THE LAW SOCIETY OF KENYA JOURNAL

VOLUME 16 (1) 2020

The Law Society Of Kenya Journal

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Volume 16 (1) 2020

Printed by:

Magfre Enterprises Limited
Cape Business Park, Block C2 Junction Between Thika Superhighway,
Eastern & Northern Bypass, Exit 11, Ruiru Next to Dr. Mattress
P.O. Box 55944-00200
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This Journal should be cited as LSKJ 16 (1) (2020)

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FINANCIAL DEVOLUTION UNDER THE CONSTITUTION OF KENYA 2010: THE QUEST FOR EQUITABLE DISTRIBUTION OF RESOURCES

Okumu Maurice Juma[1]

Abstract

This article generally discusses the financial aspects of devolution under the Constitution of Kenya 2010. The Constitution has introduced devolution among other mechanisms that will guide management and distribution of resources in Kenya. The article addresses the inequitable distribution of financial resources in Kenya with emphasis being put on the constitutional transformation in distribution of financial resources following the promulgation of the Constitution of Kenya 2010.

1. Introduction

Kenya today is not at the same level of economic development as nations in other parts of the world which were comparable to her at the time she attained her independence. This has arisen in part because of inequitable financial distribution which is as old as the independent Kenya and has been attributed to various factors, including irresponsible management of resources, ethicized politics and lack of political responsibility.

Thus, Key to addressing the inequity in the law is the introduction of devolution in the country. The Constitution of Kenya 2010 has a whole chapter on devolution of services to the 47 counties it creates, and a notable in these provisions is the specific aspect of financial devolution that it has addressed. Devolution of funds seeks to offer the solution in a more profound way. If properly implemented, it would ensure equity as well as offer a platform for the people to participate democratically in the management of their resources at the level of Counties. Devolution would also serve

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as a means of democratizing governance and accommodating diverse ethnic, linguistic and religious identities.

This study presents a comparative study of selected countries in order to articulate the need for enhancement of good governance and management of financial devolution laying emphasis on the importance of identifying the standards and principles of the best practices in a decentralized fund management system to be adopted in the country. It gives a brief overview of decentralization of funds in Kenya noting the creation of several successive funds without considering the past initiatives leading to replication of past failures, while in other cases, leading to abandonment of stronger implementation models. It concludes that there is need for the government to clearly identify the unit of financial devolution in order to enhance good governance and democracy on the basis of the most cost-effective representative and efficient model for the country.

2. Financial Devolution and Challenges of Centralization in Kenya

Before the promulgation of the Constitution of Kenya 2010 that ushered in the devolved system, Kenya was considered as one of the most centralized states in the world with a very powerful executive.[2] Sadly, centralization of management of financial resources in the country only benefited some communities which were affiliated to the holder of the office of the President for the time being or those communities with political influence.[3]

The Constitution of Kenya at independence established a devolved system of government with power shared between the centre and seven Regional Governments. Notably, this was a constitutional framework within which the Euro-Asian and minority groups hoped to protect their interests and share power in the post-independence

2 PhD Candidate- DAR-SOL, 2016-2019. Mjokumu@gmail.com. This paper has been extracted from my 2013 LLM project at the University of Nairobi Law School.

3 Ibid.

period. Each of the Regional Government had a Regional Assembly and elected local government authorities.[4]

However, regionalism was dismantled by constitutional amendments between 1964 and 1969. First, the Constitution created the office of the President as the executive authority of the regions (popularly called *"Jimbos"*),[5] which were substantially reduced to what may be described as bureaucratic departments of the executive arm.[6] Then Constitutional (Amendment No. 2) Act No. 38 of 1964 transferred to Parliament powers to alter regional boundaries. Later, the Constitutional (Amendment) Act No. 14 of 1965 completely deleted the executive powers of regions.[7] The independent sources of revenue to regions, included local taxation, were diverted to the Central Government. The amendment led to the restructuring of the regional police formations and local government authorities.[8] This second amendment greatly dismantled financial devolution that had existed under the independence Constitution. Over time, this resulted in poor accountability by the central government and unequal distribution of wealth. Regions that were not friendly to the government were less developed compared to those perceived to be government friendly.[9]

Despite these amendments, a number of decentralized funds were introduced over time through legislation and policy directives. These included the Constituency Development Fund (CDF), the Water Service Trust Fund (WSTR), and the Local Authority Transfer Fund (LATF).

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4 HWO Okoth-Ogendo, 'Constitutions without constitutionalism: Reflections on an African political paradox' in D. Greenberg et al. Constitutionalism and Democracy: Transitions in the Contemporary World (1993)65, 69.

5 (Amendment) No. 28 of 1964.

6 K Kithure, 'The Emerging Jurisprudence on Kenya's Constitutional Review' (2007); JB Ojwang', Constitutional Development in Kenya: Institutional Adaptation and Social Change (Nairobi, ACTS Press 1990).

7 YP Ghai, and JWPB McAuslan, Public Law and Political Change in Kenya (Oxford University Press: Nairobi, 1970).

8 Ibid.

9 Ibid.

In recent years, especially in the run-up to the constitutional reforms that ushered the constitution of Kenya 2010, financial devolution became one of the most highly contested, and even divisive, concepts.[10] Consensus on the mode of devolution was at long last reached and this was adopted through the Constitution in August 2010.[11]

The arguments put forward to support financial devolution were, first, under the centralized system, financial control and management based on central government had led to the distribution of financial resources to benefit regions and sectors of the economy that were determined by the executive. Second, the need for public participation in the control and management of financial resources could not be fully realized within a highly centralized framework. It was thus hoped that the introduction of devolution of financial resources would inculcate positive changes including ensuring equitable distribution of national resources, uplifting marginalized communities, increasing employment opportunities and facilitate faster decision-making that would lead to broad economic development in the country.

On the other hand, there has been fear that devolution of financial resources could also end up facilitating devolution of corruption.[12] Hence arguments against financial devolution have revolved around concerns that it would lead to devolution of corruption, the promotion of ethnicity, excessive taxation and expansive governance structures.[13]

10 D Juma, 'Devolution of Power as Constitutionalism: The Constitutional Debate in Kenya and Beyond' (August 15, 2008).

11 Constitution of Kenya, 2010, Chapter 11; Art. 174-192, specifically financial powers to two levels of government: National and County Government under Articles 201 to 231 provides for public finance in Kenya.

12 K Kirui & K Murkomen n 2.

13 K Mulwa et al, 'Devolution and Nation Building in Kenya' (Strathmore University, Nairobi 2011).

3. Constitutional Framework on Financial Devolution

The Constitution of 2010 has defined governance in the devolved model by distributing sovereign power between the national and the county levels.[14] It has vested several functions on the national government and assigned others to the county governments while others are concurrent to both the two levels of government. The Constitution has also devolved sovereign power in two major areas: state resources and political power.

3.1. Principles of Devolution under the Constitution

Article 10 and 201 of the Constitution provide that financial devolution is intended to ensure equitable distribution of national revenue, promote openness and accountability and encourage public participation in economic development. The devolved government under the Constitution is founded on three main principles namely democracy, separation of powers, effective service delivery and gender equity.[15] Devolution under the Constitution is based on the principle of separation of powers between the reserved and devolved functions of the national and county levels. Both the national and county assemblies have powers and functions which are distinct and, in some cases, concurrent.[16] The national government sets common and minimum standards which must be followed by county governments. In this regard, in cases of any conflict between national and county standards, then national standards take precedence.

The separation of functions between the national and county government ensures that there is minimal interferences from the national on the activities reserved for the county government. It enables county governments make decisions that are favourable, relevant and beneficial, depending on the local context.[17]

14 Article 1 (4) of the Constitution.

15 Article 175 of the Constitution.

16 Article 186 of the Constitution of Kenya.

17 Previously the national governments have been influencing decisions of local authorities through the office of Minister of local Government.

On gender equity, women are considered by the Constitution as one of the marginalized groups, especially in political representation and governance at national and county levels.[18] In addressing this inequality, the Constitution provides that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.[19]

The devolved system of governance has several objectives outlined in article 174 of the Constitution. Article 174 states that:

The objectives of the devolution of government are:

a) To promote democratic and accountable exercise of power.

b) To foster national unity by recognizing diversity.

c) To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them.

d) To recognize the right of communities to manage their own affairs and to further their development.

e) To protect and promote the interests and rights of minorities and marginalized communities.

f) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya.

g) To ensure equitable sharing of national and local resources throughout Kenya.

h) To facilitate the decentralization of state organs, their functions and services from the capital of Kenya and;

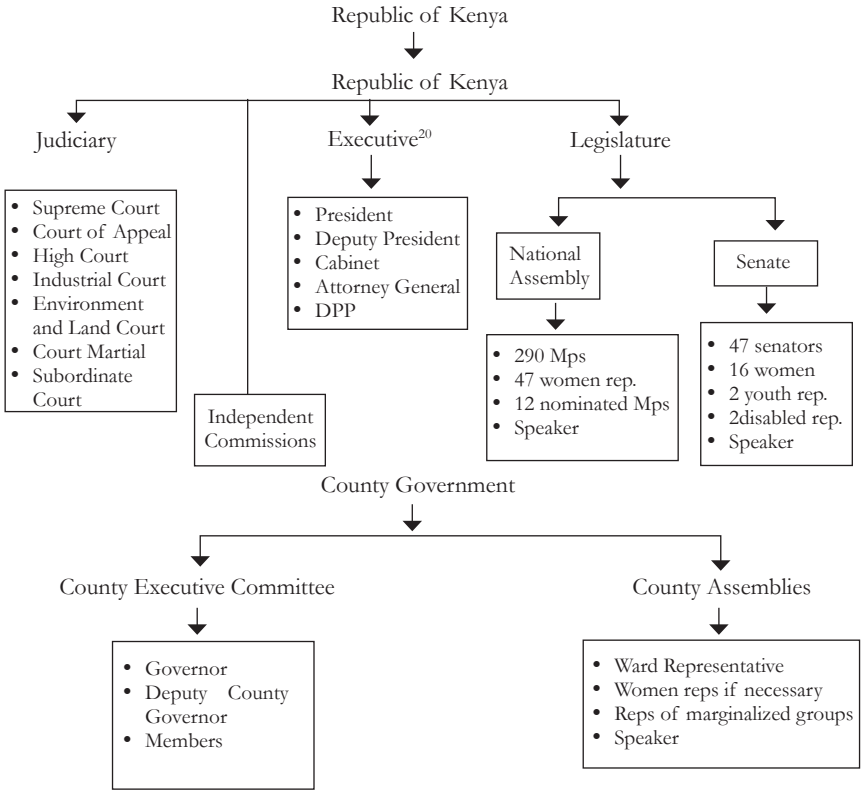
i) To enhance checks and balances and the separation of powers.

18 C Colin and Y Felicia, Gender Inequalities in Kenya (UNESCO 2006).

19 Article 27 (8) of the Constitution of Kenya.

3.2. The Structure of Government

The figures below illustrate the structure of Kenya's national and county governments



Source: Researcher (M.J. Okumu 2013)

3.3. Role of the National Government in Devolution

The Sovereign powers of the Republic under the Constitution are delegated to the three arms of government at both the national and county levels and to the Constitutional Commissions and independent offices established thereunder.[21]

20 Article 152(1) states that the cabinet shall comprise not less than fourteen and not more than 22 cabinet secretaries.

21 Article 1 of the Constitution, 2010.

3.3.1 National Executive

The National Government is structured through the Constitution with administrative and policy making powers being distributed to its three arms namely the executive, the legislature and the judiciary. Headed by the President of the Republic, the national executive arm primarily consists of: - the President, the Deputy President, the Cabinet Secretaries, the Attorney General, and the Director of Public Prosecutions.[22] The executive is guided by an underlying framework of laws. These laws require the President to appoint between 14 and 22 cabinet secretaries reflecting ethnic and regional diversity.[23]

The executive through the Ministry of Devolution and Planning and the National Treasury plays a very critical coordination role in financial devolution under the Kenya devolution setup. The National Treasury is charged with disbursing funds to the counties while the Ministry of Devolution is key in ensuring intergovernmental cooperation and coordination.

3.3.2 National Legislature

The 2010 Constitution revives a bicameral Parliament, with the Senate created to protect the devolved government.[24] The National Assembly enacts laws including dealing with financial devolution. This is the core mandate of the Parliament in addition to approving budgetary allocations and creating laws that have direct impact on the county government financial management. Senators represent the counties and serve to protect the interest of the counties and their governments.

The Senate approves bills concerning counties, determines allocation of revenue to counties and considers any resolution to remove the President and Deputy President.[25]

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22 Articles 130-132 of the Constitution of Kenya, 2010; see also "The Kenyan Government: a new structure under the new Constitution" at *http://www.kenya-information-guide.com/kenya-government.html* (accessed 7/10/12).

23 See Article 152 of the Constitution of Kenya, 2010.

24 K Kirui and K Murkomen n 2.

25 Article 96 of the Constitution, 2010.

3.3.3 Constitutional Commissions

The Constitution of Kenya 2010 establishes several Commissions which are tasked with various duties of national importance. Of relevance to financial devolution is the Commission on Revenue Allocation (CRA) and the Salaries and Remuneration Commission (SRC).[26]

The establishment of the Commission on Revenue Allocation is critical in objective and equitable distribution of national revenue throughout Kenya. The Commission is established under article 215 of the Constitution of Kenya 2010. Its principal function is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government, between the national government and county governments and amongst the counties. It is a critical commission in ensuring fair, just and equitable distribution of national revenue. In allocation of national revenue, the commission must give regard to the criteria set out under article 203 of the Constitution.[27]

The Constitution also establishes the Salaries and Remuneration Commission to set and review remuneration and benefits of all state officers.[28] This Commission ensures equitable determination of salaries for public service. In the past and even currently, there is huge disparity in the salaries payable to public servants in Kenya. This has steadily widened the gap between the poor and the rich.[29]

3.4. County Governments

The Constitution also establishes county governments with legislative and executive powers. The powers enable the counties, as devolved units, to be distinct units which are a critical element in devolution. The County Government comprises of the County

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26 Article 248 of the Constitution of Kenya 2010.

27 Indeed, in August 2015, the CRA launched a constitutional and legislative policy instructing the drafting of county revenue laws.

28 See article 230 of the Constitution, 2010.

29 'Pulling Apart: Facts and Figures on Inequality in Kenya' (Society of International Development, Nairobi 2004).

Assembly and County Executive.[30] The County Assemblies are vested with legislative powers and can make any laws that are necessary for effective performance of the function and exercise of powers of the county government.[31] The role of the County Executive is to implement county legislations, manage and coordinate the functions of the county administration among other duties.[32]

4. Devolution of National Revenue and Resource

The main aim of fiscal devolution is to ensure that at all levels of government; there are sufficient financial resources to match the responsibilities assigned to each level of government.[33] Allocating local sources of revenue to county governments that can yield sufficient revenue to meet their expenditure needs would be the ideal solution.[34] These are referred to as local/own source of revenue.

In reality, however, this is not practical because the revenue/tax bases are not uniform countrywide.[35] Charging county governments with the task of locally mobilizing all the revenues they need would result in significant differences in revenues per capita mobilized and thus inability of the various county governments to finance service provision in their jurisdictions.[36]

4.1. Criteria for Revenue Allocation in Kenya

Chapter 12 of the Constitution provides for the principles and framework of public finance and other funds, revenue raising powers and public debt, and revenue allocation

30 Article 176 of the Constitution, 2010.

31 Ibid.

32 Article 183 of the Constitution, 2010.

33 M Ndulo, 'Decentralization: Challenges of Inclusion and Equity in Governance' in M. Ndulo (ed), *Democratic Reform in Africa: Its Impact on Governance and Poverty Alleviation* (Oxford, James Currey, and Athens, Ohio: Ohio University Press 2006).

34 Ibid.

35 Ibid.

36 The Local Government Finance Commission, 1999, Introduction of Equalization Grant: Analysis and Recommendation, The Local Government Finance Commission.

among other things. It requires equitable allocation of national revenue.[37] When allocating national revenue, CRA is obligated to observe a criterion set out under article 203. The Commission is supposed to ensure that, first, county governments are able to perform the functions allocated to them; second, the fiscal capacity and efficiency of county governments;[38] third, developmental and other needs of counties; and fourth, economic disparities within and among counties.[39]

In observance of the criteria, the Commission is supposed to allocate at least 15 per cent of the national revenue to the county government. According to CRA, in the 2013/2014 fiscal year, the total shareable revenue was Shs. 945.5 Billion. The allocation to counties was Shs. 198.7 Billion, 24.2 percent of the shareable revenue against the constitutional minimum of 15 percent. Thus, in 2014/2015, county governments received Ksh. 226.7 Billion, representing 43% of the national revenue according to the Division of Revenue Act, 2014.

It is, however, instructive to note that county governments are entitled to be allocated 15 percent of the national revenue and this amount is calculated on the basis of the most recent audited and approved accounts of revenues received. The last audited accounts approved by Parliament were done in 2009/2010. Reportedly, since 2010, the audited accounts of national government have never been debated, approved or any action taken on them.[40] As a result of Parliament's failure to deal efficiently, the county governments are receiving funding based on national revenues collected five years ago, and this greatly underlines devolution.

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37 Article 202 of the Constitution 2010.

38 Ibid.

39 N. Kirira, 'Public Finance under Kenya's new constitution' SID Constitution Working Paper No. 5, at http://www.sidint.net/sites/www.sidint.net/files/docs/WP5.pdf (accessed 25/9/2015).

40 Cf Kethi Kilonzo, 'Parliament remiss is scrutinizing accounts' *The Standard*, *8 June 2014*, at http://www.standardmedia.co.ke/article/2000123992/parliament-remiss-in-scrutinising-accounts (accessed 26 September 2015).

4.2. Equalization Fund

A commitment to the principles of equality and non-discrimination is woven throughout the Constitution, driven at least in part by a desire to counteract the ethnic and regional tensions which played such a decisive and destructive role in the 2007 post-election violence.[41] The Constitution reflects a widely held belief that guarantees equality, equitable distribution of resources and balance of power represent the best way to reduce on political decision making and thereby secure a peaceful future for the country.[42]

The Equalization Fund is established under article 204 of the Constitution in recognition of the economic disparities that exist amongst various counties in Kenya. It is aimed at providing certain minimum levels of public services to disadvantaged regions.[43] An equalization fund would, therefore, aim at improving extra funds to those county governments whose revenue raising capacities are weak and expenditure needs great, to enable them provide that "minimum" level of service within their jurisdictions.

The Equalization Fund comprises of one half per cent of all national revenue.[44] This fund shall be used in provision of basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring quality of those services in the particular areas.[45] This is the most deliberate move to ensuring equitable distribution of national resources in Kenya.

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41 See Kriegler and Waki Reports (summarized version), Revised Edition 2009, at http://www.kas.de/wf/doc/kas 16094-1522-2-30.pdf (accessed 26 September 2015).

42 Jim Fitzgerald, 'The Road to Equality? The Right to Equality in Kenya's New Constitution' 5 (2010) *The Equal Rights Review* at http://www.equalrightstrust.org/ertdocumentsbank/jim%20Fitzgerald%20article.pdf (accessed 12 August 2013).

43 These include Turkana County which has so far taken the lion's share of Sh. 271b owing to the low economic standards and the fact that it had been marginalized for long. See '14 Counties to Benefit from Sh. 3bn Equalisation Fund' *Business Daily*, *27 February 2013* at http://www.microfinancegateway.org/library/developing-decentralized-financial-services-priject-review.

44 Article 204 of the Constitution of Kenya.

45 Ibid.

4.3. The Road to Fiscal and Financial Devolution in Kenya

As a research project in action, the Decentralization Fiscal Services (DFS) dates back to 2003 in which the project was designed to improve the financial services in the rural and remote areas within the country.[46] In its first phase, the project was geared towards testing and developing the tools used for strengthening governance and management of community-based financial organizations. In 2005, the project's second phase commenced with a view to demonstrating the impact of its tools in deepening and broadening the financial services outreach within the rural zones.

Another research took place in the final quarter of 2009, a joint collaboration between the Kenya Human Rights Commission (KHRC) and eight partner organizations made up of the Social and Public Accountability Network (SPAN). This study was primarily focused on assessing the degree to which citizens participate in the management and decentralization of funds in Kenya.[47] Monitoring and evaluation was inclusive in this case. Another objective of this study was geared towards evaluating the scope of devolved fund duplication, in addition, public viewpoints as far as how the funds should be managed and be improved were sought, specifically on establishing harmonized opportunities at the least or best consolidation.

The uniqueness of this study lay in the fact that all the seven existing funds, i.e. Constituency Development Fund (CDF), Local Authority Transfer Fund (LATF), Road Maintenance Levy Fund (RMLF), Free Primary Education (FPE), Secondary School Education Bursary Fund (SSEBF/Bursary Fund), Water Service Trust Fund (WSTF) and Human Immunodeficiency Virus Infection/Acquired Immunodeficiency Syndrome (HIV/AIDS), were taken into consideration.[48] These funds take care of the

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46 See A Wambugu, and N Lee, 'Developing Decentralization Financial Services: Project Review' FSD Kenya, (2008), at http://www.microfinancegateway.org/library/developing-decentralization-financial-services-project-review.

47 Kenya Human Rights Commission (KHRC); & Social and Public Accountability Network (SPAN); (2010, Dec). Harmonization of decentralized development in Kenya: towards alignment, citizen engagement and enhanced accountability, A Collaborative Joint Research Report, 1-127

48 Cf. Chapter 1.

education, water and sanitation, health and roads sectors. Thus, they address the social and economic rights.[49]

4.4. Financial Aspect of Devolution

There are two financial aspects that apply to devolution in Kenya. First is the power to raise revenue. Article 209 (3) Constitution of Kenya 2010 gives the counties power to raise their own revenue by imposing entertainment taxes, property rates, and any other authorized tax authorized by an Act of Parliament.[50]

In the Constitution, the collection of generated revenue is unclear. Revenue administration involves tax collection at the onset of determination. As it was under the 1969 constitutional system, the local authorities were supposed to take part in the collection of their own taxes. However, experience has shown that most of these local authorities lacked the capacity of discharging this function.[51] With respect to the Constitution of 2010, it is still a subject of debate whether the Kenya Revenue Authority should be collecting revenue on the county's behalf or whether the counties should be assisted to build their own capacities of collecting their revenue.

The second aspect is the power to spend revenue. County governments have the power of spending the revenue they raise. Under Article 202 of the Constitution, it is a requirement that the nationally raised revenue be equitably shared between the county and the national governments.

5. Regulatory Challenges on Financial Devolution in Kenya

The main benefits of greater financial devolution are the increased efficiency and responsiveness of government.[52] If the units of devolution are knowledgeable and

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49 Kenya Human Rights Commission (KHRC) & Social and Public Accountability Network, December 2010.

50 M Koki, BN Chege, and WL Nabulumbi, 'Devolution and Nation Building in Kenya' *Strathmore University Report* (2011) 3-10.

51 Ibid.

52 E Wallace Oates, 'Fiscal Federalism, Harcourt Brace Jovanovich' (New York, 1972).

responsive to local conditions and needs, then financial devolution should help in better spending by matching resources to the needs.[53] In practice, these benefits are not easily realizable because of many challenges.[54] There five key challenges include: First, the lack of institutional clarity and transparency in matching resources and expenditure; second, the lack of relevant expertise to plan and implement the system of financial devolution at the devolved units; third, the poor local administrative capacity and irresponsible officials with little control over their discretionary financial powers to deliver services; fourth, weak devolved institutions and inadequate governance leading to poor enforcement of rules and interference from the local elites who capture the benefits of devolution; fifth, the potential impacts of financial devolution on the central government.[55] Some of these challenges are discussed below under various headings.

5.1. Political Debate on Sharing of Resources

The principle functions of CRA are outlined in Article 216 (1) in which it is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government, either vertically or horizontally.

In February 2012, CRA proposed the criteria on sharing of revenue based on population, poverty index, land area size, institutional development, urbanization and fiscal incentives. In this criterion, the population would receive a whopping 60%, an equivalent of 120 billion Kenyan shillings.

Immediately the proposal was released to the public, there was a general public outcry, particularly with the elected parliamentarians and other professionals. The argument was that poverty, instead of population should be given more allocation. In addition, leaders protested against this initial formula on the basis that it would have seen the

53 A Omolo, 'Devolution in Kenya: A critical Review of Past and Present Frameworks' in IEA, *Devolution in Kenya: Prospects, Challenges and the Future* (IEA Research Paper Series No. 24, Institute of Economic Affairs, Nairobi 2010).

54 P Drummond and A Mansoor, *Macroeconomic Management and the Devolution of Fiscal Powers* (International Monetary Fund, Working Paper WP/02/76, IMF, 2002).

55 Ibid.

country's largest five counties receive a lion's share of the national revenue in the devolved system of fiscal governance.[56]

This political exchange made CRA to come up with a second proposal on equitable distribution of financial resources. In their recommendation, they maintained population as their first criteria but reduced the percentage from 60% to 45% and at the same time increased the poverty index allocation from 12% to 20%.[57]

In comparison, the second recommendation by CRA on financial distribution of resources made counties to have higher allocations as sampled. Nairobi County with a population of 3.1 million would receive Kshs. 10.1 billion followed by Turkana whose population is 855,399 at Kshs. 8.1 billion. Closing the list on top five on allocations would be Mandera, Kakamega and Bungoma whose populations are 1 million, 1.6 million and 1.6 million respectively that would receive Kshs. 6.9 billion and Kshs. 6.6 billion in that order.

On the other hand, Lamu whose population is 101,539 would receive Kshs. 1.6 billion, followed by Isiolo at Ksh. 2.3 billion with a population of 143,294. Tharaka-Nithi with a population of 365,330 would get Kshs. 2.4 billion; Elgeyo Marakwet with a population of 369,998 would get Kshs. 2.5 billion. Finally in closing the list of last five was Taita Taveta whose population is 284,657 and which would receive Kshs. 2.58 billion.[58] The CRA recommendations were informed by opinion on the various weights exhibited by each parameter.[59] Equity and economic disparity were given more weight in determining what amount of revenue or support from the national treasury a county gets.[60]

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56 R Obala and P Muthuri, 'MPs Oppose Reviewed County Funds Formula, (The Standard, 21 August 2012*) at* http://www.standardmedia.co.ke/?articleID=2000064453&story_title=Kenya:%20MPs%20oppose%20reviewed%20county%20funds%20formula (accessed 20 October 2012).

57 Ibid.

58 Ibid.

59 S Mkawale, A Kisia and P Opiyo, 'Commission Unveils New Counties Revenue Sharing Plan' *The Standard*, *16 August 2012.*

60 Article 202 and 203 of the Constitution of Kenya 2010.

5.2. Public participation in Revenue Allocation

Devolution stresses the importance of participation in the policy making process and of increased accountability.[61] Through participation, stakeholders influence policy formulation, alternative designs, investment choices and management decisions affecting their communities.

The Constitution intends to give powers of self-governance to the people and enhance their participation in the exercise of the power of the State. It mandates the county assemblies to conduct their business in an open manner and hold their sittings and those of committees in public and facilitate participation and involvement in the legislative and other business of the assemblies and their committees.[62]

If the constitutional provisions on public participation are fully implemented, they will ensure that the residents of a particular county or the target groups of any form of financial devolution are involved in decision making. In 2014, the High Court in Nairobi declared Kiambu County Finance Act 2013 illegal because it did not meet the public participation threshold under the Constitution. The decision of Justice G.V. Odunga in *Peter N. Gakuru & Others v Governor of Kiambu County and Others*[63] became the first one to nullify legislation for want of public participation in Kenya.

Effective local participation is, however, hindered by low literacy levels as well as lack of resources. Many citizens in Kenya are not well informed in policy matters and, therefore, may not participate effectively.[64] The literacy and numeracy levels in all the 47 counties are not uniform to offer quality participation. People in urban areas are generally more literate and exposed than those in rural areas, hence the disparity

61 ZR Ergas, 'Kenya Special Rural Development Programme: Was it Really a Failure?' 17, (1982) (*The Journal of Developing Areas* 51-66).

62 Article 196 (1).

63 Petition No. 532 of 2013.

64 AKM Kilele, 'Adult Literacy in Kenya: Kenya National Bureau of Statistics 2007' at http://www.knbs.or.ke/downloads/pdf/KNALS2007.pdf (accessed 12/4/12).

in quality of participation. According to the Kenya National Adult Literacy Survey Report, on average 38.5 percent of the Kenyan adult population is illiterate.[65]

In addition, the low literacy levels of the members of the county assemblies (MCAs) have an impact on their ability to conceptualize and discuss Finance Bills. Article 193(1)(b) provides that a person qualifies to vie for the MCA seat provided he/she satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament. Section 22(1)(b) of the Elections Act provides that a person may be nominated as a candidate for an election under this Act only if that person holds a certificate, diploma or other post-secondary school qualification acquired after a period of at least three months study, recognized by the relevant Ministry and in such manner as may be prescribed by the Commission under this Act.

