

analyzing hate speech as a limitation of freedom of expression in political speech.

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Declaration

I, PAULINE AYAKO OMOTO, 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.

Pauline Ayako

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

ABSTRACT

The concept of limitation of speech in a democratic pluralist society based on equality poses complex questions. The ability of one to express political speech by speaking freely is key to self-realization and is a right that is not granted by the state but is inherent virtue of the fact that one is a human being. Therefore, every person is legally guaranteed the freedom of expression in political speech. Owing to our political history and historical injustices caused by use of hate speech by both government and individuals, an example being the 2007 post-election violence, The Kenyan Constitution lists Hate Speech as a limitation of speech. It further confers power to legislative bodies to determine its scope and how to implement the provision through sub legislating: The National Cohesion and Integration Act (NCI). Being a democratic state based on equality persons can participate in their own governance through the exercise of speech. The question then is whether Governments should have power over this expression? If we do give government power over our political speech how then do we ensure that they do not abuse the power?

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Definition of Terms

Hate Speech: speech that harms another person on the basis of but not limited to sex, race, religion, ethnicity or sexual orientation.

Political Speech: remarks made on issues of public concern. It is very broad and encompasses political, social and economic issues that arise in the society.

LIST OF CASES

Amnesty International v Zambia, Twelfth Annual Report of the commission, 1998/1999.

Charles Onyango Obbo and Another v Attorney General of Uganda Constitutional Appeal No. 2 of 2002 (Unreported)

Chirau Alimwakwere v Robert M. Mabera & 4 Others, (2012), eKLR

Florence Amunga Omukanda & another v Attorney General & 2 others [2016], eKLR

Hector v. Attorney-General of Antigua & others [1990] 2 AC 312.

Jacob Mwanto Wangora v Hezron Mwando Kirorio [2017] eKLR

Johnstone Muthama & 8 others v Inspector General of Police & 2 others [2016] eKLR, para 28.

Mark GovaChavunduka and Another v The Minister of Home Affairs, Supreme Court of Zimbabwe Civil Appeal No. 156 of 1999

Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,

Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang

Robert Alai v The Hon Attorney General & another

Robert Alai v The Hon Attorney General & another (2017) eKLR

State Board of Education v. Barnette, 319 U.S. 624 (1943),

Virginia v. Black, 538 U.S. 343, 359 (2003)

LIST OF LEGAL INSTRUMENTS

African Charter on Human and Peoples Rights, 1986

National Cohesion and Integration, Act No 12 of 2008

Recommendation No. R (97) 20, 'hate speech', The Committee of Ministers of the Council of Europe, 1997.

The Constitution of Kenya, 2010.

The International Covenant on Civil and Political Rights, Treaty Series, vol. 999, 1976.

The Penal code, (Cap 63) 2012

The Preservation of Public Security Act,(Amendment)(No 3) 1966.

The United States constitution, 1776.

Universal Declaration of Human Rights (UDHR), 1948

LIST OF ABBREVIATIONS

NCI Act – National Cohesion and Integration Act

NCIC – National Cohesion and Integration Commission.

KADU- Kenya African Democratic Union

CoK – Constitution of Kenya

ODM - Orange Democratic Movement

CHAPTER 1: INTRODUCTION

1.1 Background of the Problem

Denis Kipruto was on the run from 9th to 15th January 2019 from the police because of a statement he posted on Twitter.¹ His post was considered ‘inciteful’ as it stated “I am not issuing threats or inciting anybody, but the truth must be told. If Uhuru betrays Ruto, then everyone should be prepared for a repeat of 2007-08. It will be the worst... ‘Deni lazima ilipwe’ (debt has to be paid).²”

Looking through the history of Kenya, the misuse of political speech lead to situations such as the 2005 constitutional campaign skirmishes and the 2007 post-election violence. This study will use the 2007 election, and cases determined by the Kenyan courts on hate speech as a case study.³ Persons such as The President of The Republic of Kenya, His Excellency Uhuru Muigai Kenyatta and The Former Head of Civil Service and Secretary to the Cabinet, Francis Kirimi Muthaura, were charged with 10 counts of crimes against humanity under Articles 7 and 25 of the Rome Statute.⁴ As much as the 6 were viewed as the face of the atrocities, the root cause was embedded in the ethnic animosity between tribes.⁵ Statements such as those made by radio presenter Denis Kipruto during the 2007 election and other political leaders such as Gatundu South Member of Movement (ODM) leader and Former Prime Minister Raila Odinga during a political rally at Wangige in Kiambu on 11th September 2017,⁶ have led to increased polarization of persons of different tribes and consequently violence.

¹Tanul N., ‘Wanted man arrested in Kericho over hate speech,’ Standard digital, -< <https://www.standardmedia.co.ke/article/2001309540/wanted-man-arrested-in-kericho-over-hate-speech> last accessed 23/11.2018

²Tanul N., ‘Wanted man arrested in Kericho over hate speech,’ Standard digital, -< <https://www.standardmedia.co.ke/article/2001309540/wanted-man-arrested-in-kericho-over-hate-speech> last accessed 23/11.2018

³ *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 23/01/ 2012, ICC-01/09-02/11

⁴ *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*

⁵ Oluwafemi A, *Post-Election Crisis in Kenya and Internally Displaced Persons: A Critical Appraisal*, Vol. 4, No. 2, Journal of Politics and Law, University of the Witwatersrand, pg 175

⁶Ndunda J, ‘Incitement case against Moses Kuria begins,’ the Star, -< https://www.the-star.co.ke/news/2019/02/12/incitement-case-against-moses-kuria-begins_c1893679 last accessed 12/02/2019.

On the other hand, the concept of limitation of speech in a democratic pluralist society based on equality poses complex questions. The hallmark of representative democracy requires the input of dialogue to express competing claims to achieve diverse opinions.⁷ Democracy becomes meaningless if there is no freedom to give and receive information especially on political issues and this is enshrined in The CoK. The question then that is essential, is how far an authority can insist on hate speech without betraying the constitutional rights of individuals or groups.⁸ As held by The African Committee on Human and Peoples Rights in *Amnesty International v Zambia*, ‘freedom of expression is a fundamental human right, essential to an individual's personal development, political consciousness and participation in the public affairs of his or her country.’⁹

The ability to speak freely is key to self-realization and is a right that is not granted by state but is inherent virtue of the fact that one is a human being.¹⁰ Communication is key for self-autonomy and self-determination which are backbone principles of a democracy. Robert Post posits that it is a fallacy to use legal regulation to eradicate visible signs of internal self-prejudices such as racism and in this context tribalism as its external manifestation in speech is infinite.¹¹ The logical question that follows with imposition of punitive legal sanctions is, what statements qualify as hate speech? The Legislative and Judicial bodies are then tasked with drawing the boundary between hate speech and insult which may sometimes be blurry.

1.2 Statement of the problem

Speech plays a vital part in the actualization of a human being. The ability to communicate has allowed social, economic, political and cultural development. Imposition of Hate speech as a limitation to political speech may seem on the surface as a good thing but, politically goes against the principles of democracy. This study seeks to analyze the degree of protection that should be

⁷ Alexander Tseis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 2009, 497

⁸ Onyoyo, ‘Criminality in “Hate Speech” Provision in the Laws of Kenya- Jurisprudential Challenges’, (2012).

⁹ *Amnesty International v Zambia*, Twelfth Annual Report of the commission, 1998/1999.

¹⁰ Preamble, *Universal Declaration of Human Rights* (UDHR), 1948,

¹¹ Post Robert C., *Racist Speech, Democracy, and the First Amendment Paper 208*, Faculty Scholarship Series, 1991, 268.

afforded to political speech as well as how to ensure the government does not become arbitrary in the exercise of hate speech as a limitation to our speech.

