University of Nairobi

Institute of Diplomacy and International Studies

Dualist or Monist: Intricacies of Treaty Practice in Kenya

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(R50/68767/2011)

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A Research Project submitted in partial fulfillment of the Degree of Master of Arts in International Studies, October, 2013

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DECLARATION

I, Kamau Mbugwa hereby declare that this research project is my original work and has not been presented for a degree in any other University.

Signed ……..…….Date……..……...2013

KAMAU MBUGWA

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

Signed ……..…….Date……..……...2013

DR. SIMON KINYANJUI

ACKNOWLEDGEMENTS

My most sincere and heartfelt appreciation goes to all those who in one way or another made it possible for me to undertake and complete this study.

My special gratitude goes to my wife and children, to whom I have dedicated the study, for allowing me time away to carry out research and for running family activities seamlessly during my absence. They were truly an unending source of strength and inspiration during the entire research period.

Last but not least, my gratitude goes to my supervisor, Dr. Simon Kinyanjui for his valuable comments and guidance which served to make this work possible.

DEDICATION

I dedicate this study to my dear wife, Charity Wanjiru and to our two beautiful children; Wanjiku Kamau and Mbugwa Kamau. They are truly the embodiment of enduring love and have been a source of motivation and inspiration to me through out the study period.

I also dedicate this study to my late parents John Mbugwa Mwatha and Lucy Wanjiku Mbugwa who, though now departed, have remained a true source of encouragement. Their undying bond has continued to urge me on in my academic curiosity.

ABSTRACT

There are two main schools of thought regarding the relationship between international law and municipal law. On the one hand is the monist theory which argues that both international law and municipal law regimes belong to the same legal system. On the other hand is the dualist theory that views international law and municipal law as two independent legal systems. The Independence Constitution did not contain any express provisions on the relationship between international law and the municipal law of Kenya. The Constitution of Kenya (2010) provides that the general rules of international law form part of the law of Kenya.

This scenario has necessitated the need for an examination of Kenya's stand on the relationship between its municipal law and international law. While some authors have concluded that the Constitution of Kenya (2010) has created a shift from the old dualist practice to a monist one, others have maintained that its provisions do not clearly define Kenya as being either dualist or monist. The problem of the study is the need to investigate the real meaning of the constitutional and legal framework relating to the treaty practice of Kenya.

The study analyses Kenya's treaty practice from independence to date. It outlines the relevant constitutional and legal provisions and looks at the policy framework relating to treaty practice to establish the parameters of treaty practice in Kenya. It also discusses the different approaches to treaty practice exhibited by the different administrations and analyses the policy governing treaty practice in Kenya over the said period. The study further examines the complexities that arise from the treaty practice and their impact on Kenya's diplomacy and foreign policy.

The study utilizes relevant treaty practice experiences of the United States of America to highlight those intricacies of treaty practice in Kenya. Finally, drawing from the discussions, the study concludes that Article 2 (6) of the Constitution does not unequivocally make Kenya a monist state with respect to treaty practice. It concludes that Kenya's current treaty practice is a hybrid of both dualism and monism.

Further, the study finds that the existing policy framework is insufficient to address the intricate nature of treaty practice in Kenya. The study also finds that the diplomacy and foreign policy of Kenya has suffered and will continue to do so in the absence of a coherent policy framework governing her treaty practice. In conclusion, the study proposes that a definition of Kenya's treaty practice as being either monist or dualist is not overly as important as the need to align that practice with her diplomacy and foreign policy.

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ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' rights
CPA	Civil Procedure Act, Chapter 21 of the Laws of Kenya
ICC	International Criminal Court
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
SPP	Southern Pacific Projects Case
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties (1969)

CHAPTER ONE

INTRODUCTION

The Constitution of Kenya at independence[1], hereinafter referred to as the Independence Constitution, did not contain any express provisions on the relationship between international law and municipal law in Kenya. The Constitution (2010) of Kenya[2] hereinafter referred to as the Constitution (2010) provides that,

> The Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. The general rules of international law shall form part of the law of Kenya. Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution[3].

As a general rule of international law, if a state contravenes a stipulation of international law, it cannot justify itself by referring to its domestic legal situation[4].

There are two main schools of thought on the relationship between international law and municipal law. One is the monist school which takes a unitary view of law as a whole and is opposed to a strict division[5] between international law and municipal law. Monists see both international law and municipal law regimes as belonging to the same legal system. Under

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[1] The Independence Constitution applied in Kenya since the country's independence in 1963. Apart from amendments from time to time, this Constitution remained in place until promulgation of the Constitution (2010) on 27th August, 2010.

[2]The Constitution (2010) ,was promulgated on 27th August, 2010..

[3] *Ibid*, the Constitution, Articles 2(5) and 2(6).

[4] Shaw, M.N., *International Law,* 6th ed. (Cambridge: Cambridge University Press, 2008) p.133.

[5] *Ibid*, Shaw, p.131.

monism, treaties are automatically incorporated into municipal law, and become binding[6] upon ratification.

The other is the dualist school which views the relationship between international law and municipal law as one where each belongs to a different legal system and cannot affect, or overrule the other[7]. The dualist perspective requires that international law must be transformed into municipal law through domestic legislation. The transformation of treaties into municipal law would therefore entail localization by making them part of the statutes of the country[8].

Dualists, like monists accept that there is no problem about customary international law being incorporated in municipal law. They argue that some treaties such as the Vienna Convention on Diplomatic Relations (VCDR)[9] codify existing customary law and in such case, the treaty is binding on all states not because it is a treaty, but because it reproduces rules of customary international law which, as such, were already binding on states[10].They however take issue with the doctrine of incorporation for treaties[11].

The provisions of the Constitution (2010) on the relationship between international law and municipal law were seemingly intended to clear any grey areas on Kenya's treaty practice that

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[6] Mwagiru, M., From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice, *Journal of Language, Technology & Entrepreneurship in Africa* Vol. 3 No. 1, (2011) pp.144-155:146.

[7] *Op cit*, Shaw, p. 131.

[8] *Op cit*, Mwagiru, p.146.

[9] Vienna Convention on Diplomatic Relations, 1961.

[10] Mwagiru, M., *Diplomacy Documents, Methods and practice*, (Kenya: Institute of Diplomacy and International Studies, 2004) pp.106.

[11] *Ibid*, Mwagiru, p.106

may have existed previously. The reality however suggests that treaty practice is a complicated process which can not be understood fully, merely by determining whether a country is dualist or monist in that respect.

The aim of this study is to critically examine the nature of treaty practice and policy framework in Kenya under the Independence Constitution as well as under the Constitution (2010). The mere existence of Constitutional provisions as well as a policy framework on treaty practice cannot alone be relied upon to understand the full extent of treaty practice in Kenya.

In this light, the study will examine the intricacies of treaty practice in Kenya and how these may impact on Kenya's diplomacy and foreign policy. Finally, this study will examine the challenges arising from these intricacies and make recommendations and interventions that would ameliorate those challenges..

1.1 PROBLEM STATEMENT

This study critically examines the nature of treaty practice and policy framework in Kenya both under the Independence Constitution as well as under the Constitution (2010). Further, the study will examine the intricacies of treaty practice and their impact on Kenya's diplomacy and foreign policy. Finally, the study recommends interventions that would be necessary to ameliorate identified challenges concerning treaty practice in Kenya.

1.2 RESEARCH OBJECTIVES

This study will have the following objectives:

1. To determine the nature of treaty practice provided under Article 2 (6) of the Constitution (2010).
2. To determine the policy situation on Kenya's treaty practice under the Independence Constitution as well as under the Constitution (2010).

3. To determine what intricacies of treaty practice exist in Kenya and their impact on Kenya's diplomacy and foreign policy.
4. To establish what challenges are likely to be experienced in Kenya's treaty practice and to propose possible solutions.

1.3 JUSTIFICATION

The Constitution (2010) provides that, any treaty or convention ratified by Kenya is deemed to form part of the law of Kenya.[12]. Some scholars have proposed that this provision has converted Kenya from a dualist to a monist state with regard to treaty practice. Other scholars have cautioned that this Constitutional dispensation is not a pure monist system because it leaves room for the transformation of some treaties into statutes before they can become operative as law in Kenya.

There is need to investigate on the real meaning of Article 2 (6) of the Constitution (2010) in light of the dualist and monist schools of thought. Related to this, is the need to examine Kenya's policy framework on treaty practice.

The study will examine what intricacies exist in Kenya's treaty practice and the impact these may have on Kenya's diplomacy and foreign policy. Finally, the study will recommend possible interventions to address the identified challenges concerning treaty practice in Kenya. By highlighting the challenges and making recommendations thereof, the study will be charting a way forward on what needs to be done to ameliorate the impact of those challenges on Kenya's diplomacy and foreign policy.

[12] *Op cit*, the Constitution (2010), Article 2(6)

1.4 LITERATURE REVIEW

Introduction

This part will highlight and analyze the key positions on the literature that is relevant to this study. A summary outlining the gaps from the literature that the study aims to fill will also be provided.

Literature

Ojwang' in his paper presented during the drafting process of the Constitution (2010)'[13] observes that the Independence Constitution[14] reads like an ordinary legal document[15]. He further advances that this character of the Independence Constitution makes it, in almost every respect, a juridical document and an instrument in the operation of the conventional legal process[16]. He proposes that the Constitutional Review Commission considers whether or not the Kenyan Constitution should be given a stronger political character[17]. Mwagiru, in his Journal article on Kenya's treaty practice[18], states that under the independent Constitution, Kenya was a dualist state.

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[13] Ojwang' J.B., *Constitutional Reform In Kenya: Basic Constitutional Issues and Concepts*, (Paper submitted during technical seminar held by The Constitution of Kenya Review Commission on 9th – 15th), in Mombasa, pp.14-31.

[14] *Op cit*, Independence Constitution.

[15] *Op cit*, Ojwang', p.22

[16] *Op cit*, Ojwang', p. 22

[17] *Op cit*, Ojwang', p. 22

[18] *Op cit*, Mwagiru, From Dualism to Monism, pp 144-155:144,

The Rose Moraa case[19] was decided under the Independence Constitution. The main issue for determination was whether section 24(3) of the Children's Act was in violation of the Constitution, International Conventions and Charters of which Kenya is a signatory, as well as the effect of such violation if at all. In dismissing the application, the court stated that the general principle, in the absence of local legislation requiring automatic domestication of a treaty, is that a convention does not automatically become municipal law unless by virtue of ratification[20]. On this, the court cited Bangalore Principles 1989[21]. The court further noted that in common law countries, where national law is clearly inconsistent with international obligation, national courts are obligated to give effect to national law.

The court distinguished that finding from the position taken by the Zambian High Court in the Sarah Longwe case [22] to the effect that ratification of international instruments by a state, without reservations, is clear testimony of the willingness of the state to be bound by the provisions of such a treaty. Consequently, the Zambian High Court held that as a result of such willingness, a matter coming before the court for determination where no local legislation was in place, judicial notice of the relevant treaty or convention should be taken in the resolution of the dispute at hand[23].

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[19] Rose Moraa & Another-vs- Attorney General [2006]eKLR

[20] *Ibid*, Rose Moraa case.

[21] The principles provide that, "It is within the proper nature of the Judicial process and well established Judicial functions for national courts to have regard to international obligations which a country undertakes- whether or not they have been incorporated into domestic law-for the purposes of removing ambiguity or uncertainty from national constitutions, legislation or common law.

[22] High Court of Zambia, Sara Longwe-vs-International Hotels (1993) 4 LRC 221, per Musumali J.

[23] *Ibid*, Sara Longwe case

Article 2 (1) of the Constitution (2010) provides that the Constitution is the supreme law of the country. Article 2(6) thereof provides that, 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'. These Constitutional provisions do not by themselves give a clear picture as to the intended treaty practice. The Constitution (2010) contains a transitional clause which provides that all the law in force immediately before the 27th August, 2010, would continues to apply and should be construed with the alterations, adoptions, qualifications and exceptions necessary to bring it into conformity with the Constitution[24].

The Treaty Making and Ratification Act, 2012[25], hereinafter referred to as the Act, is the sole Act of Parliament enacted to give effect to the provisions of Article 2(6) of the Constitution (2010) and to provide the procedure for the making and ratification of treaties and connected purposes[26]. The Act, among other matters, offers a guideline on the initiation, negotiation and ratification of treaties. Section 3 thereof provides that the Act applies to treaties which are concluded by Kenya after its commencement. It does not however provide for what should happen to treaties ratified before its enactment.

