

**BALANCE BETWEEN THE RIGHT TO FREEDOM OF EXPRESSION AND ANTI-TERROR LEGISLATION: A CASE STUDY OF KENYA**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE BACHELOR OF LAWS DEGREE, STRATHMORE UNIVERSITY**

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## **Declaration**

I declare that this paper is the work of my hands and thoughts inspired by various ideas of a progressive Human Rights Law regime

## **Abstract**

The 21<sup>st</sup> century has seen a significant rise in terrorist activities. These activities are known to disrupt public order and subsequently destabilise both developed and developing countries. The Paris attacks in November 2015 on a football stadium, a theatre and restaurants led to the death of 128 people, the largest number of deaths France has witnessed since the end of World War II not to mention the presence of the Islamic State of Iraq, Syria and the Levant (ISIL) a self-proclaimed “caliphate” arbitrarily executing scores of People in the Middle East. In Kenya, the Al shabab has conducted a number of attacks that partially disabled the country, 67 died in a Westgate Mall Act in 2013, 147 were killed in Garrissa University in 2015 and other attacks that have jeopardised the country’s economy and national security. It is the duty of the state to ensure that peace and security are maintained within their territories. Legislation is key in ensuring these objectives are met. It is however important in the course of safeguarding national security and protecting public order, they do not violate other Civil and Political Rights. Freedom of expression is the cornerstone of democracies and should therefore be limited within the confines of the law.

## List of abbreviations

¶ paragraph

ACHPR-African Convention on Human and People's Rights

ACHR-American Convention on Human Rights

AfCHR-African Court of Human Rights

ECHR-European Convention on Human Rights

EcmHR-European Commission of Human Rights

ECtHR-European Court of Human Rights

IACtHR- Inter- American Court of Human Rights

ICCPR- International Covenant on Civil and Political Rights

ICESCR-International Covenant on Economic Social and Cultural Right

SLAA- Security Laws Amendment Act

PTA- Prevention of Terrorism Act

UN- United Nations

UNTS- United Nations Treaty Series

## List of Cases

- Autronic AG v Switzerland* ECtHR Judgement of 22 May, 1990
- Abrahams v USA* U.S 616 (1919)
- Blamdet Tromso and Stensaas v Norway*. ECtHR Judgement of 20 May 1999
- Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another*  
[2015] eKLR
- Ceylan v Turkey* ECtHR Judgement of 8 July 1999
- David Njoroge Macharia v Republic* [2011] eKLR
- Grayned v City of Rockford* 408 U.S 104
- Greece v. The United Kingdom*, EcmHR, Judgement of 1958
- Handyside v United Kingdom* ECtHR Judgement of 7 December 1976
- Incal v Turkey* ECtHR Judgement of 9 June 1998
- Karatas v Turkey* ECtHR Judgement of 8 July 1999
- Kenya Section of the International Commission of Jurists v Attorney General & Another*  
[2011] eKLR
- Keun-Tae Kim v. The Republic of Korea*, CCPR Communication No. 574/1994
- Lohé Issa Konaté v. Burkina Faso* AfCHR, Application No. 004/2013
- Malawi African Association and Others v. Mauritania*, Communication No. 54/91
- Margues de Morais v Angola* (2005) AHLR 3
- Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria* (2000) AHRLR 227
- Near v Minnesota* 283 US 697 (1931)
- New York Times v United States* 403 US 713 (1971)
- Pierce v USA* 252 U.S 239 (120)
- Re the Matter of Zipporah Wambui Mathara* [2010] eKLR
- Schaefer v USA* 251 U.S 466 (1920)
- Sürek and Özdemir v. Turkey* ECtHR Judgement of 8 JULY 1999
- The Law Society of Zimbabwe v The Minister of Transport and Communication and another* (2004) AHLR 292
- Uson Ramirez v. Venezuela*, Petition 577-05, Inter-Am. C.H.R.
- Zana v Turkey* ECtHR Judgement of 25 November 1997

# BALANCE BETWEEN RIGHT TO FREEDOM OF EXPRESSION AND ANTI- TERROR LEGISLATION: A CASE STUDY OF KENYA

## CHAPTER 1- INTRODUCTION

### **1.1 Background of study.**

The 21<sup>st</sup> century has seen a significant rise in terrorist activities. These activities are known to disrupt public order and subsequently destabilise countries. Terrorism has been defined as criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act.<sup>1</sup>

Terrorism is indeed a threat and has a direct impact on human rights as the right to life, right to security, right to own property amongst other rights are violated on a large scale. This has subsequently led to a rapid response of different governments in enacting legislation which is aimed at curtailing such activities. One must therefore acknowledge and appreciate the importance of anti-terrorism laws as a means of deterring future crimes of the same nature. Governments must however ensure that in the course of safeguarding national security and protecting public order, they do not violate other Civil and Political Rights. They include but are not limited to: right to life, right to self-determination, right to liberty and security of the person, freedom from torture and inhumane treatment, freedom from slavery and forced labour, freedom of opinion and expression.<sup>2</sup> These rights cannot be limited except as provided by the law.

The right that shall be considered in this paper is freedom of expression also referred to as freedom of speech. It has been defined as the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of

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<sup>1</sup> UN Security Council Resolution 1566 (2004).

<sup>2</sup> Mbondenyi M, *International Human Rights and their enforcement in Africa*. (Law Africa Publishing (K) Ltd, Kenya 2011).

frontiers.<sup>3</sup>Freedom of expression can be on an individual, group or organisation level. It also includes freedom of the media. Kenya, like many other countries for instance the United States of America, the United Kingdom, Egypt and Ethiopia has legislated against terrorism. The law concerned with regulation of terrorist activities in Kenya is the Prevention of Terrorism Act,<sup>4</sup> which has been amended by the Security Laws Act.<sup>5</sup> This paper seeks to demonstrate that the limitations imposed on freedom of expression by the requisite Act do not conform and are therefore inconsistent with International standards as regards limitation of freedom of expression. The International Covenant on Civil and Political Rights, ICCPR, shall be considered in determining the legality of the limitation of freedom of expression.<sup>6</sup> Kenya is a signatory to the ICCPR as she ratified it on the 1<sup>st</sup> of May 1972,<sup>7</sup> she also signed the optional protocol to the covenant.<sup>8</sup> It is impressive to note that Kenya is one of the countries which has ratified the ICCPR without entering reservations. She has therefore not purported to modify or exclude any provision of the treaty.<sup>9</sup>

It is vital to remember that this paper is written in the context of the limitation on freedom of expression as per the relevant treaties<sup>10</sup> as well as the Constitution of Kenya. It seeks to critically analyse whether the limitations imposed by national security laws are within confines of the law.

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<sup>3</sup> Article 19, UNGA, *Universal Declaration of Human Rights* General Assembly Resolution 217 A(III) ( 10 December 1948), Article 19, *International Covenant on Civil and Political Rights* ,16 December 1966, 999 UNTS 171 , Article 9, *African Charter on Human and People's Rights*, 27 June 1981, Article 13,*European Convention on Human Rights* 4 November 1950, Article 10, *American Convention on Human Rights*,22 November 1969

<sup>4</sup> Laws of Kenya Act No. 30 of 2012.

