FREEDOM OF EXPRESSION IN KENYA: A STUDY OF SECTION 16 OF THE FILM AND STAGE PLAYS ACT AND ITS ROLE IN CURTAILING FREEDOM OF EXPRESSION

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DECLARATION

I, **VANESSA SARAH OTIENO** 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: .....

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

Signed:.....

[Supervisor's Name]

ABSTRACT

The main aim of this paper is to analyse the constitutionality of Section 16 of the Film and Stage Plays Act. This will be done by considering its impact upon one's guaranteed right to expression and the limitation clause. Additionally, the paper will consider the ambiguity in the provision which warrants its official to arbitrary power in regards the censorship of artistic expressions. The other objective includes comparing the Kenyan legal framework on expression to that in United States of America and South Africa.

This paper has made use of secondary sources such as book and journals, and case laws from respective countries. The major findings of this paper are that Section 16 of the Film and Stage Plays act is too vague and broad to form a substantive, constitutional law. In this way, it has granted arbitrary power to the board in censoring arts hereby limiting one's freedom of expression. Thus, to this end the paper recommends the section be reviewed amongst other recommendations.

LIST OF ABBREVIATIONS

USA	United States of America
COK	Constitution of Kenya
KICA	Kenya Information and Communications Act
CEO	Chief Executive Officer
BASATA	Baraza la Sanaa La Taifa

LIST OF CASES

European Court of Human Rights

Sunday Times v United Kingdom, ECtHR Judgement of 26 April 1979.

Inter-American Commission on Human Rights

Rios v Venezuela, IACmHR Case, Judgment of 28 January 2009, (Preliminary Objections, Merits, Reparations, and Costs).

African Commission on People's and Human Rights

Constitutional Rights Project and others v Nigeria, ACmHPR Com 148/96 (1999-2000).

England Cases

Regina v Hicklin (1886), Court of Queen's Bench.

American Case Law

Abrams v. United States (1919), The Supreme Court of the United States.

Butler v Michigan (1957), The Supreme Court of the United States.

Heffron v. International Soc'y for Krishna Consciousness (1981), The Supreme Court of the United States.

Invalid Article 373 of the Penal Code of the state of Veracruz (2013), The Supreme Court of Mexico.

Kingsley International Pictures Corporation v Regents (1959), The Supreme Court of the United States.

Manual Enterprises, Inc v Day (1962), The Supreme Court of the United States.

Memoirs v. Massachusetts (1966), The Supreme Court of the United States.

Miller v California (1973), The Supreme Court of the United States.

Pope v Illinois (1987), The Supreme Court of the United States.

Roth v Goldman (1949), United States Court of Appeal for the Second Circuit.

Roth v United States (1957), The Supreme Court of the United States.

Texas v Johnson (1989), The Supreme Court of the United States.

United States of America v Christopher S. Handley (2008), United States District Court for the Southern District of Iowa.

Whitney v California (1927), The Supreme Court of the United States

Canadian Case Law

Re Luscher (1985), Canadian Federal Court of Appeal.

Republic V Oakes (1986), The Supreme Court of Canada.

South African Case Law

Case and Anor, v. Minister of Safety and Security and Ors (1996), Constitutional Court of South Africa.

De Reuck v Director of Public Prosecution (2004), Constitutional Court of South Africa.

Goodman Gallery v Film and Publications Board (2012), The Film and Publications Appeal Tribunal.

S v Mamabolo (2001), Constitutional Court of South Africa.

Ugandan Case Law

Andrew Mujuni Mwenda v Attorney General (2010), Constitutional Court of Uganda.

Kenyan Case Law

Apollo Mboya v Attorney General and 2 others (2018) eKLR.

Cyprian Andama v Director of Public Prosecution and another; Article 19 East Africa (Interested Party) (2019) eKLR.

Daniel Ng'etich and 2 others v Attorney General and 3 others (2016) eKLR.

EG v Non- Governmental Organisations Co-ordination Board and 4 others (2015) eKLR.

Eric Gitari v Non- Governmental Organisations Co-ordination Board and 4 others (2015) eKLR.

Gatirau Peter Munya vs. Dickson Mwenda Kithinji and 2 others, Supreme Court Petition No. 26 of 2014 (2014) eKLR.

Jacqueline Okuta and another v Attorney General and 2 others (2017) eKLR.

Katiba Institute and another v Attorney General and another (2017) eKLR.

Kenya Human Rights Commission v Attorney General and another (2018) eKLR.

Nation Media Group v Attorney General (2007) eKLR.

Ngunjiri Wambugu v Inspector General of Police and 2 others (2019) eKLR.

Okiya Omtatah Okoiti V Attorney General and 2 others (2013) eKLR.

Peter Muindi and another v Director of Public Prosecutions (2019) eKLR.

Pevans East Africalimited v Betting Control and Licensing Board and 2 others; Safaricom Limited and another (Interested Parties) (2019) eKLR.

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

Republic v Chief Magistrate's Court Nairobi Exparte Jeff Koinange & 11 others [2017] eKLR.

Wanuri Kahiu and another v CEO, Kenya Film Classification Board - Ezekiel Mutua and 4 others (2018) eKLR**.**

LEGAL INSTRUMENTS

International Instruments

United States Bill of Rights, (1789).

Constitution of South Africa, (1996).

Film and Publications Act, (1996).

National Instruments

Penal Code of Kenya, (Chapter 63 of 2012).

Constitution of Kenya, 2010.

The Film and Stage Plays Act. (2012).

The Kenya Information and Communications Act, (2013).

CHAPTER ONE:

INTRODUCTION

1.1 Background

> 'O me! O life!... of the questions of these recurring; of the endless trains of the faithless... of cities filled with the foolish; what good amid these, O me, O life?' Answer. That you are here — that life exists, and identity; that the powerful play goes on and you may contribute a verse. That the powerful play goes on and you may contribute a verse. What will your verse be?"[1]

As illustrated in the hereinabove quote, speech gives individuals an avenue to share out their ideas, opinions and values in a manner that enables them to realise their full potential and character so as to have a meaningful contribution to society.[2] This was held in *Constitutional Rights Project and others v Nigeria,* where the African Commission recognised the importance of the right as an edifice to personal development and political conscience.[3]

All forms of expression have time and time again proven to be paramount to the evolution of man. From Sojourner Truth's 'Aint I a woman' that stands as a landmark in the fight for both racial and women's equality,[4] to Edouard Manet's 'Olympia' hailed as a rejection of the patriarchal gaze in art.[5] Freedom of expression has clearly depicted itself to be a note-worthy element of civilization to which without, man becomes isolated and victim to a constant loom of redundancy.[6]

All in all, this right has raised several issues, both internationally and in Kenya.[7] A factor naturally owing to its limitations which have continuously plagued the courts in their role

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[1] W Wiltman, *Leaves of Grass,* An electronic classic series publication, Pennsylvania, 2007, 302.
[2] Emerson T, 'Toward a General Theory of the First Amendment' 2 *The Yale Law Journal* 877, 1963, 879.
[3] Constitutional Rights Project and others v Nigeria, ACmHPR Com 148/96 (1999-2000).
[4] Anderson M, 'Sojourner Truth, "Address at the Woman's Rights Convention in Akron, Ohio" (29th May 1981)' 7 *Voices of Democracy* 21, Monmouth University, 2012, 21-46.
[5] Bernheimer C, 'Manet's Olympia: The figuration of Scandal' 10 *Poetics Today* 2, Duke University Press, 1989, 256.
[6] Greenawalt K, 'Free Speech Justifications' 89 *Columbia Law Review* 1, 1989, 131.
[7] Morusoi EK, 'The right of Freedom of Expression and its role in Political Transformation' Unpublished Thesis, University of Pretoria, 2016, 145-306 and 400-402.

of ensuring a balance between the interests of the state and that of contended artists.[8] This balance, so to speak, has evidentially been seen to be corrupted to incline to the interests of the state, further encouraging censorship.[9]

Censorship is defined as the supervision and control of information and ideas that are circulated amongst the people of a society.[10] It is made on two grounds: political and aesthetic,[11]the latter of which shall be the major concern of this paper.

The gesture of censorship finds its origin at getting offended.[12] This can be exemplified historically through the disconcertment felt by the white settlers in the Pan-Africanist War Chant, 'One settler, one bullet'.[13] The victims of the chant argued on the premise that their lives had been threatened. When in fact, what awoke these deep perturbations was the word 'settler'.[14] In essence, there is nothing morally wrong in the term. However, the manner of disgust in which it was used changed its conceptualisation amongst its antagonists.[15] This is mainly because, for the most part, the whites had been associated with power privileged to name-calling, and having black people participate in the same challenged this power.[16] This caused them to react by ensuring that black peoples' expression was limited.[17] Consequently, it follows that the notion of censorship is underpinned by the act of taking offense; in this way being tightened all the more whenever one feels affronted.[18]

It is this notion of taking offense that has footed the acts of the Kenya Film Classification Board. The Board is formed under section 11 of the Kenya Film and Stages Play Act.[19] Its function is to approve and license films, plays and posters in accordance to the provisions of the Act.[20] In time, the board has been seen to over-exercise their mandate to restrict

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[8] Morusoi EK, 'The right of Freedom of Expression and its role in Political Transformation' Unpublished Thesis, University of Pretoria, 2016, 6-7.
[9] http://www.yourcommonwealth.org/editors-pick/censorship-in-kenya-a-nation-plunged-into-information-darkness/ on 30 November 2019.
[10] http://media.okstate.edu/faculty/jsenat/censorship/defining.htm on 26 February 2019.
[11] Devereaux M, 'Protected Space: Politics, Censorship, and the Arts' 51 *The Journal of Aesthetic and Art Criticism* 2, 1993, 207.
[12] Coetzee JM, *Giving Offense: Essays on Censorship*, The University of Chicago Press, Chicago and London, 1996, vi-ix.
[13] Coetzee JM, *Giving Offense: Essays on Censorship*, 1-3.
[14] Coetzee JM, *Giving Offense: Essays on Censorship*, 1-3.
[15] Coetzee JM, *Giving Offense: Essays on Censorship*, 1-3.
[16] Coetzee JM, *Giving Offense: Essays on Censorship*, 1-3.
[17] Coetzee JM, *Giving Offense: Essays on Censorship*, 1-3.
[18] Coetzee JM, *Giving Offense: Essays on Censorship*, vi-ix.
[19] Section 11, *Films and Stages Play Act* (2012).
[20] Section 15, *Films and Stages Play Act* (2012).

speech that does not accord to their own values. A perfect example of this would be the infamous movie 'Rafiki'.[21] The controversial film was nominated for an Oscar, in this way securing its position as the first Kenyan film to ever be voted in to such a prestigious ceremony within the film industry. However, arriving at an imposed obstacle on its ascent to glory, the board banned it from screening. Consequently, having them face the possibility from having the film being pulled out of the nominations.[22] They argued that the film was in contravention to national laws and morality.[23]

A similar line of thought was adopted in the year 2016 when the 'same love' music video was banned on the basis that it promoted homosexuality.[24] In this case, besides simply banning the video, the board went an extra mile in asking 'You Tube'-an international video sharing service- to flag it down.[25]

This goes to show but a few instances when the Board has used its power to regulate morality. A function that pins two sections against each other, as one provides for the functions of the board while the other adds onto this but does so outside the ambit of the former provision.[26] This is all done against the limitation and restriction clause provided for in the Constitution of Kenya.[27]

In addressing this issue, this paper shall proceed by emphasizing both on the autonomy of individuals and the importance of having ideas challenge each other so as to enable their quest for truth.

1.2 Problem Statement

Section 16 of the Act provides that the board may not approve of any film or poster which in its opinion offends decency.

The problem that this paper seeks to analyse is the ambiguity behind this section and its possible effect in censoring artistic expressions. Consequently, the mandate forces us to beg the question as to the objectivity of the standard adopted by the board in determining

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[21] *Wanuri Kahiu and another v CEO, Kenya Film Classification Board - Ezekiel Mutua and 4 others* (2018) eKLR.
[22] https://www.nation.co.ke/lifestyle/buzz/Rafiki-From-banned-to-in-demand/441236-4784656-ee6e8fz/index.html on 4 January 2019.
[23] *Wanuri Kahiu and another v CEO, Kenya Film Classification Board - Ezekiel Mutua and 4 others* (2018) eKLR.
[24] https://kfcb.co.ke/restriction-of-same-love-remix-music-video/ on 10 October 2019.
[25] http://www.kbc.co.ke/kenya-film-bans-same-love-remix-music-video/ on 4 January 2019.
[26] Section 15 and 16, *Films and Stages Play Act* (2012).
[27] Article 24 and 33, *Constitution of Kenya* (2010).

decency. Additionally considering, where this is not the case –bearing in mind the fluidity of the subject matter-, whether the standards considered in determining the aforementioned issues are justifiable and ensure a proper balance between both the interests of the state and that of artists.

It is from the above assertions that this paper implicates that the aforementioned section provides for the aptitude standard necessary for unwarranted censorship. An issue that not only limits expression, but also goes against our very own Constitution as it acts ultra-vires to one's freedom of expression and the limitation clause provided in the same.[28]

1.3 Hypotheses

The study will proceed to test the following hypotheses:

1. That the term 'offend decency' provided for under section 16 of the Films Act is ambiguous and does not provide an elaborate guideline in informing artists of what exactly is expected from them, in regards decency.
2. That the section gives too much discretion to the Kenya Film and Classification Board in classifying and limiting artistic expressions.
3. That the section is unconstitutional, in that it does not meet the standards provided for under article 24 and 33 of the Constitution of Kenya.
4. That there are more efficient and less restrictive means that the state may adopt in restricting artistic expressions in efforts of balancing interests.

1.4 Research Questions

The main question this paper seeks to answer, is to the extent Section 16 of the Films Act impacts Freedom of expression

Sequentially, it shall then proceed to answer the following secondary questions:

1. How has the Kenya Film Classification Board interpreted section 16 of the Films and Stages Play Act?
2. Is the section mentioned above consistent to article 24 and 33 of the Constitution of Kenya?
3. What standard may be adopted to safeguard the protective interest of the state while still considering the expressive rights of artists?

[28] Article 24 and 33, *Constitution of Kenya* (2010).

1.5 Objectives of the Study

The main objective of this paper is to determine that section 16 of the Films Act is too vague to form a binding law.

Accordingly, it shall then proceed to justify the following secondary objectives:

1. To determine that the section warrants too much discretion to the Kenya Film Classification Board in approving artistic works.
2. To determine whether the section is in line with article 24 and 33 of the Constitution of Kenya, respectively stipulating on the limitation clause and the freedom of expression.
3. To identify a standard that would ensure that both the interests of artists and the state are considered.

1.6 Theoretical Framework

This paper shall be based on the 'New Institutional First Amendment Theory' which was an evolution of the market-place of ideas.

