

The University of Nairobi

Institute of Diplomacy and International Studies

***Kenya's Bill of Rights and its Implications on Kenya's Ability to Apply
the International Bill of Rights.***

By:

MUTHUI Hilary Mbavu

Registration No: R50/63322/2010

Supervisor: Professor Maria Nzomo

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requirements for the award of the degree of Master of Arts in
International Studies**

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DECLARATION

I, HILARY MBAVU MUTHUI, hereby declare that this dissertation is my original work and has not been presented for a degree in any other university.

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HILARY MBAVU MUTHUI

DATE

This project has been submitted for examination with my approval as University Supervisor:

.....

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PROFESSOR MARIA NZOMO

DATE

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DEDICATION

I dedicate this work to my lovely wife Stella, and our two amazing children Colette and Vitalis.

You are the reason for my being.

ABSTRACT

The promulgation of the Constitution of Kenya 2010 marked a turning point in Kenya's history. The inclusion in the Constitution of a comprehensive Bill of Rights had a fundamental impact on the basic principles and foundations upon which Kenya as a country is based. The Kenyan Bill of Rights is a culmination of long winding constitutional aspirations of Kenyans and the deep seated desire for the domestication of the International Bill of Rights and the widening and strengthening of the protection of the fundamental freedoms and rights of the people of Kenya.

This study analyses Kenya's Bill of Rights and to assess its implications on Kenya's ability to apply the International Bill of Rights. This study interrogates the essence of the inclusion of Bills of rights in Constitutions using Kenya as an example and traces the history of International Bill of Rights including its instruments. It examines the nature of the international Bill of Rights, the process of its development and its scope. It analyse Kenya's Bill of rights, explore its rationale and conceptual basis. It compares Kenya's Bill of Rights to the International Bill of Rights and explores the implications of Kenya's Bill of Rights on Kenya's ability to apply the International Bill of Rights. This study is based on the natural rights theory and it is argued that international human rights law is based on natural rights. The research adopts a descriptive design approach and a mixed method was used as quantitative information was used. A questionnaire was used to gather additional information from key informants and the deductions were applied to the information already gathered through desk research.

This study concludes that the International Bill of Rights will provide a solid basis for the implementation of the Kenyan Bill of Rights and so it should act as a constant reference point. The research also makes recommendations on how to implement Kenya's Bill of Rights to ensure that it adheres to the International Bill of Rights. A faithful implementation of the Kenyan Bill of Rights is recommended. An enhanced role of the judiciary and citizen vigilance on the implementation of the Bill of Rights is also recommended. Constant Monitoring and regular reporting on the status of human rights in Kenya will also buttress the domestication of International Bill of Rights in Kenya.

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LIST OF ACRONYMS

CAT	Convention Against Torture
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CKRC	Constitution of Kenya Review Commission
COE	Committee of Experts
CRC	Convention on the Rights of the Child
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
KNCHR	Kenya National Commission on Human Rights
MOJCA	Ministry of Justice and Constitutional Affairs
NGOs	Non Governmental Organizations
UDHR	Universal Declaration of Human Rights
UN	United Nations
UPR	Universal Periodic Review

CHAPTER ONE

1.1 Introduction to the Study

A bill of rights is an integral part of a modern constitution. In fact it is ‘a salient feature of national constitutions, its human rights provisions protect individuals against abuse of government power’¹. Many countries around the world have incorporated the international human rights law into their domestic legal regime in one form or another. Kenya is no exception and since independence it has always had a bill of rights in its constitution. Many countries including Kenya strive to attain the human rights standards set by the international bill of rights.

The promulgation of the Constitution of Kenya on 27th August 2010 had far reaching implications on Kenya’s human rights legal regime. Chapter four of the Constitution spells out the bill of rights and at the outset proclaims that it is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies².The Constitution revolutionized the treaty making processes by transforming Kenya from being a dualist state to a monist one; where treaties apply directly domestically after ratification.

The foundations of the bill of rights are traceable to the doctrine of natural law which asserts that individuals possess natural rights and the government has a role to ensure the protection and promotion of individual rights. It is also attributed to theorists such as John Locke and Thomas Jefferson, who focused on the idea of individual rights that are safeguarded by and against the government³ The conceptualization of human rights³ crystallized into the 1789 French

¹ Klabbers J. *et al*; *The Constitutionalization of International law*, Oxford University Press New York (2009) p.77

² Article 19 of the Constitution

³James Nickel: *Making Sense of Human Rights; Philosophical Reflections on the Universal Declaration*, University of California Press, 1987

Declaration of the Rights of Man and the Citizen and the American Bill of Rights. The events of the Second World War led to the formation of the United Nations which further led to the Universal Declaration of Human Rights (UDHR) of the 1948 which initiated the framework of bill of rights.⁴

The Kenyan bill of rights mirrors the international bill of rights as contained in the Universal Declaration of Human Rights (UDHR) or the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) albeit with modifications. This study examines the Kenyan bill of rights vis-a-vis the international bill of rights with a view to understanding the implications of the variances. The study categorizes the human rights examined into three that is civil and political rights, economic, social and cultural rights and third generation rights. It makes recommendations on modes of applying the bill of rights that ensures adherence to the international bill of human rights.

There are several regional human rights treaties to which Kenya is party to and they include the African Charter on Human and Peoples' rights and the African Charter on the Rights and Welfare of the Child. While this study makes general reference to these additional documents, it restricts itself to the international bill of rights. Kenya's independent constitution like many constitutions of the time emphasized on civil and political rights rather than economic social or cultural rights. A distinction is often made between these two sets of rights that civil and political rights are realizable immediately while economic social and cultural rights are realizable incrementally.

⁴ ibid

Though enforcing the compliance with human rights standards has been a challenge, the international human rights system and the cognate bodies have created enforcement machinery which includes reporting, comments by treaty bodies and decisions of judicial and quasi-judicial bodies.⁵ Many of the human rights treaties create reporting mechanisms under which states bind themselves to report. The United Nations (UN) member states have also created a general human rights reporting mechanism under the Human Rights Council which was formed in 2006⁶ and under which the universal periodic review mechanism is applied. Reporting by the government to different treaty bodies charged with human rights treaty monitoring has been reduced to a mere formality. Non adherence and even systemic violation of human rights has been common in Kenya with no proper recourse in law. This study analyses these international human rights standards as set out in different human rights treaties and how they apply to Kenya. It also takes stock of Kenya's efforts to meet these standards as set out by the international bill of rights. It grapples with opposing arguments on the universality of human rights and also the concept of customary international law especially international human rights law.

1.2 Statement of Research Problem

The coming into effect of the Constitution of Kenya 2010 with its comprehensive bill of rights resulted in the expansion of the rights enjoyable by Kenyans, setting the parameters under which these rights are to be enjoyed and setting broad principles on how they are to be applied. This study examines these rights with a view to understanding their rationale and the extent of their effects and the extent to which the bill of rights strengthens Kenya's commitment to human

⁵ Hayes K; *General Principles: Judicial Implementation of International Human Rights Norms, in Human Rights Litigation and the Domestication of human rights standards in Sub Saharan Africa*; AHRAJ Casebook Series Volume 1. p. 17.

⁶ www.ohchr.org (accessed on 21st July 2012)

rights. Although the Kenya bill of rights has been hailed as one of the most progressive in the world, limited empirical evidence has been documented so far. This assertion is investigated in this study and salient features of this bill of rights highlighted.

The list of international human rights instruments has grown tremendously over the last 60 years, yet its scope remains relative. The provisions of the treaties have grown more and more specific. Documents such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are considered to constitute the basic bill of rights. Others include the United Nations Convention on the Rights of the Child (UNCRC), the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), International Convention on the Elimination of All forms of Racial Discrimination (ICERD), Convention Against Torture (CAT) among others. All these contain human rights norms which have come to be accepted universally. The international bill of rights is often seen as a set of utopian platitudes which no state has been able to achieve in totality. They are more often than not, set as aspirations that states have to strive to achieve. This paper examines the probity of this assertion and explores the compelling powers for states to set for themselves and strive to comply with human rights standards.

Although the question on the universality of human rights has never been resolved countries around the world including Kenya continue to apply human rights as if they are universal. The bill of rights in the Constitution of Kenya 2010 is a good example of this bid to apply international human rights standards in Kenya, yet there exists a wide gap between what ought to be done to conform with these standards and what obtains on the ground. This study

assesses the universality of the provisions on human rights as contained in the Kenyan constitution.

Despite the fact that Kenya has ratified major international human rights instruments, the extent to which it has adhered to them remains a big question and this study ventures into this area in a bid to explore possibilities of accelerating compliance. Since international human rights monitoring is vital for the implementation of international human rights standards, has there been adequate emphasis laid on reporting under different human rights treaties to which Kenya is party to. This study examines these lapses in treaty monitoring and makes appropriate recommendations.

1.3 Objectives of the Study

The objectives of this study are:-

- To examine the nature of the International Bill of Rights, the process of its development, its scope and essence.
- To analyze Kenya's Bill of Rights and explore its rationale and conceptual basis.
- To compare the Kenya Bill of Rights and the International Bill of Rights and explore the implications of Kenya's Bill of rights on its ability to apply the international bill of rights domestically.

1.4 Literature Review

There exists a substantial amount of literature on the foundations of international law, the development of international human rights law, the applicability of international law in the municipal arena, customary international law, the universality of human rights, human rights reporting, the status of the application of international human rights law in Kenya and the

interpretation of international human rights by the judicial bodies. Here, the study considers the various arguments advanced by various authors who have written on these areas and explores the philosophical foundations of the arguments contained in their materials.

The concept of human rights as a universal legal obligation of states is of recent origin and its historical antecedents can be traced to the events during and after the Second World War.⁷ The Universal Declaration of Human Rights (UDHR) creates an expectation of adherence and it has been argued that it has now become part of customary international law.⁸ They state that ‘in today’s world, human rights is characteristically imagined as a movement involving the spread of liberal constitutions among states. Internal developments in many states have been much influenced by international law and institutions as well as by pressures from other states trying to enforce international law. Universality is one of the essential characteristics of human rights⁹.

International law generally governs relationships between states among themselves or other parties with international legal personality. Municipal law on the other hand governs relations between individuals among themselves and also between individuals and states or other municipal legal persons. However in practice these two legal domains are not distinct as they appear and it is common to find the two systems governing one and the same subject such as is the case with human rights. Hill (1989)¹⁰, traces the theoretical foundations of human rights and searches for the answer to the question of the universality of human rights. Hill asserts that rights

⁷ Mbondenyei M., *International Human Rights and Their Enforcement in Africa*, (Nairobi LawAfrica, 201) p. 33

⁸ Hayes K., p. 19

⁹ See generally, P. Kirchsclaeger; *Universality of Human Rights*

¹⁰ Hill D. M., *Human Rights and Foreign Policy*, (London Macmillan Press; 1989)

themselves exist in the moral bases of our common humanity; it is the way they are implemented which is a question of politics.

Steiner and Alston¹¹ have traced the origins of International Human Rights Law and given the rationale behind basic human rights principles, examined the international human rights regime and interpretations by different judicial bodies of different aspects of international human rights. Bilder¹² states that ‘The international human rights movement is based on the concept that every nation has an obligation to respect the human rights of its citizens and that other nations and the international community have a right, and responsibility, to protest if states do not adhere to this obligation’. This therefore means that Kenya, in enacting the Constitution of Kenya 2010 was fulfilling part of this obligation by setting the framework for the fulfillment of the rights of its citizens. Often enough the international community either through individual states or collectively under the UN or other regional human rights bodies have decried the provisions in the former constitution and protested the human rights situation in Kenya ostensibly in exercise of their rights and obligations as regards international human rights.

In tracing the origins of international human rights norms the naturalist versus positivist debate features in this study. In natural law there is an assumption that natural rights draw their validity from divine authority.¹³ It is ‘...a set of ideal norms or principles of a higher obligation, which are the same for all men at all times, which are concerned with the same problems that

¹¹ Steiner & Alston: *International Human Rights in Context*, (Oxford, Oxford University Press, 2nd Edition 2000)

¹² Hannum H. (ed), *Guide to International Human Rights Practice*, 4th edition (New York Transnational Publishers, Lc, Ardsley 2004) p. 3

¹³ Newman & Weissbrodt, *International Human Right*, (Cincinnati, Anderson Publishing co. 1990) p. 333

positive law attempts to solve...'¹⁴ Positivists on the other hand hold that the most important measure of human rights is to be found in the authoritative enactment of a system of law sustained by organized community coercion.¹⁵

Positivists have advanced two theories to explain the application of international law in the municipal sphere. The first one states that rules of international law cannot directly and *ex proprio vigore* be applied within the municipal sphere, in state courts before they undergo a process of specific adoption or specific incorporation into municipal law. Since according to positivists international law and municipal law constitute two strictly separate and structurally different systems, international law cannot impinge upon municipal law unless municipal law allows its constitutional machinery to be used for that purpose. Transformation of treaty rules takes place say through a specific legislation before it can become applicable municipally. However practically and according to well settled principles of international law a state cannot plead the provisions of its own law in answer to a claim against it for an alleged breach of its international law obligations.

International human rights guarantees are most valuable when they are enforceable in national law¹⁶ because a remedy in a national court is more convenient and effective than recourse in international procedure. For instance, while most of the members of the European Convention on Human Rights have a bill of rights in their national Constitutions, there are a few (such as Switzerland) who don't have. Countries which don't have a bill of rights in their

¹⁴ Bridge et al: *Fundamental Rights*, (London, Sweet & Maxwell 1973) p. 11.

¹⁵ Newman & Weissbrodt p. 334

¹⁶ Harris et al, *Law of the European Convention on Human right*, (London Reed Elsevier (UK) LTD 1995) at 23

national constitutions apply the Convention indirectly through rules of interpretation and in the development of judge-made law.

