

**AN INVESTIGATION ON CYBER JOURNALISM REGULATION IN
RELATION TO MEDIA FREEDOM IN KENYA**

by

Julius Ombui Bosire

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DECLARATION

This thesis is my original work and has not been presented for a degree award in any other university.

Julius Ombui Bosire

This thesis has been submitted with our approval as university supervisors:

Professor Patricia-Kameri Mbote (JSD)

Law School, University of Nairobi

Dr. George Nyabuga (PhD)

School of Journalism and Mass Communication, University of Nairobi

DEDICATION:

I dedicate this thesis to my mother, Agnes Bosibori Bosire.

Through education, she gave us wings to fly.

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ABSTRACT

Media freedom has always been tied to responsibilities which journalists are expected to carry for the realisation of societal common good. The emergence of new forms of journalism as a consequence of technological development and appropriations has engendered serious debate about media freedom and the practice of journalism around the world. Cyber journalism poses challenges to media regulatory framework in Kenya. Cyber journalism in this study is defined as the collection, processing and dissemination of information on the cyberspace. Unlike their counterparts in traditional media of newspaper, magazines, radio and television, cyber journalism is not typically or bureaucratically organised. Journalists on the cyberspace seem to ignore professional tenets of accuracy, balance, impartiality, fairness, objectivity and privacy. It is within this milieu that this study investigates freedom of media guaranteed by the Constitution of Kenya 2010 and regulatory challenges posed by cyber journalism. This study contextualises the liberties and limits of media freedom in the constitution. It is guided by the following questions: Why do states commit themselves to freedom of media and under what circumstances is this freedom curtailed? What are the challenges presented by cyber journalism to traditional media regulatory framework and in what manner can they be confronted? The research, which is qualitative in nature, used content analysis and interviews. It analysed secondary documents to obtain data on international law and statutes that govern media freedom and the distribution of content online. Guided by mass society theory and social responsibility theory, the study posits that media regulation is necessary. However, laws regulating journalism should not impede freedom of media and expression which is guaranteed by the Constitution of Kenya 2010 and the International Law. This study concludes that despite the fact that freedom of media is guaranteed by the Constitution of Kenya 2010, this freedom is limited for the sole purpose of protecting other people's rights. The study recommends that Internet Service Providers should not be coerced to take responsibility of content online. Bestowing the ownership of content on ISPs will create room for irresponsible cyber journalism leading to anarchy. Future research should be directed towards examining the constitutional provision of the right of access to information. Kenyan parliament passed a law in 2012 on access to information and it is important to know how the legislation impacts on the practice of journalism in Kenya.

DEFINITION OF TERMS AS USED IN THE STUDY

Apps: A computer terminology meaning applications.

Article 19: An international human rights organisation, founded in 1986, which defends and promotes freedom of expression and freedom of information worldwide.

Blog: A blog is a simple web page that has chunks of information called posts added to them on a regular basis. Depending on how it was setup by the person maintaining the blog, the posts can be all on one page forcing visitors to scroll down, or each post will have its own individual web page. Many blogs are eclectic, personal diaries recounting vacations, pet behaviour, and favourite books read. Others convey the blogger's expertise in some field of endeavour, offering, say, tech tips or consumer advice.

Blogosphere: A subset of bloggers who assign themselves the role of news source, analyst, and interpreter. They are electronic pamphleteers, self-appointed editor/commentators who use their own highly selective filter to note, deconstruct, annotate, and re-spin news items produced elsewhere. Most blogs allow readers to post comments.

Citizen Journalism: It entails the processes where private individuals do essentially what professional reporters do – report information on a blog. It can include text, pictures, audio and video. The other main feature of citizen journalism is that it is usually found online.

Control: A situation of putting into place measures that guide practitioners in a field. In this regard, it refers to guidelines for the use of cyber journalism in a responsible manner.

Cyber highways: The Internet links through which information flows worldwide.

Cyber journalism: This is journalism practiced on the cyberspace. Journalists have their own websites where they publish information which does not necessarily go through institutional media, thus devoid of gatekeeping (Singh 2009 p. 103).

Cyberlibertarians: A tradition which argues that cyberspace cannot be regulated.

Cyberpaternalists: The tradition argues to the contrary of Cyberlibertarians that cyberspace is amenable to regulation.

Cyberspace: The interconnectivity of computers where people exchange ideas regardless of their geographical location. It is synonymous with the Internet.

3G: It stands for 3rd-generation. Analog cellular phones were the first generation. Digital technology marked the second generation. 3G includes high data speeds, always-on data access, and greater voice capacity.

Facebooking: Sending information through Facebook social platform.

Newsies: The people who practice cyber journalism but not necessarily trained journalists.

Participatory journalism: Both consumers and producers of information actively participate in sharing opinion and information.

PEW Internet: The Pew Internet is one of seven projects that make up the Pew Research Center. The Project produces reports exploring the impact of the internet on families, communities, work and home, daily life, education, health care, and civic and political life. (pewinternet.org)

Podcasting: This is broadcasting of audio files over the Internet through syndication for playback on mobile devices and personal computers. Podcasting enables listeners to access and listen to music and other podcasts that are of interest to them conveniently.

Traditional Media: Also referred to as conventional media, they are media channels that existed before the Internet-enabled ones. They are the newspaper, magazines, radio and television.

Twitting: Sending messages through Twitter social platform.

Viral dissemination: Fast spread of information on contact in the Net. Messages are sent to groups, which in turn, send the same message to people connected to each individual making it spread very fast like a viral infection.

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LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR – African Commission on Human and Peoples’ Rights

ACTA – The Anti-Counterfeiting Trade Agreement, a multinational treaty that establishes international standards for intellectual property rights.

BCAC – Broadcast Content Advisory Council under CCK

CCK – Communication Commission of Kenya

CCPR – International Convention on Civil and Political Rights (a UN organ).

CP – Camden Principles

ECHR – Then European Court of Human Rights

FGDs – Focus Group Discussions

GJDFEI – Geneva Joint Declaration on Freedom of Expression on the Internet

ICCPR – International Convention on Civil and Political Rights

IG4D – Internet Governance for Development

IGF- Internet Governance Forum

Interpol – International Police

IRP – Internet Rights and Principles

IRPC – Internet Rights and Principles Coalition

ISPs – Internet Service Providers

ITU – International Telecommunication Union

MCK – Media Council of Kenya

NGOs – Non-Governmental Organisations

OAS - Organisation of American States

OSCE – Organisation for Security and Co-operation in Europe

SOPA - Stop Online Piracy Act. It is legislation for the United States of America introduced to expand the ability of U.S. law enforcement to fight online trafficking in copyrighted intellectual property and counterfeit goods.

SPJ – Society of Professional Journalists

UN – United Nations

WSIS – World Summit on the Information Society

CHAPTER ONE: INTRODUCTION

1.0 Overview

This chapter presents an overview and background to this study. It introduces the two factors necessitating the context by which this study is carried, which are a new constitutional dispensation in Kenya and technology shift. The Constitution of Kenya 2010 guarantees freedom of media with limitations, whereas the adaptation and massive acceptability of Internet use has enabled cyber journalism practice in the country. This chapter explains why media freedom is essential and why media cannot be guaranteed absolute freedom. It draws arguments from scholars such as Whitten-Woodring (2006), that the main justification for press freedom is that free media will act as a watchdog over the government and other influential persons. It also explains the dangers of freedom without responsibility (Pugh 1995). The chapter then presents the statement of the problem, research objectives, and the research questions. The chapter finally presents the thesis structure.

1.1 Background to the study

The Constitution of Kenya 2010 guarantees freedom of media of all kind. However, this freedom is curtailed if it infringes on other people's rights. Technological shift which was witnessed in Kenya in the end of the 20th century and the first decade of the 21st century with the introduction of marine cable network and mobile communication gadgets ushered in a new generation of journalists. Cyber journalism posed great challenges to media law and regulatory framework not only in Kenya, but many states worldwide.

From the foregoing, it is important to examine the various guarantees and restrictions within the laws that govern journalism and media, with specific focus on the provisions of the Constitution of Kenya 2010. Kenya, a signatory of the United Nations statutes, among them the Universal Declaration of Human Rights, takes cue from the international law and constitutionalises these fundamental and universal freedoms of expression and media. The

Constitution of Kenya 2010 guarantees freedom and independence of media from interference from the government and other powerful individuals (Article 34). The state is prohibited from exercising control or interfering with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium. The state is further restricted from penalising any person for any opinion or view or the content of any broadcast, publication or dissemination. The Constitution empowers Parliament to enact laws that provide for the establishment of a body to set media standards and regulate and monitor compliance with those standards.

The constitution prohibits messages that border propaganda for war, incitement to violence, hate speech and advocacy for hatred. It further prohibits messages that constitute ethnic incitement, vilification of others or incitement to cause harm. Any discriminatory messages that are based on grounds such as race, sex, pregnancy, moral status, health status, ethnic or social origin, colour age, disability, religion, conscience, belief, culture, dress, language or birth are outlawed (Article 33 (2) as read with Article 27 (4)). The Kenyan constitution further states that in exercising the right to freedom of expression, every person shall respect the rights and reputation of others (Article 33 sub-article 3).

Since the Universal Declaration of Human Rights (UDHR) in 1948, media freedom and regulation has been an important area of research by scholars in the fields of communication and journalism, law, political science and theory. Researchers such as Siebert (1946) and Franklin, (1981) have investigated the underlying principles and justification of media freedom and regulation. The big question has been as to whether media can be regulated without violating freedoms provided for by various statutes and conventions. McQuail (2005 p. 166) for instance argues that media should be free from control by government and other powerful interests, sufficient to allow them to report and express freely and independently and to meet the needs of their audiences.

Article 19 of the UDHR, which guarantees freedom of expression and information through “any media”, has largely been used as the basis of various treaties and principles on freedom of media. Consequently, states at the international level developed the Camden Principles on Freedom of Expression and Equality and the Geneva Joint Declaration on Freedom of Expression and Internet. At the African continental level, the Johannesburg Principles on National Security and Freedom of Expression was initiated.

Article 19 of the UDHR sets a solid foundation for freedom of expression and the media. It states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” (<http://www.udhr.org/UDHR/udhr.HTM>, accessed January 5, 2012).

Scholars and media practitioners such as Kovach and Rosenstiel, (2001) inform that the justification for freedom of media includes enabling journalists to act as watchdogs over the government and other influential people in society, thereby rendering the government more responsible and responsive to the needs of the people and the larger society. Free news media help to improve governments respect for human rights (Amnesty International 2006). Freedom of media is therefore a crucial component in improving the living standards of the citizenry because the news media provide a fundamental informational linkage between the public, elites, and governments. Free media help the public to make informed choices while at the same time they get correct information on the role of government, the public and the manner in which to develop themselves. Whitten-Woodring (2009) argues that freedom of speech and the ability to petition the government is more important to democracy than democratic institutions themselves.

The study examines the constitution’s orientation towards the defence of freedom of media and the mechanisms media have put in place to safeguard the fundamental guarantee

and the restrictions therein. As Christians, et al. (2009) argue, the press and other media have always tried to maintain their independence from the controlling powers of the state precisely to protect their freedom and their function as guardians of public social responsibility. The study further examines the need to regulate cyber journalism based on the limitations of freedom of media by the Constitution of Kenya 2010, taking into consideration the constitutional provision for a regulatory body for media practice in Kenya in Article 34 (5).

1.1.1 Technology shift and media practice

Kenya experienced a major technological shift from the year 2001, where the Internet use grew rapidly, due to introduction of broadband and marine cable technology. At that time, publics embraced the use of smart phones and other mobile devices for Internet access. In 2010, Kenya had the highest number of Internet users in the East African region, with approximately 8.8 million people accessing the web (Society for International Development 2012 p. 62). Technology enabled the practice of journalism on the Net. This study examined the manner in which both freedom of media and technological advancement may be used to promote greater justice, respect of human dignity and human rights as guaranteed in the constitution.

Cyber journalism is a term derived from cyber, which means computer-generated or virtual and journalism which is defined as writing and publishing news stories and articles in newspapers and magazines or broadcasting them on radio or television. Cyber journalism therefore is computer-generated and computer-enabled journalism. It comprises journalists' websites, weblogs, media blogs and online journalism platforms. However, among these journalists on the cyberspace, just like in the traditional media, there are non-trained journalists posting journalese information. Singh (2009) posits that a large number of amateurs are maintaining blogs that disseminate content that mimics journalists.

Today, weblogs seem to be everywhere in and around journalism: the media publish weblogs as one item in their online content repertoire, individual journalists have taken up blogging, and an array of amateurs (with regard to journalism are maintaining weblogs that at least to a certain extent resembles news journalism (Singh 2009 p. 103).

The cyberspace offers uncontrolled self-publishing space in which journalists expand on issues and points of view that do not get into the media that they work for. Weblogs free journalists from editorial policy guidelines, gatekeepers and even sometimes enable them to elude government controls. They enable the journalist to adopt a much more interpretive or even opinionated position in comparison to the standards of mainstream media (Singh 2009). Several journalists write weblogs as a parallel activity to the media houses they work for. However, some media houses are not comfortable and therefore have developed internal policies discouraging their employees from posting their information on the Web. CNN and Time asked two of their correspondents covering Iraq war to quit personal blogging (Singh 2009), but they decided to quit the media giants and maintain their weblogs. Whereas such journalists remain professionals, they are not tied by the policies of their employees' media and therefore enjoy the privileges that are found in the new technology. "Many blogs do indeed engage in original journalism and many maintain paid, professional staffs" (Baran and Davis 2012 p. 126)

Cyber journalism can easily elude the ethical and legal standards of the practice of journalism among them fairness, accuracy, balance. They may too, evade laws of defamation of slander and libel since they do not have gatekeepers and the influence of media owners and editors. Figure 1 shows the flow of information within the traditional journalism set-up. It has the provision for gatekeepers who select and identify the relevant news for their audiences. The information is obtained from the sources, processed by a discrete editorial hierarchy and

then disseminated to the public. The users' responses are sieved by the gatekeepers and only the acceptable one is released to audiences.

Unlike in the traditional media, in cyber journalism, as illustrated in Figure 2, the cycle goes on and on as new ideas emerge in the pool which is open to all – journalists, consumers and sources. Through what Bruns (2005) calls gate-watching (watching what is circulating on the Net), cyber journalists read and pick news from Internet platforms and use it as if it is their own. Journalists in this case are watching what is going on the cyberspace instead of going out and collect their news and articles from primary sources. Some have however ended publishing unverified information, which turns out to be untrue. Gatekeepers on the other hand are expected to monitor the activities taking place in society and pick what is relevant and helpful to the society for publication. They are expected to ensure that the rules and regulations for the practice of journalism are adhered to.

The researcher problematises this study through the challenges media regulatory framework in Kenya is challenged by cyber journalism. This generation of journalists has tilted the production of news from the traditionally highly editorial and hierarchical approach to more liberal information delivery. On the other hand, an online news user is able to explore news with much greater freedom than a traditional media audience (Singh, 2009). The ability by journalists to distribute content online has enabled amateurs to distribute information on the cyberspace, with no regard to the rules of the practice. This study argues that amateurs exist even in the traditional media since not everyone that practices journalism in established media houses are trained journalists. If blogging is not part of journalism, then part of blogging is journalism. However, as Baran and Davis (2012) argue, its truths are provisional and its ethos collective and messy, despite the interaction it enables between writer and reader which is unprecedented, visceral, and sometimes brutal. “And make no mistake; it heralds a golden era of journalism” (Baran and Davis 2012, p. 126).

Cyber journalism, unlike the traditional media, opens up ways that journalists can publish without necessarily subjecting their news to the editorial policy guidelines of the companies they work for (Singh, 2009). Johnson and Post (1996) argue that laws and rules that regulate physical and geographically defined territories are not sufficient for cyberspace. The duo contends that cyberspace challenges the law's traditional reliance on territorial borders; it is a 'space' bounded by screens and passwords rather than physical markers (Johnson and Post, 1996 p. 1367). Although the people who communicate in the cyberspace operate from a geographical location, their activities are removed from the real space. (Johnson and Post, 1999 p. 1368)

Lessig (1999) recommends three typologies of control for fair practice in the cyberspace – code (the use of computer architecture), norms and the market. He argues that code can supplement the law in order to achieve desired controls rather than using law alone. However, Wu, (2003, p. 681) discounts the proposition by Lessig (1999) that code is superior to other ways of regulating communication on the Net. Wu argues that code cannot be equivalent to law. He proposes the centrality of compliance, which neither law nor code address.

Internet platforms such as Skype offer opportunities for video chats for anyone with an Internet connection and lets users see and hear people who might be thousands of miles apart. Newsvine, a community-powered journalism website carries content from users and syndicated content from sources such as the Associated Press. Users can write articles and discuss news items. The enabling hardware for cyber journalism practice include cheap mobile broadband, a proliferation of feature phones and Internet-connected hardware which enable quick and accurate dissemination of information in viral form.

The cyber space has transformed people from content consumers into content producers. This development has not come without grumbling from mainstream media

journalists as to whom the news producers in the digital era are. Unlike traditional journalism, it is difficult to physically locate ownership of cyber journalism, especially independent bloggers. McQuail (2005, p. 140) contends, “They [online media] are not clearly identified in terms of ownership, nor is access monopolised in such a way that the content and flow of information can be easily controlled”.

With cyber journalism, a vast amount of information on virtually any subject is only a few clicks away. Large editorial content, advertisement material, music and voice mails are being distributed worldwide with a lot of ease that was unknown to the traditional media of newspaper, radio and television. A man or woman seated in his or her car is able to watch whatever he or she wants on their smart cellular phone or any other mobile devices in all forms of still photos, motion pictures, text and even listens to voice at his or her comfort zone. Such technology was unheard of a few years ago. Journalists are able to communicate with their audience without necessarily following any set of rules. Berkman and Shumway, 2003 p. 1932 aver: “Now millions of aspiring reporters, cultural critics media activists and political pundits can publish their own work and make the claim that they are journalists”

The explosion in the number of Web sites churning out information from cyber journalists brings into question the relevance of the existing laws that govern the practice of journalism. Although several websites are everywhere in and around journalism, not all qualify to be cyber journalism. Singh (2009) informs that not all weblogs pretend to be journalistic or related to current events in the sense shared by institutional media.

In fact most websites are mainly personal and revolve around the feelings and experiences of the author. Only 34 per cent of US bloggers surveyed by PEW Internet (a research organisation) considered their blogs a form of journalism (Singh, 2009 p. 108).

The emergence of four key forces of journalism, that is citizen journalism, conglomerations, online journalism and cyber journalism is throwing media regulators, particularly those in third world countries, out of balance (Kovach and Rosenstiel, 2007 pp. 29-32). In the era of cyber journalism, media houses engage reporters to send stories from the functions through mobile devices in order to be the first to break news. Whereas conglomeration of media brought about new chains and borderless ownerships of media outlets by single companies, platforms which enable cyber journalism have created an environment in which everybody who wants to be a journalist can do it from his or her house without necessarily owning a company or registering with government. Kobrin (2001) argues that conglomerates broke the geographical boundaries of operations, owning media houses across geographical boundaries. Cyber journalism on the other hand enables journalists to publish outside institutional media by posting their news, opinions and commentaries on their weblogs. However, some blogs operate within those conglomerates.

The complexity of the technology and its rapid rate of change make traditional regulatory schemes problematic in many issue areas. Regulatory frameworks will require joint efforts, hybrid schemes of self-regulation with public oversight and enforcement, to be effective (Kobrin, 2001 p. 688).

Computer applications that allow for the practice of cyber journalism are self-organising, collaborative, easy to use and enable immediate reaction opportunities have contributed to making them immediate and real time. Popular online features, such as commenting and user-submitted content, or integrated with popular communication on platforms within platforms like Facebook and Twitter, are strong in Kenya. The traditional media have established websites on which they deposit their content for access by the public. The applications are not always open to anyone interested while access to some content is restricted for subscription. Traditional media have become even smarter by adopting “digital

first” schemata where conventional journalists file their stories in short messages before filing for radio, television, newspapers and magazines in that order. For instance, the Nation Media Group launched the programme in 2012, with the belief that the media house would still retain its news-breaking role and therefore fighting to retain its audiences.

On the other hand, individual journalists with weblogs engage in disseminating comments and news online as soon as they received them. Under this regime of cyber journalism, as argued by Berkman and Shumway (2003), reporters and political commentators can post their news and opinion on the web for access by the public. “Now millions of aspiring reporters, cultural critics media activists and political pundits can publish their own work and make the claim that they are journalists” (Berkman and Shumway 2003 p. 1935).

Murray and Scott, (2002 p. 491) suggest that the use of hierarchy, competition, community and design as regulatory frameworks for Internet-mediated communication would yield desirable outcomes. This study, however, examines the four frameworks to establish if they could help address regulatory challenges caused by cyber journalism. Kenya’s new constitution provides for media freedom as a fundamental right. The freedom applies to “electronic, print and all other types of media” (Article 34 sub-article 1). It is clear that online media is part of that whose freedom is guaranteed by the constitution.

Lessig (2002) informs that in the cyberspace, citizens have removed themselves from the regulatory controls of their sovereign governments and have chosen to be regulated by other sets of regulatory values and norms. A cyber journalist is able to post information from wherever, outside the jurisdiction of operation (Murray and Scott 2002, p. 495). Traditional media legislation and regulation world over seem to be challenged on their effectiveness to manage cyber journalism. There seems to be a disagreement on regulation of communication on the cyberspace with journalists and other practitioners taking sides over as to whether to

adopt the traditional regulatory framework or seek new ones. On one hand, regulators who mainly comprise government agents are struggling to support practices that emanate from print and broadcasting journalism and with the belief that journalism is based on its social responsibility role to inform citizens and nurture democracy (Berkman and Shumway 2003) , while the other (the regulated) are informed by suspicion of centrally managed traditional media conglomerates and a belief, inspired by the new architectural landscape of the Internet and Web publishing that citizens can participate in democracy by creating their own journalism. Berkman and Shumway (2003) classify the two groups into traditional journalism and open or participatory journalism. Cyber journalism is participatory because both producers and consumers actively participate in the communication cycle. Studies on jurisdiction over Internet have suggested that states are challenged to charge someone with an offence that has been committed in a different state. However, scholars are seeking ways on how a person offended by such content may seek remedy.

Tensions have arisen over such issues as whether a country has jurisdiction over Internet activities originating in other countries, whether regulation of content such as hate speech and pornography is appropriate, how different privacy protections should apply (Baird, 2002 p. 16).

Conflicting interests of regulating cyber journalism are likely to stem from new quarters that have not been seen before. Whereas traditional media regulation pitted regulators on one hand and media owners and practitioners on the other, additional clashes of interests between open or participatory journalists on one hand against traditional journalists, between media owners and owners of content in cyber journalism is likely to heighten the debate of control. The study is guided by normative theories of media, namely, mass society theory and social responsibility. Mass society theory is an all-encompassing perspective on Western industrial society that attributes an influential but largely negative role to media. It

views media as having the power to profoundly shape people's perceptions of the social world and to manipulate their actions, often without their conscious awareness. This theory assumes that media influence must be controlled. "However, the manner in which to control the media elicits as varied propositions as there are theorists that offer them" (Baran and Davis 2012 p. 46). They charge that when press freedom is abused, when what they consider higher values are threatened, then media must be censored. As new media develop, critics fight to prevent their growth or to control their structure. (Baran and Davis 2012)

Critics of the theory, however base their argument on the need for citizens to have access to whatever they want in a free society and therefore look up to media as only assisting people so they can exercise this freedom. Defenders of media freedom claim that there is no clear evidence that controversial content is harmful even if it is offensive. They too embrace the freedom guaranteed in the Constitution. They remind their critics that this freedom is fundamental to democracy (Baran and Davis 2012).

Social responsibility theory on the other hand represents a compromise between views favouring government control of media and those favouring total freedom of the media. It tasks media people to be responsible and help draw a hedge around democracy against attacks by people bent to ruin it. "The press is not free if those who operate it behave as though their position conferred on them the privilege of being deaf to ideas which the processes of free speech have brought to public attention" (Baran and Davis 2012 p. 115).

Libertarian thought of media as a self-regulating marketplace of ideas is worth considering. The marketplace of ideas is self-regulating, so there is no need for a government agency to censor media messages. Audiences won't buy bad messages, and therefore irresponsible producers will go out of business (Baran and Davis 2012).

The study examines the four regulatory frameworks proposed for cyberspace by Lessig (2000) of self-regulation, co-regulation, software regulation and state regulation if

they can be applied to the practice of cyber journalism. It takes into account an argument by John Stuart Mill that "The liberty of the individual must thus far be limited; he must not make himself a nuisance to other people" (Mill, 1947 p. 55). Therefore, ethics and restraint is part and parcel of the requirements for the practice of journalism in any given society for purposes of "not injuring" others.

Hurley (2003) and Mill (1947) posit that journalism must be practiced responsibly and journalists must be made accountable for what they publish. Baker (1998) informs that the core responsibility of journalists is to present facts, tempered with context. He recognises that values are essential in determining the choice of facts that journalists choose to present to their audiences. This study anticipates that as much as freedom of media is guaranteed by the Kenyan constitution, cyber journalists, like traditional media journalists, need to adhere to certain values in order to realise a just society.

Since the 2007/2008 post-election violence, authorities in Kenya are keen to monitor content on the cyberspace. The Police, National Cohesion and Integration Commission (NCIC) and the Communications Commission of Kenya (CCK) have in the past announced monitoring online speech and mobile phone text messages and communication through technological mobile devices with the intention of stopping hate speech before it spreads. In 2012, the CCK announced plans to install network monitoring software, citing, among other reasons, the increased uptake of the Internet as well as security threats (Information and Communications Act 2012). Such moves amount to regulating the online space, at least from a policy perspective. Section 3 of the Act establishes a communications regulator, the Communications Commission of Kenya, (CCK) and also creates the offence of publishing obscene content. The Penal Code in Chapter 18 spells out offences related to defamation. Defamation is also a civil wrong covered in the Defamation Act (1992).

1.2 Statement of the problem

The Constitution of Kenya 2010 guarantees freedom of media of all kind. However, this freedom carries with it certain responsibilities that both the state and media practitioners must undertake for the realisation of societal common good. The constitution recommends that parliament enacts a law that provides for an independent body, independent of control by government, political interests or commercial interests) to set media standards and regulate and monitor compliance with those standards (Article 34). As Kenya promulgated its constitution, technological shift occurred in the country which enabled wide scale use of the Internet. The Internet, consequently gave rise to cyber journalism, a practice that poses serious challenges to regulatory framework for traditional media of newspapers, radio and television.

Increased use of the Internet transformed the way journalists source, process and transmit their content to their audiences. Whereas the printed press and broadcast media have for a long time dominated the communication scene as the main sources of information, the Internet made it possible for any person to publish ideas, information and opinions to the entire world. In particular, blogging rivals newspapers and television as dominant sources of news and information. Not surprisingly, journalists own personal weblogs besides working in newsrooms, blurring the distinction between professional journalists and amateurs. This development raises difficult questions: How can the activities of cyber journalists be reconciled with existing models of media regulation? The enforcement of the codes of conduct for the practice of journalism on the cyberspace has become a major challenge for not only Kenya but also other states. This study acknowledges that information dissemination is no longer a preserve of journalists working under multi-million-shilling media houses. Singh (2009) cites cases of journalists breaking away from established media houses to run and maintain blogs. He identifies three types of journalistic weblogs that are commonly used

world over. They are media blogs – weblogs that are part of the media content produced by professional staff journalists, second, audience blogs – weblogs that the audience can comment on platforms provided by the media and thirdly, journalist blogs – weblogs that journalists maintain outside their companies. Some journalists use these platforms to disseminate information which they feel is important but could not pass the gatekeepers in the media houses they work or worked for.

Media companies and individual journalists can publish anything from text or images to a video using high speed and broad bandwidth digital technology, which they then deliver direct to computers or mobile devices worldwide. On the other hand, governments worldwide have attempted to formulate legal framework to limit the information people see by blocking access in a variety of ways including tasking Internet Service Providers to remove material deemed unlawful. While newspapers can only be banned by courts, the decision to block a website appears to be made at whim by civil servants, ISPs or servers.

However, a major ongoing debate is who should take responsibility over “undesirable” content published Online – is it the journalist, the ISP or server? Whereas traditional media law holds publishers responsible for what they publish, it is unclear who the publisher is online. Questions linger around who the publisher is among the server that stores the content, the search engine that finds the content, or the Internet Service Provider (ISP) that delivers the content. Some governments automatically block information and monitor what people read.

1.3 Objectives of the study

1.3.1. General Objective

The general objective of this study is to investigate media freedom and challenges cyber journalism poses to media regulatory framework in Kenya.

1.3.2. Specific objectives

1. To assess the implication of Article 34 of the Constitution of Kenya 2010 as read with Article 33 (2) with regard to media freedom and regulation.
2. To explore the challenges cyber journalism poses to media regulatory framework in Kenya.
3. To establish the role of Internet Service Providers in the ownership of content online.
4. To examine the role played by international law, treaties and conventions in the regulation of cyber journalism in Kenya.
5. To explore ways used to regulate cyber journalism and propose what is most apt for Kenya.

1.4 Research questions

This study is guided by the following questions:

1. What is the implication of Article 34 as read with Article 33 (2) of the Constitution of Kenya 2010 with regard to media freedom and regulation?
2. What challenges does cyber journalism pose to traditional media regulatory framework in Kenya?
3. What is the role of Internet Service Providers in ownership of content online?
4. What is the role of the international law, treaties and conventions in regulating cyber journalism in Kenya?
5. Which of the four typologies of media regulation: self-regulation, co-regulation, software regulation and state-regulation suits cyber journalism?

1.5 Scope and limitations of study

The research was conducted in Nairobi area and the Internet. The researcher sampled respondents who were knowledgeable about the subject of study. Some respondents were senior government workers and top managers of media and communication sectors and

organisations. All the respondents resided in Nairobi, the capital city and largest business centre of Kenya. Some respondents, especially cyber journalists and journalists of traditional media were found in Nairobi. Some were contacted through the Internet, without necessarily knowing their geographical location. Documents reviewed for the study were found in various libraries in Nairobi, including University of Nairobi's Jomo Kenyatta Memorial Library, the offices of Communication Commission of Kenya, offices of Article 19, Kenya Chapter and Nairobi offices of the Media Council of Kenya.

The researcher found some of the respondents sampled having no adequate knowledge of the subject under study. Some respondents confused cyber journalism with social media, leading to unsatisfactory answers. This scenario forced the researcher to take more time than anticipated to explain the research area to some respondents. In some cases, the researcher had to drop respondents and look for others to fill the gap. Funding the research faced problems, especially printing several documents and travelling to meet respondents. The research was time consuming and sometimes the researcher was exhausted to the point of taking a break of a week or so.

1.6 Thesis structure

The thesis comprises five chapters. Chapter one contextualises the study of media freedom and regulation of cyber journalism in Kenya. It further discusses the problem statement of the study, the purpose of the study, objectives and the research questions that guide the study.

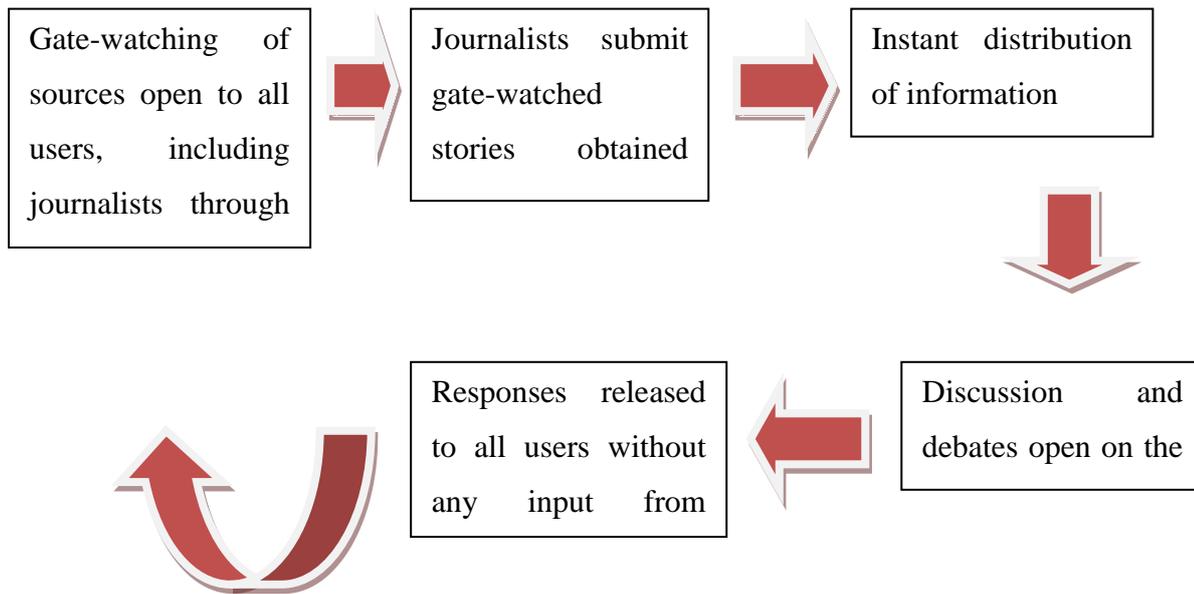
Chapter two presents the literature review on media freedom, media regulation law and journalism, cyber journalism, the evolution of media in the internet age, media regulatory framework and the theoretical framework.

Chapter three discusses the methodology of the study, which is qualitative in nature. The methodology details the epistemological stance of the researcher, the methods which are

content review and interviews. It also discusses the tools of the research which include questionnaires, secondary data analysis. The chapter details research population, data collection methods, data presentation, analysis and validity issues.

In Chapter Four, the researcher presents data analysis and interpretation obtained through both interviews and content review. It details findings based on the five research questions guiding the study. Chapter Five presents summary of findings, conclusions and recommendations of the study.

1.7 Conceptual framework



Source: A typical way of operation in cyber journalism. Illustration by the researcher based on information obtained from Bruns (2005)

1.8 Summary

The chapter has presented an introduction of the study of media freedom and the regulatory challenges posed by cyber journalism in Kenya. A detailed background to the problematic area, which is based on a new constitutional dispensation in Kenya and technological shift, has been presented. It is the technological shift that enables journalism on the Internet. The Constitution of Kenya 2010 guarantees freedom of media but limits it if freedom of journalists infringe on other people's rights. The chapter has presented the statement of the problem, objectives of the study, research questions and the thesis structure.

CHAPTER TWO: LITERATURE REVIEW AND THEORETICAL FRAMEWORK

2.0 Overview

This chapter offers a critical review of the literature on media freedom and regulation of computer-generated journalism. It classifies Internet-enabled journalism into citizen journalism, online journalism and cyber journalism. It also reviews scholarly works on the evolution of journalism parallel to changing technologies, especially in the era of the proliferation of Internet-based communication. It further reviews the literature on media and law in order to establish challenges posed by cyber journalism to existing media regulatory framework. It too, presents the theoretical framework of the study which is drawn from mass society theory and social responsibility theory. The two theories, which appear to pull either side (in regard to media freedom) help this study to contextualise the basis on which each of the two protagonists in the field take strong stances whenever they feel their stakes are threatened. For instance, media owners and journalists want free media while the governing elite feel that media should be controlled. Mass society theory explains why the state wants to control media while social responsibility theory explains why free media is a requisite for societal development and democracy.

2.1 Freedom of media

Freedom of media is guaranteed under the Bill of Rights in Cap 4 of the Constitution of Kenya 2010. It forms part of freedom of expression, a fundamental human right provided in the Universal Declaration of Human Rights. Media are free to seek, receive and impart information or ideas as contained in Article 19 of the UDHR. However, this freedom is tied to some responsibility in order to protect other people's freedoms. Both Article 33 (2) of the constitution and Article 29 (2) of the UDHR limit the freedom provided in Article 33 and Article 19 respectively. They both recommend limitations determined by law for the purpose

of securing due recognition and respect for the rights and freedoms. The other reason behind curtailing the freedom is to meet the just requirements of morality, public order and the general welfare in a democratic society. It is within this background that scholars in media freedom and regulation have sought to define the circumstances and extent of media freedom limitation.

Since the adoption of the UDHR by the UN General Assembly on 10 December 1948, most states in the world have developed laws that regulate media. The debate, among scholars of media and communication, law and sociology has been whether media freedom should be limited so that they do not infringe on other people's equally fundamental rights. Even earlier, before the UDHR, classical scholars like John Stuart Mill (1859) examined the purpose of controlling speech and concluded that for purposes of protecting other people from harmful speech, there is a need to exercise restraint when communicating to audiences. This implies that speech that does harm to others require to be controlled. The liberty of the individual must be thus far limited if he or she makes himself or herself a nuisance to other people. Mill's argument that mankind are not infallible; that their truths, for the most part, are only half-truths; that unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good, explains why journalists need to balance the information they publish.

Mill posits that opinions lose their immunity, when the circumstances in which they are expressed instigation to some mischievous act.

An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press (print media), but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard (Mill, 1859, p. 22).

Latter scholars like MacDonald (2001) posit that communication on the Internet should be regulated. He, however, infers that geographical location of an individual as an impediment to regulating content online. Lippmann and Reddish (1991) studied how governments affected freedom of media and concluded that they contravene the civic republican thought of free speech.

Hurley (2004) extrapolates that media can be restrained when they promote violence. Baird (2002) recommends the involvement of government business and non-profit organisations to draft a framework to govern communication on the Internet. Lechtman and Posner (2006) argue that Internet Service Providers should take liability for their role in the creation of and propagation of malicious computer code. They commend a law to deal with ISPs. The main regulatory systems which have been developed include individual regulation, statutory bodies, the law and regulatory councils. The law sets limits for journalists in order to protect reputation, fair trial, presumption of innocence and discrimination. Communities, however, have resorted to enforcing ethics in order to cover the grey areas of the law. Individual regulation on the other hand covers regulation by individuals or media houses in form of in-house schemes (Frost, 2007). Statutory bodies are defined by government and they are supported by legislation. This may include self-regulatory authorities. Regulatory councils are developed by media editors and proprietors who are wary of government regulating them.

Hills and Michalis (2000) argue that the primary rationale of regulation are to achieve public policy objectives like safety standards and to remedy market failures such as economies of scale and scope, market failure and abuse of that power, information asymmetry and externalities. In so doing, regulation seeks to protect the public interest. Siebert (1963), Servaes (1988) and Beers (2006) sought to discover the structures of ownership and control of media that various states have put in place, the philosophies

regarding the functions of media in a given society, analysis on normative views on communication at the local, national and international level and the power relations between media and states as viewed from multi-dimensional perspectives. The debate reels around “media as a sphere for debate that could shape the direction of the state on one hand and the commodified one – a force of manipulating the public and manufacturing consent” (Beers, 2006 p. 110).

However, various factors impinged and still impinge free media, ranging from self-censorship as enshrined in editorial policy guidelines of media organisations, codes of conduct and political interference, not forgetting the massive influence over media content by advertisers and media managers and owners. The media in the 21st century are mainly driven by the bottom line, ignoring their role of providing a sphere where rational argumentation is allowed for the formation of free and reason-based public opinion (Beers, 2006).

In the Internet era scholars such as Kreimer (2006), argue that communication utilising the cyber pathways poses challenges to regulators. Governments find it more difficult to sanction either speaker or listener. Speakers can hide their identities, impeding direct coercion; they can extend the reach of their communications into foreign jurisdictions that may face legal or practical impediments to exerting control. Regulators have fallen back on alternatives predicated on the fact that, in contrast to the usual free expression drama, the Internet is not dyadic. The Internet's resistance to direct regulation of speakers and listeners rests on a complex chain of connections, and emerging regulatory mechanisms have begun to focus on the weak links in that chain. “Rather than attacking speakers or listeners directly, governments have sought to enlist private actors within the chain as proxy censors to control the flow of information,” (Kreimer 2006, p. 13).

Benoliel (2004) in “Rethinking Cyberspace Regulatory Epistemology” argues that both substantive rules and technological standards influence user behaviour directly and as

technological standards' influence on behaviour increases, they will increase in the same strength to legal rules. "Emerging classes of technological standards, such as digital rights management (DRM), should be analogised to legal rules, which are centralised, rather than decentralised legal standards," (Benoliel 2004, p. 1071)

Lichtman and Posner (2006), in their study of holding Internet Service Providers (ISPs) accountable argue that they (ISPs) be held accountable for content entering public networks. "Service providers should therefore bear some responsibility not only for stopping malicious code, but also for helping to identify individuals who originate it," (Lichtman and Posner 2006, p. 221).

2.1.1 Manner and extent of regulation

The extent to which media should be regulated has been in public debate for a long time. The basis of the argument has been provisions of freedom of media and the press guaranteed by constitutions in various jurisdictions. Such issues as the common good, protection of other people's reputation and protecting the weak and vulnerable members of the society have been cited in various scholarly works. Reddish and Lippman (1991, p. 270) argue that speech deemed outrageous is punished by juries because it violates community standards of decency or it goes against the set norms of the society. The duo, however, argues that the government cannot impose restriction on the expression of viewpoint – at least on issues deemed relevant to the polity as a whole. Only that speech necessary solely for individual development or private use is excluded from protection.

Kovach, et al., (2007) argue for a laissez-faire approach to regulating media putting their faith in unregulated marketplace of ideas as the best ways of achieving individual liberty. They argue that the purpose of journalism is to provide people with the information they need to be free and self-governing. The central purpose of journalism being to tell the truth so that their audiences will have the information that they need to be sovereign, media should seek

information that will satisfy those needs. They further argue that the role of media includes their obligation to the truth and loyalty to the citizens. The essence of media is a discipline of verification and practitioners should maintain an independence of those that they cover and serve as an independent monitor of power. Media provide a forum for public criticism and compromise, strive to make the significant interesting and relevant, keep the news comprehensive and in proportion, practitioners have an obligation to exercise their personal conscience while citizens have rights and responsibilities when it comes to the news. Other obligations of media are objectivity, fairness and balance (Kovan and Rosenstiel, 2007 p. 6).

Pugh (1995) studies two guarantees of the American constitution namely the right to free speech on one hand and content-based restrictions on the other and how they affect one another. He concluded that some laws need to be put in place to enable fair judgement in cases of defamation in court. The use of alternatives such as cross-examination, which protect the integrity of the trial process without suppressing speech, combined with exceptional measures such as judicial orders, which can be employed in especially difficult cases and calibrated to restrict no more speech than necessary, will ensure that more information of public concern will enter the marketplace of ideas, leading to more informed and educated decision-making by the electorate (Pugh 1995, p. 1785).

In their study, *Law and Borders – The Rise of Law in Cyberspace* Johnson and Post (1996) argue that Cyberspace requires a system of rules quite distinct from the laws that regulate physical, geographically defined territories. Cyberspace challenges the law's traditional reliance on territorial borders; it is a "space" bounded by screens and passwords rather than physical markers.

Because these online "places" may contain offensive material, we may need rules requiring (or allowing) groups to post certain signs or markings at these places' outer borders. The boundaries that separate persons and things behave differently in the virtual world but are nonetheless legally significant. Messages posted under one e-

mail name will not affect the reputation of another e-mail address, even if the same physical person authors both messages. Materials separated by a password will be accessible to different sets of users, even if those materials physically exist on the very same hard drive (Johnson and Post 1996, p. 1402).

Latter scholars on freedom of communication on the Internet such as Lessig (1999), Kobrin (2000) and Bomse (2001), argue that the Internet is regulable. Lessig, in *The Law of the Horse* argues that cyberspace requires more law than that of the physical world. Lessig argues that in order to realise societal values within the cyberspace, there is a need for more than the law. More than law enables legal values which cannot be guaranteed by law alone. Cyberspace makes plain not just how this interaction takes place, but also the urgency of understanding how to affect it (Lessig 1999, p. 549).

Bomse (2001) studied the dependence of cyberspace. She was investigating *A Declaration of the Independence of Cyberspace* of John Perry Barlow (1996). Barlow declares that the cyberspace is unregulable and states should keep off. Barlow argues that cyberspace is a world that is both everywhere and nowhere, but it is not where bodies live. In the cyberspace, all people may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth. It is a world where anyone, anywhere may express their beliefs, no matter how singular, without fear of being coerced into silence or conformity. Actors on the Internet cannot obtain order by physical coercion since their identities have no bodies. "The only law that all our constituent cultures would generally recognize is the Golden Rule". (<http://editions-hache.com/essais/pdf/barlow1.pdf>)

Bomse posits that while there is certainly room for freedom from government intervention in some areas, and a need for protection of property in others it is critical that policymakers and other students of the Internet carefully consider the broader implications of the argument for privatization (Bomse 2001, p.1749). Kobrin (2000) postulates that effective

governance of cyberspace will require public-private sector cooperation, i.e., hybrid or integrative schemes combining self-regulation with government oversight and enforcement capabilities.

2.2.2 Obligation to the truth and loyalty in journalism

Although defining what truth is has been controversial in the practice of journalism, communication scholars agree that a journalist's loyalty must be to the society. This element has not been upheld without arguments. This is true even in traditional media and it still remains a baggage that cyber journalism platforms carry with them as they take root in Kenya. Scholars like Frost (2007) argue that although truth is the obligation of journalists, there are other "imperatives" to be considered, which fit so easily into the need for journalists to publish without regard to the consequences. However, it is important that a journalist of any generation or platform should attempt to tell the truth because it is the moral thing to do. This truth can be justified through moral logic and does not need to consider what the consequences of our action might be (Frost, 2007 p. 59).

Various international and national codes of conduct for the practice of journalism point out truth as a major tenet for professionals in that field. The International Federation of Journalists recognises the respect of truth by journalists and the right of the public to truth as the first duty of the journalist. The US National Communication Association lists truth at the top together with honesty as essential to the integrity of communication.

The Society for Professional Journalists Code of Ethics requires journalists to seek the truth and report it. The role of a journalist is to seek truth and provide a fair and comprehensive account of events and issues in order to enhance public enlightenment as a forerunner of justice and the foundation of democracy.

In traditional journalism, loyalty for journalists is usually divided between society and media owners. They need to follow the directives of their employers however conflicting they

are to societal needs in order to remain in employment. Under such circumstances, journalists are faced with professional dilemmas or conflicting imperatives. These ethical dilemmas are caused by the reader, the editor, the advertiser, the law, regulatory bodies and other journalists.

Munger M.C. (2008) studied the blogosphere and the truth of the messages that are spread there. He explores the need for the elicitation of information with independent judgements and that problems of polarisation mitigated. He avers that blogs and blog readers are likely to separate themselves into smaller networks according to their particular tastes. However, under some circumstances the blogosphere may still approximate a parallel processing statistical estimator of the truth with 'nice' properties.

2.2 Law and journalism

The development of media law in Kenya is rooted in England's censorship and sedition law. The English law did not tolerate anyone who published information that was perceived to malign the king and members of the leadership. It required that all publications be licensed and published by a sanctioned company. The law in this era tamed what was seen as excesses of publishers. The law of England was developed before the dawn of voyages and exploration in the beginning of 15th century before the discovery of colonies worldwide. The British model of media law was imported into its colonies and it includes a tradition that supports punishment for a publication deemed to be libellous or seditious. The law has its roots in the statute of *De Scandalis Magnatum*, which morphed into English censorship and seditious libel law. Lassiter (1978), Harvard Law Review (1904).

There were protests against the English law leading to changes into the law. The reviewed law provided for truth as a major component of argument against libel cases.

However, the reviewed law faced a setback following Lord Campbell's Act of 1843, which embraced the modern concept of freedom of the press, leading to the end of press

editorial censorship in England. However, printers were not free to publish material that might be deemed seditious or treasonable. Creech (2007, p. 29).

Although the profession of journalism is still challenged in Kenya, practitioners, governments and interested parties have been formulating standards of practice. Legislation such as the Media Act 2007 and The Kenya Communications (Amendment) Act No. 1 of 2009, were formulated in order to regulate journalism practice. Other laws at formative stages when compiling this thesis are Kenya Information and Communication (Amendment) Bill 2013 and Media Council Bill 2013. The law as the trendsetter of social custom contributes to the development of the standards of practice of journalism in a given society. Scholars such as Siebert (1964, p. 772) argue that the law guides mass communication in order to render service to the society.

Johnson and Post in their study on “Law and Borders: The Rise of Law in Cyberspace” argue that territorially based law-makers and law-enforcers find this new environment deeply threatening.

Separated from doctrine tied to territorial jurisdictions, new rules will emerge to govern a wide range of new phenomena that have no clear parallel in the non-virtual world. These new rules will play the role of law by defining legal personhood and property, resolving disputes, and crystallizing a collective conversation about online participants' core values. (Johnson and Post, 1996, p. 1367)

Recent studies by Singh (2009) have raised issues about online publishing arguing that these platforms, unlike the traditional media, are being used to publish photos that cause shock and grief. Some journalists pick political debates and make comments that amount to libel. Among the emerging challenges to the traditional media regulatory frameworks is the right of an individual to privacy or anonymity as against the right of the society to be informed. This is one of the main dilemmas facing journalists, both in traditional and cyber

platforms. The law of libel and slander has been a big issue of debate surrounding the practice of journalism since the time of the Gutenberg press by Johannes Gutenberg 1436.

