

**POLITICAL ETHNICITY AS AN IMPEDIMENT TO NATIONALISM AS ENVISAGED  
BY THE CONSTITUTION OF KENYA 2010.**

**BY**

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**APPROVAL**

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THE CONSTITUTION OF KENYA 2010.

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In accordance with the University of Nairobi policies, this thesis is accepted in partial fulfillment of the requirements for an award of the Degree in Law (LL.B).

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Supervisor

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Date



## **DEDICATION**

To all the Kenyans who still believe in nationalism.

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I would like to thank the Lord God Almighty for giving me the strength and grace to complete this dissertation.

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## ABBREVIATIONS AND ACRONYMS

<b>CORD</b>	Coalition of Reform and Democracy
<b>CIPEV</b>	Commission of Inquiry into the Post Election Violence
<b>DPP</b>	Director of Public Prosecutions
<b>GEMA</b>	Gikuyu Embu Meru Association
<b>IEBC</b>	Independent Electoral and Boundaries Commission
<b>KADU</b>	Kenya African Democratic Union
<b>KANU</b>	Kenya African National Union
<b>KAMATUSA</b>	Kalenjin, Maasai, Turkana, Samburu
<b>KKK</b>	Kikuyu, Kamba, Kalenjin
<b>MCK</b>	Media Council of Kenya
<b>MRC</b>	Mombasa Republic Council
<b>NCI</b>	National Cohesion and Integration
<b>NCIC</b>	National Cohesion and Integration Commission



**NLC**

National Land Commission

**PEV**

Post Election Violence

**SMS**

Short Messaging Service

## ABSTRACT

Political ethnicity in Kenya has often caused ethnic violence. In response, there have been many legal and institutional changes that have been made to ensure that the ethnic violence in Kenya is reduced if not obliterated. In spite of these reforms, Kenya is polarized ethnically. This study attempts to illustrate the legal and institutional inadequacies that continually hamper with nationalism. Consequently, the objectives of this study were to illustrate that the law does not provide for proper regulation of ethno-political alliances, regulation of ethnocentric utterances and vernacular campaigns that hamper nationalism. The study also sought to investigate the effect of prosecution of negative ethnicity. It also investigated the regulation and prosecution of the media in the transmission of negative ethnicity.

The thesis relied on the proposition that political ethnicity is a human construction that cannot be eliminated. Therefore, it is the mandate of the State to manage political ethnicity so that ethnic interests do not compete with national interests. This study illustrates that the laws and institutions do not adequately manage political ethnicity.

The hypotheses of the dissertation are tested by a research design which is a descriptive research design. The collected data was analyzed and interpreted. The main findings of the research were that political alliances, ethnocentric utterances and vernacular campaigns are not effectively regulated. In addition, prosecutions of negative ethnicity and the media are ineffective. The study recommends for effective management of the law; effective management of the relevant institutions and the need to address social injustices.

# **1. INTRODUCTION**

## **1.1 RESEARCH TOPIC**

The research topic of the dissertation is: “Political ethnicity as an impediment to nationalism as envisaged by the Constitution of Kenya 2010.”

## **1.2 BACKGROUND ON POLITICAL ETHNICITY IN KENYA.**

Kenya is a multi-ethnic State with about forty ethnic communities. Ethnicity is a salient feature in African countries and it is a linkage between individuals of common ancestry, culture and language. It serves as a mark of identity of such an individual in a State. More often than not, an individual in Africa will display loyalty to ethnic goals rather than national goals. This has been a challenge and regrettably like many other African developing countries, erosion of nationalism in Kenya has frequently been linked to politics that has been based on ethnicity.

Most Western countries have their political preferences based on ideologies. Conversely, Kenya's politics is largely based on ethnic leanings. This may be attributed to the uneven distribution of resources and the belief that an individual from one's ethnic community will bring back national resources to his own ethnic community. Unfortunately, it is an erroneous belief because most parts of Kenya are subjected to abject poverty despite ethnical inclination. Furthermore, the error of this credence is illustrated by the fact that most rural constituencies in Kenya are homogenous or mono-ethnic and despite electing their preferential Members of Parliament from their own ethnic communities they remain the poorest and least developed regions in the country.

The history of the impact of political ethnicity in Kenya is a long one and can be traced back to the country's first election in 1964 where the Kenya African National Union (KANU) Party represented the then major ethnic communities (Luo and Kikuyu) and the Kenya African Democratic Union (KADU) Party represented the then minority communities (Kalenjin and Coastal communities). In spite of this, at that time ethnical cleavages had not yet been



established to warrant sufficient acrimony and ethnically motivated political violence. The differences between KADU and KANU were ironically ideological. KANU advocated for capitalistic ideologies while KADU leaned on socialistic ideologies and federalism or majimboism.

However, ethnical cleavages later emerged when acts of political violence were committed against popular influential figures during the President Kenyatta era. The assassination of Thomas Mboya in 1969 caused an ethnical fissure between the Kikuyu and the Luo. At that time, Thomas Mboya had aspired to be the next president of Kenya after he and Oginga Odinga had left KANU to form Kenya People's Union. The Luo community generally believed that President Kenyatta had been involved in the murder of Mboya to thwart Mboya's aspirations of presidency and this belief subsists to date.

In 1978, President Moi succeeded President Kenyatta. He later on introduced the Nyayo philosophy which propagated the notions of love, peace and unity in Kenya. As a result, ethnically based groups were discouraged or banned because they did not encourage national unity. It has been submitted that this was an onslaught to demobilize the GEMA (Gikuyu, Embu and Meru Association) which had discouraged President Moi's succession. Accordingly, this caused a rift between the Kikuyu and Kalenjin communities.

To secure his own presidency, Kenya became a one party-state in 1982. However, after agitation of the civil society and need for constitutional reforms this position changed in 1991. In a bid to encourage democratization through multi-partyism, this development also exacerbated ethnic politics. President Moi intended to still be the President of Kenya and it has been reported<sup>1</sup> that he used violence through political methods to intimidate and perpetrate killings on non-KAMATUSA<sup>2</sup> communities in the Rift Valley region. These politically motivated atrocities were not punished.

The aforementioned historical facts had a trickling effect on the Post- Election Violence (PEV) of 2007-8. As early as September 2007, there were reported incidents of political aggression in

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<sup>1</sup> The Report by the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya (Akiwumi's Report) (Nairobi: Government Printer, 1999) Exhibit 134 (a) p. 59 -189.

<sup>2</sup> The Kalenjin, Maasai, Turkana and Samburu ethnic communities.

Molo (a violence hotspot in the 1990s) that involved the disruption of campaign rallies; the conveyance of threatening messages through the Short Message Service (SMS) and direct violence on supporters. By 30<sup>th</sup> December 2007, there was an escalation of violence, destruction of property, systematized killings and displacement of people from their homes throughout the country when the results of the elections were announced.

The most outstanding acts of ethnic violence were witnessed in the North and Central Rift Valley region with reported killings perpetrated by the notorious illegal Kikuyu group Mungiki against Kalenjins and Kalenjin vigilante gangs against Kikuyus throughout the area. A vital observation of these killings was the ethnic cleansing that took place in Koibatek District. The presence of Mungiki and ethnic cleansing has generated the opinion that the political violence was not spontaneous but organized. This has been the focal submission of the prosecution team at The Hague for the International Criminal Court proceedings against Deputy President William Ruto and President Uhuru Kenyatta.

Other than conspired killings by political figures against ethnic groups, there had been accounts of hate speech by various politicians. There were reported incidents of politicians addressing crowds in vernacular to specifically exclude other communities in campaign rallies and at the same time incite individuals from the politicians' ethnic groups to commit acts of violence.<sup>3</sup>

Moreover, the media had played a huge role in the political violence. It is the submission of this study that they had been indiscriminate and reckless in the broadcasting of: electoral violence; campaign rallies that featured hate speech; and derogatory depictions of ethnic groups and politicians. This kind of conduct inflamed passions and created tensions along ethnic lines. Of particular importance are vernacular FM Stations, such as KASS FM which propagated negative ethnicity and incited its listeners (mainly Kalenjin) to commit acts of violence against Kikuyus. The FM station also invited listeners to give out their views which were aired live. These opinions on the election results and the political violence were relayed albeit they were based on ethnic acrimony, suspicion or hatred. Such acts contributed to the PEV of 2007-8.

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<sup>3</sup> The Report by the Commission of Inquiry into Post-Election Violence (Waki's Report) (Nairobi: Government Printer, 2008) p.135, para.2.



However, after the PEV, various laws were enacted and the Constitution was promulgated to quickly address, among other things, issues brought about by political ethnicity.

The National Cohesion and Integration (NCI) Act (Act No. 12 of 2008) was enacted and its main goal is to encourage national cohesion and integration in Kenya by outlawing ethnic discrimination. This Act of Parliament is of particular importance in the regulation of political ethnicity and in Section 13 it explicitly makes hate speech illegal.

The Constitution of Kenya was then promulgated in 2010 and it is responsive to many issues in Kenya along with the concerns that encourage negative political ethnicity. The Constitution has expressly curtailed the freedom of expression of the media and individuals, who participate in the incitement to violence, hate speech or advocacy of ethnic hatred in Article 33(2). Chapter Seven deals with the representation of the people and Part Three of the Chapter specifically deals with legal and ethical principles political parties in Kenya should adopt. One of these principles provides that political parties should have a national character.<sup>4</sup>

In addition, The Elections Act of 2011 was enacted. The purpose of the Statute is to provide for the conduct of: elections to elective State offices; election dispute resolution and election referenda. Regulation of the conduct of individuals is captured in Section 67(g) of the Act where an offence is created when a person interferes with free-campaigning and uses language which advocates violence or advocates hatred on grounds of ethnicity.

The Political Parties Act of 2011 was also enacted. Other than providing for the registration and funding of political parties, the Act plays a crucial role in the regulation of the conduct of parties. The First Schedule of the Act deals with the Code of Conduct of Political Parties in Kenya. In paragraph 6 of the Schedule, parties are obliged to promote national patriotism and national unity. Moreover, paragraph 7 of the Schedule provides that a party shall not advocate hatred that amounts to ethnic incitement, vilification of others or incitement to cause harm.

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<sup>4</sup>The Constitution of Kenya 2010, Article 91(1) (a).

It may be contended that the erosion of nationalistic ideologies in Kenya has frequently been connected to political ethnicity. However, given the magnitude and extent of the PEV of 2007-8, it had been crucial for Kenya to enact laws that foster, protect and restore nationalism and slowly shift the nation from the ills that emanate from political ethnicity.

### **1.3 STATEMENT OF THE PROBLEM.**

Ethnic patronage is a challenge in Kenya that hinders nationalism greatly. The Constitution at its promulgation envisioned a Kenya which would move from its tragic massive ethnic cleavages witnessed at the PEV of 2007-8 to inspiring nationhood. Article 10 of the Constitution particularly provides for national values of governance that should be adopted by all state organs, public officers and any other persons. Such values include, inter alia, national unity and patriotism.

Political ethnicity is a social construction and thus regulation of political ethnicity per se is beyond the ambit of the law. The law cannot dictate to an individual his/her own political inclinations notwithstanding they are based on ethnic lines. Furthermore, individuals have the constitutional right to vote<sup>5</sup> in whomever they want and this right is inherent and inalienable. It is the corner stone of any democratic society. However, the law can regulate political ethnicity where it runs amok by fostering hate speech, ethnic hatred, ethnic vilification, proliferation of tribalism and ethnic violence. This is well within the range of authority of the law.

Consequently, the NCI Act, the Political Parties Act, the Elections Act and the Media Act have been instrumental in illegalizing acts that constitute political ethnicity where there is ethnic discrimination, ethnic harassment and ethnic victimization. There are several provisions that not only outlaw such acts but also provisions that expressly advocate national unity.

Although, these laws adequately legalize acts that propagate negative ethnicity and hinder nationalism they fail to consider acts which greatly discourage nationalism. Such acts include political alliances that are ethnically based for example the KKK (Kikuyu-Kalenjin-Kamba)

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<sup>5</sup> ibid, Article 38(3) (b).



alliance, the Jubilee Alliance and the Coalition of Reform and Democracy (CORD). They also fail to provide for measures which can monitor instances that can encourage acrimony and suspicion. For example, in the General Elections of 2007, there were politicians who campaigned in vernacular to exclude other ethnic communities.

In addition, the current laws fail to address situations where politicians incite their ethnic groups through ethnocentrism or ethnic egoism. The understated effect of this legal loophole was witnessed in the last general elections when some tenants told their landlords that they would pay reduced rents should their preferred political aspirant become president.<sup>6</sup> The social tensions as a result of ethnic pomposity caused ethnical violence in Nairobi slum areas such as Kibera and Mathare. Moreover, ethnocentrism has frequently been linked to aggressive acts such as ethnic cleansing where the perpetrators of the acts believe that their community is more superior to other ethnic communities.

All these examples, clearly illustrate legal inadequacies in ensuring that political parties and politicians display national character provided by the Constitution. These scenarios have shown their potential to brew ethnic violence but are still left unregulated.

In addition, the existing laws are constantly breached and there is a general lack of enforcement or an opaque mode of enforcement by the responsible agencies of and therefore the continued flagrant violations. This cultivates a culture of impunity which greatly hampers with the promotion of national values of the Constitution.

An illustration of questionable enforcement may be exemplified by two cases where politicians had breached the law against hate speech under both the Constitution and the NCI Act. These two political leaders were the Environmental Minister Ali Mwakwere and the Member of Parliament of Embakasi, Ferdinand Waititu. The facts were similar in both cases in that they involved the advocacy of ethnic hatred and ethnic incitement; however, the prosecutions of the charges were very different. The National Cohesion and Integration Commission (NCIC) withdrew the case against Mwakwere after he issued a public apology and as the Director of

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<sup>6</sup> Supra note 3 at p.195-197.



Public of Prosecution (DPP) did not oppose the withdrawal, the case was withdrawn from Court. Unlike the leniency experienced in the former case, the apology that was made by Waititu was rejected and the DPP commenced criminal proceedings against him. There have been speculations that this is because the DPP, Keriako Tobiko, is from the Maasai ethnic community and the hate speech remarks were directed to the Maasai.

The DPP has not instituted criminal proceedings against the media in its participation of ethnic incitement by inflaming passions and ethnic hatred. The NCIC has also not issued complaints of the media propagating negative ethnicity to the DPP for prosecution. Time after time, the media have distributed and showed recorded visual images of hate speech and ethnic hatred breaching the provisions of the NCI Act, the Media Act and the Constitution. For instance, Waititu's and Mwakwere's inflammatory speeches are still accessible through YouTube webcasts from Citizen TV and Kiss TV. Unlike the political leaders, media stations are neither arraigned before court nor prosecuted on allegations of ethnic incitement or transmissions of ethnic hatred.