Lumumba *et al*¹⁷ provide an historical perspective of the Constitution of Kenya 2010. In chapter three Mbondenyi¹⁸ analyses the bill of rights and interprets its provisions and their applicability. He starts by highlighting its salient features and goes on to examine specific provisions while relating them to different international human rights instruments. He observes that ‘...the Constitution places the implementation of economic, social and cultural rights on a different footing as opposed to other categories of rights. Noteworthy, however, the economic and social rights provided for in the Constitution are not as detailed as the civil and political rights. This raises doubts as to whether the government will take seriously the implementation of this category of rights as it would the other categories’¹⁹

Bayefsky²⁰ analyses the UN human rights processes under different treaties. She provides a critique of the human rights reporting systems and recommends reforms to ensure compliance with the provisions of the treaties and ultimately reduction of human rights violations. She analyses the gap between universal right and remedy which she decries as threatening the integrity of the international human rights legal regime. Many of these recommendations have been implemented with the setting up of the Human Rights Committee and the setting up of the Universal Periodic Review mechanism.

¹⁷ See generally Lumumba PLO *et al*, *The Constitution of Kenya; Contemporary readings*, (Nairobi LawAfrica, 2011)

¹⁸ *ibid* p. 61

¹⁹ *Ibid* p. 63

²⁰ See generally Bayefsky, A.F.; *The UN Treaty System; Universality at the Crossroads*; April 2001

The Constitution of Kenya 2010 provides the broad framework for treaty making. Indeed; the effect of the promulgation of the Constitution of Kenya 2010 was to make all treaties that had been ratified by Kenya up to 27th August 2010 part of Kenyan law. Articles 2(5) and 2(6) of the Constitution of Kenya makes Kenya a monist country by providing that the general rules of international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution. In contrast the South African Constitution²¹ provides for a dualist system where international agreements bind the Republic of South Africa only after they have been approved by resolution in both the National Assembly and National Council of Provinces.

In Ngondi - Houghton²² which is a report of a research conducted by the Ministry of Justice and Constitutional Affairs (MoJCA) and the Kenya National Commission on Human Rights (KNCHR) the extend of Kenya's commitment to the implementation of international human rights standards is well captured. The report gives Kenya's record of ratification and reporting under core international and regional human rights instruments. It analyses the patterns and quality of the reports. It goes on to give a critique of the domestication of international and regional human rights treaties and scrutinizes the status of implementation of specific treaties which Kenya has ratified.

Constitutionally, the legislative authority of the Kenyan state lies with parliament²³. It therefore follows that; treaties, which by their very nature place legal obligations on Kenya as a

²¹ *The Constitution of the Republic of South Africa* 1996 Article 231 (2)

²² Ngondi – Houghton C., *The State of Human Rights in Kenya; A Baseline Survey Report* Kenya National Commission on Human Rights (KNCHR) and Ministry of Justice and Constitutional Affairs (MoJCA);

²³ Article 94 (1) of the Constitution of Kenya 2010

state and individual Kenyans has to be ratified by parliament before it can apply to Kenya. Prior to the promulgation of the Constitution of Kenya 2010, Kenya ratified many treaties but had not enacted corresponding legislation to 'transform' the treaty to apply domestically. Increasingly bills of rights of different countries are being determined by international law²⁴. For want of an effective intergovernmental enforcement mechanisms international human rights protection continues to rely on a functioning national human rights protection system.²⁵ In most cases international law is generally applicable only to states and therefore for it to apply to individuals the individual governments have to create a responsibility through a domestic legislation.

There is a very close relationship between the International Bill of Rights and the Kenyan Bill of Rights. It is argued in this study that by stating that general principles of international law are applicable as part of Kenyan law, the Constitution of Kenya 2010 directly applies customary international law in Kenya. This reaffirms the universality of human rights as different states are able to voluntarily ascribe to certain universally (and generally) agreed norms. By ascribing to the international Bill of Rights, Kenya is contributing to the universalization of human rights. The international Bill of Rights will guide Kenya as it implements its own Bill of Rights thus adhering to the general norm accepted among states.

A comparative study of human rights regimes in comparable jurisdictions provides a barometer with which we can gauge the Kenyan situation. In 'Human Rights Law and Practice'²⁶ a book edited by Lord Lester *et al* the human rights practice of the United Kingdom is analysed.

²⁴ Nowak Manfred, *Introduction to the International Human Rights regime*, Martinus Nijhoff Publishers, Boston p36

²⁵ *ibid*

²⁶ Lester et al, ed; *Human Rights Law and Practice*; 3rd Edition, LexisNexis London

The application of the Human Rights Act 1998 and the European Convention on Human Rights are explored in detail. The rich jurisprudence on human rights particularly from the European Court of Human Rights provides numerous lessons for Kenya. The book demonstrates the immense influence the human rights legislation and court pronouncements have had on the United Kingdom.

The international community has put in place several mechanisms to ensure compliance with the international human rights regime and specifically for gross violation of human rights.²⁷ International human rights law obliges states to take all necessary measures to give force to the standards contained in its treaties and customary principles. This means, *inter alia*, ensuring redress for victims, prosecuting offenders, preventing abuse and combating impunity. It is therefore incumbent upon individual states to enforce these standards through their domestic legal systems. Where they do not do so, states may be compelled to surrender such persons for prosecution either in the ad hoc tribunals such as the International Criminal Tribunal for Rwanda (ICTR) International Criminal Tribunal for (the former) Yugoslavia (ICTY) or to the International Criminal Court (ICC).

1.5 Justification for the study

This research identifies the conceptual and practical differences between the Kenyan Bill of Rights and the International Bill of Rights. Clearly from the foregoing literature review little has been done to situate the human rights as contained in the Kenyan Constitution in international human rights as contained in the international Bill of Rights and this is what this study seeks to do. While there are studies on Kenya's Bill of rights, few exist that compare it

²⁷ www.unhchr.ch (accessed on 16th July 2012)

with the international bill of rights. The disparities are explored with a view to assessing their implications.

Although the Constitution of Kenya 2010 expands the bill of rights to include a substantial part of the international bill of rights, there are certain differences which have implications on the full realization of human rights in Kenya. While it is true that there exists a lot of literature on international human rights law, few studies have been done on the Kenya human rights legal regime.

Kenya is one of the few countries in the world that have adopted a Bill of rights that recognizes all the three generations of human rights; that is civil and political rights, economic social and cultural rights and third generation rights. This study delves into this phenomenon and systematically examines the opportunity it presents for Kenya to adhere to international human rights standards.

Bills of Rights play an important role in clarifying the role of the state towards its citizens and the role of citizens towards each other. Bills of Rights recognize and clarify that human rights come with responsibilities which should be exercised in a way that respects the human rights of others. This study explores the extent to which the Kenyan Bill of Rights clarifies these rights and its unique features which makes it a perfect instrument for the realization of international human rights. The study will explore interpretations of the Kenyan Bill of Rights which will give full effect to the import of the international bill of rights. The literature review reveals that there is need to examine the Kenyan Bill of rights to determine how useful it will be as an instrument of attaining the international human rights standards.

It is to be noted that the interpretation of the Kenyan Bill of rights will be influenced to a large extent by the international human rights regime. Also, there is need to tease out the novelties in the Bill of rights not only for academic purposes but also for purposes of policy making. For instance the provisions of the international Bill of Rights on economic social and cultural rights are adopted in the Kenya Constitution albeit in a deduced form. The Constitution acknowledges that these rights will be realized incrementally or progressively and that the government needs to demonstrate goodwill by putting in place the necessary policy and legislative frameworks for the implementation of the rights.

Bills of rights have been instrumental in the democratization of societies and have placed the individual as a subject of international law. As part of national Constitutions, Bills of rights help create a culture of constitutionalism and foster real and transformational change in the rule of law and greater protection of individual rights. This study seeks to understand how the expanded Bill of Rights will translate into greater enjoyment of rights by Kenyans using the international bill of rights as the ideal.

Since this study is conducted during a historic period when Kenya is implementing its Constitution it will provide important lessons for policy makers and implementers which can be used to inform the putting into place the policy framework under the new Constitutional dispensation for the application of international human rights law. This study will not only be useful to policy makers in the implementation of the Kenyan Bill of Rights but also to members of the judiciary who are tasked with interpreting it. The study will assist in monitoring and evaluating the level of adherence by the state in its endeavour to apply the international human rights regime using the Kenyan Constitution.

1.6 Theoretical framework

This study uses the natural rights theory to explain the origins on the International Bill of Rights, the principles behind the development of international Bill of Rights, the basis for the formulation and adoption of international human rights instruments and the clamour for the internationalization of human rights and domestication by different jurisdictions around the world.

Natural law is a system of law that is purportedly determined by nature, and thus universal. Classically, natural law refers to the use of reason to analyze human nature both social and personal and deduce binding rules of moral behavior from it. Natural law is classically contrasted with the positive law of a given political community, society, or state, and thus serves as a standard by which to criticize said positive law.²⁸

The theory of natural law has developed over time and was largely postulated using religious or moral grounds. In *Summa Theologica*, Thomas Aquinas identified natural law as the precepts appointed by reason.²⁹ Aquinas perceived natural rights as part of the law of God that confers certain immutable rights upon individuals. Hugo Grotius further expanded on the notion of natural law in *De jure belli et paci*, where he propounded the immutability of what is naturally right and wrong.³⁰ Hugo is credited with detaching natural law from religion and making it more secular and rationalistic.

²⁸ http://en.wikipedia.org/wiki/Natural_and_legal_rights

²⁹ Thomas Aquinas, *Summa Theologica* I-II q 94 a., 1. P 1008 (The Fathers of English Dominican Province trans., Benziger Brothers 1947 (1273) Article 2

³⁰ <http://www.lonang.com/exlibris/grotius/> (accessed on 10th September 2013)

Later the Philosopher Emanuel Kant³¹ reinforced the idea of natural law when he argued that the fundamental requirements of morality required that each treat another according to universal principles. Kant's political doctrine was derived from his moral philosophy, and as such he argued that a state had to be organized through the imposition of, and obedience to, laws that applied universally; nevertheless, these laws should respect the equality, freedom, and autonomy of the citizens. In this way Kant, prescribed that basic rights were necessary for civil society. John Locke theory was that law should protect the basic human rights against the abuses of governments.³² Locke had a lasting influence on political discourse that was reflected in both the American Declaration of Independence and France's Declaration of the Rights of Man and the Citizen, passed by the Republican Assembly after the revolution in 1789. The French declaration proclaimed 17 rights as "the natural, inalienable and sacred rights of man".³³

Thomas Paine³⁴ wrote a defence of the conception of natural rights and their connection to the rights of a particular society. In *The Rights of Man*, Paine made a distinction between *natural* rights and *civil* rights. He stated that natural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. Civil rights are those which appertain to man in right of being a member of society. Every civil right has for its foundation, some natural right pre-existing in the

³¹ <http://www.sfu.ca/~aheard/intro.html> (accessed on 10th September 2013)

³² Mbondenyi M., *International Human Rights and Their Enforcement in Africa*, (Nairobi LawAfrica, 201) p. 27

³³ <http://www.sfu.ca/~aheard/intro.html> (accessed on 10th September 2013)

³⁴ Thomas Paine, *The Rights of Man*, New York: Penguin Books, 1985, p.68

individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection

Contemporary notions of human rights draw very deeply from this natural rights tradition. In a further extension of the natural rights tradition, human rights are now often viewed as arising essentially from the nature of humankind itself. The idea that all humans possess human rights simply by existing and that these rights cannot be taken away from them are direct descendants of natural rights³⁵.

It can be asserted that through natural rights theory and by extrapolation that although the human rights comprises ideas drawn mainly from its development in Western Europe a time will come when they will be universally accepted and observed all over the world. From the literature review it is evident that the universality of human rights has grown over time and continues to grow. Steiner and Alston³⁶ have argued that human rights practices have now been ‘universalized’. Natural rights theory provides for the respect of human dignity, freedom and equality from which other human rights flow³⁷.

1.7 Hypotheses

1. The international bill of rights contains general principles which are easily adoptable domestically.
2. Kenya’s bill of rights is comprehensive and is an effective instrument for the full realization and enforcement of human rights in Kenya.

³⁵ ibid

³⁶ Baehr and Holleman., p. 77

³⁷ Mbondenyi M., *International Human Rights and Their Enforcement in Africa*, (Nairobi LawAfrica, 201) p. 27

3. Kenya's Bill of rights provides a material basis for the application of the international bill of rights.

1.8 Methodology of the Research

1.8.1 Research Design

This research adopts a descriptive design approach. The main aim of using this approach is to provide an accurate and valid representation of the factors or variables that pertain or are relevant to the research question. Descriptive designs are used to identify disparities within communities and interventions that could reduce these disparities. In this regard, a mixed method research approach was used. It combines both qualitative and quantitative forms. It is more than simply collecting and analyzing both kinds of data; it also involves the use of both approaches in tandem so that the overall strength of a study is greater than either qualitative or quantitative research. The researcher adopted a hybrid of qualitative research designs including case studies of different countries, grounded theory studies of approaches to international human rights law to analyse existing theories on international human rights law.

Qualitative research crosscuts disciplines and subject matters. It involves an in-depth understanding of human behavior and the reasons that govern human behavior. This design also makes enough provision for protection against bias and maximizes reliability. Qualitative researchers typically rely on four methods for gathering information: participation in the setting, direct observation, in depth interviews, and analysis of documents and materials. This study will employ in depth interviews and analysis of documents and materials in the subject matter. The study will use a questionnaire with well examined and unambiguous questions.

Quantitative research methodology will also be applied since it provides the fundamental connection between empirical observation and mathematical expression of quantitative

relationships. Quantitative methods assume that data is independent of people's perception, and empirical in nature. These research techniques are used to gather quantitative data – information dealing with numbers and anything that is measurable. Statistics, tables and graphs, are often used to present the results of these methods.

1.8.2 Research Areas

Data covering different aspects of international bill of human rights was sought. These included the Kenyan Constitutional provisions relating to international human rights law, Kenya's experience in applying international bill of human rights including the treaty monitoring patterns concerning Kenya, specific principles of international human rights law and the human rights law of selected countries.

1.8.3 Data sources

The researcher explored different data sources depending on the information that was needed. These included internet sources, virtual and physical academic libraries and personal collections of academic literature, government officials, international civil society officials, intergovernmental officials and academicians among other sources. The researcher will take into consideration several factors while considering data sources including reliability, validity and confidentiality.

