles of human dignity, freedom and equality.⁵³

2.5.1 The requirement of interpretation through the Laws of general application

The laws of general application embodies the concepts of rule of law in that it takes into consideration what powers a state organ derives from the law of limitation and whether the actions of the said state organ was lawfully authorized or not. A South African case which illustrates this is *August v Electoral Commission*⁵⁴ where the court held that the action of the Electoral Commission stripping the prisoners off their right to vote did not qualify as a justifiable action since the commissions acted beyond its powers. The Court was of the view that in absence of a disqualifying legislative provision, it was not possible for respondents to seek to justify the limitation of prisoner’s rights to vote in terms of section 36 of the South African Constitution as there was no law of general application upon which they could rely on.

Also the form of law that qualifies as the ‘laws of general application’ matters and from a holistic interpretation, it is safe to say that the term ‘law’ as phrased in the Bill of Rights connotes to all forms of legislations as does customary law and common law.⁵⁵ A South African case that illustrates this is *Larbi-Odam v MEC for Education*⁵⁶ in which the Constitutional Court held that subordinate legislation pertaining to education and that applied to all South African educators qualified as laws of general application. Therefore, a mere policy or practice of state organs does not qualify as a form of law of general application as

⁵² Iain Currie & Johan De Waal (n 33 above) 165

⁵³ Iain Currie & Johan De Waal (n 33 above), see also article 24 of Kenya’s 2010 Constitution 1999 (3) SA 1 (CC)

⁵⁴ Iain Currie & Johan De Waal (n 33 above) 175

⁵⁵ 1998 (1) SA 745 (CC) **Para 27**

was decided by the court in the case of *Hoffmann v South African Airways 2001 (1) SA 1 (CC)*.⁵⁷ This matter concerned the constitutionality of South African Airways (SAA) practice of refusing to employ as cabin attendants people who are living with the Human Immunodeficiency Virus (HIV). One of the questions for determination was whether such a practice was inconsistent with any provision of the Bill of Rights. In a unanimous decision the Constitutional Court held that SAA had infringed Mr. Hoffmann's constitutional right not to be unfairly discriminated against. While the court acknowledged that legitimate commercial requirements as important, it noted that the same cannot serve to disguise stereotyping and prejudice, which have no place in this era of respect for human dignity, compassion and understanding-ubuntu. This is a tacit acknowledgment that no one can invoke institutional policy or practice to limit rights that are constitutionally guaranteed.

Lastly, it is a requirement that the laws of general application need to apply impersonally and with no reference to a particular group of people. The reason behind this, is that the equal application of the law does not signify its application to everyone but simply its application to persons it regulates in the same manner in the absence of arbitrariness and equality.⁵⁸

The requirement that the limitation clause ought to be reasonable and justifiable in an open and democratic society is founded on the principles of human dignity, freedom and equality. Under this criterion, understanding what is meant by the aforementioned context will only be achieved though discussing in detail the three requirements required to justify a limitation clause, them being: open and democratic society; reasonability; and the principles of human dignity.

2.5.2 Limitation must be justifiable in an open and democratic society

In trying to understand what is meant by democratic society in this context, sometimes this requirement is discussed as if it is part of the requirement for reasonableness. For instances the Canadian court in *R v Oakes*,⁵⁹ a test on the analysis of the limitation clause that allows reasonable limitations on rights and freedoms through legislation. The test of reasonableness

⁵⁷ The policies of a state organ outlined that HIV infected persons could not qualify for employment as airline cabin crew and the constitutional court dismissed the application on ground that the policies did not form part of the laws of general application.

⁵⁸ *S v Makwanyane 1995 (3) SA 391 (CC)* it was argued that part of the criminal procedure act that dealt with the death penalty, did not constitutes the laws of general application on grounds that its application was not uniform in various provinces of South Africa.

⁵⁹ *R v Oakes (1986) 26 DLR at 225*

was enumerated in a way that linked it to the identification of limitations that are justifiable in a free and democratic society as follows:

“To establish that a limit is reasonable and demonstrably in a free and democratic society, two central criteria must be satisfied; first, the objective, which the measures responsible for a limit on a charter right or freedom are designed to serve, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom.” The standard must be high in order to ensure that objectives which are trivial and discordant with the principle integral to a free and democratic society before it can be characterized as sufficiently importance.”

What is introduced here is the first phase of the balancing of the rights interests of an individual and, on the other hand, the interests of a democratic society as represented by the state.⁶⁰ It is upon the courts to determine whether a given limitation is justified in an open and democratic society.

The reason why a given limitation by the state ought to be open and in consonance with the democratic rule is that, ‘this is the ultimate standard against which limitations must be measured.’⁶¹ This position was advanced by Justice Dickson C J in the *Oakes case* as follows

“Inclusion of these words [free and democratic society] as the final standard of justification for limits on rights and freedoms refers to the court to the very purpose for which the charter was originally entrenched in the constitution: connation society is to be free and democratic. the court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, ... political institutions which enhances the participation of individuals and group in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the charter and the ultimate standard against which a limit on

⁶⁰ TheaVinnicombe, ‘John Locke, Thomas Hobbes and the development of political economy’ (2002) 29 *International Journal of Social Economics* 690

⁶¹ TheaVinnicombe (n 60 above)

a right or freedom must be shown, despite its effect to be reasonable and demonstrably justified.”⁶²

It is clear that the rationale of a limitation in this context is to further the fundamental aims of democratic rule. However, it is noteworthy that not just any officially invoked objective will be acceptable. A limitation must be shown to give effect to another constitutional guarantee. Trivial objectives will be rejected. In the words of Woolman:

“Administrative convenience and the saving of costs should not justify the overriding of constitutional guarantees. After all, if you are going to allow rights to be trumped by efficiency concerns, you might as well have left their protection to the hurly-burly of the legislative process. On the other hand, if the government restriction is motivated by the desire to give substantive effect to another constitutional guarantee, the restriction is clearly of a substantial and pressing nature: its presence in the constitution testifies to its importance.”⁶³

Determination of what is acceptable in an open and democratic society is more of a subjective than an objective test. In order to avoid such dangers some modifications, such as the ‘contextual approach’ have been proposed,

“First rather than ask what the governmental interests are sufficiently important to the government in order to justify an infringement of a substantive right, a contextual approach would try to understand what kind of justifications are legitimate in the light of the distinctive nature of the right being infringed : and, second, it would assess the legitimacy of the justification for the infringement from the perspective of the plaintiff the group protected by the legislature, society at large and the government.”⁶⁴

Notwithstanding the contextual approach, it is for the court to determine whether any infringement or limitation to an individual’s right is in consonance with the requirement of an open and democratic society principle.

⁶² *R v Oakes (1986) DLR* at Para 64, see also Woolman S ‘Riding the push-me-pull-you: construction a test that reconciles the conflicting interest which animal the limitation clause’(1994)10 *South Africa Journal on Human Rights* 60

⁶³ Woolman (n 62 above)

⁶⁴ R Colker ‘Section 1, Contextuality, and the Anti-Disadvantage Principle’ (1993) 42 *U Toronto LJ* 81

2.5.3 Limitation must be reasonable and necessary

As earlier noted in the *Oakes case* the requirement of an open and democratic society is closely related to that of reasonable and necessary. For limitation to be justified, it must be reasonable. Dickson J noted that,

“Once a sufficiently significant objective is recognized, then the party involving section 1 must show that the means chosen are reasonable and demonstrably justified. This involves “a form of proportionality test”. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are in my view three important components of the proportionality test. First the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations ... second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question: *R v Big M Drug Mart Ltd.* Third, there must be a proportionality between the effect of the measures which are responsible for limiting the charter right or freedom and the objective which has been identified as of “sufficient importance.”⁶⁵

For any limitation of right and fundamental freedoms, the minimum impairment test ought to be invoked. There ought to be a demonstrable need that is reasonable for any limitation.⁶⁶ The benefits of a limitation ought to be proportionally more than its detriment.⁶⁷ The enquiry into effects should go further and take into account the nature of a specific right. Restrictions may have different effects, depending on the nature of the right. The impact of limitations on the ultimate criteria—the proper function of an open and democratic society based on freedom and equality – should always be born in mind.

Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the

⁶⁵ *Oakes case* Para 60-70

⁶⁶ Julie Debeljak, ‘Balancing Rights in a Democracy: The problems with limitations and overrides of rights under the Victorian Charter of Human Rights And Responsibilities Act 2006’ (2008) 32 *Melbourne University Law Review* 424

⁶⁷ R Colker (n 64 above) 77

more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.⁶⁸ It is therefore upon the court to do the balancing through out to ensure only limitations that are demonstrably necessary and reasonable are upheld.

2.5.4 Principles of human dignity

Human dignity is considered as an overriding political principle that underlies the constitutional framework, as the key basis for the interpretation and application of enforceable rights. As a concept it is distinguished from other recognized human rights as encompassing freedom and equality as its major pre-conditions.⁶⁹ It is through these pre-conditions that help define it as: prohibiting inhumane treatment; a guarantee of individual self-fulfilment; protecting group-identity; and satisfying the needs of individuals.

Under the laws of limitation, human dignity should be directed as one of the mechanism for societal equalization in modern constitutions. As a result, human dignity acts as a source of a states duty and as means of setting appropriate constrains on human persons.⁷⁰

2.6 Application and interpretation of the general limitation clause

Different countries have different ways of applying and interpreting their respective limitation clauses vis-à-vis provisions of international instruments. It is fundamental to note however that they all apply the general principles as discussed above.

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Canada's judiciary has been given an explicit constitutional mandate to interpret rights and to grant appropriate remedies, which can include the nullification of legislation.⁷¹

⁶⁸ *R v Oakes* (1986)1 S.C.R 103

⁶⁹ Margit Cohn & Dieter Grimm, 'Human dignity' as a constitutional doctrine in Mark Tushnet et al, *Routledge Handbook of Constitutional Law*, (2013) 193

⁷⁰ Margit Cohn & Dieter Grimm (n 69 above)

⁷¹ Janet Hiebert, *Innovative Models of Constitutionalism: New Constitutional Ideas: Can Parliamentary Models Resist Judicial Dominance when Interpreting Rights?* (2004) 82 *Texas Law Review* 1963, citing Janet L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review* 6 (1996).

In Russia, specific limitation clauses appear in section 1, Chapter 2 of the Russian Federation Constitution in relation to articles 23, 24, and 25.⁷² Vladimir Strekozov suggests that proportionality and legitimate state aims are key considerations for the Russian Constitutional Court as they consider the constitutionality of state restrictions of rights.⁷³

South Africa's Constitution adopts a general limitations clause that says that the rights in the Bill of Rights may be limited by a law of general application that is reasonable and justifiable in an open and democratic society based on dignity, freedom, and equality.⁷⁴ Justice Richard Gladstone has reflected on judicial interpretation of limitation clauses, noting thus:

“The result is that I earn my living doing a judicial balancing act. Perhaps three out of four of our cases involve balancing. When competing claims and interests are involved, we are compelled to engage in proportionality exercises against the background of the values the Constitution requires us to promote.”⁷⁵

Sub-Saharan African constitutions exhibit both model of limitation as a form of restriction to rights.⁷⁶ However, most of their courts interpret constitutional limitation clauses in respect to the model of a general limitation clause since it adopts the same principles as common law while analyzing the limitation to rights.⁷⁷ This approach is deemed suitable because the aforementioned model identifies and distinguishes what constitutes a justifiable and non-justifiable limitation.⁷⁸ In *Republic v. Tommy Thompson Books Ltd. & Others*, the Supreme Court of Ghana held that the conduct of the accused fell within the boundaries put on the freedom of the media, hence, the accused challenge to the law criminalizing libel failed.⁷⁹ The decision to rule against the accused asserting the right relied partly upon the determination was by virtue of being imposed by the legislature, the restriction on the right

⁷² Russian Federation Constitution (1993)

⁷³ Vladimir Strekozov., Fundamental issues of the limitation of Human Rights and fundamental freedoms in the decisions of the Constitutional Court of the Russian Federation. International Almanac at <http://www.concourt.am/armenian/almanakh/almanac2003/Contents.htm>. (Accessed on 15th March 2015)

⁷⁴ Constitution of the Republic of South Africa (1996)

⁷⁵ Richard J. Gladstone. The South African Bill of Rights (1997) 32 *Tex. Int'l L.J.* 451

⁷⁶ Sara Stapleton, Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation (1999) 31 *N.Y.U. J. Int'l L. & Pol.* 535

⁷⁷ Sara Stapleton (n 76 above) 1316

⁷⁸ Sara Stapleton (n 77 above)

⁷⁹ *Republic v Tommy Thompson Books Ltd & Others* [1996-97] SCGLR 804

could not be deemed unreasonable.⁸⁰ Howbeit, Kwasi Prempeh accurately notes in his assessment of the decision that:

“The main purpose of a constitutional limitation clause is to limit the restrictions of the government. And the limitation clause does this by indicating the limited ends that the restriction must serve as well as the limited means that it may employ. *Thus, in a case involving a claim of right vis-à-vis a governmental restriction of that right, what should be on trial is the governmental restriction, not the constitutional right.* The effect of the restriction on the essence of the right is a primary factor in determining constitutionality. The evolving comparative jurisprudence emphasizes the principles of necessity, reasonableness, and proportionality (least restrictive means), as benchmarks that reviewing courts must apply in evaluating the constitutionality of a particular statutory restriction.”⁸¹

2.7 Conclusion

In this chapter we have analyzed the principles that apply in respect to limitation of rights. The chapter has also acted as a basic guide to enable one understand the critical precepts that enable the courts interpret widely the aspects of a general limitation clause in so far as they inhibit the fundamental rights and freedoms within the Bill of Rights. The different models of limitations were examined in order to bring out the distinctive elements that go into construction of the human rights conventions and the Bill of Rights in modern constitutions. The chapter has also been an eye opener into understanding the specific international instruments that shall be discussed in chapter three; emphasis on these instruments which embody the whole concept of rights and freedoms inform states as to how they should limit such rights. This shall be the main analysis in understanding limitation of rights and freedoms in respect to the Kenyan 2010 Constitution.

