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BALANCING ACTS: NAVIGATING THE FINE LINE BETWEEN FREEDOM OF EXPRESSION AND INCITEMENT TO VIOLENCE IN KENYA

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By

MWAURA FIONA NJERI
139139

Prepared under the supervision of

DR. LYNETTE OSIEMO

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DECLARATION

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

Signed:

Date: 28/12/2024

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

Signed:

Name:

Date:

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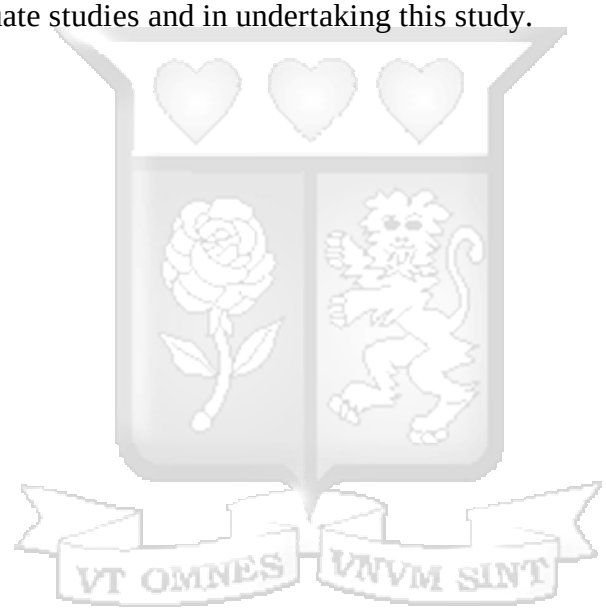

LIST OF LEGAL INSTRUMENTS

Kenyan

1. Constitution of Kenya (2010).
2. Computer Misuse and Cyber Crime Act (Act No 5 of 2018).
3. Media Council Act (Cap 411B).
4. National Cohesion and Integration Act (Act No 12 of 2008).
5. Penal Code (Cap 63 Laws of Kenya).

Foreign

1. African Charter on Human and People's Rights, 01 June 1981.
2. International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171.
3. Universal Declaration of Human Rights, 10 December 1948.

LIST OF CASES

Kenyan

1. *Andama v Director of Public Prosecutions & 2 others; Article 19 East Africa (Interested Party)* (2021) eKLR.
2. *Chirau Alimwakwere v Robert M. Mabera & 4 Others* (2012) eKLR.
3. *Isaac Kiptoo Koros v Republic* (2011) eKLR.
4. *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika (Interested Party)* (2024) eKLR.
5. *Senator Johnstone Muthama v Director of Public Prosecutions, Cabinet Secretary for Interior and Co-ordination of National Government & Inspector General of Police; Japhet Muriira Muroko (Interested Party)* (2020) eKLR.
6. *Republic v Moses Kuria* (2016) eKLR.
7. *Robert Alai v The Hon Attorney General & another* (2017) eKLR.
8. *R v Ferdinand Waititu & Another*, Nairobi Chief Magistrate Court Criminal Case No.470 of 2012.

Foreign

1. *Charles Onyango Obbo and another v Attorney General* (2004), The Supreme Court of Uganda.
2. *Edmonton Journal v Alberta* (1989), The Supreme Court of Canada.
3. *Mark Gova Chavunduka and Another v The Minister of Home Affairs* (1999), The Supreme Court of Zimbabwe (unreported).

LIST OF ABBREVIATIONS

1. ACHPR- African Charter on Human and People's Rights
2. Constitution - Constitution of Kenya, 2010.
3. DPP - Director of Public Prosecution
4. Hon. - Honourable
5. ICCPR- International Covenant on Civil and Political Rights
6. NCI Act - National Cohesion and Integration Act
7. NCIC- National Cohesion and Integration Commission
8. P.W.1- Prosecution Witness 1
9. Sgt. - Sergeant
10. UDHR- Universal Declaration of Human Rights
11. UN- United Nations

ABSTRACT

In the evolving landscape of free expression, it has become increasingly imperative to strike a delicate balance between the freedom to express oneself and the need to ensure that one's expression does not incite violence against others. In Kenya, the line between the two has often been blurred particularly during politically tense times such as election periods where certain statements have led to post-election violence. It is on this basis that the objective of this study is to examine the thin line that exists between the freedom of expression and incitement to violence in Kenya. Anchored on the liberalism theory, this study will employ the doctrinal research method where it will analyse primary sources such as statutes and case law, as well as secondary sources which include books, academic journals, and newspaper articles. The study seeks to provide useful insight through its recommendations to legal practitioners and policy makers on how to revise the existing laws and policies, by either amending them or enacting new legislation, to eliminate the use of freedom of expression as a harmful tool to incite others to violence.

TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION

1.0 BACKGROUND TO THE STUDY

In the realm of ideas and the championing of free expression, exploring the fine line between freedom of expression and incitement to violence has become vitally important. This is with the aim of discerning when words cease to be just a tool of expression and transform into a catalyst for harm and disruption of peace in society. Throughout history, there has existed a constant battle between what can and cannot be said especially in situations of high tension where peace and social order are at threat. Recall for example the 2007 post-election violence in Kenya where various statements were made, especially in political spaces, that stirred up violence along ethnic lines which resulted in numerous casualties and destruction of property.[1] Due to the blurred lines, a clear delineation of the boundary between the two is needed in order to effectively safeguard the rights of an individual to express themselves but at the same time, ensure the safety and protection of every other person from any form of violence.

Freedom of expression is the right of a person to express one's opinions freely without any interference.[2] It is provided for under Article 33 of the Constitution of Kenya, 2010 (the Constitution),[3] and in various international and regional instruments which include the International Covenant on Civil and Political Rights (ICCPR)[4], the African Charter on Human and People's Rights(ACHPR)[5] and in the Universal Declaration of Human Rights(UDHR),[6] a non-binding instrument. However, pursuant to Article 33(2) of the Constitution, this right is limited where it amounts to incitement to violence.[7] Under Section 96 of the Penal Code, incitement to violence is further criminalised where the utterance, printing or publishing of any words brings death or physical injury to an individual(s), leads to damage or destruction of property or prevents/defeats the execution or enforcement of any written law.[8]

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[1] Ochieng C, Matanga F, Iteyo C, 'Causes and Consequences of Post-Election Violence in Kenya' African Journal of Empirical Research, 2023, 489.
[2] Merriam Webster Dictionary, 4th ed.
[3] Article 33(1), *Constitution of Kenya* (2010); *Robert Alai v The Hon Attorney General & another* (2017) eKLR; *Chirau Alimwakwere v Robert M. Mabera & 4 Others* (2012) eKLR.
[4] Article 19, *International Covenant on Civil and Political Rights,* 19 December 1966, 999 UNTS 171.
[5] Article 9, *African Charter on Human and People's Rights,* 01 June 1981.
[6] Article 19, *Universal Declaration of Human Rights,* 10 December 1948.
[7] Article 33(2), *Constitution of Kenya* (2010).
[8] Section 96, *Penal Code* (Cap 63 Laws of Kenya).

With regards to incitement to violence in the online sphere, the Computer Misuse and Cyber Crime Act criminalises the intentional publication of false, misleading or fictitious data or information which is likely to incite others to violence.[9] Whereas the above provisions allow for the prosecution of online incitement to violence, as a limitation to the freedom of expression, this is not the case when it comes to statements made orally. An example of this is witnessed during the election periods in Kenya including after the most-recent 2022 elections whose disputing outcome led to '*maandamanos*'[10] in Kenya, fueled by inciteful statements made in political spaces, which saw hundreds lose their lives and property.[11] What is saddening about the situation and what then forms the basis for this study, is the fact that despite it being a recurring problem, few, if any, prosecutions have been made on the grounds of incitement to violence arising from such oral statements. This is due to these orally inciteful statements being masked as free expression of oneself protected under Article 33 of the Constitution,[12] overemphasis of procedure by the courts,[13] and in some instances, Section 96 of the Penal Code being regarded as unconstitutional.[14]

1.1 PROBLEM STATEMENT

Article 33(2) of the Constitution as read with Section 96 of the Penal Code have limited and criminalised the freedom of expression where it amounts to incitement to violence. However, despite these provisions of the law, incitement to violence is evidenced in Kenya every so often, especially in the political sphere, during times of political tension, and in the form of orally made statements. This can be credited to the inadequacy in the current laws to explicitly provide for a comprehensive criterion that outlines the elements to assess in order to differentiate an oral statement from mere expression to one that incites violence; a loophole that has been extensively exploited. Therefore, this study seeks to fill these gaps in the law by setting out and recommending the use of a comprehensive criteria outlining the distinguishing factors between the two in a bid to strike a clear line demonstrating where the freedom of expression ends, and incitement begins.