1.8.4 Sampling Technique

Since the research seeks to find out the perceptions of individuals; a non probability sampling design will be applied. The study will concentrate on institutions rich in the information sought such as the civil society organizations, Ministry of Foreign Affairs, the State Law Office and the Constitutional Implementation Commission. Since the study is exploratory and no statistical information is sought, purposeful random sampling was employed. This was

achieved by identifying a population of interest and developing a systematic way of selecting cases that is not based on advanced knowledge of how the outcomes would appear.

1.8.5 Data collection methods

Study methods included the use of qualitative and participatory research methodology. Therefore both primary and secondary data methods were used to gather information used in this study.

Primary data: This was obtained through semi-structured questionnaires which were designed bearing in mind the target group and the dynamics that governs their public relations. These were administered by the researcher or self administered through email. Interviews were held with key informants which included officers at the treaty section of the State Law office to establish the Kenyan treaty making practices; one commissioner of the Constitutional Implementation Commission to provide insights into the general constitutional implementation structure; three human rights law scholars and lawyers to assess Kenya's application of international bill of human rights and how it compares with other countries and international civil society organization officials doing advocacy on different aspects of international human rights law focus group discussions will be held for peers in particular fields under review.

Secondary data: Different materials were reviewed to gather secondary data. These include publications like books, articles, referred journals, constitutions, government publications, internet materials and other available information on the Kenyan and the international human rights law.

1.9 Chapter Outline

Chapter one contains introduction, statement of the research problem; objectives of the research, literature review, theoretical framework; hypothesis; methodology and chapter outline.

It seeks to introduce the study, its objectives, and draws the general parameters under which it is conducted. It seeks to define the scope of international bill of rights and the Kenyan Bill of Rights.

Chapter two defines international human rights, traces its development, outlines its characteristics, reviews the essence of international human rights standards and also reviews the critical international human rights instruments to which Kenya is party to. It categorizes human rights into three that is civil and political rights, economic social and cultural rights and third generation rights. It sets out to analyse the standards of human rights as set at the international level.

Chapter three gives a background of the Kenyan Bill of rights including its history, critically analyses the Bill of rights as contained in the Constitution of Kenya 2010 and explores the theoretical basis for its provisions. This chapter also appraises the Bill of rights and extrapolates the changes it will bring to Kenya's application of the international bill of rights. It analyses civil and political rights, economic social and cultural rights and third generation rights.

Chapter four give the importance of a Bill of Rights in Constitutions, gives their rationale, explains applicability of international human rights domestically in Kenya and compares Kenyan bill of rights with the international bill of rights and assess the extent to which it adheres thereto.

Chapter five makes conclusions on the research findings and makes recommendations for the implementation of Kenya's bill of rights in light of international bill of human rights.

CHAPTER TWO

2.0 A Critical Analysis of the International Bill of Rights

2.1 Introduction

This chapter traces the history of human rights, reviews the essence of international human rights standards as set in the international bill of rights, critical international human rights instruments to which Kenya is party to and also explores different instruments that govern different classifications of human rights including civil and political rights, economic, social and cultural rights and third generation rights.

2.2 Background

Human rights are basic standards or entitlements which are inherent in every human being. It is widely held that human rights are acquired at birth, cannot be taken away from an individual and are universal. They oblige the government to do some things and prevent it from doing others. Therefore human rights have a number of characteristics which include that they are universal, they are internationally recognized, they are interdependent, inalienable, they are legally protected, they focus on the dignity of the human being and that they protect individuals and groups and bind states.

There is no single document that can be called the International Bill of Rights but rather a collection of documents which essentially codify customary international law that that has been practiced over the years. International human rights law includes the legal provisions governing human rights as expounded in various international and regional human rights instruments.³⁸ These are international instruments which many states in the world have ratified or domesticated

³⁸ Newman & Weissbrodt *International Human Rights*, (Cincinnati Anderson Publishing co. 1990)

by way of incorporation in the constitution or by legislation³⁹. It has instruments that constitute the total bulk of laws that are agreed upon by States with the aim of respecting, protecting, and fulfilling human rights for all. It includes; treaties (draft texts of human rights treaties that are adopted by States Members of the relative organisation (UN/AU) for ratification and; standards (agreements that act as guides of best practices to State Members of a particular organisation but are not legally binding, commonly referred to as Declarations (e.g. UDHR 1948 and the UN Declaration on the Rights of Indigenous Peoples 2007). States that ratify or accede to a treaty, convention or a covenant undertake a commitment to fulfill the terms of the treaty. International Bill of Rights is constituted by various documents which include; Universal Declaration of Human Rights (UDHR) or the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

International human rights law includes the legal provisions governing human rights as expounded in various international and regional human rights instruments. International human rights instruments constitute the total bulk of laws that are agreed upon by States with the aim of respecting, protecting, and fulfilling human rights for all⁴⁰ and fundamental freedoms⁴¹

The philosophical foundations of human rights are to be found in Western Europe. As Robertson and Merrills write, “it is clear that the mainstream has its origin in the liberal democratic tradition of Western Europe, a tradition which is itself the product of the Greek philosophy, Roman law, the Judeo-Christian tradition, the humanism of the Reformation and the

³⁹ Mbondenyi M: *International Human Rights and Their Enforcement in Africa*, Nairobi, Law Publishing (K) Ltd, 2011

⁴⁰ See *Human Rights Committee, General Comment 29, States of Emergency (article4)*, U.N Doc. CCPR/C/21/Rev.1/Add. 11 (2001).

⁴¹ Article 21(4)

Age of reason.⁴² It means that the Western World translated into international law its philosophical, moral, cultural and religious value. Questions arise therefore as to their universality that is whether it is possible to take into account the differences while focusing on the common standards of human rights. On the other hand, if cultural differences cannot be denied, it is to establish whether differences can be an excuse to human rights abuses.

As mentioned earlier the international bill of rights presumes the universality of human rights. So why are they universal? From the natural law school of thought human rights are natural, inalienable and inherent in a human being. They exist as long as human beings exist and are therefore inseparable. It cannot vary since human beings are naturally the same in terms of desires, ambitions and pursuits the only differences occur out of socialization and the complexion. By extension some philosophers have argued that it emanates from God. St Thomas Aquinas argued that these natural rights are based on God. John Locke further expounded the issue of natural rights. He argued that after the social contract between the people and the sovereign the natural rights survived. It is therefore essential for them to be protected.

2.3 Universality versus Cultural Relativity of Human Rights

Human rights are today accepted worldwide, or at least recognized as ideals to be pursued by human societies. The Vienna Declaration and Programme of Action adopted on 25 June 1993 stated that human rights are universal by their nature and that universality was beyond question.⁴³ A growing number of instruments, bodies and mechanisms have been set up at the international level to implement them. But in the recent decades, we have witnessed gross human rights violations in many parts of the world. Understanding of the notion of human rights still

⁴² Robertson and Merrills, *Human Rights in the World: An Introduction to the Study of International Protection of Human Rights*, Manchester University Press, 1996, p.2

⁴³ The Vienna Declaration and Programme of Action adopted on 25 June 1993.

varies from one place to another, and the question remain whether there can be common human rights standard. The World Conference on Human Rights reaffirms the commitment of all States to fulfill their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law.⁴⁴

The issue of whether human rights are universal or not has dominated the legal discourse for more than twenty years in so far as international human rights law is concerned. There has been a division between those who support the view that human rights are universal while others argue that it varies as the culture of various people vary. This is referred to as *cultural relativism*. For the proponents of universality of human rights an individual is a unit possessing inalienable, inherent and indivisible rights but is driven by self interest. There have been diverse arguments on whether human rights are universal or not. Most of them were provoked by the creation of the international convention, UDHR on 10th December 1948.

On universalism and cultural relativism it is held that while the universality of human rights is widely acknowledged, many states have been known to question it.⁴⁵ Some have argued that human rights cannot be the same in every country because of differences in history, culture, religion, and economic development.

The doctrine of cultural relativism in relation to human rights holds that different societies have developed unique attitudes to the concept of human rights and human dignity. ‘Cultural relativism ...based on the proposition that human rights should not be construed as

⁴⁴ UN Charter, Article I, Paragraph 3

⁴⁵ Baehr and Holleman: *The Role of Human Rights in Foreign Policy*, 3rd Edition, (New York, Palgrave Macmillan) p. 25

absolute because there is infinite cultural variability in every society.’⁴⁶ On the other hand ‘...universalism holds that for a concept of human rights law to be defined as universal, it would have to have been established by a consensus of all states and must apply to all individuals within each of these states.’⁴⁷

The opponents of the principle have been arguing that there is no universal culture in the world. They give the reason that since human rights are much interconnected to customs and traditions of a society then they can never be universal. Cultural differences however do not contradict the search for human rights common standards. Pannikar recognizes that no culture is definitely closed to the human rights; ‘Human rights are the windows through which one particular culture envisages a just human order for its individuals’. In supporting the universality principle he further states that there are those basic entitlements that all human beings possess or should possess as the basic minimum. He stated that the right to equality and human dignity cannot be limited either by culture or the level of economic development. It has further been stated that the principle of the legitimacy of government, protection from oppressive and arbitrary rule, participation in the affairs of the community, right to life, and freedom from torture, slavery, assault, unlawful arrests and imprisonment are common to all.⁴⁸ This justifies the stand that despite the difference in cultures there is a common ground, which defines the minimum standards in the promotion and protection of human rights, internationally.

Another factor that supports the principle of universality is the fluidity of culture: colonialism, globalization and liberalization have brought wide interaction among various

⁴⁶ Mbondenyi B. K. p. 64

⁴⁷ *ibid*

⁴⁸ Henkins, L. “*Human Rights in International Law*”, in *Anthropological, Social and Judicial Bases of Human Rights*, Calucci Editore, Bari, 1989, p.196.

cultures. This explains why one cannot hide behind his culture which is not rigid. The opponents argue that the issue of the rights of women and children is western in nature and should not be strictly applied in every country. However there are some cultural practices against women and children that people will agree that they are violations of their rights.

The practices include child marriage, female genital mutilation, and wife inheritance among others. These practices are not found appropriate by many societies. We should also ask ourselves about how the victims of these practices feel about them. Then one can only conclude that they are not adhered to because of full appreciation of the culture but coercion by the external forces hence violating the victim's rights. The position that there is difference in economic development across the states in the world is untenable. Majority of States have developed without necessarily having authoritarian leaders who are indifferent to the violation of human rights. There are however some countries which are organized and developed through having strong presidents but we also have other states in third world that have had relative development while at the same time safeguarding the rights of their citizens as pointed out by Amartya that when people are free they are better placed to demand action from the government.

There has been another argument that when the UDHR was created most of the third world countries were still under colonialism. The question then goes how about China, India, Cuba and Lebanon who are third world countries but played a very influential role in the drafting of the convention. The proponents of the North /South argument as it is often called believe that the universality principle is a reason for the western powers to interfere with the internal affairs of the developing world. Religion has also been a factor and there are people who argue from religion perspective and state that human rights can only be acceptable if they emanate from God.

In spite the strong argument put forward by the proponents of the universality of human rights, it cannot be denied that the cultural variations across the world have substantial effect on the acceptance of the principle of universality. The world is multicultural and diverse in terms of culture and customs. The economic and social standards are also different e.g. literacy levels and standards of living. cultural differences cannot be denied, it is to establish whether differences can be an excuse to human rights abuses. Who will decide the nature and the level of change to meet universal standards of human rights and how avoid to be labelled or accused of cultural hegemony? For the relativists, moral and cultural values differ from one culture to another.

According to Parekh, “Different societies throw up different systems of moral beliefs depending on such things as their history, traditions, geographical circumstances, and views of the world. There are no means of judging them because there are no objective and universal criteria available for the purpose, and even if there were, we would be too deeply conditioned by our own society to discover them. Cultural differences may have an influence on the human rights issues where national competence, the sovereignty of the state or the quest of self-determination are opposed to the idea of universal human rights standards. The 1993 Vienna Conference is an example of arena where, universal principle of human rights clashed with relativistic assumptions. At the eve of that important event, African and Asian groups of nations met to draw their views they intended to put forward at the conference.

The most distinct features concerning culture that are not congruent with the universality principle are mostly found in Africa. Firstly, it is urged that the universalism is based on individualistic view of the people as opposed to ‘*communitarianism*’ of the African people. In fact in the African society duties are more important than rights. It has also been established to be quite difficult to enforce human rights in African communities because of the different

perspectives concerning various cultures. For example Female Genital Mutilation is taken as a compulsory rite of passage among some African communities while in other areas of the world it is an abhorrent uncouth practice. It will therefore be hard to convince the communities that practice it that is against human rights while at the same time it enhances acceptability and respect among them.

It is therefore quite important to understand that despite the assumed universality of human rights there are strong differences from culture to culture thus bringing different understanding of human right.

2.4 History of International Human Rights

In spite the fact that human rights have ancient precedents in religion, the concept of human rights as inviolable simply began during the era of renaissance⁴⁹. Before this, the *habeas corpus* law had already been enshrined in the Magna Carta⁵⁰. The conflict between the religions which led to civil wars in England brought out the concept of liberalism and respect for human rights to the vortex of European culture during the 18th century.

The American and French revolutions were also propelled by the rise in the consciousness on human rights. It finally led to the advent of universal suffrage. Eventually the world wars, specifically the Second World War then led to the Universal Declaration of Human Rights (UDHR). After the war focus was then turned to human rights movements for special interest groups such as feminism and civil rights of the African Americans. By the 21st century discourse on human rights had grown by leaps and bounds hence including the various causes

⁴⁹ Mutua M. *The ideology of human rights* (1996) 36 Virginia Journal of International Law p. 605

⁵⁰ Magna Carta passed between the king and the merchants in 1215AD.

such as the social and economic development. In the development of human rights law several instrument were passed across the world. For example, the Urukagina of Lagash⁵¹, this is considered as the earliest known legal code on the status of women. Several other instruments were issued in Mesopotamia e.g. the Code of Hammurabi⁵² It has also been said that the Persian Empire in the ancient Iran established some principles of human rights in the Cyrus the Great. When he conquered Babylon in 539 BC he issued the cylinder. This has been considered as the first human rights document though with several criticism. Movements have managed to achieve great social changes in so far as human rights are concerned. In Europe and America the labour unions brought about laws granting workers the right to strike, they established the minimum work conditions and forbidden child labour.