The third area that the law and journalism converge is confidentiality. Journalists in traditional media have always argued that it is to their interest that they protect the sources of their information. Such resolve has helped journalists to cushion their sources from attack whenever their reports go awry with sections of the society. But the courts have never recognised the confidentiality right.

The fourth area of convergence of journalism and law is court reporting where courts and lawyers need to devise concrete solutions to the various issues. Sometimes media have pre-empted cases pending in court and given the verdict. The law of sub-judice was introduced to guide journalist on what they should comment about and the extent which they can do so with matters pending in courts. Siebert (1946) argues that both law and journalism are social agencies devoted to the maintenance and improvement of a society and that both are conscious of their deep responsibility for the society's health. The law as the arbiter of social custom is in a position to contribute directly to this development.

However, in order to make an effective contribution, the law must rouse itself to bring its tremendous intellectual weight into the arena where these standards and practices are being thrashed out from day to day. The law must make it its business to know and understand the problems of mass communication in order to render effective service to this vital and expanding social force (Siebert 1946, p. 772).

In his study on confidentiality and the law, McConnell (1994) argues that sometimes, when it touches on medical reports, confidentiality should override the need for the public to know. "The obligation to obey a morally justifiable law is stronger than the obligation to obey a law that is unjustifiable, and the former are more likely to prevail in cases of conflict than are the latter," (McConnell 1994, p. 49).

2.2.1 The Law of defamation

The purpose of the law of defamation is for journalists and sources of information to be accountable for what they publish. The law at the same time sets standards of journalism practice in a given jurisdiction. Kenya's law of defamation is found in the Penal Code, Cap 63 Section 194. It was developed before the cyber space regime, which allows publishing on the Internet and the practice of cyber journalism. This law was therefore created for the traditional media of the newspaper, radio and television. The law proscribes false information about individuals. Defamation is defined as the publication of material either by print, writing, painting, effigy or any other means with intention to defame a person.

Defamatory matter is one which is likely to injure the reputation of a person by exposing him or her to hatred, contempt or ridicule or one which is likely to damage any person in his profession or trade by an injury to his reputation. The law recognises that it does not matter "whether at the time of the publication of the defamatory matter the person concerning whom the matter is published is living or dead; provided that no prosecution for the publication of defamatory matter concerning a dead person shall be instituted without the consent of the Attorney-General" (Section 195). Defamation by innuendo is punishable by the law. Section 196 (2):

It is not necessary for libel that a defamatory meaning should be directly or completely expressed; and it suffices if such meaning and its application to the person alleged to be defamed can be collected either from the alleged libel itself or from any extrinsic circumstances, or partly by the one and partly by the other means.

However, not all defamatory matter is unlawful within the meaning of the law of defamation. When the matter is true and is of the public benefit it should be published. However there is contention as to where one draws the line between public interest and that which is not to the interest of the public. A libellous statement would also be allowed under privileges provided in the law. Privileges are considered, under the law, when the matter is

published by the president or by cabinet ministers or when it is said in parliament. Matters directed for publication by the president and minister or if the person is subject to military or naval discipline do not amount to libel (Penal Code, Section 197).

Also privileged under the law are matters published from judicial proceedings, a matter published is a fair report of anything said, done or published in the cabinet of ministers or parliament. If the person publishing the matter is legally bound to publish it, the matter is deemed privileged.

Some cases are conditionally privileged. They include when a matter published is a fair report of anything said, done or shown in a civil or criminal inquiry or proceeding before the court. Published material cannot be privileged if the court prohibits the publication of anything said or shown before it, on grounds that it is seditious, immoral or blasphemous.

2.2.1.1 Publishing in good faith

A published matter is privileged if it is an expression of opinion in good faith as to the conduct of a person in a judicial, official or any other public capacity or as to his personal character provided it appears in such conduct. It is privileged too if the matter is an expression of opinion in good faith as relates the conduct of a person in relation to any public question to his personal character as it appears in that character. When a matter is an expression in good faith as to the conduct of a person as disclosed in evidence given in a public legal proceeding, whether civil or criminal as to the conduct of any person, as a party, witness or otherwise in any such proceeding so far as it appears in any such conduct, is privileged (Penal Code Section 199).

Other privileged matters are such as when they are published in good faith to protect the rights or interests of a person who publishes it, or of the person to whom it is published is interested, as provided in the Penal Code.

A publication of defamatory matter, however, is deemed under the law not to be of good faith by the person when that matter was untrue and that he or she did not believe it to be true or that the matter was untrue and that he published it without having taken reasonable care to ascertain whether it was true or false. Journalists find themselves in a dilemma as to prove of good or bad faith or even believing something is not true. A publication may be considered to be in bad faith when it is realised that in publishing the matter, the publisher acted with intent to injure the person defamed in a substantially greater degree than was reasonably necessary for the interest of the public or for the protection of the private right or interest in respect of which he claims to be privileged (Penal Code Section 200).

However, defamation laws have been challenged by scholars as having lost significance especially in the era of Internet-mediated communication. Johnson and Betsy, (2002) for instance argue that the application of defamation laws to libellous statements published on the Internet is taking a path different from that used in other media. Concerns about censorship, access, free speech, jurisdiction, and privacy are shaping the application of these laws to online publications.

The impact of technology, changes in social and political beliefs have shaped current defamation laws. As freedom of expression (both speech and press) became an expected right in a free society, the use of defamation statutes to protect people's reputations needed to be balanced against people's rights to express themselves freely and openly (Johnson and Betsy, 2002 p. 156).

Companies and people on whom information is published have been exposed to undesirable exposure in the Internet era. Cases of defamation are likely to be on the rise due to the nature of cyber journalism in regard to jurisdiction and anonymity protection guaranteed by Internet Service Providers. Johnson and Betsy (2002) argue that the laws of defamation do not extend to the Internet.

The laws that limit the publication of false but harmful statements about goods, services, or the companies that produce them do not extend to Internet Service Providers in the same way they do to older media. Companies therefore are vulnerable

to negative communication from sources whose anonymity provides the heart of a legal dilemma: freedom of expression and privacy versus the right to damages when libelled. This dilemma leads (us) to suggest public policy and corporate policy remedies (Johnson and Betsy 2002, p. 152).

Libellous material on the Net which is referred to as cyber libel need to be examined if it can be addressed using the parameters for traditional media of the newspaper, radio and television. There is a need also to investigate if cyber journalism needs a new set of defamation laws altogether. Johnson and Post aver that law, which they define as a thoughtful group conversation about core values, will persist on the Internet. “But it will not, could not, and should not be the same law as that applicable to physical, geographically-defined territories” (Johnson and Post, 1996, p. 1402)

2.2.2 Information privacy

The concept of privacy cannot be satisfactorily defined. However, for purposes of this study, privacy is the condition of not having undocumented personal knowledge about one possessed by others. It is facts that most individuals in a given society do not want widely known about themselves (Frost, 2007 p. 89). Privacy is a right protected by constitutions worldwide. The UDHR protects individuals’ privacy.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks (UDHR Article 12).

Politicians and other information sources have tended to view freedom of media as the freedom to publicise the truth about their opponents but when reversed, it is interpreted as an invasion of privacy (Frost 2007 pp. 45-46). Privacy law has largely been used as walls that protect people’s possessions, shield their secrets and provide a haven for lives that are different from individuals’ public character. Scholars in this field like Milberg, Smith and Burke (2000) have argued that privacy is no longer guaranteed during the time of Internet.

They argue that the nature of Internet communication tend to unveil these walls and expose what people have safeguarded as their private lives. “But the very nature of virtual life seems to rebel against this opacity. Privacy will never be the same,” (Milberg et al., 2000 p. 36).

Other scholars such as Kang (1998) argue that in the Internet age, the world has slammed into new problems or old ones that have morphed into unrecognisable shapes. Privacy has been threatened by the cyberspace (Kang, 1998 p. 1284).

Some ethicists have from time to time defended global acceptance of a right to privacy on grounds that privacy is a human right. Other observers, however, reject this normative perspective preferring descriptive perspectives which may be disconnected from the laws and norms of society. Milberg et al (2000) suggest 13 interests that cause the fundamental societal tension. These interests are shown in table 3 below.

The manner in which to conceptualise privacy is paramount for the Information Age, for the society is beset with a number of complex privacy problems, causing great disruption to numerous important practices of high social value (Solove 2001). Philosophical inquiry methods are required in order to better understand, and thus more effectively grapple with these emerging problems. Sheehan and Hoy (2000) studied dimensions of privacy among online users and addressed privacy concerns raised by consumers interviewed. Schwartz (2000) studied free speech vs. information privacy and explores free speech provided in the US constitution against privacy. Reidenberg (2000) studied conflicting international data privacy rules in cyberspace and concluded with taxonomy of strategies and partners to develop international cooperation and achieve a high level of protection for personal information in international data transfers. Milberg, et al (2000) explain that individuals can assert privacy interests in information about themselves in the following 13 distinct ways as shown in the table below.

Table 2.1 Privacy interests

| Privacy interests of individuals |
|--|
| 1. Individual autonomy |
| 2. Be left alone |
| 3. A private life |
| 4. Control information about oneself |
| 5. Limit accessibility |
| 6. Exclusive control of access to private realms |
| 7. Minimize intrusiveness |
| 8. Expect of confidentiality |
| 9. Enjoy solitude |
| 10. Enjoy intimacy |
| 11. Enjoy anonymity |
| 12. Enjoy reserve |
| 13. Secrecy |

Source: Milberg, S. J., Smith, Jeff, Burke, Sandra J. (2000, p. 36)

Kang, (1998) support the privacy of individuals also argue that this privacy should not retard information processing and dissemination on the Net. To Kang, privacy as one of the most comprehensive of rights and the right most valued by civilised men should be guarded in statutes as technology evolves. “It may dawn on us too late that privacy should have been saved along the way,” argues Kang (1998 pp. 1285-1286).

Milberg, et al (2000) propose five models of possible government involvement in privacy management – Self-Help model, Voluntary Control model, Data Commissioner model, Registration model and the Licensing model They explain that in Self-Help Model, rights of access and correction are provided for the subjects, but they are responsible for identifying problems and bringing them to the courts for resolution. Voluntary Control Model on the other hand relies on self-regulation on the part of corporate players. In this model, the law defines specific rules and requires that a "responsible person" in each organisation ensure compliance. The Data Commissioner Model is based on the ombudsman concept through a commissioner's office. The commissioner has no powers of regulation but relies on complaints from citizens, which are investigated. The position of the commissioner should be

held by an expert who should offer advice on data handling, monitor technology and make proposals, and perform some inspections of data-processing operations (Milberg et al., 2000 p.24).

In the Registration Model, it is required that all data banks containing personal information are registered. The Licensing Model requires that each data bank containing personal data be licensed. This institution would stipulate specific conditions for the collection, storage, and use of personal data. “This model anticipates potential problems, and heads them off, by requiring a prior approval for any use of data” (Milberg, et al, 2000 p. 37).

Arguments by Kang (1998), Milberg, et al, (2000) clearly show the challenges to rules of privacy by the Internet. Milberg, Smith and Burke (2000) have demonstrated the privacy interests of individuals (table 3 above). They have also recommended models that could give direction on the manner in which privacy matters should be handled in the era of cyber journalism practice.

2.2.3 Objectivity and fairness

Media are expected to be objective and fair, for that is the moral thing to do. This attribute is found in almost every code of conduct for the practice of journalism. The International Federation of Journalists’ Declaration of Principles on the conduct of Journalists classifies non-objectivity and unfairness as “grave professional offences”. The Code of Conduct for the practice of Journalism in Kenya underscores accuracy and fairness as its first fundamental objective of a journalist (see Appendix 7).

McKeown, (1976) researched on the need for media to be objective and fair to the people they write and report about. He posits that media must or should be objective. For credibility purposes, journalists and editors need to exercise soundest judgements. Their judgements must be able to objectively select from the society that which is important for the public to know (McKeown, 1976 p. 18). Pressures notwithstanding, journalists are expected

to fight these pressures in order for their reports to appear to be objective. He argues that journalists belong to a class of their own as they have to fight all the odds from both within and without in order to develop objective reports (McKeown, 1976, p. 18).

2.2.4 Ethics and moral responsibility for journalists

Ethics is a system of principles about what is right that guides a person's actions (Turow 2009 p. 131). Moral responsibility of media is based on the ethical tradition which subscribes to communication as a people of character interacting in just and beneficial ways (Griffin 2009 p. 52). Ethical principles for journalists are found in codes of ethics for the practice of the profession at national level and in international codes principles.

Turow (2009) identifies five ethical approaches of the Golden Mean, the Golden Rule, the Categorical Imperative, the Principle of Utility and the Veil of Ignorance to the practice of journalism. The Golden Mean, associated with Greek philosopher Aristotle, is based on the belief that an individual's acts are right and virtuous if they are means of extremes (Turow, 2009, p. 131). The Golden Rule, also known as Judeo-Christian Ethic, refers to the admonition to "do unto others as you would have them do unto you".

The Principle of Utility on the other hand is based on John Stuart Mill's theory that promotes an action based on its utility or usefulness (Turow, 2009, p. 132). It is often rephrased as "the greatest good for the greatest number". The philosophy postulates that the rightness or wrongness of any action can be judged on its consequences. Motives are therefore considered irrelevant. Mill believed that good consequences give pleasure whereas bad consequences result in pain. The right course of action therefore, according to utilitarianism, is the one that promotes the greatest pleasure or minimises pain for those affected by the action taken or decision made.

The Veil of Ignorance of Rawls holds that in any given situation, justice emerges only when all parties are treated without social differentiation, a perspective from which fairness is

a fundamental idea in the concept of justice. Rawls explains an assumption in the theory that the parties involved are situated behind a veil of ignorance – that they do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations. The principles of justice are chosen behind a veil of ignorance such that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances.

I assume that the parties do not know the particular circumstances of their own society. That is, they do not know its economic or political situation, or the level of civilization and culture it has been able to achieve. The persons in the original position have no information as to which generation they belong (Rawls 1999, p.118).

However, scholars such as Miller (2002) argue that ethics is a habit that is modelled and developed through practice. A man becomes just by performing just acts and self-controlled by performing acts of self-control (Miller, 2002, p. 106). Griffin (2009) examines ethics in journalism and argues that ethical communication is fundamental to responsible thinking and decision-making. It helps in the development of relationships across communities and media.

Moreover, ethical communication enhances human worth and dignity by fostering truthfulness, fairness, responsibility, personal integrity, and respect for self and others. We believe that unethical communication threatens the quality of all communication and consequently the well-being of individuals and the society in which we live. (Griffin 2009 A-8)

Frost, (2007) argues that universal laws can be drawn up identifying what is generally agreed to be moral behaviour for a group of professionals. Clauses indicating how journalists should behave are atypical of moral conducts spelt out in most Codes of conduct for professional groups. Codes of conduct are usually described as being deontological (Frost

2007 p. 247). They are based on the duties contained within them. Codes of conduct save time, ensuring there is no need to reinvent the wheel at every moral dilemma. In moral responsibility, one does not need to worry about the consequences, whether you will get away with harassing sources of information or not. It is about knowing the right thing to do such as do not cause grief. However, there are various moral dilemmas in the practice of journalism which scholars and journalists have developed a window of manoeuvre. Some of these dilemmas are caused by public interest as opposed to one's privacy. If the matter is of public interest, a journalist can go beyond the moral codes and extract the information required without following the codes to the letter.

Moral codes play a public relations role since they are introduced to assure the public that the profession has a code of practice they rely upon even during a crisis. Codes of conduct have deflated criticism of media when defences have been drawn to the fact that crises will be dealt with according to the set standards of practice by professionals. Moral codes allow "decisions to be delayed, whilst tempers cool and, more importantly, the issues to be forgotten (and maybe forgiven) by the public" (Frost, 2007 pp. 248-249).

Codes of conduct therefore are aimed at adding an aura of respectability and fairness in the practice of journalism without necessarily forcing any need for responsibility. A code of conduct also allows debate. Codes of conduct for journalists also educate new professionals on what is desirable to do in their work. Issues arising from moral codes are such as what a journalist is doing gathering, writing and disseminating information is the right thing to do. Issues of public interest versus privacy should be weighed thoroughly on moral grounds than focusing much on the consequences, argues Frost, (2007 p. 249).

Downing et al (2004), arguing from the utilitarian perspective, present the dual character of professional ethics in which the morality of practitioners' world interacts with

the professional framework of academics. On one side of the equation, they argue, the conventions and guidelines of media practice are basically utilitarian.

Turow (2009) informs that an individual who combines both intellectual and moral virtues while following reason can be happy, and that an individual's acts are right and virtuous if they are the mean of two extremes. Downing et al (2004) support the contention that happiness was the sole end of human action and the test by which an action should be judged. The utility calculus, they argue fits "hand-in-glove" with the media's seal for the public's right to know, as well as the commitment in public relations and advertising to provide their clients with the maximum benefits at the least cost. The other moral imperatives are fulfilling promises, preventing injury, providing equal distribution and relieving distress. This study examines the ethical values that guide cyber journalism and the need for Kenya to use the universal and professional ethics standards to guide this new form of journalism. They further argue that the issue of ethics and moral responsibility does not rest on utilitarianism alone.

It is arguable that an ethics of duty is in more compelling means of moral decision-making for the media professions. Duty responds to a broader range of human experiences and relations. Duty recognises that responsible actions are necessary to keep the human community humane. Our duties to others are more fundamental to human identity than are individual rights," (Downing et al, 2004 p. 22).

Turow (2009) isolates six imperatives for journalists – duty to self, duty to audience, duty to employer, duty to the profession, duty to promise-holders and duty to society. These imperatives require balance for journalists.

2.2.5 A case for media regulation

French philosopher Jean Jacques Rousseau, in his *Social Contract*, said that man is born free but he is always in chains. Rousseau presupposed that human beings were born to enjoy freedom wherever they are and in whatever they do (1913). Explaining Immanuel Kant's thought, Weber (2009) informs that individuals remain free, only to submit their will to the law which represents the public will. He further informs that individuals have to give up their freedoms to another person. Expounding on Kant's thought, Weber (2009) explains that for each part of the liberty that the individual had to give up when a society was established, it received a corresponding part of another individual's liberty, so that in the end, after the society had been established, each member had received adequate compensation or even additional forces and strengths to preserve what he or she owned.

States worldwide regulate media mainly for the common good. However, common good or public good is a subjective term, whose interpretation varies from one society to another. However, various international standards of defining the common good are provided in the international law and conventions. "Every jurisdiction controls access to some speech – what we call 'mandatory access controls' – but what that speech is differs from jurisdiction to jurisdiction" (Lessig and Resnick, 1999 p. 395).

Kovach and Rosenstiel (2007), outline the role of media as including their obligation to the truth, loyalty to the citizens, their essence is the discipline of verification, practitioners to maintain an independence of those that they cover, serve as an independent monitor of power, provide a forum for public criticism and compromise, strive to make the significant interesting and relevant and keep the news comprehensive and in proportion. Practitioners have an obligation to exercise their personal conscience. Three other obligations of media are objectivity, fairness and balance.

Murray and Scott, (2002), define regulation as any control system. This definition is based on control theory. They argue that a control system must have some standard-setting element. This may involve some means by which information about the operation of the system can be gathered, and some provision for modifying behaviour. Information gathering is usually achieved through monitoring by an agency, department or self-regulatory body and deviations addressed by application of formal and informal sanctions.

Critics of the media within the social responsibility tradition such as Siebert et al, (1984) posit that media wield enormous power for their own selfish ends with owners propagating their own opinions, especially in matters of economics and politics at the expense of opposing views. This school of thought accuses media owners of being subservient to big business and at times let advertisers control editorial policies and editorial content. Arguments for the justification of regulating media lie in their resistance to social change, their tilted attention to the superficial and sensational than the significant in their coverage of current happening and their entertainment which have always lacked in substance.

Siebert, et al (1984) posit that media have endangered public morals, invaded the privacy of individuals without a just cause. These media are usually controlled by one socioeconomic class. On the Internet front, scholars like Sussman and Sussman (1986), Post (1997) propose a review of existing regulatory framework for Internet-mediated communication to cover emerging challenges such as jurisdiction. Sussman and Sussman argue that there is no international law that governs information from one country to another. The argument supports the need for law that governs cyber journalism which transcends the geographical boundaries, with receivers and senders using content in different jurisdictions.

More importantly, there is no international law (aside from copyright protection) that governs or regulates the mass media that carry news and information to and from every country in the world (Sussman and Sussman, 1986 p. 20).

Post (1997, p 43) argues that Internet-based communication transcends the geographical boundaries. “They do not cross geographical boundaries (in the way that say environmental pollution crosses geographical boundaries); they ignore the existence of boundaries altogether.”

2.3 Cyber journalism

Media houses have set up weblogs within their websites for journalists that work for them to break news whenever it happens. In such a platform, editorial content is somewhat controlled more than is the case for independent blogging journalists. Editorial control and stylistic requirements are not as strict as in the traditional news channels of the newspaper, radio or television but editors oversee entries as they are posted by their juniors (See Singh 2009 p. 115).

Professional journalist bloggers sometimes do not take into consideration some of the tenets of the profession such as objectivity, fact checking and instead give room to rumour, thus challenging, to some extent, the traditional principles of journalism. Singh (2009) identifies three different approaches to weblog use within the media this includes special events coverage, opinion columns and news commentary. Special events coverage involves elections campaigns, major sports events and big impact breaking stories. Opinion columnists take advantage of the fact that on the Net, paper and airtime limit does not exist nor do these aspects bother them. Journalists provide lengthy features than they can in the traditional media. In News commentary, writers elaborate on the stories they write for the main outlet

and publish notes and reflections that would have no room in their mainstream media platforms.

It appears that weblogs have created a new genre in institutionalised media journalism. The author is more visible and present in the story, and the style is more personal. To compensate that entries are not usually reviewed by an editor before publication, journalists tend to correct themselves transparently and quickly reacting to readers' comments (Singh 2009, p. 117).

Whereas in traditional journalism of newspapers, magazines, radio and television only a small number of responses based on their relevance and interest were allowed from the public, cyber journalism allows everyone to post their opinions in the unlimited space available on the Net. Cyber journalism, unlike traditional journalism that was limited by scarcity of channels, leading to tight gate-keeping, the role of gate-keepers has been challenged. This is especially when unedited material gets into the Net without going through the gatekeepers. Cyber journalism platforms offer virtually unlimited space and airtime. Audience responses in traditional media were confined and still confined to small feedback sections, usually a page out of a publication of several pages. Cyber journalism accommodates responses in form of opinion and news development, turning those who are supposed to be users to become producers at the same time.

Gate-keeping, where editors watch events from a distance and condense them into a unified package, thus limiting the public from a wide range of newsworthy events, has been challenged by cyber journalism. Today, journalists have a range of information sources with compete in the same breath as those of the traditional journalist and even more.

Bruns (2005), studying the role of gate-keepers in cyber journalism era contends that the status of traditional journalism has been relegated from being the source of news to watchers and consequently gate-keepers to gate-watchers. Instead of filtering what they

receive from society and release information that conforms with the accepted standards of the practice of journalism (gate-keeping) journalists surf the Internet looking for the latest news (gate-watching) in order to pick it and either reproduce it or rewrite it for their own publications. The role of gate-keepers which traditionally comprised sieving information and disseminating what they feel appropriate to the public has now changed to browsing the Web to find what is new and where it is happening. They pick what they think is relevant for their media outlets, beef it up and package it for their audiences. Reporters in cyber journalism era become guidedogs. Instead of watching and picking what is important from society, they monitor what is circulating on the Internet and point it out to their followers to read or watch. Their role as watchdogs (watching what is going on in society and telling a story for the public to make informed choices) they post links to stories they have read and sometimes point out the stories to their readers to follow.

These new guidedogs may point their users to useful reports in conventional publications as well as to first-hand materials from official or unofficial materials or insightful commentary and analysis; in other words, they watch the output sources of sources and further publicise the material published there – they are gate-watchers, not gatekeepers (Bruns 2005).

Some cyber journalists magnify trivial issues and leave out what society considers important. In events where journalists send short messages in the form of news alerts, they are only allowed to use 140 characters. In such platforms, telling detailed stories is almost impossible. Some journalists have found it easy to go for the sensational reporting in order to attract the attention of their audiences. However, in the case of blogging journalists, they have all the opportunity to write as detailed accounts as they wish. One of the dangers that have been exhibited in cyber journalism, be it in short messages or blogs is failure to separate news from opinion, one of the major requirements for journalism practice.

Competition over who is breaking news first is forcing journalists to file news instantly from functions. This has undermined the very tenet of verification of information as one of the major pillars of the practice of journalism. Sometimes unverified information has been retracted after the damage is already caused. Singh (2009 p. 113) argues that cyber journalism makes everything as important as everything else. Bloggers who are not journalists are posting information which is almost journalese. For political reporting, the mega-tweet eternal motion stream devalues perspective, judgment and reflection, enabling some people, not necessarily trained journalists to distort and drive a campaign narrative that favours the trivial over the substantive, the immediate over the consequential and events over ideas. This normally results in a second-by-second, self-contained and self-referential closed feedback loop. Professional journalists have wasted many highly-paid hours tweeting the very latest, up-to-the-second irrelevancy about the goings-on in political circles.

Rosenstiel and Mitchell, (2003) suggest that standards of regulating blogging journalists should be set since the platforms provide enhanced avenues of communication. They argue that information supplied by blogging journalists lacks quality and professional touch which exists in the traditional media. Mere criticism of cyber journalism without necessarily setting standards for them or blocking them from doing what was perceived by other media practitioners as illegal or unethical caused a lot of anxiety among proper media people who had no option but to invest in online journalism.

During press coverage of such past scandals as Watergate in 1974 or the Iran-Contra controversy in 1987, perhaps the biggest challenge facing journalists had involved news gathering – teasing out enough information from reluctant sources to build a solid story. In the Clinton sex scandal, information flowed like floodwaters. Thanks to the Internet; it was everywhere – but much of it was murky or polluted. One news organisation might cite another organisation as its source or link to another website's story, (Rosenstiel and Mitchell, 2003 p. 34).

2.3.1 Blogging and journalism

Debate reeling around media and communication industry today is whether blogging is journalism or not. Kovach and Rosenstiel (2007) argue that the digital age is turning everyone into a journalist. They contend that in the Internet age, quite often do TV stations screen clips and newspapers publish photos taken by amateurs. Digital technology enables an amateur who bumps onto an incident while armed with a camera and takes a photo or footage to deliver it to media houses for use. Technology has therefore transformed citizens from passive consumers of news produced by professionals into active participants who can assemble their own journalism from disparate elements, argues Kovach et al., (2007 p. 19).

Allan (2009) shows that many traditional journalists have refused to accept that bloggers are journalists. Traditional journalists regard bloggers as a sort of mutant breed. “A suggestion to traditional journalists that blogging is journalism will greet you with disdain,” argues Allan, (2009 p. 83). Bloggers who are not journalists are posting information which is almost journalese (Singh 2009 p 113). Allan, (2009) further argues that even as some bloggers consider themselves to be journalists, traditional journalism reporters are often quick to pounce. Bloggers have been branded to be a lazy breed that cannot edit or double-check their copy in order to keep pace with objectivity and fairness. It is through double-checks and editing that the fundamentals of objectivity and fairness can be realised. “Few make any pretence of objectivity” (Allan, 2009 p83). Many bloggers make mistakes of accuracy, undermining the public’s trust. Technology consultant Bill Thompson describes blogging thus:

Bloggging is not journalism. Often it is as far from journalism as it is possible to get, with unsubstantiated rumour, prejudice and gossip masquerading as informed opinion” (Allan, 2009 p. 84).

Article 19 launched in the wake of celebrations of World Press Freedom International Conference 2013 at the UNESCO, The Right to Blog – a new policy paper that calls for lawmakers to better promote and protect the rights of bloggers. The Right to Blog gives practical advice to bloggers about their rights and explains how - and in what situations - they can invoke some of the privileges and defenses that traditional journalists have found vital to the integrity of their work. The organization, the champion of freedom of information recognises blogging as part of journalism. The organization argues that in the 21st century, many bloggers will take their place as watchdogs, alongside traditional media. The international community and individual states must develop protection for bloggers, just as they have developed protection for traditional media. Similar protection must be provided to bloggers. Article 19 recognises blogging as playing an invaluable role in the free flow of information worldwide and as a “true example of the democratisation of publishing in the online world”.

In the United Kingdom, a Draft Royal Charter on Self-Regulation of the Press was drafted in 2013. The charter recommends that bloggers abide by codes of practices developed by traditional media, either directly or through incentive schemes. It also recommends that it should be made mandatory for bloggers follow the ethical standards and join regulatory bodies. <http://www.article19.org/resources.php/resource/3687/en/uk:-draft-royal-charter-on-self-regulation-of-the-press-and-amendments-to-the-crime-and-courts-bill>

2.4 The evolution of media in the Internet era

The Internet era has witnessed the evolution of media ownership from single company through conglomerates, convergence, citizen journalism to online journalism. Kawamoto, (2003), Lievrouw and Livingstone, (2009) have studied convergence and conglomerations,

Allan, (2009), and Banda, (2010) have focused on citizen journalism, while Rosenstiel and Mitchell (2003) Jenkins and Thorburn (2003) have studied online journalism.

2.4.1 Media convergence

The first decade of the 21st century witnessed a generation of convergence of media that allows for the integration of different ways of managing, collecting and dissemination of news. Convergence is a term that can be traced to William Derham, a renowned English scientist in the 17th century for his effort to measure the speed of sound by timing the interval between the flash and roar of cannon (Kawamoto, 2003, p. 57-58). The idea was developed over time to give meaning to this context as the point that non-parallel lines meet. Three categories of forces converge in the digital era. They are broadcast and motion pictures industry, computer industry and print and publishing industries. In the media convergence era, various forms of media comprising video, print and audio (radio) converge within the computer technology. Another convergence includes partnerships of media houses to cross-promote their products. “In other markets newspapers paired off with local broadcast stations to cross-promote each other’s content – in a negotiated partnership with no common ownership” (Kawamoto, 2003 p. 69-70).

In this generation, conversation theatre, news and text were increasingly delivered electronically in one grand system. Media owners bought out several channels but with limited resources to run them (Kawamoto, 2003 p. 57). Gordon in Kawamoto (2003) identifies six distinct types of convergence that emerged with the digital era of the first decade of the 21st century: (i) convergence in media technology, (ii) convergence in media ownership, (iii) convergence in tactics, (iv) convergence in news gathering, (v) convergence in structure and (vi) convergence in storytelling or presentation.

In media technology, all content is stored digitally, delivered over a network and accessed through electronic devices. It involves content creation, content distribution and content consumption. The implication of this was that a media company could own various channels of communication ranging from newspaper, radio, television station to audio, visual and text on the Net. In ownership convergence, one media house owns several outlets – newspaper, television, online news and even cyber journalism platforms. Tactical convergence involves many outlets but not necessarily common ownership. Information gathering involves using same staff to generate information that is channelled through many outlets possibly with common ownership. Convergence in storytelling involves where a journalist has a variety of outlets that he/she can tell same story differently in terms of length and style. This is enabled by journalism of the newspaper, radio, television and some online channels.

The philosophy behind convergence is to use lean staff, pay less and make more money by selling information through as many channels as possible. This form of delivery of messages from one point to any other through various channels came to be known as convergence of delivery channels. Digitisation that caused the convergence of media created a new production and consumption environment for media products leading to a fundamentally different regulatory context (Lievrouw and Livingstone, 2009 p. 332).

Convergence drastically changed the foundations upon which regulation of traditional media were based. It widened the flow of information with the number of channels growing with low cost content increasing data among the public. However some dangers lurked such concentration of media in a few hands.

In this era, companies diversified and bought out more and more media outlets. Media content became more available to the public than it used to be prior to the Internet age. There was a paradigm shift from one-to-many to many-to-many communication environment. The

significance of the 'old intermediaries' who mediated the information flow from top to bottom decreased and the new digital services became global, recognising no national boundaries. Lievrouw and Livingston (2009 p. 333) posit that converged news companies expect their journalists to be flexible and fast, and both editors and corporate managers are already revaluing their workers, considering multimedia skills in their story assignments as well as in hiring and retention decisions. Although journalists and media critics complain that the additional labour demands and the work speedup required for convergence have undermined the conditions of news production, mainly by reducing the time available to report, research, write, and reflect on stories, companies contest these claims, pointing to various awards won by staff in television, print, and the Internet as evidence that multimedia production enriches their offerings and improves their staff. Journalists respond by pointing to an emerging stratification of the labour force, in which major companies support a small elite corps of reporters who are able to conduct serious investigations and long-term projects, and the remaining majority who have more responsibilities than ever. Yet it is notoriously difficult to reliably appraise the overall quality of reporting across fields and themes (Klinenberg, 2005, p. 60).

2.4.2 Citizen journalism

As the Internet gained acceptance worldwide, coupled with advanced computer technology of smart phones, tablets, ipads and other mobile devices, ordinary citizens discovered new means of easy communication without necessarily going through media houses with their gatekeepers. Citizen journalism is the bottom up coverage of events as opposed to traditional media where people received information from above. It is the contribution made by ordinary citizens offering their first hand reports, digital photographs, camcorder video footage, mobile telephone snapshots and audio clips. They use blogs or weblogs to disseminate the information they gather or draft themselves in form of opinion.

Much of the material, whether taken up by news organisations seeking to augment their coverage or by individual bloggers seeking to balance the excesses of ‘helicopter journalism’ proceed to have profound influence on audience on audience perceptions of the crisis around the world (Allan, 2009 p. 7).

Allan (2009) explains the effect of citizen journalism as heavily weighing on traditional journalism of newspaper, radio and television. Never before has there been a major international story where television news has been trounced in their coverage by amateurs wielding their own cameras. Professional news camera people and still photographers have found themselves not sent to scenes of incidents to capture footage or photos but to airports or bus stations where amateurs are running home with clips and digital photos.

This type of citizen journalism, to use the phrase suddenly appearing in mainstream news items, was being supplemented by other forms of reporting similarly made possible by digital media. At the forefront were weblogs, or blogs, where individuals gathered whatever material they could and posted it, along with their own interpretation significance. We are getting out information that traditional media have had no access to (Allan, 2009 p. 7).

This is why the fiercest critics of citizen journalism have turned out to be mainstream media who argue that this new way of communication’s content lacks facts, verification, and therefore context and has failed the credibility test. It is however reasonable to argue that some content in the weblogs meet these standards, although some deride especially when they trigger deepened emotive debates. Moreover, cyber journalism practitioners aspire to be more credible than mainstream media who are “too conservative” to allow public debate in their forums freely (Allan, 2009 p. 7).

Bloggers owe apology to none as they are no one’s employee. Their aim is to communicate to the society without hindrance from media owners. Citizen journalism allows

readers to engage in conversations rather than in the unidirectional reportage that characterises traditional media (Banda, 2010 p. 44).

The ethical value of journalistic objectivity has received much attention in academic literature, and we must treat it here within the context of news production,” Objectivity requires balance by giving the opportunity to both sides of the story to give their views. This aspect has been largely ignored by citizen journalism (Banda, 2010 p. 47).

They are therefore an informed audience that responds to issues from the point of knowing. Jenkins (2003) explains: “... the user can look over the shoulder of the reporter by searching the original documents and easily comparing one reporter’s story to those of others by scanning news publications throughout the country. Archives also become easily accessible”, (Jenkins and Thorburn, 2003 p. 272).

Websites have become forums where individuals post their eyewitness accounts, personal photographs, interpretations and analyses. Allan (2009) calls them “amateur newsies” or instant reporters, photojournalists and or columnists. They are practitioners of personal journalism or “do-it-yourself journalism”.

The contrast between Citizen Journalism and mainstream reporting is glaring. Weblogs play a role in facilitating the circulation of that form of journalism. A Weblog, apart from being a personal journal, is updated regularly with clickable hyperlinks to other items available elsewhere on the web that the blogger considers worth viewing. Web loggers illustrate how news sources are not restricted as to what was ideal by traditional media. “Indeed the man-on-the-street interview is now authored by the man on the street and self-published, including his pictures” (Allan, (2009 p. 5).

2.4.3 Online Journalism

Online journalism is largely considered a reaction of traditional media to counter citizen journalism on aspects of immediacy. Caught between a rock and a hard place, owners of old media platforms were forced to look for ways to counter fast transmission by citizen journalists. Blogs were disseminating information instantly while television and radio had to wait for their reporters to return from functions miles away for news. Newspapers on the other hand waited to reach their audiences the next day. It was to the interest of their business to remain relevant that major newspapers worldwide opened up to online platforms for their media houses.

BBC (British Broadcasting Corporation) News Online was launched on November 4, 1997, posing a great challenge to its competitors CNN, EuroNews, News Corp and MSNBC (Allan 2009 p. 34-35). Kenyan newspapers, Nation and the Standard as leaders in the Kenyan media market went online in the late 1990s. The media outlets were used to break news, updating their lead stories all the time.

Online journalism opens up new ways of storytelling, primarily through the technical components of the new medium (Internet).

Simply put, online journalists can provide a variety of media – text, audio, video and photographs – unlike other media. Data searching provides a means of accessing information unavailable to other media (Jenkins and Thorburn, 2003 p. 272).

Hume (1996) studied the new paradigms of news and concluded that as consumers start experimenting in cyberspace, the journalist's most urgent challenge is not the medium but the message. News organisations facing new competition and shrinking audiences need to reestablish the quality of their core product: reliable and useful information on which citizens can act. Beers (2006) traces trends in concentrated corporate ownership of Canadian media, new forms of online journalism and their democratic potential and limitations, and ways in

which educators can help students deconstruct and participate in traditional and newer forms of news media. He examines online journalism as a medium that opened up the blogosphere. “Internet is fast eroding assumptions about who may publish and report news,” (Beers 2006, p. 119).

2.5 Media regulatory framework

Once Vice President of the United States of America, Al Gore, in 1993, described the Internet as a network of highways much like the inter-states’ highways carrying information rather than people or goods implying the interconnectedness and public access to the information superhighways. Al Gore described the cyberspace as not only comprising major highways but also feeder roads, denoting the chain of interconnectivity of the Internet (Adams 1997).

And it is not just one eight-lane turnpike, but a connection of interstates and feeder roads made of different materials in the same way the highways are concrete or macadam or gravel. Some highways will be made of fibre optics, others coaxial cable, others will be wireless (Adams, 1997 p. 158).

Just as highways, the Internet needs some rules of use and someone who monitors compliance to these rules the way roads need the police to monitor compliance with the Highway Code. The code itself spells out the objectives to be sought by the agent. Studies of regulation have mainly focused on who should regulate media and the manner to do it. Scholars such as Hills et al (2009 p. 442) have investigated the aims of media regulators. Olson (1965) argues that the aim of regulating media is based on “logic of collective action”, in which small groups with intense interests lobby harder than consumer groups. This may lead to a battle of ideas that hide direct economic interests in amending a regulatory regime. Sometimes institutional interests can produce competing constructions of the market that can either threaten, or guard, the regulatory arrangements.

Legal theorists like Lessig (1999) Sapiro (1999) Netane (2000) and Sunstein (2000) have argued that the Internet is an unparalleled communication medium and a means of engaging in global electronic commerce. However, the Internet has its shortcomings which should be mitigated. This school of thought argues that the Net poses a fundamental danger to democracy. Sunstein (2000) in particular argues that perfect filtering of information on the Internet will lead to fractured communication environment. He suggests that this fracturing will lead to group polarization, cascades of false information and a concomitant rise in extremism and recommends governmental regulation of the Internet to reduce these features. He suggests that appropriate regulatory responses should include setting up or supporting public environments for deliberation and debate on the Net, along with a series of disclosure and "must-carry" rules (Hunter, 2001 p. 611).

Regulation from the economic perspective entails formulation and imposition of rules on economic agents designed to alter market behaviour (Hills et al 2009, p. 438). Regulation is justified as a means to achieve public policy objectives and to check on market failures. Such market failures may include economies of scale and scope, market power and abuse of that power. Regulations therefore seek to protect the public interest.

Gamble (1995) studied the justification and models of regulation. He identified political goals of government as determinant of regulation. The achievement of those goals may take different forms of regulation, including government itself or alternative but equally legitimate models of regulation.

The theoretical construction of regulating the media markets may change the distribution of benefits from one interest group to another. Players in the industry regard commissions established to regulate the market as corporate actors with their own bureaucratic interests in survival and expansion.

Shelanski (2006) supports deregulation of media on the basis of public interest. The argument in this case is that deregulation would lead to promoting competition. Within such competition, media companies will better satisfy consumers' preferences. The policy goal is to preserve media access opportunities for diverse voices and to promote informed public discussions of important issues.

Recent studies on media regulation have been centred on whether the existing regulatory framework for traditional media can apply to Internet-converged media. Studies such as Hills and Michalis, (2009) argue that the technological change may be construed as either promoting a new market sector or as altering the landscape of the existing market. This may lead to a demand for reassessment of the parameters and institutions of regulation.

Given the closer association over time between new technologies and separate regulation, scholars argue that 'convergence' of technologies requires 'convergence' of regulatory regimes (Hills and Michalis, 2009 p. 448).

Sean and Flanagan (1999) argue that content on the Internet need relevant rules and regulatory measures. Few rules, policies or conventions are in place to guide the use of the Internet. Such rules are needed to guide users on the correct word usage, punctuation, slander, illegalities, dishonest representation, pornography, crude language, which are little monitored. Scholars in this line of thought argue that some of the changes in communication in the digital era are desirable and exciting while others are undesirable and threatening. Some of the changes affect human relations and institutional relations within ordinary moral notions touching on individual rights and responsibilities, there is also a need for ethical norms to be tied up with an individual's personal ethical code, the workplace and exposure to a formal code of ethics.

Lessig (1998) studied behaviour regulatory on the Internet and discovered four types of constraint, namely law, social norms, markets and architecture. Law directs behaviour through the threat of punishment. Therefore one would refrain from committing an offence because of fear of punishment. Social norms constrain through the application of societal sanctions such as criticism or ostracism. Market on the other hand constrains behaviour through price and price-related signals while architecture physically constrains by blocking access (Lessig, 1998 p. 663).

Murray and Scott (2002) came up with a modified version of Lessig's analysis – hierarchy, competition, community and design. They argue that the four bases of regulation are observable as means of addressing the range of regulatory issues caused by Internet communication. The duo recommends a hybrid form of control, which they argue could provide the basis for better informed policy debate about regulating the Internet.

2.5.1 Self-regulation

Media institutions have always made up a case of self-regulation. Early promoters of the Internet hypothesised that government rules had no place in the online world because of its geographical extension. Therefore, the Internet, they proposed, deserved autonomous regulation. In his declaration of the independence of the cyberspace, Barlow John Perry, in 1996 stated:

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty as we gather (Baird, 2002 pp. 15-16).

Grosz and Weber, (2009) identify two concepts of self-regulation: private groups and directed self-regulation. In private groups, industry players organise themselves based on their own initiative, make decisions that limit their own behaviour. They are bound only by

broad laws of general application. On the other hand, directed self-regulation occurs within a framework that is set by the government sometimes called audited self-regulation. Media councils are normally based on this typology of self-regulation.

Grosz and Weber (2009) present three forms of self-regulation:

- (i) A traditional form of self-regulation which occurs when collective arrangements within the same market segment or between enterprises of market segments; in both cases, conflict with State laws can occur.
- (ii) A less strict form of self-regulation, which is obtained in the case of a gentleman's agreements; often these are directly enforceable, but put the participants under certain moral pressure to comply and act in accordance with the rules.
- (iii) Rules of conduct or behaviour aim to introduce participants to voluntarily observe certain specified provisions. It is a kind of code of conduct particularly applied to the Internet known as "netiquette" (Grosz and Weber 2009 p. 19).

Self-regulation is designed in such a manner that it maintains equal access of information by all groups and actors in society. Smaller consumer groups' rights often find it difficult to get heard amidst the clamour of large corporations and government. Self-regulation in its traditional sense means that governments could only intervene if participants are unable to find suitable solutions themselves. Self-regulation therefore refers to rules considered by the governed people to be adequate guidelines. The legitimacy of self-regulation is based on the fact that private incentives lead to a need-driven rule-setting process (Grosz and Weber 2009 (p 18)).

The principle of self-regulation is justified if it is more efficient than State law and if compliance with rules of the community is less likely than compliance with self-regulation.

Frost (2007) identifies codes of conduct as a means of self-regulation of media. Frost argues that categorical imperatives (one ought to do) are an important decision-making tool when formulating codes of conduct. A journalist must attempt to tell the truth, because it is the moral thing to do. This can be justified through logic and one does not need to consider what the consequences of their action might be, (Frost 2007 pp. 58-59).

As much as journalists endeavour to tell the truth, media editorial policy guidelines for media houses may impede this noble objective. The journalist in Frost's mind is not easy to come by if the editorial policy guidelines are bent to protect sister companies or friends of the CEO or the editor. Perhaps the greatest challenge that media houses in Kenya have to contend with is the growing cyber journalism where the offended journalists and public have a forum to share what they think is important or has been ignored by the mainstream media for various reasons.

However, journalists find themselves in various dilemmas as they attempt to tell the truth or remain objective as they sometimes have to conform to the demands and pressures from information sources, the editor, the media owner, the advertiser, parliament and the law, regulatory bodies, other journalists (Frost, 2007 pp. 59-65).

2.5.1.1 Editorial policy guidelines as a form of internal self-regulation

Media organisations worldwide have their own internal self-rule. Editorial policy guidelines for the old media gave direction of the media owner in regard to the practice of journalism in that organisation. Nation Media Group, the largest media organisation in East Africa, published guidelines on social media use, which were released for use for all journalists working with the group. The media house has several media outlets ranging from traditional media channels to those on the Net. The company owns several newspapers,

television and radio stations in Kenya, Uganda, Tanzania and Rwanda. At the introduction of these guidelines, the company declares that they should be read in conjunction with the NMG's general Editorial Policy Guidelines & Objectives and the Policy Guidelines for Broadcasting.

The guidelines acknowledge social media platforms as important source of news for both the general population and journalists alike. The purpose of the guidelines is to distinguish between professional and personal matters when communicating or using content on the Net. The company's move was based on the fear that its journalists may engage in disseminating information that would draw it into litigation. It made little difference whether one identifies himself or herself on social media as such or not since their actions will almost always be linked back to the company. The policy therefore requires journalists working for the company to be open and transparent in their social media dealings.

When gathering news, Nation Media Group journalists are guided by the overall principle that those using social networking sites as a source of news should apply the same journalistic tests as they would to any other method of newsgathering. "A tweet is no more reliable as a source of news than a phone tip-off to the newsroom; a blog is no more reliable than an overheard conversation." (NMG Digital First Strategy, July 2012).

Journalists are required to ensure any news they publish in social media platforms, especially when on duty, conforms to established standards of the company. To help protect this value, Nation journalists are discouraged from publishing news items unless the same has been approved and published on an NMG outlet.

The Nation launched "Digital First" strategy in July 2012, to help the media organisation break news like other social platforms. In this policy, journalists are required to be cleared by a managing editor to report directly through their personal accounts, for

example when a journalist is covering a fast-changing news event/story, it is required that NMG's key news accounts notify the company's social media audiences.

The policy cautions NMG journalists of potential conflict of interest when they make personal use of the Internet. They must therefore avoid engaging in disseminating information which calls into question NMG's editorial values. Journalists working with the company must make a clear distinction between "Nation" pages and "personal" pages. Personal pages should not use the Nation name or that of any publication or programme. If a journalist uses the personal account in any way for work, he or she has to identify himself or herself as a Nation Media Group employee in their profile. No matter what the site, no one should disclose any information or engage in any activities that bring NMG or its journalism into disrepute.

Regarding social networking sites, all NMG staff should be mindful of the information they disclose on social networking sites. They have to be careful of what they put on their profile and who has access to it. They should act in a manner which does not bring NMG into disrepute. NMG journalists should never indicate political allegiance on social networking sites, either through profile information or through joining political groups on sites such as Facebook. This is simply because it will damage the Group's reputation as being an unbiased source of news. Personal use of social sites should not include offensive comments about colleagues or co-workers.

On blogging, microblogging and tweeting, the guidelines identify two types of blogging – one, when individuals are openly identified as Nation Media Group sites or sources (these use a Nation Media Group programme name or brand). The second are those that are purely personal and which are not intended to reflect the output or views of the Nation Media Group. This guidance also applies to Nation Media Group staff use of microblogging sites, such as Twitter. A personal microblog shall not be used to break news

that Nation Media Group has not published or sanctioned. Exclusive content or photos should be submitted to the Group for vetting and publishing. Nation Media Group journalists should link to content on the Group's and other platforms and not copy and paste on to their accounts. However, they are advised not to link to unconfirmed posts and material as such action may be misconstrued as confirming the facts.

