SECRECY VERSUS DEMOCRACY:AN ANALYSIS OF THE LIMITATION OF THE RIGHT TO ACCESS STATE HELD INFORMATION AS GUARANTEED UNDER ARTICLE 35 OF THE CONSTITUTION OF KENYA ON THE GROUNDS OF NATIONAL SECURITY

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DECLARATION

I, TRIZA KAMUYU KANYI, 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: ……25/05/2024……

This dissertation has been submitted for examination with my approval as University Supervisor. Signed: …….
Doctor Josephat Kilonzo

LIST OF LEGAL INSTRUMENTS

1. International Convention on Civil and Political Rights 1967
2. African Charter on Human and Peoples Rights 1986
3. Universal Declaration of human rights
4. The Constitution of Kenya 2010
5. The Constitution of Kenya 1963
6. Access to Information Act 2016
7. National Security Council Act 2011
8. County Government Act 2012
9. Public Finance Act and Management Act 2012
10. Ethics and Anti-Corruption Commission Act 2011
11. The promotion of Access to Information Act South Africa (act 2 of 2000)

LIST OF ABBREVIATIONS

ICCPR International Convention on Civil and Political rights

ACHPR African Charter on Human and Peoples Rights

PAIA The Promotion of Access to Information Act South Africa

LIST OF CASES

A company V Commissioner, South Africa Revenue Service 2014,

Famy Care limited v Public Procurement Administrative Review Tribunal Board and another

Kahindi Lekalhaile & 4 others v Inspector General National Police Service & 3 others [2013]

Khelef Khalifa & another v Principal Secretary, Ministry of Transport & 4 others; Katiba Institute & another

Kihoro Wanyiri v Attorney General [1] *and Mirugi Kariuki v Attorney General*

Legal Advice Centre t/a Kituo Cha Sheria & 33 others (Suing on Behalf of the Estates of their Deceased Children, their Own Behalf and on Behalf of about 32 Parents of Garissa University College Terrorism Attack Victims) v Cabinet Secretary, Ministry of Education & 7 others [2021]

eKLR

President of the Republic of South Africa & others v M & G Media (Ltd) 201

Republic v Independent electoral and boundaries commission ex parte national super alliance (nasa)Kenya and 6 others (2017) eklr

Zebedeo John Opore versus The Independent Electoral and Boundaries Commission [2017

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ABSTRACT

The right to access state held information is inextricable from democracy, a government that is for the people and by the people is only truly democratic if it is participatory, transparent and accountable. This dissertation argues the indispensability of the right to access information, particularly within the context of Kenya, where arbitrary and sweeping national security secrecy claims have been wielded as a means to limit this fundamental right. Article 35 of the Kenyan Constitution guarantees the right to access information, yet its efficacy is undermined by discretionary and overreaching national security provisions.

Drawing upon a desktop research methodology encompassing a comprehensive review and analysis of journal articles, statutes, legislation, it becomes evident that the overreach of national security secrecy claims in Kenya has deep roots, despite this new age of openness brought on through the Constitution and the access to information legislative framework; it is perpetuated by a lack of regulation and oversight. This unchecked discretion has led to the maintenance of a culture of secrecy, wherein the national security is used as a blanket assertion without sufficient justification, more often than not for political reasons at the expense of democratic principles by comparing the Kenyan context with experiences from South Africa, this dissertation highlights the importance of a balanced approach to national security and access to information. While acknowledging the legitimate need to safeguard national security interests, it argues for clear and transparent mechanisms to regulate the invocation of secrecy claims.

This dissertation calls for a re-evaluation of Kenya's approach to national security secrecy claims. It advocates for the implementation of comprehensive and substantive regulation and oversight mechanisms to prevent the abuse of discretion, thereby fostering a culture of transparency and accountability.

CHAPTER ONE: INTRODUCTION

1.1 Background

'Government ought to be all outside and no inside-Woodrow Wilson[2]. In order to facilitate democracy 'of the people, for the people and by the people '[3], it must be premised on open government, transparency and accountability. In the words of Jeremy Bentham 'secrecy being an instrument of conspiracy ought never to be the system of regular government.[4]The legal framework in the early decades of Kenya's Independence did not provide much in the way of protection of fundamental freedoms. Despite the clear- cut constitutional provisions in this case paying particular reference to Article 75[5] on the freedom of expression which encompassed the freedom of information without interference.

This was as a result of clawback clauses within the Constitution itself that, which granted the executive sweeping powers of derogation, enshrined in its Article 83[6] which referenced sections of the Preservation of Public Security Act[7]. These provisions allowed the Executive to rob persons of their freedoms under the guise of national security [8] . The condition of the Kenyan people at this time was an amalgamation of hidden government, censorship, oppression, arbitrary arrest and a complete disregard of human dignity; there was little to no reprieve through the courts and all this in pretext of the protection of national security[9]

In its enactment the Constitution of Kenya 2010 brought reprieve. It explicitly provided for the right to access information in its Article 35 which states 'That every citizen has the right to access; Information held by the state ,information held by another person and required for the

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[2]Beck, John. "*The Postsecret Society*." *new formations: a journal of culture/theory/politics* 104 (2022): 238-242. muse.jhu.edu/article/845881.

[3]. President Abraham Lincoln, 'T*he Gettysburg Address',* November 19, 1863.

[4]Barry A '*Transparency as a political device* In: *Débordements: Mélanges offerts à Michel Callon* ' Paris: Presses des Mines, 2010

[5] Article 75 *Constitution of Kenya* 1963.

[6] Article 83 '*constitution of kenya* 1963.

[7] Section 3 'P*reservation of public Security act* (Cap 57 of 1963).

[8] Lumumba p, *'National security in the Kenyan legal system*' Published LLM thesis ,University of Nairobi ,Nairobi, 1989,53,

[9] Lumumba p, '*National security in the Kenyan legal system*' Published LLM thesis ,University of Nairobi ,Nairobi, 1989,84,p1.

exercise of or protection of any right or fundamental freedom and in finality sub-clause three 'that the state shall publish and publicise any important information affecting the nation[10].

With its promulgation Kenya had entered a novel age of government transparency. In the case of Famy Care limited v Public Procurement Administrative Review Tribunal Board and another, the High Court expressed that '*The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information'*[11].

It is the right to access information that promotes the enjoyment of all other fundamental freedoms, to reiterate the well-worn cliché, albeit sage advice of Sir Francis Bacon 'Knowledge is power'[12]. In realisation of this right the parliament of Kenya passed the Access to Information Act in the year 2016, granting the citizenry the means to actualize the right to know the activities of those they had elected to office and to be able to hold them accountable.

However, a dilemma emerges, for all intents and purposes a government's "raison d'etre is the protection of the state, its people and their liberties. In this endeavour a justifiable and proportional level of secrecy in government is only practical, for example in matters of active military strategies and army deployments to mention but a few. In consideration of this and other such quandaries the constitution of Kenya contemplates the need for limitation of some rights to the extent that the nature of the right remains intact.

The provisions of Article 24 2(c) dispense the appropriate limitations ;that a fundamental freedom and right cannot be limited ,unless it is by law and that any statutory limitations 'shall not limit the right or fundamental freedom so far as to derogate from its core or essential content'[13] Ergo the legislation in effect in regards to access to information draws from this allowance and lays out the exceptions to the rule ,an example being ,the provisions of section six of the Access to Information Act 2016[14] .

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[10] Article 35 ,*Constitution of Kenya* 2010.

[11] Famy Care limited v Public Procurement Administrative Review Tribunal Board and another eklr .

[12] John Bartlett, *Familiar Quotations*, 10th ed. (Boston: Little, Brown and Co., 1919), 168.

[13] Article 24' Constitution of kenya', 2010 .

[14] Section 6 'Access to information act,(No 31 of 2016)

For purposes of this dissertation the nub of the study is on the first of the exceptions which is the limitation of information whose disclosure would undermine national security. The term national security is defined by the constitution as 'the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its peoples, their rights freedoms property peace stability and prosperity and other national interests '[15]. These powers are discretionary in nature, which means they are: unrestricted and elective, national security claims of confidentiality are a drastic derogation that ought to be invoked in the justifiable protection of the aforementioned interests.

The exception however, seems to be used ever so routinely as a blanket assertion in spite of the bars set out in the legislation, by those in public office, the executive branch to be exact[16]. This, an attempt to cover up government activities, those that do not necessarily fall under the criteria. An example of this being the case Khelef Khalifa & another v Principal Secretary, Ministry of Transport & 4 others; Katiba Institute & another[17]Where the petitioners, despite proper procedural exercise, were denied the request of disclosure on documents concerning the SGR construction following inconsistencies in expenditure by the government. The respondents denied the request on the basis of national security claims, but had no evidence whatsoever to support the claims as the court later determined.

The situation described above came about because, even with the new governing constitutional provisions which are more comprehensive in nature, statutory authorities whose provisions are vague and wide, granting overreaching discretionary powers remain intact. These erode the intended effect of the fundamental right to access information. The following provisions are but a few examples highlighting a prevailing trend; with the National Security Council Act section 14(3) which gives sweeping power to the Minister on the classification of matters in regards to restriction exclusively at his/her discretion[18] .Moreover sections 131 of the Evidence Act grant the minister sole power to restrict information upon their examination and supposed belief in the harmful nature of the documents to national safety[19] accompanied by section 132 which

[15] Article 238 ',Constitution of kenya' 2010 .
[16] Lumumba p, 'National security in the kenyan legal system' Published LLM thesis ,University of Nairobi ,Nairobi, 1989,158.
[17] Khelef Khalifa & another v Principal Secretary, Ministry of Transport & 4 others; Katiba Institute & another. eklr
[18]Section 14 National security council act 2012
[19]Section 131,Evidence act ,(cap 80 of 2014)

proscribe public officers from being compelled into disclosing information they believe should remain secret from the public for national security purposes[20]

This in turn diminishes the powers of the oversight Commission on Administrative Justice whose main aim is to protect this right as it has the ability to compel the disclosure of official documents for investigation, while maintaining official secrecy. With the aforementioned provisions the commission's powers fail to extend to the cabinet, limitations which are reinforced in sections 30(a)[21] of its parent act, further dulling the system of checks and balances democracy is founded upon. This is not to say that these provisions are without purpose and should be abolished, when regulated and used appropriately in the spirit and values of the constitution they have legitimacy, however their framing allows for misuse. More often than not it is arbitrary abuse, in a bid to escape accountability and public scrutiny rather than in use of their true purpose, as seen in the horrors of previous Kenyan regimes. The blanket use of such exceptions shows an executive bent on keeping their citizens in the dark under the guise of national security.