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[9] Section 22(2), *Computer Misuse and Cyber Crime Act* (Act No 5 of 2018).
[10] '*Protests'* in English.
[11] International Commission of Jurists, '*Is Kenya going down a Slippery Slope, Press Statement on the Monday Protests, Destruction of Property, Human Rights Violation and Conduct of the National Police Service'*, 2.
[12] Karanja F, 'MP Moses Kuria acquitted in incitement to violence case' The Standard, 2019 – < MP Moses Kuria acquitted in incitement to violence case - The Standard > on 17th December 2023.
[13] *R v Ferdinand Waititu & Another*, Nairobi Chief Magistrate Court Criminal Case No.470 of 2012.
[14] *Senator Johnstone Muthama v Director of Public Prosecutions & 2 others; Japhet Muriira Muroko (Interested Party)* [2020] eKLR; Cece S, 'Incitement case against 3 politicians thrown out' Nation, 18 February 2020 – <Incitement case against 3 politicians thrown out | Nation > on 18th December 2023.

1.2 RESEARCH OBJECTIVES

1. To interrogate the current statutory framework in Kenya governing the freedom of expression and incitement to violence.
2. To analyse the current approach taken by the courts when handling cases of incitement to violence
3. Based on the findings, to recommend solutions for a better delineation of the boundary between freedom of expression and incitement to violence.

1.3 RESEARCH QUESTIONS

1. What is the current statutory framework in Kenya governing the freedom of expression and incitement to violence?
2. What has been the approach of the courts in handling cases of incitement to violence?
3. What can be done to improve the existing standards set to differentiate freedom of expression from incitement to violence?

1.4 SIGNIFICANCE OF THE STUDY

This study is significant in that it seeks to examine the thin line that currently exists between freedom of expression and incitement to violence with the aim of recommending a criterion for better delineation. The study focuses on orally made statements which, unlike online incitement that is criminalised under the Computer Misuse and Cyber Crime Act and hate speech which is defined and criminalised under the National Cohesion and Integration Act (NCI Act), are not explicitly criminalised in any subsidiary legislation beyond the general exception in the Constitution. The study will be analysing the existing statutory framework in Kenya governing incitement to violence as well as assessing the approach of the Kenyan courts in handling such cases and whether thus far, the approach has been adequate in effectively prosecuting and punishing culpable individuals. Ultimately, owing to what the author believes is the lack of a comprehensive criterion outlining the elements to use in distinguishing the two, the study hopes to propose recommendations on how to better draw the line between them. This research will provide insight to lawmakers on how to revise the existing law, by either amending it or enacting new legislation that will curb the abuse of freedom of expression through its use to incite violence. It

also aims to provide insight to the judiciary on a specific criterion to use in the prosecution of cases involving incitement to violence.

1.5 HYPOTHESIS

The hypothesis of this study is that the lack of a comprehensive criterion for what amounts to incitement to violence, especially for orally made statements, has allowed for persons to incite others to violence under the disguise of freedom of expression.

1.6 THEORETICAL FRAMEWORK

This study is centred on the liberalism theory as propagated by John Stuart Mill, with a specific focus on the Harm Principle. John Stuart Mill was the most famous and influential philosopher of the nineteenth century.[15] One of Mill's significant achievements is in his liberal championship for free expression. In his work 'On Liberty', he advocates for the freedom of expression based on the rationale that the fullest liberty of expression is required so as to push our arguments to their logical limit.[16] However, he recognizes that there can be exceptions to forms of expression that provide a positive instigation to mischievous acts. Consequently, he places the limitation of the freedom of expression on the Harm Principle which holds that the expressions and actions of individuals should be limited to prevent harm to other individuals.[17] This principle has been critiqued by scholars such as Joel Feinberg who argues that it does not cover the subject matter in depth given it fails to give sufficient detail as to what constitutes harm in its attempt to shoulder all the work necessary for a principle of free speech.[18] Nevertheless, Mill's work remains relevant to this study's main claim: that freedom of expression, while an essential right, has limitations where harm is occasioned. One of these limitations occasioning harm (whether broadly or narrowly interpreted as provided for in the critique) is the incitement to violence through orally made statements. Consequently, it is imperative for incitement to violence to be clearly and comprehensively distinguished from freedom of expression.

[15] Stanford Encyclopedia of Philosophy, 2022 ed.
[16] Mill J, *On Liberty*, Batoche Books Ltd, Canada, 1859, 11.
[17] Mill J, *On Liberty*,13.
[18] Feinberg J, 'Harmless Wrongdoing' Oxford University Press, 1990.

1.7 LITERATURE REVIEW

Despite the provision of incitement to violence as one of the exceptions to freedom of expression in the Constitution, other than its definition in the Penal Code, there exists no subsidiary legislation that provides for a comprehensive criterion to be used in regulating it, particularly regarding orally made inciteful statements. This is however different for hate speech whose regulation has been provided for in various subsidiary legislation, beyond its general provision in the Constitution. These include statutes such as the National Cohesion and Integration Act (NCI Act),[19] and the Media Council Act,[20] with additional guidelines/resources from the National Cohesion and Integration Commission (NCIC) as well as multiple scholarly work analysing and critiquing the effectiveness of the legislation surrounding hate speech.

Victor Maobe,[21] in his dissertation, analyses the investigation, prosecution and conviction of hate speech offenders in Kenya and what makes it difficult to do so. His study looks into the existing legal framework governing hate speech in Kenya such as the Media Act and the Elections Act juxtaposing it with that of Rwanda where suppression of speech is effected through laws that regulate the freedom of the media such as the press law and divisionism law.[22] It concludes by providing remedies on how to effectively criminalise hate speech in Kenya such as amending the NCI Act to expressly provide prosecutorial powers to the NCIC.[23] The gap in the above study is in its methodology whereby it only does a legislative comparison between Kenyan Law and Rwandan Law. It therefore does not provide an analysis of judicial precedent, making the study more theoretical (as it exists in law) than practical (as has been interpreted by the courts). However, its approach in analysing the various laws governing hate speech in Kenya, with the addition of an analysis of court cases, is fundamental to my intended study as it helps to show the existing legal framework governing incitement to violence and its shortcomings in comparison to hate speech.

[19] Section 13(1), *National Cohesion and Integration Act*, (Act No 12 of 2008).
[20] Second Schedule, *Media Council Act* (Cap 411B).
[21] Maobe V, 'Freedom of expression: Exploring the effectiveness of hate speech legislation in Kenya' Published LLB Dissertation, Kenyatta University, Kenya, 2016.
[22] Maobe V, 'Freedom of expression: Exploring the effectiveness of hate speech legislation in Kenya' Published LLB Dissertation, Kenyatta University, Kenya, 2016, 17-29.
[23] Maobe V, 'Freedom of expression: Exploring the effectiveness of hate speech legislation in Kenya' Published LLB Dissertation, Kenyatta University, Kenya, 2016,35.

Dick Osala Omondi,[24] in his study also assesses the existing legislation in Kenya in relation to hate speech through an analysis of political statements and court interpretations.[25] The study addresses the loophole in the system whereby despite the existence of legislation on hate speech, the law does not explicitly provide for the elements of hate speech making it difficult to prosecute hate speech cases successfully.[26] It then concludes by recommending a seven-test approach that would assist courts in qualifying a speech as hate speech thereby drawing its distinction from freedom of expression.[27] While the above study, as one of its flaws, only focuses on remedying the regulation of hate speech, the provision of the seven-test approach in tackling hate speech is insightful to my proposed study which intends to develop and propose such a criteria for incitement to violence as well.

In providing a negative implication of limiting hate speech in relation to upholding one's political rights, Pauline Omoto,[28] in her dissertation analyses and criticises the principles behind hate speech as a limitation to freedom of expression in political speech.[29] Her study questions this limitation on grounds that it is too broad given it does not categorise what type of speech amounts to hate speech and that by limiting free political speech, it infringes on an individual's democratic right to participate in their own governance.[30] Her study concludes by recommending the need to differentiate types of speech to clearly identify those amounting to hate speech, with political speech being accorded special protection, whereby it is only deemed to be hate speech if it occasions harm in line with the Harm Principle.[31]

[24] Omondi D, 'Freedom of Expression visavis Hate Speech: An analysis of the legal prescription and regulation of hate speech in Kenya' Published LLB Dissertation, University of Nairobi, Kenya, 2018.
[25] Omondi D, 'Freedom of Expression visavis Hate Speech: An analysis of the legal prescription and regulation of hate speech in Kenya' Published LLB Dissertation, University of Nairobi, Kenya, 2018, 38, 43-48.
[26] Omondi D, 'Freedom of Expression visavis Hate Speech: An analysis of the legal prescription and regulation of hate speech in Kenya' Published LLB Dissertation, University of Nairobi, Kenya, 2018,48.
[27] Omondi D, 'Freedom of Expression visavis Hate Speech: An analysis of the legal prescription and regulation of hate speech in Kenya' Published LLB Dissertation, University of Nairobi, Kenya, 2018,52.
[28] Omoto Pauline, 'Analysing hate speech as a limitation of freedom of expression in political speech' Published LLB Dissertation, Strathmore University, Kenya, 2020.
[29] Omoto Pauline, 'Analysing hate speech as a limitation of freedom of expression in political speech' Published LLB Dissertation, Strathmore University, Kenya, 2020, 12-13.
[30] Omoto Pauline, 'Analysing hate speech as a limitation of freedom of expression in political speech' Published LLB Dissertation, Strathmore University, Kenya, 2020,39.
[31] Omoto Pauline, 'Analysing hate speech as a limitation of freedom of expression in political speech' Published LLB Dissertation, Strathmore University, Kenya, 2020,43.