Microblogs are likely to be personal in tone but they must not contain personal views which could damage the Nation Media Group's reputation on issues such as accuracy, impartiality or tolerance. Impartiality is a particular concern for all Nation Media Group journalists. Nothing should appear on their personal blogs or microblogs which undermines the integrity or impartiality of the Nation Media Group's journalism.

Journalists should not:

- advocate support for a particular political party or candidate
- express views for or against any policy which is a matter of current controversy in a manner which would raise questions about the objectivity of their journalism or that of the NMG
- bring the Nation Media Group into disrepute

If a personal blog makes it clear that the author works for the Nation Media Group, it should include a simple, visible and clear disclaimer such as "these are my personal views and not those of the Nation Media Group." Retweets should be carefully worded not to seem like they are expressing a personal opinion. This is very unlikely to be a problem when you are "retweeting" a colleague's "tweet" or a Nation headline. But in other cases, you will need to consider the risk that "retweeting" of third party content can look like an endorsement of the original author's point of view. Best practice is to contextualise the retweet to create some

distance from any opinion it may contain. This applies to both Nation and personal microblogging.

The guidelines prohibit offensive material, tone of voice declaring that incitement to violence or anti-social behaviour or comments likely to cause extreme offence, for example racist or ethnic insults or stereotypes, should not be tolerated on a Nation Media Group branded space on the social media. Neither should material which is clearly likely to put a child or teenager at substantial risk of significant harm. Such material should be removed immediately. Different social networking sites already offer different models of intervention in different areas. Where editors are responsible for a Nation Media Group space on, for example, MySpace and Facebook they should become aware of how these companies normally deal with different forms of harmful and illegal content on their sites. On editing online pages, NMG journalists should not edit pages that relate to controversial issues or campaigns as this can be traced back to them and to the Nation Media Group. These guidelines were passed to NMG journalists for their input before they were officially launched in May 2012.

The Nation Media Group's guidelines on the use of social media for its journalists are part of self-regulation modes where companies set their own standards before "someone else" like government or the Media Council sets them. It prescribes what NMG journalists can communicate on the Net and the manner in which they should conduct themselves online. More importantly, the guidelines require NMG journalists to guard against hate speech and posting offensive material on the Net. This is in line with the Constitution of Kenya 2010 and international principles on freedom of expression and media as explained in detail in chapter four of this thesis. In the guidelines, NMG indicates that the company is aware of lawsuits which may emanate in journalism on the Net, and that is why it requires its journalists to be

cautious as to when they are private individuals and the point at which they are NMG employees. It is important for this study to point out that NMG was not reinventing the wheel, because at the introduction of the guidelines, it requires to be read designed to be read in conjunction with the NMG's general Editorial Policy Guidelines & Objectives and the Policy Guidelines for Broadcasting, earlier discussed in this thesis at the literature review section.

2.5.1.2 Code of conduct for journalists as a self-regulatory framework

Journalists are required to operate within the Code of Conduct for the practice of journalism in Kenya. A code is a way of constitutionalising the practice of journalism in a given jurisdiction. Journalists are under obligation to do the right thing for the good of society. Frost (2007) argues: "Codes are designed to cover the main ethical problems faced by journalists in gathering information for stories; dealing with their contacts and sources; how they go about publishing, broadcasting and presenting the information and how they guarantee the quality of the information, including dealing with complaints that arise (Frost, 2007 p. 246).

Codes of conduct are usually described as being deontological. They are based on the duties contained within them (Frost, 2007 p. 247). Anyone following a code of conduct does not need to identify the consequences, negative or positive that flow from the action in order to see that they are acting morally. The motive of codes of conduct is to compel journalists to behave morally. They are meant to balance between the constraints of the constitution and the freedom of expression that is guaranteed therein. Freedom of expression allows journalists to publish what they want but the code of conduct guides them against invading someone else's privacy, reputation, and encourages the right to fair trial and suggests remedy for both the offended and the offenders. Codes of conduct considered by journalists most of the time are rights-based – they include freedom of media, as extensively explained in the introduction of

this study, liberty and security. Other rights-based codes include privacy, presumption of innocence and fair trial.

The Code of Conduct for journalists in Kenya states that the fundamental objective of a journalist is to write a fair, accurate and an unbiased story on matters of public interest. All sides of the story shall be reported, wherever possible. Comments should be obtained from anyone who is mentioned in an unfavourable context (Appendix 7). Journalists should be careful when publishing information so that it does not inflame animosity based on religion, tribe or any sectarian grouping by giving misleading information or inaccurate headlines. Cyber journalists are therefore no exception. They need to adhere to protecting privacy of individuals and avoid intrusion into grief and shock as protected in the Codes of Conduct. People's privacy is protected in the Code of Ethics and cyber journalists are required to weigh the public's right to know against the privacy rights of the people in news. They should stick to the issues. The Code of Conduct for journalists in Kenya published by the Media Council of Kenya states:

Intrusion and inquiries into an individual's private life without the person's consent are not generally acceptable unless public interest is involved. Public interest should itself be legitimate and not merely prurient or morbid curiosity. Things concerning a person's home, family, religion, tribe, health, sexuality, personal life and private affairs are covered by the concept of privacy except where these impinge upon the public.

The Code discourages publication of material amounting to hate speech. Quoting persons making derogatory remarks based on ethnicity, race, creed, colour and sex shall be avoided. Racist or negative ethnic terms should be avoided. Careful account should be taken of the possible effect upon the ethnic or racial group concerned, and on the population as a whole, and of the changes in public attitudes as to what is and what is not acceptable when using such terms (Code of conduct for Journalists in Kenya).

2.5.3 State regulation

Media people world over resist any attempts by the State to put sanctions on freedom of media. Scholars' debates reel around freedom of media and state control. Baird (2002) argues that mass media have failed to regulate themselves and therefore government needs to show them the way to do their business. His study on regulation of the Internet recommends that the State should regulate content online. Markets and self-policing have failed to adequately address issues such as privacy protection, security, and access to adverse content (Baird, 2002 p. 15).

Baird further argues that although governments do not all share the same values, they are the only institutions that can provide stability and a place for debate over what public values need to be protected. His argument is based on the view that issues of regulation are significant policy questions that require democratic resolution, not just technical matters that can be left to experts, (Baird, 2002 p. 16).

2.5.4 Co-regulation

Co-regulation stems from the different analyses on the changing role of the state in regulating media. In co-regulation, Parliament sets the legal yardstick and levels the codification of the given principles into specific rules to private bodies. The government remains involved in monitoring the progress and effectiveness of the initiatives in meeting the perceived objectives. Such kind of mixed approaches can serve legitimate state purposes as well as efforts of the private sector (Grosz and Weber, 2009 p. 19).

Palzer, (2002) defines co-regulation as a system with elements of self-regulation as well as traditional public authority regulation. Hans-Bredow-Institute and the Institute of European Media Law define co-regulation as a combination form, which is neither pure self-regulation nor command-and-control regulation (state), but rather based on stakeholders' ongoing dialogue. The state limits its involvement to setting formal conditions for rule making,

but leaves it up to parties to shape the content. Non-official norms become part of the legislative order by insertion into statutes.

Unlike traditional media which seems to be dealing with case-by-case whenever there is defiance, content on the Internet is more complex and requires more cooperation with the objects of regulation to achieve its objectives, Hans-Bredow Institute (2006). Communication on the Internet enhances the potential for international forum dissemination. This challenges the traditional forms of co-regulation since communicators evade whatever national or international regulations (Post, 2000).

Whereas Lessig (2000) emphasises on top-down institutional approach to co-regulation, Murray and Scott (2002) argue for a hybrid form of regulation. They argue that an emphasis on hybrid forms of control will tend to lead to the deployment of hierarchical controls as instruments to steer organic or bottom up developments, whether in the form of competition, community or design-based control. “In some instances successful regimes have combined three or even all four of the bases for regulation” (Murray and Scott, 2002 p506).

Lessig (2000) argues that there is scope for the use of hybrid forms of regulation which link two or more of the modalities of regulation. In particular he suggests there is scope for example to link law and architecture, by mandating software designers to build certain elements into software code in pursuit of public regulatory objectives.

2.5.5 Software regulation

Studies on regulating media in the traditional channels of communication concentrated in law, markets and social norms. However, in the Internet age an additional framework of using code or computer architecture in regulating content online has emerged. For instance, Lessig (2000) proposes code regulation of the cyberspace, where computer software could be used to constrain behaviour as effectively as a law can do. Lessig argues

that when software regulates behaviour online, it does so in a manner similar to the way that physical architecture regulates behaviour in the real world.

The code controls behaviour as law might control behaviour: You can't easily rip the contents of my DVD because the code locks it tight. The code functions as a law might function: Telling the user what she can and cannot do (Lessig, 2000, p. 990)

Murray and Scott (2002) isolate software that can be used in constraining behaviour by merely blocking access to certain information. They identify Filterware or Censorware. The software provider will review sites and will put them on either an 'allowed' or a 'not allowed' list. Other programmes rely upon the Platform for Internet Content Selection (PICS) a standardised industry system which allows content to be rated in various categories including topics such as 'sexual content', 'race', and 'privacy', under the control of the user (Murray and Scott, 2002 p. 515). Lessig (2006) suggests that content on the Internet should be regulated by the architecture that forms it, away from the laws of the real space. He argues that the laws of the real space are not sufficient enough to govern the Internet.

In real space, we recognise how laws regulate through constitutions, statutes and other legal codes. In cyberspace we must understand how legal “code” regulates – how the software and hardware (i.e. the “code” of cyberspace) that makes cyberspace what it is also regulate cyberspace as it is (Lessig 2006, p.5).

Codes can also be used in form of worms – small computer codes that are distributed over the Internet and can be used to scan the contents of individual hard drives. Spiders of bots are computer programmes that read the contents of web pages, while spyware are programmes that are clandestinely downloaded onto the computers of consumers in order to monitor and report computer usage (Arnold, 2003 p. 574). Arnold argues that the legitimate function of government is to regulate the behaviour of its citizens and therefore code can

restrain behaviour. Since there is a human mind behind the code, it is possible that code can be used by either government or the players in the industry to regulate themselves.

Both Arnold (2003) and Lessig, (2000) argue that government constraints violate the basic privacy rights that all citizens should enjoy and that the government has a compelling interest in preventing such intrusions into the personal lives of citizens. Therefore code, argues Lessig, should not be regarded as a mere question of engineering or architecture but it “codifies values”. Arnold argues that government has an important and a legitimate role to play in the determination of the architecture of the Internet (Arnold, 2003 p. 574).

Baird (2002) informs that in the digital age software or code can be used in place of law because software developers can shape the Internet's technical architecture in ways that guide or restrict users' experiences (Baird 2002 p. 16). Grimmelmann, (2005) argues that if other institutions can regulate software, and software on the other hand can regulate individual behaviour, then software provides these institutions an effective way to shape the conduct of individuals. He posits that although the code is like physical architecture it is not really the same and one thing.

A systematic study of software as a regulator reveals several recurring patterns. These patterns are present in any regulation by software, whether it involves privacy, intellectual property, free speech, online jurisdiction, or commerce, to name just a few fields profoundly affected by the growing use of software (Grimmelmann 2005 p. 1722).

Lessig (2001) posits that as technology changes, states can choose whichever way to regulate their content online since technology does not disadvantage any of the typologies – self-regulation, co-regulation, regulation by architecture or state regulation. Lessig (2001) in *The Internet Under Siege*, studied the use of ISPs to block undesired material in order to

avoid penalties. Lessig focused on copyright infringement in this study and concluded that ISPs as part of the architectural restraint would help in regulating behaviour on the Internet.

When an ISP is notified that material on its site violates copyright, it can avoid liability if it removes the material. As it doesn't have any incentive to expose itself to liability, the ordinary result of such notification is for the ISP to remove the material (Lessig 2001, p. 64).

However, Grimmelmann, (2005) informs that code alone cannot be used to effectively constrain behaviour on line.

2.6 Theoretical framework

Studies on media freedom have focused on the need for regulation of journalism in order to make the profession respectable and credible. In this regard, there has been a need for paradigms to explain the manner in which media should be structured in order to remain true to their role as the watchdogs of the societies that they operate in. Although there has been consensus on media to be accurate, objective and sensitive to the public, media scholars have sought a theory to explain or guide how these tenets could be achieved. Some of the issues that have been sought by scholars are the manner in which media should be structured, the moral and ethical standards that should guide media professionals, and the circumstances under which media can invade people's privacy. Answers to these issues have been found in normative theories (Baran and Davis, 2012).

Normative theory describes an ideal structure and the manner of operation of a media system. Normative theories are theories that describe how things should be if some ideal values and principles are to be realised. Sources of normative theories include practitioners, critics or academics. Social responsibility theory has been identified as an ideal normative theory for media. The theory allows free press without any censorship but at the same time the content of the press should be discussed in public panel and media should accept any

obligation from public interference or professional self-regulations or both. The theory claims that everyone has a right to say something or express their opinion about the media and media must take care of social responsibility. If they do not, government or other organisations will do. In their book *Four Theories of Press*, Siebert, Peterson and Schramm (1946) state that pure libertarianism is antiquated, outdated and obsolete. That paved the way for replacement of Libertarian theory with the Social responsibility theory.

The Libertarian thought argues that if individuals could be freed from arbitrary limits on communication imposed by the church and state (as in the era of authoritarianism) they would “naturally” follow the dictates of their conscience, seek truth, engage in public debate and ultimately create a better life for themselves and others. Baran and Davis (2012) recommend the review of the libertarian theory to accommodate changing technology and political regimes worldwide.

As new industries based on new technologies emerge, will social responsibility theory continue to guide them or will alternatives develop? Social responsibility theory is suited to a particular era of national development and to specific type of media. As the media industries change, this guiding theory might very well have to be revised or replaced (Baran and Davis 2012 p. 100).

The justification for media regulation is based on arguments that media are subversive forces that must be brought under control of wise people, those who can be trusted to act in the public interest. However, studies under postmodernism are struggling to find out as to who should be trusted to censure media. Media practitioners worldwide have negotiated compromises by pointing out the danger of regulation by the state and offered an alternative of regulating themselves in order to become more socially responsible.

2.6.1 Mass Society theory

Scholars of media freedom and regulation have over the years pondered on how to make a free media responsible for their work and respond to the needs of the societies that they serve. Mass Society Theory offers various parameters for its justification on the need to put media under control. The theory stipulates that mass media are often subjected to pressures from powerful individuals within the environments that they work and therefore need to be controlled. Another equally important point raised by scholars of mass society theory is that some journalists, especially in the early 20th century were almost unethical and the power of the media should not be left to the hands of such illiterate individuals. “Newspapers of the yellow journalism era were viewed as gigantic, monopolistic enterprises employing unethical practices to pander to semiliterate mass audiences” (Baran and Dennis 2012 p. 55).

Mass Society thought is rooted in the discontent, fear and envy over whom should preserve the social order with the emergence of journalism as a tool of informing the people – particularly giving people what they want rather than what they need. These emotions undergirded the development of a theory that is both radically conservative and potentially revolutionary. The exponents of this theory feared the emergence of a new type of social order – a mass society created by mass media. This mass society would fundamentally and tragically transform the social order, which the Western elite wanted to preserve. The theory proposes the control, even the reverse of technological change generally and changes in media specifically, which threatened the status quo. It argues that a conservative effort must be made to restore the older social order. Alternatively, the proponents argue, revolutionary action should be taken to bring under elite control technology and media for use to forge a new and better social order.

The theory makes basic assumptions about individuals, the role of media, and the nature of social change. The first assumption of this theory is that the media are a powerful force within society that can subvert essential norms and values and thus undermine the social order. In order to manage this threat, media must be brought under elite control. Proponents of this view argue that the media should be controlled by the elite. To the proponents of the theory, neither the preservation of social order, nor its change can be left in the hands of journalists alone.

Secondly, the theory assumes, media have the power to reach out and directly influence the minds of average people so that their thinking is transformed. This view also falls under the direct-effects, which has been hotly debated in media theory and research. Media “possessed extraordinary power to shape the beliefs and conduct of ordinary men and women” (Baran and Dennis 2012 p. 56). Although various groupings of mass society theory exponents have their own notion about the type of direct influence different media may have, all versions stress how dangerous this influence can be and the extreme vulnerability of average people to immediate media-induced changes. Average citizens are thought to be helpless before the manipulative power of media content. However, the determining attributes of an average citizen is as varied as the number of those trying to define it.

The third assumption postulates that once people’s thinking is transformed by media, the lives of the individuals are not only ruined but also create social problems at a vast scale. This view is based on perceived or real negative aspects of media content. Virtually every major social upheaval society has confronted has been linked in some way to media. Some of the criticisms of media by this theory are true whereas some are not. If we perceive media as one of the many technologies that have shaped and continue to shape modern life, then we may find this theory either being harsh or misplaced in its criticism. This is because media have had positive effects in informing and educating people on new innovations, which could

not reach masses. This view of mass society theory implicate media as causing negative effects on society.

The fourth dimension of mass society theory is that an average person is vulnerable to media because in mass society they are cut off and isolated from traditional social institutions that previously protected them from manipulation (Kreiling, 1984). Older social orders were thought to have nurtured and protected people within communities whose culture gave meaning to their lives. People were routinely compelled to do the jobs their parents and grandparents had done. People learned specific social roles based on the accident of being born in a certain place at a certain time (Baran and Davis 2012).

It is however interesting when mass society theorists argue that isolated individuals' vulnerability to manipulation is compelling. Theorists here assert that when people are stripped of the protective cocoon provided by the traditional community, they necessarily turn to media for the guidance and reassurance previously provided by their communities. Therefore, when people leave their rural communities into big cities, media can suddenly provide communication that replaces messages from social institutions that have been left behind. Media can become the trusted and valued sources of messages about politics, entertainment, religion, education. This gives a positive contribution of media, although it eventually creates a mass society with a culture away from the one cherished by society.

Mass society therefore recommends the establishment of a totalitarian social order to address the social chaos initiated by media. This fifth assumption envisions mass society as an inherently chaotic, highly unstable form of social order that will inevitably collapse and then be replaced by totalitarianism. Mass society, with its teeming hordes of isolated individuals, must give way to an even worse form of society—highly regimented, centrally controlled, totalitarian society. Thus, to the extent that media promote the rise of mass society, they increase the likelihood of totalitarianism. From 1930 to 1960, mass society

theorists outlined a classic scenario for the degeneration of mass society into totalitarianism. Around this time, the media conveyed to the people messages from revolutionaries considered demagogues, whose ideas disrupted to social order.

The sixth and final assumption of mass society theory is that media as capable of inevitably debasing higher forms of culture, bringing about a general decline in civilisation. Mass media represented an insidious, corrosive force in society—one that threatened their influence by popularising ideas and activities they considered trivial or demeaning.

Rather than glorify gangsters (as movies did in the 1930s), why not praise great educators or religious leaders? Why pander to popular taste—why not seek to raise it to higher levels? Why give people what they want instead of giving them what they need? Why trivialise great art by turning it into cartoons (as Disney did in the 1930s)? Mass society theorists raised these questions—and had long and overly abstract answers for them (Baran and Davis, 2012 p. 62).

The debate over mass culture is escalating into cyber journalism, which is viewed as disrupting the traditional way of the practice of journalism. Furthermore, the debate over regulation of media has been contested by practitioners on one hand while governments feel that the media need to be regulated in order to monitor compliance with the standards of the practice of the profession. In the traditional mass society theory, educated elites in those nations worry about the power of this content to undermine their national cultures (Baran and Dennis, 2012, p. 63).

Mass Society theory therefore explains why the governing elite desire regulated media. It further explains how journalists, if left free, can damage the very fabric of society. The theory further explains the power of media in society. It is evident that attacks on the pervasive dysfunctional power of media have persisted and will continue to persist as long as dominant elites find their power challenged by the media and as long as the privately owned

media find it profitable to produce and distribute content that challenges widely practiced social norms and values.

New forms of media, in this case the Internet and Web, mean new forms of communication which means the development of new relationships and the creation of new centres of power and influence. You will recognise this as a near mirror image of the situation that faced our society during the nineteenth and into the early twentieth century, the incubation period of mass society theory (Baran and Davis, 2012, p. 68).

2.6.2 Social Responsibility Theory

Social responsibility theory dates back to the United States of America's Hutchins Commission of 1947, which was headed by Robert Hutchins. The commission set forth a code of social responsibility for the press, requiring five basic services. The first service is for media to give a truthful, comprehensive, and intelligent account of the day's events in a context which gives them meaning. The second requirement is to provide a forum for the exchange of comment and criticism. Thirdly, media should project a representative picture of the constituent groups in the society. Fourth, media should present and clarify the goals and values of society. Finally, the fifth responsibility is for media to provide full access to the day's intelligence. The recommendations were directed at journalists to take on more responsibility for society, further suggesting that if they did not, they risked losing some of their freedoms.

The ideas put forward in the Hutchins Commission report have come to be known as the *Social Responsibility Theory of the Press* (Siebert, Peterson, and Schramm, 1956). The theory emphasises the need for an independent press that scrutinises other social institutions and provides objective, accurate news reports. The theory calls for media to be responsible for fostering productive and creative communities. Media under social responsibility should

prioritise cultural pluralism. This can be achieved when media become the voice of all the people and not just elite groups or groups that dominate national, regional, or local culture in the past. It is the social responsibility theory that obligated journalists to be responsive to the state of the people around them. As the Hutchins Commission report said: “The press is not free if those who operate it behave as though their position conferred on them the privilege of being deaf to ideas which the processes of free speech have brought to public attention” (quoted in Baran 2012).

McQuail (1987) has interpreted the social responsibility theory and isolated its basic principles as compelling media to accept and fulfil certain obligations to society. The obligations are mainly to be met by setting high or professional standards of informativeness, truth, accuracy, objectivity, and balance. McQuail further reasons that in accepting and applying these obligations, media should be self-regulating within the framework of law and established institutions. The media should further avoid whatever might lead to crime, violence, or civil disorder or give offense to minority groups. The media therefore are not required to spread information that is likely to cause despondence among members of the societies they serve. The media as a whole should be pluralist and reflect the diversity of their society, giving access to various points of view and to rights of reply.

McQuail (2009) suggests that society and the public have a right to expect high standards of performance, and intervention can be justified to secure the, or a, public good. Journalists and media professionals on the other hand should be accountable to society as well as to employers and the market.

Social responsibility theory challenged media professionals’ ingenuity to develop new ways of serving their communities. It encouraged them to see themselves as front-line participants in the battle to preserve democracy in a world drifting inexorably toward totalitarianism. By helping pluralistic groups, media were building a wall to protect democracy from external and internal foes (Baran and Davis 2012 p. 116).

News media personnel generally remain hostile to their focus on the public good and on broad-based reporting about significant events of the day. Furthermore, in the competing ethos of news as business and that of news as socially responsible institution, social responsibility often comes in second. In our current era of large media corporations, “Friends of the ‘liberty of the press’ must recognise that communication markets restrict freedom of communication by generating barriers to entry, monopoly and restrictions upon choice, and by shifting the prevailing definition of information from that of a public good to that of a privately appropriated commodity, (Baran and Davis 2012). Although many studies have been conducted on social responsibility as a normative theory, greater effort might be needed to implement it. Evidence indicates that people don’t learn much from news reports and what they do learn is quickly forgotten. People become easily confused by stories that are poorly structured or use dramatic but irrelevant pictures.

Although media worldwide have developed several professional practices in an effort to conform to social responsibility theory, the creation of great communities has been far from being achieved. Challenges have been massive and inequality is manifested in every society worldwide. “There is evidence that hate groups are increasing in size and that their propaganda is effectively reaching larger audiences. Politicians still find it possible to win elections by stirring up public fear of various minorities,” argues Baran et al., (2012 p. 119).

Questions raised by Baran et al indicate that the theory is challenged by the manner in which journalism practiced in various states. Emerging issues on the implementation of the theory border the strategy, the responsibility of journalists assume on behalf of the communities they serve and the manner in which this responsibility should be exercised. Social responsibility theory is likely to gain new strength by emerging technologies that allow communities greater power to disseminate information.

Cable television, though never approaching the re-empowering the public revolution predicted for it in the 1960s, has at least made literally hundreds of channels available, many of which are dedicated to ethnic and specific interest communities. Now, with the near total diffusion of the Internet and World Wide Web, audience size and ability to make a profit have become unimportant concerns for literally millions of voices (Baran and Davis 2012 p.120).

Social responsibility theory prescribes journalists some responsibility as they enjoy freedom of media. It bestows upon journalists the responsibility of searching the truth through verification before they publish their reports. They are also expected to clarify the goals and values of society. This need resonates well with the research objectives on the justification of regulation of media.

2.7 Summary

This chapter contains the literature review and the theoretical framework informing this study. The chapter has presented a review of scholarly works on media freedom and regulation. It discusses academic works on obligations for journalists, the extent to which media should and can be regulated and the law that governs media. It also traces the evolution of media and journalism in the era of the Internet, media regulatory framework of self-regulation, state regulation, co-regulation and regulation by architecture. This chapter has further discussed the theories that inform the study – the normative theories of mass society and social responsibility. Mass society theory explains why the governing elite find it necessary to censure media while the social responsibility thought explains the need for free and responsible media. It is the obligation of journalists to report truthfully, be objective, fair respect people's privacy and publish in good faith. A journalist's loyalty must be to the society.

Mass society theory views media as a powerful tool which may influence change in society. The theory postulates that mass media should be controlled because some powerful individuals are likely to infiltrate them with their ideas. Mass media are often subjected to pressures from powerful individuals within the environments that they work and therefore need to be controlled. The theory was mooted from the observation of some journalists, especially in the early 20th century who were almost unethical and illiterate. It therefore explains that the philosophy of the governing elite was that the power of the media should not be left to the hands of such individuals.

Social Responsibility theory on the other hand explains the responsibility of media to include giving a truthful, comprehensive, and intelligent account of the day's events in a context which gives them meaning, to provide a forum for the exchange of comment and criticism, to project a representative picture of the constituent groups in the society, present and clarify the goals and values of society and fifth, to provide full access to the day's intelligence.

CHAPTER THREE: RESEARCH METHODOLOGY

3.0 Overview

This chapter discusses the methodology used in this study, which is qualitative in nature. It deliberates on the philosophical foundations of this research and presents the various categories of population studied. The chapter also discusses the research design, data collection methods namely content review and in-depth interviews. The chapter introduces the tools used in the research. They are questionnaires, focus group discussions, virtual focus group discussions and a review of organisational documents as secondary sources of data. The chapter further discusses the manner in which this study presents the data collected and its analysis, including validity issues, research ethical issues of informed consent, anonymity and interview ethics.

3.1 Study Epistemology

The research is guided by philosophical foundations based on the belief in a knowable world, universal properties of social behaviour and the attainment of truth through method (Rudestam, and Newton, 2007). It adopts interpretive epistemology, a branch that focuses more on the explanation of social action, (cyber journalism) through the understanding of rules (regulations) according to which people act (the practice of cyber journalism). Cyber journalists seem to operate with little or no regard to existing codes of conduct for the practice of journalism in traditional media of newspaper, radio and television. This study therefore takes the stance of interpretive epistemology in order to understand the rules under which cyber journalism ought to be practiced and whether journalists on the cyberspace are following those rules. The researcher gathered information from various media practitioners, government and secondary data and condenses it through interpretation to obtain knowledge on freedom and regulation of cyber journalism practice in Kenya. This study acknowledges the nature of journalism as an interactive venture and recognises the importance of carefully

analysing the information gathered from message senders, users, the intermediaries and the role of regulators in order to generate knowledge on media freedom and regulation of cyber journalism. The interpretive approach conceptualises communication according to the constitutive model, with the view that it involves sharing, participation, association, fellowship and possession of common faith (Carey, 2009 p. 15).

This research is at the same time guided by postmodern worldview by social scientists that the commitment to a logical empirical approach to research is not necessarily seamless. In this regard, the researcher wriggles through the scientific method while at the same time investigating the seams in the area of study to attain truths. It takes postmodernists' view that beliefs and apparent realities are socially constructed rather than given, and therefore can show up differently in different cultures, times and circumstances (Rudestam and Newton, 2007 p. 35).

The study further assumed that the amount of freedom of media and speech vary from one state to another. What is acceptable in some societies may be unacceptable in others. This dimension supports the theoretical perspective of this study – Mass society theory – that whatever people do should enhance the good of the society. Social responsibility theory, on the other hand postulates that individuals should exercise freedom with responsibility. The study appreciates the fact that Kenya's media law and regulatory framework is not entirely the same as other countries. Therefore, their uniqueness and the amount of freedom of media in the country can not only be observed but to be interpreted too in order to generate reliable knowledge on regulation of cyber journalism.

The researcher actively engaged respondents, sometimes getting deeper perspectives on the research problem, depending on respondents' answers and level of understanding of the research area. The researcher adopted a pragmatist tradition – a pluralistic land where different perspectives of truth could all be legitimate in different ways. This tradition “orients

to practical problems and evaluates ideas according to their usefulness rather than an absolute standard of truth” (Griffin, 2009 p. 52). Interpretive view as opposed to naturalists view, helped the researcher to grasp explanations from participants’ point of view. Using interpretivists’ view, the researcher sought to understand the rules social actors (cyber journalists) follow, how they interpret and understand their social actions. However, reasoning as both an interpretivist and a naturalist, the researcher went out to the field – knowing that communication happens “out there” in the world and it can be studied by scientific research which involves observation of actions and experiences of the population studied whose results get a form of scientific theory.

The researcher used interviews and content analysis as the methods of collecting data. Data obtained through content analysis informs the study about the emerging and existing international and national guidelines for communication on the Internet and media freedom, while interviews generated data on the actions, experiences and the feelings of the population on the cyber space about freedom and regulation of the cyber journalism.

3.2 Research methods

This research used virtual ethnography by interacting with both journalists in the virtual world and users of their content in order to understand what these populations do on the platforms and how they do it. The purpose of using virtual ethnography is to understand the nature of journalism practiced by cyber journalists, the freedom they experience and the nature of the ethical values and regulatory framework that guide them. The researcher interpreted the findings from virtual ethnography to establish the connectedness of the producers and consumers of cyber journalism and learn about their culture on the cyberspace.

Ethnomethodology, on the other hand helped this study to answer questions on how people involved in cyber journalism, both producers and consumers of content, make sense of their everyday activities so as to behave in socially acceptable ways. Ethnomethodology

guided the researcher to distinguish journalists who communicate within parameters which enable freedom of media and associated restraints. The researcher studied the norms of the society through the review of secondary documents. This theoretical orientation informs the study about the norms, understandings and assumptions that are taken for granted by both users and non-users of cyber journalism platforms but are affected either negatively or positively by messages communicated through the new platforms.

By employing ethnomethodology, the study sought to find out the views of cyber journalists on the freedom, regulation and ethics and why they prefer this form of communication to the traditional media. Ethnomethodology helped the researcher to answer questions regarding the manner people should communicate through platforms that enable cyber journalism practice and the manner in which these new forms of media should be used for the realisation of the common good of society.

This theoretical orientation helped the researcher to establish how journalists use the cyberspace, how this type of medium has transformed situations of communication in Kenya and the world. The researcher conducted interviews with key policy makers and players in cyber journalism platforms who include journalists and consumers of their content to elucidate desirable ethical values and a regulatory framework for cyber journalism.

This research is stimulated by the quest to address challenges of media regulation within the context of a new constitutional dispensation in Kenya and technological development which enables journalists and the users of their content to communicate freely, without licences or going through established media companies to publish. The problematic situation has been caused by users of the new platforms of communication that easily evade regulatory framework established for the traditional media of newspaper, radio and television. The researcher interviewed the users of cyber journalism platforms – the journalists themselves and the consumers of their content – to come up with concrete

proposals aimed at taking action to address the freedom of cyber journalism and its regulation and ethical standards.

Given that this study investigated human behaviour – how people communicate and what they communicate on cyber platforms and why governments regulate the media and why they would want to regulate cyber journalism – Motivation Research techniques are used. In this regard, the researcher investigated underlying motives and desires of the protagonists in this field of media freedom, regulation and ethics. This information is obtained through in-depth interviews. The researcher used questionnaire guides to inquire into the opinion of Kenyans on the manner in which freedom of cyber journalism, its regulation and the ethical values that guide the practice in Kenya can be achieved. Open-ended questions and free narration questions were used in the study. From among the respondents of this research, the researcher sought information on the use of cyber journalism and why respondents think the cyber platforms are suitable communication media in the digital era.

The researcher used qualitative research techniques, taking advantage of its strengths to discover the underlying motives of human behaviour, particularly in analysing the various factors which motivate journalists to adopt weblogs as alternative programmes and the challenges associated with it. Content analysis and interviews were used for this research. Key respondents, among them the Communication Commission of Kenya, the Ministry of Information, Kenya Information Communication Technology Board, journalists owning weblogs and public and private media organisations informed this study. These information sources provided information on the manner in which technological change enabled journalists to own weblogs and websites. In those weblogs and websites, they post their news and opinions without hindrance by policy guidelines of media houses that they worked for. The interviews were administered face-to-face, focus group discussions. The questionnaires

were mailed KIIs who were in distant geographical locations and members of the virtual focus group discussions.

3.3 Study population

The population of this study comprised policy makers and influential persons within the media and communication industry in Kenya. It is also drawn from journalists and consumers of media content both in the real space and the cyberspace. The researcher obtained data from policy makers in the ICT and communication industry. The virtual population comprised the producers and consumers of cyber journalism content. The study was undertaken using qualitative techniques, and within Nairobi, the capital city of Kenya, with samples drawn from across various sectors of the media and communication industry.

Since this is a policy-focused research, the researcher interviewed policy makers as KIIs. The policy makers informing this study were drawn from among officials at the Ministry of Information, the Communication Commission of Kenya (CCK), Information Communication Technology (ICT) experts, the Kenya ICT Board and law scholars, all of whom were based in Nairobi. Media experts, scholars, media owners and practitioners gave insights into media freedom, and the manner in which cyber journalism can be regulated. Taking advantage of the Internet, the researcher used the cyberspace to capture views of distant respondents. Platforms like facebook, Google+, Yahoo! News, Twitter and LinkedIn were initially used by the researcher to locate respondents who practiced cyber journalism. The researcher e-mailed the questionnaire to distant respondents. Respondents who were close geographically but did not have time to participate in face-to-face interview were too e-mailed the questionnaire. They e-mailed back their responses.

The researcher further interrogated the terms of use of some of the major cyber journalism platforms. The terms of use obtained from the websites, which users are required to accept before signing up to use a social network informed this study about the

responsibility of journalists as they disseminate information on the Net. The researcher analysed this information to establish if the terms of use amount to self-regulation. The intention was to examine if by complying with the terms of use, one will have adhered to the conditions attached to the constitutional provision of freedom of media, therefore adhering to the principle of social responsibility online. The researcher collected data from policy makers, cyber journalism practitioners and content consumers, bloggers, ICT experts and organisational/secondary documents.

The researcher used in-depth interviews, picking its respondents from policy makers in the media and communication industry. The researcher interviewed ICT experts in order to capture data on code regulation or architecture regulation so as to obtain information on the pros and cons of this form of restraint in the practice of cyber journalism. Members of Parliament, particularly those with knowledge of media law and ICT were interviewed. The researcher, in this aspect, sought to gain insights on considerations legislators take while formulating policies on media regulation. By so doing, the researcher was able to answer questions raised in the Civic Republicanism tradition of varied considerations for the realisation of public good as opposed to an individual's benefits.

Senior officials at the Media Council of Kenya were interviewed to obtain data on complaints made about activities of cyber journalists by the public and any policy frameworks that have been drafted on cyber journalism and the implementation of the new constitution. In particular was an investigation into the legislation that is meant for the implementation of the provisions of Section 33 and section 34 of the constitution of Kenya 2010, which is part of focus of this study.

The researcher interviewed officials of the Constitution of Kenya Implementation Commission to gain knowledge of Bills which respond to the requirement by the Constitution that an independent body should be formed to ensure a responsible and accountable media.

The researcher sought information about such Bills and if they have factored in cyber journalism practice at their draft stage. Officials of the National Cohesion and Integration Commission (NCIC) were interviewed with the aim of obtaining data on the constitutional provision that freedom of media does not extend to hate speech. The information obtained informs the study about the responsibility bestowed upon cyber journalists. The researcher used in-depth interviewing techniques, with questionnaires administered both face-to-face and electronically mailed. Distant respondents in terms of geographical location were e-mailed the questionnaire (see appendix 3), while those that could be reached had a face-to-face interview with the researcher. The questionnaire was used as a guide for virtual FGDs and VFGDs.

Data collected from the field was analysed by classifying it according to the research questions. Supported by empirical and epistemological evidence with quotes, the researcher drew conclusions and gave recommendations on the way to regulate cyber journalism in Kenya.

Table 3.2 Distribution of KII in various interview groups

| Groups | Number of respondents |
|-------------------------|-----------------------|
| Face-to-face interviews | 30 |
| Online Interviews | 16 |
| Total | 46 |

Table 3.3 Distribution of participants in FGDs and VFGDs

| Focus Group | Number of participants |
|--------------|------------------------|
| FGD1 | 7 |
| FGD2 | 7 |
| VFG1 | 7 |
| VFG2 | 8 |
| Total | 29 |

3.4 Sampling methods

The researcher used purposive sampling. He sampled reports from international conventions and treaties and national rules and regulations for media which are relevant to the study. The reports are those that mainly had information on media freedom, freedom of expression, media regulation and Internet regulation. The purpose of reviewing the documents was to elicit data which would guide this study on the international standards that have been suggested for media freedom and content regulation on the Net. The researcher used purposive sampling to pick key informants for interviews. The researcher picked on cyber journalists, media managers, media owners and reporters as respondents who had knowledge on both cyber and traditional media platforms in order to obtain relevant data for the study. Also picked through this method were respondents from among senior government officials, officials of Kenya Media Council, Communication Commission of Kenya and the Kenya Information and Communication Technology (ICT) Board.

Some of the sampled population was knowledgeable on media freedom and its limitations, while some had knowledge on the behaviour and experience of the subjects of the research. They were chosen because they were willing to talk and were representatives of diverse views on the subject. The researcher sampled 60 respondents through this process

who participated in both face-to-face interviews and mailed questionnaires and two FGDs, each comprising seven participants.

The researcher used both purposive sampling and sequence methods to obtain respondents who participated in Virtual Focus Group Discussions. The researcher identified a few members among cyber journalists and users of their content. The researcher asked those respondents to identify other people among the virtual population who may be willing to participate in the research. Some gave the researcher contacts while others contacted their colleagues to participate in the research.

The researcher engaged sequence method once again to replace some of the originally identified respondents who did not participate in the research. This was achieved through more respondents recommending and roping in their peers. The researcher sampled 15 participants who participated in two VFGDs. Participants in the VFGDs responded to the questions individually before the researcher engaged all of them to respond to critical issues or unclear issues raised by their peers. By copying all participants those issues, they were able to interrogate all the responses with the researcher taking his role as moderator. The debate went on until all the questions and issues raised were addressed to the satisfaction of the moderator. Unlike FGDs which take a few hours to obtain data, VFGDs took several days. The researcher however confined the two VFGDs to one week by following up with e-mail reminders. Both groups were running concurrently.

3.5 Data Collection Methods

The researcher used in-depth interviews and content analysis. He used questionnaires and reviews secondary documents to obtain data for this research. Mailed questionnaires and Focus Group Discussions (FGDs) were used. This enabled the researcher to explore the perspectives and perceptions of respondents and participants on freedom of media and the challenges that cyber journalism pose to media regulatory framework in Kenya.

The researcher asked respondents on their thoughts concerning the operations, processes and effects of cyber journalism. They were also asked about the changes brought about to their lives by cyber journalism. They were given to choose the preferable regulatory framework for cyber journalism from among the four typologies identified by Lessig (2000) – self-regulation, state-regulation, co-regulation or architecture. Respondents were further asked to give their opinion on the ethical values that guide cyber journalism. Respondents, too, gave information on the interpretation of Article 34 as read together with Article 33 (2) of the Constitution of Kenya 2010 in regard to freedom of media.

The face-to-face interviews and mailed questionnaire enabled this researcher to extract from respondents information about themselves, about their beliefs, or attitudes towards cyber journalism. While setting the pace, especially for FGDs, the researcher engaged participants in a light discussion based on their status such as age, place of residence, vocation, income, education and technological orientation among other social, economic and political orientation, as recommended by Thomas and Brubaker (2008 p. 169).

Questions in the questionnaire took two dimensions – one printed which sought written responses. In this case, respondents who did not have the time to sit for a face-to-face interview took an option of filling the questionnaire in hard copy form at his or her convenience. The other way used by the researcher to administer the questionnaire was electronic mail. This was appropriate for most of the respondents who were found in the virtual space but could not be reached due to the geographical distance between them and the researcher. Apart from giving responses to the questions, the use of online questionnaire and its acceptability informed the study about the level of popularity or acceptability of cyber communication channels.

The researcher took into consideration respondents' beliefs to be their knowledge on cyber journalism and their convictions about its regulation. The researcher sought the

understanding of respondents' underlying tendencies on why cyber journalism should be regulated in a manner they suggest, based on their (respondents) moral behaviour, etiquette, fair play, human rights, financial responsibility, job efficiency or artistic taste.

In-depth interviews provided a more relaxed atmosphere when collecting data. This is because respondents felt more comfortable having a conversation with the researcher about their understanding of cyber journalism and the challenges the generation of journalism poses to regulatory frameworks for traditional media. Respondents gave recommendations on how to counter them as recorded in the findings section of this thesis.

The in-depth interviews relied upon open-ended questions. The questions were administered on key informants. The aim was to develop a comprehensive picture of respondents' understanding of cyber journalism and the regulatory challenges that come with them. Respondents were free to tell their feeling about this type of media should be regulated and by who. The researcher sought to hear KIIs in their own words what their views were about regulating cyber journalism.

The researcher, from time to time, in the middle of the interviews, asked new questions to the preceding answers in order to learn more on interrelated issues on personal approach to ethical values and regulation of cyber journalism. Respondents were accorded adequate time to exhaustively extract information about the topic of study.

The researcher created an environment within which the interview became more of a conversation between partners and not between a researcher and a subject. However, the researcher in specific circumstances, treaded cautiously, not to play a junior partner in the interview by taking control of the session. Some respondents who may have forgotten they had given appointment for interview, quickly created time for the researcher. The researcher treated respondents with respect as Schutt, (2001 p. 290) suggests: "Interviewees should be treated with respect, as knowledgeable partners whose time is valued (in other words, avoid

coming late to appointments). A commitment to confidentiality should be stated and honoured.”

Interviews began with a few questions that gathered background information while building rapport. This was followed by a few general questions that sought to elicit lengthy narratives. These narratives were aimed at contextualising constitutional provisions on freedom of media and regulatory challenges of cyber journalism posed. They further sought to understand critical issues of regulation of media and cyber journalism. The researcher took cognizance of the need to agilely throughout the interview, pay attention to nonverbal cues, expressions with symbolic value and the ebb and flow of the interviewee’s feeling and interests. By so doing, the researcher, as proposed by Rubin and Rubin (1995) was free to follow his data where they lead.

The researcher used interviews because of their elasticity. Interviews elicit more information during sessions, information that could not be obtained easily. Interviews, too, suggest to the respondents that the researcher values their opinion, the reason as to why he or she dedicates his or her time to share information about this subject matter. “This display of sincere interest in respondents’ views can enhance the diligence and care with which interviewees answer questions,” (Thomas & Brubaker, 2008 p. 174).

The choice of interviews as a major data collection method for this study was based on their setting which enables the researcher to clarify issues that participants may find confusing or unclear. They further made it easy for respondents to amplify their answer or to digress from the central topic to give useful information for the study. Interviews provided an intensive understanding of a respondent’s motives, patterns of reasoning, and emotional reactions, all of the traits which are not possible with other qualitative methods of data collection.

The researcher, aware of the shortcomings of interviews such as being prone to biased responses ensured that he engaged respondents constructively, especially those working with government who might want to justify regulation by the State whereas those in the media fraternity may support self-regulation for cyber journalism. The researcher drafted open-ended questions, which were administered on respondents while at the same time interjecting and keeping the respondents on track in order to minimise any possible bias. The researcher was aware that in-depth interviews can be a time-intensive activity. This is so because of the long time it takes to conduct them, transcribe them, and analyse the results. However, in-depth interviews were worth undertaking due to the nature of the study which was seeking knowledge on the ethical values and regulatory mechanisms for cyber journalism under the Constitution of Kenya 2010. The researcher allocated as much time as possible and opened up to shifts into longer sessions of interview than as earlier anticipated, with approval from interviewees. By so doing, the interviews generated adequate data to feed into the research questions as reported in the findings section of this thesis.

3.5.1 Questionnaire

The researcher used a questionnaire to collect data from respondents. The questionnaire consisted of a series of questions for respondents to answer about freedom of media, ethics, and regulation under the constitution of Kenya 2010. The study presented the questionnaire in two forms – printed and electronic mailing, where respondents were required to give their views on the research topic. To elicit sufficient data for the study, the researcher used open-ended questions. The same questions in the questionnaire were administered in the face-to-face interviews and virtual Focus Group Discussions.

The sample population of journalists who own weblogs on which the questionnaire was administered was obtained through purposive sampling and sequence methods. The same sequence sampling method gave rise to members of the focus groups. Since the number of

bloggers in Kenya is high, the researcher identified a few through purposive sampling, whom he contacted and formed a focus group while some responded directly as Key Informant Interviewees. The bloggers recommended to the researcher some of their peers who they believed were active and credible in the practice of cyber journalism. These bloggers voluntarily and freely gave information about their colleagues who would be interested in responding to the questionnaire.

Bloggers, unlike most KIIs who belonged to the traditional media, were easier to trace. However, due to the nature of the majority of them who do not have a fixed geographical place, sequence sampling frame became the most convenient way to reach them. Another impeding factor was the fact that new people become bloggers while others quit blogging within a very short period of time.

3.5.2 Focus Group Discussions

The study gathered data through the use of both Focus Group Discussions and Virtual Focus Group Discussions. Asynchronous sessions (Berg 2009, p 183) were used, where the researcher formed groups comprising between 6 and 8 individuals engaged in cyber journalism either as journalists or consumers of content. Each group comprised mixed participants drawn from both journalists and consumers of their content. The researcher used emails and mailing lists and allowed participants to read others' comments and contribute a comment themselves at their own time. The researcher led the groups by injecting further questions or seeking clarity of arguments by participants in the discussion on media freedom, the ethical values and regulatory framework for cyber journalism within the provisions of freedom of media in the Constitution of Kenya 2010. The researcher guided the teams in answering specific questions regarding their understanding of the constitutional provisions of media freedom and the limitations, media ethics and regulation and their recommendations on the manner in which they would like the practice to be regulated. The researcher gave

participants to choose from self-regulation, state-regulation, co-regulation or software-regulation.

The membership of the focus groups was drawn from online journalists, bloggers and consumers of their content. The focus groups involve the conventional number of between 7 and 10 people, a number which, according to Schutt (2001:294), facilitates discussion by all that participated. The researcher posed open-ended questions in order to extract qualitative data. The study, through virtual focus group discussions, created an environment that enabled a natural process of forming and expressing opinions by the participants in order for the information obtained to have a sense of validity.

The researcher used an interview guide, which sometimes changed in the middle of the discussion to accommodate unforeseen issues. Four focus groups were conducted – two for FGDs and two for VFGDs. Schutt, (2001) informs: “Some focus group experts advise conducting enough focus groups to reach a point of saturation when an additional focus group adds little new information to that which has already been generated” (Schutt, 2001 p. 294)

3.5.3 Review of secondary documents

This research gathered data from international conventions and Kenyan laws. Some of the laws of Kenya were at their Bill stage at the time of compiling this thesis. Specifically, data was drawn from the Universal Declaration of Human Rights, the Camden Principles on freedom of expression and equality, the Geneva Joint Declaration on Freedom of Expression and Internet co-ordinated by OSCEA (Organisation for Security and Co-operation in Europe). Other international principles reviewed are: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information and Article 19 on Freedom of Expression and Protection of Reputation, Recommendations given by Internet Governance Forum 2011 in Nairobi and The 10 Internet Rights and Principles. The media laws reviewed by this study are Kenya Communications act 2009, The Kenya Communications

(Broadcasting) Regulations, 2009 and the Information and Communication Technology Policy. The researcher also reviewed the Kenya Information and Communication (Amendment) Bill 2013 and the Media Council Bill 2013. The researcher obtained data from the Internet Service Providers' (ISPs) rules of participation and editorial policy guidelines for online journalists working with Nation Media Group. The researcher, through the review of these proceedings of IGF in Nairobi, obtained suggestions given to regulate the Internet which may apply to cyber journalism. The researcher at the same time reviewed a report by IGF held in Lithuania in 2010. This helped the study to identify suggestions given for the governance of online content at international level.

