

**BALANCING COMPETING INTERESTS: A STUDY ON KENYA'S
ABILITY TO RECONCILE NATIONAL SECURITY WITH THE
RIGHT TO PRIVACY**

**Submitted in partial fulfillment of the requirements of the Bachelor of Laws
Degree, Strathmore University Law School**

**By
Trufena Rita Oyatsi
078121**

**Prepared under the supervision of
Linnet Muthoni**

January 2017

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Acknowledgements

First and foremost, I would like to express my profound gratitude to my supervisor Linet Muthoni for her outstanding guidance, patience and encouragement. I could not imagine having a better supervisor, mentor and friend.

Secondly, I would like to thank Dr. John Ambani for his insightful comments and critiques that often steered me in the right direction. I am forever grateful to Beatrice Kioko and Yohana Gadaffi for their “co-supervision”.

I would also like to acknowledge my parents and sisters, Esther and Gloria, who continue to inspire my journey.

To all my friends who proofread this dissertation over and over again, I am forever indebted.

Finally, I thank God for everything.

Declaration

I, [TRUFENA RITA OYATSI], do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

[LINET MUTHONI]

ABSTRACT

This study investigates whether Kenya can maintain the balance between upholding national security and protecting the right to privacy in effecting counter terrorism measures. It examines the implementation of local and international counter terrorism legislation in the domestic jurisdiction. Furthermore, it analyses the extent of derogation from the right to privacy as provided by Article 4 of the ICCPR. In addition, it carries out a comparative study between Ghana; a state that has managed to maintain its national security whilst respecting the right to privacy, and Ethiopia, a state that has countered terrorism through wanton violations of the right to privacy. Best practices are drawn from England. The study concludes by providing viable recommendations on the various issues raised.

The central theme of this study investigates whether Kenya can sustain the balance between maintaining national security while respecting the right to privacy in this era of counter terrorism. In attempting to answer this question, a plethora of related questions emerge: How flexible are human rights norms when it comes to extreme threats to national security like terrorism? Do Kenya's geopolitics warrant a greater margin of appreciation in favour of security? Do the security measures employed meet the aim for which they are intended, that is to prevent, reduce or completely eradicate terrorism?

The study recognises the proclivity of terrorism to pit the right to privacy against national security. With the evolution of terrorism from significant suicide bombings to now include mass causality shootings, states have adopted measures to counter the crime. Steps towards making national security paramount have taken centre stage and dominated the on-going conversation on dealing with terrorism. Nonetheless, these steps have been highly criticised by various human rights advocates and labelled as anathemas to civil liberties such as the right to privacy. Reconciling the notion of upholding liberties with preserving national security has proven to be one of the greatest challenges of modern times. This study, therefore examines whether this reconciliation can be achieved in Kenya.

List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AQIM	Al Qaeda in the Islamic Maghreb
ATP	Anti Terrorism Proclamation
CORD	Coalition for Reform and Democracy
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ECmHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
FBI	Federal Bureau of Investigation
FIO	Front for the Independence of Oromia
FDRE	Federal Democratic Republic of Ethiopia
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICT	Information, Communication and Technology
IG	Inspector General
ILA	International Law Association
KDF	Kenya Defence Forces
KLR	Kenya Law Reports
KNCHR	Kenya National Commission on Human Rights
NIS	National Intelligence Service
NISS	National Intelligence and Security Service

NPS	National Police Service
NSIS	National Security and Intelligence Service
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UK	United Kingdom

List of cases

A and others v. United Kingdom, ECtHR, Judgment of 19 February 2009.

Adrien Mundy Busyo et al. v. Democratic Republic of the Congo, CCPR Comm.No. 933/2000 (19 September 2003).

Aksoy v Turkey, ECtHR, Judgement of 18 December 1996.

Campbell v United Kingdom, ECtHR Judgement of 25 March 1992.

Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR.

Cyprus v Turkey, ECtHR, Judgement of 4 October 1983.

David Miranda v Secretary of State for the Home Department, [2016] EWCA Civ 6.

Gillan and Quinton v the United Kingdom, ECtHR Judgement of 12 January 2010.

Klass and others v Germany, ECtHR Judgment of 6 September 1978.

Kopp v Switzerland, ECtHR, Judgement of 25 March 1998.

Landinelli Silva v. Uruguay, CCPR Comm No. R.8/34 (8 April 1981).

Lawless v Ireland, ECtHR, Judgement of 1 July 1961.

Malone v United Kingdom, ECtHR, Judgement of 2 August 1984.

McVeigh, Neil, and Evans v UK, ECmHR, Judgement of 18 March 1981.

Miailhe v France, ECtHR, Judgement of 25 February 1993.

Norris v Attorney General, ECtHR, Judgement of 22 April 1983.

Prosecutor v Rabyie Mehammed Hassen et al (49303/2008).

Rafael Marques de Morais v. Angola, CCPR Comm.No.1128/2002 (18 April 2005).

Ross v Canada, CCPR Comm.No.736/1997 (18 October 2000).

Salgar de Montejo v Colombia, CCPR Comm No. 64/1979 (24 March 1982).

Weinberger v Uruguay, CCPR Comm No. 28/1978 (29 October 1980).

CHAPTER ONE

INTRODUCTION

1.0 Background

This study interrogates whether Kenya can sustain the delicate balance between maintaining national security and upholding the right to privacy while countering terrorism. In the aftermath of the events of 11th September 2001,¹ a prominent feature that has dominated both the academic and political arena globally is the interplay between national security and human rights.² On one hand, there are those that favour security over liberties, arguing that more restrictions on some liberties are warranted so as to provide more protection for the citizenry.³ On the other hand, there are those that maintain that curtailing liberties is playing into the hands of terrorists and would amount to losing the ‘war on terror without firing a single shot’.⁴

The Constitution of Kenya provides for a balance between security and rights,⁵ however, studies have shown that a vast majority of people prefer tilting the prevailing balance in favour of national security.⁶ According to a survey carried out by Ipsos Synovate, 85% of the 24143 people interviewed supported government intrusion into online communication for furtherance of national security.⁷ In *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR, the Court ruled that, “*The right to privacy must be weighed against or balanced with the exigencies of the common good or*

¹ Al Qaeda militants hijacked four commercial airliners and flew two of them into the World Trade Centre and the other two into the Pentagon just outside Washington D.C and in a field in rural Pennsylvania.

² Michaelson C, ‘Balancing Civil Liberties against National Security? A Critique of Counterterrorism Rhetoric’ 13 *University of New South Wales Law Journal* (2006), 29.

³ Posner R, *Not a Suicide Pact: The Constitution in a time of national emergency*, New York, Oxford University Press, 2006, 148.

⁴ See ‘On opposing the USA Patriot Act’ available at <http://www.archipelago.org/vol6-2/feingold.htm> accessed on 10 August 2016.

⁵ Article 238(2) (b), *Constitution of Kenya* (2010).

⁶ Studies carried out between 1 and 9 November 2013 by Ipsos Synovate, have indicated that 67% of Kenyans believed that the terror attack perpetrated by Al Shabaab militia at the Westgate mall, could have been foiled by the use of increased surveillance. See <http://www.standardmedia.co.ke/article/2000097671/ipsos-survey-shows-westgate-terror-attack-could-have-been-prevented/?pageNo=1> accessed on 27 July 2016.

⁷ See National Security ‘more important’ than privacy; available at <http://www.fin24.com/Tech/News/national-security-more-important-than-privacy-20160303> accessed on 27 July 2016.

the public interest. In our view, in this instance, the scales tilt in favour of the common good.”⁸

The right to privacy is considered a fundamental right universally. Domestically, it is encompassed in Article 31 of the Constitution.⁹ It is also provided for in various human rights instruments such as the Universal Declaration of Human Rights,¹⁰ International Covenant on Civil and Political Rights¹¹ and the European Convention on Human Rights.¹² Nonetheless, this right is not absolute in nature. It may be limited under certain circumstances such as in the interests of national security.¹³ It was worth noting that, in as much as the African Charter on Human and Peoples’ Rights (ACHPR)¹⁴ provides for minimal restrictions on rights; the Charter does not impact on the right to privacy.¹⁵ One of the misgivings of the right to privacy is the lack of a legal definition of the term privacy. The Special Rapporteur on Privacy acknowledges in his report that a major handicap in protecting the right to privacy is the absence of a universally agreed upon definition of the term, “privacy”.¹⁶ He further contends that had there been a definition of privacy, it would need to be revised regularly following the developments in technology.¹⁷ The Special Rapporteur claims that privacy is a desideratum nonetheless; it is an enabling right rather than an end in itself.¹⁸

The Constitution defines national security as, “*the protection against internal and external threats to Kenya’s territorial integrity and sovereignty, its people, their rights, freedoms,*

⁸ *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR, 302.

⁹ Article 31 of the Constitution of Kenya states that, “*Every person has the right to privacy, which includes the right not to have—*

(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed”.

¹⁰ Article 12, *UDHR*.

¹¹ Article 17, *ICCPR*, 16 December 1966, 999 UNTS 171.

¹² Article 8, *ECHR*, 4 November 1950, ETS No.5.

¹³ Limitations and derogations to the right to privacy shall be discussed at length in subsequent chapters of this study.

¹⁴ Adopted on 27 June 1981

¹⁵ The ACHPR does not contain express provisions for derogations and limitations of rights. For this reason and for purposes of this study, the ECHR shall serve as the human rights instrument employed to supersede the ACHPR. Moreover, it is noteworthy to mention that the ACHPR was modelled from the influence of the European Convention. See, Heyns C, ‘African Human Rights Law and the European Convention’ 11 *South African Journal of Human Rights* (1995), 253.

¹⁶ *Report of the Special Rapporteur on the right to privacy*, 2016, UN Doc A/HRC/31/64.

¹⁷ UN, *Report of the Special Rapporteur on the right to privacy*.

¹⁸ It enables the flow of information in society which is fundamental in the value of autonomy and aids in decision making by individuals. See; UN, *Report of the Special Rapporteur on the right to privacy*.

property, peace, stability and prosperity, and other national interests.”¹⁹ There are three main organs in Kenya mandated with the primary objective of providing security. These are: Kenya Defence Forces, National Intelligence Service and National Police Service.²⁰

NIS (replaced NSIS) gained immense popularity in 2012 after former President Mwai Kibaki assented to the NIS Act and thereafter, reports by human rights groups implicated the Service in gross violations of the right to privacy.²¹ Expanded surveillance powers, arbitrary and discriminatory searches and interception of communication were but a few of the activities the NIS was accused of carrying out under the guise of countering terrorism.²² Following the deaths of Muslim clerics such as Abubakar Shariff Ahmed²³ and Aboud Rogo Mohammed,²⁴ security organs were accused of interfering with the slain clerics’ privacy leading to their assassinations. Reports of a vast number of Kenyan youths joining Al Shabaab also became a catalyst for the government’s intrusive actions. Some of the attacks carried out in Kenya were orchestrated by locals who received training in Somalia.²⁵ Statistics indicate that approximately 10% of Al Shabaab fighters are of Kenyan descent.²⁶ Such information sent the Kenyan government into a panic as it began to realize that the enemy was not only confined to external forces but also dwelt amongst unsuspecting citizens.

1.1.Statement of the problem

The Constitution of Kenya requires national security to be guaranteed in accordance with utmost respect for human rights,²⁷ however, the state has failed to reconcile the two, sacrificing the right to privacy for national security under the guise of countering

¹⁹ Article 238(1), *Constitution of Kenya* (2010).

²⁰ Article 239(1), *Constitution of Kenya* (2010).

²¹ Human Rights Watch, Joint letter to the ACHPR, regarding violations in the context of Kenyan counter terrorism operations, see <https://www.hrw.org/news/2014/05/29/joint-letter-achpr-regarding-violations-context-kenyan-counterterrorism-operations> accessed on 27 July 2016.

²² The Right to Privacy in Kenya, available at <https://www.privacyinternational.org/sites/default/files/UPR%20Kenya.pdf> accessed on 27 July 2016.

²³ The Muslim cleric who predicted he would be killed, see: <http://www.bbc.com/news/world-africa-26958455> accessed on 27 July 2016.

²⁴ Al-Shabaab ‘supporter’ Aboud Rogo Mohammed killed in Kenya, see: <http://www.bbc.com/news/world-africa-19390888> accessed on 27 July 2016.

²⁵ See: www.capitalfm.co.ke/news/2015/04/slain-garissa-terrorist-studied-law-at-nairobi-univeristy/ accessed on 27 July 2016.

²⁶ Walker R, ‘*Meeting Somalia’s Islamist Insurgents*’ available at <http://news.bbc.co.uk/2/hi/africa/7365047.stm> accessed on 27 July 2016.

²⁷ Article 238(2) (b), *Constitution of Kenya*. (2010).

terrorism.²⁸ The government faces the dilemma of how to strike a balance between an ever evolving threat that requires the use of intrusive measures in order to ensure national security while safeguarding the rights and freedoms provided for in the Constitution.

1.2. Justification of the study

Given the increase in terrorist activity in Kenya and the numerous challenges faced in countering the crime while upholding the right to privacy, there needs to be more robust discussion on the topic of balancing liberties and national security. The central theme of this study generates prodigious discussions at the international arena; however, the same has not featured as much at the national level. Therefore, this study hopes to contribute to the literature on balancing security and rights in Kenya. Through the recommendations provided, this study hopes to provide legislators and human rights groups plausible solutions to the conflict that exists between reconciling human rights and maintaining national security.