It cannot also be ignored that new technological forms of media such as SMS, social media (such as Twitter, Facebook and YouTube) and blogs have been used as avenues to disseminate political information that is ethnicized. The Short Message Service was a salient feature in the PEV of 2007-8. Many SMS texts were used at that time to not only update on election violence events and spread rumours but to also instigate ethnic hatred and vilification.

The inadequacies of the laws and the opaque mode of enforcement by the prosecution of existing laws clearly conclude that political ethnicity in Kenya still remains a problem despite constitutional and statutory provisions. Therefore, unless Kenya addresses these issues then political ethnicity will continue to escalate and constantly put the country at the risk of political instability.

## 1.4 THEORETICAL FRAMEWORK.

It has been theorized that political ethnicity is a consequence of colonial rule in Africa.<sup>7</sup> That the European colonial authorities had demarcated several communities in Africa believing them to be tightly knit homogenous groups. This explains why Nyanza province, Central Province and Western Province in Kenya are largely mono-ethnic provinces. As a result, by independence these communities based on the European actions were used as vehicles to earn political mileage in the new States. This encouraged the birth of political tribalism by the political elite.

The dissertation is guided by modernism<sup>8</sup> which proposes in this case that political ethnicity is an archaic misguided social construction and that it should be eradicated so that Africa, as well as Kenya, may achieve nationalism. Modernism as propounded Karl Marx, Max Weber and Emile Durkheim involves the concepts of totality and homogeneity so as to achieve tension-reduction and a 'model state'. Thus, the integration of ethnic communities could bring about nationalism which is a more system serving concept.

As a result, the laws that regulate political ethnicity must be reviewed to bring about social change that will impact the society where there exist legal loopholes. A veteran of law who believed that law can act as a social engineer to bring about social change was Roscoe Pound. He believed that where the societal beliefs, as in this case such as ethnicized political inclinations, hindered social development then the law as a regulator of human conduct can be used to achieve the desired social change. Thus, the laws can be amended to extend the sphere of the law to regulate ethnic political alliances, ethnocentrism and unmonitored political campaigns in vernacular.

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<sup>7</sup> B. J. Berman, 'Ethnicity, Patronage and the African State: The politics of uncivil nationalism' (1998) 97(388) OJSS <<http://afraf.oxfordjournals.org/content/97/388/305.short?rss=1&source=mfr>> last accessed on 5/12/2012 at 8.11 am.

<sup>8</sup> Modernism had its origins in the Enlightenment period. This era was a celebration of the liberating potentials of the social sciences, the materialistic gains of capitalism, new forms of rational thought, due process safeguards, nationalism ideologies and abstract rights applicable to all, and the individual.

See:<[www.critcrim.org/critpapers/milovanovic\\_postmod.htm](http://www.critcrim.org/critpapers/milovanovic_postmod.htm)> last accessed on 23/1/2013 at 11.07am.

Lastly, no individuals in Kenya are above the law. The rule of law as propounded by Baron Montesquieu submits that all individuals are equal before the law whether rulers or ruled and therefore they are all subject to the law. For that reason, the media and politicians must be charged, arraigned before a court and prosecuted for their repeated breaches of legal provisions that regulate political ethnicity.

## **1.5 JUSTIFICATIONS FOR THE STUDY**

The justifications were as follows:

1. Political dysfunctionality which has caused ethnic fragmentation has threatened the political stability of the State several times.
2. Despite all the legal institutions and legal provisions, Kenya is more ethnically polarized than ever as a consequence of questionable enforcement and vacuums in the law that relate to political ethnicity.
3. President Abraham Lincoln's in the light of civil strife in the United States emphasized on national unity stating, "A divided house cannot stand". Therefore, through national unity other national goals such as: inclusiveness; equity; protection of marginalized communities; devolution of power; democracy; and participation of people can be enhanced and thereby guarantee peace and political stability in Kenya.

## **1.6 RESEARCH QUESTIONS**

The research questions are as follows:

1. Do the Constitution of Kenya, the Political Parties Act and the Elections Act effectively prohibit ethnically based alliances that hinder nationalism?



2. Does the definition of hate speech under the NCI Act adequately illegalize ethnocentrism that impedes nationalism?
3. Does the Elections Act, 2011 sufficiently provide for measures which monitor campaigns in vernacular language that encumber nationalism?
4. Do the prosecutions of negative ethnicity by the office of the DPP effectively promote nationalism?
5. Are the media prosecuted for propagating or transmitting negative ethnicity that impedes nationalism?
6. Are modern forms of media such as the Short Message Service (SMS), blogs and social media properly regulated by the government?

## **1.7 RESEARCH OBJECTIVES**

### **1.7.1 GENERAL OBJECTIVES**

The general objectives of the study are as follows-

1. to fulfill the requirements of attaining the Bachelor of Laws (LL.B) degree by achieving the requirements of this course; and
2. to assess whether political ethnicity remains an impediment of nationalism as envisioned by the Constitution of Kenya, 2010.

### **1.7.2 SPECIFIC OBJECTIVES**

The specific objectives of the study are as follows-

1. to assess whether the Constitution of Kenya, Political Parties Act and Elections Act effectively prohibits ethnically based alliances that hinder nationalism;
2. to determine if the definition of hate speech under the NCI Act adequately illegalizes ethnocentrism that impedes nationalism;
3. to investigate if the Elections Act sufficiently provides for measures which monitor campaigns in vernacular language that encumber nationalism;
4. to investigate whether the prosecutions of negative ethnicity by the office of the DPP effectively promote nationalism;
5. to investigate whether the media are prosecuted for propagating or transmitting negative ethnicity that impedes nationalism; and
6. to investigate if modern forms of media such as the Short Message Service (SMS), blogs and social media are properly regulated by the government.

## **1.8 HYPOTHESES**

The hypotheses of the study are as follows -

1. the Constitution of Kenya, Political Parties Act and the Elections Act do not effectively prohibit ethnically based alliances that hinder nationalism;
2. the definition of hate speech under the NCI Act does not adequately illegalize ethnocentrism that impedes nationalism;
3. the Elections Act does not sufficiently provide for measures which monitor campaigns in vernacular language that encumber nationalism;

4. the prosecutions of negative ethnicity by the office of the DPP do not effectively promote nationalism;
5. the media are not prosecuted for propagating or transmitting negative ethnicity that impedes nationalism; and
6. modern forms of media such as the Short Message Service (SMS), blogs and social media are not properly regulated by the government.

## 1.9 LITERATURE REVIEW.

**Andreas Wimmer, Lars-Erik Cederman and Brian Min** in their article<sup>9</sup> give an international and broad perspective of the relation between ethnicity and armed conflict from the Napoleon era in Europe to modern African States in the 21<sup>st</sup> Century. They argue that it is not ethnicity but rather ethnic competition of state power that causes social conflict and segmentation.

The writers also contend that ethnic alliances hamper State unity because they encounter rebellion from majority of the population that is excluded by such alliances. The writers however, do not recommend for the need of regulation of such political alliances that brew social conflict despite their correlation with social conflict that this study proposes.

**Sebastian Elischer**, in his working paper<sup>10</sup> examines the coalitions and commitments of political parties in Kenya. He submits that these parties have been ethnically based and have continually exacerbated the ethnical cleavages in Kenya especially after the introduction of multipartyism in Kenya. Furthermore, he argues that the 2002 elections gave a temporary illusion of nationalism and the 2007 elections clearly illustrated the extent of the ethnic cleavages in Kenya. His work is mainly illustrative than ameliorative, consequently, he does not advocate for the need of political coalitions to embody a national character as envisioned by the Constitution of Kenya 2010.

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<sup>9</sup> A.Wimmer, L-E.Cederman and B. Min, 'Ethnic politics and armed conflict: A Configurational Analysis' (American Sociological Review 74(2), 2009) p. 316-337.

<sup>10</sup> S. Elischer, 'Ethnic Coalitions of Convenience and Commitment: Political Parties and Party Systems in Kenya' (GIGA Working Paper: No. 68, February 2008) p.6-28.



**Antony Ongayo**, critically analyses in his article<sup>11</sup> the politics of ethnic alliances and ethno-regional parties in Kenya and how they threaten social order by promoting factionalism. He contends that the main enemies of nationalism have been the political elite, the educated tribal chauvinists and the media. He sheds light to this study by proposing that Kenya should consider constitutional reform that encourages representative democracy rather than pluralistic democracy. Ongayo also criticizes impunity by weak State institutions which hamper democracy. He anticipated the 2013 General Elections because according to him it should have served as a litmus test for the effect of constitutional reforms of 2010 intended to forge true democracy.

**Susan F. Hirsch** in her paper<sup>12</sup> argues that the relation between hate speech and ethnic violence has to be taken in the context in which hate speech has been uttered. Consequently, a definition for what could be hate speech is a difficult one. She contends that there is a direct link between denigrating, dehumanizing or xenophobic utterances by a political, religious or military leader and violence by the public who have been addressed such utterances.

Hirsch also admits that Kenyans do enjoy their diversity and that Kenyan humour often takes ethnical themes. However, she recognizes that there are instances where ethnic pride may be blurred by ethnic affiliation and ethnocentrism which if manipulated in a political arena can cause violence. Furthermore, she submits that the media play a crucial role to hate speech. She concludes in her article that proper regulation of hate speech may be difficult because of the constitutional right of political expression. However, like this study she proposes that there is need for more legal regulation of hate speech.

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<sup>11</sup> A. Ongayo, 'Political Parties and Party Systems in Kenya : Which way for Kenya (Kenya Today, August 2012) <[www.kenya-today.com/politics/politics-of-ethnic-alliances-and-ethno-regional-parties-which-way-for-kenya](http://www.kenya-today.com/politics/politics-of-ethnic-alliances-and-ethno-regional-parties-which-way-for-kenya)> last accessed on 18/12/2012 at 10.40pm.

<sup>12</sup> S. Hirsch, 'Putting Hate Speech in Context: Observations on Speech, Power, and Violence in Kenya' (United States Holocaust Memorial Museum Publications, 2009) <[www.ushmm.org/genocide/spv/pdf/hirsch\\_susan.pdf](http://www.ushmm.org/genocide/spv/pdf/hirsch_susan.pdf)> last accessed on 19/12/2012 at 12.46pm.

**Kasomo Daniel** provides an assessment of ethnic conflict and its challenges. He focuses on ethnocentrism as one of the causes in his article<sup>13</sup> of ethnic conflict. He defines ethnocentrism as one's belief that his/her ethnicity is more superior to other ethnicities. It also entails sentiments or beliefs that other ethnicities have inferior modes of living, adaptation patterns and cultures. He contends that extreme forms of ethnocentrism result in ethnic cleansing and violent cultural conflicts.

He sheds light on this study by mentioning how ethnic based political parties have caused factionalism that has impeded nationalism. Furthermore, in his analysis of Africa he shows that there are some ethnic communities who believe that they own Kenya. While he proposes a lot of measures that can be taken to reduce ethnic conflict, he does not unlike Hirsch show a link between ethnocentrism and hate speech or solutions thereto.

**Milly Odongo**, a Commissioner at the NCIC, critically analyzes hate speech in her article<sup>14</sup>. Unlike Hirsch who only considers the context in which hate speech may be uttered, Odongo provides for more deliberations which are subjective. She submits that the following considerations are to be taken into account: if the utterances can cause discomfiture; if they cause fear or loathing of a community; if such utterances can cause retaliation; if it creates hostility and the impact of such utterances. She also provides an analysis of the prosecution of hate speech in various jurisdictions save Kenya. However, her paper serves as a persuasive piece as it does not provide any case law from Kenya. It also lacks in showing the laxity and leniency by the Commission that this study is highly critical of.

**Nicole Stremlau and Monroe E. Price** in their paper<sup>15</sup> give an analytical framework of media, elections and political violence in Eastern Africa. They focus mainly on the actions of the media in Kenya, Uganda and Ethiopia. It is their contention that the media do play a crucial role in

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<sup>13</sup> K. Daniel, 'An assessment of ethnic conflict and its challenges today' *African Journal of Political Science and International Relations* (AJPSIR) 6 [2012] 1.

<sup>14</sup> M. Odongo, 'Unpacking Hate Speech' (National Cohesion and Integration Commission Media Centre) <[www.cohesion.or.ke/index.php/media-centre/news/144-unpacking-hate-speech-by-commissioner-milly-odongo](http://www.cohesion.or.ke/index.php/media-centre/news/144-unpacking-hate-speech-by-commissioner-milly-odongo)> last accessed on 11/12/2012 at 1.04am.

<sup>15</sup> N. Stremlau and M. Price, 'Media, Elections and Political Violence in Eastern Africa: Towards a Comparative Framework' (An Annenberg-Oxford Occasional Paper in Communications Policy Research, October 2009).



resolving disputes and tensions and, contrastingly, fuelling electoral political violence. Stremlau and Price shift their focus from normative discussions of the media and emphasize on the transparency of media parallelism. They also criticize existing institutions which are meant to regulate media as being incapable to control the wave of new technology. This is especially illustrated by the government's inadequacy in monitoring and controlling hate speech which was sent via the Short Message Service (SMS) in Kenya's PEV of 2007-8. In addition, Stremlau and Price do discuss the role of the media in ethnicity, the personalization of political heads and extensive political polarization. In spite of this, they do not give an analysis on the prosecution of the media for professional misconduct or distribution of hate speech.

**Okon Akiba**, discusses in his article<sup>16</sup> constitutionalism and the African society. He emphasizes that constitutionalism is the genuine acknowledgement of the role of the government and the determination to bring limits on the exercise of governmental power. Moreover, it is also a distinctive form of political order that enshrines human dignity as a cardinal principle. His piece particularly helps in giving depth to the importance of constitutionalism as a tool to provide a solution to a problem. Flowing from his article, nationalism as envisioned by the Constitution of Kenya is given its due importance.

**Eghosa E. Osaghae** gives in his paper<sup>17</sup> an ameliorative analysis of political ethnicity in Africa and also by extension this study. He acknowledges that ethnicity will continue to exist in Africa and continually compete with the State. Manipulation and gross management of ethnicity has been, according to him, the construction of African modern states. He contends that elite management should not be the main aspect of ethnic mismanagement but also other aspects such as inequalities, injustices and perceptions of relative deprivation. His article sheds light on this study on how political ethnicity can be managed.

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<sup>16</sup> O. Akiba, 'Constitutional Government and the Future of Constitutionalism in Africa' (Ashgate Publishing Ltd, 2004)p.3- 24.

<sup>17</sup> E. E. Osaghae, 'Ethnicity, the State, and Constitutionalism in Africa: Preliminary Observation (Ashgate Publishing Ltd, 2004) p.95-102.

