

A LEGAL ANALYSIS OF DRESS CODES IN  
INSTITUTIONS OF HIGHER LEARNING:  
A DISCUSSION WITHIN THE RIGHT TO  
FREEDOM OF EXPRESSION IN KENYA

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A DISSERTATION SUBMITTED IN PARTIAL  
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**Strathmore University**  
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OF LAWS DEGREE**

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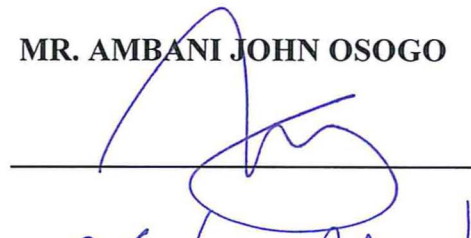
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**Abstract**

This paper analyses the threat posed to the freedom of expression through the imposition of dress codes upon student bodies in institutions of higher learning. It brings to light the rationales and theories that revolve around dressing a particular class in a certain manner and goes further to illustrate how the American jurisdiction has dealt with the freedom of expression through dressing.

The research paper then contextualizes the discussion from Hans Kelsen's pure theory of law, Durkheim's theory of evolution of society and Kenya's constitution in order to wholesomely address the research's objectives.

The dissertation is a desk-based incursion into the constitutionality of enforcing dress codes in institutions of higher learning with the threat of sanctions. From this methodology the major finding is that individuals in institutions of higher learning have already developed unique traits and as such the heterogeneity of a free dressing environment would have no effect on both the delivery of the institutions' chartered functions and the validity of the university environment.

The paper recommends that the dress code policy be maintained. However, the threat of punishments for non-conformity be nullified and to be demonstrated as being unconstitutional.

# 1. Chapter One: The Introduction

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## 1.1. Introduction

This chapter shall act as the blueprint for the entire dissertation. The main aim of this chapter is to give the reader a clear idea of what is going to be discussed throughout the dissertation.

This chapter shall paint the background of the work. Additionally, the chapter will make the first statement of the problem being tackled. In so doing the hypothesis of the study will be made and the research questions that test it will also be expounded on.

## 1.2. Background of the research

The purpose of dressing in Kenya among the indigenous tribes even before colonialism was to cover one's nakedness and to pass sociological information about the wearer. For instance, the chief of a tribe would wear headgear to distinguish him from the rest of the community in the Nandi community. Children would wear loincloth around their waists while adults would wear a cloth around their chest for women while the men generally were bare-chested. Thus, dressing distinguished between the sexes. In Bantu communities such as the Luhya and Kikuyu, boys and girls (in those that practiced female circumcision) would wear different loincloths during the event in order to affirm their participation in the rite. The dress code would inform who to be given gifts as the whole community showered presents on those being initiated.<sup>1</sup>

Before and during colonialism, dress codes were introduced in schools as a way of 'westernizing' the students. By putting the students in skirts, blouses, shirts and shorts the school administration was creating a sociological distinction between those children that went to

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<sup>1</sup>Sobania N W, *Culture and Customs of Kenya*, Greenwood Publishers, 2003, 1-26

school and those that did not. In addition to performing this clearly African sociological function, dress coding was also a part of the missionary way of distinguishing themselves. Devotees to the church such as monks, bishops, priests and nuns wore specific clothes that clearly identified who they were and what role they played in society.

Power is therefore constituted, represented and even contested through dress.<sup>2</sup> Throughout history, dressing has been enforced by Kenyan (African) communities as the tool for communication and identification. This paper delves into the question of whether the dress codes enforced in contemporary institutions of higher learning serve or curtail the freedom of expression that is so deeply embedded in the issue of dress coding.

Dress coding is so powerful that it can be used as a means of gender oppression. A sexist angle to the whole debate exists through the feminist perception that women are controlled in terms of how they dress.<sup>3</sup> The sexism here is seen where the rule only applies to women. Even the most commonplace contemporary control of male wear that is sagging of pants is not advanced with the rationale that the sight may also be bothersome to females. The rationale is usually shifted to unsuitability for the work or learning environment.

While the rationale behind certain points in a dress code might not seem as important compared to its ultimate effect; dress codes invariably instill and enforce the idea that women's bodies are innately sexual, somewhat justifying a culture that values women as much as they dress. Most dress code policies imply that ladies are tempting their male peers by simply dressing in a

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<sup>2</sup>Gisele A, *The power and politics of dress in Africa*, University of Pennsylvania, 2007, 1-5

<sup>3</sup> In Africa, the acknowledgement of one's gender is so entrenched in how one dresses that any form of dressing that goes against the norm effectively labels one a rebel. The existence of a gender is in itself pegged on the outward appearance of a person and not the role that they play in the society in which they live. See Pascal Newbourne Mwale, 'Where is the foundation of African gender? The case of Malawi' *Nordic Journal of African Studies* 11 (2002) 1 <http://www.njas.helsinki.fi/pdf-files/vol11num1/mwale.pdf> Accessed on 3rd January 2016

particular way. It reaffirms the stale ideal that men are born ungovernable, even worse it justifies the characteristic as okay. The tragedy in sexist dress coding is that it only controls women, with the presupposition that whatever males see has a direct implication on their actions. That invasion of a lady's privacy is solely due to their dress and not some form of criminal act on the part of a male offender.<sup>4</sup>

The moral aspect of the debate can be traced back to its earliest form in the public-private morality debate that arose in the Wolfenden committee.<sup>5</sup>

The discussion in the report concerned the commission of outward acts considered (and which still are) considered morally repugnant.<sup>6</sup> The relevance of the debate in this instance was that for the first time, there was a discussion about what people should do in public *vis-à-vis* what they were allowed to do in private. As the report led to the creation of a Sexual Offences Act, deep seated questions were raised. Firstly, that people had an obligation to behave in a certain way while in public.