1.3. Theoretical framework

The following theories will be used to provide a basis for the objectives of the study;

1. Social Contract theory.
2. Sociological school.

Social Contract Theory:

The concept of this theory is that in primeval times, man lived in a state of nature. This state was primarily anarchic.²⁹ The life of man was characterised by hardships and misery. Therefore, to overcome this state of nature, the people entered into a social contract that created a sovereign; mandated with the responsibility of protecting the people from oppression and in exchange, the governed would surrender some of their rights to this sovereign.³⁰

The main proponents of this theory were, Thomas Hobbes, John Locke and Jean Jacques Rousseau. According to Hobbes, prior to the social contract, the life of man was “*solitary*,

²⁸ Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 36 – 38.

²⁹ Curzon L, *Jurisprudence*, 2 ed, Cavendish Publishing Limited, 1995, 26.

³⁰ Curzon L, *Jurisprudence*, 26.

poor, nasty, brutish and short".³¹ Man's desire for self-preservation and security drove him to relinquish all his rights to the sovereign so as to live in a peaceful society. Hobbes considered security the prime value that trampled over any other right. He argued that the sovereign elected by the people, had absolute power to decide on the most effective way to secure his subjects. A prerequisite for Hobbes' social contract was unequivocal obedience from the subjects.³²

John Locke's social contract differs greatly from Hobbes' proposition. Locke characterised his state of nature as man's desire to be free from a superior ruler. He posited that nobody can have a superior power over any other person and nobody can transfer more power than that which he possesses.³³ Locke advocated for a state of liberty where man was free to do as he pleased and possessed the unequivocal right to protect his life, property and health.³⁴ The linchpin of Locke's social contract was the need to protect property; hence, men united under a *pactum unionis* and further agreed to elect a sovereign under the *pactum subjectionis* to provide security for the peoples' lives, estates and liberties.³⁵ Nevertheless, this sovereign's powers were limited to the needs of the people. The powers were only to be utilised to achieve peace, safety and the public good of the governed.³⁶

In relation to this study, the Hobbes' social contract theory supports the pro-state movement that prioritises national security. The theory posits that the citizenry donates some of their rights to the government, in exchange for security. This effectively means that citizens of Kenya would sacrifice their right to privacy and allow the government greater intrusion into their private lives in exchange for a safer environment, free from terrorist attacks. On the other hand, Locke's proposition supports the limitation of powers of the government which means that the government can never act *ultra vires* and must aim to preserve social institutions such as liberties. When applied to this study, Locke's social contract supports the strand of argument that dictates that the government ought to act according to the necessities of the people. Therefore, if the people favour security over the right to privacy or vice versa, the government must adhere to the needs of the populace.

The Sociological School:

³¹ Hobbes T, *Leviathan: With selected variants from the Latin edition of 1668*, Hackett Publishing, Indiana, 1994, 76.

³² Curzon L, *Jurisprudence*, 35.

³³ Curzon L, *Jurisprudence*, 29.

³⁴ Curzon L, *Jurisprudence*, 29.

³⁵ Curzon L, *Jurisprudence*, 29.

³⁶ Curzon L, *Jurisprudence*, 29.

Auguste Comte coined the term ‘sociology’. He believed that development in society was brought about by certain principles and patterns that were subject to observation, experiment, comparison and the historical method.³⁷ The sociological school views law as an organised system of fundamental rules and principles that reflect societal needs.³⁸

The main proponents of this school were; Jhering, Max Weber and Roscoe Pound. Jhering posited that the function of law was to serve the interests of society. He recognised that in society, there will always be conflicting interests between groups and individuals. In an attempt to reconcile competing interests, the state would have to employ both coercive (legal) and rewarding strategies. The success of a legal system would be determined by its ability to balance societal interests against those of the individual.³⁹ According to Jhering, the true purpose of law was to *realise equilibrium of individual and social principles and purposes*.⁴⁰ In his view, there was no need for conflict of interests as individuals sought protection of social institutions while society sought protection of individual rights.⁴¹

Weber and Pound both agreed that the purpose of law was to balance the security of societal and individual interests.⁴² Pound grouped interests into three categories: individual, public and social.⁴³ He argued that from a functional point of view, law seeks to reconcile conflicting interests by securing the most and sacrificing the least. He added that a balance which is *‘eliminating friction and precluding waste in human enjoyment of the goods of existence’*⁴⁴ ought to be struck. This balance would be viewed as ‘social engineering’.⁴⁵

This school of thought provides the foundation for the balancing principle provided for under Article 238(2) of the Constitution. It reinforces the ideology that, insofar as there exists an inevitable conflict between liberties and security; the two rights should be equally balanced to give rise to a win-win situation.

³⁷ Hampstead L, *Introduction to Jurisprudence*, 3 ed, Stevens and Sons, London, 1972, 335.

³⁸ Curzon L, *Jurisprudence*, 149.

³⁹ Hampstead L, *Introduction to Jurisprudence*, 340.

⁴⁰ Curzon L, *Jurisprudence*, 151.

⁴¹ Curzon L, *Jurisprudence*, 151.

⁴² Curzon L, *Jurisprudence*, 159.

⁴³ Curzon L, *Jurisprudence*, 163.

⁴⁴ Curzon L, *Jurisprudence*, 164.

⁴⁵ Curzon L, *Jurisprudence*, 164.

1.4. Literature review

Available literature on the subject of balancing national security and the right to privacy manifests itself in two different realms. Firstly, some scholars argue that states must comply with human rights even when exposed to parlous threats. These scholars oppose the inference that terrorism can be countered by curtailing rights and conclude that such practices only play into the hands of terrorists themselves. States must strike a balance between the two rights. Secondly, there exist a school of pro-state scholars that advocate for national security over liberties. These scholars espouse the idea that human rights can no longer be sacrosanct when the life of the nation is at risk.⁴⁶ They assert that the relationship between security and liberties is Pareto efficient.⁴⁷

Balancing Human Rights and the needs of the State:

Paul Hoffman's *Human Rights and Terrorism*,⁴⁸ emphasises the need to comply with human rights in the fight against terror. He argues that abandoning human rights during such times is detrimental to the state and self destructive because the state becomes what it is attempting to counter. He further states that human rights were forged from devastations experienced through lack of them, hence their appropriateness in such situations because; their absence would result in catastrophic results.

Conor Gearty in his book, *Can Human Rights Survive*,⁴⁹ carries out an in depth analysis of whether human rights can survive the war on terror. He commences by posing the question: what are human rights made of? Thereafter, he challenges the survival of human rights in an era where national security is under constant threat. Gearty also examines the legality of various measures applied to uphold national security within the United Kingdom jurisdiction. He reconciles his belief in human rights by stating that terrorism has already damaged liberties, our responses to terrorism should therefore not further damage them.

Rosemary Foot's *The United Nations, Counter Terrorism and Human Rights*,⁵⁰ examines the role of UNSC Committees in the relation to counter terrorism. She highlights the

⁴⁶ Albrechtsen J 'Human rights can no longer be sacrosanct' *The Australian*, 2006. Available at <http://www.mepnotes.blogspot.co.ke/> accessed on 29 April 2016.

⁴⁷ In allocation of resources, it is impossible to make one better off without worsening the position of another.

⁴⁸ Hoffman P, 'Human Rights and Terrorism', 26 *Human Rights Quarterly* (2004), 932-934.

⁴⁹ Gearty C, *Can Human Rights Survive*, Cambridge University Press, Cambridge (2006).

⁵⁰ Foot R, 'The United Nations, Counter Terrorism and Human Rights: Institutional Adaptation and Embedded Ideas' 29 *Human Rights Quarterly* (2007).

importance of state compliance with human rights because an alternative would result in the destruction of a democracy. She links human rights abuses with the increase in radicalisation, hence her stance that observation of human rights is vital and the balance between effectively countering terrorism and upholding liberties should be struck.

Stephen Holmes contends that there exists a dysfunctional misconception in aggrieved societies that a curtailment of liberties leads to an increase in security.⁵¹ He argues that even if liberties obstructed the government from providing security, they rank remarkably lower than the real threats to national security. The idea of quaint legalism that ties the hands of the executive, is a comforting inference derived from wishful thinking. Furthermore, he insists that there is need to maintain some rules even when faced with emergencies, to assist responders to balance the risk of delayed response against panic response.

Finally, Scholastica Omondi grapples with the question of whether terror suspects should be granted bail in accordance with Article 49(1) (h) of the Constitution. In her publication, *Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks in Kenya*⁵² Omondi compares practises from different jurisdictions such as Australia and the United States of America and draws the conclusion that the best way to balance the right to bail and national security is through the enactment of a Bail Act that prescribes the conditions under which bail may be granted or denied for terror related crimes. She concludes by asserting that a balance ought to be struck between human rights and national security so as to uphold the rule of law.⁵³

National Security is paramount:

In his book, *Not a Suicide Pact: The Constitution in a Time of National Emergency*,⁵⁴ Richard Posner elucidates that the judicial system should be pragmatic and accord national security the importance it deserves. He argues that national security is paramount and if need be, rights should be curtailed. Furthermore, he states that the unique departure from

⁵¹ Holmes S, 'In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror' *California Law Review* (2009), 317.

⁵² Omondi S, 'Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks in Kenya' *3 Quest Journals* (2015) 23-44.

⁵³ Omondi S, 'Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks in Kenya' 43.

⁵⁴ Posner R, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, Oxford University Press, 2006.

civil liberties would only be applicable to cases of terrorism since terrorism poses great and increasing danger comparable to the Second World War.

In the debate between Richard Posner and Geoffrey Stone, Posner argues that increased surveillance does not pose a threat massive enough to privacy and the benefits justify the means. He adds that liberties are important, however, they should be viewed practically without a “*quasi religious veneration*” and their curtailment ought not to be a measure of last resort especially when national security is at risk.⁵⁵

Eric Posner argues in his book, *Terror in the Balance: Security, Liberty and the Courts*⁵⁶ that governments should be granted greater latitudes to limit rights in times of emergencies. He further states that the gains achieved in maintaining national security outweigh the losses incurred in foregoing certain rights. Moreover, he points out that civil liberties interfere with the elimination of threats, hence the reason to compromise them during times of emergency.

Stephanie Cooper Blum posits in her publication that terrorism is a protracted battle that requires all instruments of battle to combat it.⁵⁷ She further argues that terrorism unlike criminal law requires prevention and pre-emption strategies such as use of advanced intelligence to counter the vice. She concludes by stating that, a form of preventive detention and increased intelligence may be some of the strategies that may be necessary so as to maintain national security.

There exists very little literature on Kenya’s ability to sustain the balance between security and rights as advocated for in the Constitution. This is the gap the study has identified and attempts to fill.

1.5.Objectives

The overall objective of this study is to determine whether Kenya can sustain the balance between maintaining national security and the right to privacy in effecting counter terrorism measures.

Furthermore, the study seeks to examine the flexibility of the human rights norm when it comes to extreme threats to national security like terrorism. Also, it investigates whether

⁵⁵ Levi E, ‘Not a Suicide Pact: A Stone-Posner Conversation’ *University of Chicago Law Review*, 2011.

⁵⁶ Posner E and Vermeule A, *Terror in the Balance: Security, Liberty and the Courts*, Oxford University Press, 2007.

⁵⁷ Blum S, *The Necessary Evil of Preventive Detention in the War Against Terror*, Cambria Press, 2008, 44.

Kenya's geographic location warrants a greater margin of appreciation in favour of security and finally, it analyses whether the security measures employed meet the aim for which they are intended.

1.6. Research questions

The study poses the following research questions;

1. How flexible is the human rights norm when it comes to extreme threats to national security like terrorism?
2. Can Kenya sustain the balance between maintaining national security and the right to privacy in effecting counter terrorism measures?
3. Does Kenya's geographic location warrant a greater margin of appreciation in favour of security?
4. Do the security measures employed meet the aim for which they are intended?

1.7.Hypothesis

1. In relation to terrorism, Kenya can sustain the balance between providing the citizenry with adequate security whilst upholding the right to privacy.

1.8.Methodology

The research methods employed in this study are qualitative. This will entail desk review of secondary sources which include books, scholarly journals, papers presented at conferences, international instruments, internet and periodicals.

Furthermore, the study will contain a comparative analysis on implementation of counter terrorism legislations in Ethiopia and Ghana. It will also draw best practices from Great Britain.

These methods of research are adopted due to accessibility of research material and time constraints.

1.9.Limitations

- i. This study will be limited to the time period of March 2016– January 2017.
- ii. The research will only be limited to use of secondary data which is mainly qualitative. This is because of the time constraints.

2.0. Chapter breakdown

This study is divided into five chapters. Each chapter is dedicated towards answering one or more of the questions posed.

Chapter 1: Introduction to the study.

This chapter introduces the research topic. It contains the background and statement of the problem, theoretical framework, literature review, objectives, research questions, hypothesis, methodology and chapter breakdown.

Chapter 2: Approaches to countering terrorism in Kenya.

This chapter provides an overview of the counter terrorism measures adopted by Kenya in general and specifically in reference to the right to privacy.

Chapter 3: Limitations and derogations from the right to privacy.

This chapter discusses the acceptable restrictions on the right to privacy. An analysis on limitations will be carried out as well as international and domestic rules governing the legitimacy of derogations.

Chapter 4: Comparative study on implementation of counter terrorism legislations in Ethiopia and Ghana.

This chapter compares two jurisdictions, namely; Ghana and Ethiopia, which have managed to maintain their national security through dissimilar approaches to the right to privacy. The chapter concludes by drawing best practices from Great Britain and lessons Kenya can learn.

Chapter 5: Recommendations and Conclusion.

The final chapter contains the findings, recommendations and conclusion.