Mwagiru,[27], discusses the resulting system of treaty practice after the promulgation of the Constitution (2010). He observes that for the first time, Kenya's treaty practice is enshrined in the Constitution[28]. He argues that this marks a shift from the old dualist to monist practice[29].

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[24] The Constitution (2010), Schedule 6, clause 7(1).

[25] The Treaty Making and Ratification Act, No. 45 of 2012

[26] *Ibid*, the Act, Preamble.

[27] *Op cit*, Mwagiru, From Dualism to Monism: pp.144-155.

[28] *Ibid*, Mwagiru, p.144.

[29] *Ibid*, Mwagiru, p.147.

The Omar Al Bashir Case[30] represents the thinking of the High Court of Kenya regarding Kenya's treaty practice under the Constitution (2010). An application for a provisional warrant of arrest against Omar Al Bashir, the President of Sudan, hereinafter referred to as Al Bashir, was filed by the civil society organizations in Kenya through the Kenya Section of the International Commission of Jurists. The Application further sought orders to compel the Kenyan Minister of State for Provincial Administration, to effect the warrant of arrest if Al Bashir set foot within Kenya. The application was based on the fact that Kenya is a party to the Rome statute, and that the International Crimes Act, 2008, was enacted partly to enable Kenya to co-operate with the International Criminal Court (ICC) established by the Rome Statute in the performance of its functions.

The ICC had previously issued warrants of arrest against Al Bashir[31]. Despite the existence of the international warrants, Al Bashir had visited Kenya during the promulgation of the Constitution (2010) and was not arrested as provided under the Rome Statute. It is presumable that this decision by the executive was based on the need to maintain good diplomatic relations between Kenya and Sudan.

In allowing the application, the court held that Kenya's obligations under the Rome Statute are governed by customary international law which binds all states. The court further

[30]Kenya Section of the International Commission of Jurists-vs- Attorney General & Another [2011]eKLR

[31] Ibid; the ICC had issued two sets of warrants. The 1st was issued on 4th March, 2009 and the 2nd one on 12th July, 2010. Subsequent to each warrant, the Registrar of the ICC] sent initial request on 6th March, 2009 and later a supplementary request on 21st July, 2010 respectively. These requested the co-operation of all states parties to the Rome Statute for arrest and surrender of Al Bashir should he set foot on their respective territory.

noted that the duty to prosecute international crimes has developed into *jus cogens*[32] and customary international law.

The Court held that it had jurisdiction to issue warrants of arrest against any person who is alleged to have committed a crime under the Rome Statute, irrespective of their status.

The Court, issued warrants of arrest and directed the relevant Minister to effect them

This case exposes the need for a framework to avoid conflict of functions between the various arms of government and to delineate how far each can or should go to act as a check against the other.

The Vienna Convention on the Law of Treaties (VCLT)[33] defines a treaty as an international agreement concluded between states [34].

For an international agreement to be 'governed by international law', Article 102 of the United Nations (UN) Charter requires that the agreement must as soon as possible be registered with the UN Secretariat and published by it. Unregistered documents cannot be invoked before any organ of the UN including the International Court of Justice (ICJ). This means that state parties who desire that their agreement should create international legal obligations, must have it in written form and submit a copy thereof to the UN and by so doing, they create a treaty[35].

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[32] Black's Law Dictionary, (8th edn),p.876: A mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted.

[33] Vienna Convention on the Law of Treaties (1969),

[34] *Op cit*, VCLT,, Article 2(a)

[35] Berridge, G. R., *Diplomacy: Theory and Practice*, (New York: Palgrave Macmillan, 2010) p. 68

Barston, in his book on Modern Diplomacy[36], argues that while treaties are normally written, oral exchanges and declarations may give rise to binding international obligations. Treaties can also be entered into between states and international organizations or between international organizations[37]. Some international instruments such as declarations do not always create obligations. They may only be indicative of policy and principles. Certain international agreements are governed by national laws of one of the parties[38]. He further enumerates the main features that distinguish the various forms of international agreements. On **t**reaties, he lists four main forms in which treaties are concluded namely; between heads of state, interstate, intergovernmental and international organization[39]. One or the other, of those ways in treaties can be concluded will be chosen depending on how symbolic or significant the treaty is considered or because of Constitutional provisions[40]. The form does not affect the binding nature of the commitment. He further notes that a treaty may be concluded in both bilateral and multilateral situations. The term treaty, he observes, is a matter of choice for the parties involved.

Barston further defines conventions as being mainly instruments of multilateral nature which are law making or regulative. They are majorly negotiated under international organizations, regional organizations and in diplomatic conferences where states and other subjects of international law will be involved. The Common problem affecting conventions is the

[36] Barston, R.P., *Modern Diplomacy*, (New York: Longman Inc.,1988)

[37] Vienna Convention on the Law of Treaties between States and International Organizations or between international organisations

[38] *Op cit*, Barston. p. 903

[39] *Op cit*, Barston, p. 903.

[40] *Op cit*, Barston, p. 904.

requirement for ratification which causes delay in the entry of a convention into force. If they are not widely ratified, they don't become fully effective.

Conventions can broadly be classified under codification conventions, institutive conventions and regulative conventions. Some conventions like the Law of the Sea Convention, 1982 somehow operate more like administrative law than classical international public law. This is especially because they devolve power to international organizations and diplomatic conferences for further development of their legal principles. Other than being multilateral instruments, conventions can also be concluded by heads of states, by states and by governments.

The book describes agreements as being less formal than treaties and conventions. Their subject matter can vary widely. Some create obligations while others do not. They are less comprehensive than treaties and conventions and their subject matter is not necessarily of a permanent nature. Broadly, they are concluded between governments rather than between states or between heads of state. They can be concluded between departments of governments in two countries.

Berridge, in his book on the Theory and practice of Diplomacy[41], concurs with Barston when he argues that there are very many agreements that are entered into by states that are not necessarily submitted to the UN. He says that not all agreements between states are referred to as treaties. Others, he says, may bear other names such as charter, convention, declaration, and so forth. Other agreements may occur through simple exchange of correspondence, general agreement, joint communiqué, memorandum of understanding, and through joint minutes. In reality, he explains, some of these are referred to as treaties even though they do not meet the

[41] *Op cit*, Berridge, p. 68

legal definition of a treaty. This may be because of the historical meaning of treaties or due to the importance of the agreement at hand[42].

According to Lowe[43], whatever name one may give to an international agreement, whether a treaty, a Convention, a Memorandum of Understanding or an exchange of notes and so forth, is just a matter of style. All are to be considered under the broad banner of 'treaties' and that the law of treaties as largely codified by the 1969 Convention on the law of treaties applies to them all.

Lowe[44] advances that although any state may conclude a treaty, there are other entities that can make treaties as well[45]. He cites the examples where the British entered into treaties with African tribes and where Indian nations entered into treaties with the United States. The book further argues that in multilateral treaty making, NGO's and representatives of industry may be involved in treaty negotiations where traditionally only government officials would be involved.

Barston[46] explains that the exchanges of notes are the most regularly and often employed treaty instruments to record agreements between governments. This could be between ambassadors or other relevant representatives in the ministry of foreign affairs or between relevant government ministers/secretaries. If these are accepted by their counterparts from the second country, they constitute an agreement. Normally, exchange of notes is a bilateral practice

[42] *Ibid*, Berridge, p. 73

[43] Lowe, V., *International Law*, (U.K.: Oxford University Press, 2007),p.65.

[44] *Ibid*, Lowe,p.65

[45] *Ibid.*, Lowe p. 65

[46] *Op cit*, Barston, pp. 208

and does not require ratification as a general rule. The subject matter of exchange of notes is essentially routine.

Barston says that it is not certain whether a declaration constitutes a treaty. Certain declarations which have law making purposes are clearly treaties. An example is the Barcelona Declaration of 1921 which recognizes the right to a flag of state which has no sea-coast. Certain declarations that are made at the conclusion of a conference by heads of government may contain policy only and can raise problems in trying to decipher whether they are treaties.

A treaty enters into force in such manner and upon such date as it may provide or as the negotiating states may agree[47]. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating states. When the consent of a state to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that state on that date, unless the treaty otherwise provides[48].

Mwagiru in his book on diplomacy, methods and practice[49], discusses the nature and importance of treaties. He advances that the idea that a treaty is an agreement between states reflects its official diplomatic character[50]. He says that treaties emphasize the interdependence of states. Mwagiru observes that various interests of states are secured through treaties and bilateral

[47] *Op cit*, VCLT, Article 24 (1)

[48] *Ibid*, Article 24 (3)

[49] Mwagiru, M., *Diplomacy Documents Methods and Practice*,(Kenya:Institute of Diplomacy and International Studies, 2004) p. 111.

[50] *Ibid*, Mwagiru, p. 109.

agreements[51]. Thirdly, those treaties emphasize one of the fundamental principles under-guarding international relations, namely, peaceful settlement of disputes[52]. Fourthly, treaties reflect and demonstrate that the world is made up of a complex cobweb of relationships between and among states. He notes that treaty relations are an important aspect of diplomacy.

Ojwang[53] notes that the acts done by Kenyan representatives with regard to treaty law have implications on Kenya. Notably, the Vienna Convention takes judicial notice of Ministers for Foreign Affairs, for purposes of performing all acts relating to the conclusion of a treaty[54]. The importance of a state to properly designate powers of conclusion is stressed by the provision that an act relating to the conclusion of a treaty performed by a person who cannot be considered under Article 7 as authorized to represent a state for that purpose is without legal effect, unless afterwards confirmed by that state.

In Cameroon v. Nigeria[55], Nigeria contended that the Maroua Declaration of 1975 signed by the two heads of state was not valid as it had not been ratified. It was noted that Article 7(2) of the VCLT provided that heads of state belonged to the group of persons who by virtue of their functions and without having to produce full powers are considered as representing their respective state.

[51] *Ibid* , Mwagiru, p.108.

[52] *Ibid*, Mwagiru, p. 108.

[53] *Op cit*, Ojwang', pp.14-31

[54] *Op cit*, VCLT, Article *7* (2)

[55] ICJ Reports, 2002, pp. 303, 430.

Mwagiru[56] notes that the Constitution of a state contains the rules on the relationship between domestic and international law. He emphasizes the importance for a state to have its Constitution state clearly what the treaty practice of a country will be, otherwise a lot of confusion will arise. He observes that a country without a clear treaty practice runs the risk of not being trusted internationally[57].

Shaw[58] observes that dualism stresses that the rules of the systems of international law and municipal law exist separately and cannot purport to have an effect on, or overrule, the other. He further observes that where municipal legislation permits the exercise of international law rules, it does so on sufferance as it were, and is an example of the supreme authority of the state within its own domestic jurisdiction, rather than of any influence maintained by international law within the internal sphere[59]

Shaw observes that the opposite of dualism, is monism. He notes that monists are united in accepting a unitary view of law as a whole and are opposed to the strict division posited by the positivists[60].

Adede, in his presentation paper on domestication of international obligations[61], agrees with Shaw, by advancing that dualism and monism are the major approaches on domestic treaty

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[56] *Op cit*, Mwagiru , From Dualism to Monism, p. 145.

[57] *Ibid*, Mwagiru, p.111

[58] *Op cit*, Shaw, p.131.

[59] *Ibid*, Shaw, p.131.

[60] *Ibid*, Shaw, p.131.

[61] Adede, O., *'Domestication of International Obligations (an Abstract)'* (Paper submitted during technical seminar held by The Constitution of Kenya Review Commission, on 9th – 15th), pp.171-173.

practice. Adede classifies monism into, extreme monism, moderate monism and ambivalent monism.

He argues that extreme monists are those states whose Constitutions expressly provide that certain treaties are directly applicable in the state and that in such cases the treaties in question are deemed superior to all laws, including Constitutional norms[62].

Moderate monists, Adede says, are those states whose Constitutions provide for direct application of certain treaties , which may only have a higher status than later legislation but not superior to the Constitution.

Lastly, ambivalent monists he argues are those states whose practice classifies certain treaties to be self executing and therefore directly applicable. The paper refers to a decision in an ambivalent monist state which has ruled that a directly applicable treaty has the same status as municipal laws and statutes and that the latest in time prevails.

Adede further observes that even under a monist system, there is a distinction on how to deal with self-executing and non-self executing treaties. He opines that the latter would require both the approval of the legislature and the subsequent act of transformation, thus resulting into a double parliamentary action in the treaty-making process. Both monist and dualist processes get to be applied on such one treaty.