1.3 Statement of objectives and chapter breakdown.

- Chapter one forms the introduction and a literature review on the topic of research.
- Chapter two formulates a theoretical framework that is to be used as a rubric and also a guiding principle in analyzing the research question.
- Chapter three deals with the different types of speech. It attempts to analyze the significance of political speech and the place of hate speech in it. It analyzes the double effect of hate speech in political speech in the context of Kenya's history.
- Chapter four analyses the limitation of hate speech in political speech and how the courts have formed precedent based on the legislation that is available to them. The chapter attempts to answer whether there is a legitimate justification for imposition of Hate speech as a limitation to a person's liberty to expression. It goes further to determine the Purpose and Effect of the Government limiting speech as a form of expression under the umbrella of the hate speech provision in the Constitution.
- Chapter five seeks understand whether it is okay to give democratic Governments power over political speech. If so what position of protection should be afforded to political speech? It also seeks to weigh the interest of protecting political speech and harm occasioned by Hate Speech. It further goes to give a conclusion and recommendations based on that study on how can the state adequately protect and promote its citizens liberty of political speech in while ensuring that other citizens' rights are not infringed upon by Hate Speech.?

1.4 Hypothesis

Governments should have limited power to dictate what permissible speech is. They should have very limited discretion to determine what Hate Speech is when it comes to political speech.

1.6 Justification of the study

Law exists to protect its citizens. However. It is important to critique the law in order to improve it. Kenyan law and judicial decisions tend to promote and justify Hate Speech as a limitation to

expression, owing to historical injustices associated with it. However, material that criticize the existing justifications are lacking. This paper seeks to analyze and criticize the principles behind hate speech set as a limitation and weigh the implications of giving governments command over acceptable speech. Further significance of this research is to determine whether Hate speech is a necessary limitation in a democratic state and provide creative solutions in the modification of law.

1.7 Research methodology

This is a qualitative Research. The approach taken is the methodology of consultation of literature on the subject under study from books, journals and scholarly articles as a secondary data. The research will look into international Instruments such as Conventions in a bid to understand the international Community Stand point on the subject. A comparative study will also be done in this research in order to critique the current law in Kenya.

1.8 Scope of Study and Limitations

This being a qualitative study, the sources are limited to non-numerical data such as but not limited to books, journals and reports. This paper's accuracy is limited to the accuracy of the source material that will be used.

The Kenyan Online resource on case reports, Eklr, only reports cases from the level of the High Court with the exclusion of Magistrate courts. This then hampers some of the case studies that are done in this Paper as it is limited to Appellate decision and secondary report on the Magistrate level case.

1.9 Literature review

Mapping out the legislations that has been enacted to protect speech in Kenya: Article 2(1) provides that ratified treaties and conventions form part of the sources of law in Kenya. For this reason, the Universal Declaration of Human Rights,¹² the International Covenant on Civil and Political Rights,¹³ African Charter on Human and Peoples Rights all provide for the protection and promotion of freedom of Expression and can be used as laws of Kenya.¹⁴

¹² Article 19, *Universal Declaration of Human Rights*, 1948.

¹³ Article 19, *The International Covenant on Civil and Political Rights*, 1966

¹⁴ Article 9, *The African Charter On Human and Peoples Rights* 1981

The CoK provides for freedom of expression,¹⁵ freedom of media,¹⁶ and access to information.¹⁷ However, limitations are imposed on these rights through a limitation clause on rights that are derogable.¹⁸ Other limitations come from internal qualifications such as hate speech.¹⁹ This is one of the loopholes that can be exploited for the exercise of arbitrary limitation of Speech as the discretion for determination of what hate speech consists of is left to the legislative authority.

Based on Kenya's position and international responsibility, she has the obligation to ensure that any regulation made that ascertains to hate speech would not form conflict with international human rights standards. Hate speech is understood in the European jurisdiction as: 'all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance.'²⁰

The National Cohesion and Integration act (NCI) which establishes the National Cohesion and integration Commission (NCIC) defines hate speech as speech that harms another person based on either on the basis of but not limited to sex, race, religion, ethnicity or sexual orientation.²¹ The provision goes further to prescribe a sanction of a sum not exceeding one million Kenyan shillings or an imprisonment term of not exceeding three years or a combination of both.²² The same is reflected in The Penal Code.²³

However there are legal questions when it comes to the interpretation and implementation of Criminality liability of hate speech. Kenyan courts have been faced with numerous challenges when it comes to the adjudication of Hate Speech cases. Politicians have been able to master what

¹⁵ Article 33(1) (a), *The Constitution of Kenya*.

¹⁶ Article 34(1), *The Constitution of Kenya*.

¹⁷ Article 35(1), *The Constitution of Kenya*.

¹⁸ Article 24, *The Constitution of Kenya*.

¹⁹ Article 33(2), *The Constitution of Kenya*.

²⁰ Recommendation No. R (97) 20, 'hate speech', The Committee of Ministers of the Council of Europe, 1997.

²¹ Section 13, *The National Cohesion and Integration Act*, 2008.

²² Section 13, *The National Cohesion and Integration Act*.

²³ Section 77(3) (e), *The Penal code*, (Cap 63) 2012.

constitutes hate speech under the NCIC Act, they then customize their message to fall short of the prescribed threshold.²⁴

In *Chirau Alimwakwere v Robert M. Mabera & 4 Others*, the constitutionality of certain provisions of the NCI. The Court acknowledged the significance of freedom of expression through speech in a democratic state quoting *Mark Gova Chavunduka and Another v The Minister of Home Affairs*.²⁵ At the same time the court recognized the limitation on this right consequently ruling that the provisions were constitutional, and the NCI Act exists on a complimentary level to the Constitution.

Within the Kenyan jurisdiction, types of Speech have not been elaborately differentiated, the importance of differentiation of these types of speech is that different types of speech get accorded different protections. In the American constitution, freedom of speech is provided for separate from freedom of expression.²⁶ This however does not mean that one can say anything and get away with it. The protection only prevents government restrictions on speech, not restrictions imposed by private individuals or businesses unless they are acting on behalf of the government.²⁷

Anton Lewis posits that one of the reasons for allowing Hate speech is that it makes us aware of terrible beliefs and strengthens our commitment in combating it.²⁸ However, Jeremy Waldron criticizes this and states that man's dignity needs to be protected and that direct victims are minority groups in cases such as the Genocide in Rwanda who need assurances of security of their lives, aspects of which are threatened by Hate speech.²⁹ On one hand propagation of Hate Speech lead to the 2007 post-election Violence but it has also made Kenyans more aware of the effects of the threat of polarization of the society on the basis of Tribes.

²⁴ Onyoyo, Criminality in "Hate Speech" Provision in the Laws of Kenya- Jurisprudential, 2012.

²⁵ *Mark Gova Chavunduka and Another v The Minister of Home Affairs*, Supreme Court of Zimbabwe Civil Appeal No. 156 of 1999

²⁶ The first Amendment, *The United States Constitution*, 1787.

²⁷ Dunn, Christopher, *Applying the Constitution to Private Actors*, New York Law Journal, New York Civil Liberties Union.

²⁸ Anthony L, *Freedom for the Thought That We Hate; A Biography of the First Amendment*. New York: Basic Books, 2007.