The researcher analysed the Camden Principles of 2008, which are based on the freedom of expression and equality as foundational rights. It is argued that the realisation of the two principles is essential for the enjoyment and protection of all human rights. The data obtained from the Camden Principles complement the data from the first protagonists of this study – the practitioners of cyber journalism whose contention is self-regulation and the state, which may suggest either state or co-regulation.

The researcher reviewed several documents at the Article 19 office in Nairobi, a resource centre for freedom of expression and media in Kenya and Africa. Other documents and declarations by meetings organised by Article 19 and the Organisation for Security and Co-operation in Europe (OSCE) were reviewed to come up with universally accepted standards of the practice of cyber-journalism which could be used as points of reference for Kenya. The researcher further analysed the Kenya Communications Act 2010, which establishes the Communication Commission of Kenya as the self-regulatory body.

The researcher interrogated guidelines by OSCE passed at two major conferences – in Dushanbe in Tajkasthan in November 2011 and another one held in December 2011 in Vienna, Austria. The information obtained from these conferences on Internet governance helped this

study to give recommendations on the regulation of cyber journalism to cover the gap of territorial governance, since this type of journalism transcends the physical or geographical boundaries. The study obtained information from the Kenya Media Amendment Bill 2010, which provided information on the country's approach to regulating cyber journalism under the Constitution of Kenya 2010. The Independent Communication Commission of Kenya Bill 2010 was analysed to find out the steps the state was taking to bring cyber journalism into the regulatory framework of other forms of practice of the profession.

The research collected data from ISPs, who are the enabling channels of cyber journalism in order to obtain information on the terms and conditions of use for analysis. This information helped to establish if the conditions of use amount to self-regulation or any other form of regulation. The data informed the study if the platforms on which cyber journalism is practiced have taken any precautionary measures against indecency and the protection of the major ideals driving the study – freedom of media, as enshrined in the Constitution of Kenya 2010.

3.6 Data presentation and analysis.

This study classified data collected into two major categories. Data gathered from secondary documents is discussed in chapter four. It analyses the international conventions and treaties on freedom of information, media and the Internet. Data collected from interviews is presented and discussed in chapter five. It entails interviews conducted on Key Informant Interviewees, mainly from among policy makers and journalist bloggers. It also discusses data generated from Focus group Discussions, both virtual and real space and general interviewees. The data from secondary documents is discussed under various themes as categorised in the research questions of this study. It discusses freedom of media and protection of reputation cyber journalism and freedom of expression, journalism and criminal

liability the responsibility of states, Internet governance, Internet service providers' rules of participation, law and jurisdiction.

The researcher transcribed data gathered through in-depth interviews. The face-to-face interviews were electronically recorded with some scribbled or jotted down and thereafter transcribed and organised, classified and analysed. The data was labelled depending on the issue that the respondent tackled and the manner of the response. The notebook carried information from each respondent, indicating his or her response to each of the issues raised in the questionnaire. Information obtained outside the questionnaire labelled so. This enabled the researcher to easily pick information for each and every item of research and place it in its right place while drafting the findings in the computer. The researcher used tables where data required illustrations. Each of the information was abbreviated to make it easy for drafting into the computer.

The researcher opened files in the computer based on the six categories listed above, including data obtained from documents and then upload it continuously as it came in from the field. The researcher highlighted data that had been entered in the computer in order to avoid repetition or omission. The researcher analysed each and every respondent's data by reading through it and using a different colour of a pen, giving comments on the margins of the notebook about the underlying thoughts of the respondent, including the face value of the data.

Organisational documents were abbreviated for easy flow into the four files created in the computer. The six files were then turned into semi-independent papers. Chapter Five discusses findings obtained from the field, starting with the sample, tables, figures, transcript summaries, and the researcher's description of what is important and noteworthy about the items. A general conclusion is drawn in a standalone chapter where the researcher draws conclusions and gives recommendations after analysing the data.

3.7 Research ethical issues

The study took into account ethical issues such as informed consent, confidentiality and consequences of the research for the interviewee. Research subjects were informed about the purpose of the investigation and the main features of the design. The right people to give the consent were contacted in time in order to delegate if they so wished. This gave confidence to respondents and some time to research on the various issues if he/she was not conversant with the questions that were raised in the questionnaire. Respondents on the other hand needed to agree to the release of the identifiable information and avoid the risk of harming someone.

The researcher, aware that there are no absolute answers to ethical issues, was armed with the following philosophical theories of ethics which helped to guide him to gather information from respondents while ensuring that they were treated with the respect they deserved, fairly and equitably in their status as human beings. Those interviewed online were contacted on telephone or sent mail to remind them on the deadlines set for the study. A friendly mail to blogging journalists was sent with a request to participate in the research. Some responded promptly while others responded after second or third request. The questions were then answered online. The researcher enquired more in circumstances which required clarification or addition. The researcher gave the respondents the opportunity to decide the venue of the interview. By so doing, the respondent felt contented to answer the questions since the environment was of their choice. This aspect gave respondents a pleasant and relaxing atmosphere with sufficient privacy. The researcher explained to respondents the importance of voice recording them since it gives exact quotes. He asked them if they were comfortable with a voice recorder before interviews began. Some agreed while others said they were not comfortable. In the latter, the researcher resorted to jotting down their responses. The researcher asked respondents to indicate if there was any section of the

interview they would not prefer to be recorded or which they would not want to respond to. This was part of the introduction before starting responding to the questions. This information was also captured in the short introductory note sent to all respondents. The researcher used his discretion and the agreed terms with some of the respondent, to erase the voice immediately after transcribing the information into the computer.

3.7.1 Ethical considerations

Part of this research was undertaken with research subjects with whom the researcher has a pre-existing and on-going professional relationship. The researcher is a professional journalist working in a newsroom in Kenya. Some of the respondents were the researcher's own supervisors at work especially media owners and media managers. Others were his juniors with whom they shared professional ideas most of the time. The researcher in this case had prior discussions with respondents falling under this category and explained why he was conducting the research. The researcher used two methods in engaging these respondents before agreeing to answer the questions of this study. First, the researcher held face-to-face meetings with those respondents who could be reached with ease and secondly, the researcher used e-mail to first introduce himself and the research, giving a detailed account about the importance of the research and why it was being conducted.

The researcher explained to them that it was only the information that they would give that would be used for the study. The researcher explained that meaningful data for this study would be achieved if they contributed their views about media freedom, ethics and regulation particularly in regard to cyber journalism. Respondents were freed to decide whether to participate in the study or not. Those who responded that they would not participate were left out while those willing participated in the data gathering process. Some felt they were not competent to answer the questions and were left out of the study. Most of those who declined mid-way gave reasons such as lack of time, some said they did not understand the law for

journalists while others simply said that they were incompetent to answer the questions. Using sequence method, the researcher replaced those who did not participate in the research.

The researcher explained to the respondents that the data gathered in this study would be treated in confidence and that the findings were meant for a doctoral thesis at the University of Nairobi. The researcher explained to the respondents that the data would be coded and no one, whatsoever, will relate the data to the respondents for both external and internal audiences of the thesis.

The researcher accorded the media owners and managers their due respect while at the same time ensuring that they answered the questions to the expectations of the study, interjecting questions, intelligibly. The researcher discovered that media freedom is an area of concern for all media personnel, right from the top to the bottom in the power hierarchy. Bloggers raised concerns that freedom of media may be abused by some of their colleagues and cause unnecessary government measures to regulate their operations.

The researcher picked some respondents not known to him, especially those who participated in the virtual FGDs. These were participants that the researcher knew only on the Web either on the social networks or through sequence. This helped the researcher to receive truly anonymised respondents even to the researcher himself. This was achieved through self-administered questionnaires with an anonymous method of return. However, in some cases of online self-administered, it was not possible to hide all the identities of those who participated in the study, since their addresses were known – whether real or disguised.

3.7.2 Informed Consent

The researcher made respondents fully aware of the nature of the research and their role in the research before they agreed to take part in it. The researcher made telephone calls and met some of the respondents face to face and explained what the study is all about and why

he chose them as respondents. Some respondents who could not be reached for a face to face interaction were contacted through electronic mail to introduce the study and the research to them before the actual interviews. The interviews, accordingly, took either face to face or mailed questionnaires depending on the distance between the researcher and the respondent.

Borrowing from (Oliver 2004) the researcher ensured that through the principle of informed consent, complex as it is, the respondents were devoid of hang-ups that come with lack of clear expectations of the research. As Oliver points out, some respondents are impressed by the status of the researcher, or even by the word research and may agree to participate without having a good idea of what the research is all about. Others may participate in the research and suffer some degree of anxiety or stress when asked questions, according to Oliver. But the researcher ensured that the respondents did not experience such hang-ups by explaining to them the implication of participating in the study.

The researcher made sure that he informed the respondents that the responses given would be published in an academic thesis and would be cited from time to time by scholars and consumers of the information in the field. The researcher provided respondents with a summary of the key aspects of the research, including aspects concerning the extent of the information which would help them decide to participate in the research. The researcher explained how they were expected to provide data and the type of questions they should expect.

The researcher assured respondents that they would not be named in connection with the research and that there will be no way that the opinions or data provided will be associated with them personally. Apart from introducing some of these aspects to the respondents during the initial encounter, the researcher took a few minutes to reassure each one of them of these aspects before the interview kicked off. The researcher made it part of the interview before the actual questions. The researcher prepared an information sheet about the research and

distributed it to potential respondents before the actual day of the interview. Respondents had the opportunity to seek clarifications or ask questions. He sent out mail of introduction to respondents to the virtual populations. The researcher contacted some through their social network pages. After responding, all the respondents picked from virtual populations were mailed the questionnaires in two forms. Some responded individually while others participated in a group debate which made the virtual focus groups.

3.7.3 Anonymity

Respondents in this study were assured and remain anonymous in the thesis. The anonymity is intended to hide the identity of respondents for any vindication or reprisal by their superiors in their places of work. The anonymous stance was applied to all even those whose positions in society are not threatened. Any confidential information given to the researcher was treated so. The researcher is aware that confidentiality and anonymity are key issues to be protected by all means in a research. Some information may cost someone a job or his/her life, yet it was important for a research.

The researcher promised respondents anonymity and confidentiality by assuring them and ensuring that no one would, by reading this thesis, create the impression that the information was obtained from a certain respondent. However, some policy matters from reports have been indicated so although the source of the reports was protected by the same ethical standards of anonymity and confidentiality.

3.8 Scope of the data collection

This research collected data from secondary documents and interviews. Secondary documents reviewed are The International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights of 1948, the Camden Principles on Freedom of Expression, the Internet Rights and Principles Internet Service Providers' rules of

participation, the Kenya Media Amendment Act 2010, and a High Court case on Kwacha Group of Companies vs. The Standard Limited on the extent of freedom of media. Interviews comprised key informants, Focus Group Discussions and Virtual Focus Group Discussions. The research population was mainly based in Nairobi, the capital city of Kenya while others were found on the Internet. Interviews were carried among samples obtained from cyber journalists, traditional journalists, media owners, media managers, officials of the Kenya Media Council, CCK, media policy experts, ICT Board and consumers of cyber journalism content.

3.9 Summary

This chapter has discussed the epistemology of the research. It details the methods used in the research and the tools used in the collection of data. This research, qualitative in nature, uses content analysis and interviews to collect data. In-depth interviews, Focus Group Discussions (FGDs), virtual FGDs, and secondary documents analysis was used by the researcher. The chapter has also presented the research population studied, validity issues and research ethical issues. Insider ethical considerations, informed consent and anonymity issues in this research are presented in this chapter.

CHAPTER FOUR: DATA PRESENTATION, ANALYSIS AND INTERPRETATION

4.0 Overview

This chapter presents analysis and interpretation of data collected from the field. The chapter is organised in terms of the four research questions articulated in Chapter One of this thesis. This chapter presents responses to Research Question 1 on the implication of Article 34 as read with Article 33 (2) of the Constitution of Kenya 2010 in regard to freedom of media. Secondly, it presents analyses and interpretation of findings on research Question 2, which sought to establish the challenges of cyber journalism to media regulatory framework. It further presents an analysis and interpretation of findings in response to Research Question 3 on the role of ISPs in regulating cyber journalism. In response to Research Question 4, this chapter analyses information obtained on the role of international law and conventions in regulating cyber journalism in Kenya. The chapter finally presents analysis and interpretation of data on how to regulate cyber journalism in Kenya. The data was obtained in response to Research Question 5.

4.1 Media freedom under the Constitution of Kenya 2010

In response to Question 1 of this study, findings suggest that Article 34 of the constitution guarantees broadcasting and other electronic media independence of control by government, political interests or commercial interests. The findings suggest that the constitution in itself opens ways for a freer environment for the practice of journalism in Kenya. Under the constitution, journalists can write opinions critical of government without fear of being harassed by state agents. “I have often written my opinion on my personal weblog without looking over my shoulder or without having to use a pseudonym,” says a journalist who runs a blog (Blogger journalist, April 20, 2012, Nairobi). It is the first time in

the history of Kenya that freedom of media has been recognised as a distinct and separate right. In the former constitution, freedom of media was lumped together with the rights of various institutions. According to the Constitution of Kenya 2010, media means any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium.

Findings suggest that the conditions tied to freedom of media in Article 33 (2) are meant to create a platform for transparency and accountability among media practitioners. The Article spells out guidelines to the extent of media freedom. The constitution does not protect activities that promote propaganda for war, incitement to violence, hate speech or hatred. Findings of this study propose a balance between the constitutional provisions in both Article 34 and Article 33 (2). The limitations provided by the constitution are necessary for practice journalism in Kenya. The conditions are anticipated to apply to both traditional media and cyber journalism. However, majority of respondents expressed concern that the philosophy and spirit of freedom of media as guaranteed by the Constitution of Kenya 2010 is to emphasise on the thrust in the substantive article (Article 34).

Article 33 (2) is a proviso and therefore it should not be used to undermine Article 34, which guarantees freedom of media. It is anticipated that the regulator or government needs to justify the proviso when an offence has been committed or it is deemed to have been committed under the constitution. The State ought to justify the application of Article 33 (2) when and if an offence has been committed. Both Article 34 and Article 33 (2) must be looked at as protecting the public good and not the interest of the government in power or a particular government institution. In the case of applying Article 33 (2), it is the duty of the government to demonstrate that it is applying it in promotion of public good. The accused party will be required to show how the contested message falls within freedom of media guaranteed by the constitution.

Article 33 (2) is meant to protect individuals' liberties from any excesses of journalists, who may be bent to misuse their freedom. Respondents were unanimous that media freedom cannot be used to promote propaganda for war, hate speech, incitement to violence, and advocacy for hatred. The freedom guaranteed by the Constitution does not shield journalists spreading information that constitutes ethnic incitement, vilification of others or incitement to cause harm from legal action. In order for journalists to balance between freedom of media and its limitations, they ought to temper this freedom with responsibility. Article 33 (3) requires journalists to be responsible and endeavour to portray situations as they are without arousing people's emotions. The constitution elevates journalistic codes of conduct as the key regulators for journalism. Parliament is mandated to enact legislation that provides for the establishment of a body, which shall "set media standards and regulate and monitor compliance with those standards" – Article 34 (5c). It is a requirement for journalists to subscribe to the Media Council of Kenya and therefore the Code of Conduct for Journalists in Kenya. The Communication Commission of Kenya, which runs parallel with the media council, is mandated to license media organisations especially radio and television.

Whereas the work of journalists is basically to inform, educate and entertain, the constitution also places a lot of responsibility in the hands of journalists to ensure that the information they disseminate does not harm other people. This could be reinforced by the ethical standards of the practice of journalism. Cyber journalists, therefore, are obligated to adhere to the constitutional requirements to respect of the rights and reputation of other people as they exercise the freedom provided in the constitution. Journalists seek information in order to inform other people about events taking place in society. They are expected to do so in a humane manner so that they do not overstep other people's freedom. Journalists have the obligation of promoting peaceful co-existence in the society.

Findings suggest that freedom of media provided in the constitution creates an orderly playing field for the practice of journalism in Kenya. First, the constitution shields media from interference or control from the state and other influential persons, and secondly restrains media from causing harm to others. The findings support Article 34 (5) which requires parliament to enact legislation that provides for the establishment of a body, which shall be independent of control by government, political interests or commercial interests. The body is mandated to set media standards and regulate and monitor compliance with those standards. The Media Council of Kenya and the Communication Commission of Kenya are the two bodies with that mandate in Kenya.

Traditional journalists are guided to respect other people's rights and reputation. Cyber journalists are expected to do the same. They are expected to get into the practice with the full knowledge that people are going to read their stories. They are expected to have knowledge that the stories they publish have effects – whether positive or negative on both sources and consumers of the content. They are therefore expected respect other people's rights, privacy and reputation.

Findings suggest that the constitution offers ground for ethical standards and minimum regulatory framework for the media. This way, the constitution keeps the government away from meddling in media content. Other threats to media independence exist. Sometimes, journalists are influenced by their political orientations to the extent that they do not see the negative influence their reports have on the integration or disintegration of the nation. Respondents suggested that reckless statements from or through journalists should be discouraged. In real broadcasts, journalists, whether traditional or cyber-based, should use technology to delay information in order to sieve hate speech.

The Media Council of Kenya and the proposed Communication Authority of Kenya (CAK) share the responsibility of ensuring that media operate within the law. CAK, formerly

the Communication Commission of Kenya (CCK) is mandated to license and allocate airwaves to media operators especially radio and television. MCK's mandate is mainly to regulate the practice of journalism and content distribution. The Code of Conduct for the Practice of Journalism in Kenya prohibits journalists from spreading information bordering hate speech or any of the provisions of Article 33 (2). Journalists are expected to ensure that they first and foremost, adhere to the Code of Conduct of the Practice of Journalism in Kenya and that they do not engage in disseminating information that borders hate speech, advocacy for hatred, incitement to violence or propaganda for war. Findings suggest that journalists who violate the constitution may be charged like any other offender under the criminal procedure Code.

Journalists have the obligation of promoting peaceful co-existence in the society. Therefore, if a journalist disseminates information which amounts to inciting people to violence, he or she needs to be checked by relevant authorities, including state machinery (policy-maker interviewee, May 02, 2012, Nairobi).

Findings suggest that some journalists, especially bloggers who have not been trained in journalism are likely to be ignorant of basic obligations such as respecting people's right to privacy, being objective and offering platform for the right of reply. Mainstream media, too, in their quest to compete with other communicators to break news, have limited time to ensure these tenets are observed. It is important for practitioners to bear in mind that the ethical standards for the practice of journalism basically remain the same. The principles of the practice of journalism must be applied to all. What has changed is the medium through which journalists communicate. Journalists on the cyberspace are obligated to follow the constitution which requires them to respect the rights and reputation of other people as they exercise the freedom provided in the constitution. Journalists should seek information in order to inform other people. They should do it in a humane manner so that they do not

overstep other people's freedoms as they exercise theirs. Freedom of cyber journalists is derived from the freedom of media as provided in the Constitution of Kenya 2010.

Findings suggest that cyber journalists sometimes disseminate sub-standard information (in regard to verification). If journalists fail to diversify their sources of information, lack balance and fail to accord their subjects the right to be heard, then there should be mechanisms that monitor their compliance with the constitutional provisions. Cyber journalists often tweet and send short messages from functions while they are underway without necessarily verifying the information. Others accord little or no right of reply to the subjects while some fail to adhere to any ethical principles for the practice of journalism (Interviewee cyber journalist, July 5, 2012, Nairobi).

However, cyber journalists should exercise their freedom with restraint rather than merely capitulate to the threat of sanctions and threats if he or she crosses the threshold. This response reinvigorates the Kantian Categorical Imperative theory of ethics which requires no hypothetical suggestions when doing the right thing. The law on the other hand should adopt a liberal regime in regard to what is punishable for the breach of the constitutional prohibition on propaganda for war, incitement to violence and hate speech. Such a liberal regime could help achieve the guaranteed freedom while rigid interpretation of the law may negate the freedom of media.

4.1.1 Limits of media freedom

It is through media that people can express their opinions and therefore, any limitation on media implies limitation of freedom of communication and expression. The Universal Declaration of Human Rights of 1948 states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." (Article 19 UDHR). Furthermore, the declaration guarantees liberty for seekers and receivers

of information. Journalists seek information and disseminate it to the public. Therefore their freedom to do so is guaranteed by the UDHR. Journalists protected by UDHR are not only those in the traditional media of the newspaper, television and radio but “any media”. This means that cyber platforms on which journalists post their stories, opinions and ideas are protected under the UDHR. The declaration also protects these journalists “regardless of frontiers”. One of the main characteristics of cyber journalists is that their content is accessed beyond geographical boundaries of states.

The United Nations therefore subscribes to the freedom of media, including cyber journalism as a human right. Kenya is signatory to the United Nations Charter, which binds the state to guarantees of freedom of expression and therefore freedom of media. Data gathered through content review suggest that cyber journalism enjoys some protection from the UDHR. Cyber journalists have a right to seek, impart and receive information regardless of frontiers. However, this freedom is not absolute. The Camden Principles on Freedom of Expression and Equality deem certain speech harmful and recommends that such speech should not enjoy freedom guaranteed by the UDHR. The Principles, formulated in a meeting held in London on December 11, 2008 and between February 23 and 24, 2009, recognise that intentional incitement to racial hatred is so harmful to equality that it should be prohibited. However, rules prohibiting such speech should be narrowly defined to prevent any abuse of restrictions, including for reasons of political opportunism. Cyber journalists, therefore, need some restraining mechanism that will help protect individuals and groups from such harm as defamation, intrusion to their privacy and the like. Such rules, however, should not be invoked to protect particular beliefs, ideologies or religions.

Every individual and every organ of society is required, under the Camden Principles strive to promote respect for the rights to freedom of expression and equality and secure their universal and effective recognition and observance (see Appendix 6). States are obligated to

take positive steps to promote diversity and pluralism, to promote equitable access to the means of communication, and in creating an enabling environment for freedom of expression and equality. The principles also caution that freedom of expression may sometimes lead to potential for abuse, and therefore recommends minimum regulation.

The Camden Principles underscore the need for self-regulation, in areas where it is effective and underline them as the most appropriate way to address professional issues relating to the media. They recognise the importance of the media and other means of public communication in enabling free expression and the realisation of equality, through ensuring equitable access. Like the traditional media which plays an important role globally, new technologies – including digital broadcasting, mobile telephony and the Internet – vastly enhance the dissemination of information and open up new channels of communication, such as the blogosphere. The Principles advocate for effective policy and regulatory frameworks which protect pluralism and diversity which must be grounded in broad social dialogue that stimulates fresh debate about the role of media in society. It should involve stakeholders from diverse communities as well as representatives of the media, public authorities, government and civil society.

<http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>, accessed January 20, 2012. (See also Appendix 6).

4.1.2 Media freedom and responsibility

The High Court of Kenya, in 2011, made a ruling on the freedom of media and its limitations as provided for in Article 34 and Article 33. The plaintiff was filed by Kwacha Group of Companies vs. The Standard Limited and two others. It sought general, aggravated and/or exemplary damages against the defendants for publishing impugned defamatory words in respect of the plaintiff. However, the court had to determine the extent of media freedom guaranteed by the Constitution. This is the preliminary ruling that interests this study.

During submission, a very challenging issue was raised as to the jurisdiction of this court under Article 34 of the Constitution. The Article provides for freedom and independence of media. The state shall not exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium. The state shall not penalize any person for any opinion or view or the content of any broadcast, publication or dissemination.

In the interim ruling, High Court judge, Justice K.H. Rawal averred that the constitutional provision is meant to achieve human dignity and equity, (Appendix 3). Therefore, Article 34 of the Constitution of Kenya 2010 must be read together with other articles of the constitution. The various constitutional provisions are meant to supplement one another and not contradict one another. The court found consistency in the various articles of the constitution that concern media practice in Kenya and declares “This Judgment is my polite effort to read and declare consistency among the Constitutional provisions.”

The court made the ruling on the application that a suit based on any law of defamation is a restriction on freedom of speech in the interest of other rights worthy of protection. More particularly, in cases of defamation, Courts have tried to strike a balance between the protection of reputation and the right of freedom of expression. The human dignity does cover the right of reputation and protection of human dignity is the duty endowed to the court by the Constitution.

The constitution, under the provisions of Article 34 has given life to the aforesaid principles and spirit of democratic values of a Nation expressed by those specific pronouncements and enactment of freedom of speech and expression of media. The courts in this country are grateful for being saved to repeat the efforts of what the courts in other countries have gone through to spell p out what is freedom of media. While the Constitution has provided the unique provisions for freedom of the media, it has also provided general

provisions to guide the courts to interpret the provisions of The Constitution and how to apply the provisions of the Bill of Rights.

The court relied on Article 259 (1) which states that This Constitution shall be interpreted in a manner that (a) Promotes its purposes, values and principles; (b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) Permits the development of the law; and (d) Contributes to good governance. Article 38 (2) stipulates "Every person has the right to the correction or deletion of untrue or misleading information that affects the Person."

The argument of the court in regard to absoluteness of the freedom of media cited that Article 24 (1) of the Constitution was the answer to that issue that no fundamental freedom is absolute and that limitation should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into consideration. No article of the constitution should be interpreted in isolation.

(a) The nature of the right or fundamental freedom;

(b) The importance of the purpose of limitation;

(c) The nature and extent of the limitation;

(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not Prejudice the rights and fundamental freedoms of others; and

(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

The value of the Constitution without doubt, is to preserve the human dignity, equality, and freedom. Article 33 (3) says "In the exercise of the right to freedom of expression every person shall respect the rights and reputation of others". The purpose of the above provision is culled out from the provisions of Article 24 (1) (d) The "person" is defined in Article 260 of the Constitution as: 'Person' includes a company, association, or other body

of persons whether incorporated or unincorporated." The court ruled that the media as an identified group is thus included in the expression "person".

Similarly, a cyber journalist whether acting in his or her individual capacity or as a group are bound by the law. Moreover, it has to be noted that any regulation or limitation as is prescribed by Article 23 (3) cannot be construed as abridgement of the freedom. See Appendix A3).

4.1.3 Freedom of media and protection of reputation

Freedom of media has always been tied to some responsibility meant to protect the vulnerable groups in society and the reputation of others. These conditions are formulated by states within the backdrop of media as having the power to reach many people within a short period of time. Mass society theory views media as having influence over their audiences and that they should be put under wise men – the ruling class and the clergy. Journalists also have the advantage of expressing themselves than the majority of members of the society. This is why protection of reputation is a key area of discussion in the field of media freedom and regulation. The East African Chapter of Article 19 offers 19 principles for freedom of expression and protection of reputation, which should guide states when they formulate regulatory frameworks for media and communications.

The principles outline the circumstances which demand freedom of opinion, expression and information. They also stipulate legitimate purpose of defamation law, guidelines on criminal defamation, prove of truth, expression of opinion, prior censorship and disproportionate punishment. Cyber journalists have a right to hold opinions regardless of frontiers, either in the form of art or through any other media of choice (Principle 1 of the East African Chapter of Article 19). Journalists are free to express their opinion through a medium of their choice. They have the right to practice their profession without interference.

However, the exercise of this fundamental right may be curtailed under specific circumstances.

The rights may, where this can be shown to be necessary, be subject to restrictions on specific grounds, as established in international law, including for the protection of the reputations of others (Principle 1).

The principle offers a remedy for those affected by any limitations of the freedom of having the right to challenge the validity of those restrictions as a matter of constitutional or human rights law before an independent court or tribunal. Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous and narrowly and precisely drawn so as to enable individuals to predict with reasonable certainty in advance the legality or otherwise of a particular action. The Constitution of Kenya 2010, Article 33 (2) clearly states that the freedom of media does not extend to propaganda for war, incitement to violence, hate speech or advocacy to violence. It is incumbent upon cyber journalists and other journalists to follow the law when practicing their profession. Restrictions by the Constitution of Kenya 2010 must therefore conform to Principle 1 with clear demonstration of a genuine purpose of protecting a legitimate reputation interest.

A constitutional restriction on freedom of expression or information, including protecting the reputations of others, cannot be justified unless it can convincingly be established that it is necessary in a democratic society (The East African chapter of Article 19, Principle 1).

The East African chapter of Article 19 states that media may be restricted because of national security interests. It however warns that some justifications may not be plausible unless their genuine purpose and demonstrable effect is to protect a country's existence. Such a move may be justified if the state's territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a

military threat, or an internal source, such as incitement to violent overthrow of the government.

Data gathered through content review suggest that some defamation laws have no legitimacy. The only legitimate purpose of defamation laws is to protect reputations. Defamation laws have been abused before to prevent open public debate and legitimate criticism of wrongdoing by state officials. Many countries have laws designed to safeguard the honour of certain objects, including national or religious symbols. Inasmuch as an object, as such, cannot have a reputation, these laws do not serve a legitimate aim. States, therefore, should not gag cyber journalists' freedom of expression under pretension that they are protecting state symbols (The East African chapter of Article19).

Defamation cases raised by relatives of deceased persons may be tricky. The harm caused by an unwarranted attack on someone's reputation is direct and personal in nature. Unlike property, reputation is not an interest that can be inherited; any interest surviving relatives may have in the reputation of a deceased person is fundamentally different from that of a living person in their own reputation. Furthermore, a right to sue in defamation for the reputation of deceased persons could easily be abused and might prevent free and open debate about historical events. Groups which have no legal existence do not have an individual reputation in any credible sense of that term. Defamation laws which purport to protect such groups' reputations cannot, as a result, be justified. Principle 2 of the East Africa Charter covers both class defamation actions on behalf of all members of the group, and actions by individuals who claim to be indirectly defamed as part of a group. Individual members of a group may be able to sue in defamation, as long as they can establish that they are personally identified and directly affected.

The principles inform that some governments seek to justify defamation laws, particularly those of a criminal nature, on the basis that they protect public interests other

than reputations, such as maintaining public order or national security, or friendly relations with other States. Since defamation laws are not carefully and narrowly designed to protect these interests, they fail the necessity part of the test for restrictions on freedom of expression. Such interests, where legitimate, should be protected by laws specifically devised for that purpose.

Governments should not use force in protecting fundamental rights when especially dealing with defamation cases. In recognition of this, international courts have directed that governments exercise restraint in applying criminal remedies when restricting fundamental rights. In some countries, the protection of one's reputation is treated primarily or exclusively as a private interest. Criminalising defamatory statements, therefore, is unnecessary.

Criminal defamation laws are abused by the powerful to limit criticism and to stifle public debate. The threat of harsh criminal sanctions, especially imprisonment, exerts a profound chilling effect on freedom of expression. Such sanctions cannot be justified, particularly in light of the adequacy of non-criminal sanctions in redressing any harm to individuals' reputations. There is always the potential for abuse of criminal defamation laws, even in countries where in general they are applied in a moderate fashion. The illegitimacy of the use of criminal defamation laws to maintain public order or to protect other public interests still exist in some countries. Criminal defamation laws are still the primary means of addressing unwarranted attacks on reputation. There has been frequent abuse of criminal defamation laws by public officials, including through the use of State resources to bring cases, along with the fundamentally personal nature of protection of one's reputation. Protected expression on the other hand legitimises peaceful exercise of the right to freedom of media. Such an expression shall not be considered a threat to national security or subjected to any restrictions or penalties.

Such threats as terrorism, war are not protected by the principles. The principles list an expression which shall not constitute a threat to national security to include:

- (i) advocates of non-violent change of government policy or the government itself;
- (ii) constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies or public officials or a foreign nation, state or its symbols, government, agencies, or public officials;
- (iii) constitutes objection or advocacy of objection, on grounds of religion, conscience or belief, to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes;
- (iv) is directed at communicating information about alleged violations of international human rights standards or international human rights law.

The principles aver that one should be punished for criticising or insulting the nation, the state or its symbols, the government, its agencies or public officials, or a foreign nation, state or its symbols, government, agency or public official unless the criticism or insult was intended or likely to incite imminent violence. Governments are obliged to take reasonable measures to prevent private groups or individuals from interfering unlawfully with the peaceful exercise of freedom of expression, even where the expression is critical of the government or its policies. Governments are particularly obliged to condemn unlawful actions aimed at silencing freedom of expression, and to investigate and bring to justice those responsible.

The principles inform that although precise standard to be applied in defamation cases involving the expression of opinions – also referred to as value judgements – is still evolving opinions deserve a high level of protection. In some jurisdictions, opinions are afforded absolute protection, on the basis of an absolute right to hold opinions. The highly subjective

nature of determining whether an opinion is 'reasonable' also argues in favour of absolute protection. Some statements may, on the surface, appear to state facts but, because of the language or context, it would be unreasonable to understand them in this way. Rhetorical devices such as hyperbole, satire and jest are clear examples. It is thus necessary to define opinions for the purposes of defamation law in such a way as to ensure that the real, rather than merely the apparent, meaning is the operative one.

4.2 Cyber journalism challenges media regulatory framework

In response to Research Question 2, respondents were unanimous that cyber journalism expands the space for journalists to share ideas and express their views in a freer atmosphere, when compared with traditional media of the newspaper, radio and television. In traditional media, journalists are sometimes constrained by policies of media houses that they work for. Some of the policies impinge on freedom of media, sometimes through self-censorship. However, journalism practice on the Net presents new challenges to media law and regulation. These challenges are mainly seen when dealing with verification, balance and right to reply (a media manager respondent, April 21, 2012, Nairobi).

Cyber journalists, like traditional journalists, need to follow the law, rules and regulations that govern journalism. The purpose of the law is to ensure fairness and the enjoyment of constitutional liberties for all members of the society. A journalist, whether in the traditional media or cyber journalism therefore cannot be permitted to recklessly defame other people just because he or she is posting the information on a blog or sending news alert.

Findings of this study suggest that defamation law is applicable to cyber journalism. Defamation defences in the traditional media should apply to cyber journalism too. Defences in the law of defamation require cyber journalists to show that what they published online is of public interest, no malice was intended and that it was true. Applying media laws of defamation, information privacy and moral responsibility on cyber journalism may not be

enforceable under certain circumstances. For instance, journalists who have fallen out of media houses in pursuit of their freedom from gatekeepers and media owners are now engaged in disseminating information through their personal weblogs (Singh, 2009 p. 103).

For purposes of self-regulation, the Media Council needs to register all journalists in the country as required by law. Media Bill 2013 requires journalists to register with the Media council. It defines a journalist as any person engaged in journalism. Journalism is defined as collecting, writing, editing and presenting of news or news articles in newspapers, magazines, radio and television broadcasts in the Internet or any other manner as may be prescribed. Journalists are required to be guided by the Code of Conduct for the Practice of Journalism in Kenya to all practicing journalists, whether in traditional journalism or cyber journalism. Independent journalists on the web need to secure recognition in MCK, which is a statutory organ recognised for self-regulation of media. However, some journalists have carried with them the tenets of journalism to the web.

Besides extremists, cyber journalism enables people to share ideas, which is one of the basic principles of democracy. It has opened up the public sphere. It is therefore the responsibility of the Media Council of Kenya to ensure that all journalists, both in the real space and the cyberspace adhere to the Code of Conduct for the Practice of Journalism in order to realise free and responsible media in both traditional media and cyber journalism platforms (a journalist blogger, April 17, 2012, Nairobi).

Findings suggest that some - bloggers are unethical and fail to check facts. Recent trends in the market, indicate that since breaking news is no longer the preserve of journalists in the newsrooms of newspapers, radio or television some journalists have tended to ignore the basic requirements like verification and fairness because of the rush to meet the convergence requirements or to hit the market first. Journalists need therefore to undergo training on the manner in which they should verify content before posting it.

Traditional media owners are opening up to cyber journalism practice. It is anticipated that they will take the lead in enforcing ethics and codes of conduct for journalists on the Web in order for the rest of cyber journalists to take cue. Respondents in the interviews informing this study suggest that pressure exerted on journalists to break news sometimes force them to sidestep key tenets such as verification and balance. Some manipulate content while others post other people's works leading to massive plagiarism in the cyberspace.

The fact that people can now get news from diverse sources is somewhat diminishing the quality of journalism. Scoops and breaking news are no longer the preserve of journalists in the mainstream media. However, cyber journalism has also challenges of verification of content, manipulation of content, and information overload from many sources (cyber-journalist interviewee, April 20, 2012, Nairobi).

Data gathered from interviews suggests that it is a duty and responsibility of cyber journalists to work within the law. Governments may resort to cyber-repression under the façade of bringing order in communication on the cyberspace. When this happens, it may cause a major threat to cyber journalism. Journalists are expected therefore to avoid criticise government or any other person online without tangible information. Cyber journalism therefore challenges the tenets of balance (a journalist blogger May 14, 2012, Nairobi).

Cyber journalists are expected to avoid misreporting, shallow reporting and unverified information. Journalists have previously reported unverified information obtained from non-journalistic websites. When bloggers and other cyber journalists argue that they cannot be bound by law enforcing agents since they are "formless", they are suggesting that they cannot operate within the constitutional guidelines for the enjoyment of freedom of media. By so doing, they reject the freedom and the umbrella body that ensures standards of media practice in Kenya, the Media Council of Kenya. This endangers their activities because they are likely to be governed by other laws besides the journalistic codes and self-regulatory mechanisms.

Among the remedies for those challenges and threats to cyber journalism is for the practitioners to acquire skills and tips on means of verification on news and content before they publish it. They also need to update themselves with the ever dynamic technology. The Media Council of Kenya on its part needs to monitor the compliance of bloggers to the standards it has set for the practice of journalism in Kenya in order to ensure that cyber journalism contributes to social harmony and cohesion, reduce disparity between rural-urban areas, bridge the gap between the poor and the rich and ensure racial and religious harmony among the regional citizens. This should be done in the sphere of freedom of media and responsibility.

Policy-makers interviewed for this study suggested that journalists ought to ensure that this freedom, which has been entrenched in the constitution, is upheld by all parties in the industry. Journalists on their part are expected by law to follow their professional ethics. Freedom and responsibility are two sides of a coin. It is incumbent upon journalists in this country to act responsibly and to uphold the principles of fairness and objectivity. Ideally the role of journalists is the custodians of public interest. Their reporting must be backed with facts which must be differentiated from opinion. There should be a clear distinction between opinion, conjecture and fact.

The Constitutional limitation of the freedom of media is meant to strike a balance between freedom of journalists and the protection of other individuals' freedom and privacy. Therefore the Constitution offers ground for the need for ethical standards and minimum regulatory framework for the media. This keeps the State away from meddling in media content while at the same time it protects individuals from intrusion to their privacy. Regulating media or setting minimum standards of the practice of journalism as provided in the Constitution is meant to shield journalists from political interference.

On the other hand, there is a need for regulation because some opinions by journalists are bent to influence the outcome of political activity. Regulating hate speech in Kenya is based on the past experiences, whether real or perceived, that media promoted hate speech during the 2007 General Election in Kenya.

Sometimes journalists are influenced by their political orientations and forget the negative effects their reports have on the integration or disintegration process of a nation. Reckless statements should be discouraged through regulations” (a policy maker interviewee, Nairobi, June 20, 2011).

4.3 The role of ISPs in cyber communication

Internet Service Providers (ISPs) are viewed as part of the effective mechanisms of regulating and enforcing ethical values among cyber journalists. The Communication Commission of Kenya approached ISPs to help it monitor hate speech and other offensive content on the Net in 2012. Government can alternatively use ITU and Interpol to monitor content online. However, ISPs have insulated themselves from being used by influential forces to monitor communication on the Net. In this regard, ISPs have terms of service to the people who use their sites to communicate and transact business. Unlike in traditional media where the publisher can be easily identified, it is not easy to determine who the publisher is in the cyberspace. Servers store content, search engines find content, while ISPs deliver content.

Twitter, for instance, declares that the terms of service govern the user’s access to and use of service and twitter’s website. “You are responsible for your use of the services, for any content that you post to the services and for any consequences thereof. ... You should only provide content that you are comfortable sharing with others under these terms”. <https://twitter.com/tos>, accessed April 8, 2012.

Users of the cyber platforms, including Twitter, Facebook and LinkedIn, which host the platforms for the practice of cyber journalism, are bound by the terms of use and they can

only continue using the services under the agreement they sign before being admitted to use them. Twitter, for instance says:

All content, whether publicly posted or privately transmitted, is the sole responsibility of the person who originated such content. We may not monitor or control the content posted via the services and, we cannot take responsibility for such content. Any use or reliance on any content or materials posted via the services obtained by you through the services is at your own risk.

The findings of this study suggest that ISPs do not endorse, support represent or guarantee the completeness, truthfulness, accuracy or reliability of any content or communications posted through the services. The ISPs do not endorse any opinions expressed through the services either. Users are informed that by using their services, they are likely to be exposed to content that might be offensive, harmful, inaccurate, or otherwise inappropriate or in some cases postings that have been mislabelled or deceptive. Twitter in its terms and conditions of use absolves itself from liability of any content containing errors of omission, loss of damage incurred as a result of the use of any content posted, emailed or otherwise made available through the services or broadcast elsewhere. This implies that the originators of the content are solely responsible for the information that they post. Any suits that may arise from information posted on the Net will target the originators – cyber journalists.

Findings suggest that cyber journalists are responsible for their use of the services provided by ISPs, for any content that they provide and for any consequences that may arise from the distributed content, including the use of their content by other users and ISPs' third party partners. ISPs put it explicitly to all users that the services provider will not be responsible or liable for use of their content and that users “present and warrant that you have

all the rights, power and authority necessary to grant the rights granted herein to any content that you submit.” <https://twitter.com/tos>, accessed April 8, 2012.

Services offered by ISPs may contain links to third-party websites or resources. The service providers are not liable or responsible for the availability or accuracy of such websites or resources and that links to such websites or resources do not imply any endorsement by the service provider of such websites or resources or the content, products or services available from such resources or websites. Twitter declares in its terms and conditions of use: “You acknowledge sole responsibility for and assume all risk arising from your use of any such websites or resources”. LinkedIn on the other hand says: “LinkedIn disclaims all liability for identity theft or any other misuse of your identity or information”. ISPs are not liable for any defamatory, offensive or illegal conduct of users or third-party.

However, a ruling by a court of appeal in England and Wales in February 2013 puts the burden of liability on ISPs. The court ruled that Google could be liable as publisher for comments posted on its blogger platform if it fails to act promptly in response to notice of a complaint. The facts of the case are as follows: Mr Payam Tamiz, the applicant, is a former Conservative party local council candidate and law student. In early July 2011, Tamiz complained to Google about eight comments posted on the London Muslim blog, which he said were defamatory of him. The comments had been posted between 28 and 30 April 2011 and included false claims that Mr Tamiz was a drug dealer and a thief (Refer to Appendix 10).

On 11 August, after further email exchanges, Google passed on the complaint to the blogger. On 14 August 2011, some five weeks after the initial complaint to Google, all the comments complained of had been removed by the blogger. Mr Tamiz filed a case in the high court demanding compensation for damages that arose from the defamatory remarks, some of which were made by anonymous people in response to the original post by the blogger.

The High Court found that three of the comments were arguably defamatory but that on common law principles Google Inc. was not a publisher of the words complained of, whether before it was notified of the complaint or after such notification. If, contrary to that view, Google Inc. was to be regarded as a publisher at common law, defamation law would provide it with a defence, in particular because it took reasonable care in passing the complaint on to the blogger after it had been notified of it. At this point of his judgment, the high court judge also indicated his acceptance of a submission that the period between notification and removal of the offending blog was so short as to give rise to potential liability on the part of Google Inc. only for a very limited period, such that the court should regard its potential liability as so trivial as not to justify the maintenance of the proceedings. The judge held that five of the comments could be characterised in this context as "mere vulgar abuse" to which no sensible person would attach much, if any, weight. They included allegations that the appellant was a drug dealer, had stolen from his employers and was hypocritical in his attitude towards women.

Tamiz appealed the high court ruling and the major issues he raised, taking them in the order in which they were considered by the judge are (1) whether there is an arguable case that Google Inc. was a publisher of the comments, (2) whether, if it was a publisher, it would have an unassailable defence under section 1 of the 1996 Act, which would compare it with service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service. (3) whether any potential liability was so trivial as not to justify the maintenance of the proceedings. (Refer Appendices 10 and 11).

4.3.1 Law and jurisdiction

Cyber journalism transcends geographical boundaries, thereby causing challenges to states' media regulatory frameworks. Twitter's terms and conditions of use stipulate that any action related to law and jurisdiction will be governed by the laws of the state of California, without regard to or application of its conflict with the provisions of the state or country of residence of the user. LinkedIn on the other hand states:

Any disputes with LinkedIn arising out of or relating to the Agreement shall be governed by California law regardless of your country of origin or where you access LinkedIn, and notwithstanding of any conflicts of law principles. <http://linkedin.custhelp.com>, accessed May 15, 2012.

LinkedIn provides for the “dos” and “don'ts” to the users of their services. The “dos” include but are not limited to comply with all applicable laws, privacy laws, intellectual property laws and regulatory requirements. Others are providing accurate information and update it as necessary and use the services professionally. The “don'ts” include acting dishonestly or unprofessionally by engaging in unprofessional behaviour by posting inappropriate, inaccurate, or objectionable content, harass, abuse or harm another person, including sending unwelcomed communications to others using LinkedIn, share information of non-Users without their consent, (<http://linkedin.custhelp.com>).

It limits users from uploading, posting, emailing, or transmitting, making available or initiating any content that:

- Falsely states, impersonates or otherwise misrepresents your identity, including but not limited to the use of a pseudonym, or misrepresenting your current or previous positions and qualifications, or your affiliations with a person or entity, past or present.

- Is unlawful, libellous, abusive, obscene, discriminatory or otherwise objectionable (<http://linkedin.custhelp.com>).

Another ISP badoo, restricts users from posting insults, obscene content or pornographic material or any other material that may offend human dignity. “don’t upload tasteless and pornographic material”. (<http://badoo.com/terms>, accessed September 22, 2011).

The terms and conditions of use raise questions on the manner in which they will be implemented, obligations of individual states to ensure that offenders were arraigned in court and justice done to them. Another equally challenging issue is that societies’ laws, truths and ethics vary. It is challenging to use the laws of California against a suspect whose culture does not recognise the alleged offence.

4.4 The role of international law and conventions

In addressing Research Question 4, findings of this study suggest that Kenya, as signatory of the international law, international treaties and conventions, may borrow from those conventions that it is signatory to when formulating a regulatory framework for cyber journalism. Article 2 of the Constitution of Kenya 2010 recognises the international law and treaties signed by Kenya as part of the law. Article 2 (5) states: “The general rules of international law shall form part of the law of Kenya”. Subsection 6 states: “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”.

The Constitution, in Article 34, echoes provisions of United Nations’ Universal Declaration of Human Rights (UDHR) 1948 on freedom of media and speech. UDHR states that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”. Article 20 of the International Covenant on Civil and Political Rights recommends that “any propaganda for war shall be

prohibited by law. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” This study postulates therefore that it is therefore important to draw reference from international conventions when implementing the Constitution of Kenya 2010.

Majority of respondents recommended that it is prudent for Kenya to borrow from the international principles and conventions when implementing the Constitution of Kenya 2010. “There is a need for international benchmarks and best practices to guide the process of formulating a regulatory framework for cyber journalists” (traditional media practitioner respondent, May 4, 2012, Nairobi). This study recognises that the main aim of fundamental freedoms is to achieve equality of human beings and to enhance human rights, which are treasured in UDHR. Article 19 of the Declaration of Human Rights, states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and seek receive and impart information and ideas through any media and regardless of frontiers.” The Camden Principles, in extrapolating Article 19 of the UDHR, recognise that certain speech, for example intentional incitement to racial hatred, is so harmful to equality that it should be prohibited. The principles open up a ray of flexibility of the rights in order to set up rules prohibiting speech deemed offensive and intruding to people’s privacy.

The Camden Principles provide for such rules prohibiting speech but cautions that they should be narrowly defined to prevent any abuse of restrictions, including for reasons of political opportunism. Effective steps need to be taken to ensure that such rules are applied equitably for the benefit of all protected groups. In this regard, a case-by-case approach which takes into account context and patterns of vulnerability is important, especially on the part of judicial authorities. Such rules should be used only to protect individuals and groups. They should not be invoked to protect particular beliefs, ideologies or religions (Article 19).

4.4.1 Freedom of expression and cyber journalism

Freedom of media is based on the fundamentals of the Universal Declaration of Human Rights (UDHR). States worldwide are urged to spell out this right in their constitutions. Kenya as a member of the United Nations and a signatory to the UDHR guarantees freedom of media in the Constitution of Kenya 2010. Although cyber journalists are free to express their opinion without interference from the state or influential persons, they are not permitted to engage in acts which interfere with other people's human rights. This argument stems from the provisions in various international treaties, including the Universal Declaration of Human Rights. UDHR further recognises that disregard and contempt of human rights have occasioned barbaric acts which have angered the conscience of mankind. In order to achieve justice for all human beings, both the UDHR and the Constitution of Kenya 2010 require that journalists should avoid information that amounts to hate speech or advocacy for hatred. As cyber journalists enjoy their freedom of media, they must ensure justice for all. They should avoid intruding people's privacy, defaming someone or posting offensive messages on the cyberspace.

