

LEGAL RECOGNITION OF STYLE AS AN EXPRESSIVE RIGHT UNDER THE
KENYAN CONSTITUTION

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By

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Word Count (11,600)

MAY 2018

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ACKNOWLEDGEMENTS

I am grateful to God Almighty, for the successful completion of this research project, my family, for being my support system and my supervisor, Sarah Ochwada, for being so understanding and patient throughout the writing process, for encouraging me to stick with my original topic, for helping me with relevant information in regards to the dissertation and guiding the research in the right path.

Thank you and God bless.

DECLARATION PAGE

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

Signed:

Date:

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

Signed:.....

[Supervisor's Name]

ABSTRACT

The main objective of this research project is to show that style is an artistic right whose freedom of expression should be protected by the law.

This research is based on various sources of information such as; study of already conducted interviews and polls from independent, accredited organisations, professional opinions, statutes, international legal instruments and analysis of case law.

The most important finding from this research project is that style discrimination more often than not leads to violation of ones' human dignity.

Lastly, my major recommendation is that style be recognised as an expressive right by the law, that is, freedom to express style should be included as a right by law makers'.

LIST OF ABBREVIATIONS

ABD- Appearance Based Discrimination

ACPHR- African Convention on Peoples' and Human Rights

CJ- Chief Justice

CMS- Catastrophe Management Solutions

CoK- Constitution of Kenya

EEOC- Equal Employment Opportunity Commission

HRM- Human Resources Management

LIST OF CASES

- 1) Rabede and Others v Principal of Leseding Technical School and Others [2013]
- 2) R v Kennedy Rhodes [2011] as reported by 'Christie Blatchford: Manitoba Judge is Dead Wrong in Rape Case' The Globe and Mail Inc., 26 March 2017 <https://www.theglobeandmail.com/> on 26 December 2017.
- 3) The Jones Case as reported by 'Maya Allen: Federal Court Rules it Legal to Discriminate Against Employees with Dreadlocks' Cosmopolitan, <http://www.cosmopolitan.com/> on 21 September 2016
- 4) The BBC report as reported by www.bbc.com
- 5) The case against Governor Fauzi Bowo as reported by www.jarkartapost.com on 8 May 2016
- 6) The case against Fr. Piero Corsi as reported by www.theguardian.com on 12 February 2013
- 7) The case against Andres Jaramillo as reported by www.elcolombiano.com on 16 June 2013

LIST OF LEGAL INSTRUMENTS

Kenyan Statute

The 2010 Constitution of Kenya

The African Charter of Human and Peoples' Rights

Other Jurisdictions

The Nigerian Constitution of 1999

International Instruments

The EU Charter of Fundamental Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The UK Human Rights 1998 Act

The Universal Declaration of Human Rights

Title VII of the Civil Rights Act of 1964

1. INTRODUCTION

Charmaine Li, a writer for a fashion website, *Ignant*, wrote in an article that “caring about clothes and style can seem very unimportant and superficial as compared to other forms of self-expression such as speech, writing, dancing, painting, music and so on, perhaps it has something to do with the fact that style is often pigeonholed as fashion magazines and consumerism—which it can be—but it can also be a lot more. For some, fashion and style can be an extension and expression of self, or a way to (re)invent one’s self.

A style of dress can be a visual manifestation of where one stands, colored by history, culture, emotions and politics. Or it can be an attempt to create a state where the gap between one’s body and one’s inner life feels the smallest, that is, trying to mirror the inside on the outside. On the other end of the spectrum, it can simply be seen as a social norm because dressing is an integral part of the society. However way you choose to approach the ritual of getting dressed, it’s an inescapable part of our lives”¹.

He further says that “the formal inclusion of style as a right in the American Constitution and other international legal instruments would help in blurring grey areas that are currently present in the relationship between style and the society and its use as a tool for self-expression”.

The fashion dictionary defines style as a unique form of clothing or arranging one’s appearance. It could alternatively be described as being a manner of expression.

Miuccia Prada² in defining style said “what you wear is how you present yourself to the world, especially today, when human contacts are so quick. Fashion is instant language.”

Gianni Versace³ said “don’t make fashion own you, but you decide what you are, what you want to express by the way you dress and the way to live.” In other words, he is saying that fashion and style has the power to convey expression.

¹ ‘Charmaine Li: Fashion as Self Expression’, 22 October 2015 www.ignant.com on 17 May 2017

² Miuccia Bianchi Prada is an Italian billionaire fashion designer and businesswoman. She is the head designer of Prada and the founder of its subsidiary MiuMiu.

In the words of Rachel Zoe,⁴ “style is a way to say who you are without having to speak.”

John Galliano⁵ described the ‘joy of dressing’ as an ‘art’. The realisation that dressing is an art makes it a form of expression; a way of communication, because it has all of these attributes there arises a need for protection.

The conclusion of this argument is that style should be made a political right associated with freedom of expression (just like speech is a political right associated with freedom of expression).

1.1 BACKGROUND (JUSTIFICATION OF STUDY)

The rationale behind this research is to show that omission of style as a right under artistic freedom of expression by law makers has indeed caused a major rift in society. This rift has further created a situation where people cannot express themselves as they would like, as well as providing excess breeding space for discrimination.

The research design is structured in a way that would focus on individuals who have been affected by this ‘omission’ and who have faced style or appearance based discrimination in one way or another. This would be shown through already conducted studies and interviews.

1.2 STATEMENT OF OBJECTIVE

My objective is to show that dress is a form of art, whose expression (style) should be protected by the law under artistic freedom of expression, just like speech.

³ Gianni Versace was an Italian fashion designer and founder of Versace, an international fashion house, which produces accessories, fragrances, make-up, and home furnishings as well as clothes. He also designed costumes for the theatre and films.

⁴ Rachel Zoe is an American fashion designer, businesswoman, and writer. She is best known for working with celebrities, fashion houses, beauty firms, advertising agencies and magazine editors.

⁵ John Charles Galliano CBE, RDI is a Gibraltar-born British fashion designer who was head designer of French fashion companies Givenchy, Christian Dior, and his own label John Galliano.

1.3 RESEARCH QUESTION

Several questions would arise in the cause of writing this research but the core question to be answered is whether dress is a form of art. The answer to this question would give rise to another question, which is; if dress is an art form then why is its expression not protected?

1.4 THEORETICAL FRAMEWORK

This is the structure that holds and supports this research study. They can be divided into two;

1.4.1 The Natural Law Approach

Natural laws are God's law and they are inherent in us, based on this, we have a natural right to express these natural laws.

Natural laws are simple laws that are already innate in us and manifest themselves by virtue of us being humans. These laws are laws before them even being entrenched in any legal instruments or before they are given formal recognition⁶. They are "God laws" and because they are laws, they have accruing rights. For example we all know without being told that killing is bad, it is an innate knowledge, we cannot explain how we know but we know. It is just natural to us. Due to the fact that it is a law it has an accruing right, which is the right to life. So also laws that are tied to expression, we cannot explain the need for us to express ourselves or why we are so impassioned about it but all we know is that it is as natural to us as breathing because it is God's law, also like other laws, because they are laws they have accruing rights which come in the form of freedom to express. Just like Morley said "a right should be something that can be expressed and exercised. If a right cannot be exercised, it becomes unsubstantial to the point of non-existence", very specifically because style is inherent in us, it is a natural law and if the rights that accrue from dressing (freedom of expression of style) cannot be exercised or if it is prevented from being exercised it becomes unsubstantial to the point where it becomes non-existent. If this right becomes non-existent

⁶ 'Heinrich Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy*' Online Library of Liberty, 1936 <http://oll.libertyfund.org/> on 11 August 2017

then it becomes useless it can neither be expressed nor protected. According to natural law legal theory, the authority of legal standards necessarily derives, at least in part, from considerations having to do with the moral merit of those standards⁷. **The moral merit of expression of style is the freedom and power to exercise one's individualism.**

You might ask what gives style the accessibility to be included under natural law, well, style has the power to convey and/or portray human emotions; it is a means through which emotions are shown, it can make expressions tangible. Since expression is already inherent in us that means that the means through which we choose to express ourselves is also inherent in us- that which is inherent in us is natural and it is guided by natural law.

