AFRICAN HUMAN RIGHTS LAW JOURNAL

The bill of rights and constitutional order: A Kenyan perspective

*Anthony Wambugu Munene**
Lecturer in Law, Moi University, Kenya

1 Introduction

The inclusion of a bill of rights in a constitutional order as a mechanism of ensuring the rights and freedoms of the individual and as a means of regulating state power has increasingly been accepted the world over.[1] The United States of America was the first state to break away from the eighteenth century Anglo-Saxon attitude that was hostile to the concept of a bill of rights. The Anglo-Saxon attitude prevailed until the second half of the twentieth century when most African states became independent. De Smith observes:[2]

> Neither in the British Constitution itself nor in any of those Commonwealth constitutions in which British influence had been predominant was there to be found any comprehensive statement of human rights.

Early Commonwealth constitutions that included bills of rights were those of India (1950) and Pakistan (1957). These constitutions, however, were homegrown after independence and are not attributable to Anglo-Saxon initiatives.[3] The trend changed in 1959 with the enactment of the Nigerian Independence Constitution, which listed a number of fundamental rights. Most of the bills of rights that emerged thereafter were imposed by colonial authorities as a precondition to independence. This was notably so in Kenya, Uganda, Malawi and Sierra Leone.

* LLB (Hons) (Nairobi), LLM (Pretoria); Advocate of the High Court of Kenya; awmunene2001@yahoo.com

1 The only exceptions today are Britain and Israel, which do not have written constitutions. In the past three decades, countries which previously had written constitutions but no bills of rights or with rights proclaimed but not justiciable, have adopted justiciable bills of rights, notably Canada, New Zealand and Tanzania.

2 SA de Smith *The new Commonwealth and its constitutions* (1964) 162.

3 As above.

Anglo-Saxon hostility to bills of rights is traceable to the writings of Jeremy Bentham who, in reaction to the French Declaration of the Rights of the Person of 1789, described natural rights as 'rhetorical nonsense — nonsense upon stilts'.[4] So entrenched was this attitude that the Simon Commission on the Indian Constitution was of the view that entrenching rights in a constitution was of little practical value.[5]

The change of attitude towards bills of rights in the twentieth century was due to a realisation that they provided a standard of achievement in democratic states. Bills of rights were therefore seen as a means of preventing an assault by governments on the rights and freedoms of the individual. Constitutionalism as a basic idea evolved at a more specific juristic stage into a human rights issue.[6]

The experience of countries with 'durable constitutions', such as the United States, shows that a bill of rights is essential in any constitutional order as a safeguard against the abuse of state power and as a vehicle for vindicating human dignity. To effectively occupy its place in the constitutional scheme, the bill must emanate from the citizens of the state. It must espouse their vision of the exercise of state power and how far that power may encroach on their rights and freedoms. It is the core of the social contract between the people and their rulers.

The Kenyan Bill of Rights is one of many bills imposed on newly independent nations by departing colonial authorities with a view to protect minority interests and more particularly the interests of European settler communities.[7] Consequently, over the years and in the face of authoritarian one-party rule, it was reduced to a mere declaration. This contribution seeks to evaluate the efficacy of the Kenyan Bill of Rights from a historical perspective.

2 The colonial constitutional order

The evolution and development of the constitutional order in Kenya can be traced to the declaration of the British East Africa Protectorate on 15 June 1895.[8] The declaration of protectorate status marked the beginning of direct administration by the British government of a territory that had previously been administered by Sir William Mackinon's Imperial

---

4 J Bentham 'Anarchical fallacies' quoted in De Smith (n 2 above) 164.

5 *Report of the Simon Commission on the Constitution of India* (1940) (Cmnd 3569) 22–23.

6 JB Ojwang 'Constitutionalism — In classical terms and in African nationhood' (1990) 6 *Lesotho Law Journal* 57 71.

7 Chapter V Constitution of Kenya Act 5 of 1969.

8 For a detailed discussion of the pre-1895 historical background, see C Singh 'The Republican Constitution of Kenya: A historical background and analysis' (1965) 14 *International and Comparative Law Quarterly* 878.

British East Africa Company under Royal Charter.[9] What had hitherto been 'stateless' ethnic communities with distinct political and social characters, were brought together into a centralised state.

Initially, the protectorate did not have any form of political governance and was for all purposes regarded as a consular district of the Sultanate of Zanzibar.[10] In 1897, the first signs of organised administration emerged with the promulgation of the East Africa Order in Council. The Order's provisions defined the territorial jurisdiction of the English monarch over the protectorate. The Office of the Commissioner of the East Africa Protectorate was established, and the Commissioner was empowered to set up administrative institutions for the purpose of effective governance.

The Commissioner was vested with powers which authorised him to make laws known as Queen's Regulations and to establish courts to enforce those laws.[11] In all his operations, the Commissioner was answerable and subject to the Secretary of State. Pursuant to his powers, the Commissioner made provision for taxation, appointment of headmen and the mounting of punitive expeditions against hostile tribes.[12]

The Commissioner's powerful position was further enhanced by the East Africa Order in Council, 1902.[13] The Commissioner was granted authority to partition the protectorate into such provinces or districts for purposes of administration as he deemed fit. His legislative powers were increased and his enactments, now known as ordinances, were no longer subject to the approval of the Secretary of State.[14] Officials in the public service held their offices at his pleasure. Further consolidation of the Commissioner's powers came by way of the East Africa Order in Council (1905) which changed his designation to Governor and Commander-in-Chief of the Protectorate. The Governor was empowered to appoint all judicial officers including judges of the High Court.[15]

In 1920, the British East Africa Protectorate became the Kenya Colony by virtue of the Kenya (Annexation) Order in Council of that year. The implication of this was that the territory no longer was governed under the provisions of the Foreign Jurisdiction Act (1890). The British government was enjoined by the British Settlements Act (1887) to assume legal

---

9 YP Ghai & JPWB McAuslan *Public law and political change in Kenya* (1970) 14. See also JB Ojwang *Constitutional development in Kenya* (1990) 22–24.

10 As above, 23.

11 Ojwang (n 9 above) 30.

12 As above.

13 It has been argued that the Kenyan constitutional evolution could be traced to the 1902 Order in Council, as it set out clearly how the protectorate would be administered. See 'The story of the Kenya Constitution' (1988) 10 *Nairobi Law Monthly* 9.

14 Ojwang (n 9 above) 31.

15 As above. The 1902 Order in Council established a High Court for the protectorate. Appeals were to be directed to Her Britannic Majesty's Court for East Africa.

duties of a different nature from those required in a foreign territory governed under the former statute.[16] One of those duties was to ensure the establishment of a Legislative Council in order to assume the Governor's legislative powers.

In practice, however, the Governor's hand remained visible in legislation as he was the Speaker of the Legislative Council until 1948 when a substantive speaker was appointed. Before then, the Governor was solely responsible for the promulgation of the Regulations and Standing Orders that superintended the Council's functioning. After the appointment of a substantive speaker, he retained the power to veto any proposed legislation.

