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NATIONAL SECURITY IN THE KENYAN
LEGAL SYSTEM

BY

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DECLARATION

I, Patrick Otieno Lumumba, do hereby declare that the Thesis is my original work and has not been submitted and is not currently being submitted for a degree in any other university.

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A B S T R A C T

This thesis has considered the tensions generated in constitutional practise between demands for centralised power on grounds of national security and its effects on the enjoyment of basic rights and liberties.

The first chapter looks at the doctrine of national security and examines its political and legal dimensions. It is argued that the core concept of national security has defied a universally acceptable definition. However, while the difficulty of finding a suitable universally acceptable definition has been acknowledged, a working definition has been offered. The chapter also discusses the relationship between fundamental rights and national security claims.

In the second chapter, the contents of Kenya's national security legislation are discussed. This has been done by referring to the relevant provisions of the Kenyan Constitution dealing with matters touching on national security. Reference has been made to other Statutes — notably The Preservation of Public Security Act (Chapter 57, Laws of Kenya), The Special District (Administration) Act (Chapter 105, Laws of Kenya), The Public Order Act (Chapter 56, Laws of Kenya) and The Outlying Districts Act (Chapter 104, Laws of Kenya). The contents of these statutes have been discussed 'in extenso' and it has been shown that their operation is tied to the Constitution which is the supreme law. The chapter has further looked at Kenyan Legislation vis-a-vis international instruments,

notably the Universal Declaration of Human Rights (1948), The United Nations Charter and the International Covenant on Civil and Political Rights (1966).

It has been pointed out that those international instruments are not binding on Kenya which subscribes to the dualist approach to international law, thus giving municipal law precedence over international law, unless the latter is expressly adopted.

Chapter 3 looks at the political and legal nature of national security claims. The political nature of national security claims is revealed by referring to instances when apparatus for preservation of national security have been used for political purposes by those in power. The legal nature of national security claims has been accounted for by referring to judicial pronouncements on matters touching on national security. The chapter further discusses the consequences of national security claims in the history of post independence Kenya.

The fourth chapter draws conclusions and makes suggestions.

A C K N O W L E D G E M E N T

I would like to thank all those who assisted in the preparation of this thesis. Although it would be invidious to select a few such as the object, of this public expression of my thanks, I ought to make special mention of Dr. R.S. Bhalla, Mr. A.G. Ringera and Professor H.W.O. Okoth Ogendo for all the assistance and encouragement they gave me. I also wish to thank Mrs. Ngeta who spent long hours to reduce this work to its present form.

I dedicate this work to Celestine and Jane.

Patrick Otieno Lumumba

Nairobi, Kenya

July, 1989

TABLE OF ABBREVIATIONS

| | |
|---------------|---|
| Cap | Chapter |
| E.A. | East African Law Reports |
| Ed. | Edition |
| F.N. | Footnote |
| I.C.J. | International Commission of Jurists |
| K.A.N.U. | Kenya African National Union |
| K.P.U. | Kenya Peoples Union |
| L.N. | Legal Notice |
| L.Q.R. | Law Quarterly Review |
| M.L.R. | Modern Law Review |
| P.C.I.J. | Permanent Court of International Justice |
| U.S.A. | United States of America |
| U.S.S.R. | Union of Soviet Socialist Republics |
| U.D.H.R. | Universal Declaration of Human Rights |
| Vol..... | Volume |
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Human Rights and Fundamental Freedoms 1950
(Text in Brownlie P.399)

I N T R O D U C T I O N

Kenya like most countries is not exempt from the problem of trying to maintain public order while at the same time protecting fundamentals rights. Indeed these attempts geared towards achieving a balance between state security and fundamental rights were evident as early as 1963 when the Bill of Rights was incorporated in the Constitution of that year. Owing to the realization of the importance of national security, the Constitution is augmented by other statutes like The Preservation of Public Security. The Public Order Act, The Special Districts (Administration) Act and The Outlying Districts Act which provide the apparatus via which national security machinery may be put into motion.

Although the Constitution and other statutes dealing with national security delineate what fundamental rights are and the extent to which they may be encroached upon to protect national security, practice in Kenya and elsewhere has shown that national security apparatus are susceptible to manipulation and have been used in Kenya and elsewhere to achieve ephemeral political gains at the expense of fundamental rights.

Since the nub of this study is the consideration of tensions generated in constitutional practise between demands for centralised power and the enjoyment of basic rights and liberties, it is revealed that national security claims and fundamental rights must co-exist. However, to guarantee a just government, it is imperative that national security apparatus should be resorted to only in circumstances when there is present and real danger, and only for the purpose of dealing with such danger. Otherwise, given their drastic nature, national security claims and measures would reduce the value of fundamental rights.

The study also concerns itself with the contents of Kenya's national security laws and the nature of such laws. The nature of national security is exposed by discussing how national security apparatus have been employed to achieve political goals rather than to deal with real and present danger to the nation. The legal nature of national security has been revealed by gauging the attitude of Kenyan Courts on matters touching on national security and fundamental rights. What has emerged from this assessment is that the courts have not come out boldly to champion the individual rights, even when the cases before them presented such an opportunity.

The thesis also gives fundamental rights and liberties in Kenya a detailed treatment. The significance of the rights is underscored, but it is clearly spelt out that these rights are not absolute and that some of them may in fact be derogated from, if necessary, in the interest of national security.

CHAPTER ONE

THE DOCTRINE OF NATIONAL SECURITY

1:1 THE MEANING OF NATIONAL SECURITY

The term national security can be used in different senses under different circumstances. Strictly speaking, the term refers to the security of the nation. Adam Smith¹ has stated that the state has three functions. One of the functions of the State is to protect the nation from internal disturbance and external aggression. It is this function that refers to national security that can be manipulated under different circumstances for different purposes. National security claims have most commonly been mixed up with political considerations and for this reason the core concept has remained fuzzy and at times elusive. This becomes clear when one studies the security legislation which enumerates what security powers the state may invoke and the apparatus that go with them. But the problem of delimiting what security is, is not peculiarly Kenyan. Tapia-Valdes, commenting on the definitional question has said that today the definition of national security depends on the definers ideology. He wrote:-

Today, the expression national security can refer to any four ontological levels: national security as a social science phenomenon, as a part of a strategy, as a government policy, or as a fact. Similarly the term encompasses four security objectives: national security for the individual, for the regime, for the nation, or for the social system. It naturally follows that the concept of national security would be elusive.²

What emerges from Tapia - Valde's observation is that the term national security suffers from conceptual ambiguity.³ The net effect of this is that the term may therefore not mean the same thing to different people and may not have precise meaning at all. Indeed, it has been said that while a term such as 'national security' and other terms akin to it like national interest, may appear to offer guidance and a basis for broad consensus, the formula that exists for determining national security issues permit everyone to label whatever policy they favour with an attractive and possibly deceptive name,⁴ particularly for those who monitor human rights.

It is in the face of the disparity in interpretation characterising national security that many scholars view national security doctrines as merely ideological rationalizations of permanent militarization of the state and society.⁵ For others they are no more than a mandate for state and class domination.⁶ Because of this

confusion created by the national security concept, it sometimes becomes difficult to distinguish between securing the nation and militarizing the nation. It is this confusion that Tapia-Valdes explains when he states:-

Therefore, if one insists on finding an abstract definition of national security he must realize that it is not purely a military notion. It is more a political category than a military one, apart of a state policy in which the military component is but one component engaged in national security.⁷

In the face of the clear conceptual ambiguity that has been revealed, a succinct understanding of national security in modern times has been explained by Barber who states that:-

...one might attempt to define national security as that part of government that has the objective of creating national and international conditions that are favourable to the protection or extension of vital values against existing or potential adversaries.⁸

Even this definition, inspite of its apparent clarity has not been able to pinpoint what security means in practice. This stems from the fact that Barber himself saw security as an individual and collective feeling of being free from external dangers or threats whether

physical, psychological or psycho-sociological which could jeopardize the achievement and preservation of some objectives considered essential, to the survival of the state and society such as life, freedom, self identity and well being. This notion of security, because of its all-embracing tendency, is close to a non-existent ideal, the search for a perfect security, which cannot be achieved in human society.

In the early days of the century, national security was seen simply as a subject of strategic studies. Traditionally strategic studies were war-focussed, history oriented and descriptive. Today, they are said to be prescriptive, concerned about the present and future.⁹ What this means is that the old military and belligerent approach has now been replaced by a more subtle approach that blends the skills of the soldier and those of the politician. This has been well described by Kissinger when he says, "the old military strategy has been replaced by a concept of "Grand strategy", an area where the skills of the soldier and those of the politician merge".¹⁰ The current concept of national security should therefore, be seen as a departure

from the traditional subject of strategic studies but as a new vision of strategy itself, strategy understood to mean the mode of survival of the society. On the basis of this strategic vision Tapia-Valdes has said that a general notion of national security can be evolved.

He writes:-

... This notion should specify the major national policy areas with which national security is concerned as well as the reasons for such concern and the means used to achieve national security goals. Accordingly the politics of national security of any nation can be characterised as the intergration of its military, foreign, economic, psycho-social and military potentials to quarantee against actual or potential external or internal adversaries and the achievement and preservation of its potential national objectives.¹² (emphasis added).

The justification in the pragmatic approach to national security may be appreciated; however the extent of the application of national security will not depend so much on the wording of the working definition. Commenting on the issue of the practical position of national security Tapia-Valdes has said:-

Despite the neatness of this characterisation, (Characterisation of national security) the real meaning and scope of the definition will depend not so much on the wording as on the kind of historical problems and geopolitical framework by which a state

defines its objectives and policy goals, on the prevailing social philosophy and strategic views, and on the nature of threats to those objectives.¹³

In light of the foregoing, it can be said that national security is a concept that has been and can be subject to varied interpretations, depending on the peculiar circumstances that exist in a given country. The mode and extent of the apparatus that exist for the protection of national security will equally be determined by the historical and geopolitical problems of a given country.

Even in the face of the obvious difficulty in chiselling out an ironclad definition of national security with universal application and appeal a working definition must be found. Thus, national security may be said to refer to the security of the state in a total sense covering its political, social, economic and geographical well being. National security claims on the other hand refers to those circumstances and/or reasons that justify the states resort to the apparatus under its control for the purpose of preserving security; national security goals thence refer to the achievement of security by the state.

National security issues or concerns may have their genesis either externally from without the state or internally from within the state. The external aspect of national security concerns itself with threats that emanate from outside the territory of the state in issue and threaten the political, social and economic fabric of the state and its inhabitants. In most cases such threats relate to actual warfare but in recent years have assumed a more subtle approach like espionage and economic sabotage. In the case of espionage one country might engage in the surreptitious collection of information of another country and use it for purposes of interfering with the politics of the country in issue or for some detrimental purpose. In the case of economic sabotage a country may interfere with the economic endeavours of another country to foment political discontent or to destroy its economic structure for whatever reason.

While the external dimension of national security remains significant particularly in inter-state relations, the real focus of national security today is in the domestic politics and policies or what may be called the internal dimension of national security. The rationale for this change of emphasis has been aptly explained by Luckham: He writes.

...The old concept of "nation in arms" as an exceptional defence policy to face an actual war is transformed into one where social and political energies are constantly channelled towards achieving a "state of security". Giving priority to military and foreign policies necessarily postpones the satisfaction of peoples present needs and expectations.¹⁴

In the domestic or internal sphere, the concerns of national security are diverse and cover a wide range of issues. Factors that may affect the security of a nation may be of a social, political or even economic nature, hence the assertion of the relationship between national security and development particularly in third world countries, where development is mostly in its embryonic stage.

Owing to the rise to prominence of national security in the domestic sphere its scope has become necessarily wide. The width of its scope can be understood because the domestic scene is normally bedevilled with numerous problems of diverse nature which differ from nation to nation, and which are of greater gravity in the young nations of the third world still groping to find firm political, social and economic policies. The present scope of

national security has been comprehensively summarised by Louw. He writes:-

The Internal side of national security has to deal with rather conventional threats different from actual warfare operations and linked, by its nature, to the ideological characteristics of contemporary belligerent conflicts. These conventional threats are those jeopardizing internal order, domestic and governmental effectiveness... National security personnel are concerned today with the problems of law and order and private as well as public morality, economic social, ethical and ideological conflicts, the effectiveness and efficiency of political institutions and processes; the soundness of the economic system and its capacity to produce the surpluses needed for national security purposes; the levels of legitimacy and consensus as to national political projects and respective foreign and military policies, and the level of national intergration and morale.¹⁵ (emphasis added)

The scope of national security is further widened for ideological reasons. The political leadership often like to clothe certain abuses of power with preservation of legitimate national security claims. The theorists of different ideological persuasions thus come up with many definitions to aid the politician. Indeed, this is why the core concept of national security has defied an iron clad definition.

1:2 THE POLITICAL AND SOCIO-ECONOMIC ASPECTS OF
NATIONAL SECURITY CLAIMS

The tendency to centralize power, particularly in Africa has been rationalised by arguing that the protection of national security requires a greater degree of centralized power.¹⁶

In order to appreciate national security claims in the context of power, it is important to understand its politico-ideological functions in the present times, when national security claims are invoked to justify actions which encroach upon rights whether constitutionally guaranteed or not. Indeed, all known constitutional systems and even international instruments on fundamental rights and freedom permit derogation from certain rights and freedoms, where the security of the state is threatened.

The significance of national security claims stem first from the fact that it is symbolic,¹⁷ being itself of respectable antiquity. Second, these claims are important because they legitimise the appropriation of excessive power by the political leadership as a means of dealing with threats to national security.

Third, national security claims are significant because the invocation and putting into motion of national security apparatus sometimes has an adverse effect on the individual rights of the citizenry, and leads to interference by the executive branch of the government into spheres of the Legislature and Judiciary.

National security claims have acquired great political social and economic significance because today the interdependence of security and development in all its dimensions is keenly stressed.¹⁸ In the realm of politics those who are designated national security experts by the political authority are charged with the task of determining what threats exist, which values and interests should be protected first, how many restrictions should the citizen be expected to tolerate because of national security demands, and how much the people should know about the reasons and measures of national policies. All these necessarily demand a deeper involvement of the national security bureaucracy in the domestic political process.¹⁹ The political importance of national security is stressed by Olivier. He writes:-

Despite its potentially adverse effects on world public order, national security is an unavoidable category of both strategy and politics. No nation-state is free to determine independently what its security needs are, and therefore how much of its resources it should divert for security purposes. The practical importance of national security compels the search for an approach that could make security goals compatible with democratic values and human rights.²⁰

National security also assumes political importance because its interpretation, implementation and indeed its very scope is invariably determined by the political setting.

Owing to the diversity of political practises it also follows that the interpretation and implementation of national security claims will not be uniform. In politically plural states, where freedom to form and join different political organizations is permitted, the implementation of national security claims will differ from its implementation in one party states, where one party has total control of all political matters, indeed, it cannot be denied that 'national securiticism' does elicit a political doctrine of its own, its ideology does not differ from that of the hegemonic forces of the society.²¹

Thus, in politically plural societies where other political parties act as a check on the activities of the party in power, there is greater hope that national security interests and democratic values may be reconciled. It is conceivable that national security claims will almost always be invoked when there is a real threat to national security. Commenting on the invocation of emergency powers (itself a national security claim) in plural political settings, Tapia-Valdes states:-

...The declaration of a state of emergency will have to be grounded in the need to confront actual concrete, and manifest disturbances of the domestic peace and public order. Regular political institutions will enact the appropriate measures which will be temporary and regulated. Because of the existence of checks-and-balances mechanisms, there will be no room, for "fancied emergency situations"²²

In a nutshell, owing to the pluralistic and competitive nature of the political arena of multi-party nations, the tendency to resort to national security claims for pure political expediency is greatly reduced.

In one party states where organized political opposition is not entertained, the understanding and scope of national security will differ diametrically from the position in plural societies. In such 'de jure' one party states

there will be a particular political organization that seeks to monopolise political power. As a means of achieving such total control, the party in power will normally present a situation of what may be called belligerent peace which blurs the distinction between internal and external affairs. The political leadership, being the unchallenged guardians of national security sometimes distort issues and magnify threats to national security in order to legitimise their actions. The political dimension of national is made more obvious because it is the political leadership that has the sole prerogative of determining the circumstances that constitute threats to the state.