However, Justice Mumbi Ngugi in the case of *Hon Johnstone Muthama v Ministry for Justice and Constitutional Affairs and AG* ruled that Sections 22(1)(b) and 24(1)(b) of the Elections Act 2011 which bars persons holding a post-secondary school qualification from being nominated as candidates for elective office or for nomination to Parliament to be unconstitutional.[66] This made it possible for persons without post-secondary school certificate to vie for elective positions, majority of who are now members of the county assembly. Many counties therefore have to pass legislation without the actual engagement and participation by a number of MCAs who cannot conceptualize the relevant issues.

5.3. Relevant Expertise and Capacities in Financial Devolution

Capacity development is an ongoing process, requiring the unleashing of a continuous supply of the appropriate legal, institutional, human and material resources and a favourable operational environment. The ingredients of capacity and capacity-building

65 Ibid.

66 Petition No. 198 of 2011 (Elections Act on Academic Standards).

come from a wide range of sources in society. These include the private sector, civil society organizations, schools, universities, think tanks and research institutions.[67]

These resources need to be mobilized and efficiently managed to build institutional capacities that will deliver equitable distribution of resources. In essence, capacity building is about people who have to be trained, adequately equipped, sufficiently remunerated and appropriately disciplined in the efficient use and management of resources.

Failure to match skills and tasks is one of the main challenges that continue to impact negatively on service delivery in Kenya. To effectively manage resources at the devolved unit, there is need to hire qualified personnel. Counties have had real challenges in employing qualified and skilled personnel to manage the affairs of the counties.[68] The national and county governments must continue building the capacity of devolved institutions responsible for supplying essential public goods and services to the people.

5.4. Inequitable Distribution of Resources in Kenya

One of the traditional roles of the national government is the redistribution of resources in order to safeguard minimum levels of welfare throughout the country.[69] Devolution of authority and resources undermine central government's ability to achieve this in two fundamental ways. First, devolution of decision-making authority progressively transfers the responsibility for devising ways in which redistribution will occur to county government. This leads in most cases to increase county resources at the expense of national budgets.

Second, this tier of government is multifarious, and it is often the case that larger or more prosperous regions are overrepresented at this level. Hence, following devolution,

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67 D Eade, Capacity-Building an Approach to People-Centred Development (Oxfam, London, UK & Ireland, 2007).

68 Task Force on Devolved Government in Kenya, *A Report on the Implementation of Devolved Government in Kenya* (Government of Kenya, Nairobi 2011).

69 F Thomas, 'Challenges of Devolution and Power Sharing Structures in Federations' Paper for the Conference Comparative Constitutional Traditions in South Asia of the joint conference of SAIS and SOAS London, 17-19 November 2006.

a smaller role for national transfers and a larger voice for the regions in deciding how transfers are allocated are likely to result in a less progressive system of fiscal redistribution that under a centralized system in Kenya.[70]

The political and economic muscle of stronger regions is likely to skew public expenditure in their favour, regardless of whether the greatest legitimacy is based on the centre or the regions and of whether the financing system of regions is based on local tax revenue or on grants from the centre. In the former case because the devolution of fiscal powers will inevitably favour wealthier areas, and in such the latter because the greater political muscle of larger and richer regions may be reflected in a greater capacity to secure transfers from the centre and to impede the evolution of a more centralized regional system of transfers or regional policy.[71]

5.5. Inter-Ethnic Rivalry within Counties

There have been tensions in multi-ethnic counties on how the power would be shared between them. These rivalries slow down decision-making hence leading to low economic performance. Some of the counties that have encountered this challenge so far include Trans Nzoia, Mombasa, Nakuru, Kisii, Migori, Embu, Kiambu among others.[72] The ethnic balancing in distribution of county resources and employment is key in ensuring the success of devolution.

5.6. Corruption at the Counties

The lack of strong accountability systems has made financial devolution in Kenya system susceptible to abuse as county leaders continue to propagate the vice of corruption. According to the Ethics and Anti-Corruption Commission (EACC), almost every county government has flouted tendering rules and violated staffing guidelines by

70 C Thompson, 'Federal Expenditure to Review Revenue Rations in the United States of America, 1971-85: An Exploration of Spatial Equity under the New Federalism" in (Environment and Planning C: Government and Policy (1989) 445-470).

71 A Markusen, 'American Federalism and Regional Policy' *International Regional Science Review* (1994)3-15.

72 I Karimi, 'Nakuru County Governor Kinuthia Mbugua on the Spot Over County Appointments' *Daily Nation*, *5 July 2013*. The Governor of Nakuru was accused of favouring a community in county executive appointments positions.

rewarding cronies and relatives, among others.[73]EACC has further cautioned against the alarming corruption rates at the counties.

The civil society, media, EACC, and other institutions have highlighted outright corrupt moves by county officials, including Bungoma, Migori and Muranga among others. For instance, in Trans-Nzoia County, the 2015 report by the Auditor General revealed that the MCAs received illicit allowances.[74] It stated that an amount of Kshs. 14,951,984.00 was paid to members of the county assembly and two other officers of the county government in form of foreign travel *per diems* and subsistence allowance for 12 days educational tour to Rwanda in the month of January 2014.[75] Under the expenses, an extra amount Kshs. 20,844 explained to be for water and joint lunches for MCAs was included.[76]

This is against the government financial regulations and procedures pertaining to foreign travel *per diems*.[77] Further, it was reported that the payment documents availed for audit were not supported by copies of stamped passports to confirm that the members of the county assembly travelled to Rwanda.

In summary, corruption at the county stage remains a big challenge in the implementation of devolution.

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73 'Massive Corruption in Counties Exposed' Business Daily, 27 February 2014 at http://www.businessdailyafrica.com/Massive-corruption-in-countie-exposed/-/539546/2224876/-/dx6xjh/-/index.html (accessed 25/8/2015).

74 See the Auditor General's Report 2014/2015, at http://www.kenao.go.ke/index.php/report/cat_view/2-reports/11-county-governments/79-county-government-reports-2014/105-trans-nzoia-county (accessed 25/8/2015). Cf Citizen Weekly Reporter (2015) 'Trans Nzoia MCAs Earned Illicit Allowances' Citizen Weekly, 7 September 2015 at http://www.theweeklycitizen.co.ke/trans-nzoia-mcas-earned-illicit-allowances/ (accessed 25/8/2015).

75 'The status of governance in Kenya' (Society for International Development, 2012) http://www.sidint.net/sites/www.sidint.net/files/docs/Governance_Report.pdf, (accessed 21/9/2015).

76 Ibid.

77 The Public Finance Management Act.

6. The Distribution of the Fiscal and Financial Power of the State

There are three aspects of financial power of the state for the case of the devolution system. These are the power to raise revenue, the power to administer the revenue and the power to spend revenue. The three aspects may be devolved in different ways.

First, the need for equalization is recognized and the design taken into account. Second, the power to raise major taxes like income tax, value added tax (VAT), customs, corporation tax, excise duty need to be assigned to the national level of government, since these resources used for equalization purposes. Third, the devolved units must also be given power to raise revenue from certain identified taxes. Fourth, there has to be provision of how the division of the revenue raised at the national level has to be done as well as the factors that has to be taken into consideration. Such a division has to be both vertical among different levels of government and horizontal among the units at different levels of government. Fifth, there has to be some institutions put in place to handle financial matters.[78]

A very well thought out and designed system of the devolution of financial power within a state is very fundamental. This being the case, a less decentralisation of power should be the Kenyan option that can raise adequate revenue.[79] However, spending this revenue would require more decentralization of power. The success of fiscal and financial devolution also requires a proper understanding of a workable formula of the concept of equalization.

In order for a design of equalization formula to be successful, it would be mandatory for Kenya to clearly understand this concept in a comparative experience of other countries that have implemented this mechanism within their system of governance.[80] Both vertical and horizontal imbalances are what necessitate equalization. In as much as

78 J Kiringai, 'Public Spending in Kenya: - An Inequality Perspective' in *Society for International Development Readings of Inequality in Kenya* (SID 2006).

79 AL Bannon, 'Designing a Constitution–Drafting Process: Lessons from Kenya' 116 (2007) (*Yale Law Journal).*

80 Ibid.

the national government level might be having higher power of taxation, it might have fewer functions as compared to the sub-national government level. On the contrary, different sub-national units tend to have different fiscal capacities for delivering public services to the people at the horizontal level.[81]

The differences are as a result of both revenue and expenditure faces of the budget. The need for different types of public services in respect to their expenditures can vary. This is mostly attributed to the different make-ups of demographic units like scattering or high population density, varying costs of provision of services and maybe topography. On the basis of revenue, different tax capacities are enacted by different units attributed to varying tax bases. Such disparities normally result from differences in economic development industrial specialization central versus the availability of natural resources and the peripheral positions.[82]

Differences may also result from the opportunities of different devolved units and the economic position at the economic level. Between members of the devolved fiscal and economic units, local development or opportunities tend to be very different. For instance, attributed to their raw materials or geographical positions, some units may possess higher levels of revenues. Lower tax bases may also be imposed to regions that lack marketable natural resources or the peripheral regions. Therefore, the provisions of public services at their required minimal national level of service are highly dependent on revenue raising capacity of the jurisdictions. This jeopardizes the public services.

Consequently, the success of a financial equalization formula is also highly dependent on the institutional framework within its area of operation. Provisions within the devolved government system that addresses specific institutions must be enacted as they dictate the mandate of determining grants and equalization questions taken time after time. In this regard there exists several options of making fiscal and financial devolution successful. These include the national government being empowered to determine the frequently arising questions on financial devolution. Critics of this

81 C Muray and RN Simeon 90.

82 KIPPRA, 'Kenya Economic Report 2009' (Kenya Institute of Public Policy Research and Analysis 2009).

approach have revealed that the idea of devolution is normally negated by this idea in that the central or national government gets an opportunity of destroying devolution through depriving devolved units their finances required for their effective operation.[83]

The second success factor in financial devolution lies on setting up a quasi-independent body like the grants commission whose main objective is designing and reforming the fiscal devolution system. This has been the case in devolved system in South Africa and the United States. With such an approach, more ideal than pragmatic solutions are realized. The effectiveness of such quasi-independent bodies is further enhanced by separating the bodies from being represented by both devolved levels and the national level of government or political affiliation.

Thirdly, the use of sub-national committees in negotiating terms of the system as is the case in Canada is also an alternative that has been viewed to be successful.[84] In addition, constituting joint intergovernmental cum inter-legislative commissions like the financial commission are other alternative working system that give room for explicit political inputs from the involved jurisdictions.

Evidence show that the success or failure of a devolved political system is either dependent on the economic or political factors. In the case of economic factor, the key element of devolution is fiscal decentralization, the relationship between the central government and the devolved units as far as the finances are concerned.[85] The crucial aspect of any federal government normally depends on the procedures of raising and spending the public resources. Different ways have been employed by different countries in dealing with this issue. Some have been successful while others have failed.

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83 O Okombo (ed), Discourses of Kenya's 2007 General Elections: Perspective and Prospects for democratic society (Clarion Nairobi).

84 O Nyanjom, 'The Political Economy of Poverty, Tokenism and Free and Fair Election in Kenya' in O. Okombo (ed.) *Discourses of Kenya's 2007 General Elections: Perspective and prospects for a democratic society* (Clarion, Nairobi 2009).

85 AK Mwendwa, 'Devolution in Kenya; Prospects, Challenges and the Future' 2 (2010) 24 *Journal of the Institute of Economic Affairs*.

7. Comparative Analysis of Financial Devolution in Selected Countries

There are important lessons that Kenya can learn from the experiences of other countries with respect to their devolved system of governance. This study examines some of the experiences in Nigeria, South Africa, United States, and Canada. Evidence show that the success or failure of a devolved political system is either dependent on the economic or political factors. In the case of economic factor, the key element of devolution is fiscal decentralization, the relationship between the central government and the devolved units as far as the finances are concerned.[86] The crucial aspect of any federal government normally depends on the procedures of raising and spending the public resources. Different ways have been employed by different countries in dealing with this issue. Some have been successful while others have failed.

In the case of larger developing countries like South Africa and Nigeria, they have had problems in dealing with matters related to fiscal decentralization. This can be attributed to the fact that these nations simultaneously attempt both national development and equitable distribution of this development.[87] Implementing these process at time can be unfriendly; more so when sentiments from political reveal that natives of the economically endowed regions tend to have the feeling that their home generated wealth need to remain with them or when there is that feeling that some regions seem to be developing much faster in comparison with others.

Both devolution and federalism describe the distribution of power between a centralized national government and subordinate bodies.[88] However, in a federal system, the power is ceded upwards to a national government of limited authority while in a devolved system, the power is transferred downwards from a central government to subsidiary assemblies.

86 Ibid.

87 Ibid.

88 See DT Studlar, 'Understanding Federalism and Devolution' at http://apcentral.collegeboard.com/apc/members/course/teachers_corner/180129.html (accessed 25/9/2015).

7.1. Equalization in Canada

With ten provinces and three territories, Canada is a federal state that mooted equalization idea back in 1940. Later in 1982, Canada finally decided to incorporate the concept of equalization in her Constitution.[89] The Federation has come up with three main transfers such as the Canada Health and Social Transfer, which supports the provincial healthcare, post-secondary education, social assistance and services; the block-funded transfer enhances flexibility that administers and designs social programs in order to allocate funds among the social programs with respect to the specific priorities.[90] The transfer is made up of both tax and cash. The tax transfer takes place when the federal government reduces rates thereby allowing the provinces to raise their tax rates using the same amount. All territories and provinces receive same amount of per capital entitlements for equal financial support in its area of operation to be realized.

Kenya has no elaborate health scheme other than the National Hospital Insurance Fund (NHIF) that covers government employees and other members of the private sector that have subscribed. Management of NHIF has been marred with allegations of corruption and mismanagement.[91]

Canada also has the equalization transfers which federal money is provided to the provinces with less prosperity to enable such provinces afford its residents services. Such equalization payments are normally unconditional. Therefore, the receiving provinces have the liberty of choosing how to spend the devolved funds. The transfers are calculated with respect to set formula by the federal legislation.

Lastly, Canada has implemented territorial funding based on the Territorial formula Financing (TFF). The transfer to the territorial governments recognizes the higher costs of providing the public services in the north. In addition, these territories have some specifically designated federal funding program that reflects the higher costs of providing public services in the north, rapid growth populations, less developed

89 Section 36(2).

90 Ibid.

91 Judie Kaberia, Nyong'o Marooned in NHIF Circus, *Capital News 4 May 2012.*

economic bases from which economic revenues are raised and the vast land mass and small population.[92]

The territories are also protected against serious downturn in the revenues that might arise. Other than these three main programs, Canada exhibits other transfer programs under which the federal government funds its provinces in her devolved financial structure.

7.2. Equalization in South Africa

South Africa has adopted a devolved government system through the 1993 interim Constitution and finally the 1996 final Constitution, based on three government spheres: the national sphere, provincial and local spheres.[93] South Africa has its provincial level of government sphere divided into nine provinces. The country's constitution emphasizes on equitable allocation and sharing of its revenue and equalization. According to article 214 of the country's final constitution, Act of Parliament must provide, first, equitable division of revenue that has been raised nationally among the national, provincial and local spheres of the government; second, the determination of each provinces equitable share of the provincial share of that revenue;[94] Third, any other allocation to provinces, local government or municipalities from the national government's share of that revenue and any conditions on which those particular allocations may be made.

The act that highlights on the equitable resource allocation in first subsection is only enacted after consultations and considerations with the provincial governments and both the Fiscal and Financial Commission.[95] Before the Commission considers allocation, it must consider a number of factors including national interests, positions on the national debts and obligations, the national government needs and interests, the position of municipalities and provinces to provide basic services, the municipality

92 Ibid.

93 C Muray & R Simeon, 'South African Financial Constitution towards Better Delivery' *Publius*31 (2001) 4, 65-92.

94 'Multi-level Government in South Africa: A Progress Report' (2001)31 *Publius: the Journal of Federalism 65*-92.

95 Multi-level Government in South Africa: A Progress Report (2001).

and provincial fiscal capacity and efficiency, economic disparities within and among the provinces, development needs of the provinces, among others.[96] The Kenyan Constitution lays down an elaborate framework that CRA must adhere to under Article 203.

The South African Constitution also establishes a Financial and Fiscal Commission that advises on some of the highlighted matters and their mode of formulation.

Other than the equitable share, the national sphere of the South African Government also gives to the provinces some conditional grants.[97] What Kenya needs to learn as it struggles to implement its fiscal and financial devolution is that resources need not to be shared on the basis of political exigencies but instead on the basis of objective criteria that takes into account the needs of each of its counties and the level of development of each county.[98]

7.3. Fiscal Devolution in the United States of America

Several beneficial effects have been realized in the current position of financial relations existing in the states, federal and local governments in the United States. Such include the comparatively higher levels of accountability and public expenditure responsiveness in the closely related revenue raising powers and the assignments of expenditure.[99] This linkage is a reflection of the traditionally weak support for redistributions across various jurisdictions.[100] In the US, grants from the federal governments to sub-national

96 Jose Maria Pinero Campos, 'OECD Economics Department Working Papers 872' OECD Publishing.

97 Ibid.

98 MOH, Taking the Kenya Essential Package for Health to the Community: A strategy for the Delivery of Level One Service (Ministry of Health, Nairobi, Kenya, 2006).

99 T Laubach, 'Fiscal Relations Across Levels of Government in the United States' *HansjorgBlochliger Jose Maria Pinero Campos (*OECD Economics Department Working Papers 872, OECD Publishing, 2011).

100 South Africa, 'Multi-Level Government in South Africa: A Progress Report' 31(2001) *Publius: the Journal of Federalism* 65-92.

governments are majorly geared towards establishing an efficient and paternalistic nature.[101]

The Fiscal devolution program in the US more so in the field of welfare has shown remarkable success in enhancing innovation as far as program design is concerned.[102] However, it is notable that the cost pressures in the field of heath care for the poor are such that greater federal involvement might become necessary.[103] The erosion of tax bases mostly sales tax and corporate income has compromised the efficiency at which states raise their revenues.[104] This trend could however be reversed by replacing these taxes with a less distorting form of indirect taxation. As a final point, it appears as if state balanced budget requirements have had salutary effects, but more extreme forms of fiscal rules have reduced state and local governments' ability to provide the desired level of public goods.[105]

7.4. Fiscal Decentralization in Nigeria

In Nigeria, fiscal decentralization is made up of the financial aspects of devolution to both regional and local governments.[106] Fiscal decentralization covers issues of division of spending responsibilities and the sources of revenue between the national, regional or local governments.[107] It also covers the amount of discretion hat has been given to both regional and local governments in determining both their aggregate and detailed revenue and expenditure.

In an attempt to ensure a sound financial footing of its local governments created in 1976, the Nigerian Federal Government decided to write off all the outstanding debts by the local governments owed to the state government. In 1981, the Nigerian federal

101 Ibid.

102 M Jose & P Campos, 'OECD Economics Department Working Papers 872' (OECD Publishing 2005).

103 AL Bannon, 'Designing a Constitution Drafting Process: Lessons from Kenya' (2007).

104 Ibid.

105 Ibid.

106 G Kunu, Financial Decentralization in Federal Nigeria (OUP, London, United Kingdom 2002)

107 Ibid.

government introduced a formula for sharing the federal revenue amongst the three levels of the government. The statutory allocations to the local governments have been witnessing several upward reviews from 10% in 1981 to the recent 20.6% in 2002. During these adjustments, both state and federal governments allocations from the federation accounts have witnessed some significant drops.[108]

In order to strengthen its local councils, the Nigerian Federal Government initiated further steps in 1988. These included making direct payments of federal allocations to the local governments, instead of passing through the state government.[109] The 1994 introduction of value added tax (VAT) was accompanied by the allocation of a 25% share to the local government. Such a large infusion of financial resources into the local government in Nigeria has culminated into both positive and negative consequences.

7.5. Lessons for Kenya

Such are some of the lessons that countries like Kenya can learn in her verge towards implementing a working financial devolution.[110] A very well thought out and design system of the devolution of financial power in Kenya is fundamental. This being the case, a less decentralization of power should be the Kenyan option that can raise adequate revenue.[111] However, spending this revenue would require more decentralization of power. The success of fiscal and financial devolution also requires a proper understanding of a workable formula of the concept of equalization.

In order for a design of equalization formula to be successful, it is mandatory for Kenya to clearly understand this concept in a comparative experience of other countries.[112] Both vertical and horizontal imbalances are what necessitate equalization. In as much as the national government level might be having higher power of taxation, it might have

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108 M Tiffen, M Mortimore and F Gichuki, *More People, Less Erosion: Environmental Recovery in Kenya* (Chichester, John Wiley & Sons 1994).

109 AL Bannon, 'Designing a Constitution-Drafting Process: Lessons from Kenya' 116 (2007) *Yale Law Journal*.

110 L Mishel, J Bernstein and J Schmitt, *The State of Working America*, 2000-2001 (ILR Press, 2001).

111 AL Bannon, Supra.

112 Ibid.

fewer functions as compared to the sub-national government level. On the contrary, different sub-national units tend to have different fiscal capacities for delivering public services to the people at the horizontal level.[113]

The differences are as a result of both revenue and expenditure faces of the budget. The need for different types of public services in respect to their expenditures can vary. This is mostly attributed to the different makeups of demographic units like scattering or high population density, varying costs of provision of services and may be topography. On the basis of revenue, different tax capacities are enacted by different units attributed to varying tax bases. Such disparities normally result from differences in economic development industrial specialization central versus the availability of natural resources and the peripheral positions.[114]

Differences may also result from the opportunities of different devolved units and the economic position at the economic level. Between members of the devolved fiscal and economic units, local development or opportunities tend to be very different. For instance, attributed to their raw materials or geographical positions, some units may possess higher levels of revenues. Lower tax bases may also be imposed to regions that lack marketable natural resources or the peripheral regions. Therefore, the provisions of public services at their required minimal national level of service are highly dependent on revenue raising capacity of the jurisdictions. This jeopardizes the public services. Problems of imbalances are also experienced at the cost level which economies of scale issue come into terms. Some devolved units may fail to attain the minimum threshold or sufficient level of production capacity. This can be attributed to the scarce population density.[115]

Consequently, the success of a financial equalization formula is also highly dependent on the institutional framework within its area of operation. Provisions within the devolved government system that addresses specific institution must be enacted as they

113 C Murray and R Simeon, n 90.

114 KIPPRA, 'Kenya Economic Report 2009' Nairobi: Kenya Institute for Public Policy Research and Analysis.

115 Ibid.

dictate the mandate of determining grants and equalization questions taken time after time. In this regard, there exist several options of making fiscal and financial devolution successful. These include the national government being empowered to determine the time to time arising questions of financial devolution. Critics of this approach have revealed that the idea of devolution is normally negated by this idea in that the central or national government gets an opportunity of destroying devolution through depriving devolved units their finances required for their effective operation.[116]

The second success factor in financial devolution lies on setting up a quasi-independent body like the grants commission whose main objective is designing and reforming the fiscal devolution system. This has been the case in devolved system in South Africa and the United States. With such an approach, more ideal than pragmatic solutions are realized. The effectiveness of such quasi-independent bodies is further enhanced by separating the bodies from being represented by both devolved levels and the national level of government or political affiliations.

Thirdly, the use of sub-national committees in negotiating terms of the system as is the case in Canada is also an alternative that has been viewed to be successful.[117] In addition, constituting joint intergovernmental cum inter-legislative commissions like the financial commission are other alternatives working system that give room for explicit political inputs from the involved jurisdictions. In respect to this, it is therefore likely for a system to opt for feasible and simple though less than ideal solution.

Kenya also needs to realize that devolution is not a magic tool that will solve all its problems. For example in the Nigerian experience, more so in the unequal allocation of the natural resources, devolution only exacerbate the economic problems more so when put into consideration issues like he derivation principle.[118] Secondly, in the situation of

116 O Okombo (ed.), Discourses of Kenya's 2007 General Elections: Perspective and Prospects for a Democratic Society (Clarion Nairobi 2009).

117 O Nyanjom, 'The Political Economy of Poverty, Tokenism and Free and Fair Election in Kenya' in O. Okombo (ed.), *Discourses of Kenya's 2007 General Elections: Perspective and Prospects for a Democratic Society* (Clarion Nairobi 2009).

118 AK Mwenda (2010) op. cit.

natural cleavages, like regional or ethno-language, instituting, devolution that adheres to these could not be wise.

Another lesson falls on how to share the country's economic output due to the different regional endowment. Countries like Nigeria and South Africa have struggled with the principle of derivation for so long.[119] The argument in this case falls on recognizing economic gains and on determining the percentages to retain in regions of these economic gains. The most convenient means is always to have most of the economic output delivered to the national government which then decides according to the agreed principles of fiscal and financial devolution how to distribute the economic gains.[120]

In almost all countries under review, namely United States, Canada, Nigeria and South Africa, it has been realized that the biggest share of the tax revenue normally goes to the central or national government. Regional governments are just involved in the collection of one or two taxes.[121] The fact that governments are always top heavy institutions, most questions are always on how to deal with this.[122] The way in this case normally is that the central government makes transfers to the regions.[123] This is however not the best option in that in cases where the central government bankrolls the region, power tends to centralize disputes irrespective of protestations. In addition, the regional governments tend to be the repositories of patronage.[124]

However, there are many other instances where advantages of financial devolution can be outlined by the case studies. One of the biggest though least celebrated is that when properly managed, the devolved regions serve as the training grounds in all aspects of the economy for the overall national leadership as seen in Canada and the United States.

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119 E Miguel, 'Ethnic Diversity and School Funding in Kenya' (Centre for Labour Economics, University of California at Berkeley, 2000).

120 Ibid.

121 Ibid.

122 AK Mwenda(2010) op. cit.

123 Ibid.

124 Ibid.

A proper handled devolution comes along with other intangible benefits. In Kenya, initiatives like the Constituency Development Fund (CDF) have given many Kenyan citizens a direct link between the taxes they pay and the associated services they receive.

In summary, it is evident that the process of devolution, irrespective of the motivation associated with it, requires full understanding of its costs, risks, implications, what it can and cannot deliver. As it stands, many countries have implemented and undergone the process of devolution, therefore it is equally important for Kenya to learn the right lessons in the process.

8. Conclusion

It is important to identity the standards and principles of the best practices in a decentralized fund management system. Quite a number of rampant cases of abuse of these devolved funds exist. When brief overviews of decentralization of funds in Kenya is done, it is noted that there have been creations of several successive funds without considering the past initiatives that in most cases replicate past failures while in other cases leading to abandonment of stronger implementation models.[125] There is need for the government to clearly identify the unit of financial devolution in order to enhance good governance and democracy on the basis of the most cost-effective, representative and efficient model for the country.[126]

For effective financial devolution, it is important to highlight some of the institutional challenges inherent in the present system, which has been characterized by fund multiplicity with numerous overlaps. For example, funds devolved under the educational system should be provided under, Constituency Development Fund (CDF), Local Authority Transfer Fund (LATF), Road Maintenance Levy Fund (RMLF), Free Primary

125 W Gikonyo, 'Working Paper on Decentralized Funds in Kenya (HannsSiedel Foundation Nairobi).

126 S Elischer, 'Ethics Coalitions of Convenience and Commitment: Political Parties and Party Systems in Kenya' GIGA Working paper No. 68 German Institute of Global and Area Studies, Hamburg, February 2008).

Education (FPE), or Secondary School Education Bursary Fund (SSEBF/Bursary Fund).[127]

Inefficient resource utilization lack of clarity between the objectives of the funds and the national development objective; lack of clarity on the formula on the establishment of the funds; continuous susceptibility of the funds to political impulse and parallel administrative structures tend to arise in situations where there are failures of clarifying the roles of existing institutions in the respective funds.

There is critical need for the separation of powers as envisaged in the fiscal and financial devolution framework. This can be supported by the numerous cases that have been reported on abuses and excesses in the implementation of CDF.[128] Therefore, there is need for the legal framework of the respective funds to safeguard institutional checks and balances with a view of strengthening accountability and governance in funds implementation. In addition, institutional mechanisms that can safeguard and facilitate the participation of communities in various funds need to be put in place. This is accompanied by implementing a framework which can protect and entrench the participation of the public.

