

**A CRITICAL ANALYSIS OF ARTICLE 24 ON THE LIMITATION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS UNDER THE CONSTITUTION OF KENYA  
2010**

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DISSERTATION

### Declaration

I, SYEKONYO PATIENCE MAINGI, 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.

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

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## TABLE OF CONTENTS

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<b>DECLARATION</b>	<b>i</b>
<b>ACKNOWLEDGEMENT</b>	<b>ii</b>
<b>ABSTRACT</b>	<b>v</b>
<b>LIST OF CASES</b>	<b>vi</b>
<b>LIST OF INTERNATIONAL INSTRUMENTS</b>	<b>vi</b>
<b>CHAPTER 1- GENERAL INTRODUCTION</b>	
1.1 Introduction.....	1
1.2 Background of the problem.....	1
1.3 Statement of the problem.....	2
1.4 Purpose of the study or general aims.....	3
1.5 Hypothesis.....	3
1.6 Research questions or specific objectives .....	4
1.7 Importance or justification or rationale of the study.....	4
1.8 Chapter outline.....	5
1.9 Definition of terms.....	6
<b>2.0 CHAPTER 2-THE CONCEPT OF LIMITATION OF RIGHTS AND THEORETICAL FRAMEWORK</b>	
2.1 Introduction.....	7
2.2 What are Human Rights .....	7
2.3 Limitation of Human Rights.....	8
2.3.1 The General Limitation Clause.....	9
2.3.2 The Features of a General Limitation Clause.....	10
2.3.3 Derogation v Limitation.....	11
2.4 The Social Contract Theory.....	12
2.5 Conclusion.....	14
<b>3.0 CHAPTER 3: AN ANALYSIS OF THE COURTS INTERPRETATION OF LIMITATION OF RIGHTS CLAUSES IN THE CONSTITUTION OF KENYA</b>	
3.1 Introduction.....	15
3.2 Breakdown of Article 24.....	15
3.3 Oakes Test.....	17
3.4 Kenyan Courts Interpretation of Article 24 of The Constitution of Kenya.....	19
3.5 Other Limitation Clauses in The Constitution.....	22
3.5.1 Limitation in Article 33 on Freedom of Expression.....	22
3.5.2 Limitation in Article 32 on The Freedom of Conscience, Religion, Belief and Opinion. ....	23
3.6 Conclusion.....	24

**4.0 CHAPTER 4: INTERNATIONAL INSTRUMENTS DEALING WITH  
LIMITATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

4.1 Introduction.....25  
4.2 Limitations of Rights Under The African Charter on Human and Peoples Rights  
(ACHPR).....25  
4.3 Limitation Of Rights Under The International Covenant For Economic Social And  
Cultural Rights  
(CESCR).....28.  
4 Limitation Of Human Rights In The International Covenant For Civil And Political  
Right (ICCPR).....30  
4.5 Conclusion.....32

**5.0 CHAPTER 5: CONCLUSION AND RECOMMENDATIONS**

5.1 Conclusion.....34  
5.2 Recommendations.....37

**BIBLIOGRAPHY .....38**

## **ABSTRACT**

This study sets out to critically examine and assess the main limitation provisions of Kenya's constitutional framework in providing a safeguard to the limitation of rights and fundamental freedoms vis a vis the international legal instruments that protect human rights thus setting out an internationally agreed upon standard for the limitation of rights. This study breaks down the provisions and examines it to see if they comply with the minimum requirement of a standard that is derived from an examination of three international instruments that set the stage with regard to the limitation of rights and fundamental freedoms. These instruments are, the African Charter on Human and Peoples Rights (ACHPR), the International Covenant for Civil and Political Rights (ICCPR) and The International Covenant for Economic, Social and Cultural rights (CESCR). Generally, limitation of human rights must take into account the protection of public interest and the rights of the individuals. The structure of a limitation form may take a general form, meaning that it limits all sets of rights or a rights specific clause that limits specific rights. However, under article 24 of the Constitution, if the enjoyment of an individual's right and fundamental freedoms prejudice the rights and fundamental freedom of another, the law provides a limit to that enjoyment.

This paper will attempt to identify and discuss the jurisprudence of Kenyan courts on the limitation of human rights, the process by which Courts in Kenya have interpreted this limitation and how this provision measures up against international instruments which provide the International threshold on limitation of rights. The study eventually reveals that in order to legally limit rights, the state must balance rights and interest of the individuals with that of the state so that the limiting measures should not outweigh the actual circumstances that necessitate the restriction, they must be non-discriminatory and finally not make a country avoid her obligation under international law.

## **LIST OF CASES**

Case concerning the Barcelona traction, light and power company, limited (Belgium v Spain) (Second Phase), ICJ Reports 1970.

Civil liberties Organization (With reference to the Nigerian Bar Association) v Nigeria 8th Annual Activity Report. Para 16 (1995), African Commission on Human and Peoples' Rights 17th Ordinary Session.

Christian Education of South Africa v Minister for Education (CCT 4/00) (2000), Constitutional Court of South Africa.

Constitutional Rights Project v Nigeria Communication No. 143/1995 (1996), African Commission on Human and Peoples' Rights, 17th Ordinary Session.

Edwards Books & Art Ltd v The Queen [1986] 2 SCR 713, Supreme Court of Canada.

Geoffrey Andare v Attorney General & 2 others [2016], eKLR

Hall v Brooklands Auto Racing Club (1933), 1 KB 205.

Kijuki Kiambi Paul Kagia & 5 Others v Clerk Meru Municipal Council Municipal council [2012], eKLR

Koigi wa Wamwere v Attorney General, Miscellaneous application, NC. Number 574/90.

R v Oakes (1986), 1 S.C.R. 103, Supreme Court of Canada.

Robert Alai v The Hon Attorney General & another [2017], eKLR

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

Southern Foundries (1926) Ltd v Shirlaw, (1939) 2 KB 206.

## **LIST OF INTERNATIONAL INSTRUMENTS**

The African Charter on Human and Peoples Rights (ACHPR)

International Covenant on Economic, Social and Cultural Rights (CESCR)

International Convention on Civil and Political Rights (ICCPR)

## **CHAPTER 1**

### **1.0 INTRODUCTION**

In promulgating a new Constitution on 27 August 2010, Kenya ushered in a new and progressive constitutional dispensation aimed at enhancing substantive equality, democracy, good governance and the protection of human rights and fundamental freedoms<sup>1</sup>. This is encompassed in the preamble of the 2010 Constitution, which expresses the commitment of the Kenyan people to nurturing and protecting the well-being of all, as well as recognising the aspirations of Kenyans to be governed by the values of human rights, equality, freedom, democracy, social justice and the rule of law.<sup>2</sup> A huge, integral part of this Constitution, is the bill of rights in Chapter four which encompasses the list of rights conferred to Kenyans generally as a whole and the specific classes of rights due to special groups of people or minorities.

The rights conferred are, however, not absolute and can be subjected to legitimate limitation in accordance with the law. Since the state is formed by the political society for the protection of human rights, if the enjoyment of the individual's rights and fundamental freedom prejudice the rights and fundamental freedoms of another, the law provides a limit to that enjoyment.<sup>3</sup> Many Constitutions and human rights instruments allow for the limitations of rights where necessary in a democratic society. For instance, the repealed Constitution provided for the limitation of rights for the public good<sup>4</sup> which was heavily criticized by the Constitution of Kenya Review Commission (CKRC) report as a 'limited version' of the bill of rights included.<sup>5</sup> Therefore, limitations to the enjoyment of rights contained in a bill of rights, must be reasonable in order to avoid a situation where the Constitution gives with one hand and takes away with the other.

### **1.2 BACKGROUND TO THE PROBLEM**

Prior to the enactment of the Kenyan Constitution 2010, the now repealed Constitution of Kenya 1963 was subject to claw back clauses which caused a lot of confusion and interference with the exercise of rights protected in the Constitution. The provisions were lacking in that

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<sup>1</sup> PLO Lumumba & Luis Franchesci *The Constitution of Kenya 2010: An Introductory Commentary* Strathmore University Press, 2014

<sup>2</sup> The Constitution of Kenya, 2010 paras 5-6 of the Preamble. See also Article 10 of the 2010 Constitution which enumerates the national values and principles of governance

<sup>3</sup> PLO Lumumba & Luis Franchesci *The Constitution of Kenya 2010: An Introductory Commentary* Strathmore University Press, 2014, P 143

<sup>4</sup> S 14, Constitution of Kenya, 1963

<sup>5</sup> Constitution of Kenya Review Commission (CKRC) 27, 2005.

they ought to have provided for instances when the fundamental rights and freedoms could be limited, but also with regard to particular rights and to what degree the limitation could be extended. In contrast, Article 24 of the Constitution of Kenya 2010 is a “new and improved” version of these clauses that goes even further to include what the repealed Constitution of Kenya lacked and also provides limits as to limitation by way of giving the procedure to be followed. It makes use of one single general clause expressly identifying the limitations of rights and fundamental freedoms. This is a huge step forward in the protection of rights especially because a comprehensive limitation clause takes into account the socio economic rights that were absent in the previous Constitution.