National security has also acquired great socio-economic significance particularly in the third world countries where the essential relation of security and the development of a sound economy and a cohesive society is keenly stressed. The political leadership in third world countries assert that socio-economic development would be greatly hindered if national security was threatened. One of the speeches of the former Tanzania President Julius Nyerere sheds light on this point. He said:-

The people and government of the United Republic are aiming to build a just society of free and equal citizens who live in healthy conditions, who control their own destiny ... This is the goal. It is certainly not a description of our present society and this is the problem ... Obviously there are certain principles... which are essential both for the goal and the path to it. We all know them - the rule of law; Freedom of speech, publication ... association (etc.) ... (these) are valuable things which we want to secure for all our people. But at the same time we must secure, urgently, freedom from hunger and from ignorance and disease for everyone. Can we allow the abuse of one freedom to sabotage our national search for another freedom?"²³ (emphasis added)

The views of Nyerere as encapsuled in the above speech are truly representative of the view of most if not all third world Leaders' who assert that individual rights cannot be exalted at the expense of national security and hence socio-economic and cultural development. However, as experience has shown the overstress of the essential relation of security and socio-economic development has sometimes provided the rulers with an 'alibi' for resorting to measures for preservation of public security on the basis of unlimited notion of threats. This trend is common in single party states in Africa where any criticism, organized or otherwise will be seen as subversion. It is the invocation of national security as a justification for creating political, economic social and indeed general development that gives it such a wide scope.

1:3 THE LEGAL ASPECT OF NATIONAL SECURITY

The legal significance of national security is very much associated with the claim advanced by states that threats to their particular security necessitate and justify curtailment of fundamental freedoms and liberties of the individual person within the national domain. Such claims have brought to the fore multiple sources of tension between the aims of national security establishment and the claims by individuals that their fundamental rights and freedoms are being violated. It is owing to the need to reconcile these contending claims that national security has acquired legal import. The rationale for this has been well rendered by Tapia-Valdes. Writing on Legitimising conditions for national security claims, he states:

If a crisis of human rights exists where new notions of national security are applied, it is because national security has put democracy itself in jeopardy. The task, therefore, is to make national security compatible with democracy and its fundamental tenet, the rule of Law. Only national security policy regulated by law can be Legitimate.²⁴

The close nexus that exists between national security claims and law, is also to be seen within the context of constitutionalism, which recognises that the exercise of state power must seek to advance the ends of society. Nwabueze, writing on the issue of emergency (itself a national security claim), has comprehensively brought out the reason why national security claims are to be closely associated with legal checks and balances. He writes:

Even the most constitutional of constitutional regimes find it necessary to arm itself, under the Constitution with special powers to deal with emergency. In all countries, it is recognised that constitutionalism has to be limited by the exigencies of an emergency since an emergency implies a state of danger to public order and public safety, which cannot adequately be met within the framework of governmental restraints imposed by the Constitution. There is a good justification for this. The preservation of the state and society is an imperative necessity, which should override the need for united government.²⁵

In other words, without violating the Constitution, rules for emergency situations grant extraordinary powers to suspend some of the fundamental rights. However, this partial derogation of rights should not extend to the exercise of the writ of habeas

corpus, the ordinary regular laws or the functioning of regular branches of government.

Indeed, it is in this regard that the significance of Law as a regulatory factor must be appreciated where national security claims are concerned. It is also this regulatory role that gives national security a legal dimension and legitimises a discussion of the relationship between national security claims and fundamental rights.

1:4

FUNDAMENTAL RIGHTS AND NATIONAL SECURITY CLAIMS

The one area in which national security claims have provoked much concern is how it relates or affects fundamental rights. It therefore becomes imperative that the relationship between national security and fundamental rights be discussed, an exercise which demands a clear understanding of what fundamental rights are.

The term fundamental rights has been used differently. Sometimes the expressions, human rights, natural rights and the rights of man are used to indicate the notion of fundamental rights. These various uses can be found in different Constitutions²⁶, regional conventions²⁷ and international conventions.²⁸ Chapter V of the Constitution

and some other Constitutions of the world, one will find some differences. These differences are due to diversity in national philosophies, cultures, traditions, social, economic and political organizations. Such differences are manifested in Western capitalist states²⁹ Marxist and socialist states³⁰ and African states recently emerged from colonialism.³¹ The fundamental rights have in fact acquired such importance that it has become a universal practise to include them in most if not all Constitutions. Internationally, the United Nations Charter, the Universal Declaration of Human Rights (1948) and the 'International Covenant on Civil and Political Rights have given Universality to these rights. These rights are considered as the foundation of peace and justice in the world. Justice Tanaka stressing their importance in the South West African Cases has stated:

The existence of human rights does not depend on the will of the state, neither internally on its Law or any other Legislative measures, nor internationally on treaty or custom in which express or tacit will of the state constitutes the essential element. Human Rights have always existed independently and before the state. Alien and even stateless persons must not be deprived of them.³²

In Kenya the concept of natural rights was embraced through the colonial power, Britain. The Kenya State, as we know it today, came into being on the 12th day of December 1963 after about seventy years of colonial tutelage under Britain. It is to be appreciated therefore that the fundamental rights clamoured for by Kenyan nationalists at the time of Independence and which ultimately found a place in the Kenyan Constitution were borrowed preponderantly from already existing international and regional instruments dealing with the subject notably the European Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as the European Convention on Human Rights). This fact is stated by Ghai and McAuslan:

A domestic Bill of Rights for Kenya made its first appearance in 1960 closely modelled on the European Convention... When Kenya's Independence became imminent, and the decision was taken to incorporate a declaration of rights, models for such a declaration were sought in the Constitutions of other countries... when she obtained her Constitution for internal self government. There was a Bill of Rights, which with minor modifications was subsequently entrenched in the Independence Constitution.⁴⁰

Since the Kenyan Bill of Rights has not come into being independently of existing international and regional documents, it is necessary to look at the conception of fundamental rights under those instruments. A look at the Western and International conception is therefore considered an important background. The Western conception is important because Kenya was a colony of Britain and had its Bill of Rights modelled after the European Convention on Human Rights. Since Kenya is a member of the Comity of nations and has acceded to all relevant international instruments which deal with human rights, notably the United Nations Charter, the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966), it is important to peruse their contents as well. This survey is also necessary for understanding a clear relationship between national security and fundamental rights.

It was in the so-called liberal democracies notably Britain, United States of America and France that human rights as we know them today emerged as a result of the refinement of the doctrine of natural rights.

In Britain, although there is no Bill of Rights, human rights have been recognized and indeed have had a long history.⁴¹ To trace the long history of human rights in England one may consider the 'Magna Carta' of 1215 as the basis of fundamental rights. Under the Magna Carta the nobles and barons of England were granted the rights of trial by peers, the right to property and security of the individual among other rights. However, these rights were not justiciable but were mere grants made by the grace of the king.

At this stage one can see that rights were only granted to a few. But at least their recognition was the main concern that made a dent to the absolute authority of the rulers. Once exceptions were made formulation of general principles became only a question of time.

The next major step in Britain on human rights was the Petition of Rights of 1628. This laid down among other things that no person in England was to pay taxes without the previous sanction of parliament. The Bill of Rights 1689 apart from establishing the sovereignty of parliament over the monarchy in matters of law making, also provided a lot of individual rights such as equality before the law, freedom of election, freedom of speech, Prohibition against special courts and excessive bail.⁴²

In the eighteenth and nineteenth century, these rights were recognised as part of positive law. Positivism although challenging natural law foundation of human rights had no general quarrel with the idea of identifying and protecting in formal documents rights considered to be fundamental. By the end of the nineteenth century and with the advent of industrial revolution, the rights of man were increasingly recognised although without legal guarantees for their protection. The legal protection of human rights entered into positive law after the demise of 'laissez faire' theories and the emergence of the idea of welfare state after the second world war.

The natural law doctrine of human rights, and in particular the social contract doctrine, had its greatest effect in America. Greatly influenced by the theories of John Locke, the Americans fought a bitter war against their mother country which was perceived as having become oppressive. This justified their resistance and clamour for Independence. With the war won and Independence declared in 1776, a Constitution was adopted in 1787 whose most important feature as far as human rights was concerned was the Bill of Rights. The Bill of Rights taking the form of amendments guaranteed and protected the rights of the individual: freedom of worship, freedom of speech and freedom of assembly,⁴³ freedom from unlawful searches⁴⁴ the right to be tried by a fair and competent court of law and the right to own property,⁴⁵ freedom from retroactive law and the right to be represented by a counsel of ones choice,⁴⁶ the right to trial by jury,⁴⁷ freedom from excessive bail and freedom from cruel and unusual punishment.⁴⁸

The American fundamental rights like those of the British are conspicuously the rights of the individual against the state.

In France, for long, absolute monarchs ruled in succession and perceived themselves as earthly representatives of divine will whose actions could never be questioned. The tyrannies and excesses of French 'ancien regime' were so extreme that by 1789, the French fuelled by the revolutionary doctrines of natural rights rose up in a revolution. The Writings of Rousseau on the social contract and those of Montesquieu on the doctrine of separation of powers supplied the required promptings.

Immediately after the revolution one of the first declarations made by the National Assembly was the famous Declaration of the Rights of Man and of the Citizen. The purpose of the declaration was the preservation of natural rights of men which were enumerated as liberty property and freedom of oppression.⁴⁹ Other rights of man were equality before the law, the right to a fair trial⁵⁰ freedom from retroactive laws⁵¹, the right to be presumed innocent until proved guilty⁵², freedom of conscience and religion,⁵³ freedom of speech and press⁵⁴ and the right to own property⁵⁵. The Declaration of the Rights of Man and of the Citizen has been affirmed in subsequent French Constitutions⁵⁶.

Looking at the fundamental rights that are protected in Britain, the United States of America and France, they all have a lot in common. They are rights of the individual against the state. The state is restricted and restrained from interfering with the freedom and liberty of the individual. The reason for this lies in the prevalent view in all countries that the state is not the creator of human rights but merely the protector of these rights.⁵⁷ This view is representative of the natural law school, though other schools like the positivist school of law posit a different view.

The positivist school for example argues from the premise that law is an end in itself. Indeed, certain identifiable characteristics of the positivist school indicate that the divine source of natural rights which is the hub of the natural law school cannot be identified. These characteristics are: (i) that law as it "is" can clearly be differentiated from law as it "ought" to be; (ii) that force or power is the essence of law; (iii) that law is a self sufficient system which does not draw on other disciplines for any of its premises; (iv) that in interpreting statutes,

Consideration of what the law ought to be have no place; (v) that judicial decisions are logical deductions from pre-existing premises; (vi) that there is an absolute duty to obey all evil laws; (vii) that there can be no 'higher law' in any significant sense; and that law consists exclusively of hard and fast rules.⁵⁸ It is to be conceded that while these are general characteristics, different jurisprudes of the positivist persuasion have their own approaches to the issues. For our purposes, it suffices to note that positivism denied a minimum moral content in the Law and pooh-pooed the natural law schools appeal to a divine source as nothing but Metaphysics. Therefore, they found it difficult to recognise that man has an inherent dignity and that human rights could exist without the will of the state. However, following the horrors of the world war when it became obvious that law without a minimum morality was undesirable, natural law was revived and this saw the emergence of international concern for human rights became real hence the plethora of conventions that followed after the second world war providing for protection of fundamental rights.⁵⁹

It is with the foregoing in view that we are persuaded by the natural law approach because it recognises the inherent dignity of a human being. It is also recognised that the positivist "injection" of morality to their jurisprudence is important in addition to their recognition of the justiciability of Fundamental rights.

In international circles serious concern for human rights did not arise until after the second world war, by which time the idea of human rights had been firmly entrenched in some national Constitutions. The history of international concern for human rights is well known and does not require a detailed statement here. Suffice to say for the present purposes - that the horrors of the second world war, the Nazi gas Chambers and the infamous holocaust that left six million Jews dead gave the required impetus for international protection of human rights, contemporaneously there was the prevalent view that the protection of human rights was the only concrete foundation for lasting international peace and security.⁶⁰ Therefore the United Nations Charter⁶¹, had one of its prominent objects as the promotion of human rights.

The General Assembly of the United Nations took the initiative of making recommendations leading to the realization of human rights. Ultimately the organ of the United Nations charged with the task, the 'Economic and Social Council' recommended a sort of an international Bill of Rights. This was approved by the General Assembly on the 10th day of December, 1948, the 'Universal Declaration of Human Rights' was adopted.

As at 1948 the members of the United Nations were from the Western and Socialist Countries. It is no wonder therefore that the kind of human rights reflected in the Declaration were rights reflecting their values, that is, civil and political rights (Western States) and social and economic rights (Marxist States). In this regard Zimba has opined:-

The nature of the specific rights and freedoms which the Universal Declaration embodied was in no significant way different from the traditional natural rights which had already been achieved in England, America and France. But on the other hand the Declaration also constituted a radical departure from the traditional conception of human rights by virtue of the fact that it deals not only with basic political and legal rights, but also with economic, social and cultural rights.⁶²

It will thus be found that Articles 1 to 21 of the 'Universal Declaration of Human Rights' are a restatement of the civil and political rights which are associated with the Western world. These include the rights of life, liberty and security of the person,⁶³ freedom from slavery⁶⁴ freedom from torture or cruel inhuman or degrading treatment or punishment,⁶⁵ equality before the law,⁶⁶ freedom from arbitrary arrest,⁶⁷ a right of a fair trial,⁶⁸ freedom of movement,⁶⁹ right to own property,⁷⁰ freedom of opinion and expression,⁷¹ freedom of thought, conscience and religion⁷² freedom of assembly and association⁷³ and freedom to take part in government.⁷⁴ Articles 22-28 of the same Declaration contain rights which are not justiciable and may be classified as marxist and socialist in nature, such as the right of work,⁷⁵ right to equal pay,⁷⁶ right to form and join trade unions,⁷⁷ right to rest and Leisure,⁷⁸ right to standard of living⁷⁹ and right to education.⁸⁰

While the significance of the 'United Nations Charter, the Universal Declaration of Human Rights' and the 'International Covenant on Civil and Political Rights cannot be gainsaid, it is important to appreciate their legal status in Kenya.

As will become clearer later,⁸¹ Kenya subscribes to the dualist approach in determining the applicability of international law in matters where there is existing municipal law governing the same subject. In Kenya the states position was firmly established in the case of Okunda v Republic where the court stated 'inter alia' that:-

...the provisions of a treaty entered into by the government ...do not become part of municipal law of Kenya, save in so far as they are made such by the laws of Kenya.⁸²

What is clear, by parity of reasoning is that the foregoing position applies to all international instruments whether they are treaties or not. Therefore, international instruments dealing with fundamental rights to which Kenya has acceded are significant in so far as they offer a background against which fundamental rights may be tested. As regards their enforceability we adopt the views of J.B. Ojwang' and J.A. Otieno Odek who commenting on the issue have said:-

Thus at the level of enforcement the standing of international legal obligations in Kenya depends on specific provisions of domestic legislation. The full tenor and effect of such legislation, in turn, depends on no other organ than the Judiciary. To this extent the nub of the scheme of

enforcement for obligation rests with the municipal courts.⁸³

Essentially because this exegesis focuses on national security as an excuse for derogating from fundamental rights it is important that the relationship between those rights and national security ought to be understood broadly as a necessary background to the discussion of fundamental rights in Kenya and the effect of national security rights upon them.

1:5 THE THEORITICAL RELATIONSHIP BETWEEN NATIONAL SECURITY CLAIMS AND FUNDAMENTAL RIGHTS

All nations that subscribe to the tenets of constitutionalism and democracy also entertain national security claims and advance those claims as a ground for expanding governmental powers or easing restrictions on those powers. Thomas I. Emerson writing on the American position has said:-

...Perhaps at no time, other than during active war, have such claims been urged more insistently or on a broader front than they are now. The reasons for this development lie deep in our present political, economic and social condition. They include the evergrowing complexities faced in the governance of a modern technological nation, the radical nature of the problems that confront us at home and the changes taking place in the world around us...⁸⁴

Kenya admittedly does not occupy the position that the United States of America does in global affairs and does not have a similar political system, but like the United States of America and many other nations, it has provided a place for national security claims which are referred to as Public security measures.⁸⁵

As earlier indicated, national security claims have defied a universally acceptable and iron-clad definition. For our purposes threats to national security are those threats of an external or internal nature which threaten the well being of the state; 'Ipso facto' national security claims are the grounds which justify the taking of certain measures as a means of securing the nations security. Indeed, the raison d'etre for including these claims [national security claims] in the Constitution is to provide the government with apparatus that may be resorted to in cases of genuine threat to national security as a means of preserving the state.

It must be recognised that threats to national security, however defined, generally create veritable strains upon Kenyas System of fundamental rights. Indeed, national security claims have become an important resort for the

executive. National security claims have become handy because they give Legitimacy to drastic powers which but for the claim of preservation of national security would not be permissible. It is conceded even at the level of theory ⁸⁶ that it is not easy to devise a system which would ensure that fundamental rights are not completely subordinate to the demands of national security.

In Kenya, the Constitution guarantees fundamental rights, and also permits derogation from some of those rights in certain situations in the interest of preservation of national security. As a means of precluding the arbitrary and spurious use of national security claims, the Kenyan Constitution has in-built checks.