After the First World War in 1919 The League of Nations was established following discussions on the treaty of Versailles. Among the provisions there were requirements to promote and respect human rights that were later included in the Universal Declaration of Human Rights. The International Labour Organization (ILO) was also established to safeguard the rights on labour and employment. After the Second World War the United Nations was formed in 1945 and later the Universal Declaration of Human Rights (UDHR) was established in 1948. This was partly in response to the barbarism of World War II as well as to enhance respect for human rights worldwide.

⁵¹ The instrument was passed in (c. 2350 BC) and it is always referred to as the first written evidence of the degradation of women.

⁵² The code of Hammurabi was created in 1780 BC.

2.5.0 International Human Rights Instruments

The standards set by the international bill of human rights are intended to guide the states in their efforts to respect, promote, and safeguard human rights. It also acts a guide to the states on how they should incorporate the bill of rights in their constitutions. They also eliminate any loophole in the provision of the rights of the people. It curtails the discretion of the states to set their own standards which may be low or even ineffective. This ensures that there are minimum standards that have to be met by every state. The standards have also been guidance in the enforcement of international law. The international law is substantially based on human rights and therefore the standards set are applied by the adjudicators and the international community to point at any violation of human rights internationally.

The standards also serve as a way of sensitizing the people on their rights whether the government provides for them in the constitution or not. This has been one of the best steps to ensure that people can enforce their rights against the government even if it denies then an avenue to do so. For example due to the awareness created by the standards people have realized their entitlement. Independent of the government; they can therefore enforce them in the international arena.

The international Bill of rights constitutes three basic human rights instruments that is the UDHR, ICCPR and the ICESCR. The history and nature of these documents are examined here below.

2.5.1 The Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights (UDHR) is the primary international articulation of the fundamental and inalienable rights of all members of the human family. Adopted by the United Nations General Assembly on December 10, 1948, the UDHR represents

the first comprehensive agreement among nations as to the specific rights and freedoms of all human beings. It covers the minimum standards that states should meet while providing for peoples' rights in their constitutions.

The UDHR was originally intended to be a common standard of achievement for all peoples and all nations but over the past fifty years, the Universal Declaration has become a cornerstone of customary international law, and all governments are now bound to apply its principles. With the fact that the UDHR successfully encompasses legal, moral and philosophical beliefs held true by all peoples, it has now easily become a living document which asserts its own elevating force on everyday events of our world.

The massive and systematically organized human rights abuses committed during The Second World War including the Nazi Genocide of the Jews and other groups prompted the development of an international human rights instrument. In particular the inclusion of crimes against humanity in the Charter of the International Military Tribunal which paved way for the subsequent Nurnberg trials, signaled the need to hold the perpetrators of atrocities internationally accorded accountable for their actions irrespective of any domestic provisions of law. At the same time the drafters of the UN Charter sought to highlight the interrelationship between war prevention and fundamental human rights. Two key ethical considerations underscored the main tenets of the UDHR, a commitment to the inherent dignity of every human being and a commitment to non-discrimination.

The drafters of the UDHR grappled with several concepts including the meaning of human dignity, the important of contextual factors (especially cultural) in the determination of the context and range of rights, the relationship of the individual to the state and society, the

potential challenges to the sovereign prerogatives of member states, the connection between rights and responsibilities and the role of spiritual values in individual and societal welfare. The onset of the cold war between the United States and the Soviet Union and the resulting deterioration of the global political climate led to sharp ideological exchanges on comparative assessments of the human rights situations in the Soviet countries and in countries under colonial rule. The disagreements underlying these exchanges eventually resulted in the abandonment of a plan for an international bill of rights, though they did not derail efforts to develop a non-binding human rights declaration.

Although the UDHR was meant to be merely an outline for a ‘human rights project’ and not a legal instrument it nonetheless became the starting point for contemporary human rights protection, now firmly established in a wide range of legally binding conventions. The declaration is based on the conviction that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is therefore essential that human rights should be protected by the rule of law at the supranational level⁵³

As a result it became possible to transcend at least at the level of political declarations, the traditional principle that a states statement of its own citizens is exclusively an internal affair. This change of paradigm paved the way for the establishment in the second half of the 20th century of a comprehensive system of universally recognized human rights guarantees. This development however consisted of a step by step process and the path was not always smooth. In

⁵³ UDHR, First and third preambular paragraphs

1953 for instance, the United States made it clear that it would have nothing to do with any human rights elaborated by the United Nations⁵⁴

The document's nonbinding status was initially perceived as one of its major weaknesses. Authoritarian states, which usually sought to protect themselves against what they considered interference in their internal affairs, approved of this feature of the declaration, and even some democratic countries initially worried about the potentially intrusive nature of the obligations that a legally binding document would impose. Some observers have argued, however, that its nonbinding status is one of the UDHR's major advantages. Its inherent flexibility has offered ample room for new strategies to promote human rights and has allowed it to serve as a springboard for the development of numerous legislative initiatives in international human rights law, including the ICCPR and the ICESCR, both of which were adopted in 1966. In addition, the UDHR has been reaffirmed in numerous resolutions passed by organs and agencies of the UN, and many countries have incorporated it into their national constitutions. This is due to the fact that a constitution must be relevant to the society because if it ignores the social realities, or inhibits movements in the direction of the people's aspirations, it will be abandoned⁵⁵.

These developments have led many analysts to conclude that, despite its nonbinding status, its provisions have achieved a juridical status akin to that of norms of customary international law. One factor contributing to the UDHR's moral authority is precisely that it transcends positive international law. Indeed, it enunciates general moral principles applicable to everyone, thus universalizing the notion of a fundamental baseline of human well-being. Despite

⁵⁴ Aliston P, *The UN's Human Rights Record: From San Francisco to Vienna and Beyond* (1994) HRQ 376.

⁵⁵ Nyerere M.J.K "Reflections on Constitutions and African Experience" in Barron, Edwards and Storey (eds) *Constitutions and National Identity* (Quadriga 1993) 16

its shortcomings, including a preoccupation with the state as the main perpetrator of human rights violations—which has marginalized human rights problems stemming from socially and culturally sanctioned abusive behavior and violence, whose perpetrators are often nonstate actors such as individuals, families, communities, and other private institutions—the UDHR was and remains the key reference point for international human rights discourse. For example, during the 1960s and '70s, several organs of the United Nations system used the declaration's provisions to condemn racial discrimination in South Africa and Southern Rhodesia (now Zimbabwe). More than any other instrument, the UDHR is responsible for making the notion of human rights nearly universally accepted.

The UDHR comprises 30 articles that contain a comprehensive listing of key civil, political, economic, social, and cultural rights. Articles 3 through to 21 outlines civil and political rights which includes, the right against torture, the right to an effective remedy for human rights violations and the right to take part in government. Articles 22 through 27 detail economic, social, and cultural rights, such as the right to work, the right to form and to join trade unions, and the right to participate freely in the cultural life of the community. The latter right relates to everyone's entitlement to be directly involved in and appreciative of the arts, and it is clearly linked to the full development of one's own personality which, in accordance with article 26, constitutes one of the goals of the right to education. Because of the ideological fissures caused by the Cold War and the concomitant failure to develop a legally binding international human rights instrument, it became common to view civil and political rights independently of economic, social, and cultural rights, though this is a misinterpretation of both the letter and the spirit of the document. For example, it is impossible for a society to fulfill its commitment to the right to education (Article 26) without taking seriously its commitment to the right to seek,

receive, and impart information (Article 19). Likewise, it is difficult to envisage the realization of the right to form and to join trade unions (Article 23) without a commensurate realization of the right to peaceful assembly and association (Article 20). Yet, these obvious linkages were obscured by the selective use of human rights norms by the main adversaries in the Cold War. The selectivity served to highlight what each side considered as its respective strength vis-à-vis the other: the terrain of civil and political rights for the Western bloc and the terrain of economic, social, and cultural rights for the Eastern bloc.

The indivisibility of human rights in Article 28—which many consider the most forward-looking article of the UDHR, though it has been one of the least-studied—links all the enumerated rights and freedoms by entitling everyone to “a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” By pointing to a global order different from that found in the contemporary world, this article is indicative, more than any other in the declaration, that the protection of human rights in its totality could transform the world and that such a future global order would incorporate the norms found in the UDHR. Ostensibly, the UDHR’s provisions highlight the interrelated and interdependent nature of different categories of human rights as well as the need for global cooperation and assistance to realize them.

2.1.2 The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is a key international human rights treaty, providing a range of protections for civil and political rights and has its roots in the same process that led to the UDHR. The ICCPR contains rights that constitute the oldest generation of human rights. It consists of natural rights to life, liberty and property and which mainly set limits to the jurisdiction of the Government and

provide minimum safety for security and physical protection of the person and their property within a society.

ICCPR obligates countries which have ratified the treaty to protect and preserve basic human rights such as the right to life and to human dignity, equality before the law, freedom of speech, assembly and association, religious freedom and privacy, freedom from torture, ill-treatment and arbitrary detention, gender equality, fair trial and minority rights. The Covenant requires governments to take administrative, judicial and legislative measures in order to protect the rights enshrined in the treaty and provide an effective remedy. The Covenant was adopted by the U.N. General Assembly in 1966 and went into force in 1976. As of August 2013, 167 countries have ratified the Covenant.

The ICCPR comprises all of the traditional human rights as they are known from historic documents such as the First Ten Amendments to the Constitution of The United States (1789/1791). However, in perfect harmony with its sister instrument, part 1 starts with the right of self-determination which is considered to be the foundational stone of all human rights in article 1. Part 2 which comprises of Articles 2 to 5 contains a number of general principles that apply across the board, among them in particular the prohibition on discrimination. Part 3 enunciates an extended list of rights, the first of which being the right to life in Article 6. Article 7 establishes a ban on torture or the cruel, inhuman or degrading treatment or punishment, and Article 8 declares slavery and forced or compulsory labor unlawful. Well-balanced guarantees of *habeas corpus* are set forth in Article 9, Article 10 establishes the complementary proviso that all persons deprived of their liberty shall be treated with humanity.

It is at the national level that the ICCPR has exerted its greatest impact. When today anywhere in the world a national constitution is framed, the ICCPR serves as the natural yardstick for the drafting of a section on fundamental rights. In most countries, the ICCPR has been made part and parcel of the national legal order although there is no general rule of international law that would enjoin States to embrace a specific method of implementation. Thus, the United States has made a declaration according to which the ICCPR is not self-executing within its domestic legal system. In some countries, administrative authorities and the courts are specifically enjoined to follow the applicable international guarantees when interpreting the national constitution. In other countries, the ICCPR has even been given the legal force of a provision of constitutional or quasi-constitutional rank. These legal techniques are not automatically successful, this is for the fact that as a rule, national judges are not very familiar with the guarantees laid down in international human rights instruments and are more often than not reluctant to accord them precedence over the applicable national laws and regulations⁵⁶.

2.1.3 The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and in force from 3 January 1976. It commits its parties to work toward the granting of economic, social and cultural rights to individuals, including labor rights and the right to health, the right to education, and the right to adequate standards of living⁵⁷. As of 2013, the Covenant had 160

⁵⁶ Joseph S, Schultz J and Castan M, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary*, 2nd edition, Oxford University Press, (2005).

⁵⁷ Coomans f. and van hoof f. *The Right to Complain about Economic, Social and Cultural Proceedings* (of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights).

parties. A further seven countries, including the United States of America, had signed but not yet ratified the Covenant.

The ICESCR is divided into five parts. Part I recognises the right of peoples to self-determination, part II defines the nature of States' obligations, part III lists the substantive rights which essentially fall into three groups: the right to work in just and favourable conditions; the right to social protection and to an adequate standard of living and to the highest attainable standards of physical and mental health; and the right to education and to enjoyment of the benefits of cultural freedom and scientific progress, part IV deals with international implementation and part V contains the typical final provisions of a human rights treaty.

2.1.4 Third Generation Rights

Third generation human rights are those rights that go beyond the mere civil and social, as expressed in many progressive documents of international law, including the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, the 1992 Rio Declaration on Environment and Development, and other pieces of generally inspirational soft law. Because of the present day tilting toward national sovereignty and the preponderance of would be offender nations, these rights have been hard to enact in legally binding documents.

The term third generation human rights remains largely unofficial, just as its other name of green rights, and thus it contains an extremely broad spectrum of rights, including: collective rights, self-determination, economic and social development, healthy environment, natural resources, communicate and communication rights, cultural heritage, intergenerational equity and sustainability⁵⁸.

⁵⁸ Maurice C, "Human Rights: Real and Supposed," *'Political Theory and The Rights of Man'* edited by D.D Raphael (Bloomington: Indiana University Press, 1967) pp 43-51

2.2 Conclusion

This chapter traced the history of international human rights, explored the concept of the universality of human rights against the concept of cultural relativity of human rights. It also analysed the three main international human rights instruments which constitute the International Bill of Rights. Finally it explored the third generation rights.

This chapter has been able to confirm that the international Bill of Rights contains general principles which are easily adoptable domestically. The information gathered contributed immensely to the objective set at the start which aimed at examining the nature of the International Bill of Rights, the process of its development, its scope and essence. It also shows natural law as the basis of international law and therefore the basis for international human rights law. When formulating international human rights instruments states rely heavily on the theory of natural law.

CHAPTER THREE

3.0 A Critical Analysis of Kenya's Bill of Rights

3.1 Introduction

This chapter begins by exploring what 'Bill of Rights' is and goes on to trace its origins. This is done to lay the basis for the analysis of the Bill of Rights as contained in the Constitution of Kenya 2010. It lays down the theoretical basis for the Constitutional provisions on human rights and explores the implications of the Constitution on Kenya's implementation of the international bill of rights.

3.2 History of the Kenyan Bill of Rights

According to Dudziak M.L.⁵⁹ Thurgood Marshall was the drafter of the Kenyan Bill of Rights contained in the Independence Constitution. The rights Marshall embraced as ideal, at least for an emerging African country, drew most extensively from the Universal Declaration of Human Rights, and parts were based on the Constitutions of Nigeria and Malaysia. Marshall's American sensibility was seen in enforcement of the bill of rights and his emphasis on equality, something he still hoped to realize in his own country⁶⁰.