To add on to this, article 25 of the 2010 Constitution clearly lays down the fundamental rights and freedoms that are not subject to limitation. These rights include freedom from torture and cruel inhuman or degrading treatment or punishment, freedom from slavery or servitude, the right to a fair hearing and the right to an order of *habeas corpus* all of which cannot be limited and are non-derogable.<sup>6</sup> The rationale behind this is that fundamental rights are natural obligations with application *egra omnes*<sup>7</sup>. They are inherent and precede the state which is formed by the political society for the protection of such rights. However, under article 24 of the Constitution, if the enjoyment of an individual’s right and fundamental freedoms prejudice the rights and fundamental freedom of another, the law provides a limit to that enjoyment. This paper will attempt to identify and discuss the jurisprudence of Kenyan courts on the limitation of human rights, the process by which Courts in Kenya have interpreted this limitation and how this provision measures up against international instruments which provide the International threshold on limitation of rights.

### **1.3 STATEMENT OF THE PROBLEM**

A limitation clause acts as a contentious provision in human rights since it seeks to curtail the enjoyment and exercise of rights guaranteed in a national constitution. Rights should just not be limited on a whim therefore the mandate conferred to the relevant authorities by the people of Kenya<sup>8</sup> to curtail their rights should not only be used sparingly but should also constantly be checked to avoid abuse, begging the question, does the judicial interpretation of the

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<sup>6</sup> Article 25, The Constitution of Kenya 2010.

<sup>7</sup> The concept was recognized in the International Court of Justice's decision in the Barcelona Traction case [(Belgium v Spain) (Second Phase) ICJ Rep 1970 3 at paragraph 33

<sup>8</sup> Article 1, The Constitution of Kenya 2010

Constitution of Kenya offer an effective approach to the limitation of rights vis a vis International Standard for limitation of rights?

#### **1.4 PURPOSE OF THE STUDY**

The general aims of this study are to illustrate a suitable approach to limiting rights. It is an inquisition into the reaction of the judiciary especially to article 24 specifically and even more importantly how the lives of Kenyans have been or will be affected by this clause and its interpretation in the courts. It will determine whether, the limitation of the rights of Kenyan citizens is within reason, is justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors, including the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, 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 the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose having in mind that limitation should be reasonable, justifiable and proportionate.<sup>9</sup>

Despite the fact that limitation clauses provide direction on the mode of justifying rights limitation, there is value in assessing the balance between the harm and benefits of limitation. As a result the study will assess the limitations outlined in Kenya's constitution, with the purpose of identifying whether the limitation clause is in consonance with the international standards and principles protecting human rights.

#### **1.5 HYPOTHESIS**

The limitation clause in the Constitution of Kenya 2010 is a general limitation clause whose interpretation in the courts impacts on all Kenyans. If not checked this ability to limit rights can be counterproductive to having protected rights in the first place. The formulation of the limitations of human rights clause under COK 2010 is deleterious to the protected rights because despite the fact that limiting rights is legitimate and justifiable, such limitation must be held against international standards, be justifiable in an open and democratic society based on human dignity, equality and freedom having in mind that any limitation should be reasonable, justifiable and proportionate. Due to its generality, the limitation clause is wide open and can be subject to abuse.

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<sup>9</sup> Article 24 , Constitution of Kenya

## **1.6 RESEARCH QUESTIONS AND SPECIFIC OBJECTIVES**

The broad objective of this study is assessing Kenya's 2010 Constitutional framework in providing safeguards to the limitation of fundamental rights and freedoms Vis a Vis international legal instruments that protect human rights.

In order to assess the extent to which the Constitution of Kenya provides a proper formula in limiting rights as well as its limitation clause Vis a Vis the international instruments protecting human rights, the following research questions are pertinent:

1. What are human rights?
2. What is limitation of rights?
3. Is limitation of rights lawful?
4. How does limitation vary from derogation?
5. How is article 24 of the Kenyan Constitution interpreted in the courts?
6. Does Kenya's 2010 constitution approach the question of limitation of rights appropriately?
7. What reforms ought to be considered to enhance protection of rights Vis a Vis the human rights discourse?

## **1.7 JUSTIFICATION OF THE STUDY**

Article 24 of the Constitution of Kenya 2010 states that

“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...”

The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. The Bill of rights is a document that concerns everyone in the society. Concurrently, not all of these rights are absolute. In fact, a good majority of these rights are not and so they must be limited for a number of reasons, public policy, national security and common good being at the top of the list. If it so happens that the manner through which these rights are limited or the law that provides for their limitation is lacking, the resounding effect maybe catastrophic.

This study will be particularly useful to legal scholars because it will shed light on the principles underlying limitation of rights with a purpose of reaffirming what entails a proper limitation clause and the approach toward it. It will determine the loopholes in limitation of rights in the Kenyan constitution with the aim of integrating and benchmarking against the international standards as regards limitation of rights in order for the authority to make appropriate limitation without defeating the essential purpose of rights.

The results of this study will also be beneficial to every Kenyan in the sense that their individual rights are affected and that if the study does indeed find a lacuna in the law, this will be the first step in addressing this issue and to coming up with possible effective solutions. If indeed the law is airtight this research will go a long way in reassuring the citizens protected under the bill of rights especially in Kenya that their rights are wholesome and the procedures surrounding the application of their human rights is fair and justified.

## **1.8 CHAPTER OUTLINE**

The dissertation will be divided into 5 chapters as follows:

Chapter 1 – Contains the proposal to the study that highlights the objectives, its significance, research questions and general introduction to the study.

Chapter 2 – Contains the theoretical framework and introduces the idea of limitation of rights, their justification and the various jurisprudential works of scholars relevant to the study of limitation of rights

Chapter 3 – Contains an analysis of article 24, the nature and structure of the limitation clause and its interpretation and implementation in Kenyan courts.

Chapter 4 - Contains an analysis of the international and regional human rights instruments, more specifically the African Charter, ICCPR and the CESCRC. The aim of this chapter is to identify the nature and scope and standard of limitation under these instruments and their implementation.

Chapter 5 - Contains the general conclusions and determination on the whole dissertation as well as recommendations and highlights as to what extent the objectives of the study were met.

## 1.9 DEFINITION OF TERMS

For the purposes of this dissertation, the following is the definition of some of the most important and relevant terms.

**Bill of rights** - The first 10 amendments to the American Constitution make up the Bill of Rights. Written by James Madison in response to calls from several states for greater constitutional protection for individual liberties, the Bill of Rights lists specific prohibitions on governmental power.<sup>10</sup>

**Derogation**- to suspend certain civil and political liberties—in response to crisis.<sup>11</sup> Different from limitation in that limitation is not a suspension of human rights and fundamental freedoms. Limitation is by operation of the law and derogation as a result of circumstance.

**Fundamental freedoms** – the rights and freedoms considered essential to the functioning of a democracy.<sup>12</sup> They allow individuals and groups to express themselves, to believe and practice what they choose, and to exercise their right to vote. For example, freedom of religion, speech, and conscience are fundamental freedoms.

**Human rights** – are natural obligations with application egra omnes that are inherent and precede the state, which is formed for the protection of such rights.<sup>13</sup>

**Limitation** - the assignment, as by statute, of a period of time within which an action must be brought, or the period of time assigned.<sup>14</sup>

**Restrictive means** – by way of imposing restrictions or limitations on someone's activities or freedom.

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<sup>10</sup> <https://www.billofrightsintstitute.org/founding-documents/bill-of-rights/>

<sup>11</sup> Emergency and Escape: Explaining Derogations from Human Rights Treaties by Emilie M Haener-Burton, Laurence R Heifer and Christopher J Farris

<sup>12</sup> <https://ccla.org/focus-areas/fundamental-freedoms/>

<sup>13</sup> PLO Lumumba & Luis Francesca, 'The Constitution of Kenya 2010: An Introductory Commentary' Strathmore University Press, 2014, P 143

<sup>14</sup>

## **CHAPTER 2: THEORETICAL FRAMEWORK**

### **2.1 INTRODUCTION**

Anyone who professes to take rights seriously must first accept at the minimum, the vague but powerful idea of human dignity.<sup>15</sup> Human rights can be legally enforced or exercised against abuse because they are entitlements of human beings by virtue of being human beings no matter their economic standing, race, tribe religion, politics ideologies and whatever other factors that differentiate human beings. This chapter will explore the human rights discourse and lay out the conceptual framework that this dissertation relies on.

### **2.2 WHAT ARE HUMAN RIGHTS?**

Human rights are the basic rights and freedoms that belong to every person in the world, by virtue of being human from birth until death. They apply regardless of origin, belief or how you choose to live your life. They can never be taken away, although they can sometimes be restricted.<sup>16</sup> They are based on values that reflect in humanity like dignity, equality, fairness and equity. All human rights are universal, indivisible and interdependent and related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.<sup>17</sup> They are universal, inalienable, dependent, indivisible, equal, and non-discriminatory and entail both rights and obligations<sup>18</sup>.