1:6 SUMMARY:

In its long history, national security has been an important factor both in inter-state relations and intra-state affairs. Being so important, national security and national security claims have attracted the attention of legal scholars, politicians and individuals in different countries. Since national security claims perform an important function its core concept has eluded a universally acceptable definition. Thus, it is to be conceded that no matter how comprehensive a definition of national security may be, its content and scope will largely be determined by the politics of the day.

While it is to be acknowledged that the definition of national security has eluded consensus, it is to be noted that it (national security) will invariably be concerned with those activities (whether of external or of internal origin) which threaten the very fabric of the socio-economic and political existence of state.

Owing to the drastic effect that national security claims have on fundamental rights, claims based on national security inevitably

cause tension between the individual and the state.

The result of the tensions generated by national security claims and individual claims for rights is what legitimises the progression of our discussion hereinafter.

FOOTNOTES

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 meant military preparedness
 to protect national integrity;
 independence, and sovereignty
 against actual attacks from
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 a state entailed actual armed
 conflict in accordance with
 a set of rules internationally
 accepted as the law of war.
 The use of the army for other
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on European Convention. Rights
which appear in the Convention
but are missing in Kenya's Bill
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66. Article 6 and 7
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68. Article 10 and 11
69. Article 13
70. Article 17
71. Article 18
72. Article 19
73. Article 20
74. Article 21
75. Article 23(1)
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CHAPTER TWO

THE CONTENT OF KENYA'S NATIONAL SECURITY LEGISLATION

2:1 THE CONSTITUTION AND NATIONAL SECURITY CLAIMS

National security claims are accommodated in the Kenyan Constitution.¹ The justification for their inclusion is that there are times when peace and tranquility in the community is threatened and a state of insecurity envelopes the community. In such instances the maintainance of order and preservation of peace become absolutely important as the Constitution itself is threatened. The organs of the state are entitled in the face of any danger to national security to safeguard law and order and to preserve state and society, stressing on the importance of national security and at the same time preserving the democratic system of government, Nwabueze states:-

Emergency powers can be accommodated with constitutionalism if they are conceived of as an ephemeral aberration occurring once in along while, and provided they are not so sweeping as to destroy or suspend the restraints² of constitutional government completely.

The rationale for the accommodation of national security claims in the Kenyan Constitution is not dissimilar from the position adopted in other countries. It is based on the principle that when there is a danger imperilling the

security of the state and its people, the preservation of the state becomes a paramount consideration, Kenya being a member of the community of nations and having acceded to the International Conventions concerned with human rights, notably the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights of 1966.³ It is, however, recognized under the International Covenants⁴ that the fundamental rights can be encroached upon to the extent that such encroachment is necessary for the general good. Indeed, it is after this long settled tradition that the Kenyan Constitution permits derogation from certain fundamental rights in specified circumstances as a measure of preservation of public security.

In Kenya, the history of national security claims dates back to the colonial days when the colonial administration resorted to those powers to protect her Majesty's Realm.⁵ When Kenya attained political independence, apart from providing for a Bill of rights, which would give Constitutional guarantee to fundamental freedoms and rights, the Independence Constitution⁶ made provision for derogation from some of those rights for preservation of Public security. The Independence Constitution under Section 27 provided for derogation from certain fundamental rights only when it was

necessary;

It provided:-

Nothing contained in or done under the authority of an act of parliament shall be held to be inconsistent with or in contravention of section 16 (protection of right to discrimination) of this Constitution to the extent that the Act authorises the taking during any period when Kenya is at war or when a declaration of emergency under Section 29 of the Constitution is in force of measures that are reasonably justifiable for dealing with the situation that exists in Kenya during that period.

Under Section 27 (2) of the Independence Constitution one of the measures that could be taken was detention of any person whose activities were prejudicial to Public security. The sub-section offered several safeguards to the detainee which included information of the reasons for detention and review of the detention by a tribunal.

Another section in the Independence Constitution that dealt with preservation of Public security was section 29 which empowered the governor to declare emergency. Section 29(1) provided:-

The Governor General may by proclamation published in the Kenya Gazette declare that a state of emergency exists for the purpose of this chapter.

Section 29(2) of the Independence Constitution stated further that no declaration of emergency could be made except with the prior resolution of either House of the National Assembly⁷, arrived at by a sixty five per cent vote of all members of the House. Such a declaration of emergency lapsed at the expiration of seven days, commencing with the day on which it was made unless it was approved by a resolution of the other House supported by sixty five per cent of the votes of all the members of that House.

Under section 29(3), a declaration of emergency could be made without prior authority of a resolution of a House of National Assembly at a time when Parliament stood prorogued or when both Houses of the National Assembly stood adjourned. But every declaration of emergency made in this manner was to lapse at the expiration of seven days commencing with the day on which it was made, unless it was in the meantime approved by a resolution of each House of the National Assembly supported by sixty five per cent of all members.

The above provision which dealt with preservation of Public security reveal that while the government at Independence was committed to the protection of fundamental rights and freedoms, the necessity of protecting the state was taken

into consideration; hence the inclusion of the power to derogate and the right to exercise wide powers in emergency situations.⁸

Even when the Constitution was amended and re-organized in 1966, and the Bill of Rights transferred from Chapter II to Chapter V of the Constitution the power to derogate was retained. The contents of section 27 were recast and made Section 83. Similarly section 29 was recast and made section 85. In both the sections the word emergency was substituted with the words 'Preservation of Public Security', because it was thought that it brought association with unpleasant memories of the emergency period in the pre-independence Kenya.

Section 83 (1) of the Constitution⁹ provides 'inter alia' that derogation from certain rights would not be deemed to be in contravention of the Constitution. These rights include, protection of liberty (Section 72), protection from freedom of expression (Section 79), protection from freedom of assembly and association (Section 80), protection from freedom of movement (Section 81) and protection from discrimination (Section 82). Under part III of The Preservation of Public Security Act¹⁰ anything done pursuant to the provisions thereof

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shall not be deemed to contravene the Constitution with regard to the fundamental rights listed above, when the said Part III¹¹ is in operation by virtue of an order made under Section 85 of the Constitution. This section empowers the President at any time, by an order published in the Kenya Gazette to bring into operation, generally or in any part of Kenya Part III of The Preservation of Public Security Act which among other things permits detention of persons, imposition of curfews, control of aliens, censorship, prohibition of assembly and acquisition of property. Derogation from the right of property under Section 4(2) (f) of The Preservation of Public Security Act is particularly incomprehensible because under Section 83 of the Constitution, property right cannot be derogated from. This power to derogate is therefore 'prima facie' unconstitutional.

The net effect of the provisions of the Kenya Constitution Sections 83 and 85 like their predecessor Sections 27 and 29 is that they clothe the executive with immense powers that may be invoked in the name of national security.¹²

Under Section 127 of the Constitution, the President is also empowered to make regulations as appear to him to be necessary or expedient for the purpose of ensuring effective government in or in relation to the North Eastern Province and Districts of Marsabit, Isiolo, Tana River and Lamu. The reasons for this provision was the Shifta secessionist movement in those areas in the 1960's.

The Kenyan Constitution gives the enabling provision under which the national security machinery comes into operation. However, as concerns the actual mode of operation and the details of the measures to be taken for the preservation of Public Security, reference has to be made to The Preservation of Public Security Act.

NATIONAL SECURITY CLAIMS UNDER THE PRESERVATION OF PUBLIC SECURITY ACT AND OTHER STATUTES:

The Preservation of Public Security Act (hereinafter referred to as the Act) came into existence in 1960 and was then known as 'The Preservation of Public Security Ordinance'. When Kenya attained Independence, the operation of the Act was linked with Section 29 of the Independence Constitution now Section 85. From thenceforth the Act would operate under a declaration made under the Constitution.¹³

The Act provides in Section 2 that preservation of public security includes, the defence of the territory and people of Kenya; the security of the fundamental rights and freedoms of the individual; the securing of the safety of persons and property; the prevention and suppression of rebellion, mutiny, violence, intimidation, disorder and crime, and unlawful attempts and conspiracies to overthrow

the Government or the Constitution; the maintenance of the administration of justice; the provision of a sufficiency of supplies and services essential to the life and well being of the community, their equitable distribution and availability at fair prices; and the provision of administrative and remedial measures during periods of actual or apprehensible national danger or calamity, or in consequence of any disaster or destruction arising from natural causes.

The definition of 'preservation of public security' as provided in the Act is not exhaustive. The Act merely provides a list of circumstances, and by the use of the word 'includes' which is an integral part of the definition it gives the state the prerogative of determining whether an act constitutes a threat to public security even when such an act is not expressly stated in the Act.

The wide definition notwithstanding, the Act makes a distinction between Public Security Measures¹⁴ and Special Public Security Measures¹⁵ all of which belong to the province of national security claims. Public security measures are dealt with under part II of the Act. Section 3(1) provides:-

- 1) If at any time it appears to the President that it is necessary for the preservation of public security to do so, he may by notice published in the Kenya Gazette declare that this part shall come into operation in Kenya or any part thereof.
- 2) Where a notice under sub-section (1) has been published, and so long as the notice is in force, it shall be lawful for the president to the extent to which this Act is brought into operation, and subject to the Constitution, to make regulations for the preservation of Public security.

The obvious effect of part II of the Act is to confer upon the President wide powers to deal with public security. Its provisions make it a subjective issue for the President to determine what constitutes a threat to Public security. While it is obvious that powers vested in the President are extensive, to be valid, they have to conform with the provisions of the Constitution. However, under section 3(4) of the Act it is provided that regulations made under part II designated 'Public Security Measures' shall not be invalid for reason of non-conformity with the Constitution when Kenya is at war.

The measures under Part III designated 'Special Public Security Measures' come into force by virtue of an order made under Section 85 of the Constitution. Section 4(1) of the Act provides that:-

Where an order under Section 85 of the Constitution (which relates to the bringing into operation of this part) has been made by the president, and so long as the order is in force, it shall be lawful for the president, to the extent to which this part is brought into operation and subject to the Constitution to make regulations for the preservation of the public security.

The regulations contemplated under Part III to deal with preservation of public security can be made for all or any of the measures specified in Section 4(2). The measures so specified include 'inter alia' the detention of persons, the registration of movement into and out of Kenya, imposition of curfews, the control of aliens including the removal of diplomatic privileges, censorship control or prohibition of the communication of any information, the control or prohibition of any procession, assembly, meeting, association or society, the control or prohibition of the acquisition, possession, disposition or use of any movable or immovable property or undertaking, forced labour, the control and regulation of harbours, ports and the movement of vessels, control of trade and prices, amending, applying with or without modification or suspending the operation of any law other than this Act or the Constitution and any matter, not being a matter specified or which provision is necessary or expedient for the preservation of public security.

The extensive nature of part III of the Act is revealed by the list of measures that may be taken to preserve public security. The scope of the said part III does not end with the list; because under section 4(2)(M) of the Act measures which are not covered by the list in section 4(2) (a) to (l) may be taken, if such measures are necessary for the preservation of public security.

Although powers to make regulations as a security measure are wide under both parts II and III of the Act, the regulations and measures taken should always be in consonance with the Constitution. However, it is important to point out that regulations under part III of the Act are slightly more restricted than those under Part II. This difference is borne out by the fact that regulations under Part III must always be in conformity with the Constitution or any other law, otherwise they will be invalid. Conversely regulations under Part II may be exempted from the requirement as to conformity when Kenya is at war. It is thus confusing that in the face of this difference, a common list of measures is used for both parts. Ghai and McAuslan have commented on this obvious confusion. They have written:-

...It is confusing that the Act (Preservation of Public Security Act) should provide a common list under section 4(2) of specified purposes for which regulations can be made under either part; It is clear for example that the purpose specified under section 4(2) (a) to (1) modify or suspend the existing law - can have no relevance to part II. Similarly, the regulation to detain cannot be made under Part II though detention is a specified purpose. It is unfortunate that the Act is so unclear on what precise kind of regulations can be made under part II, any doubt in the important area of human rights is undesirable and it is not enough to state that regulations cannot be in contravention of the Constitution or any law¹⁶.

As already indicated, the application of the regulations under Part III of the Act are a little different from those under Part II. Section 85 of the Constitution empowers the President to bring into operation generally or in any part of Kenya the measure under Part III. An order made by the President under section 85 ceases to have effect on the expiration of the period of twenty eight days commencing with the day on which the order is made, unless before such expiration it has been approved by a resolution of the National Assembly. Pursuant to section 3(6) of part II of the Act, an order that comes into force by a Presidential order can equally be revoked by him by a revoking order in the Kenyan Gazette. Although it is not expressly stated it is to be assumed that the President can only revoke such an order within twenty eight days prior to its

lapsing. However, if an order has been approved by a resolution of the Assembly its revocation will require a revoking resolution of the said Assembly supported by a majority of all members of the Assembly (excluding the ex-officio members).

After Independence, regulations have been made under Section 3 and 4 of Part III respectively.¹⁷

Under Section 3 of the Act, regulations known as 'The North-Eastern Province and Contiguous Districts Regulations'¹⁸ were first brought into force in 1966. The regulations were in respect of the North-Eastern Province of Kenya and the contiguous districts of Marsabit, Isiolo, Tana River and Lamu (hereinafter referred to as the prescribed area). Pursuant to the regulations, persons in the prescribed areas could be punished for among other things, possession of firearms, consorting with another person who is carrying or has in his possession or under his control any firearm, ammunition or explosives in suspicious circumstances or harbouring a person whose acts are prejudicial to preservation of Public security. The regulations also empower a member of the security forces or an administrative officer at any time to search without warrant any premises in the prescribed areas, arrest without warrant, destruction of buildings in the interest of Public security by

a police officer or by a member of the armed forces not below the rank of a corporal, requisition of vehicles when necessary or expedient so to do in the interests of preservation of public security or require work to be done if desirable for the maintenance of the health, safety and well being of such inhabitants or for the good rule and government of such regions so to do.

Section 17(1) of the regulations made under section 3 part II of the Act, the Chief Justice is empowered to assign a judge of the High Court for trial of specified offences.

Under Part III regulations have been made under section 4 which regulations are known as Public Security (Detained and Restricted Persons).¹⁹

Under these regulations the minister (presumably the minister in charge of security) is empowered to make restriction orders if it is necessary for the preservation of public security. He is also empowered to make detention orders if such is necessary for the preservation of public security and may attach any condition within constitutional limits. The minister may revoke the detention order at any time. Since 1966 the regulations relating to detention have been kept in operation.

It is clearly evident from the scope of the regulation that the latitude accorded to the state authorities in the interest of public security are immense.

While Parts II and III deal with specifics, part IV of the Act makes general provisions for regulations, rules and orders made pursuant thereto. Section 6(1) of part IV requires that all subsidiary regulations made under the Act must be laid before the National Assembly. Such legislation may be annulled within a period of twenty days commencing with the day on which the assembly first sits after the subsidiary legislation is laid before it. According to section 6(2) the requirement of approval under section 6(1) shall have no effect if the resolution in issue had been approved by the Assembly in its draft form.

According to section 7 Subsidiary Legislation may be applicable to the whole or part of the country, to any ship or aircraft in or over Kenya and may make different provisions with respect to different cases or classes of cases. Like the parent or enabling Act, Subsidiary Legislation will be valid irrespective of their inconsistency with any written law save the Constitution and the Act. Section 7(3) provides:-

Subsidiary Legislation shall have effect notwithstanding anything inconsistent therewith contained in any law other than this Act or the Constitution, any provision of any such law which may be inconsistent with any Subsidiary Legislation, shall whether that provision has or has not been amended, modified or suspended in its operation by any Subsidiary Legislation to the extent of the inconsistency have no effect so long as such Subsidiary Legislation remains in force.

The regulations made under Part IV are equally far-reaching. Section 7(2)(a) of the Act is particularly drastic as it allows the making of provisions for the apprehension and punishment of persons offending against regulations made under this Act. It permits the imposition of penalties including the penalty of death and the forfeiture of any property connected in any way with any offence. This particular provision is very drastic and very difficult to reconcile with the requirement that the right to life should not be derogated from. This difficulty remains even in the face of the qualification that deprivation of life following a lawful sentence will not be deemed to be in contravention of the Constitution. In our view to permit the imposition of such a penalty as death under these regulations is an erosion of the constitutional guarantee. The regulations also permit the trial of offenders by Courts other than the regular courts in accordance with such procedure as prescribed therein. While the provision

is in accordance with the Constitution, it is important that safeguards relating to trial as spelt out in the Constitution should be followed otherwise a trial under the special court would be invalid. Ghai and McAuslan commenting on this issue have written:-

The powers to provide for trials are drastic and could result in serious derogations from the right to the protection of law and its process guaranteed by Section 77 of the Constitution. This is one of the few rights that cannot be derogated from even under the emergency powers, and unless the regulations incorporate all the essential safeguards provided there both before and during the trial, they would be invalid²⁰

It is quite conceivable that regulations could be made that compromise constitutional guarantee and this is an obvious 'achilles heel' for the regulations. The regulations also authorise search of persons and entry of premises and provide for the payment of compensation and remuneration to persons affected by the regulations. Section 7(2) permits the making of incidental and supplementary provisions as appear to the President to be necessary or expedient for the purpose of the regulations. While we appreciate the practical import of giving the President such a leeway, we discern obvious disadvantages. First and foremost in 'a de jure' one party state like Kenya the likelihood of such powers being misused for political gains is real

and not imaginary. Second, because it is left to the President to decide what provisions appear to him necessary without proper checks, it is equally conceivable that an unconscientious President may misuse the power.