Marshall wrote a forward-looking bill of rights that addressed the timely pressing problem of minority rights. This was handy in a colony that had substantial white and Asian minority populations. This helped to solve the puzzle of the white settlers who were not willing to go on with peaceful deliberations. The bill of rights also sought a future for Kenya in which equality was paramount⁶¹. Later on in Kenya, there was a quest for a Constitution that could

⁵⁹ Dudziak M.L., 'Exporting American Dreams: Thurgood Marshall's African Journey' (Oxford University Press) 2008.

⁶⁰ *ibid*

⁶¹ Proposed Draft Bill of Rights, Dudziak M.L. *Working Towards Democracy*

tackle the issue of Human Rights Law in a proper manner unlike during the pre-colonial period and the period that was after the British Colonial Rule⁶². This prompted the need for a document that could address the dire need for a structurally well documented advanced and enforceable Bill of Rights that could grant democratic freedoms⁶³.

After independence many amendments were effected on the constitution which had the net effect of curtailing fundamental rights and freedoms. Governance structures were radically changed mainly to centralize power to suit the ruling elite and in effect marginalize large parts of the country. Meanwhile many changes were taking place in the international arena and there were new human rights treaties, emergence of third generation rights, globalization and new challenges such as the degradation of the environment. This crystallized into the clamour for constitutional change.

The agitation for a new Constitution gained momentum in early 1990s. The most notable step towards restoration of the rule of law was the repeal by Parliament in 1991 of Section 2A which had previously made Kenya a one party state and the Inter Parties Parliamentary Group (IPPG) reforms. To facilitate the Review of the Constitution, the Constitution of Kenya Review Commission (CKRC) was formed and the National Constitutional Conference (Bomas of Kenya Process) was held where delegates from all parts of Kenya adopted the draft Constitution. Parliament debated and revised the draft Constitution and subjected it to a national referendum in November 2005. The proposed Constitution was rejected due to some contentious issues.

The next phase towards the pursuit of the new and current Constitution started in 2008 with

⁶² Ratcliffe, B.J. ‘‘The Spelling of Kenya’’. *Journal of The Royal African Society* (1943) 42-44

⁶³ Robert M. ‘Peaceful Resistance: Advancing Human Rights and Democratic Freedoms, (Ashgate) 2006.

the passing of the Constitution of Kenya (Amendment) Act. The legislation was passed to provide for a framework for resolving the contentious issues and completing the review process. It established five organs of review namely The Committee of Experts (CoE), The Parliamentary Select Committee (PSC), The National Assembly, The reference Group and The Referendum. The National Conference Council and the National Assembly were to be accountable to the people of Kenya as the final document resulting from the revision of the Harmonized draft constitution of Kenya written by the COE initially released to the public on 17th November 2009, so that the public could debate the document and then parliament could decide whether to subject it to a referendum in June 2010. A referendum was held on 4th August 2010 and the new Constitution was approved by 67% of Kenyan voters.

Kenya entered a new political era in August 2010, following an overwhelming approval of a radically revised constitution that markedly enhances protection of basic rights, significantly constrains executive power and provides limited devolution of powers across the newly created forty seven county governments. This constitution is claimed to be the most important political development since independence from Great Britain in 1963.

3.3.0 An Analysis of the Rights and Fundamental Freedoms in Kenya's Bill of Rights

The Constitution of Kenya 2010 is a genuine Constitution of the people of Kenya. It embraces the culture and the aspirations of the Kenyan people. It is a document which the people of Kenya own and cherish. It reflects the evolution of the Kenyan society and so does its Bill of Rights. The Bill of Rights under the Constitution of Kenya 2010 consists of forty articles divided into five parts to guarantee the protection and promotion of substantive rights and freedoms. The Bill of Rights is divided into two main parts that is the general provisions relating to the Bill of Rights which contains provisions on the application, enforcement and the limits of

the Bill of Rights. This is followed by a section on fundamental rights and freedoms and on the application of these rights to specific groups of society like youths, persons with disability and older people. The other parts are on state of emergency; and the Kenya National Human Rights and Equality Commission. This sub-division ensures the provision for interpretation and enforcement of the rights.

Human rights can be enjoyed individually or collectively. Civil and political rights impose restraints on the exercise of state power while socio-economic rights extend the scope of state activities. This classification of human rights however should not be seen as rigid because human rights are interrelated and interdependent and indeed the Kenya Bill of Rights recognizes the indivisibility and interrelatedness of rights and thus embodies these categories of rights and guarantees their equal enforcement.

The constitution proclaims the Bill of rights as forming an integral part of Kenya's democratic state and as the framework for social, economic and cultural policies. It provides that these rights belong to each individual and are not granted by the state and that they include other rights and fundamental freedoms that are not included in the constitution but are recognized by law. These include rights contained in international Bill of rights but which do not find expression in the Constitution. These rights; the Constitution says are not limited except by law and only to the extent that the limitation is reasonable and justifiable in order to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the fundamental freedoms of others.

Based on the fact that rights and duties go together the Bill of Rights has imposed duties on both the state and individuals. This is evident in Article 24 which stipulates 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;
- (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 Bill of Rights is an integral part of the country's democratic governance and is the framework for social, economic and cultural policies⁶⁴. The scope of the Bill of Rights was extended to cover several new rights. It contains an introductory part entitled "General Provisions relating to the Bill of Rights" where there are provisions on the application, enforcement and the limits of the bill of right. The second part contains the substantive fundamental rights and freedoms.

This study proceeds to examine different groups of rights as contained in the Bill of Rights. These include civil and political rights, economic social and cultural rights and third generation rights.

3.3.1 Civil and Political Rights

The Constitution guarantees citizens a wide array of political rights⁶⁵. They include the freedom to form, or participate in forming a political party, participate in the activities of, or recruit members for, a political party, campaign for a political party or cause, be registered as a

⁶⁴ Article 19(1) of The Constitution

⁶⁵ Article 38 of The Constitution.

voter, vote by secret ballot in any election or referendum, and be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

On political rights, the constitution guarantees citizens a wide range of political rights as stipulated in Article 38 which presents different facets in which the right to political participation may be enjoyed. This right therefore ensures citizen participation in government activities and the government's gesture to upholding standards of international democracy. The purpose of Article 38 is therefore to allow an individual, without apparent legal disability, to participate in periodic elections, exercise his or her voting rights, and participate in the conduct of public affairs directly or through freely chosen representatives. By extension, the provision requires state authority to be based on the sovereignty of the people⁶⁶.

Another major stride taken is as regards to personal rights such as the right to privacy⁶⁷. Likewise, other several important democratic rights were included such as the freedom of the media⁶⁸, and access to information⁶⁹.

3.3.2 Economic, Social and Cultural Rights

The constitution has recognized social economic rights which by definition are rights made by a group of people within a society to maintain social order while on the other hand, economic rights are rights relating to the production, development, and management of material wealth of a country, household, or business enterprise.

⁶⁶ Lumumba P.L.O et al (2011), *'The Constitution of Kenya'* LawAfrica. 85

⁶⁷ Article 31 of The Constitution.

⁶⁸ Article 34 of The Constitution.

⁶⁹ Article 35 of The Constitution.

Article 43 states that ‘every person has the right to; the highest attainable standard of health, which includes the right to health care services, including productive health care; accessible and adequate housing and to reasonable standards of sanitation; be free from hunger and to have adequate food of acceptable quality; clean and safe water in adequate quantities; social security and to education’.⁷⁰

This group of rights was lacking in the previous Constitution and many civil rights groups had been calling for its inclusion in the Bill of Rights. Economic, social and cultural rights protect the well-being of the population and provide minimum protection for social safety of the person. These includes the right to health services, the right to social security, the right to a decent standard of living, freedom of employment, rights to welfare education and housing⁷¹. This was a great departure from what obtained in the independence constitution and is an indication that the new Constitutional dispensation puts economic, social and cultural rights at par with other rights such as civil and political rights. Indeed, it’s detrimental to dissociate economic and social rights from other categories of rights in their conception as well as enforcement.

It is highly expected that the most contentious issue on the Constitution’s economic and social rights provisions will be their enforceability. For many decades, socio-economic rights have been regarded as secondary rights. Civil and political rights are thought to be absolute and immediate whereas economic, social and cultural rights are held to be programmatic: to be realized gradually and therefore not to be real rights⁷². Giving priority to one category of rights

⁷⁰ The Constitution of Kenya 2010, Article 43

⁷¹ Article 43 of The Constitution.

⁷² Mbazira C.’ A Path to realizing Economic, Social and Cultural Rights in Africa? A Critique of the new Partnership for Africa’s Development’ (2004) *African Human Rights Law Journal*.

over others would undoubtedly grant state greater latitude to restrict or violate civil and political rights⁷³. This sentiment reflects the prevalent misunderstanding and suspicion of the nature of economic, social and cultural rights and their place in the human rights paradigm. The argument that socio-economic rights are not justiciable is based on the conception that these rights require vast resources to be implemented. This view is however blind to the fact that not all socio-economic rights need to be implemented immediately. The argument of impracticability or enforcement of socio-economic rights is also blind to the fact that the enforcement of some civil and political rights may be equally impracticable. The right to life for example, imposes an obligation on the state to provide security to its citizens. But this does not mean that murders are not committed. It is impracticable to provide every citizen with a policeman or a guard⁷⁴.

For many decades, socio-economic rights have been regarded as secondary rights. As noted by Mbazira that “civil and political rights are thought to ‘absolute’ and ‘immediate’, where as economic, social and cultural rights are pragmatic; to be realized gradually and therefore not to be ‘real’ rights’. This argument is based on the fact that the conception of these rights requires huge resources for their implementation. The inclusion of economic, social and cultural rights in the Bill of Rights will require specific and deliberate legislative and policy interventions on the part of the State if progressive realization is to be achieved as envisaged in the Constitution⁷⁵

⁷³ Gittleman R. ‘The African Charter on Human Rights and Peoples’ Rights: A legal Analysis’ (1982) 22 *Virginia Journal of International Law* 687.

⁷⁴ Arambulo K. ‘*Strengthening The Supervision of The International Covenant on Economic, Social and Cultural Rights*’ (1999) 58.

⁷⁵ Mbazira, C.; ‘*A path to realizing economic, social and cultural rights development in Africa: A critique of the New partnership for Africa’s development*’ (2004) 4 *African Human Rights Journal*

3.3.3 Third Generation Rights

This group of rights seeks to protect the rights of minorities, the right to development and the right to favorable environment. These rights are associated with the right to national self-determination, a clean environment and the rights of minorities. These include the right to development, ecological rights and the rights of indigenous people. The Bill of Rights has provisions specifically tailored to protect the rights of people falling within at least five groups, namely, children⁷⁶, persons with disabilities⁷⁷, youth⁷⁸, minorities and marginalized groups⁷⁹, and older members of the society⁸⁰.

The bill of rights has a provision for ‘group’ rights which includes children, persons with disabilities, youths, minorities and marginalized groups and older members of the society. To this effect, Article 21(3) states:⁸¹

All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of the society, persons with disabilities, children, and youths, members of minority or marginalized communities and members of particular ethnic, religious or cultural communities.

As regards children for example, the Constitution extends certain special rights to them such as the right to a name and nationality, free and compulsory basic education, basic nutrition, shelter and health care, be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, hazardous or exploitative labor, parental care and

⁷⁶ Article 53 of The Constitution.

⁷⁷ Article 54 of The Constitution.

⁷⁸ Article 55 of The Constitution.

⁷⁹ Article 56 of The Constitution.

⁸⁰ Article 57 of The Constitution.

⁸¹ Constitution of Kenya 2010, Article 21 (3)

protection, which includes equal responsibility of the mother and father to provide for the child whether they are married to each other or not; and not to be detained, except as a measure of last resort⁸².

The Constitution also makes provision for persons with disabilities in that, Article 54 entitles them to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning; access educational institutions and facilities to the extent compatible with their interests; reasonable access to all places, public transport and information; use sign language, Braille or any other appropriate means of communication; and access materials and devices to overcome constraints arising from disabilities⁸³. The Constitution places an obligation on the state to ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities⁸⁴.

3.4 Enforcement of the Bill of Rights

Apart from setting guarantees the Constitution of Kenya 2010 seeks protect its citizenry from interference of their rights by the state. Constitutionally, every person has a right to institute court proceedings to enforce their rights⁸⁵ as they have been given *locus standi*. They may do so on their own behalf or on behalf of others or in the interest of the public. It is a fact

⁸² Article 53(1) (a)-(f) of the constitution

⁸³ Article 54(1) (a)-(e) of The Constitution

⁸⁴ Article 54(2) of The Constitution.

⁸⁵ Article 22

that a democratic government that is constrained by strong institutions and a constitution will be less likely to abuse human rights of its citizens⁸⁶.

The Constitution requires the court, in the exercise of judicial authority to ensure that the purpose and principles of the constitution are protected.⁸⁷ A constitution that effectively safeguards and creates democratic space for citizens can play an important role in the protection of human rights both domestically and internationally. But it is important to put in mind that enactment of a Bill of Rights does not necessarily mean the government's full commitment to constitutionalism. On enforcement of bill of rights for instance, in the constitution of Kenya 2010 seems contradictory. There is no clear outline about the exact nature of the jurisdiction to enforce rights. Under article 23(1), the High Court has jurisdiction to hear applications for redress for violation of rights.⁸⁸ Article 23(2) requires parliament to enact legislation to give original jurisdiction to sub-ordinate courts to hear applications to enforce the bill of rights.⁸⁹

The Constitutional Commission formed under Article 59 has been split into three; The Kenya National Commission on Human Rights, The Commission on Administrative Justice and the National Commission on Gender and Equality. These are mandated to monitor the implementation of one form of human rights or another. They also investigate and give recommendations to different state organs.

⁸⁶ Mac Darrow & Alston P, '*Bills of Rights in Comparative Perspective*' p. 466

⁸⁷ Article 159 2 (c) of the Constitution of Kenya 2010

⁸⁸ Article 23 (1) of the Constitution of Kenya 2010

⁸⁹ Article 23 (2) of the Constitution of Kenya 2010

As a matter of law, high courts have inherent jurisdiction to enforce human rights. If it has subject matter jurisdiction over an issue, it does not require an additional statute to be able to enforce any provisions of the bill of rights. It therefore follows that whatever jurisdiction the courts have, they should also have human rights jurisdiction over their subject matter.

