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**JUDICIAL ENFORCEMENT OF FUNDAMENTAL RIGHTS AND  
FREEDOMS OF THE INDIVIDUAL VIS-A-VIS THE LIMITATIONS  
THERE TO IN KENYA**

**A**

**DISSERTATION**

**PREPARED AND SUBMITTED IN PARTIAL FULFILMENT OF  
THE BACHELORS OF LAW (LL.B) AT THE UNIVERSITY OF  
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## **DEDICATION**

**To my little angel Mitchell:**

**Whenever I was angry, doubtful, tired and demoralized, your delightful little smiles kept me going, I love you Mitchell baby. You are everything to me.**

**May God bless you in life.**

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## ABBREVIATIONS

1. UDHR - Universal Declaration on Human Rights, 1948
2. UN- United Nations, 1945
3. SS- Sections
4. S- Section
5. LN-Legal Notice
6. KHRC - Kenya Human Rights Commission, 1992
7. CRE-Co- The Constitution and Reform Education Consortium
8. MISC- Miscellaneous
9. APP - Application
10. A.C - Appeal cases
11. ALL E.R - All England Reports
12. NO(S) - Number(s)
13. PP - Pages
14. N- Notes
15. O.A.U - Organization of African Unity
16. I.C.J - International Court of Justice
17. P.C.J - Permanent Court of International Justice
18. L.S.K - Law Society of Kenya

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## INTRODUCTION

Protection of fundamental rights and freedoms of the individual in Kenya are enshrined in Chapter V (Sections 70-80) of the constitution of the Republic of Kenya. Section 70 entails all fundamental rights and freedoms protected and guaranteed by the constitution. The protective sections of these fundamental rights and freedoms are contained in Sections 71-82 of the constitution.

The concern of this study is to critically examine how successful the Kenya Bill of rights has been in drawing a reasonable line between individual rights and state interest without necessarily having to subject one to the oppression of the other.

Secondly, is the issue of how amicable has our bill of rights reconciled the needs of maintaining Public order to preserve the society and at the same time protecting individual liberties. The critical point to note is that protection of those rights and freedoms are subject to such limitations as are contained in those protective provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

The most motivating factor to undertake this study is the "experience of a two month clinical programme at Nakuru Law Courts. Having attended Court sessions, visited prisons and remands, and other law enforcement agencies like police stations, the writer saw the need to highlight the need to practical implement the protective sections as contained in chapter V instead of having them as mere decorations. For instance, whereas the protection of the right to life is a fundamental right, the constitutional limitation thereto has been abused in practice to the extent that we hear of police shooting and killing suspects daily in order to arrest (eg. the recent shooting of David Sila Kimuyu a University of Nairobi Student alleged to be in possession of drugs) and prevent the escape from detention (eg. the King'ong'o executions).

Perhaps the most abused right by law enforcement agencies such as the police and prisons



department is S.77 of the Constitution. Suspects are tortured in Court cells and treated as if they are criminals. Suspects are rarely informed of charges facing them before being arraigned in Court, they are either allowed limited access to their relatives or denied altogether. Access to their lawyers is also denied by the remand authorities. Such suspects are usually tortured in order to confess and this is a contravention of S.77 (7) of the constitution.

Equally affected are members of the popular sect commonly known as the "Mungiki". This religious organizations has had its members oftenly charged in courts. The authorities have capitalized on limitations enshrined in S.78 (5) of the constitution to muzzle away their freedom of conscience.

Perhaps the most recent curtailed freedom is to be seen in the amendments to the Books and Newspapers Act that seeks to limit the freedom of expression as guaranteed by S.79 of the Constitution. The amendment capitalizes on the limitation provided by S.79(2) (b) and to this extent, it appears that Acts of parliament seem to have ousted the protective sections enshrined in the constitution. The other example is the recent amendment to the Public Order Act that requires notification to the police prior to convening a public meeting. This has curtailed the freedom of assembly and association as protected by Section 80 of the Constitution, again capitalizing on the limitation provided by S.80(2)(a) of the Constitution. These are just a few examples where the fundamental rights and freedom are curtailed hence denying protection to the individual.

The enforcement of the fundamental rights and freedoms of the individuals and constitutional limitations can best be preserved in practice, through the medium of the Courts of Justice. Without this, all the preservation of particular rights and privileges would amount to nothing. Indeed, human rights will be meaningless if the Courts do not vindicate them when violated.

The jurisdiction to enforce fundamental rights and freedoms is vested in the High Court by S.84 of the constitution. The judicial enforcement of fundamental rights and freedoms of an individual

is still developing. That is why the Chief Justice vide legal Notice No. 133 of 2001 promulgated the constitution of Kenya (protection of fundamental rights and freedoms of the individual) practice and procedure rules, 2001, pursuant to Section 84 (6) of the Constitution.

It is from this background that we see the remarkable turnover of authority-stamping by the judiciary in its efforts to protect fundamental rights and freedoms.

For a precise and understandable literature, the writer seeks to breakdown this work into four chapters. Chapter one will cover the historical development of fundamental rights and freedoms catapulting to the various definitions accorded to human rights. This will be a brief chapter.

Chapter two will critically analyze how the courts, through various decided cases have sought to enforce the protective sections of the fundamental rights and freedoms ie sections 71-82 in relations to constitutional limitations thereto and a myriad of written laws promulgated pursuant to those limitations. This chapter shall form the core of this thesis.

Chapter three will analyse whether or not Kenya has achieved its international law obligation in fulfilment of the various treaties to which it is a signatory and its obligation under the international law regime.

Finally a conclusion will be reached on the extent to which fundamental rights and freedoms are protected by the judiciary as suggested and make various recommendations to streamline the shortcomings.

# CHAPTER ONE: DEFINITION OF FUNDAMENTAL RIGHTS AND FREEDOMS AND THEIR HISTORICAL BACKGROUND

## 1.1 HISTORICAL BACKGROUND OF FUNDAMENTAL RIGHTS AND FREEDOMS

There has been much debate on whether the concept of Natural Rights as formulated in the days of the ancient Greek civilization is the same concept of Human rights enshrined in most constitutions of today. This debate has been made necessary by the fact that legal experts do not want to mix up issues of morality and those of Law. Despite this, there has been consensus in one thing; that there's some degree of morality in human rights. This fact alone links the concept of fundamental human rights to that of natural rights.

Turning to the historical background of fundamental rights and freedoms, it is important to note that the Greek City state were the home of a natural law philosophy whose main characteristic was a dichotomy of a divine-ordained superior and immutable law, and an inferior temporal law, the validity of the latter being dependent on conformity with the former.

The collapse of the Greek city states and the rise of the Roman Empire led to a change of philosophy. The stoics of the Hellenistic period in a clear departure from the Greek views emphasized natural rights instead of the deity-ordained natural law. The stoics maintained that there were natural rights which were apparent and deducible by dictates of reason, independently of the existence or non-existence of God.

By perceiving nature as the source of rights, the stoic philosophers were also asserting that the rights were universal, thereby refuting the idea of different Greek city states as the recipient units of rights. Yet this quest for universality was negated by the existence and toleration of the institution of slavery and the application of different laws to wit, the **Jus Civile**, the **Jus quetium** and the **Jus naturale** to different classes of persons.

Then came the Medieval Christian philosophers, like St. Thomas Aquinas whose main contribution was to root natural law in divine authority thus giving it the equality of the highest law. They maintained that the legal rules of society only possessed the quality of law if they confirmed to right reason.

The next stage in the development of Human rights is the age of feudalism. This was seen especially in England where the conflict between feudal and despotic monarchs and land barons led to the guaranteeing in charters of the rights of the nobles. Such charters include the Magna Carter of 1215 which protected the nobles from imprisonment, exile or dispossession of property unless by judgement of the Laws of the land, the Petition of Rights of 1628 which provided that no person could be compelled to pay any loan, gift or tax without the previous sanction of parliament.

Perhaps the period with most direct influence on the modern concept of human rights was the seventeenth and eighteenth century when European philosophers like John Locke and Jean Jacques Rousseau propounded the social contract theories. John Locke, the father of the social contract theory was of the view that man as a human being has to surrender some of his rights in order to be protected by the government but this did not mean that in doing so he had surrendered all his rights. It only meant that the government was obligated to protect human rights and in so doing, man was to leave the government with the power of doing so.

it is also during the eighteenth and Nineteenth Century that concern for the individual human being started to sip into the international system as evidence to abolition of slave trade. Later, states began entering into agreements making the conduct of war more humane. This was to be seen by the practice of treating prisoners of war and wounded soldiers in a humane manner.

Then came in the American colonialists whose war of independence culminated in the Declaration of Independence in 1796. This document was couched in a classical natural law language. Ten amendments were made in 1789 to the 1787 constitution which became the American bill of

Rights. Some of the freedoms protected therein were:-

- . Freedom of religion
- . Freedom of press and assembly
- . Freedom of speech
- . Freedom from unreasonable searches and seizures
- . The right to a fair trial
- . Freedom from excessive bail and
- . Freedom from cruel and unusual punishment.

This was followed by the French Revolution of 1789 which led to the proclamation of the Declaration of the Rights of Man and of the Citizen, the same year. The Declaration asserted that men are born free and remain free and equal in rights and the aim of every practical association is the preservation of the natural and imprescriptible rights of man eg. the right to liberty, property, safety and resistance. Rights and freedom protected here included:-

- . Freedom from retroactive laws
- . Freedom of opinion
- . The right to be presumed innocent until proven guilty
- . Freedom of conscience and religion
- . Freedom from arbitrary arrest
- . Freedom of speech and press and
- . the right to property.