It falls then on the judiciary to remedy the situation as the guardians of the constitution and yet it encounters threshold obstacles. While Article 159[22] of the Constitution grants the court the discretionary powers to employ any procedure that would achieve substantive justice , this provision seems to falter in the face of national security exceptionalism .Without any explicit laws allowing the court to pierce the veil of secrecy state secrets remain hidden even from the judiciary ,thus a case cannot be tried fully on its own merit , as necessary discovery is withheld and the court then must adjudicate from a place of disadvantage , without knowledge and only one side of the story .

The United states jurisdiction refers to this as state secret privilege[23] and although it is not set in stone or rather codified in the Kenyan jurisdiction ,it is very much alive and understood as the way of things .This is seen clearly in the case of, Legal Advice Centre t/a Kituo Cha Sheria & 33 others (Suing on Behalf of the Estates of their Deceased Children, their Own Behalf and on Behalf of about 32 Parents of Garissa University College Terrorism Attack Victims) v Cabinet Secretary, Ministry of Education & 7 others [2021] eKLR[24] where even though the court had the

[20] Section 132,Evidence act ,(cap 80 of 2014)
[21] Section 30, Commision on Administrative Justice act(no 23 of 2011)
[22] Article 159,Constitution of Kenya 2010.
[23] Kwoka M 'The procedural exceptionalism of national security secrecy' Boston University law review,117,2017.
[24] Legal Advice Centre t/a Kituo Cha Sheria & 33 others (Suing on Behalf of the Estates of their Deceased Children, their Own Behalf and on Behalf of about 32 Parents of Garissa University College Terrorism Attack Victims) v Cabinet Secretary, Ministry of Education & 7 others [2021] eKLR

jurisdiction and discretion to establish whether the information sought to be withheld on grounds of national security was confidential as alleged. The court refused to partake in an in-camera inspection of the reports relying solely on the contested abridged version provided by the respondents with the court citing 'the provisions of section 6(5)[25] 'of the Access to Information Act, which provided that a public entity was not obliged to supply information to a requester if that information was reasonably accessible by other means'

A threefold block is then created where government secrecy is empowered by legislation in the use of discretionary powers, with a commission on administrative justice that has no merit to investigate the claims that follow and a judiciary that may have merit but no means to fully adjudicate the claims. Moreover, even with the test of proportionality and reasonableness, with only half the story there is not much the court can do in the way of mitigating these sweeping confidentiality powers,

1.2 Problem statement

Despite the strides made on the freedom of information following the provisions of Article 35 of the Constitution and the enactment of the 2016 Act , on the right to access information , an obstacle arises in the form of alleged national security claims. Exceptions provided for in acts such as the National security council act section 14(3)[26] and sections 131 and 132[27] of the Evidence Act which grants the executive unfettered powers of discretion in the use of national security as a ground for limitation of the right to access information . Claims that are invulnerable to questioning by the administrative commission owing to the provisions of section 30(a)[28] of the commission on Administrative Justice Act and are therefore ripe for abuse as seen in the aforementioned cases. In addition, the court is left incapacitated in the face of State secret privilege, unable to fully adjudicate on the legitimacy of the secrecy claims arbitrarily made.

These are alarming circumstances considering Kenya's history in regards to the misuse of the same national security claims in the infringement of human rights. This study therefore, analyses the limitations of Article 35 on the right to access information on the grounds of national security

[25] Section 6(5)Access to Information Act 2012.
[26] Section 14 National security council act 2012
[27]Section 131,132Evidence act ,(cap 80 of 2014)
[28] Section 30, Commision on Administrative Justice act(no 23 of 2011)

claims and examines to what extent Kenya respects the right to access information, in light of these sweeping powers

1.3 Research Objectives

1.To analyse the scope and content of the right to access information as guaranteed under Article 35 of the constitution

2. To Examine the nature, rationale and criteria of the limitations on the right to access information on the basis of national security

3. To examine the lessons that Kenya can learn from South Africa

1.4 Research Questions

1.What is the scope and content of the right to information as guaranteed under article 35 of the constitution?

2. What is the nature, rationale and criteria of national security limitations to the right to access information?

3 What lessons can Kenya draw from South Africa?

1.5 Hypothesis

This research posits that the prevailing trend of invoking national security justifications as a limitation to the right to access information has resulted in the maintenance of a culture of secrecy and a lack of open government .This hypothesis is based on the premise that the vague and wide discretionary powers espoused by the complete absence of comprehensive regulatory criteria and a watchdog allows the executive to exploit these justifications to withhold information, stifle public discourse and impede the democratic process solely in the protection of their own interests and not the publics.

1.6 Justification

The Constitution of Kenya entitles all Kenyans to a true, fair and unencumbered democracy and the utmost protection and fulfilment of their rights. Any derogation from this mission is not only a disservice to all Kenyans but also, an assault to their human dignity. In the fulfilment of this

mission the right to access information as a means towards government transparency and accountability is sacred and indispensable.

The right to access information, can and should be limited but not eroded and only through rigorous regulatory terms where the circumstances require drastic action in the protection of overall national interests and securities. Thus, this study is essential as it attempts to understand to what extent Kenya respects the right to access information by analysing the nature and criteria of the discretionary powers of invoking national security claims as a limitation to article 35 of the constitution.

1.7 Theoretical Framework

The right to access information is a fundamental tenet to any democratic society, where its citizens can make informed decisions and hold their governments accountable. This research therefore employs the theory of participatory democracy as a lens to the understanding and analysis of Article 35 and its limitations on the grounds of national security in an attempt to mitigate overreach and abuse of these clawback clause justifications

Theory of Participatory Democracy

The theory of Participatory democracy in its most basic assumption asserts that a true democracy is where sovereignty resides with the people themselves, it explores a form of governance in which the citizens are active participants of the decision-making process and are able to shape the policies that govern them. A true testament to 'the will of the people' .In the framing of her constitution , one of the founding fathers of American democracy Thomas Jefferson argued that '*Making every citizen an acting member of the government, and in the offices nearest and most interesting to him, will attach him by his strongest feelings to the independence of his country, and its republican constitutio*n.'[29]In his work Participatory democracy and democracy: The theory, the practice and a model for Missoula John J Troma asks these pertinent questions ' *What is democracy, this amorphous patriotic concept that becomes real only on the Fourth of July and election day? Why is politics such an incomprehensibly complex activity which can only be*

[29]Troma J, *Participatory democracy and democracy: The theory, the practice and a model for Missoula'*Scholar work at the University of Montana ,1989,3-10

successfully engaged in by the experts that I elect? Can I Trust my elected officials to act in my best interest?[30]

The theory of participatory democracy combats the passive and apathetic character of representative democracy where the public leaves the entire decision-making process in the hands of those who merely won the lottery of election. Jean Jacques Rousseau a founding proponent of participatory democracy asserts in his treatise 'The social contract' that 'England regards itself as free, but it is grossly mistaken it is free only during the election of its members of parliament. As soon as they are elected slavery overtakes it and it is nothing ' [31] Such is the nature of a representative democracy.

Rousseau essentially posits that only a participatory democracy can reflect the 'general and true will of the people '[32]. That delegation of the people's will through elected officials must not mean representation as representation 'entails alienation' of the people from their sovereignty ' The moment a people permits itself to be represented, it is no longer free'[33] Like Rousseau, John Stewart Mill believed in an active citizenry , where the government's role was to be educative to the public ,that their informed participation may allow them to fulfil their social ,civil and economic interests , for all intents and purposes that they may govern themselves through their leaders[34] . In his words he stated '*We do not learn to read or write, to ride or swim, by being merely told how to do it, but by doing it, so it is only by practising popular government on a limited scale, that the people will ever learn how to exercise it on a larger scale.'*[35]

Drawing lessons from the likes of Rousseau and Mill the contemporary scholar Benjamin Barber and many other like minded scholars such as Carol Pateman and James Fishkin espouse the

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[30] Troma J, *Participatory democracy and democracy: The theory, the practice and a model for Missoula'*Scholar work at the University of Montana ,1989,3-10

[31] Troma J, *Participatory democracy and democracy: The theory, the practice and a model for Missoula'*Scholar work at the University of Montana ,1989,3-10

[32] Troma J, *Participatory democracy and democracy: The theory, the practice and a model for Missoula'*Scholar work at the University of Montana ,1989,3-10

[33] Troma J, *Participatory democracy and democracy: The theory, the practice and a model for Missoula'*Scholar work at the University of Montana ,1989,3-10

[34] Troma J, *Participatory democracy and democracy: The theory, the practice and a model for Missoula'*Scholar work at the University of Montana ,1989,3-10

[35] Troma J, *Participatory democracy and democracy: The theory, the practice and a model for Missoula'*Scholar work at the University of Montana ,1989,3-10

notion that a true and strong democracy is synonymous to a participatory democracy which is defined by an active and informed citizenry[36]

Despite this, what seems to have carried sway was the notion that a participatory democracy would result in a 'tyranny of the majority 'as posited by James Madison in his Federalist paper No 10[37] was the idea that representatives were needed in order to filter the will of the people in any democracy. Similarly scholars such as Joseph Shumpter and B R Berelson who only have use for public participation at the election stage and believe passive and inactive citizenry to be a virtue of democracy , where the leaders set out the terms and the public merely reacts with silence as consent [38]Berelson argues that public indifference to governance is not only a 'Civic virtue' but also a necessity for 'cushioning the shock of disagreement, adjustment, and change'[39] , and the only means to a successful democracy .

However, a quiet and passive democracy is only well-hidden despotism. That is why this theory of participatory democracy carries this research for the very simple but crucial reason that at its core is the belief in the will of the sovereign; the people. This 'will' can only be truly fulfilled, where public discourse thrives and the public can shape the policies that govern them as opposed to just receiving them. With the most vital ingredient to democracy being an informed citizenry through government transparency. The right to access information is as stated by Aron Olaniyi 'indispensable to the health of a democracy and a means of protecting other rights[40]'

National security justifications in their sweeping , vague and discretionary nature pose a threat to democracy as they provide much room for abuse and exploitation thus subverting the will of the people, 'sovereignty's '*bete noire*''[41]. In the sentiments of Lord Akon '***Everything secret degenerates even the administration of justice ,nothing is safe that does not show it can bear discussion and publicity***'' .Thus as this research aims to analyse the nature of national security

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[36] Troma J, *Participatory democracy and democracy: The theory, the practice and a model for Missoula'*Scholar work at the University of Montana ,1989,3-10

[37]Madison J,'*Federalist pape*r No 10,' 1787.

