

**THE CONSTITUTIONALITY OF THE EXERCISE AND
REGULATION OF THE FOREIGN AFFAIRS POWER
BY COUNTY GOVERNMENTS**

**A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILMENT OF
THE BACHELOR OF LAWS DEGREE**

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Table of Contents

DISSERTATION DECLARATION FORM iv
ACKNOWLEDGEMENTS v
ABSTRACT vi
LIST OF ABBREVIATIONS vii
LIST OF CASES viii
CHAPTER ONE: INTRODUCTION 1

 1.1: Background 1

 1.2: Statement of the Problem 2

 1.3: Justification of the study 2

 1.4: Hypothesis 2

 1.5: Statement of Objectives 2

 1.6: Research Questions 3

 1.7: Literature Review 3

 1.7.1: Foreign Affairs 3

 1.7.2: Devolution 5

 1.8: Limitations 8

 1.9: Methodology 8

 1.10: Chapter Summary 8

CHAPTER TWO: THEORETICAL FRAMEWORK 10

 2.1: Constitutionalism 10

 2.2: Conclusion 14


**CHAPTER THREE: CONCEPTUALISING THE FOREIGN AFFAIRS
POWER AND DEVOLUTION** 15

 3.1: Historical Perspective of Devolution in Kenya 15

3.1.1: Colonial Era.....	15
3.1.2: Post-independence Era.....	17
3.2: Historical Perspective of the Foreign Affairs Power.....	20
3.3: Foreign Affairs Power and Devolution.....	21
3.3.1: Diplomacy	22
3.3.2: Treaty Making	25
3.4: Conclusion	26
CHAPTER FOUR: THE LEGAL AND REGULATORY FRAMEWORK GOVERNING THE EXERCISE OF FOREIGN AFFAIRS POWER	28
4.1: Introduction.....	28
4.2: The Constitution of Kenya.....	29
4.3: The Treaty Making and Ratification Act No.45 of 2012.....	30
4.4: Executive Order No.2 of May 2013	34
4.5: Ministry of Foreign Affairs and International Trade.....	35
4.6: Conclusion	36
CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS.....	38
5.1: Findings	38
5.2 Recommendations	39
BIBLIOGRAPHY	40

DISSERTATION DECLARATION FORM

This dissertation is my ORIGINAL work and has not been presented for a degree in any other University.

SIGNED 

DATE 13th April 2016

MAINA EVA NYAMBURA

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

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DATE 13. April. 2016

DR. LUIS G. FRANCESCHI

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ABSTRACT

Traditionally, Foreign Affairs Power has exclusively been the domain of the State. In Kenya, however, the introduction of devolution by the 2010 Constitution has led to the formation of county governments mirrored on the structure of the National Government. There have been members of these county governments who have sought to form relations with foreign entities including foreign states, and thus seem to exercise some limited foreign affairs power. The objective of this paper is to research the exercise of this power and determine whether county governments can constitutionally yield such power.

Through a purposive approach, it can be concluded that county governments can exercise some form of limited foreign affairs power. This power is not absolute and must be limited. The Ministry of Foreign Affairs has taken some steps to try and regulate this power. This regulation is not enough. There is a need to develop a proper legal framework to check the activities of the county government in the international plane.

This research has mainly been a qualitative research. In writing the dissertation, an in-depth analysis of primary resources, such as the Constitution as well as Acts of Parliament, has been carried out. There has also been a review of secondary material as well as an interview at the Ministry of Foreign Affairs that has been used as a source of information.

LIST OF ABBREVIATIONS

IBEAC	Imperial British East Africa Company
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
MCA(s)	Member(s) of the County Assembly

LIST OF CASES

Timothy Njoya and other v Attorney General and others(2004) AHRLR

Martin NyagahWambora and others v The Speaker of the Senate and others[2014]
eKLR

CHAPTER ONE:INTRODUCTION

1.1: Background

Kenya's political crisis has been characterised by the concentration of power in the presidency and centralised institutions without appropriate checks on these powers.¹ To reverse this trend, the 2010 Constitution proposed a devolved structure of government. This constitution was overwhelmingly voted for on 4 August 2010.

Devolution in Kenya is a system of multilevel government under which two distinct and interdependent levels of government- national and county- are required to conduct their mutual relations in a consultative and cooperative manner.²The 2010 Constitution has specifically provided for a devolved system in Article 6 as well as Chapter 11. Kenya now has 47 counties which are listed in the First Schedule of the Constitution. The county governments have a structure similar to that of the national government, with a Governor who chooses his or her executive committee. Each county also has a legislative assembly, with elected members.

The Constitution has gone further, to set out the jurisdiction and responsibilities of both the national government and the county governments, in the Fourth Schedule. In regards to foreign affairs power, the Constitution has stated that foreign affairs, foreign policy and international trade is the mandate of the National Government.³

In the past two years, however, many counties have sent county officials, including Governors, Members of the County Assembly (MCAs) and Executive Committee members, abroad to conclude deals with other state actors and to garner goodwill for their counties. This has led to the conclusion of agreements and contracts with

¹Juma D, 'Devolution of power as constitutionalism: The constitutional debate and beyond. Ethnicity, Human Rights and Constitutionalism in Africa' *International Commission of Jurists*, (2008), 1. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1382821 on 7 January 2016.

²Mutakha J, *Constitutional Law of Kenya on Devolution*, Strathmore University Press, Nairobi, 2015, 10.