Maniruzzaman, in his Journal article on state contracts in contemporary international law[63], observes that monists give little weight to the proper law or applicable law notion based

[62] *Ibid*, Adede, p. 171.

[63] Maniruzzaman, A.F.M., 'State Contracts in Contemporary International Law: Monist versus Dualist Controversies' *EJIL* Vol 12 No.2, (2001) pp. 309-328

on the doctrine of autonomy of the will of the parties[64]. This, he says, is principally because of the supremacy of international law they maintain over municipal law[65].

He particularly notes the writings of one Judge Lauterpacht whom he as argues, went out of the way to suggest a structural innovation in the context of the relationship between international law and municipal law.

Maniruzzaman says the suggestion by the said judge conceals the actual practice of states, and is no less than *de lege ferenda*.[66] He is categorical that the structure of general international law has not evolved to the extent as to automatically accommodate the argument of that judge about the relationship between international law and municipal law, at least from the strict monist standpoint[67].

Maniruzzaman further notes that:

> According to the dualist theory, though the two systems are distinct, application of international law by way of incorporation or transformation in the municipal law is only possible because the municipal law conditions its validity and operation within the municipal sphere[68].

Lowe[69] argues that treaties rank first when it comes to determination of disputes under the Statute of the ICJ[70] for the reason that states are free to vary the rules of international customary law by agreement. He compares this to the freedom that parties have to vary tort law rules by contract. Accordingly, where states have entered into a treaty, the treaty displaces

[64] *Ibid*, Maniruzzaman, p. 310.
[65] *Ibid*, Maniruzzaman, p. 311.
[66] *Ibid*, Maniruzzaman, p.314; the term refers to a 'a law that is yet to be or as it should be', as opposed to 'the law as it currently is'.
[67] *Ibid*, Maniruzzaman, p. 314
[68] *Ibid*, Maniruzzaman, p. 319
[69] *Op cit*, Lowe. p. 64
[70] *Op cit*, ICJ Statute, Article 38.

customary international law which only applies by default within the rule of *jus cogens*[71] . He argues that when determining a state's rights and obligations, one must look at the order of priority set out under Article 38 of the ICJ Statue[72].

He further discusses the matter concerning peremptory norms and argues that there is no agreement as to their scope. He argues that the general position is that these include prohibition on aggressive war, genocide and slavery. This position can be juxtaposed against the underlying point in Article 38 of the ICJ Statute that treaties can vary international customary law.

The fact that *jus cogens* are exempt from variation brings the question as to what then exactly constitutes *jus cogens*. How are municipal courts decisions expected to utilize the concept of *jus cogens*? Lowe observes that one of the various grounds that would release a state party to a treaty from its treaty obligations includes the emergence of a peremptory norm after conclusion of a treaty.

The general rule of international law is that, a state may not contend that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law, regarding competence to conclude treaties as invalidating its consent, unless that violation was manifest and concerned a rule of its internal law of fundamental importance[73].

A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith[74]. Article 38 of the Vienna Convention recognizes the position of international customary law. It says that nothing in

[71] *Op cit*, Lowe, p.76; a peremptory norm is a rule of customary international law that allows no derogation.
[72] *Ibid*, Lowe, p. 64
[73] *Op cit*, VCLT, Article 46(1)
[74] *Ibid*, VCLT, Article 46(2)

Articles 34 to 37 thereof would preclude a rule set forth in a treaty from becoming binding upon a third state, as a customary rule of international law recognized as such.

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty, except insofar as the existence of diplomatic or consular relations are indispensable for the application of the treaty[75].

Bello in his paper on the role of the judiciary[76] observes that treaties and international conventions have no real value unless they are implemented on the territory of the state party. Every treaty in force is binding upon the parties to it and must be performed by them in good faith[77]. He points out the fundamental principle of *pancta sunt servanda*[78] which governs treaty relations between states[79].

Mwagiru[80] notes that the general rule is that once a state has expressed its consent to be bound by a treaty through ratification or acceding to the treaty, it cannot opt out by pleading a

[75] *Ibid*, VCLT, Article 63.

[76] Bello, S,. '*The Role of the Judiciary in the Implementation of the Conventions on the Right of the Child in Benin*', (prepared as PhD student at the Faculty of Law and Economics and Bayreuth International Graduate School of African Studies, University of Bayreuth, Germany).

[77] *Op cit*, VCLT, Article 26; the Article sums up this position as the principle of *"Pacta sunt servanda"*

[78] This principle requires that treaties are binding on the states that are party to them and that the treaties must be performed in good faith.

[79] *Op cit*, Mwagiru, Diplomacy: Documents , p.111

[80] *Ibid*, Mwagiru, pp 110-111

rule of its domestic law[81]. He states that the only exception to this is where the rule of domestic law in question is one of fundamental importance, such as the Constitution of a state[82].

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty; this is without prejudice to Article 46[83]. Shaw[84]offers that every state has the duty to carry out in good faith its international obligations arising from treaties and it may not invoke provisions in its Constitution or its laws as an excuse for failure to perform this duty.

This position has been applied by international courts on various occasions as illustrated in the 'Applicability of the Obligation to Arbitrate case [85]', and the subsequent 'Lockerbie case[86] that inability to act under domestic law was no defense to non-compliance with an international obligation.

Shaw[87] observes that every society has created for itself a framework of principles within which to develop. He notes that that there is a close relationship between international law and international relations[88]. He acknowledges that this relationship is important and notes that it also has challenges. Shaw observes that this rule has been established by state practice and decided cases.

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[81] *Ibid*, Mwagiru, p.111
[82] *Ibid*, Mwagiru, p.111
[83] *Op cit*, VCLT, Article 27
[84] *Op cit*, Shaw, p.134.
[85] ICJ Reports, 1988, pp.12, 34.
[86] ICJ Reports, 1992, pp.3, 32.
[87] *Op cit*, Shaw, p.1
[88] *Ibid*, Shaw, p. 67.
[89] ICJ Reports, 1988, pp.12, 34.
[90] ICJ Reports, 1992, pp.3, 32.

that inability to act under domestic law was no defense to non-compliance with an international obligation.

Shaw[91] observes that every society has created for itself a framework of principles within which to develop. He notes that that there is a close relationship between international law and international relations[92]. He acknowledges that this relationship is important and notes that it also has challenges. Shaw observes that this rule has been established by state practice and decided cases.

Lowe[93] discusses the issue of what would happen if a treaty is reached in contravention of municipal law such as the negotiating team not having the relevant authority and what consequences this would have in the event of a dispute given that a party is not allowed to cite municipal law in an attempt to disown international obligations and since treaty law functions on the foundation of ostensible authority.

Shaw[94] observes that under International Law, although legislative supremacy within a state cannot be denied, it may be challenged. He says that a state that adopts laws that are contrary to the provisions of international law will render itself liable for a breach of international law on the international scene[95].

In the Nottebohm case[96] the Court remarked that while a state may formulate such rules as it wished regarding the acquisition of nationality, the exercise of diplomatic protection upon the basis of nationality was within the purview of international law. Additionally, no state may plead its municipal laws as a justification for the breach of an obligation under international law.

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[91] *Op cit*, Shaw, p.1
[92] *Ibid*, Shaw, p. 67.
[93] *Op cit*, Lowe, p. 75
[94] *Op cit*, Shaw, p.650.
[95] *Ibid*, Shaw, p. 650.
[96] International Law Reports (ILR), pp. 349, 357.

This position is also seen in the Polish Nationals in Danzig case[97], where the Court declared that a state cannot adduce as against another state its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force'.

In the Pyramids case also known as the Southern Pacific Projects (SPP) case[98], the ICJ tribunal accepted that Egyptian law was the proper law of the contract. The tribunal however took the view that international law could be deemed as part of the Egyptian law. The tribunal held that:

> Reference to Egyptian law must be construed so as to include such principles of international law as may be applicable, and that national laws of Egypt can be relied on only in as much as they do not contravene the said principles.

Maniruzzaman[99] states that as a matter of fact, there occurs a common field of operation for both municipal and international law by virtue of the autonomy of the will of the parties.

Shaw[100] observes that positivism stresses the overwhelming importance of the state. He notes that subsequently, when positivists consider the relationship of international law to municipal law, they do so upon the basis of the supremacy of the state, and the existence of wide differences between the two functioning orders. Shaw notes that this theory is known as dualism.

Berridge[101] gives the case of the Unites States where the consent of the Senate is required for treaties to become binding. Because of the inconveniences that come with negotiating treaties and ultimately obtaining the consent of the Senate, the executive in the United States is encouraged to resort to the making of informal agreements.

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[97] Permanent Court of International Justice(PCIJ), Series A/B, No. 44, pp. 21, 24; 6 AD, p. 209
[98] SPP (Middle East) Ltd. And Southern Pacific Projects-vs-Egypt & EGOTH [1988] LAR 309.
[99] *Op cit*, Maniruzzaman, pp. 309-328
[100] *Op cit*, Shaw, p.131.
[101] *Op cit*, Berridge, p.75.

He argues that the complexities of drafting treaties formally and the related procedures such as production of documents, certifying full powers of plenipotentiaries can lead to avoiding the making of formal treaties. States will then enter into 'treaties' simply by exchanging of notes or letters in which it is spelled out the terms of the agreement. A reply from the other party signifying acceptance will constitute a 'treaty'.

The book identifies ratification as another inconvenience in treaty making. The executive may be informed by the need to avoid delays in the coming into force of an agreement or the fear that there would have to be a renegotiation of the agreement if ratification is not readily available. The need to avoid possible embarrassment from Senate that would arise from failure in having an agreement ratified has led to the phenomenon of executive agreements.

Berridge, expounds that in America, an executive agreement is one entered where the Congress will have given the president general authorization in a particular field or it will be a pure executive agreement entered into on the express Constitutional powers that the president may have, for instance as the commander in chief.

In practice, executive agreements are international agreements that are entered into by the executive which are not termed a treaty and therefore do not require ratification. A third way that an executive can side step parliament is by issuing a unilateral declaration which though is not binding is nonetheless politically effective. The corresponding state could issue its own declaration on the same issue giving the declaration effectiveness. Inconvenience of unwanted publicity can also lead to informal agreements[102].

[102] *Op cit*, Berridge, p.75.

To avoid Senate rejection of treaties, the United States has at times involved Senators in negations[103]. Lowe discusses the topic of invalid treaties and in particular deals with the question as to when a treaty can be said to be invalid especially in light of the principal that treaty commitments must be observed. He looks at instances such as actual harassment of officials to coerce them to sign a treaty, treaties between powerful states and weak ones where goodies are dangled to entice the weaker state to sign a treaty or treaties secured by the actual use of force. He poses the question as what benefit the renunciation of a treaty could bring. This is especially in light of the fact that the practice of renunciation has not taken root.

Bello, in his paper on the role of the Judiciary[104] notes the need for co-operation by the various arms of government in treaty practice. The paper notes with respect to treaty practice in Benin that ordinary courts, despite an assertive independence under the Constitution, remain in practice, under the influence of an executive. This influence by the executive in some way, detrimentally affects its actions.

Ojwang[105] proposes that the Review Commission should consider whether or not certain clear procedures regarding the foreign affairs powers should be set out in the Constitution.

Mwagiru[106], argues that in order to implement the new Constitutional treaty dispensation in Kenya, there is need to have a separate statute on Kenya's treaty practice to help harmonize treaty practice and all its various elements. He argues that the adoption of a monist treaty practice will sharpen the separation of powers and that the roles of each of the three arms of government will become better defined[107].

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[103] *Op cit,* Lowe, p.67.
[104] *Op cit,* Bello.
[105] *Op cit,* Ojwang', p.26.
[106] *Op cit,* Mwagiru, From Dualism to Monism, p.154.
[107] *Ibid, Mwagiru,* p. 154.

He notes that the executive negotiates treaties and Parliament debates about them and decides on whether or not they should be ratified. That only upon and in compliance with that decision by Parliament, should the government proceed to act. Once the treaties have become law this way, the courts will interpret them as their judicial function[108]. Mwagiru proposes that this will enhance significantly the diplomacy of treaty practices in Kenya[109].

SUMMARY

From the above literature review, there are several debatable issues that arise which are relevant to this study. There are also some gaps with respect to the actual nature of treaty practice in Kenya.