Bringing this forward to creating a background on this dissertation, we see that the enforcement of a dress code in Strathmore University exhorts the governed to dress (in essence, 'act') in a certain way while they are within the precincts of the university.

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<sup>4</sup> Deivasigamani S, 'The problem with dress codes', *The Daily Princetonian-opinion column*, (2014) <<http://dailyprincetonian.com/opinion/2014/04/the-problem-with-dress-codes/>> Accessed on 5<sup>th</sup> September 2015

<sup>5</sup>The Wolfenden Report was a study that made recommendations for laws governing sexual behaviour. While relying on psychoanalysis and social science, the committee recommended that no statutes should be created to regulate acts that offend the public decency and public order. It is this report that led to the enactment of the British Sexual Offences Act of 1967. Encyclopedia Britannica, <<http://www.britannica.com/event/Wolfenden-Report>> Accessed on 5<sup>th</sup> Dec 2015

<sup>6</sup> Consequent criticisms of the committee showed that what was previously known as 'private' morality eventually made an impact on the public morality as acts that were commonplace in very many people's private spheres spilled over to the public domain and gained widespread acceptance.

Having established that there indeed exists a moralized direct correlation between dress codes and decency; dress codes and sexism. One then ought to paint a background of the dress code culture and policy in higher institutions of learning using Strathmore University only as an example.

The student in this instance is defined as any person who has registered, and is currently undertaking a course of study, whether full-time or part-time, in Strathmore University.

The Strathmore University policy handbook has this to say about the mode of dressing of all attendant students, “Students are expected to dress and behave in a professional manner, as befits mature young adults.” The university encourages all students to dress in simple, decent, modest and appropriate attire; sloppy and slovenly dress and appearance are unacceptable. The policy avers that this dress code helps maintain an atmosphere conducive to study and work. There is indeed provided the liberty to dress according to ones preferences, so long as they adhere to the conventions of good grooming. Clothes worn in university should be practical and comfortable, with a bias for a slightly loose fit.<sup>7</sup>The dress code is perceived as a way of showing one’s self-worth to public. Verbatim, “the dress code helps them (the students) to discover who they are! A person! An individual of worth by the very fact of their existence!

They discover they have an inner value that goes beyond academic grades and financial status. This is precisely because they are unique individuals with body and spiritual soul. They can think, love, care about and give themselves to others. And all this is possible because they are free beings. As free human being they have an immense dignity which they need to discover!

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<sup>7</sup>Strathmore University, Dean of Students, Rules and regulations governing student conduct and discipline’, <<http://www.strathmore.edu/dos-old/policies.php>> on 13<sup>th</sup> Dec 2015

This is the opportunity that we are offering them at Strathmore University through the dress code.”

This brief incursion into the test institution is important in that it aids setting a foundation from which the analysis shall subsist. Elaborating on a background of dress coding as it relates to gender relations and the public perceptions is necessary. The reason for this is that the gender relations and public perceptions shall form the prism through which this study will tackle the legal issues in the paper.

Laying bare the policy around which dress codes and their perception acts as an introduction to the subject by acquainting the reader with a working knowledge of the fundamentals of the subject in the test institution prior to the analysis in this dissertation. The analysis will be centered on how the creation and enforcement of the dress code impacts the delivery of the institution’s chartered objectives.

### **1.3.Statement of the research problem**

This paper concerns itself with the enforcement of dress codes in universities. Over time, the individual expression through outward appearance has been come to the forefront of constitutional freedom. In the words of Martin Luther King Jr., “Man is a being of free will. Man can choose to think, drift, or evade -- but choose he must. His thoughts determine: his character, his values, his emotions, and his actions, and so his thoughts determine his destiny. In a free society each and every man lives under a rule of law, as opposed to a whim-ridden rule of men<sup>8</sup>. The rule of law has only one proper purpose: to protect the rights of the smallest minority that has ever existed -- the individual.”

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<sup>8</sup> Martin Luther King Jr., *What is Man?: The Measure of a Man*. Fortress Press, Philadelphia, 1959

This paper therefore discusses the place of a consistently enforced dress code in an institution that is dedicated towards spawning new and innovative legal solutions.

#### **1.4.Objectives of the study**

##### **1.4.1. Primary Objectives**

The primary objective is to find out if the enforcement of a dress code in universities is essential to the discharge of the university's chartered functions.

##### **1.4.2. Secondary objectives**

1. To find out if the enforcement of a dress code has a legal basis in Kenyan law.
2. To find out the constitutional debate around dress codes in other jurisdictions.

#### **1.5.Hypothesis**

The enforcement of a dress code among students in *institutions of higher learning* of learning cannot be legally effected under Kenyan law.