The gap in the above study is that it focuses on the negative implications of terming political speech as hate speech only from the perspective of the individual's democratic rights. In doing so, it fails to consider that by freely allowing for political speech, it gives room for its exploitation and abuse, especially during politically tense situations, in a manner that fuels hatred and violence as against another person, group of persons or property and hence the need for the provision of its limitation in the first instance. Nevertheless, her study is important in advancing the main claim of my proposed study that even for incitement to violence, Article 33(2) of the Constitution is inadequate in providing clarity on the explicit elements that ought to be considered to be able to effectively differentiate mere freedom of expression that is harmless, from incitement to violence, and in her case, hate speech, both of which are harmful and hence ought to be limited.

With reference to the interaction that then exists between hate speech and incitement to violence, Susan Benesch,[32] in her work on election-related violence proceeds to look into this interaction, especially during periods of high political tension such as elections.[33] In her analysis of the 2007/2008 post-election violence in Kenya, she posits that political actors used inflammatory speech, which translates to hate speech, as a tool to incite violence, and/ or to persuade audiences to condone violence carried out by members of their own group or ethnicity, ostensibly on their behalf.[34] Benesch's view seeks to advance the argument that hate speech precedes violence and as such incitement to violence is a consequence of hate speech rather than a stand-alone limitation to the freedom of expression.[35] This view serves as a limitation to her work as it fails to recognise that under Article 33(2) of the Constitution, hate speech and incitement to violence are actually two distinct limitations to the freedom of expression. It is on the basis of this limitation that my proposed study intends to demonstrate that by adopting Benesch's view, the current legal framework in Kenya has proceeded to advance legislation on hate speech such as the NCI Act but has failed to sufficiently do the same for incitement to violence. Yet, incitement to violence is a

[32] Benesch S, 'Election-Related Violence: The Role of Dangerous Speech', American Society of International Law Proceedings of the Annual Meeting, 2011.
[33] Benesch S, 'Election-Related Violence: The Role of Dangerous Speech' American Society of International Law Proceedings of the Annual Meeting, 2011, 389.
[34] Benesch S, 'Election-Related Violence: The Role of Dangerous Speech' American Society of International Law Proceedings of the Annual Meeting, 2011, 389.
[35] Benesch S, 'Election-Related Violence: The Role of Dangerous Speech' American Society of International Law Proceedings of the Annual Meeting, 2011, 389.

limitation separate and distinct from hate speech that is equally deserving of better regulation and legislation highlighting in detail what it entails and how to distinguish it from mere expression.

Ultimately, this study aims to build on the existing literature on freedom of expression so as to provide solutions on how to fill the gaps that currently exist with regards to effectively differentiating it from incitement to violence. In doing so, the study advances the claim that similar to hate speech and due to its implications in causing harm or fear of harm through violence, a need therefore arises for better regulation of incitement to violence as a permissible justification for limiting the freedom of expression.

1.8 RESEARCH METHODOLOGY

This study will be undertaken using the doctrinal research methodology which is based on a qualitative analysis of data in order to draw inferences and come up with objective conclusions relevant to the proposed study.

The study shall rely on primary sources of data which entails the Constitution of Kenya, subsidiary legislation, international legislation and case law.

The study will also use secondary sources of data which include books, dissertations and theses, academic journals and articles and data from other credible sources such as reputable newspaper articles.

1.9 LIMITATION OF THE STUDY

This being a qualitative study using the doctrinal research methodology, its sources are limited to non-numerical data which includes books, academic journals and newspaper articles. This is a limitation to the study as the accuracy of the information provided herein is anchored on the accuracy of the sources. As such, given that most of the sources are indirect and/or reported speech they may be biased as it is the different author's opinions on the subject matter.

1.10 CHAPTER BREAKDOWN

Chapter 1: Introduction

This proposal will form the first chapter of my study. It outlines the background to the study together with the problem statement, the research questions and objectives, the significance of the study and other essential elements that form the foundation for the subsequent substantial parts of the study.

Chapter 2: Theoretical Framework

This chapter will analyse the liberalism theory with a particular focus on the Harm Principle, as propounded by John Stuart Mill. This is the theoretical framework on which the study will be anchored.

Chapter 3: The current legal framework, both the law and jurisprudence, governing the right to freedom of expression against the limitation of incitement to violence in Kenya

This chapter will look into the current statutory framework governing freedom of expression and incitement to violence in Kenya in order to determine whether the law has adequately provided for the distinction between the two. This chapter will also analyse the approach that Kenyan courts have taken in handling cases of incitement to violence. This is with the aim of assessing whether the current approach has been effective in prosecuting those found to have incited others to violence. Ultimately, this chapter seeks to identify the gaps within the current legal framework (law and jurisprudence) governing incitement to violence in Kenya.

Chapter 4: Conclusion and Recommendations

This chapter will conclude the study as well as offer recommendations to various categories of people as to the implementation of the gaps identified in this study in relation to the regulation of incitement to violence in Kenya.

CHAPTER TWO: THEORETICAL FRAMEWORK

This study is anchored on the liberalism theory, specifically focusing on the Harm Principle as propounded by John Stuart Mill. Accordingly, this chapter will provide a comprehensive analysis of the Harm Principle, examine its application within the context of this study and explore the various critiques that have been raised regarding the principle.

2.0 THE LIBERALISM THEORY

Liberalism is a political philosophy that fundamentally emphasises individual liberty, autonomy and the protection of individual rights.[36] A key tenet of the liberalism theory is its presumption in favour of individual liberty requiring that any limitation on this liberty be justified by a compelling reason, referred to as a liberty-limiting principle.[37] As a proponent of liberalism, Mill emphatically defends free expression in his book 'On Liberty' which is centred on the relation between individual liberty and social restrictions on that liberty.[38] In the book, he acknowledges that free expression is crucial to human happiness, playing both an individual or private role, and a social or public role.[39] He goes on to argue that freedom of opinion and its expression are essential components of individual well-being and the broader social good.[40] However, Mill also recognizes that security is equally essential to human well-being.[41] It is on this basis that he articulates and defends the Harm Principle.

2.1 THE HARM PRINCIPLE

The Harm Principle is a jurisdictional principle,[42] which sets a boundary for social coercion, whether it takes the form of legal penalties or informal social sanctions and moral disapprobation.[43] Mill asserts that the only legitimate purpose for which power can be rightfully exercised to

[36] Encyclopaedia Britannica, 7 ed.
[37] Bell M, 'John Stuart's Mill's Harm Principle and Free Speech: Expanding the Notion of Harm' 33 *Utilitas* 2, 2021,164.
[38] Mill J, *On Liberty*, CW XVIII. (Citations of Mill marked by 'CW volume number, page number' refer to the *Collected Works of John Stuart Mill*.)
[39] Mill J, *On Liberty*, CW XVIII, 222-223.
[40] Mill J, *On Liberty*, CW XVIII, 257-258.
[41] Mill J, *Utilitarianism*, CW X, 250–251.
[42] The Harm Principle as a jurisdictional principle references the fact that the scope of the state's authority or jurisdiction to interfere with an individual's conduct is justified only when such conduct causes harm to others.
[43] Mill J, *On Liberty*, CW XVIII, 223–224.

interfere with an individual's liberty is to prevent harm to others.[44] Mill articulates this principle by stating that "the sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. His own good, either physical or moral, is not a sufficient warrant."[45] Thus, according to the Harm Principle, unless a person's conduct causes a definite risk of harm to other persons, who either do not consent to the risk or who lack the capacity to consent, that conduct is outside society's jurisdiction.[46]

A crucial aspect of the Harm Principle is distinguishing between harm and offence. Harm, according to Mill, refers to a tangible, objectively verifiable setback to a person's interests such that their life gets better or worse depending on how those matters develop.[47] It is significant wrongful threats to personal safety, bodily and mental health, means of earning a living or securing a place to live or to the legal rights that safeguard a person's key liberties and opportunities.[48] Ultimately, Mill understands harm to be a violation of rights.