The Legislative Council was established at a time when European settlers were pushing for the creation of a 'white man's country' in the colony. As a direct consequence, membership of the Council was restricted to European representation. Hopes of creating a 'white man's country' were, however, crushed by the Devonshire White Paper of 1923 which declared Kenya to be an African territory in which the interests of the 'natives' would be paramount.[17] In 1925, therefore, provision was made for African representation in the Legislative Council. However, this provision adopted a paternalistic attitude based on the assumption that 'natives' were not capable of representing their own interests. European missionaries were invariably appointed to represent African interests in the Council. It was not until 1944 that the first African, Eliud Mathu, was appointed to represent those interests.

The political tension that ensued was the product of opposing racial interests in the post-annexation period. Its enormity necessitated a considerable amount of constitutional change.[18] Inevitably, this came only after the Mau Mau rebellion and the attendant declaration of a state of emergency. A move towards multi-racialism in government began in 1954, this being a recommendation of the British parliamentary delegation to the Colonial Secretary.[19] This resulted in the Lyttleton Constitution of 1954 which was the first public endorsement by colonial authorities of multi-racial participation in government.[20] It established a Council of Ministers consisting of 12 persons. Half of these were the Governor's appointees, the rest being elected representatives in the following proportions: three Europeans, two Asians and one African.

---

16 Singh (n 8 above) 890. See also Ghai & McAuslan (n 9 above) 50–52.

17 By the Devonshire White Paper, the British government regarded itself as exercising a trust on behalf of Africans, the object of the trust being protection and advancement of the 'native'.

18 Ojwang (n 9 above) 33; Singh (n 8 above) 892.

19 G Muigai 'Constitutional government and human rights in Kenya' (1990) 6 *Lesotho Law Journal* 107 113.

20 Ojwang (n 9 above) 33.

Following protestation from African leaders against this 'timid move towards multi-racialism' the Lennox Boyd Constitution came into being in 1958.[21]. The Council of Ministers was expanded to a membership of 16 persons, half of whom were to be elected members of the Legislative Council. Further, African representation was increased to 14 members in the Legislative Council, equal in number to elected Europeans. Despite being aimed at enhancing accountability in government,[22] the Lennox Boyd Constitution did not receive a different reaction than the one received by its predecessor. Indeed, the Lennox Boyd Constitution opened the door to larger demands.[23] African members of the Legislative Council declined to co-operate in government, arguing that representation still weighed heavily in favour of the settlers who constituted a minority of the population. They demanded a constitutional conference to map their political destiny.

In January and February 1960 the first constitutional conference was held at Lancaster House, London. The Secretary of State appointed a constitutional adviser to this conference. Ian Macleod presided over the conference. In contrast to subsequent conferences, this conference was one of racial groupings.[24] The synthesis of the conference was the Macleod Constitution, which expanded membership of the Legislative Council to 65 persons and provided for the protection of minority interests by reserving 20 seats for racial minorities.[25] Provision was made for a Council of Ministers with an African majority; three portfolios were assigned to Europeans and one to Asians.

After the 1960 conference, two national African political parties were formed. They were the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU). It had previously been unlawful for Kenyans to organise themselves politically on a national scale.[26] The Macleod Constitution allowed elections to be held in February 1961.[27] These elections were ultimately a test case in so far as the role of political parties in governance was concerned.[28] Membership of, and representation in the Legislative Council, were for the first time apportioned along party and not racial lines. Despite winning the poll, KANU, honouring its electoral pledge, declined to form the government until Kenyatta, the nationalist leader, was released from detention. KADU and the New

21 Muigai (n 20 above) 113.
22 Ojwang (n 9 above) 34.
23 As above.
24 Singh (n 8 above) 893.
25 Ojwang (n 9 above) 35.
26 Muigai (n 20 above) 115.
27 KANU garnered 16 seats in the Legislative Council with 67% of the votes, whereas KADU won 11 seats and 17% of the votes.
28 Ojwang (n 9 above) 35.

Kenya Party, a European outfit, formed a coalition government which was dominated by colonial officials and never exercised any real power.[29]

The second constitutional conference was held between February and April 1962 at Lancaster House amidst deep-seated mistrust and differences between KANU and KADU. The party lines made agreement all the more difficult.[30] Arguments emerging from this conference were based on compromises between these two parties.[31] The internal self-governing constitution that evolved was the product of vigorous bargaining by all parties. With minor modifications, this constitution later formed the basis of the Independence Constitution.[32]

In its substance, the new Constitution established a form of Westminster government. It provided for a bi-cameral legislature. The leader of the majority party in the Lower House was to be appointed Prime Minister by the Governor. Authority over what were deemed to be crucial matters of state, namely defence, foreign policy and internal security, remained vested in the Governor. The country was divided into seven regions, each with its own legislature and executive.

Upon the establishment of internal self-government in 1963, negotiations for the Independence Constitution began. In September that year the final constitutional conference was held in London. A number of changes were made to the 1962 Constitution with a view to making it more durable and workable.[33] It was decided that Kenya would be granted independence under dominion status and not as a republic. Her Majesty would remain the head of state. The Independence Constitution was born.

The Independence Constitution was negotiated and agreed upon, not as a basis on which a new nation would be founded, but as a mechanism by which governmental power and responsibility were handed over to the Kenyans. Although not intended to espouse the values and aspirations of the Kenyan people, it had the effect of creating a democracy based on the Westminster model of limited government. Kenya became independent on 12 December 1963.

3 The Independence Constitution

The British government renounced all rights of governmental authority and legislation in Kenya and removed all limitations to the competence

29 Muigai (n 20 above) 115.

30 Singh (n 8 above) 895.

31 As above.

32 Ghai & McAuslan (n 9 above) 177.

33 *Report of the Final London Conference, Kenya: Independence Constitution 1963* (1963) (Cmnd 2156) para 32. For an evaluation of the amendments made, see Singh (n 8 above) 898–900.

of the legislature through the Kenya Independence Act, 1963, and the Kenya Independence Order in Council of the same year.[34]

The Order in Council proclaimed that by the provisions of the Act, Kenya had attained independence. The Independence Constitution was set out in schedule two of the Order in Council. It was a long, detailed and complex document, strongly based on the principles of parliamentary government and the protection of minorities. The complexity of the Independence Constitution is best explained by the circumstances that attended its formulation. Awareness that the colonial authorities were about to transfer power to the Kenyans set off acrimonious debate as to how power was to be distributed upon that eventuality. Minorities became increasingly aware of their precarious position in a newly independent state. With a view to self-preservation, minorities persistently lobbied for constitutional safeguards and other means of power sharing.[35]

The Independence Constitution was a manifestation of a mistrust of power with the result that a weak form of government was established, in contrast with the previous colonial government which was premised on the consolidation of power in the executive.[36] Three broad themes characterised this Constitution: regionalism to safeguard KADU, safeguards for minorities and the control of the exercise of political power.[37]

4 Background to the Bill of Rights

The idea of an entrenched bill of rights in the Constitution first arose in 1960 when it became apparent that Kenya, like most British colonies at the time, was heading towards independence. The principle of a bill of rights was accepted at the Lancaster House constitutional conference of that year.[38] Her Majesty's government was of the firm view that legal provisions for the judicial protection of human rights were essential in the proposed Kenyan Constitution.[39]

However, a bill of rights was not incorporated into this Constitution. It became part of the Constitution through a constitutional amendment in December 1960.[40] The Bill of Rights guaranteed the traditional civil

---

34 Ghai & McAuslan (n 9 above) 178.

35 YP Ghai 'Constitutions and political order in East Africa' (1972) 21 *International and Comparative Law Quarterly* 403 410. The term 'minorities' is used to denote the numerically smaller ethnic groups, Asians and European settler communities.