The Constitution is silent about the means of implementing Article 2(6). Section 3 of the Act, provides that the Act applies to treaties which are concluded by Kenya after its commencement. It does not however provide for what would happen to the previously ratified treaties.

The above review exposes the need for a coherent policy framework as highlighted by most of the texts above. The substantive part of this study shall inquire whether this Act alone, constitutes adequate policy framework for effective implementation of Article 2(6) of the Constitution.

Mwagiru's argument that Kenya was dualist under the Independence Constitution and that a paradigm shift to monism has now taken place, is weakened by his later submission that Kenya's treaty practice under that Constitution effectively merged elements of dualism and

[108] *Op cit,* Mwagiru, p.154.

[109] *Ibid,* Mwagiru, p.154.

monism. Mwagiru proposes the need for a statute to harmonize treaty practice and all its various elements.

Adede also observes that even under a monist system, there is the issue of how to deal with self-executing and non-self executing treaties. Adede opines that a non self executing treaty, even under the monist regime, would require both the approval of the legislature and the subsequent act of transformation, thus resulting into a double parliamentary action in the treaty-making process. Both monist and dualist processes get to be applied on such one treaty.

To ensure that there is little or no overlap between the various arms of government, it is necessary to clearly define their roles. The Al Bashir case is a proper test on the doctrine of separation of powers and the principle of justiciability[110]. It poses the question whether in matters of treaty practice related to diplomatic relations, the Executive arm of government has exclusive competence, free from judicial oversight or otherwise.

Further, there is a clear need to address the issue of the executive arm of the government, engaging in acts that are designed to circumvent checks by Parliament, through the creation of international obligations that do not necessarily need ratification for them to become binding.

It is against the backdrop of the missing links as well as the positions advanced from the review above that the research objectives of this study were formulated.

1.5 THEORETICAL FRAMEWORK

The dualist and monist approaches to understanding treaty practice inform the basis of this study. Some scholars have proposed that Article 2 (6) of the Constitution (2010) has converted

[110] Black's Law Dictionary, 8th ed.: The quality or state of being appropriate or suitable for adjudication by a court.

Kenya from a dualist to a monist state with regard to treaty practice. Other scholars have cautioned that the new Constitutional dispensation is not a pure monist system because it leaves room for the transformation of some treaties into statutes before they can become operative as law in Kenya.

Other scholars argue that it is not practical to classify a country as either being strictly dualist or monist. For instance while dualists advocate for incorporation of treaties before they can become law, they still agree with monists that there is no problem about customary international law being incorporated in municipal law.

Monists have also been categorized into extreme monists, moderate monists and ambivalent monists. Extreme monists are described as those states whose basic laws expressly provide which treaties are to be directly applicable in the particular state. Such treaties are deemed to rank above all domestic laws including their Constitutions.

Moderate monists, are seen as those states whose basic laws provide for the direct application of certain treaties. Such treaties acquire a higher status than subsequent legislation. These treaties do not however rank above such states' Constitutions.

A third sub category is termed ambivalent monists. These are those that classify certain treaties as self executing and directly applicable and others as non self executing treaties that require transformation before they can become law.

It is anticipated that this study will establish whether Kenya's treaty practice is dualist, monist or a mixture of both. Consequently the relevant policy framework on treaty practice existing under the Independence Constitution as well as the Constitution (2010) will be examined in light of the outlined schools of thought.

This study will also identify what intricacies of treaty practice exist in Kenya from the point of view of the various theories advanced.

1.6 HYPOTHESES

This study is premised on the author's hypotheses that,

1. That Article 2 (6) of the Constitution (2010) does not unequivocally make Kenya a monist state with respect to treaty practice.
2. That Kenya's treaty practice as per Article 2 (6) of the Constitution (2010) is a qualified monist.
3. Kenya's policy framework is insufficient to address the intricate nature of treaty practice in Kenya.
4. Kenya's diplomacy and foreign policy will suffer in the absence of a coherent policy framework governing treaty practice.

1.7 RESEARCH METHODOLOGY

The study will be carried out between April 2013 and September, 2013.

The study will mainly involve desk research. Some minimal field research will also be undertaken. The Constitution, legislation, international legal instruments, local and international judicial decisions as well as Kenya government documents will form the bulk of the research material for the study.

The study will also utilize secondary sources of data such as text books, journals, articles, reports, and web based sources. Minimal field research will be conducted through interviews and questionnaires involving, state officers attached to treaty offices, as well as legislators. It will also rely on the author's private observations.

The author expects to face several challenges in the course of the study. This is particularly so due to the limited time available. To maximize on that limited time, the author will call upon acquaintances in the relevant institutions and departments to avail relevant information.

1.8 CHAPTER OUTLINE

Chapter one: Introduction.

This chapter introduces the nature and scope of the study. At the outset, the chapter briefly discusses Kenya's Constitutional and legal provisions touching on the relationship between international law and Kenya's treaty practice. The chapter gives the problem statement of the study and outlines the objectives of the research. It also gives a justification of the study. Further in the literature review, the chapter looks at various approaches to treaty practice. Finally a theoretical framework, hypotheses and the research methodology are provided.

Chapter two: **The Nature of Kenya's Treaty Practice before August, 2010**

This chapter examines in detail, the treaty practice in Kenya under the Independence Constitution. In particular the chapter discusses the different approaches to treaty practice exhibited by the different administrations. The policy governing treaty practice in Kenya during this period is examined as well as the complexities attendant to it. The impact of these on Kenya's diplomacy and foreign policy is also outlined. .

Chapter three: **The Nature of Kenya's Treaty Practice after August, 2010.**

This chapter begins by appreciating the new Constitutional dispensation with regard to treaty practice in Kenya. The chapter examines what substantive changes have occurred in Kenya's treaty practice after August, 2010. The Chapter examines the complexities that arise from the current treaty practice in Kenya. The impact of these on Kenya's diplomacy and foreign policy is also outlined.

Chapter four: **An examination of the intricacies of Kenya's Treaty Practice and their impact on Kenya's Diplomacy and Foreign Policy**

This chapter looks at the impact of Kenya's treaty practice, which has already been examined under chapters two and three on Kenya's diplomacy and foreign policy. To achieve this, the chapter examines various theoretical approaches adopted by different writers in trying to explain the nature of Kenya's treaty practice. Further, the chapter analyses the interplay between the various organs concerned with treaty practice. Finally, the chapter also utilizes some treaty practice experiences of the United States of America with a view to highlighting the intricacies of Kenya's treaty practice.

Chapter five: **Conclusions and Recommendations.**

This chapter sums up the arguments in the preceding chapters. It draws from the discussions in those chapters to make conclusions. The chapter also juxtaposes the hypotheses against the findings of the study to prove or disprove those hypotheses. Finally, the chapter makes recommendations on how to lessen the impact of treaty practice intricacies on Kenya's diplomacy and foreign policy.

CHAPTER TWO

THE NATURE OF KENYA'S TREATY PRACTICE BEFORE AUGUST, 2010

This chapter examines in detail, the treaty practice in Kenya under the Independence Constitution. In particular the chapter considers the position of that Constitution with regards to treaty practice. It discusses the different approaches to treaty practice adopted by the administrations of Kenyatta, Moi and Kibaki[111]. The policy governing treaty practice in Kenya during this period is examined as well as the complexities attendant to it.

This is mainly done through examination of attitudes towards treaties by the various arms of government namely; the Executive in negotiation, signing, ratification and implementation, Parliament, in ratification and enactment of the enabling legislation and the Judiciary, in interpretation of treaties through judicial decisions. The impact of these on Kenya's diplomacy and foreign policy is also outlined.

An examination of the attitude towards treaty law by the various arms of government is done. It especially looks at the attitude of the Executive in negotiating and ratifying treaties, and considers whether or not the Executive is allowed room for proper implementation of treaties.

The extent to which Parliament exercises its legislative role regarding treaty practice is looked at.

[111] Kenyatta's reign was between 1963 and August 1978 where he passed on while still in power. He was succeeded by his then Vice- President Daniel Moi who was President until the year 2002, when he was succeeded by Mwai Kibaki. Kibaki served until April, 2010 when was subsequently succeeded by the Uhuru Kenyatta.

Lastly the chapter makes an examination of judicial decisions with particular emphasis on the interpretation of Kenya's treaty practice by the courts. The impact of these decisions on Kenya's diplomacy and foreign policy is examined.

While a state should have its treaty practice clearly defined in its Constitution[112], the Independence Constitution[113] did not contain any express provisions on the relationship between international law and municipal law in Kenya. It however contained several provisions that impacted Kenya's treaty practice.

With respect to executive authority; Section 23 (1) thereof provided that 'the executive authority of the government of Kenya shall vest in the President and subject to the Constitution, may be exercised by him either directly or through officers subordinate to him'[114]. Further, it stipulated that, 'nothing in this section shall prevent Parliament from conferring functions on persons or authorities other than the President'[115].

Section 25 (1) provided that, 'save insofar 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'.

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[112] Mwagiru, M., From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice, *Journal of Language, Technology & Entrepreneurship in Africa* Vol. 3 No. 1, (2011) pp.144-155:145.

[113] In this text, this term shall refer to the Constitution in force in Kenya from the country's independence in 1963. Apart from amendments from time to time, this Constitution remained in place until the promulgation of the Constitution (2010) on 27th August, 2010.

[114] *Ibid*, Independence Constitution,section 23 (1)

[115] *Ibid*, Independence Constitution,section 23 (2)

Section 85 (1) provided that, '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 Public Security Act[116], or any of the provisions of that part of that Act'.

Section 111(2) provided that, 'the power to appoint a person to hold or act in the office of Ambassador , High Commissioner or other principal representative of Kenya in another country, and to remove from office a person holding or acting in any such office shall vest in the President'.

On legislative authority; Section 30 provided that, 'the legislative power of the republic shall vest in the Parliament of Kenya which shall consist of the President and the National assembly'.

Regarding judicial authority, Section 60 (1) stipulated that, 'there shall be a High Court which shall… have unlimited jurisdiction on civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution and any other law'.

Sections 61(1) provided that, 'the Chief Justice shall be appointed by the President. Subsection (2) thereof provided that, 'puisne judges shall be appointed by the President in accordance with the advice of the Judicial service Commission '

The Kenyan Judicature Act of 1967 entrenches in Kenya, the Common law of England[117].

Ojwang' and Franceschi in their paper on constitutional regulation of international law in Kenya[118] give an account of treaty practice before the Independence Constitution, where they

[116] Preservation of Public Security Act ,Chapter 57 Laws of Kenya: provides special public security regulations.
[117] Judicature Act, Chapter 8 Laws of Kenya, Section 3 (c).

state that before Kenya gained independence in 1963, the foreign affairs powers were exercised by the Governor as a representative of the Queen[119]. As such, they say Britain had entered into treaties with other countries in respect of their Kenyan colony which had not yet lapsed as at the time of independence[120].

The position of those treaties that Kenya had ratified before independence was expressed by the 'Kenya Independence Declaration on Treaties' of 1963 sent to the Secretary General of the United Nations [121]. This declaration clarified the status Kenya wished to accord treaties by Britain, its former colonizer[122]. This Declaration provided that:

> Bilateral treaties were to continue in force for a period of two years from the date of independence, and were to be applied on the basis of reciprocity. At the expiry of those two years, the government would consider those treaties which could be regarded as surviving according to rules of international law …Multilateral treaties were to continue in force for two years, the government would indicate to the various depositories the steps it would take with regards to each instrument.- either termination of the treaty, confirmation of its succession, or accession to the treaty. During this interim period, third states could, on the basis of reciprocity, consider Kenya to be bound by the terms of those treaties. They observe that the treaty practice in Kenya has evolved since independence.[123]

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[118]Lumumba P., Mbondenyi M. & Odero S., *The Constitution of Kenya: Contemporary Readings International Law*, (LawAfrica Publishing (K) Ltd, 2011) p.251.
[119] *Op cit,* Lumumba, Mbondenyi & Odero, p.252
[120] *Op cit*, Lumumba, Mbondenyi & Odero, p.234
[121]Full text to be found in I Seaton and M Mauti *Tanzania Treaty Practice* (1973) 48, cited by Mwagiru M. and Hunja I. 'Aspects of Treaty Practice in Kenya' (1990) 6/2 *Lesotho Law Journal 2, also cited in* Lumumba P., Mbondenyi M. & Odero S., *The Constitution of Kenya: Contemporary Readings International Law*, (LawAfrica Publishing (K) Ltd, 2011) p.251.
[122] *Op cit,* Mwagiru,From Dualism to Monism, p.252
[123]*Op cit*, Lumumba, Mbondenyi & Odero, p.251

After independence, Kenya re-negotiated all commercial treaties concluded with communist countries and terminated by notice all other commercial treaties. Kenya also decided to retain all extradition judicial assistance treaties and double assistance treaties. However, it abrogated all treaties with South Africa and Portugal[124].