Although the natural law ideas suffered a sustained assault from positivist thinkers in the nineteenth century, nevertheless, they have been able to survive the onslaught particularly by the practice noted above of guaranteeing in a justiciable bill the rights regarded as inherent in man's nature.

## **1.2 DEVELOPMENT OF HUMAN RIGHTS AT INTERNATIONAL LEVEL**

After the second world war, there was an increased need/desire among the world nations to protect fundamental human rights. It was after the defeat of Hitler of Nazi Germany regime and that of Mussolini of Italy that the United States and European governments systematically introduced the notion of a catalogue of the individuals and groups inalienable rights and freedoms which states and governments were forbidden to derogate from.

Hence after the second world war, concerns of the League of Nations, and later of the United Nations was to come up with a list of basic rights and freedoms of the individual which was established in 1945. The United Nations Organisation had as its one of the objectives to formulate an international Bill of rights. A United Nations Commission on Human Rights was set up for this purpose in 1946. The commission recommended that such a bill was to be made up of the 1948 Declaration on Human Rights, the two covenants on Human rights and their national protocols.

Countries which became decolonized after the second world war had their fundamental rights and freedoms modelled on the universal Declaration of Human Rights eg. Kenya. The UDHR (1948) was based on general principles and fundamental rights articulated and popularized during the Eighteenth century when rising middle classes in Europe overruled feudal regimes. The middle classes argued that there were certain basic, fundamental rights relating to liberty and equality of all persons which the feudal state could not legitimately deny its citizens.

On the other hand, the two covenants on human rights which came up in 1966 were; the International Covenant on Civil and Political rights and the International Covenant on Economic, Social and Cultural rights.

The International Covenant on Civil and political rights is an example of first generation rights. They are referred to as civil rights because in their absence, a civil or human society cannot exist. They are political because they limit what government can do to their citizen in exercise of their

powers. They entail "things" the state and citizens or groups of citizens are prevented from doing against individuals or groups of citizens. Civil and political rights find expressions in most national constitutions of the Western or capitalist persuasion. They are usually associated with capitalist regimes because it is here we have market oriented systems or free-enterprise countries. Thus individuals require to enjoy freedom from government so that they can unhinderedly be employed in productive work.

Rights and freedoms contained in the International Covenant on Civil and Political Rights include:

- . Right to life
- . Right to liberty
- . Right to security of the person
- . Right to equality before the law and fair trial
- . Right to protection of the institution of private property.
- . Freedom of conscience
- . Freedom of religion
- . Freedom of assembly and association
- . Freedom of speech.

On the other hand, the rights provided under the International Covenant on Economic, Social and Cultural Rights include:

- . Rights to self determination
- . Right to for trade unions
- . Right to sovereignty over natural wealth and resources
- . Right to education
- . Right to work
- . Right to practice in a country's cultural activity
- . Right to be free from hunger
- . Right to enjoyment of high standard of physical and mental health.

- . right to social security and social insurance
- . Right for the children and,
- . Family rights

It is vital to note that Socialist countries are the ones who subscribe to the views under the International covenant on Economic Social and Cultural Rights with much more emphasis. They argue that economic rights are more important far and above the civil and political rights.

Traditionally only fundamental human rights have been associated with constitutional law . The assumption being that some values are so important to everyone that they should never be violated by state power. A feature of many International human rights treaties since 1945 is that International adjudication may prevail over state sovereignty.

### **1.3 HISTORICAL BACKGROUND OF HUMAN RIGHTS IN AFRICA**

In the traditional African societies there was a deep sense of humanity and respect of dignity of man. However, this respect of humanity was emphasized in the aspect of collectiveness. This is because the African society was bound together by kinship, religious and mythical beliefs, and the primary goal of survival which therefore stressed the group rather than the individual.

Interests of the community were placed above those of the individual 3. Individuals however were expected to play a very active role within their groups ie ethnic groups, lineage clan or family. Rights were thus inseparable from duties 4. Abuses were therefore rare.

In the colonial era, respect for human rights had a dismal if not a disgraceful record. The social institutions and political setups of the African communities were destroyed and replaced by oppressive regimes and slavery. Checks and balances surrounding the powers of the traditional rulers were destroyed in certain instances converting the latter into a single native authority. Colonial administrations denied their colonial subjects certain elementary rights for instance, freedom of speech, freedom of association and freedom of assembly.



Many future leaders and intellectuals were victimised because of their struggles for humanity. The violence, inhumanity and gross violence (eg. the Soweto massacre in Apartheid South Africa where hundreds of children were killed) of human rights in this era led many African leaders to questioning the standing of former colonial power to make any virtuous reference to the concept of human rights in Africa. The colonial experience is thus an important and relevant back drop in understanding Africa's human rights issues.

#### 1.4 DEFINITION OF FUNDAMENTAL RIGHTS AND FREEDOMS

From the above historical background, it follows that there's need to define what fundamental rights and freedoms are.

Human rights has over the years been accorded a plethora of definitions. They have been variously called "natural rights"<sup>5</sup> "the rights of man"<sup>6</sup> or fundamental rights and freedoms"<sup>7</sup>.

To Maurice Cranston, a human rights is:

"a universal moral rights, something which all men everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being because he is human <sup>8</sup>"

Louis Hienkin on the other hand defined human rights more broadly and it is this definition that seems to fit in today's society. To him human rights are:

**"...claims which every individual has or should have upon the society in which he lives. To call them human suggests that they are universal. They are due to every human being in every human society, they are due to every human being in every human society. They do not differ within geography, history, culture, ideology, political or economic systems, or state of development. To call them rights implies that they are claims as of right, not merely appeals to grace or charity, or brotherhood, or love, they do not need to be earned or deserved..."<sup>9</sup>.**

Human rights are taken to imply those basic concepts which man has used in the various stages of development to enhance freedom as well as economic and social justice in society. During the drafting and preparation of the American constitution Thomas Jefferson made the following statement part of which later became incorporated in the American constitution as its preamble:

**"we hold these truths to be self-evident, that all men are created with certain inalienable rights that among these are life, liberty and the pursuit of happiness. That to secure these rights governments are instituted among men deriving their just powers from the governed...."**

The above are but a few of the definitions formulated concerning fundamental human rights. There has been much debate on whether the concept of natural rights as formulated in the days of the ancient Greek civilization is the same concept of Human Rights enshrined in most National constitutions of today. This debate has been made necessary by the fact that legal experts do not want to mix up issues of morality and those of law. Despite this there has been consensus in one thing: that there is some degree of morality in human rights. This fact alone links the concept of fundamental human rights to that of natural rights.

There is also the question as to whether the human rights express the pre-requisite of happiness or an irreducible minimum of human dignity. However, the notion that there are certain things that we cannot do to one another, and some duties we owe to each other, is common to all civilizations. Periods of social conflict and strife have emerged after which people looked back and asked themselves what happened and how a recurrence in the future can be prevented. The need then arose for humanity as a whole to come to a common understanding in order to avoid conflict and allow human interaction across previously existing borders. Thus it is with this knowledge in mind that we see that fundamental human rights are part and parcel of the existence of a society. Without their protection, human beings would result to anarchy and strife and eventually life would be meaningless.

## END NOTES:-

1. The Universal Declaration on Human Rights 1948 (UDHR)
2. The International covenant on civil and political rights 1966 and the International covenant on Economic, social and cultural rights 1966 (the two covenants later came into force in 1976)
3. Abdullah M: Human Rights protection in Africa: Towards effective mechanism: EA. Journal of peace and Human rights Vol. 13.No.1
4. Keba M'Baye-ibid, Howard Rhod "Evaluating Human rights in African: some problems of implicit comparisons" (1984)6 Human Rights quarterly 160 p.g 173-177.
5. Hart, H.L.A: "Are there any natural rights". In Lylons D. rights(Belmont, Wadsworth 1979) P.14
6. Paine, T: Rights of Man (Pelican Books 1969).
7. The constitution of Kenya Revised Edition 1998/1992) chapter V
8. Craston M. What are Human Rights (london, The Bodley Head, 1973) at p.5
9. Henkin L: Rights Here and There, 81 columbia Law Review 1582,1592 (1981).

## CHAPTER TWO

# JUDICIAL ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOM VIS-A-VIS THE LIMITATION THERE TO IN KENYA

### 2.1: INTRODUCTION

The substance of fundamental rights and freedom in Kenya is contained in chapter V of the constitution. Section 70 of the constitution is the "giving section" in that it provides that every person is entitled to fundamental rights and freedoms of the individual. However, it quickly "takes away" the said rights and freedoms by its wide claw-backs which are phrased in an umbrella of words the key ones being "... does not prejudice the rights and freedom of others or the public interest". The effect of the above provision is to operate as a sanctioning qualification to fundamental rights and freedoms.

Section 71 to 82 then follow to provide for the fundamental rights and freedoms. They are as follows:-

Section 71- protection of right to life

Section 72- protection of right to personal liberty

Section 73- Protection from slavery and forced labour

Section 74- Protection from inhuman treatment

Section 75- Protection against arbitrary search or entry

Section 77- Provision to secure protection of the law

Section 78- Protection of freedom of conscience

Section 79- Protection of freedom of expression

Section 80- Protection of freedom of assembly and  
association

Section 81- Protection of freedom of movement

Section 82- Protection from discrimination on the grounds of race etc.

Section 83 is the Section that highlights when derogations may be permissible especially when Kenya is at war, to rights and freedoms guaranteed in Sections 72,76,79,80,81 and 82. It also

goes further to state that Part III of the preservation of public security Act shall not be deemed to be inconsistent with the above named sections in so far as whatever is provided under that part (part III) is in operation by virtue of an order made under Section 85 is primarily concerned with the preservation of public security.