[38] Troma J, *Participatory democracy and democracy: The theory, the practice and a model for Missoula'*Scholar work at the University of Montana ,1989,3-10

[39] Troma J, *Participatory democracy and democracy: The theory, the practice and a model for Missoula'*Scholar work at the University of Montana ,1989,3-10

[40] Olaniyi A 'T*he right of access to information and national security in the African regional human rights system' A*frican Human rights law Journal .2017.367-389.

[41] Troma J, *Participatory democracy and democracy: The theory, the practice and a model for Missoula'*Scholar work at the University of Montana ,1989,3-10

justifications as exceptions to article 35 of the constitution of Kenya, it will demonstrate to what extent does Kenya respect the right to access information to the end of true democracy which is , participatory democracy

1.8 Literature review

Thus far, the prevailing literature on the right to access information and the use of discretionary national security secrecy claims as a limitation to the right in Kenya is centred mainly on the procedural difficulties of accessing information due to bureaucratic red tape and the lack of public awareness as is reported in the Adili studies[42] conducted by Gathu and Kahindi in regards to the first stipulation.

The literature in regards to the latter acknowledges that there is indeed a culture of government secrecy despite new legislation and the existence of rogue executive discretionary powers in the declaration of official secrecy. The 2011 paper Towards promoting access to information in Kenya, by the African network of constitutional lawyers provides an exhaustive list of the un restricted legislative powers that explicitly and unconstitutionally derogated the right to access information, many of which have now been repealed or amended and their suggestions incorporated into the 2016 legislative framework[43].

Arnold Magina, in his dissertation the analysis of the 2016 access to information act, he reiterates the scope of exceptions as stipulated in the act and mentions the need to weigh the implications of disclosure to public interests and that a test of reasonability should be employed in regards to the values of a democratic society[44]. That which seems to have much semblance to my study is P.L.O Lumumba's 1989 thesis where he opines the interaction of national security claims and human rights in the Kenyan legal system as a pretext for detention and arrest laws meant to limit fundamental rights. Guided by the post-independence constitution of 1963 and the legislation of the day Lumumba posits the use of these national security claims to arbitrarily

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[42] Gathu p, Kahindi h ,*'Adili;access to information report*' October 2015, 5

[43] Section 6 'Access to information act,(No 31 of 2016)

[44] Magina A, 'A critical analysis on the access to information act 2016 kenya Published LLM thesis ,University of Nairobi,Nairobi .2019.

detain and arrest as a means of 'political survival and to punish political opposition rather than to deal with real threats to national security'[45].

1.8 1 The right to access information and national security exceptions

The prevailing understanding amongst governance scholars like Aaron Olaniyi is that, government secrecy is an egregious deviation from the normal course of things which is openness and government transparency with these values being central and vital to democracy. He argues that the right of a citizen to access state held information is the bare minimum of any democracy and anything but is 'the antithesis of democracy'[46]With fearsome idealism transparency scholars share in the sentiment that .At best they recognize government secrecy as an inconvenience of practicality , but never as a necessity to good governance as is explored by Edwin Abuya who asserts that an accurately and well informed public act as watchdog , to its governance and it is the right to access state held information that promotes all others[47].

In his thesis Lumumba observes that '*National security claims in Kenya, have always been advanced as grounds for expanding governmental powers or easing restrictions on those powers. Indeed, such claims have been pressed by the state more vehemently because of the drastic nature.*[48]

Moreover, in his study of the Government's Need for Secrecy vs. the People's Right to Know Nick Kotz a transparency scholar states rather aptly '*We live in a highly complex, highly bureaucratized, highly dangerous world. And in it, I would contend, secrecy is a major enemy. It is the enemy of efficiency, of creativity, of cooperation, of progress, of wise decision-making. Secrecy covers up inefficiency; it obscures wrong-headed concepts; and, yes, it conceals outright corruption. Most often, secrecy is maintained primarily for the convenience of the secret keeper,*

[45]Lumumba p, 'National security in the kenyan legal system' Published LLM thesis ,University of Nairobi ,Nairobi, 1989,158.

[46] Olaniyi A 'T*he right of access to information and national security in the African regional human rights system' A*frican Human rights law Journal .2017.367-389.

[47]

[48] Lumumba p, 'National security in the kenyan legal system' Published LLM thesis ,University of Nairobi ,Nairobi, 1989,.89,

either to enhance his or her power, to make him look good politically, or to avoid embarrassment. A'[49]

Furthermore, Kwoka shares the same sentiments in regards to state secret privilege claims as she reiterates the warnings of Judge Bazelon: ''*The state secrets privilege, weakly rooted in our jurisprudence, cannot and should not be a device for the government to escape the strictures of the Fourth Amendment. "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law."* [50] Kwoka continues to state 'that their examination of threshold secrecy decisions across the various legal contexts in this study demonstrates the very real threat of the development of a body of secret law[51]'Gus Van Herten observes the continued incapacitation of courts powers *'as its solely dependent on the hope that the executive is fair and forthcoming in supplying confidential information, in depicting how the information was acquired and selected for presentation to the court, and in producing all information in the state's custody that maybe beneficial'* [52]

On the other hand, some scholars are vigorous proponents of government secrecy, as a tenet of good governance and not as an ''undesirable, problematic''[53] and drastic deviation from the norm, as Jane Costas and Christopher Grey would put it.

Heide and Villenueve , argue against the carrying notion that it has to be transparency versus secrecy ,with transparency as the standard and secrecy as the peculiarity .These authors posit that secrecy too ought to be associated with effective governing and 'perceived as a precondition for all the benefits conventionally attributed to transparency ''[54]To this end they give three

[49] Kotz N 'Lumumba p, 'National security in the kenyan legal system' Published LLM thesis ,University of Nairobi ,Nairobi, 1989,158.

[50] Kwoka M 'The procedural exceptionalism of national security secrecy' Boston University law review,vol 97 154,(2017).3

[51] Kwoka M 'The procedural exceptionalism of national security secrecy' Boston University law review,vol 97 154,(2017).3

[52]Hurten G, *Weaknesses of adjudication in the face of secret evidence' International Journal of Evidence and Proof. Volume 13, Issue 1 , 3, (2009), para 2*

[53] Costas J ,Grey *'Bringing secrecy into the open ;Towards a theorization of the social processes of organizational secrecy ''* Organizational studies,Vol 35,2014, 1423

[54] Hede, M, Villeneuve' Framing national security secrecy ;A conceptual review''International journal Vol 76,2021,2

justifications to which they have termed as frames ;The first of which is the threat frame[55] ,which legitimises government secrecy as a precondition to democracy , on the basis that for the ultimate facilitation of democracy the individual must be protected from the world ,which is a violent place . This a conception espoused further by Wadham and Modi who assert that security is the 'the trump card of secrecy'[56].That at any point in time security is threatened, all other civil liberties if need be may be seized. The effectiveness frame justification by Heide and Villenueve considers secrecy as a resource[57] , that it is incumbent upon the executive for the implementation of policies that every tool at its disposal be wielded, in this case the tool being secrecy.

In as much as open governance is at the foundation of democracy, so is policy implementation. 'getting things done''[58] as Ansell and Torfing put it. Their final justification is the elite governance frame which propounds a paternalistic view of governing, the notion that; as the leaders of a democracy are elected, the citizens believe in their capability to administrate in wisdom and reasonableness and therefore they should exit the political sphere and leave it to them

1.9 Contribution

This study in its entirety will contribute towards the discourse on the right to access information in Kenya .Foregoing the obvious difference in constitutional regimes , unlike Lumumba my research is specialised on the analysis of the limitation to the right to access information on the grounds of national security justifications .Therefore I expect that my study will be unique as it focuses on the assessment of the nature of national security confidentiality claims and the prevailing criteria and parameters set out in their regulation .All this In an attempt to understand , to what extent does Kenya respect and enforce the right to access information held by the state .I surmise, that this study will contribute to the discourse of other scholarly fields such as that, of

[55] Hede, M, Villeneuve' Framing national security secrecy ;A conceptual review''International journal Vol 76,2021,242

[56] Hede, M, Villeneuve' Framing national security secrecy ;A conceptual review''International journal Vol 76,2021,2

[57] Hede, M, Villeneuve' Framing national security secrecy ;A conceptual review''International journal Vol 76,2021,244,para 3

[58] Hede, M, Villeneuve' Framing national security secrecy ;A conceptual review''International journal Vol 76,2021,244,para 3

human rights law, administrative law, constitutional law and theory as it provide a greater understanding on the balance between the need for transparency and maintenance of security in Kenya and draw insights and lessons from other jurisdictions .

This study complements works of, Nick Kotz, Magina, Margaret Kwoka and Kipkoech Cheruiyot who advocate for the mitigation or rather regulation and restriction of the government's discretionary power in the invocation of national security claims of confidentiality.

1.10 Methodology

This study applies the desktop research methodology and therefore relies on the review of primary sources such as the Constitution of Kenya, the National Security Council Act, the Evidence Act and the Commission of Administrative Justice, Act The study also relies on secondary sources which encompasses articles, journals and books. A comparative analysis of South Africa is carried out as it presents a contrasting perspective that provides much needed insight.

1.11 Chapter Breakdown

The study is structured into the following five chapters.

Chapter One: This chapter introduces the subject of the research in the background and sets out the aims and objectives of the study. The chapter provides a hypothesis and supporting justification for the study. It further illustrates the lens to which the study is to be conceived through the theoretical framework, the means to which the research is to be carried out through the methodology and ultimately the contributions the study makes to the discourse.

Chapter two: Examines the nature and scope of the right to access information as guaranteed by article 35 by analysing.

Chapter three:Examines the nature and scope and parameters of national security secrecy claims as limitations to the fundamental right to access information.

Chapter four: Conducts a comparative analysis and drawing lessons from South Africa

Chapter five: provides a conclusion and proposes recommendations based on the findings of the study.