The theory of the 'marketplace of ideas' was propounded by John Stuart Mill in his book 'Liberty'. It posits that individuals should be able to freely share opinions, beliefs and values which in turn challenge each other in quest for the truth.[29] This premise was confirmed by Justice Holmes in the case of *Abrams v The United States* where he posited that competition amongst ideas strengthens the truth and rules out error. He further warned on the danger of stifling voices being that it deprives mankind of messages that may challenge deeply held convictions.[30]

The same assertion was made in William Alston's article 'Expression'. Specifying on unpopular views, he advocated for their toleration affirming that they will either be promoted or trodden on by public opinion. This he holds, is a better alternative to censorship, as the latter impairs creativity, ideas, individual development and democracy.[31] The best example to illustrate this would be the misconception of the world

[29] Mill JS, *On Liberty*, Batoche Books Kitchener, Canada, 2001, 43-44.
[30] *Abrams v. United States* (1919), The Supreme Court of the United States.
[31] Alston W, *Philosophy in America*, Max Black ed, Cornelll University Press, Ithaca, 1965, 15-34.

being flat. If the people who believed the world to be round were silenced, then the misconception would still hold soil.[32]

All in all, the theory fails in establishing set conditions necessary for the effective competition of ideas. This is unlike the economic market, which has an abundant theoretical foundation supporting its own conditions necessary for desirable market outcomes.[33] Consequently, it is due to this deficiency that we instead rely on the New Institutional First Amendment Theory which internalises these transaction costs through regulation by institutionalization.[34] It was propounded by Fredrick Schauer-an economist-who drew a similitude between Ronald Coarse's understanding of transaction costs to market failures such as the energy used in searching for goods, or in our case the effort expended in search for ideas; and internalised them into institutions so as to minimise their effect.[35]

Secondly, the paper shall further be based on the Autonomy Theory. The theory was proposed by Professor David Strauss' centring on the persuasion principle.[36] The principle, in essence, holds that the government should not restrict speech on the basis that it will persuade people to act in a manner that would warrant its disapproval;[37] whereas the herein concept of autonomy is assumed in a Kantanian light, which argues that man being rational should be self-legislating.[38]Accordingly, the autonomy theory posits that freedom of expression is designed so as to protect the autonomy of potential listeners and as such should not be restricted extensively, but justifiably. This theory was best expounded on by Justice Brandeis's in his opinion in the case of *Whitney v California*, where he contended that the final end of the state is to ensure that individuals are free to develop their faculties and that liberty is adopted to be valuable both as an end and as a means.[39] All considered, this spoken of 'justifiable element' noted by the theory, is achieved by adopting the use of a hypothetical individual who has no other interest or desires other than to reach the best decision for the subject under discussion. In this way,

[32] Allegro JJ, 'The bottom of the universe: Flat earth science in the Age of Encounter' 55 *History of Science* 1, 2016, 62.
[33] Strauss D, 'Persuasion, Autonomy and Freedom of Expression,' 91 *Columbia Law Review* 2, 1991, 349.
[34] Blocher J, 'Institutions in the Market-Place of Ideas,' 57 *Duke Law Journal* 4, 2015, 839.
[35] Blocher J, 'Institutions in the Market-Place of Ideas,' 839.
[36] Strauss D, 'Persuasion, Autonomy and Freedom of Expression,' 349.
[37] *Heffron v. International Soc'y for Krishna Consciousness* (1981), The Supreme Court of the United States.
[38] Guyer P, 'Kant on the Theory and Practice of Autonomy,' 20 *Social Philosophy and Policy* 2, 2003, 70-98.
[39] *Whitney v California* (1927), The Supreme Court of the United States.

it provides them with a clear and impartial prerogative in determining how far the government can go in restricting (specifically) private speech on the grounds that it is manipulative.[40]

1.7 Literature Review

In Ronald Dworkin's book entitled 'Freedom's Law', a great emphasis is made on freedom of expression being essential to the enjoyment of other rights. He asserts that it is implicit in the right to receive information and make decisions.[41] The same of which is argued in this study.

Accordingly we will rely on American Jurisprudence, as it has been extensively discussed and further provides for a three-part test for when limitations to the freedom of expression may be deemed legitimate.[42] Firstly, they hold that the limitation must be set out by laws that are drafted in a clear and precise manner.[43] This was seen in a Mexican Supreme Court case that challenged the expression used in a provision that purported to be disjunctive based off its use of the word 'or'. Here, the court held that since the expression portrays a sort of dual nature, it promoted vagueness within the law and to that extent could not be considered legitimate.[44]

The American Convention also provides that the limitations imposed, must serve compelling objectives authorised by the Convention itself. These limitations must be necessary in a democratic society, strictly proportionate and appropriate to the identified compelling objective.[45] Additionally, the court also held that speech may only be restricted where it is necessary to do so and not just when it is useful; further noting that an adoption of the latter would have a chilling effect making people afraid of expressing themselves. [46]Consequently, these accorded for limitations cannot be advanced in the following ways: in a manner that amounts to prior censorship, in a discriminatory manner or in an indirect manner.[47]

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[40] Strauss D, 'Persuasion, Autonomy and Freedom of Expression,' 369.
[41] Dworkin R, *Freedom's Law: The Moral Reading of the American Constitution,* Harvard University Press, Cammbridge, 1996, 200.
[42] *Invalid Article 373 of the Penal Code of the state of Veracruz* (2013), The Supreme Court of Mexico.
[43] *Invalid Article 373 of the Penal Code of the state of Veracruz* (2013), The Supreme Court of Mexico.
[44] *Invalid Article 373 of the Penal Code of the state of Veracruz* (2013), The Supreme Court of Mexico.
[45] Article 13 (2), American Convention on Human Rights.
[46] *Invalid Article 373 of the Penal Code of the state of Veracruz* (2013), The Supreme Court of Mexico.
[47] *Rios v Venezuela*, IACmHR Case, Judgment of 28 January 2009, (Preliminary Objections, Merits, Reparations, and Costs), 84-94.

Additionally, Thomas Scanlon's Theory on the Freedom of Expression is also paramount to our discussion in that it stipulates that the Millian principle on autonomy of expression is to be balanced on the specific expression relative to other social goods. They are to consider whether they ensure equitable distribution of access to means of expression throughout the country and finally whether they are compatible to some special rights.[48]

South Africa, on the other hand, has had a heavy unique contribution to this discourse owing to its apartheidic history,[49] intensely pioneered by its own speech proponents of the like of Van Rooyen and John Maxwell Coetzee.[50] They contributed by channelling public convictions in considering appropriate tests in censorship and placing a great emphasis on classification. To this account, it is noted that Van Rooyen has written two books discussing these issues which shall be discussed in detail subsequently.[51]

All in all, in conducting our study, it is apparent that information on the topic is very limited within the Kenyan jurisdiction. Accordingly, our major references shall be the decision of *Wanuri Kahiu v Ceo, Kenya Films Classification Board*, where the court was of the opinion that Kenya should not be visualised as such a weak society whose moral foundation could easily be shaken by simply watching a film depicting gay theme.[52]

Adittionally, the paper will consider other factors such as that raised in the case of *Geoffrey Andare v the AG*, where the court considers the vagueness of legislations and their role in promoting uncertainty within the law. Here they hold that such laws fail in substance as they do not afford the parameters in which a person may act.[53]

It follows that the gap that this paper purports to fill is to provide an evaluation on the feasibility of applying the three-fold test within the Kenyan jurisdiction so as to justify the extent of these limitations.

1.8 Methodology

This paper will adopt a qualitative research style; on the basis that it would be the most objective and effective approach in regards the topic.

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[48] Scanlon T, 'A Theory of Freedom of Expression' 1 *Philosophy and Public Affairs* 2, 1972, 224.
[49] Bouhot P, 'Freedom of Expression under Apartheid' Unpublished LLM Thesis, University of the Western Cape, 2009, 43-76.
[50] Lewsen S, 'On Music, Censorship, and Globalization' 14 *Safundi: The Journal of South African and American Studies* 4, 2013, 460.
[51] Lewsen S, 'On Music, Censorship, and Globalization,' 460.
[52] *Wanuri Kahiu and another v CEO, Kenya Film Classification Board - Ezekiel Mutua and 4 others* (2018) eKLR.
[53] *Geoffrey Andare v Attorney General and 2 others* (2016) eKLR.

It shall rely on secondary methods of data collection and most specifically look into legal texts including the Constitution of Kenya, The Kenya Film and Stages Play Act and the Kenya Film Classification Board Guidelines.

Moreover, it shall bank on books, journals and reports so as to elucidate principles relevant to this discourse; while further relying on case laws and internet resources to justify and contextualise the aforesaid principles within the Kenya jurisdiction.

1.9 Chapter Breakdown

The structure of this study shall be as follows:

CHAPTER 1

This chapter shall be outlined by the above proposal which will serve as a roadmap of our arguments.

CHAPTER 2

The chapter will consider two theories: 'the autonomy theory' and 'the new institutional first amendment theory' which essentially form the basis of this paper.

It will attempt to illustrate the relevance of these theories to freedom of expression, while contextualising them to both an international and national scene.

CHAPTER 3

This chapter shall look directly into the extent to which section 16 of the Films Act impacts article 33 of the Constitution. Consequently, it will consider the prevalent ambiguity within the identified section in this way showing how it is abused while further discounting its constitutional legitimacy. All of this shall be discussed under the umbrellic problem of censoring morality.

CHAPTER 4

It will make a comparative analysis using American and South African jurisprudence so as to further understand how best to legalise the issue. To this regard, it shall take into account the evolution of decency standards and the obscenity rule in their respective contexts.

Accordingly, read together with the previous chapter. It will enable us to consider a standard that would be appropriate within the Kenyan context.

CHAPTER 5

This chapter shall make recommendations and conclusions based off of the analysis made from the research paper.

CHAPTER TWO:

THEORETICAL FRAMEWORK

2.1 Introduction

The previous chapter outlined the structure in which this paper intends to formulate its argument. The concern of this chapter is to consider the foundational principles that debunk the premise of this paper's arguments. In line with this, it shall consider two theories: the institutionalised market place theory and the autonomy theory.

2.2 The New Institutional First Amendment Theory

This theory evolves from the theory of the market-place of ideas, whose shortcomings paved way for its development. This is discussed below.

2.2.1 The market-place of ideas

The metaphor, 'a market place of ideas' was first conceptualised by Justice Holmes in his dissenting opinion of *Abrams v United States* who argued that the best truth is that piece of thought that gets accepted during the competition of ideas.[54] It posits that bad ideas, just like bad products, are not to be feared as they accordingly will be weeded out by their better counterparts so long as they are all freely available.[55] He was of the opinion that ideas should be evaluated in an open ended forum constituted by individuals in a relevant community rather than a political authority.[56] In further agreement, Justice Brandeis in the case of *Whitney v California* was of the opinion that the freedom to think as you will and as a person thinks were indispensable elements of discovery. He further contended that bad ideas arising from this are to be remedied by speech and not through silence with obvious exceptions to extenuating circumstances.[57]

Widely appreciated is the theory that even within foreign jurisdictions closer to home, the same is noted to be applied. In the case of *S v Mamabolo,*[58] a case decided in South Africa, it was decided that the free exchange of ideas should be promoted to allow for a transparent flexibility of expressions which in turn helps to develop growing democracies. It is an argument that highly depends on government neutrality, being that its strong

[54] Hot D, Schauer F, 'Testing the Market-Place of Ideas' 90 *New York University Law Review* 4, 2015, 4.
[55] Blocher J, 'Institutions in the Market-Place of Ideas,' 829-831.
[56] Blasi V, 'Holmes and the Marketplace of Ideas' 33 *Supreme Court Review* 3, 2004, 1.
[57] Blocher J, 'Institutions in the Market-Place of Ideas,' 829-831
[58] *S v Mamabolo* (2001), Constitutional Court of South Africa.

influences could easily tip the scale in favor of certain ideas and expressions inhibiting the discovery of truth.[59]

It is from the afore-mentioned examples that we acknowledge the prominent impact of judicial discourse that has assisted in promoting the theory.

However, that aside we must reflect on some of the values buttressing its free speech principle so as to better understand the theory's role in defending expression. These values include: individual autonomy, truth seeking, self-government, the checking of abuses of power and the promotion of good character.[60] They are pre-determined aspects of man's natural right to knowledge. In the ordinary sense of things, it goes without saying that the power to think and communicate thoughts is a right granted to man naturally outside the ambits of legal frameworks. It originates from man's capability to reason.[61]

2.2.2 Criticisms of the Market-Place of Ideas

All considered, the market-place theory has been placed under strict scrutiny by numerous scholars who envision it to not only to be simplistic, but also an idealistic view that fails to take into account the nature of the real-world market.[62] It is argued that if goods and services are susceptible to distortions then ideas in a similar manner cannot be viewed exceptionally.[63] This owes not only to the metaphorical connection made between the two but also to the vulnerable nature of ideas which are easily distorted by cultural affinities and psychological predispositions that affect the manner in which they are transacted.[64] A good example of this would be human diversity such as the different levels of comprehension achieved by each person.[65] It accords to this, that there are ideas that favour people who are better well-educated over those who aren't.[66] This sources mostly from the fact that some people have an easier access to information than others, that notwithstanding are also better equipped to grasp the concepts of such ideas.[67]

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[59] Vos P, 'Rejecting the free marketplace of ideas: a value-based conception of the limits of free speech', 33 *South African Journal on Human Rights* 3, 2017, 366.
[60] Blasi V, 'Holmes and the Marketplace of Ideas,' 1.
[61] Antieau CJ, 'Natural Rights and The Founding Fathers-The Virginians' 17 *Washington and Lee Law Review* 1, 1960, 45.
[62] Blasi V, 'Holmes and the Marketplace of Ideas,' 5-45.
[63] Blasi V, 'Holmes and the Marketplace of Ideas,' 5-45.
[64] Blasi V, 'Holmes and the Marketplace of Ideas,' 5-45.
[65] Blasi V, 'Holmes and the Marketplace of Ideas,' 5-45.
[66] Blasi V, 'Holmes and the Marketplace of Ideas,' 5-45.
[67] Blasi V, 'Holmes and the Marketplace of Ideas,' 5-45.