#### **1.6.Research questions**

1. What is the legal basis for the enforcement of a dress code in institutions of higher learning?
2. Is it constitutional for there to be a dress code enforced in institutions of tertiary learning?
3. What is the relationship between dress coding in legal student fraternities and the constitutional freedom of expression?

### 1.7.Importance of the study

The Constitution of Kenya 2010 embodies what scholars have come to refer to as progressive constitutional provisions, in its clarity, innovation and comprehensive adoption of the evolving standards of human decency and integrity – human rights. One of the major reasons for this is because the Bill of Rights is very detailed in its protection of those under its jurisdiction. The progress that is seen in the current constitutional dispensation is heavily influenced by the American principles espoused in their constitution.

First and foremost, it is crucial that this study notes that there is little judicial pronouncement on dress codes either in the UK or continental Europe. Thus, the discussion has been somewhat muted even in the progressive jurisdictions such as South Africa.<sup>9</sup> Conversely, the issue of dress codes in institutions of learning has been the subject of much litigation in American courts. Therefore, this study will lean on the jurisprudence of those courts in order to discuss the research problem more eloquently. However, due to the fact that the United States of America is not a purely commonwealth country but a hybrid of both the civil and common law heritage, such *dicta* will only be used to convince the reader of the points being put across. The study shall otherwise rest on Kenyan case law and other laws in so far as fundamental rights and freedoms are concerned.

This study is crucial to an in depth understanding of the subject of dress codes in institutions of higher learning. This study seeks to answer various questions that are related to the constitutionality and legality of laws that are seen to limit the personal appearance of individuals.

With very many private institutions being created, and many laws being enacted, is there a

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<sup>9</sup>Waal D E, Mestry Re & Russo CJ, 'Religious and cultural dress at school: a comparative perspective', 14 *North-West University Law Journal*, 6 (2001), 63

chance to secure the unalienable rights to free choice, to free decisions on personal grooming, to protect the freedom of conscience, religion, belief and opinion as provided for in the Kenyan Constitution, 2010?

During the course of the discussion, this paper shall analyse the pros and cons of young and impressionable individuals abiding by an identical means of presentation. The study shall analyse the various viewpoints on the subject with a view to determining if the same affects service delivery to the students.

The study is also important in that it shall provide a basis for further debate on whether dress codes are a necessary addition to education in *institutions of higher learning* of learning. Should the institutions exceed nature's gift to man for freedom to make choices? Man is born free in nature and hence cannot adopt to be controlled and limited in what he or she wants to do. Can laws which regulate personal appearance and dictate on dressing be lawful? It is for such questions, that this study should be done

### **1.8.Scope and limitations of the study**

The area that this study specifically concerns itself with is the control of dress codes by institutions of higher learning. More specifically, the study critically appraises the merits and demerits of such practices with a view of ascertaining whether the main objective of university education in that specific institution -overall education-is achieved through the enforcement of that dress code.

The first limitation to this study is the scarcity of literature that directly pertains to the study. The issue of dress codes was until recently unheard of until the promulgation of the Constitution of Kenya 2010 forced this paper to analyse the conformity with dress codes. The lack of literature is

not to mean that no good work has been done in this field, only that the existing works are focused on hate speech, national security and not the furtherance of education.

Being a desk-based study the study is limited by the fact that the perspective that primary evidence offers is absent. However, this is not fatal to the study since the main objective of the paper is to analyse the effectiveness of enforcing a dress code on the capacity of the university to discharge its chartered functions.

## **1.9. Chapter summary**

### **Chapter One: An introduction to the study**

This chapter sums up the contents of the entire thesis. It draws a background of the subject, acquainting the reader with the general subject of enforcing dress codes in society. The reader is given a rationale for the research's conduct. Having the problem stated precisely, gives the study a focus at the onset.

The purpose of the study is stated in the proposal chapter in a format that shows the primary objective with regards to the problem. The research questions are also laid bare in this chapter, in addition to the hypotheses.

### **Chapter Two: A theoretical framework of the research**

This chapter details the lens through which the study's research questions shall test the hypothesis as they seek to achieve the research's objectives. In other words, this chapter illustrates the theoretical framework of the study.

One sees the logical structure that supports the thesis in this chapter as well-known legal theories are used to articulate the relationship between the subject of this dissertation and the law.

### **Chapter Three: An analysis of case law governing dress codes in institutions of higher learning**

This chapter shall go in depth into the issue of dress coding as a policy in Strathmore University. It shall elaborate on the current policy as the paper discerns the current debate surrounding the philosophy.

This chapter shall also shed light on rationales in other jurisdictions as they relate to this thesis in order to place the test university within the regional and even global theoretical framework.

### **Chapter Four: Conclusions and Recommendations**

This chapter brings to the discussion in the dissertation to a close. It shows the effect of the research in the paper to the legal fraternity and society at large. In this way, the paper concludes the analysis of the dissertation; determining if the objectives of the research have been reached.

Following the conclusion of the dissertation, the recommendations arising from the analysis in the previous chapter are made in this chapter. Consequently, suggestions for future research can be made in this section of the chapter as the substantive portion of the dissertation comes to an end.