Human rights law can be traced back to the Cyrus Cylinder which came about after Cyrus the great conquered the city of Babylon in 539 BC.<sup>19</sup> King Cyrus freed all the slaves they had captured during the conquest to return home and continued to declare that people should be free to choose their own religion. The Cyrus cylinder, which is a clay tablet containing his statements is the first human rights declaration in history<sup>20</sup>. Certainly, this idea of human rights caught fire and spread quickly into India, Greece and eventually Rome.

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<sup>15</sup> Dworkin R, Taking Rights Seriously, Harvard university Press, 1977

<sup>16</sup> <https://www.equalityhumanrights.com/en/human-rights/what-are-human-rights>

<sup>17</sup> Vienna Declaration and Programme of Action, World Conference on Human Rights, 1993

<sup>18</sup> <http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>

<sup>19</sup> [http://www.britishmuseum.org/research/collection\\_online/collection\\_object\\_details.aspx?objectId=327188&partId=1](http://www.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=327188&partId=1)

<sup>20</sup> <http://www.youthforhumanrights.org/what-are-human-rights/background-of-human-rights.html>

Soon thereafter, in 1215, the Magna Carta was signed by King John of England after he violated a number of ancient laws and customs by which England had been governed<sup>21</sup>. It gave people new rights and made the king subject to the law. The Magna Carta went on to arguably become the most significant early influence on the extensive historical process that led to the rule of constitutional law today. Later developments in 1628, The Petition of Rights set out the rights of the people.<sup>22</sup> The English Parliament produced it and sent it to King Charles I as a statement of civil liberties that were based upon earlier statutes and charters and asserted four principles that; No taxes may be levied without consent of Parliament, no subject may be imprisoned without cause shown (reaffirmation of the right of habeas corpus), no soldiers may be quartered upon the citizenry and that martial law may not be used in time of peace<sup>23</sup>. In 1948, The Universal Declaration of Human Rights was the first document listing the 30 rights to which everyone is entitled. It set(s) out the fundamental human rights to be universally protected<sup>24</sup>. Today, human rights are classified and organised in several different ways. At an international level the most common categorisation of human rights has been to split them into civil and political rights, and economic, social and cultural rights. Civil and political rights are enshrined in articles 3 to 21 of the Universal Declaration of Human Rights (UDHR) and in the International Covenant on Civil and Political Rights (ICCPR). Economic, social and cultural rights are enshrined in articles 22 to 28 of the Universal Declaration of Human Rights (UDHR) and in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

### **2.3 THE LIMITATION OF HUMAN RIGHTS**

Some human rights – like the right not to be tortured – are absolute. These ‘absolute’ rights can never be interfered with in any circumstance.<sup>25</sup> However, most human rights are not absolute. In Kenya, the Constitution sets the fundamental rights and freedoms that may not be limited therefore making them absolute. They are, 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.<sup>26</sup> Allowing rights to be limited is neither new nor is it wrong. It is only in cognizance of the fact that all rights are not absolute.

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<sup>21</sup> <http://www.humanrights.com/what-are-human-rights/brief-history/magna-carta.html>

<sup>22</sup> <http://www.constitution.org/eng/petright.htm>

<sup>23</sup> <http://www.humanrights.com/what-are-human-rights/brief-history/magna-carta.html>

<sup>24</sup> UN General Assembly. (1948) Universal declaration of human rights (217 [III] A). Paris.

<sup>25</sup> <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx>

<sup>26</sup> Constitution of Kenya, Rev. 2010 Article 25

Article 24 however, the focus of this paper, is on the specified limitation within the Constitutional bill of rights. They are described as ‘limited’ which means they can be restricted in certain circumstances as specified in the relevant article (24) in the Constitution of Kenya, 2010. For example, the right to liberty, freedom of movement and to some extent, freedom of association, is limited if a person is convicted and sentenced to prison. Notably, no one piece of legislation covers all the human rights. Others are contained in the international human rights treaties which Kenya has signed and ratified. Those treaty rights are binding on Kenya in international law by virtue of article 2(5) which states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. This means that Kenya has agreed to them and the Government must comply with them.

Similarly, some other rights are described as ‘qualified’ which means they can only be restricted in order to protect the rights of other people or if it’s in the public interest for specific reasons such as the prevention of crime or preservation of public order.<sup>27</sup> For example, the Government may restrict the right to freedom of expression if a person is encouraging racial hatred or even impose a curfew in a small town, limiting freedom of movement and association during the curfew as an attempt to curb crime.

### **2.3.1 THE GENERAL LIMITATION CLAUSE**

Internationally, treaty bodies evaluate on a case by case basis whether a specific limitation is excessive or not in the circumstances. There are some general dicta that are applicable to all limitations which has led to what can be termed as a basic general limitation clause which typically provides as follows:

1. That the limitation must be provided by law;
2. The measure must have the purpose of protecting one or more of the collective needs limited in the limitation clause;
3. The measure must be necessary in order to protect the named collective need.<sup>28</sup>

There are some variations provided especially in International instruments. For example, the ECHR provides in all its general limitation clauses that the measure must be ‘necessary in a democratic society’<sup>29</sup>, and article 12 of the ICCPR on freedom of movement adds that limitations ‘must be consistent with the other rights recognised in the present

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<sup>27</sup> <http://www.constitution.gov.ky/www.constitution.gov.ky/portal/pageb59e.html>

<sup>28</sup> Louise Doswald-Beck, Human Rights in Times of Conflict and Terrorism, Oxford University Press, 2011, 71

<sup>29</sup> Article 1 protocol 1 ECHR

covenant'<sup>30</sup>. Similarly, the African Commission of Human and Peoples Rights contains a general limitation clause in article 27 paragraph 2 as follows:

*The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.*

This provision as we shall see below has been used by The African Commission in order to restrict government's interpretation of limitations to rights that may seem over broad in some of the provisions in the African Charter.

By way of contrast, the Bill of Rights in the Independence constitution, was littered with 'claw-back' clauses that often defeated the very essence of guaranteeing human rights, hiding behind the internal limitations assigned specific rights as well as the general limitation clause entailing that rights would be restricted for greater public interests, for example, for public safety, security and health<sup>31</sup>. Due to these limitation clauses, the Bill of Rights ended up taking away rights more than it guaranteed. The 'claw back' clauses also found favour in the manner in which the repealed Constitution was interpreted. Which was popular because of the wide berth it gave judges. The Judiciary, which was entrusted with the task of protecting fundamental rights and individual liberties, had adopted a very restrictive approach to human rights litigation and constitutional interpretation<sup>32</sup>. In one instance, the High Court dismissed an applicant's pleadings on the technical ground that he did not identify which constitutional provision had been contravened. In *Koigi wa Wamwere v Attorney General*<sup>33</sup>, the Court held that section 72 of the Constitution protected the fundamental right to liberty, but did not specify the manner in which arrests could be made, or where such arrests could be effected. The tribunal declined to concern itself with extradition or the manner in which police officers carry out their duties.

### **2.3.2 THE FEATURES OF A GENERAL LIMITATION CLAUSE**

Phrasing a limitation clause as general, is in light of its application to some of the rights in the bill of rights that may be limited in the same criteria<sup>34</sup>. For example, article 24 of the Kenyan Constitution makes provision for limitation of rights where such limitation is permissible by

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<sup>30</sup> Article 12, 3, ICCPR

<sup>31</sup> J Mutakha-Kangu 'The theory and design of limitation of fundamental rights and freedoms' (2008) 4/1 The Law Society of Kenya Journal 1

<sup>32</sup> Mbondenyei, Kiwinda, and Osogo Ambani. *New Constitutional Law of Kenya. : Principles, Government and Human Rights*, Law Africa Publishing Ltd, 2012

<sup>33</sup> *Koigi wa Wamwere v Attorney General* Miscellaneous application NC. Number 574/90.

<sup>34</sup> Van Der Schyff, *Limitation of rights 'Astud of the European Convention on Human Rights and the South African Bill of rights'*2005

law reasonable and justifiable in an open and democratic society... to this end, the general limitation clause acts as a key provision in interpreting the bill of rights through to 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 society founded on the principles of human dignity freedom and equality.

### 2.3.3 LIMITATION V DEROGATION

Derogations provide in effect, that state measures that would normally be a violation of the human rights treaty would not contravene the treaty if these measures are taken in exceptional situations and only to the degree absolutely necessary<sup>35</sup>. Derogation is an international law concept and should only come into effect in times of war,<sup>36</sup> public emergency which threatens the life of a nation and the existence of which is officially proclaimed.<sup>37</sup> Ideally, if the emergency is the result of an armed conflict, then the next step is to respect International humanitarian law but despite these there still exists non derogable rights which are protected under the list of absolute rights in Kenya<sup>38</sup>. Similarly and common not only to the EHCR and ICCPR but also the ACHPR, are the rights to life, prohibition of torture, inhumane, cruel or degrading punishment, prohibition of slavery and servitude and the prohibition of criminal conviction or punishment not being based on a pre-existing law, which by virtue of these instruments are non derogable.