Unfortunately, this disproportionate reality remains the status-quo as not everybody is culturally attuned to information the same way.[68]

Fredrick Schauer, an economist who acknowledged a number of these distortions within the market-place theory, synonymously compared them to the botches in a typical market and attributed them the according term 'market failures'.[69] He criticized Holmes as perpetuating an atomistic theory, stating that he fails to understand that the market is an imperfect and frequently malfunctioning machine that experiences different costs of exchange which adds friction to its gears.[70] As put by the scholar Paul Brietzke, the theory ignores the weaknesses of humanity which he appropriately identifies as resource inequalities, communicative power and unstable preferences. It fails to understand that there can be no ideal results in as long as people disagree as to what constitutes a good idea.[71]

2.2.3 The Emergence of the New Institutional First Amendment Theory

It is as a result of these concerns discussed that Fredrick Schauer draws a similitude between the Ronald Coase understanding of transaction costs to the market failures identified above.[72] Ronald Coase was an economist who debunked the initial, neo-classical, idealized notion of a costless market by arguing that during transactions people not only pay for the price of goods and services, but also for the process of finding the said good and negotiating a good price. All of which takes time, energy and money being what economists refer to as transaction costs.[73] In his book, 'The nature of the Firm', Ronald Coase divides these costs into four categories being: search, information, negotiation and enforcement.[74]

It is in response to this that New Institutional Economists have established a theory meant to integrate all these factors so as to reflect the current reality.[75] They have done this by incorporating an aspect of institutions to the already developed marketplace theory, arguing that the same has better lowered transaction costs in the real market more

[68] Blasi V, 'Holmes and the Marketplace of Ideas,' 5-45.
[69] Blasi V, 'Holmes and the Marketplace of Ideas,' 5-45.
[70] Blocher J, 'Institutions in the Market-Place of Ideas,' 825-826.
[71] Brietzke P, 'How and Why the Marketplace of Ideas Fails' 31 *Valparaiso University Law Review* 3, 1997, 951 and 926-963.
[72] Blocher J, 'Institutions in the Market-Place of Ideas,' 839.
[73] Blocher J, 'Institutions in the Market-Place of Ideas,' 839.
[74] Blocher J, 'Institutions in the Market-Place of Ideas,' 839.
[75] Blocher J, 'Institutions in the Market-Place of Ideas,' 847-863.

than their governmental acquaintances.[76] These institutions loosely refer to regulators ranging from peoples' culture to social norms. Indeed, in support of the aforementioned hypothesis, it has been observed that societies better inclined to trust one another have had cheaper transactions than those constantly at each other's neck.[77]

The new institutional first amendment theory, in this way connects the market-place metaphor to institutional frameworks.[78] It holds that institutions that are market enhancers should be treated with deference by legal reformers. They posit that just as these institutions improve the market by facilitating the flow of goods and services, speech institutions improve the marketplace of ideas by facilitating for the flow of ideas done by lowering transaction costs.[79] This is exemplified through Universities and the General Press; the former equips people with the tools to decipher concepts whereas the latter serves as a clearing house for information especially on the political front. In these stipulated ways they reduce transaction cost present in typical conversations.[80] Such organizations are therefore justified in limiting the expression of their individuals if such is done to preserve the ability of these institutions to enhance their respective markets. [81]

2.2.4 Criticisms of the Theory

The first criticism asks on the manner in which good speech is to be separated from its bad counterparts. The response of which would be to view such speech institutionally, meaning that speech should be evaluated to the degree it serves its respective market.[82]

Secondly, one must consider the approach to be adopted in instances where these good institutions apply their rules in a way that does not promote the market of ideas. The answer to this, firstly, lies in making a key distinction between institutions and organizations. While an institution is what gives associations deference, an organization is a physical representation of such an institution and in this way can be subject to whims of dominant individuals.[83] Simply paraphrased, rules are to institutions as organizations are to the body that personifies such rules.[84] In most cases, strict limitations placed on

[76] Blocher J, 'Institutions in the Market-Place of Ideas,' 847-863.
[77] Ellickson R, *Order without law: How Neighbours Settle Disputes*, Harvard University Press, Cambridge, 1991, 282.
[78] Blocher J, 'Institutions in the Market-Place of Ideas,' 877-883.
[79] Blocher J, 'Institutions in the Market-Place of Ideas,' 877-883.
[80] Blocher J, 'Institutions in the Market-Place of Ideas,' 877-883.
[81] Blocher J, 'Institutions in the Market-Place of Ideas,' 860-870.
[82] Blocher J, 'Institutions in the Market-Place of Ideas,' 860-870.
[83] Blocher J, 'Institutions in the Market-Place of Ideas,' 860-870.
[84] Blocher J, 'Institutions in the Market-Place of Ideas,' 860-870.

speech are as a result of an organization misapplying its institutional norms. As such it would acquire the intervention by an intermediate body, usually the courts, to evaluate the content and the application of such norms. However, this should be applied cautiously as organizations enjoy court deference, owing to their institutional heritage.[85] This is exemplified by Joseph Blocher who gives an instance of a school forbidding an Israel refugee from giving a lecture. Well in our case, just to make the notion more applicable to home, if the University of Nairobi were to forbid a Somali refugee from addressing its faculties. At face-value, it seems as a form of discrimination, but what if the school intentions its actions as one that enhances their market by facilitating only academic forums.[86] In such an instance, a person aggrieved by the school's decisions may institute a case against them questioning their motives, but in that regard the burden of proving the same will be in their court. It is a difficult task at that, proving one's intentions, but it remains the only practical solution plausible that does not clash with the general principles of the theory.[87]

All noted the problem of how to ensure organization stick to its institutional principles seems to be the matter at hand. Accordingly, this paper seeks to adopt certain safeguards outside judicial recourse that will provide for this.

2.2.5 Application of the theory to this paper

In context of this paper, the market discussed herein is the nation of Kenya in regards their perception to the institution of freedom of expression. The organization, on the other hand, in charge of controlling this institution in the realms of decency is the Kenya Film Classification Board. Accordingly, it holds that the purpose of applying this theory to this paper is to further understand the role of the said organization in controlling expression within the frameworks of its own institution.

2.3 Autonomy Theory

The basis of this theory lies within the power of persuasion. It was advanced by Professor David Strauss relying on the works of Dworkin.[88] According to Dworkin, reflective endorsement in autonomy is a strong stance to defeat regulation. Aligning to Locke's defense of religious toleration, he holds that laws have no effect on personal conduct if it

[85] Blocher J, 'Institutions in the Market-Place of Ideas,' 860-870.
[86] Blocher J, 'Institutions in the Market-Place of Ideas,' 860-870.
[87] Blocher J, 'Institutions in the Market-Place of Ideas,' 860-870.
[88] Strauss D, 'Persuasion, Autonomy and Freedom of Expression,' 349.

does not convince one's moral convictions accordingly. [89]A state cannot make a person's life better by forcing them to live by an ethical code which they reject, a person must upon reflection and consideration consider the reasons as to why such a certain code is good for them.[90]

An understanding further propelled by Lord Delvin who held that moral dilemmas are to be solved using the rule of majority. He came upon this conclusion by considering the nature of all men to be able to decipher what is right and what is wrong. A power he holds to be personal to each and for this reason should be respected. This he accords as the purpose of democracy.[91]

2.3.1 Criticisms of the Autonomy Theory

A common objection proposed to the autonomy theory of free speech argues that there is no principle in respects to autonomy that aids in distinguishing between protected speech and other behavior. For example, riding a bicycle without a helmet could be expressive, but considering this as speech might be problematic.[92] This, however, is not a concern of this paper.

2.3.2 Application of the theory to this paper

The use of this theory is regarded in concerns to the moral policing function assumed by the Kenya Film Classification Board in advancing their roles. It is this papers contention that such a role acts in vain, as people's moral faculties are influenced by their rationality and not through coercive actions. Consequently, it follows that people are more likely to be persuaded to a way of thought through active deliberation and conversation than a forceful indoctrination of certain jurisprudence.

2.4 Conclusion

The arguments made above supports this paper's deliberations on the importance of the freedom of expression and the dangers of arbitrary censorship. They hold that the law should not over step its mandate as custodian, and instead should let other institutions determine the manner in which they should regulate their respective spheres.

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[89] Dworkin R, 'Liberal Community' 77 *California Law Review* 3, 1989, 487.
[90] Cohen J, *Philosophy, Politics and Democracy: Selected Essays*, Harvard University Press, Cambridge, 2009, 258.
[91] Lord Delvin, 'Law, Democracy and Morality' 110 *University of Pennsylvania Law Review* 5, 1962, 649.
[92] Baker CE, 'Autonomy and Free Speech' 27 *Constitutional Commentary* 2, 2011, 256-257.

CHAPTER THREE:

FREEDOM OF EXRESSION IN KENYA: CONSTITUTIONALITY OF SECTION 16 OF THE FILM AND STAGE PLAYS ACT

3.1 Introduction

The previous chapter briefly considered the theories that underlie the arguments made presently. It argues that the realm of expressions is similar to that of a market place, and in this way does not need strict legal interference to operate, as such will precariously affect one's freedom of expression.

This chapter shall consider how the law affects said speech by probing the constitutionality of section 16(4) of the Films and Stages Play Act, while further generally considering the problem of legislating morality.

3.2 Historical appraisal of Censorship in Kenya

3.2.1 Colonial Imperialism

The early-90s to its latter dates marked Kenya's struggle for independence against the rule of their colonial masters, the British. Consequently, the spread of political and anti-imperial ideologies became central to this account, intensifying the use of newspapers and political pamphlets which in this way provided a fulcrum for political action. These activities placed the colonial government on edge in fear of a thriving nationalist press,[93] resultantly leading to the enactment of the Penal Code, the Emergency Order in Council and the Newspaper Ordinance to control rebellious publications.[94]

Creatives, were not left behind in this struggle for independence and challenged oppressive colonial rule through public performances of songs and oral narratives, a tactic typified as the use of the arts of resistance.[95] A use so much so restrained so as to retain Africans' favorable attitude towards their oppressors.[96] All in all, this was eventually defeated and further became lessons taught by prominent artists such as Ngugi wa Thiong'o, who dedicated his life to ensuring pace-setters were never silenced.[97]

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[93] Frederiksen B 'Print, newspapers and audiences in colonial Kenya: African and Indian improvement, protest and connection' 81 *Africa: Journal of the International African Institute* 1, 2011, 155-172.
[94] David Makali, Media Law and Practice: the Kenyan Jurisprudence (2004) in Peter Oriare Mbeke, The Media, Legal, Regulatory, and Policy environment in Kenya. A historical briefing (2008),7.
[95] Scott J, *Domination and the Arts of Resistance,* Yale University Press, London, 1990, 1-17.
[96] Eribo S, *Press Freedom and Communication in Africa,* Africa World Publishers, New Jersey, 1997, 37.
[97] Durrani S, *Never be Silent: Publishing and imperialism in Kenya 1884-1963*, 1st edition, Vita Books Publishers, London, 2006, 239.

3.2.2 Post-Independence Era

The power embedded in censorship by its colonial masters was noted by Achieng Oneko as a constructive tool of development.[98] Infused upon it, was the development tradition that assumes that a plagued country does not have time for free and open debate.[99] Used together, these assertions justified post-coup censorship.[100]

The coup encountered and survived, the government was left tremendously shaken and responded to the betrayal by enacting oppressive laws that demeaned the very dignity of its citizens' right.[101] These laws varied in nature and ranged from the enactment of Section 2A of the Constitution that prohibited the formation of opposition parties, to unconscienced intrusions cognate to the use of torture houses.[102] Furthermore, priests were indicted for holding opinions,[103] and even common civilians persecuted for wearing subliminally indicative shirts.[104]

This approach of scaring and delimiting expression was the tool adopted by authorities in quieting down its antagonists hereby brewing irrational fear amongst the masses.[105]

It was a restriction further aggravated by President Moi's perception of Human Rights being inconsistent to African customs further holding its proponents disloyal to their heritage. [106] This opinion, he shoved down his subjects' throats to prevent a recurrence of the formidable events of 1982 and center public values to his own discernments.[107]

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[98] Eribo S, *Press Freedom and Communication in Africa,* 32.
[99] Seibert FS, Peterson T and Schramm W, *Four Theories of the Press: The Authoritarian, Libertarian, Social Responsibility, and Soviet Communist Concepts of What the Press Should Be and Do,* University of Illinois Press, Chicago, 1963, 10-23.
[100] Stiftung F, *We lived to tell the Nyayo House Story*, Friedrich Ebert Stiftung, Nairobi,2003, 2.
[101] Henrich Bell Foundation, 'The political economy of transition in Kenya' in Osingo P (ed), *The Politics of Transition in Kenya: From KANU to NARC*, 1st ed, Henrich Bell Foundation, Nairobi, 2009, 66.
[102] Kenya National Commission on Human Rights, Footprints of impunity: Counting the costs of Human Rights Violations-Nyayo House Torture chambers, 2016, 3-6 - http://knchr.org/Portals/0/CivilAndPoliticalReports/FOOTPRINTS%20OF%20IMPUNITY-B5-F-T-24-7-2017.pdf?ver=2017-07-27-105838-067 on 7 November 2019.
[103] Article 19, 'Censorship in Kenya: Government critics face the death sentence,' 1995, 11.
[104] Imanyara G, 'Kenya: Indecent Exposure' 21 *Africa-The Press* 4, 1992,1.
[105] Adar KG and Munyae A, 'Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001,' 5 *African Studies Quarterly* 1, 2001, 6.
[106] Adar KG, 'Human Rights and Academic Freedom in Kenya's Public Universities: The Case of the Universities Academic Staff Union,' 21 *Human Rights Quarterly* 1, 1999, 187.
[107] Adar KG and Munyae A, 'Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001,' 6.

All events stated, the following legislations were published: Kenya Mass Media Commission Bill and the Press Council of Kenya Bill, to regulate the operations of mass media.[108]

3.2.3 Minimal liberal Democracy

Mwai Kibaki's tenure of rule controlled political and social discourse by regulating mass media.[109]

It was a period outrageously renowned for its violent restrictions upon the masses' freedom of expression. Illustratively depicted between the years of 2005 to 2006, when- the now deceased- first lady Lucy Kibaki, stormed into Nation Media Centre raising all hell for a piece that was written on her.[110] An issue that was further compounded by the use of mercenaries deployed by the State to raid the Standard Group Nation Media House, which was later justified by the internal security minister- Honourable John Michuki- as a consequence of rattling the snake.[111]

All coming to show the impunity of government officials and the low regard they had for people's freedom to expression.[112]

3.2.4 New Constitutional Era

Noting rampant governmental interference, a need for political reformation was warranted. This was marked by the decriminalization of defamation,[113] which marked the turning point of a new age of censorship which was moral censorship.[114]With the revision of the Film and Stage Plays Act, grounds of censorship gyrated from political grounds to social ones.[115]

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[108] Awino S, 'The effect censorship laws on media freedom' Published LLB Thesis, Moi University, 2011, 6.
[109] Mbeke PR, 'The Media, Legal, Regulatory and Policy Environment in Kenya: A Historical Briefing' School of Journalism and Mass Communication, University of Nairobi, Commissioned by the BBC World Service Trust, 2008, 6.
[110] Amos KN, 'Transformation in the institution of the First Lady in Kenya; 1963-2018, Published LLB Thesis, Kenyatta University, 2015, 143.
[111] Obiero BM, Journalism in the Struggle for Democracy in Kenya: Analysis of the Standard and Nation News Coverage on Freedom of the Media in the Kenyan Constitution (2010) Dissertation to obtain the Master of Journalism Degree, Polytechnic Institute of Lisbon, 2016, 39.
[112] Ogola G, 'The Political Economy of the Media in Kenya: From Kenyatta's Nation-Building Press to Kibaki's Local-Language FM Radio,' 57 *Africa Today* 3, 2011, 87-91.
[113] *Jacqueline Okuta and another v Attorney General and 2 others* (2017) eKLR.
[114] https://www.article19.org/resources/kenya-censorship-by-film-classification-board-limiting-free-expression/ on 8 November 2019.
[115] https://www.article19.org/resources/kenya-censorship-by-film-classification-board-limiting-free-expression/ on 8 November 2019.