In an article titled 'Natural Law and the Right to Self-Expression', Felix Morley, the writer, starts by saying that some rights have been given to us directly from God. He goes on to say that man is a social being distinguished physiologically from lower animals most especially by the relative facility with which he can communicate his thoughts to his fellow men. All this communication, esthetic or utilitarian, spiritual or carnal, uplifting or degrading, is a form of self-expression. Is this communication not an evidence of the divine in man since it clearly distinguishes man from the beasts of the field? If so, any examination of the Natural Law, which is God's Law, should logically begin with an affirmation of Freedom of Expression (this means that since God directly gave us the gift of self-expression and communication then it should be provided for us to freely express and have access to and protection of this right to self-express). "A right should be something that can be expressed and exercised. If a right cannot be exercised, it becomes unsubstantial to the point of non-existence."⁸

1.4.2 The Positive Law Approach

⁷ Internet Encyclopedia of Philosophy

⁸ Morley F, *The Natural Law and the Right to Self-Expression*, Law School Publications (Natural Law Institute Proceedings Volume 4), 1951, p69

Positive laws are man-made laws, that is, statutes which have been laid down by a legislature, court, or other human institutions and can take whatever form its makers want⁹.

This includes all of the already existing positive laws that protect artistic freedom of expression and in extension human dignity. They are:

Article 10 of the Human Rights 1998 Act¹⁰ gives everyone the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without State interference.

This includes the right to communicate and to express oneself in any medium, including through words, pictures, images and actions (including through public protest and demonstrations)¹¹.

The type of expression protected includes:

- political expression (including comment on matters of general public interest);
- **artistic expression**; and
- commercial expression, particularly when it also raises matters of legitimate public debate and concern¹².

Article 33(1) of the Constitution of Kenya 2010 says “Every person has the right to freedom of expression”, which includes--

- (a) freedom to seek, receive or impart information or ideas;
- (b) **freedom of artistic creativity**; and
- (c) academic freedom and freedom of scientific research.

⁹Legal dictionary: The free dictionary, thefreedictionary.com on 18 November 2017.

¹⁰ Human Rights 1998 Act is an Act of parliament of the United Kingdom which received Royal Assent on 9th November 1998 and mostly came into force on 2nd October 2000.

¹¹ Liberty: Protecting Civil Liberties , Promoting Human Rights, 16 November 2017 <https://www.liberty-human-rights.org.uk/> on 18 November 2017.

¹² Liberty: Protecting Civil Liberties , Promoting Human Rights, 16 November 2017 <https://www.liberty-human-rights.org.uk/> on 18 November 2017.

Article 19 of the Universal Declaration of Human Rights 1948 says “everyone has the right to freedom of expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

In addition to this, Section 39 of the Nigerian Constitution 1999 provides that every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart information without interference.

Article 9(2) of the African Charter for Human and Peoples’ Rights (ACHPR) provides that every individual shall have the right to express and disseminate his opinion within the law.

For the kind of society that we find ourselves in, style being a natural law is not enough it also has to be made a positive law which will in turn accrue political right, so that it cannot be easily ignored or treated like it does not exist. If style is made a positive law people cannot go around blaming their victims and their sense of style for their inhumane acts, lack of self-control and irresponsibility. Protecting dress and its right, that is, freedom to express style would raise awareness and help curb sexual assault. In addition to this, recognition of style by the law would mean that offenders especially those who blame the style of the victim would find it more difficult to escape justice as there would be punishments for offenders so it would serve as a deterrent to those who are tempted to commit any acts of sexual violence.

Furthermore, allowing people the right to freely express themselves and hold opinions has a lot to do with promoting the inherent dignity of a person as provided for in Article 28 of Kenya’s Constitution and Article 5 of the African Charter on Human and Peoples’ Rights (ACHPR) which reads “Every person has inherent dignity and the right to have that dignity respected and protected” and “Every individual shall have the right to the respect of the dignity inherent in a human being

and to the recognition of his legal status...” respectively. What I mean by this is that a person’s right to have their inherent dignity protected will be negatively affected directly or indirectly if one is not allowed to freely express themselves.

Human dignity and the problems that arise from omission of style as an expressive right would be discussed further in chapter three.

1.5 HYPOTHESIS

The intended outcome of this study is to raise awareness and create enlightenment on the effects of recognition of style as a right under artistic freedom of expression.

1.6 RESEARCH METHODOLOGY

This research would be based on various sources of information such as; study of already conducted interviews and polls from independent, accredited organisations, professional opinions, statutes, international legal instruments and analysis of case law.

1.7 LIMITATIONS

At the initial stage of this research, the idea was to conduct a comparative analysis between Kenya and Nigeria in relation to the subject study, however, due to limited time and resources, the study could not be as in depth as originally desired. In spite of this set back, quality material and research were still used to furnish the study.

1.8 CHAPTER BREAKDOWN

Chapter two contains the literature review. This would focus on dress as an art form, breakdown of positive laws protecting freedom of artistic expression as a right and quotes dealing with style as a right.

Chapter three deals with an introduction to lookism and appearance based discrimination and an analysis of style discrimination cases.

Chapter four addresses human dignity, appearance based violence and their relationship with natural law.

Chapter five is the general analysis of the study, findings, recommendation and conclusion.

Chapter six covers the bibliography.

2.LITERATURE REVIEW

2.2DRESS AS AN ART FORM

“Dressing up is a way to express yourself and translate what you think or feel about yourself visually... the same way a painter would express how he feels or a vision that he has in his head and translate it onto a canvas with the stroke of a brush. Dressing up is an art so enjoy the process and be proud of what you present to the world when you step out of the house.¹³”

Fashion design is rarely considered to be art but what if dress is created from a need for artistic expression? Why is architecture considered to be one of the arts but fashion is not?

What we today commonly refer to as fashion is a visual form of expression that requires skill and creativity like any other creative work, but when commonly talking about fashion we define it as a mass-produced and commercial product. The topic ‘art and fashion’ is a frequently discussed theme and there is a clear relationship between the two. Art and fashion are, however, often seen as two completely different things and when fashion is approached as an art it is defined as applied or decorative art¹⁴.

Two reasons many critics say fashion cannot be art is that it lacks the aspect of rarity and that fashion is ultimately commercial in its nature. A work of art is said to be created without the pursuit of profit and that it is one of a kind, whereas fashion is a business of mass production. Fashion is a commercial phenomenon and art is usually considered to be completely free from such demands. Some who have denied classifying fashion as an art form also state that fashion is fleeting, frivolous, and highly feminised. Those who defend the claim that fashion is a form of art, say it is a visual medium that is created from the same stimuli that is used by painters and sculptors. Fashion is a creative process just like art. One

¹³ ‘Jesse Aboagye: Why Do You Dress Up? Dressing As an Art Form’ A Medium Corporation (US), 27 May 2016 <https://medium.com/> on 18 September 2017.

¹⁴ ‘HenricaLangh: The Morbid Anatomy of Emotions; Dress and Fashion As a Form of Art’ Bachelor’s Thesis Novia University of Applied Sciences 2013 <https://www.theseus.fi/> on 18 September 2017.

of the most common arguments for why fashion is not art, is that fashion is a fast-paced, commercial, and a seasonal industry¹⁵.

Critics also contend that fashion does not have the value of being rare. This, however, is not always the case. Often what we commonly understand as art is created for commercial purposes in the same way as design, while unique dress can be created without links to mass production. The painters who produced what we call 'high art' were commissioned to paint portraits or historical paintings and it was a trade like any other. At the beginning of the twentieth century, Paul Poiret¹⁶ considered himself equal to his fellow artist friends and argued that what he was creating was as much art as anything else.