⁸⁰ *Republic v Tommy Thompson Books Ltd & Others* (n 79 above)

⁸¹ Kwasi H Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionality in Africa* (2006) 80 *Tulane Law Review* 1239

CHAPTER THREE - INTERNATIONAL AND REGIONAL INSTRUMENTS

DEALING WITH THE LIMITATION OF RIGHTS

3.1 Introduction

As already alluded to in the previous chapters, limitation of rights under international law is only permitted under special circumstances to serve certain legitimate aims of a state. Whatever the circumstances of limitations, the state must at all times try to balance the rights and interests of different individuals, the legitimate state interest and concerns and the individual rights. The limitations are at times called for the benefit of the greater society as the interest of the society as a whole overrides those of individuals as will be discussed in details in this chapter. At international level, the international community has put in place legislative framework to ensure that the states do not over step the boundaries of limitations. These frameworks clearly spell out the parameters under which the rights and fundamental freedoms can be limited to. The regional community is not left behind in ensuring the protection of these rights too. These frame works are also available at the regional level.

This chapter examines the limitation of rights and fundamental freedoms clauses in international and regional instruments. The specific focus will be on the International Covenant on Civil and Political Rights (ICCPR)⁸², the International Covenant on Economic, Social and Cultural Rights (CESCR)⁸³ and the African Charter on Human and Peoples' Rights (ACHPR).⁸⁴The ICCPR and the ICESCR are international instruments that were initiated by the United Nation (UN) General Assembly, whereas the ACHPR was an initiative by the African state members of the Organization of African Unity.

3.2 International instruments

At the global level, the international community through the UN has played a critical role in developing the concept or principles of universality of rights by introducing various international instruments and conventions such as UDHR, ICCPR and ICESCR among others. ICCPR and CESCR for example alludes to the fact that all human beings are equal and whatever restrictions or limitations that are imposed must be those that are permissible

⁸²The International Covenant on Civil and Political Rights (ICCPR) was adopted by the General Assembly of the United Nations in 1966; see Ian Brownlie, Guy S Goodwin-Gill Brownlie's Documents on Human Rights, (2010) 388-404

⁸³The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the General Assembly resolution in 1966; see Ian Brownlie & Guy S Goowin-Gill (n 82 above) 370-379

⁸⁴The African Charter on Human and Peoples' Rights (the "Banjul Charter") was adopted in 1981; see Ian Brownlie & Guy S Goodwin-Gill (n 82 above) 1025-1037

under circumstances stipulated by conventions as shall be examined further in following sections.

3.2.1 Limitation of rights under the International Covenant for Civil and Political Rights (ICCPR)

It is important to note that ICCPR came into force since the world had witnessed great human right violations. It was born of the need to protect and guarantee individual rights and fundamental freedoms of citizens to ensure states respect and uphold those rights in their jurisdictions. However human rights come with duties and responsibilities and thus cannot be absolute in certain circumstances and thus there are limitations that can be imposed on the rights against individual or groups of individuals. To ensure that these rights are not arbitrary violated by the state, ICCPR predetermined and spelled out the circumstances under which certain rights can be limited. The UN thus included limitation clauses in the ICCPR because it was understood that states might have the need, when circumstances call for, to limit some ascertained rights. The circumstance contemplated within article 4 of the ICCPR allows limitations only in situation when the life of a state is threatened during the existence of a public emergency.

Various other limitations have been incorporated in the ICCPR. Article 12(3)⁸⁵ for example imposes a limitation on the right to movement and the freedom of residence thus:

“... these rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect public order, national security, the rights and freedoms of others, or public health or morals, and are consistent with the other rights recognized in the present Covenant.”

Equally, there has been a limitation imposed on the freedom to manifest one's beliefs or religion.⁸⁶ Article 18(3) provides the extent to which the limitation of religion will be subject to. Such limitation as envisaged must be prescribed by law and deemed necessary to protect public order, safety, morals, or health or the rights and freedoms of others.

⁸⁵ This is provided for within the provision of Article 12 of the ICCPR; Ian Brownlie & Guy S Goodwin-Gill (n 82 above) 392

⁸⁶ Article 18 of the ICCPR; Ian Brownlie & Guy S Goodwin-Gill (n 82 above) 394

Moreover, article 19 provides that everyone shall have the right to hold opinions without interference.⁸⁷ This right has then been subjected to restriction under article 19(3) which restriction is imposed to ensuring respect of the rights or reputation of other persons, protection of public order or of state security, or of public health or morals.

Besides the rights discussed above, the right to peaceful assembly⁸⁸ and the right to freedom of association are both subjected to limitations based on the protection of public order, safety, health, or morals and the rights and freedoms of others. While the freedom of association can be limited by states, those limitations still be in line with the provisions of the International Labour Organization (ILO) relating to the right to form associations in labour unions.⁸⁹ Therefore, the ILO provisions allow for states parties to restrict those rights through legislative measures that do not prejudice the freedom of association of workers.

As stated earlier there must be clear criteria for limitation of the rights and fundamental freedoms as stipulated under international law. In this regard, proportionality, necessity, the least restrictive alternatives and appropriateness are the main criteria for assessing the permissible scope of limitation of the right.⁹⁰ According to Juan Cianciardo,⁹¹ the principle of proportionality is a procedure used to ensure guarantee of full respect of rights by state. Juan posits that in common law jurisdictions the principle is referred to as reasonableness and applied in civil, administrative and criminal law. He further asserts that the proportionality principle stipulates that all statutes which affect human rights should be proportionate or reasonable and that in terms of analysis the principle has three key sub-principles namely adequacy, necessity and proportionality in *strictusensu*.

In so far as application is concerned, Juan portends that the principle of adequacy stipulate that the statute that affects human rights must be suitable to achieve the purpose of the lawmaker.⁹² In other words the intention of the legislature must be that which is not tainted with malice or used to settle scores. The second principle that relates to least restrictive of

⁸⁷ This is provided for within the provision of Article 19 of the ICCPR; Ian Brownlie & Guy S Goodwin-Gill (n 82 above) 394

⁸⁸ Article 21 of the ICCPR; Ian Brownlie & Guy S Goodwin-Gill (n 82 above) 395

⁸⁹ Article 8 of Convention No. 87 (1948) concerning freedom of association and the protection of the right to organize

⁹⁰ Iain Currie & Johan De Waal, *The Bill of Rights Handbook*, Juta & Co. Ltd, (2005) 165

⁹¹ Juan Cianciardo, *Principle of proportionality and their limits*, *Journal of Civil Law*, 2010 Vol. 3 177-186

⁹² Juan Cianciardo (n 91 above)

human rights looks at parameters of achieving the desired end. For example on matters of public health, movement of an individual suffering from tuberculosis can be curtailed to protect the rest of the public from infection of the disease that is highly airborne and difficult to control. But at the end of it all there must be a necessity of the action. The third one is the principle of proportionality in *strictusensu*. This principle looks at the cost and benefits of the measure taken to impose the restriction or limitation of rights.

Similarly the criterion echoed by Juan can be found in the Siracusa Principles on Limitation and Derogation Provisions of ICCPR.⁹³ These principles stipulate that any measure taken to restrict human rights should be legal, non arbitrary or discriminatory, proportionate, necessary, the least restrictive means that are reasonably available under the circumstances. Article 10 of the Siracusa Principles provides that whenever a limitation is required in terms of the Covenant to be necessary implies that limitations meet the following thresholds. One is that it is justified under the relevant provisions of the Covenant; secondly responding to a pressing public and social need; pursuing a legitimate aim and must be proportionate to that aim. It is also categorical that any assessment as to the necessity of a limitation shall be made on objective considerations. These principles put safeguards measures on excesses by state power to ensure that the individual rights and fundamental freedoms are not limited at the whims of the state or its officials acting on malice. Importantly any restriction imposed by a state must be of a limited duration, respectful of human dignity, and subject to review.

The criterion alluded to by Juan and those set by Siracusa Principles have been buttressed and made possible by the authoritative interpretation by the Human Rights Committee (HRC)⁹⁴- The HRC is a treaty monitoring body established under article 28 of ICCPR to interpret rights guaranteed under the convention and their implementation by state parties. The HRC has made this possible through its compulsory reporting procedure by state parties as well as through the elaboration of general comments. Article 40 of the ICCPR mandates a state to submit periodic reports to the HRC on progress made or challenges in the implementation of the treaty at the domestic front. Article 41, makes provisions for a state to file complaints against another state party where a state party has reasons to believe that another state party is

⁹³ This is a non-binding document adopted by the UN Economic and Social Council in 1985. United Nations Economic and Social Council UN Sub-Commission on Prevention of Discrimination and Protection of Minorities: The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Annex (1985). U.N. Doc.E/CN.4/1985/4

⁹⁴ It is the United Nations body of independent experts responsible for overseeing the implementation of the ICCPR.

not fulfilling its obligations under the treaty. The report could refer to violations of any provisions of the treaty.

HRC like any other treaty monitoring body publishes its interpretation of the provisions of ICCPR in the form of “general comments” or “general recommendations.” Through the general comments or recommendations the Committee has provided exhaustive explanations to certain provisions of the treaty. For example through General Comments No. 10,⁹⁵ 22,⁹⁶ and 27⁹⁷ the HRC has provided its exhaustive interpretation of the limitation clauses in articles 12, 18, and 19. Regarding the freedom of movement as provided under article 12, it was stated in the General Comment 27⁹⁸ that the law restricting this freedom ought to identify the legal standard upon which the restriction is grounded.⁹⁹

The HRC has stated that the laws authorizing limitations ought to use a precise criterion that does not confer unbound discretion to those charged with their execution.¹⁰⁰ The HRC has further emphasized that article 12(3), noticeably indicates that the limitations must not only serve their permissible purposes, but that they must also be necessary to protect them. As already stated earlier the limiting measures are further required to conform to the principle of proportionality. This principle has to be respected by the law that frames the restrictions inclusive of the judicial and administrative authorities applying the law. In applying the restrictive measures, states are mandated to ensure that any proceedings regarding these rights are undertaken expeditiously and that reasons are provided.¹⁰¹

The HRC in its General Comment points out that the application of restrictions in individual cases should be levied on clear legal grounds and gives the examples that the conditions imposed should meet as follows:

“If an individual were prevented from leaving a country merely on the ground that he or she is the holder of a “state secrets”, or if an individual were prevented from

⁹⁵ Based on the freedom of expression (Article 19 of ICCPR)

⁹⁶ Based on the freedom of thought, conscience and religion (Article 18 of ICCPR)

⁹⁷ Based on the freedom of movement (Article 12 of ICCPR)

⁹⁸ These are the General Comments adopted by the Human Rights Committee under article 40, paragraph 4, of the international covenant on civil and political rights at the 1783rd meeting (sixty-seventh session) in 1999.