CHAPTER TWO:

APPROACHES TO COUNTERING TERRORISM IN KENYA

1. Introduction

Counter terrorism strategies in Kenya can be traced back to colonial times when the British government employed various approaches to quell the Mau Mau uprising. On 21 October 1952, the colonial government declared a state of emergency following the murder of Senior Chief *Waruhiu Itote*, a supporter of the British government.⁵⁸ Strategies utilised to counter the insurgency included the involvement of the Security Service whose primary responsibility was to provide intelligence to the government.⁵⁹ It is noteworthy that the British viewed Mau Mau as a terrorist organisation. Nonetheless, freedom fighters received backing from the U.N. through Resolution 1514 (XV) of 1960 that declared colonialism a threat to self-determination and ordered its immediate cessation.⁶⁰

This chapter examines the measures enacted to counter terrorism in Kenya with special focus on the mechanisms relating to the right to privacy. The chapter aims to answer the question; do the measures meet the aim for which they are intended; that is, to prevent, reduce or completely eradicate terrorism?

2. Counter Terrorism Measures

2.1. Prevention of Terrorism Act

The road to enacting this legislation was interminable and highly contentious. It commenced with the drafting of the Suppression of Terrorism Bill in 2003. This Bill exasperated members of the Muslim community in Kenya and was deemed draconian due to the perceived unfair profiling of Muslims and the apparent favour for violation of liberties such as the right to privacy.⁶¹ The proposed law was rejected by Members of Parliament in 2005 as a result of the growing tension and continuous religious strife between Islam and Christianity.⁶² In 2006, a new Bill, the Anti-Terrorism Bill, was tabled

⁵⁸ Edgerton R, *Mau Mau: An African Crucible*, the Free Press, New York, 1989, 65.

⁵⁹ Walton C, *Empire of Secrets: British Intelligence, the Cold War and the Twilight of Empire*, Harper Press, London, 2013, 236.

⁶⁰ UNGA, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN A/Res/1514(XV) 14 December 1960.

⁶¹ Lind J and Howell J, 'Counter-terrorism and the politics of aid: Civil society responses in Kenya' *Institute of Social Studies*, 41(2010) 335.

⁶² Kenya's terror bill rejected. See <http://news.bbc.co.uk/2/hi/africa/3069211.stm>, accessed on 14 September 2016.

in parliament. The Bill was a carbon copy of the Suppression of Terrorism Bill, hence its failure to proceed beyond the Parliamentary Committee Level.⁶³

With immense pressure mounting on the government to enact anti-terror laws, the Prevention of Terrorism Bill was tabled in parliament. After brief debate, on 12 October 2012, former President Mwai Kibaki assented to the Bill, thus the promulgation of the Prevention of Terrorism Act. It is noteworthy that some sections of the Act have since been amended by the Security Laws (Amendment) Act. The Prevention of Terrorism Act differs from the Penal Code in that it establishes the crime of terrorism and prescribes the manner in which terrorism and other related crimes are to be prosecuted. Moreover, the Act highlights the counter terrorism strategies that are to be employed and bestows various powers on security organs involved in the fight against terror.

2.1.1. Counter Terrorism in the Prevention of Terrorism Act⁶⁴

i. Definition of a terrorist act:

It is noteworthy that despite lack of international consensus on the definition of terrorism, Section 2 provides an extensive definition of what encompasses a terrorist act.⁶⁵ The Act also highlights the aims for carrying out such acts which are said to be; to intimidate the public, compel the government to do or refrain from something and destabilise institutions in a country.⁶⁶

⁶³ Lind J and Howell J, 'Counter-terrorism and the politics of aid: Civil society responses in Kenya' *Institute of Social Studies*, 345-350.

⁶⁴ The Act aims to detect and prevent terrorist activities in Kenya. See; Long title, *Prevention of Terrorism Act* (No. 30 of 2012). It encompasses new offences related to terrorism, prescribes the manner in which these offences may be investigated and tried in a court of law.

⁶⁵ A terrorist act is defined as an act or threat of action—

(a) which—

- (i) involves the use of violence against a person;
- (ii) endangers the life of a person, other than the person committing the action;
- (iii) creates a serious risk to the health or safety of the public or a section of the public;
- (iv) results in serious damage to property;
- (v) involves the use of firearms or explosives;
- (vi) involves the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment;
- (vii) interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services;
- (viii) interferes or disrupts the provision of essential or emergency services;
- (ix) prejudices national security or public safety

⁶⁶ A disclaimer is provided in the subsequent paragraph that discredits demonstrations as terrorist acts if they do not give rise to the results in the definition.

Notwithstanding, this definition raises a couple of concerns. Firstly, the Act fails to provide a threshold for the differentiation of similar crimes enlisted in the Penal Code and in the Act. Penal crimes are upraised to terrorism levels; for example the prohibited use of explosives is provided for under Section 235 of the Penal Code and attracts a sentence of fourteen years, whereas in the Act, any person who detonates explosives is liable to face imprisonment for a period not exceeding twenty years.

Secondly, the Act equalises of a threat of action and an actual act to amount to terrorism. Does this mean that any person who threatens to commit an offence under the Act and a person who actually commits an offence are equal and should be tried equally? At what juncture do threats equate terrorism?

Such uncertainty often leads to misconstrued interpretations of terrorism. It appears that the time has come to scrap off the definition of terrorist acts and perhaps replace it with a description of a terrorist as is the practice in international conventions such as the International Convention for the Suppression of the Financing of Terrorism.⁶⁷

ii. Offences:

The Act provides for a number of offences including but not limited to; commission of a terrorist act,⁶⁸ provision⁶⁹ and possession of property for commission of a terrorist act,⁷⁰ dealing in property owned by terrorist groups,⁷¹ supporting⁷² and harbouring suspected terrorist,⁷³ provisions of weapons to groups,⁷⁴ direction in the commission of a terrorist

⁶⁷ Article 2 of the Convention describes a terrorist as any person who commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. This definition differs from the Kenyan definition of a terrorist act in that it specifically refers to an act and not a threat of action.

⁶⁸ Section 4.

⁶⁹ Section 5.

⁷⁰ Section 6.

⁷¹ Section 8.

⁷² Section 9.

⁷³ Section 10.

⁷⁴ Section 11.

act,⁷⁵ recruitment⁷⁶ and training.⁷⁷ Financing of terrorist activities from within and outside Kenya is also prohibited under the Act.⁷⁸

The minimum sentence for any terror related offence is 30 years.⁷⁹ Life imprisonment is the maximum sentence that can be imposed for any person(s) convicted of an offence pertaining to terrorism that results in the loss of life of another person.⁸⁰

iii. Powers of the police:

In the investigation of terror related offences, police are endowed with certain powers under the Act. Section 31 provides that a police officer may arrest a person if he has reasonable grounds to believe that the person has committed an offence pursuant to the Act.⁸¹ These arrests may be effected without a warrant. In essence, police are allowed to invade an individual's private property and arrest a suspect so long as there is reasonable suspicion that the individual has committed a crime under the Act. This provision clearly violates the right to privacy which not only entails privacy of personal information, but also prohibits unauthorised entry into private property.

Further, a police officer may apply *ex parte* to a Magistrate's Court to obtain an order permitting him/her to gather information on a person suspected to have committed an offence under the Act.⁸² Such orders may be issued if the Magistrate is satisfied that there are reasonable grounds to believe that; an offence has been committed, the information is related to the committal of an offence or the whereabouts of a terror suspect and reasonable attempts have been made to acquire information.⁸³ Of concern is that there is no mention of how the information will be handled once it is obtained and who has the authority to examine the information thereafter. Does this mean that personal information collected by an officer is subject to perusal by any person operating in a police station or court?

Thirdly, a police officer of or above the rank of Chief Inspector of police, may apply *ex parte* to the High Court for purposes of obtaining an order that permits him/her to intercept

⁷⁵ Section 12.

⁷⁶ Section 13.

⁷⁷ Section 14.

⁷⁸ Section 22, 23 and 25.

⁷⁹ Section 4(1).

⁸⁰ Section 4(2).

⁸¹ Section 31.

⁸² Section 34.

⁸³ Section 34 (2).

communication between suspected terrorists.⁸⁴ The officer may only apply for this order after having received written consent from the IG or Director of Public Prosecutions.⁸⁵

Lastly, the IG may make an *ex parte* application accompanied by an affidavit to the High Court to permit him/her to seize property that he/she has reasonable grounds to believe has been used or will be used in the committal of a terror related offence. However, if the dire nature of the situation renders this application impracticable, the IG may proceed to seize the property in the absence of the High Court's permission, notwithstanding, he/she makes the application to the Court thereafter, but not later than 72 hours after seizing the property.⁸⁶ This section is extremely ambiguous as it fails to clarify what amounts to an urgent situation; hence, granting the IG wide discretion, meanwhile leaving a lot of room for error and violation of rights.

iv. Limitation of rights

Rights may be limited for the purposes of; investigating a terrorist act, detecting and preventing the committal of an act and ensuring that the enjoyment of rights by an individual does not prejudice the enjoyment of their rights by others.⁸⁷ The right to privacy may be limited to the extent that; a suspect's home may be searched, his/her property seized and his/her communication interfered with.⁸⁸ Of concern is that there need not be any suspicion of a terrorist act in the works for an officer to interfere with an individual's privacy. This gives leeway for arbitrary interference with the right to privacy, with no safeguards in place to protect personal information. Essentially, any person under investigation for a terror related crime is not guaranteed of the preservation of their right to privacy.

2.2.National Intelligence Service Act

2.2.1. Counter terrorism in the NIS Act

i. Functions of NIS

Some of the key functions of NIS as provided for in the Act are as follows; to gather or share with the relevant State agencies, security and counter intelligence;⁸⁹ detect threats to

⁸⁴ Section 36(1).

⁸⁵ Section 36(2).

⁸⁶ Section 37(2).

⁸⁷ Section 35(2).

⁸⁸ Section 35(3) (a).

⁸⁹ Section 5(1) (a), *NIS Act* (No. 28 of 2012).

national security;⁹⁰ safeguard and promote national security within and outside Kenya;⁹¹ carry out protective and preventive security functions;⁹² support law enforcement agencies in detecting and preventing threats to national security;⁹³ obtain intelligence about the activities of foreign interference⁹⁴ and liaise with intelligence of other countries.⁹⁵

ii. Special operations

Section 42 of the Act prescribes that where the Director General has reasonable grounds to believe that a covert operation is necessary to enable the Service to deal with a threat to national security, he/she may issue written authorisation permitting an officer of the Service to undertake such an operation subject to the Council's guidelines.⁹⁶ A special operation refers to *measures, efforts and activities aimed at neutralising threats against national security*.⁹⁷

The written authorisation must be specific and accompanied by a warrant granted from the High Court. Moreover, it permits an officer to obtain any information, enter a premises and access anything, search for information, materials or documents, monitor communication and install or remove anything.⁹⁸ Notwithstanding, there are no guidelines on how the information seized is to be handled so as to still maintain a level of privacy despite investigations. This contradicts Article 238(2)(b) of the Constitution that calls for respect for liberties while effecting principles of national security.

iii. Limitation of rights

In the Act, some rights are subject to limitations under the criteria set out in Article 24 of the Constitution. These rights include but are not limited to; the right to access information⁹⁹ and the right to privacy.¹⁰⁰ The right to privacy may be limited if a person is under investigation or is suspected of having committed a serious crime. Moreover, the privacy of a suspect's communication may be interfered with or monitored for purposes of

⁹⁰ Section 5(1) (b).

⁹¹ Section 5(1) (d).

⁹² Section 5(1) (h).

⁹³ Section 5(1) (j).

⁹⁴ Section 5(1) (n).

⁹⁵ Section 5(1) (o).

⁹⁶ Section 42(2)

⁹⁷ Section 42 (1).

⁹⁸ Section 42 (3).

⁹⁹ Section 37.

¹⁰⁰ Section 36.

gathering information related to the crime under investigation.¹⁰¹ This rather brief section on limitation of the right to privacy ought to state the safeguards that are in place to prevent arbitrary interference with the right to privacy and the recourse an injured party may have should this occur. Nevertheless, it is acknowledged that Section 61 of the Act provides for the prosecution of any member of the Service who discloses information gathered without authorisation from the Director General.¹⁰²

2.3. Security Laws (Amendment) Act¹⁰³

2.3.1. Counter terrorism in the Security Laws (Amendment) Act

Section 52 of the Act amends the NIS Act by inserting a new section that states that; an officer of the Service may stop and arrest any person found to have committed a serious crime or in possession of any material that may be used in the commission of an offence.¹⁰⁴

The Act inserts a new section in the Prevention of Terrorism Act that provides that; The National Security Organs may intercept communication for the purposes of detecting, deterring and disrupting terrorism in accordance with procedures to be prescribed by the Cabinet Secretary. Moreover, the right to privacy under Article 31 of the Constitution shall be limited under this section for the purpose of intercepting communication directly relevant in the detecting, deterring and disrupting terrorism.¹⁰⁵

In *CORD v R*, the Court relied on the case of *Norris v Attorney General* where O’Higgins C.J stated that that the right to privacy can never be absolute and must be balanced against the state’s duty to vindicate life.¹⁰⁶ Further, it was held that given the numerous attacks the country has experienced, interception of communication and searches is justified and there seems to be no alternative, less restrictive way of achieving security. In addition, the Court

¹⁰¹ Section 36 (1).

¹⁰² Section 61.

¹⁰³ On 19 December 2014, President Uhuru Kenyatta assented to the controversial Security Bill amidst claims that the Bill contravened and violated basic human rights. See; ¹⁰³ Kenya: Security Bill tramples basic human rights, available on; <https://www.hrw.org/news/2014/12/13/kenya-security-bill-tramples-basic-rights>; accessed on 17 September 2016. Several sections of the Act were subsequently declared unconstitutional by five judges of the High Court. In *Cord v Republic of Kenya*, the High Court ruled that Sections 12, 16, 26, 29, 48, 56, 58 and 64 were unconstitutional. See; *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR, 191.

¹⁰⁴ Section 52, Security Laws (Amendment), (No. 19 of 2014).