²⁹ Waldron J, *The Harm in Hate Speech*, Harvard University Press, Cambridge Massachusetts, 2012, 105

CHAPTER 2: THEORETICAL FRAMEWORK

2.1 Theoretical framework

Understanding the theoretical basis for free speech is a task that has been undertaken by several jurists and scholars. The aim is to come up with an answer central to any question, 'why'? Why does the Kenyan Constitution provide for the protection of political free speech as expression? Why does it have a limitation of Hate Speech?³⁰

In an attempt to come up with a guiding theory for evaluating the question of this research paper, we use a hybrid theory, Speech- Act Democratic Theory, Consequentialism and Common Good. This will allow us to:

1. To understand what speech is and the role it plays.
2. To understand the impact of speech in a society.
3. The centrality of political speech and its end in a democratic society

2.2 Speech-Act Democratic Theory

Speech -Act Theory is based on the premise that communication influences behavior in a society.³¹ It is a subcategory of pragmatism. Pragmatics was coined by philosopher Charles Morris, it explains how language is used in social contexts disseminating the different ways different people create and understand meaning through linguistics. The Speech-Act theory investigates how the use of words does not only convey information but also how it inspires action.

Speech is comprised of different items in linguistics and is an expression of a person's will.³² Language on the other hand is a social undertaking and differs within communities.³³ There are rules that regulate and determine the way we communicate. In L. Austin's book '*How to Do Things with Words*' which was further advanced J.R Searle, an American Philosopher, look into the extent to which assertions are used in the performance of acts.³⁴

³⁰ Oltmann, Shannon M., '*Intellectual Freedom and Freedom of Speech: Three Theoretical Perspectives*' Information Science Faculty Publications, 2016, 4.

³¹ Baktir H., '*Speech Act Theory: Austin and Searle: Derrida's Response and Deleuze's Theory of Order-Word*', Clarendon Press, United Kingdom, 2nd Edition, 1962, 35.

³² Gallaway C, '*Input and Interaction in Language acquisition*', Cambridge University Press, 1994, 184.

³³ Baktir H., '*Speech Act Theory: Austin and Searle: Derrida's Response and Deleuze's Theory of Order-Word*', 36.

³⁴ -< <https://www.thoughtco.com/speech-act-theory-1691986> >- Accessed on 7/08/2019.

Austin draws a difference between performative language and Constative language.³⁵ Constative language describes a situation and is grounded on observation, for example: ‘the grass is green’. On the other hand, Performative speech act incite an action. For example, ‘Keep Quiet’.³⁶ However, the difference between the two is subtle. The question that arises then is, how can the intent of the speaker be conveyed when the form is so variant? Performative sentences go further from communication of information to performing actions and altering the reality of things. For example ‘I wage you one thousand shillings that she will win the race.’ This would be an interesting question to answer but going deeper into the distinction of the variations, however, that would deviate from the goal of this paper.

It is important to understand the function of speech and how it is used in a social setting for one to analyze the use of the term hate speech. Using the premise aforementioned, hate speech is seen to have both a communicative and performative aspects. More often than not the justification of limiting hate speech is that it incites violence or that it causes harm to others.

The Speech Act approach puts the people first rather than the idea itself. The ability of people to do things with words. Speech is important for knowledge as stated by J. S. Mill.³⁷ The Democratic theory posits that expression is central no matter the value it adds.³⁸ It is also ‘the Lifeblood of Democracy,’ seeing that it plays a vital role in the functioning of any democratic political system where its center is the people.³⁹

Political speech is defined as remarks made on issues of public concern. It is very broad and encompassed political, social and economic issues that arise in the society. Political speech allows us to know what our rulers are doing. As a member of the social contract with the state, issues such as healthcare, taxes and participation in the democratic process through elections are of individual concern. Political speech allows political empowerment to rule ourselves: to say NO and YES to what we agree with politically. This allows self-determination. Meiklejohn asserts that free political speech is to be protected first as it is the foundation for democratic decision making.⁴⁰

³⁵ Austin J, *How to do things with words*, Harvard University Press, Cambridge, 168.

³⁶ Austin J, *How to do things with words*, Harvard University Press, Cambridge, 180.

³⁷ Mill J, John, Parker and Son & Savill and Edwards, *On liberty*, West Strand, London, 1859.

³⁸ Meiklejohn A, ‘*Free Speech and its Relation to Self-Government*’, New York, Harper Bros, 1948 p.26

³⁹ *Chirau Alimwakwere v Robert M. Maberera & 4 others* (2012) eKLR.

⁴⁰ Meiklejohn A, ‘*Free Speech and its Relation to Self-Government*,’ p.26

In case of *Robert Alai v The Hon Attorney General and the Director of Public Prosecution*, the honorable Judge Enoch Chacha Mwita held in the constitutional court, and I quote:

*'Kenya is a democratic state with a democratically elected leadership. The people of Kenya have a democratic right to discuss the affairs of their government and leadership because of their right to freedom of expression guaranteed by Article 33 of the constitution. They cannot be freely expressing themselves if they do not criticize or comment about their leaders and public officers.'*⁴¹

He further highlights that the statements brought before the court even though they 'were calculated to undermine the authority of a public officer, the president, it was still protected as expression.'⁴² This ruling is echoed in *Chirau Alimwakwere v Robert M. Mabera & 4 Others* where the court held that:

*'The freedom of expression is one of the fundamental rights and freedoms protected by the Bill of Rights. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Article 19(2) provides 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.'*⁴³

The participation in political speech assures self-fulfillment. For one to be able to reach that level of self-realization, their mind as well as expression of what is in their mind needs to be free. The suppression of belief and opinion is considered contrary to man's nature.⁴⁴

2.3 Consequentialism

Consequentialism is a type of normative ethical theory that provides a criteria for moral evaluation.⁴⁵ It also provides or recommends rules or decision procedures for acting in a moral way. The substantive aspect of this theory is that the morality of any action is solely determined

⁴¹ *Robert Alai v The Hon Attorney General & another* (2017) eKLR.

⁴² *Robert Alai v The Hon Attorney General & another*.

⁴³ *Chirau Alimwakwere v Robert M. Mabera & 4 Others*

⁴⁴ Emerson T, *System of Freedom of Expression*, Random House Trade Paperbacks; 1st edition, Random House Trade Paperbacks, 1970.

⁴⁵ Portmore D, *Common sense Consequentialism: where morality meets Rationality*, Oxford University Press, oxford, 2nd Edition, 2011, 16.

by its consequence, ‘the end justifies the means’.⁴⁶ Rule consequentialism proposes that moral behavior follows certain rules, however, these rules are chosen on the basis of their consequence.⁴⁷ The theory tries to reconcile consequentialism itself and deontology which proposes that morality of actions should be based on the series of rules set.⁴⁸

This theory is seen in the history of freedom of expression protection in Kenya. In a country that is as ethnically diverse such as ours, there has been heavy borrowing of legislation on limitation of speech from countries such as South Africa and the European Union leading to the criminalization of Hate speech. The 1992 clashes as well as the 2007/2008 post-election violence play a key role in the structuring of laws on speech today. The crimes that were committed during these respective times were largely influenced by wide spread propaganda on media and in rallies leading to compromised security for individuals and society as a whole.

This theory thus proposes that hate speech should be imposed as a limitation on speech based on the fact that it instigates violence and disorder in the society.⁴⁹ The goal of the state then is to punish persons that use Hate speech before the effects of the utterances are felt.⁵⁰

Failure of the state to protect and promote individuals rights from the harm that results has seen judicial consequences. In *Florence Amunga Omukanda & another v Attorney General & 2 others*, the petitioners including Florence filled a consolidated petition for the violation of their fundamental freedoms. Florence Amunga sued the state for failing to protect her property as enshrined in Article 40 of The Constitution of Kenya from an arson attack which resulted to the death of her two daughters thus violating their right to life provided for in Article 26.⁵¹ This follows the 2007 post-election skirmishes. The courts found in favour of the petitioners, awarding them Kshs 2,000,000 in general damages, Kshs 80,000,000 for future medical costs, Kshs 53, 390, 000 for actual medical costs.