⁹⁹ Liberty of movement and freedom to choose residence, (U.N. Doc. CCPR/C/21/Rev.1/Add.9,) 1999 (paragraph 3)

¹⁰⁰ General Comment 27 (n 97 above) paragraph 3

¹⁰¹ freedom of movement, Article 12 of ICCPR (n 97 above)

travelling internally without a specific permit, that could not stand as a legitimate ground for restriction since it fails to comply with test of necessity and proportionality as required by limitations. On the other hand, the conditions on limiting the freedom of movement could be met by restrictions based on the access to military zones on national security grounds or limitations on the freedom to settle in areas inhabited by indigenous or minorities' communities.”¹⁰²

Further, General Comment No 27 explains that the restriction provided under Article 18 is to be strictly interpreted with attention to proportionality and non-discrimination principles. This means for example that national security should not be used as a permissible reason for limiting freedom of religious belief and expression.¹⁰³

The HRC addressed the issue on the freedom of expression in the matter *Yong Joo Kang v. Republic of Korea* (2003).¹⁰⁴ The complainant had been convicted of various criminal offences under the national security laws of Korea. He was charged for distributing pamphlets criticizing the regime and the use of security forces to harass him and others. He was also accused of making an unauthorized (and therefore criminal) visit to North Korea. He also distributed dissident publications covering numerous political, historical, economic and social issues. Upon his conviction the complainant was held in solitary confinement and classified as a communist “confident criminal” under the ideology conversion system in the country. Due to his classification, he was not eligible to fair treatment and he was denied an early parole in addition to various prison privileges. This was because he manifested a different political idea contrary to which the head of state supported. As a result, he claimed that his unfair treatment under the present state system constituted a breach of his right to hold political opinions without disruption. In responding to this complaint, the committee ruled that:

“The application of an ‘ideology conversion system’ to a prisoner convicted of espionage for the distribution of publicly available information violated the petitioner’s right to freedom of expression.”

¹⁰² See General Comment No. 23, Para. 7, HRI/GEN/1/Rev.3 at 41

¹⁰³ General Comment 27; CCPR/C/21/Rev.1/Add.9, Para.5 (n 97 above)

¹⁰⁴ United Nations Human Rights Committee, ICCPR; Communication No. 878/1999: Republic of Korea (Jurisprudence), U.N. Doc. CCPR/C/78/D/878/1999 (2003) (*Yong Joo Kang v. Republic of Korea*).

The Committee established that the “ideology conversion system” to which the author had been subjected while serving out his sentence was coercive and applied in a discriminatory fashion and stated further that the State party had failed to justify the necessity of the system’s limiting purposes thus the case constituted a violation of article 19, paragraph 1.¹⁰⁵

The right to hold opinions without interference protected in Article 19 of the ICCPR carries with it particular responsibilities and is thus subject to restrictions based on public order, national security or morals as reiterated in General Comment 10.¹⁰⁶

Looking at the limitations on the freedom to manifest a religion or belief for the purpose of protecting morals, the HRC jurisprudence about Article 18, paragraph 3 involves the depiction of religion and its ideas in the media.¹⁰⁷ In the matter of *Leven v. Kazakhstan*,¹⁰⁸ the author of the communication, Viktor Yakovlevich Leven, claimed to be a victim of violations by Kazakhstan of his rights to adopt the religion of his choice and that state limited his rights on unnecessary grounds subject to article 18 (1) and (3) read together with article 2(1) *inter alia* of the ICCPR. In holding that the state had violated his rights of religion as a foreign national, the committee held as follows:

“...the Committee reiterates that article 18, paragraph 1, of the Covenant protects the right of all members of a religious congregation, not only missionaries, and not only citizens, to manifest their religion in community with others, in worship, observance, practice and teaching. The Committee also notes that the author’s submission, uncontested by the State party, that the church that he was frequenting had existed in Kazakhstan since he was a child and that he had participated in its religious activities before and after he had obtained German citizenship. The Committee concludes that the punishment imposed on the author, and in particular its harsh consequences for the author, who is facing deportation, amount to a limitation of the author’s right to manifest his religion under article 18, paragraph 1; that the limitation has not been shown to serve any legitimate purpose identified in article 18, paragraph 3; and neither has the State party shown that this sweeping limitation of the right to manifest religion is proportionate to any legitimate purpose that it might serve. The limitation therefore does not meet the requirements of article 18, paragraph 3, and the

¹⁰⁵ United Nations Human Rights Committee, ICCPR; Communication No. 878/1999 (n 104 above)

¹⁰⁶ U.N. Doc. CCPR General Comment No. 10 1983

¹⁰⁷ U.N. Doc. CCPR/C/92/D/1487/2006

¹⁰⁸ CCPR/C/112/D/2131/2012 Communication No. 2131/2012

Committee accordingly finds that the author's rights under article 18, paragraph 1 have been violated.”

In conclusion, for limitation to be legitimate, it should fall within the conditions defined under article 19(3) of the ICCPR. That is to say, it should be *provided for by law, it should have a legitimate aim* and must be *necessary*.

3.2.2 Limitation of rights under the International Covenant on Economic, Social and Cultural Rights (CESCR)

CESCR was devised to ensure the protection of economic, social and cultural rights.¹⁰⁹ Article 4 of CESCR acts as the general limitation clause applicable to all the rights other than the right-specific limitations provided in the covenant. Article 4 provides as follows:

“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

The approach towards limitations by CESCR is quite different from that of the ICCPR. The ICCPR does not have a general limitation clause and instead opts for a rights-specific limitation clause. Moreover, ICCPR provides for derogation clause in CESCR.¹¹⁰

The limitation clause in CESCR allows for its rights to be limited along the lines of progressive realization and not of immediate application since the rights are resource based. Simply put this means that, under the Covenant, socio-economic rights are only enjoyed where resources of a state party permit its provision. This is elusive as it gives states a wide discretion as to interpret what that entails in its own perspective. So a state can minimally provide for certain rights and claim issue of lack of resources for failure to honour its obligation. Therefore lack of resources does not absolve the state from performing its minimal threshold stipulated under the convention. This is the position as espoused by

¹⁰⁹ Article 1 CESCR at sub-clause 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

¹¹⁰ Ben Saul et al, The International Covenant on Economic, Social and Cultural Rights: Commentary, cases and materials, (2014) 247

various scholars when they posit that the core principle is that limitations cannot lawfully reduce the rights beneath their minimum core just as the lack of resources cannot do so.¹¹¹

Article 4 of CESCR adopts similar grounds for limitation with like other legal frameworks but with much guidance from the Limburg principles.¹¹² These principles spell out the views on the interpretation of key provisions of the covenant. They provide a comprehensive framework for understanding the legal nature of the norms found in the covenant and are widely used as a means of interpreting those norms. They thus set standards upon which states must adhere to, to meet its obligation under the convention. However, it is necessary to analyze the principles that underlie the limitation of rights under these sub-topics: nature of the law of limitation; limitations promoting the general welfare society; and limitation in a democratic society.

3.2.2.1 The nature of the law on limitation

The focus on limitation is not based only on the formal existence of the law but also on the quality of the law. The law itself can also be in various form ranging from constitutional law, regional law, international law or administrative law, to mention a few, provided that it is accessible and precise to the community at large. Therefore this makes it possible for a state to limit rights based on the aspects of their religious, traditional or customary law.¹¹³

The Committee on Economic, Social and Cultural Rights (CESCR) has noted that states that have adopted traditional or customary law in limiting CESCR rights should not impose a single religion or tradition of a group to the whole society.¹¹⁴ In criticizing this approach, the CESCR condemned the Iran constitution under its observation as follows:

“...that the Iranian constitution purported to qualify CESCR rights by the requirements of their consistency with only Islam and not any other religion. Moreover the Committee on ESCR observed that the enjoyment of universally recognized rights were subjected to Islamic limitations that had a negative impact to the application of the CESCR in relation to the principle of non-discrimination and equality.”¹¹⁵

¹¹¹ Ben Saul et al (n 110 above)

¹¹² These are guiding frameworks used to oversee the implementation of the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

¹¹³ HRC, General Comment No.34, CCPR/C/G/34 (12 September 2011), [24]; General Comment No.32, CCPR/C/GC/32 (23 August 2007)

¹¹⁴ CESCR, Concluding observation: Iran, E/C.12/1993/7(9th June 1993) [4]

¹¹⁵ Ben Saul et al (n 110 above)

In spite of customary, traditional or religious law echoing the sentiments of the majority in the society, the legal entrenchment of its values may interfere with certain requirements of rights provided by CESC. ¹¹⁶Therefore it is essential that the laws on limitation should be able to bring about effective remedies instead of it being arbitrary, retrospective or discriminative. ¹¹⁷

3.2.2.2 Limitation promoting the general welfare of the society

The purpose of limitation should not only promote the welfare of the society but it should also further the well being of the society in a positive manner. ¹¹⁸The term ‘general’ sets ground for issues of national interest i.e. national security, public health, and public order but subject to the guidelines of the legal implications of what is necessary in a democratic society. ¹¹⁹Therefore a democratic society implies the broad and wide range of state interest to arguably have a good reason to interfere with the enjoyment of rights.

In spite of CESR rights being open to limitation to promote the general welfare of the society as whole, the legal question is whether the measures adopted are necessary and proportionate in a democratic society. This basically means that right-respecting procedures ought to be followed in maintaining minimum core rights and enable the availability of effective remedies.

For instance, the right to economic self-determination under article 1 of CESC is also not an absolute right since it may be limited on the basis of respecting environmental protection laws. By analogy, in the case of *Centre for Minority Rights Development v Kenya*¹²⁰, the African Commission analyzed the limitation on the right of people to freely dispose of their wealth and natural resources subject to article 21 of the African Charter as read together with article 1 of CESC, which is concerned, with the forcible removal of an indigenous community from their ancestral land. The African Commission ruled that limitations on group economic rights were not justifiable in the circumstances in the following terms:

“...that the state had a duty to evaluate whether their restriction on the right to private property was necessary to preserve the survival of the Endorois community despite

¹¹⁶ Ben Saul et al (n 110 above) 249

¹¹⁷ (n 116 above)

¹¹⁸ Limburg principles on the implementation of the CESC, E/CN.4/1987/17, 8 January

¹¹⁹ David J Harris et al, *Law of the European Convention on Human Rights*, 2nd edition, (2009) 348

¹²⁰ African Commission on Human and Peoples Rights, Communication No.276/2003, Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)

the fact that they had no attachment to minerals the state was interested on. Nevertheless, it is instructive to know that the right to natural resources contained within the traditional lands of the Endorois was vested in them. Hence, it is clear that a group of people inhabiting a specific region within a state may claim the protection of article 21 of the African Charter. Moreover, article 14 of the African Charter indicates that the test of what is in accordance with appropriate laws and what constitutes the general interest of community should be satisfied.”

3.2.2.3 Limitations under a democratic society

Limburg Principle 55 defines a democratic society as a society where there is recognition and respect for human rights. Limburg Principles is a guideline that addresses the complexity of the substantive issues covered by the CESCPR and sets nature and scope of the obligations of state parties to the covenant in terms of facilitation of the realization of the rights guaranteed therein.¹²¹

The Limburg principles express that the term ‘democratic society’ should be used to impose further restrictions on the application of limitations and that the state should be charged with the burden of demonstrating that their limitations do not impair the democratic function of the society.¹²² Moreover this view is in support of the interpretation of a similar reference to what is necessary in a democratic society under the limitation provisions of ICCPR.¹²³ Reference to a democratic society indicates the existence and functioning of a plurality of societal associations that peacefully promote the ideas not favourably received by the government or the majority of the society but one of the principles of democracy.¹²⁴

CESCPR is emphatic that applying limitations to the right of everyone to take part in cultural life may be necessary in certain circumstances for example where the practice is negative. It alludes to the principle of democracy in its General Comments as follows:

“...that limitation applicable to the right to partake in cultural life shall be to the necessary in cases of negative practices that infringe upon human rights of others within the culture. As a result such limitations ought to pursue a legitimate aim that is compatible with the nature of the right in spite of it promoting the general welfare of a

¹²¹ (n 118 above)

¹²² Limburg principles [53] and [54] (n 118 above)

¹²³ ICCPR: Article 14(1), Article 21 and Article 22

¹²⁴ Ben Saul et al (n 110 above) 254

democratic society in accordance with article 4 of the covenant. Moreover, it is important to take into account that the right to partake in cultural life is essentially linked to other rights, for example, the freedom of movement, freedom of opinion and expression, the freedom of thought, conscience and religion and hence international human rights standards on limitations need to be met for them to be legitimate.”¹²⁵

3.3 Regional instrument - Limitation of rights under the African Charter on Human and Peoples Rights (ACHPR)

The African Charter as established has the capacity to protect the three ‘generations’ of human rights.¹²⁶ The distinct feature of the African Charter from ICCPR and CESCPR is that it is the first regional human rights instrument to protect the three generation of human rights being: civil and political rights; economic, socio-economic rights; and group and people’s rights, in a single instrument, without drawing any distinction concerning their justifiability or implementation.¹²⁷ The fact that all rights are justiciable implies that the African Commission can apply any of the diverse rights contained in the African Charter that cannot be made effective.

The African charter embodies three types of limitations namely: right specific norm-based limitation; right specific claw-back clauses and the general limitation clause.¹²⁸ In spite of the protection offered by the African Charter, the presence of the claw-back clause evokes the fear that the rights guaranteed by the Charter may be equated with the domestic laws of the state.¹²⁹ The reason behind this is that most civil and political rights are limited by inter alia terms such as, “except for reasons and conditions previously laid down by law,”¹³⁰ “subject to law and order”¹³¹ or “within the law.”¹³² These limitations may be criticized as subjecting the right guaranteed to domestic laws hence weakening their scope and content when it comes to their application.