¹⁰⁵ Section 69.

¹⁰⁶ *Norris v Attorney General*, ECtHR, Judgement of 22 April 1983, para 587.

expressed its confidence in the safeguards enacted to prevent the arbitrary violation of the right to privacy.¹⁰⁷

2.4.Nyumba Kumi Security Initiative

This is an initiative established in 2014 by the Ministry of Internal Security.¹⁰⁸ Notwithstanding the number ten in the title of this initiative, has nothing to do with ten houses.¹⁰⁹ The initiative provides that neighbours in residential areas in Kenya, should strive to know each other and exercise vigilance of any suspicious activities carried out by any person residing in a common area.

This initiative aims to devolve security services and put citizens to task on matters relating to national security and prevention of terrorism.¹¹⁰ It is emphasized that Nyumba Kumi is neither vigilantism nor invasion on the privacy of neighbours. It should neither replace village elders nor advance political agendas.¹¹¹

The initiative is still in its infancy stages with no reports of violations of the right to privacy. It will be interesting to observe if the initiative is successful in future counter terrorism operations.

Conclusion

Kenya has made significant strides in enacting counter terrorism strategies aimed at protecting the citizenry from terrorism. These strides have; however, been subject to criticisms due to their propensity to encourage violations of basic human rights such as the right to privacy.

The Prevention of Terrorism Act has been said to inflate police powers and allow the executive greater intrusion into the private lives of the citizens, without corresponding checks and balances to ensure that these powers are not subject to abuse.¹¹² The Act

¹⁰⁷ *Cord v R*, 303.

¹⁰⁸ The term “nyumba kumi” is a Swahili phrase that translates into “ten houses” in English.

¹⁰⁹ *Ten is a concept not a number*, See; <http://www.nyumbakumisecurity.com/index.php/about> accessed on 15 September 2016.

¹¹⁰ Nyumba Kumi FAQs, available on <http://www.nyumbakumisecurity.com/index.php/about>, accessed on 15 September 2016.

¹¹¹ Draft Guidelines on Community Policing, 4th Draft, 2015, 3.

¹¹² Human Rights Watch, Kenya: Counter terrorism operations undermine rights, 2015, available at <https://www.hrw.org/news/2015/01/29/kenya-counterterrorism-operations-undermine-rights> accessed on 15 September 2016.

contains some flawed sections,¹¹³ which render it inadequate; hence, its failure to effectively combat terrorism. Misinterpretation and blatant disregard for the rule of law has led to egregious violations of the right to privacy, thus as opposed to enhancing it, the right has become a sacrificial lamb in the fight against terror.

This study therefore asserts that the security measures enacted are yet to meet the aim for which they are intended. In order to realise these objectives, there needs to be corresponding checks and balances to ensure implementation of these measures is fulfilled with utmost respect for liberties. Security agents should be compelled to act in accordance with human rights standards.

¹¹³ Examples of the flawed sections include, Section 2 that encompasses the definition of a terrorist act in spite of lack of international consensus on the definition of terrorism and terrorist acts. Also, Section 31 which provides that a police officer may arrest (without a warrant) a person if he has reasonable grounds to believe that the person has committed an offence. This Section promotes gross violations of the right to privacy.

CHAPTER THREE

LEGAL FRAMEWORK GOVERNING LIMITATIONS AND DEROGATIONS FROM THE RIGHT TO PRIVACY

1. Introduction

This chapter commences by examining the constitutive features of the right to privacy thereafter it discusses the domestic and international regimes governing limitations and derogations from the right. In addition, it analyses the constitutive features associated with limiting the right to privacy as well as rules governing the permissibility of derogations.

It is paramount to recognise that not all rights are absolute. Human rights treaties contain a level of flexibility that grants states leeway to ‘escape’ from their obligations under international law, when it comes to certain rights.¹¹⁴ In line with the social contract theory where the masses donate their powers to the sovereign in exchange for protection, there comes a time when the sovereign may have to limit the rights of an individual in order to protect the masses.

In the context of domestic laws, provisions for restrictions on the right to privacy have been enacted.¹¹⁵ On the international arena, numerous human rights instruments contain more elaborate clauses on restricting the right to privacy. These include; Article 4 of the ICCPR, Article 15 of the ECHR and Article 27 of the American Convention of Human Rights (ACHR).¹¹⁶

2. Defining the right to privacy

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression defined the right to privacy as, “*the presumption that individuals should have an area of autonomous development, interaction and liberty, a “private sphere” with or without interaction with others, free from State intervention and from excessive unsolicited intervention by other uninvited individuals*”.¹¹⁷

¹¹⁴ Burton E, Helfer L and Fariss C, ‘Emergency and Escape: Explaining Derogations from Human Rights Treaties’ *IO Foundation* (2011), 674.

¹¹⁵ See Article 24 and 58(6), *Constitution of Kenya* (2010), Section 35(3), *Prevention of Terrorism Act* (Act No.30 of 2012).

¹¹⁶ Adopted on 22 November 1969.

¹¹⁷ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 2013, UN A/HRC/23/40.

In 1890, Boston lawyers from Harvard Law School, Samuel Warren and Louis Brandeis defined privacy as the “right to be let alone”.¹¹⁸ From this definition, four elements of the right were derived, namely; bodily privacy, territorial privacy, information privacy and communication privacy.¹¹⁹

Bodily privacy refers to the right to be free from arbitrary physical searches and the right to self-determination of an individual over his/her own body.¹²⁰ In *Y.F v Turkey*,¹²¹ the European Court of Human Rights (ECtHR)¹²² deemed a medical examination performed on a female suspected of aiding and abetting a terrorist organisation a violation to her right to bodily privacy.

Secondly, territorial privacy is the right to exclude others from one’s spatial areas especially property, possessions and homes. In *Miailhe v France* the ECtHR ruled that there was indeed a violation of Article 8 of the ECHR, when French custom officers broke into the home of the three applicants and seized property.¹²³

Thirdly, information privacy can be defined as, “*the awareness and control of whether and how personal data can be gathered, stored, processed and communicated*”.¹²⁴ With recent developments in the Information, Technology and Communication (ICT) sector, this facet of privacy has become endangered. From Facebook’s haphazard privacy restructure in 2010¹²⁵ to Google’s *Street View* mishap in 2013,¹²⁶ the right to privacy of information on the internet has rapidly diminished.

Finally, communication privacy refers to the right not to have any communication interfered with, tapped or intercepted illegally. In *Malone v United Kingdom*, the ECtHR held that there had been a violation of Malone’s right to privacy since the police metered

¹¹⁸ Warren S and Brandeis L, ‘The Right to Privacy’ 193-220.

¹¹⁹ Rosenberg R, *The Social Impact of Computers*, Elsevier Academic Press, San Diego, 2004, 349-351.

¹²⁰ Miller R, *The Limits of Bodily Integrity: Abortion, Adultery and Rape Legislation in Comparative Perspective*, Ashgate Publishing Limited, Hampshire, 2007, 114.

¹²¹ *Y.F v Turkey*, ECtHR, Judgement of 22 July 2003, para 52.

¹²² The ECtHR is an international human rights court established in 1959, under the ECHR. It is based in Strasbourg, France hence the occasional reference to it as the ‘Strasbourg Court’. See http://www.coe.int/t/democracy/migration/bodies/echr_en.asp accessed on 15 June 2016.

¹²³ *Miailhe v France*, ECtHR, Judgement of 25 February 1993, para 28.

¹²⁴ Digital privacy – metaphorical conceptualization of the ‘right to be forgotten’, available at <https://brage.bibsys.no/xmlui/bitstream/id/248244/Fedorova.pdf>, accessed on 15 June 2016.

¹²⁵ See; http://www.huffingtonpost.com/jeffrey-evans/top-5-privacy-violations-_b_802615.html, accessed on 15 June 2016.

¹²⁶ See; <http://money.cnn.com/2013/03/12/technology/google-privacy-settlement/>, accessed on 15 June 2016.

his telephone and intercepted his postal and mobile communications.¹²⁷ Similarly, in *Kopp v Switzerland*, it was held that a person is entitled to enjoy the maximum degree of protection required by the rule of law in a democratic state; hence, interference with an individual's communication violates this principle.¹²⁸

Privacy is considered one of the greatest expressions of human dignity.¹²⁹ Without it, human beings are limited in behavioural and mental capacity and obliged to conform to societal standards. This impedes on the development of various personalities, prevents creativity and hinders growth.

3. Types of restrictions

The right to privacy is restricted in various ways under human rights instruments, namely through: derogation,¹³⁰ limitation,¹³¹ and claw back clauses.¹³²

a) Derogation in international law

The ICCPR, commonly known as the *primus inter pares* of human rights instruments explicitly provides for derogation under Article 4. It implies that derogations are not homologous to abrogation or abolition of a right. The latter repeal the rule of law and completely eliminate a right while the former as reiterated by the Covenant, suspend a right under specific situations.¹³³ The Covenant provides that some rights cannot be derogated from under any circumstance.¹³⁴ On the other hand, there exists the possibility of derogating from other rights such as the right to privacy, during 'times of public emergencies which threaten the life of a nation.'¹³⁵ Besides the requirement of a public

¹²⁷ *Malone v United Kingdom*, ECtHR, Judgement of 2 August 1984, para 80.

¹²⁸ *Kopp v Switzerland*, ECtHR, Judgement of 25 March 1998, para 56-61.

¹²⁹ Rachel J, 'Why Privacy is Important' 4 *Philosophy and Public Affairs* (1975) 205.

¹³⁰ This is the temporary suspension of rights in exceptional circumstances. See; Debeljak J, 'Balancing rights in a democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' 32 *Melbourne University Law Review* (2008), 425.

¹³¹ This refers to express and precise regulations that elucidate the extent of the restrictions placed on a right. See; Conte A, *Human Rights in the Prevention and Punishment of Terrorism*, Springer-Verlag Berlin Heidelberg, New York, 2010, 300.

¹³² These are inbuilt restrictions that permit a state to restrict rights to the extent permissible under domestic laws. See; Mutua M, *The African human rights system: A Critical Evaluation*. Available at: http://www.hdr.undp.org/docs/publications/background_papers/MUTUA/ accessed on 15 June 2016.

¹³³ Higgins R, 'Derogations under Human Rights Treaties' 48 *British Yearbook of International Law* (1978), 286.

¹³⁴ These rights include; freedom from torture or cruel, inhuman or degrading treatment or punishment and the right to life.

¹³⁵ Article 4(1), *ICCPR*.

emergency, there are other criteria embedded in Article 4 of the Covenant that must be adhered to while seeking to derogate from a right.¹³⁶

These requirements, as enumerated below, are aimed at legitimising the derogations sought and preventing gross violations of human rights by States and state officials.

i. Public emergency threatening the life of a nation

The first prerequisite for derogating from any right under the ICCPR is the existence of a public emergency which threatens the life of a nation. The ICCPR does not expound on the meaning of this phrase, perhaps for the sole purpose of avoiding rigidity, as *one shoe may not fit all*. Nonetheless, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights¹³⁷ (hereinafter ‘the Siracusa principles’) have interpreted and elaborated on various ambiguous definitions in the Covenant: They explain a public emergency to be a situation of ‘exceptional and actual or imminent danger’ which threatens the life of a nation. Whereas, life of a nation is one *that affects the whole of the population and either the whole or part of the territory of a state; or threatens the physical integrity of the population, the political independence or territorial integrity or the existence or basic functioning of institutions indispensable to ensure the rights recognised in the Covenant*.¹³⁸ Internal conflict and unrest that do not pose imminent danger to the life of the nation do not qualify as valid reasons for derogation. In addition, economic arduousness per se cannot warrant derogation from liberties.¹³⁹

The Human Rights Committee (HRC), established under Article 28 of the ICCPR, first encountered the ‘public emergencies’ issue in *Landinelli Silva v. Uruguay*¹⁴⁰ where political candidates had been denied their rights to participate in political activities by the government of Uruguay. The HRC failed to elucidate what amounted to a public emergency and did not do so in the subsequent cases that arose on similar matters such as

¹³⁶ For instance the derogation must not be inconsistent with a state’s obligations under international law or involve discrimination based on colour, sex, race, language, religion or social origin. See; Article 4(1), *ICCPR*.

¹³⁷ United Nations Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex UN Doc E/CN 4/1984/4 (1984).

¹³⁸ Principle 39, *Siracusa Principles*.

¹³⁹ Principle 40 and 41 respectively, *Siracusa Principles*.

¹⁴⁰ *Landinelli Silva v. Uruguay*, CCPR Comm No. R.8/34 (8 April 1981).

*Weinberger v Uruguay*¹⁴¹ and *Salgar de Montejo v Colombia*.¹⁴² In 2001, the Committee adopted General Comment No. 29 on Article 4 of the ICCPR¹⁴³ that reminded state parties that not every disturbance qualifies as a public emergency and in order for derogation to be granted, a situation has to be visibly serious and violent and cannot be dealt with using ordinary means.¹⁴⁴

Jurisprudence from the ECtHR has offered no rebuttal to acts of terrorism amounting to public emergencies. This is evident in the case of *Ireland v United Kingdom*,¹⁴⁵ where the court ruled that violent extremism witnessed in Northern Ireland amounted to a public emergency, hence permitted the derogations sought. Similarly, in *Lawless v Ireland*,¹⁴⁶ the ECtHR observed that, the phrase public emergencies threatening the life of a nation could be construed to mean, “An exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”.¹⁴⁷ The court went a step further in the *Greek case*¹⁴⁸ and developed the definition by providing four characteristics that must be present to constitute a public emergency:

1. It must be actual or imminent.
2. The effects of emergency must involve the whole nation.
3. The continuance of the organised life of the community must be threatened.
4. The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the European Convention for the maintenance of public safety, health and order, are plainly inadequate.

