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A Comparative Study of State of Emergencies: Case Study Kenya and Ethiopia

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DECLARATION

I, **Daniel Kanyinke Ole Keiwua**, do hereby declare that this is my original work and has not been submitted to any other University or Institution for any award. I hereby now submit the same for the award of Master of Law Degree of University of Nairobi.

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This thesis has been submitted for examination for the award of Master of Law Degree, for which the candidate was registered with my approval as the University of Nairobi Supervisor,

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ERIC OGWANG

Dated……..

ACKNOWLEDGEMENT

This work is a direct result of the efforts of a number of individuals without whom it would remain an unfulfilled ambition.

Due to limitation of space, I may not expressly mention every contributor!

My supervisor, Mr. Eric Ogwang for your guidance throughout this study is responsible for the shape and colour of this work.

Thank you so much and may you live long to guide others.

DEDICATION

To Almighty God, my wife Mercy Resiato, and my two daughters Nenkai Kanyinke and Seleya Kanyinke for supporting me during the time of preparation.

LIST OF CASES

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2. *Joseph Maina Mbacha and Others v. Attorney General,* High Court Miscellaneous Application No. 356 of 1989
3. *Lawless v. Ireland*, 3 ECHR (ser. A) (1961(No.3) (Court)
4. *Miruki v. Republic*. Civil Case No. 1159 of 1966 (Unreported)
5. *Mohamed Aktar Kana v. the Attorney General,* Constitutional Application No. 544 of 2010
6. *Ndiki Mutua v. Foreign Commonwealth Office* (FCO), High Court (Queen's Bench Division) Judgment, Case No: HQ09X02666: [2012] EWHC 2678 (QB)
7. *Ooko v. Republic.* Miscellaneous Criminal Application No. 540 of 1986, High Court Nairobi (Unreported)
8. *Raila Odinga v. Republic,* Miscellaneous Criminal Application No. 374 of 1988, High Court Nairobi (Unreported)
9. *Ram Krisham v. Delhi* (1953) A.I.R. 315, 329
10. *Republic of Kenya v. The Commissioner of Prisons ex parte Kamonji Kangari and Others*. Miscellaneous Civil Cause No. 60 of 1984 (High Court, Nairobi) (Unreported)
11. *Soering v. United Kingdom A.* 161 (1989); 11EHRR 439

LIST OF TREATIES (COVENANTS)

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2. Additional Protocol to International Covenant on Civil and Political Rights
3. American Convention on Human Rights
4. Convention for the Protection of Human Rights and Fundamental Freedom
5. International Covenant on Civil and Political Rights
6. International Covenant on Economic, Social and Cultural Rights
7. Siracusa Principles
8. Universal Declaration of Human Rights

LIST OF STATUTES

1. Chief's Authority Act (Cap 128 of the Laws of Kenya)
2. Constitution of Kenya 1992 (Revised)
3. Constitution of Kenya 2010
4. Constitution of Kenya Amendment Act No. 14 of 1965
5. Criminal Procedure Code (Cap 75 of the Laws of Kenya)
6. Kenya National Commission on Human Rights (KNCHR) Act, Act No. 9 of 2002
7. Penal Code (Cap 63 of the Laws of Kenya)
8. Preservation of Public Security Act (Chapter 57 of the Laws of Kenya)
9. Public Order Act (Cap 56 of the Laws of Kenya)
10. Public Security (Detained and Restricted Persons) Regulations Legal Notice No. 234 of 1978
11. Public Security (Detained and Restricted) Rules 1978, Legal Notice No. 235 of 1978

LIST OF ABBREVIATIONS

ACHPR African Charter on Human and People's Rights

ACHR American Convention on Human Rights

AG Attorney General

AU African Union

ECHR European Court of Human Rights

FAO Food and Agricultural Organization

FCO Foreign Commonwealth Office

HRC Human Rights Committee

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

IHRL International Human Rights Law

ILO International Labour Organization

KNCHR Kenya National Commission on Human Rights

KPU Kenya People's Union

LSK Law Society of Kenya

NGO Non Governmental Organizations

OAU Organization of African Union

UDHR Universal Declaration of Human Rights

UN United Nations

WHO World Health Organization

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A COMPARATIVE STUDY OF STATE OF EMERGENCIES: CASE STUDY KENYA AND ETHIOPIA

Chapter 1

1.1 Introduction

The guard on the watchtower blew his whistle, and the *askaris*, who we called *rioti* [riot squad], were set up on us all. They were using their hoe handle clubs, clubbing us indiscriminately. Some of the detainees died from the beatings before we were all told to come out of our compound naked, holding our clothing and blankets in our hands. This was not done peacefully, because the askaris were inside the compound, beating us and as we hurried out, there were others waiting for us, beating us some more. We rushed to squat in fives with our clothing beside us. Those who did not move quickly enough were set up on by the askaris and beaten. Then we would be ordered to take away our clothes in a heap, again if you were not fast enough, you were beaten. Then we were ordered to go and retrieve our things. The askaris would set on us as we rushed to take our clothes and blankets, without any regard to where they hit us...It was total mayhem, and the white man in charge just stood there screaming, '*Piga Piga sana'* [hit them, hit them more].[1]

This is an eyewitness account of the atrocities committed during the state of emergency declared in Kenya at the commencement of the Mau Mau rebellion in 1952. The power to declare a state of emergency still exists under the current constitutional dispensation and is vested with the President,[2] when the "state is threatened by war, invasion, general insurrection,

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1 Karue Kibicho, Interview, Kirimukuyu, Mathira, Nyeri District, 8 February 1999, in Caroline Elkins, '*Britain's Gulag: The Brutal end of Empire in Kenya'* (Jonathan Cape: London, 2005) at 166.

2 Constitution of Kenya, article 58.

disorder, natural disasters or public emergencies."[3] A state of emergency is defined as consisting of a legal regime in which public institutions (the police and army) are vested with extra-ordinary powers (outside the law) to address existential threat (such as a revolt of foreign invasion) to public order.[4] A state of emergency may also be defined as a declaration by the government that leads to suspension of some functions of executive, legislative and judicial powers alerting the people to change the way they usually behave or instructs the government agencies to put into operation the emergency preparedness plans. During a state of emergency state parties are allowed to temporarily adjust their obligations under the accord in special situations. States of emergency have been declared when a country is in a real crisis such as threats of foreign military intervention, political or civil unrest, natural disasters, armed conflicts, criminal and/or terrorist violence.[5] Article 58 (1), provides that " A state of emergency may be declared only under Article 132 (4) (*d*) and only when—(*a*) the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (*b*) the declaration is necessary to meet the circumstances for which the emergency is declared." Existence of a public emergency is not the only criteria for measures of derogation; other standards must be met, for example the proportionality principle. Proportionality factors highlighted by the HRC include duration, severity and geographic scope. The legitimate obligation to slim the derogations in totality to those stringently obligatory to the essentials of the circumstances institutes that both the States parties and the Committee must undertake a careful study under every Covenant article based on an unbiased assessment of the definite situation at

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3 Ibid. article 58 (1).

4 Oraá Jaime, *Human Rights in States of Emergency in International Law* 1 (Clarendon Press: Oxford, 1992) at 6

5 Constitution of Kenya, article 58 (1).

hand. Its state parties for the decision to declare state of emergency must provide careful justification to ICCPR and the reasons for any particular actions founded on such a declaration. When a state of emergency is declared, the President is allowed to constitutionally limit[6] and derogate from certain international human rights obligations.[7] However, there are a list of rights, which are non-derogable, which varies according to the treaties even though all treaties exhibit; right to life, torture prohibition, slavery prohibition or inhuman treatment and retrospective punitive measures prohibition.

Ethiopia's election results of May 2005 were the basis of conflict when the governing Ethiopian People's Revolutionary Democratic Front (EPRDF) proclaimed that they had won even before the finalization of the results. The opposing United Ethiopian Democratic Forces (UEDF) and Coalition for Unity and Democracy (CUD) disputed results over assertions of ballot fraud and intimidation of voters. The investigations of National Electoral Board's were perceived to be unfair and the argument was that EPRDF received favoritism. Consequently, after election, supporters of the opposition launched demonstrations on June 2005 despite the government prohibition on public meetings. Death of about 50 people resulted from these demonstrations. Confrontations between security forces and CUD supporters instigated the beginning of occurrence of violent clashes on November 1st 2005 on the streets of Addis Ababa. These protests and the ones that followed were very lethal. US embassy on the third day reported that a large number of rioters and their wide spread throughout the capital seemed to have overwhelmed the security forces' capacity to control the riots. It followed that instead of

6 Constitution of Kenya, article 24.

7 International Covenant on Economic, Social and Cultural Rights (ICESCR). Adopted and opened for signature, ratification and accession by General Assembly, resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, article 4.

arresting the rioters, security forces used water cannons, tear gas and live ammunition to break up the rioters and quell the protests.

At international law, a state party may derogate from its obligations only when faced with a situation of exceptional and imminent danger that threatens the life of the nation.[8] In so doing, a state claims exemption from liability imposed by a human right treaty.[9] For the most part, it is claimed where a state needs to maintain law and order.[10] Human rights can only be derogated from in accordance with circumstances allowed under customary international law or treaty.[11]

Article 15 of ECHR states that;

> "In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation. This is to the extent that such measures are consistent with its other obligations under international law. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures that it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe

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8 Article, 15, ECHR; U.N. Economic and Social Council, status of the international covenants on human rights. Note verbale dated 24 August 1984 from the Permanent Representative of the Netherlands to the United Nations Office at Geneva addressed to the Secretary-General, para. 39.

9 Curties Francis Doebler, *International Human Rights Law: Cases and Materials* (Washington D.C.: VICD Publishers, 2004) at 287.

10 Ullah, Aman and Samee Uzair, 'Derogation of Human Rights under the Covenant and their Suspension during Emergencies and Civil Martial Law in India and Pakistan,' (2011) 26 *A Research Journal of South Asian Studies* 1 at 182.

11 Ibid.

when such measures have ceased to operate and the provisions of the Convention are again being fully executed."[12]

The non-derogable rights in this treaty are in line with the provision on fundamental rights and freedoms that may not be limited in the 2010 Kenyan constitution and therefore should be adopted as standard that Kenya should use.

1.2 Background to the Study

1.2.1 Control of emergency powers in the colonial period in Kenya

The origin of emergency powers can be traced to 1895 when Kenya was declared a British protectorate.[13] Throughout the colonial period, the commissioner and later the Governor was empowered to exercise extensive and essentially emergency powers, particularly of detention and deportation. The operation of these powers in colonial Kenya, except in 1914 (during 1st World War), 1939 (2nd World War) and 1952 was a major departure from the concept of emergency powers as understood by the international community.[14] It is illustrative to note that the Governor General needed an approval of 65% of Members of the House of Representatives or Senate to issue an emergency order[15] and this approval had to be given within a week. Even after either House had granted this approval, the order lapsed after every two months unless renewed by the people's representatives.[16]

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12 Article, 15, ECHR; U.N. Economic and Social Council, status of the international covenants on human rights. Note verbale dated 24 August 1984 from the Permanent Representative of the Netherlands to the United Nations Office at Geneva addressed to the Secretary-General, para. 39.

13 Kathurima Inoti, *Emergency Powers in Kenya: A Study of the Extra-Ordinary Executive Powers Vis-à-vis the International Covenant on Civil and Political Rights* (Unpublished LLM Thesis: University of Nairobi, 1989) at 154.

14 Ibid.

15 Ibid. at 69.

16 Inoti *supra* note 8.

The Chief Executive monopolised emergency powers without any form of control. The powers could be invoked at any time, not merely to save the colonial state. For a long time, the emergency powers were exercised against Africans exclusively. Those subjected to these powers were primarily nationalists who questioned discriminative and repressive colonial policies. Thus during the colonial days, there was a new role for emergency powers far removed from saving the life of a state. The role of emergency powers can therefore be seen as perpetuating and sustaining an unpopular order to a large part of the population. Evidently, emergency powers at this level cease being extra-ordinary powers assumed exercisable in times of crisis threatening the life of the nation and degenerate into a peacetime instrument of maintaining status quo, a role that can very well be performed by the normal penal law.

1.2.2 Emergency powers at independence in Kenya

The independence Constitution provided more control for emergency powers than the pre-colonial one and therefore derogation and limitation of rights by the executive.[17] Emergency powers at independence closely resembled the international standard. They were available only in crises under controlled conditions, by the extent of the derogations legally allowed and by the central given to them by legislature in exercising their mandate. This was primarily because the new leaders had been victims of arbitrary emergency powers after which they pledged to revoke and remove such powers.

At independence, the realisation of a vision of dignity and freedom was inconsistent with continued exercise of essentially repressive emergency powers outside of the rubric of crisis. This was assisted with the spirit of independence that not only marked a break with the

[17] See generally Roger Hughes, Emergency in Kenya: Kikuyu a and the Mau Mau Insurrection (Marine Corps Command and Staff College: Virginia, 1984) at 68.

tyrannical colonial past, but heralded a future of rule of law and enjoyment of human rights. This was consistent with restriction of powers to situations that threatened the life of a state, while ordinary situations could be handled by the penal code.

The rejection of emergency powers was also concretized at independence by a rejection of emergency powers as the cornerstone of sustaining government policy. This was equivalent to saying that government policies constituted those chosen and assented to by the people, thereby making it unnecessary to use emergency powers, as had been the practice in colonial Kenya.

1.2.3 Changes to emergency powers in post independence Kenya

Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the constitution has provided against improper exercise of the power must be jealously watched and enforced by the courts.[18]

After independence, within a period of 3 years, a drastic restructuring of the emergency powers inherited from independence was made. The initial justification was that it was essential for preserving the nation in times of danger for the state and conformed to constitution.[19] On the face of it, the executive could not have a freehand in exercising these powers and must submit to oversight by Parliament. Part of the changes made included deletion of the word "emergency" from the constitution and relevant legislation.[20] It was however not lost to the political leadership that the powers being granted were emergency powers meant for grave situations that threatened the life of the nation, the difference as explained by the Attorney General being only semantic.[21]

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18 Pantanjali Sastri, C.J. in *Ram Krisham v. Delhi* (1953) A.I.R. 315, 329.

19 Ibid.

20 Yash Pal Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya* (Oxford University Press: Nairobi, 1970) at chapter 1.

21 See generally, Richard D. Wolff, *Britain and Kenya*, 1870-1930 (Trans Africa: Nairobi, 1973) at chapter 3.

What the Government proposes in this Bill (the Preservation of Public Security Act) is that it should be able, like any other Government in a democratic society, to take the necessary measures to preserve the public security in any circumstances, subject always to the control of Parliament. This will be done for the preservation of public security. The word "emergency" is unnecessary and maybe misleading. Furthermore, it has for us the most distasteful association of memory. We prefer to talk of our security.[22]

The process of dismantling emergency powers inherited at independence was accomplished through the Constitution of Kenya Amendment Act No. 14 of 1965.