¹²⁵ General Comment No.21: Article 15(1)(a), E/C.12/GC/21 (21 December 2009), [4] see para 19

¹²⁶ Peter Jones Human Rights, Group Rights, and Peoples' Rights; Human Rights Quarterly Volume 21, Number 1, 1999 at 80-107

¹²⁷ Frans Viljoen, International Human Rights Law in Africa, (2007) 238

¹²⁸ Frans Viljoen (n 127 above) 348

¹²⁹ Frans Viljoen (n 127 above)

¹³⁰ Article 6 on the right to liberty and security, ACHPR

¹³¹ Article 8 on freedom of conscience and religion, ACHPR

¹³² Article 9 on freedom of expression, ACHPR

However, the limitation clauses were rather left broad right from the early days when the African Commission through examining individual complaints, declined subjecting the protected rights to domestic laws of a state.¹³³ For instance, in *Civil Liberties Organization (with reference to the Nigerian Bar Association) v. Nigeria*¹³⁴, the African commission held that the competent authorities in regulating the right to association should not enact limitation provisions that cripple the right to the extent that exercising it is impossible but rather subject those provisions within the standards of both the national constitution and international human rights instruments.

Norm-based limitations present in the African Charter usually require the limiting laws to serve some specific objectives. This requirement ensures that the laws are aimed at protecting matters of national interest such as: public health or morality, national security and the rights and freedom of others without allowing the state to have some boundless discretion.¹³⁵ The advantage of norm-based limitations is that they are limited to some rights and that they cannot be generally treated as a claw-back clause to restrict rights.¹³⁶ In the case of *Amnesty International v Zambia*,¹³⁷ the Government of Zambia deported two leading politicians after being served with deportation orders on them, stating that their onward presence in Zambia would likely be a danger to peace and good order to the country. The complainants alleged that their right to leave any country and return to their country (Zambia) had been infringed. The government invoked the norm-based limitation contained in the same provision, to the effect that the right may be subject to restrictions “provided for by the law for the protection of national security, law and order, public health and morality.” In rejecting the contention that the mere fact of a deportation order is sufficient to meet the standard, the African Commission observed that the claw-back clause must not be interpreted against the Charter and that the recourse to them should not be used as a means of giving evidence to violate the express provisions of the charter.

¹³³ Sheila B Keetharuth, *Major African legal instruments*, 169 at http://www.kas.de/upload/auslandshomepages/namibia/.../7_Keetharuth.pdf. Accessed on 16 March 2015

¹³⁴ 101/93 Civil Liberties Organization (in respect of the Nigerian Bar Association) v. Nigeria, 8th Annual Activity Report [in Compilation 1994–2001, IHRDA, Banjul 2002, pp.200– 202] Para. 16.

¹³⁵ Frans Viljoen (n 127 above) 349

¹³⁶ Frans Viljoen (n 128 above)

¹³⁷ Comm.No.212/98 (1999)

Limitations ought to take the form of law which do not apply specifically to one group or legal personality as illustrated in the case of *Constitutional Rights Project & Others v Nigeria*,¹³⁸ whereby the Nigerian military government in 1994 issued three decrees proscribing 'The Concord,' 'The Guardian' and 'The Punch' Newspapers. The complainants argued that the decrees violated Article 9(2) of the Charter. In terms of this provision, 'every individual has the right to freedom of expression within the law.' The government argued that the decrees constituted 'law' as that term refers to the current Nigerian law and not constitutional or international law standards, and that the decrees were justified by special circumstances. The African Commission accepted that the decrees constituted law but remarked that the legal regulation targeting one group or legal personality raises serious danger of discrimination. As a result, this decision introduced the requirement that a limitation must take the form of laws of general application.

In addition to the above, the African Commission usually applies the test of proportionality to satisfy that a limitation constitutes the laws of general application.¹³⁹ This is necessary in weighing the nature, impact and the extent of limitations against the legitimate state interest being served through a particular goal. This makes it possible to outweigh the evils of limitations through strict proportionality with necessity to obtain absolute advantages. As a result, if there is more than one means of achieving an objective, the less invasive path has to be followed with a purpose of not completely obliterating the right and making it illusory.¹⁴⁰

In assessing limitations in line with 'morality' and 'common interest,' what needs to be considered should be the weight accorded to public opinion on a particular issue. In *Legal Resources Foundation v Zambia*,¹⁴¹ the Zambian government justified constitutional amendments restricting the eligibility for the office of the president to persons whose parents were both of Zambian origin, were in line with the popular will. The African Commission held that the justification of a limitation cannot be derived entirely from the popular will, as this cannot be used to limit the states responsibility in terms of the African Charter. The ambiguity of giving some weight to public opinion while simultaneously excluding its use categorically is likely to stimulate the tension between protecting the interest of the minority from being ignored at the stake of populism and retaining popular legitimacy. The purpose of

¹³⁸Communication No.143/1995 (1996)

¹³⁹ Frans Viljoen (n 127 above) 351

¹⁴⁰ Frans Viljoen (n 139 above)

¹⁴¹Communication No.211/1998

the expression in accordance with the provisions of the law is intended to regulate how the rights is to be exercised rather than that the law should be framed as embracing tolerance and respect for diversity, which is certainly more valuable and arguably majority rule that holds a state together.

Therefore, the jurisprudence of the African Commission on the interpretation of the limitation clause is that for the limitations to be valid, they ought to be in line with the states parties' obligations under the African Charter.¹⁴² Moreover, it has enabled the African Commission to tactfully construe the limitation clause by relying on its obligation to interpret the African Charter in view of the interpretations of other international human rights instruments.¹⁴³ Thus where the Commission finds a legislative measure to be incompatible with the Charter, it obliges the state to restore conformity in accordance with the provisions of the Charter.

3.4 Conclusion

In summary, this chapter has explored the limitation of fundamental rights and freedoms within ICCPR, CECSR and ACHPR and the extent to which these are permitted. It has been pointed out that states can limit rights under exceptional circumstances by providing conclusive and exhaustive reasons, which include a threat to the security and life of the nation. It is important to note that this hardly happens and people whose rights have been violated through this process seek intervention from the relevant international treaties bodies as already discussed. In reference to permissible limitations, it has been observed that: the limitations imposed ought not to violate any rights at stake; the limitations should not conflict with minimum core rights. This is in line with reading the minimum core rights as per affordability and universality as stipulated in the international and regional human rights instruments. Lastly, limitations ought to respect the principle of proportionality, which require the state to show the scope and severity of its limitation being proportionate to the aims such measures seek to pursue (for example, the general welfare of the society).

¹⁴² 212/98 Amnesty International v Zambia, 12th Annual Activity Report [in Compilation 1994–2001, IHRDA, Banjul 2002, 371–382]

¹⁴³ Article 60 and Article 61, ACHPR

CHAPTER FOUR - AN ANALYSIS OF LIMITATION CLAUSES IN THE CONSTITUTION OF KENYA 2010

4.1 Introduction

Kenya has, since her independence¹⁴⁴, had two constitutions. These include the 1963 Kenya Constitution (*now repealed*), and the 2010 Kenya Constitution. In a bid to end the colonial rule in Kenya, the British engaged the then Kenyan liberators in protracted discussions which resulted in the 1963 Constitution. Subsequently, the 1963 constitution underwent several changes which resulted in the 1964 Constitution.¹⁴⁵ The substantive second constitution came to light in 2010. The process that culminated into the promulgation of the 2010 Constitution of Kenya was shaped up with a clamour for law reform that Kenyans had yearned for in many years. Before this process, the constitution had been subjected to inchmeal amendments by members of parliament with no meaningful public participation. For example, it was the 1982 Constitutional Amendment that transformed Kenya from a multi-party to a single-party state.¹⁴⁶

The 1990s witnessed institutional decay, social breakdown and economic distress that conspired to agitate reform movements with roots dating back in the 80s. Arising from political pressures, Kenya's parliament amended the constitution in 1991 that resulted in a multiparty elections held in December 1992. However, it was only after the 1997 that the government considered undertaking the first constitutional review process that saw parliament enact legislation to jumpstart the process which led to Constitutional Review Commission established under the leadership of Yash Pal Ghai.¹⁴⁷ This resulted into the first Constitutional draft that was famously known as the 2004 Bomas Draft. This draft purposed to establish the office of the Prime Minister to be elected by Parliament, and which would reduce the powers wielded by the office of the president.¹⁴⁸ In addition, there would have been checks on executive appointments. The government however rejected this draft and instead proposed the 2005 Wako Draft which was initiated by the then Attorney General of Kenya-Amos Wako. In this draft, it was intended *inter alia* that the winner in the Presidential

¹⁴⁴ Kenya gained her independence in 1964 from her British colonizers.

¹⁴⁵ The Constitution of Kenya Amendment Act No 28 of 1964, made Kenya a republic with its own President who was now the Head of State

¹⁴⁶ Nelly Kamunde-Aquino, Kenya's Constitutional History July 2014

¹⁴⁷ http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=567:the-road-to-kenyas-new-constitution&catid=91:rights-in-focus&Itemid=296 (accessed 31 August, 2015)

¹⁴⁸ Michael Chege, "Kenya: Back From the Brink?," Journal of Democracy 19, no. 4 (2008): 125–139.

election would have to get more than 50% of the vote, else an instant re-run would occur. A constitutional referendum held in 2005 defeated this draft constitution supported by the government.

However after Post-Election-Violence in 2007/2008 there was more pressure to undertake both institutional and law reforms to help bring the country back to normalcy. In 2008, another journey for constitutional dispensation began. A new legislation was enacted that established the Committee of Experts to once again look at constitutional and institutional reforms in Kenya.¹⁴⁹ It is this Committee of Experts that finally gave Kenyans a new constitution. The process involved collecting and collating views of Kenyans on what they wanted to see in the constitution and therefore it was seen as consultative and participatory. After the views were collected a draft was done and the same was subjected to referendum in 2010 and Kenyans voted for its passage. On the 27th August 2010, the constitution was promulgated. This constitution is lauded for being progressive and having a strong human rights language.¹⁵⁰ For instance, the bill of rights had adopted the South African approach to constitutionalism in respect to limitations by having a general limitation clause that contained a similar wording.¹⁵¹

The Kenya Constitution 2010 however, does not spell out all details required for its operationalization; it mandates Parliament to develop laws that facilitate the realization of some of the rights that are guaranteed in several provisions. For example article 100 mandates Parliament to come up with legislations to promote representation in Parliament by women, persons with disabilities, youth, minority and marginalized communities as read together with article 27(8). Towards this end various legislative developments, amendments and repeals have been undertaken to ensure the conformity with constitutional provisions. This has been done to ensure the rights guaranteed in the Constitution become a reality for the benefit of the citizens and not a façade.

¹⁴⁹ Committee of Experts on Constitutional Review, "Final Report of the Committee of Experts on Constitutional Review" (Nairobi, Kenya, October 11, 2010), 45

¹⁵⁰ Commission for the Implementation of the Constitution (CIC), Quarterly Report January – March 2011

¹⁵¹ The design resembled the South African National Council of Provinces in many ways. In turn, the design of the South African National Council of Provinces was based on the Bundesrat. See Christina Murray 'NCOP: Stepchild of the Bundesrat' 50 Jahre Herrenchiemseer Verfassungskonvent 'Zur Struktur des deutschen Federalismus' (herausgegeben vom Bundesrat 1999) 262 - 278

In this chapter, the focus is on an analysis of the limitation clauses on the rights and freedoms as enshrined in the Kenyan Constitution. The chapter will review with specificity the nature of limitations imposed in the Bill of Rights.

4.2 The Repealed Kenyan Constitution

The repealed Constitution provided for rights and freedoms to be enjoyed by all her citizens under its Chapter V.¹⁵² The provisions under this chapter were criticized because all the rights guaranteed were subjected to provisions of other statutes. The National Assembly therefore had all the legislative avenues for restraining fundamental rights and freedoms thereby opposing the very rights sought to be upheld by the Constitution.