⁴⁶ Portmore D, *Common sense Consequentialism: where morality meets Rationality*, 18.

⁴⁷ Portmore D, *Common sense Consequentialism: where morality meets Rationality*, 19.

⁴⁸ Portmore D, *Common sense Consequentialism: where morality meets Rationality*, 23.

⁴⁹ Benesch S, ‘Inciting Genocide, Pleading Free Speech’ 21(2) *World Policy Journal*, 2004.

⁵⁰ Benesch S, ‘Election-Related Violence: The Role of Dangerous Speech’, 389-390

⁵¹ *Florence Amunga Omukanda & another v Attorney General & 2 others* [2016], eKLR

John Stuart Mill in his Book 'On Liberty' grapples with the question of when governments can impose or restrict your freedom by imposing and enforcing laws.⁵² He proposes the solution as the Harm Principle. He posits that if your action harms another person, then the government can intervene: 'your freedom to swing your fist ends where my nose begins.' This then means that once one's speech qualifies as hate speech and impacts the enjoyment of other people's rights and freedoms then the limitation is justified. Following the argument, the question then is how one defines harm as it then has a large impact on what your liberties are.

Mill says that the government can intervene, not that it necessarily should. This is because of the doctrine of double effect of harm. In any competitive act the winner, the person benefiting from the action gains from the same process that harms the person that loses. This then means that harm as a criteria is necessary but not a sufficient reason for imposition of limitation on liberties. The same freedom that a person will use to say hateful things about a government is the same freedom that allows another to say hateful things about the person saying the hateful things towards the government in order to defend it.

This doctrine has seen its application in Kenya by looking through its history. It was considered treason for a person to imagine the death of the president. This is borrowed from the imperial British government and seems absurd by today's contemporary standards. It goes against the inalienable right of freedom of conscience which is a prerequisite for freedom of expression.⁵³ It is the freedom of political speech that facilitated the colonialists to set up and run Kenya as a colony in a rule that deprived Kenyans of their basic human rights, that facilitated the post-colonial governments to set up an oppressive one party state but also afforded us the opportunity to fight for our independence and criticize the lack of a multiparty system which has created a better society for us to live in today.

Based on the assertion made above an evaluation needs to be made as to whether political speech should be given preferential treatment because of the integral role it plays in a democratic society. It has been established that there is a double effect that comes with hate speech, however even within

⁵² Mill J, John W, Parker and Son., & Savill and Edwards, *On liberty*, (1859), 57.

⁵³ Article 32, *The Constitution of Kenya*.

the doctrine itself there is potential of harm that might be occasioned in pursuit of individual self-determination.

What then is the realistic standard that should be deployed to measure harm against the larger interests of the society? There is a risk that is taken in allowing a wide range of discretion to the state to determine what is permissible. The same applies to allowing absolute freedom of speech.

2.4 Common Good.

Checks and balances can be established by going back to the basics. To outline this framework we need to understand the goal of society which is to achieve the Common Good. Aristotle posits that a good society needs to create suitable conditions to allow the realization of individual goods thus achieving the common good.

When it comes to balancing of interests, if an individual's interest is always pegged against the states' interest, more often than not they will lose, having the state triumph over them. It is rational to prioritize dealing with the actual harm that is caused by hate speech rather than the abstract intangible harm that is caused by the limitation of speech. However, there is a communal interest in protecting the individual good. The balance that is sought in either allowing or controlling political speech should be measured with its proper end which is the common good.

2.5 Conclusion

Speech plays a larger role other than just communication of information. The speech act theory states that some types of speech inspire action. Because of this performative aspect of speech, the democratic speech act theory states that speech is the lifeblood of a democracy.

Political speech is key in people's participation in the democratic governance. Hate speech as a limitation is more often than not justified based on the fact that it causes harm which is a consequentialist way of thinking. However, there is a deadlock due to the double effect of the harm when it comes to political speech. To resolve this deadlock, common good, which is the purpose of society is proposed as a compass.

CHAPTER 3: HATE SPEECH IN POLITICAL SPEECH

This chapter starts off by breaking down the types of speech in Kenya and their levels of protection. It narrows down to hate speech exploring the different legal definitions in our judicial system looking at its practical implementation through a case study. To understand the position of Kenya in terms of hate speech in political speech, this chapter breaks down a case decided in Court that answers the question of the constitutionality of the NCIC which the courts are to use in the determination of hate speech cases.

To holistically understand hate speech in political speech this chapter takes us on a trip down memory lane in Kenya's political history. This allows us to use the theoretical framework to analyses and criticize the limitation imposed on citizen's political speech.

3.1 Types of Speech

The Constitution of Kenya in Article 33 provides for protection of expression, however, it goes further to limit this expression. The protection of expression, which includes speech forbids the government from "abridging the freedom of speech," but at the same time the government empowers itself with authority to limit speech.⁵⁴ This expressly shows that there is protected expression and unprotected expression. Identifying categories of speech in a given particular set of facts is an important step that allows us to set out the level of judicial scrutiny that should be afforded to it.

Under protected speech, there are three categories, ideological speech, political speech and commercial speech. Political and ideological speech includes utterances on topics such a nationalism, religion, public policy, elections and matters of personal opinion.⁵⁵ Any limitation by the government of this type of speech is put under a microscope. The governing body then has to strictly justify that they have a legitimate legal reason for the limitation of this speech.

Unprotected speech is generally defined as content in speech that is restricted by law. The issue in contention in such speech is either the idea it conveys or the message that is expressed. These include:

⁵⁴ Article 33, *The constitution of Kenya*

⁵⁵ *State Board of Education v. Barnette*, 319 U.S. 624 (1943),

Obscenity. This is speech that is seen to wholly allure to the salacious interest in sex, based on the current standards of a contemporary community, it may be depicting erotic conduct in an offensive way with no literary or scientific value.

Defamation. This is the utterance or publication of speech that is false about a person, group of people or entity. It warrants either criminal or civil sanctions for a retributive and deterrence purposes. In *Jacob Mwanto Wangora v Hezron Mwando Kirorio*, the courts held that ‘The estimate of a person’s reputation is what the law of defamation was enacted to protect.’⁵⁶ **Incitement.** This is the advocacy of using force or breaking the law. In *Hassan Bidu Guyo v Republic* the appellate court upheld the previous decision that convicted the appellant on the charge of the offence of incitement to violence contrary to Section 96 of the Penal Code.

True threats. This is utterances that have some form of intimidation. However it is distinguished from political hyperbole since it intends to communicate to an audience the intention to commit an unlawful act that will cause harm to individuals or a group of individuals.⁵⁷

Speech integral to criminal conduct. There is no protection for speech that plays a central role in the commission of a criminal act

3.2 Defining Hate Speech

In the definition provided for by the NCI Act we can see that hate speech can fall into either one group or a combination of different groups of speech. It could be a true threat, defamation, but always has an element of incitement.

What differentiates hate speech from the categories stated above is the fact that it ‘harms another person based on either on the basis of but not limited to sex, race, religion, ethnicity or sexual orientation’⁵⁸

⁵⁶ *Jacob Mwanto Wangora v Hezron Mwando Kirorio* [2017] eKLR

⁵⁷ *Virginia v. Black*, 538 U.S. 343, 359 (2003)

⁵⁸ Section 13, *The National Cohesion and Integration Act*.