<sup>5</sup> Kenya gazette supplement No.167( Acts No. 19).

<sup>6</sup> *International Covenant on Civil and Political Rights*.

<sup>7</sup> United Nations treaties database, available at [https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtmsg\\_no=iv-4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtmsg_no=iv-4&lang=en) (accessed on 22.02.2015).

<sup>8</sup> *Optional Protocol to the International Covenant on Civil and Political Rights* , 16December 1966.

<sup>9</sup> Article 2, *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 U.N.T.S. 331.

<sup>10</sup> Article 19, UNGA, *Universal Declaration of Human Rights*, Article 19,*International Covenant on Civil and Political Rights*, Article 9, *African Charter on Human and People's Rights* , Article 13,*European Convention on Human Rights*, Article 10, *American Convention on Human Rights*.

## 1.2 Statement of Problem

The penal code of Kenya<sup>11</sup> has been amended to limit freedom of expression.<sup>12</sup> Section 66 of the Security laws Amendment Act inserted section 66 of the Penal Code which states, (1) A person who publishes, broadcasts or causes to be published or distributed, through print, digital or electronic means, insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.(2) A person who publishes or broadcasts any information which undermines investigations or security operations by the National Police Service or the Kenya Defence Forces commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years, or both.<sup>13</sup>

The justification made in limiting freedom of expression is article 25 of the Constitution of Kenya, where freedom of expression does not fall under non-derogable rights.<sup>14</sup> The problem is that freedom of expression has been limited by a blanket statement. It is imprecise and one does not know at what point and how they should regulate their conduct in order to abide by the law. A person risks being charged with the offence of terrorism simply because the law is unclear. The high court intervened by declaring the provisions of Sections 12 and 64 of the Security Law Amendment Act unconstitutional.<sup>15</sup> There is however still a gap in the law as to how to curtail freedom of expression. This paper will therefore prescribe in what circumstances freedom of expression should be limited. Essentially, whilst the government has the intention to protect public order and preserve national security, it does not explicitly draw the red line between acts which constitute terrorism and acts which fall within freedom of expression.

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<sup>11</sup> Laws of Kenya Cap 63.

<sup>12</sup>Section 12, *Security laws Amendment Act 2014*.

<sup>13</sup> Section 66, *Security laws Amendment Act 2014*.

<sup>14</sup>Article 24, *Constitution of Kenya (2010)*.

<sup>15</sup> *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* [2015] eKLR.

### **1.3 Research questions and objectives**

This paper seeks to answer the following questions.

- 1. Do anti-terrorism laws in Kenya curtail freedom of expression?**
- 2. What are the international standards for limiting freedom of expression and has Kenya adhered to them?**
- 3. How can anti-terror laws be drafted in such a manner that they do not unduly infringe on freedom of expression?**

In answering the first question, a critical analysis of the significant legislation in Kenya will be made. This will include the Prevention of Terrorist Act,<sup>16</sup> the penal code<sup>17</sup> as well as any other significant acts through the lenses of the amendments made on Security laws in 2014.<sup>18</sup> A review of what the national courts have stated will be made.

In tackling the second question, international and regional treaties will be analysed vis-a-vis the permissible limitations of freedom of expression. The decisions and advisory opinions made by the regional Human Rights courts such as the African Court of Human Rights, European Court of Human Rights and the Inter American Court of Human Rights will also be considered. General Comments made by the UN Human Rights Committee will be referred to.

As for the third question, the paper will seek to study how the courts have attempted to balance freedom of expression on one hand and the concerns of national security on the other. Based on these findings, the dissertation will give recommendations on how Kenya can balance the security concerns against the right to freedom of expression.

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<sup>16</sup> Laws of Kenya Act No. 30 of 2012.

<sup>17</sup> Laws of Kenya Cap 63.

<sup>18</sup> Kenya gazette supplement No.167 (Acts No. 19).

## 1.4 Theoretical framework

This paper has been written through the lenses of Natural Law theory. According to this theory, the authority of legal standards necessarily derives, at least in part, from considerations having to do with the moral merit of those standards. According to John Finnis, the conceptual point of law is to facilitate the common good by providing authoritative rules that solve coordination problems that arise in connection with the common pursuit of these goods. The paper does not ascribe to John Austin's theory of the sovereign's command which suggests that human rights are granted by the sovereign simply because the argument of human dignity appeals to the author. Human dignity informs the inherent nature of human rights which cannot be arbitrarily taken from them. Under the human rights discourse as interpreted by international and regional courts in considering the International Covenant on Civil and Political Rights (ICCPR), any limitation of a right must be

- a) Prescribed by law
- b) Legitimate
- c) Necessary within a democratic society
- d) Proportional<sup>19</sup>

### 1.4 (a) Prescribed by law

Under this requirement, the law should be accessible, unambiguous and drawn narrowly with precision so as to enable individuals to foresee whether a particular action is lawful in order to regulate their conduct.<sup>20</sup> Further, the law should provide for adequate safeguards against abuse of process in the spirit of accountability.<sup>21</sup>

### 1.4 (b) Legitimate

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<sup>19</sup> Article 19 (3), *International Covenant on Civil and Political Rights, Autronic AG V Switzerland* ECtHR Judgement of 22 May, 1990 para. 53.

<sup>20</sup> *The Law Society of Zimbabwe v The Minister of Transport and Communication and another* (2004) AHLR 292 para 22, *Autronic AG v Switzerland*, 54.

<sup>21</sup> *The Law Society of Zimbabwe v The Minister of Transport and Communication and another* 21.

Legitimate ground is that of protection of national security or of ordre public (public order), or of public health or morals<sup>22</sup> any restriction on freedom of expression that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate security interest.

#### **1.4 (c) Necessary in a democratic society**

To establish that freedom of expression is necessary, the government must demonstrate:

- i. The expression poses a serious national security threat to a legitimate national security interest
- ii. The limitation imposed is the least restrictive means possible for protecting the interest
- iii. The restriction is compatible with democratic principles.

#### **1.4 (d) Proportionality**

This implies that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect<sup>23</sup>

The paper will demonstrate that the threshold set out above has not been met by Kenya in limiting freedom of expression.

#### **1.5 Justification of study**

This paper aims to contribute to the diverse field of International Human Rights Law, specifically the war on terrorism. There is need to tread carefully to ensure that Human Rights are not jeopardised in the quest to protect national security and public order. This study is in a bid to act as a guideline to both future and current legislation that could subdue

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<sup>22</sup> Human Rights Committee, General comment no 34, 29.

<sup>23</sup> *Margues de Morais v Angola* (2005) AHLR 3, 6.8, *Blamdet Tromso and Stensaas V Norway*. ECtHR Judgement of 20 May 1999, para.58.

the right to freedom of expression in the quest of upholding any other interests that are seemingly more important.