Perhaps section 84 is the most important part of the Bill of rights. This is because it operates as the vehicle via which claimants of derogations on their fundamental rights and freedoms can access justice through the High Court. Therefore, this section contains the enforcement provisions of fundamental rights and freedoms.

However, it is worth noting that not very many people make use of this section (section 84) when their rights and freedoms are derogated. This is because many are the people who even do not know of the existence of the protective provisions in chapter V of the Constitution. It is therefore up to the lawyers and the Legal profession generally to contribute towards Public awareness of the Law. It is indeed in the interests of Lawyers that citizens know their rights because then, the Citizens are more likely to use the services of the lawyers more meaningfully.

## **2.2 JUDICIAL ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS VIS-A-VIS THE LIMITATIONS THERETO IN KENYA**

It is vital when discussing the subject of enforcement of fundamental rights and freedoms under chapter V of the Kenya Constitution to first fully apprehend the meaning of the content of section 84 of the constitution. It will be expedient to reproduce verbatim the provisions of section 84 in order to recognise the big set back it has put to many citizens seeking justice when their fundamental rights and freedoms were derogated. The sections provides:-

- 1) Subject to sub-section (6) if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect

to the same matter which is lawfully available that person (or that other person) may apply to the High Court for redress.

- 2) The High Court shall have original jurisdiction
  - a) to hear and determine an application made by a person in pursuance of subsection (1)
  - b) to determine any question arising in the case of a person which is referred to it in pursuance of subsection (3), and may make such order issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive)
- 3) If in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of section 70 to 83 (inclusive), the person presiding in that Court may, and shall if any party to the proceedings so requests, refer the question to the High court unless, in his opinion, the raising of the question is merely frivolous and vexatious.
- 4) Where a question is referred to the High Court in pursuance of subsection (3), the High Court shall give its decision upon the question and the Court in which the question arose shall dispose of the case in accordance with that decision.
- 5) parliament-
  - a) may confer upon the High Court such powers in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling that Court, more effectively to exercise the jurisdiction conferred upon it by this section and
  - b) shall make provisions-
    - i) for the rendering of financial assistance to any indigent citizen of Kenya where his right under this chapter has been infringed or with a view to enabling him engage services of an advocate to prosecute his claim and
    - ii) for ensuring that allegation of infringement of such rights are substantial and the requirement or need for financial or legal aid is real.
- 6) The Chief Justice may make rules with respect to the practice and procedure of the High court in relation to the Jurisdiction and powers conferred on it by or under this

section (including rules with respect to the time within which applications may be brought and references shall be made to the High Court.

7) A person aggrieved by the determination of the high Court under his section may appeal to the Court of Appeal as of rights.

The true interpretation of section 84 has been seen in the unfolding case law where many people were denied their fundamental rights and freedoms due to lack of rules as intended under section 84(6). However, the rules have now been made albeit too late when many citizens have suffered.

Section 84 was inserted in the constitution as the linchpin of the Bill of rights. It transforms the bill of rights from a decoration to a charter of rights capable of enjoyment. It is meant to be a cheap remedy over and above any other remedies that an aggrieved Kenyan may have under the general law.

Madan J in the celebrated case of STANELY MUNGA GITHUNGURI V THE ATTORNEY GENERAL had this to say on the interpretation of constitution:-

**"We also speak knowing that it is our duty to ask ourselves what is the use of having a constitution if it is not Honoured and respected by the people. The people will lose faith in the constitution if it fails to give effective protection of the fundamental rights. These people know and believe that, destroy the rule of law and you destroy justice. thereby also destroying security.... The ideas of justice keep people buoyant. The Court of Justice must reflect the opinion of the people"**<sup>2</sup>

The above views of Madan J. were echoed in the case of FELIX NJAGE MARATE vs ATTORNEY GENERAL when shields J said whilst granting the orders as prayed:-

**"The constitution of this republic is not a toothless bulldog, it has teeth and in particular these are found in section 84..... it might be thought that the newly independent states who in their constitutions enacted such provisions were eager to uphold the dignity of the human person and to provide remedies against those who wield power"** <sup>3</sup>

Emanating from contents of the above two cases, it is clear that the constitution is a statute of a special kind unsuited for the ordinary cannons of interpreting statutes"<sup>4</sup> As far as the interpretation of the Bill of Rights is concerned, the presumption is in favour of maximum enjoyment of freedom and rights guaranteed therein, and hence the interpretation which best ensures that end is to be favoured. A strict interpretation leading to a denial of the guaranteed rights should give way to a liberal one.

In the case of MINISTER OF HOME AFFAIRS and ANOTHER V FISHERS AND ANOTHER 5 it was held that " a constitution should be construed with less rigidity and more generously than other Acts"<sup>6</sup> The same was reiterated in the case of ATTORNEY GENERAL of SAINT CHRISTOPHER NEVIS and ANGUILLA V REYNOLDS 7 which was to the effect that the constitution should be interpreted broadly so as to conform with the protection of fundamental rights and freedoms.

Further as the Court of appeal held in OKUNDA V R 8, the constitution is a "special act of parliament" whose rules of interpretation are vastly differed from those which apply to the interpretation of the statutes.

However, the Kenyan position in interpreting the provisions contained in chapter V of the constitution has been now and strict one. The landmark case in this area is ANARITA KARIMI NJERU V R 9 where the Court interpreted the words "without prejudice to any other action which is lawfully available (as per section 84 (I) to mean that an applicant who has already sought some other remedy not to be allowed to bring a constitutional application.

However, what the above case overlooked was the effect of section 84 (2). This section was meant to create a new jurisdiction over and above the normal jurisdiction is devoid of the technical structures that usually bog down the ordinary jurisdiction of the Court for example, in a recent case of SAMUEL MAU MACHARIA AND ANOTHER V THE ATTORNEY GENERAL AND NGENGI MUIGAI 10, this factor was seen. The facts were that; in March



2000 the applicant was charged with inter alia the offence of obtaining money by false pretence, forgery, making a document without authority and uttering a false statement. The applicants pleaded not guilty to all charges. The Applicants then filed this application by way of an ordinating motion under sections 65(2), 72,73,74,77,82, and 84 of the constitution of Kenya Section 3 of the Judicature Act, Section 3A of the Civil procedure Act and Order 50 Rule 1 of the Civil Procedure Rules. The Applicant sought a declaration that the institution, prosecution and maintenance of the criminal case against he applications upon the purported complaint of the second respondent were intended to bring pressure to bear upon the applicant to settle a pending Civil suit and consequently the proceedings were an abuse of the Court process. The applicant alleged that in the circumstance the respondents had infringed the applicants rights under the aforesaid sections of the constitution of Kenya. The applicants thus sought to have the criminal proceedings stayed permanently.

It was held among other things that:

- In practice that has developed over the years is for such an application to be filed as an ordinating motion
- That section 84 (3) of the constitution of Kenya is in scope and does not guarantee automatic access to the High Court as access is subject to an order of the presiding magistrate.

However, in the end, the High Court issue an order of prohibition, prohibiting the magistrate's Court from proceeding with the criminal case. This can be best explained by the fact that the High Court under section 84(2) has been accorded an overall jurisdiction hence this does not hinder any aggrieved party from accessing justice by virtue of mere existence of technicalities that ought to be followed as a matter of procedure. This recent interpretation of section 84 by this case marks a great turning point of fundamental rights and freedoms cases from the archaic position where many people were denied their rights by were existence of bogging technicalities other cases which had the same effect were VINCENT KIBIEO SAINA THE ATTORNEY GENERAL" and KAMLES PATINI and ANOTHER V R 12 of which

preceded the above case (SAMUEL MAU MACHARIA'S CASE)

In the case of **KAMLESH PATTNI AND ANOTHER V REPUBLIC 13'** the main issue was whether access to the High Court for enforcement of fundamental rights and freedoms need be preceded by a leave of the lower Court, and whether the high Court can enforce rights when the case is already proceeding in the lower court.

The facts were that the applicant filed an ordinating motion pursuant to section 65 (2), 70, 75, 76, 77 and 84 of the constitution seeking declarations and an order of production, to prohibit a subordinate Court from hearing a pending criminal case against the applicants. Before the application was heard, the respondent raised a preliminary objection to the originating motion. The respondent argued, inter alia, that the High Court has no jurisdiction to hear an application under section 84(I) of the constitution filed by an accused person who has not raised the question of contravention of any of the provisions of section 70-83 of the constitution of Kenya in relation to him in the subordinate Court and when the subordinate Court has not under section 84 (3) referred any such question to the high Court.

Secondly, the respondent argued that the High court has no jurisdiction under section 84(1) to entertain an application by an accused person in a pending criminal case in a subordinate Court seeking an order of prohibition as one of the relief when an applicant has not sought and obtained leave to apply for such order under order 53 of the Civil procedure Rules as read together with section 9 of the Law Reform Act.

It was held among other things that:

1. Where the constitution matter has been filed directly in the High Court notwithstanding the fact that there is a criminal case pending before a subordinate court and no reference has been sought and obtained pursuant to section 84(3), the High Court still retains jurisdiction to determine the matter.
2. The spirit of Sections 70 and 84 (1) read together is that every Kenyan has the rights and freedoms specified in Sections 70 and stated in details in the subsequent sections

subject to the specified limitations and that every Kenyan has an unqualified right to apply to the High Court for redress for alleged contravention of those rights and further the High Court has original jurisdiction to enforce those rights.

3. The fundamental rights and freedoms will be hollow if section 84 (3) is construed as abridging the right of direct access to the High Court to apply for the enforcement of those rights and freedoms.
4. Under Section 84(3) of the constitution, the High Court is only required to determine questions referred to it and give a decision or answer without a remedy which is remitted to the lower Court to be acted upon while under section 84(1), the High Court is empowered to give an effective remedy on an application.