36 As above, 410.

37 Muigai (n 20 above) 116.

38 Singh (n 8 above) 913.

39 *Report of the Kenya Constitutional Conference 1960* (1960) (Cmnd 960) 9. See also De Smith (n 2 above) 163.

40 Kenya (Constitution) (Amendment No 2) Order in Council 1960.

and political rights as set out in the Universal Declaration of Human Rights and guaranteed equality of economic opportunity. Africans regarded this as a belated gesture of goodwill on the part of the British Government. The irony of a British initiative towards the protection of human rights by way of a justiciable bill of rights is to be found in the English position on the subject at that time, which Jennings captures:[41]

> . . . [I]n Britain we have no bill of rights; we merely have liberty according to the law; and we think — I truly believe — that we do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man.

Although African nationalist leaders at Lancaster House did not oppose the idea of a justiciable bill of rights, their attitude towards protection of human rights was no different from the one adopted by Dr Hastings Banda at the Nyasaland Constitutional Conference of 1962. While not objecting to a bill of rights, Dr Banda's position was that the true guarantee for the protection of minorities was the goodwill of the majority.[42]

At the second Lancaster House Conference in 1962, it was agreed to set up a committee to consider and report to the Conference on the provisions to be included in a bill of rights.[43] The Committee was presided over by Sir John Martin at the behest of the British and Kenya Colony governments and included representatives from KANU, KADU and the Kenya Coalition. It recommended substantial reformulation of the 1960 Bill.

Although human rights advocacy in Kenya preceded the introduction of the Bill of Rights, its incorporation in the Constitution is wholly attributable to British authorities. They made this a precondition to independence. It would appear that a bill of rights was not a priority issue for African leaders at the constitutional conferences. Their prime concern was independence, the transfer of power to Kenyans and power sharing among Kenyans upon independence.

The Kenyan Bill of Rights, therefore, like those of many former British colonies, cannot be said to be representative of a set of higher values emanating from, and subscribed to, by the Kenyan people. Indeed, it was meant to be nothing more than a bulwark against political power in the hands of 'natives', primarily to protect the interests of European settlers.

An analysis of the reception of the concept of human rights in Africa bears out the above assertion. The post-Second World War period in the 1950s witnessed a wave of African nationalism and the emergence of newly independent African states in the 1960s. At a conference held in

---

41 I Jennings *The approach to self-government* (1956) quoted in De Smith (n 2 above) 167.

42 *Report of the Nyasaland Constitutional Conference 1962* (1962) (Cmnd 1887) 20.

43 *Report of the Kenya Constitutional Conference 1962* (1962) (Cmnd 1700) 19.

Accra in 1958 under the auspices of the United Nations (UN), the idea of human rights began to take root in Africa. The resolutions reached at that conference proclaimed, among other things, 'unswerving loyalty to the Charter of the UN and the Universal Declaration of Human Rights'.[44]

In 1960, a follow-up conference in Addis Ababa reaffirmed the commitment of independent African states to human rights.[45] In 1961, the International Commission of Jurists hosted an African conference on the Rule of Law in Lagos, where various aspects of human rights and its socio-economic implications were discussed. That conference invited African governments to study the possibility of adopting an African convention on human rights and the creation of a court of appropriate jurisdiction, with signatory states having recourse to it.[46] Clearly, an 'African' dimension to human rights was identified at this conference.

Despite the growing awareness of human rights on the continent in the 1960s, the run-up to independence lacked a commitment to such values on the part of nationalists. The idea of a constitutional bill of rights was largely a colonial initiative with Africans accepting it as the price for independence. It was only in Zambia and Nigeria that a bill of rights was incorporated in the Independence Constitutions at the instance of the nationalists.[47]

There was no bill of rights in the Independence Constitution in Tanganyika, which was administered by the British under the UN mandate system after the Second World War and until independence in 1961. The African nationalist movement vigorously opposed the inclusion of a bill of rights in that Constitution.[48] That the British did concede to this opposition is explicable. They did not have substantial interests or white settler populations in the territory. The scenario in the neighbouring Kenya colony was altogether different. There were heavy British investments and considerable settler interests in the White Highlands in the Rift Valley and Central Kenya.

British insistence on a bill of rights in the Independence Constitution cannot for this reason be seen as a humanitarian gesture towards Africans, especially in the light of an extremely repressive colonial past characterised by inhuman and degrading treatment of the colonised people. It is best seen as a manifestation of the British and colonial authorities' concern over the security of the white settlers resident in Kenya and their property in a newly independent state.[49]

---

44 LS Zimba *The constitutional protection of fundamental rights and freedoms in Zambia* (1979) 74.

45 As above, 75.

46 As above, 77.

47 As above, 78.

48 CM Peter *Human rights in Africa: A comparative study of the African Charter on Human and Peoples' Rights and the new Tanzanian Bill of Rights* (1990) 2.

49 As above.

The Kenyan Bill of Rights was modelled on the Ugandan example. At the first meeting of the committee on a bill of rights at the second Lancaster House Conference, it was agreed that its working paper would be the Bill of Rights contained in the Uganda (Constitution) Order in Council, 1962.[50] The reasoning was that the Ugandan Bill was the most contemporary model and that it was further of special relevance because it was part of the constitution of a neighbouring East African country.

In turn, the Ugandan Bill was based on the Nigerian example as incorporated in the Nigerian Constitution of 1959.[51] The rights enshrined in the Nigerian Constitution were eurocentric in their formulation in that these rights drew heavily from, and reflected, the individualistic approach found in the European Convention on Human Rights.

These rights were limited to civil and political rights. It is through that Constitution that the Western concept of human rights was imported into Africa.[52]

5 The Kenyan Bill of Rights

The Kenyan Bill of Rights[53] is included as chapter V of the Constitution of Kenya, Act 5 of 1969, and is entitled 'Protection of Fundamental Rights and Freedoms of the Individual'. It runs from section 70 through to 86. Being modelled on the European Convention on Human Rights, it guarantees the traditional civil and political rights only.