**Lisa Misol, Binaifer Nowrojee and Ernst Jan Hogendoorn** in their report<sup>18</sup> focus on Kenya's history on politically motivated ethnical clashes in the 1990s. They contend that multiparty political life in Kenya is largely defined along ethnic lines. Accordingly, ethnic identity and political affiliation has often led to politically motivated ethnical clashes. They emphasize that the prosecution of individuals who had been suspected of committing negative acts of political ethnicity in Kenya has been futile in the past.

Misol and the others particularly criticize the police and other law enforcement agencies for being very incompetent. Their report shows that 240 people accused of crimes linked to political ethnicity were acquitted because of: shoddy investigations by the police; ignored evidence; political interference of investigations; and mishandling of evidence. It is the intention of this study to highlight using this report that from the 1990s the legal enforcement agencies in Kenya are still weak.

**The Commission of Inquiry into the Post Election Violence** of 2008 led by Justice Phillip Waki issued a report<sup>19</sup> which showed the circumstances that led to the past electoral violence. This report illustrated the historical context of politically motivated violence in Kenya. It also shows how organized killings took place in Kenya as a result of politically based ethnicity and the role of the media in aggravating ethnical cleavages. In addition, the report captures narratives of individuals who had been involved in the electoral violence from province to province. The report also illustrates the culture of impunity that has thrived in the prosecution of inter-ethnic violence in Kenya. The report very important because it demonstrates the basis for the research questions of this study.

**Tom Maliti** illustrates how after the PEV of 2007-8 in his article<sup>20</sup> that there have been challenges by the DPP's office to prosecute offences committed during that time. He particularly

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<sup>18</sup> L. Misol, B. Nowrojee and E.J. Hogendoorn, 'Playing with Fire: Weapons Proliferation, Political Violence and Human Rights in Kenya (Human Rights Watch, 2002)

<sup>19</sup> Supra note 3.

<sup>20</sup> T. Maliti, 'Kenya Prosecutor: Insufficient evidence has made prosecuting post-election violence cases difficult' (A Project of the Open Society Justice Initiatives, October 26, 2012) <[www.icckkenya.org/2012/10/kenyan-prosecutor-insufficient-evidence-post-election-violence-cases-difficult](http://www.icckkenya.org/2012/10/kenyan-prosecutor-insufficient-evidence-post-election-violence-cases-difficult)> last accessed on 16/12./2012 at 11.00pm.

puts forward that 4000 investigations the police had been pursuing in connection with Post Election Violence cannot go to court because according to the DPP's office there is insufficient evidence. Although the investigations may have undoubtedly been botched by the police, this study proposes to show that there might be a reign of impunity as speculated by Waki's Report and Akiwumi's Report.

### **1.10 RESEARCH METHODOLOGY**

The study will draw from both primary and secondary sources. The primary sources of this study shall be open and close ended questionnaires which shall be limited to Nairobi (because it is a multi-ethnic region) that will be administered to individuals who shall give accounts and views of political ethnicity in Kenya.

Once the data from the questionnaires has been collected it shall be analyzed and be complemented by other secondary sources such as papers, journals, books, magazines, newspapers, theses and other published sources obtained through desk-top research.



## CHAPTER TWO

### 2.0 THE LINK BETWEEN ETHNICITY, ETHNIC IDENTITY AND POLITICAL ETHNICITY

Ethnicity has been defined by Bruce Gilley as: “a person’s identity which is drawn from one or more markers like race, religion, shared history, regional, social symbols or language. It is distinct from that part of a person’s identity that comes from say, personal moral doctrine, economic status, civil affiliations or personal history.”<sup>21</sup> From this definition we can deduce that ethnicity has been described as part of an individual’s identity. Ethnicity is a social construction that is intricately woven in an individual and it is an indication that gives an individual his or her distinctiveness in society. However, at the same time it gives an individual a sense of belonging that he shares a common history and language with other individuals from that same ethnic community.

In Kenya, many individuals often identify themselves as being part of an ethnic community and take pride in that fact. To better comprehend the complexity of the concept that is ethnicity, the focus will be shifted from what ethnicity generally is to what ethnic identity is.

Ethnic identity has been defined in two approaches: the descriptive approach and the inclusive approach. Adrian Hastings adopts the descriptive approach of ethnic identity. He describes ethnic identity as : “the common culture whereby a group of people share the basics of life—their cloth and clothes; the style of houses; the way they relate to domestic animals and to agricultural land; the essential work which shapes the functioning of a society and how roles are divided between men and women; the way hunting is organized; how murder and robbery are handled; the way defense is organized against threatening intruders; the way property and authority are handed on; the rituals of birth, marriage and death; the customs of courtship; the proverbs, songs, lullabies;

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<sup>21</sup> B. Gilley, “Against the Concept of Ethnic Conflict,” *Third World Quarterly* 25, no. 6 (2004): 1158 <<http://web.ebscohost.com.libproxy.nps.edu/ehost/pdf?vid=2&hid=17&sid=581bf627-79e2-4985-aa88-0b9ef5b44243%40sessionmgr7>> last accessed on 05/03/2013 at 2.42pm.

shared history and myth; and the beliefs in what follows death and in God, gods or other spirits.”<sup>22</sup>

This approach is detailed and it shows how individuals gain a sense of kinship and togetherness because of the above mentioned commonalities. However, it sways too heavily on traditional, historical, religious or lingual characteristics of ethnic identity. For these reason, Hastings fails to appreciate that culture is dynamic and it changes over time. For example the religious characteristics highlighted in beliefs in God, gods or other spirits by various ethnicities have been eroded and now many ethnicities in Kenya are mainly Christian or Islamic with a small fraction still believing in ethnic gods.<sup>23</sup>

While Gilley and Hastings agree on what ethnicity and ethnic identity is, their approach fails to consider the circumstances in post colonial Africa. Ethnicity is no longer limited to cultural connotations. Almost always, politics in Africa has an ethnical dimension. This is more so in Kenya where politics is more ethnical than ideological. Therefore, it would be inaccurate to define ethnicity only from a cultural aspect because it does not explain the occurrence that is political ethnicity. It then begs the question; could ethnic identity also include shared aspirations or affiliations by a community?

Milton J. Esman gives a satisfactory answer to the above question by adopting the inclusive approach in his definition of ethnicity. He states that ethnic identity can refer to, “a community that claims common origin, often including common descent or fictive kinship; that possesses distinctive and valued cultural markers in the form of customs, dress, and especially language; and that traces a common history and *expects to share a common destiny*.”<sup>24</sup>

Esman’s definition is not as descriptive as Hastings’, however it is not exclusive to the fact that an ethnic community can be linked by aspirations or expectations that may lead to the same fate.

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<sup>22</sup> A. Hastings, “The Construction of Nationhood Ethnicity, Religion and Nationalism,” (Cambridge: Cambridge University Press, 1997), p. 167.

<sup>23</sup> The Kenya Bureau of Statistics results of the census of 2010 on religious affiliation Christians account for 31,877,734; Muslims- 4,304,798; and Traditionalists 635,352. (See: <[www.knbs.or.ke/censusreligionphp](http://www.knbs.or.ke/censusreligionphp)> last accessed on 05/03/2013 at 8.30pm.

<sup>24</sup> M.J. Esman, “Ethnic Politics,” (Ithaca: Cornell Univ. Press, 1994), p.15-16.



These expectations can be political, social or economical. It is a consequence of such shared aspirations that ethnic communities have managed to align and ally themselves politically in the hope of acquiring national resources. The understated effect of ethnical aspirations, expectations, interests and hopes that have been politicized have often been a major threat to the existence of African States.<sup>25</sup> The alignment of ethnic communities as a result of political action, political aspirations or political expectations has been called political ethnicity or ethno-politics or politicized ethnicity or tribal politics.

## **2.1 POLITICAL ETHNICITY AND MANAGEMENT OF POLITICAL ETHNICITY BY THE STATE**

Eghosa Osaghae, a renowned Nigerian Constitutional scholar, affirms that political ethnicity involves, “mobilization, demands and political action by members of ethnic interests.”<sup>26</sup> He then gives two broad spectrums of political ethnicity. One side of the spectrum encompasses positive characteristics that entail the progression of human rights such as the demand and struggle for independent statehood, protection of language and culture, local autonomy and other group rights.<sup>27</sup> However on the other side of the spectrum, politicized ethnicity can involve ethnically violent or militant activities.<sup>28</sup> This has been illustrated in the Rwanda Genocide, the Nigerian Civil War that led to secession and the PEV in Kenya. In addition, negative political ethnicity includes: discrimination of ethnicity; ethno-political competition; ethnic clashes; hate speech based on ethnicity; ethnic cleansing; and ethno-regional politics.

The degree of negative political ethnicity can be small, for example, ethnic disagreements over communal land or as exacerbated as the Rwanda genocide. The difference between the two scenarios is not the kind of ethnic conflict but the extent of ethnic mobilization. Ethnic conflict is inevitable given the diversity of ethnicities. Osaghae guides this study particularly when he observes that it is not ethnic conflict that should be stressed but the management of political ethnicity by the State.

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<sup>25</sup> E. Osaghae, “Ethnicity, the State and Constitutionalism in Africa: Preliminary Observations,” (Ashgate Publishers Ltd (2004), p.95.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*

Ineffective State management of political ethnicity can easily turn from ethnic disagreements over communal land to civil war. Thus, the State should manage the arena of ethnic politics as a neutral party to ensure proper management of potential ethnic conflict.<sup>29</sup> The State can manage ethno-politics through legal framework such as: the Constitution; statutory laws; policies; subsidiary legislation etc. Political ethnicity can also be managed by governmental institutions.

The legal framework in Kenya that manages political ethnicity in Kenya includes: the Constitution of Kenya 2010; the Media Act, 2007; the NCI Act, 2008; the Political Parties Act, 2011; and the Elections Act 2011.

## **2.2 MANAGEMENT OF POLITICAL ETHNICITY BY KENYAN LAW**

### **2.2.1 THE CONSTITUTION OF KENYA, 2010**

#### **I. Constitutionalism and nationalism**

A constitution is a set of rules and laws whose main goal is to ensure that there are checks and balances on governmental powers. However it also serves as a legal framework that enshrines values, norms and principles that a State wishes to commit to and that are to be upheld by the government. Okon Akiba recognizes that constitutionalism involves a normative element which reflects certain forms of institutional arrangements that optimize good government and the safeguarding of important values.<sup>30</sup>

The Constitution of Kenya of 2010 was preceded by various attempts at constitutional reform and the PEV of 2007-8. Majority of Kenyans had aspirations and hopes that a new constitutional order would reflect values that ensured equitability of national resources.<sup>31</sup> This was because the previous Constitution awarded imperialistic powers to the president. Constitutionalism as

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<sup>29</sup> Ibid.

<sup>30</sup> O. Akiba, 'Constitutional Government and the Future of Constitutionalism in Africa' (Ashgate Publishing Ltd, 2004) p.3- 24.

<sup>31</sup> Anon, 'Commentary on the Kenya Constitution (consolidation of 15 articles in the East African Standard) <<http://www.law.wisc.edu/gls/cotkc.pdf>> last accessed on 05/03/2013 at 5.46pm.



described by Akiba in the previous regime was impossible because the control and management of institutions was concentrated in an individual thus it was hard to safeguard nationalistic values. Distribution of resources was based on cronyism and to date distribution of resources in Kenya remains highly inequitable.<sup>32</sup>

Following the horrific violence that Kenya had experienced almost three years after the General Elections of 2007, the Constitution of Kenya was ushered in. Kenya hoped it would move from such chaos into national integration. The fundamental rights and freedoms under the Constitution were expressed emphatically and education on such rights and freedoms empowered many Kenyans. The Constitution also provided for several safeguards that would ensure that political and elective processes were effective and independent so that a repeat of the 2007- 8 PEV would not happen.

The Constitution is very ardent on the need to balance ethnical leanings and national integration. Regulation of political ethnicity is an onerous task because it is too closely associated with the right to vote.<sup>33</sup> Any citizen can vote in whoever they want and this is the cornerstone of any democracy, notwithstanding his or her ethnic affiliation and ethnic prejudice. There is no specific provision in the Constitution that illegalizes political ethnicity. Nevertheless, it cannot be ignored that nationalism as propagated by the Constitution should be adopted and encouraged by the State and its people.

Nationalism as envisaged by the Constitution deals with the involuntary meaning<sup>34</sup> of nationalism. In this context individuals identify themselves as being part of a nation or a state because of common origin or history. It is of importance to note that this was achieved after independence when Kenya went through voluntary nationalism from British imperialism. This is where our forefathers sought for political sovereignty to voluntarily become nationals of the independent State that became the Republic of Kenya in 1964. Many Kenyans today as a consequence of the freedom fighters can fathom what it is to belong to a State and the recent

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<sup>32</sup> Ibid.

<sup>33</sup> Supra note 4 at Article 38(3) (b) provides that: "Every adult citizen has the right, without unreasonable restrictions— (b) to vote by secret ballot in any election or referendum."

<sup>34</sup> Anon, 'Nationalism' (Stanford Philosophy Encyclopedia, June 2010)

<<http://plato.stanford.edu/entries/nationalism/#Bib>> last accessed on 05/03/2013 at 8.17pm.



General Elections of 2013 clearly illustrates the degree of care that Kenyans have in ensuring the existence of Kenya. Although several Kenyans today did not voluntarily participate in the creation of this nation, their identities as being part of this State and nation is not disputed but contestable with ethnic identity.

## II. The Preamble and Article 10 of the Constitution

Kenya has several prescribed norms that ensure that nationalism is safeguarded by the Constitution. The Preamble highlights the most fundamental values. It demonstrates nationalism when it states: "Proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as *one indivisible sovereign nation*."<sup>35</sup> This clause is conscious of the fact that ethnicity is strongly tied to personal identity. Consequently, its inherence cannot be dispensed. In spite of this, it remains the desire of most Kenyans that ethnic diversity does not cause the extinction of this State.

The Preamble also emphasizes the dedication of all Kenyans to ensure that national unity remains a priority. This is stressed by the words, "Committed to nurturing and protecting the well being of the individual, the family, communities and *nation*."<sup>36</sup> The Preamble of the Constitution adopts various norms that the State and its people shall ascribe to. It is my submission that these norms if followed to the letter could easily rid us of the nuisance that is negative political ethnicity. The Preamble without a doubt indicates the aspirations and norms that Kenyans agreed to adopt and enact during the Referendum over the Constitution in 2010.

In addition, national values are not only highlighted in the Preamble but by Article 10 of the Constitution. Article 10(2) of the Constitution highlights these national values as: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; good governance, integrity, transparency and accountability; and sustainable development.

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<sup>35</sup> The Preamble to the Constitution of Kenya of 2010.