The Camden Principles on Freedom of Expression and Equality aver that communicators on cyberspace, like journalists of the traditional media have a right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. They are expected to pursue equality for all as they exercise their freedom of media. The Camden Principles on Freedom of Expression and Equality which are founded on the understanding that freedom of expression and equality are foundational rights, whose realisation is essential for the enjoyment and protection of all human rights as enshrined in the Universal Declaration of Human Rights. The CP state that it is only when coordinated focus and action

is taken to promote both freedom of expression and equality that both can effectively be realised.

Cyber journalists have the liberty to communicate ideas on the Internet. This is within the Internet Rights and Principles (IRP) which provide for every person's freedom to communicate ideas on the Internet. The IRP were formulated by Internet Rights and Principles Coalition (IRPC), an open network of individuals and organisations working to uphold human rights in the Internet environment, (<http://www.internetrightsandprinciples.org/org/site/campaign>). They have the right to universal and open access to the Internet's content, free from discriminatory prioritisation, filtering or traffic control on commercial, political or other grounds. While exercising this freedom on the Net, cyber journalists are, however, should not infringe on individual's life, liberty and security online. It is the responsibility of cyber journalists to ensure that as they enjoy their freedom of media, they uphold the liberties of other people.

The Geneva Joint Declaration on Freedom of Expression and the Internet (GJDFEI) recognises freedom of expression as a core element of democracy and for purposes of advancing development goals. This includes the principles of independence and diversity – both in its own right and as an essential tool for the defence of all other rights, as a core element of democracy and for advancing development goals.

The Internet is a forum that gives voice to billions of people around the world and therefore significantly enhancing their ability to access information, pluralism and reporting (GJDFEI). The power of the Internet in promoting the realisation of other rights and exercising of freedom of expression, which may be subject to limited restrictions as are prescribed by law and are necessary. For example, in order to prevent crime and the protection of the fundamental rights of others, there is a need for restrictions. But any such restrictions must be balanced and comply with international law on the right to freedom of

expression. However, concerns abound that efforts by states to respond to the need for “limited restrictions” even when done in good faith, fail to take into account the special characteristics of the Internet, with the result that they unduly restrict freedom of expression.

GJDFEI allows restrictions on freedom of expression on the Internet only if they comply with established international standards, including that they are provided for by law, and that they are necessary to protect an interest which is recognised under international law. When assessing the proportionality of a restriction on freedom of expression on the Internet, the impact of that restriction on the ability of the Internet to deliver positive freedom of expression outcomes must be weighed against its benefits in terms of protecting other interests.

Approaches to regulation developed for other means of communication – such as telephony or broadcasting – cannot simply be transferred to the Internet but, rather, need to be specifically designed for it. Greater attention should be given to developing alternative, tailored approaches, which are adapted to the unique characteristics of the Internet, for responding to illegal content, while recognising that no special content restrictions should be established for material disseminated over the Internet (GJDFEI). The declaration recommends self-regulation as an effective tool in redressing harmful speech, and should be promoted for the Internet.

The GJDFEI adopted on June 1, 2011 following a conference at the United Nations headquarters, Geneva. Rapporteurs of freedom expression and media from various organisations were involved in the deliberations leading to the declaration. The conference had representation from African Commission on Human and Peoples’ Rights (ACHPR), United Nations (UN) Organization for Security and Co-operation in Europe (OSCE) and the Organisation of American States (OAS).

States or any interested parties are not permitted to exercise mandatory blocking of entire websites, IP addresses, ports, network protocols or social networking. This is regarded an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards. It amounts to restriction of freedom of expression and a form of prior censorship when governments or commercial service providers impose content filtering systems which are not end-user controlled. African Charter on Human and Peoples’ Rights recommends that bloggers should not be forced to abide by the ethical codes or codes of conduct developed by traditional media, either directly or through incentive schemes. Bloggers should be given the opportunity to follow the ethical standards or voluntarily join regulatory bodies if they choose to do so. Search engines and social media platforms on their part, should be excluded from the definition of “relevant publishers”.

4.4.2 Journalism and criminal liability

The International Covenant on Civil and Political Rights General Comment No. 34 recommends that criminal liability in legal cases related to Internet content should be restricted to States to which those cases have a real and substantial connection, normally because the author is established there, the content is uploaded there and/or the content is specifically directed at that State. Private parties should only be able to bring a case in a given jurisdiction where they can establish that they have suffered substantial harm in that jurisdiction – the rule against ‘libel tourism’. Standards of liability, including defences in civil cases, should take into account the overall public interest in protecting both the expression and the forum in which it is made (CCPR general comment No34).

For content uploaded in substantially the same form and at the same place, limitation periods for bringing legal cases should start to run from the first time the content was uploaded and only one action for damages should be allowed to be brought in respect of that

content, where appropriate by allowing for damages suffered in all jurisdictions to be recovered at one time – the ‘single publication’ rule (GJDFEI).

Discrimination in the treatment of Internet data and traffic, based on the device, content, author, origin and/or destination of the content, service or application is outlawed. Internet intermediaries are obligated to be transparent about any traffic or information management practices they employ, and relevant information on such practices should be made available in a form that is accessible to all stakeholders.

4.4.3 Responsibility of states

States are obligated, with regard to freedom of expression, to promote universal access to the Internet. Access to the Internet is also necessary to promote respect for other rights, such as the rights to education, healthcare and work, the right to assembly and association, and the right to free elections. The International Covenant on Civil and Political Rights General Comment No. 34 recommends that any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with freedom of expression, (CCPR/C/GC/34).

Permissible restrictions should be content-specific whereas generic bans on the operation of certain sites and systems are not compatible with freedom of expression and media. It is also inconsistent with the fundamental guarantee of freedom of expression to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.

There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should

take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto (CCPR/C/GC/34).

Cutting off access to the Internet, or parts of the Internet, for whole populations or segments of the public (shutting down the Internet) can never be justified, including on public order or national security grounds. The same applies to slow-downs imposed on the Internet or parts of the Internet.

States should not impose extreme measures like denying individuals the right to access the Internet as a punishment. If taken, such measures should be justified only where ordered by a court, taking into account the impact of this measure on the enjoyment of human rights. Free flow of information outweighs the danger of misusing the Internet (Amsterdam Recommendations June 14, 2003). However, criminal exploitation of the Internet cannot be tolerated. Illegal content must be prosecuted in the country of its origin but all legislative and law enforcement activity must clearly target only illegal content and not the infrastructure of the Internet itself.

Traditional and widely accepted values of professional journalism, acknowledging the responsibility of journalists, should be fostered so as to guarantee a free and responsible media in the digital era (Amsterdam Recommendations June 14, 2003).

4.5 Preferred typology for cyber journalism regulation

Data gathered in response to Research Question 5 suggest that self-regulation is the most preferred regulatory mechanism for cyber journalism is self-regulation. This typology is supported by proponents of Social Responsibility theory which postulates that media should be free and responsible. The Constitution of Kenya 2010 guarantees freedom of media. This freedom is also guaranteed the International Law. Article 19 the United Nations Universal Declaration of Human Rights 1948 provides for the right to freedom of opinion and

expression, a right which includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. On the other hand Article 20 of the International Covenant on Civil and Political Rights prohibits any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Findings of this study suggests that cyber journalism, like the traditional journalism of newspapers, radio and television, need to be regulated. The data collected was in response to research Question 5, on the typology suited to regulate cyber journalism in Kenya. Findings, however, suggest that the regulation should not be prohibitive, amounting to censorship. The need for regulation is based on a need to protect people's reputation from being injured by journalists. Regulation, therefore, apart from setting the standards of practice of journalism, will offer remedy to those whose reputation may be in danger of being injured. Social responsibility theory explains that journalists or media should be regulated for public interest.

Besides injuring others through defamation, journalists are considered to be better in expressing themselves than the majority of members of the society and any laws to regulate journalism should protect those who are not as good as journalists in articulating their views. Regulatory mechanisms should also offer platforms to the disadvantaged to communicate to the public. Not all people can be journalists to defend their reputations when they have been injured by journalists. Some bloggers and other cyber journalists sometimes break the laws of media practice with impunity while hiding behind the veils of anonymity. Regulating media, both in the real space and the cyberspace creates order, respect for human dignity and improves the image of the profession and professionals among society members. However, governments should not impose criminal sanctions against cyber journalists. Instead of imposing criminal sanctions, government need to sponsor civil laws for regulating cyber journalism.

Frost (2007) defends freedom of media arguing that freedom of expression allows journalists to say what they want. However, limits must be put in place to prevent journalists from invading someone else's privacy, reputation, right for a fair trial, or to publish without a good reason (Frost 2007, p. 255). Cyber journalists should be guided by the laws of defamation, information privacy and moral responsibility. Internet does not change the responsibility of journalists. It only changes the platform on which journalists communicate.

Findings of this study support the limitations of the constitutional guarantee of media freedom. Respondents support Article 34 (5) that Parliament enacts legislation that provides for the establishment of a body, which © shall set media standards and regulate and monitor compliance with those standards. The standards should be applied for journalists in both the real space and the cyberspace. This is important because the laws are meant to protect journalists on one hand, from interference by government or political forces and on the other hand the subjects of their articles and their audiences. The laws shall spell out the penalties for offenders. Any penalties imposed on offenders should not be punitive to the extent of scaring away cyber journalists and thereby killing innovation and creativity on the blogosphere.

The Media Council of Kenya is the body empowered to set the standards of the practice of journalism in Kenya and it has developed the Code of Conduct for the practice of journalism. This is the body that is provided for in Article 34 (5) and it is anticipated that it is independent of control by government, political interests or commercial interests. It is expected to be a body that reflects the interests of all sections of the society and it has the mandate to set media standards and regulate and monitor compliance with those standards.

The part of this Article that matters most is to see whether the body to be set up will be independent – not serving the interests of parliament or the appointing authority, or the needs of media owners alone, but it should be in the public interest (media law expert, April 2012, Nairobi).

The Council is the body mandated by the constitution to ensure self-regulation of media, that is, “print and all other types of media” as guaranteed in Article 34. It is clear from the constitutional provisions and data gathered in his study that the role of the State in regulating journalism is minimal. A complaints commission established under the MCK hears and determines public complaints that are raised against journalists. Sometimes the commission has imposed penalties on journalists found guilty of various malpractices. This in one way prevents cases involving journalists to be taken to courts of law. However, states world over have intervened to enforce the law when media fail to regulate themselves in order to protect individuals as well as corporates against libel, defamation, intellectual rights, as well as ensuring that citizens can enjoy their basic freedoms of information and expression. The nitty-gritty of state intervention is expected only when dealing with the manner in which journalists deliver their content. It could intervene under circumstances where there is a need to protect the dignity of the society and a nation. The state can only monitor and regulate content online if it contains the don'ts specified in Article 33 (2) on hate speech and incitement to violence.

The ethical guidelines for the practice of journalism in Kenya require that journalists avoid using indecent content and pictures that may cause shock and grief. Findings of this study recommend that these guidelines be extended to the regulation of journalism on the cyberspace. Some respondents recommended that the state should develop a law that would give more teeth to Media Council of Kenya to block any site identified to publish what is deemed indecent content (IT expert, KII, May 14, 2012, Nairobi).

It is a requirement that one cannot show pornography on Television. But this does not cover the Internet because Internet does not come to you without you seeking its content. Broadcast comes to you whether you prod it or not and that must be regulated by the state. However, on the Internet, the individual visits the site, seeking the

information. That is your own choice and not the state's choice or the sender's choice. The state cannot intervene or regulate that. We at the same time cannot rule out the state intervention because children are accessing it (policy-maker interviewee, May, 2012, Nairobi).

Respondents opposed to state regulation suggested that the state should stay away from communication between citizens. Given the opportunity to regulate cyber journalism, the state is likely to censor media content. Citizens should be allowed to communicate any information that they want through the available channels of communication.

We do not want to see the tyranny of traditional journalism imported to cyber journalism, where issues like indecent pictures are not broadcast or published. This may amount to limiting the freedom of media by self-censorship, (ICT expert interviewee, May 12, 2012, Nairobi).

The state may intervene under certain circumstances to enforce laws that have been passed by parliament to regulate media. The dispersed nature of cyber journalists impedes self-regulation. Self-regulation cyber journalists can happen if among other things, they form an association and register it, set a code of conduct for themselves and put in place mechanisms of penalising the offenders.

Although it is desirable that cyber journalists regulate themselves, the concept is practically challenged. It is not easy to trace the roofs under which some of them work from, the way one could do for traditional journalism. Except for those working with established media houses, the rest deposit their information from under trees, libraries and even in public transport vehicles. They are dispersed in both time and space. It is unrealistic to come up with a body that brings them together, the way the Media council of Kenya would register journalists practicing in the country. Some of the barriers include the amorphousness of the practitioners.

The majority of respondents in this study said they did not visualise a situation where cyber journalism can regulate itself. Cyber journalists need training on the need for ethical practices and the law so that they can adopt them in order to serve the society for prosperity. Cyber journalism practitioners risk a backlash from society. Some respondents said the state may resort to use Internet Service Providers (ISPs) to regulate cyber journalism if the journalists themselves don't take steps to regulate their conduct. Journalists are usually asked to pull down unsuitable content and if they do not, they will be blocked from using the internet services, including employing punitive measures like closing down their sites. ISPs will also be required to collaborate with the stakeholders to ensure that journalism on the new platforms adheres to the law right from the country of origin to international levels.

4.5.1 Preferred regulatory framework for cyber journalism

Self-regulation is the preferred typology for media in Kenya, both traditional and the cyberspace. Out of 46 key informant interviewees, 30 respondents recommended self-regulation for cyber journalism, 10 supported co-regulation, 4 recommended the use of software, while 3 recommended state regulation. Out of the 29 participants of both VFGDs (Virtual Focus Group Discussions) and FGDs, 20 recommended self-regulation, 3 respondents supported co-regulation, only one recommended software regulation and none for state regulation. However, in this category of respondents, 5 recommended a hybrid of all the regulatory frameworks.

Self-regulation of media revolves around setting minimum standards that guide journalists to attain the highest professional standards. This leads to the attainment of responsible media that can be trusted by the public. On the other hand, such media are competent to make the rightful demands of the public from the government. A media house or a journalist that is characterised by punishments is often viewed as being irresponsible and therefore incredible. Self-regulation helps the media respond to legitimate complaints and

therefore correct the errors and mistakes that are a genuine concern of the public. Self-regulated media professionals conduct themselves professionally and maintain dialogue with the public (Frost, 2007).

The graphs below show the distribution of respondents to the preferred typology of regulating cyber journalism in Kenya:

Table 4.4 Distribution of respondents based on regulation typology they preferred

| Regulation typology | Interviews | FGDs and VFGDs | Total |
|---------------------|------------|----------------|-------|
| Self-regulation | 30 | 20 | 50 |
| Co-regulation | 10 | 3 | 13 |
| Software regulation | 3 | 1 | 4 |
| State regulation | 3 | 0 | 3 |
| Hybrid | 0 | 5 | 5 |
| Total | 46 | 29 | 75 |

As it is indicated in the table above, state regulation of cyber journalism was ranked the least popular among respondents. Responses observed that most governments pretend that they are regulating media whereas in practice they take measures that are equal to controlling mass media. Only 5 out of 75 respondents preferred state regulation of cyber journalism an equivalent of about 6.7% of the population studied. The same number of respondents, that is, 5 out of 75 preferred a hybrid of all the four typologies for regulation of cyber journalism.

A slightly higher number of respondents, six out of 75 supported the use of software to block blogs which disseminate what may be perceived to be indecent content. This is 8% of the total respondents. The majority of respondents, 50 out of 75, an equivalent of about 66.7 per cent recommended self-regulation for cyber journalism in Kenya.

Those who recommend self-regulation fear that if the state was allowed to regulate media it would end up censoring them. By so doing, it will negate the spirit of the Constitution of Kenya 2010 which provides for freedom of media. Some respondents argued that there was a need for new code of conduct, not as restrictive as that of old journalism of the newspapers, radio and television, for cyber journalism. However, the majority concurred that cyber journalism does not need a new code of conduct, different from that applied on the traditional media. “We should not re-invent the wheel. We should adjust the regulatory framework that is used by traditional media to accommodate cyber journalism,” (KII 7, May 21, 2012, Nairobi). Cyber journalists would be expected to take personal initiative to work within the code of conduct for the practice of journalism Kenya. Failure to do so, the state is likely to come up with laws that may turn repressive. Cyber journalists shall therefore be held accountable for their content, just like those of newspapers, radio and television.

Cyber journalists, just like the traditional media, sometimes injure people’s reputation with impunity. Despite the fact that the Internet-based media open up communication fora which have morphed from the dominant multi-million business empires controlled by editorial policies and house styles, the new practice needs some laws that guide it. Respondents argued that as cyber journalists exercise their right to freedom of media and freedom of expression, they should not step on other people’s freedoms or privacy or injure their reputation. “The society needs to identify laws to guide the cyber journalists. This is because they sometimes don’t respect human rights, they incite and at are sometimes, very abusive” (a journalist blogger, June 25, 2012, Nairobi.)

Cyber journalists are bound by the laws of defamation, information privacy and moral responsibility. The profession is expected to disseminate credible and accurate information to the public. Any laws therefore aimed at regulating this profession should help to create order in society. Software regulation, as discussed in detail in the literature review section, has

human figures behind it. The objectives of using software regulation must be stated clearly and whether it is a state decision or self-regulatory mechanisms recommendations. In this regard, ISPs are instructed to implement decisions made on particular content. It is however not likely to produce desirable results if code is used to disable information channelled through specific platforms like computers and the mobile telephone. A high number of respondents, both from Key Informant Interviews and Focus Group Discussions, think it is not necessary to regulate cyber journalism using software.

As indicated in the graphs above, the majority of respondents recommended self-regulation of cyber journalism. However, self-regulation for cyber journalism has its own challenges. They include the traceability of the journalists and lack of a professional body for them. This typology is advantageous because it enables cyber journalists to regulate themselves. “However, these journalists need an organisation that will bring them together for self-discipline,” (policy-maker interviewee, June 10, 2012, Nairobi.)

Unlike traditional journalism, cyber journalists send their content using mailing lists to their audiences. The purpose of Kenya Communications Amendment Act 2009 is to legalise online transactions. The Act demands that owners of content online take responsibility of what they publish on the Net. The Act empowers CCK to compel those who transact business online have a sense of ownership. “Since senders of messages give information of the institutions they represent or their websites, one cannot disown the information. This makes traceability of offenders online possible,” (communication expert, May 21, 2012, Nairobi).

The Kenya Information and Communications (Amendment) Bill 2013 was drafted to cause changes to the operations and name of CCK in order for the body to align itself to the Constitution of Kenya 2010. The Bill recommended that CCK becomes Communication Authority of Kenya (CAK). More importantly, the Bill declares CAK an independent body

that would among other roles ensure efficient management of the Internet. The authority is mandated to develop a framework for facilitating the investigation and prosecution of cybercrime.

Cyber journalists are bound by the guidelines set by the Media Council of Kenya if they aspire to enjoy the freedoms enjoyed by journalists working both in traditional media and online publications. It is imperative for bloggers to register with the MCK as required by law in order to work within the regulatory framework provided and protected by the constitution. The law requires that every journalist registers with the Media Council the body which sets standards for the practice of journalism and monitors compliance by journalists. Findings of this study suggest that although the laws of defamation (libel and slander), information privacy and moral responsibility can be used to guide responsible cyber journalism, challenges based on jurisdiction may hamper their application. For instance, it is not clear on the manner in which to select the court that will hear cases out of the jurisdiction of a state. At the time of this research, recommendations were made that offenders could be tried in the ISPs' home of origin, which is in the United States of America. Some respondents suggested that such trials be conducted in the jurisdictions where the offence was committed because what is on trial is content and not the technology used.

The Code of Conduct for journalists in Kenya stipulates that indecent content or pornography should not be covered by journalists. Journalists, however, need to be conscious that morality is not static. Morality is dynamic and it varies from one society to another. One needs to strike a balance so as not to stifle evolution of ideas or morality while at the same time upholding the moral values of society. Cyber journalists need to be cautious not to allow some section of society to impose their values on others through the media. They must not allow fundamentalism from any quarter to thrive in media. "Journalists, whether on the cyberspace or traditional media, should not impose moral values on their audiences.

Journalists need to understand that morality varies from one society to another and it is a sub-total of shared values,” (journalist interviewee, June, 20, 2012, Nairobi).

4.5.2 A strong case for self-regulation

Findings of this study suggest that media of any kind, whether traditional or cyber journalism, should regulate themselves. However, respondents had reservations on the manner of enforcing a regulatory framework on Internet-based communication. Basing their argument on the jurisdiction puzzle, some respondents believe it is not possible to trace offending cyber journalists. Other respondents however, argued that with improving technology, it is possible to trace the origin of content to the physical residence of the originators. Others argued that even with improved technology, it takes a longer period of time and resources to trace the origins of offending information online.

Respondents recorded their preference of regulatory frameworks for cyber journalism in Kenya in the following order: self-regulation, co-regulation, software-regulation, state-regulation and finally a hybrid of the former four typologies. It is through self-regulation that the ideals of freedom of media provided in the Constitution of Kenya 2010 can possibly be realised. However, freedom of media comes with some responsibility. For cyber journalists to regulate themselves, they need to form and prescribe to a professional body that operates within some standards of the practice of cyber journalism. The regulatory framework of traditional media of newspaper, radio and television should be applied to cyber journalism.

Therefore, cyber journalists may alternatively subscribe to the Media Council of Kenya. It is further anticipated that being the sole body mandated by the Constitution to set media standards and regulate and monitor compliance with those standards, MCK is required to be independent of control by government, political interests or commercial interests. It is not within the mandate of this study to establish whether the Media Council is independent of control by these forces but the researcher argues that the appointment of officials is required

to be so and reflect the interests of all sections of society. The Camden Principles support self-regulation in areas where it is effective and underlines it as the most appropriate way to address professional issues relating to the media.

If this does not happen, then the Government may sneak in, through parliament, a legislation that may lead to both the state and the industry regulating journalism in the country. This typology is what Grosz and Weber (2009) term as co-regulation. The duo explains that under such a regime, parliament sets the legal yardstick and levels the codification of the given principles into specific rules to private bodies. The government remains involved in monitoring the progress and effectiveness of the initiatives in meeting the perceived objectives. Such mixed approaches can serve legitimate state purposes as well as efforts of the private sector. The Media Council of Kenya, as a self-regulatory agent for journalism, therefore could easily become a conduit for co-regulation. Hans-Bredow-Institut and the Institute of European Media Law (2002) define co-regulation as a combination form, which is neither pure self-regulation nor command-and-control regulation, but rather based on stakeholders' on-going dialogue. In this form of regulation, the state limits its involvement to setting formal conditions for rule-making, but leaving it up to interested parties to shape the content. Non-official norms become part of the legislative order by being inserted into statutes

The findings further suggest that the state may get involved in the regulation of cyber journalism by enforcing the Constitution in case of defiance of both the constitution and the codes of ethics for the practice of journalism in Kenya. State regulation can be justified in an event where cyber journalists become rogue with no established guidelines for them. In an event that cyber journalists fail to agree to work within some regulatory framework, which is self-regulation, the state is likely to intervene to offer the way and this may lead to either through co-regulation, software regulation or state regulation.

4.5.3 Towards software regulation

The findings of this study suggest that offensive material can be prevented using code. However, since ISPs are not engaged in filtering or monitoring what the users post, it remains difficult to use this form of regulation to block what is deemed illegal or indecent content. The remedy in such a scenario would be the penalties that have been prescribed by ISPs on prospective offenders Online. This form of regulation is unpopular among Kenyans as the statistics of this study confirm. Only 8% of the respondents supported the use of software to block offensive content posted by cyber journalists.

Regulation by architecture or code, according to findings of this study, is the third popular way of regulating cyber journalism. Respondents who support this form of regulation say it should be applied only when dealing with offensive information. Data collected in this study suggests that illicit content should be filtered from reaching vulnerable groups. The Geneva Declaration, the Amsterdam Recommendations on Freedom of Media caution against blanket blockage of content online.

On filtering and blocking information, the Declaration cautions against mandatory blocking of entire websites, IP addresses, ports, network protocols or social networking which it terms an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse.” (Amsterdam Declaration June 14, 2003).

The European Court of Human Rights (EcrHR), in December 2012, reinforced the right of individuals to access the internet, in a ruling against wholesale blocking of online content. The court asserted that the internet “has now become one of the principal means of exercising the right to freedom of expression and information.” A court in Turkey had issued an injunction blocking access for all Turkish-based Internet users to the entire Google Sites domain, supposedly to block access to a single website which included content deemed

offensive to the memory of Mustafa Kemal Atatürk, the founder of the Turkish republic. An appeal was filed in the EcrHR by the owner of an unrelated academic website that was also blocked by the order, arguing that such an interference with the free flow of information online amounts to “collateral censorship.”

Turkish courts had initially turned down appeals against the injunction arguing that the blanket ban was reasonable because it was not possible for the authorities to block a single Google-hosted site. The ruling, which was the first by an international tribunal on wholesale blocking of internet content, is seen as a very significant precedent. The court averred that access to online content is a fundamental right, and that it can only be restricted in exceptional cases, subject to full judicial review.

The judgment further made clear that the Turkish courts should have had regard to the fact that such a measure would render large amounts of information inaccessible, thus directly affecting the rights of internet users and having a significant collateral effect. The appeal had been filed in the ECHR by the Justice Initiative, part of the Open Society Foundations which uses law to protect and empower people around the world.

<http://www.opensocietyfoundations.org/press-releases/european-court-rules-against-blanket-internet-access-ban> accessed December 20, 2012.

4.5.4 State regulation

Data collected from interviews suggest that state regulation is undesirable for journalism practice in Kenya. This is because state may introduce controls over media and therefore negate the constitutional guarantee for freedom of media. State control has been witnessed in repressive regimes like China and North Korea, where state machinery shut down website and blogs that do not conform to what the respective governments view as excesses of the media. Such states go beyond regulation of media to censorship and blatant violation of the principles of freedom of expression and media. Findings therefore suggest

that the government should not regulate media of any kind, that is, the traditional media of newspapers, radio and television and cyber journalism. Findings suggest that the state can only be involved in tracing and prosecuting offenders beyond the geographical jurisdiction. The state has the capacity to trace offenders across the geographical jurisdictions using International Telecommunications Union (ITU) and International Police (Interpol).

These findings are not entirely new. Wu, (2003) disagrees with the proposition by Lessig (1999) that code is superior to other ways of regulating the Net. Wu argues that code cannot be equivalent to law, basing his argument on compliance as opposed to blocking information from reaching people. “The mixed compliance pattern finds little explanation in the concept that ‘code is law’ or in notions that technological self-help can offer a substitute for legal systems (Wu, 2003 p. 681). He therefore supports the administration of law, since it would be enforced by agencies.

4.5.5 Co-regulation

Palzer, (2002) defines co-regulation as a system with elements of self-regulation as well as traditional public authority regulation. Hans-Bredow-Institut and the Institute of European Media Law define co-regulation as a combination form, which is neither pure self-regulation nor command-and-control regulation. This form of regulation is based on stakeholders’ on-going dialogue. The state limits its involvement to setting formal conditions for rule-making, but leaving it up to parties to shape the content. Non-official norms become part of the legislative order by insertion into statutes. This is an equivalent of the Media Council of Kenya, which the constitution provides for in Article 34 (5c).

Findings of this study, particularly data obtained from FGDs, VFGDs and interviews suggest that co-regulation is appropriate for cyber journalism, in instances where the statutory regulator, the Kenya Media Council fails to ensure compliance to the set standards for the practice of journalism in Kenya. Respondents supported the Media Council’s role as a co-

regulator as well as a self-regulating agent for media based on the knowledge that there is a need for responsible practice of journalism on the Net within the constitutional provisions for freedom of media and the need for protection of other people from excesses of journalists. Participants in VFGDs proposed that since cyber journalists are part and parcel of news media and there is a need for them to adhere to the principles of the practice of journalism in Kenya. They also suggested that MCK should expand its membership recruitment to cyber journalists. By so doing, the MCK will itself obey the provisions of the Constitution of Kenya 2010 Article 34 (5 b) “establishment of a body, which shall reflect the interests of all sections of the society”.

4.5.6 Cyber journalism and professionalism

Although the platforms of the practice of journalism have changed drastically in the digital era, journalists are obligated to disseminate information for the common good of society. The freedom of media guaranteed by the Constitution of Kenya 2010 (Article 34) and the freedom of expression – Article 33 (1), and qualified by Article 33 (2) prescribes for responsibility and restraint when exercising these freedoms. Respondents in both interviews and FGDs feel that the constitutional provisions, especially Article 33 (2) are not in any way limiting freedom of media but explaining the responsibility that comes with that freedom. Democracy world over requires that freedoms should be exercised with responsibility. Therefore, it is the responsibility of cyber journalism practitioners to exercise restraint when communicating.

In cyber journalism, some citizens with no training in journalism have taken up the role of disseminating information. It is evident from the findings of this study that out of panic, journalists tried various means to reinvent themselves to counter cyber journalists’ timeliness of breaking news. Findings of this study suggest that cyber journalists with or without journalistic training ought to be guided by regulatory frameworks and the ethical

values of the profession. Their works must be directed towards achieving the common good of society as opposed to narrow and parochial interests of individual journalists.

Cyber journalists have no right to perpetuate hate speech. The constitution of Kenya succinctly puts it, that the freedom should not include propaganda for war, incitement to violence, hate speech or advocacy of hatred – Article 33 (2). Journalists are not expected to be hate mongers, whether on the cyberspace or traditional media of the newspaper, radio or television.

Cyber journalists are bound by the norms and values of the wider society and it is their duty to ensure that they operate within the norms. These norms come with punishment and rewards, which they should choose to follow or not. They will face the law that backs the norms (a journalist interviewee, May 20, 2012, Nairobi).

Cyber journalists seized the opportunity presented by technological innovation of the Internet. With the implementation of the new constitution which guarantees freedom of media coupled with the technological innovations which free journalists from the rigours of publishing through the established multi-million media houses some of them have exhibited behaviours as though they are not bound to the rules and regulations of the practice of journalism. Their claim to be professionals yet they do not want to work within the laws and ethical principles that guide professionals in the field is unacceptable. They are fighting to cut a niche of the market for themselves, yet, they want to appear to be amorphous. Data collected from both interviews and FGDs suggest that cyber journalism practitioners need to organise themselves and work within the regulatory frameworks that guide journalism. It will be self-destruction for cyber journalists to ignore the constitutional prescription and guarantees of freedom of media and freedom of expression.

Respondents recommended that the ethical standards for the practice of traditional journalism should apply to cyber journalism. It is admissible that the speed by which news

and information is disseminated in the cyberspace is relatively high compared to old journalism. News organisations in this regime were pressured to release information with speed, without the necessary journalistic checks like verification and balance. The pressure on journalists comes as they struggle to ensure that they reach the target audience first enough, earlier than their competitors. Cyber journalists ought to separate rumours from facts. Continued presentation of non-factual and unconfirmed reports will lead to subjugation of the audiences from the communicators. When this happens, the society will not have realised the common good through the journalistic practices and therefore will call for accountability by cyber journalists on their content online. In the current regime, cyber journalists lack in-depth analysis and they fail to adhere to the principle of objectivity. Findings suggest that cyber journalists need to engage the public deeply by giving information that trigger their thoughts to development. The journalists also need to carry on into the cyberspace the values of journalism practice.

Some respondents suggested that cyber journalists who promote hatred with some posting information on the Net without verification and with nuances of hatred. Journalists of all media, whether reporting for a newspaper, radio, TV or running a blog, need to be guided by values like accuracy, fairness, integrity, respect to privacy, independence, accord their audiences opportunity to reply, accountability and protection of children.

4.5.7 Guidelines for media practice in Kenya

The Media Act 2009, one of the laws that stirred media practitioners in Kenya, outlines the code of conduct of those operating the industry. The principal object of the Act is to provide for the establishment of the Media Council of Kenya and the Media Advisory Board, bodies charged with the responsibility of regulating the practice of journalism in Kenya. In its memorandum, the Act states that its aim is to create a framework that would allow journalists and other media practitioners to exercise their freedom freely and

responsibly in a sound and professional manner and to promote self-regulation and accountability in the media industry. The Media Council of Kenya is established as a body corporate while the Media Advisory Board is established as a non-corporate body. The law also provides for the appointment of the Secretary of the Council who is the chief executive officer of the Council, and whose responsibility is the day to day management of the affairs of the Council.

Clause 29 of the Act provides for the formation of a Complaints Committee as the body charged with the responsibility of hearing and determining disputes that may arise in the media industry. It at the same time empowers the Complaints Committee to establish a panel to hear and determine any matter on its behalf. Clause 36 provides for the appeal to the Media Council from any decision of the Complaints Committee by any party aggrieved by such decision.

Clause 38 of the Act provides for the manner in which the media is to inform the public of issues of public interest. It also obligates media practitioners to maintain high professional standards having due regard to the Code of Conduct of journalists. Clause 39 provides for the accreditation of foreign journalists by the Media Council while clause 40 empowers the Minister for the time being responsible for information and broadcasting to make rules for the better carrying into effect the provisions of the Bill once enacted into law.

This study observes that the restrictions or terms of practicing journalism in Kenya by the Act are not enforceable on cyber journalism. The researcher investigates the manner in which cyber journalism will be regulated in accordance with the theoretical framework informing this study.

The Third Schedule of the Act stipulates how journalists should conduct themselves while in business. One of the major issues raised in accuracy and fairness as the fundamental objective of a journalist. Their stories must be unbiased and on matters of public interest.

Comments should be obtained from anyone who is mentioned in an unfavourable context. Corrections must be carried promptly whenever it is recognised that an inaccurate story has been published. It requires that an apology be published or broadcast whenever appropriate in such a manner that the Media Council may specify. The law proscribes provocative and alarming news and information headlines which it requires to justify and reflect the story printed under them. It prohibits publication of stories that lack accuracy and fairness.

It prohibits publishing obscene, vulgar or offensive material unless such material contains a news value which is necessary in the public interest. Publication of photographs showing mutilated bodies, bloody incidents and abhorrent scenes should be avoided unless the publication or broadcast of such photographs will serve the public interest.

Journalists should treat all subjects of their coverage with respect and dignity, showing compassion to victims of crime or tragedy. They should seek to understand the diversity of their community and inform the public without bias or stereotype and present a diversity of expressions, opinions, and ideas in context. Analytical reporting should be presented based on professional perspective not personal bias.

On the independence of journalists, the law requires that they defend the independence of all journalists from those seeking influence or control over news content. To achieve this, journalists should gather and report news without fear or favour, and resist undue influence from any outside forces, including advertisers, sources, story subjects, powerful individuals and special interest groups. They should resist those who would buy or politically influence news content or who would seek to intimidate those who gather and disseminate news. Journalists are required by the law to determine news content solely through editorial judgement and not the result of outside influence. They should resist any self-interest or peer pressure that might erode journalistic duty and service to the public. The law stipulates that journalists should recognise that sponsorship of the news should not be

used in any way to determine, restrict or manipulate content. Media practitioners should refuse to allow the interests of ownership or management to influence news' judgement and content inappropriately.

The Act requires journalists to present news with integrity and decency, avoiding real or perceived conflicts of interest, and respect the dignity and intelligence of the audience as well as the subjects of news. To achieve this objective, journalists should identify sources of the news they publish or broadcast. Confidential sources should be used only when it is clearly in public interest to gather or convey important information or when a person providing information might be exposed to harm by naming him or her. Unnamed sources should not be used unless the pursuit of the truth will best be served by not naming the source who, should only be known by the editor and reporter. When material is used in a report from sources other than the reporter's, these sources should be indicated in the story.

Media practitioners should clearly label opinion and commentary, use technological tools with skill and thoughtfulness, avoiding techniques that skew facts, distort reality, or sensationalise events, and use surreptitious news gathering techniques including hidden cameras or microphones, only if there is no other way of obtaining stories of significant public importance, and if the technique is explained to the audience. On the same breath, journalists should not pay news sources that have vested interest in a story, accept gifts, favours or compensation from those who might seek to influence coverage, engage in activities that may compromise their integrity or independence.

The requires journalists and media practitioners to be accountable for their actions to the public, their profession and themselves by actively encouraging adherence to the standards, responding to public concerns, investigate complaints and correct errors promptly, recognising that they are duty-bound to conduct themselves ethically.

When covering news, views or comments on ethnic, religious or sectarian dispute, journalists should verify the facts and present them with due caution and restraint with intent to create an atmosphere congenial to national harmony, amity and peace. Provocative and alarming headlines should be avoided. News reports or commentaries should not be written or broadcast in a manner likely to inflame the passions, aggravate the tension or accentuate the strained relations between the communities concerned. Equally so, articles or broadcasts with the potential to exacerbate communal trouble should be avoided.

While on the duty of collecting information, journalists should generally identify themselves and not obtain or seek to obtain information or pictures through misrepresentation or subterfuge. Subterfuge can be justified only in the public interest and only when material cannot be obtained by any other means. When money is paid for information, serious questions can be raised about the credibility of that information and the motives of the buyer and the seller. Therefore, in principle, journalists should not receive any money as an incentive to publish any information.

A fair opportunity to reply to inaccuracies should be given to individuals or organizations when reasonably called for. If the correct request to correct inaccuracies in a story is in the form of a letter, the editor has the discretion to publish it in full or in its abridged and edited version, particularly when it is too long, but the remainder should be an effective reply to the allegations. The public's right to know should be weighed against the privacy rights of people in the news. Journalists should stick to the issues. Intrusion and inquiries into an individual's private life without the person's consent are not generally acceptable unless public interest is involved. Public interest should itself be legitimate and not merely prurient or morbid curiosity. The law defines privacy as including a person's home, family religion, tribe, health, sexuality, personal life and private affairs, except where these impinge upon the public. In cases involving personal grief or shock, inquiries should be

made with sensitivity and discretion. In hospitals, journalists should identify themselves and obtain permission from a responsible executive before entering non-public areas of hospitals or similar institutions to pursue enquiries.

Journalists should not use financial information they receive in advance for their own benefit, and should not pass the information to others. Journalists should not write or broadcast about shares, securities and other market instruments in whose performance they know they or their close families have a significant financial interest, without disclosing the interest to the editor. Journalists should not buy or sell, directly or through nominees or agents, shares or securities and other market instruments about which they intend to write in the near future.

A reporter could acquire a large amount of the company's shares and likely make a profit if that were the case. But the reporter, and the newspaper, would also lose the trust of the reader if the trade was disclosed (Roush 2004, p. 42).

The reality is that government participation in regulating the Internet is necessary. Given the new economic and geopolitical environment, finding the right balance between an open, networked system and the security of a more closed environment requires significant participation by government. Although governments do not all share the same values, they are the only institutions that can provide stability and a place for debate over what public values need to be protected. These issues are significant policy questions that require democratic resolution, not just technical matters that can be left to experts. Chen (2000) views cyber journalism as a globalisation agent, which, goes beyond breaking limitations to communication and realises a global culture, which is desirable in a globalised community. "Skill in global competency fosters within individuals multiple, simultaneous identities in terms of culture, ethnicity, race, religion, nationality, and gender. It transforms us from mono-cultural persons into multicultural persons and functions to nourish a human

personality in which we are aware of our multiple identities and are able to maintain a multi-cultural coexistence in order to develop a global civic culture (Chen, 2000 pp1-2).As the society embraces cyber journalism, the population of Kenya is moving from the enclaves of local rural culture to matters global. In this new dispensation, no one can exist without another and no culture that can exist by its own. The community is inclusive

Even as the new Constitution provides for freedom of media, parliament is given the mandate to come up with regulations that will ensure that the freedom is exercised fairly. This study investigates the regulations that Parliament will pass for cyber journalism.

4.5.8 Ethics as a complimentary measure to regulation

The fundamental objective of journalism is to serve the people with news, views, comments and information on matters of public interest in a fair, accurate, unbiased, and in a decent manner and language. A reasonable definition of a good journalist is one who gathers, in a morally justifiable way, topical, truthful, factually-based information of interest to the reader or viewer and then publishes it in a timely and accurate manner to a mass audience (Frost, 2007 P. 11). Findings of this study recon that in order to enjoy media freedom journalists are required to follow journalism ethics when collecting, processing and disseminating information. It is incumbent upon them to ensure authenticity of the news, use of restrained and socially acceptable language, objectivity and fairness in reporting and keeping in mind its cascading effect on the society and on the individuals and institutions concerned.

Findings suggest that ethics is a form of restraint that supplements law and regulations. Media world over have voluntarily accepted that codes of ethics should cover honesty and fairness, duty to seek the views of the subject of any critical reportage in advance of publication, the duty not to falsify pictures or to use them in a misleading fashion, duty to provide an opportunity to reply to critical opinions as well as to critical factual reportage.

Objectivity, respect for privacy, not to discriminate or to inflame hatred on such grounds as race, nationality, religion, or gender, not to endanger people and general standards of decency and taste.

Ethical standards recommended for cyber journalism in this study are based on both teleological and deontological schools of thought. The two schools explain that the practice of cyber journalism can only be considered to be morally right if it produces the greatest possible balance of good over evil. Findings of this study recommend journalism ethics as an imperative in the practice of cyber journalism. Teleological theories would require that cyber journalists publish information based on its usefulness, based on the principle of utilitarianism which subscribes to the rightful or wrongfulness of any action can be judged in terms of its consequences.

The value of information published by journalists, whether online or offline should be determined, as Teleologists argue, by the consequences they produce. A journalist's work is therefore considered morally right if it leads to better consequences, a greater balance of good over evil than any alternative act (Kimmel 1998 p. 44). It is therefore incumbent upon cyber journalists to make their writing achieve good as opposed to evil. By so doing, they would cause less harm as compared to pain among their information sources and audiences. A journalist has to do that act that promotes the greatest good, happiness, or satisfaction for the most people, concomitant to the ideals of the Principle of Utility of John Stuart Mill.

Deontologists' on the other hand base their argument on the consideration of other factors other than consequences. A journalist's work, therefore, is not morally good just because of their effects on human welfare, but rather because they keep a promise, show gratitude, demonstrate loyalty to an unconditional command, and the like, (Kimmel, 1998 p. 44).

The provision in the Constitution of Kenya 2010 for the freedom of media does not extend to propaganda for war, incitement to violence, hate speech, advocacy for hatred and

the respect of the reputation of others may be achieved if cyber journalists publicise information which is useful and whose consequences are good as opposed to evil. The same prescription is found in the Article 20 of the International Covenant on Civil and Political Rights: “Any propaganda for war shall be prohibited by law. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

Findings of this study suggest that a journalist on the cyber space, like journalists in the traditional media shall be guided by ethical principles. The principles help them to engage in activities that do not harm the subjects they write about and avoid unnecessary trivia which may bring to question their credibility. Respondents recommended the adoption of the ethical values for the practice of journalism in traditional journalism to guide journalism on the Net. The ethical values are found in the Media Act 2009.

Aristotle’s contention in the Golden Mean (Frost 2007, p. 14) that the function of human beings was to pursue happiness or ‘Eudaimonia’ (usually translated as flourishing) is worth emulating by journalists. According to this theory, to achieve happiness, one should live moderately – one should neither live to excess nor to frugality but in moderation somewhere between the two. The Media Council of Kenya states its mission as to safeguard media freedom, enhance professionalism and arbitrate media disputes. The Council is composed of representation from the Media Owners Association, the Kenya Union of Journalists, Editor’s Guild of Kenya, Public Relations Society of Kenya, Kenya Correspondents’ Association, Law Society of Kenya, Kenya News Agency, Kenya Institute of Mass Communications, and public universities. All those institutions are by association, members of the MCK. It is therefore clear that by the time of this study, bloggers have no association and if it exists then it has no representation in the Media Council.

Key among the ethical principles for the practice of journalism are truthfulness, honesty, and reason as essential to the integrity of communication. The US Society of Professional Journalists (SPJ) spells out the duty of a journalist is public enlightenment as the forerunner of justice and the foundation of democracy by seeking truth and providing a fair and comprehensive account of events and issues. Conscientious journalists from all media and specialties strive to serve the public with thoroughness and honesty. Professional integrity is the cornerstone of a journalist's credibility. The ethical values have come to be accepted and adopted by journalists worldwide.

Journalists are required by law, professional ethics and regulatory mechanisms to be honest, fair and courageous in gathering, reporting and interpreting information. Key among the obligations of a journalist is to minimise harm. This requirement resonates well with the theories of ethics and the requirement by the Constitution of Kenya 2010. Ethical journalists ought to treat sources, subjects and colleagues as human beings deserving of respect.

Journalists are expected to show compassion for those who may be affected adversely by news coverage, use special sensitivity when dealing with children and inexperienced sources or subjects. They ought to be sensitive when seeking or using interviews or photographs of those affected by tragedy or grief: Recognise that gathering and reporting information may cause harm or discomfort. In pursuit of news, they should shun arrogance; recognise that private people have a greater right to control information about themselves than do public officials and others who seek power, influence or attention. Only an overriding public need can justify intrusion into anyone's privacy. They must show good taste, avoid pandering to lurid curiosity, be cautious about identifying juvenile suspects or victims of sex crimes, be judicious about naming criminal suspects before the formal filing of charges, and balance a criminal suspect's fair trial rights with the public's right to be informed (See Appendix 6.)

Findings of this study indicate that not all content creators/curators in the cyberspace are trained journalists and not all of them hold to the ethical principles that guide the profession. The majority are not organised and many at times host their content outside the legal jurisdiction where the information is used or read. However, some webbloggers who post journalese information on their areas of specialisation are likely to be guided by the ethical principles of that profession. For instance, medic bloggers are guided by medical ethics, while engineers, teachers, psychiatrists and so forth may be guided by the ethical values of their professions. This category frequently writes columns in newspapers and host programmes on radio and television stations.

Cyber journalists need to operate within other norms that bind the societies they work in. These norms come with punishment and rewards, which they should choose to follow or not. The Constitution of Kenya 2010 prescribes the rules of the practice of journalism and cyber journalists to follow them. The Aristotelian principle of the Golden Mean and the teleological theories in general come to play – cyber journalists need to strive to balance between pleasure and pain when collecting and disseminating information. They ought to weigh the options available and decide on the average of the extreme actions. Hate mongers on the Internet may be subjected to laws other than media law and regulatory frameworks. Journalists need to observe professional ethics, whether one is writing for virtual media or the traditional media. Cyber journalists need to subscribe to some ethics, principles, values and it is their responsibility to adhere to those values. As Kant argues, moral thinking, the reasoning and judgement which inform and guide their action ought to be morally good: I ought to avoid false promises. Such a judgement is complete in itself and does not need a hypothesis or tacit conditioning – that is they are categorical. It is therefore the contention of this study that journalists ought to behave morally and respect other people's privacy as they practice

their profession online because that is what they ought to do. The moral law demands that men act justly without hypothesising their action.

Journalists need to disseminate information within the “maxim through which you can at the same time will that it should become a universal law” (Kemp, 1958 p. 63). This is, according to Kant, the law of nature which is an illustration of the moral law. All codes of conduct for journalism practice are derived from this very moral law. Mill, in the golden Mean, expects that cyber journalists should not only be guided by the constitutional freedom of media but also determine the content they post on the cyberspace by taking the middle ground of the two extremes of freedom of communication and the requirement of respecting other people’s freedoms. Wattles (1993) argues that the rule “Do to others as you want others to do to you” evolved in Greek culture to become the most widely recognised formula of natural law ethics. The rule of Utility on the other hand, requires that journalists do not cause pain to other members of society in their line of duty. This rule will be realised when cyber journalists embrace as their guide the three philosophical contentions of the Categorical Imperative, the Golden Rule and the Rule of Utility. Wattles traces the development of this rule, giving its relevance in today’s ethics for professionals:

Homer anticipated the golden rule; Herodotus recorded it as a moral commitment with political implications; the sophist Isocrates used it as a counsel of prudence within the popular tradition of repaying good with good and harm with harm; Plato used golden-rule thinking with a degree of irony and had limited use for a related maxim; Aristotle adapted the rule for his concept of friendship; and the Stoics extended its scope so that it became a universal norm of human relationships (Wattles, 1993 p. 69).

Cyber journalists, like traditional journalists, ought to follow the ethical values of the profession which require them to avoid harm to others. Virtue is the guiding principle to morality and ethical behaviour. Stocks (1931) informs: “For virtuous conduct requires according to Aristotle a right state of the intelligence as well as of the character, and it is the

development of character that is to be described as a mean, not that of the intelligence. Now character lives in its expression, which is action,” (Stocks, 1931 p. 166). Therefore a journalist is expected to be intelligent enough in order to develop a character that understands that doing the right thing is an obligation, which is not only moral but imperative because it is the right thing to do.