This amendment affected section 29 of the Constitution. The import of this amendment was to require a declaration of a state of emergency to be authorized by a resolution of the simple majority only. It therefore meant that even a simple majority could suffice for declaring a state of emergency. This marked the beginning of the trend of decontrolling emergency powers and making it easier for a state of emergency to be declared.

The amendment also affected the period in which authorized and unauthorized declarations of emergencies could be made. In comparative terms, whereas at independence the Governor General could declare a state of emergency without the consent of the House of Assembly (when Parliament was adjourned, prorogued or dissolved) but this was to last for only seven days, unless in the meantime the requisite approval was granted. When a declaration of emergency was dully sanctioned, it could run for a period of two months after which it automatically lapsed, unless in the meantime it was renewed by Parliament. Under this amendment, both periods were extended. Declaration of a state of emergency without

[22] Charles Njonjo, House of Representative Debates, Official Report, Volume IX, 2 June 1966.

parliamentary approval was extended from seven days to twenty one days while the period for sanctioned by parliament could run was increased from two to three months.

This Government took advantage of the existing insecurity created by the secessionist activities in North Eastern Kenya (Shifta menace) to pass the amendment. However, it was now clear that the Government had a free hand in exercising emergency powers before Parliament could scrutinize it. Whether the prevailing circumstances were sufficient to declare a state of emergency is seen in the words of the Attorney General,

There is no good reason why the authorization of a declaration of emergency by either House should require any special majority. The period of two months for which a state of emergency can last is too short. Unfortunately, some emergencies like that created by the shifta problem in North Eastern Region can last a long time.[23]

Although these measures were meant to contain the Shifta menace, these powers came to appear normal during peacetime beyond the original objective and treated that way by the administration and the residents of the region.[24]

1.2.4 State Of Emergency in Ethiopia

In Ethiopia national government can declare a state of emergency as well as the states government since Ethiopia is a federal state. The central government can affirm a state of emergency on conditions of a disaster caused by, invasion from outside, law and order breakdown that jeopardizes the constitutional order, an epidemic or a natural calamity. If an epidemic or natural calamity occurs that is statewide, the states can declare a state of emergency. Council of Ministers is conferred with the powers to declare a state of emergency on a national

[23] Ibid.

[24] Inoti *supra* note 23 at154

level subject to the House of People's Representatives' approval. States executive have the powers at the state level for the declaration of the state of emergency.

1.2.5 State Of Emergency in International Law

International human rights law has flourished from the time of Second World War. Over the years, people have known that human rights can be derogated from or limited under certain situations. Through the different creation of international law, standards have been developed to avoid abuse of human rights in states of emergency. Treaty law and customary international law, provisions set definite standards that should be adhered to in these circumstances. General ideologies of law acknowledged by "civilized" states as well contribute in the setting of standard applicable in states of emergency. Employment of emergency powers in times of crisis is a common occurrence world over. Violation of human rights occurs often in these critical circumstances when emergency powers are employed. This has resulted to rich jurisprudence by the diverse international bodies, which check, implement and uphold respect for human rights. All international law have made contribution of ensuring sensible set of standards are in place for use during states of emergency.

1.3 Statement of the Problem

Kenya's experience with a state of emergency is limited to the one that was declared in October 1952 during the Mau Mau rebellion. The declaration of a state of emergency was followed by a period of massive human rights violations namely detention without trial, torture, cruelty, loss of property, inhuman or degrading treatment or punishment and restriction of freedom of movement within concentration camps to mention but a few.

On the attainment of independence in 1963, the bulk of these abuses were resolved as the legal regime that allowed these abuses was outlawed with the independence Constitution. However, this was not to last, amendments to the independent Constitution rolled back the gains made in the protection of fundamental rights and freedoms by granting power to the executive to declare a state of emergency without regulation. This legal regime existed in Kenya until 2010 when a new Constitution was promulgated.

Kenya's current Constitution has an expanded Bill of Rights that envisages protection of fundamental rights and freedoms for all citizens. Article 58 of the Constitution allows for limitation of human rights in a state of emergency, but certain rights and freedoms cannot be derogable, these rights include "the right to a fair trial, the right to an order of *habeas corpus*, freedom from torture and cruel, inhuman or degrading treatment or punishment and freedom from slavery or servitude."[25] The 2010 constitution does not explicitly acknowledge Article 4(2) of the ICCPR non-derogable rights during state of emergencies. It only states that legislation enacted during a declaration of a state of emergency may limit a right or fundamental freedom in the Bill of Rights only to the extent that the limitation is strictly required by the emergency. In addition, the legislation is consistent with the Republic's obligations under international law applicable to a state of emergency. In addition, this law does not provide adequate notice regarding the actions that could result in imprisonment, and, second, the extent of criminal liability for offences committed during the state of emergency. This is because the vagueness of this provisions opens the door to arbitrary criminal prosecutions during declarations.

That notwithstanding, it is important to note that the law that prevailed and helped in the abuse of human rights (including non derogable rights) under a state of emergency are still

[25] Article 25, Constitution of Kenya 2010.

operational. No major changes have occurred on the procedure of operationalizing a state of emergency. For example the operative legislation remains the Preservation of Public Security Act (Chapter 57),[26] together with the Public Security (Armed forces) Regulations, 1966, Public Security (Armed forces) Order, 1966, Public Security (Control of movement) Regulations, 1967, Public Security (Meru) Regulations, 1967, Public Security (Detained and restricted persons) Regulations, 1978 and the Public Security (Detained and restricted persons) Rules, 1978. The gist of the legislation and regulations is that the President is not limited on the grounds for declaring a state of emergency.

This contrasts sharply with the position at international law (ICCPR), which sets limits as to when a state of emergency and how it should be employed are set. Kenya is a signatory to the said covenant and therefore has an obligation to abide by its provisions. Further impetus has been provided by Article 2 (5) and (6) which provides that: The general rules of international law shall form part of the law of Kenya and Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." The problem this creates is that if our domestic laws and practice do not comply with international law, they could be held to be in breach of its obligations. If a country breaches an international obligation, sanction may be imposed by other states. This may vary from criticism to economic sanction or military sanction. The offending state may also damage its reputation and other countries may decline to enter into future treaties or require larger concessions when making such treaties or lose trust in the power of current treaties.

[26] Revised Edition 2012 [1987 Edition].

1.4 Justification for the Study

There is a general dearth of information on how states can limit fundamental rights and freedoms during a state of emergency. This has two consequences: government agencies involved with maintaining law and order such as, the police and the executive are not sure of the parameters within which to interpret the scope of the limitations. Secondly, scholars, researchers and legal practitioners are hard pressed to find locally available literature when they wish to research on related topics for educational purposes.

Members of Parliament (MP) need to be equipped with the correct information which will enable them come up with appropriate legislation that would address violations of human rights during a state of emergency. The role of Parliament is to make laws.

Even though human rights treaties are part of a special kind of international agreements, and taken to be subordinate to the Constitution, the inclusion of the interpretation clause in relation to the fundamental rights will make international human rights instruments adopted and not just ratified have a status higher. The 2010 Constitution only requires reference to the '*principles*' like principles of universality, indivisibility and interdependency of every human right. As such, during the state of emergency the duty to respect, to protect, to fulfill, and the principle that restrictions of rights are the exceptions, instead of provisions of international instruments which outline the specific rights to guide the interpretation of the provisions in the fundamental rights chapter. Furthermore, it broadly refers to hard as well as soft instruments; therefore, conformity is required all the times instead of just during the need for interpretation. This will ensure that there is no exclusion of state of emergency cases, where clear disparities exist between the Constitution and international instruments, particularly, cases of clear constitutional provisions that merely require application of the Constitution.

1.5 Conceptual framework

In constitutional theory and practice, law limits government power and function.[27] This has however not been the practise in Kenya when a state of emergency is declared, as illustrated by emergencies declared since colonial times such as the state of emergency declared after the break out of the Mau Mau rebellion. Constitutionalism is generally regarded as a legitimate and "a legal limitation on government, it is the antithesis of arbitrary rule and its opposite is despotic government, the government of will instead of law."[28] This limitation is informed by the corrupting effect of absolute and unrestrained power as is practised in totalitarian states. To the extent that laws are very rigid and incapable of responding to emergency, Rousseau opines that:

> The inflexibility natural to laws, which hinder their bending to events may in certain cases be pernicious, and in a crisis, even occasion the ruin of the state. The order, slowness of legal forms requires a space of time, which circumstances refuse. In addition, as there are a thousand occurrences for which the legislator has not provided, it is very necessary part of foresight to perceive that everything cannot be foreseen.[29]

Therefore, the solution for a state faced by an emergency is not a simple one and Kenya is not unique in this regard. Since the early times of the Roman Republic to modern constitutional systems, it has been a compromise between tyranny and despotism or sacrificing the state altogether.[30] This narrow path has been travelled by translating the maxim, *solus populi suprema lex esto*[31] into a constitutional principle. The effect, which is that under emergency conditions, the demands of constitutionalism have to be limited by the exigencies of the emergency. This has

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27 B O Nwabeuze, *Constitutionalism in the Emergent States* (C. Hurst and Sons: London, 1973) at 10.
28 Ibid.
29 Jean Jacques Rousseau, *The Social Contract, Book IV, Chapter VI* (Hafner Publishing Company: New York, 1947) at 22.
30 Inoti *supra* note 23 at 12.
31 Rousseau *supra* note 60 at 174.

been universally accepted in domestic law as illustrated by limitation clauses[32] and derogation clauses under international human rights law.[33] In the words of Machiavelli:

> "Where the well-being of one's country is at all in question, no consideration of justice or injustice, of mercy or cruelty, or honour or shame must be allowed to enter in at all. Indeed, every other consideration, having been put aside, that course of action alone which will save the life and liberty of the country ought to whole heartedly pursued."[34]

The practice of exercising emergency powers under international law is to ensure the survival of a state during times when its life is in danger. In Kenya, the primary role of emergency powers is the preservation of public security.[35] This however is not synonymous with saving the life of a Nation; this is because preserving public security entails using emergency powers to address criticism of the Government or even criminal offences. For example criticism of the government, commission of criminal offences (such as treason) are treated as emergencies similar to civil wars and international wars.[36]

Whereas human rights are inherent in the dignity of every human being, states are nonetheless given room in international law to suspend some of their human rights obligations under rigid conditions under a state of emergency.[37] States are given two options to either legally derogate from their human rights obligations under treaty law or to limit the application of human rights.

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32 Constitution of Kenya, article 25.

33 Ibid. article 4(1).

34 Niccolo Machiavelli, 'The Discourse, Book III Chapter XLI', in Daniel Donno (ed), *The Prince and Selected Discourses* (Bantam Books: New York) at 47.

35 Inoti *supra* note 23 at 276.

36 Ibid.

37 Part II and III, Preservation of Public Security Act (Chapter 57 of the Laws of Kenya 2009); Section 24 and 25, Constitution of Kenya 2010; Article 4, International Covenant on Civil and Political Rights.

For example, Article 4(1) of ICCPR specifies that, "during public emergency which impends the existence of the nation and the existence of which is formally declared, the States Parties to the existing Covenant may take measures derogating from their obligations under the current Covenant to the degree stringently required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

Article 15(1) of EHCR stipulates that:

"In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

In a democratic society, the use of emergency powers and resorting to detention measures can be considered as evil.[38] This is because not only is there real fear that such powers can be used to victimize innocent citizens and lock up political opponents but it can also be a mockery of democracy and justice since these powers are supposedly used in the name of the state and for public good.[39] But perhaps the most formidable criticism of emergency powers is that they are not subject to the supervisory powers of the ordinary courts.[40] The most important element of the Constitution of Kenya under the Bill of Rights is the protection of fundamental rights and

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38 Criddle Evan J, *Human Rights, Emergencies, and the Rule of Law*, http://ssrn.com/abstract=1591970 accessed on 20 January 2013.

39 *Lawless v. Ireland*, 3 European Court of Human Rights (series A) (1961) (No. 3) (Court) at 56.

40 Kivutha Kibwana, *Fundamental Rights and Freedoms in Kenya* (Nairobi: Oxford University Press, 1990) at 68.

freedoms. Therefore, the argument for emergency powers has been described as the plea for every infringement of human freedom; it is the argument of tyranny.

Fundamental rights are those, which are inherent in human beings, meaning that they are available to them regardless of nationality, place of residence, sex, nationality, or ethnic origin, colour, religion, language, or any other status.[41] These rights are defined and listed in ICCPR and principles and state constitutions and are deemed to be essential for an individual's dignity and personal fulfilment, since they reflect a common sense of justice, fairness and decency.[42] In Kenya these rights are provided for in the Bill of Rights of the Constitution.[43] According to the Universal Declaration of Human Rights (UDHR), these rights are all universal, interrelated, interdependent and indivisible.[44]

The push for an international legal framework on human rights began with the signing of the UN Charter[45] on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization. This formed a significant step in bringing human rights firmly within the precinct of international law.[46] The significance of this gesture cannot be over emphasized as it was "an acknowledgment that laws and policies at national level were not sufficient guarantee that the rights of persons residing within the jurisdiction of a particular state would be promoted and respected,"[47] Hence the need for an international legal framework to monitor compliance and implementation. The universality of human rights brought certain realities to states, obligations regardless of their political, economic and cultural background of

41 Article 2, UDHR.
42 Louis Henkin, *International Law: Politics and Value* (Martinus Nijhoft Publishers: London, 1995) at 25
43 Caroline Elkins, '*Britain's Gulag: The Brutal end of Empire in Kenya'* (Jonathan Cape: London, 2005), Chapter Four.
44 UDHR, Preamble; Peter Halstead, *Human Rights* (Hodder Education : Oxon, 2008) at 6.
45 Charter of the United Nations and Statute of the International Court of Justice
46 ICJ *supra* note 51.
47 Ibid.

protecting, promoting all human rights and fundamental freedoms.[48] The outcome of these deliberations was a series of covenants designed to reflect that emerging consensus in the form of the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).

1.6 Theoretical framework

Any human rights premise, which support the fundamental aspects of international Laws regarding emergency constitution should not just factor in the uncertainty over the extent and relevance of human rights, but should also lay a strong foundation for safeguarding of human rights in any upcoming emergencies. In particular, human rights during emergencies should be based on the fiduciary relationship involving the public institutions and individuals subject to executive or public powers. As fiduciaries, executive institutions possess the legal obligations to protect their subjects against dominion, especially threats from arbitrary state measures. The Public institutions should ensure that Kantian standard of non-instrumentalization is enforced through ensuring that every individual subject is regarded at all times as ends-in-themselves rather than mere means. Regarding this fiduciary presumption of the state or public institutions, human rights is an institutionally based legal constraints which comes about from the state supposition of self-governing powers. Since the state fiduciary obligations are part of its legal authority, then public institutions must breach these responsibilities during emergencies without emasculating their assertion to represent their citizens as sovereign players. Such a fiduciary premise explains why a number of human rights are derogable in national crises while others are not, such that it provides principled standards for differentiating derogable rights from

[48] Ian Brownlie, *Principles of Public International Law* (Oxford University Press: Oxford, 2008) at 434.