Clearly the difference between derogation and limitation lies in the situation in which they apply in the sense that derogations are imposed only whenever there is a declared state of emergency which is used by the states to buy time and have a legal breathing time as a temporary measure to combat the crisis. A good example would be as was the case in Mpeketoni and Lamu where there was a terrorist attack in 2014.<sup>39</sup> Article 58(6) of the Kenyan Constitution read with article 4 of the ICCPR<sup>40</sup> requires that the enactment of statute 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. If rights are to rightfully and

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<sup>35</sup> Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, 2011, 79

<sup>36</sup> EHCR article 15

<sup>37</sup> Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, 2011, 79. Also please see ICCPR article 4, 1

<sup>38</sup> Article 25, Constitution of Kenya 2010

<sup>39</sup> <http://www.bbc.com/news/world-africa-27862510>

<sup>40</sup> General Assembly Resolution 2200A (XXI) of 16 December 1966 entry to force in 23 March 1976

legally be curtailed outside the purview of IHL, then they must be limited in accordance to the relevant laws.

## 2.4 SOCIAL CONTRACT THEORY

The quarrelsome nature of a man cannot allow for his peaceful co-existence with the rest of his kind without setting up laws that limit his personal rights<sup>41</sup>. The social contract theory is a philosophical theory that states that in the beginning man lived in a state of nature. They were neither government nor law to regulate them so therefore, man experienced hardships and oppression. To overcome these hardships they entered into two agreements: *Pactum Unionis* and *Pactum Subjectionis*<sup>42</sup>. In the first pact, *unionis*, people sought protection of their lives and property and as a result a society developed where people undertook to respect each other and their property and live in peace and harmony. The second pact of *subjectionis*, united people together and they pledged to obey an authority and surrendered the whole or part of their freedom and rights to an authority who guaranteed everyone protection of life, property and to a certain extent, liberty.<sup>43</sup>

Thomas Hobbes, one of the earliest proponents of this theory, submitted that the state of nature was one of fear and selfishness (before the social pacts). One in a chaotic condition of constant fear which is what led to the development of the two agreements. He rejected the communitarian and corporative aspects of the social contract tradition. For Hobbes, the bearers of the right to consent to government, and of the right to resist government that violates the social contract, are always and primarily individual persons. It is not the community that consents to government through an agreement between its authorized representatives and the sovereign: it is the whole body of individuals, each making an agreement with every other individual, to alienate their natural rights and liberties to a government and sovereign that they together agree to create. It is only when such an agreement among individuals has been reached, Hobbes argues, that a corporate body like the people or the community can be said to exist. There is no pre-contract community<sup>44</sup>, nor is there any agreement between the sovereign and the people. Other proponents of this theory, like John Locke and Jean Jacques Rousseau further

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<sup>41</sup> Thomas Hobbes, Social Contract.

<sup>42</sup> Manzoor Elahi, What is Social Contract? 2005

<sup>43</sup> Thomas Hobbes, Social Contract

<sup>44</sup> Thomas Hobbes Leviathan: Or, the Matter, Form, and Power of a Commonwealth, Ecclesiastical and Civil (1651)

developed the theory and focussed their discussions on a specific aspects of the Social Contract theory. According to them, through Social Contract, a new form of social organisation, the state, was formed to assure and guarantee rights, liberties freedom and equality<sup>45</sup>. More specifically, for Locke, the social contract is among individuals. Though these individuals live in a pre-political society—he averred that the state of nature is one in which society already exists. For Locke, the contractors and the bearers of rights to authorize government and to resist oppressive government are, essentially individuals<sup>46</sup>.

The social contract is one of the arguments that justifies limitation of rights. It is important to note that in order for society to live harmoniously, the relevant governing authority, the state, in order to be able to guarantee rights especially so that all its citizens can enjoy them, has to limit rights to avoid an overlap. This power to limit comes first from the people who agree to give up their freedoms and liberties to a community for better protection of their rights. This concept is well embedded in the Kenyan constitution by way of the principle of sovereignty. The relevant article states;

1. (1) all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
- (2) The people may exercise their sovereign power either directly or through their democratically elected representatives.<sup>47</sup>

The article continues to state the various governmental organs to which this power is delegated who have a duty to exercise that power and their functions in accordance with the Constitution. Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise, individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. However, if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests that are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary.<sup>48</sup> Conclusively, the idea of limitation of rights is as a result of the social contract that not only enable limitation but also justify limitations.

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<sup>45</sup> Manzoor Laskar, Summary of Social Contract Theory by Hobbes, Locke and Rousseau, Symbiosis International University, Date Written: April 4, 2013

<sup>46</sup> John Locke, Two Treatises of Government (1688)

<sup>47</sup> Article 1 , The Constitution of Kenya, 2010

<sup>48</sup> Louis Henkin, The Age of Rights (Columbia University Press, 1990) 4

## **2.5 CONCLUSION**

This chapter has analysed the principles that apply in respect to human rights, what human rights really are and why they should be limited as well the conceptual framework that supports the limitation of rights with a highlight on the different types of limitation clauses as well as their different effects when applied to the Kenyan context while differentiating derogation from limitation. To conclude, this is the main analysis of the aspect of limitation of rights and fundamental freedoms in respect to the Kenyan Constitution 2010.

## **CHAPTER 3: JUDICIAL INTERPRETATION OF THE HUMAN RIGHTS CLAUSES IN THE CONSTITUTION OF KENYA**

### **3.1 INTRODUCTION**

The repealed Constitution provided for rights and freedoms under its Chapter V, whose provisions were criticized by the Constitution of Kenya Review Commission because all the rights guaranteed were subject to provisions of other statutes. The national assembly under the repealed Constitution therefore had all the legislative avenues for restraining fundamental rights and freedoms thereby opposing the very rights sought to be upheld by the Constitution. The 2010 Constitution takes cognizance of the individual rights and fundamental freedoms of the citizens. In tandem with this recognition, it avoids or limits the inclusion of claw back clauses in most of its provisions unlike the repealed Constitution. In this chapter, the focus is on analysis of the limitation clauses on the rights and freedoms as enshrined in the Kenyan Constitution. The chapter will review with specify the nature of the limitations imposed on the Bill of rights in the Constitution of Kenya 2010.

### **3.2 ARTICLE 24 OF THE 2010 CONSTITUTION**

Article 24 is a general limitation clause that attempts to regulate the process of limitation of a rights in Kenya. It states;

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—
- (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.

Basically, there shall be no limitation of a fundamental right or freedom except by law meaning that in order for a limitation to occur it has to be under the operation of the law so that whoever limiting the right can and should be able to trace their authority to limit the right in question back to this article and support it with the relevant legislation that allows for the limitation in that circumstance. The provision continues that the limitation by law is only to the extent that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The idea of 'reasonability' or a 'reasonable man' is a widely applied principle in the legal world especially in the realm of tort. Of the popular definitions of the reasonable man is that he is the ordinary man, the average man, or the man on the Clapham omnibus.<sup>49</sup> The reasonable person belongs to a family of hypothetical figures in law that include: the "right-thinking member of society," the "officious bystander"<sup>50</sup>, the "reasonable parent," the "reasonable landlord," the "fair-minded and informed observer," the "person having ordinary skill in the art," and stretching back to Roman jurists, the figure of the *bonus paterfamilias*. *Prima facie*, this seems to be a fool proof way of determining a reasonable action, however in a situation where the court should decide if an incident of limitation fell below the standard of the reasonable man, the fact that the standard of care expected from this hypothetical character is objective; meaning that it does not take into account the characteristics or weaknesses or even circumstance of the limitation in the instant case. For example, the standard of care expected from a learner-driver is the same as that required by a qualified driver. Therefore, does it follow that in the limitation of rights, the standard of care expected from the

<sup>49</sup> Hall v Brooklands Auto Racing Club [1933] 1 KB 205

<sup>50</sup> Southern Foundries (1926) Ltd v Shirlaw [1939] 2 KB 206

court, the police or the civilian for example (or whoever with the requisite authority to limit) is the same? The same reasoning applied to the justifiability of limitation of rights will provide the same results because what is justifiable or not changes on a case to case basis.

The condition of an open and democratic society based on human dignity, equality and freedom is a guideline in a sense of the prevailing requisite that needs to be met in the process of limitation according to the 2010 Constitution. An irony plays out because it has been argued that limiting rights degrades human dignity and has the effect of curtailing freedom.<sup>51</sup>

The provision insists that no limit to the right or fundamental freedom will go so far as to derogate from its core or essential content. This is a maximum limit however, it would be difficult to apply objectively because rights are different and some despite the fact that they may not be absolute, require more protection than others. The right to life for example is one such case Vis a Vis the right to vote.