In David Hockney's¹⁷ words "Art has to move you, design does not unless it is a good design for a bus" because we as humans respond so naturally to dress and style, it is safe to say that dress is an art that moves and that is why we connect so deeply to it.

Keren Ben-Horin¹⁸ wrote saying "the more I study fashion history the more I appreciate the unique perspective it offers on human experiences. I get very frustrated when fashion is dismissed and thought of as frivolous and superficial, especially in academia. In my writing I use fashion to paint a narrative of social, cultural, and political change. Fashion is a very sensitive seismograph of change and it is an accessible tool for self-expression. Anyone who gets up in the morning and gets dressed knows that fashion is a language; it is a tactile communication tool that anyone can use to say something about who they are, what they are, and where they are in their lives... Fashion can be an art."¹⁹

¹⁵ Ibid

¹⁶ Paul Poiret was a leading French fashion designer, a master couturier during the first two decades of the 20th century. His contributions to his field have been likened to Picasso's legacy in 20th-century art.

¹⁷ David Hockney, OM, CH, RA (born 9 July 1937) is an English painter, a draughtsman, printmaker, stage designer and photographer. An important contributor to the pop art movement of the 1960s, he is considered one of the most influential British artists of the 20th century.

¹⁸ He is an author and fashion curator.

¹⁹ 'Cassidy Zachary: Fashion History Talks!' theartofdress.org on 11 August 2017

While dress/fashion is the art, style is its form of expression. Style can be defined as an individual's distinctive appearance²⁰. It is a way of uniquely expressing one's self and it could be a conscious or an unconscious effort to shape other people's perception of a particular individual.

Style mirrors the individuality of a person and it is very essential to the summation of an individual's personality. Just like speech and writing, it projects feelings, opinions, originality, individuality, and most importantly, it is a way of expressing one's self. Style is an artistic expression of one's self. It is a representation and extension of character.

In a society increasingly focused upon image, where the single greatest influence on a first impression is someone's physical appearance, does what you choose to wear not define who you are? If so, should this expression not be protected? It is most certainly true that people make assumptions about you based on what they see. From what you look like, what you choose to wear, to the sum of the little details like hair, nails, makeup and jewelry, it all contributes to how you are seen and perceived by others. Impressions, evaluations and decisions are made within seconds- even before you have even opened your mouth to speak. Not only does an individual's appearance tend to overshadow his/her other characteristics in forming the basis of first impressions, it also influences perceptions of the individual's other attributes."²¹

Style is a form of expression and expressions accrue rights that need to be exercised. In the words of Morley "a right should be something that can be expressed and exercised. If a right cannot be exercised, it becomes unsubstantial to the point of non-existence", and in the process of exercising these rights there arises the need for protection of these rights and this is where the law and its makers come in. If a right has no guaranteed protection there is no point in exercising it because there is no telling the kind of harm that may come to your person.

In chapter one, some positive laws that guarantee protection of freedom of (artistic) expression were mentioned these provisions would further be broken down.

²⁰English Oxford Living Dictionaries <https://en.oxforddictionaries.com/> on 24 September 2017.

²¹ Dion K, Berscheid E &Walster E, *What Is Beautiful Is Good: personality and social psychology*, 1972, p285

Article 10 of the Human Rights 1998 Act²² gives everyone the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without State interference.

This includes the right to communicate and to express oneself in any medium, including through words, pictures, images and actions (including through public protest and demonstrations)²³.

The type of expression protected includes:

- political expression (including comment on matters of general public interest);
- **artistic expression**; and
- commercial expression, particularly when it also raises matters of legitimate public debate and concern²⁴.

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²²Human Rights 1998 Act is an Act of parliament of the United Kingdom which received Royal Assent on 9th November, and mostly came into force on 2nd October 2000.

²³ Liberty: Protecting Civil Liberties , Promoting Human Rights, 16 November 2017 <https://www.liberty-human-rights.org.uk/> on 18 November 2017.

²⁴ Ibid

In addition to this, Section 39 of the Nigerian Constitution 1999 provides that every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart information without interference.

Article 9(2) of the African Charter for Human and Peoples' Rights (ACHPR) provides that every individual shall have the right to express and disseminate his opinion within the law.

It has been previously established that dress is an art; a creative art and style is its way of expressing the art, therefore it is safe to categorise style as an artistic expression in and of itself.

Though some of the above mentioned provisions do not make direct reference to freedom of artistic expression, there have been times when style has been used to express opinion and make political and socio-economic statements.

Fashion and style has always existed as a medium to express a personal standpoint whether it be politically motivated, a religious stance or rebellion against conservativeness²⁵.

For example, in fashion, the most recent example of people using style and dress to convey political messages happened in the last New York Fashion Week²⁶. Here, models dressed in shirts and pins that had different political statements on them while walking the runway. Such as; "my body my choice", "I am an immigrant" (this was in direct response to President Trump's policies), "I am feminist AF", "be the change you wish to see in the world", "we need leaders", "stand up for what you believe in" and so on. Claudia Li, a fashion designer and one of Forbes 2017 30 under 30 honorees when asked about her stance on designers making political statements through style said "I think everyone should speak out because we are all our own person and we all have something to say so just say it or wear it"²⁷.

²⁵ 'Victoria Cox: The Freedom of Expressing Yourself Through Your Wardrobe' The Conversation Tv, 13 May 2016

<http://theconversation.tv> on 11 August 2017

²⁶ It ran from the 9th to the 16th of February, 2017

²⁷ 'Poorna Bell: In the End There's Only Room for Love' The Huffington Post, 13 February 2017
<http://www.huffingtonpost.co.uk/> on 11 August 2017

Another scenario where style has been used to express opinion and by so doing made a political statement in entertainment occurred on the 3rd of February, 2013 at the Mercedes-Benz Superdome in New Orleans where Beyoncé²⁸ and her dancers for her super bowl performance took to stage clad in black panther-styled berets and black leather in reference to the Black Panther²⁹, Malcom X³⁰, and the black lives matter movement³¹. It was said to be one of the most radical political statements made by the star in all of her 20 year career and this political statement was not conveyed through traditional speech as she did not say anything in regards to black lives matter rather it was her choice of style that conveyed the message clearly as all of her audience seem to have understood her stance and its significance.

Though artistic expression is provided for and protected by the law, fashion and its freedom of expression have not been explicitly provided for and this grey area has to be catered for by the law and its makers if not there would always be a level of misunderstanding and vagueness that would be associated to style as a right.

²⁸Beyonce Giselle Knowles-Carter (born September 4th 1981) is an American singer, songwriter, dancer and actress. Performing mainly R'n'B, Beyonce has sold an estimated 100 million records as a solo artist and a further 60 million records with the group Destiny's Child, making her one of the best-selling music artists in history. She has won 22 Grammy Awards and is the most nominated woman in the award's history. She is also the most awarded artist at the MTV Video Music Awards, with 24 wins.

²⁹Black Panther Party, original name Black Panther Party for Self-Defense, African American revolutionary party, founded in 1966 in Oakland, California by Huey Newton and Bobby Seale. The party's original purpose was to patrol African American neighborhoods to protect residents from acts of police brutality.

³⁰Malcolm X (1925-1965) was an African-American Muslim minister and human rights activist. To his admirers he was a courageous advocate for the rights of blacks, a man who indicted white America in the harshest terms for its crimes against black Americans; detractors accused him of preaching racism and violence. He has been called one of the greatest and most influential African Americans in history.

³¹A network that advocates for dignity, justice and respect for the black population especially in the United States of America.

3. LOOKISM AND APPEARANCE BASED DISCRIMINATION

Style dictates how people are initially received and accepted. In most cases people are usually “judged by their covers”. When people are mistreated or ill received as a result of their style or physical appearance (or both, it forms what is known as appearance based discrimination or lookism.

Lookism or Appearance based discrimination (ABD) is a concept used to describe a setting where there exists discriminatory treatment toward people based on their **style** of clothing, hairstyle, body art (tattoos and piercings), physical attractiveness and weight; mainly in the workplace but also in social settings³². While not classified in the same way as racial, cultural, sexual discrimination, "lookism" is widespread and affects how people are perceived as well as affecting their opportunities in terms of relationships, employment and social interactions.