Section 70 takes a preambular form and assures every person in Kenya the fundamental rights and freedoms of the individual regardless of his race, tribe, place of origin or residence, political opinion, colour, creed

---

50 *Report of the Kenya Constitutional Conference 1962* (n 45 above) 19. See also A Wamala 'Some reflections on Africa's constitutional history' in B de Villiers (ed) *Birth of a constitution* (1994) 315.

51 For a historical account of the origins of the Nigerian Bill of Rights, see GO Ezejiofor *Protection of human rights under the law* (1964) 178–183.

52 W Strasser & C Heyns 'The relevance of the European Convention on Human Rights for Africa' in D Brand *et al* (eds) *From human wrongs to human rights III* (1996) 51. See also BO Nwabueze *A constitutional history of Nigeria* (1982) 116–120; YP Ghai 'Independence and constitutional safeguards in Kenya' (1967) 3 *East African Law Journal* 177 192.

53 See C Heyns (ed) *Human rights law in Africa 1996* (1998) 175–185. The Bill as reprinted in this volume has since been amended twice through (a) the Constitution of Kenya (Amendment) Act 9 of 1992 which inserted sec 84(5)(b) to enable parliament to make provision for legal aid to indigent persons wishing to prosecute claims under the Bill of Rights, and (b) the Constitution of Kenya (Amendment) Act 9 of 1997 which added 'sex' to the explicitly prohibited grounds of discrimination in sec 82 and inserted sec 84(7) to provide for appeals from the High Court to the Court of Appeal on any determination made in cases brought to enforce the Bill of Rights.

or sex.[54] In *Wadhwa v City Council of Nairobi*[55] the High Court emphasised that this declaratory provision declares the rights of the individual as a human person without any reference to any matter of nationality, citizenship or domicile.[56]

5.1 Civil and political rights

5.1.1 *The right to life*

Traditionally, the right to life is considered most important and serves as the basis of the enjoyment of other rights.[57] In Kenya, the right to life is respected. Section 71(1) of the Constitution provides that no person shall be deprived of his life intentionally save in execution of a court sentence in respect of a criminal offence. In *M'Riungu v Republic*[58] the High Court reaffirmed the constitutionality of the death penalty.[59]

Section 71(2) is a 'claw-back' clause to the right to life. This section provides that it is justifiable to deprive one of the right to life by force in order to defend any person from violence or to defend property; effect lawful arrest or prevent escape of a lawfully detained person; suppress a riot; insurrection or mutiny or to prevent the commission of a criminal offence by anyone. Further, this right is not violated where a person dies as a result of a lawful act of war. It has been argued that due to its vital nature, the right, being the basis of humanity should be made absolute by, among others, abolishing the death penalty.[60]

5.1.2 *The right to personal liberty*

This right is guaranteed, save in cases where it may be abridged by law.[61] These instances include, among others, execution of a sentence or order of a court, upon reasonable suspicion that one has committed or is about to commit a criminal offence and to prevent unlawful entry of any person into Kenya. Any person who is arrested or detained is entitled to be informed expeditiously and in a language he understands, of the reasons

---

54 In substance, however, sec 70 is a general limitation clause.

55 (1968) EA 406.

56 As above, 409.

57 CM Peter 'Fundamental rights and freedoms in Kenya: A review essay' (1991) 3 *African Journal of International and Comparative Law* 61 64.

58 Nyeri Criminal Appeal No 902 of 1981 (unreported).

59 However, in *M'Riungu* the issue as to whether the death penalty is unconstitutional on the grounds of being cruel or inhuman punishment remains unresolved. For a further discussion on the death penalty in Kenya, see G Imanyara 'The death penalty and Kenyan law' (1989) 17 *Nairobi Law Monthly* 19; DW Gachuki 'The hanging bill: Kenya's response to the crime of robbery' (1989) 17 *Nairobi Law Monthly* 24; C Mpaka 'Death penalty: The unending debate' (1989) 17 *Nairobi Law Monthly* 21.

60 Peter (n 57 above) 65.

61 Sec 72(1)(a)–(j).

for his arrest or detention. In terms of section 72(3) of the Constitution, such a person must be brought before a court within 24 hours of his arrest or detention and in a case where one is suspected of having committed a capital offence, within 14 days.

In *Wamwere v Attorney-General*[62] the High Court held that the right to personal liberty was not infringed despite the fact that the applicant's arrest was by way of kidnapping from a neighbouring country. In the court's view it was sufficient that the state had shown that the applicant was arrested on reasonable suspicion of having committed a criminal offence in terms of section 72(1)(e) of the Constitution.[63]

Prior to December 1997, one of the severest abridgments to the right to liberty was section 4(2)(a) of the Preservation of Public Security Act, which provided for detention without trial.[64] It was invariably applied to criminalise political dissent. Once a detainee was furnished with a valid detention order courts would not intervene. Judges held that they had no powers to look into the reasons for detention once the order was duly served on the detainee.[65]

5.1.3 *Protection from slavery and forced labour*

Section 73(1) of the Constitution provides that no person shall be held in slavery or servitude. Although slavery has not been the subject of litigation in Kenya, the issue of servitude was addressed in *Republic v Kadhi of Kisumu ex parte Nasreen*.[66] In this case the Kadhi made orders in an action brought by the applicant's husband upon her leaving the matrimonial home, compelling her to return to her husband. In granting her an order of *certiorari* quashing the Kadhi's orders, Justice Harris held that the implementation of those orders would in the circumstances subject the applicant to her husband's dominion to an extent amounting to servitude.[67]

Section 73(2) guarantees that no one shall be required to perform forced labour. However, section 73(3) removes certain forms of labour from the definition of forced labour. While most of these exceptions are justifiable, it is not easy to define what is meant by 'labour that is

---

62 (1991) LWR 25.

63 As above, 27. See *Kihoro v Attorney-General* Court of Appeal Civil Appeal No 151 of 1988 (unreported) where the Court of Appeal held that being held for 74 days without being charged in a court of law violated the right to personal liberty.

64 This provision was repealed by the Statute Laws (Repeals and Miscellaneous Amendments) Act 10 of 1997.

65 See eg *Odinga v Attorney-General* High Court Miscellaneous Civil Application No 104 of 1986 (unreported); *Republic v Commissioner of Prisons, ex parte Wachira and three others* Miscellaneous No 60 of 1984. See also K Murungi 'The administration of the Preservation of Public Security Act' (1986) 16 *Nairobi Law Monthly* 27.

66 (1973) EA 153.

67 As above, 161.

reasonably required as part of reasonable and normal communal or civic obligations'.

5.1.4 *Protection from inhuman treatment*

Claims based on the protection from torture and inhuman and degrading treatment, as provided for in section 74 of the Constitution, have been largely unsuccessful.[68] Subsection (2) of this section, however, allows for punishment that may be inhuman and degrading, subject to the condition that it was lawful in Kenya on 11 December 1963. That explains why corporal punishment, though widely viewed as degrading and inhuman, is still lawful in Kenya.