3.3 Constitutionality of Section 16 of the Film and Stage Plays Act

3.3.1 The nature of Censorship

In order to evaluate the constitutional legitimacy of this disputed section, it is important that we consider the nature of the subject at hand as is considered below.

It was originally traced in societies' customs and taboos that regulated peoples' day to day activities,[116] and later philosophized by Plato who contended that such was to stop mothers from relaying bad messages to their children while further ensuring unorthodox notions of God were treated as crimes.[117]

The word censorship is derived from the Latin word 'censure' meaning to assess.[118] Today, this assessment is conducted by considering what is wrong and right based on a hegemonic structure.[119]

Censorship is broadly defined as an attempt to prevent the moving and sharing of ideas that may be detrimental to the Government.[120] A factor inherently problematic as it works against man's rational nature.[121] Consequently, it follows from this that the best way to challenge such censorship is to work for the inclusion of views which challenge distribution of power.[122]

Types of Censorship

Thera are two types of censorship: formal and informal.[123] Formal types of censorship have strict rules about what may and may not be published and are backed by the force of law.[124] This includes state-sponsored censorship which is divided into hard law and soft law methods; the former of which is concerned with the use of legal processes while the

[116] Awino S, 'The effect of Censorship on the media' Published LLB, 2011, 3.
[117] Jowett B and Plato, *The Republic*, Random House, New York, 1966, 231.
[118] Mansfeild J, 'Certainties and Censure: Teacher education in a changing terrain' 3 *Policies Future in Education* 2, 2005,213.
[119] MacLaughin M and Basolos JM, 'Ideology, censorship and translation across genres: past and present,' 21 *Perspectives: Studies in Translatology* 1, 2016, 4.
[120] Fitzsimmons R, 'Censorship, Intellectual Freedom, Librarianship and the Democratic State' Libraries, Books, Ideology During the Second World War (1939-1945) Latvia, 12 October 1996, 1.
[121] Ward DV, 'Philosophical Issues in Censorship and Intellectual Freedom' 39 *Library Trends/Summer and Fall 1, 1990, 86.*
[122] Schroeder T, *Free Press Anthology*, The Truth Seeker Company, New York, 1953, 163.
[123] Little L, 'Laughing at Censorship' 28 *Yale Journal of Law and Humanities* 2, 2016, 161-164.
[124] Little L, 'Laughing at Censorship,' 161-164.

latter is achieved through the use of sets of authorities.[125]On the other hand, informal censorship is not based on rules and is more of a voluntary phenomenon.[126]

This paper will look into formal censorship, specifically moral censorship.

Moral Censorship

It is a form of censorship that works towards the protection of societal values. It has faced backlash on the ground that it closely links to regulating taste, matters of which reflect cultural judgments outside the purview of the law.[127]

It holds from this, that the law is supposed to maintain a minimum content of social morality so as to look unto other institutions to lift it, typically known as the principle of subsidiarity.[128] It is assumingly embraced due to the daunting nature of law that could easily cause a chilling effect within the creative domain,[129] which further- as identified by John Stuart Mill- cripples social progress as the same depends on the ability to develop moral variations from the majority.[130]

3.3.1.1.1.1 Understanding Obscenity

Obscenity is not determinate; it varies with time and people.[131] In the year 1484, approximately 9,000,000 people were torched on witchcraft allegations yet the same wouldn't hold ground today.[132] Further on, there was a time that the works of Shakespeare, currently considered a glory of its time, was considered profane. Imagine, if such a contention would have held ground, civilization would have been denied the splendor of his works.[133] It is this dangerously simplistic reasoning that could easily invalidate simple bodily actions such as digestion or even sex, which by themselves are not morally or immorally coded.[134]

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[125] Little L, 'Laughing at Censorship,' 161-164.
[126] https://www.enotes.com/homework-help/what-difference-between-no-media-censorship-formal-331623 on 26 September 2019.
[127] Little L, 'Laughing at Censorship,' 203.
[128] Sheerin J, 'Censorship in Contemporary Society,' 3 *Catholic Lawyer Journal* 4, 1957, 293.
[129] Sheerin J, 'Censorship in Contemporary Society,'291.
[130] Schroeder T, *Free Press Anthology*, 259.
[131] White H, *Anatomy of Censorship: Why the censors have it wrong*, University Press of America, New York, 1997, 2.
[132] Schroeder T, *Free Press Anthology*, 173.
[133] Schroeder T, *Free Press Anthology*, 163.
[134] Schroeder T, *Free Press Anthology*, 177-180.

3.3.2 The Film and Stage Plays Act

Background to the Film and Stage Plays Act

The British Colonial Film Policy began in Africa in the 1920s, following the fear that the colonised population's films will give a wrong impression of the white race in this way challenging their authority.[135] It ensured Europeans were always viewed as superior as was once argued by Sir Hesketh Bell justifying the policy by stating films contradicting this message, 'have a shocking and dangerous effect on colored youths and men in the earliest stages of culture who have hitherto been led to consider the white man's wife and daughters as patterns of purity and virtue."[136]

This was reflected by the prevailing board, Kenya's Select Committee on Film Censorship that segregated races and even placed Africans on a lower mental category than European children.[137]

In the late 50s, with the rise of the MauMau rebellion, the board banned the film 'Cry Freedom' as in its opinion it centered on civil disobedience and political unrest. An ideological discernment that made its way into the Film and Stage Plays Act of 1962,[138]and even later into the independence era as was witnessed by Mukhisa Kituyu who accused the Board of gagging a budding theatre industry in the 70s and 80s.[139]

In 2001, the discussion turned away from films to the media, when Hon Musalia Mudavadi- then the minister of Information Transport and Communication attempted to extend the Act's mandate to include supervising broadcasts under the disguise of protecting morality. This was later quashed by the High Court as unconstitutional for trying to extend the Act's mandate.[140] Successively, Amos Wako noted that the Act did not have a proper legal basis to extend its power and to this regard suggested it be repealed, but this was never done.[141] Rather just a few negligible amendments were made.[142]

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[135] http://www.bottomline.co.ke/kfcb-kenyas-morality-mafia-part-1/ on 5 November 2019.
[136] Rice T, *Films for the Colonies: Cinema and the Preservation of the British Empire,* University of California Press, California, 2019, 250.
[137] http://www.bottomline.co.ke/kfcb-kenyas-morality-mafia-part-1/ on 5 November 2019.
[138] Marian E, 'Stephen Biko and the Torture Aesthetic' 38 *A Journal of African Studies* 1, 2014, 10-30.
[139] http://www.bottomline.co.ke/kfcb-kenyas-morality-mafia-part-1/ on 5 November 2019.
[140] *Nation Media Group v Attorney General* (2007) eKLR.
[141] https://ipi.media/letter-proposals-for-kenya-media-law-amendments-would-have-an-adverse-effect-on-press-freedom/ on 5 November 2019.
[142] For example: Section 15 of the Act was reviewed to extend the Board's mandate to broadcasting, possession, distribution and exhibition of films and Section 11A stipulated for the composition of the Board, but failed to include experts from broadcasting industry.

The matter was worsened in 2009 when the Kenya Information and Communications Act, widening the Board's mandate, prohibited broadcasts that had not been approved by them. This was made all the more complicated by the publishing of the Programme Code which unexpectedly coincided with the appointment of Ezekiel Mutua as the new CEO of the board. All considered, the programming code was rendered unconstitutional *as* it witnesses KICA trying to abrogate some of its functions to a board not mandated to perform such.[143] Additionally, in light of purported delegation of power in regards a limitation of a right, it follows that the same must be done according to article 24 of the Constitution.[144] A factor that it has not adhered to, owing to the several instances it has over-exerted its power to censoring expressions. Their constant bullying has subjected its targets to revise their material rather than challenge their legitimacy in Court. This was all up until 'Rafiki,' where the Court criticised their reasoning on morals.[145]

Problematic Provision of the Act

Section 16(4) of the Act provides that:

The Board shall not approve any film or poster which in its opinion tends to prejudice the maintenance of public order or offend decency, or the public exhibition or display of which would in its opinion for any other reason be undesirable in the public interest.[146]

Considering the word obscenity is objectively indeterminate,[147] its application in this section raises two major issues. Firstly, it renders the section conceptually vague as the average citizen is unable to know the type of expression regulated and the manner in which the same may be achieved. While secondly, and in turn, it yields a wide discretion to which the Board may act.[148] On the whole, making it easier for censors to abuse its powers and further justify their over-exertion.[149]

Courts have generally discounted the use of vague provisions open to multitude of interpretations, [150]but still they are wary of the need of broad conceptualizations

[143] *Nation Media Group v Attorney General* (2007) eKLR.
[144] *Geoffrey Andare v Attorney General and 2 others* (2016) eKLR.
[145] *Wanuri Kahiu and another v CEO, Kenya Film Classification Board - Ezekiel Mutua and 4 others* (2018) eKLR.
[146] Section 16, *Film and Stage Plays Act* (2012).
[147] White H, *Anatomy of Censorship: Why the censors have it wrong,* 2.
[148] *EG and 7 others v Attorney General; DKM and 9 others* (Interested Parties); *Katiba Institute and another (Amicus Curiae)* (2016) eKLR.
[149] http://www.bottomline.co.ke/kfcb-kenyas-morality-mafia-part-1/ on 24 September 2019.
[150] *Katiba Institute and another v Attorney General and another* (2017) eKLR; *Geoffrey Andare v Attorney General and 2 others* (2016) eKLR.

necessary for adaptation of fluid subjects such as obscenity.[151] It is for this reason that they have adopted both the use of a constitutional and contextual reading of such provisions to distinguish between those which are vague and broad. This is done by looking into the following factors: the intention of the legislation determined by reading the text as a whole,[152] Constitutional principles, historical context of the identified legislation[153] amongst others.

All said, as discussed above, it is the joint conceptualization of the terms 'offends decency' and 'board's discretion' that makes this provision outside the ambits of any of the factors previously mentioned.[154] In this way, it loses its footing as being understood as broad.

It must be acknowledged that this paper does not discount the safeguards put in place for this. Some of them being the use of a diverse board and guidelines that delimit the scope of what expressions are to be considered indecent.[155] However, more measures need to be put into place to avoid the risk of abuses of power.

Application of Moral Censorship by the Kenya Film and Classification Board

The ambiguity discussed above has led to instances where the Board has wrongly applied their power to assert their own moral code over the interests of the general public. This is illustrated below:

a. Songs

Numerous musical compositions have been censored in the country due to their contested explicitly. Just towards the onset of the year 2019, a song entitled 'takataka' by an artist called Alvino was expurgated from public consumption for its deragotory language that advocated for violence against women by equating them to trash.[156] It was followed closely by another composition entitled 'piga shoka' mirroring the same theme and which caused uproar on social media platforms with the public demanding for the artists arrest.[157] The song was assumed to negligently narrate the morbid death of a Moi

[151] *Re Luscher* (1985), Canadian Federal Court of Appeal.
[152] *Peter Muindi and another v Director of Public Prosecutions* (2019) eKLR.
[153] *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others, Supreme Court Petition No. 26 of 2014* (2014) eKLR.
[154] Section 16, *Film and Stage Plays Act* (2012).
[155] Section 11 and 15, *Kenya Film and Classification Act* (2012).
[156] https://www.standardmedia.co.ke/ureport/article/2001321255/why-ezekiel-mutua-has-banned-takataka on 25 September 2019.
[157] https://www.tuko.co.ke/304779-kfcbs-ezekiel-mutua-asks-dci-arrest-singers-producers-pigwa-shoka-music-video.html on 25 September 2019.

University student by the name Ivy Wangeci who was hacked to death outside her campus in broad daylight.[158]

On the other hand, there is another spectrum of musical expressions that have been banned for the sexual tendencies to which they incline which further assume them unsuitable for children. Just recently, the famously know chant of 'Wamlambez' was banned on this basis.[159] Concurrently, the popular Tanzanian song of 'Tetema' banned on a similar grounding.[160] All considered it is important to note that both records have not been banned in their entirety; rather their performance has been restricted to clubs, where children will not be able to gain access to them. In fact, in a press conference addressing the same, Ezekiel Mutua is quoted saying, 'The songs Tetema and Wamlambez that we have restricted are not illegal. They are just not suitable for children…Just the same way beer is not illegal, but there is an age restriction on alcohol consumption to protect children.' [161]

Criticisms however arise, when their counterpart tribunal in Tanzania (BASATA) holds a contrary view. This was seen three days after the decision was made, when Basata replied by stating that the grounds in which KFCB has used to assess the song is ill-advised as the song does not promote pornography.[162]

This analysis has gone to show that censorship though impeding can be warranted in certain situations, but this is not always the case.

b. Movies

The perfect illustration of movie that was banned causing a lot of conversation amongst the masses was 'Rafiki'. It was a narration of a hopeless love encounter between two homo-sexual girls who fought for their endearing affection for each other, against the

[158] https://www.standardmedia.co.ke/ureport/article/2001320245/moi-university-student-hacked-to-death-with-axe-in-broad-daylight on 25 September 2019.
[159] https://www.tuko.co.ke/313858-wamlambez-kfcb-ceo-ezekiel-mutua-forbids-playing-song-clubs.htmlhttps://www.tuko.co.ke/313858-wamlambez-kfcb-ceo-ezekiel-mutua-forbids-playing-song-clubs.html on 25 September 2019.
[160] https://www.standardmedia.co.ke/ureport/article/2001340113/wamlambez-tetema-not-illegal-ezekiel-mutua on 25 September 2019.
[161] https://www.standardmedia.co.ke/ureport/article/2001340113/wamlambez-tetema-not-illegal-ezekiel-mutua on 25 September 2019.
[162] https://www.thecitizen.co.tz/news/Ban-of-Diamond-s-Tetema-and-Wamlambez-in-Kenya/1840340-5252982-75g7b2z/index.html on 25 September 2019.

scrutiny of traditional societal norms. Rafiki was banned on the pretense that it advocated for homosexuality in Kenya which is a criminal act.[163]