In the end, the preliminary objection was dismissed with costs, and the application to stop the lower Court proceedings was refused.

Authorities referred in this ruling were KAMLESH PATTNI V REPUBLIC 14 RIMANO ANATOMINO V THE ATTORNEY GENERAL 15 ELIPHAZ RIUNGU V REPUBLIC 16 REPUBLIC V ELMANN, 17 WILLIAM TUYOT V THE SECRETARY OF THE DISCIPLINARY COMMITTEE AND TWO OTHERS, 18 AND ANARITA KARIMI V REPUBLIC 19 among others.

It's also important to note that it is in this subsequent PATTNI'S case that it was noted that as a matter of local notoriety, the parliament has not legislated rules to be followed for matters in section 84 (5) of the constitution and that successive chief Justices had not made practice and procedure rules pursuant to section 84 (6) of the constitution. Subsequent to the holdings of the above case, the chief Justice made rules under S. 84 (6) cited as the constitution of Kenya a (protection of fundamental Rights and freedoms of the individual practice and procedure Rules 2001 (LN 133 of 2001).J

Emanating from the above discussion, we see that the Jurisdiction accorded to the High Court under Section 84 (2) is jurisdiction independent of availability or non-availability of other remedies. What this means is that it does not matter whether the applicant in issue is in a

position to get other remedies from other Courts. Moreover, the nagging problems of locus standi in the ordinary jurisdiction of the Court is absent in the jurisdiction in enforcement of fundamental rights cases. In addition jurisdiction remains regardless of the nature of the violation. This means that it does not matter whether the violation is a continuous one, an anticipated one or a past violation. This fact was clearly seen in **MAHARAJA V ATTORNEY GENERAL OF TRINIDAD AND TOBAGO 20** where the Court observed that the clear intention of the jurisdiction was to create a new remedy whether there was already some other existing remedy or not.

The same was reiterated in **OLIVER CASEY JAUNDOO V ATTORNEY GENERAL OF GUYANA 21** whose section 19 of the constitution of Guyana (which is equivalent in all respects to section 84 of the constitution of Kenya) stated that the newly created right of access to the High Court was meant to invoke a jurisdiction which was itself newly created.

However, it is important to note that lack of practice and procedure rules as contemplated in section 84(6) of the constitution has had a fatal blow to claimants of fundamental rights and freedoms. This is because the Courts have adopted two positions where they either refuse to listen to the application in issue due to lack of promulgation of practice and procedure rules by the chief Justice, or they ignore this shortcoming (ie lack of practice and procedure rules) and listen to fundamental rights and freedoms cases altogether.

The first approach is seen in various cases where a restrictive interpretation was adopted to deny many their rights and freedoms. It therefore became a practice of Courts to concentrate on limitations enshrined in the Bill of Rights section (chapter V of the constitution) to deny many people the justice sought for. The interpretation of the protective sections was done in a negative manner and this had an adverse effect on seekers of justice.

In the case of **GIBSON KAMAU KURIA V THE ATTORNEY GENERAL 22** the late

Chief Justice Miller Mooted the first suggestion that section 84(1) was in operative because he had made no rules under S. 84(2). The same was upheld in **JOSEPH MAINA MBACHA AND THREE OTHERS V ATTORNEY GENERAL 23** case where Mr. Justice Dugdale declared that the rights of access under section 84 was as dead as a dodo and could only be revived by the race of the Lade Chief Justice. These two cases are but the landmark cases in this approach of inoperativeness of section 84 of the constitution.

Turning to the other approach, it became quite prevalent that lack of practice and procedure rules as intended by section 84 (6) would have a big set back to aggrieved parties. Hence in some cases the Courts sought to listen to the application before them. For instance in **STANELY MUGA GITHINGURI V ATTORNEY GENERAL**, the Court listened to the application regardless of the absence of the rules as envisaged in Section 84(6). Also in the case of **FELIX NJAGI MARETE V REPUBLIC 24**, the Court granted the declarations and awarded damages and hence the lack of rules under section 84(6) was never considered fatal to the Court's jurisdiction.

Perhaps, it is of significance to have a close look at Section 84(6) of the constitution, it says:

The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this Section (including rules with respect to the time within which application maybe brought and reference shall be made to the High Court).

Looking at this wording of the Section, the critical or key word to note is "may". The word "may" is permissive meaning that the Chief Justice may or may not make rules to be applied when listening to applications brought under section 84 generally. This factor indeed is the one that has contributed to this great failure by Courts to vindicate human rights cases generously and positively. Had the word been "must" the great inconvenience caused by the situation of lack of rules would not have been there.

However, regard should perhaps be sought to the case of KAMLESH PATTNI and ANOTHER V THE REPUBLIC, because it unblinkingly pointed out the fact that "it is a matter of local notoriety that parliament has not legislated rules to be followed for matters in section 84 (5) of the constitution and that successive Chief Justices have not made practice and procedure rules pursuant to section 84(6) of the constitution. Its pursuant to this declaration that the Honourable Chief Justice Bernard Chunga vide legal Notice No. 133 of 2001 promulgated te constitution of Kenya (protection of fundamental rights and freedoms of the individual) practice and procedure rules, 2001. This was done in the same year the KAMLESH'S case pinpointed this glaring omission.

Hence, it is with the practice and procedure rules in place that the judiciary will have a definite path to follow unlike in the past where the Courts could decide to either entertain or not entertain fundamental rights and freedoms applications due to the uncertainty created by lack of practice and procedure rules. This meant that a person seeking justice before the promulgation of these rules had to do so knowing that the outcome was unascertained in that depending on the mood of the Court, he or she would either be denied the application altogether or with a bit of luck, be allowed the application.

It is at this juncture that we turn to the practice and procedure rules. The rules are twelve in number and were made on the seventeenth of September 2001. It is essential that we produce them verbatim. They are:-

1. These rules may be cited as the constitution of Kenya (protection of fundamental rights and freedoms of the individual) practice and procedure rules, 2001.
2. Where an accused person in a criminal case or a party to a civil suit in a subordinate Court alleges contravention of his fundamental rights or freedoms under sections 70 to 83 (inclusive) of the constitution, in relation to himself, he shall apply informally to the presiding Magistrate during the pendency of the proceedings before that court to file a reference to the High Court to determine the question of the alleged violation.
3. If the presiding magistrate is satisfied that there is a merit in the allegation, and that it

has not been made frivolously merely to delay the trial, he shall grant the application, to be determined by the High Court.

4. Where the presiding Magistrate refuses to grant the application under rule 3, he shall proceed with the trial, without prejudice to the right of the applicant to renew the application in the High Court in any appeal that may follow his conviction by the magistrate or conclusion of the matter in the subordinate Court.
5. If the reference arises in a criminal case it shall be served on the Attorney General and in a civil suit on all the parties to the suit. In either case, service must be effected within seven (7) days from the date of filing.
6. The hearing of all references to the High Court from the subordinate Court in Criminal cases shall be given priority over all other cases and shall be heard and determined expeditiously by such number of judges as the chief justice may in his discretion direct.
7. At the hearing of the reference an applicant shall not raise any question other than those framed under rule 3 except with the leave of the Court.
8. While the reference to the High court is pending, all proceedings in the subordinate Court shall be stayed pending the determination of the reference.
9. Where contravention of fundamental rights and freedoms is alleged otherwise than in the course of proceedings in a subordinate Court or the High Court, an application shall be made directly to the High Court.
10. (a) Where violation of fundamental rights and freedoms is alleged in any proceedings pending in the High Court, application for determination of the question shall be made by notice of motion in the matter and in that case the provisions of Order I of the civil Procedure rules shall as far as practicable apply.  
(b) Pending the determination of such question all further proceedings shall be stayed.
11. (a) Applications under rules 5 and 9 of these rules shall be made by originating summons and the procedure laid under order XXX VI of the Civil Procedure Rules shall, as far as practicable, apply.  
(b) If the application is made otherwise than in criminal proceedings it shall be served on the Attorney-General and the person against whom the complaint is made or

directed within fourteen days from the date of filing.

12. Any appeal from the decision of the high Court to the Court of Appeal under Section 84 (7) of the constitution shall be governed by the Court of Appeal rules.

Looking at the above rules we see several elements which in a way hinder an expedient administration of Justice. Firstly, is the requirement under rule two (2) that a person has to apply informally to the presiding magistrate during the pending of the proceedings before that Court can file a reference to the High Court. This means that after all, before accessing the High Court, the aggrieved party has to refer to a subordinate Court. This aspect renders valueless the overall jurisdiction accorded to the High Court in human rights cases. This is because failure to approach the subordinate Court may in the end apply as one of the bogging technicalities when the issue later finds itself in the High court.

Secondly, a look at Rule three (3) suggest that it is upon the magistrate presiding in the subordinate Court to decide whether the informal application in Rule two (2) has any merit in regard to the allegation therein. This aspect is seen as a slowing-down aspect because its essence is of no use as still the high Court to determine the matter will eventually venture into the issue of merit in one way or another.

Thirdly, Rule four (4) perhaps is the most inapplicable because it is very unlikely for a subordinate Court to refuse to grant an application as contemplated in Rule three(3) and nevertheless proceed with the trial without prejudice, to the right of the applicant to renew the application in the High Court in any appeal that may follow his conviction by the magistrate's or conclusion of the matter in the subordinate Court.