In contrast, offence is a subjective reaction to an experience that varies greatly among different persons.[49] It entails an affront or an insult which normally causes a momentary swing but leaves the person unharmed and whole.[50] The offence-harm distinction is therefore not determined by the intensity of discomfort a person suffers, but by whether it is, or it becomes, grounded in an objective state of the person rather than solely residing in a temporary subjective state of the person.[51] As such, it is only actions that cause harm that can be addressed by an interference with

[44] Mill J, *On Liberty*, CW XVIII, 223–224.
[45] Mill J, *On Liberty*, CW XVIII, 223–224.
[46] Bell M, 'John Stuart's Mill's Harm Principle and Free Speech: Expanding the Notion of Harm' 33 *Utilitas* 2, 2021,165.
[47] Bell M, 'John Stuart's Mill's Harm Principle and Free Speech: Expanding the Notion of Harm' 33 *Utilitas* 2, 2021,165.
[48] Bell M, 'John Stuart's Mill's Harm Principle and Free Speech: Expanding the Notion of Harm' 33 *Utilitas* 2, 2021,166.
[49] Bell M, 'John Stuart's Mill's Harm Principle and Free Speech: Expanding the Notion of Harm' 33 *Utilitas* 2, 2021,165.
[50] Bell M, 'John Stuart's Mill's Harm Principle and Free Speech: Expanding the Notion of Harm' 33 *Utilitas* 2, 2021,165.
[51] Bell M, 'John Stuart's Mill's Harm Principle and Free Speech: Expanding the Notion of Harm' 33 *Utilitas* 2, 2021,166.

liberty; all other offensive behaviour would have to be tolerated or addressed in ways that do not violate the Harm Principle.[52]

2.2 APPLICATION OF THE HARM PRINCIPLE TO THE PRESENT STUDY

The central argument in the present study is that freedom of expression should be subject to limitations and justifiable sanctions when it causes harm. One of these instances is where it amounts to incitement to violence. Relating the Harm Principle to the distinction between freedom of expression and incitement to violence, Mill first differentiates between freedom of thought and freedom of expression. While he regards freedom of thought as self-regarding and thus immune to restriction, he considers freedom of expression to have significant consequences on others and hence it should be restricted by society when it causes harm to others.[53] Mill further elaborates that for an expression to be justifiably restricted under the Harm Principle, it must meet certain criteria. That is: it must be direct, imminent and tangible.[54] For him, incitement to violence meets this criterion as it poses an immediate threat to physical safety and well-being.[55]

Mill goes on to illustrate the limitation of freedom of expression in the context of incitement to violence using the example of a newspaper opinion that labels corn merchants as "starvers of the poor".[56] He asserts that while circulating this opinion in print may be protected under the freedom of expression, expressing the same opinion verbally to an angry mob assembled outside the corn merchant's business or home or handing out such opinion to the same mob in the form of a placard crosses the line.[57] On this basis, Mill argues that "even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act."[58] Therefore, in scenarios such as this in which freedom of

[52] Bell M, 'John Stuart's Mill's Harm Principle and Free Speech: Expanding the Notion of Harm' 33 *Utilitas* 2, 2021,166.
[53] The Ethics Centre, 'What is the Harm Principle? An Ethics Explainer' 27 October 2016 https://ethics.org.au/ethics-explainer-the-harm-principle/ on 27 August 2024.
[54] The Ethics Centre, 'What is the Harm Principle? An Ethics Explainer' 27 October 2016 https://ethics.org.au/ethics-explainer-the-harm-principle/ on 27 August 2024.
[55] The Ethics Centre, 'What is the Harm Principle? An Ethics Explainer' 27 October 2016 https://ethics.org.au/ethics-explainer-the-harm-principle/ on 27 August 2024.
[56] Mill J, *On Liberty*, Batoche Books, Canada, 2001, 52.
[57] Mill J, *On Liberty*, 52
[58] Mill J, *On Liberty*, 52.

expression would certainly cause harm to others by inciting violence, such freedom could be restricted and justifiably punished.

2.3 CRITIQUES OF MILL'S HARM PRINCIPLE

John Stuart Mill's Harm Principle, while influential in shaping liberal thought, has been subject to various critiques. Different scholars have raised concerns about the principle's limitations and its practical implications for governance and societal regulation. Consequently, this section seeks to highlight these critiques.

2.3.1 Peter Simpson's Critique: Inadequacy of the Harm Principle

According to Peter Simpson, the Harm Principle is fundamentally inadequate as a basis for ensuring liberty.[59] He points out the fact that, whereas classical liberalism initially focused on the protection of people's negative rights(rights to not be interfered with), over time, liberalism has expanded to include the protection of positive rights (rights to certain goods such as education) as well.[60] This is so as to make a more equal playing field upon which people could pursue their diverse projects. For Simpson, this dynamic has led to two significant consequences. On the one hand, there has been an increase in governmental control via a militarised police force to secure both negative and positive rights.[61] On the other hand, there has been a relinquishing of control over matters of morality and religion.[62]

In this context, Simpson argues that the liberal state, constrained by the Harm Principle, offers little substantial guidance beyond the value of liberty and it is due to this lack of moral and ethical direction, particularly in the presence of immoral influences within society, that virtue, which is essential for individuals to achieve their goals, is eroded.[63] As such, Simpson concludes that the Harm Principle, in its current form, leads to a form of tyranny both externally, through an increasingly interventionist government and internally, through unchecked appetites and passions

[59] Simpson P, *Political Illiberalism: A Defense of Freedom,* Routledge, 2015, 51.
[60] Simpson P, *Political Illiberalism: A Defense of Freedom,* 51.
[61] Simpson P, *Political Illiberalism: A Defense of Freedom,* 52.
[62] Simpson P, *Political Illiberalism: A Defense of Freedom,* 55.
[63] Simpson P, *Political Illiberalism: A Defense of Freedom,* 55.

of individuals.[64] This dual tyranny then proceeds to undermine the very liberty that the Harm Principle seeks to protect.

2.3.2 Chris Daly's Critique: The Subjectivity and Limitations of the Harm Principle

For Chris Daly, his critique of the Harm Principle is founded on its inherent subjectivity and the challenges this poses for its application in the global era.[65] While the principle carries theoretical merit, Daly argues that it is susceptible to varying interpretations, particularly when political or social advantages are at stake.[66] As evidenced in the analysis of Mill's Harm principle above, he asserts that interference with individual liberty is only justified when their conduct causes harm to others.[67] However, Daly points out that Mill fails to clearly define the boundaries of what constitutes 'harm' or 'evil', who is qualified to assess this evil and what biases such persons carry, consequently leaving these determinations open to subjective interpretation.[68]

Daly uses a hypothetical scenario to illustrate this critique. He states that: if a low income father spends his family's money on gambling or alcohol, thereby depriving his family of basic needs, society might justifiably intervene and punish him.[69] However, if this father happens to be wealthy and can still provide for his family alongside paying for his vices, the question on whether he should be punished arises.[70] In such complex situations, Daly argues that the Harm Principle does not adequately address the complexity of the same behaviour as it has different consequences depending on the individual's circumstances.[71]

[64] Simpson P, *Political Illiberalism: A Defense of Freedom,* 55.
[65] Daly C, 'The Boundaries of Liberalism in a Global Era: A critique of John Stuart Mill' Honors Theses, Southern Illinois University, Carbondale, 2002, 18.
[66] Daly C, 'The Boundaries of Liberalism in a Global Era: A critique of John Stuart Mill' Honors Theses, Southern Illinois University, Carbondale, 2002, 18.
[67] Daly C, 'The Boundaries of Liberalism in a Global Era: A critique of John Stuart Mill' Honors Theses, Southern Illinois University, Carbondale, 2002, 18.
[68] Daly C, 'The Boundaries of Liberalism in a Global Era: A critique of John Stuart Mill' Honors Theses, Southern Illinois University, Carbondale, 2002, 18.
[69] Daly C, 'The Boundaries of Liberalism in a Global Era: A critique of John Stuart Mill' Honors Theses, Southern Illinois University, Carbondale, 2002, 19.
[70] Daly C, 'The Boundaries of Liberalism in a Global Era: A critique of John Stuart Mill' Honors Theses, Southern Illinois University, Carbondale, 2002, 19.
[71] Daly C, 'The Boundaries of Liberalism in a Global Era: A critique of John Stuart Mill' Honors Theses, Southern Illinois University, Carbondale, 2002, 19.