Lastly, the provision insists that a provision in legislation may limit its application of rights and fundamental freedoms to persons serving in the Kenya Defence forces or The National Police Service as regards the following rights; Privacy, Freedom of association, Assembly, demonstration, picketing and petition, Labour relations, Economic and social rights and Rights of arrested persons.

The above indicates the constitutional criteria for the limitation of the rights and fundamental freedoms in Kenya. The criteria can be inferred from the principles developed in the Canadian Supreme Court, in the landmark case of *R. v Oakes*<sup>52</sup> that is referred to as the Oakes test. This is a test relied upon by Kenyan Courts and is considered persuasive in this jurisdiction especially because it is the key landmark case on this issue. Kenyan Jurisprudence is founded upon the tests laid out by this case.

### **3.3 OAKS TEST**

Briefly, the facts of this case are that David Oakes was caught in possession of 8 grams of hash oil and a large sum of money (\$619.45.). Oakes defended himself by stating that the money was from a government program and that the oil was for his own personal use. Despite this he was suspected of drug trafficking and was soon then arrested. He was then charged with unlawful possession of a narcotic for purpose of trafficking, in violation of the presumption of

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<sup>51</sup> Roza Pati, Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective, 23 Berkeley J. Int'l Law. 223 (2005).

<sup>52</sup> *R v Oakes* (1986) 1 S.C.R. 103

innocence of Charter of Rights and Freedoms in contravention of S. 11 of the Narcotic Control Act of Canada. The lower court found that the two main functions of the Charter of Rights S. 11 were the fact that it guaranteed the rights which follow it and second that it stated the criteria against which justifications for limitations on those rights must be measured. Oakes was convicted only for possession despite the drug trafficking suspicions due to lack of evidence. His attorney brought the case up to the Ontario Court of Appeal where the court set out the following test as apposite considerations for limiting rights and freedoms, the first part:

1. Requires an objective related to concerns which are pressing and substantial in a free and democratic society.<sup>53</sup> This means there has to be a pressing and substantial objective for the law or government action.
2. It must be shown that the means chosen are reasonable and demonstrably justified which implies that the means chosen to achieve the objective must be proportional to the burden on the rights of a claimant.

The second part of the test is described as the "proportionality test" which requires the invoking party to show:

1. That the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.
2. 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;
3. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

When applying this test to the facts, the Court found that section 8 of the Narcotics Act did not pass the rational connection test because the "possession of a small or negligible quantity of narcotics does not support the inference of trafficking. It would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of

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<sup>53</sup> Based on the analysis in *R v Big M Drug Mart Ltd* [1985] 1 S.C.R. 295

narcotics.<sup>54</sup> Therefore, section 8 of the NCA was held to be in violation of the Charter and therefore of no force or effect.

The principles especially of proportionality are captured in article 24 where the Constitution points out that the limitations set out under the provisions have to be prescribed in the law.

*“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...”*

Therefore implying that the benefits of the law need to be greater than what it costs to limit the right or freedom effectively showing that in order to determine whether a law has breached a fundamental right or freedom, the Oakes test must be applied. Article 24 (2)(c) provides that no rights or fundamental freedoms can be limited so far as to derogate from its core or essential content and goes even further to fortify the importance of the proportionality test by including an additional safeguard against excessive limitation .

Due to the dearth in precedents of rights limitation of rights analysis, comparative perspectives are particularly helpful in future jurisprudence of rights limitations as seen in the Canadian context. However it is important to note that that the sequential method of analyzing rights in Oakes has been softened in subsequent cases by the Canadian Supreme Court.<sup>55</sup>

### **3.4 KENYAN COURTS INTERPRETATION OF ARTICLE 24**

The Kenyan courts seem to place a heavy reliance on the decision in *R v Oakes* as will be illustrated in the various case studies below:

#### *I. Geoffrey Andare v Attorney General*<sup>56</sup>

In this case, the petitioner challenged the constitutionality of section 29 of the Kenya Information and Communication Act, Cap 411A on the ground that it criminalizes publication of certain information in vague and overbroad terms, has a chilling effect on the guarantee to freedom of expression and creates an offence without considering the *mens rea* element on the part of the accused person. The petitioner argued that section 29 of the above mentioned Act is vague and over-broad especially with regard to the meaning of ‘grossly offensive’, ‘indecent’, ‘obscene’, ‘menacing’, ‘causing annoyance’, ‘inconvenience’ or ‘needless anxiety’.

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<sup>54</sup> *R v Oakes* (1986) 1 S.C.R. 103

<sup>55</sup> See *Edwards Books & Art Ltd v The Queen* [1986] 2 SCR 713

<sup>56</sup> *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR

He contends that the section offends the principle of legality which requires that a law, especially one that limits a fundamental right and freedom, must be clear enough to be understood and must be precise enough to cover only the activities connected to the law's purpose. The court deliberated that the criteria set out in Article 24 of the Constitution of Kenya had been applied in cases where the question of the constitutionality of statutes was at issue, and is of assistance to the courts even where article 24 is not applicable and even went ahead to quote the *Oakes* case. Honorable Mumbi Ngugi, in her deliberation, considered some of the following questions, bearing in mind the express provisions of Article 24 and the criteria in *R vs Oakes*,

“What is the purpose of the limitation, and how important is it? What is the relationship between the limitation and its purpose? Are there less restrictive means to achieve the purpose intended?”<sup>57</sup>

The Proportionality test was strictly adhered to and read with respect to various other provisions and the Court, concerned with the constitutionality of section 29 of the Kenya Information and Communication Act, came to the conclusion that the section is unconstitutional for being couched in overbroad and vague terms that violate or threaten the right to freedom of association guaranteed under Article 33 of the Constitution.

2. *Kijuki Kiambi Paul Kagia & 5 Others v Clerk Meru Municipal Council Municipal Council*

The matter of limitations was analyzed by the court. The Meru Council had stopped licensing scrap metal businesses and some citizens opposed such prohibition as unconstitutional. The court recognized that there was undeniable great public interest in the implementation of the resolution reached by the respondent to stop the licensing of scrap metal businesses. The fact was that the theft of drains, manholes, materials of various local authorities had been on the rise in the country prompting various local authorities to bar any trading of scrap metal within their jurisdictions. The court asserted that public interest must override private right or interest to halt possible prejudice to the administration of justice. It declared that there was a legitimate public expectation that the respondent's decision should be implemented and the same had since March been implemented. The court found that if it granted the rights and fundamental

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<sup>57</sup> *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR

freedoms sought in the application by the petitioners, it would prejudice the rights of the vast majority. The application was dismissed.

### 3. *Robert Alai v The Hon Attorney General & another*<sup>58</sup>

This petition raised a significant question of whether criticism of a public officer is a ground for limiting a fundamental right enshrined in the constitution. As seen from the constitution itself, the freedom of expression and to hold opinion, can only be limited by the constitution. The petitioner was charged with the offence of undermining the authority of a Public Officer contrary to Section 132 of the Penal Code<sup>59</sup>. Particulars of the offence stated that; while using the open source website Twitter, the petitioner posted the words “Insulting Raila is what Uhuru can do. He hasn’t realized the value of the Presidency. Adolescent President. This seat needs Maturity” which publication was calculated to bring into contempt the lawful authority of the President of the Republic of Kenya. The petitioner was arraigned in court and sought the following orders:

- a. A declaration that section 132 of the Penal Code is unconstitutional and invalid.
- b. A declaration that the continued enforcement of section 132 by the second respondent against the petitioner is unconstitutional.

In its deliberation, the court stated that any limitation to a fundamental right especially the right to freedom of expression must be reasonable and justifiable and as was the present case, the limitation to freedom of expression by section 132 had to be justifiable. This being a democratic society, limitation of a right must not only be reasonable but also justified by the party seeking to limit that right. The court continued to stress that such limitation needed to strike a balance between the provision limiting the right and Article 24 of the constitution. Article 24(1) requires that there be reasonable and justifiable reasons for the limitation to a right. The first respondent filed grounds of opposition to the petition, stating that the petitioner had misinterpreted and misapprehended the sovereignty<sup>60</sup> of the people to elect their leader, the freedom of expression,<sup>61</sup> the right to a fair hearing, and that the right under Article 33 (1), freedom of expression, was not absolute since it was curtailed by clause (2) and (3) of the same Article. It is true that the right to freedom of expression is limited by clause (2) and (3).

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<sup>58</sup> Robert Alai v The Hon Attorney General & another [2017] eKLR

<sup>59</sup> Section 132 of the Penal Code, Cap 63 Laws of Kenya

<sup>60</sup> Article 1, COK 2010

<sup>61</sup> Article 33 (1) COK 2010

However, that limitation should be in terms of the two sub-Articles. The court eventually allowed all the petitioners orders declaring that Section 132 of the Penal Code is unconstitutional and invalid and that the continued enforcement of Section 132 of the Penal Code by the second respondent against the petitioner herein was unconstitutional and a violation his fundamental right to freedom of expression. Criminalizing criticism like in the case above, is a curtailment of the right to speak about public officers and it derogates ones right to hold opinion. The Bill of Rights in our transformative constitution is clear that rights are for enjoyment as opposed to curtailment.