## 1.6 Literature Review

Geoffery Stone analyses the evolution of the limitation of freedom of expression in the United States Jurisdiction.<sup>24</sup> He mentions that the prevalent limitations are those that threaten national security and jeopardise national secrets. He recognises that advocating for peace during the time of war resulted into acts that were deemed to be condemning the state and therefore the US Supreme Court constantly upheld the convictions of such individuals.<sup>25</sup> Stone's approach is that Government uses the justification of national security to suffocate civil liberties. He however does not analyse the limitations of freedom of expression within the confines of the law. This paper acknowledges that freedom of expression can and should be limited. It also restricts itself to anti-terrorism legislation in Kenya as opposed to the USA.

Golder and Williams have written on how protecting national security and freedom of expression can meet half way.<sup>26</sup> They have made a comparative analysis of some common law jurisdiction like Australia, South Africa, United Kingdom and Canada. The authors argue for a midpoint between National Security and freedom of expression which is not clearly captured. This paper shall provide for not only a guideline but a clear solution once the disparity between National Security and the right to freedom of expression are reconciled.

Munene Anthony, in his article<sup>27</sup> discusses the bill of rights generally in the pre-2010 Kenyan Constitution. His paper further discusses the philosophy of the bill rights to a greater extent as opposed to the substance of the rights. Moreover, the article discusses the bill of rights in a general context.

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<sup>24</sup> Geoffery R. Stone, "Free speech and National Security." University of Chicago Law School.

<sup>25</sup> *Pierce v USA* 252 U.S 239 (1920), *Schaefer v USA* 251 U.S 466 (1920), *Abrahams v USA* U.S 616 (1919).

<sup>26</sup> Ben Golder and George Williams, "Balancing National Security and Human Rights: Assessing the Legal Response of common law Nations to the Threat of Terrorism." *Journalism of competitive analysis*, Volume 8, NO. 1, 43-62, March 2006.

<sup>27</sup> Munene. A. Wambugu, "The bill of rights and Constitutional Order: A Kenyan perspective." *African Human Rights Law journal* 2001 available at <http://www.ahrlj.up.ac.za/munene-aw> accessed on 23:02:2015.

Owiro Okoth, writes his article<sup>28</sup> on freedom of expression in the context of the media, again this article is based on the pre 2010 Constitution of Kenya.

From the aforementioned literature, freedom of expression on an individual basis has not been discussed to a large extent. Most literature on freedom of expression is with regards to freedom of the media. Furthermore, the literature available in Kenya is centred on the old constitution. Finally, legislation against terrorism is an emerging field of law especially after the severity of terrorist attacks allegedly conducted by groups such as the infamous Al Shabaab based in Somalia. The legislation in place not only seeks to stop the actual terrorists but their sympathisers as well. It is inevitable that scholarly writings are made in a bid to shade some light on this relatively new field of law.

### **1.7 Modus operandi**

In conducting the study, the mode of research shall be desk research. This shall involve the collection and synthesis of the primary resources which are acts, treaties, the Constitution and judicial precedents. Further commentaries on the primary resources by different authors shall be analysed and used appropriately in this discourse.

### **1.8 Scope and limitations**

This study is intended to be a law reform article by comparing the Kenyan legislation to the international guiding principles of human rights; it looks at freedom of expression in the context of a democratic society. It is important to note that this article is written through the lenses of human rights protection as opposed to the John Austin approach of law which favour's the sovereign's actions at all costs.

### **1.9 Outline of chapters**

This paper consists of five chapters.

- a) **Chapter I** is an introduction to the paper.

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<sup>28</sup> Okoth Owiro, "*Law and mass media in Kenya.*"

- b) **Chapter 2** will discuss the national legal framework on freedom of expression alongside international and regional framework of freedom of expression.
- c) **Chapter 3** will entail an in depth analysis of the National Security laws and how they limit freedom of expression
- d) **Chapter 4** will then demonstrate how regional Human Rights Courts have attempted to balance the right to freedom of expression and National Security.
- e) **Chapter 5** will give the conclusion and recommendations of the study.

### **1.91 Timeline and duration**

Chapter 1- March 2015

Chapters 2 and 3- October 2015

Chapters 4 and 5 –November 2015

## CHAPTER 2- THE DOMESTIC AND INTERNATIONAL LEGAL FRAMEWORK ON FREEDOM OF EXPRESSION

This chapter shall analyse the legal framework on freedom of expression in Kenya as well as international instruments such the ICCPR,<sup>29</sup> the Universal Declaration on Human Rights.<sup>30</sup> It shall also look at regional Human Rights instruments which are the African Charter on Human and Peoples' Rights,<sup>31</sup> The European Convention on Human Rights<sup>32</sup> and the American Convention on Human Rights.<sup>33</sup>

### **2.1 Freedom of expression in Kenya**

The supreme law of the land within the Kenyan territory is the Constitution.<sup>34</sup> Acts of parliament are second in command followed by judicial precedents and customary law respectively. They should not be inconsistent with the Constitution.<sup>35</sup> Freedom of expression<sup>36</sup> is firmly embedded in the bill of Rights.<sup>37</sup> Article 33(1) states

*“Every person has freedom of expression, which includes— (a) freedom to seek, receive or impart information or ideas; (b) freedom of artistic creativity; and (c) academic freedom and freedom of scientific research.”*

Freedom of expression is graciously, as of right, extended to the media. The state cannot penalise individuals or media houses as a whole by merely airing their opinion in as far as freedom of expression is exercised within the confines of the law. The establishment of broadcasts as it were should be subject only to necessary regulatory mechanisms.<sup>38</sup> Freedom of expression unlike the right to a fair trial, right to *habeous corpus*, freedom from torture and inhuman treatment, freedom from slavery and servitude is not absolute under the Kenyan discourse.<sup>39</sup> It ought to be curtailed once it becomes, propaganda of war, incitement to violence, hate speech, advocacy of hatred that leads to negative ethnicity, could trample on the right of others or lead to discrimination or even defame individuals within the

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<sup>29</sup> *International Covenant on Civil and Political Rights.*

<sup>30</sup> UNGA, *Universal Declaration of Human Rights.*

<sup>31</sup> *African Charter on Human and peoples' Rights.*

<sup>32</sup> *European Convention on Human Rights.*

<sup>33</sup> *American convention on Human Rights.*

<sup>34</sup> Article 2 (1), *Constitution of Kenya (2010).*

<sup>35</sup> Article 2 (4), *Constitution of Kenya (2010).*

<sup>36</sup> Article 33, 34, *Constitution of Kenya (2010).*

<sup>37</sup> Chapter Four, *Constitution of Kenya (2010).*

<sup>38</sup> Article 34, *Constitution of Kenya (2010).*

<sup>39</sup> Article 25, *Constitution of Kenya (2010).*

society.<sup>40</sup> Freedom of expression in Kenya is therefore protected both an individual and group basis.

Freedom of expression has inevitably been affected by statutory legislation in Kenya. Some of the laws which have touched on freedom of expression are the Penal Code,<sup>41</sup> the National Cohesion and Integration Act,<sup>42</sup> the Media Act,<sup>43</sup> the National Intelligence Service Act<sup>44</sup> and the Security Laws Amendment Act.<sup>45</sup> The specific provisions will be discussed in Chapter III where an assessment of the national security laws will be made.