4.3 Limitation of rights under Kenya's 2010 Constitution

The Constitution of Kenya 2010 takes cognizance of the individual rights and fundamental freedoms of the citizens. In tandem with this recognition it avoids or limits inclusion of claw-back clauses in most of its provisions as unlike the repealed Constitution. The Constitution of Kenya 2010 has a general limitation in its article 24 which also has imposed principles to be adhered to before the rights and freedoms can be limited in any way. The principles that must be adhered to are designed in a manner that is prescribed in the international and regional human instruments, for example the limitation must be justifiable and reasonable in an open and democratic society. Similarly, article 24(5) of the Constitution imposes limitations that erode the rights guaranteed under international instruments, to specific institutions and individuals; that is, persons serving in the Kenya Defence Forces or the National Police Service. Ordinarily, a state is required to justify the reasons why certain limitations may be imposed on certain rights and freedoms before a court or a tribunal. A court or tribunal's discretion in determining whether the limitation imposed is justifiable is dependent on the judicial independence. This implies that a state is most likely to abuse its powers by wielding influence upon judicial authority whose level of autonomy is questionable. This proposition is echoed by Kwasi Prempeh¹⁵³ who asserts that contemporaneous constitutional reforms accompanying recent democratic transitions have given African courts express and extensive constitutional review authority. This form of limitation under article 24 suspends the rights provided under most international legislative frameworks.

¹⁵² Protection of fundamental rights and freedoms of the individual

¹⁵³ Kwasi H Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionality in Africa*, (2006) 80 Tul. L. Rev. 1239

According to Sara Stapleton, the general limitations imposed under international treaties must be distinguished from derogation clauses because it provides an avenue for states to balance rights and have justification in violating or breaching other rights while derogations allow a state to deviate from the standard set norms.¹⁵⁴ For instance derogation are usually imposed whenever there is declared a state of emergency. It is used by state to buy time and legal breathing space as a temporary measure to confront the crises. This has been done in Kenya in Mpeketoni and Lamu when there was a terrorist attack in 2014. Premised on this, article 58(6) of the Constitution also read together with article 4 of the ICCPR¹⁵⁵ requires that the enactment of statutes resulting from a declaration of a state of emergency should only limit rights or fundamental freedoms to the extent that the restriction is required during the emergency. As was discussed in chapter 2, the restriction against enjoying certain rights is usually done when it is ‘necessary’ or ‘reasonably required’ to achieve certain particular societal or public goals.

Just like ICCPR, CECSR and the African charter discussed in chapter three, the Constitution of Kenya has a provision limiting the application of the rights aforementioned. This is provided for under Article 24 of the Constitution of Kenya. It provides as follows:

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

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

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

¹⁵⁴ Sara Stapleton. Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation, (1991) 31 N.Y.U. J. Int'l L. & Pol. 535

¹⁵⁵ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976

- (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) Shall 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) Shall 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 shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

- (a) Article 31—Privacy;
- (b) Article 36—Freedom of association;
- (c) Article 37—Assembly, demonstration, picketing and petition;
- (d) Article 41—Labour relations;
- (e) Article 43—Economic and social rights; and
- (f) Article 49—Rights of arrested persons.

The above provision indicates the justifiable criteria required to limit the rights and fundamental freedoms in the Constitution of Kenya 2010. The criteria can be inferred from the principles developed in the Canadian Supreme Court in *R. vs. Oakes*¹⁵⁶ now widely referred to as the Oakes Test. Courts in Canada use this test when a law violates rights found

¹⁵⁶ *R v Oakes* [1986] 1 S.C.R. 103

in the Canadian Charter of Rights and Freedom. In *Oaks case* the intention was to interpret the limits imposed by Section 1 of the Canadian Charter of Rights and Freedoms that justifiably restricted rights and freedoms through the *Narcotic Control Act, RSC 1970*. Under section 8 of the Narcotic Control Act, the burden of proof of innocence squarely rested with accused unlike that provided for innocence until proven guilty by the Crown. Oakes thus challenged the validity of the provision of the Act as it violated his rights that were guaranteed under section 11(d) of the Canadian Charter and Fundamental Freedom. The Court came up with a two-step test to determine whether the government was justified in limiting a Charter right through legislation. The court highlighted the following as pertinent considerations for restricting rights and freedoms:

1. There has to be a pressing and substantial objective for the law or government action.
2. The means chosen to achieve the objective must be proportional to the burden on the rights of the claimant.
 - i. The objective must be rationally connected to the limit on the Charter right.
 - ii. The limit must minimally impair the Charter right.
 - iii. There should be an overall balance or proportionality between the benefits of the limit and its deleterious effects

Applying this analysis to article 24, it is important to point out that the limitations set out under the provisions have to be prescribed by the law and the benefits of the law must be greater than the costs associated with limiting the right or freedom. The questions to consider in determining whether a law has breached a fundamental right or freedom is thus premised on an application of the Oakes test. This implies that there has to be a criterion to be followed to weigh the impact and costs of restricting the rights. For any restriction to surpass the test, first, it must be an objective related to concerns which are pressing and substantial in a free and democratic society, and second, the means chosen should be reasonable and justified, that is, the restriction has to be proportional to achieve the objective in question. They must not be illogical, unjust or irrational. The means adopted should also impair as little as possible the right or freedom in question. Article 24(2) (c) further reinforces the importance of the proportionality test by incorporating an additional safeguard against excessive limitation.

Despite provisions of limitations stipulated, article 25 provides that there are certain rights which cannot be limited under whatever circumstances however much it could be justifiable:

25. *Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited-*

(a) *Freedom from torture and cruel, inhumane or degrading treatment or punishment:*

(b) *Freedom from slavery or servitude:*

(c) *The right to a fair trial*

(d) *The right to an order of habeas corpus*

The provision in this article inevitably implies that there can never be any justification by the law enforcement agencies to permit torture or detain an individual without taking them to court. Subsequently, it is also provided that no individual shall be taken to trial without adhering to all the formal procedures or by denying them any rights as accused person. The prohibition in this article is mandatory and cannot be deviated from whatsoever even where a state of emergency has been declared by a state. The provision in article 25 echoes the non-derogable rights stipulated under article 4 of ICCPR to wit, right to life, freedom from torture, slavery, fair trial and recognition before the law.

4.3.1 Limitations imposed by Article 32 - Freedom of conscience, religion, belief and opinion

The Kenyan Constitution 2010 begins on the premise that there is no state religion.¹⁵⁷ This implicitly provides that any citizen of Kenya is allowed to profess whatever faith they intend. Further and in addition to this premise is article 32. It provides obligations by the State to ensure that all legislation and other instruments do not violate any individual's freedom of conscience, religion, belief and opinion, yet just like any other fundamental human rights obligations this freedom is not absolute and is subject to legitimate limitation by the State. Various international and regional instruments have provisions for protecting this right as well provisions limiting the freedom of conscience, religion, belief and opinion.

Kenya is a party to the Universal Declaration of Human Rights,¹⁵⁸ International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights. These instruments form part of the laws of Kenya by virtue of article 2 (6) which stipulates that, any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution. Article 32 of the Constitution of Kenya, Article 18 of UDHR, article 18 of

¹⁵⁷ Article 8 Constitution of Kenya 2010

¹⁵⁸ Declaration adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot, Paris.

ICCPR and article 8 of the African Charter all stipulate that everyone has the right to freedom of thought, conscience and religion. It is further provided by these articles that this right includes freedom to change one's religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. Therefore state laws and policies as well as programs or interventions must respect this.

The right to freedom of conscience, religion, belief and opinion assured under article 32 of the Constitution of Kenya 2010 includes freedom of thought on all matters, personal convictions and the commitment to religion or belief, either which is held individually or in a society with others.¹⁵⁹ Further, these freedoms are protected equally and no one is compelled to act, or engage in any act, that is contrary to the person's belief or religion.

While article 32 provides for the freedom of conscience, religion, belief and opinion, the court in *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*¹⁶⁰ appeared to have adopted an analysis that limited this freedom in relation to students practicing Christianity under the Seventh Day Adventists (SDA) faith. In this case, a petition was brought to challenge an alleged violation of the right to freedom of religion for students professing the Seventh Day Adventist faith across the country as against the Minister for Education - 1st Respondent and the Attorney General of Kenya – 2nd Respondent. The Board of Governors Alliance High School was joined in as interested parties while the National Gender and Equality Commission appeared as *amicus curiae*¹⁶¹. The Petitioner sought a declaration that as a consequence of the Respondent's failure to act in accordance with their constitutional and statutory obligations, the rights under Article 32 of the Constitution and Section 26 of the Education Act of students who subscribe to the Seventh Day Adventist faith were being violated.¹⁶²

¹⁵⁹ Article 32(2) of the Constitution of Kenya provides that:

Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.

¹⁶⁰ *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* [2014] eKLR

¹⁶¹ Garner B defines *Amicus Curiae* as a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter; Black's Law Dictionary, 7th edition, (1999) 83

¹⁶² *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* (n 160 above) Para. 3 of the judgment page 2

The arguments posed in the suit by the petitioners reiterated the fact that public schools do restrict and hinder opportunities available for Adventist students to worship and fellowship during the Sabbath hours. According to the Adventists tenets, no one is supposed to engage in any activities on the hours between Friday and Saturday sunset, yet students professing the said faith have even been suspended for non-attendance of classes or activities falling on the same period. The petitioner further argued that the Respondents had assured the National Assembly that the rights of the Adventist students to observe the Sabbath and those of female Muslim students to wear the hijab would be protected but had failed to issue a circular to that effect amounting not only to a violation of their freedom of expression, but also amounted to a violation of article 27 of the Constitution of Kenya which is against discrimination.¹⁶³

The petitioner in advancing their arguments relied on the South African Constitutional Court case of *Christian Education South Africa v Minister for Education*¹⁶⁴ where it was decided that freedom of religion includes both the right to have a belief and the right to express such belief in practice.¹⁶⁵

The Respondents replied to the allegations by contending that people should enjoy all rights equally regardless of the faith they profess and should therefore not be given any special treatment above others.¹⁶⁶ Further to this and in tandem with the provisions of the Constitution of Kenya under article 24, it was argued that the freedom to religion is not absolute. Also, it was their contention that the limitation of such a freedom can be qualified by reasonable and justifiable criteria in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors.¹⁶⁷ This they stated has to be balanced against the right to education that they admitted should be held on higher pedestal.

¹⁶³ *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* (n 160 above) Para. 9 of the judgment page 3

¹⁶⁴ (CCT 4/00) 2000

¹⁶⁵ *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* (n 160 above) Para. 10 of the judgment page 3

¹⁶⁶ *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* (n 160 above) Para. 13 of the Judgment page 4

¹⁶⁷ *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* (n 160 above) Para. 14 of the Judgment page 4

Referring to a number of case laws, the respondents argued that there should therefore be no special treatment to students professing the Adventist faith, as it would put into jeopardy the process of satisfying the right to education that encompasses completing the syllabi on time. The interested party in this petition also submitted on the matter by arguing that the right to religion as provided for under article 32 of the Constitution must be read in light of articles 24, 43(d) and 27 of the Constitution and it was its position that whereas the right to belong to a religion and hold a belief is absolute, the right to manifest it is qualified.

The judge held inter alia that:

“The programmes run by the 1st Respondent in public schools are not discriminatory as they are applicable to all students from diverse religious beliefs. I have also found that the extent of interference in the enjoyment of the Adventists’ rights and freedoms is minimized by the reasonable accommodation extended to the SDA students by the Interested Party and I have seen no evidence that other schools have declined to do so. To exempt the Adventist students from the school's programmes would mean to grant them extra accommodation that would in return be cumbersome and chaotic to the Interested Party and other public schools. In my view, the explanation made by Interested Party is sufficient to establish that any infringement of the rights to religion is reasonable and justifiable in accordance with Article 24 of the Constitution.”