A distinction need be made here between sexual obscenities and sexual realities, considered in the censoring deliberations of the South African movie 'Of Good Report' on the notion that it promoted child pornography.[164]Consequently, it was found that the movie did not advertise pornography but instead simply portrayed a sexual reality that occurs on a daily basis.[165] Comparatively, the same should be regarded in Kenya, especially in regard expressions that simply depict social realities. This was considered in the *Eric Gitari case*, where the Court noted the reality of a right for homosexuals being free to associate with one another on the virtue of being human, while discounting the use of religion and moral convictions as a basis of limiting rights.[166]

The same was considered in the case of the movie, 'Stories of our lives' which could not be viewed or broadcasted in the country. A matter rebutted by its producers who argued that the essence of the film was to open dialogue about identities, a matter which the board can only prolong much further.[167]

3.3.3 Constitutional provisions

It is in contemplation of this that we consider two factors. The first being, whether objectionable material is protectable expression and if not so, whether such a limitation is constitutionally justified.[168]

Freedom of expression

The right to expression has jealously been protected especially through judicial decisions from the decriminalization of criminal defamation,[169] to the more restrictive use of the

[163] *Section 162,* Kenyan Penal Code (1899).
[164] Ngwenya S, 'Film censorship in South Africa. The analysis of classification and the interpretations of the 1996 Film and Publications Act, with reference to the banning of the film Of Good Report at the Durban International Film Festival 2013' Published LLM Thesis, University of KwaZulu-Natal, Durban, South Africa, 2013, 45.
[165] https://www.dailymaverick.co.za/article/2013-07-29-of-good-report-finally-gets-a-good-report-but-lock-up-the-children/ on 25 September 2019.
[166] *Eric Gitari v Non- Governmental Organisations Co-ordination Board and 4 others* (2015) eKLR.
[167] https://www.sde.co.ke/pulse/article/2000144411/restriction-orders-against-stories-of-our-lives-by-kenya-film-classification-board-kfcb on 22 November 2019.
[168] MacDonald M, 'Obscenity, Censorship and Freedom of Expression: Does the Charter protect Pornograpgy?' 43 *University of Toronto Faculty Law Review* 2, 1985, 144-147.
[169] *Jacqueline Okuta and another v Attorney General and 2 others* (2017) eKLR.

sub-judice rule;[170] we note that the courts have been intent on ensuring peoples right to impart and receive ideas.[171]

In Kenya, a more liberal approach has been taken on the same, especially in regards artistic expressions. This was most pertinently discussed during the ruling made on the play of the 'The Shackles of Doom' which was convinced on the strength of morality depicted in the country, so much so, that they were of the opinion that a simple play addressing corruption in the country, a prevailing reality is unlikely to quake that.[172] The same reasoning was recently applied in the case of Rafiki.[173]

All in all, it entails the liberty to receive and impart ideas, engage in academic discourse and artistically express oneself,[174] and is limited only to the extent that it: incites violence, induces wars, advocates for hatred in form of hate speech or infringes upon others rights.[175]

Through this constitutionally protected provision, it follows that censorship of obscenity is vaguely considered in the protection of the interest of others.[176] However, judicial discourse on the same has shown that this argument on the interest of others can be misused. This, consequently, raises the question as to the legitimate constitutional source of the Films Act authority in censoring expressions. An answer of which is indicated by the limitation clause discussed below.

Justifiable Limitation on the Freedom of Expression

This is provided for under article 24 of the Constitution that provides that a limitation can only be justified when it is in conformity to the law and reasonably applied in a democratic society as is discussed as below.[177]

a. Prescribed by Law

A limitation to a guaranteed freedom must be demonstrated by a legislation that allows for said restriction[178] and must align to the general principles of the Constitution.[179] In the

[170] *Okiya Omtatah Okoiti v Attorney General and 2 others* (2013) eKLR, Republic v Chief Magistrate's Court Nairobi Exparte Jeff Koinange & 11 others [2017] eKLR.
[171] Art 33, *Constitution of Kenya* (2010).
[172] *Okiya Omtatah Okoiti v Attorney General and 2 others* (2013) eKLR.
[173] *Wanuri Kahiu and another v CEO, Kenya Film Classification Board - Ezekiel Mutua and 4 others* (2018) eKLR.
[174] Art 33, *Constitution of Kenya* (2010).
[175] Art 33, *Constitution of Kenya* (2010).
[176] Article 24(3), *Constitution of Kenya* (2010).
[177] Article 24, *Constitution of Kenya* (2010).
[178] *EG v Non- Governmental Organisations Co-ordination Board and 4 others* (2015) eKLR.

case of *Sunday Times v UK*, it was held that limitations to rights and freedoms must prescribed by law especially in matters pertaining expression.[180]

In Kenya, every law must ultimately adhere to the Constitution which Courts have a duty to uphold.[181] Consequently, it follows that if a law does not clearly provide for a stipulated constitutional principle then it is voided by vagueness and loses its legitimacy.[182]

The US is seen to promote the same by ensuring that the due process of law is adhered to. This is especially the case for obscenity laws, as an imprecise law could easily have a chilling effect on expression.[183]

b. Justifiable in a free democratic society

In order to determine that which is justifiable in a free democratic society there is need to consider whether the law serves a legitimate aim,[184] and whether it is necessary and proportionate.[185]

The right to freedom of expression can only be limited by the provisions of the Constitution and where it is limited by a statue, such a legislation must meet the constitutional test of reasonableness and justifiability.[186]

The test of reasonableness was noted in the case of *Pevans v Betting Control Board*,[187]and *Nguniri v Inspector General of Police,*[188]citing the Canadian Supreme Court that provided two-prong criteria. At the outset, the sufficient importance of limiting a law must supersede the constitutionally protected freedom, meaning that the matter must relate to a pressing matter in a free democratic institution. Secondly, the means adopted must be proportionate to its end. An analysis derived from three components.

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[179] *Kenya Human Rights Commission v Attorney General and another* (2018) eKLR.
[180] *Sunday Times v United Kingdom*, ECtHR Judgement of 26 April 1979.
[181]*Apollo Mboya v Attorney General and 2 others* (2018) eKLR
[182] *Geoffrey Andare v Attorney General and 2 others* (2016) eKLR.
[183] MacDonald M, 'Obscenity, Censorship and Freedom of Expression: Does the Charter protect Pornography?' 141.
[184] *Kenya Human Rights Commission v Communications Authority of Kenya and 4 others* (2018) eKLR
[185] *Cyprian Andama v Director of Public Prosecution and another; Article 19 East Africa (Interested Party)* (2019) eKLR.
[186] *Robert Alai v The Hon Attorney General and another (2017)* eKLR.
[187] *Pevans East Africalimited v Betting Control and Licensing Board and 2 others; Safaricom Limited and another (Interested Parties)* (2019) eKLR.
[188] *Ngunjiri Wambugu v Inspector General of Police, and 2 others (2019) eKLR*

Firstly, the measures adopted must be carefully designed to achieve the objective in question, they must not be arbitrary or based on unfair considerations.[189] This is not the case in question as the ambiguity of the section discussed above has unfairly given the board an arbitrary power of deciding indecency.[190] Moreover, vague laws do not enjoy absolute constitutional protection as it does not stipulate the precise ambits to which a person may act.[191]

Secondly, it should apply the least restrictive measure.[192] This was considered in the *Butler Case* where they were of the opinion that the refusal to sell a book to an adult for fear that a child would gain access to it, was a violation of one's freedom of expression as the restriction was deemed too wide for its purpose.[193] Contextually, it was noted in the case of *Jacquline v AG* where the Court considered a satisfactory alternative remedy in light of dangerous consequence of chilling expression.[194] It this paper's contestation that the least restrictive measure to censorship would be classification as provided for by the Act, which in essence serves the same purpose.[195]

Lastly, there must be some form of proportionality between the means of limitation and the objective of social importance.[196] To which there isn't, as the most proportionate means in this case would be classification.[197]

This balancing has proven to be troublesome as censors have notoriously been inclined to fuse the interests of morality and the law together rather than view them as independent correlations.[198] A good example of this would be when KFCB defended the censorship of the controversial 'Rafiki' on the basis that it promoted homosexuality without sufficiently identifying the law that forbids expressions on the same.[199] Therefore, it follows that the law is what guides the balancing of these interests.

However, in the case of two conflicting interests, then each should be balanced off each other in purview to its respective circumstances. This was considered in the *Ng'etich*

[189] *Republic V Oakes (1986),* Supreme Court of Canada.
[190] Section 16, *Film and Stage Plays Act* (2012).
[191] *Andrew Mujuni Mwenda v Attorney General* (2010), Constitutional Court of Uganda.
[192] *Republic V Oakes* (1986), The Supreme Court of Canada.
[193] *Butler v Michigan* (1957), The Supreme Court of the United States.
[194] *Jacqueline Okuta and another v Attorney General and 2 others* (2017) eKLR.
[195] Section 15, *Film and Stage Plays Act* (2012).
[196] *Republic v Oakes (1986, Supreme Court of Canada.*
[197] Section 15, *Film and Stage Plays Act* (2012).
[198] Little L, 'Laughing at Censorship,' 193.
[199] https://www.standardmedia.co.ke/article/2001297288/criticism-of-movies-is-not-homophobic-reactions on 27 September 2019.

case where the liberty of detainees was considered over that of the general public.[200] Conclusively, acknowledging that the contemplated section is not justifiable within the meaning of the Constitution.

3.4 Justification of Section 16 of the Act

3.4.1 Grounds for Censorship

Protection of moral values

A common defense usually given by KFCB for censoring artistic works is the protection of morality, which in this case is understood as traditional and national values.[201] This argument is deduced from the notion that asserts that the most offensive expression are the ones that attack these values. Consequently, censorship comes in to protect such basic values that regulate our social conduct.[202] This claim, however, fails to consider the complex multi-faceted nature of morality to begin with and in this way remains naïve to the questions that arise on the same.

The Board in battling morality has assumed a singled stance position on the same. It is this position that instructs us to believe that they have a misconstrued understanding of the nature of morality to begin with.

Morality is made up of values and values are incommensurable.[203] This means they vary in nature and cannot be measured upon the same scale, a factor that makes it harder to apply the proportionality test.[204] It is for this reason that a more pluralized approach should be adopted in their consideration, identified by John Rawls as a thin theory. This thin theory of good assumes general values agreeable to all. Responsively, the law should only effect these goods by creating space for individuals to respond to these general values to their own accords.[205] In delimiting expressions the board should take this general approach to values in order to sustain peaceful co-existence between communities, such being the heart of secularism.[206]

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[200] *Daniel Ng'etich and 2 others v Attorney General and 3 others* (2016) eKLR.
[201] https://twitter.com/infokfcb/status/1166654862987317250 on 27 September 2019.
[202] Sen S, 'Right to Free Speech and Censorship: A Jurisprudential Analysis' 56 *Journal of the Indian Law Institute* 2, 2014,193.
[203] Chang R, *Incommensurability, Incomparability, and Practical Reason,* Harvard University Press, Cambridge, 1997, 35-51.
[204] Chang R, *Incommensurability, Incomparability, and Practical Reason*, 35-51.
[205] Rawls J, *A Theory of Justice,* Original Version, Harvard University Press, Cambridge, 1971, 397-398.
[206] Scharff BG, 'Four Views of the Citadel: The Consequential Distinction between Secularity and Secularism,' 6 *Religion and Human Rights* 2, 2011, 118-121.

This is not the case as has been illustrated in this chapter. In fact, to the contrary, the board uses opposing arguments to justify their unjust actions. They recklessly impede upon peoples' freedom to communicate thoughts and ideas- a natural right,[207] and then rush under the umbrellic refuge of preservation when caught in the act.

It is absurd to deem man rational enough to choose his leaders but not so much as to choose what is morally proper to him. Even if this was not the case, to rid man of the choice altogether especially in the face of many other alternative creative institutions is a slap on the face.[208] Classification offers a more desired route as it prescribes to the objective realms of human rights than that the subjective whims of morality.[209]

Additionally, the Board has on numerous occasions implicated a casual link of artistic expressions to moral decadency without providing any hard-empirical evidence on the same.[210] It is a claim that falls on its knees according to a study conducted by Maria Caruso who held that there are only two ways in which artistic expressions can morally harm its viewers. The first requires the use of a highly imaginative stimulus resulting to a change in belief; and the second concerns itself with intense emotional influence leading to the same.[211]

Maria Caruso argues that artistic expressions on their own are inert and they only assume persuasive motions when coupled with a pre-existing theory.[212] She further posits that if a belief is strong, then it will not be dismissed in light of contrary evidence. An example to the same is given of a hypothetical Tribe X individual who presumes that people from Tribe Y are more inferior to that of 'X' based on observations made of a woodblock print. Later, person X becomes friends with a person from tribe Y and changes his mind. Further into time, that friend ends up betraying person X forcing him/her to assume their initial stance on the matter. In this scenario, the wood block is no longer the cause of his

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[207] *Wanuri Kahiu and another v CEO, Kenya Film Classification Board - Ezekiel Mutua and 4 others* (2018) eKLR.
[208] Schroeder T, *Free Press Anthology*, 183.
[209] Ngwenya S, 'Film censorship in South Africa. The analysis of classification and the interpretations of the 1996 Film and Publications Act, with reference to the banning of the film Of Good Report at the Durban International Film Festival 2013' Published LLM Thesis, University of KwaZulu-Natal, Durban, South Africa, 2013, 28.
[210] https://www.nation.co.ke/lifestyle/buzz/Rafiki-From-banned-to-in-demand/441236-4784656-ee6e8fz/index.html on 12 March 2020.
[211] Caruso M, 'Why immoral art cannot morally harm us' Published LLB Thesis, Georgia State University, Georgia, South Africa, 2014, 36-50.
[212] Caruso M, 'Why immoral art cannot morally harm us' Published LLB Thesis, Georgia State University, Georgia, South Africa, 2014, 36-50.

racial intonations to the people of tribe Y, and even if it was- (assuming that person X used his betrayal encounter to justify his initial assumptions of the people from tribe Y) it will be difficult to attribute it as the salient feature of such a perception. However, even if one can attribute it as a salient feature, it would still need real world confirmation, expressly Person Y's betrayal, to be assumed as truth by said individual. In the same way, the observation of 'obscene' artistic expressions is less likely to have an impact on a viewer if it is not supported by real-life events. This consequently shows that focus should not be placed so much so on artistic expressions, rather it should be redirected to the real-life events that they attempt to replicate.[213]

On the other hand, concerning emotional influence, it is argued that the power behind them allows individuals to circumvent new beliefs.[214] Although, it works in its limits, owing to the fact that such beliefs are usually short-lived unless these emotions have grown into sentiments. To this end, there are four ways in which emotions become sentiments.[215] The first says that we may see a particular artwork as eliciting relevant emotion, for examples holding a piece as disgusting. This may well so be true, but fails to indicate the reason as to why it is immoral. Such a viewer is unjustified and merely indicates their own subjective propositional attitudes.[216]

The second looks into situations where a particular artwork is relevant to an ongoing situation. Accordingly, the paper argues that artwork has no causal power to put us in such situations. Even if one walked away from the woodblock believing that Tribe Y is inferior to Tribe X, the painting does not place such a person in a situation in which this belief would be expressed. A person would have to seek that on their own. This is not to say that art expressed in the wrong context to the wrong audience has no effect, as the same evidentially has been disapproved. However, this fact does not justify the premise that these objects are always weapons. The power to harm lies in the doing act, in work, not its expression.[217]

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[213] Caruso M, 'Why immoral art cannot morally harm us' Published LLB Thesis, Georgia State University, Georgia, South Africa, 2014, 36-50.
[214] Caruso M, 'Why immoral art cannot morally harm us' Published LLB Thesis, Georgia State University, Georgia, South Africa, 2014, 36-50.
[215] Caruso M, 'Why immoral art cannot morally harm us' Published LLB Thesis, Georgia State University, Georgia, South Africa, 2014, 36-50.
[216] Caruso M, 'Why immoral art cannot morally harm us' Published LLB Thesis, Georgia State University, Georgia, South Africa, 2014, 36-50.
[217] Caruso M, 'Why immoral art cannot morally harm us' Published LLB Thesis, Georgia State University, Georgia, South Africa, 2014, 36-50.