## **2.2 Freedom of expression in the UDHR and the ICCPR**

The UDHR<sup>46</sup> is the central case of International Human Rights law. Although it is not and does not purport to be a statement of law or legal obligations, it is a common standard of achievement for all people.<sup>47</sup> The UDHR defines freedom of opinion and expression as freedom to hold opinions without interference and to seek, receive and impart information through any media and regardless of any frontiers.<sup>48</sup>

The ICCPR,<sup>49</sup> one of the 1966 New York covenants, the other being the ICESCR,<sup>50</sup> echoed the sentiments of the UDHR in recognising freedom of expression. It has defined it as the right to hold opinions without interference, freedom to seek, impart receive knowledge of any kind regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of their choice.<sup>51</sup> Like the Constitution of Kenya, the ICCPR states that freedom of expression is not absolute. It stipulates that this right comes with duties which should not at the basic level, infringe the rights and reputation of others.<sup>52</sup> The right can also be limited for the protection of national security, public order, public health and public morality. The restrictions on freedom of expression must be necessary and ought to be provided by law. Moreover, freedom of expression is also not included in the bracket of non-

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<sup>40</sup> Article 33(2) *Constitution of Kenya* (2010).

<sup>41</sup> Laws of Kenya, Cap 63.

<sup>42</sup> Laws of Kenya, Act no.12 of 2008.

<sup>43</sup> Laws of Kenya, Cap 411B.

<sup>44</sup> Laws of Kenya, act no.28 of 2012.

<sup>45</sup> Laws of Kenya, Kenya gazette supplement No.167 ( Acts No. 19)2014.

<sup>46</sup> UNGA, *Universal Declaration on Human Rights*.

<sup>47</sup> Eleanor Roosevelt, Chairman of the United Nations Commission on Human Rights during the drafting of the Universal Declaration on Human Rights.

<sup>48</sup> Article 19, UNGA, *Universal Declaration on Human Rights*.

<sup>49</sup> *International Covenant on Civil and Political Rights*.

<sup>50</sup> *International Covenant on Economic, Social and Cultural Rights*.

<sup>51</sup> Article 19( 2), *International Covenant on Civil and Political Rights*.

<sup>52</sup> Article 19,3, *International Covenant on Civil and Political Rights*.

derogable rights in the ICCPR.<sup>53</sup> The covenant provides that no derogation shall be made in regards to the right to life, freedom from cruelty and inhumane treatment, freedom from slavery and servitude, civil jail and freedom of thought, conscience and religion.

It is interesting to note that the ICCPR could be seen as an evolution from the UDHR for two main reasons; firstly, the ICCPR introduces the concept of limitations to freedom of expression and provides how and why the limitations can be imposed. The UDHR neither creates nor envisions circumstances which freedom of expression could be limited. Secondly, the ICCPR is a treaty which binds the parties and therefore expects them to follow its contents to the letter of the law except where states have entered reservations,<sup>54</sup> as opposed to the UDHR which was a mere acknowledgment of Human Rights and therefore did not create any legal obligations to adhere to it.

Kenya is a signatory to the ICCPR. It is also on the face of it a monist state<sup>55</sup> although there has been considerable legal<sup>56</sup> and scholarly debates not to mention different judicial decisions<sup>57</sup> as to whether it is still a dualist state. This debate is however not relevant because in the event that Kenya is indeed a dualist state, then the Constitution of Kenya still provides for the respect and exercise of freedom of expression.

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<sup>53</sup> Article 4, *International Covenant on Civil and Political Rights*.

<sup>54</sup> Article 2, *Vienna Convention on the law of treaties*.

<sup>55</sup> Article 2,(5),*Constitution of Kenya* (2010).

<sup>56</sup> Kabau Tom, Osogo Ambani, "Constitution and Application of International Law in Kenya: A case of migration to monism or regression to dualism" *Africa Nazarene Law University Journal* 2013.

<sup>57</sup> *Re the Matter of Zipporah Wambui Mathara* [2010] eKLR, *David Njoroge Macharia v Republic* [2011] eKLR 15, *Kenya Section of the International Commission of Jurists v Attorney General & Another* [2011] eKLR.

### **2.3 The Johannesburg Principles of National Security, Freedom of Expression and Access to Information**

The Johannesburg Principles of National Security Freedom of Expression and Access to Information<sup>58</sup> were adopted on 1 October 1995 by a group of experts in International Law, National Security, and Human Rights convened by ARTICLE 19, the International Centre against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg. The Principles are based on International and Regional Law and standards relating to the protection of Human Rights, evolving state practice and the general principles of law recognized by the community of nations. These Principles have been endorsed by Mr. Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, in his reports to the 1996, 1998, 1999 and 2001 sessions of the United Nations Commission on Human Rights, and referred to by the Commission in their annual resolutions on freedom of expression every year since 1996. Principle 1 states that everyone has the right to hold opinions without interference. It proceeds to expound that freedom of expression involves receiving and imparting ideas. Like the International instruments, the principles acknowledge the limitations of this right on the grounds of national security and other grounds (the document makes reference to international instruments). The limitations need to be prescribed by law and necessary in a democratic society. This instrument is unique because it proceeds to define what prescribed by law, legitimate national security instrument and necessary in a democratic society mean.

Principle 1.1 states

(a) Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.

(b) The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.

Principle 1.2 in defining a legitimate national security interest stipulates

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<sup>58</sup> *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 1 October 1995, available at: <http://www.refworld.org/docid/4653fa1f2.html> [accessed 9 December 2015].

Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest

Principle 1.3 considers necessary in a democratic society to mean

To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

- (a) The expression or information at issue poses a serious threat to a legitimate national security interest;
- (b) The restriction imposed is the least restrictive means possible for protecting that interest; and
- (c) The restriction is compatible with democratic principles

Although not a binding document, the Johannesburg principles are tailored to strike a balance between limiting freedom of expression, right to access to information and safeguarding national security. These guidelines shall form an integral part of the conclusion and recommendations in Chapter 5.

### 2.3 Regional Human Rights Instruments

The regional Human Rights instruments are The African Charter on Human and Peoples' Rights,<sup>59</sup> The European Convention on Human Rights<sup>60</sup> and the American Convention on Human Rights.<sup>61</sup>

### 2.4 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights at Article 9 guarantees freedom of expression as follows, 1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.<sup>62</sup> The African Commission on Human and Peoples' Rights (African Commission) has expressed the importance of freedom of expression by adopting resolutions to elaborate it beyond the charter's provisions.<sup>63</sup> It has for instance adopted a 'resolution on freedom of expression'<sup>64</sup> and a '*Declaration of principles on freedom of expression in Africa.*'<sup>65</sup> The latter has directly linked freedom of expression to the thriving of a democratic society. It recognises freedom of expression as the cornerstone of democracy.<sup>66</sup> The African Commission observed that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness and his participation in the conduct of public affairs.<sup>67</sup>

### 2.5 The European Convention on Human Rights

The European Convention on Human Rights at article 10 safeguards freedom of expression in the following words; everyone has freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a

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<sup>59</sup> *African Charter on Human and peoples' Right.*

<sup>60</sup> *European Convention on Human Rights.*

<sup>61</sup> *American convention on Human Rights.*

<sup>62</sup> Article 9, *African Charter on Human and peoples' Rights.*

<sup>63</sup> Mbondenyi M, *International Human Rights and their enforcement in Africa.* (Law Africa Publishing (K) Ltd, Kenya 2011), page 181.