In *Mwau v Attorney-General*[69] it was contended that the exercise of the Attorney-General's powers to terminate criminal proceedings by entering *nolle prosequi* and a later re-opening of the same charges, amounted to inhuman treatment of the accused. In upholding the Attorney-General's decision to reinstate the charges, the court held that that decision did not amount to inhuman treatment as it did not have characteristics lacking in natural kindness. Neither was it brutal or unfeeling.

In *Marete v Attorney-General*[70] the applicant, a married civil servant who was the father of four children, was denied his salary for a period of two and a half years for allegedly being involved in activities disruptive of the public interest. He was, however, not formally dismissed from employment. The court had no difficulty in finding that subjecting a person to a period of two and a half years without pay, work and freedom to seek alternative employment amounted to mental torture and therefore inhuman and degrading punishment.

5.1.5 *Protection from deprivation of property*

This right is essential in a capitalist society. Section 75 of the Constitution protects property negatively by promising that private property cannot be taken away without paying full compensation.[71] Furthermore, such property can only be acquired in the interests of defence, public safety, public order, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit. The necessity of taking such a course of action must rationally justify the hardship caused to the persons affected.[72]

---

68 Ojwang (n 9 above) 164; JB Ojwang & JA Otieno-Odek 'The judiciary in sensitive areas of public law: Emerging approaches to human rights litigation in Kenya' (1988) 35 *Netherlands International Law Review* 29 34.

69 High Court Criminal Application of 1983 (unreported).

70 High Court Miscellaneous Civil Application No 688 of 1986 (unreported).

71 Peter (n 57 above) 66.

72 Sec 75(1)(a)–(c). See also Ojwang & Otieno-Odek (n 68 above) 45.

In *Changanlal v Kericho Urban District Council*[73] it was held that although the law permitted a town planning scheme to be brought into operation, the scheme was subject to payment of compensation and no legislation could pass the constitutional test if it took away private property rights without compensation. Where consensus as to compensation is not reached, courts will be called upon to determine the appropriate amount to be paid to the dispossessed.[74]

The courts are, however, reluctant to aid individuals who, with a view to defeating the greater and justifiable public interest, refuse to negotiate compensation with the state. Therefore, in *Desterio v Attorney-General*[75] the High Court declined to shield a land speculator who had been duly notified by the government of his intention to acquire his land in the public interest but was not willing to negotiate compensation.

5.1.6 *Protection against arbitrary search or entry*

In recognition of the inviolability of the person and of human dignity, section 76(1) shields the individual from arbitrary searches of his person and property or the entry by other persons on his property without his consent. Section 76(2), however, weakens this protection by authorising acts pursuant to any law which restricts the right:

(a) in the public interest;
(b) to protect the rights and freedoms of others;
(c) to enable government officers to enter any premises to inspect it for purposes of levying taxes or rates due or to enable carrying out work connected with government property on the premises; or
(d) to enforce the judgment or order of a court in civil proceedings.

Under any of these circumstances, the onus is on the person claiming that his rights have been infringed to show that such action or law is not reasonably justifiable in a democratic society.[76]

This provision has not been the subject of constitutional litigation. Its implications for criminal law is disturbing. For instance, the legal position on illegally obtained evidence was laid down by the Privy Council in *Kaniu v Regina.*[77] This was a pre-constitutional case. The appellant had been convicted and sentenced to death by a Court of Emergency Assize of the then Supreme Court of Kenya for being in unlawful possession of two rounds of ammunition, contrary to Regulation 8A(1)(b) of the Emergency Regulations, 1952. The ammunition was found on him upon

---

73 (1965) EA 370.

74 See eg *New Munyu Estates Limited v Attorney General* (1972) EA 88.

75 (1982) 8 *Commonwealth Law Bulletin* 1392.

76 Proviso to sec 76(2). It would be expected that in order to effectively safeguard individual liberties, the onus of proof would be the other way round.

77 (1955) 1 All ER 236.

a search by security officers of a rank below that permitted by the Regulations. In dismissing the appeal, Lord Goddard said:[78]

> The test to be applied in considering whether the evidence is admissible, is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained.

While this decision did not qualify the rule that confessions must be voluntary, it portends grave danger to human dignity, especially where mere suspicion of a criminal offence exists.

5.1.7 *Protection of the law*

Section 77 spells out what in criminal law are commonly referred to as principles of legality. Section 77(1) provides that a person charged with a criminal offence must be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. In *Riungu v Republic*[79] the applicant was joined in a criminal prosecution containing 93 counts with four other persons. He was only affected by the last three counts. In finding the charge sheet to be so overloaded as to render it impossible to afford a fair hearing to the applicant, the court emphasised that an accused person must at all times be in a position to understand the case against him and that that was an integral part of a fair trial.

Section 77(2) sets out the safeguards for a fair hearing as envisaged by section 77(1).[80] It is couched in such terms as to ensure that every person charged with a criminal offence shall be:

(a) presumed innocent until proven guilty. This read together with section 72(5) is the very basis of granting bail pending trial. In Kenya, the four capital offences of murder, treason, robbery with violence and attempted robbery with violence are non-bailable.[81]
(b) informed expeditiously and in a language he understands, the nature of the offence with which he is charged;
(c) given adequate time and facilities to prepare his defence;
(d) allowed to defend himself in person or by a legal representative of his own choice;[82]
(e) afforded an opportunity to examine prosecution witnesses and facilities to procure attendance of his witnesses;

---

78 As above, 239.

79 High Court Criminal Application No 472 of 1996 (unreported).

80 See *Pattni v Republic* High Court Criminal Application 481 of 1995 (unreported).

81 On the issue of non-bailable offences and the constitutional implications thereof, see K M'Inoti 'Bail in capital offences: A case for the restoration of the discretionary power of the High Court' (1991) 31 *Nairobi Law Monthly* 32.

82 See K M'Inoti 'Defending the unpopular: The right to counsel as a right of all accused persons' (1990) 20 *Nairobi Law Monthly* 30.

(f) permitted, without cost, to have the assistance of an interpreter if the trial is in a language he cannot understand. In *Andrea v Republic*[83] the High Court allowed an appeal on the ground that the lower court had failed to provide an interpreter at the trial of a Portuguese speaking foreigner.

In section 77(7) the right not to be compelled to give incriminating evidence is protected. In *Republic v El Mann*[84] the accused was required to answer certain queries on a statutory form by revenue officials. His answers disclosed offences in terms of the Exchange Control Act. Upon prosecution for those offences, he objected to the form being produced in evidence on the ground that it violated section 77(7). The court admitted the statutory form in evidence by restrictively interpreting the constitutional provision and by holding that a literal meaning had to be attached to it.[85]

Section 77(8) prescribes that no one may be convicted and sentenced for an offence not provided for by a written law and the penalty therefor prescribed. This means that common law crimes known to English law do not apply in Kenya. The only exception to this rule is contempt of court.[86]

5.1.8 *Freedom of conscience*

The Constitution envisages a society which respects the individual's conscience and protects his right to think and live as he wishes.[87] Section 78(1) guarantees that no one shall be hindered in the enjoyment of his freedom of conscience. This right comprises freedom of worship, belief and thought.[88]

In *Patel v Premji*[89] the Court of Appeal held that the constitutionally protected freedom of conscience precluded courts from interfering with matters of religion, except where it constituted a breach of the law. In effect the Kenya position on freedom of worship can be summarised as follows:[90]

---

83 (1970) EA 46.