2:3 NATIONAL SECURITY CLAIMS UNDER OTHER STATUTES

Apart from The Preservation of Public Security Act there are other statutes that deal with national security. These include the Outlying Districts Act,²¹ The Special Districts (Administration) Act,²² The Public Order Act²³ and to some extent The Vagrancy Act²⁴

The Outlying Districts gives the administration power to close any district or any part thereof. Section 3 provides:-

The Minister may by order published in the Kenya Gazette declare any district to be closed to all travellers under this Act and such a district or part of the district shall be termed a closed district.

In accordance with the Act, once a district or any part thereof is closed, entry is illegal for anyone, except a native of the district, public officers in the course of their duties and other persons holding a licence. The power to grant a licence for entry into a district closed pursuant to the Act is vested in the Provincial Commissioner of the province in question or the District Commissioner or the District Officer. Any of these officers is equally empowered to prescribe conditions to be endorsed upon the licence. The licence can be withdrawn at any time.

Under Section 8 of the Outlying Districts Act, if a licensee commits a breach of the conditions endorsed upon this licence, or does any act calculated to disturb the peace of the closed district, he shall be guilty of an offence. In addition to any penalty, such a person shall be liable to forfeit any security furnished by him. The Outlying Districts Act also empowers any administrative officer, or any police officer of or above the rank of Assistant Inspector to remove or cause to be removed from a closed district any person who is unlawfully therein in contravention of the provisions of the Act.

A close study of the provisions reveals that the Outlying Districts Act is meant to deal with problems that threaten security in any district. The Outlying Districts Act is therefore tailored to deal with security problems within specified administrative areas of Kenya.

Another statute that concerns itself with security issues is The Special Districts (Administration) Act. The Act stipulates that it shall apply to all areas to which the minister may, by order, apply. The minister in issue is not named but it is to be assumed that it is the minister for the time being incharge of internal security. The statute empowers the Government to apply its provisions to any area or areas. It empowers the provincial commissioner or the District Commissioner to make orders for arrest, seizure of property or detention in respect of any tribe or a member thereof in the event of any such tribe or any section or members of the tribe acting, in the opinion of the Provincial Commissioner or the District Commissioner in a hostile manner towards the government or towards any foreign power in amity with the government or towards any persons being or residing in Kenya.

The Statute empowers the Provincial Commissioner or the District Commissioner to hold an inquiry into circumstances relating to alleged hostile acts. The Provincial Commissioner is further empowered, by an order in writing to appoint the District Commissioner, within the province under his jurisdiction, to be an arbitral tribunal, which shall exercise jurisdiction over tribesmen. The tribunal has the power to summon any member of the tribe in respect of which it has been constituted.

Under Section 15 of The Special Districts (Administration) Act where after an inquiry the Provincial Commissioner is satisfied that any person within the district or area under his jurisdiction is conducting himself so as to be dangerous to peace and good order or has a blood feud, or has created a cause of quarrel likely to lead to bloodshed, the Provincial Commissioner or the District Commissioner may by an order in writing require that person to reside in such place as may be specified in the order: save to point out that such an order shall not require a person to reside outside the district in which he normally resides, except with the prior approval of the Provincial Commissioner.

The Special Districts (Administration) Act

is specifically tailored to deal with sectional or tribal feuds which if not controlled can 'snowball' and assume national proportions.

If the provisions of The Special Districts (Administration) Act contravenes the Constitution or any other Law, the aggrieved party may have recourse to the courts on the strength of Section 3 of the Act itself. It provides:-

The Powers conferred by this Act [The Special Districts (Administration) Act] shall be in addition to and not in derogation from powers conferred by any other Law for the time being in force.

The foregoing saving provision coupled with the requirement that all laws should be consistent with the Constitution should be seen as a check on the otherwise extensive provisions of the Outlying Districts Act and The Special Districts (Administration) Act.

The Public order Act also makes provisions that are meant to control activities of organizations equipped to usurp functions of the police, the armed forces and other disciplined forces.²⁵ Under Section 4(1)(a) to (b) the Act also prohibits the wearing of uniforms which have connexion with political objects. This provision is meant to preclude activities of a

a political nature which may blossom into turmoil and thereby undermine public order within the Republic of Kenya. The Public Order Act also accords the administration and the police force immense powers to control Public gatherings and meetings. Under section 5 of the said Act a police officer in charge of a police station in a province or a police officer in charge of a division may control the conduct of a meeting including the control of the extent to which music may be played, or to which music or human speech or any other said may be amplified, broadcast, relayed or otherwise reproduced by artificial means, control direct and specify the route by which, and the time at which, any public procession within his area of control may pass, if it appears to him to be expedient in the interest of public order to do so. It is further provided that public meeting or procession cannot be held without the prior permission of the District Commissioner who may decline to grant permission if he is satisfied that the meeting or procession is likely to prejudice the maintenance of public order, to be used for any unlawful or immoral purposes, or may give permissions with conditions attached. It is open to the District Commissioner to refuse an application if in his opinion the applicant or any person or organization associated directly

or indirectly with the application or likely to be concerned with the application is likely in the opinion of the District Commissioner to be concerned in the holding or organizing of the meeting or procession has in relation to any public gathering recently contravened the provisions of the Act or any other written Law or any condition attached to a permission.

The Act also illegalises the advertisement of a public meeting or procession before permission to hold it has been obtained; and the District Commissioner may refuse to grant a licence if the meeting has been advertised prior to the obtainance of a licence. Under Section 5(4) of the Act a District Commissioner is empowered to revoke a licence or to amend its conditions if such revocation or amendment is in his opinion necessary or expedient in the interest of public order. At Section 5(5), the Act requires that the person in whose name the licence is issued must be present at the meeting from the first assembly thereof to the final dispersal thereof and shall forthwith comply with any directions which may be given to him by any police officer or administrative officer for ensuring the due performance of and compliance with the conditions of the licence and the maintainance

of public order throughout the period of assembly. Under section 5(7)(a) if an administrative officer or a police officer of or above the rank of Assistant Inspector has reason to believe that a public meeting or public procession which ought to be licenced is not so licensed is likely to take place or form in any public place, he may cause access to that public place and to any other public place adjacent thereto to be barred and to be closed to the public or to any person or class of persons for such time as may be necessary to prevent the meeting or procession taking place. Under Section 5(9) appeals on matters of amendment, cancellation or revocation may be made to the minister in charge of administration, who may 'in his discretion', confirm, reverse or vary the decision appealed against.

The Public Order Act also makes provisions for prohibition of carrying offensive weapons at public meetings and processions,²⁶ prohibition of entertainments and sporting events,²⁷ prohibition of flags, emblems, banners and kindred insignia of political organization;²⁸ all these in the interest of public security.

Under Section 8 and 9 of the Act Provisions are made in respect of curfew orders and curfew restriction if such orders and restrictions are necessary in the interests of Public order. The most recent use of these orders were in 1982 following the abortive attempt to overthrow the government of the Republic of Kenya on the 1st day of August, 1982.

What emerges from the extensive provisions of The Public Order Act is the legislative attempt to ensure that persons in their individual capacities or as members of organized societies do not engage in activities that may threaten Public order; indeed this was the reason given recently on Saturday the 3rd day of February 1990 when the police dispersed a gathering of a sect known as 'Tent of the Living' an 'anti Christ' religious group registered under The Societies Act²⁹ on the 7th day of January, 1965.

The measures which are allowed to be taken under the The Public Order Act when brought into force inevitably curtail freedom of expression and association but this is justifiable if the general good is threatened.

The Vagrancy Act although not directly concerned with matters of public order was meant to deal with persons described as vagrants who are thought by virtue of their station in life to be potentially dangerous to the public good; According to the Act a vagrant means:

- a) any person having neither lawful employment nor lawful means of subsistence such as to provide him regularly with the necessities for his maintenance, and for the purposes of this paragraph, prostitution shall not be deemed to be lawful employment, and earnings from prostitution shall not be deemed to be lawful means of subsistence; or
- b) any person having no fixed abode and not giving a satisfactory account of himself; and for the purpose of this paragraph, any person lodging in or about any verandah, pavement, sidewalk, passage, outhouse, shed, warehouse, store, shop or unoccupied building or in the open air or in or about any cart or vehicle shall be deemed to be a person having no fixed abode; or
- c) any person wandering abroad, or placing himself in any Public place to beg or gather alms...

The rationale behind the enactment of The Vagrancy Act is that persons contemplated under the Act are those whose activities could be prejudicial to Public order. In its effect the Vagrancy Act curtails the freedom of movement as guaranteed in the Constitution but this is said to be justifiable in the interest of Public good.

Indeed, the constitutionality of the Vagrancy Act has been discussed in the post independence case of Kioko v Attorney General;³⁰ in the said case Kioko, who had been convicted for being a vagrant on several occasions challenged the Constitutionality of the Vagrancy Act in so far it compromised his personal liberty. The court upheld the Vagrancy Act on the ground it was under the exemptions contemplated under Section 72 of the Kenyan Constitution which deals with personal liberty.

The Plethora of statutes discussed reveal clearly that national security laws in Kenya are extensive and far-reaching.

4 SUMMARY

This chapter sets out the Legislation that clothes the executive with the authority to exercise specified powers in the name of national security. Every country which subscribes to the tenets of Constitutionalism also recognise that there are certain dangers that may imperil a nation and which may necessitate the taking of certain measures that are injurious to the rights of the citizens. We have also seen that International Instruments like the International Covenant on Civil and Political Rights and International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms also recognise instances when derogation from fundamental rights may be justified.

With regard to Kenya we have noted that the Constitution, while guaranteeing fundamental rights and freedoms spelt out therein also provides for measures that may be taken for the sake of national security. It has also been evident in this exegesis that the operation of Kenya's National Security System is inextricably tied to the Constitution.

It has been pointed out that the Kenyan position is in consonance with international requirements. However, the international covenants are only important as guides; Kenya being a subscriber to the dualist approach which precludes the automatic application of international law.

Having looked at the contents of National Security Legislation attention now focuses on the nature and consequences of national Security claims which is the concern of the next chapter.

FOOTNOTES

1. See Sections 83, 85 and 127
2. NWABUEZE, B.O: Constitutionalism in the Emergent States
(G. Hurst and Co.London, 1973) p.174
3. Kenya acceded to the 'Internatioanl Covenant on Civil and Political Rights' on 1st May, 1972
4. See the 'United Nations Charter', The Universal Declaration of Human Rights 1948 and The International Covenant on Civil and Political Rights 1966.
5. See Infra Chapter 4
6. The provisions for Emergency and derogation were also included in the self internal Government Constitution. Chapter 1 of which dealt with Protection of Fundamental Rights and Freedoms of the Individual; section 14 allowed derogation from certain Fundamental Rights and Freedoms, Section 17 permitted the governor by aproclamation in the Kenya Gazette to declare emergency.

7. The Independence Constitution created two houses of the National Assembly namely the Senate and the House of Representatives:
Section 34(1) provided:
 - 1) There shall be a parliament which shall consist of His Majesty and the National Assembly.
 - 2) The National Assembly shall comprise two houses that is to say a Senate and a House of Representatives.

8. Infra Chapter 4.

9. The Constitution of Kenya Revised Edition 1981 (1983)

10. Chapter 57 of the Laws of Kenya.

11. Infra Chapter 3

12. Ibid

13. This meant that 'The Preservation of Public Security Act' would be brought into operation following the invocation of constitutional powers.

14. The Preservation of Public Security Act Chapter 57 of the Laws of Kenya, part III Section 3
15. Ibid Part III Section 4.
16. Y.P. GHAI and MACAUSLAN: Public Law and Political change in Kenya (Oxford University Press 1970) at P.435
J.P.W.B.
17. L.N.43/1967: This notice covers both sections 3 and 4 and created regulations to be cited as The Public Security (Control of Movement) Regulations
- These regulations affected the tribes in the schedule namely:-
- | | | |
|-----------|----------|---------|
| Gurrah | Aduran | Birah |
| Munille | Deyodia | Isaak |
| Dogodia | Odadeh | Herti |
| Lewah | Rendille | Aulinal |
| Ashraf | Gabra | Adh Wak |
| Shebellal | Burji | Abdilla |
| Sheikal | Konso | |
| Shermoge | Sankuige | |
| Warageiga | | |
| Garabeya | | |
- Who among other things may have their movement controlled in the name of preservation of Public

security.

18. L.N. 263/1966
19. L.N. 241/1966
20. Y.P. GHAI and MACAUSLAN J.W.P.B: op.cit. P.436
21. Chapter 104 of the Laws of Kenya
22. Chapter 105 of the Laws of Kenya
23. Chapter 56 of the Laws of Kenya
24. Chapter 58 of the Laws of Kenya
25. The Public Order Act chapter 56 Laws of Kenya,
Section 3(1)
26. Ibid section 6(1)
27. Ibid section 7(1)
28. Ibid section 10(1)
29. Chapter 108 of the Laws of Kenya
30. Crown Appeal 633/1964

CHAPTER THREE

THE NATURE AND CONSEQUENCES OF NATIONAL
SECURITY CLAIMS

3:1 AUTHORITY TO ASSERT NATIONAL SECURITY CLAIMS

The Kenyan Constitution like most seeks to create optimal balance between the few, in whom it confers powers, and the rest of the majority for whose benefit the said power is to be exercised.

There are it is said, three distinct kinds of governmental powers - Legislative¹, executive² and judicial³. Legislative power consists in the executing or carrying out the laws and the carrying on the manifold public activities and services. Judicial powers consists in interpreting the Laws, or more concretely, deciding in the event of dispute which specific acts are permitted or forbidden.

However, since the national security machinery is brought into motion by virtue of executive powers a discussion of the said powers is most germane. The Constitution of Kenya vests executive authority of the government in the President. Section 23 provides:

The executive authority of the government of Kenya shall vest in the president and, subject to this Constitution may be exercised by him either directly or through officers subordinated to him.

Once vested with the power the President is not to exercise the same arbitrarily but must do so for the purpose 'inter alia' of preserving the security of the state. Indeed, it is for this reason that the Constitution further confers on the President the power to take such steps as he may deem expedient to ensure preservation of public security. Section 85 provides:

- 1) Subject to this section the President may at any time by order published in the Kenya Gazette, bring into operation, generally or in any part of Kenya Part III of the preservation of the Public Security Act or any part of the provisions of the Act.

The Preservation of Public Security Act does not define in any precise terms the meaning of 'Public security'. It however states what public security includes. This shows that the definition is not exhaustive but extends to include all those acts which are similar in nature to the situations given in the Act itself. This therefore extends the scope of The Preservation of Public Security Act to its widest limits⁴. This is understandable because the manner in which human beings can behave cannot be predicted with certainty. Boli Bennett⁵ writing

on the American situation has offered what is a reasonable rationale for such a very wide definition of what constitutes preservation of Public security. He Boli Bennet has opined that it is the state that enacts the Law that determines whether the Law confers sufficient power for its purpose. It must be expected, therefore, that the state will define the Criteria for the invocation of security powers in a manner that is most favourable to its proclivity.

What is clear from the foregoing is that the state has both the political and legal mandate to utilise the apparatus envisaged by the Constitution to preserve public security as defined in The Preservation of Public Security Act.

To further appreciate the significance of the Constitution in matters of national security a little history will assist.

An assessment of the Kenyan experience shows that the Constitution has been progressively amended to widen the executive powers in matters touching on national security. This commenced with the sixth amendment of the Constitution after Independence, which amendment related to detention of persons without trial⁶. The amended

provision permits the President or his delegate in that behalf to detain a person under The Preservation of Public Security Act if such a person's activities are prejudicial to public security.

Apart from the aforesaid amendment which greatly enhanced national security apparatus there have been a myriad of Constitutional amendments⁷ whose effect has been to concentrate more and more power in the hands of the executive. The argument often advanced for frequent Constitutional amendments, particularly when they concentrate powers in the hands of the executive, is that such is necessary to facilitate development and to consolidate national security⁸. While such arguments may be plausible to some extent, sometimes such 'unchecked' amendments particularly when they are widely defined and touch on national security have the net effect of eroding fundamental rights.