CHAPTER TWO; THE CONTENT AND SCOPE OF THE RIGHT TO ACCESS STATE-HELD INFORMATION IN KENYA

2.1 Introduction

The right to access information stands as a cornerstone of democratic governance. The journey towards recognizing and embracing freedom of information laws has been nothing short of tumultuous characterised by constant change, progress and controversy. This chapter delves into the content, and scope of this fundamental right; for one it explores its historical evolution. Moreover, it navigates through the multifaceted dimensions of the right, examining the legal frameworks and mechanisms that underpin this right at both national and international levels, highlighting key legislative instruments and jurisprudence. By unpacking its content, and delineating its scope this chapter contributes to this dissertation a nuanced foundational understanding of this fundamental right.

2.2 The historical Evolution

Historically it seems the citizenry has more often than not been relegated to the shadows of ignorance. Secrecy being the antithesis of democracy, enlightened thinkers, the likes of Rousseau and Madison emerged who championed the idea of the people's right to know '-As Madison put it '*A popular Government, without popular information, or the means of acquiring it, is but prologue to a farce or tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives'*.[59]The 1766 Swedish law[60] on the freedom of the press is perceived as society's first crystallisation of the freedom of information as it required official documents to be disclosed upon request to anyone free of charge[61] a light at the end of the dark tunnel.

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[59] Sheehan C '*Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion*' 98 The American Political Science Review 2004 , 406.

[60]Khaseke M.'*The Emerging Jurisprudence On The Right Of Access To Information In Kenya*' Kenya law http://kenyalaw.org/kl/index.php?id=1904

[61] Khaseke M.'*The Emerging Jurisprudence On The Right Of Access To Information In Kenya*' Kenya law http://kenyalaw.org/kl/index.php?id=1904

This so called progressive move towards open government that civilisation seemed to have made , came to a two hundred year excruciatingly long stall ..Following the horrors of the second world war the Allied nations sought to create a framework for the for the protection and preservation of human rights , in this the United Nations General Assembly conceived the *"Freedom of Information as a fundamental right ,as the touchstone of all the freedoms to which the United Nations is consecrated. Freedom of Information implies the right to gather, transmit and publish news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the word.*"[62]This resolution was manifested through article 19[63] of the United Nations Declaration of Human Rights in 1948 followed by the 1966. International Convention on Civil and Political Rights, to which Kenya is a state party.

In spite of these remarkable strides, the pre 2010 Kenyan constitution lacked significant provisions for safeguarding the fundamental right to access information despite clauses such as Article 75[64] that addressed the freedom of expression which incorporated the freedom of information without interference. The constitution, notably, conferred extensive powers of derogation to the president's office, as outlined in Article 83,[65] which referenced sections of the Preservation of Public Security Act[66] enabling the executive to curtail these fundamental rights under the pretext of public safety.

During this period, Kenyan society grappled with a combination of secretive governance, censorship, oppression, arbitrary arrests, and a blatant disregard for human dignity. This situation was further exacerbated by legislative pieces such as the Official Secrets Act and the National Security Intelligence Service Act which granted the executive further arbitrary and indisputable powers to classify information as secret. Legal recourse through the courts was minimal, with these violations often justified under the guise of national security protection allowing the state

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[62] Khaseke M.'*The Emerging Jurisprudence On The Right Of Access To Information In Kenya*' Kenya law http://kenyalaw.org/kl/index.php?id=1904

[63] Khaseke M.'*The Emerging Jurisprudence On The Right Of Access To Information In Kenya*' Kenya law http://kenyalaw.org/kl/index.php?id=1904.

[64] Article 75 Constitution of Kenya 1963.

[65] Article 83 'constitution of kenya 1963

[66] Section 3 'Preservation of public Security act (Cap 57 of 1963).

to act unchecked .Notably, cases such as Kihoro Wanyiri v Attorney General [67]and Mirugi Kariuki v Attorney General [68]exemplified the widespread and unjust detention practices employed on those who openly questioned and criticised the government Even individuals arrested and provided with supposed justifications were subjected to unjust treatment such as Willy Mutunga [69]on a charge of sedition and Raila Odinga[70] on treason who were detained indefinitely without trial , following and in spite of 'nolle prosequi' applications (termination of proceedings) by the state .

This was an age marred by ill democracy and a blatant violation of liberties; atrocities sanctioned, hidden and covered up from the public and under the subterfuge of national security concerns. The people of Kenya had no recourse; faced with a culture of secrecy and without access to their freedom of expression and information their plight could not be made. The shadow government in operation could not be brought to the light of day and held accountable. In its enactment the constitution of Kenya 2010 brought refuge.

2.3 The Legal Framework

2.3.1 The Constitution

It is the demand of any democracy , that governance be open , accountable and transparent; it enables the sovereign to make informed decisions and hold their government accountable .The Constitution of Kenya promulgated in 2010, not only provides but safeguard's the right of access to information as a self-standing right independent of freedom of expression in its Article 35[71] which provides: (1) Every citizen has the right of access to- (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.' (2) every person has the right to the correction or deletion of

[67] Lumumba p, 'National security in the kenyan legal system' Published LLM thesis ,University of Nairobi ,Nairobi, 1989,137,p1.
[68] Lumumba p, 'National security in the kenyan legal system' Published LLM thesis ,University of Nairobi ,Nairobi, 1989,137,p1.
[69] Republic v Raila Amolo Odinga High Court Criminal Case No.54 of 1982.
[70] Lumumba p, 'National security in the kenyan legal system' Published LLM thesis ,University of Nairobi ,Nairobi, 1989,109
[71] Article 35 Constitution of kenya',2010

untrue or misleading information that affects the person. (3) The State shall publish and publicise any important information affecting the nation. The right to access information under.[72]

The right to access information is a fundamental entitlement covering all information under the control of the government, except for information legally restricted from access, in accordance with Article 24 2(c) that stipulates that any restrictions 'shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.[73] The Constitution delineates two types of responsibilities of the government concerning this entitlement. The first is the duty of active transparency outlined in Article 35(3) of the Constitution, which mandates the government to proactively disclose and disseminate information relevant to the public. This duty includes the establishment of mechanisms and procedures for accessing information, such as the designation of information officers and the enactment of access to information legislation. The Access to Information Act, 2016, operationalizes this constitutional right by providing detailed procedures for requesting and obtaining information from public bodies.

2.3.2 The legislative Framework to the right to access information in Kenya

The fundamental idea behind the concept of accessing information is centred on maximum disclosure. To further actualize and give effect to article 35 of the constitution , parliament passed the Access to Information Act 2016 whose main objective was and is to promote and ensure a culture of full disclosure of information in order to maintain transparency and accountability Every governmental body, be it at the national or county level, along with independent and constitutional commissions, is required to disclose information except in specific cases where exemptions apply. This obligation spans across all branches of government, including the Executive, Judiciary, and Parliament. Information encompasses all records held by either public institutions or private entities.

Exercising the right of access to information involves requesting it from either a public entity or a relevant private organisation. Requests must be made in writing, and there are strict deadlines for processing them.[74] If access is denied, reasons for the refusal must be provided. Requests for

[72] Article 35 Constitution of kenya',2010
[73] Article 24' Constitution of Kenya', 2010 .
[74] Section 8, Access to Information Act 2016,

information must be handled promptly, ideally within 21 days, with a specific emphasis on requests concerning an individual's life or liberty, which must be addressed within forty Eight Hours.[75] If a request for information is denied, the reasons for refusal, along with any justifications for claiming exemption, must be provided unless the information is explicitly exempt.[76] Additionally, the requester must be informed of the appeals process, which can be pursued through the office of the Ombudsman.[77]Once the fee is paid, the information access officer is required to provide the information to the office or permit relevant inspection of the information within 2 days of payment.[78]

Section 96[79] of The County Government Act[80] focuses on the accessibility of information maintained by county governments. It mandates county governments to establish an office aimed at facilitating access to information and also requires them to enact laws ensuring such access. Section 29 Ethics and Anti-Corruption Commission Act, mirrors the principles outlined in Article 35 of the Constitution, ensuring citizens' access to information by delineating the process for information requests. Moreover, the Act mandates the Commission to disseminate information within its jurisdiction that impacts the nation, aligning with the constitutional right to access information. Additionally, the Public Finance and Management Act, designed to ensure effective oversight of public finances at both national and county levels, mandates the publication of all reports from the parliamentary budget office within fourteen days of their completion[81].

2. 3.3 The Commission on Administrative Justice

The Commission on Administrative Justice is tasked with supervising and ensuring the enforcement of the Access to Information Act [82].Its responsibilities include investigating complaints related to information access, receiving compliance reports from public institutions,

[75] Section 8, Access to Information Act 2016,
[76] Section 8, Access to Information Act 2016,
[77] Section 9, Access to Information Act 2016
[78] Section 12(1)&(2), Access to Information Act 2016
[79] Section 96 County Government Act 2012
[80] Section 29 Ethics and Anti-Corruption Commission Act 2011
[81] Section 10 Public Finance and Management Act 2012
[82] Handbook on Best Practices on Implementation of Access to Information in Kenya , Commission on Administrative Justice 2018
,https://www.ombudsman.go.ke/sites/default/files/2023-08/Handbook%20on%20best%20Practices.pdf

raising public awareness, collaborating with public entities to uphold the right to information access, monitoring state compliance with international information access obligations, reviewing decisions stemming from information access violations,.[83]

The Access to Information Act provides a twofold process for review and appeal. Initially, individuals can appeal decisions that involve denying access to information, delay of information provision Appeals to the Commission on Administrative Justice must be lodged within 30 days from the date of the decision. Furthermore, the Commission has the authority to examine proactive disclosure decisions either upon request or autonomously. [84]Following such examination, the Commission holds the power to mandate the release of unlawfully withheld information, suggest compensation payments, or propose any other legal recourse. The rulings made by the Ombudsman's office are binding mandatory for both national and county entities.[85]

The second level of appeal is available through the court system. If an individual is dissatisfied with the decision made by the Commission, they have the option to appeal to the High Court within a twenty one day period. This is seen in the cases of Zebedeo John Opore versus The Independent Electoral and Boundaries Commission [2017] eKLR,[86] The petitioner sought records and documents held by the 1st Respondent relating to the Bonchari Member of National Assembly election conducted on August 8, 2017. These documents included data from electronic voter identification devices used at each polling station, copies of Forms 32A; Voter Identification & Verification Forms from each polling station, and Polling Station Diaries submitted by presiding officers for the purpose of filing an election petition. The central question before the court revolved around whether the Respondent had valid reasons, as outlined in Section 6 of the Access to Information Act, to deny access to this information. The court emphasised that any denial of access must be reasonable and justified. Ultimately, the court ruled

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[83] Handbook on Best Practices on Implementation of Access to Information in Kenya , Commission on Administrative Justice 2018 ,https://www.ombudsman.go.ke/sites/default/files/2023-08/Handbook%20on%20best%20Practices.pdf

[84] Handbook on Best Practices on Implementation of Access to Information in Kenya , Commission on Administrative Justice 2018 ,https://www.ombudsman.go.ke/sites/default/files/2023-08/Handbook%20on%20best%20Practices.pdf

[85] Handbook on Best Practices on Implementation of Access to Information in Kenya , Commission on Administrative Justice 2018 ,https://www.ombudsman.go.ke/sites/default/files/2023-08/Handbook%20on%20best%20Practices.pdf

[86] Zebedeo John Opore versus The Independent Electoral and Boundaries Commission [2017] eKLR,

in favour of the petitioner, finding that the Respondent had indeed violated the right to access information and ordered that the petitioner be granted access to the requested forms.