84 (1969) EA 357.

85 The soundness of this decision was unsuccessfully challenged in *Okang v Republic* High Court Criminal Case No 1189 of 1979 (unreported). Here the accused person's fingerprints were taken without his consent while in police custody. In upholding *El Mann* the court ruled that sec 77(7) must be construed strictly. In effect, and unfortunately so, the position in Kenyan law is that sec 77(7) only guarantees the right to remain silent at one's trial.

86 Proviso to sec 77(8).

87 P Muite & GK Kuria 'The Kenya Constitution and the church: Freedom of worship and related freedoms of association and speech' (1990) 20 *Nairobi Law Monthly* 25 27.

88 Ojwang & Odek (n 68 above) 36.

89 (1976) KLR 112.

90 Lord Denning 'Freedom under the law' (1949) quoted in Muite & Kuria (n 87 above) 27.

> . . . [W]e are free to worship or not to worship, to affirm the existence of God or deny it, to believe in Christian religion or in any other religion or in none, just as we choose.

On the right to belief and thought, the case of *M'Mpwii v Kariuki* is instructive.[91] In that case a Kenyan rugby club refused to honour a fixture against an English club for the reason that the club had sporting links with South Africa, despite an international call to boycott sports links with South Africa as a response to apartheid. The organisers of the match, Kenya Rugby Football Union, took disciplinary action and imposed fines and suspensions on the club. In challenging the decision in court, the club's officials asserted their right to freedom of conscience. The court upheld their argument and declared the Union's action *ultra vires*.

5.1.9 *Freedom of expression*

A society in which ideas cannot be continuously generated and disseminated risks economic, social and cultural stagnation.[92] One should be able to hold opinions and to voice them without interference. Section 79 of the Constitution recognises this right.

The law of sedition heavily limits this right.[93] In enforcing sedition laws, the courts have invariably cut back on the freedom of expression and have been a tool for suppressing political dissent. This judicial attitude can be traced to the colonial period and particularly the case of *Republic v Oguda*[94] which imported the reasoning of the Privy Council in *Wallace Johnson v Republic*.[95]

5.1.10 *Freedom of assembly and association*

Section 80 protects the individual's freedom to assemble and associate freely with other people. Subsection (1) particularly singles out freedom to form or belong to trade unions or other associations aimed at protecting one's interests. Public meetings are regulated by the Public Order Act, which sets out the procedure for convening such meetings.

In *Angaha v Registrar of Trade Unions*[96] a decision by the Registrar refusing registration of the appellant's trade union was upheld on the basis that while the Constitution protected their rights to belong to a trade union, it conferred no right to belong to a particular one.

---

91 High Court Civil Case No 556 of 1981 (unreported).

92 Peter (n 57 above) 72.

93 Secs 56 & 57 Penal Code.

94 (1960) EA 749.

95 (1940) AC 231. In terms of this decision, in sedition cases evidence of a threat to public order is not required. As a consequence courts do not bother to define the point at which constructive criticism ends and sedition begins.

96 (1973) EA 297.

5.1.11 *Freedom of movement*

Section 81(1) guarantees this right to all citizens. Every citizen may move freely within the country, reside in any part of it and leave or enter the country. It further gives every citizen immunity from expulsion from Kenya.

Leaving the country has raised significant problems.[97] For instance, the right to acquire a passport so as to enjoy freedom of movement remains a vexing issue. In *Mwau v Attorney-General*[98] the High Court held that a passport was not a right. In affirming that decision, the Court of Appeal stated further that the issue and withdrawal of passports are 'the prerogative of the President . . .'.[99]

5.1.12 *Freedom from discrimination*

This is the final right listed in the Bill of Rights. Section 82 prohibits discrimination at both the horizontal and vertical levels. Until December 1997 the prohibited grounds were race, tribe, place of origin or residence, political opinion, colour or creed. By amendment 'sex' was added as another ground.[100] In *Wadhwa v City Council of Nairobi*[101] a notice served by the City Council on Asian foreigners to quit their market stalls was invalidated due to its discriminatory nature. Again, in *Fernandes v Kericho Liquor Licensing Court*[102] the High court held that non-citizenship is not a disqualification in the granting of a liquor licence.

In *Re Maangi*[103] legislation which justified the refusal of granting of letters of administration of estates to Africans was struck down as being unconstitutional. Justice Farrel held:[104]

> [S]ection 9 of the . . . Act is discriminatory within the meaning of section 26(3) [now sections 82(2) and (3)] of the Constitution, and I do not think I need say more than that . . . the section . . . is discriminatory.

5.2 The case of socio-economic rights

Despite being a state party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights (African Charter or Charter), the Kenyan Bill of Rights does not recognise socio-economic rights. These rights do not even, at the very least, appear as directive principles of state policy.

---

97 Ojwang & Odek (n 68 above) 43.

98 High Court Miscellaneous Civil Case No 299 of 1983 (unreported).

99 Ojwang & Odek (n 68 above) 44. The same reasoning was applied in *Kuria v Attorney-General* High Court Miscellaneous Civil Case No 551 of 1988.

100 n 51 above.

101 n 53 above.

102 (1968) EA 640.

103 (1968) EA 637

104 As above, 639.

Upon independence, the government set out an African socialism manifesto which aimed to achieve 'political equality, social justice, human dignity, freedom from want, disease and exploitation, equal opportunities and growing *per capita* incomes, equally distributed'.[105] The policy priorities at that time were aimed at facilitating a firm basis for economic growth.[106] Over time it became evident that the government's African socialism agenda was nothing more than a convenient doctrine in explaining and justifying its involvement in the process of economic growth through involvement in active enterprise.[107]

The one sector grossly affected by the non-recognition of socio-economic rights is the agricultural industry which is the core of Kenya's economy. Operating in a system that has been described as a 'legal framework for agrarian oppression',[108] small-scale farmers are restricted in their personal economic decisions. Under the Coffee Act, for instance, the Coffee Board of Kenya is established to control the cultivation, processing and sale of coffee. In terms of section 21 of that statute, it is a criminal offence punishable with up to ten years' imprisonment for a farmer to roast coffee for sale or to export or sell it to any person other than the Board.[109]

Additionally, rural farming communities live under the immense administrative powers of chiefs. Acting under powers conferred by the Chiefs Authority Act, chiefs politically, socially and at times economically, control the villages. They may make discretionary orders controlling consumption of native liquor, planting of food crops, excessive dancing, grazing and use of water.[110]

The Kenyan view of human rights as expressed by the Bill of Rights is purely civil and political. The material welfare of the individual, which is crucial to human life and dignity, is left out.[111] However, in denying the legal protection of socio-economic rights and leaving them to the political will of the state, civil and political rights are rendered illusory.[112] This is because human rights are indivisible and interdependent.