ABD is the direct consequence of lack of protection of freedom of style, that is, an unguaranteed freedom of style.

Sam Marcossan, associate professor of law at the University of Louisville in Kentucky, explains that "appearance discrimination, as such, is not something that the law generally protects against, and that is where the problem comes in for a lot of people."

In 2007, a survey was carried out by career publisher Vault.com, which was updated on 21st of January, 2008³³. It was carried out among 468 employees in a range of industries across the US. The survey found that 85 per cent of respondents believe that tattoos and body piercings reduce the chance of getting employment. Respondents commented that “regardless of who the real person may be, stereotypes associated with piercings and tattoos can and do affect others. In general, individuals with tattoos and body piercings are often viewed as 'rougher' or 'less educated.'”

³² The Free Dictionary www.thefreedictionary.com on 11 August 2017

³³ ‘Vault Releases Survey on Tattoo and Body Piercings in the Workplace’ Business Wire, 25 July 2007 <http://www.businesswire.com/> on 11 August 2017

Majority of the findings of the poll for the survey were:

- 39% said employers should have the right to deny employment to someone based on appearance, including weight, clothing, piercing, body art, or hairstyle.
- 33% said that in their own workplace workers who are physically attractive are more likely to be hired and promoted.
- **33% said workers who are unattractive, overweight, or generally look or dress unconventionally, should be given special government legal protection such as that given persons with disabilities.**
- Of the 39% who said employers should have the right to deny employment based on looks, men outnumbered women 46% to 32 % and whites outnumbered non-whites 41% to 24%.

The workers were also asked if they had any relevant personal experience.

- 16% said that they had been the victim of appearance-based discrimination.
- 38% of those said the discrimination was based on their overall appearance; 31% said it was their weight; and 14% said it was a reaction to their hairstyle.

“Appearance discrimination is intertwined with style and its expression, as such, the need for the protection of style”³⁴.

3.1 ANALYSIS OF STYLE DISCRIMINATION CASES AND STUDIES

Due to the fact that style impressions do not just affect social interactions; they also affect one's ability to obtain employment. Employers often use appearance as a signal of an employee's qualifications³⁵, and even after hiring decisions are made, employers continue to regulate the appearance of their employees through dressing and grooming policies.

³⁴ ‘Deborah L. Rhode: Hooters Hire Based on Looks, So Do Many Companies and There is No Law Against It’ New Republic, 31 August 2014 <https://www.newrepublic.com/> on 23 September 2017.

³⁵ Adamitis M, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 2000, pgs 195, 197

In employment, appearance is part of the employee's non-verbal communication³⁶. For example, in a study³⁷ on the influence of physical attractiveness, dress, and job type, researchers found that style of dress had a consistent influence on interviewers' perceptions of employability.”

In addition to this, psychology professor Thomas Cash discovered that job interviewers favored women groomed according to a managerial style; this includes shorter, simpler hairstyles, hair away from the face, moderate cosmetics, tailored blouses and jackets, and simple gold jewelry³⁸ as opposed to more eccentric styles.

When addressing style discrimination particularly in work/professional settings, there are two schools of thought. The first school of thought is of the opinion that there are public and private institutions each with their defining rules and regulations. Public institutions are more lenient with style and appearance while private institutions are stricter, less lenient with their style allowances. The guiding ideology with the first school of thought is that one should dress according to the environment they find themselves in, that is, they should allow their space dictate their style. When you're in a public institution where style rules are flexible you should enjoy it and then on the polar end if you are in a private institution where style rules are rigid, you should adjust to the rules and accommodate them because chances are, if you chose the organisation then you probably had an idea about the strict rules and by accepting the employment contract or school enrolment, you simultaneously accepted their standards and agreed for the limitation of your style rights. It is an easier approach in trying to figure out style and appearance in employment.

³⁶ Mahajan R., *The Naked Truth: Appearance Discrimination, Employment, and the Law*, 14 Asian Am. L.J., 2007, 165 <http://scholarship.law.berkeley.edu/aalj/vol14/iss1/6on> 11 August 2017

³⁷ Johnson K & Roach-Higgins M.E, *The Influence of Physical Attractiveness and Dress on Campus Recruiters' Impressions of Female Job Applicants*, RES. J., 1987, p87.

³⁸ Cash F, *The Impact of Grooming Style on the Evaluation of Women in Management: in the psychology of fashion*, M. Solomon ed., 1985, p343.

An illustration of this is the similar cases of Lerato Radebe³⁹ and the lost dreadlocks case of a six year old Kenyan boy⁴⁰. The court ruled that if he wanted to resume education at Rusinga School he would have to shave off his dreadlocks.

The court said the school could not be compelled to take in a pupil who has dreadlocks for cosmetic purposes, which is against the school regulations. High Court Judge Mumbi Ngugi noted the boy's mother had unsuccessfully convinced the court why he should maintain his hairdo. His mother went to court seeking orders to compel the school to re-admit her son with his dreadlocks after he was kicked out for failing to meet the grooming requirements. She accused the private school of violating her son's constitutional rights by discriminating against him. She told the court that the maintenance of her son's dreadlocks was a cultural issue as his father was of Jamaican descent. However, her arguments failed to persuade the Court as she realised that her arguments lacked merit to support her case. The right to education, she said, had not been violated as **the Constitution does not bind private institutions with the responsibility.**

The judge noted there were cultures that had dreadlocks and that is accepted.

She also noted that the boy's mother had not convinced the court that her son's dreadlocks were a cultural matter.

"The petitioner had an obligation to demonstrate how wearing dreadlocks is of Jamaican culture. She has made a choice for the son to keep the dreadlocks for fashion and cosmetic reasons and not for religious reasons."

Ngugi further found that the parent consented to the school's rules and regulations and even appended her signature to them before her son joined the preparatory school⁴¹.

The second school of thought concurs that private institutions are less flexible with their style and appearance allowances as compared with public institutions, but to what

³⁹Radebe and Others v Principal of Leseding Technical School and Others [2013] eKLR

⁴⁰ 'Caroline Rwenji: A six-year-old with dreadlocks loses case' Standard Digital, 8 October 2014 <https://www.standardmedia.co.ke/> on 18 November 2017.

⁴¹Ibid

extent. Their argument is that private spaces are fast becoming public spaces. This second school of thought recognizes that there will be escalated cases of limitation of style rights should these private institutions restrict contractors, customers and third parties (especially those who directly or indirectly did not consent to the limitation) and if these style/appearance rules prevent people from accessing public goods and/or services.

Though the first school of thought is easier to grasp, the latter school of thought has more depth. Prima facie, the first school of thought is uncomplicated, it sounds like the right answer to this complex argument; however, as seen above, it is not as easy to practice in real life.

For example, recently, a Nigerian Law School graduate was denied call to bar because of her hijab⁴². On December 12, Amasa Firdaus Abdulsalam was refused permission by the body of benchers to participate in her call to bar ceremony. According to Hafsat Abiola-Costello⁴³ she says that “Amasa knew of the rule but because she felt that it was unjust, she refused to comply... by so doing she has chosen to challenge the status quo. If she succeeds, the Law school will change its rule. If she fails, she would either have to comply in order to be called to the Bar in Nigeria or give up her dream of being a lawyer here.”

Arguing for the first school of thought, Inibehe Effiong, who is a Nigerian lawyer says that “nobody is above the law” as he shares a photo of a nun who had to dress like a lawyer for her call to bar. He continues by saying “look critically at this photo and make your comments (the photo of the nun in her wig without her veil)... If you do not like heat do not go into the kitchen. If you hate war and fighting do not join the Army. If you do not want to abide by the Dress Code of the Legal Profession, do not aspire to be a Lawyer. You cannot have it both ways”.