Based on the connection between the Constitution and the institutions that oversee its enforcement, it is extremely difficult to establish a causal link between the enactment of a Bill of Rights and the reduction of human rights violations. Separation of powers and rule of law must for this case guide the exercise of government power; thus the executive, legislature, judiciary and related institutions must be committed to governance by established laws. Not forgetting that, without independent and effective institutions of governance to implement the Bill of Rights, it becomes hard to achieve the full enforcement and apply the protections that are included in the Bill of Rights.⁹⁰

3.5 Conclusion

This chapter has examined the conceptual foundations of the Kenyan Bill of Rights as contained in the Constitution and its relevance and implication for Kenya. It traced the history of Kenya's Bill of Rights and analysed several rights and freedoms contained therein. It divided the rights into civil and political rights economic social and cultural rights and third generation rights. It also looked at the enforceability of the Kenyan Bill of Rights. It has also shown how having an expanded Bill of Rights is an important step towards creating a culture of constitutionalism in the country. However in as much as Bill of Rights plays a greater role in the

⁹⁰ Okoth-Ogendo, '*Constitutions Without Constitutionalism: Reflections on an African Political Paradox*' in Greenburg et al. (eds.) *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993) 65-82 at 80

democracy of any state a coherent and comprehensive approach to its elaboration and implementation has to be put in place.

From the findings in this chapter it is logical to conclude that Kenya's Bill of rights is comprehensive and is an effective instrument for the full realization and enforcement of human rights in Kenya. It can also be concluded that codification in Kenya of human rights reflects theory of natural rights as it borrows heavily from universally accepted existing norms.

CHAPTER FOUR

4.0 Kenya's Bill of Rights versus the International Bill of Rights

4.1 Introduction

In the previous chapters this study made an in depth analysis of the International Bill of Rights and the Kenyan Bill of Rights, traced its origins, its composition and applicability. This chapter compares Kenyan Bill of rights with the international bill of rights and assesses the extent to which it adheres thereto. It also examines Kenya's experience in procedures and mechanisms for the international protection of Human Rights and reviews the reporting and monitoring procedures and mechanisms set under different international human rights instrument to which Kenya is a signatory and explore their significance to Kenya.

4.2 The Importance of a Bill of Rights in Constitutions

The importance of bill of rights in the constitution cannot be gainsaid. It may be argued that human rights may still be realized even if they are not provided for in the constitutions. However, the provisions on the rights in the constitutions play a very essential role. The inclusion of bill of rights in constitutions gives those rights a wide recognition and acceptability. Secondly, the fact that a state has ratified a treaty does not mean that it will take all the necessary efforts to apply it as required. This is due to the international politics around the world. Therefore it is important that core treaties are enshrined in the constitution in order to ensure that the government and the people are bound to respect and enforce them easily. This is also important since dualist states may fail to ratify a treaty on human rights but if the rights are contained in its constitution then it cannot escape the responsibility of promoting, respecting and safeguarding the rights.

The inclusion of the bill of rights in the constitution also has the advantage of easier access to the legal instruments by the citizens as compared to the international instruments which are mostly not accessible to the ordinary citizen. In fact most citizens are not aware of the existence of the international instruments. Another importance of having a bill of rights in the constitution is on the acceptability factor. The constitution of a state is usually promulgated after intense negotiations among the various interest groups in a state and even after a referendum. Therefore it is acceptable and recognized by the citizens. On the other hand an international instrument is created after negotiations among states and the citizens may not be aware of such negotiations. Furthermore the negotiators are always assumed to represent the interests of their respective countries which is not always the case. Therefore, the acceptability to the citizens is not as favourable as with the constitution.

Contemporary Bills of Rights are more international because they draw on the language and principles of the many international and regional human rights conventions and treaties established after the UDHR. Indeed, the Constitution of Kenya 2010 incorporates the country's international obligations directly into domestic law.⁹¹ International standards, as codified in treaties and other instruments, therefore, play a critical role in the creation and evolution of national bills of rights and human rights legislation. It therefore follows that by having a bill of rights; Kenya has accepted the idea of international human rights as universally applicable and relevant to Kenyan society. However, the ability of the executive, legislature and judiciary to effect change depends a lot on the perceived relevance of the bill of rights to Kenyan society. State organs will only be willing to provide a robust interpretation and application of the bill of rights, and stakeholders will only be willing to observe the bill of rights and its associated

⁹¹ Constitution of Kenya 2010; Article 2(5)

jurisprudence, if they perceive the Bill of Rights as legitimate and a reflection of values widely held in society.⁹²

4.3 The Rationale for a Bill of Rights

Kenya has ratified over ten international human rights instruments most of which are critical to the promotion and protection of human rights in the country. In spite the fact that most provisions in these instruments overlap, it has been essential to have the different instruments in order to address the specific violations in various groups. The groups may be categorized in terms of racial, ethnic, gender, age and social groups e.g. people with disability.

The inclusion of a bill of rights in the constitution of a country is a big step towards the achievement of constitutionalism. Constitutionalism is the provision of a chance of putting in place an improved mechanism for constitutional dispensation which “enshrines respect for human worth and dignity as its central principle, fostering conditions for political participation and legitimating substantive restraints on governmental power, even in cases where government action purportedly mirrors the popular will.”⁹³ The bill of rights will help to foster a “culture of liberty” by serving as a powerful symbol of democratic renewal and a new era of government accountability, more so than if a country relies on human rights legislation or case law.⁹⁴

The provisions of Bills of Rights help in promoting social justice and in preserving the dignity of the individual and communities. It outlines the responsibilities of the government to observe, respect, protect and promote fundamental freedoms and individual rights. It also

⁹² Darrow M & Alston P. ‘*Bills of Rights in Comparative Perspective*’ p. 490

⁹³ *ibid* p. 465

⁹⁴ *ibid* p. 486

provides for the enforcement of human rights for the full realization of the potential of every human being.

The Bill of Rights in the Constitution of Kenya 2010 gives guarantees for a wide range of rights and fundamental freedoms. In as far as the protection and promotion of human rights in Kenya is concerned the constitution has made tremendous progress from the independence Constitution. It is thus an integral part of the country's democratic governance and it provides a framework for social, economic and cultural policies. The constitution of Kenya 2010 therefore is a great achievement that has ushered in the rule of law, separation of power, and respect of fundamental rights and has gone as far as the expansion of Bill of Rights with the inclusion of socio-economic rights.

4.4 The Application of the International Bill of Rights Domestically in Kenya

The Constitution of Kenya 2010 provides for a comprehensive and advanced bill of rights. It contains provisions which are a tremendous improvement of the former constitution and for the first time provides for the protection of economic social and cultural rights, group rights, protection of minorities, the marginalized and communities and for affirmative action for women, youth and the marginalized. The combination of civil, political and socioeconomic rights shows that the constitution is progressive and it also shows an appreciation of the current trends and development in the application of international human rights.

The proclamations of the UDHR have found expression in many constitutions around the world and Kenya is no exception. Even the independence constitution contained a bill of rights which largely followed the UDHR although like many constitutions of the time it leaned more to civil and political rights. The Bill of Rights as contained in the Constitution of Kenya 2010 emphasizes on the protection from discrimination and focuses on the right of every individual to

equality before the law; introduces socio-economic rights, which attempt to reduce inequality and remedy unequal access to services.

Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of any government.⁹⁵ Kenya has shown commitment in ensuring that the rights of the people are not violated. The Judiciary⁹⁶ has been very vigilant and the civil society quite vocal on the protection of the rights of the people. This has only been possible because of the freedom granted to the people to express themselves and exercise their independence. In extending the role of the judiciary has played in the application of international human rights Article 20⁹⁷ of the constitution provides for the necessary legal grounds for the application of the human rights. There have been a lot of arguments that most of the rights in the international instruments are academic and not realistic.

While the UDHR was made with the experience of the West in the two world wars in mind the Kenyan Constitution was made in peace time. While the ideas espoused in the UDHR can be associated with Western countries who made the bulk of independent states at the time of its making the Kenyan Bill of Rights does not assume an homogeneous state but rather embraces the Kenyan culture as opposed to the UDHR which attempts to harmonize the cultures of states all over the world. The UDHR sets very high standards of human rights while the Kenyan Bill of rights is more realistic to the human development standards obtaining in Kenya.

Article 2 (5) of the Constitution states that; ‘The general rules of international law shall form part of the law of Kenya’. This means that human rights instruments form part of Kenyan

⁹⁵ Vienna Declaration and Plan of Action

⁹⁶ In the case of *Rono V Rono* the court rule that the daughters have the right to inherit the property of their father contrary to the traditions

⁹⁷ Article 20 of the Constitution of Kenya 2010

law and the rights contained in these instruments are accessible to Kenyans. This provision shows the connection between the rights in the international and regional instruments and their recognition as part of Kenya's law. This is significant to the development and implementation of human rights in Kenya. This provision is however subject to debate because; from what sources of international law is one to find the rules of international law. In some instances, general rules of international law have been referred to as customary international law and in other instances, as rules and principles recognized by the major civilized traditions of the world. International customary law is, however, generally accepted as the main source of such rules. Practically, there are very few issues today which are still under the exclusive regulation of customary international law, for example state immunity, state responsibility or the status of foreigners; one would resort to that body of law should a dispute arise regarding any of these issues. It would be important where certain rules are contained in an international treaty to which Kenya is not a party but which is important in substance and has a large number of contracting parties, if it can be shown that the rules in the treaty are a codification of international customary law.

Article 2 (6) of the Constitution provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. This provision enables Kenya to apply international human rights instruments directly without the requirement for an Act of parliament 'domesticating' it. The inclusion of this article implies that Kenya has agreed to be bound by international human rights instruments to which it is party. The implication of Article 2 (6) is that it makes Kenya a monist state, thereby departing from the position under the former Constitution, which required domestication before treaties could have binding effect within the country. The introduction of Article 2 (6) also avoids situations where the country signs a treaty more as a ceremonial gesture than because of real commitment to the tenets of the treaty and

thereafter shelve its implementation. This is true for Kenya which has ratified many treaties but few have implementing legislation. However there has been debate as to whether this provision places international treaties at the same level as constitutional provision, or at the same level with Acts of Parliament or higher. It is also not clear where there is a disparity between the International treaty and an Act of Parliament which one should prevail.

Based on Article 2 (6), Kenya is converted from a dualist into a monist State as treaties and conventions do not now have to be domesticated for them to have the force of law in Kenya. However, these provisions do not convert Kenya into a strictly monist State because article 21(4) requires the State to legislate international obligations in respect of human rights and fundamental freedoms⁹⁸. This situation is thus still debatable because from Article 2 (5) of the Constitution it is hard to determine in which sources of international law one finds the rules of international law. In some instances, general rules of international law have been referred to as customary international law and in other instances, as rules and principles recognized by the major civilized traditions of the world. International customary law is, however, generally accepted as the main source of such rules.

In considering the clarity of Articles 2 (5) and 2 (6) on the applicability of international law Franceschi L. G⁹⁹ argues that treaties are placed below the Constitution but above domestic legislation. This he says can be inferred from several provisions for instance Article 59 (1) (g) which provides as one of the functions of the Kenya National on Human rights and Equality Commission to ensure that the state complies with obligations under treaties and conventions

⁹⁸ Constitution of Kenya 2010, Article 21(4)

⁹⁹ Lumumba PLO *et al*; *The Constitution of Kenya; Contemporary Readings*; (Nairobi LawAfrica, 2011)

related to human rights in what could be understood as disregard to any contrary domestic legislation. He further goes on to argue that the Constitution gives treaties supremacy above domestic legislation when it provides under Article 143 (4) that ‘the immunity of the President shall not extend to a crime for which the president may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity’ Also, there are other constitutional provisions which make it doubtful if of the Constitution envisage absolute monism. For instance, with respect to human rights, Article 21 (4) of the Constitution provides that the “State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.” This points to the requirement for a legislation to facilitate the application of international human rights treaties in Kenya.

In general, international human rights standards should operate directly and immediately within the domestic legal system of each state party. However, not all treaties can become immediately effective. A distinction exists between ‘self-executing’ and ‘non-self-executing’ treaties. The former are able to operate automatically within the domestic field without the need for any legislation, while the latter require enabling statutes before they can function inside the country and bind the courts. Some human rights treaties are explicitly non-self-executing. For instance, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 requires that a state pass legislation in order to make the acts criminalized in the Convention illegal under its domestic law. The Rome Statute of the International Criminal Court of 1998 is another example of a non-self executing treaty as it requires states to adopt implementing legislation mandating the domestic courts to prosecute the crimes proscribed in the Statute. Treaties may be part self-executing. For example, some provisions of the ICESCR are non-self executing because they are programmatic in nature. Some provisions of the ICCPR are also

sometimes considered non-self executing - hence, the provision in Article 2 of the ICCPR obliging all state parties to “legislate where necessary to give effect to the rights recognised in the Covenant...” Article 21 (4) of the Constitution addresses this problem by ensuring that there will be no excuse in relation to treaties containing guarantees of human rights; the country must take all steps to ensure their implementation and where the treaty provisions are not self executing, implementing legislation must be enacted to make them effective.

All in all the Kenyan Bill of Rights is tailor- made to suit the rights and duties specific for the Kenyan peoples, while International Bills of Rights are more general in nature so as to ensure their application throughout the world in spite the specificities of the states.

Also, the Kenyan Bill of Rights goes extensively into explaining under what circumstances the State can limit rights and freedoms, as well as which rights and freedoms can be limited. By contrast, even though international customary law derogates these matters, the instruments themselves do not.

4.5 The Enforcement of International Human Rights in Kenya

International human rights law lays down clear rules regarding the responsibility of states vis-à-vis abuses of power that constitute violations of individual rights and freedoms. States have a general duty to ensure the effective protection to individuals or groups against human rights violations, and the most relevant specific legal obligations that this entails are the duty to prevent human rights violations; the duty to provide remedies; and the duty to investigate alleged human rights violations, to prosecute those suspected of having committed them and to punish those found guilty.¹⁰⁰ The international human rights law has wide application under the Constitution of

¹⁰⁰ Human Rights in Administration of Justice: *A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training series No. 9, OHCHR and IBA, Geneva 2008

Kenya 2010. Article 21 (4) requires the State to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.