Non- derogable rights. Moreover, the fiduciary premise furnishes considerable and technical principles, which spell out the two-tiered framework of international law emergency charters. The theoretical foundation of the restriction of fundamental rights and freedoms is based on the Kantian concept and the fiduciary theory that explain the normative basis for international law's reliance on the two tier approach to public emergencies.[49]

The fiduciary theory of human rights explains that, states or state-like actors and the citizens and non-citizens are subject to their power and, therefore, they have a fiduciary duty to guarantee their security and equal freedom. This duty arises when states assume sovereign powers. This theory has two main functions. First, it is a theory of human rights, which clarifies the substantive and procedural principles that guide international law's regulation of public emergencies focusing on the process to be followed before a state of emergency is declared. Second, it reconciles the constitutional exercise of emergency power with the rule of law.

The fiduciary theory of human rights explains the derogation regime of the international human rights law, by providing states with an avenue of using emergency powers in situations where the states capacity to protect fundamental rights is compromised. In such circumstances, the state when it is proved that such measures are necessary, may derogate from human rights such as the freedom of expression, movement and peaceful assembly in circumstances where this would conflict with the states fiduciary obligations to guarantee the subjects secure and equal freedom. However, these principles only apply during times of extreme emergencies.

During periods of public emergencies, threats to violations of fundamental rights also become heightened.[50] All international human rights instruments have responded to the challenge

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[49] Criddle Evan J, *Human Rights, Emergencies, and the Rule of Law,* http://ssrn.com/abstract=1591970 accessed on 20 January 2013 at 1.

[50] Jaime *supra* note 4 at 6.

of states derogating from their fundamental rights in times of emergencies by regulating the exercise of such powers.[51] This is done under the derogatory clauses[52] which permit states to restrict some human rights during emergencies when "the life of the nation"[53] or the "independence or security" of the state is under threat.[54] This approach by international human rights law (IHRL) poses theoretical challenge as to the philosophical foundation of the derogation of human rights during times of emergencies.

International law has put in place measures that are meant to regulate the states' exercise of derogation powers through a two tier system. The first consideration is whether the circumstances on the ground warrant the declaration of a state of emergency and second one is whether such measures are necessary.

Other than giving a theoretical foundation for derogation of certain fundamental rights during emergencies, the fiduciary theory offers an opportunity for international and regional tribunals to refine their jurisprudence in safeguarding human rights more effectively during times of emergency.[55] For example this has been used by the European Court of Human Rights (ECHR) to the effect that a public emergency must "concern [a state's] entire population" in order to justify a declaration of a state of emergency.[56] After the declaration of a state of emergency, the fiduciary theory requires the state to facilitate avenues to notify the citizens, justify the measures and give those wishing to contest the powers do so.

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51 Ibid.
52 Ibid.
53 Article 4 (2), ICCPR.
54 American Convention on Human Rights, article 27.1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].
55 Ibid.
56 Inoti *supra* note 23 at 56.

The relevance of the theory to this discourse is that the state always has a duty to protect fundamental rights and freedoms even when a state of emergency has been declared. The rule of law or legality is not suspended just because a public emergency has occurred.

1.7 Objectives

The objectives of the study were:

3. To compare the Kenyan law on state of emergency under 2010 constitution with the Ethiopia law on state of emergency and international law
4. To determine the compatibility of the emergency powers that obtain and operate in Kenya with emergency powers contemplated under international law.
5. To make recommendations for the proper regulation of derogation and limitation clauses

1.8 Research Questions

This research addressed the following questions:

3. What is the extent, nature and control of emergency powers in Kenya?
4. How does the Kenyan law compare with the Ethiopian law and the international law during state of emergency
5. To what extent is emergency power that obtains and operates in Kenya compatible with emergency powers contemplated under international human rights law in tandem with international best practices?

1.9 Hypothesis

The legal framework (2010 constitution of Kenya) for the declaration of state of emergency is in tandem with international laws. However, the provisions in the 2010

Kenya constitution for state of emergency are not adequate in terms of the rights that can be derogated from and those that cannot. A comparison of Kenyan 2010 constitution with the Ethiopian constitution on derogable and non-derogable rights during the state of emergency with respect to international law brings out the inadequacy.

1.10 Research methodology

This was a qualitative research that used desk top methods to collect both primary and secondary sources of information that will be analysed. The primary sources of information included the Constitution, statutes, international legal instruments and decided cases. These primary sources of information were useful because of their binding and authoritative nature. Secondary sources of information were also used, the main sources were: books, journal articles, electronic databases found at the University of Nairobi School of Law library and media reports.

1.11 Literature review

1.11. 1 Legal Regulation of Emergency Powers in Kenya

In a chapter on 'Human Rights under Emergency Rule' Kibwana,[57] discusses the scope of limitation of rights under Kenya legal system. Human rights can be abrogated when the country is at war or when a calamity occurs that creates a lot of havoc thereby disorganizing the country such as an earthquake or a great fire. In situations described above, the President had a legal mandate pursuant to Part III, of the Preservation of Public Security Act (Cap 57) to declare a state of emergency.

In his analysis, although the Constitution envisaged regulation of emergency powers, the President or the executive had been granted discretionary powers to declare a state of emergency,

[57] Hughes *supra* note 27 at 63-69.

under the independence Constitution thereby limiting constitutionally guaranteed human rights. This was notwithstanding the existence of rights that cannot be derogated from under Article 4 (2) of ICCPR such as the right to life, right to property, right to access justice, protection against inhuman treatment, slavery and forced labour and freedom of conscience. Such right according to the author cannot be limited even during a state of emergency. A close examination of the emergency framework reveals that Part III of the Preservation of Public Security, which is the implementing statute of emergency powers, allows the executive to derogate from all rights.

In a chronological manner, Korwa Adar[58] discusses the human rights situation in Kenya in the period 1978 to 2001 and observes that, it was characterized by centralized and personalized power by the Moi regime. This laid the foundation for dictatorship and massive human rights violations. The President issued a directive for an amendment to the Constitution to introduce Section 2(A), which was passed in record time by Parliament to turn Kenya from a *de facto* to a *de jure* single party state.[59] Detention laws, which had been suspended in 1978, were reinstated and colonial era laws such as the Chief's Authority Act, the Public Order Act, the Preservation of Public Security Act, and the Penal Code, gave the President the right to suspend individual rights guaranteed by the Constitution.[60]

Smokin and Kibwana[61] look at the Constitution as a social contract through which the dignity and liberty of individuals is protected. Accordingly, the constitution must secure fundamental rights and freedoms and where such are limited, there must be a legal justification. In their opinion, derogation and limitation of one's liberty should be permitted only when an

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58 'Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001', (2001) 5 *African Studies Quarterly*

59 Constitution of Kenya (Amendment) Act, [No. 7 of 1982].

60 Kimondo, Kanyi. *The Bill of Rights.* In, Kibwana, K, Kimondo, K and Gathii, '*The Citizen and the Constitution,'* (Nairobi: Claripress, 1992) at 54-56.

61 Smokin Wanjala and Kivutha Kibwana (eds), *Yearning for Democracy: Kenya at Dawn of the Century*. (Nairobi: Claripress, 2002) at 146-154.

individual's liberty interferes with the liberty and freedoms of others. They propose that any law, which abrogates the freedom of speech and expression, should be approved by parliament. The authors further explore the extent to which other rights and freedoms such as the freedom of movement, freedom from inhuman and degrading treatment, protection from slavery and forced labour, arbitrary search and discrimination, right to equal protection by the law and the right to vote can be limited. That such limitation must be grounded on firm legal principles as provided for in the Constitution. In addition, they further propose the abolition of the death penalty since it is, in their view, unconstitutional, as the right to life is one of those rights that is not derogable.

Joe Oloka-Onyango[62] considers the constitution as an instrument that informs citizens of their rights in areas such as how, when and by whom those rights can be restricted. The author's point of view is that some rights such as the right against torture are absolute, and therefore, if such rights are violated, essential humanness is violated. Giving examples, he argues that there are right and wrong ways of enforcing the law. For instance, the government is "not allowed to break the law so as to catch criminals." It is also not allowed to punish people for something that is not provided for under the law.[63]

In his paper presented at the Commonwealth Law Conference on Governance, Maina Kiai[64] explores the issue of fundamental rights and freedoms in relation to the fight against terrorism. He observes that Kenya has relied on the convenience provided by counter- terrorism measures to stifle alternative views and increase state power over individuals without limitations and accountability. The author further states that lack of accountability in state security matters

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62 Joe Oloka-Onyango, J, *Constitutional Development in East Africa for the Year 2001* (Dar es Salaam: E and D Ltd, 2000) at 29.

63 Ibid.

64 *The Impact of Counter Terrorism Measures on Human Rights Protection in Africa*. Paper Presented Before the Commonwealth Law Conference on Governance, Globalization and the Commonwealth held in Nairobi on 10th September 2007.

often mirrors an even bigger problem larger of the absence of accountability in matters of corruption and respect for human rights.[65]

Kiai's paper, however, does not delve into the question of regulating emergency powers that leads to derogation and limitation provided for under domestic law and international legal instruments. This was because it was written some years before the promulgation of the Constitution of Kenya, 2010 and, therefore, is deficient on the existing legal framework.

1.11.2 Regulation of Emergency Powers under International Law

Steiner and Alston[66] observe that the international human rights regime in general and the provisions of ICCPR in particular, do not limit the state's obligations in protecting human rights. Article 4 of the Covenant permits a temporary derogation in cases of public emergency which threaten the life of the nation and the existence of which is officially proclaimed. The authors further expound on the limitation clauses in Articles 18, 19, 21, and 22 of the ICCPR.[67] To illustrate how limitations are handled in Europe, the authors use the case of *A and Others v. Secretary of State for Home Department.*[68] In this case, Lord Bingham of the European Court of Human Rights held that:

> Article 3 of the European Convention on Human Rights enshrines one of the most fundamental values of democratic society. The court is well aware of the immense difficulties faced by states in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the convention prohibits in absolute

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65 Ibid.

66 Steiner, Henry J and Alston, *Philip. International Human Rights in Context: Law, Politics and Morals*, 3rd ed. (Oxford: Oxford University Press, 2008) at 150.

67 Ibid. at 154

68 [2004] UKHL 56

terms, torture or inhuman treatment or punishment, irrespective of the victims' conduct...[69]

This decision, in essence, emphasizes the fact that derogations and limitations are only allowed during state of emergency but there are some absolute rights to which there can be no limitation as to their enjoyment.

CHAPTER TWO

An assessment of the problem of regulating and controlling emergency powers in Kenya before 2010

2.1 Introduction

Where the well-being of one's country is at all in question, no consideration of justice or injustice, of mercy or cruelty, of honor or shame must be allowed to enter in at all. Indeed, every other consideration, having been put aside, that course of action alone, which will save the life and liberty of the country ought to be whole heartedly pursued.[70]

This statement sums up the dilemma of a state faced by an emergency on whether or not to protect fundamental rights and freedoms when its security is at stake. It must be said from the outset that Kenya has only experienced one state of emergency that was declared in 1952.[71] This followed a sequence of African political activism between 1944 and 1960 due to uneasiness with

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69 Ibid.

70 Niccolò Machiavelli, *The Prince on the Art of Power* (Ohio: Simon & Brown 1913) at 60.

71 See generally Tabitha Kanogo, *Squatters and the Roots of Mau Mau 1905-1963* (James Currey: London, 1987); Caroline Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya* (Jonathan Cape: London, 2005).

the slow political and economic change. Colonial governor, Sir Everlyn Baring in 1952 following the outbreak of the Mau Mau rebellion and civil unrest, declared the emergency. However, during independence time in 1963, the colonial structure of institutionalized emergency powers was replaced with a framework whose nature and content tallies with long established conception of emergency powers. The practice still informed the exercise of emergency powers in independent Kenya, which evidently was not used to address matters that threaten the security of the state as contemplated under international law. Article 4(1) of the International Covenant on Civil and Political Rights states that,

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin"

Under previous Kenyan constitution, people could still be detained without trial, except during a state of emergency, in which case the detention is subject to Article 58 of post independence Kenyan constitution. These powers were used in peacetime to discourage perceived dissidents and those opposed to the political leadership and criticism, which should ordinarily form an important component of the democratic process.[72] This was expressed through detention without trial, which substituted emergency measures as a confirmation that these powers were not meant to deal with emergencies. This is illustrated by the fact that as soon as the

[72] Kathurima Inoti, *Emergency Powers in Kenya: A Study of the Extra-Ordinary Executive Powers Vis-à-vis the International Covenant on Civil and Political Rights* (Unpublished LLM Thesis: University of Nairobi, 1989) at 184.

detention and restrictive measures made in 1966 regulations were lapsing after the death of Kenyatta in (Kenya's first President) 1978, they were quickly renewed by the new regime under Moi.[73] There was no legal framework with widely accepted constitutional and legislative foundations for the state of emergency, including operational structure consisting of the organizational arrangement or the strategic plans for handling the state of emergency.

This is the same case in Ethiopia, whereby the emergency clause of the Constitution is not part of the bill of rights provisions but under miscellaneous provisions. The article offers among other things, which branch of government has the power to declare emergency, the time limit for the state of emergency and non-derogable rights under state of emergency. In the Ethiopian Constitution, the Chapter that deals with human rights only explicitly recognizes their vertical application. The absence of mention of other entities that deal with human and fundamental rights has led some to conclude that the Constitution contain application clauses but do not recognize horizontal application of rights.

While separate, some of the characteristics of the exercise of emergency powers in Kenya included detention without trial, use of emergency powers for political purposes, as a weapon against the development of democratic systems and the use of emergency powers during peacetime. This chapter examines how emergency powers were actually regulated and controlled during the time under review. In doing so focus will be placed on constitutional and statutory limits to the exercise of emergency powers, the role of Parliament and the Judiciary, the legality of detention without trial and the restricted interpretation of the Constitution by the courts in granting orders of *habeas corpus* to secure the liberty of detained persons.

[73] Ibid.at 5.