<sup>36</sup> *Ibid.*

All State organs, State officers and all people are required by the Constitution to ascribe to the national values in the application and interpretation of the Constitution or any other law; the formulation of law; and in the making and implementation of public policy decisions.<sup>37</sup> This means that institutional bodies such as the NCIC, the Office of the Registrar of Political Parties, the Independent Electoral Boundaries Commission (IEBC) and the DPP are bound by these values in the execution of their work.

Akiba's definition of constitutionalism can be achieved with ease in Kenya if the implementation of the Constitution is hinged on both the Preamble and Article 10 of the Constitution of Kenya 2010.

### **III. The Bill of Rights**

The Bill of Rights is also another set of provisions that the Constitution has espoused to ensure that political ethnicity is managed. Like the national values, the State and all people in the Republic are bound to comply with the Bill of Rights.<sup>38</sup> Of importance to this discourse include the right to be equal before the law; the right to be free from discrimination; and the right to freedom of expression.

#### **The right to be equal before the law**

Article 27 of the Constitution deals with the right to be equal before the law. Every individual is equal before the law and has the right to equal protection and benefit from the law.<sup>39</sup> No one is above the law, neither the State nor the people.

Baron de Montesquieu in his book the Spirit of the Laws (L'Esprit des Lois) propagated this principle. He contended that the Spirit of inequality arises when citizens in a democracy do not

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<sup>37</sup> The Constitution of Kenya of 2010, Article 10(1).

<sup>38</sup> Ibid, Article 20(1).

<sup>39</sup> Ibid, Article 27(1).

recognize themselves as being part of a democracy but as individual citizens.<sup>40</sup> As a result, they acquire political power to have power over other citizens.<sup>41</sup> Kenya faces extreme inequality and it is highlighted by the fact that governance is not inspired by good leadership but the need to amass as much power as possible and the benefits thereof.

Montesquieu, however, warns against extreme equality because it would blur and dilute governance.<sup>42</sup> Extreme equality would mean that the roles assigned to formulate, implement and interpret the law could be subsumed or impeached anytime by the governed. Even democracies that postulate egalitarianism comprehend the importance of governance. The balance between extreme inequality and equality is achieved through love of the law. It is the suggestion of this paper that the expression of such love in this context is done by implementation of the Constitution of Kenya, 2010.

Prosecutions of political leaders by the government and media have often indicated that there is inequality before the law and no love of the law. Every person in Kenya is subject to the law and as an example the preferential treatment that the former Minister, Ali Mwakwere got should not be witnessed again. He was accused by the NCIC for delivering a speech that contained insulting words directed to the Arab community at the Coast region with the intention of stirring ethnic hatred against the Arab Community. He stressed, inter alia, that the Arabs were foreigners and the land they held was of the African Natives and that the African natives should take it back by all means. After he apologized for his inflammatory remarks, the NCIC withdrew the case against him under Section 87 of the Criminal Procedure Code of 2009<sup>43</sup>. The office of the DPP did not oppose the withdrawal of the case and thus the case was withdrawn from Court.<sup>44</sup>

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<sup>40</sup> I. Cox, 'Montesquieu and the History of French Laws,' (Oxford: Voltaire Foundation at the Taylor Institution, 1983), p.20

<sup>41</sup> *ibid.*

<sup>42</sup> *ibid.*

<sup>43</sup> L.Limo, 'Hate Speech Charge against Mwakwere Dropped,' (Standard Digital News, 18 September, 2012)

<[www.standardmedia.co.ke/?articleID=2000066401&story\\_title=Kenya:%20Hate%20speech%20charge%20against%20Mwakwere%20dropped](http://www.standardmedia.co.ke/?articleID=2000066401&story_title=Kenya:%20Hate%20speech%20charge%20against%20Mwakwere%20dropped)> last accessed on 04/12/2012 at 9.10pm.

<sup>44</sup> *ibid.*



The Arab community at the Coast has been in Kenya and many of them are Kenyan citizens. They have the right to own property<sup>45</sup> and they have acquired such land legally. Land is an emotive issue and it has been inequitably distributed at the Coast region. There are also historical injustices that surround the method of land ownership at the Coast.<sup>46</sup> Most African Natives were illiterate and incapable of participating and understanding the land transactions when the regulatory land regime<sup>47</sup> was established.

Although no direct link has been established, it must be mentioned that shortly after Mwakwere's speech was delivered the Mombasa Republic Council began to make secessionist claims.<sup>48</sup> One of their main contentions was the inequality of land distribution and land ownership at the Coast region.<sup>49</sup> It is their goal that the Coast Province be seceded from Kenya to address this concern and ameliorate the suffering of the poor and landless African natives.<sup>50</sup> The apology that Ali Mwakwere presented before the Court and on the media is not commensurate to the effect of his speech. He should have been prosecuted notwithstanding the fact that he was a Minister.

The media should also be prosecuted for promoting hate speech and ethnic vilification by what they broadcast. The media enterprises are people<sup>51</sup> under the Constitution and as a result subject to the law. After the PEV of 2007-8, CIPEV presented evidence that KASS FM (a Kalenjin vernacular radio station) had been singled out by government officials and victims of violence as having broadcasted ethnic hatred and ethnic violence against other communities.<sup>52</sup> However to date, there have been no prosecutions that have been instituted against this media house.

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<sup>45</sup>Supra note 4 at Article 40 read along with Article 65, provides that every person has the right to own property in Kenya. However, this right does not apply to non-citizens. Non-citizens may only have leasehold interests with respect to land.

<sup>46</sup> The National Land Policy of Kenya, Sessional Paper No. 3 of 2009, Para.3.6.4, "Land issues peculiar to the Coast region."

<sup>47</sup> The Land Titles Act of 1924, Cap 282.

<sup>48</sup> P. Aarhus, 'Quality Time with Kenya's Secessionists,' (VICE United Kingdom, 2012)

<[http://m.vice.com/en\\_uk/read/quality-time-with-kenyas-secessionists](http://m.vice.com/en_uk/read/quality-time-with-kenyas-secessionists)> last accessed on 28/03/2013 at 9.17pm.

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*

<sup>51</sup> Supra note 4 at Article 260 defines a person to include a company, association or other body of persons whether incorporated or unincorporated.

<sup>52</sup> Supra note 3 at p.298

Questionable enforcement of the law has been the norm in Kenya as opposed to the exception. In any event, implementation, application and interpretation of the law under Article 10(2) should involve, inter alia, national unity, equality, the rule of law, integrity, transparency and accountability. It is with deep regret that I submit that this has not been witnessed in the prosecution of hate speech in Kenya. Justice can never be achieved if there is no equality before the law. In order, to prevent a recurrence of the 2007-8 PEV justice through the application of this constitutional provision must be realized.

### **The right to be free from discrimination**

Discrimination involves preferential treatment of a social group such that it causes another group to be disadvantaged. It also involves victimization of a particular social group. The Constitution provides that no person or the State shall directly or indirectly discriminate against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.<sup>53</sup>

The Constitution prohibits direct and indirect discrimination. Indirect discrimination entails policies that are not formulated intentionally or consciously against a particular social group but it have the effect of disadvantaging a particular social group.<sup>54</sup> Conversely, direct discrimination (the focus of this study) involves the intentional and explicitly formulated policies of exclusion or preference.<sup>55</sup> The act of discrimination is purposeful such that it is disadvantageous or advantageous to a particular social group.

Discrimination could also be preferential or exclusive. While it is easily agreeable that actions which act less favourably against an ethnic community should be illegal, the contrary has little or no recognition in the interpretation and implementation of the law. Of particular reference is ethnocentrism which has been defined as one's belief that his/her ethnicity is more superior to

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<sup>53</sup>Supra note 25 at Article 27(3) and Article 27 (4).

<sup>54</sup> Anon, 'Discrimination,' (Stanford Encyclopedia of Philosophy, 2011)  
<<http://plato.stanford.edu/entries/discrimination/#WhiGroCou>> last accessed on 21/03/2013 at 8.32pm.

<sup>55</sup> I. Young, 'Justice and the Politics of Difference,' (Princeton: Princeton University Press, 1990) p.196  
<<http://plato.stanford.edu/entries/discrimination/#WhiGroCou>> last accessed on 21/03/2013 at 8.29pm.



other ethnicities.<sup>56</sup> It also entails sentiments or beliefs that other ethnicities have inferior modes of living, adaptation patterns and cultures.<sup>57</sup> Ethnocentric notions propagate a sense of superiority and entitlement over other ethnic communities and often this is expressed in acts such as ethnic cleansing.

The line between ethnic pride and ethnocentrism is a blurry one. However, the context in which it is witnessed will indicate if it is discriminatory or not. A statement such as, “the son of the slopes” could show that one takes pride in the fact that they come from a community that lives in a mountainous region.<sup>58</sup> However, when this statement is uttered when there is ethnic conflict, then it can be discriminatory against individuals who do not come from the mountainous area.

The effect of ethnocentrism has been witnessed in the 2007 General Elections when some tenants told their landlords that they would pay reduced rents should their preferred political aspirant from their ethnicity become president.<sup>59</sup> Once election results were announced, some communities felt that their entitlement to leadership had been robbed from them. These dejected feelings caused violence at Kibera and Mathare slums.

Discrimination based on ethnicity must be frowned upon because it is undeserved that people should get prejudicial treatment by reason of such an immutable trait.<sup>60</sup> It is imperative that the interpretation of this right should be done broadly so as to protect and guarantee this right effectively.

### **Freedom of expression**

Freedom of expression is one of the greatest human rights. However, while people are allowed to convey their ideas, opinions or speech there has to be a limitation to such expression where it is offensive or causes direct harm.

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<sup>56</sup> Supra note 13 at p.1.

<sup>57</sup> Ibid.

<sup>58</sup> Supra note 12.

<sup>59</sup> Supra note 3 at p.195-197.

<sup>60</sup> R. Kahlenberg, 'The Remedy,' (New York: Basic Books, 1996) p.54-55

<<http://plato.stanford.edu/entries/discrimination/#WhiGroCou>> last accessed on 21/03/2013 at 8.32pm.

This right is rarely curtailed because it is through this right that humanity is able to push limits in all subjects whether practical, speculative, scientific, moral or theological.<sup>61</sup> Therefore, it should not be restricted simply because it is in bad taste. John Stuart Mill categorically stated: "...there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered."<sup>62</sup> The point of concern is centered upon morality but not legality. Morality is subjective and thus freedom of expression should not be limited to personal preference. John Stuart Mill recognized this when he qualified the above quote by stating: "the only purpose, for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others."<sup>63</sup>

The limitations presented by the Constitution do not bother with expression that causes personal offense but it is more concerned with expression that causes direct harm. This is highlighted by Article 33(2) of the Constitution which states: "The right to freedom of expression does not extend to propaganda for war; incitement to violence; hate speech; or advocacy of hatred that—constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination specified or contemplated in Article 27 (4)." This provision also qualifies the freedom of expression by the media in Article 34. In the previous dispensation, the harm restriction was silent on the expression of ethnicity but after the PEV of 2007-8 it had to be incorporated in the Constitution.

CIPEV submitted that during the electoral violence there was no proper regulatory framework that properly controlled the freedom of expression by media this is especially in the case of the SMS and social media.<sup>64</sup> As a result, media houses operated freely, were partisan and became sensational and unnecessarily alarmed their audiences and inflamed their passions.<sup>65</sup>

There are still great challenges that the State faces in regulation of the freedom of expression especially after democratization. In any event, the regulation of the media must be limited where

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<sup>61</sup> J.S. Mill, 'On Liberty' ( Indianapolis: Hackett Publishing, 1978) p. 11

<sup>62</sup> *ibid*, p.15.

<sup>63</sup> *ibid*.

<sup>64</sup> *Supra* note 3 at p.296.

<sup>65</sup> *ibid*.

it advocates for hatred as propounded by the Constitution so as to avoid a repeat of the ethnic violence witnessed after the General Elections of 2007.

#### **IV. Management of political parties by the Constitution**

Article 91 of the Constitution provides for the requirements for political parties. Political parties are normally regulated by statutory law. However in Kenya, political parties have been used as vehicles that align and ally ethnical interests instead of democratic ideologies. It is for this reason that it became imperative for the regulation of political parties to be given constitutional control.

The Constitution is very vocal on the need for political parties to embody nationalism. Article 91 provides among other things, that political parties should have a national character as prescribed by an Act of Parliament; promote and uphold national unity; and promote the objects and principles of the Constitution and the rule of law.

The last General Elections clearly denote the extent by which political parties in Kenya are ethnical. Democratization of political rights in Kenya gave room for multipartyism. However it also reaffirmed ethnic identities and encouraged political alliances that found a foothold in the national system.<sup>66</sup> The Jubilee Alliance and CORD on the face of it look like alliances that encourage unification of ethnicities that are separated by borders.

However, it is the contention of this study that these political alliances revolve around personalities who are viewed to be tribal chiefs that mobilize their respective ethnic communities towards their political ambitions. These political alliances do not encourage pluralism but advocate for factionalism which widens the already existing ethnical fissure.

From the General Elections of 2013 it was evident that, the Jubilee Alliance consisted mainly of candidates from the Kalenjin, Kikuyu, Meru and Aembu ethnic communities. Meanwhile CORD comprised candidates from the Luo, Kamba and Luhya communities. The political leaders in CORD and the Jubilee Alliance aligned themselves in such a manner that they amassed power

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<sup>66</sup> Supra note 11.



over the citizenry's voting patterns. The power over the citizenry was of such an extraordinary strength and this led to the media's proverbial statement, "The tyranny of numbers."<sup>67</sup> In the interest of pluralistic democracy as opposed to fragile factionalistic democracy, there needs to be sufficient management of political alliances in Kenya.

The Constitution in Article 91(2) categorically states that political parties shall not: "be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis." The words the Constitution has used might have lent itself to mischief. The word 'founded' means originated or formed. At the time of registration of political parties most of these parties seemingly appear to embody a national character. The memberships of the parties are usually open to people notwithstanding their ethnicity. However, the political agenda of such parties is witnessed by the conduct of such parties.

The Constitution provides that parties should ascribe to a Code of Conduct.<sup>68</sup> It does not exemplify what it means by Code of Conduct. It can be presumed that Parliament has been assigned this role because it is emphasized by the Constitution that Parliament shall formulate and enact any other laws that shall regulate political parties.<sup>69</sup>

Regulation of the conduct of political alliances in Kenya is delegated to statutory law, specifically, the Political Parties Act of 2011 and the Elections Act of 2011. While, the Constitution's intention is that all political parties embody a national character it is evident that this is more of an intention than reality. Political alliances in Kenya have to be more adequately addressed given their effect in society. Extremities of unregulated ethnical alliances in other countries such as Afghanistan have brought about terrorism. The Taliban, a rogue terrorism group in Afghanistan, is financed by the Pashtun tribe who have been excluded from the government (which includes other allied tribes).<sup>70</sup> Kenya should monitor and regulate political parties before resentment of exclusion arrives at such extremities.