<sup>64</sup> Adopted at the 11<sup>th</sup> ordinary session of the African Commission, 2-9 March 1992.

<sup>65</sup> Adopted at the 32<sup>nd</sup> ordinary session of the African Commission, 17-23 March 2002.

<sup>66</sup> Preamble, *Declaration of Principles on Freedom of expression in Africa.*

<sup>67</sup> *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria* (2000) AHRLR 227, 54.

democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>68</sup>

The limitations envisioned under the ECHR are broader than the ones in the ACHPR, UDHR and ICCPR. These limitations include privileged information and any information which is necessary to ensure that the judiciary remains impartial. Like the African Commission, the European Court of Human Rights acknowledges that freedom of expression is one of the basic conditions for the progress of democratic societies and the progress of each individual.<sup>69</sup>

## **2.6 The American convention on Human Rights**

The American Convention on Human Rights probably has the most exhaustive definition of what freedom of expression constitutes as well as the possible limitations that could be imposed on this right. The ACHR at article 13 states<sup>70</sup>

1. Everyone has freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

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<sup>68</sup>Article 10, *European Convention on Human Rights*

<sup>69</sup>*Handyside v United Kingdom* ECtHR Judgement of 7 December 1976, para. 49

<sup>70</sup>Article 13, *American Convention on Human Rights*

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offenses punishable by law.

The American Convention introduces the aspect of proving liability before imposing a limitation on freedom of expression as a general rule. The Government can therefore not restrict freedom of expression based on mere suspicion. The Inter American Court on Human Rights in its advisory opinion stated

*Freedom of expression is the cornerstone upon which the very existence of society rests. It is indispensable for the formation of public opinion. It represents in short, the means that enable the community, when exercising its options to be sufficiently informed. Consequently it can be shown that a society which is not sufficiently informed is not a society that is truly free.<sup>71</sup>*

#### **2.4 Nexus in the Constitution of Kenya, UDHR, ICCPR, ACHPR, ECHR and ACHR**

The legal instruments discussed above discuss what freedom of expression entails, how and why it can be limited. Freedom of expression has been explained as the right to receive and impart knowledge by print, speech and has also been expounded to social media and other online publications. This right has been considered to be integral in the development of not only to an individual but also in a democratic society by the African Commission on Human Rights, the European Court of Human Rights and the Inter-American Court of Human Rights. Moreover, all these instruments acknowledge that freedom of expression has limitations which must be limited by law and should be necessary within a democratic society.

In conclusion, freedom of expression has been catered for by pinnacle human rights legislation as well as the municipal law in Kenya. The next chapter will assess whether the national security laws in Kenya infringe on freedom of expression and how they do so.

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<sup>71</sup> Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985), 49.

## CHAPTER 3-A CRITIQUE OF NATIONAL SECURITY LAWS IN LIGHT OF FREEDOM OF EXPRESSION.

This chapter will analyse National Security laws and whether they infringe on the right to freedom of expression as per the guidelines outlined in chapter II above. Provisions from the Penal Code,<sup>72</sup> the National Cohesion and Integration Act,<sup>73</sup> the Media Act,<sup>74</sup> the National Intelligence Service Act<sup>75</sup> the Security Laws Amendment Act (SLAA)<sup>76</sup>, the Prevention of Terrorism Act<sup>77</sup> (PTA), constitute National Security laws. The latter is however the most relevant for this chapter.

In December 2014, SLAA,<sup>78</sup> was passed by Parliament and subsequently assented by The President to amend several Acts. This law was highly contested by The Coalition for the reforms and democracy (CORD), The Kenya National Human Commission on Human Rights<sup>79</sup> a constitutional Commission and one Sam Njuguna Ng'anga in a consolidated petition filed against the Attorney General and The Republic of Kenya.<sup>80</sup> The petition contested issues including the violation of freedom of expression. The other issues involved were the right to privacy, the procedural legality of the bill and the right to a fair trial. The court declared sections 12 and 64 of the SLAA which affect freedom of expression unconstitutional. There is however still a legal gap on how the limitations on freedom of expression can be justified under the law in Kenya. Moreover, the provisions of sections 61 and 62 of SLAA were not covered in the petition whereas they have the potential of infringing on freedom of expression. This chapter will therefore proceed to analyse the contested sections of SLAA. It will also consider the doctrine of prior restraint which is predominant in the United States of America's and the Report of the Special Rapporteur on The Promotion and Protection of the Right to Freedom of Opinion and Expression.<sup>81</sup>

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<sup>72</sup> Laws of Kenya, Cap 63.

<sup>73</sup> Laws of Kenya, Act no.12 of 2008.

<sup>74</sup> Laws of Kenya, Cap 411B.

<sup>75</sup> Laws of Kenya, Act no.28 of 2012.

<sup>76</sup> Laws of Kenya, Kenya gazette supplement No.167 (Acts No. 19)2014.

<sup>77</sup> Laws of Kenya, Act no. 30 of 2012.

<sup>78</sup> The Security Laws (Amendment) Act 2014.

<sup>79</sup> Article 59, *Constitution of Kenya* (2010).

<sup>80</sup> *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another*.

<sup>81</sup> UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression : Addendum, Mission to Republic of Korea*, 21 March 2011, A/HRC/17/27/Add.2, available at: <http://www.refworld.org/docid/50f3de182.html> [accessed 29 November 2015].

### **3.1 Pertinent legislation**

Section 12 introduces section 66 of the Penal Code whereas section 64 of the SLAA introduces sections 30A and 30F to the PTA. Section 66 of the Penal Code reads as follows:

66A. (1) A person who publishes, broadcasts or causes to be published or distributed, through print, digital or electronic means, insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.

(2) A person who publishes or broadcasts any information which undermines investigations or security operations by the National Police Service or the Kenya Defence Forces commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years, or both.

Section 30A and 30F of the PTA were amended to read as follows:

30A. (1) A person who publishes or utters a statement that is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years.

(2) For purposes of sub-section (1), statement is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism if-

(a) The circumstances and manner of the publications are such that it can reasonably be inferred that it was so intended; or

(b) The intention is apparent from the contents of the statement.

(3) For purposes of this Section, it is irrelevant whether any person is in fact encouraged or induced to commit or prepare to commit an act of terrorism.

30F. (1) Any person who, without authorization from the National Police Service, broadcasts any information which undermines investigations or security operations relating to terrorism commits an offence and is liable on conviction to a term of imprisonment for a term not exceeding three years or to a fine not exceeding five million shillings, or both.

(2) A person who publishes or broadcasts photographs of victims of a terrorist attack without the consent of the National Police Service and of the victim commits an offence and is liable on conviction to a term of imprisonment for a period not exceed three years or to a fine of five million shillings, or both.

(3) Notwithstanding sub-section (2) any person may publish or broadcast factual information of a general nature to the public

Section 61 of the SLAA amended section 9A of the PTA to read as follows.