Therefore as a way forward, there is dire need of simplifying and clarifying the fiscal and financial decentralization processes in Kenya. This can be achieved by harmonizing the already existing structures and funds either vertically or horizontally. Achieving this step requires an overarching policy of decentralization that addresses the following points of concern. First, in order to promote complementarity, continuity, predictability and sustainability, there is need to establish some in-built mechanisms that can integrate both local and national development priorities and goals, thereby compelling performance. Second, enhancing good governance and democracy on the basis of the most efficient, representative and cost effective model for the nation, clear identification of the unit of devolution becomes very vital. Third, the principle of power separation either at the local or national level should be safeguarded by each funds' institutional framework. Forth, effective mechanism for fund audit other than monitoring and evaluation should

127 Ibid.

128 Ibid.

be entrenched within the decentralization framework. Lastly, in order for the public to feel the genuine representation and influence as far as the management of devolved funds is concerned, there is need for the decentralization framework to protect, streamline and enshrine public participation.

It can, therefore, be concluded that a need for a comparative, evaluator and comprehensive research on fiscal and financial devolution of funds in totality need to be done to inform the effective development of policies of financial devolution in Kenya. For an effective management of funds, the Kenya Government and other stakeholders in the implementation of financial devolution should put in place a comprehensive nationwide capacity building in order to strengthen the tools and skills for both the public and officials.

HUMAN RIGHTS VERSUS NATIONAL SECURITY: THE REFUGEE QUAGMIRE IN KENYA

Irene Maithya[1*]

Benta Moige[2ε]

ABSTRACT

Refugees have existed as early as the time when religion is said to have begun. There are various books in the Bible for instance where refugees were said to be people who were homeless and needed special attention from the society. During the first and second world wars, millions of people were displaced in Europe and this led to creation of laws that would ensure the safety and protection of refugees. Later on as African States developed, they started experiencing challenges similar to the ones being experienced in Europe and as a result the laws were revised to incorporate legal protection of the refugees in Africa. Kenya has hosted thousands of refugees from neighbouring countries like South Sudan, Somalia and Uganda during the dictatorial rule of ldi Amin. However, the *Dadaab* refugee camps, established in 1991 to host Somali refugees fleeing clashes and subsequent civil war after the ousting of Said Barre in January 1991, have posed security concerns to Kenya. The persistent insecurity in *Dadaab* refugee camps has put pressure on the Kenyan government to comply with its international human rights obligations when continually hosting refugees. It has emerged that these refugee camps have been used as breeding grounds of *Al-Shabaab* activities. It is undisputed that human rights will always come first in all circumstances, irrespective of whether one is a citizen or a refugee. But with national security on the other hand, how far can the State protect refugee rights? To what extent are host governments expected to secure the rights of refugees when the security of its citizens is at stake? And finally,

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what is the scope of these refugee rights? How will Kenya strike a 'happy medium' by ensuring that it complies with its international human rights obligations by protecting the refugees whilst ensuring that there is no compromise on national security? This article seeks to analyse the threat posed by refugees to national security, the extent to which the State should protect refugees' human rights and ensure that the security of its nationals is not compromised. The article finally attempts to suggest viable options that may mitigate the problem.

1. Introduction

1.1. Background

The Kenya refugee crux can be inextricably traced back to the 1970s when the East African region was faced with a series of events that led to instability in most countries, ranging from the coup in Uganda, which was executed by General Idi Amin on 25th January 1971,[3] the defeat of the Said Barre regime in Somalia who had risen to power through a coup, the Rwandan genocide mass slaughter of Tutsi community in Rwanda by Hutus which began on 7th April 1994 due to political issues,[4] to the numerous civil wars in the former combined country of Sudan.

These wars forced multitudes to flee from their countries to Kenya which this article could term as the safest surrounding haven. In the beginning, this did not appear to be a problem because Kenya was a welcoming and very accommodative neighbor, up until the numbers started surging. By 2013, there were over 600,000 refugees in Kenya.[5]

The Ministry of Home Affairs was then charged with the responsibility of handling and registering refugees. This matter never attracted any attention since the visitors who were being accommodated were very friendly and soon became part of the Kenyan

3 1971 Ugandan Coup D'état < http://www.wikipedia.org.wiki> accessed 19 September 2016.

4 Genocide stories < http://www.rwandanstories.org/genocide > accessed 21 September 2016.

5 Kituo Cha Sheria, '*Training Manual for Lawyers and Law students*' < http://www.kituochasheria.or.ke/wp-content/uploads > accessed 9 November 2016.

system, even though they had not been integrated into local communities, which later led to challenges of citizenship.

The question that arises is to what extent is the principle of non-refoulement applied and what detriment does national security suffer in this case?

The main refugee group in Kenya is from Somalia, as per the United Nations High Commissioner for Refugees, followed by refugees from Ethiopia. The *Dadaab* refugee camps, for instance, which were started in 1983 by the United Nations High Commission for Refugees, houses thousands of refugees from Somalia and has been in existence for over 35 years and the numbers have been surging over the years. *Kakuma* refugee camp is dominated by refugees from Ethiopia and all the other neighboring countries such as South Sudan. This article will demonstrate that the surging presence of refugees has posed a huge threat to national security. Kenya was the 12th country most impacted by terrorism in 2013.[6]

This article is divided into three parts. Part one is an introductory that sets out the background of the study. The part also sets out the problem statement in detail and seeks to draw a nexus between refugees and the threat they pose to national security. Part two is an analysis of the legal and institutional framework that governs refugees and the last part highlights the conclusions and recommendations. Some of the solutions suggested include strategies that are geared towards striking what the authors refer to as a 'happy medium', a balance between protecting refugees' rights and ensuring national security.

1.2. Problem Statement: Tracing the Terrorist Threat

As early as 1998, Kenya had already started experiencing the torment of terrorist attacks from external sources, for instance the bombing of the USA embassy in Nairobi. Another deadly attack also occurred at Kikambala Hotel in Mombasa where several citizens and Israeli nationals lost their lives.[7] This was after missiles that had been launched at an Israeli passenger plane missed the target. In late 2009, a series of

6 2015 Global Terrorism Index, < http://ww.visionofhumanity > accessed 9 December 2016.

7 Dexter Filkins 'Terror in Africa: Attacks in Mombasa; Kenyans Hunting Clues to Bombing; Toll rises to 13' *New York Times* (New York 30 November 2012*)*.

terrorist attacks were experienced on Kenyan soil. Tourists were attacked at the Kenyan coast, while some of them were taken captive to Somalia where the terrorist group *Al-Shabaab* used them to demand for ransom from the Kenyan government. Some of the tourists were even killed by this terrorist group. This put the security of Kenyan citizens and tourists at risk. The Kenyan economy was threatened because Kenya faced travel bans from countries that felt that their citizens would not be secure in Kenya due to the state of insecurity.[8] Countries feared for the safety of their citizens in Kenya while the danger was still eminent in the country and they issued travel warnings.[9] The *Al-Shabaab,* after crippling the tourism sector in Kenya, targeted innocent Kenyan civilians in the numerous attacks perpetrated in the coastal towns, in which several lives were lost.

The government, being the custodian of the fundamental rights of the people, had to take action in order to ensure that lives were not at stake and in 2011 began the 'LINDA NCHI' initiative where Kenyan soldiers went into Somalia to liberate it from terrorist and militia groups and bring it under the control of the federal government of Somalia. This however worsened the situation, as attacks increased, presumably in retaliation.

There have been over 130 terrorist attacks in Kenya since then and thousands of lives have been lost.[10] On 17th September, 2011 a grenade shell was recovered at the offices of the then Prime Minister but the authorities made a report that the grenade did not target anyone and dismissed the threat as non-serious.[11] However, there was a clear indication of the seriousness of the threat of terror, as the attacks were directed at the Government of Kenya. Between 2012 and 2013, there were over 17 attacks occasioned by hand grenades and explosives in North-Eastern Kenya, Mombasa and Nairobi.

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8 Kenya Battles Decline in Foreign Tourists < http://www.nation.co.ke/news > accessed 29 October 2016.

9 Kenya Travel Warning < http://www.travel.state.gov//travel.state.gov/Kenya > accessed 29 October 2016.

10 Paul Wafula, 'Kenya Has Experienced 100 Terror Related Attacks in 3 Years' *Standard Digital (*Nairobi 18 August 2014) *10.*

11 The Standard, September 21, 2013.

Kenya experienced one of the most disheartening terrorist attacks in one of the biggest malls, Westgate Mall, in Nairobi on 21st September 2013 where 68 people lost their lives. *Al-Shabaab* claimed responsibility of the attack.[12] Later in the year, there was an attack at Mpeketoni where innocent people were killed, most of them of Kikuyu origin, and *Al-Shabaab* claimed responsibility. In 2014, two simultaneous attacks were carried out in Mpeketoni where more than 60 people were killed. In 2015, there was an attack in some mines in Garissa where up to nine policemen were killed and some injured.

1.3. Impact of Refugees on Security

3.1.1 The Link between Refugees and Insecurity

The fear of the state of insecurity in the North Eastern region of Kenya, and especially with the influx of refugees (allegedly feared to be in possession of arms), started with the establishment of *Dadaab* refugee camps in 1991. This fear was accelerated by memories of the Shifta movement in the 1960s that waged secessionist wars in North Eastern, supported by Mogadishu. This was because of Somalia's claim of territory in Kenya's North Eastern region. President Jomo Kenyatta maintained that Kenya would not concede any of its territory to Somalia.[13] To date, the Government of Kenya, through its Ministry of Interior, perceives refugees of Somali origin as a possible threat to national peace, order and security. These fears are predicated upon the constant clamour for safety.

The reason refugees are associated with insecurity is that the authorities, and especially the Ministry of Interior and National Coordination through its Cabinet Secretary, has indicated that some refugees have in the past been apprehended in illegal possession of firearms. Some of these apprehended persons propagate proliferation of the said illicit firearms. The use of illicit small arms leads to widespread illegal activity and eventually undermines the legitimate authority of the State.[14] The international common borders

12 Daily Nation, September 21, 2013.

13 K Orwa, Foreign Relations and International Co-operation, Ministry of Information and Broadcasting (ed.), Kenya: An Official Handbook (Nairobi: Colourprint, 1988) p 308.

14 J Kamenju, M Singo and F Wairagu, Terrorized Citizens: Profiling Small Arms and Insecurity in the North Rift Region of Kenya. Security Research and Information Centre-SRIC (2003) p 83.

between Kenya and Somalia are often not sufficiently policed and people can and do easily cross the border on either side. The number of officers deployed by the government of Kenya is hardly enough for such an extensive common border[15] and the rough terrain and hostile weather make border policing more difficult. The porous nature of the border makes it easy for the trafficking of illegal arms. Some are of the view that the porous Kenya-Somalia border is part of a broader, complex pattern of State failure and communal violence afflicting much of the horn of Africa.[16]

The planning and execution of the dehumanising Westgate Mall attack was allegedly traced back to the *Dadaab* refugee camps[17] but there was no direct evidence that linked the refugees of this camp to the attack. The Kenyan government had its suspicions but could not do much as there was no direct and substantial evidence; the tracks had been covered, and therefore no nexus could be drawn between the two. Worse still, on 2nd April 2015, gunmen stormed Garissa University in the wee hours and killed over 140 students. The *Al-Shabaab* terrorist group claimed responsibility.[18] And the same inference was drawn but yet again there was no direct evidence to link refugees directly to the attack.

A nexus could however be drawn between the terrorist group and the refugees at *Dadaab,* in that these refugees are Somali nationals and the group has its base in Somalia, making it easier to manipulate or intimidate these nationals into harboring their activities.

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15 J Kamenju, M Singo and F Wairagu, Terrorized Citizens: Profiling Small Arms and Insecurity in the North Rift Region of Kenya. Security Research and Information Centre-SRIC (2003) p 84.

16 O Godana, J Doyo and J McPeak, Linkages between Community, Environmental and Conflict Management: Experiences from Northern Kenya. Conference Report Ithaca (New York: Cornell University 2003) p 3.

17 Westgate mall attacker lived in Somali refugee camp < http://www.pbs.org/newshour/rundown/westgate-mall-attacker-lived-in-somali-refugee-camp-kenyan-officials-say/ >accessed 23 January 2017.

18 Daily Nation Thursday April 2 2015.

Although it has not been proven, the refugee camps could be termed as a softer landing for *Al-Shabaab* because of the free commodities such as food that are provided in the camps. There is also less supervision and Kenyan security agents are less concerned about the presence of the refugees in the country, because a greater number have not been accorded documents to recognise them as legally refugees or asylum seekers.

In 2016, Hagadera camp of the *Dadaab* refugee camps experienced an attack when explosives went off injuring thousands of refugees, as per the United Nations fact sheet.[19] This means that the camps are not safe for even the refugees themselves thus rendering them more vulnerable than they already are.

It is against this backdrop that this article argues that refugees are a real threat to Kenyan national security.

3.1.2 Other Insecurities Posed by Refugee Accommodation

Kenya has also experienced a strain on its economy, as it is expected to treat refugees no differently than Kenyan citizens. This means that it has to provide social needs, amenities and social services, which adds a strain on the already struggling economy.

Apart from the attacks that have been associated with the presence of refugees in the country, there other adverse effects that have occurred as a result of hosting them. It would be absurd to assume that the residents of the semi-arid area where these refugee camps are, which camps are in fact some of the largest in the world, have the same livelihood as they did before. Natives of that region struggle and scramble for resources such as water and food for themselves and for their animals, so adding such a great number to the region means that the resources become more scarce, which actually threatens the people's social security. It can be argued that *"It cannot be prudent to let your 'children' sleep hungry because you have a visitor, who is not keen on ending their stay and has actually overstayed their welcome."*

Kenya as a country has a duty to accord its citizens positive rights as provided for in the Constitution under the Bill of Rights, and most of them are social rights which include provision of basic needs. Justice Mumbi Ngugi, in the case of *Mitubell Welfare*

19 < http://www.unhcr.org/news/latest/2012/12/4eflec326 > accessed 2 December 2016.

Authority v Kenya Airports Authority,[20] a case that had been leveled against the government, held that the government has to show that it is making an effort towards realising social economic rights, although they are to be achieved progressively.[21] Clearly, the government is not able to fully support its citizens economically, and therefore lacks the extra muscle to host and provide for refugees. The Kenya National Commission on Human Rights Report, 2010 on refugee status stated that the countries that are supposed to give aid to help support the refugees have blatantly failed to do so, not once but a number of times. It is a bit unreasonable to impose additional costs to the already hard pressed social and public welfare budget of a country.

Secondly, it cannot be assumed that the environmental status in the refugee camps area has remained the same over time.[22] Sudden and unplanned changes take place that lead to serious impact on the whole eco-system. The semi-arid region may eventually become a desert and the effects of this may be long term.

In addition to this, one cannot afford to ignore the political strain that has been caused by the refugee crux. One instance is the political heat that the repatriation announcement by the Cabinet Secretary of the Ministry of Interior and National Coordination generated. The issue became a battleground between the country's opposition and the government. The opposition was by all means right and justified to stand for the rights of refugees, which actually bore fruits, but it caused a strain on the political standing of Kenya however insignificant it may be viewed to be.

3.1.3 Government's Response to the Threat Posed by Refugees

The events discussed above in 1.3.1 led to the then Minister of Interior and Co-ordination of National Government, Nkaissery Joseph, releasing a press statement clarifying that refugee camps had become hosting grounds for the terrorist group that had caused

20 Petition 164 of 2011, eKLR.

21 *Mitubell* (n26).

22 Refugees and the environment; <http://www.safefuelandenergy.org/files/Analysis%20of%20UNHCR's%20environment%20policies.pdf>accessed 23 January 2017.

deadly attacks on Kenyan soil.[23] This led to the government's decision to close down the camps.[24] The Minister's press statement conveyed the government's intention to repatriate the refugees in the camps to their respective countries, as the danger that had prompted their coming to Kenya existed no more and moreover, Kenya's security was at stake. Security of Kenya's nationals was the main reason that led the government to choose to give the voluntary repatriation directive, but it is evident that there were other economic, political and environmental considerations that had been taken into account. However, the directive was not received well by civil society groups that claimed that the refugees' rights had been infringed upon and that the government did not have a legal justification to repatriate the refugees.

The Tripartite Agreement between the Kenyan government, the Somali government and the United Nations High Commissioner for Refugees, provided that refugees could be repatriated as long as it was voluntary and as long as Somalia was safe for them.[25] The refugees were allowed to voluntarily choose where they wanted to be settled in Somalia following a survey that had been conducted on Somalia which found that some parts were considered safe.

However, the rights of refugees cannot be assumed. They are to be protected from all forms of discrimination as any other Kenyan citizen who is protected under the Kenyan Constitution. They also have rights under the Refugees Act, 2006 and the various Conventions on Refugees that have been ratified by Kenya. They have a right to non-refoulement unless they have voluntarily agreed to be returned to their countries and only if they feel that it is safe enough for them to do so. Human rights are applied universally in the world to all human beings; they are entitled to these rights regardless of their status. This means that they should be facilitated to enjoy all rights as under the

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23 Kenya: Stop recruitment of Somalis in refugee camps <https://www.hrw.org/news/2009/10/22/kenya-stop-recruitment-somalis-refugee-camps> accessed 23 January 2017.

24 Allafrica.com/stories/20160545.html. <http://ALLAfrica.com > accessed 26 January 2017.

25 Available <http://www.refworl.org/pdfid/5285e0294.pdf> accessed 27 January 2017.

Kenyan Constitution, including the right to fair administrative action under Article 47.[26] One of the few constitutional rights that they cannot assert is the right to vote as it is exclusively for Kenyan citizens.

All in all, the principle of proportionality is vital and comes into play when determining whether repatriation is appropriate and necessary. Will the repatriation be necessary in the quest for security of the State or will it cause the refugees unwarranted detriment? Refoulement should be the last resort. As per the High Court's decision in *Kituo Cha Sheria and 7 others versus the Attorney General*[27] the government's directives were said to be a threat to the petitioners' fundamental freedoms and rights and to the non-refoulement principle contained in Section 18 of the Refugees Act. As much as the Refugees Act is out to protect the rights of refugees, it does provide for circumstances under which a refugee or members of his or her family can be expelled from the country that they have sought refuge in. The reasons are based on matters of national security and order after consultations between the minister of security and the minister of matters relating to immigration.[28]

The foregoing court decision then signposts that refugee rights should be given due priority. If the State cannot prove that the refugee camps are breeding grounds for terrorist groups that pose a threat to national security, or that Somalia is safe enough to have its citizens return home or that the refugees have voluntarily accepted to go back to their countries, then this article contends that, Kenya will have to live with hosting and having refugees in it. This article suggests that the Kenyan government may have to let the refugees stay as long as they want and perhaps be forced to award citizenship to some or even all, as in the case of the *Makonde* people in the Kenyan coast who lived in Kenya long enough to be registered as Kenyan citizens.

Countries such as the United States of America that have their wage bill calculated in trillions, would rather give financial aid than take in refugees, even though they have ratified conventions relating to refugees, because they are aware of the adverse effects

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26 The 2010 Kenyan Constitution < http://www.kenyalaw.org > accessed 4 December 2016.

27 Petition nos.19 and 115 of 2013 at Nairobi High Court.

28 Section 21, Refugees Act 2006.

of hosting them. In the *Matter of S-K,*[29] the United States government refused to grant refugee or asylum status or allow entry into the country for a group of persons that had supported the Chin National Front which is considered an illegal organisation, including a Burmese national who had provided approximately 7,000 dollars to the organisation.

Similarly, in other jurisdictions such as Canada, in the case of *Suresh v Canada*[30] the court explained that in exceptional circumstances such as a threat to national security, deportation to face torture would be allowed.

3.1.4 Protecting State Sovereignty

Amid all this confusion on what action the government is best suited to undertake, and in an effort to justify the government's decision to close down *Dadaab* refugee camps, one would argue for the sovereignty of the State and the freedom that a State has in making decisions that affect the State after taking into consideration the effects of that decision on its people. All sovereign power belongs to the people of Kenya who in turn delegate it to representatives to act on their behalf.[31] The government thus acts on behalf of the people of Kenya and if it deems fit to repatriate the refugees, though weak, this decision can be said to be the decision of the people of Kenya as a whole.

2. An Analysis of Refugees' Legal and Institutional Protection Framework

2.1. Legal Protection of Refugees' Rights in Kenya

The State has put in place specific legislation to protect the rights of refugees. The State has also domesticated international human rights law instruments that protect refugees.

1.2.1 Domestic Legal Status of International Human Rights Law

The 2010 Constitution transformed Kenya from a dualist to a monist State by providing that all treaties ratified by Kenya would form part of the law of Kenya. This means

29 23 I&N, 936(BIA 2006).

30 1S.C.R3, 2002. Supreme Court of Canada.

31 Article 1 of the 2010 Kenyan Constitution.

that there is no longer a need for implementing legislation, and international treaties can now be invoked before the courts, tribunals and administrative authorities in the Republic. However, Articles 2(5) and 2(6) of the Constitution relating to the application of international laws and ratification of international treaties and conventions, is to be given full effect and clarity through legislation. This is more so since Article 21(4) of the Constitution requires the State to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms. Where a treaty is non-self-executing, requisite legislation needs to be passed, particularly for human rights treaties.

1.2.2 Treaty Law

Kenya is a signatory to a number of conventions and treaties dealing with refugees and their protection. The conventions have been domesticated by dint of section 16 of the Refugees Act which provides that every refugee shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is a party.[32]

(i) *The 1951 Refugee Convention Relating to The Status of Refugees*

This Convention was enacted to deal with the refugee problem that had come about as a result of the first and second world wars. The Convention mainly focused on Europe as millions had been displaced and had sought refuge in neighbouring countries. The Convention had restricted refugee status to those whose circumstance had been caused by events that transpired before 1951. Its provisions were limited to Europe and it was temporal because it was believed that the situation would end after a period of three years. However, the problem was not resolved in the three years and this prompted the creation of the following Protocol.

(ii) *The 1967 Protocol Relating to The Status of Refugees*

The Protocol was enacted to seal the loopholes that had been exposed by the 1951 Convention. It was basically enacted to correct the assumptions which had been made

32 Section 16, Refugees Act 2006.

in 1951, and removed the geographical restriction to include other parts of the world, because it was discovered that there were refugees in several other areas apart from Europe. However, it allowed States that had previously ratified the Convention to choose whether they would retain the geographical limitation clause or do away with it.

(iii) 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

The OAU Convention was enacted to solve specific issues of refugees in Africa. It was out to encourage receiving countries to enact laws and set standards for the treatment of refugees, but it did not provide any remedies for the countries of origin of the refugees. The Convention also reinforced the principle of non-refoulement and emphasised on the rights of refugees in Africa. However, the major question that arises is whether States have achieved the expectations of the Convention. For instance, Kenya, among other African countries, has treated refugees with suspicion and resentment, to the extent that it planned the closure of the Dadaab refugee camps.[33] This may be attributed to the increased insecurity in, and other constraints that are occasioned on, receiving countries.

1.2.3 Domestic Legal Framework

(i) *The 2010 Constitution*

The 2010 Kenyan Constitution, which is in fact rated among the most liberal constitutions in Africa and in the world, has an expansive Bill of Rights. And as per the average understanding of human rights, they accrue to every person by virtue of them being human beings. Although the refugees might not have absolute title rights provided for in the Constitution, they are to enjoy basic rights such as protection from discrimination,[34] right to life[35] and right to fair administrative action.[36] In 2006,

33 Petition no. 227 of 2016.

34 Constitution of Kenya 2010, Article 27.

35 (n32), Article 23.

36 (n32), Article 43.

Parliament enacted the Refugees Act, domesticating the 1967 Protocol and the United Nations Convention Relating to the Status of Refugees.

(ii) *The Refugees Act, 2006*

This Act was enacted in Kenya in 2006 and has been tailored to make provisions for the management, protection and recognition of refugees. It contains requirements that one must meet in order to be recognised as a refugee. One of the requirements is that a person must have left his or her country of origin as a result of fear of persecution on grounds of race, religion, sex or membership to a particular social group and as a result, is unable to present themselves to their country for protection. It also provides for the rights of the refugees, which include the right of non-refoulement and the procedure that should be followed in determining a person's refugee status and also creates bodies that are in charge of refugee status determination. The Act also has grounds for the deprivation of refugee status and situations when one can be repatriated back to his or her county.

2.2. The Principle of Non-Refoulement

The principle of non-refoulement, enshrined in Section 18[37] and Article 33 of the OAU Convention, can be described as the fundamental protection for refugees whereby a refugee cannot be repatriated back to their country if there is still exists the fear of persecution. This principle has over time gained the status of an international customary rule,[38] a *jus cogens* which is a peremptory norm that all States are bound by and cannot depart from, even by way of a treaty. The principle of non-refoulement is the pillar of international protection for refugees, because it binds all States regardless of whether or not they are signatories to conventions or treaties.

Once a country has admitted refugees, it then has a duty to either accord them the national treatment standard or the international minimum standard.[39] A State should not give preferential treatment to its citizens as per the national treatment standard and

37 The Refugees Act 2006.

38 Jean Allain, 'The *Jus Cogens* Nature of Non-Refoulement' *International Journal of Refugee Law* (2001) 533-558 vol 13(4)4.

39 F Njeng'a, *International Law and World Order Problems* (2001) 43.

it should not willfully deny the refugees the international standard as was laid out in the case of *USA v Mexican States*. The refugees are to enjoy basic rights just like any other citizen of the host country.[40]

One of the main reason why refugees leave their countries is war. Their livelihoods have been threatened in one way or another, through militia attacks or activities.[41] So, it is impracticable to assume that all refugees in these camps are there voluntarily and lack a compelling reason to justify their presence in those camps. Instead, it should be apparent that they are genuinely seeking to secure their right to life, away from their hostile home environment. This right to life is one of the rights that has no boundaries regardless of whether one is not a citizen of a particular country.

The principle of non-refoulement prompted human rights activists to head to court to stop what they described as a violation of the refugees' rights. In *Kituo cha Sheria and 7 others v The Attorney General*[42] the petitioners argued that the government had breached the OAU Convention by giving an order that all refugees in urban centers return back to *Dadaab* and *Kakuma* refugee camps which are hosting refugees from South Sudan, Somalia and Ethiopia.

The petitioners further relied on the provisions of Articles 27, 28, 30 and 39 of the Constitution,[43]arguing that it could be unlawful to force refugees back to the refugee camps while they had invested and made their lives in the urban centers, and repatriate them against their wishes because of attacks in the country, despite there not being sufficient evidence pointing to them. In the ruling, the process of refoulement was declared improper as it was conducted in disregard of due procedure.

If offenders who have been found guilty of committing capital offences have had their lives protected, such as in the South African case of *S v Makwanyane* and another,[44]

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40 *USA v United Mexican States* 42B U. S543 (1976).

41 Caroline Lichuma,' Kenya Should Obey International Law On the Repatriation of Refugees. 21 June 2016.

42 Petition 19 of 2013 eKLR.

43 Constitution of Kenya, 2010.

44 (CCT3/94) [1995] ZACC 3; (6) BCLR 665 (3) SA 391; [1996] 2 CHRLD 16.

where the South African court ruled against the death penalty in an effort to protect the serenity and sacredness of life, why should Kenya choose to assume this right by handing refugees back to their war-torn countries where their lives are clearly threatened? States have had to intervene to protect citizens of another country from the death penalty in their home country, as it was in *Minister of Home Affairs v Emmanuel Tsebe,*[45] where South African activists went to court to prevent the South African government from handing back two Botswana citizens who had been found guilty of robbery with violence.

Refugees are entitled to the right to non-refoulement and they are not to be returned to their countries unless they feel safe enough to go back or peace has been restored.[46] Kenya is under obligation to not use the limitations to the non-refoulement principle to the detriment of the refugees. The limitations or exceptions should instead strike a balance between national security and refugee protection. Kenya must not rely on the language of Article 33 of the OAU Convention and the Kenya Constitution[47] to form broad anti-terror policies that exclude legitimate refugees, or otherwise damage refugee protection.[48]

2.3. Institutional Framework in respect of refugees in Kenya

During the first phase of refugee presence in Kenya between 1963 and 1986,[49] the Ministry of Home Affairs was in charge of refugee management. Currently, there exists the Ministry of State for Immigration and Registration of Persons, which is in charge of refugee affairs including Refugee Status Determination.

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45 (27682/10,51010/10) [2011] ZAGPJHC 115; 2012 (1) BCLR 77 (GSJ); [2012] 1 All SA83 (GSJ).

46 Section 18, Refugees Act 2006.

47 Article 24, Constitution 2010.

48 Alphax'icd Kipchumba, 'Face of National Security Threats with A Special Focus On the Extent of the State Accountability for The Protection of Refugee Rights' *Research paper; All Kenyan Moot Court Competition* 20 February 2015.