3.3 Alan Wadi Okengo v Republic

In the case of *Alan Wadi Okengo v Republic*, the defendant in the Magistrate court at Nairobi had been charged with the offence of Hate Speech contrary to section 13(1) of the NCIC.⁵⁹ The facts brought before the court were that the defendant had posted on Facebook the following statement.

*“For the security to be tight Kikuyus from other regions need to be deported to central region! For Kenyans to enjoy their freedom, Kikuyus must be deported to their central region”*⁶⁰.

This was considered to be an instigation of hate among members of different ethnic groups. Going back to the definition, the utterances were targeted to a specific ethnic group with the intent of harm through deportation.

The further charge was that contrary to section 132 of the Penal Code,⁶¹ he had undermined the authority of a public officer by posting on Facebook utterances that were ‘calculated to bring into contempt the lawful authority of the President of the Republic of Kenya.’⁶² The defendant pleaded guilty in the Magistrate Court and was sentenced accordingly. However, he appealed the sentence to the High Court.

His appeal was based on the fact that he felt that ‘he had been sentenced to serve a sentence that was harsh and excessive in the circumstances.’⁶³

The court of first instance interpreted section 13(1) (a)(b) and (2) of the NCI in defining Hate Speech as having *Mens Rea* of the intent to “stir up ethnic hatred, or having regard to the circumstances, ethnic hatred is likely to be stirred up.”⁶⁴

How then does one determine intent? The court that it can either be expressed in the threatening or abusive nature of the utterances made or published.⁶⁵ In the particular facts presented to the

⁵⁹ Section 13 (1) (a) (b) & (2), National Cohesion and Integration Act

⁶⁰ Faith Karanja, ‘Hate messages on President Uhuru Kenyatta lands student in jail,’ Standard Digital, 3 January 2015. -< <https://www.standardmedia.co.ke/business/article/2000146557/hate-messages-on-president-uhuru-land-student-in-jail>>- accessed on 15/03/2020

⁶¹ *Alan Wadi Okengo v Republic* [2015] eKLR

⁶² Section 132, Penal code.

⁶³ *Alan Wadi Okengo v Republic* [2015] eKLR

⁶⁴ Section 13 (1) (e), *National Cohesion and Integration*.

⁶⁵ Section 13 (1) (c), *National Cohesion and Integration*.

court, it was seen in the message that was posted on Facebook that were seen to be furthering ethnic hatred.

The Appellate Courts held in favour of the appellant, given the circumstances of procedural errors in the prosecution of his case in the magistrate court. He presented in court and the fact that he had already been serving his sentence for one year and ordered that he be released from prison.

The enactment of the NCI Act was not met without reluctance.

3.4 Chirau Alimwakwere v Robert M. Mabera & 4 Others

The Question of the constitutionality of the National Cohesion and Integration Act was dealt with in *Chirau Alimwakwere v Robert M. Mabera & 4 Others*.⁶⁶ In this case the issue for determination was;

‘The constitutionality of certain provisions of the *National Cohesion and Integration Act (Act No. 12 of 2008)* (“the *NCI Act*”) and whether the petitioner should be investigated and prosecuted for offences under the Act he is alleged to have committed.’⁶⁷

The petitioner challenges the constitutionality of the act after making statements at a public rally that were considered an abuse of the freedom of expression afforded to him. He maintained that his speech was under the umbrella of protected speech provided for in Article 33 of the Constitution.⁶⁸ In his petition he sought to ‘declare **sections 13, 14 and 62** of the *NCI Act* unconstitutional to the extent that they purport to criminalize the freedom of a person to express themselves about past injustices.’⁶⁹ He claims to have said the following during the rally:

(‘Waswahili na Waarabu tuna uchungu sanasana, walitugandamiza, wakatufanya watumwa, hatutakubali, hatutakubali, sisi, sisi, kama walivyofanya mababu zetu, walisema wale Wadigo, Wakamba na Waduruma tukawanunua kama makaa... Nawaonya watu wa bara walio na ukabila wataona cha mtema kuni. Ningetoa amri na maneno yakawa mengine.’⁷⁰

⁶⁶ *Chirau Alimwakwere v Robert M. Mabera & 4 Others*

⁶⁷ *Chirau Alimwakwere v Robert M. Mabera & 4 Others*

⁶⁸ Article 33, *The Constitution of Kenya*.

⁶⁹ *Chirau Alimwakwere v Robert M. Mabera & 4 Others*

⁷⁰ *Chirau Alimwakwere v Robert M. Mabera & 4 Others*

'Us as Swahili people and Arabs, are especially very bitter, they have oppressed us and made us servants. Unlike our ancestors, we refuse to accept. The colonialists said that they bought the Digo, Kambas and Duruma like coal. I warn the inland people that are tribalistic, there will be consequences. I have given orders so this won't be the same.'

He claimed that the essence of his articulations was to respond to the historical injustices that his people have faced. The statement in themselves did not amount to hate speech. In looking at the defense raised questioning the constitutionality of the NCIC, the courts in their interpretation looked to international law and quoted *Mark Gova Chavunduka and Another v The Minister of Home Affairs*.⁷¹ In this case it highlighted the importance of freedom of speech to democracy for the following purposes:

“(...) (i) it helps an individual attain self-fulfillment; (ii) it assists in the discovery of truth and in promoting political and social participation; (iii) it strengthens the capacity of an individual to participate in decision making; and it provides a mechanism by which it would be possible to establish a reasonable balance between stability and change⁷²”

The court goes however asserted that:

“(...) neither absolute nor boundless; most democratic societies impose limitations on freedom of expressions (sic) which attempt to balance the freedom of expression and the societal or public interest and the rights of others.⁷³”

The courts upheld the constitutionality of the provisions in the NCI Act stating that they were protective of other individual's rights in Nature.

3.5 History of political speech in Kenya

To understand the implications of hate speech in political speech we must first look at the history of political speech in Kenya.

During the colonial era that span between 1895 to 1993, there were extensive human rights violations. The British Empire excluded the African people from administration of their own

⁷¹ *Mark Gova Chavunduka and Another v The Minister of Home Affairs Supreme Court*, Civil Appeal No. 156 of 1999 (unreported)

⁷² *Mark Gova Chavunduka and Another v The Minister of Home Affairs Supreme Court*.

⁷³ *Charles Onyango Obbo and Another v Attorney General of Uganda Constitutional Appeal No. 2 of 2002* (Unreported)

county and imposed segregation laws. There was also forced labour and limitations of economic activities that could be done by Black people.⁷⁴ Political reforms were made towards the end of this period to have more inclusive racial representation, however, the laws prescribed the exact number of seats that each race would have in the Legislative Council maintain the majority seats for the white colonialists.⁷⁵

The post-Independence from 1964 to 1992 was hallmarked by its presidential imperialism rule. The country had a central government with a president that had power over both the legislature and the Judiciary. The country became a *de facto* one party system seeing the desolation of the opposition party KADU in 1964.⁷⁶ Jaramogi Oginga Odinga attempted to return Kenya into a multiparty state by forming Kenya Peoples Union but was not successful. Short after the president Jomo Kenyatta banned formation of other parties and detained leaders that attempted to do so. He died in Power and was succeeded by Daniel Arap Moi who carried on the same system of leadership.⁷⁷ There were heavy restrictions to freedom of expression, freedom of the media, extrajudicial killings and extrajudicial detention.