9A. A person who advocates, promotes, advises or facilitates with intent to commit a terrorist act. Any act preparatory to a Terrorist act, commits an offence and is liable, on conviction to imprisonment for a term not exceeding twenty

Section 62 of the SLAA amended section 12D to read as follows

12D. A person who adopts or promotes an extreme belief system for the purpose of facilitating ideologically based violence to advance political, religious or social change commits an offence and is liable on conviction, to imprisonment for a term not exceeding thirty years.

### 3.2 The legality of the proposed amendments.

The Constitution clearly states out how a right may be limited.<sup>82</sup> Having established that freedom of expression is not a non-derogable right,<sup>83</sup> the threshold outlined under article 24 must be met. The legislator must not only factor in the nature of the right but also the importance and purpose of limitation and the nature and extent of limitation. Freedom of expression as alluded to in the preamble of UDHR and decisions by Human Rights Courts discussed in Chapter II is the cornerstone of a democratic society. The nature of the right is therefore pivotal to the growth of Kenya as a democracy. The country has been rocked by several terrorist attacks purportedly committed by the Al Shabaab Militants in Somalia. The right was limited due to national security concerns which are justifiable under both international and national law. The proposed amendment under section 12 of SLAA, however, does not specify the extent of the limitation. The legislation, section 66(1), does not specify the type of material when published is likely to cause fear, alarm or disturbance to public peace. These criteria are relative and imprecise, one may therefore not know how to regulate their conduct in order not to violate the law. Loosely worded or vague laws may not be used to restrict freedom of expression.<sup>84</sup> Section 66(2) further undermines investigative journalism as an individual needs to seek the security organs authority before publishing stories under official investigation. The arguments brought to the court in the CORD case in light of this section was under freedom of the media. It is however important to take note that this section could also affect individuals who are not necessarily journalists. They could be normal people running social media accounts like Twitter, Facebook, Instagram or even blogs.<sup>85</sup> Therefore in as much as freedom of the media is infringed, so is individual freedom of expression.

Section 62 of the SLAA (which introduces 12D) of the PTA, is very broad in the sense that it does not define what a radical belief is. It goes against the basic principle of legality *Nullum crimen, nulla poena sine lege* which roughly translates to no crime can be punished without law. While the law has been drafted, it fails to define the criminalised act which in this case is radical belief. Similarly section 61(which introduces 9A) of the SLAA uses blanket words like advocate, promote, advises or facilitate without explaining the extent to which these

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<sup>82</sup> Article of 24, *Constitution of Kenya* (2010).

<sup>83</sup> Article 25, *Constitution of Kenya* (2010).

<sup>84</sup> *Grayned V City of Rock ford* 408 U.S 104 at page 108-109, General Comment No. 34 ¶ 3 and 4.

<sup>85</sup> A web site on which someone writes about personal opinions, activities, and experiences.

activities constitute an offence, In any case, the Special Rapporteur Report of 2011 states that only incitement to terrorism may be criminalised.<sup>86</sup> Section 64 of SLAA (introduces s 30A) makes whatever is deemed to be incitement to terrorism a strict liability offence. The gravity of the offence of terrorism is so intense and it is therefore unfair to convict a person without establishing an element of pre meditation of the act.

### **3.3 The doctrine of prior restraint**

The concept of prior restraint, broadly speaking, deals with official restrictions imposed upon speech or other forms of expression in advance of actual publication. Prior restraint is thus distinguished from subsequent punishment, which is a penalty imposed after the communication has been made as a punishment for having made it.<sup>87</sup> The latter would advocate for the paying of damages for instance only after the expression has been made. That way freedom of expression is not anticipatorily limited. The provision of section 30F of the PTA are therefore a direct result of prior restraint as the permission of the security personnel must be sought beforehand. This doctrine has been rejected by the first amendment of the American Constitution which states

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*

Being one of the oldest progressive democracies in the world, Kenya should be able to borrow a leaf from the United States of America. Freedom of expression is considered a no go zone for the legislature except in exceptional cases. The Supreme Court of the United States in the cases of *Near v Minnesota*<sup>88</sup> and *New York Times v United States*<sup>89</sup> held that there can be no prior restraints to the freedom of the media and that such restraints are only permissible in very limited circumstances.

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<sup>86</sup> UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, 25.

<sup>87</sup> Emerson, Thomas I., "The Doctrine of Prior Restraint" (1955). Faculty Scholarship Series. Paper 2804. Available at <[http://digitalcommons.law.yale.edu/fss\\_papers/2804](http://digitalcommons.law.yale.edu/fss_papers/2804)> [accessed on 29<sup>th</sup> November 2015].

<sup>88</sup> 283 US 697 (1931).

<sup>89</sup> 403 US 713 (1971).

The High Court of Kenya in the *CORD and others v Republic and another* has demonstrated its zeal to protect the Constitution of Kenya. It has championed the campaign to respect and promote freedom of expression by declaring sections 12 and 64 of the SLAA unconstitutional. Anti-terror legislation indeed infringed on freedom of expression until the declaration of the unconstitutionality of the aforementioned sections. Some of the legislation continues to infringe on this right as has been explained above. More ought to be done to ensure that the laws being drafted and passed are precise, necessary and legitimate in a democratic society. Indeed, we retain our dignity as individuals only by insisting that no one, no official and no majority has the right to withhold an opinion from us on the ground that we are not fit to hear or consider it.<sup>90</sup>

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<sup>90</sup> Dworking Ronald, *Freedom's law: The Moral reading of the American Constitution* 1996 ,page 200.

## CHAPTER 4: HOW HUMAN RIGHTS COURTS STRIKE A BALANCE BETWEEN FREEDOM OF EXPRESSION AND NATIONAL SECURITY LAWS

### 4.1 Background of discussion

Human rights courts in balancing freedom of expression and other competing interests including national security have implemented a systematic four limb analysis:

1. prescribed by law,
2. legitimate,
3. necessary in a democratic society,
4. proportionality.

In addition to these four limbs, which are enshrined in legislative instruments, courts have considered other factors unique to the situation in contention. The violation of freedom of expression is sequential in these above four criteria that is, if one of the criterion is not fulfilled, then the freedom of expression has been violated.

The jurisprudence established by Human Rights Courts<sup>91</sup> is pivotal in guiding legislatures and national courts on how to ensure freedom of expression is not infringed on. Furthermore, the courts reinforce the Human Rights regime by not only interpreting and applying the Human Rights conventions<sup>92</sup> but also ‘soft law’.<sup>93</sup> Freedom of expression in its limitation, has to be legitimate, necessary in a democratic society and proportional in the ACHR and ECHR. The ACHPR does not however expressly categorise it into such but the interpretation of the convention, as shall be demonstrated shortly has arrived at the same conclusion.<sup>94</sup>

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<sup>91</sup> African Court of Human Rights, European Court of Human Rights and Inter American Court of Human Rights.

<sup>92</sup> *African Charter on Human and People’s Rights, European Convention on Human Rights, American Convention on Human Rights.*

<sup>93</sup> UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, available at: <http://www.refworld.org/docid/4672bc122.html> [accessed 9 December 2015], *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 1 October 1995, available at: <http://www.refworld.org/docid/4653fa1f2.html> [accessed 9 December 2015].