Fourthly, Rule Five (5) has the effect of prolonging an application in reference to a criminal case in that the Attorney-General has to be served, and if it is a civil suit the other parties to the suit have to be served. The aspect of prolonging is seen in the seven (7) days required from the date of filing. Keeping in mind that fundamental rights and freedom cases are issues that touch on



the welfare of the individuals, it is imprudent to even in the first place think of talking about service in that, it may be the case that the aggrieved party is a detainee in remand who has not for a long period been able to access the services of the Court yet when the opportunity arises, another period of service is applied to make such person to continue suffering in remands. This phenomenon is a day to day practise in Kenyan Court in conjunction with prison and remands. This aspect therefore serves not to expediently bring to justice the offenders but to continue torturing the aggrieved parties. A recent article in the Daily Nation which highlighted a couple's dilemma in that they had spent two years in remand having not been taken to Court to the extent that they even had a baby being born in remand and it later died, is a good example of expediency with which such cases need when at last parties get access to Court.

Rule Six (6) on the other hand is meant to favour claimants of fundamental rights and freedoms in that all reference to High Court from the subordinate Court in criminal cases shall be given priority. However, it may be the case that even the reference take along time before coming to the jurisdiction of the Court.

Rule Seven (7) serves to restrict the issues contained the application in that nothing outside the issues contained therein way be raised. This restrictive operation does not in any way promote fundamental rights and freedoms yet interpretation of such rights and freedoms is supposed to be a broad one.

Rule Eight (8) clearly pin-points the insignificance of the subordinate Court listening to a fundamental rights and freedoms case because, after all, so long as the reference to the High Court is pending, proceedings in the subordinate Court should be stayed (stopped) pending determination of the referee. This renders the subordinate Court functionless hence fundamental rights and freedoms cases should be referred to the High Court directly as it is the determining factor. A look at Rule nine (9) reveals that a case touching on fundamental rights and freedoms can after all be directed to the High Court directly. This may be the right channel to follow instead of wasting time in entertaining the subordinate Court.

Rule ten (10) and eleven (11) are more of procedural in that they refer to how a case touching on fundamental rights and freedoms is to be filed.

Finally Rule twelve (12) gives an aggrieved party the right to appeal to the Court of Appeal if not satisfied by the decision of the High Court.

Having discussed the practice and procedure rules, one may conclude that they are insignificant, they are intended to delay the course of administration of justice and are confusing. But on the other hand it is worth noting that the High Court itself has been given jurisdiction in various areas, for instance the supervisory jurisdiction it has under section 60 of the constitution as well as the jurisdiction under section 84 (2) hence it may be the case that it is loaded with a lot of matters thus it needs some aid which is seen by bringing into picture the subordinate Court.

However, nevertheless, we should understand that fundamental rights and freedoms cases are cases of sui generis aspect in that they touch on the core of the society whose existence is guaranteed by the well-being of human beings. Hence, cases touching on human rights should take priority in any Court so that the protective sections as contained in the Bill of Rights in chapter V of the constitution may be seen to be operative.

### 2.3 CONCLUSION

Having discussed lengthily on the judicial enforcement of fundamental rights and freedoms, it is necessary to conclude by saying that the rules (practice and procedure rules) promulgated by the Chief Justice need to be given time so that we can see whether they will be operative in assisting seekers of justice in the field of fundamental rights and freedoms.

It is also worth nothing that the judiciary should come out and stamp its authority by deciding fundamental rights and freedoms cases fearlessly and to the benefit of aggrieved parties. This aspects can already be seen in KAMLESH PATTNI and SAMUEL MAU MACHARIA cases. Moreover, it is of utmost import to have a public campaign that is well-financed so that

violations on fundamental rights and freedoms can be broadly and effectively preached to the world and the victims assisted. The Kenya Human Rights Commission (KHRC) may be congratulated to this end because it has bravely acted as the public's voice in airing such grievance. The KHRC has gone as far as engaging the police department and its officers who were invited to conduct human rights lecture at Kiganjo Police Training College.

Moreover, a Human Rights Education and outreach programme has successfully developed and established working structures and relationships with selected KHRC partner communities. This programme is central to realization of a strong human rights movement in Kenya. It conducts training for community based human rights defenders in addition to creating human outreach activities and facilitated the establishment of human rights communities in the commission's six partner communities.

The programme has also developed a broad range of human rights information, education and communication materials support its work. KHRC'S other outreach activities includes the Constitution and reform Education Consortium (CRE -Co) initiative. The commission is currently giving legal cover to CRE-Co which is a consortium of twenty-two Civil Society organizations that will be involved in constitutional reform education. The secretariat was to be constituted in August, 2001 and some members of the consortium have received funding to begin implementation of their programs.

## END NOTES

1. The constitution of Kenya (protection of fundamental rights and freedoms of the individuals) practice and procedure rules, 2001, see L.N No. 133 of 2001.
2. High Court of Kenya at Nairobi Miscellaneous application No. 271 of 1985
3. High Court miscellaneous Application No. 271 of 1985 (unreported)
4. (1978) 3 all E.R 129
5. (1979) 3 All E.R 21
6. Pg 136 of (1979) 3 All E.R 21
7. (1979) 3 All E.R 129
8. (1970) EA. 463 pp.460
9. (1979) KLR 154
10. High Court Miscellaneous Application NO. 356 of 2000
11. Miscellaneous Application NOS. 839 and 1099 of 1999 (unreported)
12. Miscellaneous Application No. 322 of 1999 and Miscellaneous Application No. 810 of 1999
13. Supra NO. 12
14. High COURT Misc. App. Nos 481 of 1995 and 482 of 1995 (unreported)
15. High Court Misc. Criminal Application NO. 249 of 1996 (unreported)
16. High Court Misc. Criminal Application NO. 472 of 1996 (unreported)
17. (1969) EA. 357
18. High Court Misc. App. No. 129 of 1995 (unreported)
19. Supra 11.9
20. (1978) 2 All Er 670
21. (1971) A.C 972
22. High COURT Misc. App No. 180 of 1990
23. The Nairobi Law Monthly No. 42 of 1992
24. High Court of Kenya at Nairobi Misc. App. No. 551 of 1988

## **CHAPTER THREE:**

# **A CRITICAL ANALYSIS OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS IN KENYA IN COMPARISON WITH THE INTERNATIONAL HUMAN RIGHTS REGIME**

### **3.1: INTRODUCTION**

Until recently, a state's treatment of its own citizens was not considered a proper concern of international law. Only in the wake of widespread revolution against the crimes committed immediately before and during World War II did nations finally begin to accept limits on their virtually absolute sovereignty regarding the human rights of those residing within their jurisdiction. Building on several strands in earlier law, the trial of the Nazi war criminals at Nuremberg established that certain grave human rights violations by a government against its citizens are matter of international concern.

Having seen how fundamental rights and freedoms are enforced in the Kenyan judiciary, we now turn to the international arena and make comparison of the same and at the same time analyse whether Kenya has met its international law obligation in fulfilment of the various treaties to which it is a signatory.

International law has long allowed for the punishment of individuals who commit a certain limited subset of international crimes. Certain acts notably, piracy and slave trading, were considered so heinous and deprecatory that any state which caught such offenders was authorized to try them and punish them. Universal jurisdiction of state over pirates and slavers dates back to the origins of international law. Such jurisdiction was based on both the nature and consequences of the prescribed acts: The acts in themselves involved morally reprehensive acts of violence against civilians, often including loss of life, and the consequences included interference with commerce and navigation on the High Seas 1.

International law may be found in treaties among states and in non-treaty based law, including customs and general principles of law 2. However, it is prudent to first have a brief look at the

International Law historical background in the arena of Human rights.

### 3.2: HISTORICAL BACKGROUND OF INTERNATIONAL HUMAN RIGHTS

The aftermath of both World War I and World War II saw the need to have in place instruments geared at safeguarding Human Rights in order to avoid the Repeat of acts of inhumanity and horrors associated with the two world wars. It was by efforts geared to meet this end that the United Nations Organizations became established in 1945. It was after its establishments that comprehensive multi-lateral human rights instruments began entering into force.

However, it was with the promulgation of the United Nation Charter in 1945, that the modern concept of international human rights movements came into view. The Charter's Scattered provisions though they stopped short of incorporating a Bill of Rights were nevertheless of great impact on the movement of human rights since they shed the green light to be followed by future instruments. To mention but a few, some of the UN Charter provisions were:-

Article I - Which highlighted the objective of the charter as being geared to achieving international co-operation in promoting and encouraging respect of fundamental human rights and freedoms.

Article 13(b)- Which was to the effect that the General Assembly shall make recommendations for the purposes of assisting in the realization of human rights.

Article 55(c)-Whose main pre-occupation was that UN shall promote Universal respect for and observance of human rights and fundamental freedoms

Article 56 - which urges all members to co-operate in the venture of promoting universal respect for human rights and their observance.

Article 62 - That the Economic and Social council may make recommendation for the purposes of promoting respect for and observance for human rights.

Article 68 - Which is to the effect that the Economic and Social Council shall set up commissions in economic and social fields for the promotion of Human Rights.

The above articles do clearly have one thing in common:--

-they refer principally to the aims or goals of the UN.

-articles which make reference to human rights seek to promote them.

As we have already seen, article 68 of the charter had contemplated the establishment of a human rights commission. This dream was to come true when in 1946 a commission of Human Rights was established. It was charged with the duty of submitting reports and proposals on an international bill of Rights. However, approaches to meet this end were divided. At the commission's first meeting in 1947, some representatives argued that the Draft Bill of Rights under preparation should take the form of a declaration. This would mean that it would be more or less the same as a recommendation of the General Assembly to the effect that member state would have a moral and political obligation towards human rights. This approach meant that the declaration won't be legally binding.

The other approach was that the Draft Bill be adopted by the General Assembly and once its ratified by member states, it would be binding.

The first path was followed with the result that in 1948 the UN Commission on Human Rights adopted a draft declaration which was later adopted by the General Assembly in 10th December, 1948. The Declaration was called, the Universal Declaration of Human Rights (UDHR) 1948. However a declaration is regarded as soft law since its not binding.