The decision in *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*¹⁶⁸ included a test of proportionality in balancing the right to education and the freedom to practice religion. Jim Murdoch however points out that, one should not be limited as to the extent in which they exercise their freedom to have or adopt a religion or belief of one’s choice.¹⁶⁹ Even so, religion or beliefs must not at any time be used as a tool for the encouraging war or advocating for hatred.¹⁷⁰

While there have been occasions when the cases have been taken to court to implement the rights and freedoms of citizens in respective spheres, there have been instances when the right to practice religion was restricted without adherence to the law. In Kenya, recent militia

¹⁶⁸ *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* (n 160 above)

¹⁶⁹ Jim Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights*, (2012) 49

¹⁷⁰ Jyotsna Mishra, *Scope and Categories of Human Rights*, 10; *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies UN doc. HRI/GEN/1, 145 Para. 7*

attacks have resulted into arbitrary closure of worship places especially mosques without any law approving the same. The closure of some mosques in Kenya has only resulted in government officials using the media as a platform to justify such acts during the continued spate of grenade and bomb attacks. In a report by one journalist and Editor James Munyeki¹⁷¹, it was reported that the state had attempted through the Director of Criminal Investigations in Kenya to cause the closure of a mosque in Machakos. The explanation for such closure was that some mosques in Kenya were being used as training centers for youths to be recruited by the terrorist group known as Al-Shabab. The attempts to shut down the Mosques were also initiated by what was alleged to be a takeover by radical groups who are alleged to have taken over mosques in Mombasa.¹⁷² Security officers have even at certain point stormed into Mosques over security concerns. The most recent occurrence of this is the events by security officers violating rights and opening tear gas at worshippers within the Musa Mosque, Mombasa in efforts to fish out purported Jihadist convention. Several youths were arrested in the siege.¹⁷³

The practice of extreme Islam that is termed jihad – holy war - has been blamed on the catastrophic and shameful massacre that took place at the Westgate mall in Nairobi.¹⁷⁴ The attack that was undertaken by alleged Al-Shabab agents was indicated to be a message to the Kenyan Government as a result of its invasion of Somalia by the Kenya Defence Forces in what was a regional peacekeeping mission operated by the African Union with the approval of the United Nations.¹⁷⁵

It is worth noting that however much the issue of terrorism is an international catastrophe, profiling the parties linked to heinous acts as Muslims thereby denying them the peaceful practice of their religious customs amounts to discrimination that in turn interferes with the parties' rights to practice their faith. For example as a result of this misconception, curfews

¹⁷¹ Online Standard Newspaper, Monday, September 15th 2014

¹⁷² Posted Wednesday, November 19 2014 by- Wachira Mwangi

<http://mobile.nation.co.ke/counties/Two-mosques-in-Mombasa-closed-after-another-dawn-raid/-/1950480/2527980/-/format/xhtml/-/t2ibh0/-/index.html> (Accessed on 27 March, 2015)

¹⁷³ Online Standard Digital, report by Philip Mwakio November 20th 2014

<http://www.standardmedia.co.ke/thecounties/article/2000141942/four-mosques-closed-indefinitely> (Accessed on 20th June, 2015)

¹⁷⁴ BBC news report by Baya Cat and Darin Graham September 2014 at

<http://www.bbc.com/news/world-africa-29247163> (Accessed on 20th June, 2015)

¹⁷⁵ Cameron Evers, Kenya's war against Al-Shabab: An internal/external affair at

http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1658:kenyas-war-against-al-shabab-an-internalexternal-affair-&catid=60:conflict-terrorism-discussion-papers&Itemid=265 (Accessed on 20th June, 2015)

have been imposed in Muslim dominated residential areas restricting movement, space and time to worship which clearly violates the freedom to religion. Limitations as have been noted should not result in any impairment of the enjoyment of any of the religious rights, or in any discrimination against adherents to other religions or non-believers.

4.3.2 Limitation under Article 33 on the Freedom of expression

Freedom of expression is a basic foundation of democracy – it is a core freedom without which democracy could not exist. The limitation provided against this freedom is also includes the general kind as provided under article 24 of the Constitution of Kenya. The provision as seen from the analysis above does not specify to what extent this right is limited except how it is justified. This implies that this freedom is equally not absolute; this was the decision in the matter of *Schenck vs. United States*.¹⁷⁶ In this case the accused was charged and convicted for conspiring to cause insubordination. He distributed thousands of flyers to American servicemen drafted to fight in World War I then; asserting that the draft amounted to “involuntary servitude” proscribed by the Constitution’s Thirteenth Amendment and urged the draftees to petition its repeal. The court maintained that Schenck had fully intended to undermine the draft because his flyers were designed to have precisely that effect. Justice Holmes held that there was no violation of speech. The Judge had the following to say:

“...that “the character of every act depends upon the circumstances in which it is done. While in peacetime such flyers could be construed as harmless speech, in times of war they could be construed as acts of national insubordination...a man who cries “Fire!” in a crowded theatre, in a quiet park or home, such a cry would be protected by the First Amendment, but “the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”

This case provides clear circumstances under which a state can constitutionally limit an individual’s free speech. It also points to the fact that the freedom of speech cannot be extended to provide any injunction to anyone who utters words that the law has a right to prevent. The Constitution of Kenya has thus limited the freedom of expression in its article 33 as follows:

- 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*

¹⁷⁶ (1919) 249 U.S.47

- (c) *academic freedom and freedom of scientific research.*
- (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.*

Article 33(2) makes a distinction between freedom of expression that tends to propagating propaganda for war; incitement to violence; hate speech; and advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm; or which is based on any ground of discrimination specified or contemplated in article 27(4). Kenyan courts are therefore limited by the provisions of this article while interpreting the boundaries of the said limitations that would constitute a contravention of the freedom of expression by any person in relation to the said restrictions. The media in Kenya has been most affected by the application of laws to inhibit their freedom of expression and yet we know that the right to freedom of speech is crucial in a democratic society for information sharing on issues of political debate and public accountability and transparency. Any limitations imposed therefore must be legitimate and leave room for protection of elements of a free press, including protection of journalistic sources. Media freedom is guaranteed¹⁷⁷ as long as it does not breach expression rules and there is provision for a regulatory body to set media standards and monitor compliance with those standards. The Media Act of 2007¹⁷⁸ creates the Media Council for self-regulation of the media and the Complaints Commission under the Council, their duties and procedure. Similarly, there is established Code of Conduct for journalists. This code of conduct serves as the ethical foundation for the practice of journalism in Kenya. It provides on issues such as accurate and fair reporting, confidentiality

¹⁷⁷ Article 34 (1)

¹⁷⁸ CHAPTER 411B laws of Kenya

and transparency as well as editors responsibility. All these are aimed at getting balanced reporting of issues as they occur in a country without violating other people's rights.

In tandem with international instruments provision, the law limiting freedom of expression is imposed to group or person not to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms. Those who express their opinions also have a corresponding duty and responsibility to the community by ensuring that they respect rights of others. It prohibits utterance that spread hate, words that are defamatory or likely to cause discontent among members of the community. The same limitation of expression has been provided for under Section 96 of the Penal Code Cap 63 Laws of Kenya thus:

'Any person who, without lawful excuse, the burden of proof whereof shall lie upon him, utters, prints or publishes any words, or does any act or thing, indicating or implying that it is or might be desirable to do, or omit to do, any act the doing or omission of which is calculated –

(a) to bring death or physical injury to any person or to any class, community or body of persons; or

(b) to lead to the damage or destruction of any property; or

(c) to prevent or defeat by violence or by other unlawful means the execution or enforcement of any written law or to lead to defiance or disobedience of any such law, or of any lawful authority, is guilty of an offence and is liable to imprisonment for a term not exceeding five years.'

While debates emerged following the 2007-2008 post election violence in Kenya, hate speech was understood to be an incontrovertible cause. The deponents¹⁷⁹ of this indicated that the intention to incite prejudicial treatment or action against a defined tribe or persons or individuals amounted to hate speech that should be classified as a criminal act. Hate speech was one of the grounds and themes that are formidable in forming the international criminal court cases against the suspected perpetrators of the post election violence in Kenya. Hate speech was stated to be publicized through both print media and the press.¹⁸⁰ The laws that were enacted thereafter to curb hate speech as a limited form of freedom of expression include: section 77 of the Penal Code Chapter 63 of the laws of Kenya which inhibits

¹⁷⁹ A report published by the KNHCR after the ethnically-spiced propaganda marking the 2005 Constitutional referendum campaign

¹⁸⁰ The Kriegler Report (The Independent Review Commission –IREC) and the Waki Report (Commission of Inquiry into Post-Election Violence – CIPEV)

incitement to violence and promoting feelings of hatred or enmity between different races or communities; sections 13 and 62 of the National Cohesion and Integration Act, 2008, Laws of Kenya, which form the basis for prosecuting hate speech in Kenya; and the second schedule of the Media Act No. 3 of 2007, Laws of Kenya, regulation 25 titled Code of Conduct for the Practice of Journalism in Kenya.

Dar Braveman and others¹⁸¹ have stated that the freedom of expression can be dispensed with at the expense of governance and democracy. As can be interpreted from the arguments above, freedom of expression should therefore be restricted in a manner that is aimed at protecting the general welfare of the society for the maintenance of harmony, order and peace as opposed to incitement or hate speech.

Another limit to the freedom of expression and access to information has occurred in the recent digital migration in Kenya. This brought about questions on the freedom of expression. In the matter of *Royal Media Services Ltd v Attorney General & 2 others*¹⁸², Justice Majanja delivered the decision that clearly indicated that when an institution is exercising a regulatory authority which entitles a media house to follow due process mandated by law, then such an exercise cannot be construed to violate the Constitution or fundamental rights and freedoms of a petitioner.

The subject of the decision was on the nature and extent of the freedom of the media protected under Article 34 of the Constitution and whether it has been violated by the respondents in the context of the migration of terrestrial television broadcasting from analogue to digital platform. The court held that the petitioners are not entitled to be issued with Broadcast Signal Distributors (BSD) licenses by the CCK on the basis of their established status or on the basis of any legitimate expectation. Licensing is subject to statutory provisions that allow the CCK in exercise of its mandate to make certain considerations and impose conditions that are necessary for the achievement of the objects and purposes of the Constitution and the law. The issuing of BSD license to other licensees to the exclusion of the petitioners as alleged in the petition is not a violation of articles 33 and 34 of the Constitution.

¹⁸¹ Daan Braveman et al. *Constitutional Law: Structure and Rights in Our Federal System*, 4th edition, (2003) 866

¹⁸² [2013] eKLR

In answer to the issue on digital migration, the court held that it is not a violation of the petitioners' fundamental rights and freedoms and no basis has been made by the petitioner to stop, delay or vary the digital migration process. The process of migration of the broadcasting platform from analogue to digital was consultative and participatory and in line with Kenya's international obligations. This decision somehow follows the principles enunciated in the *Oakes case* where it was held that as long as there is a pressing and substantial objective for the law or government action and the means chosen to achieve the objective is proportional to the burden on the rights of the claimant then it cannot amount to a violation.

The law as discussed under article 19 of the ICCPR provides concisely that, principles of legality and proportionality should be considered for imposition of one or more of the legitimate purposes enumerated in article 19(3). Following this principle, the court in the *Coalition for Reform and Democracy-CORD & 2 others vs. the Attorney General & Another*,¹⁸³ held that the provisions in the Security (amendment) Act 2015 of Kenya was in breach of article 34 of the Constitution of Kenya hence null and void. The Petitioners in this case sought the court's determination on issues inter alia, whether certain sections as amended by the recently enacted Security Law (Amendment) Act (SLAA) were unconstitutional for violation of the right to freedom of expression and the right to freedom of the media guaranteed under articles 33 and 34. On the question whether the impugned provisions of the Security Law (Amendment) Act were unconstitutional for violating the Bill of Rights the court in holding that there was a violation of the freedoms of expression and of the media held thus:

- (i) Section 12 of SLAA and section 66A of the Penal Code are unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution.
- (ii) Section 64 of SLAA that introduced sections 30A and 30F to the Prevention of Terrorism Act are unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution.¹⁸⁴

The judges found the sections of the security law that called for more control on the media violated the constitution by limiting freedom of expression. The significance of this petition

¹⁸³ Petition No. 628 of 2014 consolidated with Petition No's 630 OF 2014 and 12 of 2015

¹⁸⁴ Petition No. 628 of 2014 consolidated with Petition No's 630 OF 2014 and 12 of 2015 (n 183 above) p 90 of 93 Para. 464 (a) and (b)

was the fact that the court applied a proportionality test in determining whether the limitation imposed was justifiable. In ruling that the clause amounted to a breach of the freedom of expression, the amendment constituted an unjustified interference in journalistic activity. The criminalization of legitimate reporting activities would inevitably and unduly interfere with the public's right to receive information about matters of public interest.

4.3.3 Limitation of the Freedom of movement and residence under Article 39 of the Constitution of Kenya

Freedom of movement deals with the rights of individuals to move freely within the state for those who are lawfully within the country and to enter another country and the restrictions imposed on immigration.¹⁸⁵ As already alluded to, rights maybe restricted, either by way of derogation under article 4 of ICCPR, or to protect national security, public order, public health or morals or the rights and freedoms of others, as allowed by article 12(3). Such restrictions can only be taken to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law. Restriction of the freedom of movement usually involves more of a civil and political measure as opposed to a social economic measure.¹⁸⁶ The right to leave one's country, or acquire citizenship has been analyzed by Goodwin-Gill as not absolute.¹⁸⁷ This implies that the freedom of movement can be limited to the extent justifiable by law in a democratic society.

A circumstance when one's freedom of movement is impeded by operation of the law applies especially in cases of police detention. The case of *Wanyiri Kihoro vs. the Attorney General*¹⁸⁸ provides a much approved basis of discussing the extent to which the limit of the right to liberty can be imposed. In the said case, Kwach JA quoted with approval the holding in *Njuguna s/o Kimani and others vs. Reginam*¹⁸⁹, where it was stated that;

“The notion that the police can keep a suspect in unlawful custody and prolong their questioning of him by refraining from formally charging him is so repugnant to the traditions and practice of English law that we find difficulty in speaking of it with

¹⁸⁵ Satvinder S Juss, 'Free Movement and the World Order' (2004) 16 International Journal of Refugee Law 289

¹⁸⁶ Nancy L. Green & François Weil, *Citizenship and Those Who Leave: The Politics of Emigration and Expatriation*, (2007) 13

¹⁸⁷ Vera Gowlland-Debbas, A paper on the Problem of Refugees in the Light of Contemporary International Law Issues, 93 & 96 at <http://www.unhcr.org/4ca348026.pdf> (Accessed on 20th June, 2015)

¹⁸⁸ Civil Appeal No.151 of 1987

¹⁸⁹ (1954) XXI EACA 316 at page 319

restraint. It must be recognized that once a police officer has made up his mind to charge any person, it is his duty to inform that person as soon as practicable and thereafter to produce him before a Magistrate as required by section 32 or section 35 of the Criminal Procedure Code.”