49 Kituo cha Sheria Manual on Refugee Lawyers and Law students, page 6.

The ministry is bound by the provisions of the Refugees Act, 2006 which require the creation of the Department of Refugee Affairs[50]. The Department is in charge of all administrative matters concerning refugees and also coordinates activities and programs relating to refugees. The Department has since been disbanded under unclear circumstances and replaced by the Refugees Affairs Secretariat which performs all the functions that were initially performed by the Department. There is also established the Office of the Commissioner under section 7, who is in charge of the Ministry, reception of applications for refugee status determination, reception of refugees, provision of durable solutions for refugees and other things.

There also exists the Refugee Affairs Committee which helps the Commissioner in matters concerning the recognition of persons. The Refugee Affairs Secretariat is in charge of issuing identification documents to refugees. However, it has been argued that there is not enough capacity and will within the Ministry to implement the provisions on how determination of the refugee status should be done in practice.[51]

3. Conclusions and Recommendations

3.1. Conclusions

Before the eyes of any jurisdiction with laws that advocate for basic and fundamental human rights such as the right to life, dignity and security of the person as Kenya does,[52] it would be improper and unfair to assume that only the citizens of the country are entitled to these rights. Some of these rights are non-derogable unless one has had the rights limited by law as a result of the commission of a crime. Being a refugee is not a crime and a person does not choose to be born in times of war. It is unjust to fuel constant exiling of persons who have been exiled all their lives, from their war-torn countries, and from the country that they thought was their safe haven. Refugees may not be Kenyan citizens, but by virtue of them being human beings, natural law as well

50 Section 6, Refugees Act 2006.

51 Sara Pavanello, *Hidden and Exposed refugees in Nairobi" Humanitarian* Policy Group Working Paper March 2010.

52 Articles 26, 28 and 29, 2010 Constitution.

as the Kenyan Constitution accords them the right to human dignity, a right that is not limited to Kenyan citizens only.

Has the government applied the proportionality test in repatriating refugees, *vis-a-vis* the danger that they are likely to face in their home countries? Has the government done all that it should do to protect its people against terrorist attacks before pointing a blaming finger to the refugees? What is the impact of corruption on our economy? Wouldn't the millions lost into pockets of cunning public servants be sufficient to take care of Kenyan citizens and any surplus, however little it may be, directed towards protecting the refugees? How vigilant are our security forces and what is their response to intelligence reports?

This article suggests that Kenyans themselves have neglected the duty to keep their country safe. They might be acting out of self-comfort in finding someone to blame for their woes, some of which are self-induced and can be prevented. This article is not implying that refugees have had no role to play in insecurity in Kenya, but asserts that there is a larger group that is innocent, a group that might be handed over to the jaws of death in refoulement. Kenyan authorities are worried that *Al-Shabaab* derives support from the refugee community, yet closing *Dadaab* camp in such a manner would make Kenya ultimately less safe. It would feed the instability inside Somalia and cause further suffering to the refugees.[53]

3.2. Recommendations

(i) *Provision of more durable solutions by the UNHCR*

This article argues that it is proper for countries to accommodate refugees. However, it is the authors' view that accommodation of refugees is supposed to be a temporary solution. The United Nations should pursue intervention in war-torn countries and protect the civilian population so that they do not have to leave their countries in the first place. The United Nations body that has been entrusted the mandate to explore

53 Kitur Sharon Chepkirui, *Refugees A Threat to National Security Case Study Kenya*; LLB Dissertation Strathmore University March 2016.

durable solutions to the refugee problem, the United Nations High Commissioner for Refugees, should for example explore prevention as a long lasting solution.

The United Nations High Commissioner for Refugees, the host States and other stakeholders should not assume that accommodation is all the refugees need. The potential emotional torture that they go through in these camps, the pain of not being able to be in their home countries and houses, is enough to indicate that it is high time that the United Nations took a different channel towards solving the refugee problem that currently exists.

Being the body that is in charge of refugee affairs, the UNHCR is also meant to ensure that there is no radicalisation or use of weapons in refugee camps and that there are no life threatening activities taking place in the refugee camps. The Commission should be held responsible for any threats that may be caused to the host countries as a measure to ensure that the Commissioner acts diligently so as to protect countries that have been kind enough to host refugees.

Owing to the fact that Kenya hosts one of the largest numbers of refugees in the world, the United Nations should create improved and new accommodation spaces to make it easier for the Kenyan government to patrol and ensure its security. Owing to the fact that Kenya is surrounded by neighbours who over time have experienced civil wars that have led to massive displacements, the UN is required to build habitable and manageable refugee sites in Kenya to help in maintaining the country's security and order in general.

If the foregoing succeeds, countries would not complain about any security threats or other forms of insecurity posed or perceived as so by refugees.

(ii) *Study and Application of the Principle of Proportionality*

This principle seeks to ensure that all other channels are unsuitable before repatriating a refugee. It is undeniably clear that there is a possible threat posed to the country by the presence of refugees. It is also clear that refugees have rights despite the fact that these rights may have limitations. It is important to try and mitigate these two factors. The government thus ought to take reasonable measures and considerations before

deciding to repatriate refugees. The government is meant to come to this solution as the last resort after it has explored all other available avenues and there still exists a threat as posed by the refugees. National tribunals are to use a proportionality test to balance the nature of the offence committed by a refugee with the consequence that he or she will face if returned to his or her country. The government should look at the effects that these refugees will suffer if they are to be returned to their home countries and the state of Kenya's economic, social and political security if they are to be allowed to stay in the country.

(iii) *Consideration of The Right to Life*

Looking at the Kenyan law, capital offences such as murder and robbery with violence attract the death penalty as per the provisions of the Penal Code.[54] This is because the law is trying to put across the point that no life is greater than the other. The right to life is a right that is open and applies equally to every person regardless of their nationality. Sending someone back to a war zone can be considered to mean that their life is something that can be gambled over.

As much as the government is justified to protect the rights of its own citizens, it should also consider the lives that will be lost if the refugees were taken back to Somalia where *Al-Shabaab,* who are putting the lives of Kenyans at risk, live, eat and conduct their day to day activities. Repatriation will see many people put their lives at risk and some of them will even join the militia group[55].

The Kenyan government has a duty to protect the rights of refugees despite the fact that they are not Kenyan citizens. Suspects of the 1998 bombing of USA embassies in Kenya and Tanzania were arrested in South Africa and the USA government wanted them to be tried in the USA. Khalifan Khamis Mohamed sued, arguing that the South African government had a duty to protect the individual's right to life and should thus not allow them to be tried in the USA that had the existence of a death sentence. The

54 Section 186 and 20, Kenyan Penal Code, Chapter 63 Laws of Kenya.

55 IB Times in the United Kingdom; Exclusive 30 June 2016.

court agreed.[56] This shows that every State, including Kenya, has the obligation to put in place a framework that will ensure protection of the right to life, and this includes non-refoulement. The government should explore other options which prevent a violation of this right. If the government has found all reasons for repatriation, it should be remembered of its obligation of the protection of fundamental rights because failure to do so will make a mockery of the Kenyan Constitution that has been hailed for its good performance and its liberal nature.

Also in several occasions, the South African government has brought to the fore that there can be extra-territorial application of rights. In the case of *Kaunda and others v President of South Africa*[57], the court protected a citizen of South Africa from being tried in Equatorial Guinea because of the existence of the death penalty. Kenya should thus follow these footsteps as no life is greater than the other, a refugee's life is as equally important as a Kenyan citizen's.

(iv) *Participation in Restoration of Peace in War Torn Countries*

The ideal approach to restoring peace in Somalia and other countries, including eliminating the treat of *Al-Shabaab,* is one that adopts a combination of humanitarian, development-oriented, diplomatic and militaristic approaches.[58] This means that the Kenyan government can engage in diplomatic and military activities to help bring about peace in these countries. Kenya has been taking impressive steps towards trying to restore peace in these countries by donating troops to organisations such as the African Mission in Somalia that aims to restore peace in Somalia, and the United Nations in its missions to restore peace in countries which have had prolonged civil wars such South Sudan.

The government however recently withdrew its troops taking part in the mission in South Sudan. This was in response to the sacking of the Kenyan commander who

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56 *Mohammed v President of South Africa* CCT 17/01[2001].

57 (CCT 23/04) [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC).

58 Rufus Karanja, *Stabilizing Somalia; Options for Peace and Stability*; Refugee Insights Newsletter 20th Edition pg.8.

apparently had failed to respond to an attack at Juba Hotel.[59] This may have been a swift move that served the moment but this means that it is going to take longer to end the war in South Sudan and more refugees are going to keep coming into the country. Kenya might have achieved expressing its frustration but added onto the burden that it is trying to fight; the refugee crux. It more helpful to curb the problem from the root making it easier to send back people to a safe country, rather than making rash decisions that add to the problem. The State may need to rethink its decision of withdrawing the troops.

(v) *Intensification of Security Within the State and Along the Borders*

Some governments use the fight against terrorism as a means to get rid of legitimate, non-violent, political opposition or as a justification for using disproportionate force in violation of international humanitarian and human rights law.[60] Kenya is not one of those countries that has used the issue of refugees as an excuse to breach international laws, but it can do more by guarding its borders and ensuring that only refugees get into the country and do not carry materials that may put the country's security at a risk. All the loopholes at the entry points should be sealed to ensure that this is successful. The government should also allocate more funding towards border security and recruit security experts from countries such as Israel.

(vi) *Integration of Refugees*

One of the qualifications that one should meet in order to be considered as a Kenyan citizen is one should have lived in Kenya for over seven years.[61] Some of the refugees have been residing in Kenya lawfully for over 30 years. One of the things that the government can do is integrate the people into Kenyan societies. This may aid in boosting the economy.

One reason that people engage in terror activities is the lack of economic stamina; the people cannot quite sustain themselves economically so when an opportunity arises to

59 Daily Nation, November 4, 2016.

60 U S Committee for Refugees and Immigrants Report (Refworl 2003).

61 Constitution of Kenya 2010, Article 15.

get a source of income, they take it up regardless of the hazards related to it. If the refugees are integrated into the society and are able to engage in economic activities, they will have little or no time to get involved in terrorism. Although, this may take a long time and a lot of effort from the government, it is almost certain that integration will reduce insecurity threats because the people will be occupied and will have alternative occupations keeping them from organising and planning crime.

The *Makonde* people at the Kenyan coast were refugees from Mozambique who came to Kenya in the 1930s and settled at the coast as sugarcane farmers and workers on these farms. Over time, Kenya became their home because almost all of the people from that community know no other home. They were awarded citizenship in December 2016 by the President after what was a very long struggle on their part. This should be the case for other refugees who have met the qualifications to become Kenyan citizens.

(vii) *Resettlement*

This is where refugees are transferred from the first country that they fled to and where they have sought asylum, to a country that is willing to admit them and offer them citizenship.[62] The United Nations High Commissioner for Refugees has the mandate, among other roles, to resettle refugees.[63]

Occasionally, the Kenyan State also embraces the option of refugee integration which leads to permanent infusion of refugees into the Kenyan populace. Other States such as the United States of America does not take in refugees but offers financial aid to countries that host refugees.

Since refugee laws allow for coordination between States, Kenya can work with the UNCHR to find resettlement opportunities in foreign countries.

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62 United Nations Meetings and Press Releases; General Assembly Adopts Declaration for Refugees and Migrants, 19th September 2016.

63 United Nations High Commissioner for Refugee Statute. UNHCR 1951 Convention Relating to the Status of Refugees.

(viii) *Holding Supporters of Terrorism Individually Responsible for Terrorism/Insecurity*

There might be reasonable grounds to believe that there is a group of people that sympathises with *Al-Shabaab*. It is only fair that the government holds people individually liable and not deal with the refugees as if they are all aiding the activities that have seen the security of the country deteriorate over time. The Refugees Act[64] provides for grounds under which a refugee or a member of his/her family can be expelled if there are reasonable grounds to believe that a threat is being posed to national security or public policy.

64 Section 21.

FROM THE SURGEON TO THE MORTICIAN: THE WORLD TRADE ORGANIZATION SUPERINTENDING THE DEATH OF MULTILATERALISM IN WORLD TRADE

Daniel Achach

1. Introduction

The World Trade Organization (WTO) was formed pursuant to the 1994 Marrakesh Agreement, frequently referred to as the WTO Agreement.[1] Article III of this Agreement provides the primary purposes of the WTO broadly stated as implementing and monitoring a set of global trade rules, settling disputes among member countries and negotiating new trade agreements.[2] In addition to the provisions of Article III, technical assistance to developing country members to allow the latter sufficiently integrate into the world trading system is, undisputedly, another imperative role of the WTO.

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1 The creation of the WTO was the product of over seven years of turbulent negotiations between 127 countries culminating in the most extensive international trade agreement ever concluded. The Marrakesh Agreement concluded on April 15th 1994 and in force since January 1st 1995 is the principal source of WTO law. It consists of a short basic agreement (of sixteen articles) and numerous other agreements included in the annexes to this basic agreement. It is referred to as the Marrakesh Agreement as it was concluded in Marrakesh, Morocco. World Trade Organization: The Legal Texts (Cambridge: Cambridge University Press)

2 A number of theories have been put forward as to WTO's actual or appropriate objectives, but there is much disagreement on the issue (Mercurio, Lester S, Arwel D and Kara L: 2008). Officially, WTO presents its three main objectives as a negotiating forum, providing a set of rules and helping settle disputes among Members {WTO, *Understanding the WTO* (WTO, Geneva, 2005) 8-13}. In addition, the WTO elaborates that the world trading system is governed by five key principles namely; non-discrimination, free trade through reduction in trade barriers, predictability through binding commitments, fair and undistorted competition and special treatment for developing countries.

On 29 July 2008, the Ministerial Conference called by the then WTO Director General Pascal Lamy in a final endeavour to complete the Doha Round of trade negotiations collapsed, thus ending the long period of post war multilateral trade liberalization.[3] Although partial agreements on some of the issues at the WTO's Bali Ministerial Conference in 2013 and Nairobi Ministerial Conference in 2015 may be a hopeful sign that the trade agreements may still be possible, the message remains clear: the future of WTO–led trade agreements is bleak; the waters at the world's trade body are turbulent and disturbed.[4]

What ails the multilateral trading system? Is the world witnessing the death and subsequent burial of the world's leading trade negotiations and trade-related dispute settlement body? Is the WTO through its Ministerial Conferences acting as a Mortician performing the final rites on the Doha Development Agenda (DDA)? What would the death of DDA portend of multilateralism in trade negotiations? Or is the WTO the Surgeon's operating table where the inherent frailties of the world trading system are being dissected, diagnosed and attended?

This paper seeks to interrogate these concerns by identifying the possible causes of the turbulence and unease being witnessed at the WTO post the Nairobi Ministerial Conference. It identifies four areas of concern ailing multilateralism namely; *The debacle of 'new issues' at the Doha Round, Shift in Geo-Politics, Impact of Regionalism and Mega-Regionals and Institutional Frailties at the WTO*. The paper postulates that unless the identified areas are addressed at once by the WTO and its membership, the future of multilateralism in trade negotiations remains on the brink of precipice and the subsequent Ministerial Conferences of the WTO could be but entombment meetings for the Doha Round and the multilateral negotiations altogether.

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3 The Ministerial Conference, a creature of Article IV of the WTO Agreement, is the supreme body of the WTO composed of minister-level representatives from all Member states and has decision making powers on all matters under any of the multilateral WTO agreements. The last Ministerial Conference of the WTO meeting, which was the first ever to be held in Africa, was held in Nairobi in December 2015.

4 Kent Jones, *Reconstructing the World Trade Organization for the 21st Century: An Institutional Approach* (New York: Oxford press, 2015)

1.1. The Debacle of the 'New Issues' at the Doha Round

The Doha Round is the latest round of trade negotiations among the WTO membership.[5] Its aim is to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules.[6] The work programme covers about 20 areas of trade.[7] The Round is also known semi-officially as the Doha Development Agenda (DDA) as a fundamental objective is to improve the trading prospects of developing countries.[8]

The Round was officially launched at the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001. The Doha Ministerial Declaration provided the mandate for the negotiations, including on agriculture, services and intellectual property topics,

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5 WTO's Ministerial Conference carries out its meetings through Rounds of Negotiations. These Rounds are named after the cities or countries where the agenda for the Round is set. The erstwhile round of negotiations was the Uruguay Round which led to the adoption of the WTO agreement itself. The current Round is referred to as the Doha Round as the first meeting that set the agenda was held in Doha, Qatar.

6 World Trade Organization(2016) *The Doha Round*, https://www.wto.org/english/tratop_e/dda_e/dda_e.htm

7 Among the areas of negotiation includes Agriculture, Services, Market Access for Non-Agricultural Products (NAMA), Trade Related Intellectual Property Rights (TRIPS), Trade and Investments, Transparency in Government Procurement, Trade Facilitation, WTO rules on anti-dumping, WTO rules on subsidies, WTO rules on regional agreements, Dispute Settlement Understanding, Trade and Environment, Electronic Commerce, Small Economies, Trade Debt and Finance, Trade and Transfer of Technology, Technical Cooperation and Capacity Building, Least Developed Countries, Special and Differential Treatment and Implementation Issues.

8 It has been argued that the phrase 'development agenda' has been a source of confusion as it meant different things to rich and poor countries. It was meant to signal to developing countries that the new trade round would give special consideration to their interests. It represented an honest effort to address developing counties' disappointment in the results of the Uruguay Round, particularly over the dashed expectations of widespread gains from textile and agricultural trade liberalization. However, WTO sponsored trade negotiations have been unable to offer a systematic and targeted development agenda. *Kent Jones, supra note 4.*

which began earlier. In Doha, Ministers also approved a decision on how to address the problems developing countries face in implementing the current WTO agreements.

One of the most divisive issues at the Doha Round negotiations has been whether the Doha Development Agenda as framed in 2001 still remains relevant and vital to the world trade today as it then was. The antagonists of the Doha Development Agenda have argued that the topography of world trade has momentously shifted over time and that the concerns of nations in trade today are no longer the same. Consequently, they have contended, there is necessity to re-visit, re-consider, re-examine, re-think, revise and possibly abandon the whole Doha Development Agenda in favour of the new issues that presently concern world traders and world trade relationships.

Notwithstanding the initial buoyancy in the Doha negotiations, rigidities and divergences amongst key trading countries and blocs made it stall. In the succeeding years, while the negotiations at times blinkered emblems of life, for the most parts prospects remained truncated.

Through the Nairobi Ministerial Conference, particular governments articulated the view that it is time to move on.[9] A number of issues were covered during the Nairobi Ministerial Conference, some of which do not form part of the original DDA. This then begs the question whether the Nairobi Conference was the culmination of the Doha Round and whether Doha is indeed still alive. Even more potent is the question of the impact of the death of Doha Round on multilateralism in trade negotiations.

To a considerable extent Nairobi Ministerial Conference was a positive achievement by the WTO in its quest to contain a fall out and to inspire confidence that multilateralism in trade negotiations is still alive. Notably, one of the areas of achievement in Nairobi was on export subsidies which has been one of the most divisive issues of the DDA.[10]

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9 Michael Froman, We are at the end of the line on the Doha Round of Trade Talks, Financial Times, December 13, 2015

10 "World Trade Organization Strikes 'Historic' Farming Subsidy Deal," BBC News, December 20, 2015, http:www.bbc.com/news/business-35145377.

There is now a formal decision on phasing out these subsidies.[11] Although the various carve-outs cleverly implanted in this agreement by negotiators imply that its efficacy might be somewhat less than suggested, and its full impact remains to be seen, it is a positive step all the same in this bumpy road.[12] Another positive outcome from Nairobi Ministerial Conference was that the WTO announced during the conference that new trade liberalization had been achieved through a second Information Technology Agreement (ITA-II), an agreement among 53 WTO members to lower duties, on a Most-Favoured-Nation (MFN)[13] basis on a wide range of technology products.[14]

The above positives notwithstanding, the chief disagreement among WTO members rages on. It is about the future of the Doha Development Agenda and to a larger extent questions the WTO's function as a negotiations forum. Should the WTO continue working on the Doha Agenda trying to complete the outstanding items or should it move on to other issues, and if so, which ones? This is the elephant in the room.

When the curtains finally fell on the conference, the Nairobi Ministerial Declaration referenced both positions without resolving the issue. The declaration states thus:

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11 World Trade Organization, "Export Competition: Ministerial Decision of December 19 2015," WT/MIN(15)/45, WT/L/980, December 21, 2015.

12 Lester Simon, 'Is the Doha Round Over? The WTO's Negotiating Agenda for 2016 and Beyond', Free Trade Bulletin, No. 64, February 11 2016.

13 Discrimination in matters relating to trade breeds resentment and poisons the economic and political relations between countries. Non-discrimination is therefore a key concept in WTO law and policy. MFN treatment obligation relates to whether a country favours some countries over others. The key provision dealing with the MFN treatment obligation for measures affecting trade in goods is Article 1:1 of General Agreement on Tariffs and Trade (GATT) 1994, whereas the corresponding provision for measures affecting trade in services is Article II:I of the General Agreement on Trade in Services (GATS).

14 The World Trade Organization, "WTO Members Conclude Landmark $1.3 Trillion IT Trade Deal," December 16, 2015, https://www.wto.org/english/news_e/news15_e/ita_16dec15_e.htm. As a result of these negotiations, approximately 65% of tariff lines were expected to be fully eliminated by 1 July 2016. Most of the remaining tariff lines would be phased out in four stages over three years. This means that by 2019 almost all imports of the relevant products will be duty free.

> We recognize that many members reaffirm the Doha Development Agenda, and the Declarations and Decisions adopted at Doha and at the Ministerial Conferences held since then, and reaffirm their full commitment to conclude the DDA on that basis. Other members do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations. Members have different views on how to address negotiations. We acknowledge the strong legal structure of this Organization.[15]

Speaking for the sceptics of the Doha Development Agenda, both the United States and the European Union emphasized the end of Doha and moving on to new issues and approaches. The United States trade representative Ambassador Michael Froman talked about a 'new phase in WTO's evolution, a new era for the WTO' and how WTO members will now 'be freed to consider new approaches to pressing unresolved issues and begin evaluating new issues for the Organization to consider.[16] The European Union noted on its part that 'Ministers also mapped out the future direction for WTO trade negotiations and started a debate on new issues that the WTO should address'.[17]

It is however not at once clear what the chief opponents of Doha, steered by the US and EU really want. Does the Doha Round need to be formally ended, or just renamed? The muddle in this debacle of the new issues at the WTO is vividly captured by Ambassador Froman as follows:

That route forward is a new form of pragmatic multilateralism. Moving beyond Doha does not mean leaving its unfinished business behind. Rather, it means bringing new approaches to the table. Doha issues are too important to leave to the Doha architecture that has failed for so long. Freeing ourselves from the strictures of Doha would also

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15 World Trade Organization, "Nairobi Ministerial Declaration," adopted on December 19, 2015, WT/MIN (15)/DEC, December 21, 2015, para.30.

16 "Statement by Ambassador Michael Froman at the Conclusion of the 10th World Trade Organization Ministerial Conference," December 2015. https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/december/statement-ambassador-michael.

17 European Commission, "WTO Delivers Ground-Breaking Deal for Development," December 19, 2015, http://europa.eu/rapid/press-release_IP-15-6379_fr.htm.

allow us to explore emerging trade issues. Many developing countries have encouraged new discussions on issues like e-commerce and the needs of small businesses.[18]

Whereas as noted above this issue was not resolved in the Nairobi Ministerial Conference, it remains the single biggest threat to the Doha Development Agenda and by extension to multilateral trade negotiations. This paper proffers that a way out must be found, and nigh fast if the WTO's function as a forum for trade negotiations is to be salvaged. It is suggested herein that a middle ground needs to be found by a clever infusion of the 'new issues' into the DDA and perhaps renaming the DDA to free the negotiations of its strictures. It is postulated herein that the collapse of the Doha Round negotiations would signal serious apprehensions regarding the ability and aptitude of the WTO to conduct multilateral trade negotiations. What is at stake in reviving the negotiating role of the WTO is its ability for all countries, developed, developing and least developed, to come together in a single forum to deliberate over market access and trade rules that will allow all countries to gain from trade on a non-discriminatory basis. This in essence is the hallmark of multilateral trade negotiations.

1.2. The Effect of the Shift in Geo-Politics on Trade Negotiations

For decades the multilateral trading system enjoyed political support while at the same time facilitating unprecedented economic growth. Member states of Organization for Economic Co-operation and Development (OECD) as well as emerging economies successfully pursued deeper economic integration and division of labour.[19] The establishment of the WTO in 1995 symbolized the political will that characterized the 1990s. After the end of the cold war, organizing cooperation without hegemony appeared possible.[20]

The post -cold war trading system was built on organizational principles in place since the 1940s. The General Agreement on Tariffs and Trade (GATT) which came into

18 Supra note 9.

19 www.oecd.org.

20 William A., Alfred E. and Richard L., *U.S Trade Policy: History, Theory and the WTO* (Routledge 2015).

being hot on the heels of the Second World War facilitated both economic integration and political cooperation. It is important to recall that GATT's legendary article I, the Most Favoured Nation (MFN)[21] clause was much more than an instrument for trade liberalization.[22] After the dreadful experiences of 1930s, characterized by competitive deflations and a dramatic rise in protectionist policies, the architects of the post war regulatory architecture sought to develop instruments that would facilitate peaceful cooperation.[23] The recipe worked well for the GATT member countries.[24]

One of the causes of turmoil at the WTO today can be attributed to the shift of geopolitics in trade negotiations.[25] Maximizing the gains from trade on a global basis requires a framework for global trade negotiations and rules that can somehow align

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21 Supra, note 12.

22 The Appellate Body observed in *EC-Tariff Preferences* (2004) that it is well established that the MFN treatment obligation set out in article I:I of the GATT 1994 is a 'cornerstone of the GATT' and 'one of the pillars of the WTO trading system'

23 Due to technological innovations resulting in a dramatic fall in transport, communication and computing costs, the natural barriers of time and space that separate national economies have been coming down. Between 1920 and 1990, average ocean freight and port charges for US import and export cargo fell by almost 70%. Between 1930 and 1990, average air-transport fares per passenger mile fell by 84%. As noted by Thomas Friedman in his 2005 book, The World is Flat-A brief History of the Globalized World in the Twenty First Century: Clearly, it is possible for more people than ever to collaborate and compete in real time with more other people on more different kinds of work from more different corners of the planet and on more equal footing than at any previous time in the history of the world-using computers, e-mails, networks, teleconferencing and dynamic new software.

24 After the disintegration of the Soviet Union, the former Eastern Bloc was integrated in the existing trading system. Negotiations with the Russian Federation were most difficult, but after almost twenty years of negotiating, the country joined the WTO in 2012 as its 156th Member.

25 Leadership of the world economy by the United States, in particular, has diminished. The Doha Round is therefore without an effective champion. Slowing US economic growth, controversial US foreign policies especially in Iraq and US presidents perceived to be with either low international esteem (George W Bush) or limited interest in trade liberalization (Barrack Obama) are contributing factors. (Kent Jones:2015)

the interests of all participants in favour of universal trade liberalization. The GATT played this role in the years after World War II and was remarkably successful. The major players, led by the United States and the Europeans, were developed countries with similar attitudes regarding the main issues of trade liberalization who would lead the way on the agenda, what would be negotiated, who would participate, and where the lines would be drawn between economic policies subject to trade negotiations and those that would be off-limits.[26]

The GATT system rested on a foundation of delicate political balances and compromises, all of which were integral parts of its institutional structure. The success of the GATT made countries hungry for even more trade expansion, giving rise to negotiations for a new and expanded trade framework in the Uruguay Round, resulting in the establishment of WTO.[27]

The test for WTO's ability to continue the GATT tradition of multilateral trade liberalization would come in the next big negotiation, the Doha Round.[28] The path to a Doha Agreement was not easy because the world and the trading environment

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26 There has been a change in the bargaining power of the GATT/WTO system away from dominance of the United States and European Union and toward the emerging markets. India and Brazil joined the new 'Quard' group shortly after the Doha Round was launched. The Quard countries previously composed largely OECD members, had served as the foundation for agreement in the Uruguay Round, but the new, more diverse Quard contained positions that could not be reconciled among its members. (Kent Jones:2015)

27 The WTO was an unintended by-product of the Uruguay Round negotiation. It was not included in the negotiating mandate of the Uruguay Round established in the Ministerial Meeting at Punta del Este in 1986. The concept of a new trade organization developed as a derivative of other concerns that surfaced during the negotiation process. One such early concern was coherence, which specifically referred to institutional cooperation between the GATT, IMF and World Bank.