If going by the first school of thought, the Nigerian law school is within the confines of ‘private institution’ and so she should just adhere to the laid down rules and regulations that

⁴²Aljazeera: Nigerian Law Graduate Denied Call to Bar over Hijab’ Aljazeera, 16 December 2017 <http://www.aljazeera.com/> on 24 December 2017.

⁴³Hafsat Abiola-Costello is a Nigeria human rights, civil rights and democracy activist, founder of the Kudirat Initiative for Democracy, which seeks to strengthen civil society and promote democracy in Nigeria.

she was probably aware of, without objections, as opposed to complaining and fighting for her style and religious rights. Clearly, it is not as simple. To what extent can an individual be limited and can they seek redress from the courts?

It is not as simple in practice to choose between either /or, especially when the choice is between very important units such as religion and profession.

The second school of thought is more favorable because in real life, you want to know that irrespective of the working space you find yourself in, that style would not be a barrier that becomes a defining limitation to your passion or dream job. You want to know that there is no such ultimatum where you have to choose between your job which is your source of livelihood and your style which is your sense of self. It would be a beautiful thing to have both.

Secondly, to what extent can private institutions limit style and appearance? How much power are private institutions allowed to have, enough from preventing one access to public goods and services, even the right to education? When do their powers become ultra vires and at what point is the Court allowed to intervene? It is true that private institutions have more liberty to yield control over members of their organisation (students, employees and so on) but they also have to understand that it is not absolute. The point at which “restrictions” and “controls” start to infringe on individual rights’ is where the line should be drawn especially if consent was not directly or indirectly given.

For example the judiciary is a public institution with some characteristics of a private institution; therefore, they can limit the style/appearance of officers of the court such as police officers, lawyers and so on. Is there a point to this limitation, like is there a purpose to it such as uniformity and improving concentration or is it pointless and so extreme that in the process of obedience one loses sense of self? When does it become irrationally excessive?

charcoal, or black, but it's not bright green with purple polka dots and red clown shoes, either⁴⁶.

In Kenya, by virtue of the 2010 Constitution, with regards to style an individual cannot be discriminated against on the basis of wearing dreadlocks because of their right to non-discrimination and freedom of conscience and belief⁴⁷, in Articles 27 and 32 which reads “every person is equal before the law and has the right to equal protection and equal benefit of the law” and “every person has the right to freedom of conscience, religion, thought, belief and opinion” respectively. Whether your employer is a private or state organisation you ought not to be victimized for wearing this iconic hair style⁴⁸.

In Article 32, one can always argue that by wearing dreadlocks he/she is manifesting their beliefs as the supreme law grants everyone the freedom of conscience and belief. Therefore, as an individual, one may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of their dreadlocks.

In the judiciary, Kenya is making considerable progress in recognising individuals' styles as the then Chief Justice Dr. Willy Mutungain 2011 said that “lawyers are now free to appear in the Supreme Court wearing studs or dreadlocks”⁴⁹, this may be seen as very little progress and it is, but big steps are brought about by little pushes. In recent news, the current CJ, David Kenani Maraga overturned the decision sadly.

In 2010, Chastity Jones⁵⁰ went in for a job interview at a call center for Catastrophe Management Solutions (CMS) in Mobile, Alabama, she wore a blue suit and short dreadlocks. She met all the requirements for the job, excelled in the interview, and was

⁴⁶ Ibid

⁴⁷ Conscience is the frame of mind of a person while belief is that which guides the conscience.

⁴⁸ Issac Bara-za: 'Workplace Dreadlocks Are Not Illegal' Barazain Sights, 17 July 2014 <https://barazainsights.wordpress.com/> on 23 September 2017.

⁴⁹ Emmanuel Toili: Kenya CJ Allows Lawyers to Wear Studs and Dreadlocks' Daily Nation, 5 July 2011 <http://www.nation.co.ke/> on 23 September 2017.

⁵⁰ The Jones Case as reported by 'Maya Allen: Federal Court Rules it Legal to Discriminate Against Employees with Dreadlocks' Cosmopolitan, 21 September 2016 <http://www.cosmopolitan.com/> on 10 December 2017.

offered the position on the spot. Nevertheless, when she was filling out company paperwork for the job, she was seen by a human-resources manager (HRM) and her hair was noticed. According to court documents, Chastity was told by the HRM that CMS could not hire her "with the dreadlocks." The HRM added, "They tend to get messy, although I'm not saying yours are, but you know what I'm talking about."⁵¹ This was an indirect ultimatum to choose between her dreadlocks or her job. She refused to change her hairstyle and her job offer was rescinded.

This case shows how style can be connected to race because Jones went to the Equal Employment Opportunity Commission (EEOC), and in 2013, the EEOC filed a lawsuit on Jones' behalf, citing Title VII of the Civil Rights Act of 1964⁵²:

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The EEOC also stated that withdrawing her employment contract simply due to her hairstyle is an act of racial discrimination because "dreadlocks are a manner of wearing the hair that is physiologically and culturally associated with people of African descent." Their statement also noted that the "hairstyle can be a determinant of racial identity."

⁵¹'Wilkinson A: No Dreadlocks Allowed' The Atlantic, 3 November 2016 <https://www.theatlantic.com/> on 23 September 2017.

⁵²Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, as it appears in volume 42 of the United States Code, beginning at section 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin.

On September 15, the U.S. Court of Appeals (the 11th circuit) ruled in favor of CMS' decision to refuse to hire Jones because of her dreadlocks. The court disagreed with the EEOC's claim that it is in fact racial discrimination. And while it's no secret that dreadlocks are a hairstyle that have been worn by black people for decades, the court ruled that since the hairstyle is not an immutable characteristic of black people, it's not racial discrimination.

"As far as we can tell, every court to have considered the issue has rejected the argument that Title VII protects hairstyles culturally associated with race," stated judge Adalberto Jordan, who delivered the decision.

Harsh but lawful!

This is yet another glaring example that proves the outright prejudice that many black women face simply because of the way that we choose to wear our hair. Young girls are getting expelled from school for wearing afros and black women are getting fired from their jobs simply because of their natural hair, not because of their ability to do their jobs. This has to stop⁵³.

There are so many scenarios where people have been denied employment or education because of their style and appearance. For example in the United States of America, it has been made lawful for an employer to reject an applicant because of his or her dreadlocks⁵⁴, not only is this restrictive and against the general idea of freedom of expression, it deprives an individual the opportunity to earn a living, a source of livelihood.

Following a BBC magazine article which asked whether discrimination against people with tattoos should be banned in the workplace, some readers of the magazine have been getting in touch about their experiences of terminated job interviews, losing out on promised promotions and leaving jobs because of their tattoos⁵⁵.

⁵³ 'Maya Allen: Federal Court Rules It Legal To Discriminate Against Employees With Dreadlocks' Cosmopolitan, 21 September 2016 <http://www.cosmopolitan.com/> on 23 September 2017.

⁵⁴ 'Wimberly L, Steckel S, and Stine P.C: Employer May Lawfully Reject Applicant with Dreadlock', 17 November 2016 <http://www.wimlaw.com> on 20 May 2017

⁵⁵ 'Magazine I lost a Job because of My Tattoos' BBC News, 22 September 2014 <http://www.bbc.com/> on 23 September 2017.

Karla Valentine, 35, from Suffolk, UK and quite heavily tattooed held a job as a mid-day assistant at a school. She says that when she was employed she had tattoos, which were okay as they were covered during the winter period up. However, in the summer, it got hotter and her arms were on display and that is when she was issued with a "standard of dress" guide which said that tattoos and piercings are not good examples and should remain covered up at all times.

She continues by saying that "I was good at my job and the children seemed to like talking about my tattoos. I did start a bit of a campaign but I didn't want to work in an environment that said because I have tattoos and a piercing I cannot do the job".

After which, she set up an appointment with the headmaster and resigned a week later. Though the headmaster wanted to salvage the situation, Karla had already decided that she did not wish to work in a place that discriminated against tattoos and piercings. She said, "I do not believe I should have to fight to justify that I am a hardworking and decent person."