Most recently, the Strasbourg Court reaffirmed the existence of a public emergency in *A and Others v United Kingdom*,¹⁴⁹ when it allowed the British government to derogate from

¹⁴¹ *Weinberger v Uruguay*, CCPR Comm No. 28/1978 (29 October 1980).

¹⁴² *Salgar de Montejo v Colombia*, CCPR Comm No. 64/1979 (24 March 1982).

¹⁴³ *CCPR General Comment No. 29, Derogation during States of Emergency (Article 4)*, 31 August 2001, CCPR/C/21/Rev.1/Add.11.

¹⁴⁴ *CCPR General Comment 29*, 3. HRC is a body comprising of eighteen members who are nationals of State Parties. Decisions from the HRC are included in the study in spite of their lack of precedence setting nature because the HRC is mandated with the responsibility of monitoring the implementation of the ICCPR. See; Human Rights Committee, available at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> accessed on 30 January 2017.

¹⁴⁵ *Ireland v. United Kingdom*, ECtHR, Judgement of 18 January 1978, para. 207.

¹⁴⁶ *Lawless v Ireland*, ECtHR, Judgement of 1 July 1961, para. 28.

¹⁴⁷ *Lawless v Ireland*, 03.

¹⁴⁸ *Denmark, Norway, Sweden and the Netherlands v Greece*, ECtHR, Judgement of 5 November 1969, para. 112.

¹⁴⁹ *A and others v. United Kingdom*, ECtHR, Judgment of 19 February 2009, para. 180.

Article 5 of the ECHR¹⁵⁰ in the aftermath of 9/11. The court justified its actions on the grounds that, a state should take measures necessary to prevent disaster(s) before they occur.¹⁵¹ The ECtHR in determining cases of these nature, grants a wide ‘margin of appreciation’ to states. The doctrine of margin of appreciation was first developed in *Ireland v United Kingdom* where the court concluded that “by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it”.¹⁵²

The International Law Association (ILA) has attempted to define the term public emergencies threatening the life of a nation by making use of the Paris Minimum Standards of Human Rights Norms in a State of Emergency¹⁵³ which interpret the term to mean, “an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed”.¹⁵⁴ This phrase is also used to imply the temporal nature of derogations. The HRC unequivocal comments on Egypt’s thirty year long state of emergency concluded that this was a violation of the ICCPR.¹⁵⁵ Notwithstanding, Article 4 does not stipulate the proposed length of a public emergency. The Paris Standards were quick to notice this gap in the ICCPR and stated that the declaration of a state of emergency shall never exceed the period strictly required to restore normal conditions and the duration shall be determined by a state’s constitution.¹⁵⁶

Given that in the definition, public emergencies are limited to a ‘moment’ it would seem impracticable to use derogation to a long standing campaign such as the war on terror.

¹⁵⁰ Right to liberty and security.

¹⁵¹ *A and others v. United Kingdom*, 05.

¹⁵² *Ireland v United Kingdom*, 35.

¹⁵³ The Paris Minimum Standards of Human Rights Norms in a State of Emergency (hereinafter Paris Standards) were drafted by the ILA Committee on the Enforcement of Human Rights and were adopted in 1984. It contains 16 articles on derogation during states of emergencies. See; American Journal of International Law, available on

<http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/ParisMinimumStandards.pdf> accessed on 16 June 2016.

¹⁵⁴ Sec 1(b), *Paris Standards*.

¹⁵⁵ McCarthy S, *The International Law of Human Rights and States of Exception*, Martinus Nijhoff Publishers, The Hague, 1998, 109.

¹⁵⁶ Section 3 (a) and (b), *Paris Standards*.

Perhaps a time has come to introduce a time frame for how long a public emergency ought to last so as to avoid a lifelong state of emergency such as that of Egypt.¹⁵⁷

ii. Official proclamation and notification

Official proclamation and notification is a *conditio sine qua non* under Article 4 of the ICCPR. States are required to officially proclaim and notify other state parties through the Secretary General of the United Nations (UN) of the provisions of which it has derogated from and the reasons thereof. A further notice should be given describing the measures taken, justifications for taking such measures, the date the emergency ceases to exist and the derogation is subsequently terminated.¹⁵⁸ This condition is placed so as to discourage arbitrary deprivation of liberties.

The Siracusa Principles emphasize that a state that fails to notify other state parties of its intention to derogate from liberties, breaches its obligations and may be denied access to defences under the Covenant.¹⁵⁹

In *Cyprus v Turkey*,¹⁶⁰ the ECtHR ruled that Turkey was in breach of her international obligations as she failed to make an official proclamation and notify other states of her occupation of Cyprus. The HRC objected to the derogation implemented by the Democratic Republic of Congo (DRC) in *Adrien Mundy Busyo et al. v. Democratic Republic of the Congo*,¹⁶¹ on the grounds that no notification had been made. Furthermore, the HRC expressed concern that due process, when it comes to proclamation and notification, has been ignored by numerous states. For example, the Committee reported that Peru derogated from rights; however, no notification was issued to the Secretary General and the Peruvian government did not specify which right(s) were suspended.¹⁶²

¹⁵⁷ Article 58 (2)(b) of the Constitution of Kenya prescribes that a state of emergency should last for a period not exceeding fourteen days, unless the National Assembly extends the declaration.

¹⁵⁸ Article 4(1), ICCPR.

¹⁵⁹ Principle 47, *Siracusa Principles*.

¹⁶⁰ *Cyprus v Turkey*, ECtHR, Judgement of 4 October 1983. This decision was made by the European Commission of Human Rights that ceased to exist when the Court became permanent on 1 November 1998. See <http://hudoc.echr.coe.int/eng?i=001-104211> accessed on 16 June 2016.

¹⁶¹ *Adrien Mundy Busyo et al. v. Democratic Republic of the Congo*, CCPR Comm.No. 933/2000 (19 September 2003).

¹⁶² Concluding Observations of the Human Rights Committee, Peru, U.N. Doc. CCPR/C/79/Add.8 (1992). Available at <http://hrlibrary.umn.edu/hrcommittee/peru1992.html> accessed on 16 June 2016.

iii. Proportionality

The ICCPR and the ECHR dictate that, derogations should only be carried out ‘to the extent strictly required by the exigencies of the situation’.¹⁶³ Proportionality standards question the validity of the measure(s) taken and the manner of implementation applied. The Siracusa Principles add that ‘the severity, duration and geographic scope of any measure shall be strictly necessary to deal with the threat to the life of the nation and proportionate to its nature and extent’.¹⁶⁴ General Comment 29 emphasizes that states must provide justification that all measures correspond with this principle. The HRC declined to accept Israel’s justification (existence of a state of emergency) when the president ordered a dismissal of judges pursuant to the Covenant. Israel failed to prove how the situation required such drastic measures.¹⁶⁵

In *Aksoy v Turkey*,¹⁶⁶ the applicant, a terror suspect, had been held in police custody for up to fourteen days without being presented before a judge. The Turkish government defended their actions claiming that police investigations were hampered by the vast presence of terrorist organisations in the area. Nevertheless, the ECtHR was not convinced that the exigency of the situation required the denial of the applicant’s right to judicial intervention for a period of up to fourteen days. Recently, in *A and others v United Kingdom*, the Court arrived at a similar conclusion as in the *Aksoy* case, that in as much as a public emergency existed, the British government was disproportionate in detaining terror suspects indefinitely.¹⁶⁷

In *Campbell v UK*, the court asserted that opening and reading of mail sent to prisoners was a violation of Article 8; further, security checks could be carried out without reading the contents of the mail. Prison services were therefore disproportionate in checking for illicit substances sent to prisoners.¹⁶⁸ Similarly in *Klass v Germany*, the ECtHR contended that in as much as surveillance may be necessary, it must be carried out as is required by the situation and there must be guarantees against abuse.¹⁶⁹

¹⁶³ Article 4, *ICCPR* and Article 15, *ECHR*.

¹⁶⁴ Principle 51, *Siracusa Principles*.

¹⁶⁵ Concluding observations of the Human Rights Committee: Israel (21 August 2003), UN-Doc. CCPR/CO/78/ISR, para. 5.2. Available on <http://www.refworld.org/docid/3fdc6bd57.html> accessed on 16 June 2016.

¹⁶⁶ *Aksoy v Turkey*, ECtHR, Judgement of 18 December 1996, para. 78.

¹⁶⁷ *A and others v. United Kingdom*, 2(ii).

¹⁶⁸ *Campbell v United Kingdom*, ECtHR Judgement of 25 March 1992, para 41.

¹⁶⁹ *Klass and others v Germany*, ECtHR Judgment of 6 September 1978, para 57.

In determining the level of proportionality, states are afforded a margin of appreciation.¹⁷⁰ This margin allows states to determine the extent of measures required to quash an emergency.¹⁷¹ The doctrine encourages separation of powers as the court usurps from making decisions on the measures to be implemented, a function reserved for the executive. The court only steps in to review the legality of the measures.

iv. Consistency and Non discrimination

States are obliged to adhere to international laws when derogating from rights.¹⁷² The idea behind this provision was to ensure protection of liberties in greater latitudes than that offered by the human rights instruments. The HRC is mandated to take a state's international obligations under consideration, when considering a state's application to derogate. States are urged to consider the developments in international human rights law pertaining to emergencies.¹⁷³

The ICCPR prohibits any derogation that discriminate persons based on race, colour, sex, language, religion or social origin.¹⁷⁴ Nonetheless, this list remarkably differs from Article 2 on non discrimination. Grounds such as political or other opinion, national origin, property and birth or other status are noticeably absent from Article 4. This poses the question, is discrimination based on political affiliations and nationality acceptable?

The ECHR is silent on the topic of discrimination.¹⁷⁵ Jurisprudence from the court however, implies that the ECHR acknowledges the principle of non discrimination. In *A and others v United Kingdom*,¹⁷⁶ the court ruled that prosecution of non nationals over nationals was discriminatory, hence the decision to deny the derogation.

b) Limitations in international law

Distinct from derogation, certain liberties under human rights instruments contain in built limitations that prescribe the conditions under which the right may be restricted. Limitation

¹⁷⁰ Yourow C defines a margin of appreciation as to freedom to act; manoeuvring, breathing or "elbow" room; or the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a violation of the Convention. See; Yourow C, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Kluwer Publishers, The Hague, 1996, 14.

¹⁷¹ This doctrine has been widely adopted in the ECtHR, however, the HRC is yet to warm up to it.

¹⁷² Article 4(1), ICCPR and Article 15(1), ECHR.

¹⁷³ CCPR General Comment 29, 9-10.

¹⁷⁴ Article 4(1), ICCPR.

¹⁷⁵ Unlike Article 4(1) of the ICCPR, Article 15 of the ECHR does not contain a provision for non discrimination.

¹⁷⁶ *A and others v United Kingdom*, 186.

of rights in the ICCPR is only licit under the following conditions: the limitation must be *prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.*¹⁷⁷

The Siracusa Principles provide a detailed outline on application of limitations. They state that no limitation shall be permitted, other than those applied in the Covenant.¹⁷⁸ Furthermore, all limitations shall be applied in favour of the right and in a proportionate and non discriminatory manner.¹⁷⁹ The principles also expound on the conditions that accompany limitations.

i. Prescribed by law

Limitations may only be applied to certain rights if, national laws that are consistent with the Covenant allow for it.¹⁸⁰ Moreover, no laws that provide for limitations should be arbitrary.¹⁸¹ In *Ross v Canada*,¹⁸² the HRC held that the author's dismissal as a teacher was lawful as the right to freedom of expression could be limited and there existed laws that coincided with the decision.

ii. In a democratic society

The Principles acknowledge that there is no model for a democratic society; however, they interpret this term to mean, a society that respects human rights.¹⁸³ Therefore, it is upon the state to ensure that the limitations do not interfere with the democracy in the society.¹⁸⁴

iii. National security and public safety

States can limit rights so as to protect the existence of the nation, its territorial integrity or political independence against force or threat of force. A state may also justify limitations

¹⁷⁷ Article 22(2), *ICCPR*.

¹⁷⁸ Principle 1, *Siracusa Principles*.

¹⁷⁹ Principles 3, 9 and 11, *Siracusa Principles*.

¹⁸⁰ Principle 15, *Siracusa Principles*. It is noteworthy that, the ICCPR does not provide for the limitation of the right to privacy, however, the Prevention of Terrorism Act (No.30 of 2012) under Section 35(3) provides for limiting this right.

¹⁸¹ Principle 16, *Siracusa Principles*.

¹⁸² *Ross v Canada*, CCPR Comm.No.736/1997 (18 October 2000).

¹⁸³ Principle 20, *Siracusa Principles*.

¹⁸⁴ Principle 21, *Siracusa Principles*.

if they are aimed at repressing practices against its population. The Siracusa Principles define public safety to mean *protection against danger to the safety of persons, to their life or physical integrity or serious damage to their property*.¹⁸⁵ The limitations must not be arbitrary and remedies against abuse must be available.

In 2015, France declared a state of emergency following the Paris attacks that left 130 people dead.¹⁸⁶ The government derogated from the right to privacy so as to enhance national security and public safety during the tumultuous times.¹⁸⁷ Turkey also declared a state of emergency and officially notified the UN on 15 July 2016.¹⁸⁸ It was proclaimed that the reason for the declaration was to attempt to restore national security and derogate from some rights such as the right to privacy.¹⁸⁹

iv. Necessity and proportionality

Necessity and proportionality are elements synonymous with restrictions on liberties. As discussed earlier, the limitations must be proportionate to the expected ends and necessary to achieve the ends sought. In *Morais v Angola*,¹⁹⁰ the HRC observed that necessity and proportionality can be used interchangeably as necessity implies a level of proportionality.