<sup>94</sup> Article 19 (3), *International Covenant on Civil and Political Rights*, Article 10, *European Convention on Human Rights*, Article 13, *American Convention on Human Rights*, Article 9, *African Charter on Human and Peoples’ Rights*.

## 4.2 ECtHR

The ECtHR has decided on a number of cases which are directly linked to terrorism most of which are associated with Turkey.<sup>95</sup> In *Zana v Turkey*<sup>96</sup> where a former mayor was convicted by the Turkish National Security Courts for allegedly defending an act punishable by law as a serious crime and endangering public safety, the ECtHR upheld the conviction. Zana had uttered the following words at a press conference while he was imprisoned. "I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake ...". The court in making its final decision, considered whether the law under which the accused was convicted was prescribed by law, legitimate, proportional and necessary in a democratic society. The court reiterated that freedom of expression was not only limited to receiving and imparting information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.<sup>97</sup> Further the offence which the accused was charged with was encapsulated in the Turkish Criminal Code under articles 168 and 312 therefore the restriction on freedom of expression was prescribed by law. The Government of Turkey argued that it pursued a legitimate aim since its territorial integrity was under threat by the terrorist group PKK and that the accused, being a former mayor was in a position of influence and could instigate further harm by his words. The court conquered with this argument citing that such a statement coming from a political figure who was well known in the region could have an impact such as to justify the national authorities' taking a measure designed to maintain national security and public safety. With regards to necessity, the court stated that this implies the existence of a pressing social need which a state uses its discretion to determine. This discretion is referred to as the state's margin of appreciation. The state's margin of appreciation is not absolute as it goes hand in hand with European supervision, embracing both the legislation and the decisions applying to it, even those given by an independent court. The words in question uttered by Mr. Zana were not looked at in isolation, the rising alarming insecurity tension in Turkey caused by PKK was factored in. The court held that the interference was legitimate and proportionate and therefore no violation of article 10 had

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<sup>95</sup> *Zana v Turkey* ECtHR Judgement of 25 November 1997, *Incal v Turkey* ECtHR Judgement of 9 June 1998 , *Ceylan v Turkey* ECtHR Judgement of 8 July 1999 , *Sürek and Özdemir v. Turkey* Judgement of 8 July 1999, *Karatas v Turkey* ECtHR 8 July 1999.

<sup>96</sup> *Zana v Turkey* ECtHR.

<sup>97</sup> *Handyside v UK* ECtHR , 49.

occurred. In sentencing, however, the court was lenient and made Mr.Zana serve 1/5<sup>th</sup> of the sentence.

In the case of *Sürek and Özdemir v. Turkey*,<sup>98</sup> the Court held the applicants vicariously liable as they provided the outlet through which incitement to violence was advocated to the public even though they did not ascribe to the sentiments.<sup>99</sup> One of the applicant was the owner of the newspaper outlet who had no control over editorial contents of the paper whereas the other one was the chief editorial officer.

The ECtHR in determining whether a certain action is prescribed by law looks at the existence of legislation that constrains freedom of expression. In the *Zana, Sürek and Özdemir* cases above, the court looked at whether the offences which the accused persons were charged with were spelt out clearly in Statutes . They also consider whether the law is precise and clear. In the latter case, the European Commission argued that the laws in question were vague and therefore failed to meet the ‘prescribed by law’ threshold. This argument was not however given much consideration. A limitation is considered legitimate when it can be justified under the categories in article 10(2) which are: in the interests of national security, territorial integrity or public safety the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. In meeting the test of necessary in a democratic society, the court has allowed the doctrine state margin of appreciation to be implemented. The state uses its discretion to determine what constitutes necessity although it has to be a pressing social need. The powers are however subject to review by the court.

### **4.3 State’s Margin of Appreciation**

The doctrine of state margin of appreciation is unique to the European regime of Human Rights law. Although not expressly prescribed in the convention or *travaux préparatoires*,<sup>100</sup> this doctrine has been instrumental in shaping the jurisprudence of the ECtHR. Broadly speaking, the state margin of appreciation refers to the room for manoeuvre the ECtHR is prepared to accord National authorities in fulfilling their obligations under the

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<sup>98</sup> *Sürek and Özdemir v. Turkey*, ECtHR.

<sup>99</sup> *Sürek and Özdemir v. Turkey*, ECtHR judgement of 8 July 1999, para. 63.

<sup>100</sup> These are the official record of a negotiation. They are often useful in clarifying the intention of a treaty or other instrument as per article 32 of the Vienna Convention on the laws of treaties.

ECHR.<sup>101</sup> Despite having a mountain of jurisprudence, the state margin of appreciation is largely uneven and unpredictable as the ECtHR employs its discretion in determining whether the doctrine has rightly been invoked by member states. The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and the Member States and enables the Court to balance the sovereignty of Member States with their obligations under the Convention.<sup>102</sup> The court appreciates the cultural and traditional asymmetry that exists within the European countries and therefore grants flexibility to the states in interpreting the convention under its watch. The inception of margin of appreciation was the *Greece v UK*<sup>103</sup> decision commonly referred to as the Cyprus case. The case was in light of Article 15 of the ECHR which explains the derogation of the convention. Incidentally, the respondent state cited national security as the reason for derogation from the convention. The court can grant a wide or narrow margin the latter meaning that the court strictly scrutinising steps taken by the states while the former means the member states have a much wider discretion to derogate from the convention. A narrow discretion is granted in the case where absolute rights are at stake for instance Articles 2 and 3 of the ECtHR which are right to life and right to prohibition from torture respectively. Similarly, other non-derogable rights like article 7 and 4 (1) of the ECHR i.e being held criminally liable for any act or omission which did not constitute a crime at the time it was committed and the right to prohibition from slavery are subject to a narrow margin of appreciation. Critics have been quick to point out that the ECtHR does not carry out its own investigation in determining whether an actual national security threat does exist and relies on the alleging state's facts.

An equivalent of this doctrine in Kenya would be the derogation and suspension of rights when a state of emergency has been declared.<sup>104</sup> The state's power is however not absolute as it is still subject to the law<sup>105</sup> and judicial system.<sup>106</sup>

#### 4.4 IACtHR

In *Usón Ramírez v. Venezuela*,<sup>107</sup> the Inter-American Court held that article 13(1) and (2) had been violated due to the ambiguity and vagueness of the law which directly violated the

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<sup>101</sup> S. Greer – *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe, July 2000, p. 5.

<sup>102</sup> Helen Fenwick – *Civil Liberties and Human Rights*, Cavendish Publishing Limited, London, 2005, p.34-37.

<sup>103</sup> *Greece v. The United Kingdom*, EcmHR, Judgement of 1958, para. 136.

<sup>104</sup> Article 58, *Constitution of Kenya* (2010).

<sup>105</sup> Article 24, *Constitution of Kenya* (2010).