28 Supra, note 5.

had changed in many fundamental ways.[29] High economic growth had shifted from developed to developing and emerging market countries, which thereby gained negotiating power. This situation created conflict with many of the old GATT rules and procedures that the WTO had retained. Hunger for more trade brought new sectors into the negotiations, such as agriculture and services, which were politically very sensitive in most countries.

Globalization had created fear and uncertainty in many countries over the impact and adjustment cost of new international competition, and institutional boundaries on what issue would be subject to trade negotiations were being challenged in an atmosphere of economic anxiety.[30] Domestic political economies in each of WTOs member countries had to grapple with new and difficult trade-offs in pursuing national policies on trade liberalization, and many of the new WTO members had political institutions and preferences that diverged from those of countries that had spearheaded trade liberalization in the past. Internal WTO stresses, domestic political tensions over trade in many countries, and conflicting views among WTO members have created difficult conditions for Doha negotiations.[31]

Departure from the global regulation of trade is resulting in the return of large preferential trade agreements. This is a parallel to the 1930s. Then as now, the global economy was increasingly divided into blocs, and in trade, one observed a distinction

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29 The WTO membership has grown too large and diverse, there has been a change in bargaining power away from the US and EU, leadership of world economy by the US has diminished, the world has been distracted by other crises like global warming and terrorism, business interests have turned toward regional and global value chains and countries have become weary of making binding new WTO commitments. (Kent Jones:2015)

30 In the *Lexus and the Olive Tree-Understanding Globalization* (2nd edn First Anchor Books, 2000) 9, Thomas Friedman defines globalization thus: it is the inexorable integration of markets, nation states and technologies to a degree never witnessed before-in a way that is enabling individuals, corporations and nation-states to reach around the world farther, faster, deeper and cheaper than ever before, and in a way that is enabling the world to reach into individuals, corporations, and nation-states farther, faster, deeper and cheaper than ever before.

31 Ibid.

between trade with allies and trade with rivals.[32] The new and very large trade projects namely the Transatlantic Trade and Investment Partnership (TTIP) and the Trans Pacific Partnership (TPP) both underline this trend.[33] The participation of the US in these projects cannot be underscored, and so does the conspicuous absence of the emerging market countries like China, Russia, India, Brazil and South Africa.

This paper argues that the obvious impact of this shift in geopolitics and the political tensions that accompany it is a structural weakening of the WTO and undermining of the existing multilateral order. There is an obvious conflict between the developed world and the emerging market countries. The steps that the emerging market countries, especially BRICS,[34] will take in response to the large preferential trade agreements being pursued by the developed world remains to be seen. Will they come to the rescue of the multilateral system, or will they seek instead to develop their own trade policy strategies outside the WTO?[35] This, it is argued, is one of the threats currently facing and shaking the WTO's role as a forum for multilateral trade negotiations.

1.3. The Impact of Regionalism and Mega-Regionals

Though numerous countries began concluding Regional Trade Agreements (RTAs) well before the Doha Round began in 2001, they seem to have reinvigorated their

32 Supra note 19.

33 TTIP is primarily a deal to cut tariffs and regulatory barriers to trade between the US and EU countries, making it easier for traders on both sides of the Atlantic to access each other's markets. TPP on the other hand is a free trade agreement between the US and 11 other countries including Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. This agreement has been criticized, inter alia, as attempts by the US to regain control of the world economy and a reaction to China's rise given the conspicuous absence of China in both agreements.

34 Brazil, Russia, India, China, South Africa.

35 There is already under negotiations a Continental Free Trade Agreement among African countries largely viewed as a reaction to the TTIP and TPP arrangements.

interests in such agreements since the Doha Round bogged down.[36] Lately, and as already noted in the foregoing section of this paper, a trend has emerged in which large countries are now negotiating RTAs with other large countries, and with larger number of countries, especially in Asia.[37] These large RTAs have acquired the nomenclature of 'Mega-Regionals', a term that appears to have acquired unanimous acceptance of usage among international trade lawyers, economists and scholars.

RTA negotiations of this expanded scope in principle involve larger potential gains from trade, but also more difficult obstacles to an agreement, since they involve countries in which there is more equally balanced bargaining power.[38] If the partners already trade extensively with each other, the RTA agenda will typically try to expand the scope of products and rules under negotiation, perhaps breaking new ground in trade cooperation and possibly establishing precedents for future multilateral agreement in the WTO. In fact, it has been argued that the big RTAs in the post Doha period appear to aspire the sort of high impact trade liberalization on a regional scale that WTO could not deliver in the Doha Round itself.[39] Should this be a positive or a negative score on WTOs board? This paper uses the TPP and TTIP to attempt an answer to this concern.

The TPP was the most ambitious trade agreement under negotiation in 2013/2014 when the talks included twelve countries.[40] TPP negotiations grew out of an earlier agreement that included Brunei, Chile, New Zealand and Singapore, concluded in 2006.[41] The TPP is particularly significant to the future course of global trade policy because of its ambitions for a deeper integration among a large number of countries. The TPP

36 According to WTO, as of 1st July 2001, some 635 notifications of RTAs (counting goods, services and accessions separately) had been received by the GATT/WTO. Of these, 423 were in force. This should be compared to just under 200 RTAs that had been notified to the WTO as at 2001 when the DDA was formulated.

37 Supra, note 33.

38 Kent Jones, supra.

39 Ibid.

40 Supra note 33.

41 Australia, Peru, the US and Vietnam joined this group opening up negotiations for a larger agreement in 2008, subsequently joined by other TPP countries.

agenda is extremely broad in its coverage and more ambitious in several aspects than the DDA.[42] If such an ambitious RTA is concluded, it will definitely bring to fore the contest between regional liberalization through RTAs versus multilateral liberalization through WTO. Some authors have however argued that concluding TPP would be positive to WTO in the sense that its ambition to cover a wide range of products could provide a blue print and a precedent for global trade liberalization in the future.[43]

TTIP is another child of the suspended Doha Round. Like the TPP, its potential for expanding the gains from trade is enormous. The US and EU carry on the largest bilateral commercial relationship in the world economy with approximately $3.7 trillion in joint cross border direct investment.[44]

The TTIP is of special interest to the future course of WTO negotiations. This is so because as the two largest and wealthiest services-oriented economies of the world, the negotiations provide the best hope of achieving progress in liberalizing services trade and reducing technical and regulatory barriers. Trade liberalization in these areas could establish bench marks for global liberalization later. Both have highly protected agricultural sectors that have posed major problems in WTO negotiations with developing countries and it has been argued elsewhere that a mutual agreement to scale down such protection through subsidy reductions could remove a major impediment to further multilateral trade liberalization.[45]

The recent proliferation of RTAs appears to be motivated largely by a strong desire among WTO members to achieve trade liberalization on a bilateral and regional basis while the Doha Round has in the meantime failed to deliver an agreement. While the

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42 There are 29 proposed chapters, covering trade in industrial goods, services, agriculture, as well as labour, safety and environmental standards, rules of origin, rules on intellectual property, competition policy (including state owned enterprises), investment, government procurement and safeguards and TPP dispute settlement procedures.

43 Schott, Jeffrey J (ed), *Free Trade Agreements: US Strategies and Priorities* (Washington DC: Peterson Institute for International Economics 2004).

44 HLWG (High Level Working Group on Jobs and Growth) (2013). Final Report, February 11. Washington and Brussels: USTR and European Commission.

45 Supra note 43.

gains from trade would be maximized through a comprehensive WTO agreement, it is debatable whether harnessing this desire through RTAs would eventually revive or diminish a desire for a WTO agreement. As already noted, both TPP and TTIP as mega regionals have immense opportunity to provide break-through in critical areas that largely led to impasse at Doha Round. Through this TPP and TTIP can revive WTO-based multilateralism, covering substantial trade flows and proposing new rules and market opening measures.[46]

A successful agreement on major new trade provisions would be likely to attract interest by other countries either in joining the agreement or negotiating similar agreements or calling for WTO negotiations to multilateralise the agreements. The biggest danger is that the contentious issues will merely replicate Doha Round problems, leaving new deals to wither on the vine (Kent Jones: 2015).

An RTA achieved on the strength of strong common interests among the partners must contain elements for nurturing wider acceptance in order to move all WTO members closer to consensus. In the debate on the role of RTAs and mega-regionals in multilateral trade liberalization, it is the capacity of governments standing behind the RTA to welcome new members and further trade liberalization that makes the biggest difference and this is a matter of political, economic attitude, confidence, outlook and commitment of the governments.[47]

The argument advanced herein is that while the content of the mega-regionals may provide the potential for globalizing market access and rules, this is not the end of the story. It turns on the decisions by large trading countries, in this case the US and the EU, to pursue a proper follow up to their mega-regionals to push for a WTO agreement that would signify that the mega-regionals are building blocs as opposed to stumbling blocs to multilateralism in trade negotiations.

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46 Schott, Jeffrey, Barbara Kotchwar, and Julia Muir, *Understanding the Trans-Pacific Partnership* (Policy Analysis in International Economics2013).

47 Bhagwati, Jadish, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford University Press, Oxford and New York 2008).

This then takes us back to the question of controlling power at WTO negotiations pitting developed countries led by US and EU against emerging economies led by BRICS. Is the US and EU attempting to wrestle the controlling power through these mega-regionals by setting blue prints in forums where the emerging economies have no say? One notices without much ado that the expanded scopes of TPP and TTIP basically include negotiations on issues which the US and EU have tried to introduce in the WTO and christened as 'new issues' and dealt with in the preceding sections of this paper. The question for WTO and advocates of multilateralism is what the success of TPP and TTIP especially on the 'new issues' would portend for them and how WTO should react to these developments.

1.4. The Institutional Frailties at the WTO

Besides the preceding factors which can essentially be perceived as outward dynamics on WTO's negotiating role, there are also a glut of internal concerns regarding the structure and functioning of the WTO that can be directly allied to the impasse at the Doha Round. This paper contends that the more the membership of WTO inflates, and brings with it the assortment of nations in terms of their levels and sophistication of development, the more these internal weaknesses become bare and the more they continue to dog the functioning of WTO as a negotiating forum for trade liberalization.

First among these is the principle of Single-Undertaking. This is a principle under the WTO law which requires that every item under negotiation is a part of the whole as an indivisible package and cannot be agreed separately.[48] Nothing is agreed until everything is agreed. For many developing countries, the single undertaking commits them to substantially more trade obligations than previously required under the GATT regime.[49] For the developed world which already adheres to most of the existing pacts, this requirement entails just a few additional commitments. Coupled with the scaling back of the SDT provisions, the single undertaking was intended to lead to a more integration of the developing world into the multilateral system. It was understandably

48 Paragraph 47 of the Doha Ministerial Declaration. WT/MIN (01)/DEC/1; 20 November 2001.

49 Schott Jeffrey J Johanna W Buurman, *The Uruguay Round: An Assessment* (Washington: Institute for International Economics).

regarded by many nations as the key to reaching a broad consensus on all the new WTO issues and unifying the system of rights and obligations for all members.[50]

It could have provided the framework for a large package of Doha Round agreements if the diversity of basic views on market access among major players on agriculture and services had not been so great.[51] This problem was linked with the very extension of WTO coverage into new and politically sensitive sectors. Agriculture, as noted earlier, had been largely exempted from GATT disciplines due to strong domestic support for protection in the US, and later the EU. In the Doha Round, India proved to be the most intransigent opponent to liberalized agricultural market access at home, due to vulnerability of its hundreds of millions of farmers to import competition.[52] Services trade liberalization was perhaps even more problematic since much of the sector was subject to domestic regulation, another national sovereignty issue.

Thus a Doha Round agreement including agriculture and services proved to be extremely difficult to negotiate among a disparate set of countries, many of which guarded their sovereignty over these sectors. The single undertaking and the new product coverage thereby contributed to an institutional breakdown in the WTO's ability to secure consensus.

Another key issue at the WTO that might have led to the impasse at the Doha Round is the Trade Related Intellectual Property Rights (TRIPS) agreement. This was a product of the Uruguay Round and which has been widely considered by the developing countries as having undermined the basic expectation that trade liberalization would unambiguously benefit all parties. The TRIPS agreement essentially protects the

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50 Martin, Will, and Aaditya Mattoo, eds. *Unfinished Business? The WTO's Doha Agenda* (Washington, DC. World Bank 2011).

51 By the time the Doha negotiations required negotiators to make meaningful progress on liberalization in these sectors, it became clear that WTO membership exhibited huge divergences in bargaining positions, making a single undertaking "package" deal virtually impossible.

52 Jones, Kent, *The Doha Blues: Institutional Crisis and Reform in the WTO* (New York: Oxford University Press 2010).

monopoly rights of Intellectual Property Rights (IPR) holders.[53] For developing countries, the cost of implementing TRIPS and of IPR compliance far outweigh the remote benefits, and their bargain on this agreements is largely questionable.

Even if the Uruguay Round was beneficial to all countries, the prospects that a single negotiating issue could systematically reduce the welfare benefits of certain countries makes such countries wary of engaging in new trade agreements particularly with politically sensitive issues such as services. This has to a larger extent slowed the ambition to reach consensus at the Doha Round.

Another discernible institutional frailty at the WTO was the entry of China into the membership of WTO. China has been largely looked at as a disruptive member of the WTO given its massive exporting capacity in labour intensive goods which raises fears among many countries, both developed and developing, of surges in Chinese exports that could threaten their domestic industries, as well as other exporting countries markets abroad. Consequently, any trade liberalization in goods that China exports will be negotiated in the shadow of these fears until its ability to disrupt politically sensitive markets is offset by the prospects for other WTO members to gain new and valuable access to Chinese domestic markets.

2. Conclusion

The WTO was hardly underway before participants, observers and academics began to propose ways that its structure or procedures might be upgraded. The amount of suggestions grew after each setback for the system, most especially the unsuccessful ministerial conferences of 1999 and 2003 and the general slowdown in the negotiations thereafter.

53 The economic arguments for protecting IPRs lie in their contribution to incentives for innovation. Yet the merits of this case imply the need for the World Intellectual Property Organization (WIPO) to be responsible for global IPR protection. Unfortunately WIPO has no effective enforcement powers and it is highly unlikely that TRIPS will ever be carved out of WTO. Jones, Kent. Supra.

Sometimes the problem for the trading system comes not from a lack of ideas but from a surfeit of them. The field of trade policy lies at the intersection of politics, economics and law. The future of the WTO and the theorists and practitioners in these three disciplines do not always understand one another. Lord Salisbury warned that, "If you believe doctors, nothing is wholesome: if you believe the theologians, nothing is innocent: if you believe the soldiers, nothing is safe. They all require their strong wine diluted by a very large admixture of insipid common sense".[54]

The same might be said of the lawyers for whom no agreement is sufficiently clear, the economists for whom it is never sufficiently open, and the politicians who will always demand wiggle room. One can never fully satisfy all three groups, but must instead fall back upon common sense in resolving the three groups' sometimes contradictory advice. Considering the fact that trade agreements are usually negotiated by lawyers who must answer to politicians, the general trend is for the preferences of those two groups – and perhaps the politicians above all – to be privileged over those of the economists. This has made for a system in which the exceptions often outnumber the rules, but in which the rules do matter and the economic consequences are significant. It also means that observers can have very distinct views of what ails the trading system, and may propose radically different solutions.

In view of the discussion herein, it is the author's view that the future of WTO as a negotiating forum for multilateral trade liberalization is threatened post Nairobi than ever before. The Nairobi Ministerial Conference served as a reminder of how deep the ailment has permeated WTO, and unless the actors take steps to realign the identified dents at WTO, the latter stands a serious risk of vanishing with the Doha Round.

54 Andrew, Roberts, ed, *Salisbury: Victorian Titan* (Kindle Edition 2012).

THE HUMAN RIGHTS OF TERRORISM SUSPECTS IN KENYA

Maurice Oduor

Abstract

In the 21st Century, the phenomenon of Terrorism has become one of the terrifying threats to human existence, security and wellbeing. It is now a global threat and a new battlefront for the international community. Terrorism today is not just a threat to individual western European states, but the international community as a whole. The new terrorists' mantra, 'you are either with us or against us' effectively places everyone at risk. The apparent disregard by terrorists in recent times, for some of their victim's race, religion, gender, age *et cetera* and therefore treat such victims as collateral damage in the execution of their broader scheme, has galvanized the position of the international community against terrorism. This article focuses on the balance of security concerns and the protection of the rights of terrorism suspects during the fight against terror in Kenya. This article seeks to strike a balance between the protection of national security *vis-à-vis* the rights of terrorism suspects.

Because of the above, states, including Kenya are increasingly compelled to take extraordinary steps to combat this vice. The traditional measures of dealing with suspects of ordinary crimes (apprehension and custody by law enforcement agencies and due process of the law) have been put to the real test while dealing with terrorism suspects, considering the peculiar nature of terrorism, its evolving nature and threat.

In the face of rising global acts of terror and the response of states to the same, this article with specific reference to Kenya seeks to reaffirm the significance of balancing the interest of national security on the one hand and the human rights of terrorism suspects on the other, within the realm of both national and international law. The author believes that even in the course of protecting domestic and international peace and security, the rights of terrorism suspects must still be protected in conformity with the principles of the rule of law. Given the preceding, reference is made to the laws of Kenya and other states and relevant international instruments and case law to support

the assertion. A comparative analysis of the practice of selected countries has been conducted.

1. Introduction

Human rights according to most Natural Law philosophers[1] are universal and inalienable. However, history is replete with examples of the gross violation of human rights, for example; the Holocaust of the Jews, the Rwandan genocide, genocide in the former Yugoslavia to mention a few of the extensive human rights violations perpetrated by humankind against their own. Historically, differences between peoples have been settled by armed conflict. Where the military strength was unequal the weaker side resorted to guerrilla warfare, although within the customs armed conflict. For example, the African National Congress (ANC) in South Africa waged guerrilla warfare against the apartheid regime, but within the limits of international humanitarian law. Sudan Peoples' Liberation Army (SPLA) in waging both conventional and guerrilla warfare against the Republic of Sudan adhered to the laws of armed conflict.

However, in recent times, those who perceive themselves as victims of historical injustices or have other grievances but are militarily challenged and disadvantaged have adopted and perfected terrorism as the method of choice in waging war. It is noted that, "In the history of human civilization terrorism has been used by individuals and organizations in causing terror."[2] The human cost of terrorism has been felt in virtually every corner of the globe.[3]

Considering the above, the question of combating terror and at the same time respecting the human rights and fundamental freedoms of terror suspects has come to the fore. The problem of terrorism and the rights of the suspects is a controversial

1 John Locke, Thomas Aquinas, Jean Jacque Rousseau etc.

2 B. Rastegari, R. Nordin, Counter-Terrorism and the Risk of Human Rights Violation within ASEAN: Narrative of Balancing between Security and Human Rights (See Introduction, opening sentence p. 1), Paper presented in the International Conference Harmonizing Legal Principles toward ASEAN Community, April 2, 2012.

3 Human Rights, Terrorism and Counterterrorism, Fact Sheet No. 32, See, Introduction p.1. Office of the United Nations High Commissioner for Human Rights.

one, both countries and human rights activists. In recent times, numerous states, have become victims of terror attacks and been epitomized by the 11th September attacks[4] in the United States, the West Gate[5] and Garissa University terror attacks[6] in Kenya and the Paris[7] and Nice[8] terror attacks in France, the Bayern attack.[9] The United Nations have not been insulated from terror attacks, "the United Nations family has itself suffered tragic human loss as a result of violent terrorist acts. The attack on its offices in Baghdad on19 August 2003 claimed the lives of the Special Representative of the Secretary-General, Sergio Vieira de Mello, and 21 other men and women, and injured over 150 others, some very seriously."[10]

In the wake of the said attacks, states are increasingly adopting new measures and laws to counter the terror attacks. In recent years, however, the measures taken by

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4 September 11 attacks in the United States are synonymous by the attack on the Twin Towers by aircrafts.

5 This attack took place in Nairobi, Kenya on Saturday 21 September 2013 where a shopping mall was attacked and about 69 people shot dead in a terror attack.

6 This attack took place in Garissa a town in North eastern part of Kenya towards the Somalia border on 2 April 2015, where approximately 120 students were shot dead by Al Shabab terrorists.

7 The coordinated terrorist attack on the evening of 13 November 2015 in Paris that killed at least 129 people and injured more than 350 others — all in a matter of minutes. The assaults unfolded at various locations throughout the French capital and its suburbs, among them restaurants, a popular nightclub, and a soccer stadium.

8 On Thursday 14th July 2016, A truck, a 19-ton refrigeration vehicle rented by the assailant on Monday, sped down the crowded seaside promenade in Nice around 10:45, going about 1.1 miles eastward. The assailant exchanged gunfire with three police officers before he was shot to death. At least 84 people were killed — including 10 children and teenagers — and 303 were wounded. Of those wounded, 121 remain in hospitals, 26 of them in intensive care. Foreigners among the dead included three Germans, two Americans, two Tunisians and a Russian. At least three other Americans were injured (The New York Times, July 15, 2016)).

9 At least nine people were killed and 16 others injured Friday in a shooting rampage at a busy shopping district in Munich, Germany, police said *(CNN, July 23 2016)*.

10 http://www.un.org/apps/news/story.asp?NewsID=8023# UN News Centre, Top UN envoy Sergio Vieira de Mello killed in terrorist blast in Baghdad.

States to combat terrorism have themselves often posed severe challenges to human rights and the rule of law.[11] The reaction of states to terror attacks continue to create concern. In specific reference to the September 11 attacks in the United States, it is noted that, "as the response of governments worldwide to the September 11 attacks some governments have introduced and enacted new legislation and series of measures affecting civil liberties and violating human rights."[12] The United Nations on its part, with the intention of assisting states develop legal frameworks, capable of regulating matters touching on terrorism and human rights, has adopted a draft international instrument with an acceptable definition of terrorism and conscious of human rights of terror suspects.[13] The measures taken by states in combating terror and which are contrary to fundamental rights and freedoms include denial of bail, unduly prolonged detention, *incommunicado* detention, torture, among others.

Kenya's strategies in combating terror at various levels, appear to have been influenced by among others, the following terror attacks both at home and abroad; the Mpeketoni attack in Lamu on the night of 5–6 July 2014, where it was reported that at least 29 people were killed in two deadly shooting attacks[14], the West Gate Mall terror attack, on Saturday 21 September 2013, where 69 people were shot dead in this upmarket mall in Nairobi[15], the Garissa University terror attack on 2 April 2015, where approximately 148 students were shot dead by Al Shabab terrorists[16], the Mandera Quarry attack on 7th July 2015 where suspected Al-Shabab terrorists attacked a residential area in Mandera Town, killing 14 people and injuring 11 others.[17] The attack was similar to another in which 36 quarry workers were massacred in December 2014 and the Mandera Bus

11 Office of the United Nations High Commissioner for Human Rights.

12 http://www.academia.edu/795832/CounterTerrorism_and_Risk_of_Human_Rights_Violation_within_ASEAN_Narrative_of_Balanceu_between_Security_and_Human_Rights.

13 Draft Comprehensive Convention against Terrorism.

14 http://www.bbc.com/news/world-africa-28181246.

15 *Foreign policy .com/2015/.../Nairobi-Kenya-Westgate Mall-attack-al-shab.*

16 *www.bbc.com/news/world-africa-32169080.*

17 *www.nation.co.ke .*

attacks where at least 28 people were shot dead by suspected Al Shabab terrorists,[18] the El Ade terror attack in Somalia, at dawn on the 15 January 2016, when *Al*-Shabab militants launched an attack on a Kenyan army base in El Ade (Somalia).[19] The El Ade attack has been followed once more by most recent terror attack once persons suspected to be Al-Shaba militants on the 27th January 2017. It is held that, "...suspected Al Shabab militants had attacked a Kenyan military camp in Kulbiyow, Lower Jubba, Somalia, some 18 kilometres from the Kenyan border."[20] The reports claim that 57 soldiers belonging to Kenya Defence Forces were killed in the dawn attack.

As a response to the preceding the Kenyan state has adopted several counter-' terror strategies among them; the proposed *Nyumba Kumi* initiative,[21] which is influenced by the thinking that security is a collective responsibility. This thought was supported by the President of the Republic of Kenya Uhuru Muigai Kenyatta in his statement that, "Security is a shared mandate of all people living in Kenya. The first rule of security is vigilance...we must all embrace *Nyumba Kumi*."[22] The background to *Nyumba Kumi* or community policing in Kenya was launched by the government in April 2005,[23] in response to security challenges and a need to adopt new strategies with the involvement of the community at the centre of security measures. Other plans which have raised human rights concerns include, surveillance measures against members of the public, including terror suspects by the security agencies in Kenya. Concerning the preceding, it was also reported that, "Without warning... Safaricom, Kenya's largest telecoms operator, had contracted with the government to provide a new communications and street-level surveillance system. The new system integrates 2,000 video surveillance cameras, video

18 *www.nation.co.ke/news/-/1056/2531918/-/15rilibz/-/index.html.*

19 www.bbc.co.uk/news/world-africa-35364593.

20 http://www.nation.co.ke/news/Shabaab-militants-raid-Kenya-military-camp/1056-3789070-xfh55i/.

21 This is an initiative of the Jubilee Government in Kenya to have houses clustered into groups of ten (10) in a neighbourhood with a view of sharing security-related information with law enforcement agencies.

22 H.E. Uhuru Kenyatta, C.G.H. The President of the Republic of Kenya, 20th October 2013.

23 Republic of Kenya, Draft Guidelines for Implementation of Community Policing –Nyumba Kumi Usalama wa Msingi, p.1, Government Printer.

conferencing, digital radios, and a mapping system into a central command center."[24] Violation of privacy[25] has been raised in relation to gathering of phone data without the consent of subscribers and justified under the National Intelligence Service Act. [26] The unlawful acts according to Human Rights Watch include; Tapping of telephones, raids on homes of terror suspects, freezing of accounts of people and institutions suspected of links with terror groups for example an organization in point was the Muslim for Human Rights International (MUHURI),[27] whose bank account was frozen, leading to a legal suit,[28] and the torture and abuse of terror suspects which is corroborated by Human Rights Watch which claimed that there was "evidence of arbitrary arrests and mistreatment of terrorism suspects in detention."[29] There was also a concern about extrajudicial killings which were supported by various reports for example, "in August 2014, Human Rights Watch found evidence of at least 10 cases of extrajudicial killings of terrorism suspects by the Anti-Terrorism Police Unit (ATPU)[30], *et cetera*. States have also adopted new laws which detain terror suspects beyond the statutory prescribed

24 Ephraim Percy Kenyanito, 'Surveillance in a legal vacuum: Kenya considers massive new spying system' (13 June 2014).

25 Article 31 of the 2010 Constitution of Kenya, which states: "Every person has the right to privacy, which includes the right not to have… (d) the privacy of their communications infringed".

26 Section 36.

27 MUHURI is a civil society organization (CSO) based in the coastal region of Kenya that has been involved in promoting good governance and respect for the human rights of marginalized groups since 1997.

28 *Muslims for Human Rights (Muhuri) & another v Inspector-General of Police & 4 others* [2015] eKLR.

29 'Kenya: Killings, Disappearances by Anti-Terror Police,' Human Rights Watch, 18 August 2014.

30 https://www.hrw.org/world-report/2015/country-chapters/kenya.

periods[31], *incommunicado* detention,[32] detention without the option of bail, among others.

Considering the above, there are concerns as to whether these strategies and laws conform to national law, constitutional provisions and even international human rights standards. Questions have arisen as to the constitutionality of such measures, their conformity to the rules of natural justice, adherence to due process and respect for human rights in general.

This article attempts to illustrate the challenges posed by terrorism and the response by Kenya both in practice and via law and whether or not they conform to national, regional and international human rights instruments. It begins by providing an analysis of the legal definitions of human rights and terrorism, and then moves on to consider the human rights of terrorism suspects and particularly in Kenya supported by both statutes and case law. Subsequently analysis of how international instruments provide for the human rights of terror suspects is conducted. The need to balance between the interests of terrorism suspects and those of national in Kenya in the war against terror is postulated. The right to self - defence and respect of human rights of terror suspects is also discussed. Relevant legislation and case laws are cited to further shed light on the human rights of terror suspects and national security interests of the state. Recommendations and conclusions are made consequently.

2. Legal Definitions

It is granted that definitions are often not uniform. The preceding notwithstanding, definitions often have a 'golden thread' weaving through them. It is this 'golden thread' which we must have in mind as we engage in academic discourse. It is therefore incumbent that, in discussing terrorism and the balance between national security concerns and the protection of terrorism suspects' human rights, as topics in legal academic discourse,

31 http://www.standardmedia.co.ke/article/2000203109/two-isis-suspects-detained-for-30-days-as-police-foil-terror-attacks.