## 2. Chapter Two: A theoretical framework of the research

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### 2.1. Introduction

The previous chapter laid out the entire structure of this dissertation. It began by laying out the background of the paper. The chapter then proceeded to state the problem to be tackled. The research problem is to be discussed through research questions that test the hypothesis. The proposal laid out both the scope and importance of this research. In its last section, a summary of all subsequent chapters is made. It is from that premise that this chapter now starts. This chapter shows the logical continuum in which this debate exists in. By talking about the theories surrounding the culture of dress coding, the paper aspires to make it easy for the reader to relate the principles of law to the research questions as they test the hypothesis.

The two schools of thought that are expressed in this chapter are Hans Kelsen's theory of the *grundnorm* and Emile Durkheim's theories of societal evolution. Indeed, these two theories may seem strange bedfellows in a discussion of legal theory. However, it must also not be lost on us that the topic at hand is itself somewhat novel to the Kenyan-and indeed African-context. Also, the research tries to have a neutral approach and hence relies on somewhat "neutral-theorists".

In a nutshell, this chapter shall use the *grundnorm* theory to show that highest validating authority in the management of *institutions of higher learning* is the constitution.<sup>10</sup> The *grundnorm* theory shows that every society is governed by norms that have crystallized into laws over time. Acting in accordance with these norms of behavior is regarded as abiding the law.

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<sup>10</sup>The Constitution of Kenya 2010 is the expression of the collective sovereignty and will of all Kenyans. It is seen in the preamble of the constitution where we the people of Kenya exercising our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution: adopt, enact and give this Constitution to ourselves and to our future generations.

Hans Kelsen's pure theory of law and the theories of societal evolution shall also be supported by a short discussion of constitutionality in as far as the constitutionally mandated freedoms from discrimination and expression on the basis of dressing are concerned.

Afterwards, the chapter shall then turn to Emile Durkheim. The theoretical importance of Emile Durkheim's work is that he dissected how society works. He divided the stages of evolution of society into the mechanical and organic state. In the former, conformity is determined through uniformity. He argued that this is a primitive approach. In the latter, conformity to societal expectations rests on an individual's unique contribution to society; with the various individual parts of the society gelling to form the whole. The purpose of relying on Durkheim is to show what stages our society must be in to validate the enforcement of dress, thus setting the stage for the subsequent chapter to discuss the research problem.

## **2.2. The pure theory of law and its relation with this research**

Hans Kelsen as a theorist was dead set against religion as the ultimate authority for dictating what ought to or ought not to be acceptable conduct of individuals in any society. He theorised that what people assumed was religious truth was nothing more than norms that have hardened over time. They then operate as laws as rules or norms. These are part of a system of norms having relationships of validity which they derive from higher norms. A norm to him is therefore a valid course of action if a higher norm authorised the making of the lower norm.

He posits that how things ought to be or how people ought to act can only be legitimised by the existence of a higher authority than the one being exercised by the person committing the act.<sup>11</sup>

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<sup>11</sup>Kelsen was as a legal theorist of the 20<sup>th</sup> century. He claimed that the then contemporary philosophies were insufficient since they claimed unnecessarily imbibed political ideology and moralizing; secondly, that attempts to reduce law to natural or social sciences made the law what it was not. Instead, Kelsen suggested a 'pure' theory of

However, it is a logical conclusion that at one point there shall come to an end the overlord. By this, this paper means that there is, at the apex of all leadership, a person or group of people who have no norms imposed upon them.

Hans Kelsen determined that the guiding body of norms guiding the conduct of individuals in any society is the *grundnorm*. Kelsen recognised higher validating powers are not infinite. Every society runs out of higher authorising power at the absolute apex. In remedying this situation the author introduced the *grundnorm*; sometimes translated as 'basic norm'. This basic norm drives conduct in society by dictating which acts are acceptable in society. Conformity that standard affirms the underlying belief in the system individuals confirm acceptance of membership to that society.

To Hans Kelsen, the identity of the *grundnorm* is merely a *sociological fact*. It does not arise from any moral or other judgement. According to him, no divine power played a role in creating laws and ethics in society. To him *lex divina* as earlier propounded by canonical lawyers such as St Thomas Aquinas held no water. As such the ethos by which societies run are entirely dictated by the members of that society, consistent with the maxim "might is right".

Kelsen's perception of the law is crucial to how this dissertation shall test the hypothesis. This theorists' works shall be used to illustrate the fact that the controlling authority of the dress coding of students does not ultimately trace back to a religious higher power. Rather, that it is the higher authority of school government that imposes such norms upon the student body.

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law whose main characteristic of cognition focused on the law alone" and this purity serves as its "basic methodological principle" Stanford Encyclopedia of Philosophy, <<http://plato.stanford.edu/entries/lawphil-theory/>> Accessed on 14<sup>th</sup> Sept 2015. See also Lars Vinx, 'Hans Kelsen's Pure Theory of Law: Legality and Legitimacy', (Oxford University Press, 2007)

This theoretical framework shows the reader that the 'ruling' authority in the university is its administration. Having solved half the equation, it now becomes the burden of the research to determine if indeed the *grundnorm* in the enforcing of dress codes in institutions of higher learning has a basis on the education (not practice) of legal personnel.