In 1992 to 2010 was period marked with minimal Liberal democracy. The return of Multiparty brought back the hope of restoring Democracy. The people of Kenya were then afforded with choices during elections. Although this was a step in the right direction there were still tendencies of the previous regime that persisted. Although there was increased freedom of speech, it was also this period that media houses were raided in order to avoid publication of material the state didn't want in the public.⁷⁸

The post 2010 era was hallmarked by the promulgation of the New Constitution. It was considered a Transformative Constitution that sought take lessons learnt and make radical changes.

3.6 The double effect on relation to the common good in hate speech

The Colonial government use of oppressive laws to undermine Kenyan's fight for attainment of independence shows their opposition towards political speech. One would have the notion that the

⁷⁴ PLO Lumumba, MK Mbondenyi and SO Odero, *Constitution of Kenya contemporary*, 2012, p 18

⁷⁵ Robert M, 'Constitution-Making in Contemporary Kenya' 2001, Human Rights Quarterly, p 97.

⁷⁶ PLO Lumumba, MK Mbondenyi and SO Odero, *Constitution of Kenya contemporary*, 2012, p 19

⁷⁷ Mutua M, Justice Under Siege: *The Rule of Judicial Subservience in Kenya*,', Human Rights Quarterly. 2001, 96, 98.

⁷⁸ Mutua M., *Kenyas Quest for Democracy: Taming Leviathan*, Lynne Rienner Pub, 1st Edition, 2008, p. 245.

British colonial Government supported freedom of speech as seen in the freedom that was given to publishing houses such as magazines and Newspapers. However, this was the same tool that was used to suppress the political activities of freedom activists in Kenya.⁷⁹

The Legislative Council, which was by then the governing body of Kenya allowed expression to the extent that it did not undermine the prevailing authority of the Government. However, with the intensification of the fight towards independence, undermining government was an inevitable part of the fight. In Response the Governor imposed harsh rules over any public gathering or meetings to control Africans.⁸⁰

Post-independence, as stated before, was marked by excessive power of the executive. This saw the enactment of The Preservation of Public Security Act 1966 that gave the state power to censor any communication.⁸¹ The president was able to limit political political speech and assembly. Between the years of 1963 to the 1990s there seemed to be some level of freedom to criticize the government, however looking at how events unfolded, the Kenyatta and Moi Regimes where not tolerant of political pluralism.

Assassinations of JM Kariuki, Pio Gama Pinto and Bishop Alexander Kipsang Muge as well as the detention of Jaramogi Oginga Odinga were some of the consequences for those that were courageous enough to express their critic of the government, politicians and public policies seemed to be the order of the day. The limitations also span to academic institutions where students and lecturers were not allowed to voice their opinions on matters that were political.⁸²

With the struggle for the protection of political speech accompanied by a great deal of hate speech that polarized the nation. The formation of political parties and positions on different ideological polices have been marked with a great deal of ethnic undertones. Ideas such as the greed of the akikuyu became stereotypes seeing as how a lot of corrupt Kikuyu leaders in power grabbed land and plunged the country into foreign debt pocketing billions of shillings. This inevitably led to civil unrest, violence and tensions. However, it is also through these hateful speech that was able

⁷⁹ Elkins C., *Britains Gulag: the Brutal End of Empire in Kenya*, Pimlico, New Ed edition, 2005,

⁸⁰ Dudziak M, Working Towards Democracy: Thurgood Marshall and the constitution of Kenya, Duke Law Journal, Vol 56.

⁸¹ The Preservation of Public Security Act, (Amendment) (No 3) 1966.

⁸² Adar K, 'Human Rights and Academic Freedom in Kenya's Public Universities: The Case of the Universities Academic Staff Union', Human Rights Quarterly, 1999, p 187.

to draw the attention of many and propelled the nation to rethink the values that it holds dear in light of the vision it had for itself.

3.7 Conclusion

There are generally two types of speech, protected and unprotected speech. Political speech is protected but once it qualifies as Hate speech, it loses protection. Alan Wadi Case aids in the definition of Hate Speech while the Chirau Alimwakwere Case asserts the constitutionality of the NCIC Act. Diving into Kenya's history, we see inadequate protection of political speech as well as a lot of violence from Hate Speech. The dilemma comes in when looking at the double effect of Hate speech that has contributed to both the prosperity and inadequacy of our civilization.

CHAPTER 4: LIMITATION ON POLITICAL SPEECH

Even with the provision in the constitution for the protection of expression, the restrictive nature and to a certain extent formalistic political restraints have given rise to a situation that resembles a circumstance in which a person is seen to have the privilege to express themselves rather than an inherent right to expression.

This Chapter seeks to scrutinize the grounds as well as the existing criteria used for the limitation. This limitation is further analyzed by looking into the purpose of the Government, who are the custodians of our rights, for listing Hate speech as a limitation to Political Speech. Consequently the chapter looks at the effect of imposing this limitation.

4.1 Limitation on political speech.

It cannot be said that our government has complete power to dictate what citizens can and cannot say. The legitimacy of our democracy is dependent on its citizen's ability to freely express their political views on governance. The question then is what conceptual tool can be used to measure the extent of limitation of political speech without seeming too demanding or too narrow?

Meiklejohn posits that speech that is political in nature that speaks to the heart of the values of our country, which are enshrined in the constitution, ought to be given the highest form of protection. On the other hand, expression in the private sphere, this being expression that is not political, used to fulfill one's self among other purposes should be accorded less protection.

4.2 Legal limitation- 3 part test

International law as well as national law provides for protection of fundamental rights. They, at the same time provide leeway for the limitation of certain rights. To try and avoid the arbitrary limitation of rights, a three part test was created that guide courts as well as legislative bodies. This same criteria can be used to measure whether there was a legitimate exercise of a limitation. This is enshrined in our constitution as follows:

*'(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.'*⁸³

⁸³ Article 24 The Constitution of Kenya.

4.3.1 The limitation is in Law

For there to be a legitimate imposition of a limitation on any given right, it has to be provided for in law. The law has to expressly state that the governing body has the power to limit that right. Kenyan laws, as a result of being a former British colony, bear to some extent some sought of similarity. In the pre-2010 era different legislations such as the Public order Act,⁸⁴ Penal Code,⁸⁵ and the Preservation of public safety Act,⁸⁶ were used in the limitation of political speech. However, with the promulgation of the 2010 Constitution, based on the principle of constitutional supremacy, were declared unconstitutional as there was a conflict between them. The Constitution now comes in to define the internal limits to political speech which is a definitional basis. As previously state one of these limitations is hate speech.⁸⁷

4.3.2 Necessity

The parameters of the necessity of limitation has been provided for in Article 24 of the constitution: ‘based on human dignity, equality and freedom, taking into account all relevant factors.’⁸⁸ Some of the relevant factors are the national principles laid down in Article 10, such as nationalism, national unity, human dignity, fairness, social justice, inclusiveness, equality, human rights, non-discrimination and the security of the oppressed.⁸⁹

An evaluation however needs to be made on what matric is to be used to determine what is necessary. In the case against Moses Kuria DPP appealed to the High Court in this case because it was aggrieved by the trial court's decision to grant bail to the respondent pending trial. His main argument was that the court of justice should have known that the defendant was a repeat offender. Consequently, holding the defendant in jail until the trial was in the best interest of the public.⁹⁰

The respondent's comments were a threat to national security, particularly in an election year, according to the prosecution. In the past, the prosecutor's case was based on violence because of

⁸⁴ Chapter 56, Law of Kenya.

⁸⁵ Chapter 63, Laws of Kenya.

⁸⁶ Chapter 57, Laws of Kenya.

⁸⁷ Article 33 & 24, The Constitution of Kenya.

⁸⁸ Article 24, The Constitution of Kenya.

⁸⁹ Article 10, The Constitution of Kenya.