The decision points out that one has a right to liberty and movement which should not be restricted under unjustifiable conditions. The brief facts of the case in *Wanyiri Kihoro vs. The Attorney General (Supra)* are that: the appellant, a lawyer was arrested without a warrant and held in detention for more than the days stipulated (the constitution 2010 under article 49 provides that one can be held for at most 24 hours before being taken to court) without being charged with any offence where he was tortured and subjected to inhuman and degrading treatment by the police thus suffering great pain. On appeal, the court held that his arrest was unlawful and violated rights guaranteed in the Constitution. This decision has saved Kenyans from dictatorial regime that gave the police wide powers that were prone to abuse at the detriment of accused persons. The inclusion of this section in the Constitutions is a great milestone for Kenyan citizens.

In Kenya therefore, a person can only be detained for a period of 24 hours and not longer.¹⁹⁰ After this period, one must be produced before court to either answer to charges imposed against him, or subject to a court determination, further legal detention (when bail is denied) to allow for proper investigations to be undertaken.

The newly enacted Security (Amendment) Act Kenya, had, before certain sections were declared unconstitutional sought to restrict the freedom of movement. Sections 62 through 66 of the Act increased the role of security personnel in Kenya to arrest and detain people. This arbitrarily increased their powers provided for under the National Intelligence Security Act; and was therefore bound to be abused to serve other purposes not amenable in law. Sections 62 through 66 of the Security (Amendment) Act Kenya expanded the powers of the National Intelligence Service to stop and detain suspects, search and seize private property, and monitor communications without a court warrant. This they tried to justify as amounting to ‘doing whatever is necessary to preserve national security’.

¹⁹⁰ Article 49 of the Constitution of Kenya

The amendments turned out to be a complete contravention of the provisions of article 49 of the constitution of Kenya 2010 on the rights of an arrested person. Under its sub-clause 49(1)(f), one is required to be produced before court within a period of twenty-four hours unless the period falls after the court working hours – Court working hours in Kenya begin from 0900hours to 1700hours.

Article 49(2) stipulates that an offence which is punishable by a fine or jail term of less than six months should not result into the incarceration of an offender. The implication of these provisions is that when a person is legally detained, their right to liberty limited to the extent that a crime has been committed. The court in the case of *Purity Kanana Kinoti v Republic*¹⁹¹, reiterated the position that a police officer who subjects a person to detention for a period longer than allowed in the constitution should compensate them and that the same amounts to a violation of the arrested persons rights especially in regards to their freedom of movement. The court here applied an earlier decision in the matter of *Julius Kamau Mbugua vs. Republic*¹⁹², where the court held thus:

“... the breach of the right to personal liberty is not trial related. It is a right to which every citizen is entitled. It is the function of the Government to ensure that citizens enjoy the right. The duty is specifically on the police where the suspect is in police custody.”

In respect to freedom of movement and residency in Kenya, the case of *Mohamed Ibrahim Naz vs. Cabinet secretary responsible for matters relating to citizenship and the management of foreign nationals & another*¹⁹³ sheds light. The case involved a Pakistani national residing in Kenya by virtue of a work permit. He was arrested without a warrant and detained for four days, then deported to Pakistan. He alleged that no reasons were ever offered to him and that he was never served with a declaration by the Cabinet Secretary declaring him to be a prohibited immigrant. He attempted to get back to Kenya after his deportation, but was denied entry into Kenya. He alleged that his rights under article 47 of the Constitution were violated as due process was never followed.

The court in dismissing the petition held in summary as follows:

¹⁹¹ [2011] eKLR

¹⁹² Criminal Appeal No. 50 of 2008

¹⁹³ Nairobi High Court Petition No. 333 of 2013

1. *The provisions of the constitution under article 39 on the freedom of movement in Kenya were in consonance with the provisions of the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights and the African Charter on Human and People's Rights.*¹⁹⁴
2. *The Petitioner not being a citizen in Kenya was not afforded the protection under Article 39. The right to enter, remain in and reside in Kenya was held to be a preserve to Kenyan citizens and the Petitioner could therefore not demand the same protection.*¹⁹⁵
3. *Due process was followed as required for the removal of an alien from a state's territory, as provided under international conventions.*¹⁹⁶
4. *Due process was followed in the deportation of the petitioner vide the declaration issued.*¹⁹⁷
5. *Failure to challenge the said declaration and removal orders necessitated the deportation of the Petitioner by due process.*¹⁹⁸ *The court could therefore not interfere with the decision of the state.*

The decision above appears to justify that due process having been followed and that the said provision in section 33(1) of the Kenyan Citizenship and Immigrants Act was the premise upon which such justification was made. The section provides numerous grounds that entitle the State to prohibit immigrants and inadmissible persons.

4.4 Conclusion

The analysis undertaken in this chapter has indicated that not all rights as enshrined in the constitution are absolute. The analysis of the provisions of article 24 and 25 of the Constitution of Kenya has demonstrated that the limitation of certain rights should be pegged on the law and depend on a particular set of circumstances. The restriction must recognize that certain principles have to be adhered to for the continuance of a just, free and democratic

¹⁹⁴ Court Petition No. 333 of 2013 (n 193 above) Para 23-26

¹⁹⁵ Court Petition No. 333 of 2013 (n 193 above) Para 27

¹⁹⁶ Petition No. 333 of 2013 (n 193 above)

¹⁹⁷ Petition No. 333 of 2013 (n 193 above) Para 31

¹⁹⁸ Petition No. 333 of 2013 (n 193 above) Para 30

society based on human dignity, equality and freedom. There are however certain rights that can never be limited by virtue of the fact that they have been from time immemorial been considered of such importance that they are peremptory norms of international law from which no derogation is permitted (*jus cogens*). These norms are recognized by the international community as a whole as being fundamental to the maintenance of an international legal order. These include the absolute prohibition of torture, cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude, the right to a fair trial and the right to an order of habeas corpus. In Kenya, Article 25 provides that there are certain rights that cannot be limited under whatever circumstance however much it could be justifiable along what international instruments stipulate. These rights include freedom from torture, slavery, fair trial and an order of habeas corpus:

The provision in article 25 inevitably implies that there can never be any justification raised by the law enforcement agencies to permit torture or detain an individual without taking them to court. Subsequently, it is also provides that no individual shall be taken to trail without adhering to all the formal procedures or by denying them any rights as accused persons. The prohibition in this Article is mandatory and cannot be deviated from even in times of a declared state of emergency.

The law in Kenya appears to integrate the required elements of the proportionality principle in imposing limitation on certain rights and freedoms as discussed above. It can be observed from the case law discussed as well as analysis undertaken here that there is a causal connection between the national measure and the aim pursued. A limitation on freedom to religion can be imposed in furtherance of greater goals of right to education in certain circumstances as was discussed in the *SDA case*. Though not limiting the practice, the aim is to indicate that the exact way of worship can be dispensed with at the prospect of fulfilling a greater goal. Thus the measure imposed to restrict the right to worship or in other words freedom of religion is relevant and pertinent.

Looking at the limits restricting the freedom of expression, it is clear that there is no specific limiting criterion. The extent to which the same has been justified has been clearly highlighted in the constitution and other legislations developed have to that extent only advanced the legal constitutional obligation. It is therefore structured in such a way that implied there is no alternative measure available, which is less restrictive.

Finally, in relation to the freedom of movement, it is clear that there has been shown the relationship of proportionality between limiting movement and residency and the objective of national security. The implication of the deportations is that as long as state security is threatened, there is a need to impose a ban on such parties threatening the state.

CHAPTER 5 – CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusion

The main objective of this study was to assess Kenya's 2010 Constitutional framework in providing safeguards to the limitation of rights and fundamental freedoms vis-à-vis the international legal instruments protecting human rights. It also set to establish the concepts and principles underlying the limitation of rights and the extent to which the Kenya's 2010 Constitution provides a proper formula in limiting rights of citizen. In order to realize or achieve these objectives the study undertook a desk and library based research that mainly relied on published and unpublished materials. It reviewed materials on international, regional and national legal and policy frameworks. Specifically the national government position papers, reports to the various human rights monitoring bodies, Non-Governmental Organisation reports and publications were analysed to find out Kenya's and other jurisdictions position on limitation of rights. Review of books, articles and journals as well as case law in the subject area was also undertaken through this method. Internet sources were also used to access some selected journals, articles and reports from international organisations and case law. The study contains five chapters that discuss various issues as outlined in the objectives of the study.

Chapter one has provided detailed background to the study shedding light on limitations of right. As discussed in the chapter, enjoyment and importance of human rights is dependent on how individuals interact with other people at all levels of the society in relation to equality, tolerance and respect in order to lessen friction in the society. It is the state that has authority to limit rights bargained by the society through use of appropriate legal criteria. Limitation clause limits guaranteed rights, therefore for it to be operational; the rights set forward in the national constitution must be ascertainable and specify the manner in which rights are restricted. For instance the Bill of Rights under the repealed constitution of Kenya was subject to claw-back clauses which caused interference and confusion with the exercise of rights protected in the constitution and watered down the essence of provisions of fundamental rights and freedoms. With the advent of the Constitution 2010, things have changed. The Constitution is laudable for providing a general limitation clause with qualifications which not only limits rights but also the power to limit rights. It is this change

that this study interrogated to establish whether the formula adopted is in tandem with the international standards.

The creation of a limitation clause in a Constitution sets out conditions upon which limitation of rights must be assessed is undertaken in chapter two. Discussions are made to the concepts and principles that underlie the limitation of rights. These principles are based on various issues for example the weight that rights hold a certain right in the overall constitutional scheme in order to justify its limitation and measure taken to limit rights must serve a specific purpose that is reasonable to the citizen. It is also stated that the limitation should not be excessive than what is warranted by the purpose that it seeks to achieve and the measure taken should be less restrictive. Two main features or approaches of a general limitation clause are discussed which basically revolve around their interpretation through the laws of general application and the requirement that the limitation clause must be reasonable and justifiable within an open and democratic society founded on the principles of human dignity, freedom and equality. These are the key precincts of limitation clauses that a state must comply with in exercising its authority to limit rights.

A discussion of the decision of the Canadian court in *R v Oakes*¹⁹⁹ provided a test on the analysis of the limitation clause that allows reasonable limitations on rights and freedoms through legislation. It was indicated that for a limitation to be justified, its objective has to warrant overriding a constitutionally protected right or freedom. The standard in this case must be high in order to ensure that objectives which are trivial and discordant with the principle integral to a free and democratic society are eliminated. Therefore the principle implies that there has to be a balancing of the rights and interests of an individual on the one hand, and the interests of a democratic society as represented by the state

Chapter three has provided detailed discussion on the limitation of rights and fundamental freedoms clauses in international and regional instruments. The instruments discussed are ICCPR, ICESCR and ACPHR which all allude to the fact that all human beings are equal. Hence whatever restrictions or limitations that are imposed must be those that are permissible under circumstances stipulated by legislative framework. Such limitation can only be imposed by a state after providing conclusive and exhaustive reasons, which include a threat

¹⁹⁹ *R v Oakes* (1986) 26 DLR at 225

to the security and life of a nation. The limitation must take cognizance of specific values that support a free and democratic society, based on human dignity, equality and freedom and be imposed in appropriate circumstances to achieve overall societal goals and aspiration.

The frameworks are categorical that there must be clear criteria for limitation of rights and fundamental freedoms. The criteria set by these frameworks in assessing the permissible scope of limitation of the right are: the test of proportionality or reasonableness, necessity, the least restrictive alternatives and appropriateness of the limitation imposed. The principles act as safeguards measures on excesses by state power to ensure that the individual rights and fundamental freedoms are not limited at the whims of the state or its officials.

The analysis of the International framework and regional framework that was undertaken in chapter three indicated that article 4 of the ICCPR allows limitations only in situation when the life of a state is threatened during the existence of a public emergency. The ICCPR also contains other limitations in article 12(3), which imposes a limitation on the right to movement and the freedom of residence and limits it to the extent that the restriction is necessary to protect public order, national security, the rights and freedoms of others, or public health or morals, and are consistent with the other rights recognized in Covenant. Article 18(3) provides the limitation of the freedom to manifest one's beliefs or religion which is subject to prescribed by the law and deemed necessary to protect public order, safety, morals, or health or the rights and freedoms of others. The scope of limitation imposed within the ICCPR has been authoritatively considered by the Human Rights Committee (HRC). The HRC has also stated that the laws authorizing limitations ought to use a precise criterion that does not confer unbound discretion to those charged with their execution.