### 2.3. Theories of societal evolution

Emile Durkheim<sup>12</sup> wrote widely on the subject of the evolution of societies. According to Durkheim, the sort of cohesive behavior in any society is heavily dependent on the type of society that is in question. The theorist then goes further to classify societies as being based on mechanical or organic solidarity.

As per Durkheim in his work, 'Division of Labour in Society'<sup>13</sup>, there exist two kinds of social solidarity: mechanical solidarity and organic solidarity.

Mechanical solidarity connects the individual to society without any intermediary. In this instance society is organized collectively and all members of the group share the same beliefs. There is no differing point of view in the colony. The bond that binds the individual to society is this collective conscious, this shared belief system.<sup>14</sup>

With organic solidarity, on the other hand, society is a system of different functions that are united by definite relationships. Each individual has a distinct role to play in addition to an innately unique personality. Thus, as the individual grows, society grows a (s) he is a part of the

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<sup>12</sup>David Émile Durkheim (April 15, 1858 – November 15, 1917) was a French sociologist, social psychologist and philosopher. His first major sociological work was *The Division of Labour in Society* (1893). In 1895, he published *The Rules of Sociological Method* and set up the first European department of sociology.  
<http://plato.stanford.edu/entries/weber/> on 13<sup>th</sup> Sept 2015

<sup>13</sup>Durkheim, *Division of Labour Society*, NS, (1966) 168

<sup>14</sup>Kenneth Smith, *Emile Durkheim and the Collective Consciousness of Society: A Study in Criminology*, Anthem Press, USA (2014) ch 1

larger society. The society in turn becomes more efficient; moving in sync, with each cog in the wheel moving distinctly.

According to Durkheim, the more primitive a society is, the more it is characterized by mechanical solidarity. The government or ruling authority ensures that members of that society alter their selves to resemble each other and share the same beliefs and morals.<sup>15</sup> As society becomes more evolved, the individual members of those societies start to become more unique and distinguishable from each other.

This analogy of the evolution of a society is important to this study because it contributes to the study by helping to identify the stage of sociology that the university society is in with regards to the enforcement of a dress code in the test university. The chartered objectives of the test institution are aimed at providing a legal education to their students.

In light of the vast heterogeneity of the Kenyan public, this theoretical lens helps the reader to determine whether indeed a homogeneity of individuals is required in the application of the law in addition to the homogeneity of the law being taught. This theoretical perspective will help this thesis interrogate whether a homogeneous dress code has an impact on the innovative aspect of law that is required of successful practitioners.

## 2.4. Conclusion

This chapter has discussed Hans Kelsen's theory of the *grundnorm* as the basic rationale for the institution of the dress codes in institutions of learning. The main rationale for using this theorist's work is because historically, jurisprudence has shown that Hans Kelsen's pure theory of law is not at direct loggerheads with other theories of law.

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<sup>15</sup>Smith, *The State as the organ of common consciousness*, 63-67

That is, a society whose laws are determined through *grundnorms* may well be a positivist or natural law one.<sup>16</sup> Kenya has characteristics of natural law in the preamble and spirit of its constitution, while the laws themselves are enforced with a positivist accent.

Even more fittingly, Kelsen's theory distinguishes institutions, practices and norms from what is the duly constituted law<sup>17</sup>. What this means to this research paper is that the pure theory recognizes that the practices in institutions do not necessarily have a constitutional/legislative foundation and therefore it is possible that practices do exist and have gained validity outside the shadow of the law. This position is crucial to this thesis as it shall test the constitutionality of enforcing dress code in the *institutions of higher learning*, using the dress code policy in Strathmore University for reference.

Having shown that norms may indeed exist outside the written law of the constitution; the chapter also showed that the constitution is the 'ultimate' *grundnorm* in Kenya's society. This is evidenced by the constitution itself and Section 3 of the Judicature Act.

In addition to that the organic and mechanical theories of societies have been tackled. The theorist demonstrated that primitive societies place a higher premium in outward uniformity. Conversely, that the more evolved a society becomes; the more a premium is placed on the uniqueness of an individual rather than their uniformity.

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<sup>16</sup>While Kelsen's theory asserts that a legal norm (rule or principle, judicial or legislative in origin) may be valid law despite its incompatibility with a norm (enforcement of a dress code among law students in this instance), his theory of the process of creating and applying law leaves a place for this thesis' arguments, to be addressed to officials engaged in lawmaking or law-interpretation. One could accept most of Kelsen's conception of, "pure law" and still be an ardent believer in a theory of natural law or natural rights, of Bentham's utilitarianism or Hegel's evolutionary-cultural theory, or any other ought-law theory, as the proper guide for the lawmaker. Kelsen H. (Edwin W. Patterson ed), 'Hans Kelsen and his pure theory of Law', vol 40 (1), California Law Review p7

<sup>17</sup>This positivism is evidenced by Section 3 of the Judicature Act which lists all the sources of law that are applicable to the Kenya context. Furthermore, the constitution imbibes all international treaties into Kenyan law to the extent of their conformity to it.

This exercise is important in that it shows how the enforcement of the dress code fits within the perceived theories of societies' evolution.