That is why in years that followed, there was need to make the declaration provide for more comprehensive provisions in a single convention. The convention would embody both civil and political rights as well as economic, social and cultural rights. However, there arose a conflict in the process of drafting which resulted in the decision by the commission of human rights in 1952 to build upon the Universal Declaration of Human Rights by dividing it into two treaties ie;

- The international covenant on civil and Political Rights; and,
- The international covenant on Economic, Social and Cultural Rights.

The covenants were not adopted until 1966 by the General Assembly. Again, they stayed dormant for another ten years before entering into force.

During this same period, specialized human treaties also entered into force. For instance;

- The convention on prevention and punishment of the crime of genocide.
- The International labour organisation
- The convention on the status relating to refugees etc.

However, it was not until the two international covenant of 1966 came into force, that the rest of the treaties were to achieve a wide coverage as human rights topics as the Universal Declaration. The Universal Declaration is regarded as a common standard of achievement for all peoples of all nations. To this end, it seems as having become part of customary international law binding on all states without their express consent.

At this juncture, it is of utmost importance to briefly examine the rights enumerated in the two covenants of 1966 since it is on their basis that most nation constitutions are embodied.

The International covenant on civil and political rights has its rights guaranteed in part three. The rights are comparable to those in regional treaties such as the African Charter on Human and peoples rights, the European Convention and the inter-American convention.

The rights are:-

- i) Right of life
- ii) Prohibition of torture and inhuman conditions
- iii) Right to personal liberty and security
- iv) Prohibition of slavery
- v) Freedom of opinion, expression and information
- vi) Freedom of assembly and association



- vii) Freedom of movement
- viii) Freedom of thought, conscience, Religion and belief
- xi) Rights of minorities
- xii) Protection of aliens against arbitrary expulsion.

Similarly, rights under the international covenant on Economic, Social and Cultural right are contained in part III.

They are:

- i) The rights to work
- ii) Right to favourable conditions of work
- iii) Right to form and join trade unions
- iv) Right to engage in industrial action
- v) Right to adequate standard of living, food, clothing and housing
- vi) Right to social security
- vii) Right to rest and leisure
- ix) Right to physical and mental health
- x) Right to education
- xi) Protection of the family ie family rights
- xii) Scientific and cultural rights

These rights are inter-independent with as well as complementary to the Civil and Political rights.

This inter-dependence principle reflect the fact that the two sets of rights can neither logically nor practically be separated. This inter-dependence feature has always been part of the UN Doctrine.

Having dwelt so much on the development of human rights from 1945, it is essential that we quickly have a look at other regional treaties on human rights.

### **3.3 OTHER REGIONAL TREATIES ON HUMAN RIGHTS**

The other world's major regional human rights systems are: the European convention system, the inter-American convention system and the African system.

#### **THE EUROPEAN SYSTEM**

It is based upon the European covenant for the protection of Human Rights and fundamental freedoms. It was signed in 1950 and late came into force on 1953. It was the first comprehensive treaty in the world in the field of human rights.

The system establishes an International complaints procedure and an International Court on human rights. Before the year 2001 the convention had established three organs for purposes of over-seeing its application. They were; the, European Commission of Human Rights, the European Court of human Rights and a Committee of Ministers. However via a protocol of 1991 the first two were abolished and in their place, a permanent Court of Human Rights was created. The Court consists of a number of Judges equal to the number of member states to the council of Europe. The protocol establishes a procedure whereby states as well as individuals may petition the Court following an allegation on of violation of the human rights spelt out in the convention. Decisions of the Court are directly applicable and enjoyable in the jurisdiction of the state parties.

#### **THE INTER-AMERICAN CONVENTION SYSTEM**

It is based on the American Convention of Human Rights. The convention protects civil and political rights and seeks to realize the promotion of the same.

The enforcement mechanisms are the Inter-American commission on Human Rights and the Inter-American Court on human rights. The procedures described aim at securing a friendly settlement between the parties.

#### **THE AFRICAN SYSTEM**

It is based upon the African Charter on Human and peoples Rights. It was adopted by the organization of African Unity (OAU) in 1981 at Nairobi. It came into force in 1986. Kenya

became a state party through ratification in December, 1991.

The charter chiefly protects Civil and Political rights as well as economic, social and cultural rights.

This charter is novel in that it prescribes, the right to development. This is seen in the sense that it grants to all people the right to a general satisfactory environment favourable to development.

Looking at its enforcement mechanism a commission established thereunder is responsible for the charter's implementation. This is by way of compulsory system of state and individual petition.

### **3.4 THE REMEDIAL ASPECT OF INTERNATIONAL LAW INSTRUMENTS ON HUMAN RIGHTS**

All the comprehensive human rights treaties include in some form, the rights to a remedy of violations. The Universal Declaration of Human Right, the most accepted general articulation of recognized human rights, lists the right to a remedy in article 8 thus:-

**"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"3**

On the other hand, the International covenant on Civil and Political Rights develops and specifies civil and political rights enumerated in the Universal Declaration. It defines the right to a remedy in article 2(3). it reads:-

Each state party to the present covenant undertakes:-

- (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.**
- (b) to ensure that any person claiming such a remedy shall have his right thereto**

determined by authorities, or by any other competent authority provided for by the Legal systems of the state and to develop the possibilities of judicial remedy;

(c) to ensure that the competent authorities shall enforce such remedies when granted.

The drafting history of the above international covenant reveals that the commission on human Rights was concerned with ensuring accountability of government defences of sovereign immunity or superior orders<sup>4</sup>. The drafters therefore specified in article 2(3) (a) that the Right to a remedy extends to violations by government officials. During the drafting of the convention, some state wanted to strengthen the affirmative obligation on the part of the government authorities to prosecute violations. The Phillipines representative proposed adding the sentence; **"violators shall be swiftly brought to Law, especially when they are public officials"**<sup>5</sup> making explicit, a government obligation to prosecute those violating human rights. Although the proposal was defeated without discussion the Philippine representative stressed that the defeat **"should not be taken to mean that the commission was indifferent to the fate of violators."**<sup>6</sup>

In addition to the remedy provisions of article 2(3), the covenant requires compensation for unlawful arrest or deprivations of liberty. Article 9(5) States that,

**"(a)ny one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation"**

Moreover, article 14(6) specifically requires compensation for those punished as a result of a miscarriage of justice. The European convention on article 5.5 (unlawful arrest or detention) and the American convention in article 10 (miscarriage of Justice) similarly provide for compensation for those wrongs.

Article 25 of the American convention also provides for the right to a remedy. The inter-American commission on Human Rights has long interpreted the "right to a remedy" language in

the American convention to include the obligation to investigate and prosecute, calling repeatedly for investigation of the facts and punishment of the responsible individuals in cases of torture and disappearance.<sup>7</sup>

Finally, the European Court of Human rights has also interpreted the "right to remedy" language of the European convention to include the obligation to investigate and prosecute. Article 13 of the convention provides that;

**"(e)veryone whose rights and freedoms as set forth in this convention are violated shall have an effective remedy before a natural authority notwithstanding that the violation has been committed by persons acting in an official capacity."**

The European court has on at least one occasion adopted a liberal construction of the remedy provision in the Klass case,<sup>8</sup> the court held that article 13 requires the state to ensure a remedy before a national authority, in order both have his claim, (of violation of the convention) decided and if appropriate, to obtain redress.

### **3.5 THE RIGHT TO JUDICIAL REMEDY UNDER INTERNATIONAL LAW INSTRUMENTS ON HUMAN RIGHTS**

Another possible source of an obligation to investigate prosecute, and provide redress is the provision common to the civil and political covenant, the American convention and the European convention requiring access to a court for determination of one's civil rights. The origin of this provisions is article 10 of the Universal Declaration which states:

**"Everyone is entitled in full equally to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charges against him".**

Article 14 of the covenant requires that "All persons shall be equal before the Courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent

and impartial tribunal established by law.

Further, article 8.1 of the American convention guarantees that :-

Every person has the right to a hearing with due guarantees and within a reasonable time by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligation of a civil, labour, fiscal or any other nature.

The American convention provision follows on an earlier one found in article XVIII of the 1948 American Declaration of the Rights of man which state:

Every person may resort to the Courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the Courts will protect him from acts of authority that to his prejudice, violate any fundamental constitutional rights.

The language in article 6 of the European convention is quite similar to that of article 14 of the covenant.<sup>9</sup> However, despite the apparent broad reach and usefulness of the language of these provisions, the European and inter-American systems diverge in their view of the provisions scope. The European commission and the Court of Human Rights have addressed the meaning of article 6 in a number of cases. They distinguish rights arising under private Law, which are covered by article 6, from those stemming from public or administrative law which are not covered. Nonetheless neither the mere fact that the state is a private party, for example in a tort suit, nor the fact that domestic law denies access to a court necessarily removes the rights to be adjudicated from the article 6 context. It depends on an examination of the exact nature of the suit in issue. It is at this juncture that we need to have a brief look at the international Court of Justice as it serves as the foremost judicial mechanism that vindicates human rights issues.

### **3.6 THE INTERNATIONAL COURT OF JUSTICE**

The international Court of Justice(I.C.J) is an important instrument of enforcement to look at

when discussing the issue of enforcement of human rights in international law. The ICJ was set up in 1946 in place of its predecessor the permanent Court of international Justice (PCIJ). The United Nation Charter, of 1945 specified the principal organs of the UN as, the General Assembly, Security Council, International Court of Justice and the secretariat 10. Article 92 designates the Court as the principal judicial organ of the UN and this is reiterated in Article I of the statute 11 of the ICJ. Based on the fact of that of its predecessor, the statute of the Court is an annex to the charter and hence an integral part of the same.