Article 4 of CESCR acts as the general limitation clause applicable to all the rights other than the right-specific limitations provided in the covenant. The approach towards limitation by CESCR is quite different from that of the ICCPR. The ICCPR does not have a general limitation clause and instead opts for a right-specific limitation clause. ICCPR provides for derogation from specific rights at times of emergency whereas there is no derogation clause in CESCR. The limitation clause in CESCR allows for its rights to be limited along the lines of progressive realization and not of immediate application since the rights are resource based. Meaning they can only be effectively implemented when a state has resources to facilitate their enjoyment. Despite this the core principle is that limitations cannot lawfully reduce the rights beneath its minimum core just as the lack of resources cannot do so.

The African Charter was noted to have the capacity to protect the three ‘generations’ of human rights: the civil and political rights; socio-economic and cultural rights; and group and people’s rights. The charter does not draw any distinction amongst their justiciability or implementation. It embodies three types of limitations namely: right specific norm-based limitation; right specific claw-back clauses and the general limitation clause. The scope of limitation imposed within the African Charter has been authoritatively considered by the African Commission on Human and People Rights. The African Commission is the body tasked with the protection and promotion human rights in the continent. The jurisprudence from the African Commission on the interpretation of the limitation clause emphasizes that for the limitations to be valid, they ought to be in line with the states parties’ obligations under the African Charter.

The chapter therefore concluded that in all the analyzed legislative instruments, states can limit rights under exceptional circumstances by providing conclusive and exhaustive reasons, which include a threat to the security and life of the nation. In reference to permissible limitations, it has been observed that: the limitations imposed ought not to violate any rights at stake; the limitations should not conflict with minimum core rights. Lastly, limitations ought to respect the principle of proportionality, which require the state to show the scope and severity of its limitation being proportionate to the aims such measures seek to pursue (for example, the general welfare of the society).

Chapter four analyzes the nature of limitation of rights and fundamental freedoms that are prescribed in the Kenya’s 2010 Constitution. An analysis of the limitation clauses on the rights and freedoms as enshrined in the Constitution is undertaken and a distinction is made between Constitution of 2010 and the repealed Constitution in terms of limitation of rights. Key findings in the study indicated that the bill of rights under the repealed constitution of Kenya was subject to claw-back clauses which caused interference and confusion with the exercise of rights protected in the constitution. Limitations were delineated in terms that highly prioritized public interest through presence of subsequent sections in the constitution that outlined the content of each right and circumstances of its limitation. It also was signified that the limitations were subject to rights of civil and political nature due to the limited scope on the nature of rights the constitution seemed to protect. By contrast, the Bill of Rights in the Kenya’s Constitution 2010 was noted to be progressive make use of a single clause in

limiting the rights in Article 24.

In Kenya, fundamental rights and freedoms are provided for under chapter 4 of the Constitution 2010 – the Bill of Rights. This chapter entrenches the protection of fundamental rights such as the respect for life, freedom of expression, freedom to practice religion, freedom of movement, the inherent dignity of the human person. The Bill of Rights further provides for the protection of socio-economic rights that require the State to commit itself to ensuring their fulfilment and the adherence to public participation of its citizens. While these rights as enshrined in the Constitution are guaranteed to every Kenyan citizen, they are however limited under article 24 of the Constitution.

Whereas article 24 limits rights and fundamental freedoms generally on one hand, on the other it stipulates the principles that must be considered while restricting such rights. Issues for consideration include the nature of the right or fundamental freedom and the purpose of the limitation. Equally important and highlighted under the said article is the need to ensure that a balance is struck between the rights or fundamental freedoms sought to be restricted and the enjoyment of rights and fundamental freedoms by any individual and general welfare of the society. The balance is aimed at ensuring that the right or fundamental freedom is not prejudiced.

Article 25 of the Kenya's 2010 Constitution makes provision for the rights that cannot be limited. These rights include freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus*. The language adopted here on limitation resonates with what is provided for under article 4 of ICCPR. These rights are held in high regard and are inviolable thus absolute. No one is permitted to torture, to enslave and to deny another person the right to a fair trial. The order of *habeas corpus* has now been specifically incorporated in the Constitution as opposed to the repealed Constitution. Analysis of some case law in Kenya, show the extent to which courts have determined whether a limitation of right is permissible through interpretation of general clauses of limitation. Some cases are progressive and the decisions that emanate from them follow the principles that underlie limitation of rights as prescribed by law.

The chapter concluded that not all rights as enshrined in the constitution are absolute and thus

can be subject to limitations. It has been demonstrated that the limitation of certain rights should be pegged on the law and depend on a particular set of circumstances. The restriction must recognize that certain principles have to be adhered to for the continuance of a just, free and democratic society based on human dignity, equality and freedom.

This study has shown that in order to protect the various fundamental rights and freedoms of the people, the state must balance the rights and interests of different persons with the legitimate state interests and concerns and that of the individual. It has been stated here that limitations of rights are imposed for the benefit of the greater society. The limiting measures taken however should not outweigh the actual circumstances necessitating the restriction and should be non-discriminatory. Note worthy is the fact that the restrictions imposed should not make a state avoid her obligation under international law.

From the study one can safely conclude that the law in Kenya appears to integrate the required elements of the proportionality principle in imposing limitation on certain rights and freedoms as well as case law emanating from the Courts. In many instances the Kenyan legal system to an extent has embraced and incorporated the principles governing limitations of rights as enshrined in both international and regional instruments.

5.2 Recommendations

The study calls upon the judiciary to be vigilant in their role of protecting the rights guaranteed in the Constitution and provide interpretation in determining whether a limitation clause has been properly imposed when such cases are brought before them for deliberation. Based on the common law system, judges in superior courts define the law by developing precedents.²⁰⁰ The decisions arrived at by judges in discovering and analysing legal principles are supposed to be sound and guided by the provisions of the Constitution, statute and legal policy. An example is seen in the decided case of *Re Spectrum Plus Ltd*²⁰¹, where Lord Nicholls stated that:

“Judges have a legitimate law-making function. It is a function they have long exercised. In common law countries much of the basic law is still the common law. The common law is judge-made law. For centuries, judges have been charged with the responsibility of keeping this law abreast of current social conditions and

²⁰⁰ A. Goodhart, "Precedent in English and Continental Law", [1934] 50 Law Quarterly Review 40, 41

²⁰¹ [2005] 2 AC 680

expectations.”

The judges, in Kenya, must therefore follow the principles alluded to by Lord Nicholls in undertaking their role of ordering the society through the incorporation of constitutional provisions that promote and protect individual rights. Since the Constitution of Kenya 2010 has ensured that each citizen has abundant assurance in the value and efficacy of law as a drive for political, economic, social and cultural changes, the judiciary is duty bound to ensure that the said rights are upheld. This is the epitome of democracy which is the basis of raising public expectations which the Judiciary is part of. The National and devolved governments are the providers of basic standards of public amenity, the guarantor of minimum levels of security and, increasingly, the regulator of economic activity and the protector of every citizen's right. These kinds of protection call for a general system of rights and a more intrusive role for the law which the judiciary is central to.

In Kenya, the 2010 constitution has imposed a duty on the Courts to give effect to the provisions of the law in so far as statute permits.²⁰² Where any law or act is inconsistent with the constitution, the courts have complete authority to pronounce a declaration of incompatibility. Once the declaration is made by the court then it is presumed that the National Assembly will amend the law so as to remove the inconsistency in line with the courts pronouncement.

The limitations imposed by provisions of the Constitution is entirely commendable as it secures rights which are universally regarded as the foundation of any functioning civil society which include *inter alia* a right to life, freedom of expression, freedom of movement and liberty, freedom of speech, access to justice administered by an independent judiciary, security of property, and so on. The function of the courts in dealing with the constitution is essentially interpretative and not creative. For example, in providing an advisory opinion on the two-thirds gender rule, the Supreme Court of Kenya Reference No 2 of 2012²⁰³ stated that in relation to elective positions within both the National and County governments was to be achieved progressively and that the government had a time span within which to develop a formula for the realization of the two thirds gender principle by the 27th of August, 2015.

²⁰² Article 159(1)(e) of the Constitution of Kenya 2010

²⁰³ In the matter of the principle of Gender Representation in the National Assembly and the Senate [2012]eKLR

This interpretation by the Supreme courts was applauded as an interpretation that was against discrimination as provided under Article 27 of the Constitution and seen as a safe guard to the rights guaranteed in the constitution.

In a nutshell, the Judiciary's responsibility in promoting constitutionalism and upholding the bill of rights involves interpretation of the Constitution while considering its supremacy. The judiciary being an independent organ of government has the power to make declaratory orders where the other organs of Government have failed to adhere to the constitution or to correct any failure resulting from misapplication of the law. Additionally, the Judiciary has the responsibility of enforcing the provisions of the bill of rights which have from time to time been neglected or violated with impunity. The judiciary must act like an anchor of the constitution by ensuring that it is involved in making determinations on issues that are of a socio-political nature that restores public confidence in it as defender and protector of rights without favour or fear.

The National Assembly is equally tasked with the role of ensuring that utmost caution is taken when performing their legislative duties to avoid developing legislature that arbitrarily deprives any citizen of their rights. All acts of parliament must therefore conform to constitutional pressures as far as limitations of rights are concerned. As was enunciated by Lord Diplock in *R vs. Inland Revenue Commissioners ex p. National Federation of Self-Employed and Small Businesses*;²⁰⁴ "Parliament is sovereign and has the sole prerogative of legislating. Ministers are answerable to the courts for the lawfulness of their acts. But they are accountable exclusively to Parliament for their policies and for the efficiency with which they carried them out, and of these things Parliament was the sole judge."

In Kenya, this enunciation applies as the Constitution vests the power of legislation in Parliament. The National Assembly has the role of law making, establishing and developing through amendments or statutory legislation in Kenya. In developing such legislation parliament is duty bound to ensure their conformity with the constitutional provisions and to avoid legislation that violates rights of citizens. It has been the trend for some time that some of the laws which the parliament developed since the promulgation of the Constitution of Kenya have limited the rights of individuals arbitrarily. This was witnessed for instance the

²⁰⁴ [1982] AC 617, 619

Media Council Bill, which was then seen as empowering the government to gag the media and the gag was seen serve public or national interest.²⁰⁵ This was a draconian move that was aimed at limiting freedom of expression and freedom of media through the back door against the spirit and letter of the constitution. Such attempts must be resisted by parliament as they owe a duty to Kenyans to protect and uphold the constitution as committed by themselves when they take up such office.

The independence of the parliament is entrenched on the fact that it has legislative prerogative in exercising political sovereignty when conducting the house business of legislating.²⁰⁶ Parliament is therefore free from any form of influence or interference by the remaining arms of government which include the Executive and the Judiciary. The constitution has therefore mandated the Parliament with the task of formulating legislation which is intended for implementing several provisions of the Constitution as provided under the fifth schedule of the 2010 constitution for the realization of the rights guaranteed.²⁰⁷

Hart posits that Parliament needs to strike a balance between its authority of legislation against justification and limitation of certain rights.²⁰⁸ He avers that a breach of such fundamental role by Parliament resulting in laws which are inconsistent with the rule of law is frowned upon by the Judiciary which in all instances has the interpretive power to quash such laws.²⁰⁹ This power is derived from Article 165(1)(b)(e) and 165(6) of the constitution which gives the High Court of Kenya Supervisory powers in terms of judicial review to control Acts of Parliament, and sometimes adjudge them to void if it is found that such acts are against common right and reason, or repugnant or impossible to be performed.²¹⁰

In essence, parliament as the law making body must perform this duty within the confines of the Constitution to ensure utmost adherence to the rule of law. This perhaps can help to meet the parameters within which rights can be limited to alleviate violations.

²⁰⁵ Article 34(5) of the Constitution of Kenya 2010 provides Parliament with the role of enacting legislation that provides for the establishment of a body, which shall *inter alia* set media standards and regulate and monitor compliance with those standards

²⁰⁶ Article 94(5) of the Constitution of Kenya 2010

²⁰⁷ Article 261(1) of the Constitution of Kenya 2010

²⁰⁸ H.L.A. Hart, *The Concept of Law*, (Revised edition), 1994, p. 207-12

²⁰⁹ Hart (n 209 above)

²¹⁰ Prof. Christian Roschmann, Mr. Peter Wendoh & Mr. Steve Ogolla; *Human rights, separation of powers and devolution in the Kenyan constitution, 2010: comparison and lessons for EAC Member states*

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