The ECHR has vastly contributed to the discussion on limitations. It provides for limitations on the aforementioned rights in the ICCPR but also includes limitations on the right to privacy.¹⁹¹ Similar to the ICCPR, the ECHR also prescribes three conditions that must be adhered to when limiting rights: legality, necessity and legitimacy.¹⁹²

The ACHPR permits for limitation of some rights such as the right to liberty and security;¹⁹³ the freedoms of conscience, profession and religion;¹⁹⁴ association;¹⁹⁵

¹⁸⁵ Principle 33, *Siracusa Principles*.

¹⁸⁶ Paris attacks: What happened on the night, available at <http://www.bbc.com/news/world-europe-34818994> accessed on 17 October 2016.

¹⁸⁷ Human Rights Derogation in France in Response to Terrorism, available at <http://nationalsecuritylawbrief.com/human-rights-derogation-in-france-in-response-to-terrorism/> accessed on 17 October 2016.

¹⁸⁸ Turkey Notification under Article 4(3) available at <https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf> accessed on 17 October 2016.

¹⁸⁹ Turkey's Derogation from Human Rights Treaties- An Update, available at <http://www.ejiltalk.org/turkeys-derogation-from-human-rights-treaties-an-update/> accessed on 17 October 2016.

¹⁹⁰ *Rafael Marques de Morais v. Angola*, CCPR Comm.No.1128/2002 (18 April 2005).

¹⁹¹ Article 8, *ECHR*.

¹⁹² Legitimacy refers to the permissible situations such as public order, national security and public safety.

¹⁹³ Article 6, *ACHPR*.

¹⁹⁴ Article 8, *ACHPR*.

¹⁹⁵ Article 10, *ACHPR*.

assembly;¹⁹⁶ and the right to freedom of movement and residence.¹⁹⁷ The conditions accompanying these limitations are legality and legitimacy. The Africa Commission on Human and Peoples' Rights (hereinafter 'the Commission') justified the absence of derogation clauses and minimal limitations in *Media Rights Agenda and Constitutional Projects v Nigeria*, stating "*the Charter does not contain a derogation clause and therefore limitation on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances, the reasons for possible limitation must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained*".¹⁹⁸

4. Derogations and Limitations in Kenyan law

Article 24 provides for the limitation of rights only to the extent that the limitation is lawful, reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹⁹⁹ The conditions set for limitations are similar to the conditions in the ICCPR and ECHR but include taking into consideration the:

- a) Nature of the right;
- b) Importance of the purpose of the limitation;
- c) The nature and extent of the limitation;
- d) The need to ensure that an individual's enjoyment of rights does not prejudice the rights of others;
- e) The relations between the limitation and its purpose and whether there are any less restrictive means of achieving the purpose.²⁰⁰

Further, Article 25 establishes absolute rights that shall not be limited under any circumstance. They include; freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial and the right to an order of *habeas corpus*.²⁰¹

¹⁹⁶ Article 11, *ACHPR*.

¹⁹⁷ Article 12, *ACHPR*.

¹⁹⁸ *Media Rights Agenda and Constitutional Projects v Nigeria*, ACmHPR Comm. 05/93, 128/94, 130/94 152/96, 12 Activity Report (1998), 64-71.

¹⁹⁹ Article 24(1), *Constitution of Kenya*.

²⁰⁰ Article 24(1), *Constitution of Kenya*.

²⁰¹ Article 25, *Constitution of Kenya*.

Article 58 prescribes for the declaration of a state of emergency when the state is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergencies.²⁰² Any legislation passed during this declaration may limit a right only to the extent required by the emergency and consistent with Kenya's obligations under international law.²⁰³ The state of emergency is limited to a period not exceeding fourteen days and can only be extended by a resolution adopted by the National Assembly for a period not exceeding two months at a time.²⁰⁴

Section 35 of the Prevention of Terrorism Act provides for the limitation of certain rights such as the right to privacy. The limitations are only applicable for the following purposes; to enable investigation of a terrorist act, to detect and prevent a terrorist act and to ensure that the enjoyment of an individual's rights does not prejudice the rights of others.²⁰⁵

The Act also prescribes the extent to which the right to privacy may be limited. It establishes that a person; his/her home and property may be searched, his/her possessions seized and interference and/or interception of a person's communication may be carried out by authorities.²⁰⁶ This provision on limitations is in line with Article 24 of the Constitution that provides for the limitation of rights.

5. Theoretical analysis of limitations and derogations

This section of the discussion analyses the relationship between limitations and derogations and the two theories enunciated in the first chapter of this study namely; the social contract theory and the sociological school. The discussion mostly coincides with the former theory as opposed to the latter because, the latter calls for a balance between competing interests without sacrificing either.²⁰⁷ Roscoe Pound explained that the law has a responsibility to satisfy social interests without a disproportionate sacrifice of other interests.²⁰⁸ Moreover, he states that there are no inherent limitations to rights.²⁰⁹ Thus, in relation to this discussion, the sociological school would oppose the derogation and limitation of rights as these amounts to sacrificing liberties for security.

²⁰² Article 58(1) (a), *Constitution of Kenya*.

²⁰³ Article 58(6) (a), *Constitution of Kenya*.

²⁰⁴ Article 58 (2) and (3), *Constitution of Kenya*.

²⁰⁵ Section 35(2), *Prevention of Terrorism Act*.

²⁰⁶ Section 35(3) (a), *Prevention of Terrorism Act*.

²⁰⁷ Hampstead L, *Introduction to Jurisprudence*, 363.

²⁰⁸ Hampstead L, *Introduction to Jurisprudence*, 363.

²⁰⁹ Hampstead L, *Introduction to Jurisprudence*, 363.

In his theory, Hobbes considered security the salient need of human beings. He argued that the sovereign possessed the authority to decide on the most effective way to provide security for the subjects.²¹⁰ In relation to the discussion above, Hobbes would advocate for restrictions to be placed upon rights, if the restriction would assist in the furtherance of national security.

Locke on the other hand, propounded that a social contract arose out of the need to protect the natural rights, that is; life, liberties and estates.²¹¹ The sovereign was elected to protect these natural rights failure to which he would be impeached.²¹² It appears that Locke would not favour the restriction of liberties since he vehemently fought for their preservation. Nonetheless, he also advocated for the preservation of life and as established in this chapter, terrorism poses a threat to life, hence the need to limit some rights for purposes of preserving life. It is therefore unclear where Locke would stand had he been faced with this argument. This study infers that derogations and limitations lean more towards Hobbes' school of thought.

Conclusion

The discussion in this chapter establishes that human rights laws are indeed flexible. In considering the better option of the two, it is noted that derogations are designed to temporarily suspend rights during extreme cases, while limitations are utilised as per the exigencies of the situation. In the war against terror, a war that is not time bound, limitations seem to fit the bill as they permit restrictions on rights while maintaining a front of upholding the rule of law. Cyprus, Iraq and Mexico are examples of states that declined to derogate from rights during a state of emergency on the basis that limitations were sufficient to quell the threats to national security.²¹³

Focussing on the Kenyan context, it is appalling to note that in spite of the numerous attacks Kenya has experienced, the government has never declared a state of emergency to deal with the threat to security. The U.S Embassy bombings, Westgate mall and Garissa College attacks meet the conditions set under Article 58(1) of the Constitution on when a

²¹⁰ Curzon L, *Jurisprudence*, 35.

²¹¹ A biography of John Locke (1632-1704), available at <http://www.let.rug.nl/usa/biographies/john-locke/> accessed on 23 October 2016.

²¹² Curzon L, *Jurisprudence*, 29.

²¹³ The interface between public emergency powers and international law, available at <http://icon.oxfordjournals.org/content/2/2/380.full.pdf> accessed on 28 October 2016.

state of emergency may be declared.²¹⁴ This is because of the magnitude of damage and loss of lives that resulted from the attacks. The Constitution does not expressly provide for derogations but continually speaks of limitations.

The study therefore draws the conclusion that sustaining the balance between national security and the right to privacy is achievable through the use of derogations and limitations provided for in various instruments. It is suggested that Kenya ought to emulate jurisdictions such as France and Turkey that have successfully derogated and limited rights when faced with threats to their national security, hence ensuring compliance with international law.

²¹⁴ History of Terror in Kenya: A Chronology of Terrorist Attacks in the Country, available at <http://www.standardmedia.co.ke/ktnhome/video/watch/2000083228/analysis-of-the-history-of-terror-in-kenya> accessed on 30 January 2017.

CHAPTER FOUR:

COMPARATIVE STUDY ON THE IMPLEMENTATION OF COUNTER TERRORISM LEGISLATION IN GHANA AND ETHIOPIA

1. Introduction

The deadly attack on the World Trade Centre marked the genesis of a series of lethal attacks motivated by various aspects such as religious fanaticism and political ideologies. To date, no state can comfortably assert that it is immune from threats to national security propagated by terrorist. The need to develop strategies aimed at preventing the materialisation of these threats has become acute and real.

It is noteworthy that some states such as Ethiopia and Ghana have managed to avert potential threats to their security through dissimilar approaches to the right to privacy.²¹⁵ These approaches form the premises for the discussion in this section of the study.

This chapter also examines the implementation of counter terrorism laws in Britain, a state that has managed to maintain its national security while preserving the sanctity of the right to privacy.

2. Counter terrorism in Ethiopia

Ethiopia has for many years battled with terrorism.²¹⁶ Since the entry of the Arabs into Ethiopia in the second century, the state of Ethiopia has experienced a series of conflicts revolving around religion, land and political power.²¹⁷ Ethiopia shares a border with 5 other countries that have been greatly affected by either domestic or international terrorism, namely; Djibouti, Eritrea, Kenya, Somalia and Sudan. Nevertheless, the state has managed to forestall the materialisation of any potential threats from the Al Shabaab

²¹⁵ The two states have been chosen for the following reasons; Ghana has received several warnings of potential threats due to its geographical proximity to states such as Cote d'Ivoire, Burkina Faso and Mali which have previously been targets of Al Qaeda in the Islamic Maghreb (AQIM). None of these threats have actualised. Furthermore, Ghana's counter terrorism laws, though still in the infancy stage, have been implemented with strict compliance to international standards on the right to privacy. Ethiopia on the other hand, a state adjacent to Somalia, has successfully precluded most terrorist attacks from the Al Shabaab militia group through gross violations of human rights, in particular the right to privacy.

²¹⁶ Shinn D, 'Ethiopia and Combating Terrorism: An Important Ally with Its Own Priorities' *United States Institute for Peace* (2004) 5.

²¹⁷ Jalata A, 'State Terrorism and Globalization: The Cases of Ethiopia and Sudan' *University of Tennessee* (2005) 80.

militia group through scathing approaches to privacy. This section of the study analyses the legislation enacted to counter terrorism in Ethiopia and examines its effect on the right to privacy.

2.1. The Constitution of the Federal Democratic Republic of Ethiopia²¹⁸

Article 87 of the Constitution contains a remarkably brief section on principles of national defence.²¹⁹ Thereafter, Article 93 of the Constitution explicates the circumstances when a state of emergency may be declared. It states that the Council of Ministers from the Federal Government may declare a state of emergency should an external attack, a breakdown of law and order that threaten the Constitutional order and cannot be suppressed by ordinary law enforcement agencies, a natural disaster and an epidemic occur.²²⁰ The Constitution also grants the Council of Ministers all the necessary powers it requires to protect the state's peace, public security and sovereignty.²²¹ Moreover, the Council of Ministers is permitted to suspend all democratic and political rights to the extent necessary to avert the causative agent(s) of the state of emergency. Nonetheless, in exercise of its powers, the Council of Ministers cannot suspend the following rights; nomenclature of the state;²²² prohibition against inhumane treatment;²²³ equality;²²⁴ self determination²²⁵ and culture.²²⁶ The Constitution bestows upon the Council of Ministers immense amounts of power that have been subject to abuse due to lack of adequate checks and balances.²²⁷

It is interesting to note that the Constitution of the FDRE permits for the suspension of the protection of the right to life, freedom of thought, conscience and religion, the right to

²¹⁸ The Federal Democratic Republic of Ethiopia (FDRE) adopted their Constitution on 8 December 1994. The supreme law of the land came into force in 1995 following the repeal of three previous Constitutions. See; Zeyohannes S and Asrat D, *Constitutional Law I: Teaching Material*, Justice and Legal System Research Institute, Addis Ababa, 2009, 79-100.

²¹⁹ The composition of the national armed forces shall reflect the equitable representation of the Nations, Nationalities and Peoples of Ethiopia; The Minister of Defence shall be a civilian; The armed forces shall protect the sovereignty of the country and carry out any responsibilities as may be assigned to them under any state of emergency declared in accordance with the Constitution; The armed forces shall at all times obey and respect the Constitution; The armed forces shall carry out their functions free of any partisanship to any political organization(s).

²²⁰ Article 93(1) (a), *Constitution of FDRE*.

²²¹ Article 93(4) (a), *Constitution of FDRE*.

²²² Article 1, *Constitution of FDRE*.

²²³ Article 18, *Constitution of FDRE*.

²²⁴ Article 25, *Constitution of FDRE*.

²²⁵ Article 39(1), *Constitution of FDRE*.

²²⁶ Article 39(2), *Constitution of FDRE*.

²²⁷ See; Legal Analysis of Ethiopia's state of emergency, available at <https://www.hrw.org/news/2016/10/30/legal-analysis-ethiopias-state-emergency> accessed on 12 November 2016.

access to justice and the right to recognition everywhere as a person before the law during a state of emergency. There is no requirement that the suspension of these rights should be exercised in a proportionate manner. This is despite the fact that Ethiopia is party to most of the core human rights treaties. Such provisions (or lack thereof) in the Constitution, illustrate instances when Ethiopia has failed to comply with international human rights law.