Article 93 stipulates that all UN members are also members of the Court. It is also possible for non-UN members to become parties to the statute (eg. Switzerland) subject to recommendation by the security council and the approval by the General Assembly. Members undertake to comply with decisions in cases to which they are a party. Should a party fail to comply, the other party may bring the matter to the security council which can use its powers in implementing a decision." If a state moreover considers that it has a legal interest that risks being affected by a decision of the Court, the state may request to intervene. The Court decides whether this request should be accepted.

The ICJ has fifteen judges serving in the individual capacity and the General assembly. A third of the positions are made available every three years; and judges are subject to re-election. Not more than one judge from each country can be among the fifteen. The major legal systems of the world have to be represented in the fifteen judges. The judges must be qualified for the highest judicial positions or be qualified "juris-consults" in the home country to be eligible. The current composition of the Court has judges coming from: France, Japan, Algeria, Germany, Sierra leone, Netherlands, Brazil, Jordan, USA, Belgium, Madagascar and Hungary.

All questions are decided by majority vote of the Judges present while the president or the vice president has the casting vote when needed.<sup>2</sup> The competence of the Court is defined in article 36 of the statute. The competence to make three types of rulings based on the mandate of two general types of cases: Interstate disputes and advisory opinions. The three types of rulings are

provisional measures, judgment on merits and advisory opinions respectively.

It is however essential to mention something about the Security Council and the General Assembly. The two are the Charter based organs with the addition of the Economic and Social Council, and the Commission on Human Rights. The Security Council forms the apex of the UN Charter. Its main function is to promote human rights in so far as a given situation constitutes a threat to international peace and security. The Security Council is composed of the five leading superpowers in the world. The General Assembly on the other hand, acts as an organ of implementing or rather ratifying resolutions. It has already passed.

Therefore, we see that, before a human rights violation case goes to the ICJ the matter must have been dealt with by the Security Council in its venture to maintain international peace and security.

It is with this knowledge that we now turn to have a look at the effectiveness of the enforcement mechanism of international human rights. To start with, we can positively say that the permanent Security Council members and their clients are in effect immune from censure. By implication on their client states or allies may be afforded some protection as well. This conduct may in the end encourage countries who violate human rights to continue doing so since in the end they emerge victorious as no punitive measures are imposed on them.

The other shortcoming is that monitoring behaviour of countries alleged to be violating human rights as already seen in the Inter-American and European systems may prove to be costly and time-consuming. This would definitely end up not being of any use as perpetrators of human rights violations may still be continuing with the violation. The end result would be that by the time an offence as alleged has been proved, through the monitoring systems, more violation than the ones already alleged will have been committed. Thus sanctions are imposed too late. Moreover, when sanctions are applied to all parties in a conflict, pre-existing power relations are exacerbated or reinforced.



Finally its important to note that individuals are in most cases to seek for intervention by international law when they have exhausted the available domestic remedies. This point is in deep comparison with the Kenyan position; that individuals have to seek redress from the High Court after they have exhausted all remedies available in the subordinate courts. However, this position has been proved wrong by the judicial turn of events in interpretation of human rights cases.

### **3.7 A CRITICAL ANALYSIS OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS IN KENYA IN COMPARISON WITH THE INTERNATIONAL ARENA**

From the foregoing discussion, we can already see that there's a bit of comparison in human rights enforcement between the Kenyan position and the international law position.

To start with, individuals have been accorded locus standi both in Kenya and international law regime to lodge complaints of human rights violations.

Secondly, the fundamental rights and freedoms protected in Kenya's constitution are similar to those prescribed in the various international law instruments with exception that international instruments go beyond the Kenya Bill of rights position to prescribe for Second and third Generation rights.

Thirdly, under Kenyan's Bill of rights chapter in the constitution, the High Court has been specifically appointed in Section 84(2) or rather given jurisdiction to hear all human rights cases; regardless of whether they hae been lodged in other subordinate Courts. This position is similar to the specification of the international Court of Justice under article 36 of the statute of ICJ which gives the Court Jurisdiction to hear all cases referred to it by the parties involved matters specially provided for in the UN charter... or in treaties and conventions in force.

Turning to the differences between the two position (ie Kenyan position, and the International Law position) it is of utmost importance to perhaps note the major difference between the two

which is, whereas the provisions of fundamental rights and freedoms in chapter V of the constitution of Kenya are characterised by claw-back provisions, in international law instruments concerning human rights do not have the so called 'punctures' on the rights they provide. Even though some provisions in such international human rights instrument may have limitations, the limitations are not explicit.

This phenomenon can perhaps be best explained by one aspect: The aspect of universalization. This aspect is best pronounced in the UDHR 1948 whose major pre-occupation is to treat human rights as a common standard of achievement for all peoples and nations, every individual and every organ of society. The UDHR further goes on to state that the declaration shall be kept constantly in the mind of people of member states and those of other territories under their jurisdiction, who shall strive to teach, educate and promote respect for the rights and freedoms provided therein.

The other aspect of differentiation which though not eminently dealt with by chapter V of the bill of rights in our Kenyan constitution is the issue of retrospectiveness concerning violation of fundamental rights and freedoms. Under the international regime, violations of human rights can still be re-visited even though they were committed before the various international law instruments on human rights prohibiting such acts came into force. This aspect is aimed at universalizing respect for human rights.

It is with the above brief comparison that we turn to concluding this chapter.

Firstly it is important to note that respect for human rights form the core of every society and nation that exists harmoniously and peacefully. It is vital to state that perpetrators of human rights should be brought to justice so that the law may not be regarded as operating in a vacuum. It is also important to enforce fundamental human rights so that people may not fear for derogation of their basic rights (eg. life, liberty and property) as they form the core of development and it is with development that states become stable and independent.

### 3.8 RECOMMENDATION

This juncture brings us to possible recommendations that would further improve on the respect of fundamental human rights in the international arena. It is our submission in this century that the United Nations Human Rights policies and strategies be built on the following foundations:-

That its policies and strategies be geared at strengthening and harmonizing the treaty-based human rights bodies so that we do not have a differentiation in implementation of sanction in the various geographical regions.

The policies be geared at combatting discrimination on grounds of race, gender, religion and culture. This would help very much in abstinence from associating certain religion with terrorism.

Improving methods of education and dissemination of human rights so as to implant and enrich a culture of human rights, democracy and the rule of law globally. In achieving this end, the objective of the UDHR 1948 will have been attained.

In improving the capacity of United Nation Human rights instrumentalities to react rapidly to gross violation of human rights with a view to helping arrest them swiftly. This would combat perpetrators who are fond of violating human rights capitalizing on the slow process of the monitoring system.

Developing the Human rights components of conflicts prevention, peace-making, peace-keeping and peace-building

Finally, reclaiming the vision of the United Nations set out in the charter and the UDHR

Turning to the Kenyan case, recommendations that would ensure respect and upholding of dignity of individuals would be to:-

Scrape of the claw-back clauses which render the rights and freedoms so guaranteed unsatisfactory.

Section 84 should fill in the glaring omission seen on the bill of Rights chapter by introducing other rights which go hand in hand with the ones provided for

in international human rights treaties (such as the two international covenants of 1966) but which have been omitted for instance:

- a) Right to work
- b) Right to education
- c) Rights to health
- d) Right to peace
- e) Right to culture etc.

In doing so, it would be aimed at attaining the same footing with international instruments which have second and third generations rights in addition to the first generations rights already provided for in chapter V of our constitution.

The government should open up institution of learning from which, the bill of rights as stipulated in chapter V of the constitution can be taught. This would be aimed at making people aware of their rights since many are the ignorant ones hence they do not go to courts for vindication of their rights.

Lastly, there should be an operative separation of powers system whereby Courts should feel free to exercise their jurisdiction without interference.

However, this can only be achieved through the much awaited and cumbersome amendment of our constitution.

## END NOTES:

1. K.Randall, "Universal Jurisdiction Under territorial Law" 66 Texas Law Review 785 (1985)
2. The statute of the international Court of Justice Article 38 see 59, stat.1055, T.S. NO. 993 (June 26 1945)
3. Universal Declaration, G.A.Res. 217, U.N OOC.A/810 (1948) art.8
4. Schacter: "The obligation to implement the covenant in Domestic Law", in the international bill of rights, L. Henkin ed (New York: columbia University press 1981) p.326, 10 U.N GAOR Anne (Agendat Hem 28) Ch. V para 15, U.N.DOC. A/2929(1955).
5. Commission on Human rights 6th Sess. U.N. DOC. E/CN.4/SR. 195 (1950) para 24
6. Commission on Human Rights 6th Sess. U.N. DOC. E/CN.4/SR.195 (1950) para 23 (statement of Mr. Mendez).
7. See E.g..., case 821, inter Am C.H.R, 86, OAE/ser. L/V/11.57 doc6,rev 1(1982) p.87 (disappearance); case 6586,inter-Am C.H.R.91, O.E.A/ser. L/V/11/61; doc 22 rev.1 (1983) p.93 (torture arbitrary arrest)
8. Case Klass and others (F.R.G) 28 Eur,Crt. H.R. (ser.A) 1978 German Nationals brought suit against their government for allegedly violating the convention by enacting a certain surveillance Law).
9. American Declaration, O.A.S Res XXX adopted by the Ninth International Conference of American States (March 30-May, 2, 1948) Bogota, O.A.S; off.Rec.OEA/ser L/V/1.4 Rev (1965)
10. Article 7 of the UN Charter
11. Statue of the ICJ signed June 26, 1945, 59 STAT 1055; 33 UNTS 993.
12. Article 55 of the statute.

## **CHAPTER FOUR**

### **4.1 CONCLUSION**

Having discussed diversely the subject of fundamental rights and freedoms it is prudent to come to a conclusion on this area. However, it would be useful if we summarily pointed out essential issues in the last three chapters that we have already discussed.