⁹⁰ Ndunda J, ‘Incitement case against Moses Kuria begins,’ The Star, 12 February 2019,

similar statements. The prudent course of action would be to apply prohibitive measures to safeguard public order.

In response to the prosecutor's statement, the appeal court noted that bail is refused only when there are compelling reasons for doing so. According to case law, the necessity for the limitation was argued that a defendant is denied bail in order to protect the public if they are likely to repeat the offense. In this case, the court noted that it was the duty of a public figure to talk prudently in order to avoid discord.

Counter argument

One of the most common justification that is often presented when it comes to the protection of harmful and potentially harmful political speech is that any sort of suppression has the potential of undermining the search for the truth in the well of Ideas. Scholars hold the belief that Truth is attained when it has the chance to clash with mistake.⁹¹

Meiklejohn explains the concept of self-determination using the social contract theory. He states that since the power originated from the people and was vested in the governing body, it is the citizens who are to be at the forefront of writing and rewriting how their territory should be governed. For this to be achieved, we need the protection of Article 33, leaving each citizen with the ability to fully commend and criticize those in power as well as their policies.⁹²

4.3.3 Proportionate.

Proportionality dictates that the measure that is taken to limit the rights of individuals should be proportionate to the necessity that warrants its limitation. Article 24 goes further to provide that: 'the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.'⁹³ this means that the proportionality is measure by asking the question, was it the least restrictive measure that could be used in the limitation of Political speech?

In the Moses Kuria case the courts held in accordance with Article 33 of Kenya's Constitution. Instead of limiting his freedom, the court decided to set Moses Kuria free on more stringent bond

⁹¹Mill J, John W, Parker and Son, & Savill and Edwards, *On liberty*, (1859), 57.).

⁹²Meiklejohn A '*Free Speech and its Relation to Self-Government*' , New York, Harper Bros, 1948 p.29

⁹³ Article 24, The Constitution of Kenya.

and bail conditions. With this final decision, the court's obiter dicta dissents. A similar obiter was used in *Johnstone Muthama*,⁹⁴ concluding that their ability to influence large groups was necessary.⁹⁵

4.4 Purpose of Governments imposing this Limitation.

It causes psychological damage – an application of the consequentialist theory is seen in this reason for restricting or prohibiting Hate Speech. The rationale is that this kind of speech causes harm to both an individual's and group's mental health. When a person encounters derogatory speech that is hateful in nature on a daily basis, it may end up taking a toll on that person as the message that it sends is that the person or group of people are not respected neither are they accorded the same level of dignity as the other members of that society.⁹⁶ This can get to the point that the group being targeted internalizes and starts to believe in the assertions that are made about them. This can be seen in instances where a group is constantly told they are lesser than the rest start believing in their inferiority.⁹⁷

It promotes tribalistic as well as other beliefs that may lead to violence – as discussed in the previous chapter there are negative repercussions to ethnic verbal abuse as they have been one of the ingredients of violence throughout our country's history. It has served as the proverbial bark that is heard before the bite of ethnic rampage. Put in other terms, the talk comes before the walk, these may vary from hate crimes on one or two people to widespread violence like the post-election violence in Kenya to genocides such as the Rwanda Genocide. It is the tolerance of such speech that create an environment where people get comfortable with such crimes against humanity.⁹⁸

It silences the minority groups – although the advocacy of protection of hate speech may seem to imply that there will be more speech in the public space, it might produce the opposite effect by curtailing the speech of those that are deficient in numbers, women as well as children. Instead of inspiring these groups of persons to engage in public discussions and debates, it limits the amount of speech they get to the public sphere from these groups. Other than that the overpowering

⁹⁴ *Johnstone Muthama & 8 others v Inspector General of Police & 2 others* [2016] eKLR, para 28.

⁹⁵ *Johnstone Muthama & 8 others v Inspector General of Police & 2 others*.

⁹⁶ Kenneth B. Clark, *Dark Ghetto: Dilemmas of Social Power*, Wesleyan, Subsequent edition (1965) 63-64

⁹⁷ Mari J. Matsuda, *Words That Wound: Critical Race Theory, Assaultive Speech, And The First Amendment* (New Perspectives on Law, Culture, and Society, Westview Press; 1 edition (1993)

⁹⁸ Alexander Tsesis, *Destructive Messages: How Hate Speech Paves The Way For Harmful Social Movements* (2002).

majority speech may demotivate these groups from speaking up because even though they try, they are not heard or rather they are rebuked for going against the existing norm.

4.5 Effect.

The chilling effect is the discouragement of the legitimate exercise of the fundamental natural rights because of the imposition of a legal sanction on any acts in the exercise of that act. It has been argued that the protection of hate speech denies those that propagate it an avenue to release their frustrations and inner thoughts. This is what is referred to as the 'safety valve'. The rationale is that we afford these people with an avenue to release their exasperation in a way that is less pervasive as opposed to more violent means. By putting legal constraints on Hate speech, it may be driven into the dark. The question then is whether this adequately solves the underlying issue. Telling a person they cannot speak does not change how they feel about the subject matter they are prohibited to talk about. The issue with this then is that once the speech goes underground it becomes more difficult to monitor, this has potential of becoming dangerous. For instance, by not letting people have the freedom to express hateful speech about an immigrant issue in their country might potentially increase the violence against that minority group.⁹⁹

However, the limitation of this argument is that it is not based on any statistical evidence rather on empirical studies. Research has actually shown that giving people the freedom to stigmatize other members of society makes them even more violent. Those that propound the argument on allowing hateful expression argue that by banning Hate Speech may give the community a false sense of peace and security. The best way to address any substantive issue starts with a conversation about it. What is not talked about cannot be addressed.

4.6 Conclusion

The Constitution empowers the government to limit certain rights. However, they have to abide by a conjunctive 3 part test. The limitation has to be in law, is must be necessary in a democratic state and proportionate. The courts are empowered to scrutinize whether limitations imposed by the governments abide by this test. Hate Speech is a limitation provided in law. However, there are substantive arguments on either side on necessity and proportionality. Following the consequentialist theory, there are a number of reasons the government limits political speech

⁹⁹Weinstein J, Hate Speech, Pornography And The Radical Attack On Free Speech Doctrine, Westview Press; 1 edition, Arizona, 1999, 150-51

through Hate Speech, however, if the imposition of sanctions can create a chilling effect that can be detrimental to the democracy.

CHAPTER 5: THE PLACE OF HATE SPEECH IN POLITICAL SPEECH

The previous chapters have looked into the place of political speech in our society. They have also questioned the place of the Hate Speech limitation and analyzed the rationale and justification for having it in our constitution. This chapter seeks to propose some solutions to the questions that have been previously raised.

5.1 The reality of Hate speech in Political Speech

The provision on the ban on Hate Speech is a blanket cover that does not differentiate on the type of speech. This then means that the limitation also extends to speech that is political in nature. The law bans one from making any derogatory statements against people on ethnic lines. However, what if these speech constitute actual and genuine political positions held by a person?

For example, in the formation of the Jubilee government, if Uhuru and Ruto had an agreement whereby Uhuru was to back Ruto in the presidential race. After his term was over but went back on his word and decided to back another candidate for presidency. Ruto, with the backing of his supporters who may be predominantly from his ethnic group may feel deceived and would want to express themselves accordingly. In this form of representative democracy, leaders are a representation of a group of Kenyans, the reality in most cases means a certain ethnic group. This polarizes the group behind Uhuru against the group behind Ruto. One could see how some of the hateful things said between the two groups could be seen as inflammatory on ethnic lines and be categorized as unprotected speech, hate speech. It is understandable how one could rationalize that such speech could end up inciting violence or some form of unlawful discrimination.