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<sup>67</sup> M.Mutiga, 'Adopting the US vote system would end the eternal tyranny of numbers,' (Sunday Nation Newspaper, 17 March 2013) p.12.

<sup>68</sup> Supra note 4 at Article 91 (1) (h).

<sup>69</sup> Ibid, Article 92 (i).

<sup>70</sup> Supra note 9 at p. 2

## **2.2.2 THE NATIONAL COHESION AND INTEGRATION ACT, 2008**

This Act was preceded by the PEV of 2007-8 in Kenya. The purpose of the NCI Act is to: encourage national cohesion and integration by outlawing discrimination on ethnic grounds; and to provide for the establishment, powers and functions of the NCIC.

### **Ethnic Discrimination**

Ethnic discrimination under this Act is an expansion of Article 27(4) of the Constitution that deals with discrimination. Ethnic grounds as defined by the Act mean any of the following grounds, namely colour, race, religion, nationality or ethnic or national origins.<sup>71</sup> This definition not only embodies Bruce Gilley's definition of ethnicity but also includes nationality and national origins. This inclusion is to cater for people in Kenya who are not Kenyans and people who although have different national origins have acquired Kenyan citizenship.

Direct discrimination is highlighted in Section 3(a) which provides that: "a person discriminates against another person- if on ethnic grounds he treats that other person less favorably than he treats or would treat other persons." Indirect discrimination where policies consequentially favour or exclude a particular ethnic community is espoused in Section 3 (b) of the NCI Act. It states: "a person discriminates against another person if- he applies to that other person a requirement or condition which he applies or would apply equally to persons not of the same ethnic group as that other person but- which is such that the proportion of persons of the same ethnic group as that other person who can comply with it is considerably smaller than the proportion of persons not of that ethnic group who can comply with it; and which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it applied; and which is to the detriment of that other person because he cannot comply with it."

Despite this descriptive approach, the NCI Act fails to consider that discrimination should not only be perceived from an exclusion perspective but also a preferential one. It is because of this

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<sup>71</sup> The National Cohesion and Integration Act of 2008, Section 2.



that ethnocentrism is not recognized by the NCI Act as a form of ethnic discrimination. In fact, the NCI Act in Section 4 emphasizes its narrow approach. This section deals with ethnic victimization.<sup>72</sup> The Act should be revised and amended so that it can properly manage political ethnicity.

### **Hate Speech**

The Act does not define hate speech. It instead gives details of ways in which speech could stir up ethnic hatred. Section 13 states: “a person who: uses threatening, abusive or insulting words or behaviour, or displays any written material; publishes or distributes written material; presents or directs the public performance of a play; distributes, shows or plays, a recording of visual images; or provides, produces or directs a programme; which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up.”

It is difficult to define hate speech in isolation of the circumstances that the statement was uttered in. Milly Odongo, a Commissioner of the NCIC, suggests that the context in which an utterance was made will determine if it amounts to hate speech.<sup>73</sup> This is an objective criterion in the sense that if the statement was made in an ethnic or politically charged environment then it will be deemed to be inflammatory.<sup>74</sup> The construction of the context in which a statement was made expands itself to include ethnocentrism. However, such a statement must be insulting, threatening or abusive. Once again the Act limits itself to its constricted point of view that ethnic hatred is only a result of discrimination that tends to exclude other ethnic communities.

The Act continually fails to take a multidimensional approach on the regulation of political ethnicity and thus leaves a loophole for ethnocentrism to thrive. The manifestations and effects

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<sup>72</sup> *ibid*, Section 4 defines ethnic victimization as “...any act that is injurious to the well-being and esteem of the person by treating the person victimized less favourably than, in those circumstances, he treats or would treat other persons...”

<sup>73</sup> *Supra* note 14

<sup>74</sup> *ibid*.

Like the Constitution, the Act's intention to deal with political alliances is limited. The Act presupposes that if the compositions of members or the governing body of political parties are controlled then parties with agendas to promote ethnic or regional ideologies cannot exist. Often, the electorate is not concerned with the membership or governance of political parties. In fact, the electorate have little or no knowledge of who the governing body is or their constituent members. The Act in its bid to manage political ethnicity should have gone further and controlled the composition of candidates from political parties such that they reflect regional and ethnical balance. This is because the electorate is more familiar with candidates from political parties rather than the members or the governing body of political parties.

In any event, the Act provides in Schedule 1, the Code of Conduct parties shall ascribe to. There are several requirements that political parties should abide by, among them is the obligation to promote national patriotism and national unity<sup>80</sup> and the requirement not to advocate hatred that amounts to ethnic incitement, vilification of others or incitement to cause harm.<sup>81</sup> All political parties are bound by the Code of Conduct under the Act and by extension bound to meet the aforementioned obligations.<sup>82</sup>

These are the only requirements by the Code of Conduct that specifically deal with the management of political ethnicity. The provisions of the law are a commendable attempt but they still fail to effectively manage political alliances. Often political alliances forged on ethnicity hide behind the guise of promoting national unity.

A good example is the short-lived G7 Alliance. The Alliance comprised political personalities from the Kikuyu, Kalenjin, Kamba and Luhya communities.<sup>83</sup> These personalities argued that their alliance was not tribal but one that fostered integration of communities in Kenya.<sup>84</sup> This

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<sup>80</sup> Supra note 57 at Schedule 1, Paragraph 6 (f).

<sup>81</sup> *ibid*, Schedule 1, Paragraph 7(f).

<sup>82</sup> *ibid*, Section 6 (2) (e).

<sup>83</sup> Anon, 'Kenya's G7 alliance moves to heal rifts in the ranks' (NATION TEAM, November 2012)

<[http://www.africanstandardnews.org/index.php?option=com\\_content&view=article&id=t1163:nation-team-newsdeskkenationmediacom&catid=3:newsflash](http://www.africanstandardnews.org/index.php?option=com_content&view=article&id=t1163:nation-team-newsdeskkenationmediacom&catid=3:newsflash)> last accessed 05/03/2013 at 8.12pm

<sup>84</sup> *ibid*.



was a bid to mobilize communities and their votes from certain regions in Kenya.<sup>85</sup> An integration of four out of about forty two communities in Kenya does not promote nationalism but factionalism. These kinds of alliances exclude other communities who with time harbour anger and resentment similar to that of the Pashtun tribe of Afghanistan. Therefore, the Political Parties Act should be amended to expand the already existing provisions so that it can effectively manage ethno-political alliances in Kenya.

#### **2.2.4 THE ELECTIONS ACT, 2011**

The Elections Act of 2011 was an Act of Parliament enacted to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; and to provide for election dispute resolution.

The Act is very crucial in the management of political ethnicity in Kenya. Political leaders in Kenya use political parties as seen in the previous sub-topics to mobilize ethnic communities who can then vote for them so that they participate in governance. Given Kenya's history, the Act plays an important role in the campaign process and providing the Code of Conduct which political parties; candidates nominated by political parties and officials under the Act are to ascribe by.

There is no provision in the Act that prohibits campaigns in vernacular language. Individuals are encouraged to campaign freely. However, this right is limited in Section 67(1) (g) and an offence is created where a person uses offensive or insulting language; incites violence or influences voters on the grounds of ethnicity or any other ground of discrimination. This provision is more expansive than the Political Parties Act in that it can encompass ethnocentrism where voters are influenced on the grounds of ethnicity.

Many regions in Kenya are mono-ethnic and most individuals in such areas are more conversant with vernacular language. Often, campaign speeches are delivered in vernacular. It is the

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<sup>85</sup> *ibid.*

submission of this study that ethnocentrism is more heightened with such speeches. When a candidate delivers a speech in vernacular saying, “It is our turn to enter State House. We should not let those other people take what is ours.” In this context, ‘our’ can be understood or misconstrued to be our ethnic community and ‘those other people’ could mean other ethnic communities. Such speeches are very frequent in Kenya and are seldom regulated.

There have also been instances where individuals campaign in both Kiswahili and vernacular in regions that are multiethnic. A witness reported that during the campaigns of the 2007 General Elections, some politicians delivered speeches in the Kiswahili language then uttered inflammatory words in vernacular to deliberately cut off other communities.<sup>86</sup> Likewise, there is no effective regulation of these kinds of speeches.

The Elections Act attempts to address these issues in its Second Schedule which deals with the Electoral Code of Conduct that registered political parties and candidates are obliged to conform to. The provisions under the Schedule are more detailed than those found in the Political Parties Act. Moreover, the Elections Act establishes a body known as the Electoral Code of Conduct Enforcement Committee.<sup>87</sup> It is tasked with the enforcement of the provisions of the Code of Conduct on behalf of the IEBC.

Consequently, it has the task of ensuring that registered political parties and candidates promote ethnic tolerance<sup>88</sup> and promote cultural diversity<sup>89</sup>. Hastings definition was hinged on culture as being the main maker of ethnicity. Relying on this school of thought registered political parties should ensure that their candidates reflect both cultural and ethnical diversity. The Electoral Code of Conduct Enforcement Committee must also monitor concerned parties so that they avoid: the use of hate speech, language or any kind of action which may lead to violence or intimidation;<sup>90</sup> and any discrimination based on ethnicity in connection with the election and any other political activity<sup>91</sup>.

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<sup>86</sup> Supra note 3, p.135.

<sup>87</sup> The Elections Act of 2011, Schedule 2, paragraph 16.

<sup>88</sup> *ibid*, Schedule 2, paragraph 5 (g).

<sup>89</sup> *ibid*, Schedule 2, paragraph 5 (h).

<sup>90</sup> *ibid*, Schedule 2, paragraph 6 (a).

<sup>91</sup> *ibid*, Schedule 2, paragraph 6 (j).

The Elections Act addresses some of the challenges that had been found in the Political Parties Act. The Electoral Code of Conduct does not however give sufficient regulation of campaigns that are in vernacular. To that extent the Act does not effectively manage political ethnicity.

### **2.2.5 THE MEDIA ACT,2007**

The Media Act was painstakingly enacted in 2007. It had received a lot of backlash from media enterprises who had just begun to enjoy the fruits of liberalization as a result of democratization in 1992. They contended that there was too much control by the government and that this infringed on the constitutional right of freedom of expression. The purpose of the Act was to provide for the establishment, functions and powers of the Media Council of Kenya (MCK). In addition, the Act provided for: the conduct and discipline of journalists and the media; and for the self-regulation of the media.

While the aforementioned statutes were enacted after the 2007-8 electoral violence, the Media Act was enacted before the General Elections of 2007. An assessment of the provisions of the Act indicates that there was proper management of political ethnicity even before the electoral violence. This is particularly highlighted by the Code of Conduct. In Section 35(2), an obligation is imposed on the media to keep and maintain high professional ethical standards and at all times have due regard to the Code of Conduct set out in the Second Schedule.

It is a requirement of the law that national harmony should be propagated by the media when there is sectarian or ethnic conflict.<sup>92</sup> Furthermore, the media should not write or broadcast any information during ethnic conflict that would aggravate tension or inflame passions of the public that would result in ethnic ordeals.<sup>93</sup> Hate speech has been addressed by the Act. Nevertheless, it has been narrowly defined as opposed to the NCI Act. However, the Act allows for subjectivity in that derogatory remarks must not be quoted if they would in the circumstances of the situation be unacceptable to public opinion.

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<sup>92</sup> The Media Act of 2007, Schedule 2, Paragraph 11 (a).

<sup>93</sup> *Ibid*, Schedule 2, Paragraph 11 (c).



Media as defined by the Act includes both electronic and print forms engaged in any production for circulation to the public.”<sup>94</sup> This definition of the media encompasses new forms of technology such as the SMS, blogs, websites, and social network platforms. Stereotypes and propaganda are not altered by technology but the dissemination of such information is accelerated and the ability to meet people who hold such opinions.<sup>95</sup> The ethnic violence of 2007-8 illustrated the extent by which mobile phone technology was used to exacerbate ethnic tension with incendiary text messages. In addition, mobile phones were used to call radio stations (particularly KASS FM) whereby listeners were soliciting their biased and derogatory opinions across airwaves.

The law was in effect at the height of political violence in Kenya. The MCK is tasked with the responsibility of ensuring compliance of with all the provisions of the Act as well as uphold the ethics required by journalists. There was no response by the MCK and the responsibility of managing the potential and actual violence was taken on by the Ministry of Information and Communications. The Ministry held the media responsible for careless, unprofessional and partisan reporting. The Ministry wanted to censor the media but the then Attorney General, Amos Wako, argued that censoring was unconstitutional and illegal.<sup>96</sup>

This Act is most commendable in its attempt to balance the roles of the media as a reflection of the society but also as a tool that can shape and inform public opinion positively. This does not mean that the media ignores the ills in society such as negative political ethnicity. Far from that, the intended purpose of the Act is that the media recognizes these issues but as a conciliator and not as an instigator. However, the major problem lies in the enforcement of the provisions of the Media Act as is in the case of the aforementioned legal frameworks.

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<sup>94</sup> *ibid*, Section 2.

<sup>95</sup> *Supra* note 15 at p.8.

<sup>96</sup> *Supra* note 3 at p.295-6.



### 2.3 MANAGEMENT OF POLITICAL ETHNICITY BY INSTITUTIONS

Drawing back to Okon Akiba's definition of constitutionalism, good government and the enforcement of values such as nationalism is dependent on institutional arrangements.<sup>97</sup> Institutions or offices in Kenya are therefore very important in the management of political ethnicity.

The NCIC has the power to investigate complaints against individuals who have committed hate speech and take such individuals before the court. However, the cases on hate speech have been few and their prosecution very questionable. For example the Ali Mwakwere case. After the former Minister of Environment issued an apology for his hate speech, the case was withdrawn and he became the ambassador of national cohesion and integration in Kenya.<sup>98</sup> The NCI Act is very emphatic that a person who is accused of committing hate speech is liable to imprisonment of three months or a fine of one million Kenyan Shillings.<sup>99</sup> It is important to observe that there is no provision that allows for accolades granted after apologetic remarks are made to the public.

Months later after the hate speech remark made by Mwakwere, the former Member of Parliament Ferdinand Waititu was accused of committing hate speech against the Maasai community.<sup>100</sup> Surprisingly, the leniency extended by the Office of the DPP in the former case was not witnessed in this case. The case is still ongoing and there is speculation that the differential treatment is because the DPP is from the Maasai community. If the speculation is true then the case against Mwakwere under Section 87 of the Criminal Procedure Code should be reinstated so that equality before the law can be reflected. No one is above the law and everyone must be subject to the law.

The IEBC and the Office of the Registrar of Political Parties have been silent on strictly enforcing their Codes of Conduct. There have been no cases that were of negative ethnicity. The focus of both Acts has concentrated on the conduct of elections and nominations within parties.