### **3.5 OTHER LIMITATION CLAUSES IN THE CONSTITUTION**

Noteworthy is that article 24 is not the only clause in the constitution that prescribes the limitation process on various rights. There are several other provisions that limit specific rights that can be said to be an extension or manifestation of article 24.

#### **3.5.1 LIMITATION IN ARTICLE 33 ON FREEDOM OF EXPRESSION**

The limitation imposed in article 33 of the COK is similar to the limitations in article 24 in the sense that they are both general in that they do not specify to what extent this right is limited except how it is justified. Freedom of expression is a large building block in any democracy which is one of the reasons why this particular freedom is fiercely protected world over. The fact of a limitation clause in the provisions governing freedom of expression in Kenya imply that this is not an absolute right. Article 33 (2) states:

*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;*

*(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.*

### 3.5.2 LIMITATION IN ARTICLE 32 OF THE FREEDOM OF CONSCIENCE, RELIGION, BELIEF AND OPINION.

Article 8 of the COK states that there shall be no state religion. This gives freedom to Kenyans to profess any faith under the sun. Article 32 provides obligations by the state to ensure legislation and other instruments do not violate any person's freedom of conscience, religion, belief and opinion. By virtue of the facts that the general rules of international law and any treaty or convention ratified by Kenya forms part of the laws of Kenya<sup>62</sup> and that Kenya is a party to The Universal Declaration Of Human Rights<sup>63</sup>, The African Charter on Human and Peoples rights and the International Covenant on Civil and Political Rights all stipulate that the freedom of thought conscience and religion includes the freedom to change ones beliefs, in community or individually, to manifest their religion or belief in teaching , practice, worship and observance.

The best instance of limitation of this right is brought out in a Kenyan case, *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*<sup>64</sup> where a petition was brought before the courts to challenge an alleged violation of the rights conferred in article 32 for SDA students across the country. The petitioner's arguments were based on the fact that public schools in the country restrict and hinder opportunities available for SDA students to worship during the Sabbath hours, between sunset Friday and Saturday. Relying on landmark South African case, *Christian Education of South Africa v Minister for Education*<sup>65</sup> that established that freedom of religion includes both the right to have a belief and the right to express that belief in public. The respondents argued by contending that people should enjoy all things regardless of the faiths they profess and therefore should not be given any special treatment. They invoked article 24 claiming that the limitation of that freedom was not absolute and could therefore be qualified by a reasonable and justifiable criteria in an open and democratic society which had to be balanced against the right to education which they argued should be held on a higher pedestal . The judge held that there lacked a discriminatory element because all the students in the particular school where held to the same standard and used the

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<sup>62</sup> S. 2 (5) and (6) Constitution of Kenya 2010

<sup>63</sup> Declaration adopted by the UN general assembly on 10 December 1948 at the Palais de Chaillot, Paris.

<sup>64</sup> *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* [2014] eKLR

<sup>65</sup> *Christian Education of South Africa v Minister for Education* (CCT 4/00) 2000

floodgates argument with regard to other public schools in the country. And therefore denied the petitioners prayers arguing that the test of proportionality given in article 24 was met.

### **3.6 CONCLUSION**

In conclusion, the Kenyan courts seem to integrate the required elements of the proportionality principle in imposing limitation on certain rights and freedoms as seen above, guided by the provisions in article 24. More outstanding is the use of article 24 to justify the limitation of one derogable right and even in preference and with respect to another as shown in the Seventh Day Adventist case. The Kenyan limitation clauses are mostly general limitation clauses which is a step up from the claw back clauses that filled the previous constitution. However, its generality also presents in itself a problem which this chapter evidences in showing the courts reliance on cases from other jurisdictions to decide cases that require the application of the limitation clause because of the breadth of the scope of the clause. This is also very likely to lead to misuse as mentioned above.

## **CHAPTER 4: INTERNATIONAL INSTRUMENTS DEALING WITH LIMITATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

### **4.1 INTRODUCTION**

A significant element in the development of international instruments protecting human rights was the movement away from the use of single (general) limitation clauses to the elaboration of specific limitation clauses in each article. The limitation provisions are found in several articles of the human rights Covenants as well as in other regional human rights instruments. Any restriction on the rights or freedoms provided for in universal or regional human rights instruments must meet three requirements: first, it must be prescribed by law (the principle of legality), second, it must have justified one of the specified legitimate aims pursued in the particular article and third, the limitation in all circumstances must be necessary in a democratic society.<sup>66</sup> The purpose of this chapter is to examine the specific principles related to the limitation provisions in international and regional human rights instruments by examining select international rights instruments that best address the subject of limitations and comparing them to Kenya's own limitation clauses in order to determine if they meet the standard and the effect of that thereafter. The International Human Right Conventions that will be discussed are, The African Charter on Human and Peoples Rights (ACHPR), the International Covenant on Economic, Social and Cultural Rights (CESCR) and the International Convention on Civil and Political Rights (ICCPR).

### **4.2 LIMITATION OF RIGHTS UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS (ACHPR)**

The African Charter on Human and Peoples' Rights (Banjul Charter) is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent. The Commission is officially charged with three major functions: the protection of human and peoples' rights, the promotion of human and peoples' rights and the interpretation of the African Charter on Human and Peoples' Rights. Human rights are generally categorized into three generations of rights; civil and political rights, economic and

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<sup>66</sup> Basic principles governing limitations on individual rights and freedoms in human rights instruments  
Mohamed Elewa Badar, the International Journal of Human Rights Vol. 7, Iss. 4, 2003

socio economic rights and group and people's rights. This Charter is the first of its kind to protect all these Generations of rights in one instrument, without drawing any distinctions concerning their justifiability or implementation.

Interestingly, the African Charter does not contain a derogation clause. This means that derogations are not permitted under the Charter therefore, limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies and special circumstances. The only legitimate reasons for limitations to the rights and freedoms of the Charter are found in article 27(2) of the ACHPR which fall under Chapter 2 of the charter that stipulates the individual's duties. Some of the duties stipulated in article 27 are, that every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

The absence of an express derogation clause is odd especially in the context of the member states of the African Charter that frequently declare states of emergency<sup>67</sup>. To add on to this is the ironical fact that most African constitutions contain such a clause. This deviation from the norm raises several questions and invokes vast feelings about the charter. Despite this, limitations ought to take the form of law which does not specifically apply to one group or legal personality as is illustrated in the case of *Constitutional Rights Projects V Nigeria*<sup>68</sup> where the Nigerian military government in 1994, issued three decrees proscribing three different Nigerian newspapers. The complainants argued that the decrees violated article 9(2) of the African Charter which stipulated that every individual has the right to freedom of expression within the law. Nigerian government argued that the decrees constituted the law and that decrees were justified in special circumstances. While the African commission agreed that the decrees constituted the law, they remarked that the legal regulation targeting one group (the media) raised a serious danger of discrimination and as a result the finding introduced the requirement must take the formal laws of general application.

The African Charter embodies three types of limitation namely, right specific limitation, right specific claw back clauses and the general limitation clause. In spite of the protection the African Charter offers, the presence of the claw back clause invokes fear that the rights

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<sup>67</sup> Early States and State Formation in Africa, Graham Connah

<sup>68</sup> Constitutional Rights Project v Nigeria Communication No. 143/1995 (1996)

protected in the Charter may be equated with the domestic laws of the state.<sup>69</sup> The reason being that most civil and political rights are limited by *inter alia* terms such as “except for reasons and conditions previously laid down by law,” or “subject to law and order”<sup>70</sup>. 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. However the African Court of Human Rights disproved this by declining to subject the protected rights to domestic laws of a state as is shown in the case, *Civil liberties Organization (With reference to the Nigerian Bar Association ) v Nigeria*.<sup>71</sup> The African Commission held that the competent authorities in regulation the right to the extent that exercising it is impossible but rather subject to those provisions within the standards of both the national constitution and international human rights instruments.

The commission, just like the Kenyan Courts applies the test of proportionality to satisfy that a limitation clause constitutes the general laws of application and this is how they have managed to limit rights justifiably even without a derogation clause, making it easy to outweigh the evils of limitations through strict proportionality with necessity to obtain absolute advantages .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 party’s obligations under the charter. Furthermore, this has enabled the African commission to construe the limitation clause by relying on its obligation to interpret the African charter in view of the interpretations of the other international human rights instruments.