She said it is sad that in 2014 we are still so discriminatory about peoples' choices and styles. She said she also feels sad because children grow up being taught these shallow-minded views. The best bit was that after a month or so of me leaving they had a school fete with a temporary tattoo stall for the children!"

Sam Brisbane from Australia shares her story of style discrimination. Her former employer was against body modifications due to her religious beliefs and she was always harassed for her tattoos and piercings. According to her, "she says that after getting her tattoos, she had hours cut even though the tattoos were not visible. She said that though she had both her feet done, she always wore socks and shoes to keep them hidden. She works in childcare and was told that even when in public she had to maintain her appearance and keep her tattoos covered because she might see the children that she looked after outside the childcare premises.

In my uniform, you cannot see my tattoos. As I keep it professional but I've been told that I'm unapproachable and scary with tattoos and piercings and that could lose potential clients to the business".

Amii Parr is a 20-year-old girl from Reading in the UK, who has had her fair share of style discrimination. She says, "I'm a heavily tattooed 20-year-old girl, who has had very mixed reactions to my art. I find that because I am such a young girl and have as many as I do (I lost count at 50) that people either love them and find me brave or hate me and insult me by using my tattoos as ammunition.

I have even had an employer hang up the phone on me when they found out I had tattoos.

In 2012, she applied for a job as a waiter. It was an audio-visual interview. It was going fine. The employer started talking about the uniform. When he said it was short-sleeved, the minute she said she had her arms tattooed, he just hung up.

In a different style discriminatory situation, she was working as a shop assistant in a mobile phone shop when a customer started screaming in her face. He had some problems with his top-up, she was trying to help but he had bought it from another shop and when she could not refund him, he switched.

He went off on her saying that she only has the job because of her tattoos and that she was disgusting and a letdown to her company and then he spat in her face and walked out.

I have had awards for my customer service and in that shop, my manager had sleeves tattoos, my other manager had a neck tattoo.

She says she is not a rude or horrible person. She is clean (does not do drugs or anything). She says, "I work hard, pay bills, do charity work for animals and yet they call me disgusting names for no reasons". She concludes by saying that her art is not offensive, that "heavily tattooed" is not a synonym for nasty, scary or stupid.

In Emily Olson's case the 18 year old from Wisconsin, USA faced promotion denial. According to her, "I was promised a promotion when I turned 18". She had been waiting for the promotion for five (5) months and the promotion was supposed to elevate her from a busser (a person who buses tables, washes dishes, serves food and stocks coolers) to a server at a bar and grill.

On her 18th birthday however, she got a half-sleeve and her boss immediately denied her the promotion he promised even though (as she claims) some of her co-workers had much more visible tattoos and piercings.

She quit a month later.

Her boss did not directly say that it was because of her tattoo, but the comments he made towards her made it clear he did not like it. He asked her if she was crazy for getting it and why her parents would allow her to do that to herself.

He also said "it was very dark and that she will be better in the kitchen rather than being a waitress".

In all of the above cases we have seen employers reject individuals based solely on style and general appearance.

An individual should not be discriminated against or deprived of an important and inalienable right such as the right to employment because of his/her natural attributes, like the manner in which his/her hair grows out or because of their style; especially if it is not integral to the work description.

This is not just social rejection because it also economically affects the person, the mind, his or her income and the contributions one can make to the development of one's country, for example, inability to pay tax means one cannot actively contribute to the development of the government and Country. Here, not just the individual is losing but also the State.

Everyone has a right to gainful employment as provided for in Article 23(1) of the Universal Declaration of Human Rights, which states:

(1) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

The International Covenant on Economic, Social and Cultural Rights states in Part III, Article 6 that:

(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

The African Charter on Human and Peoples' Rights also recognizes the right, 'emphasizing conditions and pay, i.e. labor rights. Article 15, states:

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

The right to work is the concept that people have a human right to work, or engage in productive employment, and may not be prevented from doing so⁵⁶. None of the above mentioned provisions provide that an employee or potential employee is not allowed the rights to freely express themselves through speech, style, writing or whichever way he or she chooses to express themselves or that an employee or potential employee may be rejected because of their choice of style and physical appearance.

Under U.S federal law⁵⁷ it is illegal for an employer to terminate an employee's employment because of discrimination or retaliation⁵⁸.

These discriminatory practices could be curbed if law makers included protection of style as a right and guaranteed its freedom of expression in legal instruments (both domestic and international) only then would tangible progress be recorded.

⁵⁶ Definition of the right to work <https://www.thebalance.com> on 3 February, 2018

⁵⁷Title VII of the Civil Rights Act of 1964: Equal Employment Opportunity

⁵⁸ 'Esther Smith: Termination of Employment based on Discrimination is Illegal', 25 August 2011 <https://www.findlaw.com/>

4. HUMAN DIGNITY

What is style discrimination?

Style discrimination in professional settings is a big problem that requires immediate attention but even bigger is style discrimination in social settings.

Style discrimination in social, everyday settings is an epidemic that is polluting the society especially because it is widespread and as such affects double the people that style discrimination in professional settings affect.

Violation of human dignity could be as a result of style discrimination in social settings and the violence associated with style/appearance based discrimination.

4.1 What is Human Dignity?

The mercurial concept of human dignity features in ethical, legal, and political discourse as a foundational commitment to human value or human status⁵⁹.

Human dignity is one of the most important fundamental human rights and an element of a democratic society enshrined in many legal instruments that recognize its absolute nature. There is a moral imperative to protect and assure respect of human dignity and it is considered determinative for the principle of human rights and in particular for the principle of equality and non-discrimination⁶⁰. The principle of human dignity enjoys an express recognition in the Charter of Fundamental Rights⁶¹, which states: "*Human dignity is inviolable. It must be respected and protected*".

In summary, "dignity is the feeling of self-worth that a person has"⁶².

⁵⁹ Internet Encyclopedia of Philosophy <http://www.iep.utm.edu> on 11 August 2017

⁶⁰ 'Revista Universul Juridic Revistă lunară de doctrină și jurisprudență', 12 December 2016 <http://revista.universuljuridic.ro/> on 11 August 2017

⁶¹ EU Charter of Fundamental Rights

⁶² 'Donna Hicks, Ph.D.: Why dignity matters: the important role that dignity playing our lives and relationships' Psychology Today, 7 August 2011 <https://www.psychologytoday.com/> on 11 August 2017

In Jeremy Waldron's⁶³ book, he wrote that "from a civic dimension human dignity should not be seen as a decoration but it should be supported in order to provide the foundation of a general decent treatment and respect for persons"⁶⁴. By respecting peoples' choices of style we simultaneously contribute to providing a generally decent treatment for people. We need to be able to express ourselves for human dignity to be upheld.

As mentioned earlier, Article 28 of Kenya's Constitution provides that "Every person has inherent dignity and the right to have that dignity respected and protected" while Article 5 of the African Charter on Human and Peoples' Rights (ACHPR) reads "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status..."

4.2 What Is Appearance Based Violence?

Appearance based violence has to do with inflicting harm on a person, be it physical, verbal or both based on their style or general appearance.

Kenya witnessed a litany of such situations when women were being stripped and assaulted verbally and physically over claims of indecency, hence, the birth of the "my dress my choice movement" which spun series of controversial and political debates causing #mydressmychoice to trend all over social media platforms after a viral video was shared on the internet on the 17th of November 2014 showing a school girl in Mombasa being stripped and attacked in a matatu by a number of men of whom one was an officer of the law (a policeman) because she was thought to have been scantily dressed, therefore, "indecent"⁶⁵.

In order for human dignity to be upheld and safeguarded in accordance with article 28 of the Constitution of Kenya and Article 5 of the African Charter on Human and Peoples' Rights, the law and its makers have to formally recognize style as a political right under (artistic)

⁶³ Jeremy Waldron is a New Zealand Professor of law and philosophy. He is regarded as one of the world's leading legal and political philosophers.