3:2 THE POLITICAL NATURE OF NATIONAL SECURITY CLAIMS
IN KENYA

National security claims in Kenya, have always been advanced as grounds for expanding governmental powers or easing restriction on those powers.

Indeed, such claims have been pressed by the state more vehemently because of the drastic nature of the apparatus it legitimises⁹.

As earlier indicated, the rationale for centralising power has been stated as the necessity to facilitate socio-economic development. This goal has however been progressively abandoned and the power so centralised or concentrated in the hands of the executive has become a tool of perpetuating political goals for those in power. This trend has been characterised by quick resort to detention laws sometimes in circumstances when the threat to national security is imaginary rather than present and real and when the true aim was clearly to punish political dissent. In Kenya, politico-legal power vested in the executive is sometimes used for ulterior political motives, for example, to suppress political opinions that are at variance with government policy. The net effect of the amendments which vested the executive with discretionary power is that state power, particularly in matters that relate to public security has tilted in favour of discretionary political power at the expense of the law. This is borne out by the frequent resort to detention of persons without the benefit of court trials for detainees on the grounds of national security.

The detentions of Mukaru Ng'ang'a¹¹, Mirugi Kariuki¹², Kihoro Wanyiri¹³, Willy Mutunga¹⁴ and many others in recent years demonstrates how the vesting of the power of detention in the hands of the executive has even allowed the executive to snatch cases from the hands of the judiciary. The case of Raila Odinga¹⁵ illustrates this point. Raila was charged with the offence of treason under section 40 of the penal code; while the case was before the High Court, the state entered 'a nolle prosequi' and he was subsequently detained¹⁶ on the ground that his activities were prejudicial to public security. This happened again in the case of Willy Mutunga who had been charged with the offence of sedition contrary to section 56 of the Penal Code and was subsequently detained after the state had entered 'a nolle prosequi' in the sedition case.

Sometimes resort to detention powers has been against professionals, invariably lawyers who have defended persons who are unpopular with the government. In such cases, as in all, it is invariably stated that detention has become necessary to preserve public security. This assertion has been borne out by the detention of a Nairobi Lawyer

John Khaminwa¹⁷. The lawyer was defending one Muriithi¹⁸ formerly a high ranking officer (Deputy Director) of Kenyan Intelligence. He was transferred to head a parastatal dealing with pork and its products. He challenged his transfer in court through the said Khwaminwa. Khaminwa in stressing that the transfer was unlawful relied on Section 24 of the Constitution. However, the President through whose office the transfer was sanctioned saw the lawyer's argument as a challenge of his powers under the said section 24 of the Constitution which provides:-

Subject to this Constitution and any other law, the powers of Constituting and abolishing any offices, for the Republic of Kenya, of making appointments to any such office and terminating any such appointment, shall vest in the President.

- 1) Save in so far as may be otherwise provided by this Constitution or by any other law every person who holds office in the service of the Republic of Kenya shall hold that office during the pleasure of the President.

Provided that this subsection shall not apply in the case of a person who enters into a contract of service in writing with the Government of Kenya by which he undertakes to serve the Government for a period which does not exceed three years.

Soon after Khaminwa's appearance in Muriithi's Case, and following reference to that case at a public rally addressed by the President¹⁸.

Khaminwa was detained ostensibly because his activities were prejudicial to public security; to the discerning eye, this was a clear case of using the drastic national security powers of detention to punish dissent. This trend is captured well by Okoth - Ogendo .

He writes:-

It is significant ... that governing elites in Africa have reacted most adversely to criticism. Indeed, in the vast majority of cases full powers granted by security legislations have been used for the sole reason of curtailing private (or organized) criticism²⁰

What has also emerged in Kenya since the attainment of political independence is that national security interests have triggered an expansion of governmental power. They have also been offered as an excuse for easing restrictions on such power. This has sometimes been done for the sake of political expediency.

An illustration of the use of national security powers for political reasons was revealed following the resignation of then Vice-President Oginga Odinga on the 14th day of April, 1966. After his resignation, under his leadership, with Bildad Kaggia as his deputy, on 22nd April, 1966, he requested recognition from the speaker

as the official opposition. Odinga was invited and became the leader of the newly formed Kenya Peoples Union (hereinafter referred to as K.P.U.) but as yet unregistered political party which was later registered on the 20th day of May, 1966. After the creation of K.P.U. and the restoration of formal parliamentary opposition, relations grew sour between the ruling party K.A.N.U. and K.P.U. which had its stronghold in Nyanza Province, the home of its leader, Odinga. In 1969 when the President of Kenya and leader of the ruling party K.A.N.U. visited Kisumu town in Nyanza Province, the political climate was tense. The purpose of the visit was to officially open the New Nyanza General Hospital. Riots broke out during the function to perform the opening ceremony. The leaders of K.P.U. were placed under house arrest on the nebulous allegation that they were engaged in subversive activities against the government. Apart from the detention of the K.P.U. leadership which would have been sufficient if security was the only thing in issue, K.P.U. was proscribed. In justifying the detentions a government Minister said:-

The government has made a firm decision to deal with the subversive elements who have been working with foreign and unfriendly elements to destroy the peaceful running of the country and that is why the detentions and the house arrests have been put into force.²¹

It is curious that it became necessary to proscribe the political party (K.P.U.) when only a few individuals in the ranks of its leadership were said to be privy to alleged subversive activities. This was a clear demonstration of the high handedness of the party in power and the use of preservation of public security to punish political opposition.

A further occurrence that underscores the political nature of national security claims was demonstrated in 1975. During the said year a radical Kenyan member of Parliament for Nyandarua North Constituency, Josiah Mwangi Kariuki, popularly known as 'J.M.' disappeared mysteriously. On his disappearance the government issued conflicting information about his whereabouts; the then Vice-President, among others stating that he was in Zambia. However, his badly decomposed body was found at Ngong Hills a few miles from Nairobi. Following the discovery of his body, a parliamentary select committee was constituted to look into the death of J.M. and report its findings. The committee in its findings indicated guilt on the part of some government officials. Following that report a nominated member of parliament Mr. Philip Njoka stated that the twelve members of the parliamentary select committee

which looked into J.M.s death were a group of rogues. Speaking on a motion to recommend action against the said Phillip Njoka for his utterances, Martin Shikuku, a Kenyan Parliamentarian representing Butere Parliamentary Constituency said:-

Any members who brands other members rogues is trying to kill Parliament the way K.A.N.U. was killed. 22

Mr. Jean Marie Seroney the member of parliament for Tinderet Constituency who was sitting as the speaker, while responding to a question from a member demanding substantiation from Shikuku said:-

According to parliamentary standing orders a member of parliament cannot be asked to substantiate the obvious²³

Following the foregoing statements, on the 5th day of October 1975, Mr. Martin Shikuku and Mr. Seroney were picked from within the precincts of parliament and consigned to detention, the concatenation of events leaving no doubt that the detention stemmed from their utterances. The reason advanced was the standard and perennial one that the detainees activities were prejudicial to public security. As may be safely concluded from the events leading to

the detentions hereinbefore chronicled politics rather than real danger to national security has been the real reason for recourse to the national security as a 'tool' of detention. The victims in the said cases have invariably been government critics whose only 'offence' was voicing sentiments unpopular with the politics of the day. The reason for the progressive politicisation of national security issues has been explained well by Thomas Emerson. He has written:-

That claims of national security must always be viewed with a degree of scepticism. The government always resent criticism or dissent and are prone to suppress such activity in the name of national security as a method of distracting public attention from other problems with which the nation must deal.²⁴

This statement is true in the Kenyan experience, indeed, most detainees have admitted that apart from being informed by the government authorities that their activities were prejudicial to public security no detailed reasons are ever given²⁵ in the manner contemplated by section 83 (2) (a) of the Constitution which provides:-

- 2) Where a person is detained by virtue of law referred to in sub section (1) the following provisions shall apply:-
 - a) He shall, as soon as reasonably practicable and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing in a language that

he understands specifying in details the grounds upon which he is detained.

The tendency of the government to conceal issues of detention and matters of national security generally in a shroud of mystery lends credence to the assertion that sometimes national security claims are invoked to cover up embarrassment, incompetence, corruption or outright violation of law.

While we appreciate that the invocation of national security claims is most commonly necessitated by diabolical political machinations which threaten the nation, for this very reason, national security claims are very susceptible to misuse on occasions when the real aim is to achieve selfish political ends rather than to deal with actual threats to national security.

3:3 THE LEGAL NATURE OF NATIONAL SECURITY CLAIMS

The role of the courts in helping to maintain the appropriate balance between the measures necessary for national security and the preservation of constitutional liberties is of fundamental significance. Judicial institutions are undeniably the instruments for protecting individual rights against encroachment by the state.

Performance of that function with impartiality on the part of the judiciary is of even more fundamental significance. The appeal to public emotions, the temptations to exploit national security claims for improper purposes, the absence of normal political safeguards and the susceptibility of the term national security to wide definition all make the supervisory and checking powers of the courts more relevant in national security claims.

While the significance of law as a regulatory factor in matters concerning national security cannot be denied, it must be conceded that the executive branch, and to some extent the legislative have consistently endeavoured to curtail or eliminate the functions of the judiciary where national security claims are involved. The rationale for curtailment of the judicial functions is based on the argument, that the courts are not competent to deal with special problems of national security. That only the executive branch possesses the necessary expertise, that oversight by the courts entail delay and impair effective action, that undue administrative burdens are imposed upon the executive and the like. Indeed, section 83

of the Constitution gives wide discretionary powers to the President for the preservation of public security. The argument therefore goes that the legislature has vested the executive with wide powers to restrict fundamental rights and freedom in a manner that reduces the courts interference. Section 83 of the Constitution provides:-

- 1) Nothing contained in or done under the authority of an Act of parliament shall be held to be inconsistent with or in contravention of sections 72, 76, 79, 80, 81 or 82 when Kenya is at war, and nothing contained in or done under the authority of any provision of part III of part III of the preservation of Public Security Act shall be held to be inconsistent with or in contravention of those sections of the Constitution when and in so far as the provision is in operation by virtue of an order under section 85²⁶

The effect of bringing into operation provisions of The Preservation of Public Security Act by virtue of section 85 is drastic as is revealed by the detention cases in Kenya. Attempts at questioning the validity of detention in courts have not succeeded; this is attested to by a number of cases which have gone to courts.

In the case of Application by Scholastica Waithera Kamau on behalf of Gibson Kamau Kuria²⁷,

Gibson Kamau Kuria was arrested on the 26th day of February, 1987 from his office. On the 2nd day of March, an application was filed under

Rule 2 of the Criminal Procedure rules (Directions in the nature of Habeas Corpus). The state in response, appeared by its counsel who produced a detention order issued pursuant to the provisions of The Preservation of Public Security Act stating that Gibson Kamau Kuria had been detained. The court after perusing the order ruled that the requirements of the 'habeas corpus' application had been satisfied and that the court had become 'functus officio' quod the matter.

Similarly in The Application of Idah Betty Odinga²⁸ an application for 'habeas corpus' was made by Betty Odinga the wife of Raila Odinga who had been picked up on the 30th day of August, 1988 and was being held unlawfully. The application sought the release of Raila Odinga. In a manner very similar to the Kamau case, the state during the hearing of the application produced a detention order which the court accepted as valid. In refusing to look at the regulations governing detention, the presiding Judge, David Porter cited the opinion of Jones then Acting Chief Justice in Re Ibrahim when he said:-

...One cannot look behind a valid detention order as it must be assumed that a Minister ought to be and is deeply concerned, about the liberty of the subject, and only issues a detention order after considering all the information before him. In coming to this

conclusion weighs all the evidence and acts (not merely on the advice of a police officer only). In particular he has the interests of the state in mind, and he is assumed to have acted judiciously in arriving at the conclusion...²⁹

After citing the above opinion, Judge Porter turned to the case before him (The Raila Case) and he said, 'in many other subsequent cases the court has held that it cannot go behind the detention order itself, and therefore i see no purpose in doing so³⁰ These two cases and others³¹ reveal the inability or reluctance of the Kenyan Courts to go into the details of the state security. Indeed, when 'face to face' with matters that touch on the relationship of the state and the individual, the courts have demonstrated a tendency of leaning in favour of the state.

The argument often offered that the courts are incompetent to deal with matters of national security has no proper basis. Apart from offering a justification for executive monopoly of national security apparatus, there seems no reason to accept these assertions of incompetence as carrying more weight in national security cases than in numerous other cases with which the courts have to deal everyday. Indeed, the cases of treason³² and sedition³³ with which the Kenyan courts deal under the Penal Code always

touch on national security. Commenting on the argument that national security issues do not belong to the province of the courts, one Emerson has aptly written:-

...with the possible exception of some issues in the area of foreign relations. The functions of neutral oversight in national security cases does not entail problems that are too complex or administratively awkward for judicial institution. The one contention peculiar to national security matters - that the courts cannot be trusted with state security is difficult to take seriously³⁴

What is important therefore is that our courts should demonstrate firm fidelity and adherence to legal principles which will equalise the imbalance between national security claims and fundamental rights. The principles which can affirm the legal nature of national security have been properly summarised by Emerson.

He states:-

1. Constitutional principles protecting individual liberties occupy a preferred position in the hierarchy of democratic values hence there is a presumption in favour of Constitutional rights.
2. Government claims of injury to national security must be viewed with healthy skepticism.
3. The burden of proof to demonstrate its case rests upon the government.
4. The government must show a direct immediate, grave, and specific harm to national security not vague or speculative threat.

5. The restriction sought by the government must be confined to the narrowest possible constraints to achieve the goal.
6. Wherever possible, hard and fast rules rather than loose balancing tests should be formulated and applied.³⁵

What is revealed by the experience hereinabove chronicled is that while the legal nature of national security cannot be denied the courts have through deliberate reluctance failed to subject national security claims to strict legal checks.

The Constitution of Kenya guarantees the rights of the individuals. It also sets limits to government powers to derogate from these rights. Alongside the usual regulating measures meant to apply during periods of normalcy, provisions are also made to deal with public security in emergency situations. These measures however, are special. Their legitimacy in fact is never in doubt but their operation, sometimes create problems. Their legitimacy is almost accepted as a general principle. Nwabueze while justifying these special rules stated:-

Even the most constitutional regimes finds it necessary to arm itself under the Constitution with special powers to deal with an emergency. In all countries, it is recognized that

constitutionalism has to be limited by the exigencies of an emergency, since an emergency implies a state of danger to public safety which cannot adequately be met within the framework of governmental restraints imposed by the Constitution.³⁶

One can state that the power to derogate from fundamental rights is an attempt to reconcile individual interests with the interests of the society. The need to accommodate both these sets of claims is not debatable but measures must always be taken to guard against spurious invocation of national security interests to excuse violations of fundamental rights.

There are two approaches of allowing national security claims. These are accommodation clause' and 'derogation clause'. The former provides that the right in question shall be subject to limits dictated by such considerations as public order and general welfare.³⁷ The accommodation clause rests on the understanding that all fundamental rights are subject to conditions in the general interest even under normal circumstances.³⁸

The Kenyan Constitution provides that all rights guaranteed by the Constitution are limited and are to be enjoyed but may be encroached upon so far as desirable in a democratic society to protect the interests of others

and to preserve national security. Derogation on the other hand refers to the powers of the state to encroach upon certain constitutionally guaranteed rights when the States' security is threatened. The usual ground upon which fundamental rights are derogated from is national security as permitted under section 83 of the Constitution.

As prelude to the proper understanding of national security claims on fundamental rights a detailed survey of the said rights is germane.

FUNDAMENTAL RIGHTS IN KENYA

As afore indicated the concept of human rights as understood in the Western countries - that is the rights of the individual against the state or the community is alien to Africa³⁹. However, after colonialism and subsequent attainment of political independence several African countries, particularly in the Commonwealth have Constitutions containing the Bill of Rights which are generally copied from the European Convention of Human Rights.⁴⁰ Thus, the fundamental rights to be found in the Kenyan Bill of Rights, being a former colony of Britain, are mainly the so called traditional rights of the individual against the state which are also

found in the European Convention of Human Rights with the exception of a few.

A Bill of Rights made its first appearance in the Kenyan Constitution as a result of the first Lancaster House Conference⁴¹. When Kenya's political Independence drew nearer it was resolved that a declaration of rights be incorporated in the Constitution. When Kenya did ultimately attain internal self government there was a Bill of Rights which protected the traditional Universal rights. Those rights are currently found in chapter V of the Constitution.⁴² In this exegesis, because the main concern is national security, those rights which may be derogated from on grounds of national security are discussed in detail while the rest are discussed in minor detail as a means of providing a complete picture of the rights as they are in Kenya today.