4.6 Summary

This chapter has presented, analysed and interpreted findings, based on the five research questions of the study. It has analysed and interpreted findings on the implication of Article 34 as read together with Article 33 (2) of the Constitution of Kenya 2010. The chapter demonstrates that the limits of media articulated in Article 33 (2) are not meant to stifle media freedom which is guaranteed in Article 34 of the constitution. It is meant to balance between freedom of media and protection of the rights of other individuals so that they are not infringed on by media.

It is evident from data presented and analysed in this chapter that cyber journalism challenges regulatory mechanisms used by traditional media. Cyber journalism content transcends geographical boundaries, therefore causing challenges of regulation based on jurisdiction. Other challenges include traceability of some bloggers, lack of organisation for cyber journalists and lack of knowledge of the rules of operation as journalists among some practitioners.

Internet Service Providers have provided terms and condition of using their platforms. Some of the conditions address pertinent issues regarding how to confront regulatory challenges caused by cyber journalism. ISPs advise users to take full responsibility of content they distribute on the Internet. This implies that cyber journalists are expected to own the content they post on the Internet. The data analysed in this section answers Research Question 3.

In regard to Question 4, the chapter informs that the Constitution of Kenya 2010 recognises the international law and treaties the state has signed. This means that the international law and treaties can be used as part of the laws of Kenya. The chapter presents an analysis of some of the laws and treaties which are relevant to media freedom and regulation of content on the Internet.

The preferred regulation typology for cyber journalism is self-regulation. This chapter has extensively analysed and interpreted findings on Research Question 5 as what respondents preferred as the best suited of self-regulation, co-regulation, state regulation and regulation by architecture.

CHAPTER FIVE: SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.0 Overview

Although the Constitution of Kenya 2010 guarantees freedom of media, the same law limits the freedom for the sole purpose of holding journalists accountable for what they publish. The constitution anticipates that journalists respect the rights and reputations of other members of the society. The guarantees and limitations are not unique for Kenya but also states worldwide. Such laws are formulated for the protection of national security, public order, public health or morals (Butch and Edstorm 2012). This chapter presents conclusions and key recommendations on media freedom and regulation of cyber journalism in Kenya. It is clear from findings analysed and presented in chapters Four, Article 34 is a substantive article of the Constitution of Kenya 2010 which provides the foundation of freedom of media. Article 33 (2), to the contrary, is a proviso, which strikes the balance between the freedom of media and the need for journalists to pursue the common good of the society. In retrospect, the constitution requires that all media be regulated. In this study, self-regulation stands out as the preferred typology for cyber journalism in Kenya.

5.1 Implications of the study

The study has policy, theoretical and practical implications. On the policy front, study noted that freedom of media within the context of the Constitution of Kenya 2010 carries with it certain responsibilities. Whereas Article 34 provides for freedom of media, Article 33 (2) requires that journalists pursue the common good of society as opposed to individual interests. Any policies formulated to regulate the practice of journalism, therefore, should endeavour to pursue common good over private interests.

This study helps protagonists in the media industry, that is, policy makers, journalists, media owners and other interested parties, to understand that cyber journalism is part of the

media whose freedom is guaranteed by the constitution. Article 34 (1) defines media as “electronic, print and all other types of media”. Therefore, since the constitution provides for freedom of all media, the law anticipates that all forms of media be regulated. Since cyber journalists, like all other journalists enjoy freedom of media guaranteed by the constitution, they should submit themselves for regulation.

The government, regulatory bodies and policy makers are expected to develop laws that protect the freedom of media guaranteed by the constitution while at the same time guarantee the general public protection from any excesses by journalists. This study recommends that in any contentious circumstances over media freedom and its limitations the substantive law should triumph over the proviso.

Journalists are not allowed to malign other people under the pretext of exercising freedom of media. The law requires that journalists act responsibly when they exercise their constitutionally guaranteed freedom. Journalists of all kinds – traditional or cyber journalists – should be subjected to the laws that regulate media in Kenya. The Kenyan jurisprudence on the other hand, should enhance freedom of media with the aim of achieving the common good of the society. The jurisprudence should give media large latitude such that even if the information published turns out to be incorrect, they are not persecuted in a bid to sanctify privacy in a defamation suit. Defences of defamation, such as good faith and truth, should be given a chance. The burden should remain on the applicant to prove that the media went out maliciously to defame them. If the journalist is able to say that the information published came from a source and that he or she had no reason to doubt its veracity, then that should be considered a valid defence. It is indeed the role of journalists to investigate and publish information on members of the public. They should be given latitude to play this role. This role is protected by the law to make public figures, to account for their actions and speech.

On the other hand, it is important for journalists to bear in mind that freedom of media carries with it duties and responsibilities. Journalists, whether in traditional media or on the cyberspace may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and all these are necessary in a democratic society. However, such restrictions may happen in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others.

The Constitution of Kenya 2010, the International Law and other treaties anticipate that when enjoying freedom of media, practitioners should respect other people's freedoms and avoid propaganda for war, incitement to violence, hate speech and advocacy for hatred. It is therefore imperative for cyber journalists to work within the freedom and limits of media as provided in the constitution. States and parties responsible for the regulation of cyber journalism on the other hand, should be guided by the constitution and the International Law.

This study, however, points out that a heavy-handed approach to regulation of journalism and media may discourage innovation by individual users. A hands-on approach by regulators, be it self-regulation, co-regulation, state regulation or regulation by architecture, carries the danger of undermining the public duties of the media. Such a move is likely to lead to sloppy and skewed political discourses.

5.2 Media freedom

Freedom of media is a constitutional liberty in Kenya. The constitution anticipates that the government and other powerful forces should not exercise control over or interfere with any person engaged in the production or circulation of any publication or dissemination of information through any medium. The constitutional protection of freedom of media explicitly says that media shall be independent of control by government, political interests or commercial interests. Kenya, as a signatory to international human rights instruments, needs

to continuously ensure that restrictions to freedom of media comply with the international law and treaties such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR).

Everyone has the right to freedom of opinion and expression, a right that includes freedom to hold opinions without interference and to seek ideas through any media and regardless of frontiers (UDHR Article 19). Furthermore, a distinction must be made between illegal content which the state may prohibit and harmful or offensive content which the state is not required to prohibit. Illegal content may include, as specified in Article 33 (2): propaganda for war, incitement to violence, hate speech and advocacy for hatred. The distinction will help protect both vulnerable groups in society and journalists themselves.

5.3 Methods of enforcement of media regulation

This study demonstrates that the Constitution of Kenya 2010 provides for the formation of an independent body to regulate media. The Media Council of Kenya (MCK) and the Communication Commission of Kenya (CCK), proposed to become Communication Authority of Kenya (CAK) are the institutions charged with the responsibility of media regulation in Kenya. Whereas MCK is mandated to monitor compliance to the code of conduct for journalists, CAK is mandated to among other roles to promote and facilitate efficient management of Internet, develop framework for facilitating investigations and prosecution of cybercrime (Kenya Information and Communications Amendment Bill 2013). Media Bill 2013 requires MCK to register all practising journalists in the country. This implies that only those registered with the council are recognised as journalists in Kenya and therefore have the legitimacy to enjoy the freedom of media under the council's guidelines for the practice of journalism. The core function of the complaints commission, which is an independent organ within MCK, is to mediate or arbitrate disputes between media and people they may have offended, the public and the media and inter-media complaints. This study

recommends that the MCK opens the doors for interested cyber journalists for membership and accreditation to practice journalism as required by the law.

Likewise, the study postulates that the terms and conditions for accreditation of media practitioners should be minimal so that it does not stifle freedom of media. The International Covenant on Civil and Political Rights recommends: “Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events,” (ICCPR paragraph 44). Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.

5.3.1 Ethics and cyber journalism

This study recommends that journalists conform to the ethical values that guide the profession. The ethical values are found in the Golden Mean, the Categorical Imperative and the Principle of Utility (Turow, 2009 pp. 131-133). Freedom of cyber journalists can be strengthened when and if journalists practice their profession “within the limits of the law”, “with personal responsibility”, and “based on respect for other people’s rights and sensibilities” as prescribed by the Internet Governance Principles. The limits of the law involve justified restrictions whose frame shall be designated by the international instruments on human rights which provide protection to freedom of expression. Article 29 of the Universal Declaration of Human Rights provides for everyone’s duties to the community in which alone the free and full development of his personality is possible. The UDHR anticipates that in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Both the law and ethics,

blended, are likely to produce desired results for the common good of society. Ewing (1948) argues on the principle of Utility:

Certainly the most popular and perhaps the most plausible view among thinkers on ethics has been utilitarianism. This term is used in a narrower and in a wider sense. It may stand for hedonistic utilitarianism, which regards pleasure as the only good and pain as the only evil, or it may stand for any view which makes the rightness of an act depend solely on its conduciveness to good without committing one to any particular theory as to what things are good (Ewing, 1948 p.100).

Whether Hedonistic utilitarianism or the wider sense of it as explained by Ewing (1948) this study recommends that cyber journalists should minimise or completely eliminate pain among the people that they communicate about or to. They should pursue happiness in their profession by observing the ethical standards for the profession, which should be observed unconditionally as prescribed by the Categorical Imperative philosophy. The Golden Rule anticipates that journalists should move away from the extreme ends of pain and pleasure. Since morality, moral goodness, goodness without qualification is the attribute solely of action for duty's sake, cyber journalists and journalists in general are expected to execute their work within the Categorical Imperative philosophy – doing the right thing because it is the right thing to do. “Morality, moral goodness is a characteristic of good willing, and an agent's willing is good when he does what he ought simply because he ought” (Connolly 1959, p. 88).

5.3.2 Towards media freedom, regulation and ethics for cyber journalism

It is clear from the findings of this study that free media provide a platform for people to exchange ideas without interference of the state or other influential persons in society. A democratic society represents the triumph of the rule of many over rule of the few (Christians et al, 2009 p. 91). Therefore, it is important for cyber journalists and media in general to

pursue that goal within the law, enjoying freedom of media but still pursuing the ideals of social responsibility theory in order to realise the common good of the society that they serve. Cyber journalists, like traditional media journalists, are guided by the ethical values of honesty, fairness, and treating their sources and subjects as human beings deserving of respect. The society anticipates that journalists act independently, that is, they should be free of any obligation to any interest other than the public's right to know, and they must be accountable to their readers, viewers and to each other. Bloggers who monitor colleagues' activities in both the traditional media of newspaper, radio and television and the cyberspace should do so in good faith.

Cyber journalists are required to not only obey the law but also observe standards for the practice of their profession. Furthermore, it is the duty of cyber journalists to treat their sources and subjects in a humane way as the Golden Rule principle outlines: "do unto others as you would have them do unto you" (Turow, 2009 p. 132). The Kantian Categorical Imperative on the other hand requires journalists to "follow ethical principles as if these principles could be applied in any other situation" (Turow, 2009 p. 132). This principle calls for the development of rules of order or duties which would also guide journalists against intruding other people's privacy.

Whereas cyber journalists who work with established news organisations have the capacity to regulate themselves it is not easy for journalist bloggers to regulate themselves because first, they are not organised and secondly because their quest to "liberate themselves" from control of media owners distances themselves from the existing media regulatory mechanisms. Amateur bloggers pose an even greater challenge for the existing regulatory framework. This study observes that, just like the rule of a public figure, who cannot legally claim of someone having intruded his or her privacy, cyber journalists who choose to operate away from the regulator, shall be governed by other laws other than the existing media

regulatory framework. As stated in the preceding sections, the state may choose to apply Article 33 (2 and 3) for the sake of common good (refer *Kwacha v. Standard Media Group*, Appendix 3).

Kenya is a signatory to International and regional instruments that guarantee the right to freedom of expression and the right of access to information such as the Universal Declaration on Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), the African Charter on Human and People's Rights (ACHPR) and the World Summit on the Information Society's Declaration of Principles, where states commit to media pluralism and diversity. The United Nations Human Rights Committee held in Geneva in July 2011 states in General Comment No 34 that the ICCPR protects all forms of expression and the means of their dissemination, including all forms of electronic and Internet-based modes of expression. The committee also avers that restrictions on the operation of websites, blogs or any other Internet-based, electronic or other information dissemination system (including systems to support such communication, such as Internet service providers or search engines) are only permissible to the extent that they are content-specific. Generic bans on the operation of certain sites and systems are not permissible. It is also inconsistent with the guidelines to prohibit a site or an information dissemination system from publishing material solely on grounds that it may be critical of the government or the political social system espoused by the government.

On the other hand, The Joint Declaration on Freedom of Expression and the Internet of June 2011 stipulates that regulatory approaches in the telecommunications and broadcasting sectors cannot simply be transferred to the Internet. The declaration calls for promotion of self-regulation as an effective tool in redressing harmful speech. Kenya is obliged to implement international treaties through domestic law. As the Constitution of Kenya 2010 (Article 3 sub-article 5) guarantees, the general rules of international law shall

form part of the law of Kenya and any treaty or convention ratified by Kenya shall form part of the law of Kenya under the constitution (Article 3 sub-article 6).

5.4 Conclusions

This study established that the Internet has become an open space and a vibrant medium for journalists in Kenya. The development has expanded the sphere for the practice of journalism from the traditional forms of newspapers, radio and television. Some journalists now quit what they perceive to be a highly censored newsroom practice and instead join the Internet-based field which has limited the chain of gatekeepers and consequently restrictions to publish. The achievement of this sphere is concomitant with the provisions of the Constitution of Kenya 2010 of freedom of media (Article 34). It is anticipated that when formulating a regulatory framework for cyber journalism, the state and other stakeholders shall ensure that all people enjoy the right to freedom of media. The society ought to acknowledge that cyber journalism is not something to be wished away. Traditional journalists need to develop a mind shift and accept the reality that cyber journalism will continue and even expand as technological innovations keep advancing or changing. Likewise, the definition of who a journalist is will continue morphing. In this regard, one needs not to be an employee of a media house in order to remain a journalist or become one.

Cyber journalists on the other hand ought to operate within their purpose and mandate of informing, educating, interpreting, moulding opinion, enabling decision making, working as an agent of change and to entertain. They need to know their readers' interests, be accurate, objective and credible. Their works must be clear and have significance. Although it is feisty and combative, its style and round-the-clock news cycle raise questions about how cyber journalism can offer reporting compatible with these standards. Furthermore, Web technology has strengthened the traditional watchdog functions of journalism by giving reporters efficient ways to probe more deeply for information. The capacity to search

documents, compile background and historical context, and identify authoritative sources has expanded the reporter's toolbox. It also has introduced a fundamentally different culture built on interactivity, fewer rules, and fewer limits.

The continued application of old news standards to cyber journalism has proved an uphill task to translate the virtues of accuracy, balance, and clarity to a medium where the advantages of speed and timeliness prevail. It is imperative that the state engages in consultation with all the stakeholders when developing legislation that would enable the best practices in cyber journalism. This is in line with the Civic Republicanism contention which offers a regime according to which regulatory outcomes are best understood as the product of collective deliberation on regulatory goals and values (Reddish and Lippman 1991 p. 272). The state and all stakeholders should pursue goals that are meant to achieve the common good as opposed to individual and selfish interests. Civic Republicanism embraces a belief in the pursuit of common good over private interests and the virtue of deliberation. Governments and other policy makers should avoid private interests at the expense of the broader common good.

This study recognises that the Constitution of Kenya 2010 adopts the general rules of International Law as part of the law of Kenya (Article 2 sub-article 5) and that any treaty ratified by Kenya shall form part of the law of Kenya (Article 2 sub-article 6). Therefore, there is a need to refer to recommendations by international authorities on freedom of media and freedom of speech, including Internet rights. The General Comment No 34 of the UN Human Rights Committee, 2011, the Report of the Special Rapporteur on Freedom of Expression through 2011 and the Declaration of the International Mandates on Freedom of Expression in 2011 focus on using the Internet to enhance freedom of expression and opinion and only allowing restrictions under limited, pre-determined conditions. The reports also call on states to take positive steps to facilitate freedom of information on the Internet. There is a

need to take a holistic approach to offensive content online by dealing with issues such as discrimination, bigotry, and bias by building peace instead of resorting to censorship on the Internet. The state therefore should not censor the Internet since it is a public sphere that opens up the democratic space of the citizens of the country.

Media of all kinds, regardless of frontiers, whether print, television, radio or cyberspace shall be free, the right which shall include freedom to seek, receive and impart information and ideas of all kinds. This is concomitant with Article 19 of the International Covenant on Civil and Political Rights (ICCPR). The exercise of freedom of media carries with it special duties and responsibilities. This freedom may therefore be subject to restrictions, but these shall only be such as are provided by law and are necessary for purposes of respecting of the rights or reputations of others and the protection of national security, public order, public health or societal morals. Other prohibitions by law may include propaganda for war and any advocacy of national, racial or religious hatred. Also prohibited is information that constitutes incitement to discrimination, hostility or violence. Any restriction must pursue a legitimate aim. Article 19(3) of the ICCPR explains the legitimate aim to include respect of the rights or reputations of others, protection of national security, public order, or of public health or morals. To justify any measure which interferes with freedom of media, the government must be acting in response to a pressing social need, not merely out of political convenience. The restriction must impair the right as little as possible and in particular, must not be overly broad or restrict legitimate speech. The impact of the restriction must also be proportionate. The harm to freedom of expression must not be greater than the benefit to the interest which is being protected.

5.4.1 Regulation of cyber journalism by architecture and the role of ISPs

This study recommends that the role of ISPs needs to be defined as more forms of communication shift to the cyberspace. With increased journalism activity online, an increase in cases of defamation and intrusion into people's privacy, among other offences related to media regulation is expected. It is likely that such disputes may involve private entities against cyber journalists or state's attempt to control journalists. At the time of this thesis, it is not clear under such circumstances as when a person complains over allegedly offensive content asks an ISP to remove it, who the ISP should honour between the cyber journalist and the offended person. The state should come clear on the circumstances under which ISPs should interfere with content online and whose request should be honoured and under what circumstances. Architecture can be used to block undesirable content especially when the owners cannot be traced or when they refuse to remove such content when ordered to do so.

5.4.2 The right to privacy and confidentiality

The Constitution of Kenya 2010 guarantees the right to privacy (Article 31). This right is also protected in international law, UDHR and codes of conduct for the practice of journalism world over. Although these codes of conduct exist and are more often than not followed by traditional journalists and cyber journalists who work for established media houses, it is still unclear on how individual blogging journalists shall comply with these rules. This study recommends that cyber journalists, like other journalists should respect people's privacy as provided in the constitution.

Similarly, cyber journalists access material on the Internet, which may be deemed private. There is a need for data protection laws that give guidance on protection from access or protection from publication for mass consumption of confidential reports accessed online. For instance, a journalist blogger was charged with illegally accessing and publicising private

communication material of an airliner in Kenya in 2012. Data collected in this study point out that many cyber journalists do not clearly understand the wider privacy implications for information they post about people and organisations. Such issues as privacy and anonymity, the right to forget what has been deleted from the Internet, storage and ownership of cyber journalism content, need to be discussed and streamed into the laws of Kenya. Netanel (2000, p. 402) theorises that a self-governing cyber-space would more fully realise liberal democratic ideals. Cyberspace self-governance more fully embodies the liberal democratic goals of individual liberty, popular sovereignty, and the consent of the governed than does the "top-down" administration of even the most democratic nation-states.

5.4.3 The role of the state in ensuring freedom of cyber journalism

Freedom of media is a necessary condition for the realisation of transparency and accountability which are, in turn, essential for the promotion and protection of human rights. (International Covenant on Civil and Political Rights paragraph 3). Free, uncensored and unhindered media is essential in any society to allow freedom of opinion and expression and the enjoyment of other Covenant rights. Freedom of media constitutes one of the cornerstones of a democratic society. Free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential in a democratic society. There is a need, therefore, for free media that enables public to comment on issues touching on their lives without censorship or restraint in order to inform public opinion. The public also has a corresponding right to receive media output for their own good.

The state should therefore take account of the developments in information and communication technologies, such as the Internet and mobile-based electronic information dissemination systems and how they have substantially changed communication and

journalism in Kenya and worldwide. It is anticipated that the state should guarantee independence and editorial freedom to cyber journalists. The state should therefore take all necessary steps to foster the independence of cyber journalism.

Both traditional journalists and cyber journalists must be vigilant and ensure that the freedom of media guaranteed by the constitution is not abrogated through policies and practice. This study informs that the state may sometimes want to come up with policies that may rescind the freedom provisions if cyber journalists do not form professional associations within which members will be compelled to enjoy the freedom. Courts on the other hand should be involved to interpret the law whenever there is doubt.

5.4.4 Restriction on cyber journalism

The International Convention on Civil and Political Rights, the Universal Declaration Human Rights and the Constitution of Kenya 2010 expressly state that the exercise of the right to freedom of expression or freedom of media carries with it special duties and responsibilities. This study finds two limitative areas for media that are permitted by law. These restrictions relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals (ICCPR paragraph 28 and 29). States are implored upon to avoid imposing restrictions that may jeopardise freedom of media. The Covenant avers that the relation between right and restriction and between norm and exception must not be reversed. Such restrictions may only be imposed as provided by law. Law may include laws of parliamentary privilege and laws of contempt of court. Since any restriction on freedom of media constitutes a serious curtailment of human rights, it is not compatible with the Covenant for a restriction to be enshrined in traditional, religious or other such customary law (ICCPR Comment 24).

Therefore, any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with fundamental freedom of expression.

Permissible restrictions generally should be content-specific. Generic bans on the operation of certain sites and systems are not compatible with the law. It is also against the law for the state to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.

Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists should be compatible with the CCPR. Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors (CCPR 44). Therefore, restrictions for cyber journalists should be based on the right and reputation of others and the common good as opposed to an individual's pleasure.

The role of ISPs in regulating cyber journalism needs wide consultations among all the protagonists, that is, cyber journalists, traditional journalists, government and the civil society. The regulator or government should not force ISPs to monitor content and neither should they hold ISPs liable for the actions of users. In order to foster freedom of media as guaranteed by the constitution and international law, ISPs should be insulated against liability

of content generated by users. By so doing, cyber journalism will realise the dream a public sphere where the public exchange ideas in a democratic society. Furthermore, this will compel responsible cyber journalism that will realise the common good of the society.

5.4.5 Codes of ethics

This study recommends for ethics for cyber journalists. ICCPR observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations. For the purpose of protecting the freedom of media, morals must be based on principles not deriving exclusively from a single tradition. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination (ICCPR Comment 32). This study recommends the Golden Mean, the Categorical Imperative and the Principle of Utility be considered as the drivers of ethical considerations for cyber journalists.

5.4.6 Defamation laws

This study recommends defamation laws to apply on cyber journalists just as in the traditional media. The State should, however, ensure that defamation laws do not stifle freedom of media. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification (CCPR 46). It is clear from findings of this study that with regard to comments about public figures, states should consider to avoid penalising or otherwise rendering unlawful untrue statements that have been published in error but without malice. Otherwise, a public interest in the subject matter of the criticism should be recognised as a defence.

Excessively punitive measures and penalties should be avoided in defamation cases. Where relevant, the state or the regulator should place reasonable limits on the requirement

for a defendant to reimburse the expenses of the successful party. The state should consider decriminalising defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a state to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others (CCPR Comment 47).

5.5 Area of future research

The right to access to information in Kenya is guaranteed in Article 35 of the Constitution of Kenya 2010. Every citizen has a right of access to information held by the state, information held by another person and required for the exercise or protection of any right or fundamental freedom. The constitution further says that every person has the right to the correction and deletion of untrue and misleading information that affects the person and that the state shall publish and publicise any important information affecting the nation.

The society ought to understand that media are only purveyors of information and whoever that blocks them from accessing information is rendering them unproductive and at the same time denying the public knowledge they are entitled to in order to make informed choices. Kenyan Parliament is in the process of passing the Access to Information Bill 2013. It is important for an investigation to be conducted on how the access to information rules are likely to impact on freedom of media, the practice of journalism and access to information.

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APPENDIX 1: INTERVIEW GUIDE

1. The Constitution of Kenya 2010 provides for freedom and independence of the media while at the same time it requires regulation for the industry. What is your opinion on this freedom in regard to the need for responsible media?
2. The constitution requires parliament to enact a legislation that provides for the establishment a body to set media standards that regulate and monitor compliance with those standards. What is your opinion on this?
3. Is self-regulation of media an effective tool to instil among cyber journalists standards required by law for the media practice in Kenya?
4. How effective is software regulation for cyber journalism in Kenya?
5. What is the role of the state in regulating cyber journalism in Kenya?
6. In what manner can Kenya use co-regulation to ensure compliance to the standards of media practice among cyber journalists?
7. What are your thoughts about applying media laws of defamation (libel and slander), information privacy and moral responsibility on cyber journalism?
8. Can ethical standards for the practice of old journalism apply to cyber journalism?
9. Would you recommend Kenya to borrow from international law and principles to regulate cyber journalism?

About the interviewee

To be filled in by interviewer:

- a. **Name of interviewee**
- b. **Job title**

APPENDIX 2: FGD GUIDE

1. The Constitution of Kenya 2010 provides for freedom and independence of the media while at the same time it requires regulation for the industry. What is your opinion on this freedom in regard to the need for responsible media?
2. The constitution requires parliament to enact a legislation that provides for the establishment a body to set media standards that regulate and monitor compliance with those standards. What is your opinion on this?
3. Is self-regulation of media an effective tool to instil among cyber journalists standards required by law for the media practice in Kenya?
4. How effective is software regulation for cyber journalism in Kenya?
5. What is the role of the state in regulating cyber journalism in Kenya?
6. In what manner can Kenya use co-regulation to ensure compliance to the standards of media practice among cyber journalists?
7. What are your thoughts about applying media laws of defamation (libel and slander), information privacy and moral responsibility on cyber journalism?
8. Can ethical standards for the practice of old journalism apply to cyber journalism?
9. Would you recommend Kenya to borrow from international law and principles to regulate cyber journalism?

About the FGD

To be filled in by the moderator:

**APPENDIX 3: HIGH COURT CASE INTERPRETING FREEDOM OF MEDIA
UNDER THE CONSTITUTION**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 319 OF 2005

KWACHA GROUP OF COMPANIES.....1ST PLAINTIFF

JIMI WANJIGI.....2ND PLAINTIFF

VERSUS

TOM MSHINDI.....1ST DEFENDANT

DAVID MAKALI.....2ND DEFENDANT

THE STANDARD LIMITED3RD DEFENDANT

INTERIM JUDGEMENT ON THE CONSTITUTIONAL ISSUE

This plaint was filed to seek general, aggravated and/or exemplary damages against the defendants for publishing impugned defamatory words in respect of the plaintiff.

The hearing of the suit commenced on 21st July, 2010 and the same ended on 12th November, 2010. However, during the submission, a very challenging issue was raised as to the jurisdiction of this court under Article 34 of the Constitution. The court was urged to interpret the said provision of the Constitution, evidently under Article 165 (3) (d) i.e. jurisdiction to hear any question respecting the interpretation of this Constitution.

Our Constitution has stolen a march over the Constitutions of many democratic states like U.S.A and India by providing for a specific freedom for media, which has been intoned by the provisions of Article 34.

I shall cite the relevant part thereof i.e. Article 34(1) and (2)

“(1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).

(2) The State shall not –

(a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or

(b) penalize any person for any opinion or view or the content of any broadcast, publication or dissemination.”

Relying on the above provisions, Mr. Gitonga, the learned counsel for the defendants, contended that this court has no jurisdiction to hear this suit.

Mr. Gitonga premised this submissions on Article 34 (1) and (2) which by giving specific right of freedom of media barring any control of state over or interference with any person engaged in broadcasting, production or circulation of any-publication or the dissemination of

information by any medium and that the state is also restrained from penalizing any person for any opinion or view or the content of any broadcast, publication or dissemination.

Mr. Gitonga added that as per Article 34 (1) the only limitation or regulation of this freedom is what is expressed in Article 33 (2), namely:

"(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)-"

(Emphasis mine)

It was emphasized further that by not including the rights specified in Article 33 (3) as a limitation to the freedom of Media, the people of Kenya have spoken in no uncertain terms that any publication in media cannot be now challenged before the court on the grounds that they are defamatory because what is published or broadcast is beyond the control of state and that Judiciary is included being an organ of the stat. The state defined in Article 259; viz *"state' when used as a noun means the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution."*

As I have stated earlier, the freedom of media is a unique feature of our Constitution and I stress that all the courts of the world had taken in and protected the freedom of Press/Media under the umbrella of Freedom of Speech and Expression.

The Supreme Court of India in the case of ***Ramesh Thapar – vs. state of Madras (1959) SCR 12*** has held that freedom of speech and expression includes freedom of propagation of ideas and that this freedom is ensured by the freedom of circulation. The court also observed that the freedom of speech and expression are the foundation of all democratic organizations and essential for the proper functioning of the process of democracy.

In the case of ***Express Newspaper & Others -vs.- Union of India AIR 1958 SC 578***, the Supreme Court of India has summarized the principles relating to the freedom of specific expression in respect of media, namely, no measure can be enacted which would have effect of imposing a pre-censorship curtailing the circulation or restricting the choice of employment or unemployment in the editorial force and the court has further emphasized that such measure would certainly tend to infringe the freedom of speech and expression and such acts would therefore be liable to be struck down as unconstitutional. In short, the court indicated which kinds of restrictions could be declared as infringement of Freedom of Media. In my view, our Constitution under the provisions of Article 34 has given life to the aforesaid principles and spirit of democratic values of a Nation expressed by those specific pronouncements and enactment of freedom of speech and expression of media. The courts in this country are grateful for being saved to repeat the efforts of what the courts in other countries have gone through to spell p out what is freedom of media.

While the Constitution has provided the unique provisions for freedom of the media, it has also provided general provisions to guide the courts to interpret the provisions of The Constitution and how to apply the provisions of the Bill of Rights.

I shall quote relevant provisions of Article 20.

(1) The Bill of Rights applies to all law and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) In applying a provision of the Bill of Rights, a court shall -

*(a) Develop the law to the extent that it does give effect to a right or fundamental freedom;
and*

(b) Adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote -

(a) The value that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) The spirit, purport and objects of the Bill of Rights. (emphasis mine)

Article 259 (1) somehow lends weight to the above provisions and I shall quote the same -

(1) This Constitution shall be interpreted in a manner that (a) Promotes its purposes, values and principles; (b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) Permits the development of the law; and (d) Contributes to good governance.

Lastly, I shall note Article 25 which provides that certain rights cannot be limited and they are:

"(Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited -

(a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) Freedom from slavery or servitude;

(c) The right to a fair trial; and

(d) The right to an order of habeas corpus.

I may just mention that freedom of media is not one of those unlimited rights.

I shall quote some of the constitutional provisions which emphasis the spirit, purport and objects of the Bill of Rights. Article 28:

"Every person has inherent dignity and the right to have that dignity respected and protected." (emphasis mine).

Article 38 governs the provisions for access to information and I shall quote Article 38 (2) which stipulates:

"Every person has the right to the correction or deletion of untrue or misleading information that affects the Person." (emphasis mine).

Mr. Gitonga's submissions, which follow, shall be considered in the background of the above observations.

It was submitted that the incorporation of Article 34 has history of Constitutional making process. In the Report of Constitution of Kenya Review Commission dated 18th September, 2002, it was recommended that the new Constitution should give general protection to the media, including protection from government interference. The provision of 2002 draft was almost adopted in the provisions made in 2004 draft. Mr. Gitonga emphasized that the

wordings of those two drafts are similar to Article 34 of the Constitution which is retained despite the amendment proposed by 2005 draft which included the limitation to the rights like.

(a) The limitations or restrictions provided for by the Constitution;

(b) The respect of the rights and reputations of others; and

(c) The maintenance of the integrity, authority and independence of the Court's judicial proceedings and the administration of justice.

Mr. Gitonga thus submitted that the omission of the aforesaid limitations in Article 34 means that the people of Kenya rejected the same and did not want any state control on freedom of media. Thus the Judiciary which is included in definition of state has no right to 'involve itself in matter's concerning the media.

He added that the publication which is impugned by the plaintiff as a defamatory publication cannot be looked into by the court and further contended that even if the court comes to the conclusion that it is defamatory to the plaintiff, it cannot in any event, give judgment on damages because that exercise shall be in contravention of Article 34 (2) (b) which prohibits state to penalize the media for any opinion or view or the contents of any broadcast, publication or dissemination.

Mr. Issa, the learned counsel for the plaintiff opened two pronged opposition to the contentions raised by Mr. Gitonga.

It is submitted that the issue of jurisdiction was not pleaded in the Defence and no effort to amend the Defence is undertaken. Thus as per Order 2 Rule 4 of Civil Procedure Rules (previously Order VI Rule 4 (1) and (2) of Civil Procedure Rules) which stipulates inter alia that in any pleading subsequent to the plaint a party shall plead specifically any matter which alleges that any claim or defence of opposite party is no, maintainable or which if pleaded might tale other party by surprise.

The decision of Court of Appeal in the case between Stephen Onyango Achola & Another and Edward Sule House & Another (Civil Appeal No. 209101 UR) was relied upon.

I may bear in my mind that in the said case, the issue raised was that of limitation, and which was not pleaded but was raised as a preliminary objection.

The court observed and I quote:

'The second respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to reply on that issue and base its preliminary objection on it; nor will the second respondent be entitled to reply on that defence during the trial of the suit unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party who is entitled to reply on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit.'

The second side of the opposition to the issue of jurisdiction is based on the interpretation of the Constitution. It was averred that the Constitution undisputedly gives the High Court Power to determine issues of interpretation as per Article 165 (3) (d) of the Constitution.

It is quite clear also that the Constitution has given the High Court an unlimited original jurisdiction in Criminal and Civil matters. It was thus stressed that the cause involving defamation is a civil matter and that as per provisions of Article 165 (3) (a) of the Constitution. This court has jurisdiction to hear this matter.

I shall state, here that it is trite that the Court is enjoined to determine the issue of jurisdiction raised before it as a preliminary point. I do agree that this issue was indicated and was raised at the very end of the trial, but the issue under the Constitutional provisions, whenever raised, needs to be considered and determined. It has been now raised and submitted upon and I shall have to deal with it.

The limitations on the jurisdiction of the High Court are spelt out in Article 165 (5) and Mr. Issa contended that the suit is properly before the court.

In response to the issue that the freedom of media is absolute, it was submitted that Article 24 of the Constitution is the answer to that issue that no fundamental freedom is absolute and that limitation should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

I shall cite the factors enumerated in the said Article which should be considered before a right is limited, namely -

(a) The nature of the right or fundamental freedom;

(b) The importance of the purpose of limitation;

(c) The nature and extent of the limitation;

(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not Prejudice the rights and fundamental freedoms of others; and

(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. (emphasis mine).

I may pause and observe here that the limitations which are mentioned in the said Article can be assimilated with regulations or restrictions. I would also agree that here, the court has to interpret several provisions of the Constitution while giving the effect or purport to another provision of the same Constitution and any freedom cannot be interpreted in isolation with other freedoms enshrined in the Constitution. I must admit that it is difficult to get a direct precedent on this issue because of unique incorporation of Freedom of Media in our Constitution and that the court has to understand the spirit, value and purport of several

fundamental rights enshrined in our Constitution. The value of the Constitution without doubt, is to preserve the human *dignity, equality, equity and freedom.*

None of the rights are superior to other except those stipulated in Article 25. I am also fortified in my observations by Article 27 (2) which stipulates that *"Equality includes the full and equal enjoyment of all rights and fundamental freedoms"* as well as Article 24 (1) (d) cited hereinabove.

Freedom of expression which applies to "every person" is provided by Article 33 of the Constitution and that right has been given a restriction or regulation by Article 33 (3) and I shall quote the same:

"(3) In the exercise of the right to freedom of expression every person shall respect the rights and reputation of others"

The purpose of the above provision is culled out from the provisions of Article 24 (1) (d) specified herein before.

The "person" is defined in Article 260 of the Constitution as:

"'Person' includes a company, association, or other body of persons whether incorporated or unincorporated."

The media as an identified group is thus included in the expression "person".

Moreover, it has to be noted that any regulation or limitation as is prescribed by Article 23 (3) cannot be construed as abridgement of the freedom.

The Supreme Court of India in the case of **Bennet Coleman & Co. & Others (1972) RD - SC266** has observed, namely -

""It does not follow from this that freedom of expression is not subject to regulations which may not amount to abridgment. It is a total misconception to say that speech cannot be regulated or that every regulation of speech would be abridgement of the freedom of speech. No freedom however, absolute, can be free from regulation (Emphasis mine).

It was further emphasized by the court and I quote:

"There might be an abridgement of speech, but not an abridgement of freedom of speech. The pith and substance test although not strictly appropriate might serve as a useful purpose in the process of deciding whether the provision in question which work some interference with the freedom of speech are essentially, regulatory in character.
"(emphasis mine).

I have observed earlier, that the other jurisdiction of the world has interpreted and included freedom of media under the all-encompassing freedom of speech and expression and the above observations are thus appropriate to be considered in respect of Freedom of Media. I may note that the cases referred by me in any event involved regulations to the media.

Considering or taking the pith and substance test, would any court consider the provisions of Article 33 (3) (above specified) of **the Constitution** as the abridgment of the freedom of speech, even if those provisions were enacted by an Act of Parliament? I would unhesitantly say. It cannot be!

Considering the value and spirit of the Constitution and all the relevant provisions thereof cited hereinbefore, as well as taking into account the spirit of human dignity, equality and equity, it comes out clearly that the rights granted by the Constitution should be enjoyed as well as governed equally amongst all persons.

If the court has to accept the interpretation propounded by Mr. Gitonga, it shall be encouraging travesty of justice, rule of law and equality as well as equity in protections of laws and Constitution.

Looking at the submissions practically, it shall resound in death knell of principle of protection of human dignity and reputation. Any person intending to defame another only has to go to the media and ask them to publish the defamatory article and then the media to take shelter under Article 34.

Here, I shall like to quote a passage from **Coleman's** case (supra) where the court emphasized by observing, namely:

"It has been said that justice is the effort of man to mitigate inequality of man. The whole drive of the directive principles of the Constitution is towards this goal and it is in consonance with the new concept of equality."

Our Constitution has in no uncertain terms, adopted the principle of equality and it has not stopped there. It includes human dignity and equity.

I shall like to adopt a passage from the South African case of **Del Plessis and Others -vs.- De Clerk and another (1997) LRC 1, 637 at 672.**

"Any law of defamation is a restriction on freedom of speech in the interest of other rights worthy of protection. More particularly, in cases of defamation, Courts have tried to strike a balance between the protection of reputation and the right of freedom of expression."

I can do nothing more than reiterate the same. The human dignity does cover the right of reputation and protection of human dignity is the duty endowed to the court by the Constitution.

The removal of some portion from the Draft Constitution stipulating Court's powers as regards freedom of media cannot be construed as taking away court's power to do justice and

in any event, the Constitution has amply granted the courts the powers to exercise its primary duty which is to preserve and guard justice, equity and equality.

I may not say more than what I have observed hereinbefore and reject the point raised by Mr. Gitonga that the court has no jurisdiction to hear and determine the defamation cases filed against the members of media as per the provisions of Article 34 of the Constitution.

I am at this stage reminded of often quoted observation of **Albert Einstein**; namely

"Out of clutter, find simplicity.

From discord, find harmony.

In the middle of difficulty find opportunity."

This Judgment is my polite effort to read and declare consistency among the Constitutional provisions.

I shall after this give the final judgment on the issues in the suit, on 11th May, 2011 as earlier notified.

Dated, signed and delivered at Nairobi this 13th day of April, 2011

K. H. RAWAL

JUDGE

13.04.2011

APPENDIX 4: AN INACCURATE VIRAL STORY IN ONLINE NEWSPAPER IN JANUARY 2012

Joe Paterno Funeral and Memorial Details

The funeral arrangements for Joe Paterno have been announced, as reported by the Centre Daily Times.

There will be two public viewings for Paterno at the Pasquerilla Spiritual Center on Tuesday from 1 – 11 p.m., and on Wednesday from 8 a.m. – 12 p.m.

A public memorial service in the Bryce Jordan Center will take place at 2 p.m. on Thursday.

The Paterno family has asked that instead of flowers or gifts, donations can be made in Joe's honor to the Penn State IFC/Panhellenic Dance Marathon (THON) or the Special Olympics of Pennsylvania

We'll have more information as it becomes available.

Update: According to a tweet from the Lion Ambassador Alumni Interest Group Twitter account, tickets will be required for Thursday's memorial service. Details will be released on GoPsuSports.com soon.

<http://onwardstate.com/2012/01/23/joe-paterno-funeral-details/>, accessed January 24, 2012.

Funeral arrangements for Joe Paterno announced

By CDT staff reports — State College - Centre Daily Times

Posted: 12:23pm on Jan 23, 2012; Modified: 1:15pm on Jan 23, 2012

Plans for a public memorial service for Penn State football icon Joe Paterno, to be held Thursday in the Bryce Jordan Center, were announced today.

Koch Funeral Home, which is handling the arrangements for the family, said there will be a public viewing from 1 to 11 p.m. Tuesday and from 8 a.m. to noon Wednesday at the Pasquerilla Spiritual Center on Penn State's University Park campus.

A private funeral service for the family will be held at 2 p.m. Wednesday.

The public memorial service in the Bryce Jordan Center will take place at 2 p.m. Thursday.

According to the funeral home, more information will be provided as it becomes available. In lieu of flowers or gifts, the family asks that donations be made to the Special Olympics of Pennsylvania or to Penn State IFC Panhellenic Dance Marathon, known as Thon.

<http://www.centredaily.com/2012/01/23/3063215/funeral-arrangements-for-joe-paterno.html>,
accessed January 24, 2012.

It further gives reference for more information. Read more here:

<http://www.centredaily.com/2012/01/23/3063215/funeral-arrangements-for-joe-paterno.html#storylink=cpy>

Washington Post, on January 22, 2012 reported that Paterno was not dead.

Reports of Joe Paterno's death turned out to be greatly exaggerated Saturday night. But unlike Mark Twain's famous declaration that he was still alive 115 years ago, the erroneous accounts about the former Penn State football coach's demise traveled far and wide within minutes, whipped into a firestorm by social media.

The false reports began Saturday evening, when Onward State, a student-run Web site affiliated with Penn State, apparently was the first to report that Paterno, 85, had died. The site said it based its report on an e-mail sent to the school's football players.

The student report was picked up by a local Top 40 radio station, WBHV (94.5 FM), which added the detail that Paterno had died with his family by his side, according to the Poynter Institute, a journalism-education organization that itself tweeted the inaccurate report.

Within minutes of Onward's story, the news appeared on CBS Sports's Web site, followed by the Huffington Post and Deadspin. Journalists began tweeting it, too, including Anderson Cooper of CNN and Howard Kurtz, the former media columnist for The Washington Post and host of a Sunday morning CNN program. Both Cooper and Kurtz later corrected themselves.

But Paterno, who is seriously ill with lung cancer, hadn't died.

Family members and Penn State tweeted statements denying the media accounts. At 9:21 p.m., Paterno's son Jay tweeted that Paterno "is continuing to fight." Another son, Scott, told his Twitter followers, "Dad is alive but in serious condition. We continue to ask for your prayers and privacy during this time." (The Post, citing individuals close to Paterno's family, reported Saturday night that Paterno remained connected to a ventilator and that his family was weighing whether to take him off the ventilator Sunday).

Even as news organizations and journalists scrambled to correct their misinformation, the initial accounts touched off a massive wave of Paterno-is-dead postings on Facebook and Twitter.

The Paterno incident demonstrates the consequences of reporting unverified information from an obscure source. It also suggests once again how quickly information, including the inaccurate kind, can move in the digital age. The entire life cycle of the Paterno story — from initial death reports to face-saving corrections — took about 45 minutes.

The episode brings to mind the media chain reaction that followed NPR's erroneous report a year ago that U.S. Rep. Gabrielle Giffords (D-Ariz.) had died after being shot in Tucson. Giffords was severely wounded in the shooting, but survived.

Several journalists took to Twitter late Saturday and early Sunday to criticize their own. "Paterno mess should teach journalists to — G-forbid — report before reporting," tweeted Joe Flint, the Los Angeles Times' media reporter. "Unlikely, as we live in age of shoot first and aim later."

In a note posted Saturday night on Onward State's Web site and Facebook page, managing editor Devon Edwards retracted the Paterno story and said he was resigning. "There are no excuses for what we did," he wrote. "We all make mistakes, but it's impossible to brush off one of this magnitude. Right now, we deserve all of the criticism headed our way."

He added, "I take full responsibility for the events that transpired tonight, and for the black mark upon the organization that I have caused. I ask not for your forgiveness, but for your understanding. I am so very, very, sorry, and we at Onward State continue to pray for Coach Paterno."

APPENDIX 5: PRINCIPLES OF ETHICAL COMMUNICATION BY US NATIONAL COMMUNICATION ASSOCIATION

The US National Communication Association (NCA) endorsed and committed its members to the nine principles of ethical communication, which this study borrows to show how and why cyber journalism needs ethical principles to guide them. The table below shows the nine principles which this study takes as a guide that would lead to the realisation of moral responsibility in the practice of cyber journalism.

We advocate truthfulness, honesty, and reason as essential to the integrity of communication.

We endorse freedom of expression, diversity of perspective, and tolerance of dissent to achieve the informed and responsible decision making fundamental to a civil society.

We strive to understand and respect other communicators before evaluating and responding to their messages.

We promote access to communication resources and opportunities as necessary to fulfil human potential and contribute to the well-being of families, communities, and society.

We promote communication climates of caring and mutual understanding that respect the unique needs and characteristics of individual communicators.

We condemn communication that degrades individuals and humanity through distortion, intimidation, coercion, and violence and through the expression of

intolerance and hatred.

We are committed to the courageous expression of personal convictions in pursuit of fairness and justice.

We advocate sharing information, opinions, and feelings when facing significant choices while also respecting privacy and confidentiality.

We accept responsibility for the short- and long-term consequences of our own communication and expect the same of others.

Source: Griffin, (2009). Appendix C (pA8).

**APPENDIX 6: THE CAMDEN PRINCIPLES ON FREEDOM OF EXPRESSION AND
EQUALITY**

I. Legal protection for equality and freedom of expression

Principle 1: Ratification and incorporation of human rights law

All States should ratify and give effect in domestic law, through incorporation or otherwise, international and regional human rights treaties guaranteeing the rights to equality and freedom of expression.

Principle 2: Legal framework for the protection of the right to freedom of expression

2.1. States should ensure that the right to freedom of opinion and expression, through any medium of communication, including the right to information, is enshrined in domestic constitutional provisions or their equivalent, in accordance with international human rights law.

2.2. In particular, States should ensure that domestic constitutional provisions set out clearly the scope of permissible restrictions on the right to freedom of expression, including that such restrictions must be provided by law, be narrowly defined to serve a legitimate interest recognised in the constitution, and be necessary in a democratic society to protect that interest.

2.3. States should establish a clear legal framework for the protection of the right to information, including the right of access to information held by public bodies, and promote the proactive disclosure of information.

Principle 3: Legal framework for the protection of the right to equality

3.1. States should ensure that the right to equality is enshrined in domestic constitutional provisions or their equivalent, in accordance with international human rights law.

3.2. Domestic legislation should guarantee that:

- i. All persons are equal before the law and are entitled to the equal protection of the law.
- ii. Everyone has the right to be free of discrimination based on grounds such as race, gender, ethnicity, religion or belief, disability, age, sexual orientation, language, political or other opinion, national or social origin, nationality, property, birth or other status.

3.3. States should establish a clear legal and policy framework for combating discrimination in its various forms, including harassment, and for realising the right to equality, including in relation to freedom of expression.

Principle 4: Access to remedies

4.1. States should ensure the availability of accessible and effective remedies for human rights violations, including violations of the rights to freedom of expression and equality. These should include both judicial and non-judicial remedies, such as before national human rights institutions and/or ombudspersons.

4.2. States should ensure that the right to a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed.

Principle 5: A public policy framework for pluralism and equality

5.1. All States should have in place a public policy and regulatory framework for the media, including new media, which promotes pluralism and equality, in accordance with the following:

i. The framework should respect the fundamental principle that any regulation of the media should only be undertaken by bodies which are independent of the government, which are publicly accountable and which operate transparently.

ii. The framework should promote the right of different communities to freely access and use media and information and communications technologies for the production and circulation of their own content, as well as for the reception of content produced by others, regardless of frontiers.

5.2. This framework should be implemented, among others, through the following measures:

i. Promoting universal and affordable access to the means of communication and reception of media services, including telephones, the Internet and electricity.

ii. Ensuring that there is no discrimination in relation to the right to establish newspapers, radio and television outlets, and other communications systems.

iii. Allocating sufficient 'space' to broadcasting uses on different communications platforms to ensure that, as a whole, the public is able to receive a range of diverse broadcasting services.

iv. Making an equitable allocation of resources, including broadcasting frequencies, among public service, commercial and community media, so that together they represent the full range of cultures, communities and opinions in society.

v. Requiring the governing bodies of media regulators broadly to reflect society as a whole.

vi. Putting in place effective measures to prevent undue concentration of media ownership.

vii. Providing public support, whether financial or in other forms, through an independent and transparent process, and based on objective criteria, to promote the provision of reliable, pluralist and timely information for all, and the production of content which makes an important contribution to diversity or which promotes dialogue among different communities.