Additionally, Daly critiques the application of the Harm principle to less severe behaviour that does not necessarily threaten others basic survival rights due to its difficulty in distinguishing between different degrees of harm.[72] In this instance, he uses the example of smoking which although it may be harmful to others through passive smoking, it does not pose the same direct threat to survival as drunk driving.[73] This goes to show the difference in the degrees of harm or inconvenience that can potentially affect others by an individual's behaviour. Consequently, Daly cautions that the Harm Principle's reliance on subjective judgements and its potential for misapplication by extremists could undermine Mill's vision of liberty, especially if these judgments are influenced by external pressures and not made objectively.[74]

2.3.3 Donald Dripps Critique: The Vagueness and Practical Limitations of the Harm Principle

Donald Dripps critiques the Harm Principle on grounds that the idea of harm is too vague, too dependent on baseline assessments of private rights, too open to long chains of causal speculation and it has limited practical utility in protecting individual liberty.[75] Dripps further contends that the Harm Principle is profoundly deficient as an expression of the limits that should restrict society's resort to its most coercive instrument: sanctions.[76] He argues that the principle's institutional deficiencies derive directly from establishing the proper limitations of criminal law based on the consequences of individual conduct rather than along procedural and jurisdictional lines which he suggests to be the better criteria.[77] For Dripps, by focusing on the substance of private conduct, the Harm Principle therefore fails to provide the necessary protections for individuals liberty within the context of criminal sanctions.[78]

In conclusion, the liberalism theory, as expressed through Mill's Harm Principle, provides a nuanced framework for understanding the limits of individual liberty and the justification of social coercion. With particular reference to the present study, the Harm Principle and its application to

[72] Daly C, 'The Boundaries of Liberalism in a Global Era: A critique of John Stuart Mill' Honors Theses, Southern Illinois University, Carbondale, 2002, 19.
[73] Daly C, 'The Boundaries of Liberalism in a Global Era: A critique of John Stuart Mill' Honors Theses, Southern Illinois University, Carbondale, 2002, 19.
[74] Daly C, 'The Boundaries of Liberalism in a Global Era: A critique of John Stuart Mill' Honors Theses, Southern Illinois University, Carbondale, 2002, 20.
[75] Dripps D, 'The liberal critique of the harm principle' 17 *Criminal Justice Ethics* 2, 1998, 3.
[76] Dripps D, 'The liberal critique of the harm principle,'3.
[77] Dripps D, 'The liberal critique of the harm principle,'4.
[78] Dripps D, 'The liberal critique of the harm principle,'4.

incitement to violence underscores the delicate balance between protecting individual liberty and ensuring public safety thereby highlighting the need to clearly and comprehensively distinguish between freedom of expression and incitement to violence. However, the critiques reveal significant challenges in the application and interpretation of the principle especially in light of the evolving complexities of modern governance and social dynamics.

Despite the critiques, the Harm Principle and its broad application remains a cornerstone of liberal thought and a justification for the restriction of one's individual liberty whereby it amounts to harm. This therefore makes the Harm Principle particularly relevant as the theoretical framework of this study which seeks to show that freedom of expression can and should be justifiably restricted where it constitutes incitement to violence.

CHAPTER 3: THE LEGAL FRAMEWORK GOVERNING FREEDOM OF EXPRESSION AND INCITEMENT TO VIOLENCE IN KENYA

This chapter provides a comprehensive analysis of the existing legal framework regulating freedom of expression and incitement to violence in Kenya. It explores both statutory provisions and the judicial approach taken in adjudicating cases that pertain to these two distinguishing areas of law. Through this analysis, the chapter seeks to assess whether the current laws and judicial interpretations effectively delineate the boundary between legitimate expression and incitement to violence, thereby highlighting any gaps or ambiguities within the current legal structure.

In Kenya, freedom of expression is one of the fundamental rights and freedoms protected by the Bill of Rights under Chapter 4 of the Constitution.[79] Specifically, Article 33(1) provides that every person has the right to freedom of expression including the freedom to seek, receive or impart information or ideas; freedom of artistic creativity; as well as academic freedom and freedom of scientific research.[80] The importance of this democratic right is articulated in the cases of *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others;Ayika (Interested Party),*[81] and *Robert Alai v The Hon Attorney General and the Director of Public Prosecution*[82] where it is described as a tool through which citizens express their criticism and make their leaders know when their actions may not be in the interest of the nation.[83]

Further, in the case of *Chirau Alimwakwere v Robert M. Mabera & 4 Others,*[84] the court goes on to describe freedom of expression as the bedrock of democratic governance. It then quotes the Supreme Court of Canada in the case of *Edmonton Journal v Alberta,*[85] where the democratic role of freedom of expression is stated in the following words,

> "It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to

[79] *Chirau Alimwakwere v Robert M. Mabera & 4 Others* (2012) eKLR.
[80] Article 33(1), *Constitution of Kenya* (2010).
[81] *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika (Interested Party)* (2024) eKLR.
[82] *Robert Alai v The Hon Attorney General and the Director of Public Prosecution* (2017) eKLR.
[83] *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika (Interested Party)* (2024) eKLR.
[84] *Chirau Alimwakwere v Robert M. Mabera & 4 Others* (2012) eKLR.
[85] *Edmonton Journal v Alberta* (1989), The Supreme Court of Canada.

> put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized."[86]

Additionally, the court refers to the decision of the Supreme Court of Zimbabwe in *Mark Gova Chavunduka and Another v The Minister of Home Affairs,*[87] where it is noted that freedom of expression serves special objectives in a democracy whereby,

> "(i) it helps an individual attain self-fulfilment; (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 (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and change."[88]

In *Andama v Director of Public Prosecutions & 2 others; Article 19 East Africa,* [89] the court also links freedom of expression to democracy and proceeds to illustrate this link by referencing the case of *Charles Onyango Obbo and another v Attorney General,* [90] before the Ugandan Supreme Court where it was held that,

> "Protection of the fundamental human rights, therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, the protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of the freedom of expression. This is as true in the new democracies as it is in the old ones."[91]

Within the international realm, according to Article 2(6) of the Constitution through which any treaty or convention ratified by Kenya forms part of its laws,[92] the right to freedom of expression

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[86] *Edmonton Journal v Alberta* (1989), The Supreme Court of Canada.
[87] *Mark Gova Chavunduka and Another v The Minister of Home Affairs* (1999), The Supreme Court of Zimbabwe (unreported).
[88] *Mark Gova Chavunduka and Another v The Minister of Home Affairs* (1999), The Supreme Court of Zimbabwe (unreported).
[89] *Andama v Director of Public Prosecutions & 2 others; Article 19 East Africa (Interested Party)* (2021) eKLR.
[90] *Charles Onyango Obbo and another v Attorney General* (2004), The Supreme Court of Uganda.
[91] *Charles Onyango Obbo and another v Attorney General* (2004), The Supreme Court of Uganda.
[92] Article 2(6), *Constitution of Kenya* (2010).

is also guaranteed under Article 19(2) of the ICCPR which highlights that everyone has a right to freedom of expression including the freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.[93] Though a non-binding treaty, the right to freedom of expression is further provided for in Article 19 of the UDHR which states that everyone has the right to freedom of opinion and expression including the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[94] At a continental level, this is emulated in Article 9 of the ACHPR which provides that every individual shall have the right to receive information and express his opinions within the law.[95]

3.1 THE GAP IN THE CURRENT LEGAL FRAMEWORK

The current legal framework governing freedom of expression and incitement to violence in Kenya affirms the status of freedom of expression as a fundamental right albeit not absolute as it is subject to limitation in instances of incitement to violence. Nonetheless, an analysis of the various laws, judicial decisions and a comparison of existing subsidiary legislation regulating incitement to violence vis-a-vis hate speech reveals an existing gap within the legal framework when it comes to the regulation of incitement to violence.

3.1.1 The existing gap within the law and the current judicial approach

Incitement to violence is provided for as a limitation to the right to freedom of expression under Article 33(2) of the Constitution.[96] The court's holding in the *Chirau* case reflects an acknowledgement of Article 33(2) being consistent with international principles and standards, particularly Article 19(3) and 20(2) of the ICCPR,[97] in recognizing that freedom of expression is not an absolute right and as such, the limitation of incitement to violence falls outside the terms of constitutional protection.[98] Under Article 19(3) of the ICCPR limited restrictions on freedom of expression are permitted where these are a) provided by law; b) the legally sanctioned restriction

[93] Article 19(2), *International Covenant on Civil and Political Rights,* 19 December 1966, 999 UNTS 171.
[94] Article 19, *Universal Declaration of Human Rights,* 10 December 1948.
[95] Article 9, *African Charter on Human and People's Rights,* 01 June 1981.
[96] Article 33(2), *Constitution of Kenya* (2010).
[97] Article 19(3) and 20(2), *International Covenant on Civil and Political Rights,* 19 December 1966, 999 UNTS 171.
[98] *Chirau Alimwakwere v Robert M. Mabera & 4 Others* (2012) eKLR.

must protect or promote an aim deemed legitimate such as respect for the rights and reputation of others, and protection of national security, public order, public health or morals; and c) the restriction must be necessary for the protection or promotion of the legitimate aim.[99] A further obligation is placed on state parties under Article 20(2) which provides that, *"Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."*[100]

Nevertheless, as noted by the court, incitement to violence along with other forms of expression excluded from the ambit of protection of Article 33(2) are not expressly defined by the Constitution.[101] Consequently, due to the deleterious effects of these excluded forms of expression, an obligation is therefore placed upon the State to impose sanctions on such conduct through criminal law.[102] It is for this reason that reference is made to the Penal Code, which criminalises various forms of incitement to violence, as well as the Computer Misuse and Cyber Crimes Act which serves to address and curb forms of incitement to violence occurring within the digital landscape.