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<sup>97</sup> Supra note 16.

<sup>98</sup> Supra note 23.

<sup>99</sup> Supra note 15 at Section 15 (2).

<sup>100</sup> Anon, 'Kenya MP Ferdinand accused of 'hate speech' (BBC News, 25 September 2012) <[www.bbc.co.uk/news/world-africa-19713466](http://www.bbc.co.uk/news/world-africa-19713466)> last accessed on 04/12/2012> at 9.52pm.

The MCK has also been quite silent on the enforcement of the provisions of the Media Act. Many provisions found in the Statute's Code of Conduct and the NCI Act are flagrantly breached. For instance, the inflammatory speeches made by Mwakwere and Waititu are still accessible in YouTube from webcasts from Citizen and KISS TV. In the previous regime, the Attorney General advocated for absolute freedom of expression. However, the Constitution of Kenya, 2010 provides that the freedom of the media is limited where it causes harm or advocates for hatred.<sup>101</sup>

Despite, the questionable enforcement and implementation of the law by these statutory bodies and the Office of the DPP there was no electoral violence in 2013. The reason for this was the propagation of peace campaign messages in the media. Moreover, NCIC issued a hotline to report any incidents of hate speech or violence. The effect of these specialized programmes at the peak of the worst ethnic polarization in Kenya ensured that they would not be a recurrence of electoral violence. The promulgation of the Constitution had also addressed most of the issues that had caused the last PEV most especially electoral malpractices and the independence of the judiciary.

Notwithstanding the above, no ethnic violence is ever an isolated incident. It is an accumulation of poorly managed political ethnicity. Thus, institutions that manage political ethnicity must not be lax, lenient, opaque or suspicious in exercising their functions. Strict application of the law and robust enforcement will not only remedy ethnic cleavages but also promote nationalism.

## **2.4 CONCLUSION**

It may be assessed that the legal framework in Kenya is not completely effective in its management of political ethnicity. The laws need to be amended to properly regulate ethnocentrism, campaigns in vernacular and ethno-political alliances. Kenya becomes ethnically polarized with every election and if the laws are not addressed then there will be ethnic violence that will be more aggravated than the last PEV. In addition, the State needs to empower the

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<sup>101</sup> Supra note 4, Article 34 (1).

existing weak State institutions. The Attorney General also has to be fiery in the application of laws that manage political ethnicity because he is the defender of public interest.<sup>102</sup> It is in the public interest that nationalism is propagated and the rule of law as well as other constitutional principles are upheld and protected.

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<sup>102</sup> Ibid, Article 156(6).

## **CHAPTER 3**

### **3.0 RESEARCH METHODOLOGY, DATA ANALYSIS AND INTERPRETATION**

#### **3.1 RESEARCH METHODOLOGY**

##### **3.1.1 THE RESEARCH DESIGN**

Nationalism and political ethnicity are social phenomena that cannot be satisfactorily captured in books, journals or any other secondary sources. It became essential to obtain the perceptions, feelings and beliefs of the public to give this thesis structure and answers to the questions investigated. Consequently, a descriptive research design was implored because it was the most effective in testing the hypotheses of this study.

##### **3.1.2 DATA COLLECTION**

This dissertation drew from both primary and secondary sources. The secondary sources included: statutes, constitutions, reports, journals, books, magazines, newspapers, theses and other published sources obtained through desk-top research.

These sources were complemented by questionnaires<sup>103</sup> that were both close-ended and open ended administered to the public. Questionnaires were chosen as a method of data collection because they were cost effective and easily manageable. In addition, they were best suited for the research design of this study. Most of the questionnaires were self administered. However, where the respondent could not speak or understand English I assisted the respondents by translating the questions in Kiswahili.

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<sup>103</sup> See Appendices.



### **3.1.3 POPULATION**

The population considered by this study were residents of Nairobi county. The target population consisted of persons above the age of eighteen because they have the capacity to vote and thus play an active role in the management or propagation of political ethnicity.

### **3.1.4 THE SAMPLE SITE**

The sampling site was Nairobi County. It has a population of about 3,138,369.<sup>104</sup> It consists of eight constituencies namely: Makadara, Kamukunji, Starehe, Lang'ata, Dagoretti, Westlands, Kasarani and Embakasi.<sup>105</sup> Nairobi was selected as the sampling site because it is an ethnically diverse region. Nairobi was divided into its eight constituencies and Westlands was chosen.

Not only is Westlands ethnically diverse but it is also economically diverse. It is home to the most affluent Kenyans who live in the suburbs and also home to the Deep Sea and Kangemi slums. Along with the diversity, it was also logistically sound to carry out my research in Westlands.

### **3.1.5 THE SAMPLING DESIGN**

The selected sample design of the population was divided into two phases. The first phase involved simple random sampling. Random sampling was prudent to use because it was both cost effective and time conscious. In addition, this method of sampling has been argued to be objective and statistically regular.<sup>106</sup>

For the reason that Nairobi is a multiethnic county it was important to ensure that the population was properly represented and that not only one ethnic community dominated the research. The

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<sup>104</sup> Kenya Open Data < <https://opendata.go.ke/facet/counties/Nairobi> > last accessed on 09/05/2013 at 12.47pm.

<sup>105</sup> Ibid.

<sup>106</sup> O. Mugenda and A. Mugenda, 'Research methods: Quantitative and Qualitative Approaches,' (Acts Press, Nairobi, 2003) p.209-228.

second phase thus involved purposeful or non-probability sampling. This is where other respondents from the main ethnic communities who had been excluded by the first phase were deliberately picked to participate in this research.

### **3.2 DATA ANALYSIS AND INTERPRETATION**

In this section qualitative data and quantitative data that were collected from the research through the questionnaires that had been submitted were presented and interpreted. The presentation of the data was done using charts, frequencies, tables and percentages. The analysis and interpretation of the data was complemented by secondary sources.

Information that was collected gave the research an opportunity to test the hypotheses of the study. The analysis of the data also helped in framing the recommendations of the study. 75 questionnaires were handed out but only 50 questionnaires could be used. 25 of the questionnaires had either been lost, unfilled or not fully filled. Nevertheless, this return rate was sufficient to draw up conclusions and recommendations of the study because it was more than 50%.<sup>107</sup>

The questionnaires were divided into six parts. The first part dealt with the background information of the respondents. Often attributes of the respondents affects their perceptions and beliefs. The second part dealt with politically based alliances and the purpose of this part was to research on the respondents' sentiments on political coalitions. Hate speech was dealt with in the third part where the research sought to establish a link between ethnocentrism and hate speech. The effect of campaigns delivered in vernacular language was investigated in the fourth part. The fifth part dealt with the enforcement and prosecution of hate speech by responsible agencies. Control and management of negative ethnicity propagated by the media was investigated in the last part.

The results of the research shall now be considered.

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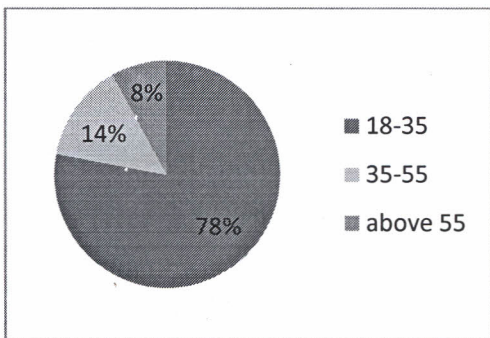
<sup>107</sup>E.R. Babbie, 'The Practice of Social Research' (11<sup>th</sup> Ed., Thomas Learning Inc Belmont:2007).

### **3.2.1 BACKGROUND INFORMATION**

#### **I. AGE**

The results of the research showed that 7 of the respondents were between the ages of 35 and 55. Only 4 of the respondents were above the age of 55. However, 39 of the respondents were below 35 years of age. This may be for two reasons. Firstly, the older population might have been inaccessible and excluded by the sampling. Secondly, this is a direct reflection of Kenya's demographics where the youth between the ages of 18-35 are the majority of Kenya's adults. This indicates that the youth in Kenya are the most influential population in the propagation or management of negative ethnicity.

**Figure 1: Age of the respondents**



#### **II. OCCUPATION**

The occupations of the respondents were divided into those who worked in the formal sector, informal sector and students. The respondents that worked in the formal sector included: actuarial scientists, lecturers, engineers, bankers, I.T workers and business people. The informal sector included people who worked as farmers, gardeners, drivers, cooks, janitors and domestic workers. The last group included students who were in the university, colleges and computer schools.

Majority of the respondents worked in the formal sector. The results of the research do not however reflect Kenya's true economic situation in that majority of its population are either



unemployed or work in the informal sector. It cannot be ignored that Westlands is among the most affluent constituencies in the country which might explain the anomaly. Yet again it might have been possible that the respondents had been dishonest about their occupations.

**Table 1: Occupations of the respondents**

	Frequency	Percentage
Formal sector	21	42%
Informal sector	18	36%
Students	11	22%
Total	50	100%

### **III. CONSTITUENCY**

All the respondents confirmed they resided in Westlands. However, when asked the name of the constituency they submitted various constituencies such as Njoro, Kaiti and Mwingi West. Surprisingly the respondents who submitted other constituencies other than Westlands all worked in the informal sector and accounted for 36% of all respondents.

This phenomenon is very common in Kenya where people living within cities travel to their rural homes to register and vote. The effect of this migration intentionally or unintentionally helps presidential candidates meet constitutional requirements. Article 138 (4) (b) of the Constitution states that: "A candidate shall be declared elected as President if the candidate receives—at least twenty-five per cent of the votes cast in each of more than half of the counties." It is contended that if many individuals supporting a particular candidate spread out in various counties rather than by concentrating in one county; then their preferred presidential candidate will meet the constitutional requirement.

### 3.2.2 POLITICALLY BASED ALLIANCES

#### I. RELEVANCE OF POLITICAL ALLIANCES/COALITIONS

The relevance of political alliances in Kenya was investigated. 36 or 72% of the respondents think that political coalitions are relevant in Kenya. The respondents in this group believe that political coalitions allow ethnic integration. They contend that political alliances allow for marginalized ethnic communities who would have otherwise been left out in governance and politics. It is also their perception that democracy is propagated by political coalitions in that parties have the freedom to join and ally. This was particularly impossible when Kenya was a one party state. Political alliances also help presidential candidates win in the general elections by meeting the constitutional requirements.

Contrastingly, the remaining 28% (14 of the respondents) contend that they are irrelevant because they are tribal. They also feel that political alliances are neither socialistic nor ideological but individualistic. This is the sentiment reflected by Antony Ongayo in his article where he states that political competition in Kenya is “between political parties that are individualistic, ethnic-oriented and disconnected with the citizenry they claim to represent, while at the same time using or whipping ethnic feelings for political expediency.”<sup>108</sup>

It is the contention of this study that political alliances are very important and they illustrate the level of democracy in a State. In addition, political alliances hinge upon the constitutional freedom of association. Article 36(1) provides that: “Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

However, it cannot be overlooked that in Kenya political alliances are ethnical and are used to ally and align ethnicities to meet ethnical interests instead of ideologies. Ethnicity remained the undertone in 46 (or 92%) of the responses given by the respondents when asked if political

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<sup>108</sup> Supra note 11.

alliances are relevant in Kenya. The fact that political alliances in Kenya are ethnic and not ideological, without a doubt makes the relevance of political alliances questionable.

## II. POLITICAL ALLIANCES AND NATIONALISM

The research sought to investigate what the effect of political alliances was on nationalism. 17 of the respondents (34%) argued that political alliances promote nationalism. This is because they allow for ethnic integration between diverse ethnic communities. This group also argued that marginalized people are represented and have a chance to participate in the government. Some respondents contradictorily submitted that strong parties mobilize strong tribes from which a strong president can be voted in.

33 of the respondents (66%) stated that political alliances hamper nationalism because they are ethnically based. They further submitted that ethnic communities which are not represented in the political alliances are often left out.

Political alliances in Kenya are tribal and this has been confirmed. Mutahi Ngunyi a controversial political commentator predicted that the Jubilee Alliance would win the 2013 elections. He relied on the assumption that Kenya is a tribal country and that elections were over at the close of voter registration.<sup>109</sup> He predicted that the Jubilee Alliance would win by 6,188,672 votes.<sup>110</sup> This number comprised the Kalenjin and GEMA (Kikuyu, Embu and Meru) voters who had registered.

After the General Elections of 2013, the Jubilee Alliance won the elections by 6,173,433 votes.<sup>111</sup> His prediction was not far off along with his reliance on ethnic voting. Relying on his hypothesis on raw ethnic voting, Kenya as a multiethnic nation is not reflected by the voice of five ethnic communities. Kenya could not be properly represented had the CORD coalition won which was largely composed of the Kamba and Luo ethnic communities or the Amani coalition

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<sup>109</sup> M. Ngunyi, 'Tyranny of Numbers' (Interview done by Citizen Kenya, February 2013) <[www.youtube.com/watch?v=977VqPqcQvk](http://www.youtube.com/watch?v=977VqPqcQvk)> last accessed on 21/03/2013 at 6.23pm.

<sup>110</sup> Ibid.

<sup>111</sup> Citizen Kenya, 'I. Hassan declares Uhuru Kenyatta winner in the presidential polls' ( Citizen Kenya, March 2013) <<http://www.youtube.com/watch?v=xJIAZMMntY0>> last accessed on 21/03/2010 at 6.41pm.



which relied on votes from the Luhya ethnic communities. It is the submission of this study that political coalitions are tribal and consequently do not reflect nationalism.

### **III. POLITICAL ALLIANCES AND DEMOCRACY**

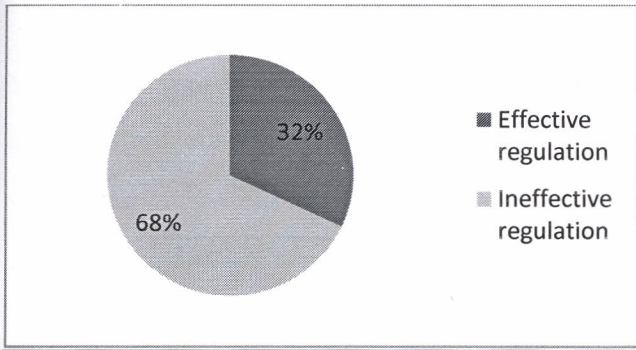
The respondents were asked if political alliances strengthen or weaken democracy. 50% of the respondents thought that political coalitions strengthen democracy. They believed that political alliances provide opportunities for diverse opinions to be enveloped in one single unit. They also contended that through such political formations individuals are able to choose the leaders they want. The other half does not believe that political parties strengthen democracy. The reasons were that these parties are individualistic and they only represent particular tribes.

This study contends that political alliances do in fact promote democracy but to a limited extent. Democracy can be broadly described as a form of government where people choose their preferred representatives through an election process. Alliances do not hinder the ability of individuals to elect candidates directly.