2.2 2010 Kenya Constitution

Article 58 (State of emergency) (6) (a) (ii) domesticates the international Human Rights. In particular, unlike the previous constitution which out rightly limited the right and fundamental freedom during state of emergency declarations, the 2010 constitution limits the rights only to the extent that the legislation is compatible with the Republic commitment under state of emergency international law. The 2010 Constitution lays down the procedures for any acts of restriction of rights and fundamental freedoms (Article 24). As such, individuals' freedom as enshrined in the Bill of Rights shall not be restricted except by law, and only to the degree that the restrictions are reasonable and permissible in an open and democratic society anchored in human dignity, equality and freedom. Notably, Article 58 (State of emergency) (6) (a) (ii) defines that any piece legislation enacted due to a pronouncement of a state of emergency needs to be consistent with the Republic commitment under international law as appropriate to a state of emergency. Furthermore, even after a pronouncement of a state of emergency, it is clear in Article 58 (7) that any declaration or legislation enacted or any other action undertaken should not allow or authorize the indemnification of the State, or of any individual with regard to any illegal deed or omission. Hence, the state or any individual who commits violations and abuses of rights should face the due process of law.

On the contrary, in the Ethiopian constitution, the power of the government to declare a state of emergency is vested both on the states government and on the federal government. The federal government can declare a state of emergency if the crisis is caused by external invasion, a breakdown of law and order which endangers the constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel. As such, the states can only declare a state-wide state of emergency while the power to decree a state of emergency at the

federal level is vested on the Council of Ministers subject to the approval of House of People's Representatives. This constitution provisions and legal framework limit the enjoyment of fundamental rights and freedoms and sometimes contradicted the same Constitution that gives power for such limitations. Hence, people can still be detained without trial

The limitation of human rights under the Ethiopian Constitution does not recognize the right to life, prohibition of torture, freedom of religion, thought and conscience, the non-imprisonment for contractual obligation, non retroactivity of criminal law and recognition as a person before the law as non-derogable rights. Despite this, the Constitution adds to the list a set of rights that are not embodied in the ICCPR, the right to equality, self determination, and prohibition of trafficking in person. Constitutional limits do not stop the regime from the practice of centralization and personalization of power. Some of the human rights violations include detention without trial, torture, arbitrary arrests, police brutality and denial of the right to assemble and expression, then the country's human right record was very poor. Thus, Ethiopians are denied rights to expression, assemble and information which clearly undermined the county' obligation under international law besides the letter and spirit of Article 4(2) of ICCPR. The UN Human Rights Committee observes that certain non-derogable rights must remain inviolable. Certain human rights are non-derogable under any circumstances. The ECHR and the ICCPR recognizes these rights as including the right to life, proscription of torture, freedom from slavery, freedom from post facto legislation or any other judicial guarantees, right to acknowledgment before the law, in addition to freedom of deliberation, conscience and religion.

Under 2010 constitution, it is not clear that whatever the emergency circumstances, *post hoc* accountability powers of the legislature, particularly the right to carry out inquiries and investigations regarding execution of emergency powers are guaranteed by law. This is

important for both evaluating the government conduct and recognizing lessons learned in order to ensure any future emergencies are followed with full preservation of rights. In order to safeguard against contravention of non-derogable rights, the right to undertake proceedings before a court regarding lawfulness of emergency measures needs to be defined through an autonomous judiciary. However, the 2010 constitution is clear on the courts playing a foremost role in decisions regarding legality of a declaration of a state of emergency and in reviewing the legality of specific emergency measures.[74]

2.3 Legal Exercise of Emergency Powers

The International Covenant on Civil and Political Rights observes that the most important mandate of a democratically elected government is to protect the fundamental rights and freedoms of its citizens. Thus to allow for any deviation in limiting and derogating from this norm is misnomer that should be taken under very exceptional circumstances[75]. This is because such endeavour could constitute a violation of the same rights that should be protected.[76] To that extent, derogation and limitation of human rights should only occur when the situation poses a real danger to the existence of the state and not fanciful justifications. As an illustration, in wartime the government is allowed to conscript or force its citizens into the army thus depriving them of their liberty. A natural calamity such as an earthquake could give the government the leeway to translocate people from affected areas even against their wish, on top of imposing a curfew in the area to ensure the safety of persons and property[77].

Nevertheless, the state is legally allowed to derogate and limit human rights in instances when the country is at war or when an emergency occurs which creates a natural calamity and

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74 Korwa *Supra note* 14.

75 United Nations Charter-Universal Declaration of Human Rights (**UDHR**)

76 Kivutha Kibwana, *Fundamental Rights and Freedoms in Kenya* (Oxford University Press: Nairobi, 1990) pg 63.

77 United Nations Charter-Universal Declaration of Human Rights

wrecks havoc in the country, such as an earthquake, a great fire that burns a large part of the city and massive flooding.[78] When these calamities occur, the President is entitled to declare a state of emergency under Part III of the Preservation of Public Security Act,[79] and limit or derogate human rights and freedoms. This measure should actually be the last resort but criticisms abound to the effect that such limitations constitute substantive and far-reaching negation of human rights. This is so because under international and domestic law only a few rights can be derogated from the right to personal liberty,[80] protection against arbitrary search or entry,[81] freedom of expression,[82] freedom of assembly and association,[83] freedom of movement[84] and protection from discrimination.[85]

In the Ethiopian constitution, the right to life is protected under the Constitution with the exception for the punishment of a serious criminal offence determined by law. Death penalty is permitted pursuant to the Constitution. The right to life is derogable under the Constitution, as it is not provided in the list of non-derogable rights. even though the rights to association and demonstration is derogable to the extent the exigencies of the situation warrants, both under the Constitution and the ICCPR, a state of emergency has not been declared by the Council of Ministers pursuant to the Constitution. Be it as it may, the shooting and killing of demonstrators in defiance of a ban on demonstration would not be justified under any circumstance or exigency, since the right to life is a non-derogable right.

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78 Ibid, *Fundamental Rights and Freedoms in Kenya* pg 64
79 Chapter 57, Laws of Kenya.
80 Section 72, Constitution of Kenya, 1963 (repealed).
81 Ibid. section 77.
82 Ibid. Section 79.
83 Ibid. Section 80.
84 Ibid. Section 81.
85 Ibid. Section 82.

The 2010 constitution is vague on arbitrary suppression of human rights on the request of a national emergency. In particular, it considers that in all instance of emergency declaration the State is in an extraordinary threat or state of crisis. Thus, even though limitations on human rights are permissible during wars or other emergency, certain rights were not subject to limitation under any conditions. Derogation is not subject to a particular procedure and that such derogation, undertaken under exceptional circumstances needs to be offered exceptional publicity. The Bill of Rights as contained in 2010 Constitution differs from the previous Constitution since it offers more sets of rights instead of just civil and political rights. In particular, it calls for the right to fair administrative action, and who bears the obligations in regards to the rights are apparent in the 2010 constitution than the previous one. It also comprises a general limitation clause, which affects rights horizontally.

The 2010 Constitution is unambiguous regarding when a state of emergency can be declared[86]. For instance, the President may pronounce a state of emergency for no longer than fourteen days, and it is only the National Assembly which will offer an extension. Notably, the threshold majorities for permitting an extension are made gradually higher for succeeding extensions, something that requires the initial extension to have a majority approval of no less than two-thirds of all members of the National Assembly, with subsequent extensions requiring approval of no less than three-quarters of all members of the National Assembly to be approved.

In an emergency, limitations and derogations of human rights are undertaken pursuant to the Preservation of Public Security Act. Under this Act, two types of emergencies exist, ordinary emergency power under Part II and special or far reaching emergency powers under Part III.

[86] Art 58(4).

Pursuant to these provisions, a raft of measures can be contemplated including: detention of persons, registration, restriction of movement and compulsory movement of persons as well as imposing curfews, control of aliens, removal of diplomatic passports, censorship, control and prohibition of the communication of any information. This is in addition to the following rights that can be controlled and prohibited: any procession, assembly, meeting, association (society), compulsory acquisition, requisitioning, control or disposition of any property, control and regulation of harbours, ports and movement of vessels and transport in general and trade together with the prices of goods and services. Moreover, the state may require persons to work or render services including conscription. Other than the above mentioned, the state can suspend the operation of any law except the Preservation of Public Security Act and the Constitution. What is more worrying is that the President was empowered to take any measures necessary for the preservation of public security[87], which allowed the President any type of derogation.

The 2010 Constitution is explicit on when a state of emergency can be declared, who makes the declaration, how the declaration is made, and for how long[88]. Furthermore, rights may be limited only to the extent strictly required by the emergency and in accordance with international law obligations[89]. Similarly, In the Ethiopian constitution, the emergency clause provides that in matters of national defence and public order, the President has the power to declare state of emergency. However, the Assembly of the Republic (the Assembly) has the power to ratify the suspension of the right and the declaration of emergency[90]. The Assembly should decide on the ratification of the state of emergency within 48 hrs. However, unlike the 2010 Kenyan

87 Kivutha *supra note* 16

88 Arts 132(4)(d) and 58.

89 Art 58(6).

90 a critical analysis of non-derogable rights in a state of emergency Under the African system: the case of Ethiopia and Mozambique

Constitution, the judiciary in Ethiopia has no powers to validate the legality of the declaration of the state of emergency, and if the Assembly is not in session then the Standing Commission of the Assembly has the power to authorize or confirm state of emergency subject to subsequent ratification by the Assembly. These measures are very extensive and go against specific constitutional provisions. Regulation of the exercise of emergency powers is difficult because an emergency order is personal to the government, as it declares it presumably after considering all options and circumstances at hand.

2. 4 2010 Constitutional limits to the protection of fundamental rights and freedoms

Government functions are divided into three namely the executive, the legislature and the judiciary. The executive function is concerned with implementation of Government policy and especially matters relating to state of emergency, the legislature makes laws while the mandate of the judiciary is dispute resolution. The principle of the rule of law requires that the three organs remain separate to avoid dictatorship. Moreover the doctrine of separation of powers envisages that one organ should not have a monopoly over government functions.[91] However, the Kenyan Supreme Court has the mandate to decide on the validity of a pronouncement of a state of emergency including incidental questions[92], even as the national Assembly has the powers to approve any extension.

The special emergency powers granted to the government by high merit of the 2010 constitution and statutory laws, includes restriction of press freedom, prohibition of public meetings, domestic deployment of armed forces, in addition to evacuation of people from their homes and work places. Furthermore, other restrictions includes, searches of homes and private

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91 Kenya Section of International Commission of Jurists, *State of the Rule of Law in Kenya Report* (ICJ: Nairobi, 2006) at 49

92 Art 58(7).

places without warrant; arrests without charges, confiscation of private property, regulation of private sector operations , intervention with financial transactions and export regulations, as well as special legislation to punish non-compliance with emergency regulations. In the 2010 constitution, in a state of emergency, responsibility for government should remain with civilian authorities both on national and county level. The role of Security forces is to aid the civilian authorities in a sort of subsidiary role[93].

2.5 Control of Emergency Powers by Parliament

The 2010 constitution observes that enforcement of human rights is to be equalled by accommodations supportive of the reasonable wants of the State to carry out its public duties for the general good. As such, the fundamental rights and freedoms are in some ways not fixed, and are subjected to certain restrictions to the degree necessary to safeguard the rights of others and the lawful needs of the society. Nevertheless, a right or fundamental freedom in the 2010 Bill of Rights may not be restricted except by edict, and then only to the level that the restriction is reasonable and justified in an open and democratic society anchored in human dignity, equality and freedom, in view of all relevant factors, such as nature of the right or fundamental freedom. Furthermore, this applies to the significance of the rationale of the limitation; the scenery and level of the restriction; the call for ensuring that the delight of rights and primary freedoms by any person does not prejudice the rights and elementary freedoms of others. It does not even prejudice the relation between the restriction and its intent including whether there are less restrictive means to achieve the purpose.

In the Ethiopian constitution, the emergency clause is provided under title XV of the Constitution. Article 72 of the Constitution provides that individual freedoms and guarantees

[93] Article 25

may only be temporarily limited or suspended in the event of the declaration of a state of emergency. The Constitution provides rights that are not derogable in state of emergency. These are the right to life, the right to personal integrity, and non-retroactivity of criminal law, civil capacity and citizenship, the right of accused person to a defence and freedom of religion. Freedom of thought and conscience, prohibition of slavery, prohibition of imprisonment for contractual obligation and recognition as a person before the law are not included in the list of non-derogable rights[94].

Moreover, the 2010 Constitution states that no right or elementary freedom may be so limited that it derogate from its foundation or indispensable content. in effect, the State or individuals seeking to justify a particular limitation due to declaration of the state of emergency shall reveal to the court, and National Assembly the requirements of the Constitution have been satisfied. Notably, the 2010 Constitution asserts that the design of the restrictions of both human and constitutional rights may perhaps not be well matched with definite fundamental rights. However, certain rights and fundamental freedoms must not be limited, and they comprise the freedom from torture and cruel, inhuman or degrading treatment, punishment, freedom from slavery or servitude; right to a fair trial; and the right to an arrangement of *habeas corpus*[95]

Under the 2010 constitution, both the National Assembly and Senate have an obligation to approve declarations and extension of state of emergency. In particular, the MPs can overturn the President's conclusion to declare state of emergency. They can also discontinue the deferment of freedom of movement, information in addition to other rights that are suspended during a state of emergency in a region where there is internal insecurity. The previous constitution endowed Parliament with five ways in which it could control the exercise of

[94] a critical analysis of non-derogable rights in a state of emergency Under the African system: the case of Ethiopia and Mozambique

[95] Article 25.

emergency powers, first, through revoking the order of the President that operationalizes Part III of the Preservation of Public Security Act.[96] Bringing this part into operation takes 28 days of the order being made by the President, however on the two occasions the order was invoked (1966 and 1978), and Parliament confirmed the order without looking at the merits of such confirmation. It is notable to remember that the confirmation of the emergency order in 1978 was unnecessary since the country was experiencing peace and stability.[97] Notwithstanding the approval, the President could still get his way by simply invoking emergency powers granted by Part II where he does not need parliamentary approval.

Parliament control of emergency powers could also take the form of requiring that regulations made under the Preservation of Public Security Act should be brought before Parliament for approval.

> All subsidiary legislation shall be laid before the National Assembly as soon as may be after it is made, and if the Assembly within the period of twenty days commencing with the day on which the Assembly first site after the subsidiary legislation is laid before it, resolves that it be annulled, it shall cease to have effect.[98]

These provisions were formulated unconstructively as prima facie valid unless annulled by Parliament in twenty days. It would have been better for the regulations to be formulated positively where they would be invalid until approved by Parliament. The possibility of mischief by the executive is not lost especially if the regulations were laid in an inattentive Parliament where the twenty days would pass without notice.[99]

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96 Section 85 (2), Constitution of Kenya, 1963 (repealed).