A. Protection of Right to Life

Section 71(1) of the Constitution provides that no person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the Law of Kenya of which he has been convicted. The right is further qualified by providing that a person

shall not be deemed to have been deprived of his life in contravention of this section if he dies as a result of use of force to a justifiable extent for the defence of any person from violence or for the defence of property,⁴³ in order to effect a lawful arrest or to prevent the escape of a person lawfully detained,⁴⁴ for the purpose of suppressing a riot, insurrection or mutiny⁴⁵ or in order to prevent the commission by that person of a criminal offence⁴⁶ or if he dies during a lawful act of war. It is clear that the right to life like all other rights is subject to exceptions. The inclusion of the exceptions is understandable but their true import is not easily discernible. Commenting on the subject Ghai and McAuslan have stated:-

It is not immediately obvious what purpose is served by the enumeration of these exceptions. It may have been thought that these exceptions were necessary to preserve the common law and statutory powers of the police and armed forces to use reasonable force in the execution of their duties, though no powers expressly authorise them to take life...⁴⁷

It will be appreciated that there is a dearth of case law on the right to life in Kenya. This dearth attests to its significance as the right upon which all others depend.

It may also be an indication of the ignorance of the people or their unwillingness to file suits on matters touching the right to life.

Protection of Right to Personal Liberty

Section 72 of the Constitution without defining what personal liberty means, provides that no person shall be deprived of his personal liberty save as may be authorised by law. Such authorization are in the execution of the sentence or order of a court following a conviction, in the execution of the order of the High Court or court of Appeal punishing a person for contempt, in execution of a court order made to secure fulfilment of an obligation imposed upon him by Law, for the purpose of bringing a person before a court in execution of a court order, upon a reasonable suspicion of having committed or being about to commit a criminal offence, or in the case of a person who has not attained the age of eighteen years for the purpose of his education or welfare, for the purpose of preventing the spread of an infectious or contagious disease, in the case of a person who is reasonably suspected to be of unsound mind, addicted to drugs or alcohol or a vagrant. The case of Kioko v Republic⁴⁸ which dealt with the Constitutionality of the Vagrancy Act elucidates the subject. In this case,

the appellant was convicted of an offence under the Vagrancy Act,⁴⁹ a colonial statute, the intent of which had been to keep the urban areas clear of tramps, vagabonds and loiterers.⁵⁰ The court of the first instance had imposed a sentence of imprisonment for one year taking into account that it was the seventh time the accused was convicted of vagrancy. The appellants only ground of appeal was that it was his belief that such colonial laws as the Vagrancy Act had been revoked under the post-independence legal order. The court in considering the Constitutionality of the Vagrancy Act, in the light of the Bill of Rights concluded that Vagrants were a class of persons whom the statute sought to regulate in the interest of public order.⁵¹ Therefore the Vagrancy Act was held not to have violated the right of liberty. Section 72 also provides that whenever a person has been arrested or detained he has to be informed as soon as reasonably practicable in a language that he understands, of the reasons for it. A person who has been arrested for suspicion of having committed an offence must be brought to court within twenty four hours or within fourteen days where he is arrested or detained upon a reasonable suspicion of having committed an offence punishable by death.⁵²

C) Freedom from Slavery and forced Labour

Freedom from slavery and forced labour is covered by section 73 of the Constitution. This section does not define what forced labour is, but it provides that forced labour does not include labour required following a court order or sentence. It does not include labour required of a person while he is lawfully detained if the same is necessary in the interests of hygiene or for the maintenance of the place at which he is detained, labour required of a member of a disciplined force in pursuance of his duties as such, labour required during a period when Kenya is at war or an order under section 85 is in force or in the event of any emergency or calamity that threatens the life or well being of the community, to the extent that the requiring of labour is reasonably justifiable in the circumstances of a situation arising or existing during that period or as a result of the emergency or calamity, for the purpose of dealing with that situation; or labour reasonably required as a part of reasonable and normal communal work or in other civil obligations.

D) Protection from inhuman Treatment

Section 74 guarantees protection from inhuman or degrading punishment or other treatment. What amounts to inhuman or degrading treatment is not defined but it is provided that nothing done under the authority of any law shall be held to be inconsistent with or in contravention of this section. This right cannot be derogated from.

E) Protection of property

The subject of protection of property is dealt with under section 75 of the Constitution. The said property rights are comprehensively protected. It is provided therein that no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired unless such acquisition is necessary in the interests of defence public order, public morality, public health, town and county planning or the development or utilization of it in such a manner as to promote the public benefit. This section is however not effected under section 83 of the Constitution which refers to derogation of fundamental rights.

F) Protection against Arbitrary search or Entry

The Constitution provides at Section 76 that a person shall not be subjected to the search of his person or his property or entry by others on his premises. However, the encroachment of this right will not be deemed to be in contravention of the section if entry or search is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning the development and utilization of any other property in such a manner as to promote the public benefit. Qualifications to the right also exist in respect of authorised officers or agents of the government of Kenya or local government authority, or of a body corporate established by Law for public purposes, to enter on the premises or anything thereon for the purpose of a tax, rate or due or in order to carry out work connected with property that is lawfully on those premises and that belong to that government authority or body corporate. Entries into a premises for the purpose of enforcing the judgement or order of a court in civil proceedings by order of a court are also permitted.

G) Protection of Freedom of Expression

Protection of freedom of expression is guaranteed under section 79 of the Constitution. It entails protection of the right to hold opinions, to receive and impart ideas and information generally to an individual or a class of persons without interference and freedom from interference with a persons correspondence. This freedom is however qualified and nothing done under the authority of any law shall be held to be in contravention of or inconsistent with this section if done in the interest of defence, public safety order, morality or health or for the purpose of protecting reputations, rights and freedom of others or maintaining independence of courts or regulating technical administration or operation of telephoning, telegraphing posts wireless broadcasting or television. Restrictions may also be placed on public officers so far as justifiable in a democratic society.

In the case of Republic v David Onyango Oloo⁵³ the accused was charged with possession and publication of a seditious document. In defence he maintained that the document was not seditious, as it was a constructive criticism of the conduct of public matters. He further

pleaded that he had difficulty perceiving the demarcation point between constructive criticism and sedition. The court without addressing the issue as raised found the accused guilty of the offence of sedition and sentenced him to five years imprisonment. This shows that any divergence in public expression from government is unlawful and thus seditious. It is to be observed that the Law relating to sedition as contained in the penal code is thus a clear qualification of the Constitutional safeguard for freedom of expression.

H) Protection of Freedom of Assembly and Association

Freedom of assembly and association is dealt with in section 80 of the Constitution, it is broadly defined to include the right to assemble freely and associate with other persons and belong to trade unions or other associations for the protection of his interests. The right may however be restricted in the interest of public security, to protect the right of others or in respect of public officers or persons in the service of local government authority or for refusal of registration of trade unions or associations where others exist representing similar interests

and so far as the same are justifiable in a democratic society.

In the case of Bildad Kaggia v Republic⁵⁴ the court had the opportunity to deal with the right of freedom of assembly and association. In the said case the then Vice President of the now defunct opposition party, the Kenya Peoples' Union, had been invited to the occasion of the opening of a sub branch office of the party. Arising from the content of the speech he was then making the ceremony was cancelled by the provincial administration by virtue of powers vested by the Public Order Act⁵⁵. Bildad Kaggia complied with the order, and the crowd dispersed in an orderly manner. But he was charged with the offence of holding an unlawful meeting. Both the court of the first instance and the court of Appeal found Kaggia guilty and sentenced him to six (6) months imprisonment.

The arguments for the appellant was confined to the interpretation and application of the Act. No arguments were offered as to its constitutionality, yet this was a perfect case for determining the Constitutional right of assembly and association. As J.B. Ojwang and J.A. Otieno - Odek have said:-

The Kaggia case, by paying no regard to the right of assembly and association, when this was directly relevant and potentially a determinative concept, underlines the overwhelming deference to the ordinary statute, that is shown by the courts even when the climate for the exercise of fundamental rights abundantly exists.⁵⁶

In Ang aha v Registrar of Trade Unions⁵⁷ the matter in issue was the right to belong to a trade union. The appellants appealed against the decision of the registrar of trade unions to refuse registration for their proposed union. The refusal was based on the ground that the interests sought to be protected by the proposed union were already substantially catered for by existing unions. It was argued that the appellants freedom of association, as guaranteed under the Constitution, had been infringed by the registrars refusal. The court held that while the Constitution protected the right of the appellants to belong to a trade union, it gave them no right to belong to a particular trade union. Justice Muli (as he then was) said:

The Trade Unions Act is not inconsistent with or in contravention of the Constitution. It follows therefore that the right to be registered as a trade union is a contingent right acquired upon the fulfilment of the requirements of the provisions of the Trade Union Act. The registrar is charged with the duty to satisfy himself that the policy laid down under the Constitution and safeguarded by the provisions under the Act is not infringed.⁵⁸

These two decisions clearly manifest the courts attitude. They expose the tendency of the courts to treat other legislation as if they were at par with Constitutional provisions. The Kaggia case demonstrates it in the case of Public Order Act⁵⁹ and the Ang'aha case in the case of The Trade Unions Act⁶⁰

1. Protection of Freedom of Movement

Section 81 of the Constitution provides that no citizen of Kenya will be deprived of his freedom of movement, that is to say, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya. This right is qualified and lawful detention shall not be deemed to be a curtailment of the freedom. It is provided that nothing done under the authority of the Law, which imposes restrictions on the movement or residence within Kenya of any person or any persons right to leave Kenya, that are reasonably required in the interest of defence, public safety or public order shall be regarded as contravening this freedom save to point out that a person whose movement is restricted as aforesaid may have the order against him reviewed by an Independent and impartial tribunal presided over by

a person appointed by the President from among persons qualified to be appointed as a judge of the High Court.⁶¹ Restrictions may also be placed on the movement or residence within Kenya or on the right to leave Kenya of persons generally or any other class that are reasonably required in the interest of defence, public safety, public order, public morality, public health or the protection or control of nomadic peoples except where such action is deemed not to be justifiable in a democratic society. Restrictions may also be placed on movement or residence within Kenya or of any persons right to leave Kenya either in consequence of having been found guilty of a criminal offence under the law, or to ensure that the person or persons in question appear in court at a later date. Restrictions may also be placed on the movement of public officers, or members of disciplined forces or any person in Kenya to ensure that he does not leave Kenya without fulfilling his contractual obligations.

Section 81(6) provides further that until it is otherwise provided by an Act of Parliament nothing under this provision shall affect the operation of the Outlying District Act⁶² or

any law amending or replacing either of those Acts. The operation of these two Legislation have been discussed earlier and it suffices to say that they are harsh in effect and arguably unconstitutional in justifying collective punishment.

As it is clear from the provisions hereinabove set out the guarantee of freedom of movement contemplates movement within the country; into the country and out of the country. The detention of persons is one way in which persons freedom has been curtailed on grounds of public security. Lately, however, two cases have focussed attention on movement out of the country.

In Mwau v Attorney General⁶⁴ the applicant sought the restoration of his passport to enable him to move out of the country. He prayed to the court that immigration officials be compelled by a judicial order to restore his passport. The court of Appeal to which the applicant appealed following the High court's refusal to rule in his favour said:-

The issue and withdrawal of passports is the prerogative of the President and it is open to the Minister responsible to decide on each application whether or not to make a request in respect of the applicant. If the Minister thinks it would not be in the best interest of the country to make such a request, it would be open to him to refuse to issue a passport.⁶⁵

A similar issue arose in the case of Gibson Kamau Kuria v Attorney General⁶⁶ where the accused a former detainee was deprived of his passport and thus precluded from attending a ceremony where he was to be awarded 'The Robert F. Kennedy Human Rights Award'. To date Kamau Kuria has never been given his passport. It is true as has been asserted by the state authorities that the issuing of passports is a prerogative of the state, but such a prerogative must be exercised judiciously since the denial of a passport imposes unreasonable restriction on the freedom of movement.

J) Freedom to Secure Protection of Law

Section 77 of the Constitution provides that if a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. This section also provides that no person can be convicted of a criminal offence unless that offence is defined and the penalty prescribed in written law. Further it is provided that no person who has been tried and acquitted can be tried for the same offence. This is the principle of double jeopardy. The other safeguards are that a person should be informed of his offence in a language

that he understands, the right of an accused to be represented by a legal representative of his own choice, an accused is also under no obligation to give self incriminating evidence.

This Constitutionally guaranteed right has also been abused on several occasions in Kenya. Accused persons have been kept in custody for upwards of even two weeks without proper charges being preferred against them.⁶⁷

In most instances the courts approach in matters of protection of law has been restrictive and in favour of the state. The case of El Mann v Republic⁶⁸ is germane. The accused had been required to answer certain questions on a statutory form by revenue officers. His answers disclosed offences against the Exchange Control Act. He was subsequently charged with those offences. At the trial, he raised an objection that the use of the form in issue as evidence by the state was violation of section 77(7) of the Constitution which states that no person who is tried for a criminal offence shall be compelled to give evidence at his trial'. The accused's objection was considered in a Constitutional court under section 67 of the Constitution. The court held that section 77

was to be construed literally; and the answers given by the accused on the statutory form could not be regarded as evidence at the trial by the accused and was therefore admissible.

Ten years after the decision in the El Mann⁶⁹ case another case sought to challenge the said decision, in Charles Young Okang v Republic,⁷⁰ the accused was charged with the offence of obtaining goods by false pretences. While he was in custody, the police took his fingerprints against his wishes. He objected to the use of these fingerprints as evidence, on the basis that Section 77(7) of the Constitution protected him against giving such evidence at his trial. The court held that the El Mann case had been properly decided and that the section must be construed strictly.

What emerges from the decisions in the El Mann and Young Okang cases is that very little protection is offered by section 77(7) to the accused person.

Although the Kenyan courts have not had occasion to deal with issues of collective punishment, it is another area that negates the Constitutional guarantee of protection of law. Reference will be made here to The Special

District (Administration) Act⁷¹ which provides inter alia'.

...If the District Commissioner in the area concerned has reasonable grounds in his opinion that any tribe or section of it is acting in a hostile manner towards any foreign power in friendly relationship with the government of Kenya... he can order the arrest of all or any member of the tribe.⁷²

The net effect of the foregoing provision is to put premium upon punishment of members of a tribe or a section thereof before their guilt has been proven by a court of law on the excuse of public order. This is unconstitutional because it presumes the guilt of all.

As already indicated, Kenyan Courts have not entertained such a matter, but the Cypriot courts have, in the case of Ross Clunis v Papadopoulos, the commissioner of Limassol following an inquiry, made an order under the governing regulations imposing a fine of 35,000 dollars on the assessable Greek Cypriots inhabiting the area had failed to take reasonable steps to prevent the commission of a number of murders and other offences. The respondent had sought to have the order of the commissioner quashed, on the ground that it involved the imposition of punishment on persons not proved guilty.

The privy council dismissed this argument, maintaining that the purpose of collective responsibility was to ensure that inhabitants of the area would adopt an attitude that was more helpful to the cause of securing public safety and order. For this reason, it was held that the commissioner's order was not 'ultra vires' the Cypriot Constitution. It is important to note that the Cypriot Constitution like the Kenyan Constitution guaranteed innocence until proof of guilt. It is therefore to be assumed that faced with a similar suit the Kenyan courts would favour an approach similar to that of the privy council in the Ross Clunis v Papadopoulos Case⁷⁴

Under section 77(1)(d) it is provided that an accused person shall have the right to be represented by a legal representative of his own choice. In the case of Republic v Ogola⁷⁵ where a trial magistrate refused to adjourn a case and proceeded to convict the accused while the counsel of his choice was appearing in another case before the High Court, the court quashed the conviction and ordered a trial 'de novo'.

A similar experience was evident in the case of Muyimba v Uganda⁷⁶ decided by the now defunct East African Court of Appeal. The court said:

Just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused, so it seems to their lordships' (a decision) cannot stand where there has been a refusal to adjourn to allow counsel to appear for the appellant as of right. If an accused is deprived of that right through no fault of his counsel and a conviction follows, the conviction will be quashed on appeal.

K) Protection of Freedom of Conscience

Section 78 of the Constitution provides 'inter alia' that no person shall be hindered in the enjoyment of his freedom of conscience, this includes freedom of thought and religion, freedom to change his religion or belief, and freedom either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship teaching, practise and observance. This is however qualified by the provision that anything done under the authority of any law in the interests of defence, public safety, public morality or public health, or for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise a religion without the unsolicited

intervention of members of another religion shall not be deemed to be unconstitutional. This establishes Kenya as a secular state. Freedom of religion or conscience here signifies non-interference by the state in any religion or promotion of any particular religion.