32 Ibid, Two Terror suspects Abubakar Jillo Muhamed and Kigizo Mgutu were held for over thirty days in an undisclosed location to pave way for investigations.

provisions be made of the legal definitions of terrorism and human rights in order to infuse greater clarity in the said discussion. Given the previous, the descriptions of terrorism and human rights are provided below.

2.1. Terrorism

There is no universally accepted definition of terrorism. In the United Nations General Assembly (UNGA) in 2001, the representative of the Czech Republic stated that, "the assembly could make an enormous contribution if it provided a general definition of terrorism, as this was a missing element in the international legal and political framework."[33] The speaker believed that, the "definition would also help to distinguish political from private violence, eliminating the overreach of the many 'sectoral' anti-terrorism treaties"[34]. The definition would also distinguish between a 'terrorist organization' from a 'liberation movement'[35] and that, "a definition may also help to confine the scope of UN Security Council resolutions, since 11 September 2001, which have encouraged states to pursue unilateral and excessive counter-terrorism measures."[36]

The quest to arrive at an accepted definition of terrorism can be traced to 1996, in the discussions, initially at the resolutions and decisions adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, at its forty-eighth session, Resolutions 1996/1 on the Situation in the Middle East and, having in mind Commission on Human Rights resolution 1996/7 of 11 April 1996 stating that:

"....supporting the declaration adopted at the Summit of Peacemakers held at Sharm-El-Sheikh, Egypt, on 13 March 1996, which had as its objectives enhancing the peace process, promoting security and combating terrorism, condemning acts of terrorism,

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33 Jori Duursma, December 20, 2008, Harvard International Review, Definition of Terrorism and Self Determination.

34 Ibid.

35 The prime reason is the standoff with the Organization of the Islamic Conference (OIC). The Arab Terrorism Convention and the Terrorism Convention of the Organization of the Islamic Conference (OIC) define terrorism to exclude armed struggle for liberation and self-determination.

36 Ben Saul, *Defining Terrorism in International Law* (Oxford University Press 2008).

from whatever source, in the Middle East which seek to undermine the peace process.."[37] It further expressed, "…full support for the achievements of the peace process thus far, and encouraging the continuation of negotiations,"[38]

The above efforts later progressed, when the UN General Assembly established an *Ad Hoc* Committee to support the efforts of the Sixth Committee to draft new treaties against terrorism.[39] Since 2000 the *Ad Hoc* Committee has focused on the drafting of a treaty against nuclear terrorism and a comprehensive convention against terrorism, and since 2005 it has focused exclusively on the latter. The definition of terrorism is still contentious, thus the concession that, 'agreement on a universally acceptable definition of the term, however, remains problematic'.[40]

In the broad sense of the word, terrorism refers to the use of force for political purposes such as to create fear, draw widespread attention to a political grievance and, or to provoke a draconian or sustained response from the targeted state.[41]

The above definitional challenges notwithstanding, there have been attempts to come up with an agreed definition of terrorism. The working definition of terrorism under consideration by the *Ad Hoc* Committee of the General Assembly is the following:[42]

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37 Human Rights Library, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 48th Session, U.N. Doc. E/CN.4/Sub.2/1996/41 (1996). Part 1.

38 Ibid.

39 D O'Donnell, 31-12-2006, International treaties against terrorism and the use of terrorism during armed conflict and by armed forces, International Review of the Red Cross, No. 864.

40 Ibid.

41 James D. Kiras, 'Terrorism and irregular warfare,' John Baylis, James Wirtz, Eliot Cohen, and Collin S. (eds), *Strategy in the Contemporary World, 'Introduction to Strategic Studies* (New York: Oxford University Press, 2002) p 221.

42 Article 2, Draft Comprehensive Convention against International Terrorism.

> (1) Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
> "Death or severe bodily injury to any person"; or
> "Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment"; or
>
> "Damage to property, places, facilities, or systems referred to in paragraph 1(b) of the present article resulting or likely to result in major economic loss." In addition, "when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act."

Terrorism can also be defined as 'criminal acts intended or calculated to provoke a state of terror in the general public, or a group of persons or particular persons for political purposes.'[43]

In the United States Code,[44] reference is made to international terrorism and the definition is as follows:

> The term 'international terrorism'[45] means activities that:
> (A) Involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
> (B) Appear to be intended—
> (i) To intimidate or coerce a civilian population;

43 This definition is used in numerous UN resolutions such as the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism UN Doc A/Res/ 51/ 210/ 17th December 1996, Annex

44 The United States Code is a consolidation and codification by subject matter of the general and permanent laws of the United States. It is prepared by the Office of the Law Revision Counsel of the United States House of Representatives

45 18 U.S.C. § 2331

(ii) To influence the policy of a government by intimidation or coercion; or

(iii) To affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) Occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of how they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

In Kenya the Prevention of Terrorism Act 2012[46] does not define terrorism but instead a terrorist act and terrorist group. This omission may be informed by appreciating the difficulty of defining terrorism universally and to avoid coming up with a definition which contradicts a universal definition at a later period. Article 2 (1)[47] defines a terrorist act as follows:

'Terrorist act' means an act or threat of action:

(a) Which:

(i) Involves the use of violence against a person;

(ii) Endangers the life of a person, other than the person committing the action

(iii) Creates a serious risk to the health or safety of the public or a section of the public;

(iv) Results in serious damage to property;

(v) Involves the use of firearms or explosives;

(vi) Involves the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment;

(vii) Interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services;

46 Act No. 30 of 2012

47 Ibid

(viii) Interferes or disrupts the provision of essential or emergency services;

(ix) Prejudices national security or public safety; and

(b) Which is carried out with the aim of:

(i) Intimidating or causing fear amongst members of the public or a section of the public;

(ii) Intimidating or compelling the Government or international organization to do, or refrain from any act; or organization to do, or refrain from any act; or

(iv) Destabilizing the religious, political, constitutional, economic or social institutions of a country, or an international organization.

Provided that an act which disrupts any services and is committed in pursuance of a protest, demonstration or stoppage of work shall be deemed not to be a terrorist act within the meaning of this definition so long as the act is not intended to result in any harm referred to in paragraph (a)(i) to (iv)

In Uganda, like in Kenya, terrorism is not defined but rather a terrorist act. In the Ant-Terrorism Act, article 7(2) provides that:

> A person commits an act of terrorism who, for purposes of influencing the Government or intimidating the public or a section of the public and for a political, religious, social or economic aim, indiscriminately without due regard to the safety of others or property, carries out all or any of the following acts:
> (a) intentional and unlawful manufacture, delivery, placement, discharge or detonation of an explosive or other lethal device, whether attempted or actual, in, into or against a place of public use, a State or Government facility, a public transportation system or an infrastructure facility, with the intent to cause death or serious bodily injury, or extensive destruction likely to or actually resulting in major economic loss;

(b) Direct involvement or complicity in the murder, kidnapping, maiming or attack, whether actual, attempted or threatened, on a person or groups of persons, in public or private institutions;
(c) Direct involvement or complicity in the murder, kidnapping, abducting, maiming or attack, whether actual, attempted or threatened on the person, official premises, private accommodation, or means of transport or diplomatic agents or other internationally protected persons;
(d) Intentional and unlawful provision or collection of funds, whether attempted or actual, with the intention or knowledge that any part of the funds may be used to carry out any of the terrorist activities under this Act;
(e) Direct involvement or complicity in the seizure or detention of, and threat to kill, injure or continue to detain a hostage, whether actual or attempted in order to compel a State, an international inter-governmental organisation, a person or group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage;
(f) Unlawful seizure of an aircraft or public transport or the hijacking of passengers or group of persons for ransom;
(g) Serious interference with or disruption of an electronic system;
(h) Unlawful importation, sale, making, manufacture or distribution of any firearms, explosive, ammunition or bomb; (i) intentional development or production or use of, or complicity in the development or production or use of a biological weapon;
(i) Unlawful possession of explosives, ammunition, bomb or any materials for making of any of the foregoing.

Terrorism is defined as 'Acts of violence committed by groups that view themselves as victimized by some notable historical wrong.'[48] Although these groups have no formal connection with governments, they usually have the financial and moral backing of sympathetic governments.

48 Dictionary.com.

In the UK, the Terrorism definition was supported by the Financial Action Task Force (FATF) law which provided that, 'The use of violent acts designed to influence the government or to intimidate the public, and for the purpose of advancing a political, religious, or ideological cause.'

In Brazil, a senate approved bill defined terrorism as, 'Attack against a person, through violence or serious threat, motivated by *political extremism* [emphasis added], religious intolerance, ethnic, racial and gender prejudice or xenophobia, with the objective of provoking generalized panic.'[49]

The bill further described 'political extremism' as 'a serious attack against the stability of the democratic system with the purpose of subverting the functioning of its institutions.'[50] A court in Kenya has stated that terrorism 'Terrorism is the calculated use of violence or threat of violence to inculcate fear; intended to coerce or intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.'[51]

In relation to the definition of terrorism and states being increasingly obsessed with security over anything else, including human rights protection, it is concluded that, 'although there is no universally recognized definition of terrorism in international law, standards provide that the term should not be used to criminalize acts that lack the elements of intent to cause death or serious bodily injury, or the taking of hostages'.[52]

The common denominator running through the above definitions include the following elements: violent criminal acts, targeting civilians and property, intention to intimidate or coerce civilian population and influence government policy and to advance a political, religious or ideological cause.

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49 PLC 101/2015.

50 Ibid.

51 *Muslims for Human Rights (Muhuri) & another v Inspector-General of Police & 4 others* [2015] eKLR

52 https://www.hrw.org/news/2015/11/13/brazil-counterterrorism-bill-endangers-basic-rights.

2.2. Human Rights

In discussing the human rights of all persons, including those of terrorism suspects and in order to appreciate this article better, it is reasonable to revisit the definition and concepts of human rights. The definition and meaning of human rights is not uniform and therefore expressed variously by diverse scholars. Human rights could be generally defined as 'those rights which are inherent in our nature and without which we cannot live as human beings'[53] A human right is a universal moral right, something which all men, everywhere at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human simply because he is human.[54] Human rights are basic moral claims that all human beings can assert.[55] Human rights are international norms that help to protect all people everywhere from severe political, legal and social abuses.[56] Differently, human rights can be defined as, 'basic moral guarantees that people in all countries and cultures allegedly have simply because they are people'.[57]

'Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual needs. They are based on humankind's increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection'.[58]

In an attempt to justify the entitlement of human beings to human rights, scholars have expressed diverse thoughts including the following:

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53 United Nations Human rights: Questions and answers (1987) 4.

54 S. Augender, 'Questioning the universality of Human Rights', 28 (1&2) Indian Socio-Legal Journal (2002) at 80.

55 Richard Rwiza, 2010, Ethics of Human Rights, p. 14, CUEA Press.

56 Stanford Encyclopaedia of Philosophy, 07.02.2003 and updated on 24.08.2010.

57 Nickel James. Making sense of human rights: Philosophical Reflections on Universal Declaration on Human Rights. (Berkeley; University of California Press, referred to in Stanford Encyclopaedia of Philosophy)

58 Ibid.

In the protection of human rights, John Locke emphasized on the inalienability of certain rights *inter alia*, the right to life, liberty and property[59]. Immanuel Kant supports the right to liberty by stating that, 'Individual liberty or autonomy was the sole right belonging to *every* man by virtue of his humanity.'[60] According to Rousseau, "... the only way to guarantee the realization of innate liberty and equality was through the establishment of a political organization formed by a social contract"[61].

The Universal Declaration of Human Rights[62] forcefully and eloquently argues for human rights by recognizing 'the inherent dignity and of the equal and inalienable rights of all members of the human family' and concludes that the preceding is, 'the foundation of freedom, justice and peace in the world.' The Declaration further provides that, 'everyone is entitled to all the rights and freedoms outlined in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status.' The Declaration refers to the so-called inalienable rights by stating that, 'everyone has the right to life, liberty and security of person.'[63] The significance of liberty as a human right is powerfully postulated in the following words, '[A]lways remember that human freedom is not a gift to man… [but] an achievement by man **…** gained by vigilance and struggle.'[64]

The above analysis of the definitions of human rights brings to the fore the intrinsic nature of human rights and its universality. It also suggests that the enjoyment of human rights should not be discriminatory and that the eligibility criteria should only be that, one is 'human and rational'.

The preceding definitions seem to have a golden thread running through them, and that is that human rights are universal, inalienable, inherent, and fundamental etc. It is thus

59 John Locke, Two Treatises of Government (New Yorke: Haffner Library of Classics, 1947 ed.) pp. 124, 128, 163.

60 Rommen at 100.

61 Justice at 18.

62 1948.

63 UDHR 1948, Article 3.

64 Senator Harry F. Byrd.

possible to conclude that all human beings including terrorism suspects are entitled to human rights in view of the foregoing golden thread.

3. The Human Rights of Terrorism Suspects

The inhumanity of terrorism and its *modus operandi* has raised the question about the humanity of terrorists and whether or not they can lay claim to protection under the human rights regime. The preceding seems to have influenced how the War on Terror has been waged by law enforcement agencies, which in turn has raised the concern of respect for the terrorism suspects' human rights.

The respect of the human rights of terrorists emanates from the rationale that, "all persons are entitled to fundamental rights and freedoms" as provided in the Universal Declaration[65] which provides in article 3 that, 'Everyone has the right to life, liberty and security of person'[66] and Article 7 that, 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'[67].

It is worth noting that all the preceding assertions consciously and deliberately apply the word 'all', meaning there are no exclusions. The Common Law and Criminal Law principles, in particular reinforce the rationale for the respect of the rights of terror suspects by providing that, 'all persons are innocent until proven guilty.'[68] Given the foregoing principles, terrorism suspects, like all other suspects, are entitled to human rights including those relating to 'due process'[69] and 'presumption of innocence, until proven guilty' and that due process of the law include; the right to be informed of the offence they are alleged to have committed, to have legal representation of their choice, to have the right to bail, freedom from torture and the right to a speedy and fair trial *et*

65 Universal Declaration on Human Rights 1948.

66 Ibid.

67 Ibid.

68 A fundamental tenet of criminal law, is contained in statutes and judicial opinions. See also the Constitution of Kenya article 50(2)(a).

69 Ibid The Constitution of Kenya, Article 50(1)(2).

cetera. They are also entitled to the laws of natural justice which include the right to be heard and not to be condemned unheard (*audi alteram partem*).

Terrorism suspects are therefore entitled to justice, notwithstanding the nature of the offence they are alleged to have committed. Terrorism suspects' entitlement to justice can be supported by Martin Luther King's quote that, 'Injustice anywhere is a threat to justice everywhere'[70] which rings true today as it did in the spring of 1963 when he led a mass demonstration together with the student movement in Birmingham and Alabama. King's concept of justice was preceded by Aristotle's which provided and rightfully so, that, 'Justice according to nature is better than justice according to law.'[71] In supporting his assertion Aristotle stated concerning natural justice that, 'Being the product of rational order, this type of justice was in accord with nature and, thus, universal.'[72] This approach makes sense considering the fact that some autocratic states may be tempted to use oppressive legal provisions to victimize their political opponents and settle personal scores under the guise of fighting 'terror' on the emphasis of legality of laws, without due consideration to their legitimacy.

3.1. Human Rights Of Terrorism Suspects In Kenya In View of the Constitution Of The Republic Of Kenya, 1963 (As Amended To 2008)

It appears that the Kenyan courts by and large have been relatively progressive in protecting the human rights of terrorism suspects, even before the promulgation of the 2010 Constitution, as illustrated by the case of *Salim Awadh Salim & 10 others v Commissioner of Police & 3 others*.[73] In this case, the petitioners were suspected of being involved in terrorist activities. The suspects claimed that, '...they were arrested by Kenyan security forces, held in custody unlawfully, sent to Somalia and Ethiopia

70 In his 'Letter from the Birmingham jail', he puts the struggle against injustice in Birmingham in the broader context of the United States.

71 W Seagle, The History of Law 370 (1946) [hereinafter cited as Seagle].

72 Haines at 6-7, 23.

73 **In the high court of Kenya at Nairobi, Constitutional & Judicial Review Division, Petition No. 822 of 2008.**

without due process being followed, and tortured while in the custody of Kenyan, Somali and Ethiopian security forces.'[74]

The High Court found that the 1st and 2nd respondents were liable for the violation of the petitioners' rights under articles 72 and 74 of the constitution,[75] and that they violated the petitioners' rights to due process, made the following declarations:

i. The arrest of the petitioners was, in the circumstances, arbitrary, unlawful, and unconstitutional and in violation of their fundamental right against arbitrary arrest guaranteed by sections 70 and 72 of the Constitution.

ii. The detention of the petitioners in Kenya for a period longer than twenty four (24) hours without being arraigned in a court of law in Kenya was unconstitutional and in violation of their fundamental rights to personal liberty and the protection of law guaranteed by sections 70 and 72 of the Constitution.

iii. The holding of the petitioners in incommunicado detention for a period longer than twenty four (24) hours was arbitrary, unlawful, and unconstitutional and in violation of their fundamental rights to the integrity, dignity and security of the person and freedom against torture, cruel, inhuman and degrading treatment or punishment guaranteed by sections 70 and 74 of the Constitution.

iv. The physical and verbal assault of the 1st petitioner whilst in detention without trial in Kenya was unlawful and unconstitutional and in violation of the 1st petitioner's fundamental rights to the integrity and dignity of the person, freedom against torture, cruel, inhuman and degrading treatment or punishment guaranteed by section 74 of the Constitution.

v. The forcible removal from Kenya of the petitioners to foreign States without due process was unlawful and unconstitutional and in violation of their fundamental rights to the protection of the integrity, dignity and security of the person, protection of law, the right of access to justice and freedom against expulsion from Kenya guaranteed by section 81 of the constitution of Kenya.

74 Ibid.

75 Pre 2010 Constitution of Kenya.

The above decision in the case of *Salim Awadh Salim, et al. v Commissioner of Police et al* by Judge Mumbi Ngugi, was considered at that time to have the potential of acting as a catalyst in giving impetus to police reforms in Kenya. And indeed the police reforms in part came through the enactment of the current constitution. The concerns surrounding police reforms were highlighted by statements to the effect that, "...Kenya's Anti-Terrorism Police Unit and other security forces are acting without regard for the law and violating human rights during counterterrorism operations'.[76]

3.2. Human Rights of Terrorism Suspects In View of the Security Laws Amended Act and the 2010 Constitution in Kenya

Terrorism is a relatively new phenomenon in Kenya. In the past, there were isolated incidents of terrorism, to the extent that they were not deemed to be a threat to national security. Among the first terror attacks in Kenya was in 1980, when terrorists linked to the Palestinian Liberation Organization attacked the Israeli owned Norfolk Hotel in Nairobi killing 15 people, most of them Kenyans.[77] This was subsequently followed by the 1998 US Embassy bombings.[78]K However, in recent times, in the wake of repeated abductions of tourists in Kenya by Al Shabaab suspects and Kenya's subsequent entry into Somalia in what was referred to as 'self - defence', Kenya appeared to have exposed itself to the first real direct threats of terrorism. The attacks since then have become frequent and are now regarded as a serious threat to national security.

In apparent response to the increasing terror attacks, Kenya appears to have adopted a new approach of introducing new laws to try and convict terror suspects. The Security Laws Amendment Bill was such a proposed new set of laws, whose intention was to apparently combat terror activities, but in the process had the effect of restricting certain fundamental rights and freedoms in the name of fighting terrorism.

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76 https://www.opensocietyfoundations.org/voices/case-watch-kenya-judge-rules-against-war-terror-renditions.

77 Koome Gikunda, 'Terrorism in Kenya' at http://web.stanford.edu/class/e297a/Terrorism.

78 The United States Embassies in Kenya and Tanzania were attacked in twin bombings.

The above Bill was eventually adopted as the Security Laws Amendment Act (SLAA),[79] which in a sense was necessitated by the desire to prosecute terrorism suspects and to protect the state and its citizens from terror attacks. The SLAA was adopted with the intention of amending various laws relating to security, considering the spate of insecurity incidents in Kenya, with specific attention to terrorism-related incidents. The said amendments targeted multiple laws, for example, the Prevention of Terrorism Act, the Evidence Act, the National Intelligence Service Act, the Refugees Act, and the Criminal Procedure Code (CPC) among others. The effect of some of the amendments, has raised a concern about their constitutionality and conformity with international and regional human rights instruments that Kenya has ratified. The amendments have affected rights and freedoms of suspects, for example, section 26 of SLAA which introduced section 26A of the Evidence Act relates to freedom from self-incrimination, section 20 of the SLAA which introduced section 364A of the CPC relates to the right to bail and freedom from unlawful custody, section 16 of the SLAA introducing section 42A of the CPC relates to the right to access evidence, section 48 of the SLAA which introduced section 18 A of the Refugee Act 2006 relates to the right to *non refoulement* etc.

The SLAA was deemed by opposition parties for example Coalition for Reforms and Democracy (CORD) and civil society groups for example Kituo cha Sheria in Kenya, as having several contentious clauses as cited above. Among them (clauses), is that violating the accused person's, right to access evidence intended to be presented against him. The preceding is in sync with the need to ensure that the accused person can prepare their defences adequately. It is argued that, the amended clause 16[80] targets various laws including the Prevention of Terrorism Act,[81] which has the effect of denying the accused person evidence sought to be presented against him until just before the hearing. This deals a fatal blow to legal guarantees of a fair trial.

79 No.19 of 2014, An Act of Parliament to amend the laws relating to security.

80 Security Law Amended Act, 2014, No. 19 of 2014.

81 Act No. 30 of 2012.

Other contentious clauses include section 26 of the Act[82] which has been mentioned in the preceding paragraphs, introduces an admission of a statement by consent in criminal trials. This amendment is objected to as contravening Article 50(2) (i)[83] concerning self-incriminating evidence. Criminal law prohibits admission of self-incriminatory evidence. This is supposed to ensure that one is not coerced or under duress compelled to record self-incriminating evidence. Clause 26[84] seems to violate this rule and is deemed unconstitutional. It is claimed that clause 56[85] introduced new Part V dealing with 'special operations' which operations are meant to neutralize threats against national security. It is feared that such operations may easily claw back the gains made by the 2010 Constitution of Kenya and take the country to the one party dispensation where civil liberties were breached by 'covert operations.' Maintenance of law and order is an essential function of any state. However, in so doing a state must act above board and use legal means to do so. The state should not engage in opaque activities carried out with shadowy groups not known to the law. Even in the so-called fight against terror, the *modus operandi* must be approved by law.

Clause 64[86] introduced an offence of publication of offending material which is defined as publication or statement that is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism. This clause was thought to be ambiguous, contrary to the position that, law ought to be clear, precise and reasonable. In other words room for ambiguity must be minimized. This is to ensure that law enforcement agencies do not misuse the law and charge persons on flimsy grounds and support the same with vague statutory clauses.

Though ostensibly targeting terrorism suspects, the above legislation has also been criticized as violating the Constitution of Kenya, 2010. The SLAA was perceived by civil rights activists and opposition parties as a law which was disguised as a security law but with the intention of ushering in a police state where the rights of suspects to

82 Ibid.

83 Constitution of Kenya 2010.

84 The Security Law Amendment Act.

85 The Security Law Amendment Act.

86 Ibid.

due process are blatantly breached. There was apprehension that it could also be used to infringe on the rights of critics of the government. This fear may be well founded, in view of the evolution, history and development of some of the laws of Kenya. It is only recently that the statute books of Kenya contained the law of detention without trial.[87] The detention laws were used to punish political dissidents in the Kenyatta and Moi regimes. The detention without trial law just like some of the security laws also were 'clothed' in intentions which *prima facie* appeared well meaning, but subsequently with benefit of hindsight were entirely meant to muzzle dissenting voices and persecute proponents of divergent views.

Considering the preceding, the SLAA does not inspire much confidence, but it is still considered a reasonable effort to balance the interests of terrorism suspects and those of state security. On 2nd January 2 015, a petition was filed challenging the constitutionality of the SLAA by the Coalition for Reforms and Democracy (CORD) and the Kenya Human Rights Commission (KHRC) at Nairobi, Milimani Law Courts in the Constitutional and Human Rights Division.[88]

The petition questioned the legality of the process by which The SLAA and the constitutionality of some of its clauses. The petitioners sought orders to have these sections suspended pending determination of a full hearing.

In support of its case, CORD filed an affidavit sworn by Hon Francis Nyenze, the Minority Leader in the National Assembly on 23rd December, 2014, where among others it contended that, 'the Security Laws (Amendment) Act contravened the Bill of Rights as well as the provisions of the Constitution of Kenya and that it is inconsistent with the Constitution of Kenya and is therefore null and void to the extent of the inconsistency'.[89] It was reiterated that, 'as the Security Laws (Amendment) Bill 2014 was

87 The Constitution of *Kenya* (*Amendment*) *Act*, No.17 of 1966.

88 Petition No. 628 of 2014 consolidated with petition nos 630 of 2014 and 12 of 2015, in the case of *CORD & 2 others vs the Attorney General & another*.

89 Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another [2015] eKLR.

passed and/or enacted in contravention of the Constitution, the said Act is therefore invalid, null and void.'[90]

The above matter was precipitated by the amendment of 22 other acts of parliament by the SLAA. In the said case the petitioners argued that the amendments were unconstitutional. The court having considered the submissions of the parties made the following orders:

i. Section 16 of the Security Laws (Amendment) Act and Section 42A of Criminal Procedure Code are hereby declared unconstitutional as they violate the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on as provided under Article 50(2) (j) of the Constitution.

ii. Section 20 of the Security Laws (Amendment) Act which amended Section 364A of the Criminal Procedure Code is hereby declared unconstitutional for being in conflict with the right to be released on bond or bail on reasonable conditions as provided for under Article 49(1) (h) of the Constitution.

iii. Section 26 of the Security Laws (Amendment) Act which introduced Section 26A into the Evidence Act is hereby declared unconstitutional for violating the right of an accused person to remain silent during proceedings as guaranteed under Article 50(2) (i) of the Constitution.

iv. Section 48 of the Security Laws (Amendment) Act which introduced Section 18A to the Refugee Act, 2006 is hereby declared unconstitutional for violating the principle of non-refoulment as recognized under the 1951 United Nations Convention on the Status of Refugees which is part of the laws of Kenya by dint of Article 2(5) and (6) of the Constitution.

The significance of the human rights of terrorism suspects and particularly the requirement of subjecting every person to due process is illustrated in the case of *Muslims for Human Rights (MUHURI) & another v Inspector-General of Police & 4 others.*[91] In that case the Inspector General of Police had issued a notice which listed

90 Ibid.

91 [2015] eKLR.

entities and individuals suspected to have links with Al Shaabab[92] and for that reason had their accounts frozen. Among those affected by the said list were the petitioners, who were of the view that, the actions of the respondents were unconstitutional and contrary to the rules of natural justice. In relation to the foregoing, the court noted that:

There are unanswered questions as to the right to fair administrative action guaranteed by Article 47 of the Constitution. There are questions as to the right to the presumption of innocence and the requirement to be informed in sufficient detail of the charges against an accused, and the right to adequate time and facilities to answer such charges or, as in the case at hand, such suspicions. The rights and freedoms subsist and are inherent at all times, both before, during investigations and at trial and are not divided in time and scope.

The decision of the judge in the above case to issue conservatory orders in favour of the petitioners to protect the above listed-rights underlines the significance of the said rights and the equal treatment of all before the law, including terror suspects.

4. International Law and Human Rights of Terrorism Suspects

Most of these treaties (terrorism related) also contain dispositions concerning the protection of human rights.[93]It is however, noted that most of the early treaties relating to terrorism were vague on the obligation of states to uphold the human rights of the terrorism suspect. Article 9 of the 1973 Convention on internationally protected persons, for example, simply provides that 'Any person regarding whom proceedings are being carried out in connection with any of the crimes set forth in article 2 shall be guaranteed fair treatment in all stages of the proceedings.' Similar provisions are found in the 1979 Convention against hostage-taking, the 1979 Convention on nuclear

92 A Terror group operating from Somalia and has been linked to the multiple terror attacks in East African region particularly in Kenya.

93 D. O'Donnell, 'International treaties against terrorism and the use of terrorism during armed conflict and by armed forces' *International Review of the Red Cross* Vol. 88 Number 864 December 2006.

material and the 1988 Convention on maritime navigation.[94] The foregoing has since changed with the adoption of recent treaties.

Relatively recent documents have incorporated clauses which guarantee the human rights of terrorism suspects. For example the 1997 Convention against terrorist bombings and the 1999 Convention against the financing of terrorism contain the following, more comprehensive formula:

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.[95]

Many of these treaties also recognize the right of a foreign detainee to communicate with, and in some cases to receive the visit of, his or her consular representative.[96]

94 Articles 8(2), 12 and 10(2), respectively. (The 1970 and 1971 Conventions on civil aviation do not contain provisions of this kind).