<sup>106</sup> Article 165 1 (b), *Constitution of Kenya* (2010).

principle of legality, *Nullum crimen nulla poena sine lege previa*, as envisioned by Article 9 of the American convention.<sup>108</sup> In *Manuel Cepeda Vergas v Colombia*<sup>109</sup> the Court found that although Senator Cepeda Vergas was able to exercise his political rights, his freedom of expression and freedom of association, “the fact that he continued to exercise them was obviously the reason for his extrajudicial execution,” meaning that the State “did not create either the conditions or the due guarantees for Senator Cepeda (...) to have the real opportunity to exercise the function for which he had been democratically elected; particularly, by promoting the ideological vision he represented through his free participation in public debate, in exercise of his freedom of expression. This decision further stretches the obligation of the state to foster an environment where freedoms and rights thrive.

#### 4.5 AfCHPR

The African Court on Human and Peoples’ Rights, despite not having a clear test on how to limit freedom of expression<sup>110</sup> applied international norms in *Lohé Issa Konaté v. Burkina Faso*.<sup>111</sup> It invoked a decision by The UN Human Rights Committee which stated

*“...to be considered as “law”, norms have to be drafted with sufficient clarity to enable an individual to adapt his behaviour to the rules and made accessible to the public. The law cannot give persons who are in charge of its application unlimited powers of decision on the restriction of freedom of expression. Laws must contain rules which are sufficiently precise to allow persons in charge of their application to know what forms of expression are legitimately restricted and what forms of expression are unduly restricted.”*<sup>112</sup>

Moreover in *African Commission on Human and Peoples’ Rights, Malawi African Association and Others v. Mauritania*, the court held that the phrase “within the law” must be interpreted in reference to international norms which can provide grounds of limitation on

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<sup>107</sup> *Uson Ramirez v. Venezuela*, Petition 577-05, Inter-Am. C.H.R., Report No. 36/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2006).

<sup>108</sup> *Uson Ramirez v. Venezuela*, 56, 57, 58.

<sup>109</sup> *Manuel Cepeda Vargas v. Colombia*, IACtHR Judgment of 26 May 2010, (Preliminary Objections, Merits, Reparations and Costs).

<sup>110</sup> Article 9(2), *African Charter on Human and Peoples’ Rights*.

<sup>111</sup> *Lohé Issa Konaté v. Burkina Faso* AfCHPR, Application No. 004/2013, 128.

<sup>112</sup> UN Human Rights Committee, *Keun-Tae Kim v. The Republic of Korea*, CCPR Comm No. 574/1994, (4 January 1999), para 25.

freedom of expression.<sup>113</sup> In *Lohé Issa Konaté v. Burkina Faso*, the court echoed the sentiments of the African commission in *Media Rights Agenda and Others v Nigeria*.<sup>114</sup>

#### **4.5 Application in Kenya**

As for the Kenyan legislation, section 66(1), does not specify the type of the material which when published is likely to cause fear, alarm or disturbance to public peace. These criteria are relative and imprecise, one may therefore not know how to regulate their conduct in order not to violate the law. Section 62 of the SLAA (which introduces 12D) of the PTA, is very broad in the sense that it does not define what a radical belief is. It goes against the basic principle of legality *Nullum crimen, nulla poena sine lege* which roughly translates to no crime can be punished without law. While the law has been drafted, it fails to define the criminalised act which in this case is radical belief. Similarly section 61(which introduces 9A) of the SLAA uses blanket words like advocate, promote, advises or facilitate without explaining the extent to which these activities constitute an offence. The vagueness and imprecision of the law violates the principle of legality of the law espoused by the Inter-American court in *Uson Ramirez v. Venezuela*. The UN Human Rights Committee alluded to the same conclusion in the *Keun-Tae Kim v. The Republic of Korea* decision. The state can however be granted a legal leeway in justifying the necessity of the legislation by citing the catastrophic terrorist attacks that have occurred in Kenya like the Westgate mall and Garissa university attacks in 2013 and 2015 respectively. There should however be checks and balances to ensure the protection and safeguard of freedom of expression and Human Rights law in its entirety similar to European doctrine of state margin of appreciation.

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<sup>113</sup> *African Commission on Human and Peoples' Rights, Malawi African Association and Others v. Mauritania*, Communication No. 54/91-61/91-98/93-164/97-196/97-210/98, para 102.

<sup>114</sup> *Media Rights Agenda and Others v Nigeria*.

## CHAPTER 5- CONCLUSION AND RECOMMENDATIONS

This paper has addressed the research questions asked in chapter I which are

1. Do anti-terrorism laws in Kenya curtail the freedom of expression?
2. What are the international standards for limiting the freedom of expression and has Kenya adhered to them?
3. How can anti-terror laws be drafted in such a manner that they do not unduly infringe on the freedom of expression?

The paper first exploited the international standards on freedom of expression guided by the Universal Declaration of Human Rights, ICCPR, the regional framework of Human Rights in Europe, Africa and the Americas as provided for by the ECHR, AfCHPR and ACHR respectively. The constitution of Kenya also protects this right which is deemed by the IACtHR to be the cornerstone of democracies.<sup>115</sup> The author has rightfully pointed out that freedom of expression is not an absolute right and is therefore derogable. The manner of derogation is however systematic as implemented by the African, European and Inter-American Courts of Human Rights. The limitations imposed on freedom of expression have to be

1. prescribed by law,
2. legitimate,
3. necessary in a democratic society
4. Proportional.

The jurisprudence pertaining to the aforementioned 4 folds has been discussed at length in Chapter IV. As to whether the anti-terror legislation infringes on freedom of expression, it can be inferred from this paper that only two folds of limitation, necessary in a democratic society and legitimate have been fully met. Despite being prescribed by the law, anti-terror legislation in Kenya as proposed by the SLAA (sections 66, 61 and 62) is vague and imprecise therefore the prescribed by law fold has not fully been

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<sup>115</sup> Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct.

complied with. The penalties to the offences in the proposed anti-terror legislation for instance Section 64 which establishes incitement to terrorism as a strict liability is disproportionate to the gravity of the offences. Principle 24 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information.

States, “A person, media outlet, political or other organization may not be subject to such sanctions, restraints or penalties for a security-related crime involving freedom of expression or information that are disproportionate to the seriousness of the actual crime.”

This paper alludes to the limitation of certain Human Rights as a response to the increased terrorist activities in Kenya. It however insists that these limitations ought to be construed within the law and in advancement of Human Rights Law in Kenya. The high court repealed some provisions in the SLAA act, the legislature has however not yet come up with any laws to fill that gap. This research paper therefore recommends the following pointers

- Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.
- The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.
- Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.
- A government must demonstrate that the expression or information at issue poses a serious threat to a legitimate national security interest.
- The restriction imposed is the least restrictive means possible for protecting that interest.
- The restriction is compatible with democratic principles such as the rule of law, transparency and accountability.

## **6. BIBLIOGRAPHY**

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¶ paragraph

ACHPR-African Convention on Human and People's Rights

ACHR-American Convention on Human Rights

AfCHR-African Court of Human Rights

ECHR-European Convention on Human Rights

EcmHR- European Commission of Human Rights

ECtHR-European Court of Human Rights

IACtHR- Inter- American Court of Human Rights

ICCPR- International Covenant on Civil and Political Rights

ICESCR-International Covenant on Economic Social and Cultural Right

SLAA- Security Laws Amendment Act

PTA- Prevention of Terrorism Act

UN- United Nations

UNTS- United Nations Treaty Series

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