By providing for remedies in the Constitution, Kenya is complying with its international obligations to do so. Article 8 of the UDHR states that everyone: “has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or law”. This right is also incorporated in Article 2, 3 of the 1966 International Covenant on Civil and Political Rights (ICCPR), which provides that anyone whose: “rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”) paragraph (a)) and that this remedy is to be “determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedies” (paragraph (b)). Kenya has also incorporated the provisions of international instruments i.e. the UDHR, ICCPR, ICESR and CRC in the constitution.

The role of the judiciary in the application of international human rights has been expanded by the Constitution. Article 20 is on the applicability of the Bill of Rights and it provides that it applies to all law and binds all state organs and all persons. Also that the rights contained in the Constitution are to be enjoyed to the greatest extent consistent with the nature of the right.

On the functions of the president Article 132 (1) (c) (iii) requires that once every year, the president shall submit for debate a report to the National Assembly on the progress made in fulfilling the international obligations under international human rights and humanitarian law. Further, Article 132 (5) states that the president shall ensure that the international obligations of the republic are fulfilled through the actions of the relevant Cabinet Secretaries.

Article 58 (6) (a) (ii) states that any legislation enacted in consequence of a declaration of a state of emergency may limit a right or fundamental freedom in the Bill of rights only to the extent that the legislation is consistent with the Republic's obligations under international law applicable to a state of emergency.

4.6.0 Analysis of Selected Human Rights

The study proceeds to examine select individual rights and goes on to compare the provisions in the international Bill of Rights with similar ones in the Kenyan Bill of rights. This is meant to bring out the similarities and the differences and the implications of such differences.

4.6.1.0 Civil and Political Rights

4.6.1.1 The right to life

Article 26 of the Constitution guarantees the right to life, it states that life of a person starts at conception and prohibits intentional deprivation of life. It prohibits abortion except on medical grounds but allows the deprivation of life in accordance with the Constitution of other written law. This may seem to contradict the UDHR which does not limit the right to life¹⁰¹. Article 6 of the ICCPR does not abolish the death penalty and recognizes that there are state parties which may have it under their laws. There is however the Second Optional Protocol to ICCPR which calls for the abolition of the death penalty and which Kenya has not ratified. This provision may seem to contradict with the guarantee in 26 (1) which states that every person has the right to life.

In commenting about the death penalty Thuku M¹⁰² comments as follows:

¹⁰¹ Article 3 of the UDHR

¹⁰² *The Kenyan Bill of Rights (2010): Consolidating the Gains and Analysing the Domestication of International Human Rights Instruments*, Muthee Thuku (April 2011)

‘This is a debate that is going to deepen in the future as pro and anti death penalty groups seek its constitutionality. Even though no hangings have taken place in Kenya since 1987, the death penalty remains in the books and hundreds of people are waiting on the death row. The death penalty has been argued to be a form of torture or other cruel, inhuman or degrading treatment or punishment and may be argued to go against the spirit of Articles 25 (a) and 29 (f) which outlaw such treatment/punishment.’

The Article also leaves room for intentional deprivation of life of a person under clause 26 (3) which states that ‘a person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.’ Even though no hangings have taken place in Kenya since 1987, the death penalty remains in the books and hundreds of people are waiting on the death row. The death penalty has been argued to be a form of torture or other cruel, inhuman or degrading treatment or punishment and may be argued to go against the spirit of Articles 25 (a) and 29 (f) which outlaw such treatment/punishment¹⁰³.

Unlike the UDHR and the Kenya bill of rights or even the ICSCER, the ICCPR provides a detailed coverage as regards to the right to life in Article 6. It gives out that every human being has the inherent right to life and shall be protected by law. No one shall be arbitrarily deprived of his life. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the ICCPR and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

¹⁰³ Murray R. ‘The African Charter on Human and Peoples’ Rights 1987-200: *An Overview of its progress and problems*’ (2001) 1 *African Human Rights Law Journal* 2

The ICCPR provides for instances when deprivation of life constitutes the crime of genocide, it is understood that nothing in article 6 shall authorize any State Party to the ICCPR to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. The ICCPR further states that anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. It also has a limitation on the sentence of death in that it shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. It then concludes that nothing in article 6 shall be invoked to delay or to prevent the abolition of capital punishment by any state party to the ICCPR.

The ICCPR clearly gives out what the right of life entails and goes on to give the instances that may limit the right. The aspect that does not come out from the ICCPR and the UDHR but the Kenyan Bill of rights states is as to when life begins. Article 26 gives that life begins at conception.

4.6.1.2 Equality and freedom from discrimination

Article 27 of the Constitution is extensive in guaranteeing equal rights for all before the law and in prohibiting all forms of discrimination. It proclaims that persons are to enjoy the rights and freedoms recognized and guaranteed in the constitution without distinction of any kind such as race, sex, pregnancy, marital status, health, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language, or birth. The exclusion of individuals from enjoying the rights in the constitution on the basis of any of these distinctions may therefore amount to discrimination. The term discrimination is described as any distinction, exclusion or preference that has an effect of nullifying or impairing equal enjoyment of rights. Although

discrimination is a particular form of differentiation, the concepts are distinct. Differentiation therefore does not amount to discrimination if it is intended to redress the imbalances in society and if it does not result in the violation of the right to equality and other associated rights.

In particular, 27 (3) states that: ‘women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.’ The Article also obliges the State to undertake legislative measures to address discrimination suffered by persons or groups in the past. It also requires the State to ensure that no elective or appointive body shall have more than two-thirds of its members from the same gender. Under Freedom of expression, Article 33 (2) d) ii), advocacy of hatred that promotes discrimination or violence is prohibited. Article 60 (1) f) puts elimination of gender discrimination in law, customs and practices related to land and property in land as one of the key principles of land management. Article 250 (4) requires that appointments to Commissions and Independent Offices be guided by this Article and should reflect ethnic diversity of the people of Kenya. The same is required for composition of the Defence Forces (Article 241 (4), the National Police Service (Article 246 (4), the National Executive (Article 130 (2) and in allocation of political parties seats (Article 90 (2) (c).

Numerous provisions addressing equality and non-discrimination are found throughout International human rights law instruments, reflecting the importance of these principles to the enjoyment of human rights. Indeed, the Preamble of the UDHR talks about the “equal rights of men and women,” and Article 1 says that all human beings are born free and equal in dignity and rights Article 2 of the UDHR then goes on to list the grounds upon which no “distinction” or discrimination is permitted, including “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 7 addresses equality

before the law and equal protection of the law, in other words the right of everyone to have the law fairly applied without discrimination. Further references to “equality” are found throughout the rest of the UDHR in the context of specific rights, such as the equal rights of men and women regarding marriage.

The basic provisions in the UDHR are reflected again in the ICESCR and the ICCPR. Both the ICESCR and ICCPR contain articles ensuring the equal rights of men and women (Article 3 in each Covenant), and prohibitions of discrimination (Article 2 in each Covenant) on the same grounds as those listed in the UDHR. Article 26 of the ICCPR addresses the issue of equality before the law and equal protection of the law. Article 26 of the Covenant is the cornerstone of protection against discrimination under the Covenant. It states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Contrary to article 2(1), which is linked to the rights recognized in the Covenant, article 26 provides an autonomous right of equality and prohibits discrimination in law or in fact in any field regulated and protected by public authorities.

4.6.1.3 Human Dignity

Article 28 of the Constitution recognizes the inherent dignity of every person and the right to have that dignity respected and protected. The need to protect and respect human dignity is the essence of all human rights discourse.¹⁰⁴ In other words, the ultimate aim of human rights

¹⁰⁴See generally, Cullen A. ‘*Defining Torture in International Law; A Critique of the Concept Employed by the European Court of Human Rights*’ (2003)

protection is to secure an individual's intrinsic human dignity. The right to human dignity may therefore be guaranteed in a number of ways including affording one the opportunity to freely develop her personality. Article 19(2) states that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities.

The UDHR addresses human dignity in Article 1 stating that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. In the ICCPR human dignity is provided for in Article 10. It states that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Article 2 further gives another provision that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. It further clarifies that the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded appropriate treatment.

Human dignity is a key component in human rights as we can reliably tell from the Kenya bill of rights and the international bill of rights. It is stated in the preamble to the ICCPR that the rights it contains "derive from the inherent dignity of the human person." The ICESCR says something similar, though both conventions also proclaim that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world," as though the two were coordinate

principles. It is also noted in the UDHR that rights derive from dignity. Looking into the importance of these differences then, the first claim that “rights derive from the inherent dignity of the human person,” seems straightforwardly foundational. It makes it sound as if the whole point of human rights is to protect and promote human dignity, and it would seem to follow that the best way to find out what rights we have is to figure out what the inherent dignity of the human person involves and what is necessary for its protection and promotion. The second claim, by contrast, treats rights and dignity as coordinate ideas, rather than deriving one from the other: this impression is reinforced in the first article of the UDHR: “All human beings are born free and equal in dignity and rights.”

4.6.1.4 Political rights

Article 38 guarantees every citizen freedom to make political choices. It gives all Kenyans a constitutional right to participate in the way they are governed and in the political processes thereby strengthening the democratic process. Article 1 (1) states that all sovereign power belongs to the people of Kenya while 1 (2) states that the people may exercise their sovereign power either directly or through their democratically elected representatives. Article 4 (2) states that the Republic of Kenya shall be a multi-party democratic

State founded on the national values and principles of governance referred to in Article 10. In Article 10 (2) (a), democracy and participation of the people are mentioned as part of the core national values and principles of governance. Further rights and principles guiding representation of the people are expounded in Chapter 7 (Representation of the people). In Chapter 8 (Legislature), Article 118 obliges parliament to ensure public access and participation during its business and Article 119 gives the right to every person to petition Parliament to consider any matter within its authority.

Special rights to participate in political processes for special and marginalized groups (workers, youth, and women, persons with disabilities, minorities and marginalized communities) are stressed under Articles 97 (c) and 100. Under Article 104 (Right of recall), the electorate have the right to recall a member of the National Assembly or of the Senate before the end of the term of relevant House for non-performance. Article 232 (d) puts involvement of the people in the process of policy making as one of the values and principles of Public Service. Article 258 gives the right to every person to institute court proceedings claiming the Constitution has been contravened or is threatened with contravention. Under Fourth Schedule (Distribution of functions between the National Government and County Governments), Part 2 (14), one of the functions of the County Government shall be ‘ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.’ This is in the spirit of Articles 174 and 175 (Objects and principles of devolved government) which gives one of the objects and principles of devolution as enhanced participation and ensuring powers of self governance of the people in the exercise of the powers of the State and in making decisions affecting them.

Political rights are also provided for by the UDHR in Article 21 stating that everyone has the right to take part in the government of his country, directly or through freely chosen representatives and should have the right of equal access to public service in his country. The will of the people shall be the basis of the authority of government and this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. Article 25 of the ICCPR grants political

rights stating that every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions, they are also allowed to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors and to have access, on general terms of equality, to public service in his country.

4.6.2 Economic Social and Cultural Rights

Article 43 of the Constitution deals with the Right to an adequate standard of living for persons and families. These rights include right to adequate food, clothing, shelter, clean and safe water, education, health and social security. An Equalization fund for marginalized areas is set aside under Article 204 as an affirmative action towards economic and social rights. This fund is for purposes of providing basic services including water, roads, health facilities and electricity but is set to lapse in 20 years from the effective date unless Parliament extends it for a fixed period of years as per Article 204 (6) and (7). Under Article 232 (c), responsive, effective and equitable provision of services is cited as one of the core values and principles of the Public Service. The rights under this Article may be limited with respect to members of Kenya Defence Forces and the National Police Service by Article 24 (1).

The inclusion of socio-economic rights in the Constitution gives effect to some of the rights stipulated in international human rights instruments such as the ICESCR. The approach in the constitution and ICESCR is similar in that it invokes progressive realization of this category of rights.

Article 20(5) of the Constitution states that

‘In applying any right under Article 43, if the state claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles: -

- (a) it is the responsibility of the state to show that the resources are not available;
- (b) in allocating resources, the state shall give priority to the ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
- (c) the court, tribunal or other authority may not interfere with a decision by a state organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

For many decades, socio-economic rights have been regarded as secondary rights. As noted by Mbazira that “civil and political rights are thought to be “absolute’ and ‘immediate’, whereas economic, social and cultural rights are pragmatic; to be realized gradually and therefore not to be ‘real’ rights’. This argument is based on the fact that the conception of these rights requires huge resources for their implementation. The ICESCR attest to this by requiring states to ‘take steps to the maximum of their available resources with a view to progressive and full realization of the rights....’¹⁰⁵

The inclusion of economic, social and cultural rights in the Bill of Rights will require specific and deliberate legislative and policy interventions on the part of the State if progressive realization is to be achieved as envisaged in the Constitution¹⁰⁶

Economic and social rights are granted in the UDHR in article 22 and 25. Article 22 which states that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the

¹⁰⁵ See Generally the ICESCR

¹⁰⁶ Mbazira, C.: A path to realizing economic, social and cultural rights development in Africa: *A critique of the New partnership for Africa’s development (2004)* 4 *African Human Rights Journal*

organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. Article 25 states that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

The ICESCR details provisions on economic and social rights in articles 9, 11, and 12. In Article 9 it gives that States Parties to the ICESCR should recognize the right of everyone to social security, including social insurance. It goes on to say in Article 11 that they should also recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. States Parties should take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. Those states should also recognize the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed and those are to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of

natural resources and also to take into account the problems of both food-importing and food-exporting countries, to ensure an equal access.¹⁰⁷

4.6.3 Third Generation Rights

The Kenyan Constitution makes provision for several third generation rights. This is very progressive as many old Constitutions do not have these rights. Article 42 guarantees the right to clean and healthy environment which includes the right to have the environment protected for the benefit of the present and future generations through legislative and other measures.