Kenya attained independence on 12th December, 1963. This was on the basis of the Independence Constitution which was negotiated and formulated in London[125]. Fisher in his journal article on a study of the legal framework of the government from colonial times to the present[126]has referred to this Constitution as a 'British- imposed Constitution'. He[127] observes that;

> this Constitution established an executive branch of government whose power was severely restrained by the power of regional authorities, by a strong representative legislature, by the Constitutional entrenchment of a Western-style bill of rights, and by an absolutely independent judiciary charged with maintaining this system.

Lumumba[128], being of the same view argues that one of the key features of this Constitution was that it embodied a system of regionalism, where the country was divided into seven regions where each region enjoyed its independent legislative and executive powers.

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[124] *Ibid,* Lumumba, Mbondenyi & Odero, p. 254
[125] *Ibid,* Lumumba, Mbondenyi & Odero, p. 254
[126] Fisher Z. in his review of, Public Law and Political Change in Kenya: A study of the Legal Framework of Government from Colonial Times to the Present, by Ghai Y. & Mc Auslan J.,*The International Journal of African Historical Studies'* Vol. 5, No. 1(1972),pp. 132-136, P. 133.
[127] *Ibid,* Fisher, p.133

[128] Lumumba P., *'A journey trough time in search of a new Constitution'* Text to be found in Lumumba P., Mbondenyi M. & Odero S., *The Constitution of Kenya: Contemporary Readings International Law,* (LawAfrica Publishing (K) Ltd, 2011) pp. 13-43, P. 22.

Similarly, Ojwang' and Franceschi in their journal article on Constitutional regulation of foreign affairs power in Kenya have argued that Kenya's approach to treaty practice has been greatly influenced by Britain, its colonial master[129].

Kenyatta who was the Prime Minister at the time of Kenya's independence became her first President. Kenyatta was tasked with the implementation of the Independence Constitution[130].

Fisher, [131] illustrates the effect of such export of systems from one society to another by stating that, 'just as an English oak, you cannot transplant English systems to Africa and expect it to retain the tough character it bears in England[132]'.

Khapoya in his journal article[133] considers the issue whether Moi's administration was different from that of Kenyatta. He argues that during the entire regime of President Kenyatta, Kenya's foreign policy was characterized as pragmatic and pro-west[134]. He says that Kenya tended to see what other states were going to do before taking a position on any issue[135].

Ojwang' and Franceschi in their said journal article[136] have considered the effect of having a Constitution without a clear position on treaty law and the apparent hogging of treaty practice by the executive arm of government. In illustrating that for the period between independence and August, 2010, treaty practice was mainly an executive function, they echo the words of Nwabueze thus;

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[129] Ojwang' J. and Franceschi L., Constitutional Regulation of the Foreign Affairs power in Kenya: A Comparative Assessment, *Journal of African Law*, Vol.46. No.1(2002),pp.43-58, p.47.
[130] *Ibid*, Ojwang & Franceschi, p. 47
[131] *Op cit*, Fisher,p. 132
[132] See also Nyali-vs- A.G. (1956), 1 Q.B.1 also quoted in T. Franck, *Comparative Constitutional Process* (New York, 1968), p.xxix.
[133] Khapoya V. ,Kenya under Moi: Continuity or Change? *Africa Today*, Vol. 27 (1980), pp. 17-28, p.25
[134] *Ibid*, Khapoya, p.25
[135] *Ibid*, Khapoya, p.25
[136] *Op cit*, Ojwang & Franceschi, Foreign Affairs Power in Kenya, p.44.

> the Africanness of the presidency in Africa refers to the fact that it is largely free from such Constitutional devices, particularly those of a rigid separation of powers and federalism. It is the universal absence of such restraint mechanisms that is implied in the qualifying word 'African'[137].

Fisher, in his said review of Ghai and McAuslan[138] notes the authors' criticism of Kenya's political leadership, particularly citing former President Kenyatta's failure to put in place proper systems, in favour of his concentration of personal authority. He further argues that for partisan advantage, the government failed to observe Constitutional mandates that preserve the freedom to oppose government policy.

Makinda in his journal article on Kenya's foreign policy [139] cites Professor Okumu,[140] observation that during Kenyatta's regime, Kenya's treaty practice was largely defined by her circumstances after independence. He identifies the specific needs that steered this[141] as;

> the need to attract more foreign capital which ultimately meant the predominance of the West, need to maintain commercial links with neighbouring states which led to a wider dependence on the wider East African market and the need to ensure the security of her borders and consolidate the domestic political power

[137] *Ibid*, Ojwang & Franceschi, Foreign Affairs Power in Kenya, p.44

[138] *Op cit*, Fisher p. 132

[139] Makinda S., From Quiet Diplomacy to Cold War politics: Kenya's Foreign Policy, *Third World Quarterly*, Vol. 5 No. 2, Africa: Tensions & Contentions (Apr.,1983) pp.309-319, p. 301

[140] Okumu J., 'Kenya's Foreign Policy' in Aluko O. (ed) , *The Foreign Policies of African States*, London: Hodder & Stoughton, 1977, p.138

[141] *Ibid*,Makinda,.p. 302

base ultimately leading to a defence security agreement with Ethiopia in 1964 and several other defence agreements with Britain[142].

Makinda[143] illustrates how treaty practice in Kenya during Kenyattas's reign was informed by Kenya's need to secure her territories. In 1964, Kenya and Britain signed an agreement providing for the Royal Air Force to establish the Kenya Air Force. In March of the same year, they signed another agreement for the Royal Air Force to expand Kenya's Army and set up a small naval force[144]. The agreement with Ethiopia was a secret mutual defence agreement between the two governments to work out a joint strategy for meeting the common Somali threat[145]

Makinda[146] further elaborates on the significance of the need to attract foreign investment and economic aid in shaping treaty practice and cites Parliament's passage of a law guaranteeing protection of foreign investors as an example.

Katete Orwa[147] summarizes the policy governing treaty practice in Kenya under Kenyatta as having been guided by 'good neighbourliness, Pan Africanism and non- alignment policies.

In 1978, Kenyatta died while in power and his Vice President Moi assumed office of President. Moi in his early days in office coined a slogan, 'nyayo' meaning 'footsteps', to advance that his administration would carry on with Kenyatta's policies[148].

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[142] *Ibid,* Makinda citing,*The Africa Research Bulletin* (Political, Social and Cultural), February and March 1964 issues respectively.

[143]*Op cit,* Makinda , p. 302

[144] *Ibid,*Makinda , p. 302

[145] *Op cit,*Makinda p. 302,

[146] *Ibid,*Makinda, p. 302

[147] Orwa K., *Foreign Relations & International Co-operation : Kenya Official Handbook* (1988)

An examination of whether or not President Moi kept to his word on following Kenyatta's footsteps on Kenya's treaty practice is necessary. In 1978, Moi ostensibly in compliance with International law on human rights and principles released all the political detainees who had been detained by Kenyatta's administration[149].

Adar and Munene[150] argue that Moi worked towards ensuring that neither legislative nor judicial action would interfere with his policies. They further advance that he took measures that ensured his control over both the Judiciary and the Legislature as discussed below. Under Moi, the principle of the separation of powers was rendered ineffectual[151].

Section 2 (A) of the Independence Constitution was introduced in 1982 through a Constitutional amendment by Moi's government. This effectively made Kenya a *de jure* single party state[152].

Eugene Cotran[153], a former British expatriate judge in Kenya, stated that in cases in which the president had direct interest, the government applied pressure on the expatriate judges to make rulings in favour of the state.

Two expatriate judges, Justices Derek Schofield and Patrick O'Connor, resigned because of what they referred to as a judicial system *"blatantly contravened by those who are supposed to be its supreme guardians"*[154].

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[148] *Op cit,* Kapoya, p. 17.

[149] *Ibid,* Khapoya p. 17

[150] Adar K. & Munene I., *Human Rights Abuse in Kenya under Daniel Arap Moi,* 1978-2001.

[151] *Op cit,* Adar & Munene,p.

[152] This was effected vide Constitution of Kenya, Amendment Act, Number 7 of 1982, which introduced Section 2(A)

[153] *Op cit,*Ojwang' and Franchesci, Foreign Affairs Power in Kenya, p.56-57

Under Moi, Parliament enacted laws[155], providing for the removal of the security of tenure of the Attorney General, the Controller and Auditor General, the judges of the High Court and the Court of Appeal.

The Kenya Human Rights Commission in its Report on the Bill of Rights[156] argues that the difference between dualism and monism is also discernible through judicial interpretation[157]. The report further argues that for a long time, courts were reluctant to apply provisions of any treaty which had not been domesticated[158].

In the case of Rose Moraa[159] , the court stated that the general principle and the position in Kenya was that, unless there was a provision in the local law of automatic domestication of a treaty, a convention did not automatically become municipal law unless by virtue of ratification[160]. The Court further stated that, in common law countries, where national law was clear and inconsistent with an international obligation, the national court was under obligation to give effect to national law.

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[154] *Ibid*,Ojwang' and Franceschi, p.56-57

[155] Some of these are; Act No. 14 of 1986 and Act No.4 of 1988.

[156] Towards Equality and Anti Discrimination: An Overview of International and domestic Law on Anti-Discrimination in Kenya, a report by Kenya Human Rights Commission, 2010.

[157] Making the Bill of Rights Operational: Policy, Legal And Administrative Priorities And Considerations, Occasional Report By The Kenya National Commission On Human Rights October 2011, p.8.

[158] *Ibid*, The Kenya National Commission On Human Rights , p.8.

[159] Rose Moraa & Another-vs- Attorney General [2006]eKLR

[160] *Ibid*, Rose Moraa case.

In the Endorois People Communication case before the African Commission for Peoples' Rights (ACHPR)[161], The African Commission found Kenya to have violated the African Commission on Human and Peoples' rights (ACHPR) .

In the Ogunda case [162], the court held that all laws, whether domestic or international, must be in conformity with the Constitution, and that where any conflict existed, the Constitution would prevail.

In the case of Attorney General V Mohamud Mohammed Hashi & 8 Others [2012] eKLR, the Court of Appeal upheld a decision of the High Court which held that Kenya lacked jurisdiction to try Somali pirates because the crime occurred in international waters, notwithstanding the classic International law doctrine of universal jurisdiction, reflects common judicial understanding of domestic courts as creatures of domestic law.

Conversely, over the years, the courts demonstrated their willingness to apply treaties that were ratified without reservations but which Parliament had not domesticated through legislation[163]. For example, in Rono v. Rono & Another[164] the court ruled on the premise that Kenya as a signatory to an international Convention could not just wish it away.

In the said Rono case, the Court of Appeal stated that although the traditional view had been that international obligations are applied domestically only when they had been

[161] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council –vs- Kenya, Communication No. 276/2003.

[162] Ogunda v. AG, (1970) E A 19

[163] *Op cit*, The Kenya National Commission On Human Rights, p.8.

[164] Rono v. Rono & another, [2008] KLR, available at, p. 812-13 (citing Bangalore Principle No. 7). See also Republic vs. Minister for home affairs & 2 others Ex-parte Leonard Sitamze [2008], available at http://kenyalaw.org/CaseSearch/view_preview1.php?li nk=810836047490385154082 78 .

incorporated into domestic law, "*the current thinking on the common law theory is that both international customary law and treaty law can be applied by State courts where there is no conflict with existing State law, even in the absence of implementing legislation.*[165]"

Treaties are among the most important means by which states relate to one another in the sphere of international law. A treaty brings about external effects which bind a state to fulfill an international obligation. It may also produce internal effects if it has the consequence of producing some change in the municipal legal system. Such incorporation in its clearest forms, can come automatically at the time of ratification (monist theory), or be indirect, by legislative enactment of the treaty (dualist concept)[166].

Sheldon[167] observes that some Constitutions are silent on the relationship between treaties and domestic law, resulting in a situation where courts have had to affirm or deny the constitutionality of such agreements and their place in the legal system.