---

105 *African socialism and its application to planning in Kenya* Sessional Paper No 10 of 1965 (1965) 11–13.

106 A McChesney 'The promotion of economic and political rights: Two African approaches' (1979–80) 23–24 *Journal of African Law* 163 170.

107 As above 171. See also E Muriithi & C Mburu 'Economic and human rights issues' (1992) 43 *Nairobi Law Monthly* 18.

108 International Commission of Jurists (ICJ) *Democratisation and the rule of law in Kenya* (1997) 29.

109 For other laws subjugating farmers, see ICJ (n 108 above) Appendix A. These laws invariably have a colonial origin.

110 ICJ (n 108 above) 31.

111 SC Wanjala 'Law and the protection of dignity of the individual in the under-developed state: The Kenyan example' (1993) *University of Nairobi Law Journal* 1 2.

112 As above.

Gross captures this reality:[113]

> The reality of each of these rights will be secured only by the recognition, as otherwise, if social, cultural and economic rights are not effective, political rights will be reduced to a mere statement of form . . . without the reality of political and civil rights, and . . . freedom as understood in the broadest sense, economic and social rights have no real sense or significance.

5.3 Limitation

A dominant theme of the Bill of Rights is that rights are not absolute. It has a two-tiered mechanism of limiting the liberties it proclaims. On the one hand is a general limitation clause and on the other internal claw-back clauses in the provisions of the Bill.

Section 70 is the general limitation clause. It declares the enjoyment of individual rights and freedoms to be subject to respect for the rights of others and the public interest. In *Pattni v Republic*[114] it was held that the Constitution places the public interest above the interest of the individual.[115]

Internal limitations further restrict protected rights. The right to life, for example, is subject to the death penalty. Furthermore, the right is not contravened when one is killed in self-defence, to effect arrest, in the suppression of a riot or as a result of a lawful act of war.[116] Apart from the protection from slavery, servitude and torture, all other rights are accompanied by a claw-back clause. In effect, under normal circumstances, breach of an obligation to respect the rights protected is permissible for a specified number of reasons.

Although the point has never been authoritatively settled by the courts, it emerges from the case law that the onus is on the applicant to show that his rights have been infringed and for the respondent to show that such infringement is justified as being within the scope of the limitation clause or the various claw-back clauses.

5.4 Derogation

The Constitution permits the derogation or suspension of fundamental rights during an emergency.[117] Section 83(1) provides that 'when Kenya

---

113 EH Gross 'The evolving concept of human rights: Western, socialist and third world approaches' in BG Ramcharan (ed) *Thirty years after the Universal Declaration* (1979) 44.

114 n 80 above.

115 This reasoning flows through the case law. See for example *Riungu v Republic* High Court Criminal Application No 232 of 1994 (unreported) and *Mazrui v Republic* High Court Criminal Application No 91 of 1985 (unreported).

116 See Peter (n 57 above) 65.

117 For an exposition on emergency powers, see generally K M'Inoti 'Emergency powers in Kenya: A study of extraordinary executive powers *vis-à-vis* the International Covenant on Civil And Political Rights 1966' unpublished LLM dissertation, University of Nairobi, 1989.

is at war', nothing contained in an Act of parliament or done under its authority shall be deemed to contravene the rights to liberty, freedom from arbitrary search or entry, freedom of expression, freedom of assembly and association, freedom of movement or freedom from discrimination.

Section 83(1) further provides that nothing done under the authority of part III of the Preservation of Public Security Act shall infringe those rights when its operation has been effected by an order made under section 85 of the Constitution. The provision empowers the President for purposes of preservation of public security to bring part III of the Act into operation by an order published in the Kenya Gazette. No criteria are given for determining what constitutes a threat to public security. That is left to the subjective decision of the President. What seems to be clear is that emergency powers may not be exercised during peacetime.

The most glaring abuse of emergency powers is the 25 year emergency in the North Eastern Province.[118] The North Eastern Province and Contiguous Districts Regulations, 1996, were promulgated under the Preservation of Public Security Act to enable the government to suppress the *shifta* secessionist movement. This Kenyan Somali movement sought to secede and join Somalia. The Regulations remained intact up to 1991 when they were repealed despite the fact that the secessionist movement had fizzled out in the early 1970s. During that period, fundamental rights were virtually suspended in the area and security forces grossly abused the emergency powers. For instance, in 1984 at Wajir security forces acting under the emergency regulations then in force, killed 2 000 civilians despite there being no threat to public peace and order.

It has been suggested that the criteria set out by the European Commission on Human Rights in *Lawless v Ireland*[119] for determining when a public emergency exists should apply.[120] That certain rights are non-derogable, even in times of emergency, is implicit in section 83(1), as it expressly sets out the rights affected in such situations.

5.5 Enforcement mechanisms

5.5.1 *Jurisdiction of courts*

There are two principal ways in which the Bill of Rights may be enforced. The first is through ordinary litigation, which will be subject to the rules set out in the Civil Procedure Act. The second is through the enforcement mechanism contained in section 84 of the Constitution.

---

118 K M'Inoti 'Beyond the 'emergency' in the North Eastern Province: An analysis of the use and abuse of emergency powers' (1992) 41 *Nairobi Law Monthly* 37.

119 (1958–59) 2 *Yearbook of the European Convention on Human Rights* 308.

120 AO Mumma 'Preservation of public security through executive restraint of personal liberty: A case of the Kenyan position' (1988) 21 *Verfassung und recht in Ubersee* 445 450.

Under the first mode it would appear that even the subordinate courts established under the Magistrates Courts Act would have jurisdiction to indirectly give effect to the Bill of Rights when dealing with common law matters such as property disputes or trespass actions. This would then be subject to the normal appeal processes.

The procedure for enforcing the Bill is provided by section 84(2) of the Constitution. This section vests the High Court with original jurisdiction to hear applications alleging breach of the rights guaranteed and questions of their violation arising from proceedings in a subordinate court as may be referred to it by such court. Section 84(7) provides an avenue for appeal to the Court of Appeal for any person aggrieved by the decision of the High Court.

Section 84(6) provides that the chief justice may make rules of procedure under the section. The lack of rules in the 1980s created a crisis when the High Court held that it had no jurisdiction to hear human rights issues on that basis only.[121] These decisions were made notwithstanding earlier decisions recognising jurisdiction where no rules had been made, and which further held that in such instances the court could be moved by any procedure known to law.[122] After almost two decades of post-independence constitutional litigation, the decisions denying the High Court's jurisdiction were not only difficult to rationalise but also indefensible.[123] However, in 1990, at a time when there was intense local and international pressure for the restoration of multi-party democracy, the courts reaffirmed their jurisdiction to enforce the Bill.[124] This remains the position today. This position was also fortified on 17 September 2001 when the chief justice, pursuant to section 84(6) of the Constitution, made rules of procedure for enforcing the Bill of Rights, namely the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001.