The principles that guide the Kenyan provisions and those of the Charter of proportionality and legality in limiting rights are similar. However, as mentioned, alongside the rights specific clauses and general clauses are the claw back clauses which Kenyans fought very hard to be rid of in the 2010 Constitution. Above this, the Charter contains norm-based limitation clauses that require the limiting laws to serve specific objectives. These ensure that laws are successfully aimed at protecting matters of national interest like national security and the rights and freedoms of others without allowing the state boundless discretion. The advantage of this over claw back clauses is that they are limited to some right and therefore cannot be used as claw back clauses to limit rights. The African commission has observed that the claw back

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<sup>69</sup> Frans\_Viljoen, *International Human Rights Law in Africa*, (2007) 238

<sup>70</sup> FransViljoen, *International Human Rights Law in Africa*, (2007) 239

<sup>71</sup> *Civil liberties Organization (With reference to the Nigerian Bar Association) v Nigeria* 8<sup>th</sup> Annual Activity Report. Para 16

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 from the case *International v Zambia*<sup>72</sup> where the *Zambian Government* invoked the norm based limitation to the effect that the right must be subject to the restrictions provided for in the law for the protection of national security, law, order and morality in which way, protects the Charter from the negative effects of the claw back clause.

#### **4.3 LIMITATION OF RIGHTS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (CESCR)**

The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties.<sup>73</sup> It was designed to ensure protection of economic, social and cultural rights. Article 4 of CESCR acts as the general clause applicable to all rights other than the right specific limitations that are provided in the covenant. Article 4 provides as follows

##### Article 4

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.

This limitation clause allows for its rights to be limited along the lines of progressive realization and not of immediate application because the rights are resource based. Simply put, under the covenant, socio-economic rights are only enjoyed when where the resources of a state permit its provision. This can potentially create a problem because states could minimally provide for certain rights then claim issue of lack of resources for failure to honor its promises. Therefore, lack of resources does not absolve a state from performing its minimal threshold stipulated under the convention being the position espoused by scholars when they posit that the core principles is that limitations cannot lawfully reduce the rights beneath their minimum core as the lack of resources cannot do so.<sup>74</sup>

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<sup>72</sup> *International v Zambia* Comm.No.212/98 (1999)

<sup>73</sup> <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx>

<sup>74</sup> Ben Saul et al, *The International Covenant on Economic, Social and Cultural rights: commentary, cases and materials*.

The purpose of limitation should not only promote the welfare of the society but it should also further the wellbeing of the society in a positive manner.<sup>75</sup> A good example of this limitation at play would be as in the case of *Centre For Minority Rights Development V Kenya*<sup>76</sup> where the African Commission analyzed the limitation on the right of the people to freely dispose of their wealth and natural resources as in article 1 of CESCER, 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 has a duty to evaluate whether the restriction on the right to private property was necessary to preserve the survival of the endorois community despite the fact that they had no attachment to the minerals that 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 rest of what is in accordance with appropriate laws and what constitutes the general interest of the community should be satisfied.”

The focus on limitation is not based only on the formal existence of the law but also in the nature of the laws itself. For example, the law reveals itself in various forms like Constitutional law, regional law, International law and Administrative law to mention a few on the condition that it is accessible to the community at large. This makes it legal for a state to limit rights based on the aspects of their religious, traditional or customary law.<sup>77</sup> The CESCER Committee noted that states have adopted traditional or customary law in limiting CESCER rights should not impose a single religion or tradition of a group to the whole society.<sup>78</sup> When criticizing this approach, the CESCER condemned the Iranian Constitution under its observation that the Iranian constitution purported to qualify CESCER requirements of their consistency with only Islam and no other religion. Moreover, the Committee on the ESCR observed that the enjoyment of universally recognized rights were subjected to Islamic limitations that had a negative impact on the application of the CESCER in relation to the principle of non-discrimination and equality.<sup>79</sup>

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<sup>75</sup> Limburg principles on the implementation of the CESCER, E/CN.4/1987/17,8 January

<sup>76</sup> ACPHR Communication No 276/2003 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya

<sup>77</sup> HRC, General Comment No. 34, CCPR/C/G/34 (12 September 2011)

<sup>78</sup> CESCER, Concluding Observation: Iran E/C.12/1993/7(9<sup>TH</sup> June 1993)

<sup>79</sup> CESCER, Concluding Observation: Iran E/C.12/1993/7(9<sup>TH</sup> June 1993)

Lastly, The Limburg principles are a guideline that addresses the complexities of the substantive issues covered by the CESCR and sets the nature and scope of obligations of state Parties to the covenant in terms of facilitation of the realization of the rights guaranteed therein.<sup>80</sup> These Principles have proven an important step in the development of understanding of the nature and scope of states' obligation with regard to economic, social and cultural (ESC) rights. A process that has been continued by the 1997 Maastricht Guidelines on Violations of ESC Rights and the 2011 Maastricht Principles on Extraterritorial Obligations of States in the Area of ESC Rights.<sup>81</sup>

#### **4.4 LIMITATION OF RIGHTS UNDER THE INTERNATIONAL COVENANT FOR CIVIL AND POLITICAL RIGHTS (ICCPR)**

The United Nations International Covenant for Civil and Political Rights (ICCPR) attempts to ensure the protection of civil and political rights. It was adopted by the United Nations' General Assembly on December 19, 1966, and it came into force on March 23, 1976. The ICCPR recognizes the inherent dignity of each individual and undertakes to promote conditions within states to allow the enjoyment of civil and political rights.<sup>82</sup> Countries that have ratified the Covenant are obligated "to protect and preserve basic human rights and compelled to take administrative, judicial, and legislative measures in order to protect the rights enshrined in the treaty and to provide an effective remedy." There are currently 74 signatories and 168 parties to the ICCPR.<sup>83</sup>

The approach towards limitations under the ICESCR 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 clauses. The ICCPR came into force after the world had witnessed great human violations and therefore was borne off the need to protect and guarantee individual rights and fundamental freedoms.<sup>84</sup> In order to ensure that rights are not violated by the state, the UN included limitation clauses in the ICCPR because it is understood that states have the need when circumstances call for, to limit some ascertained rights. For example, the circumstance

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<sup>80</sup> Limburg Principles on the implementation of the CESCR, E/CN.4/1987/17, 8<sup>TH</sup> January

<sup>81</sup> <https://www.maastrichtuniversity.nl/events/limburg-principles-and-migration>

<sup>82</sup> <https://ccla.org/summary-international-covenant-on-civil-and-political-rights-iccpr/>

<sup>83</sup> <https://ccla.org/summary-international-covenant-on-civil-and-political-rights-iccpr/>

<sup>84</sup> <https://ccla.org/summary-international-covenant-on-civil-and-political-rights-iccpr/>

contemplated in article 5 of the ICCPR allows limitations only in the situation when the life of a state is threatened during the existence of a public emergency.<sup>85</sup>

Various other limitations have been incorporated into the ICCPR. Article 12 imposes a limitation on the right to freedom of residence thus;

“... rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”<sup>86</sup>

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. To add on to this, article 19 provides that everyone shall have the right to hold opinions without interference. This right is subjected to a restriction which is imposed to ensuring respect of the rights and reputation of other people and protection of public order or of state security, or of public health morals.<sup>87</sup>

As stated earlier, there must be a clear criteria or the limitation of rights and fundamental freedoms as stipulated in international law. In this regard, proportionality, necessity, the least restrictive alternatives and appropriateness are the main criteria for assessing the limitable scope of limitation of the rights all present in article 24 of the 2010 Constitution. This criterion can be found in the Sirucasa principles on limitation and derogation provisions of the ICCPR.<sup>88</sup> These principles stipulate that any measure taken to restrict human rights should be legal, non-arbitrary or discriminatory, proportionate, necessary and the least restrictive means that are reasonable under the circumstances. Article 10 of the Sirucasa Principles provides that whenever a limitation is required in terms of the covenant to be necessary implies that the limitation meets the following thresholds; one is that it is justified under the relevant provisions of the covenant. Secondly, it must be responding to a pressing public and social need, three, pursuing a legitimate aim and must be proportionate to that aim.

The principles have been buttressed and made possible by the Human Rights Committee<sup>89</sup> (HRC), which is a treaty monitoring body established under article 28 of the ICCPR mandated to interpret rights guaranteed under the convention and their implementation by state parties.

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<sup>85</sup> Art 5, ICCPR

<sup>86</sup> Article 12(3) ICCPR.

<sup>87</sup> Article 19(3), ICCPR

<sup>88</sup> 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

<sup>89</sup> <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx>

The HRC has provided its exhaustive interpretation of the limitation clauses in articles 12, 18, and 19. As regards freedom of movement as provided for in article 12, it was stated in general comment 27<sup>90</sup> that the law restricting this freedom ought to identify the legal standard upon which the restriction is grounded. The HRC has also further emphasized that article 12(3) of the ICCPR noticeably indicates that the limitations must not only serve their permissible purposes but that they must also be necessary to protect them which doubles back to the principle of proportionality. This is also a requirement in the 2010 Constitution in article 24 where among the relevant factors considered for limitation to take place legally is the importance of the purpose of limitation as well as the nature and extent of the limitation.

It is also categorical that any assessment as to the limitation of that claim shall be made on objective considerations. These principles put safeguard measures on excesses by state power to ensure that individual rights and fundamental freedoms are not limited at the whims of the state officials acting on malice. Any restriction imposed on a state must be of a limited duration, respectful of human dignity and subject to review. In conclusion for limitation to be legitimate under the ICCPR, it must fall under the conditions defined under article 19(3) of the ICCPR. That is, it should be provided for by law, it should have a legitimate aim and it should be necessary. These requirements are similar to the Kenyan provisions in the Constitution 2010, where a right or fundamental right is not limited except by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society.