Section 96 of the Penal Code criminalises incitement to violence by rendering the utterance, printing or publishing of any words which bring death or physical injury to an individual(s), leads to damage or destruction of property or prevents/defeats the execution or enforcement of any written law an offence liable to imprisonment of a term not exceeding five years.[103] Further, Section 66A of the Penal Code prohibits publications and broadcasts that are likely to cause public alarm, incitement to violence or disturb public peace.[104] Additionally, under Section 77 of the Penal Code, any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a subversive intention, or utters any words with a subversive intention, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.[105] For the purpose of section 77, under subsection 3, it goes on to include incitement to

[99] Article 19(3), *International Covenant on Civil and Political Rights,* 19 December 1966, 999 UNTS 171.
[100] Article 20(2), *International Covenant on Civil and Political Rights,* 19 December 1966, 999 UNTS 171.
[101] *Chirau Alimwakwere v Robert M. Mabera & 4 Others* (2012) eKLR.
[102] *Chirau Alimwakwere v Robert M. Mabera & 4 Others* (2012) eKLR.
[103] Section 96, *Penal Code* (Cap 63 Laws of Kenya).
[104] Section 66A, *Penal Code* (Cap 63 Laws of Kenya).
[105] Section 77, *Penal Code* (Cap 63 Laws of Kenya).

violence as constituting a 'subversive' activity. [106] Within the online sphere, Section 22 of the Computer Misuse and Cyber Crimes Act makes it an offence to publish false, misleading or fictitious data or misinformation that is likely to incite others to violence. [107]

However, an analysis of judicial outcomes illustrates that although there exist statutory provisions addressing incitement to violence, successful prosecutions under these laws are uncommon and rare. This paucity can be attributed to different factors, most notably, declarations of unconstitutionality regarding some of these provisions as well as evidentiary issues which hinder the prosecution's ability to meet the requisite standard and burden of proof.

For instance, in the case of *Senator Johnstone Muthama v Director of Public Prosecutions, Cabinet Secretary for Interior and Co-ordination of National Government & Inspector General of Police; Japhet Muriira Muroko (Interested Party),* [108] the Petitioner was charged with the offence of incitement to violence pursuant to Section 96 of the Penal Code for his utterances during a public rally at Uhuru Park where he said,

> *"Kuanza wiki ijayo kama walimu hawatalipwa, hakuna mtu ataenda kufanya kazi, na yule ataenda kufanya kazi atakula mawe."* (Translated to mean, *"From next week if teachers will not have been paid, nobody will go to work, and whoever goes shall be stoned"*).[109]

Despite the incite-ful nature of his utterance, the court proceeded to declare Section 96 of the Penal Code as unconstitutional to the extent that it shifts the legal and evidential burden of proof to an accused person. It went on to prohibit the Director of Public Prosecutions (DPP) or any person acting for and on their behalf from further prosecuting the Petitioner. [110]

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[106] Section 77(3)(b), *Penal Code* (Cap 63 Laws of Kenya).
[107] Section 22(2), *Computer Misuse and Cyber Crime Act* (Act No 5 of 2018).
[108] *Senator Johnstone Muthama v Director of Public Prosecutions, Cabinet Secretary for Interior and Co-ordination of National Government & Inspector General of Police; Japhet Muriira Muroko (Interested Party)* (2020) eKLR.
[109] *Senator Johnstone Muthama v Director of Public Prosecutions, Cabinet Secretary for Interior and Co-ordination of National Government & Inspector General of Police; Japhet Muriira Muroko (Interested Party)* (2020) eKLR.
[110] *Senator Johnstone Muthama v Director of Public Prosecutions, Cabinet Secretary for Interior and Co-ordination of National Government & Inspector General of Police; Japhet Muriira Muroko (Interested Party)* (2020) eKLR.

Similarly, in the case of *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others;Ayika (Interested Party),*[111] the interested party using his verified *X(formerly Twitter)*[112] handle account posted among other statements that people should prepare for an army to take over government for 90 days then there would be elections and was subsequently arrested and charged with subversive activities contrary to section 77(1) (a) of the Penal Code.[113] This resulted in the Petitioner challenging the constitutionality of Section 77 of the Penal Code. In its judgement, the court proceeded to declare Section 77 of the Penal Code as unconstitutional terming it a colonial legacy which limited freedom of expression through the vaguely worded offence of subversion and whose provisions were overly broad and vague thereby lacking clarity as to their purpose and intent.[114]

In another pertinent case involving former Gatundu South MP (as he then was) Moses Kuria, was accused of inciting violence against Raila Odinga, the official opposition leader at the time, his wife and his supporters during a political rally at Wangige in Kiambu on September 11, 2017 ahead of the repeat presidential elections in 2017. In his address, Moses Kuria called for a manhunt for the 70,000 people in the country who had voted for Raila Odinga during the initial presidential elections in 2017. He was further captured on video claiming that *"Raila cannot be trusted with the future of Kenyan youths because he has 'offered his own three children as sacrifice' to gain power."*[115] In this case, Chief Magistrate Francis Andayi acquitted the accused on the basis that the prosecution had failed to adduce enough evidence against the law maker to establish a prima facie case. Specifically, the court noted that the charges against Moses Kuria did not meet the threshold of Section 96(a) of the Penal Code which required that his utterances should bring death or physical injury to any person or to any class, community or body of persons; or result in the damage or destruction of any property.[116]

[111] *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika (Interested Party)* (2024) eKLR.
[112] X (formerly Twitter) is a global social media platform owned by Elon Musk.
[113] *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika (Interested Party)* (2024) eKLR.
[114] *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika (Interested Party)* (2024) eKLR.
[115] Karanja F, 'MP Moses Kuria acquitted in incitement to violence case' The Standard, 2019 – < MP Moses Kuria acquitted in incitement to violence case - The Standard > on 11 November 2024.
[116] Karanja F, 'MP Moses Kuria acquitted in incitement to violence case' The Standard, 2019 – < MP Moses Kuria acquitted in incitement to violence case - The Standard > on 11 November 2024.

The evidentiary challenges associated with prosecuting incitement to violence under Section 96 of the Penal Code can also be seen in the case of *Isaac Kiptoo Koros v Republic.*[117] where the appellant was charged with obstructing a police officer contrary to section 253 (b) of the Penal Code as well as with incitement to violence and disobedience of the law contrary to section 96(c) of the Penal Code. Here, the court emphasised that the offence of incitement to violence is committed only if it is shown that the accused person's conduct was without lawful excuse.[118] As such, it was incumbent upon the prosecution to show in the first place that the appellant uttered words which were calculated to prevent or defeat by violence the enforcement of the law.[119] In this case, there were inconsistencies and lack of unanimity in the prosecution's evidence concerning the exact words allegedly spoken by the appellant. According to Prosecution Witness 1(P.W.1) Channelle Beru, the appellant had said *"hawa ni wakora"* (these are thugs) in relation to the police officers on the scene, but according to Sergeant (Sgt.) Sagala, the appellant said they were *"conmen on the loose."* and that they were *"bogus officers out to solicit money from wananchi.*" This lack of uniformity on the words spoken by the appellant ultimately led to the conviction of the accused by the trial court being quashed and the probation sentence set aside.[120]

The issue of incitement to violence still remains rampant in Kenya's political landscape as evidenced by the recent impeachment of the second deputy president of Kenya, Hon. Rigathi Gachagua. Among other grounds for his impeachment were his highly inflammatory and inciteful utterances during various public fora where he likened the Government of Kenya to a company such that the allocation of government development projects and public sector jobs should be based on 'shares' determined by how the populace of the various ethnic communities voted in the 2022 general election.[121] The parliamentary proceedings on this matter highlighted the effect of these statements which was the undermining of national unity and peaceful co-existence in the context of Kenyan society's multi-ethnic demography and multi-cultural diversity. Additionally, these statements risked alienating, isolating, and creating disharmony among the various ethnic communities of Kenya which could potentially lead to violence.[122] While these utterances

[117] *Isaac Kiptoo Koros v Republic* (2011) eKLR.
[118] *Isaac Kiptoo Koros v Republic* (2011) eKLR.
[119] *Isaac Kiptoo Koros v Republic* (2011) eKLR.
[120] *Isaac Kiptoo Koros v Republic* (2011) eKLR.
[121] National Assembly Hansard Report, 8 October 2024, 5-7.
[122] National Assembly Hansard Report, 8 October 2024, 5-7.

ultimately contributed to Mr. Gachagua's impeachment, the prevailing legal framework's inadequacies in clearly distinguishing between freedom of expression and incitement exacerbate the uncertainties about the appropriate mechanisms for addressing and prosecuting of such conduct.