In the case of Kahindi Lekalhaile & 4 others v Inspector General National Police Service & 3 others [2013] eKLR, the petitioners, including Kahindi Lekhaile, sought to obtain information regarding the ivory stock held by the Kenya Wildlife Service and other private establishments. They were concerned that some of this ivory might have been illegally traded. The petitioners brought their request to court, seeking an audit of the ivory stock. The main issue for the court to decide was whether the court was the appropriate venue for the petitioners to seek this information, and whether they were entitled to receive it.

The court's ruling emphasised that individuals seeking information must first approach the public entity that holds the information. If the request is denied or ignored, then the individual can escalate the matter to the court. However, the court also stressed that the right to access information is not automatic. Instead, individuals must actively exercise their right by formally requesting the information. Simply having the right to access information does not mean that the information will be provided without any effort on the part of the individual seeking it.. In summary, the court affirmed the importance of the right to access information but emphasised that individuals must take proactive steps to request the information they seek, and they should initially approach the relevant public entity holding the information before resorting to legal action.[87]

2.3.4 The International and regional framework on the right of access to information

The Constitution of Kenya further guarantees the rights to access information through Article 2(6) which provides that the fundamental principles of international law will be integrated into Kenya's legal framework.[88] That any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution this buttresses and solidifies the right to access information not only through local legislation but also through International standards.

[87] Kahindi Lekalhaile & 4 others v Inspector General National Police Service & 3 others [2013]
[88] Article 2(6)' Constitution of kenya', 2010

The United Nations General Assembly established the foundation for discussions regarding the entitlement to access information. The UN Special Rapporteur on Freedom of Opinion and Expression affirmed this stance in his 1995 report to the UN Commission on Human Rights (UNHCR), stating 'Freedom will be bereft of all effectiveness if the people have no access to information'[89] This principle is reiterated in several international instruments such as in Article 19 of the International Covenant on Civil and Political Rights (ICCPR) [90], which espouses the right to seek, receive, and disseminate information imposing an affirmative duty on states to ensure information access.

The African Charter on Human and Peoples' Rights Article 9 (1) guarantees the right of every individual to receive information[91] These conventions are further complemented by several informal guidelines. The Tshwane Principles[92] regarding the Right to Information and National Security aim to safeguard the public's right to access information held by governments while also safeguarding legitimate government interests in protecting against national security threats. According to these Principles, governments may legitimately keep certain information confidential to safeguard narrowly defined national security concerns.

2.4 Conclusion

For all intents and purposes, the legislative and institutional framework concerning the actualization of the right to access information in Kenya appears thorough and sturdy. It encompasses the fundamental principle of maximum transparency, envisioned in Article 35 of the Constitution and supported by relevant legislative measures. This indicates a strong commitment to ensuring openness and accountability in governing. This includes provisions for the proactive disclosure of information by public bodies, mechanisms for citizens to request information, and safeguards to ensure the proper handling of sensitive data. However, great oversight and regulation is needed to ensure effective implementation and promotion of the right to access information.

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[89] UN Document E/CN.4/1995/32, para 35. the Special Rapporteur's annual reports to the UNHCR since 1995.
[90] Article 19 'International Covenant on Civil and Political Rights 1976
[91] Article 9 (1) African Charter on Human and Peoples' Rights, 1986.
[92] The Global Principles on National Security and the Right To Information2013 https://www.opensocietyfoundations.org/fact-sheets/tshwane-principles-national-security-and-right-information-overvw-15-point

CHAPTER THREE; THE EXECUTIVE PRIVILEGE OF SECRECY; THE NATURE SCOPE AND CONSEQUENCES OF NATIONAL SECURITY SECRECY CLAIMS AS A LIMITATION TO THE RIGHT TO ACCESS INFORMATION AS GUARANTEED BY ARTICLE 35 OF THE CONSTITUTION

Everything secret degenerates, even the administration of justice; nothing is safe that does not show it can bear discussion and publicity.[93]

- Lord Acton

3.1 Introduction

In chapter two we see a vastly competent legal apparatus in regards to the right to access state held information in Kenya, aimed at finally achieving a true open and participatory democratic government for its citizens. As aforementioned this is not an absolute right. In his thought system Adam smith contended that the state had only three duties[94] , and that which is pertinent to this study is the duty of the defence of the nation from internal and external threats. Undeniably these circumstances warrant some protection through a veil of secrecy.

To this end then, and as far as it is apropos this right is limited through the executive privilege of secrecy; the use of national security secrecy claims as an exception to the right. Nevertheless, that which will become apparent in this chapter is that the malleability of this right makes it imprecise at best. Due to the nature of this exception government security mechanisms have been utilised to further political objectives rather than addressing genuine threats to the nation. In the words of *John Reid for the most part, officials love secrecy because it is a tool of power and control, not because the information they hold is particularly sensitive by nature*[95]

Therefore this chapter concerns itself with national security secrecy claims ,in essence the nature of such laws , their extent and consequences as an exception to the right to access state held information What becomes apparent from this evaluation is that even with the progressive

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[93]Lord John Dalberg Acton, parliamentary address , circa 1860 ,https://www.goodreads.com/quotes/114460-every-thing-secret-degenerates-even-the-administration-of-justice-nothing

[94]Turan Yay , '*The role of the state in Adam Smith's thought system and Modern public Finance Theory ;a comparative Evaluation*' International Journal of Economics and Finance Studies ,Vol 2,2010 1309-8055.

[95] .John reid -1999 https://fipa.bc.ca/library/Public_Education/foiquotes.htm

constitution and legislation the administrative states bureaucratic apparatus in regards to this right leaves much to be desired in the way of ensuring government transparency and a true participatory democracy.

3.1 The nature of national security

One of the greater challenges of accurately evaluating human rights in the face of national security claims is of defining the concept of national security itself .In his article 'national security as an ambiguous symbol' Wolfers contends that when ' *political formulas such as "national interest" or "national security" gain popularity they need to be scrutinised with particular care as they may not mean the same thing to different people and that they may not have any precise meaning at all.*'[96] 'Today the definition of national security depends on the definers ideology', for this reason its nature has remained fuzzy and at times elusive[97].

The constitution of Kenya in its article 238 (1)defines national security as *the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.*[98] While it may seem like it provides direction and a foundation for agreement this definition does little in the way of precisely identifying national security concerns as it fails to pinpoint what exactly national security means in practice [99] .This situation is further frustrated in that this conceptual ambiguity echoes through legislative instruments with statutes such as the National Security Council Act maintaining the same abstractness with no clear end in sight . Tapia Valdes comments that;

'because of its seeming abstractness, that core concept of national security does not answer the questions of "security of whom?" and "development for whom?" Therefore, the kinds of problems that the national security expert must tackle are difficult, if not insoluble. For example, he must determine what threats exist; which values and interests should be protected first; how many restrictions should the citizen be expected to tolerate because of national security demands; and

[96] Wolfers, Arnold. "'National Security' as an Ambiguous Symbol." *Political Science Quarterly*, vol. 67, no. 4, 1952, pp. 481–502.
[97] Lumumba p, '*National security in the kenyan legal system*' Published LLM thesis ,University of Nairobi ,Nairobi, 1989,158.
[98] Article 238(1) *Constitution of Kenya* ,2010
[99] Lumumba p, 'National security in the kenyan legal system' Published LLM thesis ,University of Nairobi ,Nairobi, 1989,158

how much should the people know about the reasons and measures of the national security policies[100]**.**

In light of the vagueness of national security, scholars view this concept simply as ideological justifications for enduring disparities. One that grants a considerable if not overarching discretionary power [101]. This concept of national security provides the rationale ,circumstances and or justifications that a state can use its discretionary powers as an exception to derogate or limit the rights of the people. By virtue of its ambiguity national security grants little to no directional policy when administering its mechanism .It is this vague apparatus that political leaders have a tendency to use to justify abuses of power by disguising them as necessary measures for safeguarding national security. The question then becomes, how can this indistinct and hazy concept of national security warrant enough justification for the derogation of the rights that are not only core to democracy but innate and inherent to the people.

For the purposes of this discourse the focus rests entirely on national security secrecy, the limitation of the people's right to access state held information as guaranteed by the constitution, a right inextricable and foundational to democracy. The very nature of the national security concept as an executive privilege to limit the freedom of information through national security secrecy claims is entirely incompatible with democracy itself, a true democracy needs transparency and accountability which only comes with an informed public. In this matter the world seems to be of two minds.

Those like James Madison who espoused that 'a popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge'[102]On the other hand, there are those who argue like Schoenfeld, that "when one turns to the most fundamental business of democratic governance, namely, self-preservation the imperative of secrecy becomes critical, often a matter of survival."[103]Simply put that the means justify the ends, the means being secrecy and the end security and survival.