Thirdly, argues that sentiments are adopted where there is social encouragement to adopt the belief. The objection to this argument is obvious. In this case, if a person adopts the moral attitudes of an expression because society endorses such attitudes, then it is not the expression that morally harms us; rather it is the social belief that cause us to adopt such attitudes that are immoral.[218]

Last but not least, when the adoption of an attitude is not consequential of the art piece but some counterfactual state of affairs. For example, if a person was to adopt an anti-feminist attitudes for the fear that acting otherwise would cause social structure to unravel. In this case, any moral harm is resultant of a person's belief and not an art piece.[219]

All in all, this goes to show the insignificant role art plays in moral decadence, further discounting most of the arguments that are proposed by the Board.

Protecting the impressionable audience

The term weaker inclinations attribute to the group of people who are easily morally influenced; as such it is typically associated to children as their rational faculties are not fully developed.[220]

Accordingly, it is a common argument used in Kenya especially in matters concerning children as they are thought to be impressionable. A more vivid description of such an instance would be the banning of the songs 'Wamlambez' and 'Tetema' from being played in the general public.[221]

All in all, we do not seek to dispense on the vulnerability of children, but rather seek to attain a balance between their protection and the remainder of the society's freedom of expression.

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[218] Caruso M, 'Why immoral art cannot morally harm us' Published LLB Thesis, Georgia State University, Georgia, South Africa, 2014, 36-50.
[219] Caruso M, 'Why immoral art cannot morally harm us' Published LLB Thesis, Georgia State University, Georgia, South Africa, 2014, 36-50.
[220] Storey M, 'The Moral Censor' 9 *The Australian Quarterly* 3, 1937, 79-81.
[221] https://www.standardmedia.co.ke/ureport/article/2001339681/wamlambez-tetema-to-be-only-played-in-bars-ezekiel-mutua on 24 September 2019.

3.4.2 Inefficiency of Censorship

Effect on democracy

Censorship goes against the very grain of democracy by curtailing one of its most important hallmarks which grants people the freedom of thought and opinion.[222]

Additionally, it also works contrary to the principle of the rule of law which allows for the due process. This principle requires its adherents to draft laws capable of public scrutiny; as such its subjects must be able to decipher what is expected of them. These laws must be precise to enable its subjects be able to decipher what is expected of them. There is also lack of a fair hearing as the alleged perpetrator is not given a chance to defend their matter before their respective adjudicators. [223]

Complicates the discovery of truth

This is made harder as a lot of power is left to the officials in charge of censoring who in their way of suppressing indecencies can discriminate on legitimate opinions. An enduring Achilles' heel of power, fattening upon that which it feeds, leading to discrimination on the basis of opinion rather than alleged decency. Its demise starts by censoring that which is evil to that which is doubtful to the unpopular and ultimately, the popular.[224] It is this slippery slope that we wish to avoid holding that nothing but error can suffer in honest debate. Granted, there are some materials that ought to be excluded from the public domain. However, such a power is venomous in the hands of an administrative official as it can lead to censoring unpopular opinions protected under the Constitution. [225]

3.5 Constitutionality of Section 16 of the Act

3.5.1 No constructive offence.

As a general rule of law, it is affirmed that offences must be ascertainable.[226] In fact, in the *case of Sunday Times*, the matter was expounded on by stating the following:

'First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the

[222] Sen S, 'Right to Free Speech and Censorship: A Jurisprudential Analysis' 193.
[223] Schroeder T, *Free Press Anthology*, 153.
[224] Schroeder T, *Free Press Anthology*, 157.
[225] Schroeder T, *Free Press Anthology*, 157-161.
[226] *Sunday Times v United Kingdom*, ECtHR Judgement of 26 April 1979.

circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.'[227]

Section 16 of the Act does not clearly define the illegal parameters of acts to be considered within its ambits. In essence meaning that the law is uncertain therefore unconstitutional.

3.5.2 Goes against Freedom of expression provided for under the Constitution.

As contemplated above, the provision for restricting possible obscene material is unconstitutional, as it fails the limitation test expounded above.

3.6 Conclusion

The law is vague for a reason and this is to allow for context. The ambiguity in section 16 of the Act, however, is unconstitutional being that it grants arbitrary power to a board enabling it censor materials on a subjective basis being morally.

The Constitution, to this regard, seems to preempt the problem of censoring morally and for this reason does not include a decency provision in its limitation clause. Instead it allows for the formulation of a law empowered with the role of classifying such arts of expression to their appropriate audience. This act of classification is what we consider a proper balance between interests. However, as arguments have well been illustrated above, there is a thin line between such classification and censorship. This calls for a proper system of checks and balances so as to ensure the line is not crossed. Accordingly, this is discussed in the following chapter.

[227] Schroeder T, *Free Press Anthology*, 172.

CHAPTER FOUR:

COMPARATIVE ANALYSIS

4.1 Introduction

The previous chapter discussed the unconstitutionality of the breadth of section 16 of the Film and Stage Plays Act, while further indicating instances where the provision has been abused to censor unpopular speech. It came to the conclusion that the section grants arbitrary power to the board in censoring artistic expressions by giving a wide discretion in which they can act.

This chapter shall consider the measures adopted by two countries: United States of America and South Africa in delimiting the scope of their respective boards so as to prevent the danger of censorship.

4.2 Selection of USA and South Africa as Comparative Study

This paper uses the USA as a benchmark owing to its wide legal jurisprudence on the subject at hand. The evolution of free expression in America has evolved over time to become the substantive body of law that it is today. From the common law rule of 1868 seen in *Regina v Hicklin,*[228] which held that obscenity was anything that corrupted those open to moral influences to the three-prong test adopted in the case of *Miller v California* discussed below.[229] We note tremendous growth in the legal depiction of obscenity and its reflection to budding societies. Consequently, holding that the same be attributed to the Kenyan setting. It is granted that the social dynamics between prevailing countries differ tremendously, however, the principles underlying their decisions can be universally applicable as they concern but one freedom. This chapter embarks to mainly rely on those principles.

The setting in South Africa, on the other hand, is closer to our own. Following that a good part of our Constitution is inspired by theirs,[230] and that our government structures

[228] *Regina v Hicklin* (1886), Court of Queen's Bench.
[229] *Miller v California* (1973), The Supreme Court of the United States.
[230] Ghai JC and Ghai Y, 'The Contribution of the South African Constitution to Kenya's Constitution', in Dixon R and Roux T (eds) *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence***,** Cambridge University Press, Sydney, 2018, 252-256.

resemble tremendously.[231] This is evidenced by section 16 and 36 of their Constitution, respectively providing for an identical freedom of expression provision to our own.[232]

It follows that it is a good benchmark for the topic at hand. Moreover, the Kenya Films and Classification Board has been seen to previously engage with South African's equivalent, the Publications Film Board, in order to find means of better improving their legislations and implementation on matters pertaining to artistic expressions.[233]

The legal framework concerned with obscene materials in America is considered under the First Amendment. As a general rule, the amendment does not protect obscenity. However, a lot of discourse has occurred over the years of what exactly should be considered obscene and the test that should be adopted.[234] It is in response to this that courts generally adopt the Miller test to substantiate the same. It is a three-prong test that considers a reasonable person and contemporary community standards. It shall be further discussed below.

South Africa, similarly, has an identical freedom of expression provision and limitation clause in its Constitution that allows for artistic creativity.[235]Moreover, they have a Film and Publications that is responsible for the classification of films which acts in similar purview to our very own act. To the contrary, however, their Act is more concise in its role towards obscenity as it does not delegate such a power to its board in determining matters that may be considered indecent.[236]

The approach of this chapter will be to analyse the inefficiencies of censorship considered in the previous chapter, banking them upon legal principles developed in the USA and South Africa.

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[231] Ghai JC and Ghai Y, 'The Contribution of the South African Constitution to Kenya's Constitution', in Dixon R and Roux T (eds) *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence***,** Cambridge University Press, Sydney, 2018, 273.
[232] *Section 16 and 36*, Constitution of South Africa (1996).
[233] Film and Publications Board, Discussion Document on the Review of the Classification Guidelines, 2017, 43.
[234] Schauer F, 'Speech and "Speech"- Obscenity and "Obscenity": An exercise in the Interpretation of Constitutional Language' 67 *Georgetown Law Journal* 4, 1979, 900-930.
[235] Ghai JC and Ghai Y, 'The Contribution of the South African Constitution to Kenya's Constitution', in Dixon R and Roux T (eds) *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence***,** Cambridge University Press, Sydney, 2018, 261.
[236] Section 4A, Film and Publications Act (1996).

4.3. Protection of Moral Values in the law

As was discussed in the previous chapter, the Board has assumed the role of censoring expression that go against a suggested moral grain of the country. In this way, they assume the role of a moral guardian.

Currently in Kenya, there is no set criteria used in determining obscenity. Rather, material is simply judged through the discretion of the board.[237] It is this unlimited power that enables the Board to restrict expression discriminatively and censor works on the notions of taste, while further clenching onto water-shed justifications such as the preservation of national values to legitimise their actions.[238] The closest thing to a test assumingly adopted, is the consideration of the impact an expression may have upon the moral foundation of the country.[239] Of which, in light of the arguments made below, is quite abstract to stand the test of legitimacy.

That said, even if the country was to formulate a test for obscenities or rather consider adopting the Miller test. The argument of what is to be considered valuable will prevail. A factor further complicated by the flexible nature of the values to begin with

It is to this regard, that the USA courts have paid keen attention to the following principles to limit such arbitrary power.

Firstly, the courts have contemplated on the redeeming social importance of the expression. This was first considered in the case of *Roth v United* States, where obscenity was defined as material that did not have any redeeming social importance.[240] The only question arising from such was the manner in which a 'lack of redeeming social importance' was to be qualified, and it follows that just five years later an attempt to the same was considered in the case of *Manual Enterprises v Day.*[241] The court in this instance established the concept of 'patent offensiveness' which they defined as that which offended community standards. It did this in acknowledgment of the fact that not all prurient material lacked literary, scientific or artistic merit and for this reason noted a need of a value check that would ensure that such material were not censored on the

[237] Section 16(4), Film and Stage Plays Act (2012).
[238] *Wanuri Kahiu and another v CEO, Kenya Film Classification Board - Ezekiel Mutua and 4 others* (2018) eKLR.
[239] *Wanuri Kahiu and another v CEO, Kenya Film Classification Board - Ezekiel Mutua and 4 others* (2018) eKLR.
[240] *Roth v United States* (1957), The Supreme Court of the United States.
[241] *Manual Enterprise Inc v Day* (1962), The Supreme Court of the United States.

single virtue of their explicit nature.[242] This proposition was further supported in the case of *Memoires v Massauchetes* who were of opinion that any piece of work that has any redeeming social value warrants protection under the first amendment.[243]

Once the material is considered to contain some literary value, the next factor to be deliberated on is the dominant theme of the objectionable work. It requires that an expression be judged as a whole while further considering the relevance of the objectionable piece to the same. This goes to mean, that a disagreeable portion relevant to an expressions' general theme, on its own, cannot discount its use. [244] In this regard, relevancy is determined by noting the author's sincerity of purpose while further looking into literary necessity. This is collectively understood as the author's need to use a certain expression to produce his/her intended purpose.[245] Courts have generally held that where a part is relevant to the dominant theme, then such a material should not be considered obscene.[246] However, remonstrations to this argument have posited that such parts though relevant to the theme may not at all times be necessary to depict. Granted merit, it would be encroaching on artists' rights to require that they can only use necessary expressions. A more effective approach would be to consider the author's intent in making the film or poster in question.[247]

Lastly, this paper considers contemporary community standards. A common argument issued for censoring artistic expressions is their effect on prevailing community moral standards, as has been discussed in the preceding chapter. It assumes that a piece of work could be so dangerous that it influences individuals to depart from current norms.[248] Such an argument is considered misguided by scholar William Lockhart for two reasons. Firstly, it misconstrues the essence of the right to freedom of expression.[249] This it demonstrates through its attempts to limit public debate, a factor essential for any democracy being that such facilitates an avenue through which society can perfect its

[242] Staal L, 'First Amendment: The Objective Standard for Social Value in Obscenity Cases' 78 *The Journal of Criminal Law and Criminology* 4, 1988, 739-740.
[243] *Memoirs v. Massachusetts* (1966), The Supreme Court of the United States.
[244] Lockhart R, 'Literature, the Law of obscenity and the Constitution,' 38 *Minnesota Law Review* 4, 1954, 346.
[245] Lockhart R, 'Literature, the Law of obscenity and the Constitution,' 346-347.
[246] Lockhart WB, McClure R, 'Censorship of Obscenity: The Developing Constitutional Standards,' 45 *Minnesota Law Review* 5, 1960, 88-95.
[247] Lockhart WB, McClure R, 'Censorship of Obscenity: The Developing Constitutional Standards,' 103-108.
[248] Lockhart R, 'Literature, the Law of obscenity and the Constitution' 38 *Minnesota Law Review* 4, 1954, 375.
[249] Lockhart R, 'Literature, the Law of obscenity and the Constitution,' 375.

standards of conduct and beliefs.[250] It is with this in mind that it follows, that the solution to challenging norms shouldn't be censorship but intelligent defence for only this can ensure the ultimate perfection of contemplated standards.[251] Ensuing to this, the argument that such an opinion could challenge prevailing contemporary standards loses its legitimacy; on the basis that asserting the same would be the equivalent of suggesting that only expressions that effect no impactful difference to society are guaranteed.[252]It is such a reasoning that led courts to adopt the reasonable man test over that of the average man.[253] Secondly, changes in society are usually gradual and resultant of many factors, meaning it should to take more than the display of a couple of artistic expressions to significantly sway the mind-set of a community.[254]Justice Okwany shared similar sentiments in his recent judgments where he was of the opinion that Kenya's moral foundation was not that weak to be easily shaken by a few controversial pieces of art.[255]

That considered, the only issue arising on this matter is the subject of who these spoken standards are reflected on. As such, two formulations emerge: a national and a local conception, both of which present their own unique issues. Judge Jerome Frank clearly stated the concern of the first in his opinion in the case of *Roth v Goldman*, by acknowledging the challenge of deciphering 'average' public opinion on the topic of obscenity which he noted in turn makes the law vaguer.[256] Furthermore, another issue is distinguished in the flexibility of such standards, as exemplified in the manner in which past distinguished works offend current contemporary standards. On the other hand, applying local community standards to a national demographic is an arbitrary act that rids the rest of the community the option to choose what they would consider obscene. In both, application of the same would limit the scope of artistic expressions accessible to its primary audience who note its redeeming social importance.[257] This issue acknowledges the necessity of using the 'reasonable man test' considered above and 'the probable audience test' discussed below.