This largely depends on whether pluralistic democracy is really democracy. Mutahi Ngunyi predicted that the Jubilee Alliance would win through his model the 'Tyranny of Numbers.' Can factionalism be democracy? While the constitution provides for a model that reflects representative democracy it cannot be denied that the 'Tyranny of Numbers' will remain an issue that will continually impede constitutional principles.

#### IV. REGULATION OF POLITICAL COALITIONS THAT ARE ETHNICAL.

**Figure 2: Regulation of ethno-political alliances**



In this part, the research sought to assess whether the law effectively regulated ethno-political alliances. 32% or 16 of the respondents found that the law effectively regulates such alliances. However, 34 of the respondents (or 68%) found that the law was ineffective. The reasons were that many parties are tribal and it may be difficult to control or change this because Kenya is after all a tribal country. Others felt that although the Constitution does not effectively prohibit them, the enforcement agencies are quite lax and corrupt. It was also contended that Kenya looks at ethnic diversity as a curse and fails to utilize it towards more positive goals. Some were hopeful (mainly from the age groups above 35years) that with cultural erosion and intermarriage, Kenya might move from tribal politics.

The hypothesis of the research that the law ineffectively regulates political alliances that are ethnical was tested and affirmed. The law should then be amended so as to limit these kinds of associations.

### 3.2.3 HATE SPEECH

#### I. PERCEPTIONS OF HATE SPEECH

Majority 96% (or 48) of the respondents had a broad understanding of what hate speech is. They also recognized the subjective stipulations put forward by Susan Hirsh and Milly Odongo that

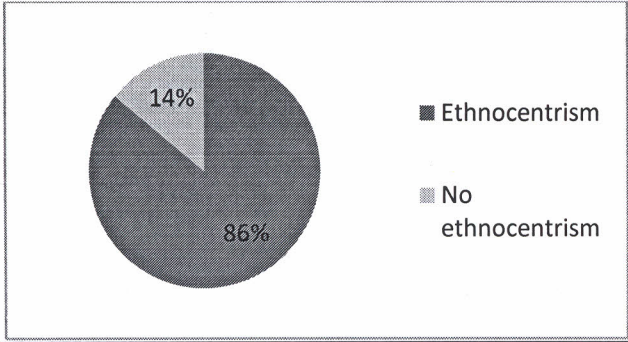
the speech has the potential to cause discomfiture and it is derogatory. However 4% (or only 2 respondents) had no idea of what hate speech was. This may be attributed to their level of education.

While hate speech is difficult to define, hate speech was described as speech which can cause ethnic hatred, suspicion or ethnic conflict.

**II. ETHNOCENTRISM**

In this section, the respondents were asked if some ethnic communities felt they were superior to other ethnic communities. The research sought to investigate if ethnocentrism did exist in Kenya and the effect thereof.

**Figure 3: Ethnocentrism in Kenya**



7 of the respondents (14%) rejected the view that superiority of ethnicity between communities exists. This group believes that it is not feelings of superiority or inferiority but rather ignorance and lack of cross cultural interactions. On the other hand, 43 of the respondents (86%) thought that there are ethnic communities which feel that they are superior to other ethnic communities.

It is important to note that the research did not require that the respondents single out any ethnic community. However, they particularly singled out the Kikuyu and Luo ethnic communities as feeling more superior to other ethnic communities. Others felt that all ethnic communities harbor feelings of superiority because of historical reasons. Some felt that ethnic superiority is determined by the ethnic community from which the president comes from.



**Table 2: Reasons for ethnocentrism in Kenya**

	Frequency	Percentage
Respondents that singled out the Kikuyu as being ethnocentric	21	42%
Respondents that singled out the Kikuyu and Luo as being ethnocentric	4	8%
Respondents that felt ethnocentrism is a result of historical factors	8	16%
Respondents that felt that ethnocentrism is determined by the tribe of the president	10	20%
Total	43	86%

Most of the results harbored resentment and feelings of exclusion. The Kikuyus were singled out because of their economic prowess which gives them leverage in the country's economy. Moreover, they are the most populous and largely influence the politics of the country through ethnic voting. In addition, three out of four Kenyan presidents have come from the Kikuyu community. Interestingly, some Kalenjin respondents felt that the Kikuyu were ethnocentric. This was in spite of the Deputy President coming from their ethnic community. This is an assertion of the inadequacies of ethnical political alliances in ensuring democracy.

The Luos were also selected and this because of the ethnic stereotype that the Luo community are proud and arrogant. Some researchers have relied on this stereotype. Kasomo Daniel who

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blatantly puts forward in his thesis that, "The Luo have to accept that they belong to a country called Kenya, when the majority of them have not even seen Mt Kirinyaga."<sup>112</sup>

Despite his remarks, he postulates that ethnocentrism is as old as humanity.<sup>113</sup> Some of the respondents felt that all communities feel they are more superior to others and this is because of historical reasons that result in ethnic pride. One respondent put forward that the "Somalis hold themselves with pride because they are descendants from the Cush Kingdom."

In addition, colonialism created ethnic stereotypes and this led to subjugation of certain tribes even after independence. Kasomo submits that colonial policy managed to heighten ethnic tensions and ethnic animosity by favouring one community above others. This in turn made it easier to divide and rule Africa. For example, "Some "tribes" were seen to be good cooks and watchmen, while others were good shamba boys. Only a few selected and trusted people could serve in clerical capacities."<sup>114</sup> After independence, the political elite reinforced such policies and this resulted in such of perceptions of ethnicity in Kenya.

There exists a misconception that through the presidency an ethnic community can access national resources. While Kenyan leaders do favour their family members and cronies from their ethnic community this does not necessarily mean that the entire ethnic community benefits. Kasomo puts forward that the effect of this misconception leads to perceptions such as: "The Kikuyu ate during the Kenyatta era and are now eating under the Kibaki era. The Kalenjins ate under Moi. Each of the other tribes are trying to be as close as possible to Kibaki."<sup>115</sup>

### **III. CONSEQUENCES OF ETHNOCENTRIC UTTERANCES**

This part provided the research with an opportunity to establish a link between ethnocentric utterances and hate speech. A few of the respondents (14%) had denied the existence of ethnocentrism and did not therefore participate in this part of the research. However, 86% of the

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<sup>112</sup> Supra note 13 at p.4.

<sup>113</sup> Ibid.,p.5.

<sup>114</sup> Ibid,p.4

<sup>115</sup> Ibid.



respondents recognized that ethnocentrism exists in Kenya. This group found that the effect of ethnocentric utterances could cause political violence, secession, tribalism, civil war, poor development in Kenya and recurrences such as the 'Tyranny of Numbers'. The results in this section once again affirmed the hypothesis of this dissertation that the National Cohesion and Integration Act has failed to illegalize ethnocentric utterances in its definition of hate speech.

### **3.2.4 CAMPAIGNS IN VERNACULAR**

#### **I. CAMPAIGNS DELIVERED IN VERNACULAR**

The research had asked the respondents on what their opinions were on campaigns that are delivered in vernacular language. 42% (21 of the respondents) think that campaigns are ethnically inclined to be understood by the chosen few. They are also of the opinion that all campaigns should be delivered in national languages to promote national unity. Moreover, such campaigns have been used to deliver hate speech remarks. Half of the respondents however think that campaigns in vernacular are essential where people do not understand any language other than vernacular. However, the remaining 8% (4 of the respondents) hold that such campaigns are important if their purpose is communication and they are bad if they are used to incite the public.

This study submits that vernacular campaigns are of the essence in Kenya because not all Kenyans are conversant with English or Kiswahili. However, such campaigns have been delivered with the intention of inflaming ethnic passions and stirring hatred or violence. Thus, the National Cohesion and Integration Commission, the Independent Electoral and Boundaries Commission and other responsible governmental institutions should monitor such speeches.

#### **II. SURVEILLANCE OF VERNACULAR CAMPAIGNS BY THE GOVERNMENT**

The questionnaires asked the respondents if they thought the government effectively monitors campaigns in vernacular. 32 of the respondents (64%) were of the view that the government does not effectively monitor vernacular campaigns. They stated that the government officials tasked

with this job are partisan. Their partiality largely depends on the person who is monitoring such campaigns. 6% of the respondents did not know if the government is effective or not in this regard. However 30% (15 of the respondents) felt that the government had effectively managed campaigns that were conducted in the last General Election as opposed to the General Elections of 2007 and the Constitutional Referendum of 2005.

Majority of the results asserted the hypothesis that the government and the law ineffectively monitor or regulate vernacular campaigns.

### **3.2.5 ENFORCEMENT BY RESPONSIBLE AGENCIES**

#### **I. PROSECUTION OF HATE SPEECH**

In this part the respondents were asked what they thought of the prosecution of hate speech in Kenya. 20% (10 of the respondents) were of the opinion that the prosecution of hate speech in Kenya is evolving and it is on the right path. 4% did not on the other hand participate in this section because they did not understand what hate speech means.

38 of the respondents (76%) did not however share this optimism. They held that the prosecution of hate speech in Kenya is ineffective and particularly pointed out that no individuals have been jailed for committing this crime. The hypothesis that prosecution of hate speech in Kenya is ineffective was thus established.

#### **II. PROSECUTION OF HATE SPEECH AND NATIONALISM**

A few of the respondents (18%) felt that the prosecution of hate speech did not encourage nationalism. They were of the opinion that the prosecution was subjected to corruption and thus was ineffective. Contrastingly, majority of the respondents (78%) believed that nationalism is encouraged by the prosecution of hate speech in Kenya. They found that the prosecution acts as a deterrence and as a result the incidents of hate speech have considerably decreased. 4% of the

respondents did not still participate in this part because they did not have any knowledge on what hate speech is.

This study relied on the hypothesis that poor prosecution of hate speech in Kenya does not encourage nationalism. However, majority of the respondents did not agree. Thus the effect of poor prosecution as an impediment to nationalism was not established.

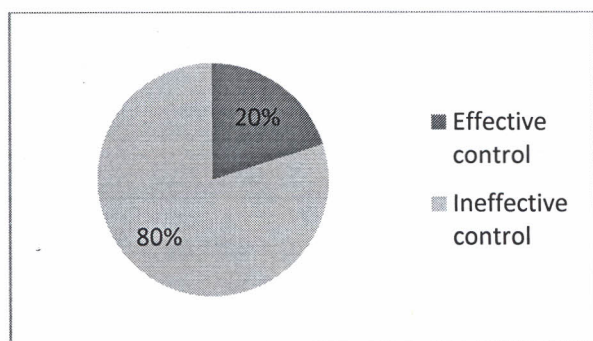
**Table 3: Prosecution of hate speech and nationalism**

	Frequency	Percentage
Encourages nationalism	9	18%
Discourages nationalism	39	78%
Do not know	2	4%
Total	50	100%

### **3.2.6 THE MEDIA**

#### **I. GOVERNMENTAL REGULATION OF THE MEDIA**

**Figure 4: Governmental control of the media**



The research in this section sought to investigate the efficacy of governmental regulation of the media. 10 of the respondents (20%) were of the opinion that the government effectively controls transmissions or broadcasts of the media. Conversely, 40 of the respondents (80%) of the respondents felt that regulation of the media by the government was ineffective. The popular sentiment was that the government has never prosecuted the media for negative ethnicity. The effect of social media and the spread of negative ethnicity could also not be ignored.



The media was particularly used in the spread of negative ethnicity in the General Elections of 2007 and also in 2013. In the past, the media had been unable to control transmissions by new forms of technology such as the Short Messaging Service. Mobile Service Providers had however by 2013 installed software that could detect message that contained offensive words.<sup>116</sup> The then Permanent Secretary of Information said that most mobile phone providers blocked 300,000 hate short message texts per day at that time.<sup>117</sup> This prevented events similar to what happened in 2007.<sup>118</sup>

However, he admitted that it was difficult for the government to control the spread of offensive messages on social media sites such as Facebook or Twitter.<sup>119</sup> A research project called Umati submitted that the most dangerous speech incidents were found in Facebook.<sup>120</sup>

## II. CHALLENGES FACING REGULATION OF THE MEDIA

In this last part the research sought to investigate the challenges the government encountered in ensuring the media does not promote negative ethnicity. 4 of the respondents (8%) felt that the government does not encounter any challenges. Poor infrastructure and development were cited to be problems that the media faces by 10 of the respondents (20%). This group also contended that the government is inept in regulating the media because it has not advanced technologically.

However, 44% (22 of the respondents) thought that because freedom of expression by the media is guaranteed by the constitution any censorship by the government will be deemed to have infringed upon this right. Finally, 8% of the respondents were of the opinion that the media was unprofessional and partisan and some politicians owned or had ties with media houses.

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<sup>116</sup> F. Mukinda, "Phone Firms Block 300,000 The Texts Daily, says Ndemo," (Daily Nation, March 21,2013) p.3

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Ushahidi, "Umati: Monitoring Online Dangerous Speech"(iHub Research, October 2012- January 2013) p. 23

### **3.3 CONCLUSION**

The data above that has been presented and analyzed shows that the public view political alliances to be ethnical but also relevant. In addition, most of the public think that they hamper nationalism and weaken democracy. The respondents were also of the view that the government agencies were ineffective in the regulation of political alliances.

The link between ethnocentrism and hate speech was affirmed. It was also established that a very small population does not know what hate speech means. Most of the respondents felt that campaigns that are delivered in vernacular language are important however they contend that such campaigns are not effectively monitored.

It was established that the government is ineffective in the prosecution of hate speech. The prosecution of hate speech does not however discourage nationalism. Majority of the public does not feel that the media is effectively controlled by the government. Freedom of expression, poor infrastructure and partiality were some of the challenges that the government faced in ensuring that negative ethnicity is not promoted.

## **CHAPTER 4**

### **4.0 SUMMARY, RECOMMENDATIONS AND CONCLUSION**

#### **4.1 SUMMARY**

##### **4.1.1 PURPOSE AND OBJECTIVES OF THE STUDY**

The objectives of the study were: to assess whether the law effectively prohibits ethnically based political alliances that hinder nationalism; to determine if the definition of hate speech by the law adequately illegalizes ethnocentrism that impedes nationalism; and to investigate if the law sufficiently provides for measures which monitor campaigns in vernacular language that encumber nationalism.

In addition the research sought: to investigate whether the prosecutions of negative ethnicity effectively promote nationalism; to investigate whether the media are prosecuted for propagating or transmitting negative ethnicity that impedes nationalism; and to investigate if modern forms of media such as the Short Message Service (SMS), blogs and social media are properly regulated by the government.