The right to privacy is contained in Article 26 of the Constitution. It prohibits arbitrary searches of an individual's home, person or property and the confiscation of any personal property that may be in the person's possession.²²⁸ Furthermore, an individual's communication is also protected under the right to privacy. The right is not subject to any restrictions except in compelling circumstances, such as in the preservation of national security and public peace, in the prevention of crimes and the safeguarding of public health and morals.²²⁹ The limitations on the right to privacy must be prescribed by law.

2.2.Ethiopian Anti Terrorism Proclamation²³⁰

The Ethiopian Anti Terrorism Proclamation (ATP) in its preamble recognises the right of the Ethiopian populace to live in peace, freedom and security.²³¹ It also acknowledges the inadequacy of the laws in the FDRE to combat the terrorism, hence, the need to enact laws whose main objective is the prevention and control of terrorism.²³²

The ATP was enacted following the UN Resolution 1373²³³ that obliged states to reframe their national laws by incorporating all the international conventions on counter terrorism and the Organisation of the African Union Convention on the Prevention and Combating of Terrorism (Algiers Convention).

The section below analyses the key features of the ATP with regard to the right to privacy.

i. Definition of terrorism

²²⁸ Article 26(1), *Constitution of FDRE*.

²²⁹ Article 26(3), *Constitution of FDRE*.

²³⁰ Proclamation No. 652/2009.

²³¹ Preamble, *Anti Terrorism Proclamation*.

²³² Preamble, *Anti Terrorism Proclamation*.

²³³ UNSC S/RES/1373 (2001) Threats to international peace and security caused by terrorist acts.

The ATP provides a definition to what constitutes a terrorist act in spite of lack of international consensus on the definition of terrorism.²³⁴ The punishment for engaging in a terrorist acts is imprisonment for fifteen years to life or death.²³⁵ It is also pivotal to bring to attention that the other actions enumerated in the ATP as terrorist acts can easily be argued to be normal penal code crimes that have been elevated to terrorism status, for instance; causing serious damage to property is equivalent to damaging property under the penal code.²³⁶ The danger of trying crimes that have not been adequately defined is that some may attract a greater punishment than that which is deserved. For example, causing serious damage to property under the ATP is punishable by imprisonment for a term of fifteen years to life, whereas the same crime under the penal code is punishable by imprisonment for a term not exceeding five years along with a fine.²³⁷

In December 2009, two Swedish journalists, Martin Schibbye and Johan Persson, were tried and convicted under the ATP for entering the country illegally. Such a crime is easily punishable under the penal code and criminal procedure code especially since it was determined that the two journalists were in the country to investigate the insurgency in the eastern Somali region.²³⁸

Moreover, the broad and vague definition of terrorist acts has been used as a tool to impede criticism against the government of Ethiopia. The phrase ‘whosoever or a group intending to advance a political ideology, religious or ideological cause by coercing the government’ in the ATP, criminalises any legitimate protests against the government. More often than not, protests of any nature are usually carried out with the aim of coercing or affecting policy passed by the government. Therefore, criminalisation of such demonstrations curtails the citizen’s right to freedom of expression and stifles democracy in a state. In 2008, Human Rights Watch reported that critics and political opponents of the Ethiopian

²³⁴ Section 3 of the ATP describes a terrorist act as one that is perpetrated by “an individual or a group with the intent to advance a political, religious or ideological cause by coercing the government, intimidating the public or a section of the public, or destabilizing or destroying the fundamental political, constitutional, economic or social institutions of the country”. Other actions that constitute a terrorist act include; causing a person’s death or inflicting serious bodily harm, creating grave risk to the safety or health of the public or a section of the public, kidnapping or taking hostages, causing serious damage to property, damaging natural resources, the environment, historical or cultural heritages, disrupting public services and threatening to commit any of the aforementioned acts.

²³⁵ Section 3(7), *Anti Terrorism Proclamation*.

²³⁶ Article 653-654, *Penal Code, Ethiopia*.

²³⁷ Article 654, *Penal Code, Ethiopia*.

²³⁸ Ethiopia: Terrorism Law Decimates Media, available at <https://www.hrw.org/news/2013/05/03/ethiopia-terrorism-law-decimates-media> accessed on 12 November 2016.

government have frequently been subject to harassment, inhumane treatment and prosecution.²³⁹

In *Public Prosecutor v Rabyie Mehammed Hassen*,²⁴⁰ seven suspects alleged to be members of the Front for the Independence of Oromia (FIO) were charged with four counts of terrorism namely; membership to a proscribed organisation, inciting civil war, preparation and possession of terrorist materials. It was later determined that the FIO was not a proscribed organisation. Furthermore, some of the crimes the six out of seven suspects were convicted for, did not amount to crimes under any Ethiopian laws since the ATP had not come into force yet.

ii. Prevention and investigation of terrorism

Section 14 of the ATP permits the National Intelligence and Security Service (NISS) to intercept or conduct surveillance on the telephone, fax, internet, radio, postal or other means of communication of a person suspected to be involved in terrorism.²⁴¹ Moreover, the NISS may secretly enter into a premise to install, enforce or remove the interception.²⁴² The person carrying out the surveillance requires a warrant from the court prior to commencing.

A lessor of a house, car, room or similar facility is obliged to record in detail the identity of the lessee and submit the same to nearest police station within a day.²⁴³ In addition, any person who hosts a foreigner in his/her premises must inform the police and furnish a copy of the foreigner's passport.²⁴⁴

These provisions raise several objections such as; a lessee loses their right to remain anonymous since a comprehensive description of their personal details must be submitted to the police. There are no safeguards in place to protect these details and it remains unclear how much information should be furnished by the lessee. Foreigners are also compelled to submit a copy of their passports to the police through their host(s). This security measure that is widely used across several countries is not accompanied by checks and balances that aim to protect privacy in Ethiopia. This begs the questions, what happens

²³⁹ Ethiopia: Events of 2008, available at <https://www.hrw.org/world-report/2009/country-chapters/ethiopia> accessed on 12 November 2016.

²⁴⁰ *Prosecutor v Rabyie Mehammed Hassen et al* (49303/2008).

²⁴¹ Section 14(1) (a), *Anti Terrorism Proclamation*.

²⁴² Section 14(1) (b) and (c), *Anti Terrorism Proclamation*.

²⁴³ Section 15(1), *Anti Terrorism Proclamation*.

²⁴⁴ Section 15(2), *Anti Terrorism Proclamation*.

to the information once it is declared bootless? Does the lessor or host have a duty to maintain secrecy or can he/she divulge the information to others? Such provisions in the ATP directly curtail the right to privacy and compromise the safety of an individual's personal identity. There should be guidelines and limitations in place regarding the dissemination and analysis of personal data.

The ATP also allows a police officer to carry out sudden searches on vehicles and pedestrians provided the officer has reasonable suspicion that a terrorist act may be committed. The officer can only perform these searches once he/she has received authorisation from the Director General of the Federal Police or a person delegated by him/her.²⁴⁵ Secondly, a police officer may apply to the court for a warrant or in urgent cases, request for permission to carry out a covert search via telephone.²⁴⁶ In the American case of *United States v Carvajal-Minota*,²⁴⁷ the court defined a covert search as surreptitious entry into premises by authorities for purposes of carrying out investigations, without seizing property. The main risk involved with issuing warrants over the telephone is that, the court may haphazardly issue warrants without full knowledge of the situation thus authorise a police officer to violate the privacy of unsuspecting individuals. Furthermore, there are no safeguards in place to govern the manner in which these covert searches may be implemented.

In 2014, the Human Rights Report on Ethiopia observed that despite the laws explicitly stating that warrants should be acquired from the court before a police officer carries out a search, authorities blatantly ignored this provision and arbitrarily searched the homes of several Muslims in Addis Ababa.²⁴⁸ The opposition political party leaders alleged that government operatives tapped their communication systems and attempted to cajole them into illegal activities by pretending to be groups designated as terrorist organisations.²⁴⁹

The government's actions towards the opposition and other members of society greatly infringe on the right to privacy. The flagrant disregard for international law and ruthless abuse of human rights instruments has widely contributed towards Ethiopia's ability to

²⁴⁵ Section 16, *Anti Terrorism Proclamation*.

²⁴⁶ Section 17, *Anti Terrorism Proclamation*.

²⁴⁷ *United States v Carvajal-Minota*, 706 F. Supp. 726 (N.D. Cal. 1989).

²⁴⁸ Ethiopia 2014 Human Rights Report, available at <http://www.state.gov/documents/organization/236570.pdf> accessed on 20 November 2016.

²⁴⁹ <http://www.state.gov/documents/organization/236570.pdf> accessed on 20 November 2016.

counter terrorism. Nonetheless, this approach is inimical as the government becomes what it aims to fight, hence, defeating the purpose of counter terrorism.

3. Counter terrorism in Ghana

Ghana has never experienced violent extremism and threats to national security such as terrorism.²⁵⁰ This is in spite of its close proximity to Mali, Burkina Faso and Côte d'Ivoire. Ghana has also sent troops to Mali to fight AQIM.²⁵¹ It is commendable how the state has managed to avert all potential terrorist threats while upholding the right to privacy.²⁵²

3.1. Constitution of Ghana

The Constitution contains an expansive Bill of rights that encompasses the right to privacy. Article 18(2) states that, “*No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of the rights or freedoms of others*”.²⁵³

Article 31(1) of the Constitution provides for emergency powers. It prescribes that, following the receipt of advice from the Council of State; the President may declare a state of emergency through a proclamation published in the gazette.²⁵⁴ Thereafter, the President must furnish before Parliament his/her reasons for declaring the state of emergency. Parliament shall then decide, within seventy two hours after receiving the proclamation, whether or not to uphold it. The President must proceed in accordance with the decision rendered by Parliament.²⁵⁵

The Constitution also establishes a National Security Council mandated to:²⁵⁶

(a) Consider and take appropriate measures to safeguard the internal and external security of Ghana.

²⁵⁰ Averting terrorism in Ghana, available at <http://www.ghanaweb.com/GhanaHomePage/features/Averting-terrorism-in-Ghana-426962> accessed on 31 January 2017.

²⁵¹ See; <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/Kwesi-Pratt-Is-Ghana-s-Army-Psychologically-Prepared-For-The-Malian-War-262583> accessed on 30 January 2017.

²⁵² The state ranks remarkably low in the Global Terrorism Index sitting at number 106 out of 130 countries. See; Global Terrorism Index 2016, available at <http://economicsandpeace.org/wp-content/uploads/2016/11/Global-Terrorism-Index-2016.2.pdf> accessed on 1 December 2016.

²⁵³ Article 18(2), *Constitution of Ghana*.

²⁵⁴ Article 31(1), *Constitution of Ghana*.

²⁵⁵ Article 31(3), *Constitution of Ghana*.

²⁵⁶ Article 84, *Constitution of Ghana*.

(b) Ensure the collection of information relating to the security of Ghana and the integration of the domestic, foreign and security policies relating to it so as to enable the security services and other departments and agencies of the Government to co-operate more effectively in matters relating to national security;

(c) Assess and appraise the objectives, commitments and risks of Ghana in relation to the actual and potential military power in the interest of national security; and

(d) Take appropriate measures regarding the consideration of policies on matters of common interest to the departments and agencies of the Government concerned with national security.

3.2. Anti Terrorism Act²⁵⁷

a) Definition of terrorism

Section 2 defines a terrorist act²⁵⁸ and further asserts that any person who is convicted of a terror related offence is liable to imprisonment for a term of not less than seven years and not exceeding twenty five years.²⁵⁹ The Act further explicates what does not amount to an act of terrorism. These include protests, demonstration of stoppages of work that disrupt essential services.²⁶⁰

b) Searches

Section 24 of the Act permits a police officer to enter any premises on the grounds that he/she has reasonable suspicion that property is being used in the commission of a terrorist

²⁵⁷ Long title, *Anti Terrorism Act*.

²⁵⁸ A terrorist act refers to an act performed in furtherance of a political, ideological, religious, racial or ethnic cause and causes serious bodily harm to a person; causes serious damage to property; endangers a person's life; creates a serious risk to the health or safety of the public; involves the use of firearms or explosives; releases into the environment or exposes the public to;

(i) dangerous, hazardous, radioactive or harmful substances;

(ii) toxic chemicals; or

(iii) microbial or other biological agents or toxins;

is prejudicial to national security or public safety; is designed or intended to disrupt;

(i) A computer system or the provision of services directly related to communications;

(ii) Banking or financial services;

(iii) Utilities, transportation; or

(iv) Other essential services;

Or is designed or intended to cause damage to essential infrastructure. See; Article 2(1), *Anti Terrorism Act*.

²⁵⁹ Article 2(2), *Anti Terrorism Act*.

²⁶⁰ Article 3, *Anti Terrorism Act*. In comparison with the ATP of Ethiopia, the Anti Terrorism Act is lucid in distinguishing between terrorist acts and non-terrorist acts. This leaves little to no room for abuse of powers and convictions that are not terrorism related.

act.²⁶¹ The officer may also enter the premises forcefully for purposes of conducting a search. A conveyance may also be halted if it is suspected to be involved with terrorism.²⁶² Furthermore, a police officer may conduct a physical search on an individual suspected to be involved in terrorism.²⁶³ Any person who obstructs or denies access to a police officer is guilty of a crime punishable by a fine of not more than five hundred penalty units or imprisonment for a term not exceeding two years or both.²⁶⁴

There have been no reports of violations of the right to privacy by police officers during these searches. Annual human rights reports published by the American Department of State describe Ghana as constitutional democracy with a strong presidency.²⁶⁵ The reports highlight that authorities in Ghana respect the right to privacy and no violations have been reported.²⁶⁶

c) Interception of communication

Section 34 of the Act states that a police officer who is not below the rank of an Assistant Commissioner of Police may make an *ex parte* application to a Circuit Court so as to obtain permission to intercept communication.²⁶⁷ The police officer may only make the application after receiving prior consent from the Minister.²⁶⁸

d) Information relating to passengers on a vessel and persons leaving and entering Ghana

The operator of an aircraft or master of a vessel departing from a territory outside Ghana is obliged to furnish the Inspector General of Police with the particulars of persons on or expected to be on the aircraft or vessel.²⁶⁹ The information received by the Inspector General shall not be disclosed or utilised save for purposes of national security.²⁷⁰

²⁶¹ Article 24(1), *Anti Terrorism Act*.