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[100] Valdes ,T 'A typology of national security policies' Yale Journal of International law ,1982 , pg 1.
[101] Valdes ,T 'A typology of national security policies' Yale Journal of International law ,1982 , pg 1.
[102] Aftergood S , *'National Security Secrecy: How the Limits Chang*e' The Johns Hopkins University PressSocial Research , FALL 2010, Vol. 77, No. 3, (839-852

[103] Aftergood S , *'National Security Secrecy: How the Limits Chang*e' The Johns Hopkins University PressSocial Research , FALL 2010, Vol. 77, No. 3, (839-852

What is of note is the use of the word survival which solicits a grave seriousness, what this exceptionalism suggests is that it is only to be invoked in the direst of circumstances in practice. However, these mechanisms are incorporated within regular governance procedures, like document classification systems, there's a particular focus on delineating public sector information requiring safeguarding, primarily justified by security concerns.[104]

The issue is that when the notion of national security is so broad uncertain and fuzzy , who's to say what is vital to national security and survival and what is not ,save for the whims of the amoral overly ambitious politic 'through closed-door decision-making in smoke-filled rooms which amount to a corrosion of the public interest.[105] Its abstractness breeds no empirical measure of necessity , on the issue Agamben notes that "the declaration of the state of exception has gradually been replaced by an unprecedented generalisation of the paradigm of security as the normal technique of the government."[106]

This is to say that instead of being an exception, this executive privilege of secrecy appears to be a norm. Now for the most part the Kenyan legal apparatus in regards to the right to access to information is proficient and comprehensive as was illustrated in the analysis of the legal framework, however in the face of national security secrecy exceptionalism the system seems to fall short.

3.2 The legitimacy of secrecy provisions; The Legal scope and parameters of national security secrecy

To reconcile the conflict between transparency and democracy with national security secrecy exceptionalism this part of the chapter explores and analyses the legal scope and parameters that regulate this mechanism.

In an attempt at a remedy we fall to regional and International standards in bringing these exemption provisions in line with transparency. In its capacity and power, The African Commission on Human and Peoples rights interpreted and applied relevant provisions from the perspective of international law thus establishing a set of legal standards and an analytical

[104] Lumumba p, '*National security in the kenyan legal system*' Published LLM thesis ,University of Nairobi ,Nairobi, 1989,158.

[105] Aftergood S , *'National Security Secrecy: How the Limits Chang*e' The Johns Hopkins University PressSocial Research , FALL 2010, Vol. 77, No. 3, (839-852

[106] Aftergood S , *'National Security Secrecy: How the Limits Chang*e' The Johns Hopkins University PressSocial Research , FALL 2010, Vol. 77, No. 3, (839-852

structure for a permissible restriction on the right to access information.[107]This entails a three-part test: that the restriction must be prescribed by law, that they must serve a genuine public interest, and be absolutely necessary to achieve that interest.[108]

3.2.1 Principle of Legality

First and foremost is the principle of legality Article 9(2) of the African Charter of Human and Peoples Rights recognizes the power of states to control access to information and uphold freedom of expression, as long as it aligns with legal boundaries[109]Recent decisions by the African Commission on Human and Peoples Rights highlight that this statement specifically pertains to domestic legislation aligning with international standards , ensuring African nations fulfil their obligations under the Charter without circumvention.[110] The Commission asserts that the Charter does not override national constitutions and laws, but rather, they should adhere to international laws and standards that bind State-parties. That while the Charter permits states to consider valid security concerns when fulfilling their duties, the law must not confer unfettered discretion.[111]

3.2.2 Principle of Legitimacy

For a restriction to be legitimate, human dignity is an absolute that must be maintained indicating that protected rights should not be easily encroached upon, and not every conceivable rationale for interference can be deemed justifiable or permissible in a democratic community.[112] Therefore states bear a significant responsibility to justify any limitation on rights. The sole acceptable justifications for restricting the rights and freedoms outlined in the article 24 of the

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[107] Salau A ' T*he right to access information and its limitation by national security in Nigeria mutually inclusive or exclusive* ' Thesis presented for the doctor of Philosophy in public law , University of Cape Town . 2017, pg 85.
[108] Salau A ' T*he right to access information and its limitation by national security in Nigeria mutually inclusive or exclusive* ' Thesis presented for the doctor of Philosophy in public law , University of Cape Town . 2017, pg 85.
[109] Article 9 (2) The African Charter on Human and Peoples rights ,1981.
[110] Salau A ' T*he right to access information and its limitation by national security in Nigeria mutually inclusive or exclusive* ' Thesis presented for the doctor of Philosophy in public law , University of Cape Town . 2017, pg 87
[111] Salau A ' T*he right to access information and its limitation by national security in Nigeria mutually inclusive or exclusive* ' Thesis presented for the doctor of Philosophy in public law , University of Cape Town . 2017, pg 95

[112] Salau A ' T*he right to access information and its limitation by national security in Nigeria mutually inclusive or exclusive* ' Thesis presented for the doctor of Philosophy in public law , University of Cape Town . 2017, pg 95.

Constitution of Kenya[113] and Article 27 of the African Charter meaning that these rights should be practised while considering the rights of others, collective security, morality, and the common good[114]

3.2.3 Necessity to Democracy

The third condition for valid limitation on access to information, is that the limitation must be of necessity in a democratic society, this refers to the need for proportionality between the extent of the restriction compared to the nature of the right involved, considering all relevant factors. Given that the right to access Information is indispensable to democracy, the principle has been established that restrictions, even those for national security reasons, should be minimal ensuring that the infringement on a right is no more than absolutely necessary to ensure the nation's survival[115] .

3.3 Analysis of the legitimacy of Kenya's national security secrecy provisions.

This part subjects various Kenyan laws to the three-part test of restrictions to the right of access to information. First, the law needs to impose a restriction without undermining the right. Secondly, it should advance a valid national security concern while ensuring public access to information, which is fundamental for a healthy democracy. Lastly, the restriction should be proportional and rational, aiming to achieve its purpose while imposing the least possible limitation.[116]

In the limitation of any fundamental right, the first point of reference is Article 24(1) of the constitution This Article dispenses the appropriate limitations; that a fundamental freedom and right cannot be limited, unless it is by law and that any statutory limitations 'shall not limit the right or fundamental freedom so far as to derogate from its core or essential content[117]

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[113] Article 24 ,Constitution of Kenya ,2010.
[114] Article 27 , African Charter of Human and Peoples Rights ,1981
[115] Salau A ' T*he right to access information and its limitation by national security in Nigeria mutually inclusive or exclusive* ' Thesis presented for the doctor of Philosophy in public law , University of Cape Town . 2017, pg 85
[116] Salau A ' T*he right to access information and its limitation by national security in Nigeria mutually inclusive or exclusive* ' Thesis presented for the doctor of Philosophy in public law , University of Cape Town . 2017, pg 85
[117] Article 24 ,Constitution of Kenya ,2010.

Article 24 of the Constitution of Kenya outlines limitations to certain rights and freedoms, including the right to access information, in the interest of national security. While such limitations are vital for the protection of our national interests, they must be scrutinised through the lenses of legality, necessity to democracy, and legitimacy. Emphasising the delicate balance required between upholding democratic values and ensuring national security.

The principle of legality asserts that any limitation on rights must be prescribed by law, clear, precise, and foreseeable. Article 24 ostensibly meets this criterion by stipulating that restrictions on rights must be provided by law.[118] However, concerns arise regarding the ambiguity of certain terms, such as "national security," which invite broad interpretation and potential abuse. The lack of precise definitions could lead to arbitrary restrictions, undermining the principle of legality.

Democracy only thrives on transparency, accountability, and the free flow of information. Restrictions on the right to access information should be narrowly tailored and strictly necessary to protect legitimate national security interests. While Article 24 recognizes this by requiring limitations to be "reasonable and justifiable in an open and democratic society,"[119] the devil lies in the application. Excessive secrecy prevents public participation and impedes accountability, posing a threat to the very essence of democracy. Therefore, any limitation on the right to access information must be proportionate to the threat posed and subject to robust oversight mechanisms to prevent abuse.

The legitimacy of restrictions on rights hinges on their conformity with democratic values. While national security concerns are legitimate, they should not serve as a pretext for curtailing fundamental freedoms arbitrarily. Article 24 acknowledges this by stating that limitations must be consistent with the provisions of the Bill of Rights. However, the challenge lies in striking the right balance between security imperatives and fundamental rights. Any restriction that unduly infringe upon the right to access information without sufficient justification undermines the legitimacy of the legal framework as a whole.[120]

What comes across, from the analysis of Article 24, is that while it has brought much needed change and restriction from the blatant and undemocratic provisions of the previous constitution

[118] Article 24 (1) Constitution of Kenya ,2010
[119] Article 24 (1)Constitution of Kenya ,2010.
[120] Article 24 (1) Constitution of Kenya ,2010.

Nevertheless there seems substantial room for unmitigated subjectivity and arbitrary discretion. While these provisions are designed to ensure that limitations on rights and freedoms are clear, specific, and proportionate, in practice, the requirement for explicit intention and specificity[121] can be bypassed through broadly defined security provisions. legislative instruments use general terms related to national security, allowing for wide-ranging interpretations that can curtail rights without adequate scrutiny.

Detailing the nature and extent of limitations ensures that restrictions are carefully tailored and proportionate to their intended purpose, aligning with democratic principles. Despite this requirement, the subjective nature of assessing what constitutes a proportionate limitation can lead to overly broad national security measures. The prevailing argument by an overreaching executive has been that extensive limitations are necessary for security, making it difficult for courts to challenge these assertions without appearing to undermine national security. Prohibiting limitations that undermine the core or essential content of a right ensures that fundamental freedoms retain their essential protections, even in the face of necessary restrictions

Determining what constitutes the "core or essential content"[122] of a right is inherently subjective and open to interpretation. This vagueness has been exploited to justify extensive limitations under the guise of national security, especially when courts are deferential to executive and legislative claims about security needs. As elaborated in the case of Legal Advice Centre t/a Kituo Cha Sheria & 33 others (Suing on Behalf of the Estates of their Deceased Children, their Own Behalf and on Behalf of about 32 Parents of Garissa University College Terrorism Attack Victims) v Cabinet Secretary, Ministry of Education & 7 others [2021] eKLR[123] where the court shied away from taking a judicial peek[124] at sensitive information relying entirely on curated and abridged evidence from the intelligence services.