97 Kathurima *supra note* 3 at 187.

98 Section 6 (1), Constitution of Kenya, 1963 (repealed).

99 H B Ndoria Gicheru, *Parliamentary Practice in Kenya* (Transafrican Publishers: Nairobi, 1976) at 105.

This scenario played out in the case of *Republic of Kenya v. The Commissioner of Prisons ex parte Kamonji Kangari and Others*.[100] The Public Security (Detained and Restricted Persons) Regulations[101] and the Public Security (Detained and Restricted) Rules 1978[102] under which the four applicants were detained had been laid in Parliament on November 3rd 1978. Parliament was adjourned and prorogued on the same day with the next session resuming on 6th March 1979, when the regulations were not laid in Parliament. The applicants argued that it was mandatory for the regulations to be laid in Parliament for 20 days, the effect of the adjournment, subsequent prorogation was to quash whatever had been laid before Parliament, and therefore it had to be laid afresh when the new session opened on 6 March 1979. Further, without that process the provisions of section (6) 1 of the Preservation of Public Security Act would have been violated thus making the detention order null and void.[103]

The Republic argued that once subsidiary legislation is laid in Parliament, that would have sufficed, the twenty days start running as soon as the assembly first sits after laying it, in this case 6th March 1979. In any case given that annulment proceedings had not began, the regulations were valid. Further to that, non compliance with Section (6) 1 of the Act is a directory and not mandatory requirement whose breach is a misdemeanour not likely to invalidate the requirement.[104] The court agreed with the Government that no proceedings were pending at the time the application was made.

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100 Miscellaneous Civil Cause No. 60 of 1984 (High Court, Nairobi) (Unreported).

101 Legal Notice No. 234 of 1978.

102 Legal Notice No. 235 of 1978.

103 Thomas Erskine May, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*; (Lexis Nexus: London, 1976) at 260: "the effect of prorogation is at once to suspend all business until Parliament shall be summoned again. Not only are the sittings of Parliament at an end but all proceedings pending at the time are quashed…Every Bill must therefore be renewed after prorogation as if it were introduced for the first time."

104 Ibid. at 163.

The filing of this application prompted the Attorney General (AG) to table the Subsidiary Legislation Bill[105] specifically to validate the regulations in question despite the fact that Parliament had been prorogued. After winning the case, no further attempt was made by the AG to push ahead with the Bill.

2.6 Control of Emergency Powers by The Judiciary

Under 2010 constitution, the Supreme Court may decide on the validity of state of emergency declaration. The Supreme Court also determines the validity of any extension of a declaration of state of emergency, including any legislation enacted, or other action taken, in consequence of the declaration[106]. The Supreme Court will also determine the validity of limitations of rights and fundamental freedom in the Bill of Rights only to the extent that the limitation is strictly required by the emergency. In particular, under section **160**. (1) Of the 2010 constitution, the exercise of judicial authority shall be subject only to the Constitution and the law, and not under control or direction of any person or authority. In the Ethiopian constitution, the counsel for defence, which is just one aspect of fair trial, is non–derogable under the Constitution. This encompasses the right to an appeal, the right to be presumed innocent, right to defence including the right to be defended by counsel of one's choice and the right to be tried within a reasonable time by an impartial court or tribunal[107]

2.7 Legality of the Detention Order

Regulation 6 (1) of the Public Security (Detained and Restricted Persons) Regulation is instructive, provides that 'if the Minister is satisfied' as to the necessity of exercising control

105 Kenya Gazette Supplement No. 23 (Bill No. 8).

106 Article 58

107 a critical analysis of non-derogable rights in a state of emergency Under the African system: the case of Ethiopia and mozambique

over a person beyond the control afforded by the restriction, then he may, for preservation of public security, order the detention of the person. Subsection 2 of the Regulation provides that a person so detained shall be deemed to be in lawful custody so long as the detention order is in force. A detention order granted by the Minister pursuant to Section 8 of the Preservation of Public Security Act is a valid order.

The 2010 constitution observes that presumption of innocence shall be respected, and Article 25 of the 2010 constitution observes that during detention, four rights cannot be limited. That is freedom from torture and cruel; inhuman or degrading treatment; freedom from slavery or servitude; and the right to a fair trial; and the right to an order of *habeas corpus*. Even though the right to derogate is a flexible mechanism, the right to derogate does not imply that the Government can avoid its International Covenant on Civil and Political Rights obligations at will. As such, the role of the judiciary is to ensure that it is a right that is circumscribed by several conditions like standard of non-derogability of particular rights, the standard of strict necessity and the standard of international notification.

Ones an order has been given by the Minister, the courts may examine its legality unlike the previous constitution whereby the courts had a tendency to avoid the issue through technicalities such as the lack of jurisdiction and publication of rules of procedure by the court.

2.8 Failure by the Chief Justice to make rules of procedure for enforcement of fundamental rights and freedoms

The 2010 constitution is clear on whether the Supreme Court can decide on the terms of confinement imposed on the victims during declaration of state of emergency. However, it is not clear on what constitutes cruel, inhuman and degrading forms of punishment, such as incarceration or continuous confinement, forced labor, or which sentences such persons should

serve when in solitary confinement. However, console can be taken from the fact that every individual non-derogable right to juridical persona is expressly assured by articles 16 and 4(2) of International Covenant of which Kenya is a signatory.

The awkward indecision of legal provisions criminalizing certain conduct falls foul of the requirements of the 2010 constitution. The right to be tried by an independent and impartial tribunal is absolute under the International Covenant on Civil and Political Rights particularly in scenario, which criminal proceedings may result in the imposition of capital punishment. They must be consistent with the prohibition of retroactive criminal law defined in the non-derogable provisions of article 15 of the Covenant. Since the 2010 constitution makes Courts to fall in the risk of using strongly theoretical account of what they are up to in regard to deciding state of emergency cases, some judges can fall into the grip of national security fundamentalism and provide the state wide discretion in carrying out absolute powers.

2.9 Application of the writ of Habeas Corpus

The writ of *habeas corpus* is an important instrument in the administration of justice granted by the 2010 constitution for redressing claims where a person has been unlawfully arrested or detained. The constitution also guarantees that every person brought to trial is entitled is not just essential duly established procedures of the legal process but also an active involvement of an independent and impartial judicial body having the power to pass on the legality of measures adopted in a state of emergency. Unlike the previous constitution whereby a detained person was not in a position to file such a suit, relatives or friends of the accused person would file a suit of action in the High Court known as a *habeas corpus* proceeding.[108] The essence of this proceeding is to ensure the liberty of the detained person by demanding the

[108] Section 389, Criminal Procedure Code (CPC) Rule 2

arresting or detaining authority to produce the person failure to which it can be held in contempt of Court and be committed to a jail term. The writ of *habeas corpus* is the perfect tool for the securing of the liberty of persons held unlawfully by the Government.[109] However, this facility was abused in independent Kenya, instead of offering liberty for the person it led to such a person being arrested or detained legally. This resulted into relatives and friends of the detained person not to institute *habeas corpus* proceedings for fear of the consequential effects.[110] .

Furthermore, the 2010 constitution is not clear on whether the judiciary can prevent the disclosure to the detainee and his legal adviser of information based on which decisions on the extension of detention are made. This is because our adversarial system of the common law makes the independence of the judiciary to be compromised if judges or other judicial officers were to be involved in the granting or the approval of extensions. For instance, it is unclear whether the judiciary has a role of substituting its views regarding what measures are most appropriate or expedient at the relevant time in dealing with an emergency situation for the Government which has direct responsibility for establishing the balance between the taking effective measures to combat recent transnational crimes, like terrorism while concurrently respecting individual rights.

Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Law

In the case of *Scholastica Waithera Kamau,* the applicant applied for an ex parte *habeas corpus* to show cause why the applicant's husband (an advocate) should not be released. The Commissioner of Police was directed to appear in court on 12th March 1987 to show cause why the advocate should not be released. On the day this was to happen, a detention order was

109 Kivutha *supra note* 16 at 86.

110 Ibid.

produced. This was challenged by the petitioner under section 84 (1) of the Constitution to show the validity and legality of the detention order. The court followed previous judgments and held that: "the only issue before the court was whether the Commissioner of Police had complied with the order to show cause why the applicant's husband should not be released. Having found that the Commissioner had complied by producing a detention order, there was nothing else that the court could do.

2.10 Judicial independence

Judicial independence is an important ingredient in the proper functioning of the rule of law in all democratic states. The constitutional dispensation prior to 2010 was not designed to deliver an independent justice. Whereas the constitution recognized the executive and legislature as important arms of government, the judiciary never enjoyed such eminence. Thus the judiciary became constrained in delivering its mandate of protecting fundamental rights and freedoms during state of emergency. Without the constitutional insulation of autonomy and independence, the judiciary became an appendage of the executive, owing to the fact that all Judges,[111] the Chief Justice[112] and the Attorney General[113] were all presidential appointees. The President could remove them as he wished so long as he constituted a tribunal to make such a recommendation. As such, the judiciary never enjoyed security of tenure and were amenable to manipulation notwithstanding that they served at the pleasure of the President.[114]

Based on 2010 constitution, the basic principle of the independence of the judiciary is that every individual has the right to be heard by regular courts during the state of emergency,

111 Section 61(2), Constitution of Kenya 1992 (Amended).
112 Ibid. Sec. 61
113 Ibid. Sec. 109
114 Ibid. Section 24

and following procedures previously established by law. The constitution is still vague on whether the judiciary can enforce its decision when the government and supported by National assembly can create tribunals which do not use the duly established procedures of the legal process and which can displace the jurisdiction belonging to the Supreme court or judicial tribunals. This implies that the State with stamping of national assembly can in some instances decide to derogate from its obligation to offer effective remedies for human rights violations during state of emergency, and which are not enforceable by the judiciary. The judiciary or the courts can hide any incompleteness in their decisions while suppressing their more assertive pronouncements in a manner that can be contradictory with the bill of right. It remains unclear whether the courts can be willing to stand up to the government during crisis, and apply their substantial heft against the government-expanded state of emergency powers.

Nevertheless, the 2010 constitution gives the judiciary the powers to delay the exercise of habeas corpus where there exists a reasonable ground for doing so. The decision to delay access to an advocate is subject to judicial review and that in such proceedings the burden of displaying reasonable grounds for doing so rests on the establishment. In the 2010 constitution, judicial review is shown to be a speedy and effective process. The soundness of the derogation cannot be called into question for the sole basis that the Government has decided to scrutinize whether in the future a way could be found of ensuring greater conformity with international Convention obligations.

2.11 Conclusion

The response of the government to a state of emergency is a decisive test of its commitment to the effective protection of fundamental rights and freedoms. This is because the exercise of emergency power through the national assembly, which is based on political

persuasion, can provide an opportunity for executive to violate rights that are designated as non-derogable under the 2010 Constitution. The post independence constitution on exercise of emergency powers exhibited three characteristics: they were exercised in peacetime when the circumstances did not warrant it, they were used for political purposes (to monopolize political power) rather than situations that threatened the security of the state, and thirdly, its most potent manifestation was detention without trial.

However, the 2010 constitution gives the the Supreme Court the powers to regulate and control of this power, two bodies had the constitutional mandate to control and regulate emergency powers. This is because the control of the exercise of emergency powers by National Assembly can be more apparent than real. The judiciary under the 2010 constitution does not have considerable and far-reaching inherent weaknesses which can make it difficult for it to stand up against the excesses of the executive. The courts cannot devise ingenious ways of sidestepping matters under the Constitution such as hiding behind lack of jurisdiction, absence of rules and procedures for enforcement of fundamental rights and freedoms and outright avoidance of directly dealing with the matter by agreeing with the detention order. As such, the victims cannot endure human right violations without any possibility of redress. The courts also have the power to play a major role in decisions concerning the legality of a declaration of a state of emergency, and in reviewing the legality of explicit emergency measures. In order to guard against infringement of non-derogable rights, the 2010 constitution offers the judiciary the power to hear victim and any citizen questions relating to the lawfulness of emergency measures.

CHAPTER THREE

Exercise of emergency powers under international human rights legal regime

3.1 Introduction

The inflexibility natural to laws, which hinders their bending to events, may, in certain cases to be pernicious, and in a crisis, even occasion the ruin of the state. The order and slowness of legal forms require a space of time, which circumstances refuse. In addition as there are a thousand occurrences for which the legislator has not provided, it is very necessary part of foresight to perceive that nothing can be foreseen.[115]

State of emergencies tends to aggravate terrible violations of human rights, particularly reductions in individual liberties. Several measures also inexplicably burden victims or minorities as temporary measures can outlive the emergency and remain embedded in the legal system which then erodes the legal order. Therefore, excessive powers cannot be tolerated for a long time and some safeguards are necessary.[116] This chapter examines to what extent the exercise emergency powers in Kenya is in accord with international human rights instruments under the Bill of Rights.[117]

Whereas under international legal instruments certain rights are non derogable (rights which should not be limited whatsoever), such as the right to life and a fair trial, the Preservation of Public Security Act (Cap 57 of the Laws of Kenya) does not provide any such distinctions. For example, rendition is a violation of human rights due to actual physical abuse, violation of

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115 Jean Jacques Rousseau, *The Social Contract, Book IV, Chapter VI* (Hafner Publishing Company: New York, 1947).

116 Hatchard, John. *Individual Freedoms and State Security in the African Context: The Case of Zimbabwe* (Harare: Ohio University Press, 1993) at 3.

117 Chapter 4(Articles 19-59), Constitution of Kenya 2010

freedom of movement, threat to personal integrity, deprivation of liberty, subjecting the detainees to torture, inhuman and degrading treatment, arbitrary detention and abuse. This contravenes articles 7 and 9 of ICCPR and Article 6 of the African Charter on Human and Peoples Rights, which Kenya has ratified. In Kenya, the High Court in *Mohamed Aktar Kana v. the Attorney General*[118] has ruled the extraordinary renditions impugn the oath of office by the President to uphold and obey the Constitution, including the Bill of Rights. The court ordered that the applicant should not be extradited to Uganda and that the President should be served with the ruling through the office of the Secretary to the Cabinet. One characteristic of human rights is that they are sacrosanct, fundamental and inalienable[119] that they cannot be denied to anybody on any ground, regardless of race, colour, tribe or sexual orientation.