²⁶² Article 24(2), *Anti Terrorism Act*.

²⁶³ Article 24(3) (a), *Anti Terrorism Act*.

²⁶⁴ Article 25, *Anti Terrorism Act*.

²⁶⁵ This study used reports from the year 2010 to 2015 from the U.S Department of State to draw these conclusions.

²⁶⁶ Ghana 2015 Human Rights Report, available at <http://www.state.gov/documents/organization/252899.pdf> accessed on 1 December 2016.

²⁶⁷ Article 34(1), *Anti Terrorism Act*.

²⁶⁸ Article 34(2), *Anti Terrorism Act*.

²⁶⁹ Article 36(1), *Anti Terrorism Act*.

²⁷⁰ Article 36(4), *Anti Terrorism Act*.

These provisions aim at protecting the personal information of foreigners while simultaneously maintaining national security. Ghana has demonstrated exemplary efforts in attempting to counter terrorism while maintaining the right to privacy. In his remarks following a leaked memo claiming that Ghana was to be the next target of AQIM, President John Mahama stated, “*We need to ensure vigilance and reporting of suspicious activities; however, we’ve got to be very careful in order not to condone acts that have the proclivity to lead to gross basic human rights violations*”.²⁷¹

4. Best practices from the United Kingdom

This chapter concludes by drawing best practices from Great Britain, a state that has experienced terrorist attacks such as the 7 July 2005 London bombings.²⁷² Great Britain has enacted a number of statutes aimed at dealing with terrorism namely; Criminal Justice Act,²⁷³ Terrorism Act,²⁷⁴ Counter Terrorism Act²⁷⁵ and the Counter Terrorism and Security Act.²⁷⁶ It is also governed by its Human Rights Act²⁷⁷ and the ECHR.

Similar to the ECHR, Article 8 of the Human Rights Act provides for the right to privacy. Jurisprudence emanating from the UK has illustrated Britain’s willingness to place human rights on an equal pedestal to national security. In *Gillan and Quinton v the United Kingdom*,²⁷⁸ the ECtHR ruled that Section 44 of the Terrorism Act (2000) which permits authorities to carry out public searches and seize property suspected to belong to terrorist organisations violated the right to privacy. The Court added that the criteria for carrying out a search as per the Act was too broad and did not distinguish between persons legitimately exercising their rights and terrorists.²⁷⁹

Recently, in *David Miranda v Secretary of State for the Home Department*,²⁸⁰ the Court of Appeal overturned a decision by the High Court and declared that the nine hour detention

²⁷¹ Leaked memo says Ghana terror threat ‘Real’, see; <http://www.voanews.com/a/leaked-memo-says-terror-threat-in-ghana-is-real/3287303.html> accessed on 5December 2016.

²⁷² Four Islamic extremists executed a series of coordinated attacks aboard three trains in the London Underground transport system and a fourth on a double-decker bus. The attack killed 56 civilians and injured over 700 people. 7/7 as it is commonly referred to, was the second worst attack in the UK after the 1988 Pan Am flight 103 was bombed. See; <http://www.bbc.com/news/uk-33253598> accessed on 11 December 2016.

²⁷³ Criminal Justice Act 2003 (Cap 44).

²⁷⁴ Terrorism Act 2006 (Cap11).

²⁷⁵ Counter Terrorism Act 2008 (Cap 28).

²⁷⁶ Counter Terrorism and Security Act 2015.

²⁷⁷ Human Rights Act 1998 (Cap 42). The Human Rights Act gives further effect to the ECHR. See; Long title, *Human Rights Act 1998*.

²⁷⁸ *Gillan and Quinton v the United Kingdom*, ECtHR Judgement of 12 January 2010, para 77.

²⁷⁹ *Gillan and Quinton v the United Kingdom*, 80.

²⁸⁰ *David Miranda v Secretary of State for the Home Department*, [2016] EWCA Civ 6.

and seizure of journalism related material belonging to David Miranda amounted to a violation of his right to privacy and freedom of the press. The Court also declared Schedule 7 of the Terrorism Act incompatible with the Human Rights Act and the ECHR.²⁸¹ In *McVeigh, Neil, and Evans v United Kingdom*,²⁸² the Court ruled that there was a violation of Article 8 since the three suspects who were detained for over forty five hours were arbitrarily searched and not allowed to contact their spouses.

The United Kingdom has been at the front line in advocating for an appropriate balance to be struck between human rights and national security. The former Prime Minister, David Cameron in his address to parliament affirmed that liberties are ‘part and parcel’ of British life; he also added that the UK will continue to be the shrewd defender of security and freedom as they are both pivotal to democracy.²⁸³

5. Lessons drawn from Ghana and Britain

5.1. Ghana

In 2013, troops from Ghana entered Mali with the aim of fighting Islamic rebels that had seized control over the northern part of the country. This scenario is similar to the Kenyan situation where KDF soldiers entered Somalia with the aim of overthrowing Al Shabaab militants and restoring peace to the war torn state.

The Anti Terrorism Act of Ghana requires the operator of a foreign vessel to furnish the Inspector General with the particulars of his/her passengers. This information can only be used for purposes of national security. This ensures that the right to privacy is upheld while the needs of the state are met. Kenya should adopt such a strategy so as to monitor persons entering the state while ensuring that personal information is not recklessly divulged.

5.2. United Kingdom

The UK has been an aggressive participant in the fight against terror evidenced by the deployment of numerous troops in volatile states such as Somalia, Syria and Sudan. The most important lesson Kenya can learn from Great Britain is the role of the judiciary in the

²⁸¹ Schedule 7 of the Terrorism Act (2000) permits an examining officer to stop any vehicle or person regardless of whether or not the officer has grounds for suspicion. It also requires the person stopped to submit to the officer any information requested. In addition, the examining officer may detain the individual for a period not exceeding nine hours.

²⁸² *McVeigh, Neil, and Evans v UK*, ECmHR, Judgement of 18 March 1981.

²⁸³ Balancing freedom and security-a modern British Bill of Rights, available at <https://www.theguardian.com/politics/2006/jun/26/conservatives.constitution> accessed on 13 December 2016.

fight against terror. The courts in England have been quick to overrule decisions made by the executive and parliament that pit human rights against national security and often sacrifice liberties for security. The judiciary ensures that an appropriate balance is struck between the two interests such that one does not suffer on account of the other.

The Kenyan judiciary should adopt the same stance and ensure that the war on terror is characterized by strict adherence to human rights standards and decisions made by other arms of government heed to these standards. The striking out of some sections in the Security Laws (Amendment) Act is a move in the right direction.

Conclusion

From the discussion above, it is clear that Ethiopia and Ghana have utilised divergent mechanisms to maintain their national security. These mechanisms have had different impacts on the right to privacy; Ethiopia has neglected to adhere to international human rights standards and has adopted the ruthless stance of using intelligence to interfere with the populace's privacy and limit government opposition. On the other hand, Ghana has been keen to respect liberties while attempting to maintain its national security and uphold its untainted record of no terrorism. Kenya can borrow from practices in Britain and Ghana that have proven to work and have successfully upheld the right to privacy whilst maintaining security.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

1. Introduction

This chapter proffers the findings, recommendations and conclusions. The overall objective of this study was to determine whether Kenya can sustain the delicate balance between maintaining national security and the right to privacy in effecting counter terrorism measures.

2. Findings

Terrorism is one of the greatest threats to national security. The measures enacted to counter terrorism in Kenya are yet to achieve their intended goal. The implementation of the various laws by security agencies have contradicted their aims; hence, the failure to effectively counter terrorism.

Finally, the right to privacy has become a casualty in the fight against terror. The government has utilised numerous forms of intelligence that have turned out to be more intrusive than productive. Checks and balances need to govern the counter terrorism operations.

3. Recommendations

2.1.Introduction of an Anti Terrorism Court

Terrorism poses a pernicious threat to national security unlike other penal crimes. This assertion is drawn from the umpteen attacks that have left devastating effects on the Kenyan society. There has been a need to enact special laws to deal with terrorism due to the realisation that criminal laws embedded in statutes such as the Penal Code were insufficient in tackling terrorism related crimes.

In a similar manner, there is also a need to establish a separate court with unlimited original and appellate jurisdiction over terrorism related crimes. The benefits of establishing a separate court that exclusively deals with terrorism are; the backlog of cases in other courts is significantly reduced; hence improving the judicial system in Kenya in totality. Secondly, due to the perpetual occurrence and nature of terrorism, there needs to be a system that can expeditiously handle these cases, for instance, investigating officers should be furnished with search warrants speedily so as to enable them to thwart potential

threats to security. The court will also ensure judicial officers are specifically trained in the field of national security and human rights so as to encourage legitimacy.

2.2. Training and sensitization of security personnel

In order to preserve the right to privacy, security personnel carrying out intelligence must be acquainted with human rights laws governing the right. There should be compulsory training based on best practices such as UK's MI5 Intelligence Unit on how to balance national security with the right to privacy so as avoid sacrificing the right to privacy under the guise of countering terrorism.

It is worth noting that attempts have been made by the government to monitor and improve the operations of the police. This has been done through the enactment of the Independent Police Oversight Authority Act²⁸⁴ that established the Independent Police Oversight Authority (IPOA).²⁸⁵

2.3. Encouraging public participation

Community policing and strategies similar to the *Nyumba Kumi* initiative that involve the public should be encouraged so as to maintain national security. These strategies should not be intrusive in nature but rather encourage the public domain to remain vigilant and report any suspicious mannerisms. Civic education should also be carried out at the county level by various human rights groups, educating the masses on the importance of respecting liberties during trying times so as to prevent the occurrence unfair profiling of members of society and playing into the hands of terrorists by violating liberties that were vehemently fought for.

2.4. Enactment of a Data Protection Act

With the increase in surveillance and the use of intelligence to counter terrorism, there is need to enact a Data Protection Act that will provide checks and balances and govern the intelligence gathering process so as to ensure the right to privacy is adequately respected. The Data Protection Bill is currently before Parliament and awaits further debate. It is vital to the democracy of the nation and for purposes of maintaining the rule of law that this Bill is swiftly promulgated into law.

²⁸⁴ No. 35 of 2011, Laws of Kenya.

²⁸⁵ IPOA is mandated with the responsibility of providing civilian oversight over police duties. See; Section 5, *Independent Police Oversight Authority Act*.

2.5.Utilisation of derogation mechanisms

States are permitted to temporarily suspend rights during times of public emergencies that threaten the life of a nation. It is evident that terrorism has hastily risen above the ranks and now qualifies as a threat to the life of a nation. Derogations should therefore be utilized as a measure of last resort when attempting to counter terrorism. It has been proven that some of the greatest democracies in the world such as the United States have managed to sustain their eminence precisely because they temporarily suspended some liberties during tumultuous times.²⁸⁶ The suspension of rights in the US has been done in relation to foreign terror suspects.²⁸⁷

2.6.Revision of existing anti-terrorism laws

There is a need to revise some sections in the Prevention of Terrorism Act. These sections include; Section 2 of the Act that defines terrorist acts. There needs to be clarification whether an act and a threat of action amount to the same thing; hence carry equal penalties. Furthermore, a threshold for the level of violence against a person; serious damage to property and serious risk to the health of the public must be provided, failure to which the Section may be grossly misconstrued. Herein lies the challenge of defining terrorism acts in the absence of an internationally agreed upon definition. Perhaps the entire definition should be done away with to avoid misinterpretation.

2.7.Expedite police reforms

The police reforms that were passed in 2015 need to be implemented promptly so as to witness the materialisation of strategies such as the mandatory training of police officers and an improvement in the execution of the *Nyumba Kumi* initiative.

Conclusion

Useful intelligence and surveillance plays a vital role in ensuring national security and averting potential threats to the life of the nation. The gathering of intelligence can be the difference between loss of lives and destruction of property and continuous peaceful relations in Kenya. Unlike other civil liberties, the interaction between the right to privacy

²⁸⁶ Horchem H, 'The Lost Revolution of West Germany's Terrorists' in Rapoport D, *Terrorism and Political Violence*, Taylor and Francis Online, 2007, 353-360.

²⁸⁷ Military given go-ahead to detain US terror suspects without trial, available at <https://www.theguardian.com/world/2011/dec/15/americans-face-guantanamo-detention-obama>, accessed on 30 January 2017.

and national security comes into play before, during and long after terrorist attacks. Therefore, it is pivotal that this right is afforded utmost respect and is utilised in accordance with the rule of law.

This study has tested and proved the hypothesis that Kenya can sustain the balance between providing national security and upholding the right to privacy. This can be achieved through employing the court to safeguard the right to privacy by monitoring police activities and promoting the use of intelligence led investigations that do not infringe on the right. Limitations on the right to privacy should be within constitutional bounds.

The Sociological school of thought discussed at the beginning of this study best coincides with the theory of balancing the two competing interests; national security and right to privacy. The jurisprudential theory posits that the success of a democracy is determined by its ability to reconcile competing interests. Thus, Kenya can only be considered a fully democratic state if it is able to sustain the balance between national security and the right to privacy during good times and tumultuous times.

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