5.3. This framework should also include the following measures:

i. Repealing any restrictions on the use of minority languages that have the effect of discouraging or preventing media specifically addressed to different communities.

ii. Making diversity, including in terms of media targeting different communities, one of the criteria for assessing broadcasting licence applications.

Principles

iii. Ensuring that disadvantaged and excluded groups have equitable access to media resources, including training opportunities.

5.4. Public service values in the media should be protected and enhanced by transforming State- or government-controlled media systems, by strengthening existing public service broadcasting networks, and by ensuring adequate funding for public service media, so as to ensure pluralism, freedom of expression and equality in a changing media landscape.

Principle 6: Role of the mass media

6.1. All mass media should, as a moral and social responsibility, take steps to:

i. Ensure that their workforces are diverse and representative of society as a whole.

ii. Address as far as possible issues of concern to all groups in society.

iii. Seek a multiplicity of sources and voices within different communities, rather than representing communities as monolithic blocs.

iv. Adhere to high standards of information provision that meet recognised professional and ethical standards.

Principle 7: Right of correction and reply

7.1. The rights of correction and reply should be guaranteed to protect the right to equality and non-discrimination, and the free flow of information

7.2. The exercise of a right of correction or reply should not extinguish other remedies, although it may be taken into account in the consideration of such other remedies, for example to reduce damage awards.

7.3. These rights are best protected through self-regulatory systems. No mandatory right of reply or correction should be imposed where an effective self-regulatory system is in place.

7.4. The right of correction gives any person the right to demand that a mass media outlet publish or broadcast a correction where that media outlet has previously published or broadcast incorrect information.

7.5. The right of reply gives any person the right to have a mass media outlet disseminate his or her response where the publication or broadcast by that media outlet of incorrect or misleading facts has infringed a recognised right of that person, and where a correction cannot reasonably be expected to redress the wrong.

III. Promoting intercultural understanding

Principle 8: State responsibilities

8.1. States should impose obligations on public officials at all levels, including ministers, to avoid as far as possible making statements that promote discrimination or undermine equality and intercultural understanding. For civil servants, this should be reflected in formal codes of conduct or employment rules.

8.2. States should engage in broad efforts to combat negative stereotypes of, and discrimination against, individuals and groups and to promote intercultural understanding and evaluation, including

by providing teacher training on human rights values and principles and by introducing or strengthening intercultural understanding as a part of the school curriculum for pupils of all ages.

Principle 9: Media responsibilities

9.1. All media should, as a moral and social responsibility, play a role in combating discrimination and in promoting intercultural understanding, including by considering the following:

- i. Taking care to report in context and in a factual and sensitive manner, while ensuring that acts of discrimination are brought to the attention of the public.
- ii. Being alert to the danger of discrimination or negative stereotypes of individuals and groups being furthered by the media.
- iii. Avoiding unnecessary references to race, religion, gender and other group characteristics that may promote intolerance.
- iv. Raising awareness of the harm caused by discrimination and negative stereotyping.
- v. Reporting on different groups or communities and giving their members an opportunity to speak and to be heard in a way that promotes a better understanding of them, while at the same time reflecting the perspectives of those groups or communities.

9.2. Public service broadcasters should be under an obligation to avoid negative stereotypes of individuals and groups, and their mandate should require them to promote intercultural understanding and to foster a better understanding of different communities and the issues they face. This should include the airing of programmes which portray different communities as equal members of society.

9.3. Professional codes of conduct for the media and journalists should reflect equality principles and effective steps should be taken to promulgate and implement such codes.

9.4. Professional development programmes for media professionals should raise awareness about the role the media can play in promoting equality and the need to avoid negative stereotypes.

Principle 10: Other actors

10.1. Politicians and other leadership figures in society should avoid making statements that might promote discrimination or undermine equality, and should take advantage of their positions to

promote intercultural understanding, including by contesting, where appropriate, discriminatory statements or behaviour.

10.2. Civil society organisations should respect pluralism, and promote the rights to freedom of expression and equality in accordance with these Principles. In particular, they should promote intercultural understanding, acknowledge dissenting voices, and support the ability of members of different communities, and particularly marginalised groups, to voice their perspectives and concerns, in a way that recognises the internal diversity of communities.

IV. Freedom of expression and harmful speech

Principle 11: Restrictions

11.1. States should not impose any restrictions on freedom of expression that are not in accordance with the standards set out in Principle 2.2 and, in particular, restrictions should be provided by law, serve to protect the rights or reputations of others, national security or public order, or public health or morals, and be necessary in a democratic society to protect these interests.² This implies, among other things, that restrictions:

- i. Are clearly and narrowly defined and respond to a pressing social need.
- ii. Are the least intrusive measure available, in the sense that there is no other measure which would be effective and yet less restrictive of freedom of expression.
- iii. Are not overbroad, in the sense that they do not restrict speech in a wide or untargeted way, or go beyond the scope of harmful speech and rule out legitimate speech.
- iv. Are proportionate in the sense that the benefit to the protected interest outweighs the harm to freedom of expression, including in respect to the sanctions they authorise.

11.2. States should review their legal framework to ensure that any restrictions on freedom of expression conform to the above.

Principle 12: Incitement to hatred

12.1. All States should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (hate speech).³ National legal systems should make it clear, either explicitly or through authoritative interpretation, that:

i. The terms ‘hatred’ and ‘hostility’ refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group.

ii. The term ‘advocacy’ is to be understood as requiring an intention to promote hatred publicly towards the target group.

iii. The term ‘incitement’ refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.

iv. The promotion, by different communities, of a positive sense of group identity does not constitute hate speech.

12.2. States should prohibit the condoning or denying of crimes of genocide, crimes against humanity and war crimes, but only where such statements constitute hate speech as defined by Principle 12.1.

12.3. States should not prohibit criticism directed at, or debate about, particular ideas, beliefs or ideologies, or religions or religious institutions, unless such expression constitutes hate speech as defined by Principle 12.1.

12.4. States should ensure that persons who have suffered actual damages as a result of hate speech as defined by Principle 12.1 have a right to an effective remedy, including a civil remedy for damages.

12.5. States should review their legal framework to ensure that any hate speech regulations conform to the above.

<http://www.article19.org/resources.php/resource/1214/en/camden-principles-on-freedom-of-expression-and-equality>, accessed on January 9, 2012.

APPENDIX 7: CODE OF CONDUCT FOR THE PRACTICE OF JOURNALISM IN KENYA

The Media Act 2010

The second schedule of the Act outlines the Code of Conduct of the Practice of Journalism in Kenya. It isolates 25 rules that journalists must adhere to when practicing the profession.

1. Accuracy and Fairness

The fundamental objective of a journalist is to write a fair, accurate and an unbiased story on matters of public interest. All sides of the story shall be reported, wherever possible. Comments should be obtained from anyone who is mentioned in an unfavourable context.

Whenever it is recognized that an inaccurate, misleading or distorted story has been published or broadcast, it should be corrected promptly. Corrections should present the correct information and should not restate the error except when clarity demands.

An apology shall be published or broadcast whenever appropriate in such manner as the Council may specify.

When stories fall short on accuracy and fairness, they should not be published. Journalists, while free to be partisan, should distinguish clearly in their reports between comment, conjecture and fact.

In general, provocative and alarming headlines should be avoided. Headings should reflect and justify the matter printed under them. I-leadings containing allegations made in statements should either identify the body or the source making them or at least carry quotation marks.

Journalists should present news fairly and impartially, placing primary value on significance and relevance.

Journalists should treat all subjects of news coverage with respect and dignity, showing particular compassion to victims of crime or tragedy.

Journalists should seek to understand the diversity of their community and inform the public without bias or stereotype and present a diversity of expressions, opinions, and ideas in context.

Journalists and other media practitioners should present analytical reporting based on professional perspective, not personal bias.

2. Independence

Journalists should defend the independence of all journalists from those seeking influence or control over news content. They should -

(a) gather and report news without fear or favour, and vigorously resist undue influence from any outside forces, including advertisers, sources, story subjects, powerful individuals and special interest groups.

(b) resist those who would buy or politically influence news content or who would seek to intimidate those who gather and disseminate news.

(c) determine news content solely through editorial judgement and not the result of outside influence.

(d) resist any self-interest or peer pressure that might erode journalistic duty and service to the public.

(e) recognize that sponsor the news should not be used in any way to determine, restrict or manipulate content.

(f) refuse to allow the interests of ownership or management to influence news' judgment and content inappropriately.

3. Integrity

Journalists should present news with integrity and decency, avoiding real or perceived conflicts of interest, and respect the dignity and intelligence of the audience as well as the subjects of news. They should—

- (a) identify sources whenever possible. Confidential sources should be used only when it is clearly in public interest to gather or convey important information or when a person providing information might be harmed;
- (b) clearly label opinion and commentary;
- (c) use technological tools with skill and thoughtfulness, avoiding techniques that skew facts, distort reality, or sensationalize events;
- (d) use surreptitious news gathering techniques including hidden cameras or microphones, only if there is no other way of obtaining stories of significant public importance, and if the technique is explained to the audience.

Journalists should not —

- (a) pay news sources who have vested interest in a story;
- (b) accept gifts, favours or compensation from those who might seek to influence coverage;
- (c) engage in activities that may compromise their integrity or independence.

4. Accountability

Journalists and all media practitioners should recognize that they are accountable for their actions to the public, the profession and themselves. They should—

- (a) actively encourage adherence to these standards by all journalists and media practitioners;
- (b) respond to public concerns, investigate complaints and correct errors promptly;
- (c) recognise that they are duty-bound to conduct themselves ethically.

5. Opportunity to Reply

A fair opportunity to reply to inaccuracies should be given to individuals or organizations when reasonably called for. If the request to correct inaccuracies in a story is in the form of a letter, the editor has the discretion to publish it in full or in its abridged and

edited version, particularly when it is too long, but the remainder should be an effective reply to the allegations.

6. Unnamed Sources

Unnamed sources should not be used unless the pursuit of the truth will best be served by not naming the source who should be known by the editor and reporter. When material is used in a report from sources other than the reporter's, these sources should be indicated in the story.

7. Confidentiality

In general, journalists have a professional obligation to protect confidential sources of information.

8. Misrepresentation

Journalists should generally identify themselves and not obtain or seek to obtain information or pictures through misrepresentation or subterfuge. Subterfuge can be justified only in the public interest and only when material cannot be obtained by any other means.

9. Obscenity, Taste and Tone in Reporting

(a) In general, journalists should avoid publishing obscene, vulgar or offensive material unless such material contains a news value which is necessary in the public interest.

(b) In the same vein, publication of photographs showing mutilated bodies, bloody incidents and abhorrent scenes should be avoided unless the publication or broadcast of such photographs will serve the public interest.

10. Paying for News and Articles

When money is paid for information, serious questions can be raised about the credibility of that information and the motives of the buyer and the seller. Therefore, in principle, journalists should not receive any money as an incentive to publish any information.

11. Covering Ethnic, Religious and Sectarian Conflict

(a) News, views or comments on ethnic, religious or sectarian dispute should be published or broadcast after proper verification of facts and presented with due caution and restraint in a manner which is conducive to the creation of an atmosphere congenial to national harmony, amity and peace.

(b) Provocative and alarming headlines should be avoided.

(c) News reports or commentaries should not be written or broadcast in a manner likely to inflame the passions, aggravate the tension or accentuate the strained relations between the communities concerned. Equally so, articles or broadcasts with the potential to exacerbate communal trouble should be avoided.

12. Recording Interviews and Telephone Conversations

(a) Except in justifiable cases, journalists should not tape or record anyone without the person's knowledge. An exception may be made only if the recording is necessary to protect the journalist in a legal action or for some other compelling reason. In this context these standards also apply to electronic media.

(b) Before recording a telephone conversation for broadcast, or broadcasting a telephone conversation live, a station should inform any party to the call of its intention to broadcast the conversation. This, however, does not apply to conversation whose broadcast can reasonably be presumed, for example, telephone calls to programmes where the station customarily broadcasts calls.

13. Privacy

(a) The public's right to know should be weighed against the privacy rights of people in the news.

(b) Journalists should stick to the issues.

(c) Intrusion and inquiries into an individual's private life without the person's consent are not generally acceptable unless public interest is involved. Public interest should itself be legitimate and not merely prurient or morbid curiosity. Things concerning a person's home, family, religion, tribe, health, sexuality, personal life and private affairs are covered by the concept of privacy except where these impinge upon the public.

14. Intrusion into Grief and Shock

(a) In cases involving personal grief or shock, inquiries should be made with sensitivity and discretion.

(b) In hospitals, journalists should identify themselves and obtain permission from a responsible executive before entering non-public areas of hospitals or similar institutions to pursue enquiries.

15. Sex Discrimination

Women and men should be treated equally as news subjects and news sources.

16. Financial Journalism

(a) Journalists should not use financial information they receive in advance for their own benefit, and should not pass the information to others.

(b) Journalists should not write or broadcast about shares securities and other market instruments in whose performance they know they or their close families have a significant financial interest, without disclosing the interest to the editor.

(c) Journalists should not buy or sell, directly or through nominees or agents, shares or securities and other market instruments about which they intend to write in the near future.

17. Letters to the Editor

An editor who decides to open a column on a controversial subject is not obliged to publish all the letters received in regard to that subject. The editor may select and publish

only some of them either in their entirety or the gist thereof. However, in exercising this right, the editor should make an honest attempt to ensure that what is published is not one-sided but presents a fair balance between the pros and the cons of the principal issue. The editor shall have the discretion to decide at which point to end the debate in the event of a rejoinder upon rejoinder by two or more parties on a controversial subject.

18. Protection of Children

Children should not be identified in cases concerning sexual offences, whether as victims, witnesses or defendants. Except in matters of public interest, for example, cases of child abuse or abandonment, journalists should not normally interview or photograph children on subjects involving their personal welfare in the absence, or without the consent, of a parent or other adult who is responsible for the children. Children should not be approached or photographed while at school and other formal institutions without the permission of school authorities.

In adhering to this principle, a journalist should always take into account specific cases of children in difficult circumstances.

19. Victims of Sexual Offences

The media should not identify victims of sexual assault or publish material likely to contribute to such identification.

Such publications do not serve any legitimate journalistic or public need and may bring social opprobrium to the victims and social embarrassment to their relations, family, friends, community, religious order and to the institutions to which they belong.

20. Use of Pictures and Names

As a general rule, the media should apply caution in the use of pictures and names and should avoid publication when there is a possibility of harming the persons concerned.

Manipulation of pictures in a manner that distorts reality should be avoided. Pictures of grief, disaster and those that embarrass and promote sexism should be discouraged.

21. Innocent Relatives and Friends

The media should generally avoid identify relatives or friends of persons convicted or accused of crime unless the reference to them is necessary for the full, fair and accurate reporting of the crime or legal proceedings.

22. Acts of Violence

The media should avoid presenting acts of violence, armed robberies, banditry and terrorist activities in a manner that glorifies such anti-social conduct. Also, newspapers should not allow their columns to be used for writings which tend to encourage or glorify social evils, warlike activities, ethnic, racial or religious hostilities.

23. Editor's Responsibilities

The editor shall assume the responsibility for all content, including advertisements, published in a newspaper. If responsibility is disclaimed, this shall be explicitly stated beforehand.

24. Advertisements

The editor should not allow any advertisement which is contrary to any aspect of this Code of Conduct. In this regard, and to the extent applicable, the editor should be guided by the Advertiser's Code of Conduct.

25. Hate Speech

Quoting persons making derogatory remarks based on ethnicity, race, creed, colour and sex shall be avoided. Racist or negative ethnic terms should be avoided. Careful account should be taken of the possible effect upon the ethnic or racial group concerned, and on the population as a whole, and of the changes in public attitudes as to what is and bat is not acceptable when using such terms.

APPENDIX 8: SOCIETY FOR PROFESSIONAL JOURNALISTS CODE OF ETHICS

Seek Truth and Report It

Members of the Society of Professional Journalists (SPJ) believe that public enlightenment is the forerunner of justice and the foundation of democracy. The duty of the journalist is to further those ends by seeking truth and providing a fair and comprehensive account of events and issues. Conscientious journalists from all media and specialties strive to serve the public with thoroughness and honesty. Professional integrity is the cornerstone of a journalist's credibility. Members of the Society share a dedication to ethical behaviour and adopt this code to declare the Society's principles and standards of practice. These ethical values have come to be accepted and adopted by journalists worldwide.

- Journalists should be honest, fair and courageous in gathering, reporting and interpreting information. Journalists should:
- Test the accuracy of information from all sources and exercise care to avoid inadvertent error. Deliberate distortion is never permissible.
- Diligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing.
- Identify sources whenever feasible. The public is entitled to as much information as possible on sources' reliability.
- Always question sources' motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.
- Make certain that headlines, news teases and promotional material, photos, video, audio, graphics, sound bites and quotations do not misrepresent. They should not oversimplify or highlight incidents out of context.

- Never distort the content of news photos or video Image enhancement for technical clarity is always permissible. Label montages and photo illustrations.
- Avoid misleading re-enactments or staged news events. If re-enactment is necessary to tell a story, label it.
- Avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public.
- Use of such methods should be explained as part of the story.

Never plagiarise.

- Tell the story of the diversity and magnitude of the human experience boldly, even when it is unpopular to do so.
- Examine their own cultural values and avoid imposing those values on others.
- Avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status.
- Support the open exchange of views, even views they find repugnant.
- Give voice to the voiceless; official and unofficial sources of information can be equally valid.
- Distinguish between advocacy and news reporting. Analysis and commentary should be labelled and not misrepresent fact or context.
- Distinguish news from advertising and shun hybrids that blur the lines between the two.
- Recognise a special obligation to ensure that the public's business is conducted in the open and that government records are open to inspection.

Minimise Harm

Ethical journalists treat sources, subjects and colleagues as human beings deserving of respect. Journalists should:

- Show compassion for those who may be affected adversely by news coverage. Use special sensitivity when dealing with children and inexperienced sources or subjects.
- Be sensitive when seeking or using interviews or photographs of those affected by tragedy or grief: Recognise that gathering and reporting information may cause harm or discomfort.
- Pursuit of the news is not a license for arrogance.
- Recognise that private people have a greater right to control information about themselves than do public officials and others who seek power, influence or attention.
- Only an overriding public need can justify intrusion into anyone's privacy.
- Show good taste. Avoid pandering to lurid curiosity.
- Be cautious about identifying juvenile suspects or victims of sex crimes.
- Be judicious about naming criminal suspects before the formal filing of charges.
- Balance a criminal suspect's fair trial rights with the public's right to be informed.

Act Independently

Journalists should be free of obligation to any interest other than the public's right to know.

Journalists should:

- Avoid conflicts of interest, real or perceived.
- Remain free of associations and activities that may compromise integrity or damage credibility.
- Refuse gifts, favours, fees, free travel and special treatment, and shun secondary employment, political involvement, public office and service in community organizations if they compromise journalistic integrity.

- Disclose unavoidable conflicts.
- Be vigilant and courageous about holding those with power accountable.
- Deny favoured treatment to advertisers and special interests and resist their pressure to influence news coverage.
- Be wary of sources offering information for favors or money; avoid bidding for news.

Be Accountable

Journalists are accountable to their readers, listeners, viewers and each other.

Journalists should:

- Clarify and explain news coverage and invite dialogue with the public over journalistic conduct.
- Encourage the public to voice grievances against the news media.
- Admit mistakes and correct them promptly.
- Expose unethical practices of journalists and the news media.
- Abide by the same high standards to which they hold others.

The SPJ Code of Ethics is voluntarily embraced by thousands of journalists, regardless of place or platform, and is widely used in newsrooms and classrooms as a guide for ethical behaviour. The code is intended not as a set of “rules” but as a resource for ethical decision-making. It is not — nor can it be under the First Amendment — legally enforceable.

The present version of the code was adopted by the 1996 SPJ National Convention, after months of study and debate among the Society’s members. Sigma Delta Chi’s first Code of Ethics was borrowed from the American Society of Newspaper Editors in 1926. In 1973, Sigma Delta Chi wrote its own code, which was revised in 1984, 1987 and 1996.

<http://www.spj.org/pdf/ethicscode.pdf>

APPENDIX 9: INTERNATIONAL FEDERATION OF JOURNALISTS

Declaration of Principles of Conduct of Journalists

This international declaration is proclaimed as a standard of professional conduct for journalists engaged in gathering, transmitting, disseminating and commenting on news and information in describing events.

1. Respect for truth and for the right of the public to truth is the first duty of the journalist.
2. In pursuance of this duty, the journalist shall at all times defend the principles of freedom in the honest collection and publication of news, and of the right to fair comment and criticism.
3. The journalist shall report only in accordance with facts of which he/she knows the origin. The journalist shall not suppress essential information or falsify documents.
4. The journalist shall only use fair methods to obtain news, photographs and documents.
5. The journalist shall do the utmost to rectify any published information which is found to be harmfully inaccurate.
6. The journalist shall observe professional secrecy regarding the source of information obtained in confidence.
7. The journalist shall be alert to the danger of discrimination being furthered by media, and shall do the utmost to avoid facilitating such discriminations based on, among other things, race, sex, sexual orientation, language, religion, political or other opinions, and national and social origins.
8. The journalist shall regard as grave professional offenses the following: plagiarism; malicious misinterpretation; calumny; libel; slander; unfounded accusations;

acceptance of a bribe in any form in consideration of either publication or suppression.

9. Journalists worthy of the name shall deem it their duty to observe faithfully the principles stated above. Within the general law of each country the journalist shall recognise in matters of professional matters the jurisdiction of colleagues only, to the exclusion of any kind of interference by governments or others.

Adopted by 1954 World Congress of the IFJ. Amended by the 1986 World Congress.

APPENDIX 10: PAYAM TAMIZ V GOOGLE INC. AND GOOGLE UK LIMITED

Neutral Citation Number: [2012] EWHC 449 (QB)

Case No: HQ11D03178

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

2 March 2012

Before:

THE HONOURABLE MR JUSTICE EADY

Between:

PAYAM TAMIZ

Claimant

- and -

GOOGLE INC

GOOGLE UK LIMITED

Defendants

The Claimant appeared in person

Catrin Evans (instructed by Reynolds Porter Chamberlain LLP) for the First Defendant

The Second Defendant was not represented

Hearing date: 16 February 2012

HTML VERSION OF JUDGMENT

Crown Copyright ©

Mr Justice Eady :

The parties

1. In this libel action Mr Payam Tamiz has sued both Google Inc and Google UK Ltd (as, respectively, First and Second Defendants) in relation to eight comments which are said to be defamatory of him and which were posted on a blog bearing the name "London Muslim" at various times between 28 and 30 April 2011. He does not sue in relation to the original blog or article to which these comments related, nor in respect of some 37 other comments contained in the same thread. Nevertheless, it may be that such matters would need to be taken into account as part of the context for the words sued upon.
2. Google Inc is a corporation registered in Delaware, in the USA, and its principal place of business is in California. On 22 September 2011 Mr Tamiz was granted permission by Master Eyre to serve the claim form on Google Inc in California. It is now sought by Ms Evans on its behalf to have that order (which was made, in the usual way, on a without notice application) set aside in accordance with the provisions of CPR Part 11(1) and (6).
3. Ms Evans also asks that the court should declare that there is no jurisdiction to try the claim; alternatively, should the court hold that there is such jurisdiction, that it should not be exercised.
4. Google Inc provides a range of Internet services including via Blogger.com (also based in and managed from the USA). This is described as a "platform" which allows any Internet user, in any part of the world, to create an independent blog free of charge. If someone uses that service, without having his/her own web address ("URL"), then Blogger.com allows users to host their blogs on Blogger.com URLs. This was the case with the blog on which the comments complained of in these proceedings

were posted. Google UK Ltd simply carries on a sales support and marketing business within this jurisdiction. It does not operate or control Blogger.com and has therefore been joined in these proceedings inappropriately. This was explained in a defence served on 8 December 2011. The English company takes no part in the applications before me.

5. It seems that Mr Tamiz was in the news for a brief period in or about April 2011 in relation to allegations that he had resigned as a Conservative Party candidate for local elections in Thanet after making inappropriate remarks. Indeed, this was the subject of the original post or article on the London Muslim blog, to which the eight comments sued upon were supposed to be in response. It had been headed "Tory Muslim candidate Payam Tamiz resigns after calling girls 'sluts'". As I have already made clear, Mr Tamiz has brought no proceedings against either the original blogger or the individual commentators, who would undoubtedly be responsible in law for any defamatory words they had posted. This may not be altogether surprising, since most of these communications are made anonymously and it is not easy to track down who was responsible. In the absence of any such problems, however, Mr Tamiz has sued in respect of an article appearing (originally on 27 April 2011) in the *Evening Standard* by Joe Murphy, described as Political Editor, and dealing with the allegation that he had resigned after it had been discovered that his Facebook site referred to women as "sluts".

The words complained of

6. I shall set out the initial blog or article appearing on the London Muslim website on 27 April simply because it is relevant background context for what followed. The words appeared under a photograph of Mr Tamiz:

"Payam Tamiz a Tory Muslim council candidate with a 5 o'clock shadow has resigned from the party after calling Thanet girls 'sluts'.

Tamiz who on his Twitter page describes himself as an 'ambitious British Muslim' is bizarrely studying law so one would have thought (*sic*) this Tory prat with Star Trek Spock ears might have engaged the odd brain cell before making these offensive remarks."

7. Thereafter a range of comments appears and I shall set out only those complained of, which have been conveniently labelled A to H for ease of reference.

Comment A

"Anonymous said ...

I know Mr Tamiz very well and am surprised that it has taken this long for all this to come out, Payam is a known drug dealer in thanet and has been taken to court for theft from his employers tescos in Ramsgate. His whole family are criminals his mother Mrs Sohela Tamiz has several convictions for theft and shoplifting and got sentenced at maidstone crown court

28 April 2011 14:53"

Comment B

"Anonymous said ...

Can't deny what he said is true but isn't this the same Payam Tamiz that use to take girls back to his 'houseparties' practically every weekend with his friends and sleep with them? Hypocritical much?

30 April 2011 12:28"

Comment C

"Anonymous said ...

The blokes a class A prat not only for the comments he recently made. He may have a few half wits as a following but I speak for the people that have known payam for several years and have been on the reciving (*sic*) end of his abuse a disrespect and his not such a nice person. I'm sure we'll be hearing alot more from his past which will paint a true picture of him.

28 April 2011 23:04"

Comment D

"Anonymous said ...

So Mr Whacker is a violent (*sic*) racist, certainly doesn't like white people does he?!

If you'd ever been to Margate you would find the majority are white women, even those from the Eastern bloc. To tar all Margate women with the word slut is very derogatory, how does he know? Does he make a habit of chasing women around? Or as someone implies above, does he sell drugs to them?

28 April 23:51"

(Only the last two questions are the subject of complaint.)

Comment E

"Anonymous said ...

I've only read that Payams claiming to be 21, I'm sure he told me that his older than that. Fake asylum claim was it. The good old home office and all us wankers that pay tax for waste of spaces like him.

29 April 2011 01:09"

Comment F

"Anonymous said ...

Before Payam starts to call women sluts it might be an idea for him to look closer to home, how many (*sic*) brothers and sisters has he got, all with different fathers. I thought Muslim men were the one who were meant to have more than one wife, not the women with more than one husband. Is there not a 30 year gap between the ages of his younger to older brother and sister. Look closer to home pal.

29 April 2011 09:40"

Comment G

"Anonymous said ...

The only reason his callig (*sic*) girls slags is cos he aint getting none himself. And he blames a relationship breakup for his comments, but the only problem with that being is that Payams never had a girlfriend since I known him and thats been a couple of years, that makes him single at the time.

Poor little Payam, has you giving it the large one to your friends blown up in your face and back fired.

It couldn't have happended (*sic*) to a better person, his a little snake and he knows it. I'd put my money on him still being a virgin, not being funny but you only got to look at his picture to work that out.

29 April 2011 21:26"

Comment H

"Anonymous said ...

And his brothers girl friend is an escort girl, Claudine Lear, look closer to home pal.

29 April 2011 18:43"

A summary of the case advanced by Google Inc

8. In general terms, the stance of Google Inc is that it has no control over any of this content. It is thus not a publisher of the material but merely a neutral service provider. In due course, following the Claimant's complaint, Google Inc after a considerable delay passed it on to the blogger in question, who remains unidentified so far as the Claimant is concerned, and he took all the material down, along

with the original article, on a voluntary basis. There is no evidence that it has been re-posted at any time since.

9. Google Inc makes the point that it has no way of knowing whether the comments complained of were true or not (or subject to some other defence in law). It argues that it cannot reasonably be expected to investigate and determine the truth or falsity of allegations made by bloggers.
10. One needs to be wary of analogies when considering modern technology, but it may perhaps be said that the position is, according to Google Inc, rather as though it owned a wall on which various people had chosen to inscribe graffiti. It does not regard itself as being more responsible for the content of these graffiti than would the owner of such a wall.
11. Against this background, Ms Evans has developed the following arguments. First, she submits that the particulars of claim do not go so far as asserting that the words complained of have been accessed or downloaded by a substantial number of readers in this jurisdiction. On that ground alone, she argues that the Claimant has not even pleaded that a "real and substantial tort" has been committed in this jurisdiction: see *Jameel (Yousef) v Dow Jones & Co Inc* [\[2005\] QB 946](#). He sought to deal with this by introducing a skeleton argument and a number of witness statements shortly before the hearing. He being a litigant in person, no objection was taken to this course. Ms Evans also argues, however, that in any event the content of the words complained of does not reach what she describes as the necessary "threshold of seriousness required to establish a cause of action in libel".
12. Secondly, Ms Evans argues that Google Inc is not a publisher for the purposes of the English law of defamation.
13. Thirdly, even if Google Inc is to be regarded as a publisher of the words complained of, Ms Evans argues that it would be protected against liability by Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002. These implement in the law of the United Kingdom the provisions of Article 14 of Directive 2000/31/EC of the European Parliament and of the Council dated 8 June 2000 relating to electronic commerce.

The complaints made to Google Inc

14. It is appropriate to address these submissions both by reference to the period before Google Inc received any notification of Mr Tamiz' complaint and to the period afterwards, in order to see whether it makes any difference as a matter of law. For that reason, I should go into a little further detail as to the history of the communications between the parties, as described in the evidence of Mr Jaron Lewis, who is Ms Evans' instructing solicitor.
15. According to Mr Tamiz, he first notified his complaint on 28 or 29 April 2011 (i.e. as the postings were taking place) when he used the "Report Abuse" function on the relevant web page. What became of this remains unclear.
16. A letter of claim was sent on 29 June to Google UK Ltd, which was received on 5 July. This complained of the original article, as being defamatory and untrue, although it was not subsequently sued upon in these proceedings. Complaint was also made of what is now described as Comment A. This letter was passed by Google UK Ltd to Google Inc, which responded to Mr Tamiz by email on 8 July. Clarification was sought as to whether the comment in question was said to be untrue, since his letter had not apparently made that clear. It was at this stage that it was pointed out to Mr Tamiz that the blogger service had nothing to do with Google UK Ltd.
17. Mr Tamiz responded promptly on 8 July to the effect that Comment A was indeed "false and defamatory". At this stage, he introduced a complaint about Comment B as well.
18. The "Blogger Team" within Google Inc sent a further email to Mr Tamiz on 19 July, seeking his permission to forward his complaint to the author of the blog page. He was told, however, that Google Inc itself would not be removing the post complained of. Mr Tamiz responded by giving the necessary permission on 22 July.
19. In that email of 22 July, Mr Tamiz complained about a further five comments on the blog, now identified as Comments C, D, E, F and G. He confirmed that these were alleged to be defamatory and it seemed to be implicit also that he was characterising them as untrue.
20. After considerable delay, Google Inc forwarded the letter of claim to the blogger on 11 August of last year and informed Mr Tamiz that it had done so. As I have said, on 14 August the article and all the

comments were removed by the blogger himself. Mr Tamiz was accordingly notified by Google Inc the following day. It was on or about 10 August that he sent the claim form in these proceedings, together with the original particulars of claim, to the court. It was issued by the court on 16 August.

21. After the Master gave permission to serve the claim form in California, on 22 September, the particulars of claim incorporated an additional complaint relating to Comment H and were served on 2 November.

The reasons for seeking permission to serve out of the jurisdiction

22. When Mr Tamiz applied for permission to serve out, he seems to have been relying on PD6B of CPR Pt 6 with specific reference to sub-paragraph 3.1(3) and/or 3.1(9). It would appear that the first ground was based on a misapprehension, since the provision specifies circumstances in which:

"(3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –

(a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

Here, the only relevant "defendant" on whom the claim form had been served within this jurisdiction was Google UK Ltd, in respect of which there is and was no "real issue which it is reasonable for the court to try".

23. That leaves sub-paragraph 3.1(9) to be considered as a basis for service out. This presupposes a claim in tort "where – (a) damage was sustained within the jurisdiction; or (b) the damage sustained resulted from an act committed within the jurisdiction". Here, it is to be assumed that Mr Tamiz contends that damage has been sustained to his reputation within the jurisdiction: that is what any libel action is supposed to be concerned with. It is true that under English common law damage is presumed, but publication has first to be proved. It is clear that publication cannot be inferred solely by reason of the

fact that defamatory allegations have been accessible on the Internet: see *Jameel (Yousef)*, cited above, and *Al Amoudi v Brisard* [\[2007\] 1 WLR 113](#). Thus, the burden lies upon the relevant claimant to establish at the outset a "real and substantial" publication with this jurisdiction.

Is there any evidence of a "real and substantial tort" within this jurisdiction?

24. Ms Evans' first point was that Mr Tamiz has so far not even pleaded any instances of substantive publication. That is an omission he sought to correct, at the last minute before the hearing, by adducing witness statements from various individuals who had seen some of the material complained of. He further claimed that, given time, he would be able to produce similar evidence from others. Nowadays, of course, it will not generally suffice for a claimant merely to prove that the relevant material has been accessed, read or downloaded by some identified person(s). It is necessary to go further and show some ground for believing that it has been given a measure of credence and thus been liable to affect the claimant's reputation in the eyes of such person(s). It is not enough to show, for example, that the words have been read by someone in the claimant's "camp", such as a solicitor, friend, relative or colleague who has attached no weight to it at all, as happened in *Jameel (Yousef)*. Mr Tamiz, however, suggests that not all of the deponents or potential deponents he has introduced are friends or acquaintances of his and that some may well have attached a degree of credence to what was alleged. In particular, someone at Conservative Central Office had asked for some of the allegations to be investigated or refuted.
25. Ms Evans argues that anyone accessing the material complained of in these proceedings, and quoted above, would recognise it as being typical of the mindless rubbish to be found all over the Internet. People realise, she submits, that often contributors to threads of this kind are merely shooting from the hip, and without giving the matter any forethought or mature reflection: no weight should be attached to what they are saying, any more than to casual bar room gossip. She referred in this context to the discussion in *Smith v ADVFN Plc* [\[2008\] EWHC 1797 \(QB\)](#) at [14]-[17] and to *Clift v Clarke* [\[2011\] EWHC 1164 \(QB\)](#) at [32] and [36].
26. It seems to me necessary to consider carefully each of the eight comments individually. They cannot all necessarily be readily dismissed as "mere vulgar abuse" or as being obviously not intended to be taken seriously. For example, Comment A contains two clear allegations (i) of being a drug dealer and (ii) of

having stolen from a former employer. What is more, the author suggests that the information is widely known and that there has even been a conviction for theft. Those were apparently the matters on which the Conservative Party, not surprisingly, required reassurance.

27. Less significant is Comment B, which alleges substantively only that Mr Tamiz used to sleep with girls at "houseparties". Nowadays, I do not suppose that would be taken to be defamatory by "right-thinking members of society", but it is coupled with an accusation of hypocrisy and I do not feel able at this stage to conclude that this is incapable of founding a cause of action.
28. As to Comments C, E, F, G and H, I would agree with Ms Evans that they can each be characterised as effectively "mere vulgar abuse". No sensible person would attach much, if any, weight to them. They do not seem to represent examples of a real and substantial tort such as to suggest any need for the vindication of Mr Tamiz' reputation.
29. On the other hand, I am not so persuaded in relation to Comment D, which rehearses (albeit with a question mark attached) the earlier charge of being a drug dealer. As with Comment A, I believe that I cannot simply dismiss this complaint out of hand.
30. An allegation of criminal offending, whether of theft from an employer or of dealing in drugs, cannot be discounted on the basis of a mere "numbers game". Such allegations are apt to cause damage to reputation, in some circumstances, even in the case of restricted publication. If this were an application to strike out, I would accordingly leave in Comments A and D. I would also leave Comment B, but I would remove the other five comments.
31. It is submitted that whatever defamatory sting is contained in those comments is, at least, significantly diluted by the surrounding context of the thread. They too would therefore be likely to be dismissed as part of the generally abusive banter. That seems to me the kind of argument that could be developed at trial, rather than on an application analogous to a strike out. The fact that some contributors to a thread are talking nonsense does not in itself mean that all the others should be similarly dismissed

Is Google Inc a "publisher" according to common law principles?

32. Ms Evans next raised the argument that Google Inc should not be regarded, as a matter of English law, as a publisher of the words complained of. It is probably fair to say that none of the decisions so far relating to the role of Internet service providers (ISPs) has definitively established, in general terms, exactly how such entities fit into the traditional framework of common law principles. In the recent decision of His Honour Judge Parkes QC in *Davison Habeeb* [\[2011\] EWHC 3031 \(QB\)](#), he recognised that " ... there is in my judgment an arguable case that [Google Inc] is the publisher of the material complained of, and that at least following notification it is liable for publication of that material".
33. The position may well be fact-sensitive. Liability may turn upon the extent to which the relevant ISP entity has knowledge of the words complained of, and of their illegality or potential illegality, and/or on the extent to which it has control over publication. For example, in *Godfrey v Demon Internet Ltd* [\[2001\] QB 201](#), it was held that an ISP which continued to store a defamatory posting on its news server, after having been asked to remove it by the claimant, was responsible for the publications which occurred when that posting was later accessed. (That case was decided some 18 months before the Human Rights Act came into effect.) On the other hand, in *Bunt v Tilley* [\[2007\] 1 WLR 1243](#), a claim was struck out against three separate ISPs on the basis that " ... persons who truly fulfil no more than the role of a passive medium for communication cannot be characterised as publishers".
34. In a rather different context, where Google Inc had been sued in respect of its role as operator of the widely used search engine, it was held not to be responsible for publication of defamatory "snippets", derived from automated searches by "web-crawling robots", even though published on the "results" page in response to Google searches. Because the process is automated, and searches are framed by those making the enquiry without any human input from Google Inc, it was held that the mental element traditionally involved in responsibility for publication at common law was absent: see *Metropolitan International Schools Ltd v Designtecnica Corpn* [\[2011\] 1 WLR 1743](#).
35. No allegation is made in this case of liability on the part of Google Inc in respect of any of the "comments" complained of prior to notification by Mr Tamiz of his objections. It is only necessary, therefore, to assess potential legal liability from the point of notification (whenever that occurred). It is relevant to have in mind, although it cannot be determinative as a matter of law, that Google Inc promulgates and attempts to follow a well known policy of its own; that is to say, it will not remove

offending material because it is not in a position to investigate or come to a decision upon any legal challenge. As I understand it, this is partly a question of principle and partly a matter of sheer practicality. Google Inc regards itself as providing a platform for the free exchange of information and ideas and would not wish to be seen as a censor. In any event, the blogs on Blogger.com contain, I am told, more than half a trillion words and 250,000 new words are added every minute. In these circumstances, it is virtually impossible for the corporation to exercise editorial control over content. The position was summarised by Ms Evans' instructing solicitor in paragraph 9 of his witness statement:

"[Blogger.com] does not create, select, solicit, vet or approve that content, which is published and controlled by the blog owners. Blogger.com merely provides the tools for users to operate and maintain their sites."

36. Ms Evans invites me to adopt a similar approach to that in the *Designtecnica* case and to conclude that it would be "unrealistic" to attribute responsibility for publication of material on any particular blog to Google Inc, whether before or after notification of a complaint.
37. Where the law is uncertain, in the face of rapidly developing technology, it is important that judges should strive to achieve consistency in their decisions and that proper regard should be paid, in doing so, to the values enshrined in the European Convention on Human Rights and Fundamental Freedoms. In particular, one should guard against imposing legal liability in restraint of Article 10 where it is not necessary or proportionate so to do. In this context, Ms Evans argues that it is unnecessary to impose liability on ISPs when a complainant, in order to have access to justice, may alternatively have resort to those who undoubtedly are responsible for publishing the offending words. This would include primarily the authors and possibly also the persons who have control of the blog in question. As I have indicated already, this is an approach which may be regarded as more theoretical than real because of problems of anonymity, but it is certainly not an argument that can be simply ignored. In *Bunt v Tilley*, cited above, the claims against AOL UK Ltd, Tiscali UK Ltd and British Telecommunications Plc were all struck out. Against that background, I concluded the judgment with these words:

"The Claimant is not deprived of access to justice. His remedies lie against the First to Third Defendants (if he can establish the necessary ingredients in respect of each). They may not be

persons of substance, such as to make it worthwhile pursuing them. Even if that is right, it is clearly not a sufficient reason for bringing in the present applicants ..."

The important question, in the present context, would appear to be, not whether Mr Tamiz can identify the authors or bloggers in question, still less whether they are worth powder and shot, but rather whether he is in a position to establish against Google Inc the necessary attributes of a publisher in accordance with common law principles.

38. Google Inc accepts the responsibility of notifying (albeit not always with great promptitude) the blogger(s) in question. It does not, however, accept that it should investigate every complaint received, whether by way of establishing the facts or obtaining advice on the relevant domestic law or laws that may be applicable. The fact that an entity in Google Inc's position may have been notified of a complaint does not immediately convert its status or role into that of a publisher. It is not easy to see that its role, if confined to that of a provider or facilitator beforehand, should be automatically expanded thereafter into that of a person who authorises or acquiesces in publication. It claims to remain as neutral in that process after notification as it was before. It takes no position on the appropriateness of publication one way or the other. It may be true that it has the technical capability of taking down (or, in a real sense, censoring) communications which have been launched by bloggers or commentators on its platform. Yet that is not by any means the same as saying that it has become an author or authoriser of publication. It is no doubt often true that the owner of a wall which has been festooned, overnight, with defamatory graffiti could acquire scaffolding and have it all deleted with whitewash. That is not necessarily to say, however, that the unfortunate owner must, unless and until this has been accomplished, be classified as a publisher.

39. It seems to me to be a significant factor in the evidence before me that Google Inc is not required to take any positive step, technically, in the process of continuing the accessibility of the offending material, whether it has been notified of a complainant's objection or not. In those circumstances, I would be prepared to hold that it should not be regarded as a publisher, or even as one who authorises publication, under the established principles of the common law. As I understand the evidence its role, as a platform provider, is a purely passive one. The situation would thus be closely analogous to that described in *Bunt v Tilley* and thus, in striving to achieve consistency in the court's decision-making, I

would rule that Google Inc is not liable at common law as a publisher. It would accordingly have no need to rely upon a defence (statutory or otherwise).

The alternative arguments based on s.1 of the Defamation Act 1996

40. Ms Evans invites me also to consider the terms of s.1 of the Defamation Act 1996 and its possible impact on circumstances of this kind. The provisions are as follows:

"Responsibility for publication

(1) In defamation proceedings a person has a defence if he shows that –

(a) he was not the author, editor or publisher of the statement complained of,

(b) he took reasonable care in relation to its publication, and

(c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

(2) For this purpose 'author', 'editor' and 'publisher' have the following meanings, which are further explained in subsection (3) –

'author' means the originator of the statement, but does not include a person who did not intend that his statement be published at all;

'editor' means a person a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and

'publisher' means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.

(3) A person shall not be considered the author, editor or publisher of a statement if he is only involved –

(a) in printing, producing, distributing or selling printed material containing the statement;

(b) in processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part I of the Copyright, Designs and Patents Act 1988) containing the statement;

(c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;

(d) as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the make of the statement;

(e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

In a case not within paragraphs (a) to (e) the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement.

(4) Employees or agents of an author, editor or publisher are in the same position as the employer or principal to the extent that they are responsible for the content of the statement or the decision to publish it.

(5) In determining for the purposes of this section whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard shall be had to –

(a) the extent of his responsibility for the content of the statement or the decision to publish it,

(b) the nature or circumstances of the publication, and

(c) the previous conduct or character of the author, editor or publisher.

(6) This section does not apply to any cause of action which arose before the section came into force."

41. Since the object of these provisions is *inter alia* to narrow the scope of a publisher's potential liability for defamation, they would only become relevant on the hypothesis that I am wrong in my primary conclusion, in accordance with the common law principles, that Google Inc should not be held responsible as a publisher of the eight comments complained of. Ms Evans argues, on that assumption, that Google Inc would escape any such liability (including after notification) by reason of these provisions.

42. Whereas Google Inc in the course of its business makes facilities available, including by way of a platform for bloggers who use Blogger.com, it cannot be said to fall within the definition of a "commercial publisher". That is because it does not itself issue material to the public, or a section of the public. The blogger behind the "London Muslim" blog and/or those persons who comment upon its contents may very well be regarded as "issuing material to the public" (albeit quite possibly not in the course of a business). But that is, Ms Evans submits, a quite different activity from merely making the platform available. More specifically, she argues that it would be unrealistic and misleading to regard her client as issuing material containing any of the eight comments in the course of such a business.

43. Ms Evans also suggests that it is implicit in the statutory notion of "issuing material to the public" in the course of a business that there is a direct relationship, of a commercial or contractual nature, between the relevant "publisher" and its readers. I would not necessarily accept that in order to qualify as such a "publisher" it would be necessary to be remunerated directly by the reader. The London *Evening Standard* nowadays, for example, is distributed without charge to its readers. It nonetheless represents a commercial publishing activity, even though the proprietor looks to advertisers for its

revenue stream and ultimately for any profit. I am not sure, however, that this undermines Ms Evans' argument overall, since the proprietor of the *Evening Standard* undoubtedly issues material to the public in the course of a business. There are obviously other publishers who operate in the same way. But that is not the case with Google Inc.

44. It is relevant in the present context to consider the terms of s.1(3)(e), since it seems likely that Google Inc could be characterised as providing access to a communications system by means of which statements are transmitted by a person or persons over whom it has no effective control. That seems to me to be an accurate description of the service Google Inc provides. Ms Evans referred to a passage in *Gatley on Libel and Slander* (11th edn) at para 6.23, where the learned editors consider the position of a service provider who hosts a subscriber's web page in circumstances where there is a contract containing conditions about the content of the page, which might include restrictions on the inclusions of defamatory matter. They comment:

"However, if this were to be held to amount to 'effective control' over the originator of the material that would seriously reduce the protection afforded by s.1."

It seems to me to be likely that the draftsman had in mind, not so much the possibility of intervention and reliance on such a contractual term, but rather the situation where there was effective day-to-day control.

45. Reference was also made to the decision of Morland J in *Godfrey v Demon Internet Ltd*, cited above, at pp205-207, where his Lordship was considering the application of these very provisions to the facts before him. He was there concerned with a defendant ISP which carried a newsgroup and stored postings within the hierarchy for about a fortnight, during which time the posting would be available to be read by the customers. An unknown person in the United States made a posting which was "squalid, obscene and defamatory of the plaintiff". It followed a path from its originating American ISP to the defendant's news-server in England. It was not disputed that it could have obliterated the posting from its news-server after receiving a request from Mr Godfrey. Having referred to the relevant passages of s.1 of the 1996 Act, Morland J concluded with these words:

"In my judgment the defendants were clearly not the publisher of the posting defamatory of the plaintiff within the meaning of section 1(2) and (3) and incontrovertibly can avail themselves of section 1(1)(a). However the difficulty facing the defendants is section 1(1)(b) and (c). After 17 January 1997, after receipt of the plaintiff's fax, the defendants knew of the defamatory posting but chose not to remove it from their Usenet news servers. In my judgment this places the defendants in an insuperable difficulty so that they cannot avail themselves of the defence provided by section 1."

46. In this context, Ms Evans also adverted to what she considered a somewhat opaque passage in the judgment in the *Designtecnica* case at [80]:

"There is no need to address the possible defence under section 1 of the 1996 Act in the light of my finding in the Third Defendant's favour on primary liability. If, however, it should correctly be considered as a 'publisher', contrary to my conclusion, it is difficult to see how it would then qualify under section 1(1)(a)."