The 2010 constitution is based on the spirit of declaring state of emergency as a conservative measure intended to safeguard the elementary lineaments of the constitutional order from violent threat. However, the law is on state of emergency should not be vague with regards to which provisions of the penal code will be applied to decide on the level of guilt and punishment individuals could face. The law should provide adequate notice regarding the actions that could result in imprisonment, and, second, the extent of criminal liability for offenses committed during the state of emergency. This is because the vagueness of these provisions opens the door to arbitrary criminal prosecutions during declarations. A provision of the Bill of Rights should bind the natural or juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. This broadening ensures that there will be a case-by-case evaluation and individualized consideration of each situation on its own facts. There needs to be an interpretation clause

[118] Constitutional Application No. 544 of 2010
[119] Preamble to the UDHR, ICCPR

dealing with human rights and fundamental freedoms during state of emergencies which calls for the bill of rights to be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, and the International Covenants on Human Rights. Even though human rights treaties are part of a special kind of international agreements, and taken to be subordinate to the Constitution, the inclusion of the interpretation clause in relation to the fundamental rights will make international human rights instruments adopted and not just ratified have a status higher. The 2010 Constitution only requires reference to the '*principles*' like principles of universality, indivisibility and interdependency of every human right. As such, during the state of emergency the duty to respect, to protect, to fulfil, and the principle that restrictions of rights are the exceptions, instead of provisions of international instruments which outline the specific rights to guide the interpretation of the provisions in the fundamental rights chapter. Furthermore, it broadly refers to hard as well as soft instruments; therefore, conformity is required all the times instead of just during the need for interpretation. This will ensure that there is no exclusion of state of emergency cases, where clear disparities exist between the Constitution and international instruments, particularly, cases of clear constitutional provisions that merely require application of the Constitution.

The 2010 Constitution only contains regain clauses within most of the protected rights. Some of the internal limitations simply refer to those limitations determined and established by law, and even though others are more detailed, they require compelling circumstances and specific laws necessary to safeguard public security, peace, and the protection of the rights and freedoms of others. There are therefore different standards depending on which right the Constitution seeks to limit. The problem is exacerbated by the non-existence of more sweeping general limitations clause in the Constitution that would have ensured standardization of

standards in scrutinizing the conventionality of limitations of rights. For instance, the protection against torture and inhuman treatment or punishment in the 2010 Constitution may not in any way be limited, and it should instead allow the limitation of "the rights in the Bill of Rights" so long as it stands the constitutional test of reasonability and justifiability.

This chapter highlights the grounds or criteria under which fundamental rights can be derogated from in Kenya as a state party to the international legal instruments that constitute the International Bill of Rights. The chapter further investigates the disconnect between derogation under the international human rights law and the said limitations under the Constitution of Kenya 2010. Finally, the effect of Kenya's ratification of the International Human Rights instruments and the eventual domestication of the same will be examined.

3.2 The status of a state of Emergency in International Law

Even under state of emergency there has to be a continuum with respect to the legally safeguarded substance of a right. Under article 4(1) of the International covenant States are allowed to derogate from their obligation during state of emergency, but on condition that they will offer effectual remedies for any human rights violations, particularly remedies enforceable by a judiciary whose independence is secured. As such, an un-proclaimed state of emergency exists when the ordinary law making procedures are used to pass 'quasi' emergency laws in the form of wide ranging security legislation.[120] Concerning this, the Kenya 2010 constitution only offers the only circumstances that justify derogation of individual freedoms to be when the life of the nation is threatened.[121] The following criteria are held to justify a state of emergency under the 2010 Kenya constitution.

[120] Hatchard *supra note* 2 at 2.

[121] Arts 132(4)(d) and 58

The first and obvious one is a state of war or preparations to meet its imminent outbreak. This is based on articles 7 and 9 of ICCPR, Article 6 of the African Charter on Human and Peoples Rights, and Article 4(1) of the International Covenant on Civil and Political Rights while non-derogation rights are based on articles 6, 7, 8, 11, 15, 16 and 18. When the state is preparing for war, it needs wide powers that inevitably affect many facets of national life such as the freedom of movement, association and privacy among others.[122] The second situation is armed internal rebellion or subversion, which may or may not require taking wide powers such as external relations or restrictions on non-nationals. In the third situation, a civil unrest may occur on a localized scale, which may require additional law and order provisions to the areas affected by the unrest.[123] The powers required in this case will be limited to those necessary to quelling the unrest. Fourth and more importantly, the state is allowed to declare a state of emergency when there is an economic emergency. Such an emergency must relate to the problems of underdevelopment, which may require the assumption of emergency powers that are aimed at preventing economic collapse. These powers will be different from those envisaged above.[124] Fifthly, when natural disasters occur, the government may take steps to counter the problem by taking measures such as requisitioning such services like transportation. The type of emergency powers to contain the latter will invariably be different and of a temporary nature only for the period of the disaster in question.[125]

Kenya ratified the International Covenant on Civil and Political Rights in 1992 and International Convention for the Protection of All Persons from Enforced Disappearance in

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122 Supra note 2.
123 Ibid.
124 C Palley, C. *Constitutional History of Southern Rhodesia* (Oxford: Clarendon Press, 1966) at 241
125 Ibid.

2007. The right of a state to derogate certain individual freedoms during an emergency is well grounded in international law; Article 4 of the ICCPR states that:

> "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the state parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion or social origin."[126]

3.3 Derogation of rights under the International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights[127] embodies first generation rights that are available to all persons regardless of their race, colour, gender, status or creed.[128]An important feature of the ICCPR is that the creation of the Human Rights Committee (HRC) whose mandate is to receive reports from states on the progress in the implementation of the treaty provisions. Besides the committee has the added duty of hearing complains of individuals on violations of rights where such states have ratified the Optional Protocol to the Covenant.[129] The role of the Optional Protocol is to provide access to the committee where an individual feels that his rights have been violated through the domestic legal system.[130]

However, the 2010 constitution does not explicitly acknowledge Article 4(2) of the ICCPR non-derogable rights during state of emergencies. It only states that legislation enacted during a

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126 Article 2(1), ICCPR

127 General Assembly Resolution 2200A (XXI), 21 United Nations GAOR Supp. (No.16) at 52, U.N. Doc.A/6316 (1966), 999 U.N.T.S. 171, *entered into force March* 23, 1976

128 Preamble to the ICCPR

129 G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force March* 23 1976.

130 The Kenya Section of the International Commission of Jurists, Handbook on Human Rights for Judicial Officers (ICJ: Nairobi) at 3.

declaration of a state of emergency may limit a right or fundamental freedom in the Bill of Rights only to the extent that the limitation is strictly required by the emergency. In addition, the legislation is consistent with the Republic's obligations under international law applicable to a state of emergency[131].

Article 4 of the ICCPR outlines the basic principles that states have to abide by when they wish to derogate from the civil and political rights in exceptional situations. Article 4(2) of the ICCPR outlines the non-derogable rights, which include;

1. The right to life,[132]
2. protection from torture or to cruel, inhuman or degrading treatment or punishment,[133]
3. protection from slavery and the slave-trade and perform forced or compulsory labour,[134]
4. "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation,"[135] Article 15 "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law,"
5. Article 16, "Everyone shall have the right to recognition everywhere as a person before the law" and
6. The right to freedom of thought, conscience and religion.[136]

131 Article 132 (4) (d)
132 Ibid. Article 6
133 Ibid. Article 7
134 ICCPR,Article 8(1 and 3a)
135 Ibid. Article 11
136 Ibid. Article 18(1)

Article 4(3) of the Covenant requires a derogating state to immediately inform the other state parties to the Covenant through the Secretary General of the UN, of the provisions from which it has derogated and of the reasons by which it has been actuated.

The Siracusa Principles on the Limitation and Derogation provisions in the International Covenant on Civil and Political Rights (Siracusa Principles) provides comprehensive guidelines on derogations and limitations.[137] For a limitation to be valid, it must be provided for in a generally applied national law that "is consistent with the ICCPR and is in force at the time the limitation is applied."[138] These laws must not be "arbitrary" or "unreasonable" and any laws that limit human rights "shall be clear and accessible to everyone."[139] All limitations on a right recognized by the ICCPR shall be provided for by law and be compatible with its objects and purposes.[140] Adequate safeguards and effective remedies must be provided by law against illegal or abusive imposition or application of limitations on human rights.[141] Public health maybe invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.[142] Every limitation imposed should be subject to the possibility of challenge to and remedy against its abusive application. No limitation on a right recognized by the ICCPR should discriminate contrary to Article 2(1).

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137 UN Commission on Human Rights, the Siracusa Principles on the Derogation and Limitation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, available at: http://www.unhcr.org/refworld/docid/467bc122.html [accessed 16 February 2012].

138 Ibid.

139 Muller, Amrei. Limitations to and Derogations from Economic, Social and Cultural Rights. *9 Human Rights Law Review 557.*

140 Ibid.

141 Ibid.

142 For instance patients on highly contagious diseases treatment (e.g. Ebola) are normally kept in isolation on public health grounds.

The ICCPR requires limitations to be "necessary," this term implies that the limitation;

1. Is based on one of the grounds justifying limitations recognized by the relevant article of the covenant;
2. Responds to a pressing public or social need;
3. Pursues a legitimate aim, and
4. Is proportionate to that aim[143]

As for the requirement of "a democratic society", the Human Rights Committee (HRC) has stated that a society, which recognizes and respects the human rights as set out in the UN Charter and the UDHR may be viewed as meeting this definition.[144] However, it is important to note that the HRC has raised concern at the general restrictions and limitations based on vague and undefined concepts such as public order, public safety, public security, necessity, national security, international terrorism, latent subversion, perverse delinquency and internal disturbance and requested explanations as to the domestic understandings of these concepts.[145] National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.[146] Nonetheless, national security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order. On the other hand, systematic violation of human rights undermines true national security and may jeopardize international peace and security.

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143 Siracuse Principles.

144 Human Rights Committee. General Comment 21 at para. 21.

145 Human Rights Committee. General Comment 21 at para. 21.

146 Allain Jean, 'Derogation from the European Convention of Human Rights in the Light of "other Obligations under International Law', (2005) 5 *European Human Rights Law Review* 480-498.

3.4 Criteria for Derogation of Rights under the ICCPR

The principle of exceptional threat affirms that states can derogate from human rights only in exceptional cases, when there is "public emergency threatening the life of the state."[147] The ECHR has defined a "public emergency threatening the life of the nation" as an "exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is party is composed."[148]

The emergency powers under the 2010 constitution are implied from provisions that are more general, instead of having a formula in which the state can use to justify limiting of rights. For instance, In Art 58 6 (a) (1) the 2010 constitution asserts that any legislation enacted in consequence of a declaration of a state of emergency may limit a right or fundamental freedom in the Bill of Rights only to the extent that limitation is strictly required by the emergency. By stating, "Strictly required by the emergency" implies the state can apply anything even if it is arbitrary as long as national Assembly approves it. What, in any event, is the meaning of 'strictly required'? Is a matter 'commonly known' when it is infamous in the community as a whole, or in a certain segment thereof? If the latter, how severely must the measure be? The regulation does not require the state to determine beforehand whether the measures concerned are likely to have particular outcomes. As such, how is the state to determine whether they have the effect of 'delaying the ending of the emergency.

In addition, there is no distinction or tailoring of emergency powers applied during international war and those applied in local strife's or crises occasioned by natural disaster. This

147 ICCPR, Article 4(2)

148 *Lawless v. Ireland (Merits*) A 3(1961); 1EHRR15 at para. 28

makes it hard to isolate certain uniqueness distinctive of emergency rule. Even though the 2010 constitution contains the most liberal consociational aspects it remains solely pegged on parliamentary supremacy ideology, and it presents the risk of National Assembly to legislate on anything embodied in statutory form, and the Supreme court even if it finds it absurd, unjust, and unreasonable the two bodies cannot impose their decisions on the other. The 2010 constitution still makes the National assembly to practice the ideology of parliamentary sovereignty, which gives it powers to intrude as far as it wishes on the rights and liberties enjoyed by legal subjects under the common law and also through administrative actions. Presently, every executive agency owe its existence to, or draw from all but a small sections of its power from legislation, such that when legislation confers judgment, the way in which preference is practiced, the power discharged needs to be in accordance with the will of National assembly as expressed in the enabling instrument. It is important to note that during state of emergency, the Supreme Court will only offer a judicial review, which is interpreted using common law approaches of construction and against the background of definite common law assumptions concerning legislative intent. Therefore, such presumptions during emergency under 2010 constitution will apply unless the legislature takes the obscurity to exclude them, and which in the end becomes an administrative act.

For instance, in the 2010 constitution preventive measures are not by itself covered, it is not clear on what special circumstances they can be considered to constitute "penalty" during state of emergency. Secondly, does confiscation order comprises a "penalty" even though the state can consider that it is a preventive measure outside the bill of rights.

There is also a very high possibility that devices formulated by the National Assembly can prevent victims from attaining access to courts as they reduce the efficacy of 2010 constitution

judicial review regarding emergency laws. In particular, emergency detainees and their relatives right to sue and be released can be jeopardized by the state through the National Assembly placing serious obstacle in the form of regulations which clearly deprive the detainees of their right to access a lawyer without official consent. It is these inadequacies or narrowness of a variety of criminal offences during the state of emergency has made the 2010 constitution to have loopholes in which the state can create offences, which blur the dividing line between legitimate hostility and subversion.

Under the 2010 constitution emergency criminal trials, procedural justice facets like presumption of innocence, comprehensible specification of charges, just rules of evidence and elicitation , open court proceedings, and so on, can become protracted which ultimately threatens prosecution. This uncertain subordinate emergency legislation leaves room for court to make vague, in effect, how would part of an enactment that are void or imprecision be excised without rendering the remainder absurd or out of order. For instance, the 2010 constitution is vague in commonly used emergency words like ‘unrest’ and 'security action' such that they can fatally taint all the substantive provisions in which the terms can take place. In particular, there is no guideline to define unrest during emergency since unrest can imply any activity or conduct which to a reasonable bystander would appear to be anyone or more of the following activities or forms of conduct.

(1) An assembly in breach of an order under the security regulations

(2) Any physical assault on security forces or on a member of a local authority or on the house or family of a member of a security force or local government

(3) Any behavior, which comprises public violence

This also applies to **'subversive statement',** since it is not clear in the constitution which formula the state and approved by national Assembly can apply to ban speech, news comments, statements or remarks which can have the effect or are calculated to threaten the safety of the public or maintenance of public order. As such, it is open for the state to out rightly ban every access to news events during the emergency, including publications and comments.

3.5 The Principle of Exceptional Threat

Among the cases, which may qualify as exceptional situations, are international or non-international armed conflicts, serious environmental or natural disasters and attempts to overthrow the constitutional order.[149] For instance, in situations of emergency attributable to an armed conflict or severe natural disaster, it might be necessary to derogate from certain aspects of the right to freedom of movement in order to ensure the protection of the right to life or to prevent looting. On the contrary, the 2010 constitution, the emergency provisions have not stated explicitly what criteria the state should apply in establishing what is to be considered an item of an unlawful nature, is it an object as defined by its establishment, or is it an item identified from some declaration adopted at some meeting or other type of gatherings? Furthermore, the statements to be considered as exceptional threats are they made by the entity leaders, because of such, its object, or does one infer the entity items from its actual activities even though they may have never been expressed, and if so, from whom does one conclude them in that episode?'. Therefore, the onus is on the state to devise a principles or guidelines for describing exceptional threats with satisfactory clarity in order to enable those affected by emergency regulations to understand what they might or might not do during the emergency rather than being enshrined in the constitution.