Do we then prohibit a group of Kenyans from airing their actual political views because it is hate speech in this circumstance? This then brings into debate whether regulation of political speech is justifiable considering the fact that the speech that will be available in the public sphere will not be an accurate representation of the actual political views that are held by the community. This exclusion seems to be going against the very essence of political speech. Those that perpetuate hate speech are then denied the tool that allows them to take part in the self-governance and self-determination aspect of democratic governance which is their right.

What then we are tasked with is finding that balance of which on the one hand has the compelling argument that political expression should be given privileged protection, on the other side of the

argument harm, in all its different forms is seen as a legitimate justification for the imposition of restriction of exercise of individual rights.

5.2 Application of Harm evaluation.

Stephen Darwall's makes a distinction separating recognition and appraisal respects. He states that recognition means that people are warranted to have their opinions accorded some level of weight and to be taken seriously as persons that have the capacity to do so.¹⁰⁰ What hate speech then does is that it withholds this equal treatment which each and every person should enjoy. We do not turn a blind eye to the fact the nature of the effect of Hate Speech results into the denial of the inherent dignity of minority, vulnerable and disadvantaged groups. With the way our societies are modeled in this day and age, there are platforms that easily transfer harm to individuals. There is also both actual and potential harm that is occasioned to both individuals and the country by dictating what political speech is allowed in the public sphere and what is not. Using the hypothetical example of Uhuru and Ruto, one could see how suppression could affect people's ability to participate in democratic governance by limiting their speech.

In the landmark case *Hector v. Attorney-General of Antigua & others* the courts held: It is almost too obvious in a free democratic society to have to say that those who hold office in government and are in charge of public administration must always be open to criticism. Any attempt to suppress or fetter such criticism amounts to the most insidious and objectionable kind of political censorship. At the same time, it is no less apparent that the very aim of attacking those who have their political opponents handling public affairs is to weaken public confidence in their stewardship and reassure the electorate that the opponents would do a better job than those who currently hold office. Having regard to these factors, their lordships cannot help interpreting a constitutional provision that criminalizes comments with the greatest skepticism likely to impair public confidence in the conduct of public affairs.¹⁰¹

A balance must be found between free expressions and hate speech. Thus, a distinction needs to be made between speech that can cause harm due to its potential to incite violence; and offensive speech that is insulting but not harmful¹⁰². The court is better placed to determine rights in relation

¹⁰⁰ Darwall S, *Two Kinds of Respects*, Ethics, The University of Chicago Press, Vol 88, 1977, 38

¹⁰¹ *Hector v. Attorney-General of Antigua & others* [1990] 2 AC 312.

¹⁰² Benesch S, 'Election-Related Violence: The Role of Dangerous Speech', American Society of International Law Proceedings of the Annual Meeting, 2011, 389.

to this distinction, it should determine whether speech has potential to broach harmful consequences or constitutes mere insults.

5.3 Hate Speech limitation and Common Good.

Waldron's argues that a person's dignity in itself is a good measure as a principle for the measurement of the dignity rational.¹⁰³ Following this argument, Hate Speech is seen as unacceptable because it withholds a person's inalienable equal status in the community proposing that they are lesser than others while advocating superiority of certain groups of the society.

The protection afforded to freedom of speech is based on individualism's assumption that the society exists to uphold the individual's worth and integrity. As social beings, the right to political speech is basically the best move to publicly express our individual opinion

Traditionally, rights have often been interpreted as shielding the individual from group incursion, based on respect for the identity or independence of the individual. According to Etzioni, in his analysis of privacy rights, it is not an absolute value and does not triumph over all other freedoms or interests for the common good.¹⁰⁴ In this sense, the same definition may be extrapolated.

Etzioni is right to criticize those who claim that freedom of speech is a right of the individual to overshadow public interests. Nevertheless, the issue is that the pragmatic balance between individual rights and the common good is seldom preferred by individual rights— unless the interest promoted on the common good side is insignificant. Generally speaking, society will win if its interests are balanced against those of the individual

The problem with the community view of Etzioni is that individuality from the community does not need to be on the opposite side of the scale. Such a view suggests that there are distinct and competing individual and societal interests. There are also many liberal conceptions of individual rights underpinning a similar view. John Dewey proposed an alternative theory on the individual-community relationship.¹⁰⁵

There is no rigid dichotomy between individuals and society for Dewey. Society forms the individual, and the individual's benefit as well as society is often interrelated rather than

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¹⁰⁴ Etzioni A, The Limits Of Privacy, Journal of Law and Medicine, Vol 27, 1999, 196.

¹⁰⁵ D. Solove, I've got nothing to hide and other misunderstandings of privacy', GW Law Faculty Publications & Other Works, 2007.

antagonistic. They can not, therefore, distinguish the idea of ourselves and our own good from our idea of others and their good.¹⁰⁶

Dewey argues that rights should therefore be valued on the basis of "the contribution they make to the community's welfare."¹⁰⁷ "Otherwise, individual rights would not be important enough in any kind of utilitarian calculus to outweigh the majority of social interests, and it would be impossible to justify individual rights. As such, Dewey concluded, for civil liberties, we must rely on a "economic foundation and public justification".¹⁰⁸

5.4 Conclusion

The reality is that we do not have legal differentiation of categories of speech. Thus a blanket approach is taken in imposing limitation on all types of speech. There forms an existential dilemma when it comes to the limiting political speech. Issues of discrimination based on opinion start to emerge. The question of empowering a body with power to limit the very tool that is designed to check it comes into question. There is an individualistic approach that is taken in limiting political expression based on the utility calculus in balancing individual interest verses communal interest, however, there is a communal interest in protecting individual good. There is no doubt that Hate Speech can cause harm to individuals, however, harm can be caused to the democracy if political speech is limited.

5.5 Recommendation

The predominant core in this debate that polarizes the position of absolute free speech and imposition of Hate speech as a limitation is seen in the arguments of judges and scholars that seems to be based on the content of the political speech. As a matter of principle, one possible way of looking at this debate with the lens of content neutrality. This Principle presupposes in the hate speech debate that the government should not be allowed to draw discriminatory lines between the speaker and their opinion.

¹⁰⁶ J. Dewey, *The Middle Works of John Dewey, Volume 5, Ethics*, Southern Illinois University Press; 1st edition, 1978.

¹⁰⁷ J Dewey, *Liberalism and Civil Liberties* (1936), reprinted in A. Ann Boydston. *The Later Works of John Dewey, Volume 7, 1925 - 1953: 1932, Ethics*, Southern Illinois University Press (1989).

¹⁰⁸ J Dewey, *Liberalism and Civil Liberties* (1936).

On one hand this principle works for free speech propagators, while on the other hand states such as Kenya that have the restriction enshrined in the constitution treat political expression in a manner in which the focus is the analysis is whether the speech qualifies as hate speech and limit any other considerations. Thus if political speech qualifies as Hate Speech it immediately loses its protection under Article 33 of the Constitution of Kenya. To be in a deadlock given the unbridgeable gulf between prohibitionists and oppositionists.

To Bridge this inadequacy, we need to avoid the risk of masking visible signs of internal communal prejudices to the point that we are unable to solve them. We cannot treat a disease which we cannot see the symptoms to. A middle ground needs to be met where we differentiate types of speech and political speech is given preferential protection. The threshold for imposition of Hate speech on this type of speech should be measures against the Harm Principle. The speech should be seen as likely to cause that outcome. The Standard of proof of the harm should be raised above balance of probability but below beyond reasonable doubt. This solution is a middle ground that brings together both the Individual interest and the communal Interest.

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