L) Protection from Discrimination on Grounds of Race

The right against discrimination is also protected in the Constitution under section 82. The essence of the right is that no law should be enacted which in itself or in its effect is discriminatory. This has been illustrated in the case of Madhwa and Others v City Council of Nairobi,⁷⁷ the case involved six plaintiffs all of whom were citizens of the United Kingdom and the colonies but resident in Kenya and four of whom had their applications for registration as Kenya citizens pending consideration. They were holders of four stalls in a municipal market. The council's social services and Housing Committee resolved to Africanise and the plaintiffs were given a notice. Justice Harris (as he then was) in determining the Constitutionality of the resolution held that it was contrary to section 14 (now section 82, Chapter V) of the Constitution which declares that no law should be discriminatory

in itself or in its effect. The term 'discriminatory' was also defined to mean:-

...affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.⁷⁸

In Shah Devshi and Company Limited v Transporting licencing Board⁷⁹ the applicant challenged the refusal of the Board to renew their transport licences in certain areas on the ground that the board took into account irrelevant issues; that the company was wholly or substantially owned by non-citizens and that the Board was trying to promote the involvement of the citizens in the transport business - that is by giving other people the licence to operate in some of those areas where the applicant used to have monopoly. The High Court as per the late Chanan Singh held that the refusal by the Board to renew some of the licenses was illegal and thus unconstitutional. The court was of the view that the Board took into consideration irrelevant issues.

In Fernandes v Kericho Liquor licensing Court⁸⁰ where the applicant was refused a licence on the grounds of non-citizenship the High court allowed an appeal, on the basis that non-citizenship could not have been contemplated as a disqualification for the grant of liquor licence.

In Re Maangi⁸¹ an African widow had appealed for letters of administration in respect of the estate of her deceased husband. It had up to then been the practise of the High Court of Kenya not to grant letters of administration to Africans. Justification for this practise was attributed to the then applicable Indian Acts (Amendment) Act, Section 9 of the Act provided that all Indian Acts applied to Africans, with respect to certain specified matters. Probate and Administration was not enumerated as one of such matters. It was common ground that the relevant provision was discriminatory and Mr. Justice Farell said:-

... Section 9 of the Indian Acts (Amendment) Act is discriminatory within the meaning of section 26(3) now section 82(2) and (3) of the Constitution, and I do not think I need say any more than that... the section is discriminatory.

Following the decision in the Re Maangi section of the Indian Acts (Amendment) Act was deleted by implementing the statute law (Miscellaneous Amendment) Act.

What emerges from the case law is that the courts have been quick to declare unconstitutional such laws as were discriminatory on racial grounds.

M) A Note on Kenya's Bill of Rights

What should be noted about Kenyan Bill of Rights is that it has elaborate provisions, which are also elaborately riddled with numerous qualifications. As Ghai and McAuslan have rightly applied:-

...The substance of the rights has been closely and carefully qualified and it may well be argued that in consequence little of the substance is left. It is inevitable in any system of guarantees that there would be exceptions but the crucial question is the method of providing for them.⁸²

It is clear from the Constitution and the available juristic comments that while most of the Constitutionally guaranteed rights and freedoms are justiciable some of them may be derogated from if it is necessary to do so to safeguard national security.

3:5 THE EFFECT OF NATIONAL SECURITY CLAIMS ON THE
ENJOYMENT OF FUNDAMENTAL RIGHTS

National security claims when brought into motion have the effect of interfering with the fundamentals enshrined in the Constitution. To appreciate the true effect of these claims on fundamental rights historical background is most appropriate. Such a historical assessment must commence from England, Kenya's erstwhile coloniser and logically to the present position.

A. The English Background

A brief study of the relationship between national security claims and fundamental rights reveals that even in England as in Kenya today the most frequently curtailed right was the right of liberty.

Thus one of the most important legal issues which arose during the great Constitutional struggle of the seventeenth Century in Britain was the question of the supposed prerogative of the crown to detain the subject without presenting criminal charges.

A case in point is Parnels case⁸³ in respect of which it was reported to parliament that certain prisoners were detained at the kings special command. Many of the parliamentarians were strongly opposed to such an extraordinary prerogative power. However the courts accepted the Kings privileges of detention. This matter regarding the kings claim to prerogative power was debated in parliament and the result was the petition of rights which among other things abolished the power of detention which had been confirmed in Parnels case. The king and the council were then deprived of the power to lock anyone who was considered dangerous to security of the state without laying a criminal charge. From this time on, only the express will of parliament was capable in law of conferring powers of arrest and detention.

The first method adopted to confer these powers was referred to as the Harbeas Corpus Suspension Act whose sole effect was to increase the term for which a person charged with treason could be held without trial. However, parliament ceased using this method by giving emergency powers in the 19th and 20th centuries and adopted the use of statutes conferring broad emergency powers⁸⁴.

When Kenya became a colony of Great Britain such emergency powers found their way into the new colony via subordinate Legislation.

B) The Kenyan History

The 1897 East African order-in-council made under the Foreign Jurisdiction Act of 1890 empowered the Commissioner of the East African protectorate to make laws for the administration of the protectorate. Pursuant to those powers, the commissioner made regulations known as the Natives Courts regulations⁸⁵ which empowered the Commissioner to take specified measures whenever the colony was threatened. Section 77 of the said regulations provided:-

Where it is shown to the satisfaction of the Commissioner that any person subject to these regulations is disaffected to His Majesty's Government has committed or is about to commit an offence against these regulations; or is otherwise conducting himself as to be dangerous to the peace and good order in the protectorate or is intriguing against the government of the protectorate, the commissioner may if he thinks fit... direct such person to be removed or to be interned in such place within the limits of the protectorate as he may direct.

The net effect of section 77 was to vest the commissioner with immense powers in times of threat to peace and good order.

In 1907, The Natives Courts Regulations of 1904 was repealed by the courts ordinance of 1907. Section 77 of the Native Courts Regulations had however been transferred to the Removal of Natives within special Districts Ordinance⁸⁶ and cited as Section 2. The 1907 ordinance was repealed by the 1908 Removal of Natives Ordinance⁸⁷ but the powers of the commissioner were retained. This statute was also repealed by the 1909 Removal of Natives Ordinance in 1923⁸⁸, the 1908 ordinance was also repealed by the Deportation Ordinance 1923.⁸⁹ Finally, the 1923 ordinance was repealed by The Deportation (Aliens) Ordinance 1949.⁹⁰ This ordinance was a major departure from the previous ordinances. In this ordinance, the provision for detention which was a recurring phenomenon in the preceding statutes was not reproduced. Consequently, the series of ordinances which ended with the 1923 ordinance ceased to be used against political offenders.

However, earlier in 1939, different types of laws were provided for by the Emergency Powers order-in-council⁹¹ which was the application in Kenya of the Emergency Powers (Defence) Act of 1939 of England. Among other things it provided for detention of persons whose detention appeared to the secretary to be expedient.⁹²

The detention powers granted by these regulations were temporary powers unlike those provided by the ordinances that had up till then been used.

Section 11(1) of the Emergency Powers Order-in-Council provided that these powers were only to operate for one year after which they were to lapse unless extended by the Colonial Parliament for another year. These provisions were used by the colonial government to deal with a freedom fighting group in Kenya called 'Mau Mau'. Under the said provisions scores of persons who were involved in the struggle for Kenya's political Independence were deprived of their liberty ostensibly because their activities were prejudicial to his majesty's government.

What emerges from the foregoing is that the right that was almost invariably encroached upon even during the pre-independence era was that of liberty. Detention of persons whose activities were thought to be prejudicial to the good government of her majesty was resorted to time and again.

During the colonial era, fundamental rights were almost non-existent as the colonialists paid no attention to the rights of the local populace. Even after Britain became a signatory to the European Convention of

Human Rights and Fundamental Freedoms in 1953, the situation did not know any marked change, notwithstanding that the Convention obliged Britain as a colonizing power to respect human rights in the administration of Kenya and Other colonies. As Ghai and McAuslan have said the signing of the Convention was not a major blessing to Kenya. They have written:-

The Convention did not automatically become a part of the municipal law of Kenya due to the common law doctrine that a treaty does not affect domestic law unless it has been expressly incorporated by the local legislature. The Consequence was that no recourse could be had to Kenyan courts for violations of the convention...⁹³

The truth of the pre-Independence experience is that fundamental rights were held in very low esteem in the Kenyan colony. Very keen attention was paid to the preservation of peace and order for the benefit of the colonising power. It is also important to note that even under the convention the right to derogate in times of emergency was granted. Between 1954 and 1960, when armed struggle for Independence was very intense, Britain did derogate from human rights in relation to Kenya.

In a nutshell, what is clear is that fundamental rights occupied a very insignificant role in Kenya during the colonial era.

On independence, the new government committed itself to the establishment of a country where the rule of law would be supreme and where the fundamental rights of the individual would be guaranteed. The manifesto of the leading political party, Kenya African National Union (K.A.N.U.) stated at paragraph 6:-

We believe in the fundamental rights of the individual and these will be guaranteed by the Constitution drawn up by the Constituent assembly. Clamours for a Bill of Rights, privileges and paper safeguards can never be a substitute for a racial harmony which is essential.⁹⁴

With the foregoing sentiments in the background, chapter 11 of the Independence Constitution, now chapter V, was thus incorporated in the Constitution under the heading 'Protection of Fundamental Rights and Freedoms of the Individual'. However, even in those early days of Independence, section 29 of the Independence Constitution provided for a declaration of emergency if done under the authority of an Act of parliament.

In 1966 the government introduced a bill⁹⁵ amending sections 27 and 29 (sections 83 and 85 respectively of the present Constitution.)⁹⁶ Both these sections deal with derogation from fundamental rights and freedoms for the preservation of Public security. As a part of the amendment, the word 'emergency' which had hitherto been in the Constitution was replaced and substituted with the words public security. This terminological substitution was explained by the Attorney General of the day. He said:-

... Situations can arise or may be provoked where the government has to take special measures... In some systems of law this situation is called an emergency. Furthermore for us it has the most dictatorial association of memory. We prefer to talk about public security.⁹⁷

As earlier indicated, this change of terminology did not alter the justification for derogation in specified circumstances and to this, attention is now galvanized as permitted under section 83 of the Constitution.

The Kenyan Constitution of section 83 permits derogation from some fundamental rights, namely section 72 (protection from personal liberty), Section 76 (protection against arbitrary search

or entry), section 79 (protection of freedom of protection expression), section 80 (protection of freedom of assembly and association), section 81 (protection of freedom of movement), section 82 protection from discrimination on grounds of race etc.) Such derogation is permissible if a valid order bringing into effect part III of The Preservation of Public Security Act is in operation. Derogation is also permissible under Part II Section 3(4) of The Preservation of Public Security Act. In either of these circumstances, the President may derogate from Constitutional protection of the aforementioned rights.

What must be noted about derogations whenever they occur is that they will invariably have far-reaching effect in permitting the executive to take measures that would otherwise be anathemic to democratic practice. Keeping this in view, Christopher Schreur states some important basic policy measures that are to be taken into consideration whenever there is derogation from fundamental rights.

These are:-

1. First and most fundamental is the principle of reasonable accomodation between the necessities of the community interests and justified particular individual interests.

2. Derogation must be accompanied by official proclamations and notifications giving all relevant details.
3. Derogations must be subject to effective supervision in order to prevent abuse.
4. Derogations must be used only in situations of absolute necessity in which other means cannot be expected to safeguard public order.
5. Derogation must be applied subject to strict proportionality. This means (a) that derogation should only apply to those rights which have to be limited to cope with the emergency and (b) that the limitation should only apply to the extent absolutely required.
6. Derogations should be withdrawn as soon as circumstances permit.⁹⁸

As we have seen, in Kenya, section 83 of the Constitution as read together with The Preservation of Public Security Act provides the mode of operation of the national security system.

As far as derogation is allowed in times of war, it is to be noted that since Independence, Kenya has not been engaged in a war that has necessitated derogation in the manner and to the extent contemplated by The Preservation of Public Security Act Part II, Section 3(4). However, in 1966, pursuant to the provisions of section 127 of the Constitution, the North Eastern Province and Contiguous Districts Regulations⁹⁹ were enacted to deal with the shifta menace in that area. The putting into effect of those regulations was tantamount to declaration of martial law and as already alluded was meant to deal with a secessionist group called 'Shifta' which was active in that area until the early nineteen hundred and eighties. Despite the evident ebb in the activities of shifta, the regulations still remain in force. By virtue of those regulations, the President was given 'a blank cheque' to take any measure that he deemed necessary to facilitate effective governing of that area. The measures taken led to restriction of movement of persons and sometimes collective punishment was resorted when the circumstances dictated.

In the same year on the 20th day of July, 1966, Public Security (Detained and Restricted Persons) Regulations¹⁰⁰ were made under

The Preservation of Public Security Act. The regulations provide the mode of restricting persons and detaining persons in the interest of preservation of public security. Pursuant to the requirements of Section 85(5) the regulations for detention and restriction of persons required to be given fresh effect when there is a change in the occupant of the office of the President. This was done on the first day of November, 1978¹⁰¹ when Jomo Kenyatta the then President died and Daniel Toroitich Arap Moi took over as the President.

What has been evident in Kenya since Independence is that derogations have most exclusively been concerned with measures of administrative detentions. No proper case of emergency has arisen that has necessitated the invocation of national security measures. Thus to some extent we agree with Murungi Kiraitu when he suggests that national security powers have not always been needed to deal with real threats to public security and to the extent that those threats if any have demanded, the said Murungi Kiraitu has written:-

The emergency powers cannot therefore be said to have been invoked in Kenya during public emergency which threatens the life of the nation, nor are the rights abrogated only to the extent strictly required by the exigencies of the situation.¹⁰²

Section 83 of the Constitution in attempting to ensure that proper safeguards are retained requires 'inter alia' that in the event of detention, the detainee must be informed of the reasons for his detention, that within fourteen days after the commencement of his detention, a notification must be published in the Kenya Gazette, that his detention must be reviewed at intervals of not more than six months by an Independent and impartial tribunal established by law, that he must be afforded facilities to consult a legal representative of his own choice.

It must be admitted that the requirements of the Constitution as spelt out hereinabove have been followed by and large, except with regard to the commencement of detention and supply of grounds of detention. With regard to the former, persons have been kept in confinement for long periods prior to official detention and although it may be argued that a person will be deemed to have been detained from the date of the signing of a detention order, it is not clear how the pre-detention confinement is to be treated. 'Prima facie' such confinement is unconstitutional but our courts have not come out to state the clear position, as vouched for by a number of cases where detainees have made

allegations of lengthy confinement prior to official detention.

The first case is that of Kihoro Wanyiri v Attorney General¹⁰³. The plaintiff was arrested without a warrant on the 30th day of July, 1986 and unlawfully confined without any charge for seventy four (74) days. The second case was that of Mukaru Ng'ang'a v The Attorney General;¹⁰⁴ the plaintiff was picked without a warrant on the 4th day of April, 1986 and held for ninety (90) days upto the 4th day of July, 1986 when he was served with a detention order. The third case was that of Mirugi Kariuki v The Attorney General;¹⁰⁵ the plaintiff herein was picked up from the law courts in Nakuru on the 9th day of December, 1986 and held up to 20th day of December, 1986 for eleven (11) days after which he was served with a detention order. The common denominator in all the three cases is that the courts that were seized of the matter never made any ruling on the obviously unlawful confinements preceding the detention and were merely content upon the production of a valid detention order as sufficient to discharge the state from further responsibility.

Regarding the requirements that a detainee should be supplied with detailed reasons justifying their detention, a number of complaints have been voiced by some detainees that the state has not always supplied such details as the Constitution requires. This dates as far back as 1966 in the case of Ooko v Republic¹⁰⁶ Ooko was detained under a detention order, with his surname but different first names, signed by the Minister. On the 27th day of September, 1966 he filed a complaint in the High Court alleging that his detention was unlawful for the following reasons: he was not given the reasons for his detention within the prescribed period and when the reasons were given, they were not sufficiently detailed as required by the Constitution. He was detained under the wrong name and outsiders were present when his detention order was being reviewed by the tribunal. On the issue relevant herein, the court found that the reasons were given within the prescribed time but agreed with the plaintiff that they were not sufficiently detailed. The court did observe, however, that the inadequacy was not sufficient ground for releasing the detainee and his recourse was to obtain further and better particulars. As already demonstrated in cases previously cited this tendency has persisted.

Apart from the aberration cited, it would appear that procedurally, detentions in Kenya have been properly done. As to the question of substantive validity the courts have evaded the issue under the shadow of state security. In all cases where the invocation of the provisions of The Preservation of Public Security Act have interfered with fundamental rights of the individual, the courts general attitude is to look at the procedure of detention rather than into the substance of the case. This view rests on the presupposition by the courts that 'prima facie' the government is the best judge of the existence of the charge against the person affected, that what constitutes danger to Public security is largely a question for the state, that the courts will not interfere except to enquire whether the state has reasonably considered the person affected by the Act as a real danger to public security; it is only in this respect that the question of detention under The Preservation of Public Security Act becomes judicial. The courts in deciding whether detention is for the sake of public security takes into account the diversity of local conditions and as already demonstrated attaches great respect to the states declaration. The courts are not concerned with the prudence, exigencies or even directly with the necessity of the use of The Preservation of Public Security Act.