A brief look at chapter one reveals that the definition of human rights is wide and bond. However, the vital thing to note is that whatever definition accorded to the term, the bottom-line is that human rights or fundamental rights and freedoms need to be protected since it is with their protection that we have in place a peacefully existing society. Moreover, it is with these fundamental rights and freedoms that we are assured of the existence of a society because without them no society can exist as men or rather human beings will tend to behave irrationally thereby derogating such fundamental rights as the right to life.

Chapter two which formed the core of this work revealed that many are the people who have been denied their rights and freedoms due to lack of an effective machinery of enforcement of fundamental rights and freedoms in place. The absence of promulgation of practice and procedure rules as contemplated by section 84(6) of the constitution have over the years made the protective Section contained in chapter V of the constitution functionless. However, with the recent promulgation of these rules in September 2001 by the Honourable Chief Justice Bernard Chunga, we look forward to seeing an effective implementation of the protective section particularly Section 84 as a whole.

Another thing that revealed itself in chapter two is that claimants of violations on their fundamental rights and freedoms have over the years failed to get justice due to the bogging technicalities involved in availing one-self a remedy from the High Court. These technicalities are seen in the requirement of one to have first lodged his/her complaint in the subordinate Court which if

capable of awarding him remedies, he need not proceed to the High Court. We have therefore seen that many people who jumped this step and went to the High court were never listened and this in itself is a misdirection since the jurisdiction accorded to the High Court in Section 84(2) is meant to have the High court entertaining matters on violation of fundamental rights and freedoms regardless of whether there is already existing remedies available in subordinate Courts.

Proceeding to chapter three, we find out that there's a lot of similarity in the shortcoming associated with the enforcement machinery in Kenya, with that of international Law level. This is because although the U.N has been very effective in setting standards in many human rights fields, efforts by the organization to establish institutions and procedures capable of securing enforcement have not been that successful.

Even after 50 years of the UDHR' and many years after which states became state parties to the two international covenants 2' many states have not yet internationalized their international human rights undertaking. One of the reasons for this great fail is because many states hae not universalized their international human rights. Moreover, states have not shed away the idea that conditions of a state including how a state treats its national are no one else's business. In addition, states have not wholly assimilated the fact that they have an international obligation to respect the rights of their citizens and that violation of such rights is a violation of international law. This fact is derived from the sense that when states become signatories to international human rights instruments, they undertake an obligation to respect and abide by them; automatically.

Other reasons as to why many states have little regard for enforcing fundamental rights and freedoms of their citizens is that most governments are pre-occupied with developing their economies. However this venture does not seem to succeed due to the inherent corruption in such governments.

Countries such as the third world countries are also characterized by inherent poverty, starvation,

civil wars which makes the arena of fundamental rights and freedoms to be overtaken by the rule of "survival for the fittest" meaning that only those who are hard cores will survive any violation on what they know to be their rights.

Even though we might look back and say that we have the security council and the General Assembly at the fore-front of enforcement mechanisms we realize that these enforcement mechanisms may be biased especially to countries who do not have an equal footing as they do. Again, the procedure involved in monitoring and investigating any allegations of violations of international human rights are long and cumbersome and in the end, it takes ages before the culprits are brought to justice by which time many individuals will have suffered.

Going back to the Kenya Situation, we can rightly conclude that:-

- i. That in practice, the enforcement of fundamental rights and freedoms of the individual have been curtailed by application of constitutional limitations thereto.
- ii. That a plethora of written laws and/or provisions made thereunder are derogatory of the protective sections of the constitution that safeguards these rights, hence conclusion that the fact that only the constitution can derogate such rights is not totally correct.
- iii. That whether or not fundamental rights and freedoms of an individual have been violated can only be determined by interpretation by the Courts of the protective sections vis-a-vis the limitations thereto.
- iv. That whether or not an Act of parliament contravenes protective provisions of the fundamental rights and freedoms of the individual depends on interpretation by the Court of these protective provisions vis-a-vis the limitation thereto.
- v. That the judiciary plays a pivotal role in protection and enforcement of fundamental rights and freedoms.



## 4.2 RECOMMENDATIONS

In order for human rights (fundamental rights and freedom) to acquire an intensified and broad coverage the following elements should be put in place seriously:-

- a) From the foregoing discussion of this work we have discovered that many are the people who do not know of their rights. Hence people whose fundamental rights and freedoms are violated remain silent until luck comes by their side and they get help of those who are aware of the existence of such rights, or they persevere the violations, or to an extreme lose their lives altogether. It is therefore of great concern to have an education campaign which is at full blast to make people aware of their rights.

The KHRC3 can be congratulated to this end because it has tried through its various campaign to bring to light the awareness of fundamental rights and freedoms. What the commission (KHRC) really requires is financial aid to enable it move all over across the Country to complete its campaign.

- b) Independence of the Judiciary.

It is very important to have an independent judiciary so that it may be capable of vindicating human rights issues without fear. Many are the years when we have had our citizens suffer due to the rather restrictive and narrow approach the Courts have applied to human rights cases partly due to the lack of independence they have as an organ of the Judiciary. For instance a look at section 61 and 62 of the constitution, reveals that the judiciary is in a way supposed to owe its allegiance to the executive and the parliament since the two branches play a pivotal role in its existence.

Section 61 which prescribes for the appointments of the Chief-Justice by the president should be scrapped of and in its place, a machinery for appointing the Chief-Justice should emanate from the judiciary itself. Just like the way lawyers are regulated by the LSK4, judges and magistrate's should also have their own organ that deals with their matters including discipline as well as appointments.

Section 62 of the constitution provides that the tenure of office of Judges of High Court is to be

prescribed by parliament. This provision in a way interferes with the independence of such Judges. This is because they may be tempted to behave according to the whims of parliament in return for a longer tenure of office. Again, this provision should be scrapped off and be left solely for the judiciary itself to determine. Thus it is very essential for the judiciary to form a serious administrative organ to deal with its issues.

Therefore, there is serious need for separation of powers among the three organs namely the Executive Judiciary and parliament. This is one of the issues being looked for as in the much waited constitution review which hopefully may end this year towards the end.

c) Pauper-briefs

We very well have the knowledge that many are the peoples who live below the poverty line, while the majority are poor. It is also within our knowledge that litigation requires expenditure of money which is scarce to such people. This therefore operates as a hindering factor for people to approach Courts whenever their rights are violated.

Therefore, there arises the need to have or to access free litigation services to the poor whose rights are violated. In the High COURT there exists a pauper-briefs file for criminal cases in which lawyers appearing for poor clients are supposed to sign their names. However, this has not been taken seriously because lawyers are also corrupt and in need of money. Therefore we see that the poor continue to suffer. It is therefore of essence that the pauper-briefs be taken seriously. This could be by way of letting the public know that it exists and instead of requiring lawyers to be the ones to sign, it should allow the poor to avail their names so that they can later be allocated the lawyers to argue their cases.

This suggestion may appear odd but it would be of great help since, it is within our knowledge that very few lawyers sign the pauper-brief file if any. However, opening up the pauper -brief file to the public may also welcome the cunning and witty crooks who though not poor may want to access free litigation services. This shortcoming should be dwelt with by way of first ascertaining the true

position of such people when they give in their names for free litigious services. This may be a cumbersome process but it may work with a bit of success than the former position of requiring lawyers to sign the pauper-brief files themselves.

Moreover, it is important that lawyers move at the forefront in campaigning for human rights. They should fulfil their duty to the society in their efforts to ensure a peacefully and harmoniously existing society.

d) Prisons systems

Prisons in Kenya today are the worst places a human being would ever want to be. This is because instead of serving as rehabilitating places, they are the places where human rights are intensely disregarded and violated. This is seen in the day to day torture by prison warders of their prisoners and the unhealthy conditions in which such prisoners are subjected to.

Therefore, there is great need to have a prisons system that caters for the needs of their prisoners. It should serve as an institution that upholds human rights thereby maintaining human dignity. Since prisons are meant to rehabilitate they should practice what they aim at. Just like an old saying, they shouldn't "preach water when they themselves are taking wine", the prisons should if anything be more friendlier to its prisoners.

However, the other aspect is that many prisons host much more prisoners than their capacity can allow. We therefore need to have a rehabilitation process of prisons geared towards having more spaced prisons for the health of prisoners. This is because many are the times we hear of loss of lives of prisoners due to overcrowding and this is in itself a derogation of the right to life.

e) Removal of clawbacks

Finally, the constitution in chapter V should serve the purpose it was intended to do. This is because, there is no need of having in the first place a machine that cannot work. The Bill of Rights chapter in our constitution is characterized by many punctures that can never make a vehicle move. It would be therefore worthless to have it in the first place.

Focussing on the importance of fundamental rights and freedoms it follows that provisions of the

same should be geared at allowing a broad and excessive enjoyment of the said fundamental rights and freedoms. This would transform them from mere decorations to meaningful provisions that are protective of individual. Therefore section 84 of the constitution should get rid of the claw-back clauses which render the rights and freedoms so guaranteed unsatisfactory.

Sections 84 should also fill in the glaring omission seen in the Bill of rights chapter by introducing other rights which go hand-in-hand with the ones already provided. For instance,

- . the right to work
- . the right to education
- . the right to health
- . the right to peace, and
- . the right to culture among others.

To this end, we will have in place a successful guarantee of fundamental rights and freedoms.

**END NOTES:**

1. Universal declaration of Human Rights 1948
2. The International covenant on civil and political rights 1966, and the International covenant on Economic, social and cultural rights 1966 (both later came into force in 1976)
3. Kenya Human Rights commission 1992
4. Law society of Kenya

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