[149] Human Rights Committee General Comment 29

In effect, the 2010 constitution calls for victims or affected parties during emergency declaration not to assess any exceptional threat defined by the state in an objective sense, but to view the so called threats through the lenses of a rational bystander. To make it inferior, there is no ouster clause in which the courts can use to strike down emergency legislations due to their vagueness, mostly since there are no ineluctable legal principles which can help the court to compel the state to deny detainees of their derogable rights.

The HRC has on various occasions, emphasized that with regard to the ICCPR, "restoration of a state of normalcy emergency where full respect for the covenant can again be secured must be the predominant objective of a state party derogating from the covenant."[150] The existence of "democratic institutions is a vital precondition for all protection of human rights, must be preserved and there may be situations in which some rights need to be derogated from in order to guarantee the fulfilment of more fundamental rights."[151]

3.6 The Principle of Non-Discrimination

The principle of non-discrimination is another criterion that states must fulfil when they wish to derogate from civil and political rights. This principle states that the endeavour by states to derogate should not be discriminate "on grounds of race, colour, sex, language, religion or social origin."[152]

3.7 The Principle of Proportionality

The principle of proportionality states that rights can only be derogated from "to the extent required by the exigencies of the situation."[153] The import of this provision is that there must be proportionality between the severity and scope of the interference to the emergency that

150 HRC, General Comment 29 at para. 1
151 Ibid.
152 Article 2, UDHR; Article 4(1), ICCPR
153 Article 4(1), ICCPR

threatens the life of the nation. Every single measure taken must bear a reasonable relationship to the threat. The derogation must be linked to the facts of the emergency, and must potentially be effective in helping overcome the grave situation.[154] The severity, duration and geographic scope of any derogation measure shall be such only as strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent. A measure is not strictly required by the exigencies of the situation where ordinary measures permissible under the specific limitation clauses of the covenant would be adequate to deal with the threat to the life of the nation. The national constitution and laws governing states of emergency should provide for prompt and periodic independent review by the legislature of the necessity for derogation measures.[155] Effective measures should be available to persons adversely affected by the derogation measures not strictly required by the exigencies of the situation.

The principle of proportionality also refers to the territorial scope of the measures and requires their regular review.[156]It dictates that in practice "no provision of the Covenant, however validly derogated from will entirely be inapplicable to the behaviour of a state party."[157]

3.8 The Principle of Non Derogability

Not all rights are available for derogation, the principle of non-derogation states that certain rights are so important for the protection of the dignity of individuals and guarantee their survival in situations of emergency.[158] Article 4(2) gives a list of the non-derogable rights, which include; the right to life, freedom from torture, cruel, inhuman or degrading treatment, and punishment and from medical or scientific experimentation without free consent. In addition, it

154 HRC, General Comment 29
155 HRC, General Comment 29
156 Ibid.
157 Ibid.
158 HRC, General Comment 29

contains the freedom from slavery or involuntary servitude, protection from imprisonment for contractual debt, conviction or sentence to a heavier penalty by virtue of retroactive criminal legislation, the right to recognition as a person before the law and freedom of thought, conscience and religion. These rights are non-derogable under any conditions even for the asserted purpose of preserving the life of the nation.

3.9 The Principle Of International Notification

Article 4(1), of ICCPR requires states to officially proclaim and notify the other states to the covenant, through the Secretary-General of the UN any derogation from the covenant . This notification must contain;

1. "The provisions of the Covenant from which it has derogated,
2. A copy of the proclamation of emergency, together with the constitutional provisions, legislation or decrees governing the state of emergency in order to assist the states parties to appreciate the scope of the derogation,
3. The effective date of the imposition of the state of emergency and the period for which it has been proclaimed,
4. An explanation of the reasons which actuated the government's decision to derogate, including a brief description of the factual circumstances leading up to the proclamation of the state of emergency and
5. A brief description of the anticipated effect of the derogation measures on the rights recognized by the Covenant, including copies of decrees derogating from these rights issued prior to the notification."[159]

[159] Principle 46, Siracusa Principles

The essence of official proclamation is to inform people affected by the derogations about the exact material, territorial scope of application of the emergency measures. It also allows state's legislative and judicial bodies to supervise their legality and implementation.[160] The derogating state bears the burden of justifying its actions under the law. Derogation provisions cannot be interpreted to imply for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized by law or at their limitation to a greater extent than is provided for by law.[161]

3.10 Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)

The second Optional Protocol to the ICCPR[162] was designed to specifically advocate for the abolition of the death penalty. The function of the Optional Protocol is to give emphasis to Article 6 of the original Convention, which refers to the abolition of the death penalty. It states that

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Protection and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court."

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160 Article 4(3), ICCPR

161 Principle 64, Siracusa Principles

162 Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989

The language of the Optional Protocol with regard to derogation of rights is to the effect that the right is non-derogable and where the death penalty is carried out, it must follow the due process.

3.11 Derogation of rights under the Universal Declaration of Human Rights (UDHR)

Article 29(2) of the UDHR sets out the ultimate purpose of law:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare in a democratic society.

In this provision it is evident that limitations can be described as "techniques of accommodation, "which allow states to determine the extent to which they will provide for human rights protection within their general legal systems.[163]

Following the acceptance of the UDHR, two international treaties; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were formed. Kenya ratified these two treaties in May 1992 and is therefore bound by their provisions on the derogation of fundamental rights encapsulated in Article 4(2) of ICCPR and Article 4, 5, 8(3), 16(b), 17 and 28 of ICESCR.

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

The International Covenant on Economic, Social and Cultural Rights[164] embody the second-generation human rights and fundamental freedoms that protect the social, cultural and economic rights. They are captured under Article 41, 43 and 44 of the Constitution of Kenya 2010. The limitation provisions of the convention are Article 4 and 5.

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163 Allain Jean 'Derogation from the European Convention of Human Rights in the Light of "other Obligations under International Law', (2005) 5 *European Human Rights Law Review* 480-498.

164 G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) U.N.T.S. 3, *entered into force January* 3, 1976.

Article 4 states that;

> The state parties to the present Covenant recognize that, in the enjoyment of these rights provided by the state in conformity with the present covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be comparable with the nature of the these rights and solely for the purpose of promoting the general welfare in a democratic society.

This leaves no doubt that the Convention only recognizes derogation by states to limit rights that exist in law and not extra-judicial limitations. Such limitations must be such that they promote the rule of law and democracy.

Article 5, states that;

> 1. Nothing in the present Covenant may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act at the destruction of any of the rights or freedoms recognized herein, or at their limitation to greater extent than is provided for in the present Covenant.
>
> 2. No restriction upon or derogated from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that recognizes them to a lesser extent.

The import of this Article is to the extent that human rights are universal and interrelated; the infringement of one affects all the rest in form and substance. The implementation of these rights are self limiting as they require the state to take steps including public expenditure, to provide a basic standard of living and respect cultural expectations.[165] Among the rights protected by the

[165] ICJ *supra note* 17 at 3.

Covenant include; the right to education,[166] social security,[167]right to work, under just and favorable conditions,[168] right to cultural life and physical and mental health.[169]

It is one thing to make provision for the convention to provide for state obligations and quite another to ensure that states follow up on these commitments. The Committee on Economic, Social and Cultural Rights is charged with the task of monitoring the compliance and implementation of these rights.[170] To assist it in its task, it gets information and reports submitted by state parties, U.N specialized agencies (ILO, UNICEF, WHO, FAO and UNHCR). Information is also received from NGO's and community based organizations that work in states that have ratified the convention such as the UN treaty bodies and from any other available source.[171]

These rights have been termed as progressive rights,

> Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.[172]

The fact that has been recognized by the Constitution of Kenya 2010;

> In applying any right under Article 43, if the state claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles-
>
> It is the responsibility of the state to show that the resources are not available.[173]

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166 Article 13(1), ICESCR.
167 Ibid. Article 9.
168 Ibid. Article 8(9).
169 Ibid. Article 12(1).
170 Ibid. Article 16(2).
171 Office of the Commissioner of Human Rights, Fact Sheet No. 16 (Rev.1), The Committee on Economic, Social and Cultural Rights.
172 ICESCR, Article 2(3).

This is so because the realization of these rights solely depends on the state's capacity to budget for them. Therefore, the implementation of these rights is self limiting.[174] That is why the move towards the realization of these rights should be deliberate, concrete and targeted to meeting the obligations under the covenant,[175] in spite of the lack of principles to guide this process under the convention.

3.13 The African Charter on Human and People's Rights

The African Charter on Human and People's Rights (ACHPR)[176] or the Banjul Charter is a creature of the OAU (AU) created in 1981, purposely to promote and protect human rights and fundamental freedoms in the African continent. The Charter was as a result of a conflict between the African Governments and the United Nations Declaration on Human Rights. This was more so on the provision under the UDHR of the universality of human rights which the African states did not agree to.[177] The OAU's thinking was that human rights have regional peculiarities that must be recognized in designing an international human rights legal regime. This was deliberate because;

> The OAU focused its attention on liberation of colonized states in the continent and condemnation of apartheid. In order to avoid conflict between member states, the OAU emphasized the principle of non interference with internal affairs of member states. For along time, following abuse of power by African Presidents, the OAU kept silent on the violation of human rights by African states. For example, the massacre of thousands of Hutus in Burundi in 1972 and 1973 were neither discussed nor condemned by OAU.

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173 Article 20(5), Constitution of Kenya 2010.
174 Article 2(1).
175 Kenya Section of ICJ at 4.
176 Adopted by the eighteenth Assembly of Heads of State and Government, June 27, 1981-Nairobi, Kenya, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986.
177 Preamble to the UDHR

> Human rights violations within states were regarded as internal affairs of the respective states and did not warrant the attention of the international.[178]

However, unlike the other international human rights instruments, the African Charter gives provision for not only rights but duties as well. The Charter does not expressly address itself to derogation or limitation. However Article14 uses the language of encroachment in public interest;

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.[179]

3.14 A Comparison of Kenyan, Ethiopian and international laws during states of emergency

3.14. 1 the right to life

Ethiopian Constitution protects the right to life except for the punishment following a grave criminal offence established by law. This means that, death penalty is allowed by the Constitution. Under the Ethiopian Constitution, The right to life can be derogated since it is not found in the non-derogable rights list. Practically, when crisis occurs, especially during states of emergency, the government normally breaches this right. The Kenyan constitution also protects the right to life and does not provide for death penalty in case of a severe criminal offence. Kenya places itself under international law applicable to a state of emergency. Since non derogable rights in international law vary from one treaty to another but the right to life is common to all, it means that the right to life in Kenya is a non derogable right in compliance

[178] Kenya Section of ICJ at 5
[179] Article 14, ACHPR

with the international law on state of emergency according to the treaty ratified at that time. This is unlike Ethiopia law, which allows derogation of right to life.

3.14.2 Cruel, Inhuman or Degrading Treatment or Punishment

Article 18 of the Ethiopian constitution provides for protection against harsh, inhuman or demeaning treatment or penalty. Even so, torture, which has attended the status of jus cogens or peremptory norms, is not incorporated in the current provision or in other constitution provisions of Ethiopia. The Kenya constitution of 2010 provides this as one of the fundamental rights and freedoms that shall not be limited. This right is also common to all international law on state of emergency as a non-derogable right and therefore according to the treaty ratified, Kenya becomes compliant since it places itself under international obligation during the state of emergency

3.14.3 Slavery or Servitude

Article 18 of the Ethiopian Constitution prohibits slavery or servitude including compulsory or forced labor. Moreover, human trafficking is prohibited. Human trafficking under the Ethiopian constitution is a non derogable right which is not like the ICCPR. With respect to forced labor, although it is listed under article 18, service exacted during calamity or emergency threatening community's well being or life fall under the exception of forced labor. Forced labor prohibition under ACHPR is not well defined. However, ACHPR prohibits all form of exploitation and one can reason out that forced lab our prohibition is included. In the same way, ICCPR prohibits forced labour apart from certain practices. In Kenya this right becomes non derogable as it is to all international law during state of emergency. In addition, this right is

among fundamental rights and freedoms and pursuant to article 25 of the Kenyan constitution 2010, this right may not be limited under any circumstance.

3.14.4 Nomenclature of The State

The nomenclature of the state proclaims the system of government that is formed, a state that is federal and democratic. This is a non-derogable provision under the Ethiopian Constitution. The implication of this provision is that the state of emergency will not affect the federal structure of Ethiopia in any way. If this is a right then will it not defeat the political participation right, the self-determination right and other rights recognized under the Ethiopian constitution? There is no provision under the ICCPR or the ACHPRT that defines it as right. Peoples will forms the basis of the state structure, which is articulated through participation. The concept is dynamic and is not fixed and pertinent throughout. The African Commission in the case of *Katangese peoples' congress v Zaire* has expressed this view by stating that self-determination may be exercised in the form of independence, self government, federalism or unilateralism or any other form.[180] Therefore, holding federalism as a right which is not derogable would be undistinguishable to self-determination right limitation and refusal to recognize the persistent nature of the right. The 2010 Kenya constitution does not declare whether the nomenclature of state is derogable or not during the state of emergency.

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180 Tessema, Belay Frenesh. *A Critical Analysis Of Non-Derogable Rights In A State Of Emergency.* Maputo: University of Pretoria, 2005.

3.14. 5 Equality

Equality includes the full and equal enjoyment of all rights and fundamental freedoms[181]. This is a non-derogable right under Ethiopian constitution. Article 3 of the ACHPR affirms the right to equality. A violation of the right to equality before the law and equal protection of the law has been interpreted by the African Commission in the case of *constitutional rights project and another v Nigeria* to refer to laws made to apply to specific individuals or legal entity.[182] Even though the ICPPR does not include equality as a non derogable right, the opinion of HRC is that there are essentials of the non discrimination right which under any circumstances cannot be derogated from. The 2010 constitution of Kenya is not clear on whether the right to equality is derogable or non derogable

3.14.6 Self determination

Article 39 of the Ethiopian constitution provides for the right to self-determination. It allows nationalities, all nations, and Ethiopian people an unrestricted right of secession from the nation and is non-derogable. While ICCPR provides for the right to self-determination, the conventions does not incorporate the unrestricted right of secession. Self-determination right is also provided for by article 20 of the ACHPR. This right is not in the list of the rights that can be derogated from under the ICCPR but a general remark of HRC has the view that international person's rights protection, which belongs to minorities, includes fundamentals that must in all circumstances including state of emergency be respected. The 2010 constitution of Kenya has no provision for the right to self-determination.

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181 The constitution of Kenya art 27(2)

182 Tessema, Belay Frenesh. *A Critical Analysis Of Non-Derogable Rights In A State Of Emergency.* Maputo: University of Pretoria, 2005.