### **3. Chapter 3: The Constitutionality of dress codes within institutions of higher learning**

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#### **3.1. Introduction**

The previous chapter laid out the theoretical leaning of this thesis. It set the foundation for this chapter. That was achieved by using known and well established theorists to put its point across. By leaning on Hans Kelsen, the dissertation showed that Kenyan law does indeed fit into both natural and positivist moulds. Furthermore, that the constitution is the greatest expression of the *grundnorm* in Kenya. In addition to that, it was also noted that the constitution itself protects diversity through the bill of rights. The diversity being protected in Article 28 is proof that as per Durkheim's theory of societal evolution, Kenya is an organic society.

The chapter also noted that some norms do exist outside the letter and spirit of the laws of the land. That these laws have existed due to the fact that up to now, they have not been deemed to be directly at loggerheads with the supreme law of the land. With the promulgation of the 2010 constitution, new *grundnorms* were ushered in that have the potential effect of nullifying punishment for non-conformity to dress code policies.

This brings us to the objective of this chapter-to discuss the justifiability and validity of the imposition of dress codes within institutions of higher learning.

The discussion in this chapter will be centered on the three research questions.

The first question seeks to discern if there exists a legal basis for the enforcement of a dress code in institutions of learning. The constitutional questions surrounding the dress coding in

institutions of learning shall be tackled with comparisons being drawn with jurisprudence in other countries. Finally, the research questions will attempt to discuss the theoretical effect of enforcing a singular mode of dressing have on the legal psyche of a law student fraternity. These questions shall help test the hypothesis in this chapter.

The primary objective of the thesis is to find out if the enforcement of a dress code in universities is essential to the discharge of the university's chartered functions. In achieving this objective, this chapter shall delve into similar discussions from the American jurisdiction. The study uses the American Jurisdiction vis-à-vis Kenyan context since they have had a many cases dealing with the same issue compared to any other jurisdiction. It is important to do so in order to bring out the constitutional aspects of the whole enterprise. The analysis of the foreign jurisdictions jurisprudence will provide a ledge from which this discussion will jump into a contextualized analysis.

### **3.2. Dress codes in a constitutional discussion**

In Kenya, the freedom of speech is ensconced in the print and audiovisual media. Indeed, most of the contemporary laws currently in place only control the freedom of the mass media and private individuals as they interact on social platforms. What makes this study unique is that it delves into analyzing whether institutions that were previously in keeping with the pre-2010 constitution still have the validity to impose dress codes in a manner that violates Article 28 rights of those under its purview.

Talking about the dress codes in the constitutional sense takes on the cloak of freedom as a fundamental right of the individual concerned. In Kenya the freedom of expression is protected by Article 33 of the constitution as read with Article 28. This is not to mean that there is no

constitutional debate on the question of the freedom of expression as a fundamental right. In Petition no 557 of 2013, the petitioner counsel Muite S.C argued that the establishment of the media forebears its right to a freedom of expression under the constitution.<sup>18</sup>

In the American jurisdiction the question is more directly tackled in courts as the embodiment of freedom of expression in the First Amendment.<sup>19</sup> In the more progressive American jurisdiction, the courts have discussed the linkage between the freedom of expression and the wearing of unique dressing in schools and made good jurisprudence.

The persuasive *locus classicus* in the specific question of dress codes in schools is, *Tinker v. Des Moines Independent Community School District*.<sup>20</sup> The case proclaims that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>21</sup> The Supreme court in *Tinker* held that in order for public schools to regulate student speech, schools must demonstrate that the speech would “substantially interfere” with school discipline or with the rights of other students. This freedom of speech was exemplified by the ability of students to dress in their own manner. This position is fortified in Kenyan case law through the Justice Mumbi Ngugi’s pronouncement in petition 450 of 2014<sup>22</sup>, she held that “the wearing of dreadlocks for cultural or religious reasons is, in my view, entitled to protection under the Constitution and should be accorded reasonable accommodation.”

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<sup>18</sup>*Royal Media Services & 3 others v Attorney General & 7 others* (eKLR)

<sup>19</sup>The First Amendment (Amendment I) to the United States Constitution prohibits the making of any law that has the effect of abridging the freedom of speech. It was adopted on December 15, 1791, as one of the ten amendments that constitute the Bill of Rights.

<sup>20</sup>393 U.S. 503 (1969).

<sup>21</sup>*Tinker* (1969) 506

<sup>22</sup>*J K(Suing On Behalf Of Ck).... Petitioner and Board Of Directors Of R School.... 1<sup>st</sup> Respondent, R School Limited ... 2<sup>nd</sup> Respondent* (eKLR)

In this respect, the case law only acts as a means of granting schools the authority to regulate lewd speech,<sup>23</sup> school-sponsored speech<sup>24</sup> and speech promoting illegal drug use. The freedom of expression has been described by the learned judge in Kenyan court cases... as, "the freedom of expression of any person as enshrined in the Articles 33 and 34 is regulated so that the persons who exercise the freedom do so in such a way that they do not violate the natural rights of other persons."<sup>25</sup>