---

121 *Kuria v Attorney-General* (n 97 above); *Mbacha v Attorney-General* High Court Miscellaneous Civil Application 356 of 1989.

122 *Benoist Plantation v Felix* (1956) 21 EACA 104.

123 See GK Kuria & AM Vasquez 'Judges and human rights: The Kenyan experience' (1991) 35 *Journal of African Law* 142; AM Vasquez 'Is the Kenyan Bill of Rights enforceable after 4 July 1989?' (1990) 20 *Nairobi Law Monthly* 20; W Maina 'Justice Dugdale and the Bill of Rights' (1991) 34 *Nairobi Law Monthly* 27; K M'Inoti 'The reluctant guard: The High Court and the decline of constitutional remedies in Kenya' (1991) 34 *Nairobi Law Monthly* 17; FJ Viljoen 'The realisation of human rights in Africa through intergovernmental organisations' unpublished LLD thesis, University of Pretoria, 1997 293.

124 See eg *Imunde v Attorney-General* High Court Miscellaneous Civil Application No 180 of 1990 (unreported); *Matiba v Attorney-General* High Court Civil Application No 666 0f 1990 (unreported).

5.5.2 *Locus standi*

Section 84(1) recognises only two sets of individuals who may competently apply for redress under the Bill of Rights. These are a person alleging a contravention of his rights, and a person acting on behalf of a detained person in so far as he alleges a contravention of the detained person's rights.

This is restrictive as it leaves out the possibility of *actio popularis* and the position of persons without capacity to act for themselves is not clear. Suffice it to say that the point of *locus standi* has not been canvassed in the courts and most cases that have been dismissed at the threshold stage have been dismissed on jurisdictional grounds.

5.5.3 *Applicable law*

The Bill of Rights does not provide tools of interpretation to give effect to its provisions. This has had an impact on the effective enjoyment of fundamental rights and freedoms in Kenya. The courts have not hesitated to look at decisions of courts in other jurisdictions. The problem, however, has been that unswerving loyalty has been accorded to the principles of English constitutional law and judicial decisions. The problem that arises is that the English constitutional order is fundamentally different from Kenya's in that it is based on an unwritten constitution and that the doctrine of parliamentary supremacy prevails in England.[125] Its jurisprudence is therefore not of a comparable nature.

In *El Mann*[126] the court relied on English authorities and held that the Constitution must be interpreted like any other statute when the words are clear. That decision was followed in *Kariuki v Attorney-General,*[127] and in *Imanyara v Attorney-General*[128] the court applied the principles of ordinary interpretation of statutes in determining whether section 2A of the Constitution, which made Kenya a one-party state, was inconsistent with section 80 which guarantees freedom of association and assembly.

In most cases brought against the state, courts have been hostile to comparative jurisprudence of courts in jurisdictions with written constitutions. As a result constitutional remedies have declined immensely. In as far as most of the Bill of Rights provisions are concerned,

---

125 The basis of Kenya's constitutional law is constitutional supremacy. Sec 3 of the Constitution reads: 'This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to sec 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.'

126 n 86 above.

127 High Court Miscellaneous Civil Application No 891 of 1993 (unreported).

128 High Court Miscellaneous Civil Application No 7 of 1991 (unreported).

the words of Justice Holmes have come alive. In *The Western Maid*[129] the judge warned:[130]

> Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to grasp.

5.5.4 *Remedies*

Section 84(1) provides that a person with *locus standi* who alleges a violation of any of the rights protected in the Bill of Rights may apply to the High Court for redress. No restrictions are imposed by section 84 on the type of remedies that a court may grant. The courts will therefore, in appropriate cases, award damages, *certiorari,* injunction, prohibition, declarations or other such remedy as they deem fit in the circumstances of a particular case.

6 Conclusion

The function fulfilled by a bill of rights in a constitutional order of checking arbitrary government and facilitating democratic processes cannot be gainsaid. But for any bill of rights to effectively limit governmental powers, it must in its very nature embody a social contract between the rulers and the governed. This is because legitimacy lies at the very heart of the proper functioning of any constitutional order. Unless a bill of rights is effectively located in such a place in any constitutional order, there exists the risk of considerably expanding the powers of the state and drastically reducing the scope of individual liberties.[131]

A bill of rights must then emanate from the people ceding powers of governance to the rulers. There must be some autochthonous input in such a bill, for it is the vision attending its formulation that must guide its interpretation. It is in light of the lack of this that the failure or dysfunctional state of most African bills of rights can be explained. Most of the bills in former British colonies such as Kenya were imposed on those states by the departing colonial authorities at independence.

An effective bill of rights must be a negotiated instrument among various interest groups in a body politic. Sachs observes:[132]

> An effective bill of rights in any country must relate to the culture, traditions and institutions of that country, at the historic moment when the bill of rights is considered necessary an effective bill comes from inside the historical

---

129 257 US 419 (1922).

130 As above, 433.

131 J Jeffries 'The Bill of Rights' (1988) *New Zealand Law Journal* 97.

132 A Sachs 'Towards a bill of rights for a democratic South Africa' (1991) 35 *Journal of African Law* 21 30.

> process, not outside and reflects a set of values gained in the course of the struggle and rooted in the consciousness of the people, not one imported from other contexts.

One can easily trace the poor state of interpretation of the Kenyan Bill of Rights to the failure to define the nation's values at independence. Additionally, with the demise of one-party rule in 1991, constitutional mechanisms should have been put in place to facilitate the entrenchment of plural democracy. At that point in time a new legal order came into being and that order necessitated an autochthonous constitution.[133]

Autochthony ensures that the constitution principally legitimises the exercise of governmental power by the rulers and through a bill of rights regulates the use of that power against the individual. The experience of Western democracies, and after the end of the Cold War, the emerging democracies in the East, indicates that at the very least, an African bill of rights can and should espouse home-grown African values. Such an approach to constitutionalism would not be out of place.[134]

Certain deep-rooted realities in African social settings would greatly impact on constitutions. These would include group rights such as those of cultural, religious and linguistic minorities, socio-economic development and equitable access to natural resources, among other things. These realities need to be identified and addressed. A bill of rights that places too much emphasis on the individual is one that is not in touch with reality, since African nature is collectivist to the extent that in addition to individual rights, there is a need to recognise and guarantee larger societal rights.

Only when the Kenyan Bill of Rights takes into consideration these realities will its subjects be assured that in future government will not be irresponsible and unresponsive to their general welfare.

---

133 This point is made with reference to Tanzania in HG Mwakyembe *Tanzania's eighth constitutional amendment and its implications on constitutionalism, democracy and the union question* (1995) 168.

134 Ojwang (n 6 above) 64.