95 Articles 14 and 17, respectively.

96 Article 6(3) of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; Article 6(3) of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Article 6(2) of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; Article 6(3) of the 1979 International Convention against the Taking of Hostages; Article 11.6 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Article 7(3) of the 1997 International Convention for the Suppression of Terrorist Bombings; and Article 9(4) of the 1999 International Convention for the Suppression of Financing of Terrorism.

Recent treaties also contain a provision that in effect prohibits the practices known as 'rendition' and 'extraordinary rendition,'[97] whose links to torture, denial of access to competent courts, incommunicado detention and other human rights violations have been documented.

The rights of the suspect in detention are also enshrined in statutory provisions, for example article 13(1) of the Convention against terrorist bombings provides that:

> A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of testimony, identification or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences under this Convention may be transferred if the following conditions are met: (a) The person freely gives his or her informed consent; (b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

The evolution and development of international law instruments emphasize the importance of adhering to the rule of law and protection of human rights and

97 There does not yet appear to be any precise and broadly accepted definition of these two terms. Rendition can be understood to mean the transfer of a prisoner or detainee to a country where he or she is wanted for questioning, or to give testimony, but where they are not accused of a crime, in which case extradition would be the usual procedure. See A. Khan, 'Partners in crime: friendly renditions to Muslim torture chambers', Washburn University School of Law, 2005, available at: papers.ssrn.com/sol3/papers.cfm?abstract_id5937130. CIA documents in the public domain use the term 'rendition' to refer to the transfer of prisoners to the United States or to US custody. This seems to be consistent with a presidential directive No. 36 of 21 June 1995, which provides that 'If we [the United States government] do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government' available at: www.fas.org/irp/.

fundamental freedoms in the process of subjecting suspects of terrorism to judicial process.

5. Balancing Human Rights of Terrorism Suspects and Security Laws

Being a global phenomenon the threat of terrorism spares no state. Indeed no state can claim immunity from it and even states which have not been directly affected indirectly, when their citizens are caught in the cross-fire outside their jurisdictions. In view of the various attacks including the September 11 attacks, it was noted that, '…countries have adopted new legislations or practices that appear to violate fair trial guarantees or other human rights standards such as indefinite detention of large numbers of alleged terrorists, the setting up of special military courts with limited fair trial guarantees and violation against humanitarian law…'[98]

Human rights defenders argue that, human rights must not be suspended arbitrarily and that states should not unilaterally adopt laws and measures which are unconstitutional and contrary to international human rights, even in the face of threats to national security. Article 24 of the Constitution of Kenya,[99] sets the extent to which fundamental rights and freedoms can be limited by providing that:

> A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> a) The nature of the right or fundamental freedom
>
> b) The importance of the purpose of the limitation
>
> c) The nature and extent of the limitation

98 http://www.academia.edu/795832/CounterTerrorism_and_Risk_of_Human_Rights_Violation_within_ASEAN_Narrative_of_Balance_between_Security_and_Human_Rights.

99 Constitution of Kenya 2010 article 24.

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

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

The importance of fundamental rights and freedoms and their inalienability is propagated by John Locke.[100] Locke's theory can be interpreted to mean all human beings without exception are entitled to fundamental rights and in view of this article, all persons include terror suspects. This position is reinforced by the Constitution of Kenya[101] which provides that:

> The rights and fundamental freedoms in the Bill of Rights –
>
> (a) Belong to each individual and are not granted by the State;
>
> (b) Do not exclude other rights and fundamental freedoms, not in the Bill of Rights, but recognized or conferred by law except to the extent that they are inconsistent with this Chapter; and
>
> (c) Are subject only to the limitations contemplated in this Constitution.

The balancing act between national security interests and individual freedom and where the tilt should lie is brought out succinctly in the below cited cases.

In the *Muhuri* case[102] in relation to the question of public versus individual freedom the court held that:

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100 The English philosopher and political theorist John Locke (1632-1704) laid much of the groundwork for the Enlightenment and made central contributions to the development of liberalism. Trained in medicine, he was a key advocate of the empirical approaches of the Scientific Revolution. His political theory of government by the consent of the governed as a means to protect "life, liberty and estate" deeply influenced the United States' founding documents.

101 Ibid, Article 19(3).

102 *Muslims for Human Rights (MUHURI) & another v Inspector-General of Police & 4 others* [2015] eKLR.

> On the argument that the public interest outweighs the individual interest, and that the balance of convenience leans to the public interest, there is no greater public interest than adherence to the Constitution, and the rule of law; however inconvenient and cumbersome this may at times appear. National security as an important aspect of the public interest and protection of rights and fundamental freedoms of the individual are not mutually exclusive. The Constitution enjoins those seeking to limit the rights and fundamental freedoms, to show whether there are no other less restrictive ways of limiting those rights than the methods employed in the Gazette Notice.

In the *CORD* case,[103] in view of the balancing act, between national security and human rights, Judge Odunga, in *obiter dictum* stated that, 'What is at stake is the balancing of the need to secure the country on one hand and the protection of the Bill of Rights on the other both of which the State is enjoined to attain.'

The significance of balancing counter-terrorism measures and the protection of human rights is emphasized by the United Nations Action to Counter Terrorism, which states as follows:

> The defence of human rights and upholding the rule of law while countering terrorism is indeed at the heart of the United Nations Global Counter-Terrorism Strategy. Member States acknowledged that effective counter-terrorism measures and the protection of human rights were not conflicting goals but complementary and mutually reinforcing aims. They pledged to take measures aimed at addressing violations of human rights and to ensure that any measures taken to counter terrorism comply with their human rights obligations.[104]

The above position is further supported by the following position of the Office of the United Nations High Commissioner for Human Rights:

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103 *CORD & 2 others vs the Attorney General & another*.

104 http://www.un.org/en/terrorism/terrorism-hr.shtml, General Assembly resolution 60/288, annex.

> Respect for human rights and the rule of law must be the bedrock of the global fight against terrorism. This requires the development of national counter-terrorism strategies that seek to prevent acts of terrorism, prosecute those responsible for such criminal acts, and promote and protect human rights and the rule of law.

The United Nations had made its goal to pursue respect of human rights in the face of counter terrorism measures. It has made the protection of human rights an integral part of the international fight against terrorism. In tandem with the above in 2005, the post of Special Rapporteur[105] on the promotion and protection of human rights and fundamental freedoms, while countering terrorism was created.

States have also adopted various laws in an attempt to combat terror attacks and to make their countries safe and secure from the said threat. These laws have raised serious discourse on their consonance with the respect and protection of fundamental rights and freedoms.

International law permits States to take national legislative measures to combat terrorism, but such measures must not offend against International Law'.[106] The human rights framework acts as a protective basis for counter-terrorism, attempts to guarantee fundamental human rights against the desire to increasing security.[107] It is further emphasized that, 'It is possible to reconcile the requirements of defending society with the preservation of the fundamental rights and freedoms.'[108]

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105 The Special Rapporteur also addresses allegations of human rights violations in the course of countering terrorism. He conducts visits to selected individual countries and has engaged in correspondence with more than 40 countries about their laws and practices. He reports regularly both to the Human Rights Council and to the General Assembly, including on selected thematic issues and his country visits.

106 http://www.academia.edu/795832/CounterTerrorism_and_Risk_of_Human_Rights_Violation_within_ASEAN_Narrative_of_Balance_between_Security_and_Human_Rights.

107 Ibid.

108 Wolfgan Benedek and Alice Yotopou-Marangopoulos (eds), *Anti-Terrorism Measures and Human Rights* (Koninkjke Brill, Netherlands, 2004) p vi.

6. State's Right to Self Defence and the Respect of Human Rights

States are not only permitted to legislate relevant laws to prosecute terrorism suspects but also to take other measures, including self-defence when under any threat, including the threat of terrorism. Natural laws grant the right to self-defence, as a natural right, that everyone has the natural right to protect themselves from unprovoked attacks, within the realms and limitations of the law of self-defence. The United Nations Charter *vide* article 51 provides for the right to self-defence and the conditions therein in view of attack. It provides that:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The right to self-defence can also be traced from the constitutional responsibility of states to defend the lives and property of citizens. This is highlighted by the statement that, '… governments have to protect their citizens against terrorist attacks that potentially involve their lives, and properties.'[109] States have, therefore, long been under an obligation to take measures to protect the fundamental rights against terrorist acts.[110] However all the above measures by states must conform to both national and international laws.

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109 http://www.academia.edu/795832/CounterTerrorism_and_Risk_of_Human_Rights_Violation_within_ASEAN_Narrative_of_Balance_between_Security_and_Human_Rights.

110 Sabine von Schorlemer, 'Human Rights: Substantive and Institutional Implications of the War against Terrorism' (2003) 14 (2), European Journal of International Law, p.265 http://www.ejil.org/pdfs/14 /2/414.pdf > accessed (07 February 2012).

In further supporting the need of striking an equilibrium, it is stated that, "…any response to threat of terrorism must be in accordance with human rights standards." This is further supported by the assertion that, any anti-terrorist policy implemented must be in compliance with the democratic values held by the citizens.[111] The delicate balancing act is recognized by Stoudmann in his statement that, 'It can be quite a delicate matter at times to find the right balance between legitimate security concerns on the one hand and the protection of human rights on the other.'[112]

In Kenya the balancing of the right to self-defence and the respect of human rights is particularly significant because of the negative perception created by the conduct of Kenya's state security forces when combating terrorism suspects. This perception is reinforced by the statement that, 'Kenya's security forces have been long criticized for their violations of human rights.'[113] The Anti-Terrorism Police Unit (ATPU), in particular, has been linked to enforced disappearances and extra-judicial killings in the context of counter-terrorism operations and operations aimed at Al-Shabaab.[114]

7. Legislation and Case Law on the Fight against Terror and Human Rights Respect in Selected Countries

In the case of the *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others*[115] the court's introductory statement reinforces the significance of balancing the fight against terror and the respect of the human rights of suspects as follows:

111 Elena Pokalova, 'Terrorism: The Dilemma of Response,' in *International Criminal Justice: Critical Perspectives and New Challenges*, ed. G. Andreopoulos, (Springer Science Business Media, LLC, 2011), doi: 10.1007/978–1–4419–1102–5_5.

112 Gerard Stoudmann, Finding a Balance between Ensuring Security and Protecting Human Rights in the Fight against Terrorism p 283.

113 Ibid.

114 https://www.hrw.org/news/2014/12/13/kenya-security-bill-tramples-basic-rights.

115 [2015] eKLR.

> We are living in troubled times. Terrorism has caused untold suffering to citizens and greatly compromised national security and the security of the individual. There is thus a clear and urgent need for the State to take appropriate measures to enhance national security and the security of its citizens. However, protecting national security carries with it the obligation on the State not to derogate from the rights and fundamental freedoms guaranteed in the Constitution of Kenya 2010. It is how the State manages this balance that is at the core of the petition before us.

Post September 11 attacks era in the United States has witnessed what critics view as the gross violation of human rights in the fight against terrorism. It is claimed that:

> In the past decade, several cases arose in which the authorities used the threat of 'international terrorism' to violate the basic civil rights of many in the Arab and Muslim communities. These cases have reinforced ethnic and religious stereotypes against immigrants from the Middle East and have produced numerous acts of anti-Arab and anti-Muslim discrimination.[116]

In the United States, the passage of the Anti-terrorism Act has resulted in the violation of various fundamental rights and freedoms. It is claimed that the said law has singled out the Arab and Muslim immigrant communities.

It is alleged that the Act has led to, '... the substantial increase in detentions and deportations based on evidence that is kept secret from the accused and his attorney. While the Immigration and Naturalization Service (INS) relies on a regulation from the 1950s to keep evidence secret, the use of this procedure is averred to have rose substantially after the passage of the Anti-terrorism Act'[117]. It is alleged that, '... the Justice Department is using secret evidence in the cases of approximately twelve immigrants to establish that they threaten 'US national security' because of their alleged political associations.'[118] The non-citizens are also being detained without bond. According to

116 Kamal Nawash, *US Anti-Terrorism Legislation: The Erosion of Civil Rights*.

117 Ibid.

118 Ibid.

Kamal[119], 'all of these immigrants are Arabs and Muslims from the Middle East. Two of them, Dr Mazen Al-Najjar and Dr Anwar Haddam, have been in jail for more than three years without criminal charges.'[120]

Case law in the United States has vindicated persons whose rights were breached by the Anti-Terrorist Act. For example, the use of secret evidence was rejected in the case of *Federal Appeals Court for the District of Columbia, Rafeedie v. INS*, 1989. The court rejected an attempt by the INS to use secret evidence to exclude from the United States a lawful permanent resident upon his return from a trip abroad. In this matter the shifting of the burden to the accused person was found to be inconsistent with the constitution. In *obiter dictum* in relation to burden of proof the court in part stated that:

> Rafeedie—like Joseph K. in Kafka's *The Trial*—can prevail ... only if he can rebut the undisclosed evidence against him, i.e., prove that he is not a terrorist regardless of what might be implied by the government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.[121]

In another case the use of secret evidence was rejected. In the case of *Federal District Court in New Jersey, Kiareldeen v. Reno,* 1999,[122] the court ordered the release of Hany Kiareldeen after he had been detained for nineteen months based on secret evidence that is believed to have been offered by his estranged wife, with whom he was having a custody battle. In granting Kiareldeen's petition for *habeas corpus*, the court cited the Supreme Court's decision in *Bridges v. Wixon*[123] and said. 'The court cannot justify the government's attempt to 'allow [persons] to be convicted on unsworn testimony of

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119 Kamal Nawash was general legal counsel for the American-Arab Anti-discrimination Committee from 1998 to 2000. He is now a partner in the law firm of Hanania & Nawash in Washington, D.C.

120 Ibid.

121 880 F.2d 506 (D.C. Cir. 1989).

122 **U.S. District Court for the District of New Jersey - 71 F. Supp. 2d 402 (D.N.J. 1999).**

123 326 U.S. 135 (1945).

witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded'.

The United States has also been accused of misusing judicial procedures to the detriment of suspects of terrorism. For example it is alleged that, the US government selectively uses procedures to disadvantage suspects. In view of the foregoing it is explained in relation to the United States government that, 'The advantage for the government in civil proceedings such as immigration and civil asset forfeiture proceedings is that it substantially lowers the government's burden of proof.'[124] Rather than having to prove its case 'beyond a reasonable doubt, in civil proceedings the government only has to prove its case by the "preponderance of the evidence.'[125] It is further claimed that, 'the practical result of lowering the burden of proof is that ultimately the burden shifts from the government (to prove the accused's guilt) to the accused (to prove his innocence).[126]

In relation to Malaysia it is reported by the Congressional Research Service of the United States Congress that, 'The level of terrorist activity in Malaysia is considered comparatively low to other Southeast Asian nations. The Malaysian government maintains that its strict laws and police activity undermined the previously existing networks of terrorism in Malaysia and continue to prove to be an effective deterrent to extremism.'[127]

Another case which rejects use of secret evidence is the case of *Federal Court for the Eastern District of Virginia, Haddam v Reno,* 1999[128] in which it was stated that:

> The use of secret evidence against a party, evidence that is given to, and relied on, by the [immigration judge and the Board of Immigration Appeals] but kept entirely concealed from the party and the party's

124 Kamal Nawash, *US Anti-Terrorism Legislation: The Erosion of Civil Rights.*

125 Ibid.

126 Ibid.

127 http://www.academia.edu/795832/CounterTerrorism_and_Risk_of_Human_Rights_Violation_within_ASEAN_Narrative_of_Balance_between_Security_and_Human_Rights.

128 54 F. Supp.2d 588, 598 (E.D. *Va. 1999*)) *Federal Court for the Eastern District of Virginia.*

> counsel, is an obnoxious practice, so unfair that in any ordinary litigation context, its unconstitutionality is manifest.

In Malaysia, the counter terrorism laws revolve around the Internal Security Act (ISA) adopted in 1960. It was enacted to, '... deal with communist insurgency in Malaysia and contains extensive power to detain without warrant or trial and without access to legal counsel and power to extend the period of detention without trial and without submitting any evidence for review by the courts.[129]

It is widely held that laws should not be ambiguous and thus expose persons to arbitrary interpretation of the law to satisfy narrow interests of those entrusted with power. In Brazil, the recently approved bill, has been criticised precisely for its ambiguity. It is claimed that, 'In failing to define the scope of the crimes narrowly, the bill would not satisfy the internationally recognized test of legality, which requires the law to be set out with sufficient precision and clarity so that its application is foreseeable, and people can regulate their conduct with certainty to comply.'[130]

It is further noted that, "Four United Nations experts, including the experts on freedoms of association and assembly, freedoms of opinion and expression, and protection of human rights defenders, criticized the bill in a joint statement on November 4,[131] saying that it is 'too broadly drafted and may unduly restrict fundamental freedoms.' The UN General Assembly has urged countries to 'ensure that their laws criminalizing acts of terrorism are…formulated with precision.'[132]

In retrospect and with a view of protecting both national security and rights of terrorism suspects, it is agreed that laws should be formulated in a manner which discourages ambiguity. It is stated that, 'Human Rights Watch research shows that countries around

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129 Section 73 (1) and 8 of the ISA.

130 https://www.hrw.org/news/2015/11/13/brazil-counterterrorism-bill-endangers-basic-rights.

131 2015.

132 https://www.hrw.org/news/2015/11/13/brazil-counterterrorism-bill-endangers-basic-rights.

the world have used vaguely worded counterterrorism laws to target non-governmental groups, stifle peaceful dissent, and restrict freedom of expression'.[133]

8. Conclusion

Notwithstanding the danger and threat of terrorism, the fight against the scourge must continue to respect and protect the rights of terrorism suspects because they remain suspects until proven guilty and therefore must enjoy equal protection before the law and be subject to due process. It must be borne in mind that, in line with the philosophy of Lauterpacht, International Law still remains the best suited law to monitor and protect human rights. States should be prohibited from referring to the weakness or deficiency of national law as an excuse for non-compliance with international law.[134] Human rights protection should never be sacrificed at any alter of convenience and all persons should remain equal before the law and enjoy equal treatment regardless of any other consideration.

9. Recommendations

As Kenya effects the SLAA,[135] cognizant of the High Court's ruling,[136] deliberate effort must be made to read it together with the International Bill of Rights[137] and the Constitution of Kenya, particularly article 24 (1),[138] which provides that:

> A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable

133 Ibid.

134 Article 27 of the Vienna Convention on the Law of Treaties 1969.

135 In ruling, Judge Odunga used "the guided missile" approach to target only the offensive parts of the Act. The court decided to suspend only those provisions which disclose a danger to life and limb or imminent danger to the Bill of Rights at that very moment by way of conservatory orders.

136 *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* [2015] eKLR.

137 The Universal declaration of Human Rights and the International Covenants of 1966.

138 Constitution of Kenya.

and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

a) The nature of the right or fundamental freedom;

b) The importance of the purpose of the limitation;

c) The nature and extent of the limitation;

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

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

The above article implies that even where the State attempts to limit the enjoyment of specific fundamental rights and freedoms of non-citizens it must take cognizance of the dictates of the rule of law and equity.[139]

In view of ensuring that the definition of terrorism is not prone to open ended interpretations, various judicial organs have made recommendations, for example:

> According to the Inter-American Court of Human Rights, "definitions of crimes must clearly describe the criminalized conduct, establishing its elements, and the factors that distinguish it from other forms of conduct that are either not punishable or punishable with non-criminal measures.[140]

The international community must come up with a common and acceptable definition of terrorism, including the promulgation of international laws to prosecute the crime of terrorism. An international treaty which confers on states universal jurisdiction over the crime of terrorism should be adopted, giving any state the right to prosecute suspects within their territories even where the crimes were committed in third states.

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139 In publication. Dr Maurice Ajwang Owuor, 2019// Balancing the principle of *non-refoulement* and threat to national security: a case study of Kenya//.

140 https://www.hrw.org/news/2015/11/13/brazil-counterterrorism-bill-endangers-basic-rights.

This treaty should be included among the treaties with the character of *jus cogens*[141] and *erga omnes*.[142]

The principle of *aut dedere aut judicare* (to extradite or to prosecute) must be complied with considering the consent of the person subject of the process.

The principle of cooperation of States must be adopted by states in their quest to prosecute terrorism related crimes, taking into consideration the human rights and fundamental freedoms of suspects of terrorism.

141 Universally accepted and recognized norms in relation to which no derogation is permitted.

142 Norms which are deemed to be obligatory and binding to all.

ARBITRATION OF EMPLOYMENT DISPUTES IN KENYA: CHALLENGES & OPPORTUNITIES

George Ogembo*

Abstract

For a long time, there has existed a debate in Kenya and indeed the entire commonwealth nations as to whether arbitration agreements can successfully be inserted into individual employment contracts and whether such agreements are enforceable so that parties are compelled to subject all employment disputes to arbitration. The situation has not been helped by the contrasting judicial decisions and vague legislations on the subject. In the circumstances, it is safe to conclude that the subject of inclusion and enforceability of arbitration provisions in employment agreements is generally considered controversial. It is argued here that amidst the controversy, there exists points of convergence and opportunities that could be explored to midwife a suitable framework for the application and acceptance of arbitration as a proper mode of resolution of employment disputes away from adjudication which this article seeks to address.

1. Introduction

Employment arbitration specifically refers to resolution of workplace disputes by way of arbitration.[1] Indeed, the Constitution of Kenya promotes, but does not compel, the utilization of alternative dispute resolution mechanisms, including arbitration by

1 Arbitration has been defined as a process whereby parties voluntarily agree to refer their disputes to an impartial third person or persons selected by the parties for a decision that is final and binding on the parties. Parties usually make these choices by way of a written contract or agreement, referred to as the arbitration agreement.

the courts and tribunals, when exercising judicial authority.[2] The employer is hence not compelled to enter into arbitration agreement with an employee as a viable route to resolve disputes that arises within or upon termination of the employment contract. Indeed, there has generally been a slow uptake or embrace of arbitration agreements to regulate dispute resolutions by both employers and employees, with the majority of labour disputes currently being settled in Employment and Labour Relations Court.[3] However, the preference of disputants for the courts has led to increased caseloads thereby prompting a relook at the viability of employment arbitration as alternative pathway.[4]

The Employment Act and the Labour Relations Act have not explicitly addressed the actual place of employment arbitration. They have instead given pre-eminence to conciliation as opposed to arbitration in resolving workplace conflicts. The move has its roots in the enactment of the new labour laws in 2007 that effectively eroded the conventional 'employment at-will' doctrine and concomitant creation of statutory and constitutional concept of fair labour practices.[5] With the emergence of the new jurisprudence, various concepts that governs commercial arbitration, key being

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2 Article 159(2) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by principles that inter-alia promotes alternative forms of dispute resolution including arbitration.

3 The Court was established as a specialized court for labour and employment disputes and is distinct from the ordinary courts. The special procedures and Judges in these courts was intended to ensure application of expertise in complex labour law jurisprudence while making the system less formal, faster, more economical and more accessible than the ordinary courts.

4 According to the 2016-2017 State of the Judiciary and the Administration of Justice Report, there existed a backlog of at least 13,273 cases pending at the Employment and Labour Relations Court of Kenya dating back to 5 years. < https://www.judiciary.go.ke/download/state-of-the-judiciary-and-the-administration-of-justice-report-2016-2017/> accessed on August 28, 2018.

5 The new labour laws include Employment Act, No. 11 of 2007; The Labour Institutions Act, No. 12 of 2007; The Work Injury Benefits Act, No. 13 of 2007; The Labour Relations Act No. 14 of 2007 and The Occupational Safety and Health Act, No. 15 of 2007.

party autonomy, have struggled to find relevance and footing within the spheres of employment law.[6]

Even where parties agree to arbitrate employment disputes, the attendant agreement would still navigate various minefields should the arbitration be initiated at the workplace or prior to the termination of an employee's contract of employment. Employers hardly engage in individual employees grievance arbitration. Moreover, the concept of management prerogative remains the hallmark of employment relationships. Thus, arbitration could be an inappropriate or unsuitable mode of resolving what would appear to be mere grievances in the workplace.[7] The employer is endowed with the prerogative to organize work and make necessary changes within the employment atmosphere or to make certain decisions without external involvement or direction. Courts and indeed other external dispute resolution forums are largely reluctant to interfere with the rights of management to manage its business, unless substantive unfairness is demonstrated.

In the majority of instances, employers have opted to establish robust grievance management procedures to resolve workplace conflicts which invariably renders invocation of alternative disputes resolution mechanisms unnecessary. Even for employers who prefer the route of employment arbitration, there is a tendency to develop multi-step internal grievance procedures with arbitration being the final step or

6 The freedom of parties to consensually execute arbitration agreement is known as the principle of party autonomy. The principle provides a right for the parties to international commercial arbitration to choose applicable substantive law and these laws when chosen shall govern the contractual relationship of the parties.

7 Management prerogative is that wide freedom of an employer to regulate, according to its own discretion and judgement, all aspects of employment including hiring, work assignments, working methods, time, place and manner of work, process to be followed, supervision of workers, transfer of employees, work supervision, discipline or recall of workers.

stage.[8] Additionally, the majority of these procedures are enhanced to provide avenues for appeal which has the effect of resolving significant number of disputes internally. In the circumstances, the opponents of inclusion of arbitration in individual employment contracts argue that mandatory arbitration has the potential of disrupting the existing mechanisms of resolving employment disputes and does not provide an effective trade-off worth pursuing.

Common cases where the court has been called upon to pronounce itself on the validity or otherwise of an arbitration clause is at the post-employment contract stage where the dispute revolves around termination and attendant terminal benefits. It is hardly possible for parties within an employment contract to submit to an arbitration process during the term of the employment contract and still maintain an amicable employment relationship. Even then, workplace conflicts may arise, which do not necessarily generate legal issues, but which may call for invocation of the existing arbitration clause. In such cases, the mechanism would be most inefficacious.

The foregoing brings into sharp focus the legal and practical concerns regarding mandatory arbitration and whether an arbitration agreement can preclude the judicial adjudication of statutory rights. The article will be limited to arbitration of employment disputes involving the individual rights of employers and employees that arises outside the context of Collective Bargaining Agreement (CBA).[9] This is different from the arbitration of workplace disputes under a CBA, as the latter is designed to resolve workplace disputes as a substitute for economic pressure in the form of strikes and not the individuals' employment disputes. Labour Relations Act expressly provide that an employer, group of employers or employers' association and a trade union may conclude a collective agreement providing for arbitration of any category of

8 A grievance is any dissatisfaction or feeling of injustice having connection with one's employment situation which is brought to the attention of management. Unlike a mere dissatisfaction or complaint, a grievance is a complaint that has been formally presented to a management representative or to a union official.

9 Section 2 of the Labour Relations Act, No. 14 of 2007 defines a collective agreement to mean a written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organisation of employers.

trade disputes identified in the collective agreement by an independent and impartial arbitrator agreed upon by the parties.[10]

2. The Place of Arbitration in Employment Law Jurisprudence

It cannot be gainsaid that arbitration provisions can be effective, efficient and economic ways of disposing employment disputes. However, in majority of instances where parties to an employment contract have resorted to arbitration, they have largely been compelled to arbitrate with an attempt to resolve an employment arbitration case using commercial arbitration principles notwithstanding the fact that labour arbitration is distinctly different from commercial arbitration. This has tended to distort the unique policies attendant to employment arbitration. In fact, the jurisprudential underpinnings, sources of law and the policy justifications vary between the two models of arbitration.

Generally, employment law jurisprudence is hinged on expeditious access to justice by an employee at minimal costs devoid of complex legal hurdles. The power relationship between the employer and employee is strictly regulated. Modern employment law mirrors a dual perspective or model with contractual and regulatory elements. To this end, employment laws are enacted along public policy principles to re-arrange the power relationship in favour of employees by providing the floor of rights principally aimed at protecting the weaker members of the society while maintaining the social goals necessary for an employer-employee relationship to be nurtured and protected.

The enactment of the floor of rights was an interventionist reaction to the shortcomings of the principles of contractual employment. Further, the enactments were principally aimed at tempering the exploitation of the employers' power position in the workplace and address the failure of contractual employment law to effectively adjust or leverage the relative power positions between the employer and employee.[11]

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10 Section 58(1), Labour Relations Act, Act No. 14 of 2007.

11 Simon Deakin, *The Floor of Rights in European Labour Law*, New Zealand Journal of Industrial Relations, 1990, Pg. 219.

The Employment and Labour law is a classic example of a determination by the State that a host of rights and obligations of parties to employment relations should not be determined solely by the agreements between them. The legislature has created and sought to protect these rights through the enactment of public laws which, by their very nature, cannot be abrogated by the members of the public or institutions.[12] The laws guarantee employee minimum terms and conditions of employment as well as eliminating discrimination and other forms of unfair labour practices including unfair termination. These are mandatory provisions and the law abhors any form of departure from these floor of rights by providing inferior rights as the same would be tantamount to infringing on the principles of public policy.