3.15 International human rights law and its application to domestic law

Human rights are universal, interdependent and interrelated. In applying human rights, states have embraced national and regional peculiarities by factoring in various historical, cultural and religious backgrounds.[183] However all states have a duty to promote, fulfil, enforce and protect all human rights and fundamental freedoms.[184]

The most important source of international human rights is treaty law, although consensus is still divided as to whether the provisions of the UDHR constitute international customary law in international human rights (IHR).[185] The UDHR was adopted by the UN General Assembly in 1948 and is the 1st such instrument that touches on international human rights. It has developed into the benchmark for the establishment of international and regional human rights legal framework.[186] The declaration deals with 1st and 2nd generation rights (civil, political, social, economic and cultural rights). Although as a declaration it is not binding, its provisions presently constitute part of the international customary law on human rights.[187] The rationale for including the declaration as part of customary international law is that it binds all countries unlike treaties which only bind states that have accepted treaty obligations. Besides, obligations under customary international law are considered as obligations *erga omnes* (which means of universal application).

3.16 The effect of ratification of international legal instruments

Kenya has ratified many international human rights instruments, and they include. United Nations International Covenant on Civil and Political Rights (ICCPR), ratified on 1st May 1992,

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183 ICJ *supra note* 17 at 1.

184 Vienna Declaration and Programme of Action (Part 1, Para. 5), adopted by the World Conference on Human Rights, Vienna, 25 June 1993 (CA/CONF.157/24, Part 1, Chapter iii)

185 Ian Brownlie, *Principles of Public International Law 4th ed.* (Clarendon Press: Oxford, 1990) at 570.

186 ICJ *supra note* 17 at 1.

187 Ibid.

the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) also ratified on 1st may 1992, the African Charter on Human and Peoples' Rights and the African Charter on Human and Peoples' Rights.

Having ratified these instruments, Kenya as state member under the international human rights law is under an obligation to respect,[188] protect, and fulfil by promoting and facilitating the implementation of the said rights. The state is under an obligation to make efforts for progressive realization by using maximum resources available to attain those rights. Where a state is unable to realize those rights, it must seek international assistance[189]and or use all appropriate means including but not limited to legislative measures.

In practical terms, it has been suggested that the influence and acceptance of these conventions has actually spread everywhere across several countries well beyond the number of actual ratifications. Given such an impressive record of success, the potential of these conventions in the protection of fundamental rights and freedoms cannot be over-emphasized, thus it could be used as a tool to stimulate dialogue aimed at regulating the extent of the derogations. Kenya as a state party to these international legal instruments it has ratified is duty bound to ensure its domestic law is in harmony with international legal obligations. Consequently Article 2(5) and (6) of the Constitution of Kenya, 2010 has been drafted in line with these provisions.

3.17 Conclusion

Although international human rights law seeks to promote the protection of fundamental rights and freedoms, it is conceded that in certain circumstances such rights may not be available

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188 Obligations of State Members further stressed in Article 2 of ICESCR and Council on Economic Social, Cultural Rights, General Comment No. 3.

189 Article 2(1), ICESCR; Article 2(6), Constitution of Kenya 2010

to citizens for various reasons. When that eventuality has to happen, states are allowed to derogate from their obligations when the life of the state is in danger, but this can only happen under certain principles namely: the principle of exceptional threat, principle of non-discrimination, principle of proportionality, principle of non-derogability and the principle of international notification. However, in the rendition cases in Kenya, these guidelines have not been followed with the consequence that citizen's rights have been violated with impunity.

The preservation of the thought that emergency powers remain in principle subject to control by the law is perhaps the most important aspect of the 2010 constitution, and which can be made by the courts under crisis rule. Nevertheless, questions arises regarding whether the special rules of emergency executive and legislative regulations will have any lasting effect on the development of the general principles of administrative law pertinent in the non-emergency area. What is still in the 2010 constitution is the ability of a declaration of a state of emergency to form a discrete legal system, having its own standards and characteristics. The statutory emergency laws can still free the executive not entirely but from some legal controls. There is also the risk that the state can simply promulgate /legislations, which have been struck down by the courts. Therefore, the courts/Supreme court should be measured in applying precedent laid down in emergency cases to those encompassing exercise of executive powers under the ordinary law. In particular, only those aspects of the judicial judgments in which the right of review will be endorsed in principle may attest to be of more enduring implication than those in which the courts can approve some particular contravention of rights. This relative impotence of the judiciary to control the exercise of the executive emergency powers is founded on the 2010 constitution generosity to statutory legislations, and which the National assembly has been given powers to confer on the executive. In particular, how will the courts uphold some reasonable

balance between the executive power and individual rights under emergency rule, clearly, when the emergency regulations are not immune from assault based on their indistinctness?

CHAPTER FOUR

Summary, conclusion and recommendation

4.1 Summary

In summary, although the declaration of a state of emergency previously exposed Kenyan citizens to massive human right violations, no concerted effort has been made to study the legality of state of emergency in the light of international human right norms. The UDHR had been in existence since 1948, and signified the universality of human rights, but the colonial Government breached its international obligations by violating the rights of citizens during the state of emergency. This is notwithstanding the fact that the exercise of emergency powers is an important and necessary tool in the life of a modern state. The reality of the matter is that a country's statutes and constitution cannot provide a remedy for every eventuality that is likely to occur, more critically when the life of a state is in danger. It is for that reason that emergency powers are provided for under domestic and international law.

However, Kenya's experience with emergency powers is that these powers have been used in peacetime to detain perceived political dissidents and for political reasons rather than during exceptional circumstances. Currently the 2010 Constitution is explicit on when a state of emergency can be declared, who makes the declaration, how the declaration is made, and for

how long[190]. Furthermore, rights may be limited only to the extent strictly required by the emergency and in accordance with international law obligations

4.2 Conclusion

Various international human right treaties provide a mechanism through which members states' can use to legally derogate or limit fundamental rights and freedoms in a state of emergency. Kenya experience is that the declaration of a state of emergency gives the state the excuse to limit fundamental rights of its citizens. This not only undermines the rule of law but puts into question the country's commitment to the observance and enforcement of its human rights obligations under international law.

This discussion is against the backdrop that Kenya ratified the three most important human right instruments in 1992 namely; the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Optional Protocol to the ICCPR and the International Covenant on Economic, Social and Cultural Rights. The three Covenants form the core of International Bill of Rights. They provide that human rights are inalienable and universally available without any discrimination. However, Kenya's conduct in the rendition cases is contrary to its commitments and obligations to these instruments, which are set out to be the fulfilment, promotion and protection of the human rights of its citizens.

The instruments are alive to the fact that in times of emergencies, states may find it difficult to abide by their obligations and therefore have offered guidelines on when and how states can derogate from their obligations in limiting fundamental rights under domestic legislation. According to these guidelines in limiting human rights, a number of principles must be observed namely; the principle of exceptional circumstances the principle of proportionality,

[190] Arts 132(4)(d) and 58.

the principle of non derogability of rights, the principle of non discrimination and the principle of international notification. In carrying out renditions, Kenya has not followed this guidelines leading to the derogation of rights that are considered non derogable under international law.

The Ethiopian constitution is very clear with regard to the state of emergency law. Five rights are recognized as non-derogable in times of state of emergency. They include equality, nomenclature of the state, freedom from slavery, the right not to be subjected to inhuman and degrading treatment, and self-determination. However, the right to life is derogable. Unlike the Ethiopian constitution, the 2010 Kenya constitution shows inadequacy in clarification of the non-derogable rights on the state of emergency but refers to international law applicable.

The Constitution of Kenya 2010 has found innovative ways of dealing with the problem of limiting fundamental rights. Article 2(5) and (6), is categorical that the principles of international law and the Conventions ratified by the Kenya Government will form part of the Kenya's domestic law. Thus, the domestication of international law provides a window through which the derogations and limitations of fundamental rights and freedoms can be vindicated. However the challenge is the successful implementation and the passage of the necessary legislation to operationalize these provisions on the limitation of fundamental rights and freedoms of the Constitution. The High Court has been granted the independence and mandate to regulate derogation of rights and grant remedies of *habeas corpus* if necessary. The right granted to members of public for seek redress in contemplation of the contravention of the Constitution is significant as the courts have finally become the final arbiters in matters concerning abrogation from fundamental rights. It is therefore the researcher's submission that citizen's rights should be protected even during a state of emergency, the only way to do so is to

follow international human rights treaties that prescribe the extent to which a state would limit/derogate from human rights in a state of emergency.

The constitution of Kenya 2010 contains entrenched articles that cannot be amended unless approved by the people in a referendum. The Bill of rights is one of those articles. This is meant to uphold the sovereignty of the people of Kenya and shield a key pillar of the constitution from arbitrary alteration by any person or any authority without full participation and endorsement of the people of Kenya.

The constitution of Kenya 2010 provides for strengthened independent and functional institutions, including especially the Police, the Judiciary and the Legislature. These critical institutions are no longer susceptible to executive manipulation. Further, the 2010 Kenya constitution expressly safeguards judicial independence and provides a more reformed Judiciary to foster independence impartial and expedition's access to justice and rule of law for all.

Lastly, there is a growing international recognition of the interdependence between the promotion of human rights and the realization of good governance. Kenya must move in tandem with the emerging global culture of human rights protection and best governance practices.

In order to achieve the convergence of human rights and democratic governance the constitution of Kenya 2010 has provided for an implementation framework that requires parliament to enact enabling legislation within the specified timelines. Further the constitution has established the commission for the implementation of the constitution 2010, an independent body charged with the responsibility of monitoring facilitating and overseeing the effective implementation of the constitution of Kenya 2010. The challenge lies in the implementation process.

4.3 Recommendations

4.3.1 Legislation should be enacted to clearly define state of Emergency Laws domestically

The 2010 Kenya constitution refers to international law during states of emergency. Non-derogable rights vary from one treaty to another although there are those common to all. In present time or future, Kenya may have ratified several treaties and conventions, which may conflict in terms of derogable or non-derogable rights during the state of emergency. Therefore, Kenya needs to legislate on laws relating to states of emergency rather than domesticating the international laws

4.3.2 Enhance safeguards for victims of Emergency Powers

The safeguards provided for the victims of emergency powers should be enhanced to ensure that an innocent person is not denied his fundamental rights while he is not a danger to the security of the nation. Since resort to emergency powers in Kenya has at times not been when the safety of the nation is at stake, it is imperative to ensure that fundamental rights are not negated by casual resort to emergency powers. The enhancement of the safeguards may be achieved in the following ways:

Providing for express judicial scrutiny of whether a person who has been interned is a risk to the public security. This means that resort to emergency measures becomes a justiciable issue with it open to the courts to go behind the detention order and ascertain whether there are substantial reasons for believing that the detainee is a threat to public security. In this respect, Kenya could borrow from other jurisdictions such as Tanzania which allows detainees to challenge any aspect of the detention in a court of law. This will ensure that only people who are

dangerous to the national security are detained and the persons charged rather than detained where allegations against them amount to a mere under the penal law.

In addition, it could require a change of heart on the part of the judiciary since continued clinging to strict and legalistic interpretation of provisions relating to procedural safeguards may render the changes as ineffective as the present bare safeguards have been rendered. The judiciary would therefore, have to appreciate that individual liberty is best safeguarded by strict observance of and compliance with procedural safeguards.

4.3.3 Operationalization of Article 2(5 and 6) of the Constitution

The operationalization of Article 2(5 and 6),[191] which domesticates international customary law and treaty law will go a long way in making the exercise of emergency powers into conformity with international best practices. It is evident that the requirements of ICCPR regarding the control of emergency powers are sound and should be adopted in Kenya.[192] This is the only way that the danger attendant to the use of emergency powers in perpetuity as evidenced under the previous law can be curtailed.

4.3.4 Enforcement of public interest litigation

For the first time, the constitution has expanded public interest litigation to any citizen to challenge the constitutionality or otherwise of a legal provision. Article 258(1), is instructive "every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention." This moves away from the earlier position where only the Attorney General had the *locus standi* to sue on behalf of the public.

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191 "The general rules of international law shall form part of the law of Kenya" and "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution"

192 Kivutha Kibwana. *Fundamental Rights and Freedoms in Kenya* (Nairobi: Oxford University Press, 1990) at 69

Thus persons whose rights have been limited pursuant to emergency powers have an opportunity to challenge such powers.

There should also be an express constitutional provision ensuring that an emergency is a temporary phenomenon. This means that the current position, which has been in existence from 1968 whereby an order bringing Part III of the Preservation of Public Security Act into force continues somehow indefinitely, must be altered to preferably approve emergency measure which has been duly approved by Parliament. The emergency should last for three months after which the emergency powers automatically lapses, unless the legislature, by a similar majority as that which confirmed the declaration of the emergency renews the declaration. Once again, here we are talking of a legislature, which, upon objective appraisal of the conditions obtaining in the country is free, and conscientious enough to refuse the renewal of emergency powers where and when it feels they are not necessary.

4.3. 5 Enhanced capacity of the Courts to uphold and enforce the bill of rights

The victims whose rights have been limited should make more use of the courts, granted that they now enjoy more powers granted under Article 1 and 2 respectively (sovereignty of the people and supremacy of the Constitution) unlike before. Through this, suspects illegally extradited to other countries such as Uganda and the USA can not only claim damages from the Government of Kenya but also apply for an order of *habeas corpus*[193] that would compel the government to produce the suspects in court. This is because there is a glaring failure on the part of the Government to accord with the constitutional provisions. Further, the suspects can seek declaratory orders that their rights have been infringed with the consent and acquiescence of the

[193] Article 25(d), Constitution of Kenya

Government.[194] Indeed, no rendition can be carried out without the tacit approval of the Government. The declarations and the payment of reparations to the families will act as a deterrent to violation of the law by the Government. If the Commissioner of Police disobeys the orders of the court not to extradite the suspects, contempt of court proceedings could be filed against him/her.

4.3.6 Total implementation of the Constitution

Many reforms envisaged under Constitution will depend on the political will and capacity of Parliament to implement and enact the enabling legislation. This is more so with regard to legislation that will operationalize Kenya's procedure of domesticating international law envisaged under Article 2(5) and (6). This is more so because the guidelines to derogate from international human rights standards are grounded in international law especially the ICCPR that Kenya has ratified but not domesticated.

4.3.7 Amendment of the Preservation of Public Security Act

There is a need to come up with new legislation that would regulate the derogation of fundamental rights and freedoms in line with the country's international obligations. This is important because the existing legislation (Preservation of Public Security Act) is already obsolete with the passage of the new Constitution. limitation and emergency powers needs being revisited to remove the danger they now face of being misused by the executive and in light of the new Constitution.

[194] Ibid. Article 23

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