I can understand her puzzlement. In this brief and passing comment, I was contemplating the somewhat counter-intuitive hypothesis that Google Inc should be considered as a "publisher", contrary to my primary finding, and this led to her confusion. I was obviously finding it difficult to envisage how it could on that hypothesis, in any meaningful sense, *not* be "a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business". I do not believe there is an inconsistency between my conclusion and that of Morland J in *Godfrey*. Unlike Morland J, I did not go on to consider s.1(1)(b) and (c). It was not relevant to do so in the context of a search engine. All I was suggesting, in the passage at [80], was that *if* Google Inc was to be regarded as a publisher of the search "snippets", it was difficult to see how it would *not* fall within the definition of a commercial publisher. It would, on that hypothesis, not qualify for exemption under s.1(1)(a) and would be counted a "publisher".

47. For the sake of completeness, I will also address Ms Evans' arguments on s.1(1)(b) and (c). First, she submits that Google Inc did take "reasonable care" in relation to Mr Tamiz' complaint when they passed it on to the blogger in question. She argues that it was a proportionate response in view of the huge number of posts on the Blogger.com pages and the unreality of expecting Google Inc to

investigate the truth of the offending allegations and the availability, or otherwise, of other defences under English law. One could certainly say that the response was somewhat dilatory, but I would not consider it, in all the circumstances of this case, to be outside the bounds of a reasonable response.

48. Section 1(1)(c) contemplates a third element in the statutory defence; namely, that a defendant must demonstrate that "he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement". The natural interpretation of the phrase "a defamatory statement", to an English lawyer, is that the statement in question is *prima facie* defamatory. That is to say, it is not concerned with the assessment of the merits of any available defence, but only with the question of whether the words are defamatory on their face (or, perhaps, by way of innuendo if a proper explanation has been provided of the extraneous facts which would convey a defamatory meaning to persons with the relevant knowledge).

49. In the case of Mr Tamiz, of course, there is no suggestion that any relevant knowledge on the part of Google Inc predated his notification. As a matter of fact, different complaints were raised on different dates. He complained in relation to Comment A on 29 June 2011, although this was not received by Google Inc until about 5 July. He drew Comment B to its attention on or about 8 July and Comments C to G on or about 22 July. As I have already indicated, I would only consider that Comments A, B and D are arguably defamatory. Each of these had obviously a different date of notification. In each case, however, once the complaint was notified, I think that Google Inc would have had reason to believe that the relevant comment was defamatory. That is because allegations of theft, drug dealing and hypocrisy are on their face defamatory. That is far from saying, on the other hand, that Google Inc would have known, or had reason to believe, that it had done anything to cause or contribute to the publication of any of these statements.

50. Furthermore, Ms Evans argues that, in each case, the period between notification and the removal of the offending blog (on 14 August 2011) was so short as to give rise to potential liability on the part of Google Inc only for a very limited period – such that the court should regard its potential liability, if any, as being so trivial as not to justify the maintenance of these proceedings. In other words, to adopt the language of the Court of Appeal in *Jameel (Yousef)*, "the game would not be worth the candle". I believe she must be right about that.

51. If there were any need for Google Inc to rely on s.1 of the 1996 Act, I believe it would provide a defence.

The alternative argument based on Reg 19 of the 2002 Regulations

52. I turn now to Ms Evans' third line of argument. Even assuming that there were a reasonable prospect of establishing that Google Inc should be regarded as a publisher in accordance with common law, it is submitted that this claim would be defeated in any event by reason of Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 ("the Regulations"). The recent decision of *Davison v Habeeb* provides an example where that statutory defence succeeded and I am invited to take a similar approach.

53. The wording of the Regulation is as follows:

"Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where –

(a) the service provider –

(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider."

54. The somewhat unfamiliar expression "information society service" is explained in Regulation 2, which refers to Recital 17 of the E Commerce Directive. Such services cover "any service normally provided

for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service". Further assistance is to be found in Article 1(2) of the European Directive 98/48/EC (the Amended Technical Standards Directive):

"For the purposes of this definition:

- 'at a distance' means that the service is provided without the parties being simultaneously present,
- 'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electro-magnetic means,
- 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request."

55. In the Regulations the term "recipient of the service" is defined by Regulation 2 as being "any person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible". It is thus clear, according to the evidence, that Google Inc is the provider of Blogger.com which is an information society service; correspondingly, the "London Muslim" blogger is a "recipient" of the service, which he uses for the purpose of making information accessible.

56. Thus, Ms Evans submits that Mr Tamiz will only have a viable claim against Google Inc if he has a reasonable prospect of establishing at trial that it had, at the time the proceedings were commenced, "actual knowledge of unlawful information" or was "aware of facts and circumstances from which it would have been apparent to the service provider that the information was unlawful".

57. It is clearly important to focus on the meaning of the word "unlawful" in this context. As I have already noted, under the common law, it is generally reckoned that the publication of a "defamatory" allegation is not necessarily unlawful. While it may bear a *prima facie* defamatory meaning on its face, such a

publication may ultimately prove not to be unlawful if some recognised defence is available. The point was addressed in *Bunt v Tilley*, at [72], where it was observed that "in order to be able to characterise something as 'unlawful' a person would need to know something of the strength or weaknesses of the available defences". I was invited to consider also the terms of paragraph 16.75 of Dr Matthew Collins' work *The Law of Defamation and the Internet* (3rd edn):

"Suppose, for example, that a host knows that its server contains information imputing that an individual is guilty of a serious crime, but knows no facts or circumstances bearing one way or the other on the truth or falsity of that imputation. In those circumstances, it seems likely that the host would be entitled to rely on the Regulation 19 defence. The host does not have actual knowledge that the information on its server is unlawful, and is not aware of factual circumstances from which it is or would have been apparent that that information is unlawful."

A similar approach was adopted in *Kaschke v Gray* [\[2011\] 1 WLR 452](#), at [100], by Stadlen J and in *Davison v Habeeb*, at [64], by Judge Parkes QC. As was recognised, in each of the passages cited, the intention underlying Regulation 19 is to afford a powerful and clear defence to a provider unless the relevant state of knowledge can be established.

58. It is important now to take account of the recent decision of the Grand Chamber in Luxembourg in *L'Oréal SA and ors v eBay International AG and ors*, 12 July 2011. That was concerned with interpreting Article 14 of the E Commerce Directive upon which Regulation 19 itself is based. Ms Evans invited my attention especially to paragraphs [120]-[122]:

"120. As the case in the main proceedings may result in an order to pay damages, it is for the referring court to consider whether eBay has, in relation to the offers for sale at issue and to the extent that the latter have infringed L'Oréal's trademarks, been 'aware of facts or circumstances from which the illegal activity or information is apparent'. In the last-mentioned respect, it is sufficient, in order for the provider of an information society service to be denied entitlement to the exemption from liability provided for in Article 14 of Directive 2000/31, for it to have been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance with Article 14(1)(b) of Directive 2000/31.

121. Moreover, if the rules set out Article 14(1)(a) of Directive 2000/31 are not to be rendered redundant, they must be interpreted as covering every situation in which the provider concerned becomes aware, in one way or another, of such facts or circumstances.

122. The situations thus covered include, in particular, that in which the operator of an online marketplace uncovers, as the result of an investigation undertaken on its own initiative, an illegal activity or illegal information, as well as a situation in which the operator is notified of the existence of such an activity or such information. In the second case, although such a notification admittedly cannot automatically preclude the exemption from liability provided for in Article 14 of Directive 2000/31, given that notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated, the fact remains that such notification represents, as a general rule, a factor of which the national court must take account when determining, in the light of the information so transmitted to the operator, whether the latter was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality."

59. Ms Evans highlights particularly the words "insufficiently precise or inadequately substantiated", set out in paragraph 122, as being consistent with the approach taken in the English cases to which I have referred. Accordingly, she submits, a provider who simply receives notification that particular words are alleged to be defamatory will not have received notification of illegality in terms that are adequately substantiated. Such a provider would not have actual knowledge of illegality; nor an awareness of facts or circumstances from which it would have been apparent that the information was unlawful. In order to achieve that state of mind, it would be necessary to examine and consider, on an informed basis, the validity or strength of any available defences (including, for example, those of justification, fair comment and qualified privilege in one or other of its recognised forms).

60. For good measure, Ms Evans also referred to Regulation 22, which is concerned with the notice by which actual knowledge is said to be imputed:

"In determining whether a service provider has actual knowledge for the purposes of regulations 18(b)(v) and 19(a)(i), a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, among other things, shall give regard to –

(a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c), and

(b) the extent to which any notice includes –

(i) the full name and address of the sender of the notice;

(ii) details of the location of the information in question; and

(iii) details of the unlawful nature of the activity or information in question."

In this particular case Ms Evans highlights the absence of any "details of the unlawful nature of the activity or information in question"; in other words, no explanation is offered as to the extent of inaccuracy or the inadequacy of any defence. It may be thought by Mr Tamiz to be implicit in his complaints that he was denying, outright, any allegation of theft or drug dealing, but it cannot be right that any provider is required, in the light of the strict terms of Regulation 19, to take all such protestations at face value. Clearly more is required for a provider to acquire a sufficient state of knowledge to be deprived of the statutory protection.

61. I would conclude, therefore, that if I am incorrect, or unduly precipitate, in reaching my earlier conclusion that Google Inc should not be regarded as a publisher of the offending words at all, in accordance with common law principles, I would hold in any event that it would be exempted from liability in accordance with Regulation 19.

The outcome of the application

62. For these reasons it seems to be appropriate, in accordance with Ms Evans' submissions, that the court should decline jurisdiction in these proceedings. Accordingly, the Master's order for service out of the jurisdiction will be set aside.

<http://www.bailii.org/ew/cases/EWHC/QB/2012/449.html>

**APPENDIX 11: IN THE COURT OF APPEAL - PAYAM TAMIZ V GOOGLE INC.
AND GOOGLE UK LIMITED**

Neutral Citation Number: [2013] EWCA Civ 68

Case No: A2/2012/0691

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Eady

[\[2012\] EWHC 449 \(QB\)](#)

Royal Courts of Justice
Strand, London, WC2A 2LL

14/02/2013

Before:

**THE MASTER OF THE ROLLS
LORD JUSTICE RICHARDS
and
LORD JUSTICE SULLIVAN**

Between:

Payam Tamiz

Appellant

- and -

Google Inc

Respondent

Godwin Busuttil (instructed by Brett Wilson LLP) for the Appellant

Antony White QC and Catrin Evans (instructed by Reynolds Porter Chamberlain LLP) for the

Respondent

Hearing dates : 3-4 December 2012

HTML VERSION OF JUDGMENT

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Lord Justice Richards :

1. The respondent, Google Inc, is a corporation registered in Delaware and with its principal place of business in California. It provides a range of internet services including Blogger (also referred to as Blogger.com), a service based and managed in the USA but available worldwide. Blogger is a platform that allows any internet user in any part of the world to create an independent blog (web log). The service includes design tools to help users create layouts for their blogs and, if they do not have their own URL (web address), enables them to host their blogs on Blogger URLs. The service itself is free of charge but bloggers can sign up to a linked Google service that enables them to display advertisements on their blogs, the revenues from which are shared between the blogger and Google Inc.
2. One of the blogs hosted on Blogger bears the name "London Muslim". The appellant, Mr Tamiz, complains that eight specific comments posted on the London Muslim blog between 28 and 30 April 2011 were defamatory of him. There is an issue, considered below, as to when any complaint was first notified by him to Google Inc. It is common ground, however, that his letter of claim was received by Google Inc in early July 2011; that on 11 August 2011, after further email exchanges, the letter was forwarded to the blogger; and that on 14 August 2011 the blogger voluntarily removed all the comments about which complaint is made.
3. The appellant seeks to bring a claim in libel against Google Inc in respect of the publication of the allegedly defamatory comments during the period prior to their removal. He was granted permission by

Master Eyre to serve the claim form on Google Inc in California. On Google Inc's subsequent application, however, Eady J held that the court should decline jurisdiction and that the Master's order for service out of the jurisdiction should therefore be set aside. The judge's order to that effect is the subject of the present appeal. The judge also held that Google UK Ltd had been joined in the proceedings inappropriately and that there was no triable claim against it. There is no appeal against that aspect of his decision.

4. In summary, Eady J found that three of the comments were arguably defamatory but that on common law principles Google Inc was not a publisher of the words complained of, whether before it was notified of the complaint or after such notification. If, contrary to that view, Google Inc was to be regarded as a publisher at common law, section 1 of the Defamation Act 1996 ("the 1996 Act") would provide it with a defence, in particular because it took reasonable care in passing the complaint on to the blogger after it had been notified of it. At this point of his judgment Eady J also indicated his acceptance of a submission that the period between notification and removal of the offending blog was so short as to give rise to potential liability on the part of Google Inc only for a very limited period, such that the court should regard its potential liability as so trivial as not to justify the maintenance of the proceedings, in accordance with the principles in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] [QB 946](#). Nevertheless he went on to consider an alternative defence under regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 ("the 2002 Regulations"), which he held would provide Google Inc with a defence if it were otherwise needed.
5. The main issues in the appeal, taking them in the order in which they were considered by the judge below, are (1) whether there is an arguable case that Google Inc was a publisher of the comments, (2) whether, if it was a publisher, it would have an unassailable defence under section 1 of the 1996 Act, (3) whether any potential liability was so trivial as not to justify the maintenance of the proceedings, and (4) whether Google Inc would have a defence, if otherwise necessary, under regulation 19 of the 2002 Regulations.
6. Before considering those issues it is necessary to say a little more about various background matters.

The comments themselves

7. An article in the *Evening Standard* on 27 April 2011 contained an allegation that the appellant had resigned as a Conservative Party candidate for local elections in Thanet after it had been discovered that his Facebook site referred to women as "sluts". The appellant sued separately in respect of that article and the proceedings were settled by a consent order. The topic was picked up in an article posted on the London Muslim blog on 27 April. This gave rise to a number of comments posted anonymously over the next three days. The comments complained of are set out in Eady J's judgment at [7]. The judge held that five of the comments could be characterised in this context as "mere vulgar abuse" to which no sensible person would attach much, if any, weight (see *Smith v ADVFN Plc* [2008] EWHC 1797 (QB) at [13]-[17], and *Clift v Clarke* [2011] EWHC 1164 (QB) at [32] and [36]). He found, however, that three of the comments (Comments A, B and D) were arguably defamatory. They included allegations that the appellant was a drug dealer, had stolen from his employers and was hypocritical in his attitude towards women.
8. The arguments on the appeal included a brief submission that the judge ought also to have found other comments to be arguably defamatory: in particular, Comment E which contained a suggestion that the appellant had made a fake asylum claim. But the judge directed himself correctly and I see no sufficient basis for interfering with the assessment he made on this issue.

Notification of the complaint

9. On the evidence before him, the judge dealt with the factual issue of notification as follows:

"15. According to Mr Tamiz, he first notified his complaint on 28 or 29 April 2011 (i.e. as the postings were taking place) when he used the "Report Abuse" function on the relevant web page. What became of this remains unclear.

16. A letter of claim was sent on 29 June to Google UK Ltd, which was received on 5 July. This complained of the original article, as being defamatory and untrue, although it was not subsequently sued upon in these proceedings. Complaint was also made of what is now described as Comment A. This letter was passed by Google UK Ltd to Google Inc, which responded to Mr Tamiz by email on 8 July. Clarification was sought as to whether the comment in question was said to be untrue, since his letter had not apparently made that clear.

It was at this stage that it was pointed out to Mr Tamiz that the blogger service had nothing to do with Google UK Ltd.

17. Mr Tamiz responded promptly on 8 July to the effect that Comment A was indeed "false and defamatory". At this stage, he introduced a complaint about Comment B as well.

18. The 'Blogger Team' within Google Inc sent a further email to Mr Tamiz on 19 July, seeking his permission to forward his complaint to the author of the blog page. He was told, however, that Google Inc itself would not be removing the post complained of. Mr Tamiz responded by giving the necessary permission on 22 July.

19. In that email of 22 July, Mr Tamiz complained about a further five comments on the blog, now identified as Comments C, D, E, F and G. He confirmed that these were alleged to be defamatory and it seemed to be implicit also that he was characterising them as untrue.

20. After considerable delay, Google Inc forwarded the letter of claim to the blogger on 11 August of last year and informed Mr Tamiz that it had done so. As I have said, on 14 August the article and all the comments were removed by the blogger himself. Mr Tamiz was accordingly notified by Google Inc the following day"

10. In his particulars of claim the appellant alleged that between 29 April and the letter of claim he made various telephone calls to Google UK Ltd and sent two letters, dated 29 April and 23 May, to that company's offices. Those allegations were not admitted by the defendants and were not supported by evidence at the hearing before Eady J. The defendants also contended that communications to Google UK Ltd were not capable of constituting notification to Google Inc. The transcript of the hearing makes it tolerably clear that the appellant was content in the event to proceed on the basis that the date of notification of the complaint to Google Inc was the date when the letter of claim was forwarded to Google Inc by Google UK Ltd, which fell between 5 July (when Google UK Ltd received the letter) and 8 July (when Google Inc first contacted the appellant by email). All this fits with the way the judge dealt with the matter in the passage quoted above.

11. The appellant has applied to adduce fresh evidence on the appeal, in the form of a witness statement in which he gives detailed further information about the Blogger service and about his dealings with Google UK Ltd and Google Inc, exhibiting *inter alia* copies of the two letters allegedly sent by him to Google UK Ltd. If that evidence is admitted, Google Inc applies to adduce fresh evidence in response, by way of a witness statement asserting that Google UK Ltd has no record of receiving any telephone calls or letters from the appellant prior to the letter of claim, and giving an update on the procedure for complaints about postings on Blogger.
12. *Ladd v Marshall* [\[1954\] 1 WLR 1489](#) remains central to the exercise of the court's discretion as to the receipt of fresh evidence under CPR 52.11(2) (see the discussion at para 52.11.2 of Civil Procedure 2012). The first condition in *Ladd v Marshall* is plainly not met in this case: the evidence the appellant now seeks to adduce could have been obtained with reasonable diligence for use at the hearing below. Indeed, in practice the issue to which the evidence relates fell away at that hearing, since the appellant was content to proceed on the narrower basis that the letter of claim constituted notification of his complaint. I bear in mind that at that stage of the proceedings he was representing himself but I attach relatively little weight to that consideration because he is a law graduate and, as appears from the transcript of the hearing, is intelligent and articulate. Taking everything into account, I do not consider that the case for admission of the fresh evidence has been made out. The issues in the appeal ought in my view to be determined on the factual basis on which the judge proceeded.

Google Inc's policy

13. Google Inc's policy towards the content of blogs hosted by Blogger at the material time is set out in a witness statement of Mr Jaron Lewis, a solicitor with conduct of the company's case:

"9. Blogger.com is not involved with the creation of content that people post on their blogs. It does not create, select, solicit, vet or approve that content, which is published and controlled by the blog owners

10. Blogger.com does operate a 'Content Policy' which sets out restrictions on what users can do using the service This makes clear that content such as child pornography, or promoting race hatred, is prohibited. The policy is explained in the following terms:

'Blogger is a free service for communication, self-expression and freedom of speech. We believe that Blogger increases the availability of information, encourages healthy debate and makes possible new connections between people.

We respect our users' ownership of and responsibility for the content they choose to share. It is our belief that censoring this content is contrary to a service that bases itself on freedom of expression.

In order to uphold these values, we need to curb abuses that threaten our ability to provide this service and the freedom of expression it encourages. As a result, there are some boundaries on the type of content that can be hosted with Blogger. The boundaries we have defined are those that both comply with legal requirements and that serve to enhance the service as a whole.'

11. [Google Inc] also operates a 'Report Abuse' feature There are eight grounds for reporting abuse, and users have to select one of these. The eight listed are ...

- Defamation/Libel/Slander

...

12. If the user selects 'Defamation/Libel/Slander', which is what appears to have happened in this case ..., a second screen is displayed.

13. The second screen makes clear that the Blogger.com service is operated in accordance with US law, and that defamatory material will only be taken down if it has been found to be libellous (i.e. unlawful) by a court. The reason for this policy is that under US law, [Google Inc] is not a publisher of third party content hosted on blogspot.com. US law works on the basis that claimants must raise their defamation issues directly with the author of the material, not third party service providers such as Blogger.com.

14. Given the volume of content uploaded by users of the Blogger service, it is usually not practicable for [Google Inc] to remove content without first receiving the Court's

determination that the content is, in fact, libellous. Google is not in a position to adjudicate such disputes itself."

14. In this case Google Inc appears to have gone slightly further than the stated policy, in that the email of 11 August 2011 by which it passed on to the blogger the details of the appellant's complaint contained an actual *request* to "please remove the allegedly defamatory content in your blog within three (3) days of today's date". The blogger complied with that request.

Whether Google Inc was a publisher of the comments

15. The appellant's pleaded case relates to the period *after* Google Inc had been notified of his complaint. As Eady J observed, it is therefore only necessary to assess potential legal liability from the point of notification. Nevertheless the judge's reasons and the arguments in this court extended to the position before as well as after notification.
16. At [35]-[38] of his judgment, the judge noted *inter alia* that it was virtually impossible for Google Inc to exercise editorial control over the content of the blogs it hosts, which in the aggregate contain more than half a trillion words, with 250,000 new words added every minute. He referred to the submission that it would be unrealistic to attribute responsibility for publication of material on any particular blog to Google Inc, whether before or after notification of a complaint. He also referred to the importance of striving to achieve consistency in decisions in the face of rapidly developing technology, and to paying proper regard to the values enshrined in the ECHR. He said that the fact that an entity in Google Inc's position had been notified of a complaint did not immediately convert its status or role into that of a publisher. If Google Inc's status before notification of a complaint was that of a provider or a facilitator, it was not easy to see why that role should be expanded thereafter into that of a person who authorised or acquiesced in publication. Google Inc claimed to remain as neutral in the process after notification as it was before. It might be true that it had the technical capability of taking down blogs or comments on its platform, yet that was not by any means the same as saying that it had become an author or authoriser of the publication:

"It is no doubt often true that the owner of a wall which has been festooned, overnight, with defamatory graffiti could acquire scaffolding and have it all deleted with whitewash. That is

not necessarily to say, however, that the unfortunate owner must, unless and until this has been accomplished, be classified as a publisher."

17. The judge went on at [39] to attach significance to the evidence that Google Inc was not required to take any positive step, technically, in the process of continuing the accessibility of the offending material: he said that its role as a platform provider was "a purely passive one". The situation was thus in his view closely analogous to that described in *Bunt v Tilley* [\[2007\] 1 WLR 1243](#), and in striving to achieve consistency in the court's decision-making he would rule that Google Inc was not liable at common law as a publisher.

18. *Bunt v Tilley* concerned internet service providers (ISPs) who were not alleged to have *hosted* any website relevant to the claims. The issue was whether they could be liable simply in respect of defamatory material communicated via the services they provided. Eady J was again the judge. In a central passage of his judgment he said this:

"21. In determining responsibility for publication in the context of the law of defamation, it seems to me to be important to focus on what the person did, or failed to do, in the chain of communication. It is clear that the state of a defendant's knowledge can be an important factor. If a person knowingly permits another to communicate information which is defamatory, when there would be an opportunity to prevent the publication, there would seem to be no reason in principle why liability should not accrue. So too, if the true position were that the applicants had been (in the claimant's words) responsible for 'corporate sponsorship and approval of their illegal activities'.

22. I have little doubt, however, that to impose legal responsibility upon anyone under the common law for the publication of words it is essential to demonstrate a degree of awareness or at least an assumption of general responsibility, such as has long been recognised in the context of editorial responsibility. As Lord Morris commented in *McLeod v St Aubyn* [\[1899\] AC 549](#), 562: 'A printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents. The appellant in this case never intended to publish.' In that case the relevant publication consisted in handing over an unread copy of a

newspaper for return the following day. It was held that there was no sufficient degree of awareness or intention to impose legal responsibility for that 'publication'.

23. Of course, to be liable for a defamatory publication it is not always necessary to be aware of the defamatory content, still less of its legal significance. Editors and publishers are often fixed with responsibility notwithstanding such lack of knowledge. On the other hand, for a person to be held responsible there must be knowing involvement in the process of publication of *the relevant words* [emphasis in the original]. It is not enough that a person merely plays a passive instrumental role in the process. (See also in this context *Emmens v Pottle* (1885) 16 QBD 354, 357, per Lord Esher MR.)"

19. At [36] he held that an ISP which performs no more than a passive role in facilitating postings on the internet cannot be deemed to be a publisher at common law. A telephone company or other passive medium of communication, such as an ISP, is not analogous to someone in the position of a distributor, who might at common law be treated as having published so as to need a defence.

20. In *Metropolitan International Schools Ltd v Designtecnica Corpn* [\[2011\] 1 WLR 1743](#) Eady J applied a similar analysis in relation to defamatory comments which, having been posted on a website, appeared as a "snippet" of information when an internet search was carried out under the claimant's name on Google Inc's search engine. The judge said that for a person to be fixed at common law with responsibility for publishing defamatory words, there needed to be a mental element, as summarised in *Bunt v Tilley*. He held that the search in issue was performed automatically and involved no input from Google Inc, which had not authorised or caused the snippet to appear on the user's screen in any meaningful sense but had merely by the provision of its search service played the role of a facilitator. As to the position once Google Inc had been informed of the defamatory content of the snippet, the judge said that a person can be liable for the publication of libel by acquiescence, that is to say by permitting publication to continue when he or she has the power to prevent it. He drew a distinction between a search engine and someone hosting a website, pointing to the greater difficulty of ensuring that offending words do not appear on a search snippet. Google Inc's "take-down" procedure might not have operated as rapidly as the claimant would wish, but it did not follow as a matter of law that between notification and take-down Google Inc became liable as a publisher of the offending material.

While efforts were being made to achieve a take-down in relation to a particular URL it was hardly possible to fix Google Inc with liability on the basis of authorisation, approval or acquiescence. On the facts of the case, he believed it unrealistic to attribute responsibility for publication to Google Inc.

21. At the forefront of the appellant's submissions to this court was an elaborate attack on *Bunt v Tilley* as applied in *Metropolitan International Schools Ltd* and the present case. Mr Busuttil submitted that the reasoning in *Bunt v Tilley* erroneously conflated a number of different threads of law. What Eady J said about the need for "knowing involvement in the process of publication of *the relevant words*" is at odds with the principle of strict liability for publication, irrespective of knowledge of the defamatory words. Further, in certain circumstances a person may be or become involved in publishing defamatory material by omission, by failing or forbearing to take a step that ought to have been taken, or by remaining passive. The judge's reasoning does not accurately reflect the distinction between a *primary* publisher and a *secondary* publisher (for whom alone the common law defence of innocent dissemination is available). Nor does the reasoning take proper account of the principles of vicarious liability or agency as they apply to render corporations liable for the publication of defamatory material by employees or agents. Mr Busuttil drew our attention to numerous domestic and Commonwealth authorities, submitting in particular that the courts in Australia have not accepted the *Bunt v Tilley* analysis (see e.g. *Trkulja v Google Inc (No.5)* [2012] VSC 533, a decision of the Supreme Court of Victoria), although the analysis has been followed by the Canadian Supreme Court (see *Crookes v Newton* [2011] 3 SCR 269).
22. Mr Busuttil submitted that Google Inc is a corporation in the business of publishing, acting not just through its employees but also through the myriad of bloggers and all those who post comments on the blogs. It has control over the blogger, who in turn has control over the comments posted on the blog. Google Inc is therefore to be regarded as a primary publisher, potentially liable for defamatory material on the blogs, irrespective of knowledge or fault and irrespective of whether it has been notified of any complaint, subject however to any statutory defences. Alternatively it is a secondary publisher, facilitating publication in a manner analogous to a distributor, subject to the common law defence of innocent dissemination as well as to statutory defences, though it will be difficult to establish the defence of innocent dissemination if it has the power to prevent continuing publication and chooses not to exercise that power.

23. I do not find it necessary to address the full detail of Mr Busuttil's criticisms of *Bunt v Tilley*. I am not persuaded that Eady J fell into any fundamental error of analysis or reached the wrong conclusion in relation to the kind of internet service under consideration in that case. For the reasons set out below, however, I respectfully differ from Eady J's view that the present case is so closely analogous to *Bunt v Tilley* as to call for the same conclusion. In my view the judge was wrong to regard Google Inc's role in respect of Blogger blogs as a purely passive one and to attach the significance he did to the absence of any positive steps by Google Inc in relation to continued publication of the comments in issue.
24. By the Blogger service Google Inc provides a platform for blogs, together with design tools and, if required, a URL; it also provides a related service to enable the display of remunerative advertisements on a blog. It makes the Blogger service available on terms of its own choice and it can readily remove or block access to any blog that does not comply with those terms (a point of distinction with the search engine under consideration in *Metropolitan International Schools Ltd*, as the judge himself noted in that case). As a matter of corporate policy and no doubt also for reasons of practicality, it does not seek to exercise prior control over the content of blogs or comments posted on them, but it defines the limits of permitted content and it has the power and capability to remove or block access to offending material to which its attention is drawn.
25. By the provision of that service Google Inc plainly facilitates publication of the blogs (including the comments posted on them). Its involvement is not such, however, as to make it a primary publisher of the blogs. It does not create the blogs or have any prior knowledge of, or effective control over, their content. It is not in a position comparable to that of the author or editor of a defamatory article. Nor is it in a position comparable to that of the corporate proprietor of a newspaper in which a defamatory article is printed. Such a corporation may be liable as a primary publisher by reason of the involvement of its employees or agents in the publication. But there is no relationship of employment or agency between Google Inc and the bloggers or those posting comments on the blogs: such people are plainly independent of Google Inc and do not act in any sense on its behalf or in its name. The appellant's reliance on principles of vicarious liability or agency in this context is misplaced.
26. I am also very doubtful about the argument that Google Inc's role is that of a secondary publisher, facilitating publication in a manner analogous to a distributor. In any event it seems to me that such an

argument can get nowhere in relation to the period prior to notification of the complaint. There is a long established line of authority that a person involved only in dissemination is not to be treated as a publisher unless he knew or ought by the exercise of reasonable care to have known that the publication was likely to be defamatory: *Emmens v Pottle* (1885) 16 QBD 354, 357-358; *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170, 177-180; *Bottomley v FW Woolworth and Co Ltd* (1932) 48 TLR 521. There are differences in the reasoning in support of that conclusion but the conclusion itself is clear enough. The principle operated in *Bottomley* to absolve Woolworth from liability for publication of a defamatory article in a consignment of remaindered American magazines that it distributed: the company did not check every magazine for defamatory content, there was nothing in the nature of the individual magazine which should have led it to suppose that the magazine contained a libel, and it had not been negligent in failing to carry out a periodical examination of specimen magazines. Since it cannot be said that Google Inc either knew or ought reasonably to have known of the defamatory comments prior to notification of the appellant's complaint, that line of authority tells against viewing Google Inc as a secondary publisher prior to such notification. Moreover, even if it were to be so regarded, it would have an unassailable defence during that period under section 1 of the 1996 Act, considered below.

27. In relation to the position *after* notification of the complaint, however, additional considerations arise, and it is in relation to this period that I take a different view from that of Eady J on the issue of publication. I am led to do so primarily by the decision of the Court of Appeal in *Byrne v Deane* [1937] 1 KB 818. That case concerned an allegedly defamatory verse which someone had posted on the wall of a golf club and which was then allowed to remain there for some days. The defendants, who had not been involved in the initial publication, were the proprietors of the golf club, and one of them was also the club secretary. One of the rules of the club provided that "no notice or placard shall be posted in the club premises without the consent of the secretary". The court held by a majority that the words of the verse were not capable of a defamatory meaning, but all three members of the court agreed that there was evidence of publication by one or both of the defendants. Greer LJ expressed the point in this way (at page 830):

"In my judgment the two proprietors of this establishment by allowing the defamatory statement, if it be defamatory, to rest upon their wall and not to remove it, with the knowledge

that they must have had that by not removing it would be read by people to whom it would convey such meaning as it had, were taking part in the publication of it."

28. Slesser LJ considered there to be evidence of publication by the secretary but not by the other defendant. In relation to the secretary he said this (at pages 834-835):

"There are cases which go to show that persons who themselves take no overt part in the publication of defamatory matter may nevertheless so adopt and promote the reading of the defamatory matter as to constitute themselves liable for the publication

... She said 'I read it. It seemed to me somebody was rather annoyed with somebody.' I think having read it, and having dominion over the walls of the club as far as the posting of notices was concerned, it could properly be said that there was some evidence that she did promote and associate herself with the continuance of the publication."

29. Greene LJ agreed with Greer LJ that there was evidence of publication by both defendants. His reasons included the following (at pages 837-838):

"It is said that as a general proposition where the act of the person alleged to have published a libel has not been any positive act, but has merely been the refraining from doing some act, he cannot be guilty of publication. I am quite unable to accept any such general proposition. It may very well be that in some circumstances a person, by refraining from removing or obliterating the defamatory matter, is not committing any publication at all. In other circumstances he may be doing so. The test it appears to me is this: having regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?"

30. *Byrne v Deane* was considered in *Godfrey v Demon Internet Ltd* [\[2001\] QB 201](#), in which the defendant ISP received and stored on its news server a defamatory article which had been posted by an unknown person using another ISP. The plaintiff notified the defendant of the article and asked it to remove the article, but the defendant failed to do so and the posting remained on the news server for

ten days until it expired automatically. The plaintiff claimed against the defendant in respect of that period of ten days. Morland J held that the defendant was liable. Whilst he cited the passage from Greene LJ's judgment in *Byrne v Deane* quoted above, he rested his decision on the broader ground that whenever there was a transmission of a defamatory posting from the storage of the defendant's news server, the defendant was a publisher of that posting but had a defence under section 1 of the 1996 Act until it lost that defence as a result of the plaintiff's notification.

31. More directly in point is *Davison v Habeeb and Others* [\[2011\] EWHC 3031 \(QB\)](#), which concerned defamatory material posted on a blog hosted by Google Inc itself. HHJ Parkes QC, sitting as a deputy judge of the High Court, considered it arguable that Google Inc was a publisher from the outset, subject to the defence under section 1 of the 1996 Act, but he also relied on *Byrne v Deane* as an alternative strand in the reasoning that led him to conclude that there was an arguable case against Google Inc:

"38. ... The analogy between the ISPs which Eady J was considering in *Bunt v Tilley* ... and the postal service was an apt one, because the ISPs in that case, like the postal or indeed the telephone services, were simply conduits, or facilitators, enabling messages to be carried from one person, or one computer, to another. Blogger.com, by contrast, is not simply a facilitator, or at least not in the same way as the ISPs. It might be seen as analogous to a gigantic noticeboard which is in [Google Inc's] control, in the sense that [Google Inc] provides the noticeboard for users to post their notices on, and it can take the notices down (like the club secretary in *Byrne v Deane* ...) if they are pointed out to it. However, pending notification it cannot possibly have the slightest familiarity with the notices posted, because the noticeboard contains such a vast and constantly growing volume of material. On that analogy, it ought not to be viewed as a publisher until (at the earliest) it has been notified that it is carrying defamatory material so that, by not taking it down, it can fairly be taken to have consented to and participated in publication by the primary publisher. The alternative is to say that, like Demon Internet in *Godfrey v Demon Internet Ltd*..., it chose to host material which turned out to be defamatory, and which it was open to anyone to download, so that at common law it was prima facie liable for publication of the material, subject to proof that it lacked the necessary mental state.

...

42. ... In my view it must be at least arguable that [Google Inc] should properly be seen as a publisher responding to requests for downloads like Demon Internet, rather than a mere facilitator, playing a passive instrumental role.

...

47. Even if [Google Inc] should properly be seen as a facilitator, the mere provider of a gigantic noticeboard on which others published defamatory material, in my judgment it must also at least be arguable that at some point after notification [Google Inc] became liable for continued publication of the material complained of on the *Byrne v Deane* principle of consent or acquiescence."

32. The principles in *Byrne v Deane* have also been applied in the context of website or search engine content in a number of Commonwealth cases to which Mr Busuttil drew our attention: see, in particular, *Sadiq v Baycorp (NZ) Limited* [2008] NZHC 403 and *A v Google New Zealand Ltd* [2012] NZHC 2352.

33. In the present case, Eady J referred at [32]-[33] to *Godfrey v Demon Internet Ltd* and to *Davison v Habeeb*, observing that the position may well be fact sensitive: liability may turn upon the extent to which the relevant ISP has knowledge of the words complained of, and of their illegality or potential illegality, and/or on the extent to which it has control over publication. In relation to Blogger he said nothing about HHJ Parkes QC's analogy with the provision of a gigantic notice board on which others post comments. Instead, he drew an analogy with ownership of a wall on which various people choose to inscribe graffiti, for which the owner is not responsible (see [16] above). I have to say that I find the notice board analogy far more apposite and useful than the graffiti analogy. The provision of a platform for the blogs is equivalent to the provision of a notice board; and Google Inc goes further than this by providing tools to help a blogger design the layout of his part of the notice board and by providing a service that enables a blogger to display advertisements alongside the notices on his part of the notice board. Most importantly, it makes the notice board available to bloggers on terms of its own choice and it can readily remove or block access to any notice that does not comply with those terms.

34. Those features bring the case in my view within the scope of the reasoning in *Byrne v Deane*. Thus, if Google Inc allows defamatory material to remain on a Blogger blog after it has been notified of the presence of that material, it might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of that material on the blog and thereby to have become a publisher of the material. Mr White QC submitted that the vast difference in scale between the Blogger set-up and the small club-room in *Byrne v Deane* makes such an inference unrealistic and that nobody would view a comment on a blog as something with which Google Inc had associated itself or for which it had made itself responsible by taking no action to remove it after notification of a complaint. Those are certainly matters for argument but they are not decisive in Google Inc's favour at this stage of proceedings, where we are concerned only with whether the appellant has an arguable case against it as a publisher of the comments in issue.
35. I do not consider that such an inference could properly be drawn until Google Inc had had a reasonable time within which to act to remove the defamatory comments. It will be recalled that on the judge's findings the letter of claim containing the complaint about Comment A was received on or about 5 July 2011 (and certainly by 8 July), the complaint about Comment B was introduced in the appellant's response to Google Inc on 8 July, and the complaint about Comment D was introduced on 22 July. The letter of claim was forwarded to the blogger on 11 August and the material was all removed on 14 August. That means that in relation to Comments A and B, in particular, a period of over five weeks elapsed between notification and removal. In the context of the defence under section 1 of the 1996 Act, considered below, Eady J described Google Inc's response as somewhat dilatory but not outside the bounds of a reasonable response. Whilst I accept the judge's assessment in the context of the statutory defence, it is in my view open to argument that the time taken was sufficiently long to leave room for an inference adverse to Google Inc on *Byrne v Deane* principles.
36. The period during which Google Inc might fall to be treated on that basis as a publisher of the defamatory comments would be a very short one, but it means that the claim cannot in my view be dismissed on the ground that Google Inc was clearly not a publisher of the comments at all.

The defence under section 1 of the 1996 Act

37. I therefore turn to consider the defence under section 1 of the 1996 Act. That section provides:

"(1) In defamation proceedings a person has a defence if he shows that –

(a) he was not the author, editor or publisher of the statement complained of,

(b) he took reasonable care in relation to its publication, and

(c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

(2) For this purpose 'author', 'editor' and 'publisher' have the following meanings, which are further explained in subsection (3) –

'author' means the originator of the statement, but does not include a person who did not intend that his statement be published at all;

'editor' means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and

'publisher' means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.

(3) A person shall not be considered the author, editor or publisher of a statement if he is only involved –

(a) in printing, producing, distributing or selling printed material containing the statement;

(b) in processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part I of the Copyright, Designs and Patents Act 1988) containing the statement;

(c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment,

system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;

(d) as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;

(e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

In a case not within paragraphs (a) to (e) the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement.

(4) Employees or agents of an author, editor or publisher are in the same position as the employer or principal to the extent that they are responsible for the content of the statement or the decision to publish it.

(5) In determining for the purposes of this section whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard shall be had to

(a) the extent of his responsibility for the content of the statement or the decision to publish it,

(b) the nature or circumstances of the publication, and

(c) the previous conduct or character of the author, editor or publisher."

38. It will be seen that the conditions in subsection (1) are cumulative. Eady J held at [42]-[51] that all three conditions were satisfied in this case.

39. As to subsection (1)(a), he held that Google Inc was not a "publisher" for these purposes even if, contrary to his primary conclusion, it was to be treated at common law as having been a publisher of

the defamatory comments. It did not come within the definition of "commercial publisher" within subsection (2) since in operating the Blogger service it did not itself issue material to the public or a section of the public and, specifically, it did not issue material containing the statements complained of. Eady J also drew support from subsection (3)(e), taking the view that Google Inc could accurately be characterised as providing access to a communications system by means of which the statements were transmitted or made available by a person over whom it had no effective control: by "effective control" it was likely that the draftsman had in mind effective day-to-day control rather than the possibility of intervention in reliance on a contractual term about the permitted content of a web page.

40. I see no reason to disagree with the judge's conclusion on that point. In particular, I do not think that Google Inc can sensibly be said to have "issued" the defamatory comments even if it was involved in their publication in a way capable of attracting liability at common law. Its involvement was of a kind analogous to, if not identical to, that described in subsection (3)(e). I share the judge's view that the existence of a contractual term about the content of blogs is not sufficient to give it "effective control" over the person who posted the defamatory comments.

41. As to the conditions in subsection (1)(b) and (c), in my judgment they are plainly satisfied in relation to the period prior to notification of the complaint. There is no basis for concluding in relation to that period that Google Inc failed to take reasonable care in relation to publication of the comments or that it knew or had reason to believe that it caused or contributed to their publication. Greater difficulty arises, however, in relation to the application of the conditions to continued publication of the comments after Google Inc had notice of their allegedly defamatory content.

42. Thus, the relevant question in relation to subsection (1)(b) is whether Google Inc took reasonable care in relation to the continued publication of the comments. Eady J referred to the submissions of counsel for Google Inc that the company took reasonable care in relation to the appellant's complaint when it passed the complaint on to the blogger and that this was a proportionate response. The judge held at [47]:

"One could certainly say that the response was somewhat dilatory, but I would not consider it, in all the circumstances of this case, to be outside the bounds of a reasonable response".

43. This may have been a generous view but I am not persuaded that it was wrong. The factors in subsection (5), to which regard must be had in determining whether Google Inc took reasonable care, tell in its favour: the company had no responsibility for the content of the comments or the decision to publish them; the circumstances of publication include the vast number of blogs that are hosted on Blogger, which may be said to justify a longer response time; and there is no evidence of anything in the previous conduct of the particular blogger or of those who posted the comments that might have called for speedier action to be taken. The situation is distinguishable from that which caused Morland J to hold in *Godfrey v Demon Internet* that subsection (1)(b) posed an insuperable difficulty for the defendants since "after receipt of the plaintiff's fax, the defendants knew of the defamatory posting but chose not to remove it from their ... news servers": it is clear why, in the absence of any steps at all, the judge in that case did not think that reasonable care had been exercised.
44. The relevant question in relation to subsection (1)(c) is whether it can be said that in the period after notification of the complaint Google Inc did not know, and had no reason to believe, that what it did caused or contributed to the publication of a defamatory statement. The judge's reasoning on this was very brief. He said at [49] that once the complaint in respect of a relevant comment was notified, Google Inc would have had reason to believe that the comment was defamatory, but that this was "far from saying ... that Google Inc would have known, or had reason to believe, that it had done anything to cause or contribute to the publication of any of these statements". But the very considerations that lead me to conclude that Google Inc arguably became a publisher of the defamatory comments on *Byrne v Deane* principles also tend towards the conclusion that following notification it knew or had reason to believe that what it did caused or contributed to the continued publication of the comments. The judge in *Davison v Habeeb and Others*, at [46], thought it arguable in that case that at some point after notification Google Inc knew or had reason to believe that its continued hosting of the material in question caused or contributed to the publication of a defamatory statement. In my view the same can be said in the present case.
45. Mr White QC submitted that Eady J appeared to have had in mind what was said in *Milne v Express Newspapers* [\[2005\] 1 WLR 772](#) about the similar language in section 4(3) of the 1996 Act, to the effect that an offer to make amends under section 2 is a defence unless the person by whom the offer was made "knew or had reason to believe" that the statement complained of (a) referred to the aggrieved

party or was likely to be understood as referring to him, and (b) was false and defamatory of that party. The court held in that case that a person knew or had reason to believe that a statement was false if he either knew that it was false or was reckless as to whether it was false, in the sense of not considering or caring whether it was true or not. Eady J made reference to that decision when finding in *Bunt v Tilley*, at [61], that the condition in subsection (1)(c) was satisfied in relation to one of the ISPs because the email sent to it by the complainant "did not effectively put [it] on notice, and its staff were given no reason to believe that they were causing or contributing to the publication of the postings complained of". That finding turned, however, on the particular terms of the email in question, and it is difficult to read into the judge's reasoning in the present case any implied reference either to what he said on this point in *Bunt v Tilley* or to the decision or reasoning in *Milne v Express Newspapers*. In any event this line of reasoning does not appear to me to provide a satisfactory answer to the concern I have expressed about the judge's view of subsection (1)(c) in the present case.

46. In the light of that concern about subsection (1)(c) I am not satisfied that, if Google Inc were found to be a publisher of the defamatory comments on *Byrne v Deane* principles, section 1 of the 1996 Act would provide it with an unassailable defence.
47. For that reason it is necessary to move to the next issue considered by the judge, namely the question whether any potential liability on the part of Google Inc was sufficient to justify the maintenance of the proceedings against it. The judge appeared to treat this as a subsidiary point under his consideration of the statutory defence, but it is in truth a distinct issue which assumes real importance in this case if I am correct in the conclusions I have reached so far.

"Real and substantial tort"

48. At [50] of his judgment, Eady J accepted an argument by counsel for Google Inc that the period between notification of the complaint and removal of the offending blog was so short as to give rise to any potential liability on the part of Google Inc only for a very limited period, such that the court should regard it as so trivial as not to justify the maintenance of the proceedings. The judge said that, to adopt the words in *Jameel (Yousef) v Dow Jones & Co Inc* (cited above), "the game would not be worth the candle".

49. In *Jameel (Yousef)* the Court of Appeal upheld an application to strike out as an abuse of process defamation proceedings against the publisher of a US newspaper in respect of an article posted on an internet website in the USA which was available to subscribers in England but had been the subject of minimal publication within this jurisdiction. The court considered that the principles relevant to a strike-out application overlapped with those relevant to an application to set aside permission to serve out of the jurisdiction. It was in the latter context that the question whether "a real and substantial tort has been committed within the jurisdiction" had been developed, but the court considered that the question whether a substantial tort had been committed in the jurisdiction was also relevant to an application to strike out as abuse of process. It held that keeping a proper balance between the article 10 right of freedom of expression and the protection of individual reputation required the court to bring to a stop, as an abuse of process, defamation proceedings that were not serving the legitimate purpose of protecting the claimant's reputation, which included compensating the claimant only if that reputation had been unlawfully damaged. The court went on to consider whether, on the facts of the case before it, vindication of the claimant's reputation justified the continuance of the action. It concluded:

"69. If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The costs of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.

70. If we were considering an application to set aside permission to serve these proceedings out of the jurisdiction we would allow that application on the basis that the five publications that had taken place in this jurisdiction did not, individually or collectively, amount to a real and substantial tort. Jurisdiction is no longer in issue, but subject to the effect of the claim for an injunction that we have yet to consider, we consider for precisely the same reason that it would not be right to permit this action to proceed. It would be an abuse of the process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake"

50. In my judgment, Eady J was plainly right to conclude that the application in the present case to set aside permission to serve out of the jurisdiction should be allowed for like reasons. The allegedly defamatory comments were posted between 28 and 30 April, soon after the initial blog of 27 April. By the very nature of a blog, they will have been followed by numerous other comments in the chain and, whilst still accessible, will have receded into history. As I have indicated, the earliest point at which Google Inc could have become liable in respect of the comments would be some time after notification of the complaint in respect of them. But it is highly improbable that any significant number of readers will have accessed the comments after that time and prior to removal of the entire blog. It follows, as the judge clearly had in mind, that any damage to the appellant's reputation arising out of continued publication of the comments during that period will have been trivial; and in those circumstances the judge was right to consider that "the game would not be worth the candle". I do not accept Mr Busuttill's submission that various other features of the claim, including the fact that the appellant's name is relatively uncommon and distinctive in this jurisdiction, undermined the judge's conclusion.

51. It follows that, despite the fact that I have reached certain conclusions favourable to the appellant on the previous issues, this appeal must in my view fail.

52. In those circumstances, although the issue was the subject of detailed argument before us, it is unnecessary to consider whether Google Inc would have a defence under regulation 19 of the 2002 Regulations.

Lord Justice Sullivan :

53. I agree.

Master of the Rolls :

54. I also agree.

<http://www.bailii.org/ew/cases/EWCA/Civ/2013/68.html> accessed February 15, 2013