The analysis of article 24 , has revealed an Achilles heel , yes there is no perfect law ,however the resulting legislative consequences are glaring .The provisions of section 6 of the access to formation act provide for several justifications for the limitation of the right to access information, that which is the particular focus of this dissertation is the first which is the

[121] Article 24 (2)(a)Constitution of Kenya ,2010.
[122] Article 24 (2)(a)Constitution of Kenya ,2010.
[123] Legal Advice Centre t/a Kituo Cha Sheria & 33 others (Suing on Behalf of the Estates of their Deceased Children, their Own Behalf and on Behalf of about 32 Parents of Garissa University College Terrorism Attack Victims) v Cabinet Secretary, Ministry of Education & 7 others [2021] eKLR
[124] A Company v Commissioner, South African Revenue Service,2014 (4) SA 549 (WCC).

limitation of information where it 'undermine the national security of Kenya[125]'.This is also reiterated in the National Security Council Act section 14 which states

The right of access to information under Article 35 (1) and (3) of the Constitution shall be limited in respect of classified information or information under the custody of the Council under the following circumstances— (a) the protection of classified information; (b) the maintenance and preservation of national The National Security Council Act, 2012 8 security; (c) where the disclosure is prejudicial to ongoing investigations or security operations; and (d) where the enjoyment of rights and freedoms does not prejudice the rights and freedoms of other persons disclosing or publicising information, the disclosure or publication of which would be prejudicial to national security.[126]

These clauses are further operationalised through provisions such as sections 131[127] and 132[128]of The Evidence Act which grants the executive unfettered powers of discretion in the use of national security secrecy claims in regards to matters that are considered classified. Claims that are invulnerable to questioning by the administrative commission owing to the provisions of section 30(a)[129] of the Commission on Administrative Justice Act. The problem is that in as much as the constitution aims to protect the right to access information, the aforementioned provisions create circumstances where this right is rendered inoperable and even incompatible with international standards.

Upon first instance the definitional question of national security resurges , While these statutes may highlight categories, including military strategies, defence intelligence methods to counter subversive actions, military capabilities and weapon systems excluding nuclear arms, counter-subversion intelligence, divulgence of intelligence sources and methods[130]; none of these provide actual or precise meaning in practice of what national security concerns actually are and only provide an abstract guideline . This means that the whole concept is entirely discretionary and therefore unregulated. Thus, the invocation of these claims has more often than not been

[125] Section 6 ,Access to Information Act , 2016 .
[126] Section 14,National Security Council act 2011
[127] Section 131 ,Evidence act ,cap 80 of 2014.
[128] Section 132 ,Evidence act ,cap 80 of 2014.
[129] Section 30, Commision on Administrative Justice act(no 23 of 2011)

[130] Section 6 ,Access to Information Act , 2016 .

political, allowing individuals to assign appealing and potentially misleading titles to any policy they support in the name of national security[131].

In his work Salau shares this very sentiment stating that '*Unfortunately, the Act's description of national security-related information is infinitely elastic, covering not only economic matters and the conduct of government affairs, but any 'information whose unauthorised disclosure would prejudice national security' (section 6(2)(a)). A subdued public interest override thus exists in section 6(4) under which disclosure may be required ... as shall be determined by a court'*[132]The fact is national security exceptionalism, even as limited by the constitution, remains afflicted by ideology as opposed to empirical necessity .Not only does the public not have any right to certain information but they are also robbed of any ability to verify the necessity of this exceptionalism .[133]

When a state authority or public institution withholds public information, it must sufficiently establish that there are legitimate grounds for such restriction. The restrictions must be entirely precise to allow individuals to foresee any conduct that may be affected by it[134]The lack of such precise parameters and regulation in the Kenyan National security mechanism confers an unfettered discretion on the executing authority and fails to provide sufficient guidance to what exactly is a legitimate justification beyond the mere label of national security concern.

The Access to information act, the Evidence Act and the National Security Agencies Act give the executive an unfettered classification discretion for national security reasons regardless of the public interest in access to state information. The laws do not clearly outline the term 'national security' or provide a specific process for classification, including who has the authority to classify information, the different levels of classification, and what types of information can be classified. This ambiguity allows the executive branch to retain control over information in order to advance its own agenda. It is only when an express specification of procedure and requirements exist in law that this exceptionalism may be legitimate and justiciable any kind of arbitrariness and abuse in classifying information.

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[131] Lumumba p, '*National security in the kenyan legal system*' Published LLM thesis ,University of Nairobi ,Nairobi, 1989,95

[132] Salau A ' T*he right to access information and its limitation by national security in Nigeria mutually inclusive or exclusive* ' Thesis presented for the doctor of Philosophy in public law , University of Cape Town . 2017, 124

[133] Lumumba p, '*National security in the kenyan legal system*' Published LLM thesis ,University of Nairobi ,Nairobi, 1989,.

[134] Salau A ' T*he right to access information and its limitation by national security in Nigeria mutually inclusive or exclusive* ' Thesis presented for the doctor of Philosophy in public law , University of Cape Town . 2017, 126

That which has been iterated through this study is that a true democracy must be open, transparent and participatory. The right of access to information as discussed in the previous chapters is the linchpin of a healthy democracy[135]. Thus, it is only when information is 'necessary' and or vital to a nation's survival that secrecy may be warranted. In order to ensure that a restriction is justifiable it must undergo heavy scrutiny to ensure it is not excessive or disproportionate to the legitimate purpose it seeks to achieve. This is a condition that the aforementioned provisions fail to meet as they are only blanket assertions that cannot be questioned even by the commission of administrative justice and the Court of law due to state secret privilege. This allows restrictions which erode or destroy the essence of the right

3.4 Conclusion

In Spite of the progress made, the fact remains that a culture of secrecy still prevails in Kenya aided by the utter lack in substantive regulation as is seen in the analysis above. The Executive has still retained its grip on the arbitrary and overreaching discretionary powers granted through these lack statutory provisions, leading to a lack of transparency accountability and most importantly an obliteration of our democracy.

[135] Salau A ' T*he right to access information and its limitation by national security in Nigeria mutually inclusive or exclusive* ' Thesis presented for the doctor of Philosophy in public law , University of Cape Town . 2017, 128

CHAPTER FOUR; COMPARATIVE ANALYSIS OF REGIONAL MECHANISMS IN REGARDS TO NATIONAL SECURITY EXCEPTIONALISM AIMED AT DRAWING LESSONS FROM SOUTH AFRICA

4.1 Introduction

From the analysis in the previous chapter; in more ways than one, we see that despite Kenya's progress in providing laws aimed at protecting and promoting the right to access information towards eradicating a culture of secrecy, these provisions seem to have fallen short in the face of national security secrecy exceptionalism. Thus, this chapter carries out a comparative analysis of regional mechanisms in regards to the limitation of the right to access information, aimed at drawing lessons from South Africa,

4.2 Comparative analysis of the legal Framework and mechanisms

4.2.1 Constitution.

The constitutionalising of the right to access information, under Article 32[136] of the South African constitution prompted the post-apartheid evolution of transparency and accountability[137] . This right provides that everyone has the right of access to a). any information held by the state; b) any information that is held by another person and that is required for the exercise or protection of any rights and that national legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.[138]

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[136] Article 32. Constitution of the Republic of South Africa 1997.
[137] Klaaren, Jonathan. "*The Judicial Role in Defining National Security and Access to Information in South Africa."* *Democracy and Security,* vol. 11, no. 3, 2015, pp. 275–97. *JSTOR*, https://www.jstor.org/stable/48602374. Accessed 8 Apr. 2024.
[138] Article 32. Constitution of the Republic of South Africa 1997

'The control of information and enforced secrecy was at the heart of the anti-democratic character of the apartheid system'[139]Motivated by a desire to not repeat the mistakes of the past , South Africa overhauled and transformed its limitation mechanisms in a practical manner that allowed for greater accountability .This is seen through Article 36 (1)[140] of the Constitution which stipulates that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right ,the importance of the purpose of the limitation ,the nature and extent of the limitation. the relation between the limitation and its purpose; and. less restrictive means to achieve the purpose[141].Most Importantly sub Article (2) which explicitly prevents derogation from sub article 1 as it provides that ; Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.[142]

4.2.2 The Legislative framework.

In 2001, The Promotion of Access to Information Act herein referred to as the (PAIA) came into force actualizing the right to access information. This Act requires public and private entities to implement specific structures, such as manuals, designated information officers, voluntary disclosure protocols, and automatic record availability. Both types of entities must respond to information requests within 30 days. There is a request fee of 35 rand for public bodies and 50 rand for private bodies, with additional charges for locating, retrieving, and copying records[143].
The right to access information can be limited in the confines of the aforementioned provisions of Article 36 of the Constitution. In this endeavour the PAIA in its section 41 presents the defence, security, and International relations of the republic as a justification to limit the right to access information.

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[139] Klaaren J*,'The promotion of access to and protection of national security information in south africa'* Center of study of law and society .University of California , 2003.
[140] Article 36. Constitution of the Republic of South Africa 1997.
[141] Article 36. Constitution of the Republic of South Africa 1997.

[142] Article 36. Constitution of the Republic of South Africa 1997.

[143]https://www.ucl.ac.uk/constitution-unit/research/research-archive/foi-archive/international-focus/south-africa

'Public access to information is the life-blood of any meaningful democratic participation'[144], for this reason section 46[145] The Act provides for mandatory disclosure in public interest, an override to any conceivable limitation aimed at. protecting the sovereign, and promoting true democracy.

The public interest override is seen in the case of the President of the Republic of South Africa & others v M & G Media (Ltd) 2012[146] . Following a presidentially commissioned trip of two Judges to President Mugabe of Zimbabwe, vested in ensuring an informed public M&G Media requested public access to reports about the nature of the trip. Upon refusal to grant access the executive cited sections 41 of the PAIA as a justification to denying the right to this state held information .Through section of PAIA '80(1)[147] which states that, despite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any grounds

The court was able to break the veil of secrecy, through Judicial Peek and in its judgement the court held that 'Without disclosing the details of the contents of the report I can reveal that the report potentially discloses evidence of a substantial contravention of, or failure to comply with the law. I am of the view that the public interest supersedes the harm that may ensue should the report be released.'[148] What is evident is that, even in the face of potential threat or harm, the public interest overrides, protects the will of the people, ensuring always that transparency and open government is the order of the day.4.2.3 Lessons for Kenya

While Kenyan mechanisms do consider the public interest as seen under section 6(4)[149] of the Access to Information Act that states; the court could require a public entity or private body to disclose information where the court formed the opinion that public interest in disclosure outweighed the harm to protected interests. The lax wording 'that the court could' presents an avenue for the ineffectiveness of the clause. In contrast the South African public interest override

[144] Klaaren, Jonathan. "*The Judicial Role in Defining National Security and Access to Information in South Africa." Democracy and Security,* vol. 11, no. 3, 2015, pp. 275–97. *JSTOR*, https://www.jstor.org/stable/48602374. Accessed 8 Apr. 2024.