3:6 SUMMARY

National security claims in Kenya are an important resort for the government because they confer enormous discretion on the executive branch. These powers can be exercised ostensibly to preserve public security as a national measure without fetters of an administrative or judicial nature.

The Kenyan government, like many others, commonly asserts that there exists a right to derogate from human rights to safeguard public interest during crisis. Crisis or emergency situations may involve violence or some other phenomena which threatens the actual breakdown of minimum order. In such situations it is argued that unwavering insistence on special individual interest may be detrimental to the Kenyan society at large. The Kenyan Constitution recognises the rights of the individuals but does not recognise them as absolute. The Constitution seeks to reconcile these rights and national security claims, at least at a theoretical level.

The attempt at reconciliation of the contending interests of national security, and those of the rights of the individual is seen in the Constitution, which guarantees fundamental rights

and allows derogation from such rights in circumstances specified in The Preservation of Public Security Act. What is to be noted is that such judicial and Legislative constraints have not afforded a meaningful basis for the control and supervision of the executive in the exercise of discretionary powers vested in it, and to be exercised in the interest of national security. The tendency has been to use those powers to further special interests of a political nature.

The picture that emerges in Kenya is that as a result of the over politicisation of national security claims, the legal basis of executive power has almost been ignored wholly. The net effect of this is that the nature of national security claims appears to be purely of a political nature. This approach has seen the courts reduce themselves simply to watchdogs over matters of procedural propriety rather than substance.

FOOTNOTES

1. The Kenyan Constitution Revised Edition 1987
(1983) Section
2. Ibid Section 23
3. Ibid Section 60-67
4. Chapter 57, Laws of Kenya
5. BOLI-BENETT, J: Human Rights or State
Expansion? Cross
National Definition of
Constitutional Rights
1870-1970. (Boulder-
Colorado, Westview
Press, 1981) at P.IV.
6. The Constitution of Kenya (Amendment No.3)
Act No.18 of 1966.

See the following Amendments

- a) The Constitution of Kenya (Amendment)
Act No.14 of 1975 was enacted
amending the Constitution to
extend the prerogative of mercy under
section 27 - It has been referred to
as 'The Ngei Amendment' because its
aim was to assist then President Jomo
Kenyatta to help his political protege

Paul Ngei who had been found guilty for committing an election offence and who on the basis of law as it then stood would have been ineligible to present himself for election.

b) The Constitution of Kenya (Amendment) Act No.14 of 1986 which was enacted to provide that the Attorney General and the Controller and Auditor General would hold office at the pleasure of the President and

c) The Constitution of Kenya (Amendment) Act No.4 of 1988 which was enacted to provide that the judges of the High Court and Court of Appeal would hold office during the Presidents pleasure.

8. See African Concord Vol.2 No.37

In an interview President Daniel T. Moi of Kenya in justifying Constitutional amendment removing the security of tenure of the Attorney General, Controller and Auditor General, members of the Public Service Commission and Judges says 'Any change in the Constitution is a major exercise. It has to be justified.

We have on several occasions right from 1960s found it necessary to amend our Constitution to make it relevant, to prevailing circumstances.

9. OKOTH-OGENDO, H.W.O.: Infra see F.N.
at p.22

10. On July 21, 1987, Amnesty International a London based human rights watched issued a report entitled:-
Kenya: Torture, Political Detentions and Unfair Trials. This followed the arrest of several hundreds of Kenyans opposed to the Government some of whom were detained without trial and others who pleaded guilty and were convicted on their own pleas of guilt. Amnesty International concerned about the mass pleas of 'guilty' were of the view that torture was used to elicit the pleas hence their report, the Ministry of Foreign Affairs issued a rejoinder in which the Minister of Foreign Affairs said 'inter alia' "Kenya is an open society and a state governed by the rule of Law, that the government at the same time recognises its responsibility of protecting its citizens against a group or groups of people who take the Law in their own hands and thus threatening the peace and security of the country" (see the

Nairobi Law Monthly, October 1987, a monthly magazine published in Nairobi p.6) The statement was made in an attempt to justify the detentions of several persons for alleged involvement in activities of a clandestine organization known as MWAKENYA acronymn for 'Muungano wa Wazalendo wa Kenya.

11. Detained pursuant to Gazette Notice No.2715 of 11th July, 1986.
12. Detained Pursuant to Gazette Notice No.5453 in Kenya Gazette dated December, 1986
13. Detained pursuant to Gazette Notice No.4280 Kenya Gazette dated 17th October, 1986.
14. Detained pursuant to Gazette Notice No.1413 in Kenya Gazette dated 15th June 1982.
15. Republic v Raila Aluo Odinga High Court Criminal Case No.54 of 1982
16. Detained pursuant to Gazette Notice No.2050 in the issue of Kenya Gazette dated 14th April, 1982.

19. During a speech to the Nation on the 1st day of June (Madaraka Day) the President made a remark in reference to the case. He said in Kiswahili:

'Ningependa mawakili... kusoma kifungo ambacho kinaeleza watu kwamba kila mtumishi wa serikali yuko chini ya uwezo wa Rais' (I would like lawyers... to read section 24 of the Kenya Constitution which provides explicitly that all members of the Public service hold their offices at the Presidents pleasure). Daily Nation 2nd June 1982 it is interesting to note that three days after this speech John Khaminwa was detained his client Muriithi having been detained earlier'

20. OKOTH-OGENDO, H.W.O.: Loc. cit. p.21
21. Daily Nation: 2nd October, 1969
22. Daily Nation: 9th October, 1975
23. Ibid
24. EMERSON, J.I.: 'National Security and Civil Liberties' Yale Journal of World Public Order Studies (1982) at p.80
25. Personal interviews with ex-detainees Patrick Ouma Onyango detained 1986, Paul Ong'or Amina

detained 1987 and Israel Otieno Wasonga Agina detained in 1986 all of whom have been released has shown that none of them were ever given the reasons for their detention as contemplated by section 83(2) of the Constitution.

26. The Constitution
Supra F.N.11
27. Nairobi High Court Criminal Application No.33 of 1987
28. Miscellaneous Criminal Application No.374 of 1988 in the High Court of Kenya at Nairobi.
29. [1970] E.A. 168
30. PORTER J: SEE F.N. 29
31. 1) Ooko v Republic High Court
Civil Case No.1159 of 1966

ii) Mirugi Kariuki v Attorney General
High Court Nairobi Civil Case
No.1795 of 1987.
32. Section 40 Penal Code Chapter 63
Laws of Kenya.

33. Section 57 Ibid
34. EMERSON, J.I: Loc. cit at p.82
35. Ibid at p.85-86
36. NWABUEZE, B.O.: Constitutionalism in the Emergent States (London, Hurst and Company, 1973) p.174
37. CHRISTOPHER SCHREUR: 'Derogation of Human Rights in situations of Public Emergency: The Experience of the European Convention of Human Rights' The Yale Law Journal of World Public Order vol.9, 1982, at p.114
38. See Chapter v of the Kenyan Constitution sections 71, 72, 73, 74, 75, 76, 77, 78, 79, 81 and 82.
39. KEBA MBAYE: 'The Implementation of Human Rights in Africa' 'The Advocate' vol.11 (1987/88) p.5
40. DE SMITH, S.A.: "Fundamental Rights in the Commonwealth" (1961) 10 International Comparative Law Quarterly p.83

41. Kenya Constitution (Amendment) No.2
Order-in-Council 2201/1961
42. These rights were formerly in chapter 1
of the Independence Constitution.
43. Section 71(2)(a)
44. Section 71(2)(b)
45. Section 71(2)(c)
46. Section 71(2)(d)
47. Y.P. GHAI and
J.P.W.B. MCAUSLAN: op. cit P.414
48. Criminal App. No.663 of 1984
High Court of Kenya at Nairobi (Unreported)
49. Chapter 58, Laws of Kenya
50. J.B. OJWANG and J.A. ODEK Loc cit. at P.33
51. G. KAMAU - KURIA
and J.B. OJWANG "Judges and the rule of
law in the framework of
politics. The Kenya case
"Public Law" (1979)
P.254, at pp.270-272.

52. Act No.4 of 1988 amended Section 72(3) of the Constitution by inserting the expression 'or within fourteen days of his arrest or detention where he is arrested or detained upon a reasonable suspicion of his having committed or about to commit an offence punishable by death" Immediately after the words, 'twenty four hours of his arrest or commencement of his detention.

53. High Court civil case Number 1423 of 1986, Appeal (court of Appeal) No.152 of 1986. See Daily Nation (Nairobi) October 27, 1982 (Unreported - Senior Resident Magistrate's Court)

54. [1969] E.A. 451

55. Chapter 56 Laws of Kenya

56. J.B. OJWANG and
J.A. ODEK: Loc. cit. p.38

57. [1973] E.A. 297

58. Ibid at p.303-304. See also Odiago v Registrar of Societies, Nairobi Civil Appeal case No.21 of 1961 and Tera Aduda v Registrar of Trade unions [1978] K.L.R. 119 on the same issue

59. Chapter 56 Laws of Kenya
60. Chapter 233 Laws of Kenya
61. The Kenya Constitution, Section 81(4)
62. Chapter 104, Laws of Kenya
63. Chapter 105, Laws of Kenya
64. Noted in 10 Commonwealth Law Bulletin, No.3 (1984) P.1108 - 1109 and in The Nairobi Law Monthly' (No.12 and 13, February, 1989) p.6 to 22.
65. Ibid
66. Miscellaneous Application No.551 of 1988 in the High Court of Kenya at Nairobi.
67. See High Court Civil Case No.1792 of 1987 filed on the 4th day of May, 1988 by Cecilia Njoki on behalf of Stephen Wanjema who was arrested. See also the case of Stephen Mbaraka v Republic Criminal Application No.193 of 1987
68. [1969] E.A. 347
69. Ibid

70. Nairobi, High Court Civil Case No.1189 of 1979
71. Chapter 105, Laws of Kenya
72. Y.P. GHAI and
J.P.W.P. MCAUSLAN: op. cit. P.418
73. [1958] I.W.L.R. 546 (P.C.)
74. Ibid
75. [1973] E.A.117
76. [1969] E.A. 433 (C.A.)
77. [1968] E.A. 406
78. Ibid
79. [1971] E.A. 289
80. [1968] E.A. 640
81. [1968] E.A. 637
82. Y.P. GHAI and J.B.W.P McaUSLAN:
op. cit. P.128

83. R.J. SHARPE: The Law of Habeas Corpus (clarendon press, oxford 1976) at p.90 - 93
84. See for example Foreign Jurisdiction Act of 1890
85. No.15 of 1897
86. Act No.1 of 1904
87. Act No.17 of 1908
88. Act No.08 of 1909
89. No.2 of 1923 - Section 5 of this Act permitted curtailment of ones liberty by detention if his conduct was prejudicial to peace and good order.
90. No.39 of 1949
91. Proclamations, Rules and Regulations 1939, Vol. XVIII, p.977
92. Ibid at Section 2

93. Y.P. GHAI and
J.B.W.P. McAUSLAN: Public Law and Political
change in change.
(Oxford University Press
1970) at p.440-441
94. K.A.N.U. Manifesto for Independence Social
Democracy and Stability (printed by
Patwa News Agency, 1960) at p.31
95. Act No.18 of 1966
96. Section 27 - permitted derogation from
certain rights under Section 16 (right to
liberty), section 20 (freedom from arbitrary
search), section 23 (freedom of expression),
section 24 (freedom of Assembly), section 25
(freedom of movement) and section 26 (freedom
from discrimination)
- Section 29 permitted declaration of Emergency
when Kenya was at war or when there was
a danger imperilling the nation.
97. Kenya House of Representatives Official
Report Vol.9 paragraph 11, 1966
P.278 - 279 (Charles Mugane Njonjo)

98. CHRISTOPHER SCHREUR: Loc. cit P.113
99. Legal Notice No.211 of 1966
100. Legal Notice No.211 of 1966
101. Legal Notice No.234 of 1978
102. MURUNGI KIRAITU: National Implementation of Human Rights Obligations: The Implementation of the International Covenant on Civil and Political Rights (LL.M Thesis June, 1982 Nairobi, unpublished) at P.136
103. Nairobi, High Court Civil suit No.1793 of 1987, see Nairobi Law Monthly, October, 1987 at P.12
104. Nairobi, High Court Civil Suit No.2715 of 1987 see Ibid
105. Nairobi, High Court Civil Suit No.1295 of 1987 see Ibid.
106. High Court, Civil case No.1159 of 1966 (unreported.)

CHAPTER FOUR

SUMMARY AND CONCLUSIONS

In order to achieve the very important goal of maintaining peace and tranquility within its territory, Kenya needs apparatus that it may resort to when the state and its populace are threatened from within or from without. Indeed, it is for this reason that one of the cardinal aims of this thesis was to provide an apposite definition of national security claims and further to establish the proper province of such claims.

Owing to the practical importance of national security claims in the conduct of a country's affairs, it has been prone to diverse interpretations meant to suit the circumstances and intentions of those who seek to use national security apparatus for different purposes on the justification of national security. However, in the face of the numerous shades of meaning ascribed to national security, it has been stated "that national security refers to that part of government policy that has the objective of creating national and international conditions that are favourable to the protection or extension of vital national values against existing or potential adversaries;"¹ in other words, when

one talks of threat to national security one refers to dangers of an external or internal source which threaten the tranquility and well being of the state. On the other hand national security claims refer to the grounds that justify resort by the state to such apparatus as the law provides for the purpose of dealing with dangers that pose threat to peace and tranquility.

As it has been observed, national security is a very important concern of the Kenyan Government, but democratic dictates demand that it is not to be achieved at the expense of constitutional liberties. A tightly closed security system seeking to avoid all risks is not compatible with a democratic society. The effort to resolve the tensions between national security claims and constitutionally guaranteed fundamental rights should always proceed on a balanced path. While the significance of national security cannot be gainsaid, it is not true that the greater the degree of Constitutional liberty maintained the lesser the degree of national security achieved. Rather, there must an accommodation between the two systems in which each supplements and supports the other.

While the Constitution and other legislations that deal with national security reveal an attempt to create a balance between demands of national security and fundamental rights, what emerges is that the quantum of power the government enjoys is far-reaching and even in the face of existing statutory controls, the achievement of an optimal balance has remained elusive.

In Kenya, as in many other developing countries, it has been revealed that the justification for controlling power was and is still based on the argument that such power was and remains a conditio-sine-qua-non in the search of economic development and social progress. While it is conceded that this is a noble goal, it has become evident that national security apparatus have been employed more and more by those in power to facilitate political survival and to punish political opposition rather than to deal with real threats to national security. In Kenya, the tendency has been to utilise national security claims as a means of achieving political ends of those in power. This misuse of national security apparatus has become particularly evident in the area of detention; government critics and those labelled 'political opponents' have sometimes had their rights curtailed on very

unclear claims of national security. It is submitted that this is a tendency to be deplored.

The Kenyan courts which have a crucial role to play in ensuring that the proper equilibrium is maintained between the State and the individual have not stamped their authority with firmness in matters touching on the liberty of an individual, particularly in cases where the interest of the state is in issue. Indeed, in cases of preventive detention the courts have stated expressly that they cannot go behind a detention order even in cases where the detention was procedurally defective². Further, in cases concerning 'habeas corpus' applications, the courts have failed to come out boldly in favour of the individual.

While the significance of national security claims cannot be denied, it is clear that a few changes and/or improvements are desirable to ensure that national security claims are not employed to deal with imaginary threats to security as an 'alibi' for achieving selfish political goals.

It is recommended that the state authority should confine the invocation of national security claims to instances of actual and real danger to the state. This demands, among other things, that the reasons for resort to national security measures should be made public. In the case of detention, the existing Law is sufficient (If detention is necessary at all); the only requirement is that the courts should be firm to ensure that the detainee is supplied with the detailed reasons for his detention. It is further recommended that the Constitution be amended to make it mandatory that reasons for detention, if they cannot be made public, be made known to judges who will determine the validity or otherwise of such detentions.

While it is clear that a lot more can be done, it cannot be done by Legislation alone because even today the law is replete with safeguards. The panacea lies in the realization by the state authority of the drastic nature of the power at their disposal and the need to resort to such power only in case of real danger to state security and not for flimsy reasons to achieve ephemeral political goals which have no bearing on national security.

FOOTNOTES

1. Barber, L.: 'National Security Policy'
in National Security:
A modern Approach 35
(N. Louw Ed. 1978) P.2

2. Ooko v
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