It has been largely observed that Kenya was, under the independence Constitution, a dualist state[168]. Ojwang' and Franchesci [169] observe that as at the year 2002, Kenya had

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[165] *Op cit,*the Rono case.

[166] *Op cit,*Ojwang' and Franchesci, Foreign Affairs Power in Kenya, p.45.

[167] Shelton D., International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion, (USA: Oxford University Press, 2011).

[168] Mwagiru, in his Journal article on the shift of Kenya's treaty practice……..See also , Making the Bill Of Rights Operational: Policy, Legal And Administrative Priorities And Considerations, Occasional Report By The Kenya National Commission On Human Rights October 2011, p.8. See also Kenya Human Rights Commission, *An Overview of International and Domestic Law on Anti- Discrimination in Kenya'*……

[169] *Op cit,* Ojwang' & Franceschi , Foreign Affairs Power in Kenya,p.56-57

concluded more than 430 bilateral and multi-lateral agreements. There was however, no office with a harmonized record where all treaties concluded were kept. Further they argue, that this situation limited the scope for compliance and implementation and affected the credibility of Kenya internationally.

It has been argued that the failure by the Independence Constitution to establish a particular comprehensive fashion of treaty practice coupled with the scattered Constitutional and legal provisions which impacted on Kenya's treaty practice, implied that the President of the day had the power with regards to international relations including treaty practice[170].

Ojwang' and Franchesci,[171] propose that a sensible balance must exist between the requirement for public participation through checks and balances and the need for efficient government. The Executive's monopoly regarding matters affecting treaties is considered favourable by some scholars because it avoids delays and because many disparate voices could generate confusion[172].

Ojwang' and Franchesci sum up the effect of the particular attitudes of the various administrations of the day thus;

> We find in Africa beautiful Constitutions, excellently written laws, innovative jurisprudence and among the most extraordinary legal minds of the modern world.

[170] *Ibid,* Ojwang' & Franceschi p.43.

[171] *Ibid,* Ojwang' & Franceschi p.44

[172] *Op cit,* Ojwang' &Franchesci, Foreign Affairs Power in Kenya,p.44

> Nevertheless, in many instances, this has been jeopardized by a deficient political will of an inadequate political class[173].

Makumi summarizes Kenya's treaty practice under the Independence Constitution thus;

> Parliamentary action was not required for those treaties whose provisions were not inconsistent with any of Kenya's legislation. Treaties that require an act or omission not expressly authorized by any laws of Kenya require an Act of Parliament to give them that effect. Where a Treaty contained provisions which were not catered for by existing laws, a statute was required to be enacted to give effect to such treaty[174].

Khapoya, in the conclusion of his journal article[175] says that Moi's policies did not constitute any significant departure from that of Kenyatta. The treaties on human rights that Kenya had ratified were flagrantly breached by the executive as most were yet to be ratified by Parliament and that Parliament could not go against the executive's preferences[176].

Makinda[177] addresses the element of foreign capital and cites one Professor Colin Leys as implying that the powerlessness that Kenyatta and Moi found themselves in was as a consequence of their interactions with foreign capital, and that it was partly that powerlessness that led to the pursuit of quiet diplomacy.

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[173] P.L.O. Lumumba , M.K. Mbondenyi & S.O. Odero , The Constitution of Kenya Contemporary Readings, p.234

[174] *Op cit,*Mwagiru, From Dualism to Monism, p.149

[175] *Op cit,*Khapoya, p.27.

[176] *Op cit,*Khapoya, p.27

[177] *Op cit,*Makinda, p.303

Ojwang' and Franceschi[178], in analyzing this period, observe a deficiency in regulation of foreign affairs power. They proposed an amendment to section 111 of the Independence Constitution regarding appointment of ambassadors by inclusion of two new sections 'to regulate the making of war and peace and on treaty making'[179].They further advanced that there was need to define the foreign affairs power as well as 'regulation of its mode of exercise, with additional checks and balances[180].

[178] *Op cit,* Ojwang' & Franceschi, , p. 58.

[179] *Ibid,*Ojwang' & Franceschi, p. 58.

[180] *Ibid,*Owang' & Franceschi, , p. 58.

CHAPTER THREE

THE NATURE OF KENYA'S TREATY PRACTICE AFTER AUGUST, 2010.

This chapter looks at Kenya's treaty practice as established by the Constitution of Kenya, 2010, hereinafter referred to as the Constitution (2010). It identifies the particular Constitutional provisions that have a direct bearing on Kenya's treaty practice. It also examines the legislative framework relevant to Kenya's treaty practice.

Further, the chapter examines the behavior of the Executive, the Legislature and the Courts towards treaty practice. The Chapter also outlines the complexities that arise from the prevailing treaty practice in Kenya and their impact on Kenya's diplomacy and foreign policy.

Ojwang' and Franceschi in their journal article on Constitutional Regulation of Foreign Affairs Power in Kenya[181] advance the argument that treaty practice in Kenya should be regulated by the Constitution. Appreciating this position, Mwagiru[182], in his article on Kenya's treaty practice, observes that Kenya's treaty practice is now enshrined constitutionally.

The Constitutional provisions relevant to treaty practice are identified below as follows;

Article 2 (1) provides that the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government[183]. Sub Article (6) thereof provides that any treaty or convention that has been ratified by Kenya forms part of the law of Kenya.

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[181] Ojwang' J. and Franceschi L., Constitutional Regulation of the Foreign Affairs power in Kenya: A Comparative Assessment, *Journal of African Law,* Vol.46. No.1 (2002),pp.43-58, p.43.

[182] Mwagiru, M., From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice, *Journal of Language, Technology & Entrepreneurship in Africa* Vol. 3 No. 1, (2011) pp.144-155:144.

[183] The two levels of Government are identified under article 1(4) of the Constitution (2010) which states that 'The sovereign power of the people is exercised at the national level; and the county level.

Article 1(3) provides that sovereign power under the Constitution is delegated to; Parliament and the legislative assemblies in the county governments, the national executive and the executive structures in the county governments, and the Judiciary and independent tribunals.

Additionally, Article 6(2) states that 'the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and co-operation.

Article 94(1) provides that the legislative authority of Kenya at the national level is vested and exercised by Parliament. Sub Article 5 thereof provides that no person, or body other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by the Constitution or by legislation. Article 93 (1) provides that Parliament shall consist of the National Assembly and the Senate.

Article 95 (3) grants the National Assembly the powers to enact legislation. Where a Bill concerns counties, Article 96(2) requires that the Senate participates in the law making function by considering, debating and approving such Bills[184] in line with Article 1 (4) which defines the levels of government in Kenya

Article 95(5) provides that the National Assembly is empowered to review the conduct in office of the President, the Deputy President and other State officers and also to initiate the process of removing them from office. Sub section 6 of the same Article tasks the National Assembly with the responsibility to approve declarations of war and extensions of states of emergency.

[184] Also see articles 109-113 of the Constitution (2010) on the details of the Senate's participation in the law making function.

Article 152 obligates Parliament to vet presidential nominees for the positions of cabinet secretaries, including Cabinet Secretary responsible for Foreign Affairs whose office is provided for under Article 240(2). It also gives Parliament the power to sack the same secretaries for among other reasons, committing a crime under municipal or international law.

The Fifth Schedule of the Constitution (2010) which outlines the various legislations to be enacted by Parliament is silent on whether any legislation is required to expound on Article 2(6) of the Constitution (2010). However, there are several Articles in the Constitution (2010) particularly concerning International Human Rights Instruments which require legislation to be enacted as follows;

Article 21(4) requires the state to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms. Further, Article 51 (3) (*b*) requires Parliament to enact legislation that takes into account the relevant international human rights instruments.

The National Executive of the Republic of Kenya is defined by the Constitution (2010) as comprising the President, the Deputy President and the rest of the Cabinet[185]. The Constitution (2010) also provides that the President exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries[186].

Article 111 grants the President 'the power to appoint a person to hold or act in the office of Ambassador, High Commissioner or other principle representative of Kenya in the country and to remove them from office.

[185] *Op cit*, the Constitution (2010), article 130(1).

[186] *Op cit*, the Constitution (2010), article 131(1)(b).

Article 132 provides that the President shall once every year submit a report for debate to the National Assembly on the progress made in fulfilling the international obligations of the Republic.

Article 240 establishes a National Security Council [187] with the power to integrate domestic, foreign and military policies relating to national security[188]. The Council may with approval of Parliament also approve the deployment of foreign forces in Kenya[189].

Article 119(1) of the Constitution (2010) gives every citizen the right to petition Parliament to consider any matters within its authority including enacting, amending or repealing any legislation.

Pursuant to Article 2(6) of the Constitution (2010), the Treaty Making and Ratification Act, 2012[190], herein after referred to as the Act, was enacted 'to provide the procedure for the making and ratification of treaties and other related purposes'[191]. Some of the provisions in the Act which are directly relevant to treaty practice are as follows;

Section 2(1) defines "treaty" as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in

[187] The composition of the National Security Council is provided under Article 240 (2) which states that 'The Council consists of the; President; Deputy President; Cabinet Secretary responsible for defence; Cabinet Secretary responsible for foreign affairs; Cabinet Secretary responsible for internal security; Attorney-General; Chief of Kenya Defence Forces and Director-General of the National Intelligence Service; and has further provided various powers of the Council'.

[188] *Op cit*, the Constitution (2010) article 240(6).

[189] *Ibid*, the Constitution (2010) article 240(8).

[190] Treaty Making and Ratification Act, No. 45 of 2012

[191] The objective of the Act as provided in the Preamble of the Act.

two or more related instruments and whatever its particular designation and includes a convention'. This provision is a direct import from the Vienna Convention on the Law of Treaties (VCLT)[192]. Section 3 limits the application of the Act to treaties which are concluded by Kenya after its commencement.

Section 4 imposes the general responsibility for treaty negotiation on the Executive. Section 5 provides that the national executive or the relevant State department shall initiate the treaty making process[193].

On ratification of treaties, the Act[194] requires approval by both the Cabinet and Parliament. Section 7 provides that where the Government intends to ratify a treaty, the Cabinet Secretary of the relevant State department shall, in consultation with the Attorney-General, submit to the Cabinet the treaty, together with a memorandum outlining the objects and subject matter of the treaty including the summary of the process leading to the adoption of the treaty and the date of signature to the treaty.

Section 8 provides that where the cabinet approves the ratification of a treaty, 'the Cabinet Secretary shall submit the treaty and a memorandum on the treaty to the speaker of the National Assembly'. Sub section 2 thereof provides that once a treaty is approved under Section 8 then it shall, depending on the subject matter of that treaty, be considered by both or the relevant house of Parliament. Sub section 4 thereof provides for approval by Parliament of the ratification of a treaty with or without reservations to specific provisions of the treaty. Section 4

[192] Vienna Convention on the Law of Treaties (1969), Article 2, 1(a),

[193] The relevant state department is defined at Section 2 of the Act as 'the State department responsible for the subject matter of the treaty to be approved for ratification'.

[194] *Op cit,* the Act, sections 8, and 12.

(6) provides that where one House approves the ratification of a treaty and the other House refuses to approve the ratification of the treaty, the treaty shall be referred to the Mediation Committee[195].

Should both Houses of Parliament refuse to approve the ratification of a treaty, Section 8(7) provides that the Speakers of the two Houses shall submit their decision to the relevant Cabinet Secretary within 14 days of the decision. Section 8 (8) allows for the resubmission of a treaty to the National Assembly and where applicable the Senate, where approval for the ratification of the treaty had been initially refused.

Section 9 provides that where Parliament refuses to approve the ratification of a treaty the Government shall not ratify the treaty. At the same time, Section 12 provides that, no treaty shall be ratified on behalf of the Government of Kenya unless it has been considered and approved by the Cabinet and Parliament in accordance with the Act.

Section 11 provides that the Cabinet Secretary may grant full powers to such persons as may be appropriate for the purposes of ratification of any treaty in accordance with the Act.

Section 10 provides that 'all instruments of ratification of a Treaty shall be signed, sealed and deposited by the Cabinet Secretary at the requisite international body and a copy thereof shall be filed with the Registrar of Treaties' established to serve as the depository of all treaties to which Kenya is a party[196]. The Registry should have a record of all treaties; contain the status of all the treaties pending ratification or domestication as well as the timelines for such

[195] *Op cit,* the Act, section 8 (6). (Article 112 of the Constitution (2010) also provides the same procedure with regards to ordinary Bills concerning county governments. On this, the role of the Mediation Committee is set out under Article 113.)