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[250] Lockhart R, 'Literature, the Law of obscenity and the Constitution,' 375.
[251] Lockhart R, 'Literature, the Law of obscenity and the Constitution,' 375.
[252] Lockhart R, 'Literature, the Law of obscenity and the Constitution,' 375.
[253] *Pope v Illinois* (1987), The Supreme Court of the United States.
[254] Lockhart R, 'Literature, the Law of obscenity and the Constitution,' 375.
[255] *Wanuri Kahiu and another v CEO, Kenya Film Classification Board - Ezekiel Mutua and 4 others* (2018) eKLR.
[256] *Roth v Goldman* (1949), United States Court of Appeal for the Second Circuit.
[257] Lockhart WB, McClure R, 'Censorship of Obscenity: The Developing Constitutional Standards,'110-114.

All in all, these principles are accorded in a more substantiated test which ties them all together while further providing a more effective guide to censorship. The test is renowned as the Miller test and is applicable in present times.[258] It was first adopted in the case of *Miller v California*, and is used to determine whether a piece of work is obscene. It considers the following:[259]

> *(a) whether the "average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.*[260]

This same test is still applied in present ages as is depicted in the case of *United States of America v Christopher Handley*,[261] which clearly indicated that all banned material must satisfy the Miller test.[262]

All considered, there still remains the issue of what is to be considered valuable. Consequently, this paper accords a need for public debate to identify such values and revise them accordingly as is done in South Africa.

In South Africa, the guidelines that establish the criteria for classification, is revised every five years so as to reflect changing social dynamics. The most recent revision was enacted this year following an intense research conducted in the year 2018. Under this, a new definition of prejudice as assumed by the Equality Act was adopted; further the age category for 10 was replaced by a new bracket of 10-12.[263] Whereas in Kenya, the last revision of its classification guidelines took place in the year 2012. All acknowledged, steps have been undertaken to ensure this. However, no results have been borne.[264]Resultantly, taking matters back to the starting line. This issue necessitates a

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[258] Randazza MJ, 'Ulysses: A Mighty Hero in the Fight for Freedom of Expression' 11 *University of Massachusetts Law Review* 2, 2016, 292.
[259] *Miller v California* (1973), The Supreme Court of the United States.
[260] Ruane K, 'Freedom of Speech and Press: Exceptions to the First Amendment' Congressional Research Service, 8 September 2014, 2- https://fas.org/sgp/crs/misc/95-815.pdf on 2 November 2019.
[261]*United States of America v Christopher S. Handley* (2008), United States District Court for the Southern District of Iowa.
[262] *United States of America v Christopher S. Handley* (2008), United States District Court for the Southern District of Iowa.
[263] https://www.fpb.org.za/press-release/revised-classification-guidelines-empowers-film-and-publication-board-to-provide-a-service-to-south-africa/ on 2 November 2019.
[264] https://www.standardmedia.co.ke/article/2000199071/advertisers-protest-guidelines-issued-by-kenya-film-classification-board on 10 November 2019.

provision that provides an exact time-frame as to when revisions are to be conducted, while further ensuring an effective framework as to how the same may be achieved.

4.4 Law as a Protector of the Impressionable Audience

In Kenya, this impressionable audience has typically been understood as the demographic of children, being that their rational capacities are not fully developed. Accordingly, attempts have been made to limit restricted expressions to their appropriate forums such as night clubs which is an effective means to classification. This was done so as to limit children's access to said material. However, the Board has also illegitimately used this power as shall be discussed. It is important to note, that it is not this paper's intention to assume all expressions warrant publicity; rather it simply seeks to draw the line between those expressions that do based on their artistic merit and those that don't.

The famous songs of 'Wamlambez' by Ethic, sublimely makes reference to sexual innuendos not appropriate for a general viewing. It is for this reason its performance was restricted to clubs.[265] On the other hand, 'Tamrimbo' another song by Ethic, cannot be graced with the same amount of mercy owing to the more explicit nature of its lyrics that assume to advocate for violence against women.[266] Nonetheless, in as much as the board in some occasions appropriately exercises its discretion, there are still instances it has been seen to supersede the same. This was illustrated both through the banning of the Tanzanian song, 'Tetema' and the movie 'Rafiki' which are still widely contested by the general public both at a national and international perspective.[267] Most of which is alleged under the disguise of protecting children or prevailing moral values.

On the other hand, the approach adopted by the USA courts on the matter evolves throughout the years. In the year 1896, they adopted the Hicklin test in the case of *Rosen v United States* as the suitable test for obscenity.[268] This act gave the principle constitutional protection within the United States.[269] It was influenced by the famous opinion of English Justice Cockburn who, in one of his judgments, held that the test of

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[265] https://www.standardmedia.co.ke/ureport/article/2001340113/wamlambez-tetema-not-illegal-ezekiel-mutua 29 September 2019.
[266] https://www.standardmedia.co.ke/article/2001348162/ethic-music-group-apologises-days-after-ezekiel-mutua-called-for-their-arrest 25 November 2019.
[267] https://www.standardmedia.co.ke/ureport/article/2001339681/wamlambez-tetema-to-be-only-played-in-bars-ezekiel-mutua 25 November 2019.
[268] Mullin KE, 'Unmasking the Confessional Unmasked: The 1868 Hicklin Test and the Toleration of Obscenity' 85 *English History Literature Journal* 2, 2018, 471-472.
[269] Gillers S, 'A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from Hicklin to Ulysses II' 85 *Washington University Law Review* 2, 2007, 220.

obscenity is whether a material can deprave or corrupt minds susceptible to immoral influences.[270] It centred on the effect the obscene material had on its venal audience and not the book's substance. A judge simply had to find a hypothetical scenario where someone other than himself could be corrupted by the work.[271] However, almost an entire century later, its use was challenged in the case of *United States v One book called Ulysses* where the federal court avoided the Hicklin test and found the material not to be obscene.[272] Judge Woolsey, in his dissent, went even further to state that the expression cannot be obscene as it reflects a day in the life of an every-day middle-class Dublin. In fact, one can go as far to say, that to this extent, obscenity has been understood from an inappropriate perception of the word which includes those matters of life usually deemed private. This strange presumption insinuates that the typical day of a person could be judged as obscene, further assuming life itself to be obscene.[273] All in all, its use revolutionised the obscenity conundrum by including the consideration of factors that would avail such material to adults.[274] It expanded the Hicklin rule by requiring that in judging obscenity one not only considers the susceptible person rather the average person.[275]

Whereas in South Africa, most publications were censored on political grounds owing to their apartheidic history. This, however, seized to be the case with the enactment of the Film and Publications Act that brought tremendous strides not only politically but socially as well.[276] It was instituted in the year 1998 and brought tremendous shift from censorship to classification, the latter concerned with regulating that which people have access to while the former is more concerned with regulating material through age restrictions.[277] It is concerned with striking a balance between the interest of children and that of the general public.[278] Instead of censoring films that would rather be objectionable to certain members of the society, the film publications board participates in classifying

[270] *Regina v Hicklin* (1886), Court of Queen's Bench.
[271] Randazza MJ, 'Ulysses: A Mighty Hero in the Fight for Freedom of Expression,' 283.
[272] Romero ST, *Media and Entertainment Law,* Cengage Learning, New York, 2009, 35.
[273] Randazza MJ, 'Ulysses: A Mighty Hero in the Fight for Freedom of Expression,' 280.
[274] Romero ST, *Media and Entertainment Law,* 35.
[275] Lockhart R, 'Literature, the Law of obscenity and the Constitution,' 340.
[276] Smyth R, 'The Development of British Colonial Film Policy, 1927-1939, with Special Reference to East and Central Africa' 20 *Journal of African History* 3, 1979, 437-450.
[277] Mills L, 'Stop the press: Why Censorship has made headline news again' 10 *Potchefstroom Electronic Journal* 1, 2007, 84-88.
[278] Mills L, 'Stop the press: Why Censorship has made headline news again,' 84-88.

them as either restricted or unrestricted. [279]Restricted films can only be distributed to adult who are licensed to conduct business of adult premises and unrestricted films which though age-restricted may be disseminated to any distributor registered with the board.[280] Censoring, in this context has come to be understood as a political act owing that it is based on people's perceptions which are already prejudiced, whereas classification is a legal policy.[281] This was intently considered in the case of *Goodman Gallery v Film and Publications Board* where the board classified a piece of art 16N meaning that no one below the age of 16 could view it.[282]

4.5 Complicates the discovery of truth

Currently, in Kenya the most prevalent test indicated in the Board's argument for censorship is that of the average man.[283] In applying this test, they accord a magnified amount of weight to moral values as seen by the everyday common citizen.[284] This is deduced from a good majority of the examples of banned expressions discussed in the previous chapter. However, this argument falls short of legitimacy owing to the fact that it is not the everyday Kenyan that has access to such material, at least in the understanding of films.[285] In Kenya, the film industry is not as prosperous as the music industry. To this regard, accessibility of music is easier in comparison to that of films,[286]and for this reason this paper in pre-emption for what shall be discussed below, considers a strict contemplation of the harm principle in the music and movie scene- with the latter enjoying further safeguards that have been adopted in South Africa, again discussed below.

Secondly, as has been the essence of this paper, the use of vague terms in the act should be highly discouraged. Section 16 of CAP 22 allows the board to censor works which in its opinion seems to offend decency.[287] This precariously wide provision gives the board

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[279] Mills L, 'Stop the press: Why Censorship has made headline news again,' 84-88.
[280] Mills L, 'Stop the press: Why Censorship has made headline news again,' 84-88.
[281] Ngwenya S, 'Film censorship in South Africa. The analysis of classification and the interpretations of the 1996 Film and Publications Act, with reference to the banning of the film Of Good Report at the Durban International Film Festival 2013' Published LLM Thesis, University of KwaZulu-Natal, Durban, South Africa, 2013, 70 and 95.
[282] *Goodman Gallery v Film and Publications Board* (2012), The Film and Publications Appeal Tribunal.
[283] http://www.bottomline.co.ke/kfcb-kenyas-morality-mafia-part-1/ on 10 November 2019.
[284] http://www.bottomline.co.ke/kfcb-kenyas-morality-mafia-part-1/ on 10 November 2019.
[285] https://www.bbc.com/news/world-africa-13681344 on 7 November 2019.
[286] https://www.bbc.com/news/world-africa-13681344 on 7 November 2019.
[287] Section 16, Film and Stage Plays Act (2012).

more discretion than is necessary in classifying artistic works.[288] A power, that they can easily take advantage of because of the prevailing subjectivity of indecency.[289] Consequently, it should follow that the act should only mandate the board to classify films according to an agreed upon guideline, rather than mandate them a role of moral policing as is contemplated in the South African Act.[290]

Moreover, the reasoning of the board in coming to their decisions is always a grey area as there is no easily accessible forum that formally communicates to the public the rationale behind said decisions.[291] Debates on classification mostly occur in twitter pages, which mostly just give a brief account as to the reason why a certain expression has been banned and concludes at that.[292]

Lastly and discussed first, is the board's constant justification of censorship assumingly being the protection of moral values in the country. It works in a vacuum and is the board's most lethal weapon in limiting expression.[293] Essentially, it acts as a barrier from the truth, by turning an eye to the realities of life deemed inappropriate. It purports to hide away aspects of life, endangering hiding it as a whole.[294] It is the use of this dangerous tool in indeterminate circumstances that brings out its terminal effects. In Kenya's field of expression, one of these effects is that it has betrothed upon censors the power to forward their own personal vendettas in the disguise of national general interest.[295]

It is a power historically known all too well in the USA, and was signified by a single individual named Anthony Comstack. His intense politicization for the fight against indecency led to the first anti-obscenity law known as the Comstack Act.[296] Following the death of his mother at the age of ten, Mr. Comstack rationalised that the only way to

[288] Section 16, Film and Stage Plays Act (2012).
[289] Miller AD 'Obscenity and Community Standards: A Social Choice Approach' Journal of Economic Theory,2008,75- http://portal.idc.ac.il/he/ilea/home/documents/miller_obscenity.pdf on 5 November 2019.
[290] Section 9-10, Film and Publications Act (1996).
[291] https://www.standardmedia.co.ke/ureport/article/2001348312/ezekiel-mutua-reacts-to-ethic-s-apology on 5 November 2019.
[292] https://www.standardmedia.co.ke/ureport/article/2001348312/ezekiel-mutua-reacts-to-ethic-s-apology on 5 November 2019.
[293] https://freedomhouse.org/report/freedom-net/2017/kenya on 24 November 2019.
[294] https://web.mit.edu/gtmarx/www/cenandsec.html on 24 November 2019.
[295] Randazza MJ, 'Ulysses: A Mighty Hero in the Fight for Freedom of Expression,' 279.
[296] Rosenfeld MJ, *The age of independence: interracial unions, same-sex unions, and the changing American family*, Harvard University Press, Cambridge, 2007, 28.