3.1.1 The existing gap arising from the absence of stand-alone subsidiary legislation regulating incitement to violence

An analysis of the current legal framework governing incitement to violence through orally made statements highlights a significant gap: the absence of stand-alone subsidiary legislation providing specific guidelines on its regulation and prosecution, aside from the general criminalization under the various provisions of the Penal Code. This is in stark contrast to hate speech, another constitutionally recognised limitation to freedom of expression under Article 33(2) of the Constitution, which is expressly governed and regulated under the National Cohesion and Integration Act (NCI Act). Following the 2007/2008 post-election violence in Kenya, the NCI Act was enacted in 2008 to encourage national cohesion and integration as well as provide for the establishment, powers and functions of the National Cohesion and Integration Commission (NCIC) mandated to tame hate speech and promote national cohesion and integration.[123]

Under Section 13 of the NCI Act, hate speech is explicitly prohibited. It is described as the use of threatening, abusive or insulting words or behaviour, or display of any written material; publishing or distribution of written material; presenting or directing the performance the public performance of a play; distribution, showing or playing, a recording of visual images; or providing, producing or directing a programme, which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour done with the intention to stir up ethnic hatred or having regard to all the circumstances, ethnic hatred is likely to be stirred up.[124] In order to assess if an act of ethnic hatred qualifies to be termed as hate speech, the NCI Act proceeds to define the phrase ethnic hatred as hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.[125] A person who therefore

[123] Preamble, *National Cohesion and Integration Act*, (Act No 12 of 2008); National Cohesion and Integration Commission, *Kenya's National Action Plan Against Hate Speech*, 2022, 2.
[124] Section 13(1), *National Cohesion and Integration Act*, (Act No 12 of 2008).
[125] Section 13(3), *National Cohesion and Integration Act*, (Act No 12 of 2008).

performs an act amounting to hate speech, is found to have committed an offence and is liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.[126]

In addition, the NCI Act also prohibits the crime of racial or ethnic contempt under Section 62(1) whereby it renders it an offence, liable to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years, or both, to make utterances that have an objective to encourage feelings of hostility, hatred, contempt, discrimination or violence against another individual, community or group on the grounds of race or ethnicity.[127] Other sections of the NCI Act further provide for enforcement mechanisms such as complaint and compliance procedures that facilitate and provide guidance to the NCIC on the matters they may investigate and how to conduct the investigation of hate speech cases.[128]

Supplementary to this legislation, the NCIC has also issued non-statutory guidelines such as the 'Kenya's National Action Plan Against Hate Speech' which details the role of various actors in combating hate speech and outlines a structured plan of action for the implementation of hate speech management in Kenya.[129] Another notable resource is 'Hatelex: A Lexicon of Hate Speech Terms in Kenya' which highlights commonly used terms in different vernacular languages that would be regarded as amounting to hate speech in the Kenyan contexts.[130]

In conclusion, the absence of subsidiary legislation and supplementary guidelines that provide for regulation of incitement to violence, combined with the legal ambiguities in both the Constitution and the Penal Code, and the limited success in prosecuting incitement to violence cases due to restrictive judicial approaches underscore a significant gap within the current legal framework on incitement to violence within the Kenyan landscape. This points to a critical need for a more detailed framework that articulates a more precise delineation between the right to freedom of expression and the limitation of incitement to violence. This would entail the establishment of a

[126] Section 13(2), *National Cohesion and Integration Act*, (Act No 12 of 2008).
[127] Section 13(1), *National Cohesion and Integration Act*, (Act No 12 of 2008).
[128] Part VI, *National Cohesion and Integration Act*, (Act No 12 of 2008).
[129] National Cohesion and Integration Commission, *Kenya's National Action Plan Against Hate Speech*, 2022.
[130] National Cohesion and Integration Commission, *Hatelex: A Lexicon of Hate Speech Terms in Kenya*, 2022.

comprehensive criteria that defines and describes incitement to violence as a distinct limitation to the right to freedom of expression and consequently a criminal offence in Kenya.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

Based on the analysis and identification of the gaps in the current legal framework governing the right to freedom of expression vis-à-vis the crime of incitement to violence in Kenya, this chapter highlights the main conclusions arrived at from the analysis as well as provides recommendations that would aid in better regulating incitement to violence within the Kenyan context.

4.1 CONCLUSION

Incitement to violence, as a limitation to the freedom of expression, has the probability of causing adverse consequences at an individual, community/group and national level. Against this backdrop, this study arrives at four key conclusions.

First, a fine line exists between balancing the freedom of expression and incitement to violence. This complexity stems from the inherent nature of the right to freedom of expression which seeks to protect people's ability to articulate their views freely, including through expressions that may be deemed to be offensive or unpopular. The nature of this right has therefore, at times, made it possible for individuals to perpetuate incitement to violence while hiding behind the veil of freedom of expression. Consequently, the regulation of incitement to violence while simultaneously upholding and safeguarding the fundamental right to free expression remains a significant yet challenging endeavour.

Second, although Kenya generally has legislation aimed at regulating incitement to violence, the existing legal framework lacks a comprehensive, workable and practical definition and/or criteria for determining what constitutes incitement to violence. For instance, Article 33(2) of the Constitution identifies incitement to violence as a limitation to the freedom of expression, however, as observed in judicial decisions,[131] it does not expressly define the term 'incitement to violence'. Similarly, subsidiary legislation in place such as the Penal Code criminalises incitement to violence through various sections and employing different terms, but it also fails to comprehensively describe what amounts to incitement to violence with certainty and feasibility. This is in contrast to hate speech whose regulation is seen to be more effective by virtue of its express description in subsidiary legislation, the NCI Act, and through the supplementary

[131] *Chirau Alimwakwere v Robert M. Mabera & 4 Others* (2012) eKLR.

guidelines provided for by the NCIC. It is based on this legal ambiguity within the legal framework governing incitement to violence that the constitutionality of some of these provisions has been questioned as demonstrated in cases such as *Senator Johnstone Muthama*[132] and *Katiba Institute,*[133] analysed in Chapter Three above.

Third, from the analysis of jurisprudence dealing with incitement to violence, this study notes that the courts remain cautious in providing for a precise definition and description of incitement to violence. Instead, they have tactfully avoided substantively differentiating freedom of expression from incitement to violence by primarily focusing on procedural and evidentiary technicalities as seen in cases such as *Isaac Kiptoo Koros v Republic.*[134] This reluctance of the courts to define, develop and apply a set criteria for addressing incitement to violence cases appears to be rooted in concerns that such regulation may inadvertently undermine and infringe on the democratic right to freedom of expression in the process. However, this judicial approach has significant adverse consequences. The absence of establishing and applying a well-defined criterion coupled with the court's emphasis on procedure has rendered the successful prosecution of incitement to violence cases challenging; even in instances where the commission of the offence by the individual(s) concerned is apparent.

Lastly, incitement to violence, particularly through orally made statements, is exacerbated during periods of political tension in Kenya. This pattern can be traced back to the 2007 post-election violence and subsequent election periods during which people, particularly members of the political class, made statements that incited the public to violence and in certain instances resulted in actual violence. A more recent example is the political unrest surrounding the controversial proposed Finance Bill 2024 which sparked protests across the country and eventually led to the impeachment of Deputy President Hon. Rigathi Gachagua for, among other reasons, the making of statements deemed to amount to incitement to violence. The volatile nature of such periods therefore calls upon the need for better regulation of incitement to violence in Kenya whereby

[132] *Senator Johnstone Muthama v Director of Public Prosecutions, Cabinet Secretary for Interior and Co-ordination of National Government & Inspector General of Police; Japhet Muriira Muroko (Interested Party)* (2020) eKLR.
[133] *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika (Interested Party)* (2024) eKLR.
[134] *Isaac Kiptoo Koros v Republic* (2011) eKLR.

those responsible for its perpetuation do not simply get away with it without being held accountable for their conduct.

Cumulatively, this study concludes that due to the detrimental effects of incitement to violence not only on the lives and well-being of individuals but also on the peaceful and harmonious co-existence of people, with diverse backgrounds, in society, there must be clarity on when to draw the line between freedom of expression and incitement to violence. This is to ensure the effective regulation and successful prosecution of the offence while also safeguarding the right to express oneself.

4.2 RECOMMENDATIONS

Drawing from the foregoing conclusions, the study makes several recommendations to various categories of people, most notably, the judiciary and the legislature, who play a key role in the regulation of incitement to violence.

4.2.1 Recommendations to the Judiciary

To the Judiciary, this study recommends:

The assessment of all incitement cases under a robust and uniform six-part incitement test.[135] The adoption and application of this test within the Kenyan legal framework serves as **the main recommendation of this study** in order to better delineate between freedom of expression and incitement to violence. This test should examine the following elements:

a. The context of the expression

Assessing the context of the expression should ideally be the starting point in determining whether a statement meets the threshold of incitement to violence. The analysis of the context should consider the following aspects:

The existence and history of conflicts within the society. Under this element, the court could examine issues such as whether there has previously existed conflicts between relevant groups and whether this has led to the outbreaks of violence following other instances of incitement. In Kenya

[135] This test was developed by ARTICLE 19 in its 2012 Policy Brief on Prohibiting incitement to discrimination, hostility or violence. See -</https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf > accessed on 2 December 2024.

for example, the court could consider the 2007 post-election violence as an instance during which there was conflict between certain tribes in Kenya which then led to the outbreak of violence for reasons including incitement of the public to violence.

The existence and history of institutionalised discrimination against a certain group or groups particularly during a particular period for example election periods in Kenya. Under this element, the court could assess whether there are structural inequalities and discrimination against a certain group or groups of people and the reaction to inciteful statements targeting these group/groups.