[196] *Op cit,*the Act, section 13 (2)

ratification or domestication[197]. Further, Section 14(4) (c) provides that the Registrar shall inform lead State departments to observe and uphold the obligations of their respective departments.

Regarding implementation of treaties, Section 15 provides that the Cabinet Secretary shall cause to be laid before the National Assembly, at least once every financial year, a report containing records of all treaties which Kenya has ratified and which may in any way bind Kenya to specific actions.

Where Kenya wishes to withdraw from a treaty, Section 17 provides that the relevant Cabinet Secretary shall prepare a cabinet memorandum indicating the reasons for such an intention.

As per the Vienna Convention[198], states are obligated to abide by their international obligations. Kenya grappled with this issue when the President of Sudan herein after referred to as 'Al Bashir' who has warrants of arrest issued against him under the Rome Statute attended the promulgation of the Constitution (2010)[199] ceremony in August, 2010. The fact that the

[197] *Ibid*,the Act, section 13 (2)

[198] *Op cit,* VCLT, articles 27 and 46.

[199] Kenya is a party to The Rome Statute which establishes the International Criminal Court [ICC], which prosecutes and judges, particular categories of offences provided under Article 5 thereof being 'crimes of genocide, crimes against humanity, war crimes, and crime of aggression'. This was domesticated in Kenya through International Crimes Act [2008], which came into force on 1st January, 2009. The objective of the Act as set out in its preamble is "…to make provisions for the punishment of certain International Crimes, namely, genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court [ICC] established by the Rome Statute in the performance of its functions".

government did not arrest him caused concern to some sectors of the Kenyan society. A second planned visit of Al Bashir to Kenya later that year occasioned the filing in court of a case by Civil Society Organizations[200] pursuant to the Rome Statute in which they sought and obtained orders of his arrest if he visited Kenya.

In an interview with a senior officer[201] at the Ministry of Foreign Affairs it emerged that the government has drafted a Bill on Foreign Service and Diplomatic Representation[202], which would supplement the Treaty Making and Ratification Act, and give more life to Article 2(6) of the Constitution (2010).

According to the said officer the draft Bill provides that Kenya shall establish Diplomatic and Consular relations in accordance with '…Treaties and Conventions establishing international Organizations. The draft further provides that '...The functions of the Foreign and Diplomatic Service shall include: Coordinating Kenya's participation in Negotiation and conclusion of International Treaties, Conventions and agreements; Ratification and Accession on behalf of the Government to International Treaties, Conventions and Agreements; Depository and Custodian of all Treaties, Conventions and Agreements to which Kenya is a state party…'

Article 12(1) of the Rome Statute provides that, 'A state which becomes a party to this statute thereby accepts the jurisdiction of the Court with respect to the Crimes referred to in Article 5"

[200] Kenya Section of The International Commission of Jurists v Attorney General & Another [2011] eKLR

[201] The identity of the government officer has been withheld on account of a confidentiality agreement entered between the author and the interviewee.

[202] Proposed Foreign Service and Diplomatic Representation Act.

Shelton, in her book discussing developments in international law and their relationship to national legal systems[203] observes that, 'the courts of most states have adopted a presumption that domestic law is intended to conform to international law'. This would appear to have been the view of the court in the Zipporah Wambui Mathara case[204], hereinafter referred to as 'the Zipporah case' where the court was faced with a situation where the Civil Procedure Act (CPA)[205] conflicted with the provisions of the International Covenant on Civil and Political Rights (ICCPR)[206], hereinafter referred to as 'the Convention' which Kenya ratified under the Independence Constitution but which was not domesticated by way of legislation. The case involved a judgment debtor who was incarcerated in Prison where she was committed to serve a jail term due to her failure to satisfy the decretal sum.

While the said Civil Procedure Act makes the provisions for recovery of debt through committal of the judgment debtor to civil jail, Article 11 of the Convention[207] provides that 'No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.' Justice Koome, in allowing the application against committal to civil jail, asserted that 'by virtue of the provisions of Section 2(6) of the Constitution (2010), International Treaties and Conventions that Kenya has ratified are imported as part of the sources of the Kenyan Law, even if the same had not been previously domesticated.

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[203] Shelton D., International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion, (USA: Oxford University Press, 2011)., p.18

[204] In Re The Matter of Zipporah Wambui Mathara [2010] eKLR

[205] The Civil Procedure Act, Chapter 21 Laws of Kenya.

[206] International Covenant on Civil and Political Rights, ratified by Kenya on 1st May 1972,

[207] *Op cit,* CPA, Section 38(c)

Mwagiru [208]advances that the Constitutional provisions on the relationship between international law and municipal law are seemingly intended to clarify any grey areas on Kenya's treaty practice that may have existed previously.

Franceschi[209], arguing on the import of Article 2 (6) of the Constitution (2010) prior to the enactment of the Act comments as follows;

> The Constitution (2010) provides a monist system with no clear instructions on signature and ratification. It neglected to define the power to ratify which is a grave omission for a monist Constitution. And once this abeyance is in place, the gap must be filled through the principle of executive residual functions.

Fraceschi[210] interprets Article 2 of the Constitution (2010) in line with the High Court's decision in the Zipporah case[211], to mean that 'Treaties are part of the law of Kenya under the Constitution, not above and not with the Constitution but may be above domestic laws in Kenya'.

Shelton[212] observes that 'the processes required to obtain domestic application of treaties is an internal legal matter to be determined by the individual states'. He further observes that 'such provisions seem to support a dualist notion in respect to the relationship between international

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[208] *Op cit,* Mwagiru, From Dualism to Monism, p.146.

[209] *Op cit,*Franceschi G., Constitutional Regulation of International Law in Kenya, *cited in* Lumumba P., Mbondenyi M. & Odero S., *The Constitution of Kenya: Contemporary Readings International Law,* (LawAfrica Publishing (K) Ltd, 2011) p. 281

[210] *Op cit,* Franceschi, p. 281

[211] *Ibid,* Franceschi, p. 281

[212] *Op cit,* Shelton, p.3

and domestic law'[213]. Franceschi [214] appears to appreciate this argument when he compares the Constitution (2010) to the Harmonized Draft[215] herein after referred to as the Draft, and observes that the Draft[216] provided a clear mechanism for the approval and signing of treaties. He also notes that the draft clearly established the need for parliamentary intervention before enforcement.

He contrasts this with the Constitution (2010)[217] which merely states that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution', and concludes that 'Kenya is a monist system with no clear provisions on signature and ratification'[218].

He proceeds to argue that the failure to define the power to ratify Treaties in the Constitution was a serious omission for a monist Constitution, which in his view is the Kenyan system. He[219] further observes that as long as the power to ratify treaties is not provided for, the gap would be filled through the exercise of discretionary executive powers[220]. The import of this, he argues, is

[213] *Ibid,* Shelton, p.3

[214] *Op cit,* Franceschi, Constitutional Regulation of International Law in Kenya (2011), p. 280

[215] The draft was published on 17th November, 2009 by the Committee of Experts on Constitutional Review.

[216] *Ibid,* the Draft, article 81(4)

[217] *Op cit,* the Constitution (2010) article 2(6)

[218] *Op cit,* Franceschi, Constitutional Regulation of International Law in Kenya (2011), p. 280

[219] *Ibid,* Franceschi (2011), p. 280

[220] *Ibid,* Franceschi (2011), p. 280

that by having the President ratify treaties discretionary, he would be legislating with no checks and balances[221].

Takele Bulto in his journal article on the dualism-monism divide[222], observes that 'the monist doctrine does not recognize the distinction between the domestic and the international, and, does not allow room for contradiction between the two sets of rules'. He further states that 'the dualist doctrine represents a contrasting approach and starts from the assumption that the national and international legal systems regulate entirely different and parallel subject matters and have no room for conflict'[223].

While Makumi has argued that the Constitutional position[224] which makes international treaties that Kenya has ratified part of the laws of Kenya[225] as having completely transformed Kenya from a monist to a dualist state[226], Franceschi [227] observes a Constitutional grey area. He notes that Articles 21(4) and 51(3) of the Constitution (2010) require legislation to bring certain treaties to effect.

Article 21(4) requires the state to 'enact and implement legislation for the fulfillment of its international obligations and Parliament in its legislative role to take into account international obligations in respect of human rights', a direct contradiction of a monist system

[221] *Op cit,* Franceschi, Constitutional Regulation of International Law in Kenya, p. 280

[222] Bulto T., The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia' 23 *Journal Ethiopian Law,* No.1 pp.132-135:135

[223]*Ibid,* Bulto,135

[224] *Op cit,* the Constitution (2010), article 2(6)

[225] *Op cit,* Mwagiru, From Dualism to Monism, p. 144

[226] *Ibid,* Mwagiru, From Dualism to Monism, p. 144

[227]*Op cit,* Franceschi, Constitutional Regulation of International Law in Kenya (2011), p.277

which does not require legislation to be made with respect to ratified treaties[228], as opposed to Article 51(3) which requires Parliament to enact legislation that takes into account the relevant international human rights instruments , which provision Franceschi argues supports a monist system.

[228] *Op cit,* Franceschi, Constitutional Regulation of International Law in Kenya (2011), p.277

CHAPTER FOUR

AN EXAMINATION OF THE INTRICACIES OF KENYA'S TREATY PRACTICE AND THEIR IMPACT ON KENYA'S DIPLOMACY AND FOREIGN POLICY

The chapter outlines intricacies of Kenya's treaty practice, which have been examined under the preceding chapters. It also examines the impact of these intricacies on Kenya's diplomacy and foreign policy. To better understand the nature of those intricacies, the chapter also utilizes some treaty practice experiences of the United States of America hereinafter referred to as 'United States'.

The relevance of identifying the treaty practice of a country has been discussed in the preceding chapters. The relationship between international law and the municipal law of a country underpins a country's treaty practice and has an impact on that country's diplomacy and foreign policy.

Kenya's treaty's practice as outlaid in the Constitution of Kenya, 2010, hereinafter referred to as the Constitution (2010) has attracted different interpretations. In attempting to understand Kenya's treaty practice, some writers and notably Makumi[229] have taken a monist approach. Makumi argues that Article 2 (6) of the Constitution (2010) makes Kenya a monist state[230]. On the other hand, others such as Franceschi[231]have taken a mixed approach. They have argued that

[229] Mwagiru, M., From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice, *Journal of Language, Technology & Entrepreneurship in Africa* Vol. 3 No. 1, (2011) pp.144-155: p. 144

[230] *Op cit,* Mwagiru, p.144.

[231]Franceschi L., Constitutional Regulation of the Foreign Affairs power in Kenya: A Comparative Assessment, *cited in* Lumumba P., Mbondenyi M. & Odero S., *The Constitution of Kenya: Contemporary Readings International Law,* (LawAfrica Publishing (K) Ltd, 2011) p.277

the Constitutional provisions affecting treaty practice have led to a grey area, in that, it is not clear which between municipal law and the treaties that Kenya has ratified ranks higher than the other[232].

Franceschi has concluded that the Constitution (2010) provides a monist system with no clear instructions on signature and ratification. He has also cited Articles 21(4) and 51(3) of the Constitution (2010) and argued that they contradict the monist implication of Article 2 (6).

The requirement by Article 21(4) of the Constitution (2010) for the enactment and implementation of legislation in order to fulfill international obligations in respect of human rights as well as the requirement by 51(3) (b) for Parliament to enact legislation that takes into account the relevant international human rights instruments, as Franceschi argues, are a direct contradiction of a monist system which does not require legislation to be made with respect to ratified treaties[233].These provisions if anything, support a dualist system.

Further, as Ojwang' and Franceschi[234] have observed, it is important to have the Constitution regulate the treaty practice of a country. The situation in the United States best captures this argument. Out of a total of seven Articles which constitute the United States Constitution four relate to treaties. This underlines the importance that the United States gives to its treaty practice. In addition, the United States Constitution[235] lays out the role of each state organ with regard to treaty practice.

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[232] *Op cit,* Franceschi (2011), p. 277

[233] *Op cit,* Franceschi, Constitutional Regulation of International Law in Kenya, p.277

[234] Ojwang' J. and Franceschi L., Constitutional Regulation of the Foreign Affairs power in Kenya: A Comparative Assessment, *Journal of African Law,* Vol. 46 No.1 (2002), pp.43-58, p.43

[235] Constitution of the United States of America, article 1.