More immediate to the discussion is the exception made in the lower courts of the US in adding an exception to *Tinker*. The courts found that public schools may restrict student speech through content-neutral regulations such as mandatory uniform policies or dress codes, which need only, satisfy intermediate/cursory scrutiny<sup>26</sup> instead of *Tinker*'s heightened scrutiny. More recently, in *Palmer ex rel. Palmer v. Waxahachie Independent School District*<sup>27</sup>, the Fifth Circuit court upheld the constitutionality of the dress code of the Waxahachie Independent School District (WISD) under intermediate scrutiny. *Palmer* showed the danger of the *Canady* exception<sup>28</sup>

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<sup>23</sup> The original case in which the principle was set out was *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). More recently, the discussion of the principle of control of content described as unwanted in the dressing of people was seen in *Citizens United v. Federal Election Commission* 558 U.S. (2010) p5-12. Here, the Learned judge Roberts, C. J., determined that a communication "is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" in other words, the governing authority (the election commission) did not have the authority to prevent people from wearing clothing with a political message because, "this delivery system has a lower risk of distorting the political process than do television ads; and that there should be an exception to the ban for non-profit corporate political speech." The courts recognized that the First Amendment applies even to corporations, as was held in, *First Nat. Bank of Boston v. Bellotti*, 435 U. S. 765, 778, p 14, and extended this protection to the context of political speech, [*NAACP v. Button*, 371 U. S. 415, p428-429.]

<sup>24</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Brought out the legally sanctioned principles on what comprised of school sponsored speech. The facts in the 2010 case of *Palmer* saw the courts adjudge the plaintiff correct for wearing a shirt that had 'San Diego' written on it.

<sup>25</sup> Dr John Ritho Kanogo, Dr Geoffrey Avugwi Ritho V Joseph Ngugi , Standard Group Ltd [2012] eKLR

<sup>26</sup> The circuit (subordinate court) court in *Bar-Navon v. Brevard County School Board.*, 290 Fed. App'x 273, 276-77 (11th Cir. 2008) upheld the school district's dress code prohibiting the wearing of non-otic pierced jewelry under intermediate scrutiny.

<sup>27</sup> 579 F.3d 502 (5th Cir. 2009), cert. denied, 130 S. Ct. 1055 (2010).

<sup>28</sup> The *Canady* case held that public schools can restrict student speech through contentneutral regulations that satisfy intermediate scrutiny.

swallowing the *Tinker* rule by allowing government censorship of non-disruptive, political student speech in public schools.

Contextualizing the discussion to Kenya, one needs to start from the constitutional freedom to of expression. Article 33 (1) gives every person has the right to freedom of expression, which includes the freedom of artistic creativity and its expression. The only curtail to that freedom is presented in sub-article 2(2) The right to freedom of expression does not extend to— (a) propaganda for war; (b) incitement to violence; (c) hate speech; or (d) advocacy of hatred that— (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or (ii) is based on any ground of discrimination specified or contemplated in Article 27 (4). (3).

This brief passage in the constitution is the very embodiment of the *Palmers* case in Kenya law. When the same article goes on to note that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. Similarly, the exceptions to the *Palmers* case are clearly laid out in the spirit of these articles.

In light of these constitutional provisions, the question that persists is whether indeed there is any legal foundation for the threat of suspension and even expulsion by the school disciplinary committee of the test university. The freedom of choice is enshrined in the constitution in Article 27 (4) explicitly outlaws discrimination of any kind. The threat of denial of an education (from suspension or even expulsion) due to outward appearances of a person without legally specific mandated benchmarks on the level of other jurisdictions that exercise such punishment is puzzling.

Unravelling this puzzle drives this research to Emile Durkheim's theory of the evolution of society. When a society is in its mechanical phase, accomplishment is determined in terms of just

how homogeneous individuals can become. As it evolves, individuals manifest uniquenesses that contribute to the collective growth of that situation.

Students that gain admissions into universities come from vastly different socio-cultural backgrounds. Individuals from different secondary schools meet in *institutions of higher learning* in order to acquire training on the legal concepts and principles. Looking at the charter of the test institution, one is hard pressed to deduce the correlation between grasping of legal information, the formation of a legal mind and the insistence on a specific outward appearance. The test university (Strathmore) University Charter, Article 4 (2) states that the philosophy of the university is in agreement with the Kelsian school of thought in that kelsianism and natural law (faith )and reason (positivism) can co-exist. Drawing back to the Durkheimian analogy, this passage shows that the letter of the test university propounds for diversity in personages. This casts aspersions on the validity of instilling dress codes.

Article 2(6) of the constitution of Kenya by default adopts the letter of the UN charter when it accepts the inherent dignity of every human being. Therefore, this can be understood to be that there is already an inherent dignity<sup>29</sup> to every human being, an inalienable value in their merited contribution to society. In keeping with the conditions for the control of dress codes in *institutions of higher learning*, it makes sense to posit that the effect of any particular mode of dressing would negatively impact on the capacity of a tertiary institution from delivering on its

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<sup>29</sup>The Universal Declaration of Human Rights (UDHR) was adopted by world nations in furtherance of the UN Charter. The preamble recognises the inherent dignity of all persons as well as the equal and inalienable rights of humankind. Importantly, the UDHR recognises that these human rights should be protected by rule of law. Article 2 abolishes distinction of any kind including sex, while Article 7 recognises that all human beings are equal under the law and should thus enjoy equal protection by law.