⁶⁴ Waldron J., *Torture, terror and trade-offs: Philosophy for the white house*, Oxford university press, 2010, p66.

⁶⁵ 'Rachael Wambui: Life after "My dress My choice"' Daily Nation, 3 March 2017 <http://www.nation.co.ke> on 11 August 2017

freedom of expression. If the dignity of a human person is recognized, then there is a likelier opportunity for reduction of persecution and disrespect towards the human person as well as preservation of freedom of expression.

In certain cases, sexual offenders have used style and physical appearance as an excuse to verbally and physically harass their victims and get away with their acts. There is presence of prejudice in the court systems as a result of its failure to recognize style as a right. For example, in a 2005 study carried out by Amnesty International in Britain⁶⁶, more than a third of the poll said that “a woman was at least partly to blame for her rape if she was wearing sexy or revealing clothing and/or was drunk”.

Ruth Hall, from the support group Women Against Rape, criticized "prejudices" in the court system, saying: "They still put the woman on trial, including her sexual history with other men and **what she was wearing**, which is supposed to be banned and then blame the woman for what happened to her and hold her accountable". This forms the basis for victim blaming based on style. (Victim blaming based on style⁶⁷ is the devaluing practice of shaming an individual; the victim (usually female) for their choice of style/appearance and practically holding them partially or entirely responsible for the harm that befell them.)

She continues by saying "If that is the standard set by the people who are supposed to be prosecuting rapists and protecting us it is not surprising if members of the public say the same thing."

She added: "Rather than another Government awareness campaign, the Government's responsibility is to get the criminal justice authorities to prosecute violent men. Let them worry about the awareness of the police, judges and the Crown Prosecution Service and public awareness will change."⁶⁸

⁶⁶ Amnesty International UK, 21 Nov 2005 <https://www.amnesty.org.uk> on 11 August 2017

⁶⁷ 'Definition of Victim Blaming' U.S Legal, <https://definitions.uslegal.com/v/victim-blaming> on 3 February 2018.

⁶⁸ 'Sheila Coates, director of the South Essex Rape and Incest Crisis Centre' Daily Mail, 12 March 2016 <http://www.dailymail.co.uk/> on 11 August 2017

Mikki Kendall, a style writer, wrote that “the idea that clothing contributes to rape is very common and false.” She continues by writing “the idea that clothing has anything to do with assault is global and persistent. In 1999, the Supreme Court of Appeals in Rome ruled that a woman wearing jeans couldn’t be raped, reasoning that a rapist couldn’t forcibly remove a pair of pants”.

Police question victims of sexual assault about what they were wearing, as though the length of their skirt is an indication of consent. Members of the Missouri legislature responded to reports of increasing sexual harassment with plans to enforce more modest dress codes, as though the problem is a 19-year-old’s first business suit and not the 50-year-old who is using his power over an intern inappropriately⁶⁹. In 2005, Amnesty International polled Britons and found that as many as a third of respondents believed women were partially responsible for being assaulted because of attire and behavior (as mentioned above) which again shows disrespect for human dignity as a result of infringing on freedom of (artistic) expression.

Examples of cases where sexual offenders have escaped being punished by the law because of the style (choice of fashion) of the victim:

Back in 2011⁷⁰, a rapist in Manitoba, Canada, was given no jail time because, according to the judge, Justice Robert Dewar, the 26-year-old woman, who was forced into intercourse in the woods along a highway, met the rapist under “inviting circumstances.” He noted that she and her friend were wearing “tube tops with no bra, high heels and plenty of makeup.” The judge concluded by saying that “they made their intentions publicly known that they wanted to party ... This is a different case than one where there is no perceived invitation.” He further went on to say that “sex was in the air because of her suggestive attire

⁶⁹ ‘Mikki Kendall: Why Dress Codes Can’t Stop Sexual Assault’ Washington Post, 13 April 2016 <https://www.washingtonpost.com/> on 11 August 2017

⁷⁰ *R v Kennedy Rhode* [2011] as reported by ‘Christie Blatchford: Manitoba Judge is Dead Wrong in Rape Case’ The Globe and Mail Inc., 26 March 2017 <https://www.theglobeandmail.com/> on 26 December 2017.

and flirtatious conduct on the night of the attack.⁷¹” In this case, the decision could not be overturned despite the unsoundness of the judge’s reasoning.

In this second example, in response to a young woman getting raped and murdered on public transportation in Jakarta, Indonesia⁷², the capital Governor, Fauzi Bowo spoke out. What he did was not condone her killing, or her rape, but instead, place blame on what the girl was wearing. He says,

“Imagine if someone sits on board a mikrolet (minivan) wearing a miniskirt; you would get a bit turned on.”

Additionally, for him, women should “adjust to their environment so that they don't provoke people into committing unwanted acts.”

In response, dozens of women gathered in the center of the city to demand an apology, while wearing miniskirts. According to the IB Times⁷³, the women came carrying signs emblazoned with slogans like “Don't Tell Us How to Dress But Tell Them Not to Rape” and “My Mini Skirt, My Right.” This was a well-organised response to the speech that the Governor made, however, the fact remains that a young woman had already been assaulted and killed and the law was and still is silent.

The offenders are roaming the streets freely because according to them; the woman’s miniskirt justifies her rape and subsequent death. This shows the prejudice that the law and its makers have in regards to style. Silence of law makers have encouraged the actions of offenders and if law makers continue to be silent on dress and its freedom of expression then more of these cases shall be heard in the future.

Thirdly, in a message printed and posted by a Catholic priest, Piero Corsi, he wrote, “How often do we see girls and mature women going around scantily dressed and in provocative

⁷¹ ‘Mike McIntyre: Justice Dewar removed from cases of 'sexual nature’” Winnipeg Free Press, 3 January 2011 <https://www.winnipegfreepress.com> on 11 August 2017

⁷² ‘The Jakarta Post, ‘Group of Men Rape Indonesian Girl’” 8 May 2016 www.jakartapost.com on 11 August 2017 (Indonesian Newspaper)

⁷³ ‘Ananya Roy: Rape of Indonesian Girl’ IB Times, 14 July 2016 <http://www.ibtimes.co.uk/> on 22 May 2017

clothes?" The statement itself was a response to the 118 women who were killed in acts of domestic violence in Italy that year, and the wave of sexual violence throughout the country. He continued by saying "they provoke the worst instincts, which end in violence or sexual abuse," Corsi wrote. "They should search their consciences and ask: Did we bring this on ourselves?"⁷⁴

Piero Corsi, a catholic priest, is in many words blaming the victims and their choice of style for whatever violence done to their person as opposed to calling out to the consciences of weak and selfish people who cannot control themselves and who cannot give people space to live and express their natural rights.

Style is a natural right because as explained in chapter one, under natural law approach, Style is a tool for self-expression. Already established that the need to express is inherent in us, this means, the means through which we choose to express ourselves is also inherent in us- that which is inherent is natural , as such, making style a natural right.

At a meeting held in the town hall in January, journalist Riccardo Lacona, author of the book *Se Questi Sono Gli Uomini* (If These Are The Men), said: "The return of Fr Corsi forces us to face reality. His words are unacceptable, but in fact reflect a common feeling in Italy ... It highlights the backwardness of our culture"⁷⁵.

The mayor of Lerici, Marco Caluri, said the article was "astonishing and deeply offensive" and the bishop of La Spezia ordered it to be taken down, saying it contained "unacceptable opinions which are against the common position of the church"⁷⁶.

In 2013, after a girl was sexually assaulted at a popular nightclub in Bogota, Colombia⁷⁷, the club's owner, Andres Jaramillo, came forward with some of the reasons he thought it

⁷⁴ 'Jessica Abrahams Why Italy Cannot Forgive The Priest Who Says Women Provoke Abuse' The Guardian, 12 February 2013 www.theguardian.com on 22 May 2017

⁷⁵ 'Jessica Abrahams: Why Italy Cannot Forgive The Priest Who Says Women Provoke Abuse' The Guardian, 12 February 2013 www.theguardian.com on 22 May 2017

⁷⁶ 'James Mackenzie: Italian priest sparks outrage over blame of women for violence' Reuters, 27 December 2012 <http://www.reuters.com/> on 11 August 2017

happened. In short, he blamed the miniskirt she was wearing. He continues by saying "Let's consider what happens when a 20-year-old girl comes out with her girlfriends... and she is dressed in an overcoat and underneath it, has a miniskirt on. Well, what's she playing at?"