Treaties impact directly on a country's diplomacy and foreign policy[236]. Kenya is no exception as the Al Bashir Case[237] demonstrates. The court, in adopting a monist approach on the interpretation of the Constitution made a declaration that Kenya was under an obligation to arrest Al Bashir pursuant to its obligations under the Rome Statute, if he visited Kenya [238]. This was in direct conflict with the Government's foreign policy on Sudan which was appears to have been informed by an African Union Resolution that called on Member states not to cooperate with the International Criminal Court on the matter[239].

Contrary to that approach by the Kenyan Judiciary, courts in the United States normally decline to decide disputes between the legislature and the President when a matter relates to the treaty-making power mainly on the basis of the principle of non-justiciability[240]. This approach ensures that the government does not suffer paralysis in its diplomacy and foreign policy.

The distribution of functions among state organs on matters concerning treaties can impact the diplomacy and foreign policy of a country either positively or negatively. For instance under

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[236] Makumi, M., *Diplomacy Documents, Methods and practice*, (Kenya: Institute of Diplomacy and International Studies, 2004) pp.106.

[237] Kenya Section of the International Commission of Jurists-vs- Attorney General & Another [2011]eKLR

[238] *Ibid*, Al Bashir case.

[239] Doc. Assembly/AU/13(xiii), Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court adopted by the Thirteenth Ordinary Session of the Assembly in Sirte Libya, on 3 July 2009.

[240] *Dole v. Carter*, 444 F. Supp. 1065 (D. Kan. 1977), *motion for injunction pending appeal denied*, 569 F.2d 1109 (10th Cir. 1977).

the Treaty Making and Ratification Act[241], hereinafter referred to as the Act, the Kenyan Executive has the responsibility of treaty making[242].

However, Parliament can also, under the Act[243], refuse to approve the ratification of a treaty in which case the government should not ratify the treaty[244]. The implication of those provisions is that the government can conceivably have its diplomacy and foreign policy paralyzed where Parliament adopts an attitude that is not in harmony with the government's policy on treaties.

Further, given that Kenya is a multiparty democracy[245] where parties compete in Parliament, a government without adequate support in Parliament can face the danger of its diplomacy and foreign policy hanging in the balance. Because of such inconveniences, the United States whose Constitution[246] requires that treaties must have the approval of two thirds of the Senate before a treaty can be ratified, has developed a practice of involving senators in the negotiations of treaties[247]. This is designed to avoid a protracted treaty making process or failure to obtain Senatorial approval[248]. Such a scenario if replicated in Kenya would see the involvement of legislators in negotiations of treaties.

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[241] The Treaty Making and Ratification Act, Act No. 45 of 2012, Section 4(1).

[242] *Ibid,* the Act, section 4(1)

[243] *Ibid,*the Act,section 9

[244] *Ibid,* Section 12

[245] The Constitution (2010), article 4 (2)

[246] *Op cit,* the United States Constitution, article I(2).

[247] Lowe, V., *International Law,* (U.K.: Oxford University Press, 2007), p. 67

[248] Berridge, G. R., *Diplomacy: Theory and Practice,* (New York: Palgrave Macmillan, 2010), p.75.

Berridge[249], in acknowledging the possibility of paralysis in the treaty making process, states that, because of the inconveniences that come with negotiating treaties and ultimately obtaining the consent of the Senate, the executive in the United States is encouraged to resort to the making of informal agreements. The Act[250] creates such a window in the Kenyan case where it provides that certain bilateral agreements are not subject to the application of the provisions of the Act with regard to treaties. This affords the government latitude to conclude certain agreements without necessarily seeking Parliamentary approval.

Another intricacy of treaty practice as observed by Ojwang' and Franchesci[251] is failure by a country to comply with its international obligations arising from a failure to keep treaty records. They further observe that as of the year 2002, Kenya had concluded more than 430 bilateral and multi-lateral agreements. There was however, no office with a harmonized record where all treaties concluded were kept. They rightly point out, that this situation limited the scope for compliance and implementation and affected the credibility of Kenya internationally.

In the context of the Constitution (2010), the Act[252] provides that where the Government intends to ratify a treaty, the Cabinet Secretary of the relevant State department shall, in consultation with the Attorney-General, submit to the Cabinet the treaty, together with a memorandum outlining the objects and subject matter of the treaty including the summary of the process leading to the adoption of the treaty and the date of signature to the treaty. It is

[249] *Ibid*, Berridge, p.75.

[250] *Op cit,* the Act, section 3 (4)

[251] *Op cit,*Ojwang' & Franceschi , Foreign Affairs Power in Kenya (2002), p.56-57

[252] *Op cit,* the Act, section 7

comprehensible that a cabinet secretary who is not well versed in the foreign policy of the government could come up with a treaty that is not in line with such foreign policy.

The Act[253] addresses Ojwang' and Franchesci's concern regarding a centralized system of records [254] by requiring that all instruments of ratification of a treaty are required to be deposited by the Cabinet Secretary at the requisite international body and a copy thereof is to be filed with the Registrar of Treaties' established to serve as the depository of all treaties to which Kenya is a party[255].

The Registry should have a record of all treaties; contain the status of all the treaties pending ratification or domestication as well as the timelines for such ratification or domestication[256]. The Act[257] further provides that the Registrar shall inform lead State departments to observe and uphold the obligations of their respective departments.

From the above, it can be argued that treaty practice is not a straight forward process that can easily be defined merely on the basis of a country's legal framework. The workings of a country's treaty practice is the sum total of various factors; the legal framework encompassing the relationship between international law and the municipal law of a country, the interplay between the various organs of government and the politics of the day.

[253] *Ibid,* the Act, section 10

[254] *Op cit,* Ojwang' & Franceschi , Foreign Affairs Power in Kenya (2002), p.56-57

[255] *Op cit,* the Act, section 13 (2)

[256] *Ibid,* the Act, section 13 (2)

[257] *Ibid,* the Act, section 14(4) (c)

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

In the research objectives, the study set out to determine the nature of treaty practice provided under Article 2 (6) of the Constitution of Kenya, 2010, hereinafter referred to as the Constitution (2010), the policy situation on Kenya's treaty practice before and after August, 2010, the intricacies of treaty practice in Kenya and their impact on Kenya's diplomacy and foreign policy. The study also set out to determine what challenges are likely to be experienced in Kenya's treaty practice and to propose possible solutions.

This chapter summarizes the findings of the study and against those findings it tests the hypotheses of the study and draws conclusions. Finally, the study proposes recommendations on what can be done to streamline Kenya's treaty practice. Such recommendations if adopted would be expected to harmonize Kenya's treaty practice with its diplomacy and foreign policy.

As Mwagiru[258] has observed all states have a treaty practice and while some states may have an ad hoc one, others have structured it in their Constitutions. The independence Constitution did not contain any express provisions on treaty practice.

Conversely Article 2(6) of the Constitution (2010) provides that all treaties ratified in Kenya are deemed to form part of the laws of Kenya. This provision implies a monist treaty practice. Articles 21(4) and Article 51 (3) (*b*) of the Constitution (2010) however contradict Article 2(6) because they require the enactment of legislation to give effect to particular international instruments. This negates the apparent monist system implied by Article 2(6) because a monist

[258] Mwagiru, M., From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice, *Journal of Language, Technology & Entrepreneurship in Africa* Vol. 3 No. 1, (2011) pp.144-155: p. 145

system does not require legislation to be made with respect to ratified treaties[259]. The Constitution (2010) therefore does not prescribe a coherent structure on treaty practice. In agreeing with this position, Franceschi[260] adds that the Constitution (2010) provides no clear instructions on signature and ratification.

The policies of the government can be deduced from observations of the behavior and actions of its leaders. As discussed in chapter two, policies can change depending on the prevailing circumstances as well as change in the leadership. The intricacies of treaty practice in Kenya, under both the independence Constitution and the Constitution (2010) have been highlighted through an examination of the interplay between and among the various organs of government.

The study agrees with Ojwang and Franceschi[261], in their observation that there was a domination of treaty practice processes by the executive under the independence Constitution. The study also agrees with their proposal for the Constitutional Review Commission[262] to consider setting out in the Constitution clear procedures regarding the foreign affairs power[263]. The Constitution (2010) however does not provide such guidelines.

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[259] Franceschi G., Constitutional Regulation of International Law in Kenya, *Lumumba P., Mbondenyi M. & Odero S., The Constitution of Kenya: Contemporary Readings International Law*, (LawAfrica Publishing (K) Ltd, 2011) pp. 233-286 : 281

[260] *Ibid,*Franceschi (2011) , p. 281

[261] Ojwang' J. and Franceschi L., Constitutional Regulation of the Foreign Affairs power in Kenya: A Comparative Assessment, *Journal of African Law,* Vol.46. No.1 (2002),pp.43-58, p.44.

[262] *Ibid,* Ojwang and Franceschi (2002), p.44

[263] *Op cit,* Ojwang and Franceschi (2002), p.58.

The study agrees with Mwagiru's[264] argument, that a separate statute on Kenya's treaty practice would help to harmonize treaty practice and all its various elements is in line with the findings of this study. As he notes[265] the executive arm of government negotiates treaties, the legislative arm debates about them and decides whether they should be ratified or not while the courts interpret them in their judicial function[266].

The Treaty Making and Ratification Act[267], hereinafter referred as the Act which provides the procedure for making and ratifying treaties by outlaying the roles of the executive and the legislature on treaty making and ratification, partly addresses the need for laying out a procedure for treaty practice. The proposed Bill on Foreign Service and Diplomatic Representation, if eventually passed, will supplement the Treaty Making and Ratification Act and better define Kenya's treaty practice.

The study finds that treaty practice under the independence Constitution was characterized by inconsistencies as illustrated by the conflicting judicial decisions in Rose Moraa[268] and Rono[269]. The study agrees with Mwagiru[270] in concluding that the anomalies and inconsistencies were because of the ad hoc nature of treaty practice under the independence Constitution.

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[264] *Op cit,* Mwagiru, p.154.

[265] *Op cit,* Mwagiru, p. 154

[266] *Ibid,* Mwagiru, p.154.

[267] The Treaty Making and Ratification Act, No. 45 of 2012

[268] Rose Moraa & Another-vs- Attorney General [2006]eKLR

[269] Rono v. Rono & another, [2008] KLR

[270] *Op cit,*Mwagiru, p. 154

Under the Constitution (2010) the Al Bashir case[271] highlights another intricacy of treaty practice by demonstrating the conflicting interests that can arise among different arms of government. The decision in this case highlighted the conflicting positions adopted by the judiciary and the executive thereby exposing Kenya's lack of a coherent policy framework on treaty practice.

While the study agrees with Mwagiru's[272] general observation that the adoption of a monist treaty practice would sharpen the separation of powers by making the roles of each of the three arms of government better defined, it departs from the position of those authors including Mwagiru[273] who have argued that the Constitution (2010) has marked a shift from dualism to monism[274].

The study concurs with Shelton[275] that it is almost impossible to find a system that is entirely either dualist or monist. This is informed, as Shelton[276] argues, by the fact that the 'division between the two systems covers a wide range of possibilities in theory and in practice'[277]. Accordingly the study concludes that Kenya's treaty practice contains both monist

[271] Kenya Section of the International Commission of Jurists-vs- Attorney General & Another [2011]eKLR

[272] *Op cit,* Mwagiru, p. 154.

[273] *Ibid,* Mwagiru, p.144.

[274] *Op cit,* Mwagiru, , p.144

[275] Shelton D., International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion, (USA: Oxford University Press, 2011), p.2

[276] *Ibid,* Shelton, p.2

[277] *Ibid,* Shelton, p.2

and dualist tendencies and is therefore a hybrid of the two. Kenya's treaty practice cannot therefore be classified as either monist or dualist.

To address the issue of conflicting judicial decisions on the interpretation of treaties as well as conflict among the various arms of government on their respective roles in treaty practice, this study recommends that it is important to ensure that the country's foreign policy is understood by the various organs of government. This would ensure the government is not exposed as lacking an official foreign policy position. The study observes that this is among the reasons that courts in the United States do not normally interfere with the executive's treaty making power.

This study finally recommends that the processes of treaty practice in Kenya be further coordinated with a view to ensuring that intricacies of treaty practice, do not negatively impact Kenya's diplomacy and foreign policy. In that regard the proposed Bill should be harmonized with the Act so that the various arms of government work in harmony when it comes to implementing Kenya's foreign policy.

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