#### **4.5 CONCLUSION**

This chapter with relevance to permissible limitations, has observed that the limitations imposed ought not to violate the any rights at stake. They should not conflict with the minimum core rights and that, limitations ought to respect the principle of proportionality which require the state to show the scope and severity of its limitation as being proportionate to the aims such measure seek to pursue like the general welfare of the society.

The international Instruments detailed above, that is, the African Charter For Human NAD Peoples Rights (ACHPR), the International Covenant on Economic, Social and Cultural Rights (CESCR) and the International Covenant for Civil and Political rights (ICCPR) all have different approaches to the way the go about the process of limitation of rights be it a simple general limitation clause or right specific limitation clauses. However, more importantly is that

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<sup>90</sup> General Comments adopted by the Human Rights Committee Under article 40 para 4 of the ICCPR at the 1783<sup>rd</sup> meeting session 67 1999.

all these instruments seem to rely on the same basic human principles like dignity and similar legal principles like reasonableness, proportionality in order to prescribe the restriction of human rights. These are the very same principles that educated the drafting process for the general limitation clauses that Kenyans experience in the 2010 Constitution.

The 2010 Constitution states that 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 the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; 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 the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. All these requirements are a culmination of the various guiding principles behind the international human rights instruments like the Sirucasa principles referred to above. It would seem that there are more similarities between the Kenyan limitation of rights and fundamental clauses and the International standard for such a limitation clause with respect to the ACHPR, ICCPR and CESCRC than differences.

## **CHAPTER 5: RECOMMENDATION AND CONCLUSIONS**

### **5.1 CONCLUSIONS**

The main objective of this study was to assess Kenya's 2010 Constitutional framework espoused mainly in article 24 of the Constitution in providing safeguards to the limitation of rights and fundamental freedoms against the international framework derived from the international legal instruments that provide the standard as regards the protection of human rights. In addition to this, this study also set out to establish the concepts and some principles and to the extent in which the Constitution provides a proper formula in limiting the rights of a citizen. In order to realize these objectives, the study undertook a desk and library based research that mainly relied on published materials, national and regional frameworks, organization reports, reviews of books and articles and select internet sources. The study is five chapters that discuss various issues as is outlined in the objectives of the study.

Chapter one sets the stage for the dissertation explaining the hypothesis that the limitation clause in the 2010 Constitution is a general limitation clause whose interpretation in the courts impacts on all Kenyans. If not checked, this ability to limit rights can be counterproductive to having protected rights in the first place. The formulation of the limitations of human rights clause under COK 2010 is deleterious to the protected rights because despite the fact that limiting rights is legitimate and justifiable, such limitation must be held against international standards, be justifiable in an open and democratic society that is based on human dignity, equality and freedom, having in mind that any limitation should be reasonable, justifiable and proportionate. Due to its generality, the limitation clause is wide open and can be subject to abuse. It continued to set out that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings therefore it is in every Kenyan's best interest that this study is conducted in order to find out if the process of limitation of their fundamental rights and freedoms does not expose them to abuse and meets the International Standard that should ideally be the basic requirement for such a process.

Chapter two discusses the theoretical framework and introduces and explains the idea of human rights as the basic rights and freedoms that belong to every person in the world, by virtue of

being human from birth until death that apply regardless of origin, belief or way of life. They can never be taken away, although they can sometimes be restricted. These restrictions, are legal and justifiable whose backbone is the social contract. The social contract is one of the arguments that justifies limitation of right because in order for society to live harmoniously, the relevant governing authority, the state, must guarantee rights especially so that all its citizens can enjoy them. Therefore the authority has to limit rights to avoid an overlap. This power to limit comes first from the people who agree to give up their freedoms and liberties to a community for better protection of their rights. This concept is well embedded in the Kenyan constitution by way of the principle of sovereignty this chapter concludes by tying together the theoretical framework.

Chapter three undertakes an analysis of article 24 the provision that carries the general limitation clause, the nature and structure of the limitation clause and its interpretation and implementation in Kenyan courts. The Article provides that 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 but not limited to the nature of the right or fundamental freedom, the importance of the purpose and extent of the limitation. A discussion of the case *R v Oakes*<sup>91</sup>, the key authority in rights limitation provides the test on analysis of the limitation clause that allows reasonable limitations on rights and freedoms through legislation. The test which is a necessity and proportionality test is captured in article 24 which provides that no rights or fundamental freedoms can be limited so far as to derogate from its core or essential content and goes even further to fortify the importance of the proportionality test by including an additional safeguard against excessive limitation . An examination of Kenyan Cases reveals that the Kenyan courts rely heavily on this precedent despite being foreign to decide Kenyan cases. This chapter concludes by showing the fact that the 2010 Constitution also carries right specific limitation clauses like the instances of Article 33 on the Freedom of expression and article 32 on the freedom of conscience, belief, religion and opinion, despite the general limitation clause found in Article 24.

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<sup>91</sup> *R v Oakes* (1986) 26 DLR at 255

Chapter four provided an in depth analysis of the international and regional human rights instruments, more specifically the African Charter for Human and Peoples Rights (ACPHR), International Covenant for Civil AND Political rights (ICCPR) and the International Covenant for Economic, Social and Cultural Rights (CESCR). Upon comparing the general clause provisions of Article 24 and those in the African Charter it is evident that the principles of proportionality and legality in limiting rights are similar. However, as mentioned, alongside the rights specific clauses and general clauses are the claw back clauses present in the African Charter which Kenyans fought very hard to be rid off in the 2010 Constitution. Above this, the Charter contains norm-based limitation clauses that require the limiting laws to serve specific objectives in order to ensure that laws are successfully aimed at protecting matters of national interest like national security and the rights and freedoms of others without allowing the state boundless discretion. The advantage of this over claw back clauses is that they are limited to some right and therefore cannot be used as claw back clauses to limit rights.

Article 4 of CESCR acts as the general clause applicable to all rights other than the right specific limitations that are provided in the covenant. This limitation clause allows for its rights to be limited along the lines of progressive realization and not of immediate application because the rights are resource based. Simply put, under the covenant, socio-economic rights are only enjoyed when where the resources of a state permit its provision. The use of both general and rights specific clauses in the CESCR is similar to the structure of the Provisions in the Kenyan constitution of limitation. The United Nations International Covenant for Civil and Political Rights (ICCPR) take on limitation is different from the other International instruments mainly because the ICCPR does not have a general limitation clause and instead opts for a rights specific limitation clauses. In this regard, proportionality, necessity, the least restrictive alternatives and appropriateness are the main criteria for assessing the limitable scope of limitation of the rights all present in article 24 of the 2010 Constitution. This very criterion can be found in the Sirucasa principles on limitation and derogation provisions of the ICCPR.<sup>92</sup> These principles stipulate that any measure taken to restrict human rights should be legal, non-arbitrary or discriminatory, proportionate, necessary and the least restrictive means that are reasonable under the circumstances.

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<sup>92</sup> 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

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

## **5.2 RECOMMENDATIONS**

This study calls upon the Judiciary to be vigilant in its role of protecting the rights guaranteed in the Constitution and in the provision of interpretation in determining whether a limitation clause has been properly imposed when such cases as brought before them for deliberation. Kenya, being a common law system adopting new legislation in the form of the Constitution relies heavily on precedence that is set by superior courts. The decisions arrived at by judges in analyzing legal principles are supposed to be sounds, guided by the constitution statutes and legal policy. 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.<sup>93</sup> Where any law is inconsistent with the Constitution which is the supreme law of the land, the courts have complete authority and duty to pronounce a declaration of incompatibility. As an independent organ of government, the judiciary has a duty to uphold constitutionalism and make declaratory orders where the other organs of governments have failed to adhere to the constitution or to correct any failures resulting from a misapplication of the law.

The law is the greatest tool that we have that we can use to ensure the people's rights are protected. In itself the provisions contained in the Kenyan Constitution 2010 are capable of being an instrument that can successfully be used to ensure proper limitation. A large duty lies as aforementioned in the judiciary to keenly interpret and apply the law especially as regards limitation. The National assembly is equally tasked with the role of ensuring that caution is taken especially when performing its legislative duties in order to avoid arbitrarily depriving any citizens of their rights. Therefore, in so far as limitations are concerned, all acts of parliament must conform to the international standard when drafting and passing laws and must conform to constitutional pressures. In Kenya, legislative power is vested by the Constitution in parliament. The National assembly has not only the role of law making, but also the establishment and development of laws through amendments or statutory legislation.

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<sup>93</sup> Article 159(1)(e) of the Constitution of Kenya 2010

Conclusively, parliament must ensure utmost adherence to the rule of law. This will assist in meeting parameters within which rights can be limited to alleviate violations

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