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.htm>> accessed 5 September 2015

chartered functions. However in order to retain objectivity in the reader's eyes, it is imperative that tried and tested legal theories be applied.

The effecting of a dress code by an institution of learning without clear bounds as to the extent of the restrictions may act as a means of 'mechanising' the collective psyche of a student fraternity. Identifying the *grundnorm* in this instance is difficult because the constitution itself goes against the sanctions that are made against a person for their mode of dressing.

It then becomes fairly easy to identify the discrimination in this instance. Taking the cue from the Zimbabwean case of Department of Correctional Services and Another v Police and Prison Civil Rights Union (POPCRU) and others; one sees that discrimination is proven when a prohibition interferes with the practice or expression of a culture.<sup>30</sup> One notes that even though the 2010 High court 'Family care' case<sup>31</sup> held that corporate bodies may not be enjoy the benefits of the Bill of rights, the convincing argument in *First National. Bank of Boston v. Bellotti* holds that corporate may indeed be held accountable for its violation. In this case the courts recognized that the First Amendment applies even to corporations. Furthermore, the Kenyan penal code is already replete with the twin versions of morality (public and private). The provisions in both are for what acts of civility are allowed in public and which ones are not. For instance, the act of publicly showing affection is offensive (public indecency) while the same is the legally recognized effect of marriage (consummation) when conducted in private. Juxtaposing this to the discussion one notes that it is only up to the law to dictate what the *grundnorm* for dressing is. The constitution being the apex law of the land makes it difficult to justify the threat of suspension or expulsion for non-conformity.

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<sup>30</sup>(CA 6/2010) [2011] ZALAC 21; (2011) 32 ILJ 2629 (LAC)

<sup>31</sup>Petition 43 of 2012 (eKLR)

### **3.3.Conclusion**

This discussion has shed light on the contributions of universities in giving skilled workers to society and contributing to its overall well-being. It has further interrogated the relationship between the dress code and societal evolution while at the same time showing that outward appearances and the impartation of knowledge can have a mutual existence as per Hans Kelsen. This discussion now lays the foundation for recommendations on the legal validity of dress codes in institutions of learning.

## 4. Chapter Four: Conclusions and Recommendations

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### 4.1. Introduction

The previous chapters served to lay a theoretical foundation to this discussion. Eminent theorists' work was used to buttress the theoretical leaning of this paper. The *grundnorm* in the Kenyan society was identified as the constitution with regard to dressing of those under its jurisdiction. Furthermore, the fact that the diversity of individuals is protected from discrimination by any person both natural and juristic is proof that Kenya is indeed a highly evolved organic society.

The lively discussion on this topic pointed to various latent unconstitutional aspects of dress codes. This happened through analyzing American jurisprudence and relating the *dicta* to the Kenyan circumstance.

Therefore, this chapter 'ties up' the discussion by concluding the various thought processes that were invoked by the research questions; setting the stage for the recommendations that invariably arise from the dissertation.

### 4.2. Conclusions

The primary objective of the research was to find out if the enforcement of a dress code in universities is essential to the discharge of the university's chartered functions. In achieving this objective the research also sought to unearth and contextualized the global discussion around dress codes and analysed the matter through the prism of the Constitution of Kenya 2010.

The paper concerned itself with the enforcement of dress codes in universities. Over time, the individual expression through outward appearance has been come to the forefront of

constitutional freedom. This paper therefore discussed the place of a consistently enforced dress code in an institution and its relation to the qualified fundamental right of expression.

Bringing the study to its conclusion through an evaluation of the hypothesis as it was discussed and analysed in the research. The hypothesis was that the enforcement of a dress code among students in *institutions of higher learning* of learning enjoys a quasi-legal foundation hence cannot be legally effected.

The study found that indeed there is a legal basis for the enforcement of a dress code in institutions of tertiary learning. But that dress code espouses constitutional rights and so is enforceable only to the extent that the Constitution of Kenya 2010 prevents the alienation and differential treatment of those who express themselves creatively through dressing.

Acknowledging the vast social, economic and cultural heterogeneity of Kenya; it then behooved the study to justify the validity of various modes of dressing through Durkheim's theory of societal evolution. That the more evolved a society is, the more the individuals in it are bound to seek unique self-expression, but still act as functional members of that society.

The pure theory of law informed the study's agenda of analyzing whether dress codes and the constitutional freedom of expression could co-exist. It found no legally actionable forbearance on one on the other. This was because the pure theory of law showed a disconnection between the dignity, morals of individuals and their self-expression through dress. That the test university's mission is well achievable; but whose dress code violations are not actionable hence theoretically unenforceable through the support of the courts. The most efficient safeguard against the abuse of that freedom of expression is the constitution since it encompasses all the case law already present on the subject in progressive jurisdictions.

The study therefore can be said to have achieved its objectives in addition to identifying areas for further research. The most notable area of research is that of analyzing the legal framework of de-dress coding institutions of higher learning.

The following recommendations arise from the study:

1. Dress codes are made to include the various socio-cultural dynamics of Kenya's societies instead of putting different dynamics into one category.
2. The inability to comply with dress codes either on the basis of conscience, expression or culture should be made clearer through specific subsidiary legislation. In other words, considerations should be made for the exemption of individuals for their freedom of expression to be allowed.

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