In response, more than 100 women and men gathered in the country's capital to protest, and brought their miniskirts with them. Additionally, online, the hashtag #YoMePongoUnaMinifaldaYQue, or, "I wear a miniskirt — so what?" went viral, as people condemned the idea that miniskirts are directly responsible for someone raping another person.

Though there was a sound response to victim blaming (based on the victim's choice of style) and what Andres Jaramillo was trying to imply, the truth is that someone has already been sexually assaulted, there has been utter violation of her dignity and her offender has been left unpunished- the law has completely ignored all of this and it would almost seem as if the silence of the law is of itself an encouragement.

Statistically speaking in Africa, we have the highest number of assault victims that do not come up to report because of fear that they and their style would be blamed by both men and women for this injustice and violation of their dignity⁷⁸. Victims hesitate to report because it would be implied that somehow their style played a major part in suggesting invitation. Some victims go as far as self-blaming and conforming to the standard of our society where it is excusable for a person to assault another person because of the way he or she person was dressed.

4.3 Connection between Human Dignity, Appearance Based Violence and Natural Law

Every time cases of appearance based violence arises, it automatically ties with violation of the human dignity of a person. Inclusion of dress and its freedom of expression as a right would go a long way in reducing cases of appearance based violence while simultaneously preserving human dignity.

⁷⁷ 'Sebastian Alejandro: Girl Assaulted in Nightclub' El Colombiano, 16 June 2013 www.elcolombiano.com on 22 May 2017

⁷⁸ 'Aabye-Gayle Francis-Favila: You Are Not Alone; Uncovering the Secret of Black Women and Sexual Abuse, 29 March 2017 www.thebodyisnotanapology.com 20 May 2017.

Appearance based violence and victim shaming through style always goes back to Natural law.

Appearance based violence is a direct consequence of an unprotected style right. What I mean by this is, style is a natural form of expression and as such has an accruing right which is its freedom to express, when the right to freedom of style is ignored, it becomes irrelevant to the point where this right stops existing, which then gives people ample space to disrespect and dishonor the right by committing acts such as sexual assault and rape and see nothing wrong with it, while violating human dignity in the process.

In a society like ours, where validation gives relevance, there is a need for us to realise that failure to see style and its freedom as a right under natural law would only lead to cases of people treating this right like it does not exist and going a step further to disallow people from accessing this right and abusing them when they try to express this God-given right.

I think it is about time for the style of a human person to be legally protected and people accorded the respect and dignity that by virtue of being human beings was given to them by God.

5. GENERAL ANALYSIS

This chapter aims to sum up the discussions in the previous chapters. In so doing, it shall conclude on whether or not style should be made a constitutional right. It shall also propose a recommendation that may assist in addressing this problem.

5.1 FINDINGS

Chapter 2 showed how dress could be an art form and by so doing showed how it could be an expressive tool. From the study (still in chapter 2), we saw instances where style/fashion was used to deliver political messages. Other expressive tools such as speech and writing are formally recognized and protected by the Constitution in such a way that an individual can have the freedom to express him/herself using either of the above mentioned. The Constitution guarantees freedom of media (article 34 CoK), freedom of conscience (article 32 CoK), and freedom of expression (article 33 CoK). Though freedom of expression recognizes freedom of artistic creativity and style falls under artistic creativity, the law does not explicitly provide for the recognition of style as an expressive right.

Style is often times regarded as frivolous and this is not so as the study has shown several instances where people have been subjected to discrimination/rejection, sexual harassment, violence and infringement on human dignity all based on style.

Furthermore, there are recorded cases when these acts of discrimination and harassment were allowed/excused by the law and people in charge of our safety.

For example, in the US it is legal for an employer to discriminate against people with dreadlocks. In addition to this, in chapter 4 when discussing cases of appearance based violence there are a number of cases where offenders were left unpunished because of the style of their victims.

The first case was a rapist in Manitoba, Canada who did not get jail time because the judge ruled that the victim had "invited" the rapist because of her short skirt.

The second case was the Governor of Jakarta (Indonesia), Fauzi Bowo, who spoke out on the rape and murder of an under aged girl and said that miniskirts turn men on and so women

should “adjust to their environments so that they do not provoke people from committing unwanted acts”.

The third case was a scenario where a catholic priest, Piero Corsi, responded to the murder of 118 women in cases of domestic violence in Italy. Through a printed message, he said that women bring their attack on themselves by provoking their attackers by going around scantily dressed and in provocative clothes.

Lastly, the case of a club owner, Andres Jaramillo, who in trying to explain the potential reason for the harassment of a girl in his nightclubsaid, “let us consider what happens when a 20-year-old girl comes out with her girlfriends... and she is dressed in an overcoat and underneath it, has a miniskirt on. Well, what is she playing at?”

From all these cases it is clear how physical appearance/style played a huge role in arriving at the conclusion, yet and still it is considered frivolous. Style in one way or another affects individuals on a daily basis.

This needs to be protected.

When Kenya witnessed the MyDressMyChoice movement, it was wholly on the basis of style. The movement was as a result of a plethora of sexual harassment cases which infringed on the self-respect and human dignity of the victims. Perhaps this may not have happened if the right to express style was guaranteed by the Constitution. Just like how an individual cannot be harassed or violated for freely speaking within the boundaries of his/her rights because his freedom of speech is guaranteed by the constitution; so should an individual be able to express him/herself through style and be protected by the law.

Infringement of human dignity is a direct consequence of appearance/style based discrimination. That is, whenever there is appearance/style based discrimination, human dignity has simultaneously been infringed on.

The importance of style and the huge role it plays in our society is undeniable. The main aim of the law is to provide justice for all and recognizing style as an enforceable right would go a long way in promoting justice. Style should be a right that can be expressed and exercised. In the words of Felix Morley “a right should be something that can be expressed and

exercised. If a right cannot be exercised it becomes unsubstantial to the point of non-existence.

5.2 RECOMMENDATION

The importance of recognizing style as an expressive right in the constitution and other legal instruments cannot be overly emphasized.

My simple recommendation is that States, institutions and individuals ought to recognize, adopt and enforce the right to style.

It should be provided for in the Constitution through an amendment of Article 33 of the Constitution of Kenya. Here, it would explicably state that style is an expressive right (under artistic creativity) which is guaranteed and protected by the laws of the state and denial of style rights or harassment on the basis of style would be a criminal offence.

An effect of recognition would be reduced cases of sexual assault/harassment as offenders would no longer be able to lean on the loophole of omission as an escape route to avoid punishment. It would also serve as a deterrent to potential offenders, in addition to this; people would be more comfortable to leave their homes not worrying about if their style would be a cause of pandemonium and attract "jungle justice".

In guaranteeing the right to style, it is only logical to establish that no right is absolute. For example, one's right to life can be limited if he/she takes another's life, so can freedom of style be limited by nudity restrictions and objective appropriateness.

One's rights end when another's begins.

5.3 CONCLUSION

In conclusion, the aim of the study was to prove that style is indeed a natural right whose expression ought to be constitutionally protected by the law while emphasizing that:

- 1) Dress is a form of art and style is its tool of expression.
- 2) Style is a natural right

- 3) Individuals should not face discrimination based on their style. Be it professional or social discrimination.
- 4) Human dignity is an important and inalienable right
- 5) Where there is occurrence of style discrimination or appearance based violence there would be an automatic violation of human rights.
- 6) Recognition of style as a natural right is not sufficient. It has to be formally and explicitly provided for in the law by law makers. That is, "protection" has to be accorded to style.

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