Heaven was through refraining from tainted thoughts. A decision that he did not just limit upon himself but felt entitled to exert upon others.[297]

All in all, this jurisprudence wore out and the approach of banning materials that challenged current moral standards was halted by the *Case of Kingsley Pictures,*[298] where the court pinioned the right to freedom to include the right to advocate for ideas-including those deemed as immoral. Justice Stewart, in his majority opinion, stated that censoring a piece of art on its merit to challenge prevailing norms and not on the matter of obscenity, contradicts the affirmed right to express oneself.[299]

This is not to say that the freedom goes unlimited as was considered by Justice Stewart invoking Justice Brandeis decision in *Whitney v California*, who in according the harm principle was of the opinion that actions should only be prohibited in light of clear and present danger. Justice Stewart, in this regard, considered free speech to include that which is forbidden by law in as far as it doesn't incite people nor suggest that its advocacy will be acted upon immediately.[300] In scenarios where there is no incitement or harm then the same must be left to be corrected by institutions outside the law and not through the curtailment of rights.[301]

Similarly, the same can be argued when limiting expressions in Kenya; case in point, the censoring of the dramatic expository 'Rafiki'. In considering its merits under current moral standards, the Board should have considered the likelihood of the movie on itself to create a clear and present danger. They should have questioned whether the film essentially incited people to homosexuality or whether it simply narrated the life of a group of people residing in the country. A matter of which, is effectively determined by considering the question of whether its promotion would force people to act upon it immediately. The response of which answers to the negative, reiterating the ruling of Justice Okwany in its respective, who considered the moral foundation of the country to be strong enough to receive such expressions.[302]

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[297] Randazza MJ, 'Ulysses: A Mighty Hero in the Fight for Freedom of Expression,' 279.
[298] *Kingsley International Pictures Corporation v Regents* (1959), The Supreme Court of the United States.
[299] Lockhart WB, McClure R, 'Censorship of Obscenity: The Developing Constitutional Standards,' 100.
[300] Lockhart WB, McClure R, 'Censorship of Obscenity: The Developing Constitutional Standards,' 101.
[301] Lockhart WB, McClure R, 'Censorship of Obscenity: The Developing Constitutional Standards,' 101.
[302] *Wanuri Kahiu and another v CEO, Kenya Film Classification Board - Ezekiel Mutua and 4 others* (2018) eKLR.

This is the danger of having vague laws presiding over the matters of morality, it gives a single unit the power to subject expressions to their own understandings as previously indicated, in the times of Comstock.[303]

All in all, this just necessitates the need of an independent body, act and tests that will prevent such arbitrary use of power.[304] A matter widely considered in South Africa's legal jurisprudence especially in their Films and Publications Act and its application of the likely reader test.[305]

South Africa regarded the average man test up until the early 1970s when its yardstick-use shifted to the likely/probable viewer test.[306] This was first applied in the case of the movie of 'Mapantsula' which contextually allowed the state of South Africa to talk about race without really talking about race.[307] It was evoked by Van Rooyen whose rule over the directorate at the time- the body in charge of censoring prior to the PFB- was characterised by impersonality.[308] He noted the importance of the likely-reader test owing to the subjectivity of obscenity. Consequently, he held that interrogating a hypothetical reader's response to a material would provide a more objective understanding on the obscenity of an expression as it would be independent of the censor's personal reaction.[309] This awareness inspired his reasonable approach to the matter by firstly appointing a committee of expert to advise him on artistic merit and secondly adopting the likely viewer test over the traditional average reader.[310] All of which was done to ensure ultimate objectivity.

The same regard to objectivity has been retained in current legal dispensations. For example, the composition of the board in charge of classifying films is determined by the

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[303] Randazza MJ, 'Ulysses: A Mighty Hero in the Fight for Freedom of Expression,'279.

[304] Ngwenya S, 'Film censorship in South Africa. The analysis of classification and the interpretations of the 1996 Film and Publications Act, with reference to the banning of the film Of Good Report at the Durban International Film Festival 2013' Published LLM Thesis, University of KwaZulu-Natal, Durban, South Africa, 2013, 95-99.

[305] Ngwenya S, 'Film censorship in South Africa. The analysis of classification and the interpretations of the 1996 Film and Publications Act, with reference to the banning of the film Of Good Report at the Durban International Film Festival 2013' Published LLM Thesis, University of KwaZulu-Natal, Durban, South Africa, 2013, 95-99.

[306]Rivers PL, *Governing Hate and Race in the United States and South* Africa, Suny Press, New York, 2008,115.

[307] Rivers PL, 'Governing Images: The Politics of Film and Video Distribution in Late-Apartheid and Post-apartheid South Africa' 59 *Journal of Film and Video* 1, 2007, 25.

[308] Rivers PL, 'Governing Images: The Politics of Film and Video Distribution in Late-Apartheid and Post-apartheid South Africa,' 25.

[309] Coetzee JM, 'Censorship in South Africa' 17 *English in Africa* 1, 1990, 3.

[310]Davis G, *Voices of Justice and Reason: Apartheid and Beyond in South African Literature*, Rodopoi Publishers, Amsterdam-New York, 2003, 123.

council who further evaluates their competence.[311] Classification committees are then further appointed by the board to make decisions on its behalf.[312] That aside, the act tries to refrain from using broad conceptualisations such as obscenity and indecency in its provisions, and goes a step forward in defining such objectionable themes, for example, it explicitly delimits the scope of what should be perceived as sexual conduct.[313] It also repeals the use of the Indecent or Obscene Photographic Act,[314] and ensures that a quasi-annual report is availed to its respective ministry to ensure that its board is acting in line with general provisions of the law.[315]

Additionally, in their consideration of censoring films, the board has taken due regard of the likely viewer test. This was most recently, exemplified in its deliberations in classifying a movie 'Of good report' where a myriad of factors was later considered following the agitation that followed its classification.[316] This included: lack of sexually explicit depictions, that the film opened for the Durban film festival showing artistic value and it would impossible for its target audience- being those that attend film festivals- to conclude that the purpose of the film was to stimulate arousal.[317] Consequentially, it was held that the appeal board did not act illegally by censoring the piece of work but was rather applying a vague law. This was, however, later rebutted by Professor Govender- the chairman of the Appeals Board-who held that the law was vague for a reason and this was to allow for context. For this reason, he further affirms that it would be best to professionalise classification by introducing a classification course at university level to educate trainers to interpret the Act more efficiently.[318] Such a course will enable classifiers to consider the intention and context films as stated in the *De Reuck*

[311] Section 4A (d), Film and Publications Act (1996).
[312] Section 10, Film and Publications Act (1996).
[313] Section 1, Film and Publications Act (1996).
[314] Section 33, Film and Publications Act (1996).
[315] Section 4A, Film and Publications Act (1996).
[316] Ngwenya S, 'Film censorship in South Africa. The analysis of classification and the interpretations of the 1996 Film and Publications Act, with reference to the banning of the film Of Good Report at the Durban International Film Festival 2013' Published LLM Thesis, University of KwaZulu-Natal, Durban, South Africa, 2013,95.
[317] Ngwenya S, 'Film censorship in South Africa. The analysis of classification and the interpretations of the 1996 Film and Publications Act, with reference to the banning of the film Of Good Report at the Durban International Film Festival 2013' Published LLM Thesis, University of KwaZulu-Natal, Durban, South Africa, 2013,95.
[318] Ngwenya S, 'Film censorship in South Africa. The analysis of classification and the interpretations of the 1996 Film and Publications Act, with reference to the banning of the film Of Good Report at the Durban International Film Festival 2013' Published LLM Thesis, University of KwaZulu-Natal, Durban, South Africa, 2013, 96-99.

case,[319] where the court was of the opinion that all expressions must be considered contextually amidst other factors.[320]

It should be accorded that South Africa duly notes the danger of placing too much power in administrative organs holding that such easily leads to such powers ruthlessly applying the same to surpass cultural, political and specifically sexual expressions.[321] It is for this reason that it adopts the above and identified safeguards.

In matters pertaining censorship Kenya still significantly lags behind South Africa as noted in their recent report where it notes that despite the exchange programme conducted between the two countries- meant for the former to broaden its approach to classification. Effects of the same are still not noted in Kenya's legislation as evidenced by the prevalent of section 16 of the film and stage plays act that provides the board with discretion to limit expressions that it deems to offend decency.[322] In fact, resolutions of that exchange led to KFCB resolving only to ban works that threaten national security while classifying the rest.[323] However, this has not been the case. As the Act only provides that the board should review these guidelines regularly, without stipulating an exact time quadrant.[324] Consequently, the last time the said reference was reviewed was in the year 2012.[325]

4.6 Conclusion

The United States of America, in its control over censorship, has through the years advocated for the use of general principles that aid in protecting speech. This includes: redeeming social importance, dominant theme of the work, contemporary community standards, intention of the author amongst others. It is these themes that subsist in the Miller test that has expanded the test for obscenity. Hand in hand, noticing the arbitrariness that prevails within administrative boards when making a decision; they necessitate that harm be clearly proved before a right be limited.

On the other hand, South Africa introduced the use of the probable reader test than that of the average reader so as to ensure that material was not restricted to those who have a

[319] *De Reuck v Director of Public Prosecution* (2004), Constitutional Court of South Africa.
[320] *De Reuck v Director of Public Prosecution* (2004), Constitutional Court of South Africa.
[321] *Case and Anor, v. Minister of Safety and Security and Ors* (1996) Constitutional Court of South Africa.
[322] Film and Publications Board, Discussion Document on the Review of the Classification Guidelines, 2017, 43.
[323] Film and Publications Board, Discussion Document on the Review of the Classification Guidelines, 2017, 43.
[324] Section 15(2), The Film and Stage Plays Act (2012).
[325] Kenya Film Classification Board Classification Guidelines (2012).

right to access to it. Moreover, they widely incline to classification of materials according to prevailing standards and go as far as to review the same at intervals of five years.

All in all, this goes to show that both countries understand the importance of freedom of expression and work both vigilantly and consistently to protect it.

CHAPTER FIVE:

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This study has come to prove that section 16 of the Film and Stage Plays Act is too vague a law to serve as a compelling ground for censoring artistic expressions. It has gone further to show that such ambiguity is what the Kenya Film Classification Board uses as a loophole in censoring expressions that do not accord to their own opinions. An act that is not only unconstitutional but unfair.

Consequently, the previous chapter consider measure to be adopted by previous jurisdictions in limiting corresponding board's power, as compared by the jurisdictions of the United States of America and South Africa. This chapter, in reiteration, will summarise some of these recommendations.

5.2 Conclusion

The research was guided by three research questions. Firstly, it sought to discover how section 16 of the Act has been interpreted. Secondly, it considered whether the section was consistent with article 24 and 33 of the Constitution of Kenya. Lastly, it considered standards that should be adopted so as to protect both the interests of the State and artists. This was questioned so as to test the following hypotheses. The first holding that the term 'offend decency' provided for under section 16 of the Act does not provide an elaborate guideline in informing artists on what exactly is expected from them as artists, in the realms of decency. Secondly, that the section gives too much power to the Kenya Film and Classification Board in limiting artistic expressions. Thirdly, that the provisions are unconstitutional as it does not meet the standards of article 24 and 33 of the COK. Lastly, it considers less restrictive measures States have adopted in restricting expressions.

As was seen in Chapter 3, there is no conclusive understanding of what exactly offends stipulated decency. In time it has been understood as a fluid concept that varies amongst communities. It is for this reason, that courts have allowed for a limited application of general connotations to allow for context in a multitude of cultures as was seen in the case of *Re: Luscher*.[326]Consequently, it follows that despite the law being broad. It does so to

[326] *Re Luscher* (1985), Canadian Federal Court of Appeal.

provide for context for both artists and classifiers. However, this does not labyrinthine the law. As was contemplated in Chapter 4, an abolition of the term altogether as seen under the South African's Film and publication Act is still an effective way of considering the issue. A removal of the provision of classification according to 'decency', under the functions of the board, substituted with the general function of classifying films according to current contemporary standards in the view of probable reasonable reader; is more likely to remove ambiguity and provide for a more definite understanding for classification for both the classifier and the artist. All in all, answering both the first and second research questions.

It was also found, that in relation to the second research question, the notion of constitutionality in the matter is only slightly evidenced under article 33 of the Constitution under the interest of others. To this regard, it passes the first part of the two-fold test provided for under article 24 which is legality. However, its application to justifiability is seen to be wavering as censorship fails to serve as the least restrictive measure in limiting artistic expressions, rather the most appropriate measure would be to classify such films while limiting their access during water-shed hours. Moreover, the legislation limiting rights should not be arbitrary, and a vague law does not enjoy absolute constitutional protection.[327] This is not the case in our matter, as section 16 in its ambiguity gives the board too much discretion in deciding such matters- a factor that easily inclines to arbitrariness. As a result, this study concludes the section is not constitutional.

Last but not least, the paper considered measures taken from other jurisdictions in dealing with the matter. Accordingly, to close up the gaps left in the decency provisions, these jurisdictions have abolished the use of vague conceptualisations in their legislations providing for more definite roles, adopted the use of certain tests such as the Miller test, the reasonable person test the probable viewer test and even heavily inclining to classification then censorship unless proven to be injurious to society according to the harm principle developed in *Whitney v California*.[328]

5.3 Recommendations

The root of this study has come to show that section 16 of the film and Stage Plays Act is an ineffective legal source for censoring artistic expressions. This ineffectiveness stems

[327] *Andrew Mujuni Mwenda v Attorney General* (2010), Constitutional Court of Uganda.
[328] *Whitney v California* (1927), The Supreme Court of the United States.

from its ambiguity and the failure of institutional bodies to apply their power according to the constitutional principles on limitation. Accordingly, this paper recommends the following to deal with the issue.

5.3.1 Repeal of Section 16 of the Film and Stage Plays Act

Section 16 of the Act should be repealed and replaced with a provision that generally provides for the definite functions of the board. For example: based on the principles discussed in this study, instead of a stipulated function being banning works that offend decency. The provision should borrow largely from the Miller test providing for the classification of works in consideration of contemporary community standards and artistic merit, in light of the harm principle contemplated in the *Whitney case*,[329] all in the view of the reasonable probable reader- as contemplated in the South African jurisprudence

Such a provision is based in a positive light and provides clear principles to which the board will be bound to. This not only prevents the board from acting arbitrary but also serves as a guide for the common citizen to understand works within its limits. Moreover, it is fairly more constitutional as it abides to its principles, is justifiable and proportionate.

5.3.2 Publication of Decisions.

The board should establish the use of more formal reports that are easily accessible to the common citizen, outlining their reasons for classifying certain expressions. This is to avoid such reasoning's from being diluted in public discourse that occurs on online platforms. Such reports should be easily accessible to the public, for example, the board may publish the same on their websites.

5.3.3 Regular revision of the KFCB guidelines

A provision should be adopted in the Act that allows for the regular revision of the KFCB guidelines as is provided for in the Film and Publications Act of South Africa. Accordingly, South Africa revises its guidelines after every five years and the same should be assumed in Kenya.

5.3.4 Educating Censors

As is being contemplated in South Africa, a course should be availed at university level that would educate censors on how best to perform their functions. This professionalization of the task will enable censors with the tools and skills of classifying artistic expressions so as to prevent the injustices of censorship. The state should partner with national universities to provide programmes to High School graduates who are

[329] *Whitney v California* (1927), The Supreme Court of the United States.

interested in such forums of classification. This will not only diversify the composition of the board but also provide for an objective classification process.

Moreover, censors will be educated on the use of more objective tests that assist in coming to a more justified conclusion. These tests include: The Miller test, the harm test, the reasonable man and the probable, likely viewer.

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