##### **4.1.2 MAIN FINDINGS**

The main findings of the study are as follows:

#### **I. Political alliances are ethnical and are not effectively regulated**

From the research, majority of the respondents believed that political alliances are relevant because they are tools which can propagate democracy. Although political alliances were considered to be relevant, most of the respondents stated that they were ethnical (66%) and consequently hampered nationalism. This is because political alliances are used as vehicles to



mobilize ethnical interests instead of ideological interests. Half of the respondents believed that political alliances hindered democracy.

In addition, it was established that the law does not effectively regulate such political alliances. The Constitution of Kenya, 2010, Codes of Conduct of both the Elections Act of 2011 and the Political Parties Act of 2011 only regulate the formation of political alliances but not their conduct.

## **II. Ethnocentric utterances can amount to hate speech**

96% of the respondents knew what hate speech means. They understood that hate speech entails words or utterances that have the potential to cause discomfiture, violence or hatred. It was confirmed by 86% of the respondents that the effect of utterances which indicate ethnic superiority (ethnocentrism) could cause political violence, secession, tribalism and civil war. The respondents believed that ethnocentrism was caused by the large ethnic communities in Kenya most specifically the Kikuyu and Luo. They also pointed out that ethnocentrism could be the result of Kenya's history. Finally, they stated that ethnocentrism is determined by the ethnic community of the president.

It was also established that the National Cohesion and Integration Act definition of hate speech does not consider ethnocentric instances. Therefore, utterances that are ethnocentric and that point out preferential beliefs of one's own ethnic community to the detriment of other ethnic communities are not effectively regulated in Kenya.

## **III. Campaigns delivered in vernacular are not effectively monitored**

The Elections Act allows for candidates to campaign freely. There is no provision that makes it illegal for candidates to campaign in vernacular. This Act provides for a body called the Electoral Code of Conduct Enforcement Committee which is tasked with, among other things, the mandate to ensure that speeches do not influence or incite voters on the grounds of ethnicity.

Many campaigns in vernacular influence and incite voters ethnically. However, no individuals have been prosecuted for this kind of offence under the Act.

The research showed that the respondents found that campaigns in vernacular are important given that not all Kenyans can understand the national languages: Kiswahili and English. However, it was confirmed that campaigns in vernacular have been used to inflame ethnic passions and to deliver hate speech remarks. It was also ascertained (by 64% of the respondents) that the government does not effectively monitor such campaigns.

#### **IV. Although the prosecution of hate speech is ineffective it does not impede nationalism**

The Constitution stipulates that no persons are above the law. This means that all offenders must be brought to justice. This provision has been circumvented where prominent politicians (such as Ali Mwakwere) have escaped the arms of justice because of questionable prosecution of hate speech in Kenya.

It is because of ineffective prosecution that the respondents particularly pointed out that they did not know of any person who had been convicted for committing hate speech. However, most of the respondents (78%) believed that the prosecution of hate speech did not impede nationalism. This is because the criminalization of hate speech has acted as a deterrence and most people are now afraid of uttering remarks that amount to hate speech.

#### **V. The media is not prosecuted for transmitting or broadcasting negative ethnicity by the government**

It was established (by 80% of the respondents) that the government does not effectively regulate the media. It was also confirmed that the government has never prosecuted the media for negative ethnicity. The reasons for this were that media houses are partisan and have ties with prominent political leaders. Moreover, the constitutional guarantee of freedom of expression by the media makes it difficult for the government to effectively control the media.

However, the Constitution states that freedom of media can be limited where it advocates for hate speech; advocacy of hatred that constitutes ethnic incitement and ethnic vilification; and incitement to violence.

## **VI. Regulation of modern forms of media by the government is ineffective**

The government had improved on its regulation of modern forms of media in the previous General Elections. However, most respondents (80%) still found that the government was ineffective in the regulation of modern forms of the media such as Face book, Twitter, YouTube and blogs across the social network. A quarter of these respondents submitted that the government was technologically inept in controlling transmissions and broadcasts across social networks.

## **4.2 RECOMMENDATIONS**

Political ethnicity will continue to exist in Kenya because the State constantly competes with ethnic loyalties. Osaghae Eghosa submits in his paper<sup>121</sup> that the greatest fallacy that exists in Africa is that African States are nations. This is true of most Kenyans as they identify themselves as being tribesmen first but not citizens. It has already been mentioned that ethnicity in Kenya is not primordial it does not only involve language, culture or dress; it is instrumentalist in that it can mobilize and ally an ethnic community towards certain interests.<sup>122</sup> As a result, the recommendations of this study are as follows:

### **I. EFFECTIVE MANAGEMENT OF THE LAW ON NEGATIVE POLITICAL ETHNICITY.**

The State must manage political ethnicity to avoid ethnic conflict. It has already been established that the law managing political ethnicity is not very effective. Consequently, the Constitution should be amended so that it prohibits the actions of political alliances which are regional or

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<sup>121</sup> Eghosa Osaghae, 'Ethnicity and the State in Africa' (Afrasian Centre for Peace and Development Studies, 2006) Working Paper Series No.7.

<sup>122</sup> Ibid, p.3



ethnic in character. Moreover, the Elections Act and the Political Parties Act should be reviewed and amended so that the application of the law is not only limited to the formation of political alliances but also the actions of such alliances.

It has been also illustrated that ethnocentrism is linked to hate speech. Thus, the NCI Act should be amended to include ethnocentric remarks as being part of hate speech. It must be commended that the National Cohesion and Integration Commission (NCIC) before the General Elections of 2013 had issued a directive making it illegal for any person to use ethnic stereotypes which could in context amount to hate speech. Some of these offensive remarks include “*kihii*” (Kikuyu word meaning uncircumcised that is often used to describe Luos) or ‘*waizi or wezi*’ (Swahili word meaning thieves and which has been used to describe Kikuyus). The effect of this directive along with an SMS hate speech hotline ensured that the effects of such ethnocentric utterances were reduced to a minimum in the last General Elections.

Finally, the Independent Electoral and Boundaries Commission can issue a directive or Parliament can enact a law by which politicians who campaign in vernacular are required to use the services of an English or Kiswahili translator even when they are campaigning in a mono-ethnic region. This is because many ethnocentric remarks are often uttered in vernacular language.

## **II. EFFECTIVE MANAGEMENT OF NEGATIVE POLITICAL ETHNICITY BY RELEVANT STATE AUTHORITIES**

The Constitution of Kenya of 2010 plays an immense role in the management of political ethnicity by state authorities. It limits the freedom of expression by people and the media where this amounts to hate speech. The enforcement of this provision has however been questionable. The result of such poor prosecution has been impunity. Impunity has been defined as, “the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any

inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.”<sup>123</sup>

The effect of questionable or poor prosecution in Kenya has been recurrence of violence, revenge or retribution for injustices, lack of confidence in the justice system and a negative socio-culture where people believe they can commit crimes that go unpunished. This study submits that the media, prominent political heads and other people must be prosecuted to ensure that the political violence that was witnessed in 2007-8 does not recur. While the prosecution must apply the rule of law and prosecute such offenders, it is also important to establish a vetting body. This body should investigate and monitor relevant state bodies such as the Independent Electoral Boundaries Commission, the National Cohesion and Integration Commission, the Political Parties Tribunal, the Media Council of Kenya and the office of the Director of Public Prosecution to ensure that they are enforcing the law and performing the duties bestowed upon them by law.

The government does not effectively monitor campaign speeches in vernacular. Therefore the government should employ personnel who can attend campaign rallies and monitor such speeches.

The media is the most problematic to regulate. It is important to point out that this study does not advocate for surveillance that could extinguish the independence of the media. The research proposes for measures which ensure that the media can be effectively monitored without undue governmental regulation.

For instance, media enterprises should not be allowed to endorse any political candidates. The reason for this is that independence of the media is very important because it shapes public opinion. The government should also liaise with independent bodies such as iHUB who had created platforms that could detect hate speech across social media. Moreover, the Communications Council of Kenya, mobile phone operators and independent monitoring

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<sup>123</sup> The Amended Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, submitted to the United Nations Commission on Human Rights on 8 February 2005.

institutions should work together to ensure political stability.<sup>124</sup> If these recommendations are followed then the government would be able to manage political ethnicity without limiting freedom of the media.

### **III. REDRESS OF SOCIAL INJUSTICES**

Many authors have argued that the solution to multiethnic countries such as Kenya is federalism.<sup>125</sup> Other authors have argued that constitutional engineering to involve political inclusion could limit negative ethnicity. This has been the case in Nigeria where the presidency is rotated between the Northern and Southern regions of Nigeria. In addition, some scholars are of the view that devolution of power, decentralization or local political autonomy could efficiently manage political ethnicity.<sup>126</sup>

The above solutions do not however offer a long-term solution. This has been witnessed in Nigeria where rotational presidency or federalism has not achieved nationalism. This is because such measures only manage political ethnicity that is propagated by the elite.<sup>127</sup> It has been argued that the elite are the main beneficiaries of such arrangements because they get a fair share in the 'national cake'.<sup>128</sup>

This dissertation relies on the school of thought that the management of ethnicity can only be effective if fundamental inequalities, injustices and misconstrued perceptions<sup>129</sup> are immediately addressed and the necessary measures are taken into account. If this is not done then the State will continually be under the risk of ethnic violence.

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<sup>124</sup> Supra note 15 at p.31.

<sup>125</sup> O. Awolowo, 'Path to Nigerian Freedom' (London: Faber & Faber, 1947) p. 50.

<sup>126</sup> Supra note 121 at p. 10.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.



The Ndung'u report<sup>130</sup> submitted that the acquisition; allocation; registration; and administration of land matters in Kenya has been a major problem in Kenya. The Waki Report also pointed out that ethnic violence was caused because many Kenyans had been deprived of their land by 'outsiders'. In addition, a report done by the Kenya National Commission of Human Rights on the recent ethnic skirmishes in Tana Delta<sup>131</sup> showed that ethnic violence had been caused by disputes over land. Moreover, the Mombasa Republic Council (MRC) has made secessionist claims because of landlessness of Kenya's coastal ethnic communities caused by illegal land grabbing. The National Land Commission (NLC) is a constitutional body<sup>132</sup> which has been given the mandate to investigate claims and complaints of present and historical injustices and recommend appropriate redress. This study recommends that the NLC should robustly carry out this mandate to ensure political stability of the State.

It has been shown through research that there is no staggering inequality between ethnic communities in Kenya.<sup>133</sup> However, there is a huge disparity between members of the same ethnic community.<sup>134</sup> The perception in Kenya that was also illustrated by this thesis is that many Kenyans feel that there are other ethnic communities which are superior to their own. This research based on this perception recommends that inequalities in the distribution of resources and services in Kenya must be addressed. Therefore, the Commission on the Implementation of the Constitution and any other relevant bodies should ensure that devolution under the Constitution should be fully implemented. While this is a temporary solution to negative political ethnicity it will quell resentment and perceptions of deprivation.

The government should also create more jobs or offer opportunities for self employment. The Waki Report submitted that idle and unemployed youth often form militia gangs which are hired by politicians to cause ethnic violence during election periods.<sup>135</sup>

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<sup>130</sup> The Report of the Commission of Inquiry into the Illegal/ Irregular Allocation of Public Land (The Ndungu Report), (Nairobi: Government Printer, June 2004).

<sup>131</sup> The Kenya National Commission on Human Rights, '29 Days of Terror in the Delta: KNCHR Account into the Atrocities at Tana Delta (KNHCR, October 2012).

<sup>132</sup> *Supra* note 4 at Article 67.

<sup>133</sup> *Supra* note 3 at p.31.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid*, p.33

### 4.3 CONCLUSION

Poorly managed political ethnicity in Africa has led to secession, civil war, ethnic violence, genocides and ethnic cleansing. Kenya like many other countries is multiethnic and often ethnic communities have been allied to meet certain ethnic interests. The law has been shown by this study to be ineffective in the management and control of instrumentalist efforts of ethnicity and the result has been a perpetuation of ethnic or regional political alliances and the utterances of incendiary ethnocentric remarks. There has also been poor prosecution of hate speech in Kenya, ineffective monitoring of campaigns in vernacular and also ineffective monitoring of new forms of social media.

The study does not in any way recommend the elimination of ethnicity in Kenya. Ethnicity is not Kenya's curse but her strength and beauty. It forms part of an individual's identity. Personal identity whether ethnic, social or religious helps a person achieve true self appreciation, self actualization and self realization. Unlike Samora Machel this research does not postulate that the tribe must die for the State to survive. It does not argue for Eurocentrism.

The intention of this study is to illustrate that Kenya has genuine ethnic claims that threaten the survival of the State and it recommends that such claims must be addressed. Most of these claims stem from social injustices such as land issues, inequality and unemployment that are yet to be addressed. It is this research's position is fully implemented that if the Constitution of Kenya and the recommendations of this study are taken into account then political ethnicity in Kenya will be effectively managed will no longer impede nationalism.

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**APPENDICES**

**QUESTIONNAIRE**

**SECTION A: BACKGROUND INFORMATION**

1. What is your age?

18- 30 [ ] 30-40 [ ] Above 40 [ ]

2. What is your occupation?

.....

3. What is the name of your constituency?

.....

**SECTION B: POLITICALLY BASED ALLIANCES**

4. Do you think political alliances/coalitions are relevant in Kenya today? Please elaborate your answer.

.....

.....

5. Do political alliances in Kenya hamper or promote nationalism? Please explain your response.

.....

.....

6. Do you think political alliances/coalitions strengthen or weaken democracy? Kindly explain your answer.

.....

.....

7. Does the law effectively monitor political coalitions based on ethnicity?  
YES [ ] NO [ ]

8. If no, what do you think are the challenges the relevant government agencies face in ensuring political parties promote nationalism?

.....

.....

**SECTION C: HATE SPEECH**

9. What do you understand by hate speech?

.....

.....

10. Do you think that there are ethnic communities which feel that they are superior to other ethnic communities? Please elaborate your response.

.....

.....

11. What do you think could be the consequences of utterances that indicate superiority over other ethnic communities?

.....

.....

**D: CAMPAIGNS IN VERNACULAR**

12. What is your opinion of campaigns that are delivered in vernacular language?

.....

.....

13. Do you think that the government effectively monitors campaigns in vernacular language? Please elaborate your response.

.....

.....

**E: ENFORCEMENT BY RESPONSIBLE AGENCIES**

14. What is your opinion on the effectiveness of prosecution of hate speech in Kenya?

.....

.....

15. Does the prosecution of hate speech in Kenya encourage/ discourage nationalism? Please elaborate on your answer.

.....

.....

**F: THE MEDIA**

16. Does the government effectively control transmissions or broadcasts of the media (on radio, newspapers, television, SMS, internet etc.)?

YES [ ]

NO [ ]

17. If no, what is your opinion of the prosecution of the media for propagating or transmitting negative ethnicity?

.....

.....



18. What do you think are the challenges the government faces in ensuring the media does not promote negative ethnicity?

.....

.....

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