Even though Arbitration has many benefits, it cannot survive a fairness analysis unless both parties have the ability to voluntarily, knowingly, and without pressure or coercion, choose to arbitrate rather than litigate claims.[13] Generally, in employment contracts, employees have either little or no meaningful choice regarding whether to accept undesirable provision in the employment agreement, since the general feeling is that if they were to refuse to sign and insist on further negotiation of any term of the contract, the employer could decline to grant them employment, a situation that is likely to render them unemployed.

It should not be lost that not all employees find themselves in such a disadvantageous situation and parties could, in certain situations, be allowed to mutually benefit from the flexibility, efficiency and privacy of arbitration proceedings. Some employees are presumed to possess sufficient bargaining powers and can freely accept or object to the inclusion of the arbitration clause in employment contracts. In such cases, the employee may easily be able to so negotiate and have a mutual agreement formed with his free and informed consent, to include an arbitration clause in the contract of employment.[14]

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12 William H. Daughtrey, Modifications Necessary for Commercial Arbitration Law to protect Statutory Rights Against Discrimination in Employment: A Discussion and Proposals for Change, Ohio State Journal on Dispute Resolution Vol 14:1 (1998) pg 32.

13 Ganna Giesbrecht-Mckee, *The Fairness Problem: Mandatory Arbitration in Employment Contracts*, Williamette Law Review (2014) Pg 259.

14 *Dr Kennedy Amuhaya Manini v AMREF* [2014] eKLR.

The arbitration clauses in employment contracts would initially have to surmount the hurdle of potential or loose presumption of procedural and substantive unconscionability. In the circumstances, the court faced with an application seeking to implement an arbitration clause ought to address itself to the question of unconscionability. The key guiding parameter is whether the court is dealing with an employer who has unilaterally incorporated a standardized arbitration clause for all its employees on one the hand or, in other words, the potentially procedurally unconscionable means by which the agreement was signed and offered the employee on a take-it-or leave-it basis. While procedural unconscionability involves an analysis of whether fraud and duress was involved in the execution of the contract, substantive unconscionability principally aims at interrogating whether the terms of the agreement are unfairly one-sided.[15]

A snapshot of how different countries treat the question of labour and employment arbitration points to the fact that utilization of arbitration procedures in this sub-sector ought to be treated differently and cautiously. There exist common themes and comparative contrasts in the use of arbitration as regards approaches of each country. Whereas North America, led by United States of America and Canada embraces the concept of employment arbitration, the reception in Europe and in most Commonwealth States range from relative chill to being completely outlawed.[16] Such strict interpretation and application is based on an argument bordering on public policy measures intended to protect employees who are in a weaker bargaining position as compared to employers.

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15 Karl G. Nelson, Arbitration of Employment Claims: Challenges and Limits on Enforceability in Texas at <https://www.gibsondunn.com/wp-content/uploads/documents/publications/NelsonWilliamsArbitrationAdvocate.pdf> Accessed on August 28, 2018.

16 *International Labour and Employment Arbitration: A French and European Perspective*, American Bar Association (www.amercianbar.org). Arbitration of employment disputes is forbidden in German Labour Law, except for maters collective issues; In Spain, arbitration is generally not used for individual workplace disputes; In France, as a general rule, arbitration concerning individual employment contracts is prohibited. In Austria, a 1993 Supreme Court decision outlawed arbitration clause contained in CBA as contrary to Labour Constitution Act. In UK, there are prohibitions on resolving workplace disputes through arbitration.

Countries that have outlawed or severely restricted arbitration of employment disputes, key being Brazil, France, Germany, South Africa, Spain and United Kingdom, have instead established special labour courts, tribunals or administrative systems for adjudicating labour disputes with additional appellate systems.[17] These mechanisms, which may operate either on governmental or private structures, provide a varied alternative approaches that facilitate efficient and cost effective measures without necessarily requiring employees to waive their rights to utilize the judicial system.

The key underlying commonality is that employment arbitration is not usually kept far away from the influence of government regulations or institutions. It is trite that despite globalization and spread of international business, employment relations systems are usually embedded in national rather than a global institution.[18] The key variable is on the degree of government regulations and whether to house the institutional processes within the government, in the private sector or a combination of the two.[19] Studies show that when properly instituted and implemented, employment arbitration could assit in the decongestion of the ordinary court system.[20] Understanding the common themes and comperatives presents an opportunity for Kenya to choose the best practices with an intention of redesigning of the current ADR systems to fully accommodate employment arbitration.

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17 Examples of these bodies include: Superior Labour Court in Brazil, Conseils De Prud' Homme in France, Arbeitsgerichte in Germany,UK Employment Tribunals, Juzgados de lo social in Spain, CCMA in South Africa.

18 Katz, Harry C., & Kochan, T. A., & Colvin, A. J. S. (2015). *Labor, management, and interactions [Electronic version]. In Labor relations in a globalizing world* (pp. 27-51). Ithaca, NY: ILR Press, an imprint of Cornell University Press.

19 Ronald C. Brown, 'Comparative Alternative Dispute Resolution for Individual Labour Disputes in Japan, China and the United States: Lessons from Asia?, St. John's Law Review, Vol. 86:543.

20 Example, in China, the number of labour arbitration cases grew from 10,326 in 1989 to about 693,000 in 2008, an increase of more than 6,000%.

3. Legislative or Statutory Cogs to Employment Arbitration

Even though arbitration is constitutionally entrenched and widely accepted as a mode of dispute resolution, the Kenyan Employment law drastically limits the extent to which employment-related issues can be arbitrated, especially where it relates to individual employee claims. Generally, the right of an individual employee to access the protection of Employment and Labour Relations Court (ELR court) for resolution of employment disputes is a public policy issue and ought to be protected as part of the minimum statutory terms and conditions of employment. Several provisions of the Employment Act and Employment and Labour Relations Act has significantly diminished the possibility of arbitrating employment disputes. Indeed, an issue of public policy would arise where a party were prepared to argue that Parliament did intend for parties to litigate employment disputes only through the court, mediation or conciliation.

Part III of the Employment Act provides that a written contract of employment shall provide certain detailed particulars. From a reading of the particulars, it is not a statutory requirement that a dispute resolution clause be included as a mandatory clause in a written contract of employment. Further, it is expressed that provisions of Part V and VI constitutes the minimum terms of the contract of service. However, if it is regulated by any other regulations as agreed in CBA, contract between the parties, enacted by any other written law or decreed by a judgement which are more favourable terms and conditions of employment that are more favourable for an employee than the terms provided in Part V and VI, then such favourable terms and conditions of service shall apply. However, it is arguable whether introduction of a dispute resolution clause which is not contemplated by the Employment Act could be classified as a favourable term of employment.

The Employment Act provides an inbuilt mechanism for addressing any complaint as regards summary dismissal and unfair termination. It provides that an employee has an option of presenting a complaint to a labour officer for conciliation or the ELR

Court.[21] Part XII addresses disputes settlement procedures. It provides that whenever an employer or employee neglects or refuses to fulfil a contract of service; or any question, difference or dispute arises as to the rights and liabilities of either party; or touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, an aggrieved party may complain to the labour officer or lodge a complaint or claim to the ELR court. It further provides that no court other than the ELR court shall determine any complaint on the specified matters.[22] The remedies for wrongful dismissal and unfair termination provided under the Employment Act can only be granted either by the labour officer or ELR court.[23]

The foregoing buttresses the fact that the ELR court and the labour officer have been conferred the principal responsibility to enforce the statutory employment claims and the restrictions mirror the public policy principles aimed at providing uniformity in enforcement as regards violation of statutory rights of an employee. An aggrieved employee should not ordinarily be denied access to these statutory mechanisms for adjudication or redress with respect to violations or complaints arising out of the employment relationships.

Turning to the provisions of Employment and Labour Relations Court Act, the ELR Court is granted an exclusive original and appellate jurisdiction to hear and determine all disputes relating to employment and labour relations including disputes relating to or arising out of employment between an employer and employee.[24] The jurisdiction is expansive and at the same time jealously guarded. Even though parliament is granted the power to enact legislations conferring jurisdiction on Magistrates Courts with respect to disputes relating to employment and labour relations, only certain limited disputes can be litigated in these courts. The Magistrate Court Act only limits the jurisdiction of Magistrate Courts to matters specified in Section 29 of the Employment and Labour Relations Courts Act.[25] The former Act provides that the Magistrate Courts can only

21 Section 47, Employment Act, Act No. 11 of 2007.

22 Section 87, Employment Act, Act No. 11 of 2007.

23 Sections 49 & 50, Employment Act, Act No. 11 of 2007.

24 Section 12, Employment and Labour Relations Court Act, Act No. 20 of 2011.

25 Section 9(b), Magistrate Court Act, No.26 of 2015.

handle disputes relating to offences under the Employment Act or any other dispute as may be designated in the Gazette notice by the Chief Justice on the advice of the Principal Judge of the Employment and Labour Relations Court. The limitation has been confirmed in a recent Court of Appeal decision.[26] However, in June 2018, the Chief Justice allowed magistrates in the rank of Senior Resident Magistrate and above to determine disputes arising from contracts where an employee's gross monthly pay does not exceed Kshs. 80,000. The directive is clearly an additional work to magistrates whose courts had at least 366,133 pending cases with a total of 199,536 being classified as a backlog.[27]

The alternative dispute resolution mechanisms are nonetheless not precluded and it is provided as follows:

> Nothing in this Act may be construed as precluding the court from adopting and implementing, on its own motion, or at the request of the parties, any other appropriate means of resolution of the dispute, including internal methods, conciliation, mediation and traditional dispute resolution mechanism in accordance with Article 159(2)(c) of the Constitution.

From the wording of the clause, it is clear that:

(a) The court has absolute discretion to adopt and implement appropriate means on its own motion or at the request of a party once it is seized with the dispute. The court should first analyse the appropriateness of the mode; and

(b) Arbitration mechanism is not contemplated as a mode open to the court to adopt and implement either on its own motion or at the request of the parties.

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26 *Law Society of Kenya, Nairobi Branch v Malindi Law Society & 6 others, Nairobi* CA No. 287 of 2016.

27 State of the Judiciary and Administration of Justice Report 2016-2017 <https://www.judiciary.go.ke/download/state-of-the-judiciary-and-the-administration-of-justice-report-2016-2017/> accessed on August 28, 2018.

> The other relevant provision is that, "If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.

From the wording of the clause, it is clear that:

(a) This is the only clause in the entire Act where arbitration is mentioned, and even then, it is ambiguous in that a court satisfied that a matter can be referred to conciliation or mediation cannot proceed to make an order that it be referred to arbitration; and

(b) The law gives pre-eminence to conciliation and mediation as an alternative mode of resolution of employment disputes as opposed to arbitration.

The court has proceeded to hold that the fact that the law omits to mention arbitration as an alternative method of dispute resolution was a deliberate omission as the labour laws provide for both internal dispute resolutions and conciliation. The reason for reference of disputes to ADR is to save time and expenses or utilize expert opinion. This is such that if these ends are not likely to be achieved, the courts provide the most direct and expedient avenue to resolve the dispute.[28]

4. Adoption of Minimum Standards of Procedural Fairness

Despite the highlighted obstacles to employment arbitration or its slow uptake, it is widely recognized and promoted by the Constitution and ILO in the area of conflict pacification as it is arguably fast.[29] The probability of opportunities for growth of individual employment disputes arbitration in Kenya will be strong and healthy if proper guidelines were enacted and enforced. These guidelines ought to allay fears that

28 *Dr Kennedy Amuhaya Manyonyi v African Medical and Research Foundation* [2014] eKLR.

29 ILO, *Labour Dispute and Prevention*, <http://www.ilo.org/ifpdial/areas-of-work/labour-dispute/lang--en/index.htm> accessed on August 28, 2018.

the arbitrator would lack the requisite experience, impartiality and protections currently afforded by the law as interpreted and implemented by the courts.

As earlier discussed, the Employment Act which is the principal legislation governing employment contracts, provides irreducible minimum terms and conditions of employment. These minimum conditions, including the fundamental principles governing labour management, must be safeguarded in arbitration proceedings. By signing an arbitration agreement, an employee does not waive these rights. Indeed, employment arbitration has the potential of altering the landscape of individual employment disputes resolution and the impact of employment and labour laws.

Since employment arbitration would require a careful combination of aspects of labour and commercial arbitration, it does not fit comfortably within the existing rules governing a purely commercial arbitration. To be able to provide an effective trade-off worth considering in resolving employment disputes, there must exist clear and unequivocal guidelines or ground rules to allay fears that mandatory arbitration would exacerbate inequality in access to justice at the workplace.

An arbitration agreement that seeks to halt the jurisdiction of the employment court must be crafted in a manner to aid the cause of justice. From the conflicting manner in which the judges have approached the thorny issue of arbitration in employment cases, it emerges that the underlying issue or convergence is the need to have a level playing field to fully address the labour issues as between employers and employees considering the social aspects of labour law. The imbalanced setting in which employment disputes arise prevents the automatic incorporation of principles governing arbitration of purely commercial disputes.

It is debatable whether arbitration arising out of an employment contract dispute is truly a species of commercial arbitration. The key question is whether the principles underlying commercial arbitration proceedings, principally governed by contract as opposed to statutory law rights and remedies, is consistent with the conceptual rationale of employment law. A related issue is whether the existing Arbitration Act could be used to enforce arbitration of statutory or public law claims.

The current laws, structures and practices relating to arbitration in Kenya are tailored to commercial arbitration. Apart from the Arbitration Act, the Nairobi Centre for International Arbitration Act[30] was principally enacted to provide for the establishment of regional centre for international commercial arbitration and the arbitral court.[31] It is hence clear that the sources of law and policy justifications differ to the extent that an employment dispute can hardly be resolved using the commercial arbitration principles and procedures without distorting the unique policies attendant to employment or labour arbitration.[32]

The focus of employment arbitration is not on private commercial agreements, with the attendant business efficiency benefits, but on violation of the rights extended by the State to employees and centred on non-negotiable statutory protections. It would, therefore, be important that the purposes and procedures of commercial arbitration be balanced against concerns of public interest in employment law. [33]

Even though the proponents of employment arbitration within the existing arbitration rules may be prepared to argue that an arbitrator would be entitled to offer the same substantive relief available to an employee, gathering from the principles governing privacy and finality of commercial arbitration proceedings, the key concern would be that no mechanism exists for an employment court to require or ensure that arbitrators must safeguards the entire statutory rights of an employee.[34] In addition, inexperienced arbitrators may lack the skills to apply the law as Parliament intended to address the

30 Act No. 26 of 2013.

31 The Preamble states that it is an Act of Parliament to provide for the establishment of regional centre for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes.

32 Allison Anderson, Labour and Commercial Arbitration: The Court's Misguided Merger, Boston College Law Review, Vol. 54 Issue 3, Pg. 1238.

33 William H. Daughtrey, *Modifications Necessary for Commercial Arbitration Law to protect Statutory Rights Against Discrimination in Employment*: A Discussion and Proposals for Change, Ohio State Journal on Dispute Resolution Vol 14:1 (1998) Page 32.

34 Arbitral relaxation of judicial rules and insulation from court review on the merits of the claim is a principal cornerstone of commercial arbitration and promoted the efficiency of the arms-length commercial parties.

violation of the applicable statutory rights. Only a narrow opportunity would be available to nullify the obvious errors of an arbitrator.

To demonstrate that principles attendant to commercial arbitration have no place in employment arbitration, the Labour Relations Act expressly exclude the application of Arbitration Act to any proceedings before the court.[35] In 1996, on the realization that employment disputes do not comfortably fit into the existing categories governed by the arbitration rules, the American Arbitration Association (AAA) established its Employment Disputes Panel and drafted its own set of arbitration rules complete with arbitration panels.[36] It is a high time that the settlement of employment disputes found their own home amongst the existing procedures and institutions governing arbitration in Kenya.

Opportunities exist for arbitration to be generally accepted as a means of resolving all manner of disputes in employment. Drafting and implementing employment arbitration rules that guarantees due process while protecting the rights of the parties to a speedy and cost effective process is key. In addition, a well-crafted arbitration agreements and dispute resolution procedures holds the promise for avoiding attendant problems of litigation or adjudication of disputes that cannot be resolved by other ADR mechanisms.

The spotlight would be on the institutional design and procedures developed to guide employment arbitration proceedings. On the extreme side, there would be need for Parliament to establish a legislatively sanctioned arbitration body which would ensure there is public forum accessible to all parties while still providing a less formal and more efficient mechanism than litigation. South Africa, for example, has established a

35 Section 75, Labour Relations Act, No. 14 of 2007.

36 *www.adr.org;* The AAA administers employment arbitrations pursuant to the due process standards contained in the AAA's Employment Due Process Protocol and the AAA's Employment Arbitration Rules.

Commission for Conciliation, Mediation and Arbitration (CCMA) as independent body charged with resolving disputes in labour relations.[37]

Alternatively, even though treated separately, employment arbitration may nevertheless be aligned to the existing structural mechanisms and overall jurisprudence currently tailored to commercial arbitration. There should, however, exist a basic structure for modification, rather than development of new employment arbitration laws and structures that substantially divert from those used in commercial arbitration.

To effectively accommodate employment disputes within the realm of commercial arbitration, it would be important to set out clear arbitration rules and structures slightly modified to guarantee its acceptability and enforceability. In this regard, it is important to adopt minimum standards of procedural fairness which would apply to all pre-dispute employment arbitration agreements and the arbitration process. The convenient starting point would be to enactment new *Employment Arbitration Rules* that properly guide employment arbitration in Kenya. The rules would essentially emerge from the existing rules and mechanisms governing commercial arbitration but with modifications based on or modelled along the following minimum principles.

4.1. Irreducible Statutory Remedies and Choice of Substantive Law

Choice of law is a commonplace element in contract law. These are terms in the agreement that require any dispute to be governed by laws of a particular jurisdiction. Some employers may seek to strip away the statutory and constitutional protections and deter employees from asserting their claims through the use of the choice of law provision in arbitration agreements. The fear may compel employees to presume that due process protections are more explicitly instituted in the courts than in arbitration. Although arbitration is

37 *www.ccma.org.za*; The CCMA conciliates workplace disputes; arbitrates disputes that remain unresolved after conciliation; facilitates the establishment of workplace forums and statutory councils; compiles and publishes information and statistics about its activities; and considers applications for accreditation and subsidy from bargaining councils and private agencies.

> not inferior to a judicial remedy, employment arbitration does not provide the opportunity for alteration of the substantive legal rights protecting employees. It has thus been held that, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum"[38]

A party who chooses arbitration over litigation would still be afforded the same substantive statutory rights available albeit at a different forum. The net effect would be that arbitral awards will be equal to what the courts would offer after judicial adjudication, and courts ordinarily will not enforce waivers of substantive statutory rights. The advantage of arbitration would be to ensure expeditious disposal of the matter and other attendant merits.

In these circumstances, what is altered is the structure of procedural rights by resorting to an alternative forum to ventilate the dispute. In other words, an employee only trades the procedures and opportunities for review of the courtroom for the simplicity, expedition and informality of arbitration.[39] Employees should not be prejudiced by the remedies and awards given in arbitration, and remedies that are statutorily available in the event of breach by the employer, including the corresponding interpretations by the Employment and Labour Relations Court, should be available during employment arbitration. The system must allow the same access, measure of protection and remedies that the court would award with the arbitrator being bound by the principle of *stare decisis*.

Since an employer is forbidden from limiting the extent of its liability, any arbitration agreement that provides for an inferior award, even if executed by the parties, would be deemed as unconscionable and hence void.

Global companies employing expatriates may, in an attempt to manage its employees spanning multiple jurisdictions, may find arbitration agreements excluding the application of employment law of the host county attractive. However, once employment relationship in the foreign country is established, a multinational company

38 *Mistsubishi Motors v Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 628 [1985].

39 Ibid, *Mistsubishi Motors*.

is required to be subject to the employment laws applicable to those they employ in different jurisdictions, unless the institution is prepared to plead the defence of diplomatic immunity from legal process.

4.2. Execution of Arbitration Agreements

Waiver of the right to adjudicate by an employee requires an explicit, clear and unmistakable waiver action. There ought to exist a mechanism to demonstrate that a particular employee knowingly and voluntarily agreed to arbitrate any or all claims against an employer. An arbitration provision should be declared null and void if it is demonstrated that it was not executed freely by the affected employee. Employees suffer a disadvantage when it comes to executing employment contracts key being the desire to secure the job against all odds, failing to read and understand the actual terms of the employment contract, issuance of the terms and requiring an employee's signature after the employment has begun or included in the employees handbook which do not require an employee's signature or acknowledgement.

Essentially, the Rules should discourage the practice of employers compelling prospective employees to execute binding pre-dispute arbitration agreement as a condition of employment. Similarly, employers should be discouraged from inserting such clauses in the Human Resource Manuals and requiring the employees to acknowledge receipt of the Manual and making its contents binding on the employee.

Instead, employers should prepare and have employees execute arbitration agreements separate from the remainder of the terms of the contract and invite the employees to agree to its contents and have it executed separately. This would ensure that the arbitration clause is easily noticeable by an employee instead of being buried in the fine prints. The employer must ensure and, if possible, place safeguards to ensure and prove that the employee knowingly and voluntarily signed the arbitration agreement when required.

4.3. Arbitrator Appointment and Neutrality

In adjudication process, a dispute is listed before a duly appointed judge whose impartiality is presumed owing to the attendant constitutional and statutory safeguards regarding impartiality attached to their office. In arbitration proceedings, however,

parties are left to agree upon the qualifications and appointment procedures of an arbitrator.

While the ability of the parties to select their own arbitrators is recognized as one of the arbitration's most desired features, it represents a huge challenge when it comes to employment arbitration, where parties are presumed to possess unequal bargaining power and financial muscle. The neutrality standards of an arbitrator could be higher in employment arbitration. Since the arbitrator would be a substitute for a judge, he functions as a quasi-public actor in the sphere of vindicating public law. The employer and the State must ensure that any absurdity in the arbitration agreements especially as regards manner of appointment of arbitrator is eliminated.

Just like court annexed mediation in the High Court, the ministry for the time being responsible for labour matters could approve a list of arbitrators with expertise in the employment field, properly trained, mandated and probably gazetted to handle individual employment disputes. Parties to the dispute would then be required to elect an arbitrator from among the persons included in the approved list or panel. Persons for appointment as employment arbitrators ought to be vetted to ensure the resulting panel consists of eminently qualified employment dispute resolution specialists for proper management of arbitration.

4.4. Representation by Counsel or Trade Union Representative

To effectively articulate and enforce individual employee rights in arbitration proceedings, a well-functioning mechanism providing employee representation is key. In post-employment arbitration, an employee ought to be granted an option of being represented in the arbitration proceedings by counsel. The arbitration procedure must specify the right of representation of an employee either by a counsel of his choice, or by trade union representatives.

4.5. Access to Information and Burden of Proof

The arbitration must import the statutory burden of proof and discovery requirements as outlined in the Employment Act. In addition, the employee and employer should have adequate access to relevant information through a discovery or exchange of information

process. The discovery process should be conducted in the most expeditious and cost-effective manner.

4.6. Costs of Arbitration

The arbitration rules should require that disputes be heard by an impartial person jointly selected by the parties and with expertise in the employment field. The extra cost of arbitrator fees makes the arbitration appropriate only for high value claims. In Kenya, arbitration can be more expensive than adjudication. This is because parties pay the arbitrator's fees directly and by the hour. Litigants do not pay fees for the use of the court in the same manner they pay the arbitrator.

The costs of the arbitration may be higher where there are numerous preliminary applications for considerations and if the agreement calls for more than one arbitrator or on account of the general complexity of the matter. There exists a genuine and reasonable fear that employers may use their superior bargaining power to impose on employees costly arbitrators and unduly prolong the proceedings while incurring additional costs way above the ability of the employee.

In the majority of post-employment arbitration, an employee having been dismissed from employment, obviously would not have sufficient resources to engage the services of an arbitrator. The overall principle is that arbitration can and should be made accessible and cheaper for both parties by ensuring that excessive fees are not levied on employees. Similarly, an employee's access to arbitration cannot be precluded on the sole basis of his inability to pay the full costs of the arbitration.

It is important to balance the disparity in resources between employer and employee. Under the Belgian law, it is not possible to insert in the employment agreement an arbitration clause with the purpose of bringing the case to an arbitrator unless the employee earns at least $66,406 gross per year and is in a management position. This is to ensure that an employee would be in a better position to meet the costs attendant to the arbitration process.

In addition, County Labour Office can be empowered to carry out arbitration proceedings with respect to certain class of employees without direct expenses to the parties, especially the employees.[40]

4.7. Seat of Arbitration

Seat of arbitration is the legal jurisdiction to which the arbitration is tied. It need not be in the same country as venue, although in practice they are similar. In commercial arbitration agreements, parties decide the seat of arbitration. By selecting a given State as the seat, the arbitration process is placed within the framework of the State's mandatory national laws applicable to the arbitration including any assistance and enforcement of the resulting award. Parties to an employment contract will often specify a jurisdictional clause which is a matter governed by principles of public policy.

The Rome Convention gives pre-eminence to the laws of the country in which or from which the employee carries out their work which can override the parties' choice of law.[41] Further, the provisions thereon are overriding and mandatory to safeguard public interest irrespective of the law otherwise applicable to the contract under the regulations.[42]

The Convention which is applicable in Kenya, emphasises the importance of the protection of employees by reaching a conclusion which enables the employee, who is in a subordinate economic positions, to enforce his rights in the country in which

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40 <*https://statbel.fgov.be/en/themes/work-training/overview-belgian-wages-and-salaries*> accessed on August 28, 2018.

41 Article 8(1) of the Rome Convention provides as follows:
An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.
Article 8(2) on the other hand provides that, "The contract shall be governed by the law of the country in which or failing that, from which the employee habitually carries out his work in performance of the contract".

42 Article 9.

he carries out his work rather than relying on an alternative place of engagement. Consequently, any agreement that provides for arbitration in a place away from the habitual place of employment or outside Kenya could be either void or voidable at the instance of the employee.

4.8. Written Awards

Arbitrator must issue written awards with conclusive reasons for reaching a decision. This is owing to the strong public interest attendant thereto that lays emphasis on decisional reasoning. Without the reasoned award, it would be impossible to establish whether the arbitrator paid due attention to the statutory and common law provisions attendant to employment dispute resolution and negate the possibility of effective appellate review.

4.9. Finality Provisions

Generally, arbitration should be free from substantive judicial oversight. However, when it relates to employment arbitration, the efficiency in resolving legal controversies must be weighed against public policy or interest to enforce rights aimed at protecting the rights and interests of employees. The arbitration finality ought to be defined more broadly to, allow albeit limited, for substantive judicial appeal of awards. This is to the extent that, should substantial errors taint arbitral proceedings based on merits, the court should be allowed to intervene. It should be allowed to vacate, modify or correct an arbitral award or obvious errors in the arbitral process that has the effect of eroding the jurisprudence developed and evolved by the court to protect public interests.

4.10. Arbitrability and Enforcement

As opposed to commercial arbitration, it would be ideal for the Employment and Labour Relations Court to resolve the questions of arbitrability and legality or enforceability. The Employment and Labour Relations Court has a wider jurisdiction to enforce the employment rights and will bring certainty in the interpretation and enforcement of the minimum Standards.

4.11. Irreducible Minimums in Individual Employment Agreements

Even though the arbitration agreement may be a negotiated one, it would be void if it varies with the principles of public policy that guides and protects an employee in the workplace. Parties must be careful not to render the agreement substantively unconscionable by inserting the terms that would be contrary to public policy including with respect to the choice of substantive law and seat of arbitration.

5. Conclusion

Arbitration has great potential to resolve employment disputes in Kenya and its influence cannot be fully curtailed. Notwithstanding the foregoing limitations and bottlenecks, there exists an urgent need for the greater use of arbitration in the resolution of employment disputes. Parties to an employment contract should be free to contract out of the express statutory provisions and in the process, be bound by an alternative dispute resolution mechanism that forbids an employee from approaching the ordinary courts to litigate an employment dispute.

To support this noble objective, it would be important and indeed desirable that some legal reforms are initiated to anchor, clarify and broaden the scope of employment arbitration and as a result, increase its level of acceptance within the employment sector as a whole.

The debate should now move further to how the legislature and arbitration agencies should accommodate the trend with the attendant arbitral efficiency while protecting the substantive rights of an employee in addressing the statutory right vindication. The solution lies in supplementing traditional commercial arbitration rather than supplanting it in the employment context.

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