Article 56 obliges the government to put in place affirmative action programmes for minorities and marginalized groups in order to enable them to participate in governance, provide special opportunities, develop their cultural and linguistic heritage and ensure access to water, health services and infrastructure. Under Article 10 (National values and principles of governance) protection of the marginalized is part of the core national values and principles of governance. State organs are obliged to address the needs of members of minorities, marginalized groups and particular ethnic, religious and cultural communities under Article 21 (3). In Chapter 7 (Representation of the people) Article 91 (1) (e) requires that political parties respect the right of all persons to participate in political processes including minorities and marginalized groups. Article 100 (d) (e) obliges Parliament to enact legislation to promote representation of ethnic and other minorities and marginalized communities in Parliament. In Chapter 11 (Devolved government), Articles 174 (e) and 177(1) (c) puts protection and promotion of the interests and rights of minorities and marginalized communities as part of the key objects of devolution. The right of minorities to participate in the County Assembly is also

¹⁰⁷ See generally: Arambulo K ‘ *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights* ‘ (1999) 58.

expressed under Article 197 (2) (b) (County assembly gender balance and diversity). Article 250 (4) requires that appointments to Commissions and Independent Offices be guided by Article 10 (National values and principles of governance) and should reflect ethnic diversity of the people of Kenya. The same is required for composition of the Defence Forces (Article 241 (4), the National Police Service (Article 246 (4), the National Executive (Article 130 (2) and in allocation of political parties seats (Article 90 (2) (c). With regard to Public Finance, Article 203 (1) (h) puts it that one of the criteria for determining budgetary allocations is the need for affirmative action in respect of disadvantaged areas and groups. An Equalization Fund for marginalized areas is set aside under Article 204. This fund is for purposes of providing basic services including water, roads, health facilities and electricity. Article 227 (2) (b) puts, ‘the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination’ as one of the considerations that should be factored in the procurement and disposal of public goods and services. Article 232 (h, i) puts representation of Kenya’s diverse communities and affording equal opportunities for appointment, training and advancement for members of all ethnic groups in the Public Service as part of its core values and principles. The interpretations of who constitutes a ‘marginalized community’ and ‘marginalized group’ are given in Article 260 (Interpretation).

A marginalised group is defined as ‘a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4)’ However, an interpretation for the word ‘minority’ is not given in the distribution of world food supplies in relation to need. Rights of minorities and marginalized groups in the UDHR in Article 2 and 21 and 27 addressed here in. Article 27 states that everyone has the right freely to participate in the cultural life of the community, to enjoy the

arts and to share in scientific advancement and its benefits and that everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Rights of minorities and marginalized groups in the ICCPR are stated in Article 25 and 27. Article 25 is stated herein and Article 27 states that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. Rights of minorities and marginalized groups in the ICESCR are addressed in Article 1 and 15. Article 1 gives that all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. Also all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The States Parties to the ICESCR, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations. Article 15 provides that the States Parties to the ICESCR recognize the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its applications, to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The steps to be taken by the states parties to the ICESCR to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. The states should also undertake to respect the freedom indispensable for scientific research and creative activity and to recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

4.7 Conclusion

Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion ought to be the first responsibility of any government.¹⁰⁸ Kenya has incorporated the provisions of international instruments i.e. the UDHR, ICCPR, ICESR and CRC in the constitution and as stated earlier in this study, Kenya is party to various international human rights instruments.

This chapter has demonstrated the similarities and differences between the International Bill of Rights and the Kenya Bill of rights. It has made comparisons on select provisions of both bills and assessed the significance of the differences. It has shown that Kenya's Bill of Rights provides a material basis for the application of the international Bill of Rights.

The information obtained and laid out in this chapter affirms the assertion that it is important to entrench bills of rights in national constitutions. This gives them protection and the status that will ensure observance and non derogation. It lays the basis for constitutionalism in the country.

The enforceability of the Kenyan Bill of Rights is also explored in this chapter and it has been established that it provides very firm foundations for the application and enforcement of its provisions. Ordinary citizens are able to access the courts and claim their rights without hindrance and with the facilitation of different arms of government.

¹⁰⁸ Vienna Declaration and Plan of Action

CHAPTER FIVE

5.0 Conclusions and Recommendations

5.1 Introduction

This study has analysed the international Bill of rights, traced their origins and has looked at its justifications. It has also looked at the Kenyan Bill of rights and examined its place in the Kenyan Constitution and elucidated on different categories of human rights that it contains. This is the closing chapter which sums up the study, ties up and makes conclusions on the findings and gives the way forward by way of recommendations.

5.2 Conclusions

This study has defined what a Bill of Rights is and the importance of having one in national Constitution. It identifies a Bill of rights as a centerpiece in a national Constitution and which constitutes the essence of constitutional protection of citizens which brings about real transformational change in the rule of law. The Bill of Rights assists citizens to understand their obligations under the constitution and helps build a culture of constitutionalism. It presents the Bill of Rights in a state's Constitution as a tool for achieving international human rights standards which are ideals against which countries measure themselves against. The origin of the Bill of Rights has been explored and its growth and development traced. It is observed that there have been more and more countries adopting the international Bill of Rights thus increasing the universality of human rights.

The characteristics of the International Bill of Rights have been extrapolated upon and the inalienability, universality, indivisibility of human rights has been demonstrated. The three generations of human rights that is civil and political rights, economic social and cultural rights and third generation rights were explained and their origins and rationale investigated. While

civil and political rights are easily adoptable, economic social and cultural rights are harder to embrace and states have been slow in incorporating them in their national Constitutions. The three major international human rights instruments which constitute the international Bill of Rights; that is the UDHR, ICCPR and the ICESCR were analysed. While the UDHR lays the basis for the protection of human rights generally the ICCPR and ICESCR are more specific and binding on member states.

Kenya's expanded Bill of Rights per the Constitution 2010 has been analysed and certain specific rights interrogated. The study presents the Kenyan Bill of Rights as comprehensive and amenable to implementation and which will afford Kenyans greater protection for their human rights. We have projected on how this increased protection of human rights is going to reflect in reality. It therefore can be concluded that Kenya's Bill of Rights aspires to adhere to the international Bill of Rights and tries to adapt the ideals contained therein. The study has delved into the issue of enforceability of human rights especially in the Kenyan context.

The capturing of economic, social and cultural rights in the Kenyan Bill of Rights makes the attainment of basic standards of living in Kenya possible. Although no timelines are given for the fulfillment of these rights it is possible for the executive to set policies which will ensure that the rights are fulfilled.

It is therefore accurate to assert that the international Bill of Rights sets the general parameters for the exercise of human rights and leaves the specifics to the individual states. The UDHR particularly is state-centric according to the trend at that time and places obligations on states to respect, fulfill and protect human rights.

We have compared the concept of universality of human rights and the concept of cultural relativity of human rights. It can be concluded from the findings that throughout the study we have demonstrated how the concept of the universality of human rights has been embraced both at the international and Kenyan level. However while all human rights are universal, the significance of national, regional particularities and various historical, cultural and religious backgrounds must be borne in mind¹⁰⁹.

This study traced the history of international human rights, explored the concept of the universality of human rights against the concept of cultural relativity of human rights. It also analysed the three main international human rights instruments which constitute the International Bill of Rights. Finally it explored the third generation rights which is a relatively new development and which is progressive and futuristic.

It has been demonstrated in this study that Bills of rights in national Constitutions are essential as it enables citizens to know exactly what to expect from their government and from each other, and to provide a framework for giving practical effect to common values. It has been shown that that human rights come with responsibilities and must be exercised in a way that respects the human rights of others.

5.3.0 Recommendations

5.3.1 Implementation of the Bill of Rights

The constitution gives roles and responsibilities to various arms of government and the public in general in the implementation of the Constitution. It behooves these duty bearers to fulfill their mandates under the Constitution. It is the role of government to facilitate the

¹⁰⁹ University of Peace: Human Rights Reference Handbook' (2004)

enjoyment of all the rights contained in the Constitution to the fullest possible extent, by all people, including the listed special groups.

The process of implementation of the Constitution needs to enhance perceptions of inclusion if it is to facilitate real transition to democracy, peace and respect for human rights. Through fulfilling its duty to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights (constitutionalism), the State has the opportunity to ensure that every Kenyan feels equally protected by the Constitution, which is necessary to facilitate meaningful advancement towards a just and equal society as stipulated under article 20 (1) which states that: ‘the bill of rights applies to all law and binds all state organs and all person’.¹¹⁰

Kenya has an obligation to fulfill its mandate under the international bill of rights. On the ICESCR for instance the government is under an obligation to take steps towards the full realization of the rights therein, to avoid measures which would diminish those rights and to forbid discrimination with regard to those rights.

5.3.2 Establishing Frameworks for Implementation of the Bill of Rights

There are different frameworks that are envisaged in the Constitution to aid its implementation and which include legislation, policies and institutions. There is need for these structures are put in place and to make sure that they are effective for the implementation of the Bill of Rights.

¹¹⁰ Article 20 (1) of the Constitution of Kenya 2010

5.3.3 Creation of Public Awareness on Bill of Rights

Without knowledge of the rights and duties bestowed upon them, the Kenyan people are not able to claim their rights under the Constitution. Considering that there is a significant number of the Kenyan population which is illiterate there is need for a campaign to popularize the content of the Bill of Rights.

5.3.4 Role of the Citizens

The citizens are under an obligation to keep the government in check and to monitor its implementation of the Bill of Rights whether under the Constitution or internationally. Ordinary Kenyan citizens ought to undertake public interest litigation to test the applicability of the different provisions in the Bill of Rights.

5.3.5 Ratification of More International Human Rights Instruments

Kenya should adopt more international standards in the application of the Bill of Rights, so that instances where rights and freedoms are curbed can be reduced to the minimum, and even then the curbing of these rights and freedoms should only apply to derogable rights, as provided for in international human rights law. The legislature must weed out retrogressive laws that impede the implementation of the International Bill of rights and enact progressive laws that aid its implementation.

5.3.6 Human Rights Reporting and Monitoring

There is need to utilize international mechanisms to monitor the progress in the implementation of the bill of rights. These include the Universal Periodic Review (UPR) which is an important procedure for the review of the human rights situations around the world through which the Kenyan human rights record is scrutinized. UPR is a mechanism of Human Rights

reporting under the UN system and was established by the UN General Assembly in 2006 as a process through which the human rights records of the member states can be reviewed. The Human Rights Council is mandated to "undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States". This review, conducted through the UN Human Rights Council (HRC), is based on the human rights obligations contained in the UN Charter, the UDHR, international human rights instruments to which the State is party. It provides a unique avenue for the global community to assess the level of compliance with the international Bill of Rights. It provides an opportunity for all States to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights. It also includes a sharing of best human rights practices around the globe.

Different treaties in which Kenya is a member have different reporting mechanisms. This subtopic explores some of them¹¹¹. Under the ICCPR the procedure is treaty based and in its Article 40 states are required to submit report on the measures they have adopted which give effects to the rights recognized within the Covenant and on the progress made in the enjoyment of those rights within one year of its entry into force for the state party and thereafter every five years.

Under the ICESCR there is the Committee on Economic Social and Cultural Rights and by ECOSOC Resolution 1988/4 states are to submit an initial report on the measures they have adopted and the progress made in achieving the observance of the rights recognized within the

¹¹¹ See United Nations, Human Rights Committee: Considerations of Reports Submitted by States Parties Under Article 40 of the ICCPR.: KENYA. CCPR/C/KEN/2004/2

Covenant within two years of its entry into force for the State Party and thereafter every five years.

Human rights reporting and monitoring mechanisms provide data on the extent of realization of human rights for purposes of monitoring progress, and reporting accordingly under relevant treaties. It also creates a framework for a national demand side for timely, quality and authentic reporting to government departments, civil society and individual citizens. This way understanding the exact situation of promotion and protection of each right within the country is achieved.

5.3.7 Role of the Judiciary

There are far-reaching changes proposed in Kenya's legal system in the Constitution as it opens the domestic legal system to international law. It is proposed that courts are going to play a significant role in implementation of international norms at the domestic level.

The courts will have take notice of the new sources of law that should govern the cases that come before them and they will have an obligation not only to apply treaty provisions but to also recognize and apply principles that underlie international law. The courts will have to determine and interpret provisions and implications of various conventions. In order to make a correct decision on this, the courts must be aware of the nature and implications of various treaties and the important role of judicial remedies in their implementation. Judges, magistrates and all the stakeholders must be conversant with both the local laws but the international law.

The courts have a duty to give a wide interpretation of human rights that encompasses International Bill of Rights and that favours the citizens. They must prompt the executive to respect the rights of the citizens and the legislature to legislate with the citizens in mind.

5.3.8 Further Research

There is need for continuous research on the application of the Bill of Rights especially by tracking the interpretations made by courts. There is need also need to do comparative studies on Bills of Rights in jurisdictions comparable to Kenya and the dynamics they exhibit in relation to the international bill of rights. Further exploration of the developments since the institution of the international Bill of Rights todate especially with regard to subsequent treaties dealing with specific rights such as the CEDAW, CAT, CRC among others and the significance of the third generation rights.

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Appendix I: Questionnaire

What features distinguish Kenyan Bill of Rights from the International Bill of Rights

1. What are the main differences between the Kenyan Constitution's provisions on human rights and the international human rights?
2. What implications do these disparities have on Kenya's efforts to implement the international Bill of Rights?
3. What are the possible strategies for managing the disparities between the Kenya's Bill of rights and the international bill of rights?

Appendix II: List of Interviewees

No	NAME	POSITION & ORGANIZATION
1.	Caroline Amondi	Ag. National Coordinator National Legal Aid (& Awareness) Programme (NALEAP), Department of Justice
2.	Jacqueline Njagi	Deputy Legal Aid Coordinator National Legal Aid (& Awareness) Programme (NALEAP), Department of Justice
3.	John Tuta	Director, Justice & Legal Affairs Department of Justice
4.	Dr. Luis Franceschi	Dean, Faculty of Law Strathmore University
5.	Christine Ochieng'	Executive Director Federation of Women Lawyers (FIDA Kenya)
6.	Professor Joe Holland	Professor St. Thomas University
7.	Professor Morris Mbondenyei	Head African Nazarine University Law School
8.	Joseph Gitonga	Deputy Legal Aid Coordinator National Legal Aid (& Awareness) Programme (NALEAP), Department of Justice
9.	Jedidah Waruhiu	Programme Manager DIAKONIA
10.	Catherine Njuguna	Pan African Coordinator IMCS Africa Region