The media landscape in Kenya particularly the diversity and pluralism of the media in the country. This would entail an examination of issues such as censorship; limits to the independence and transparency of the media or journalists; broad and unclear restrictions on the content of what may be published or broadcast and the evidence of bias in the application of these restrictions.

b. The speaker/proponent of the expression

For the second element, the identity of the speaker, particularly their position or status in society as well as their standing or influence should be taken into account. As was stated by the court in the case of *Republic v Moses Kuria,*[136] the Respondent, Hon. Moses Kuria, being a public figure and a person of influence, had an extra responsibility to be careful in choosing the words he utters in public so that his utterances do not plant seeds of discord between members of the various communities that make up Kenya.[137] As such, the court emphasized that public figures ought to weigh their words because whatever they say is bound or is likely to have an effect on the members of society unlike similar words uttered by an ordinary citizen.[138]

On this basis, this element should consider aspects such as the official position of the speaker; the level of the speaker's authority or influence over the audience coupled with his/her charisma; the relationship of the speaker with the audience for example a religious or community leader with the ability to influence the audience's decisions and actions and lastly whether the statement was made by the person in his/her official capacity. Under this element, special consideration should be given

[136] *Republic v Moses Kuria* (2016) eKLR.
[137] *Republic v Moses Kuria* (2016) eKLR.
[138] *Republic v Moses Kuria* (2016) eKLR.

to members of the political class/ politicians whom the court noted have been the key makers of utterances that incite members of the public to violence within the Kenyan context.[139]

c. The intent of the speaker/proponent of the expression to incite violence.

The question of the speaker's intent to incite others to violence should be based on an assessment of the case and its circumstances as a whole. As such individual aspects that the court could examine include:

The language used by the speaker. Here, the court could look at how explicit the language was or whether the language was direct without being explicit; the wording and tone of the speech used by the speaker and the circumstances in which the speaker disseminated the statement(s). Given the context, the court could also assess whether the speaker's intent to incite violence was unambiguous and clear to its audience such that the speaker could reasonably have guessed the likely impact of his/her speech.

The objectives pursued by the speaker. Under this aspect, the court could consider the purpose of the speaker's utterances and what compelled him/her to speak. Where the court identifies that the motive behind the speech was for other reasons such as the dissemination of news, historical research or attempts to expose the wrongdoings of the government in the interests of public accountability, and not for purposes of inciting violence, then this may not amount to incitement to violence.

The scale and repetition of the communication. The intent of the speaker could also be determined by assessing the time factor such that if the speaker repeated the communication over time or on numerous occasions, then it is more likely that there was an intention to incite a certain action which in that case would be violence towards a certain individual or group of individuals.

d. The content of the expression.

In analysing the content of the expression, consideration should be given to:

What was said by the speaker whereby of relevance is the degree to which the statements made involved a direct call for the audience to act in a certain way. Consequently, where the court finds

[139] *Republic v Moses Kuria* (2016) eKLR.

that the statements specifically call for violence and that such a call to action was unambiguous as far as the intended audience is concerned and could not be interpreted in any other fashion, this would then strongly point to the statement made amounting to incitement to violence.

Who was targeted in terms of both the audience, that is, those whom the speech was intended to incite as well as the potential victims of the violence which refers to the individual/group or community who are the object of the violence called for in the speech. With reference to the victims, the court should therefore consider factors such as whether they are directly or indirectly named and whether the statements describe the victims-to-be as other than human.

How the words were said whereby the court should examine the degree to which the speech was provocative and direct without including mitigating material. Additionally, the court should take into consideration whether the statements made by the speaker contained phrases, words, or coded language that has taken on a special loaded meaning, in the understanding of the speaker and the audience.

e. The extent and magnitude of the expression.

This should include an examination of the following three factors:

The public nature of the expression. In assessing the public nature of the incitement to violence, the court should consider whether the statement was circulated in a restricted environment or whether it was widely accessible to the general public; whether the communication was directed at the general public (a non-specific audience); whether the speech was directed towards a number of individuals in a public place and whether the statements were made in a closed place accessible by ticket/paying of an entrance fee or if it was in an exposed or public area. For speeches made in private, they should be considered in light of an individual's right to privacy such that their private location may act as a mitigating circumstance.

The means of dissemination of the expression for example during a public gathering such as political rallies and campaigns, the press, audio-visual media, a book, or a piece of art. Here, of relevance is to consider whether the statement was circulated in a restricted environment, or it was widely accessible to the general public.

The magnitude or intensity of the expression with regards to its frequency, amount and the extent of the communications for example one instance of dissemination visavis several repeated instances of dissemination.

f. The likelihood of the advocated action occurring, including its imminence.

Under this element, the test should be whether the ordinary, reasonable viewer would understand from the public act that he/she is being incited to violence. While the probability of violence is to be established on a case-by-case basis, common factors the court could consider in incitement to violence cases include:

Whether the speech was understood by its audience as a call to acts of violence such that there was a reasonable probability that the speaker's communication would succeed in inciting actual action by the audience against the target group.

Whether the speaker was able to influence the audience such that there was a reasonable probability that harm, physical and/or psychological to an individual or group, or harm to social cohesion, would result from the expression

Whether the audience had the means to resort to the advocated action and commit acts of violence such as access to weapons as simple as stones whose use could injure an individual or result in the destruction of property.

Whether the targeted victim group has experienced past incidents of suffering resulting from violence towards them or whether it has previously been the target of acts of violence.

In applying this six-part incitement test to judicial determinations, it is essential to ensure that its implementation does not become a tool for unjustly penalizing expressions that are merely offensive or unpopular but do not necessarily amount to incitement to violence. As such, in order to safeguard an individual's freedom of expression, only cases of incitement to violence that satisfy all six elements of the incitement to violence criteria should attract a severe penalty such as imprisonment or substantial fines. For the less severe forms of incitement, that meet some but not all elements of the six-part criteria, this could be addressed through alternative measures, including

civil or administrative law-based restrictions or public policy responses. This graduated approach would help in balancing the effective regulation and prosecution of incitement to violence while also protecting the right to freedom of expression.

Other recommendations to the Judiciary include:

Availing a variety of civil and administrative remedies to victims of incitement to violence. The civil remedies could include monetary and non-monetary compensation. On the other hand, the administrative remedies could include an order to issue a public apology by the perpetrator of incitement to violence (though not as an automatic loss of culpability) and the formulation of codes of integrity providing for institutional and sectoral consequences for the making of utterances constituting incitement to violence. Having a range of remedies would help ensure that for all forms of incitement to violence, regardless of their degree of severity, the perpetrators are held accountable for their criminal actions in one way or another with the victims having access to a wide range of remedies.

The resort to alternative dispute resolution mechanisms such as arbitration as provided for in Article 159(2)(c) of the Constitution for less severe cases of incitement to violence. Due to the time-sensitive nature of incitement to violence cases, resorting to alternative means would assist in avoiding delays that may arise from handling such cases through the formal court process.

4.2.2 Recommendations to the Legislature/Lawmakers

To the lawmakers(legislature), this study recommends:

The enactment of stand-alone sui generis legislation on incitement to violence or the amendment of existing legislation such as the NCI Act to include a section which, in addition to criminalizing the conduct, provides therein the six-part incitement test as the criteria for assessing incitement to violence cases. The Act should also include provisions highlighting enforcement mechanisms for incitement to violence such as complaint and compliance procedures, investigation processes and prosecutorial guidelines.

The inclusion, either in the stand-alone legislation or through an amendment of the NCI Act, of an express definition of the term 'incitement to violence' or the key terms that make up the crime such as what is meant by 'violence' and 'incitement' in the context of the offence. Having a precise

definition of the crime to supplement its general criminalisation would help provide the certainty needed for an obligation to prohibit incitement to violence as well as bring about consistency and uniformity in the jurisprudence surrounding the commission of the crime.

The preparation and inclusion of comprehensive guidelines on incitement to violence which would entail details on aspects such as the role of various stakeholders in curbing incitement to violence as well as words/statements/phrases whose use would amount to incitement to violence. These supplementary guidelines could be annexed in the stand-alone legislation governing incitement to violence or be provided for in the NCI Act so as to give them a binding character before any judicial forum.

4.2.3 Other General Recommendations

The provision of comprehensive and regular training and education on incitement to violence to the judiciary, law enforcement authorities, public bodies, civil servants, and the general public. The training would include enlightening these various categories of people on aspects such as how to identify and consequently avoid incitement to violence, how to report incidents of incitement to violence, the investigative process of such cases, and the importance of upholding human rights values and principles in order to promote peace and harmony within the society among the various tribes and communities.

International bodies such as the United Nations (UN) and the African Union (AU) should take on a more active role in monitoring cases of incitement to violence in Kenya. This should be done in a way that is context-specific and inclusive of local languages to ensure accuracy and cultural relevance. Additionally, such efforts should leverage existing in-house expertise, guidance from UN human rights mechanisms, and contributions from independent national human rights institutions and civil society organizations. Further, it is imperative that their monitoring role includes the requirement of periodic review and reporting of incidents of incitement to violence by Kenya to enhance accountability and inform preventive measures.

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