[145] Section 46 ,Promotion of access to information act (act 2 of 2000).

[146] President of the Republic of South Africa & others v M & G Media (Ltd) 2012 .

[147] Section 80(1) ,Promotion of access to information act (act 2 of 2000).

[148] President of the Republic of South Africa & others v M & G Media (Ltd) 2012 .

[149] Section 6(4) Access to information act , 2016.

provides for mandatory disclosure despite potential harm as prescribed by section 46 of the PAIA[150]

For all , the term national security seems to elude empirical , specific and comprehensive definition ,for this reason it must be interpreted by context. In this Kenya shares the same constitutional insistence , that all national security exceptionalism must be within the law , for a legitimate purpose and necessary for democracy , but it fails to provide any practical mechanisms beyond the mere declarations In antithesis to the Kenyan situation, Klareen notes an intriguing consequence to the lack of a valid or substantive definition of national security in favour for more disclosure through legislative regulation[151] .

Under the scheme of the Promotion of Access to Information Act (PAIA). Section 80(3)(b) of PAIA empowers courts considering applications brought under PAIA to conduct an *in-camera* review of the contested record. Section 80 also empowers a court to take a "judicial peek" which is a practice occasionally used by our courts to privately inspect allegedly privileged documents[152]. In A Company v Commissioner, South African Revenue Service[153], the following was said about judicial peek: "Historically, the need sometimes arose in the context of the determination of interlocutory disputes about the right of one party to inspect discovered documents in respect of which the other party had claimed privilege. It entails the judge looking at material that is not available to the party against whom the alleged right of non-disclosure is asserted[154].

Whereas in the Kenyan case the lack of a substantive definition has done little in the way of promoting a path to greater regulation of national security , and the court has since shied away at employing the 'judicial peek[155]'. As seen in the previously discussed case of Legal Advice Centre t/a Kituo Cha Sheria & 33 others (Suing on Behalf of the Estates of their Deceased

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[150] Section 46 ,Promotion of access to information act (act 2 of 2000).

[151] Klaaren, Jonathan. "*The Judicial Role in Defining National Security and Access to Information in South Africa." Democracy and Security,* vol. 11, no. 3, 2015, pp. 275–97. *JSTOR*, https://www.jstor.org/stable/48602374. Accessed 8 Apr. 2024.

[152] Section 80(3) (b),Promotion of access to information act (act 2 of 2000).

[153] A Company v Commissioner, South African Revenue Service,2014 (4) SA 549 (WCC).

[154] A Company v Commissioner, South African Revenue Service,2014 (4) SA 549 (WCC).

[155] A Company v Commissioner, South African Revenue Service,2014 (4) SA 549 (WCC).

Children, their Own Behalf and on Behalf of about 32 Parents of Garissa University College Terrorism Attack Victims) v Cabinet Secretary, Ministry of Education & 7 others [2021] eKLR[156] This demonstrates the South African desire to tailor and make explicit the understanding of national security as much as possible[157], a fit yet to happen in the Kenyan Context.

4.3 Conclusion

The analysis of regional mechanisms regarding national security exceptionalism reveals significant differences between South Africa and Kenya. South Africa stands out with its robust judicial oversight and comprehensive regulatory frameworks that effectively limit the scope of national security secrecy. This has led to a more transparent and accountable approach to national security matters, ensuring that the balance between state security and individual rights is more carefully maintained. In contrast, Kenya's mechanisms are less stringent, often allowing for broader and less scrutinised applications of national security claim

[156] Legal Advice Centre t/a Kituo Cha Sheria & 33 others (Suing on Behalf of the Estates of their Deceased Children, their Own Behalf and on Behalf of about 32 Parents of Garissa University College Terrorism Attack Victims) v Cabinet Secretary, Ministry of Education & 7 others [2021] eKLR

[157] Klaaren, Jonathan. "*The Judicial Role in Defining National Security and Access to Information in South Africa.*" *Democracy and Security,* vol. 11, no. 3, 2015, pp. 275–97. *JSTOR*, https://www.jstor.org/stable/48602374. Accessed 8 Apr. 2024.

CHAPTER 5; RECOMMENDATIONS AND CONCLUSIONS

5.1 Introduction

Despite the strides made towards an age of open government through Article 35 of the Constitution of Kenya and its supporting legislation, this dissertation has found that this regulation still falls short when met with national security secrecy claims. Those who do not learn from history are condemned to repeat it. Kenya is no stranger to the abuse of discretionary power and blanket assertions of national security claims. It is the use of overarching unregulated national security exceptionalism, that allowed for the centralization and personalization of power that gradually laid the foundation for a dictatorship and innumerable human rights violations by previous administrations. The infringement of rights, blatant oppression and censorship, that which for all intents and purposes are political in nature as opposed to being merely functional tools.

The first chapter of this dissertation, provides the research problem and sets out the research questions to be answered aimed at supporting the proposed hypothesis. The second chapter presents the legal framework, scope and content of the right to access information. The third chapter provides the nature, scope and consequences of executive privilege, while the fourth chapter presents a comparative analysis of regional mechanisms aimed at drawing lessons from South Africa. This Chapter presents the conclusions of this dissertation derived from its findings and offers recommendations as a remedy to the problem

5.2 Conclusions

Despite the progressive Kenyan regulatory framework on the right to access information and the constitutionalising of the right to access state-held information in Article 35 of the Kenyan Constitution, this research argues that the ongoing trend of using national security justifications to limit this right has perpetuated a culture of secrecy and hindered open government. This study has found that the vague and broad discretionary powers allowed by lax legislative national security provisions, such as Section 14 of the National Security Act and Sections 131 and 132 of

the Evidence Act, coupled with the complete absence of comprehensive regulatory criteria and an effective oversight mechanism, allow the executive to misuse these justifications to withhold information, suppress public discourse, and impede the democratic process, primarily to protect their own interests rather than the public's The analysis of Kenya's right to access information within the context of national security reveals significant challenges in balancing transparency with security. The constitutional and regulatory frameworks, while progressive in intent, are undermined by broad and ill-defined legislative provisions that grant excessive discretionary powers to the executive. These provisions, particularly those in the lack the necessary specificity and oversight mechanisms to prevent abuse.

The lessons drawn from South Africa's experience underscore the importance of strong judicial review and regulatory mechanisms in upholding transparency and protecting civil liberties. These insights serve as a guide to refine the Kenyan approach to national security exceptionalism, emphasising the need for checks and balances to prevent the abuse of national security as a blanket justification for secrecy. For Kenya to truly uphold the right to access information as enshrined in Article 35 of its Constitution, it is imperative that it tightens the legislative provisions governing national security exceptionalism. Clearer definitions, stricter criteria, and robust judicial oversight mechanisms are essential to ensure that national security privilege is not misused to conceal information for self-serving purposes. While Kenya's constitutional and regulatory frameworks represent significant steps towards greater transparency, their effectiveness remains compromised and she still has a way to go towards true participatory democracy.

5.3 Recommendations

5.3.1 Repeal and Amendment of legislative provisions

The right to access state held information is inextricable from democracy, as it is not an absolute right greater care must be taken in its protection and promotion in order to prevent its curtailment and erosion through national security exceptionalism.

For one ,like South Africa Kenya should endeavour to introduce mandatory disclosure provisions on the basis that public interest outweighs the potential harm. Furthermore ,in order

to promote greater judicial oversight , the legislature should head the Obiter dictum of the case Legal Advice Centre t/a Kituo Cha Sheria & 33 others (Suing on Behalf of the Estates of their Deceased Children, their Own Behalf and on Behalf of about 32 Parents of Garissa University College Terrorism Attack Victims) v Cabinet Secretary, Ministry of Education & 7 others [2021] eKLR[158] 'we note that there is no law in place on the procedures for the confirmation of sensitive and confidential information for purposes of its disclosure, and we have had to look to other jurisdictions for guidance. There is, therefore, a need for a law to be enacted setting out the necessary procedures and protocols on disclosure of confidential and sensitive information, including information touching on national security."

The repeal and amendment of vague and arbitrary legislative provisions such as section 14 of the National security council Act 2012 [159]and sections 131 and 132 of the Evidence Act[160] , is essential to promoting access to information.

5.3.2. Innovative interpretation of relevant laws by the Judiciary

In the absence of statutory provisions that explicitly permit the' Judicial Peek' of matters classified under national security exceptionalism, the court must employ its discretionary powers granted to it under Article 159[161] of the Constitution and ensure that substantive justice is carried out. Through this Article, the court can use 'the judicial peek' to ensure that the matters that are being withheld meet the criterion of legality, legitimacy and necessity to democracy and especially in the spirit of the constitution and democracy. The high court of Kenya in Republic v Independent electoral and boundaries commission ex parte national super alliance (NASA)Kenya and 6 others 2017[162] , held that ;"Our Constitution neither endorses judicial restraint or expansive judicial activism: it simply creates the Judiciary as the institution through which the people of Kenya have bequeathed their sovereign power to exercise judicial authority and the mandates that Judiciary, and specifically, the High Court, to enforce the Bill of Rights. In

[158] Legal Advice Centre t/a Kituo Cha Sheria & 33 others (Suing on Behalf of the Estates of their Deceased Children, their Own Behalf and on Behalf of about 32 Parents of Garissa University College Terrorism Attack Victims) v Cabinet Secretary, Ministry of Education & 7 others [2021] eKLR
[159] Section 14 , National security council act 2012 .
[160] Section 131 and 132 ,Evidence Act Cap 80
[161] Article 159, Constitution of Kenya ,2010
[162] Kenya in Republic v Independent electoral and boundaries commission ex parte national super alliance (nasa)kenya and 6 others 2017

doing so, the Constitution does not constrain the Judiciary to self-limit itself so as to create administrative autonomy or institutional capacity of coordinate organs under the banner of "Judicial Restraint." [163]

[163] The high court
of kenya in republic v Independent electoral and boundaries commission ex parte national super alliance (nasa)kenya and 6 others (2017)eklr par 65.

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