³ Fourth Schedule, *Constitution of Kenya* (2010).

public foreign entities. Since then, the Ministry of Foreign Affairs has come up with regulations to govern foreign travel by county governments.⁴

1.2: Statement of the Problem

This paper seeks to find out whether the county governments can be considered to be constitutionally exercising some sort of foreign affairs power, and whether the actions taken by the Ministry of Foreign Affairs to regulate the exercise of this power are sufficient and consistent with the Constitution.

1.3: Justification of the study

This research is relevant as it will investigate the relationship of the two levels of government from a novel angle.

It is also relevant as there seems to be a problem, especially for the National Government, to adequately carry out its constitutional mandate. This is seen from all the complaints that the Ministry of Foreign Affairs has received from countries such as Rwanda, China, Malaysia and Singapore about the numerous delegations from county governments.⁵

1.4: Hypothesis

The study is premised on the assumption that County governments are exercising some limited form of foreign affairs power.

1.5: Statement of Objectives

The following are the objectives of this research paper:

⁴<http://www.nation.co.ke/counties/New-rules-foreign-travel-counties/-/1107872/2515870/-/om1vne/-/index.html> on 7 January 2016.

⁵<http://www.nation.co.ke/news/Kenya-risks-being-blacklisted-over-unplanned-foreign-trips/-/1056/2498886/-/tcg0oi/-/index.html> on 7 January 2016.

- To determine whether the county governments may constitutionally exercise limited Foreign Affairs Power.
- To determine whether the regulation of the limited Foreign Affairs Power that the county governments may exercise is sufficient and is in line with the Constitution.

1.6: Research Questions

The following are the research questions of this paper:

- Can the county governments constitutionally exercise Foreign Affairs Power?
- If they do so, is the existing regulation of this power sufficient and constitutional?

1.7: Literature Review

1.7.1: Foreign Affairs

Foreign relations can be understood as the process and consequences of interactions with other states. The foreign affairs function is expressed, asserted and commanded through the exercise of a power, the foreign affairs power. The foreign affairs power is defined as the competence to decide and act in matters having to do with the interests of the home state in foreign states.⁶ The view espoused from this definition is that foreign affairs power is exercised only by states.

According to Franceschi⁷, foreign affairs power includes four distinct powers: Treaty Making, Diplomacy, Recognition of States and Governments and Declaration

⁶Franceschi L, 'The Constitutional Regulation of the Foreign Affairs Power: The Kenyan Experience in a Comparative Perspective' LL.M Thesis, University of Nairobi, 1999, 23.

⁷Franceschi L, 'The Constitutional Regulation of the Foreign Affairs Power: The Kenyan Experience in a Comparative Perspective' LL.M Thesis, University of Nairobi, 1999. 22. See also Franceschi L, *The African Human Rights Judicial System, Viewed from a Foreign Affairs Perspective*, Cambridge Scholars Publishing, London, 2014, 21.

of War and Peace. The powers of Treaty Making and Diplomacy will be further discussed in this research paper.

Scholars have either considered treaties in a wide sense, (*latusensu*) or in a strict and limited sense, (*strictusensu*). Treaty '*strictusensu*' comprises only those treaties establishing a legal relation which gives rise to rights and obligations, while, treaty '*latusensu*' is a more general and open definition which comprises not only those agreements establishing a legal relation but any relation, be it legal or not.⁸ For the purposes, of this research, the wider definition of treaties will be used.

According to the 1986 Vienna Convention on the Law of Treaties, a treaty refers to an agreement which establishes relations between two entities either states, or a state and an international organisation.⁹ County governments have concluded cooperation agreements with foreign entities. An example of one such treaty is one concluded between the Nyamira County Government and the German Government for the development of sports in the region.¹⁰ It is therefore worth interrogating if these agreements may be considered as treaties and if the county governments are thus exercising foreign affairs power.

Diplomacy is often narrowly defined as the art of conducting negotiations and concluding treaties between states,¹¹ or as broadly as the art of negotiations.¹² Mwangi, as cited by Franceschi, asserts that diplomacy is the study

⁸Franceschi L, 'The Constitutional Regulation of the Foreign Affairs Power', 117-118.

⁹ Article 2, 1986 *Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations*, 21 March 1986.

¹⁰<http://www.nation.co.ke/counties/kisumu/Nyamira+to+partner+with+Germany+to+help+youth/-/1954182/1954690/-/a0m7xkz/-/index.html> on 7 January 2016.

¹¹BolshiaSovetskaiaEntsiklopediia, 2nd Edition, XIV, at 405, cited by Franceschi L, 'The Constitutional Regulation of the Foreign Affairs Power: The Kenyan Experience in a Comparative Perspective' (LL.M Thesis, University of Nairobi 1999), 219.

¹²W. Garden in *TraiteComplet de Diplomatie, au TheorieGenerales des Relations Exterieurs des Puissances de l'Europe* (Paris: Libraire de Treuthel el Wurtz, 1883) I, at 1-2. Cited by L G Franceschi, 'The Constitutional Regulation of the Foreign Affairs Power: The Kenyan Experience in a Comparative Perspective' LL.M Thesis, University of Nairobi 1999, 244.

of the relations between actors in international relations and the mechanisms, process and rules by which those relations are rendered functional.¹³ It is clear that for there to be any diplomacy, there must first be the establishment of some sort of relationship between two or more foreign entities. Thereafter, diplomacy will come into effect as it is the rule or accepted way that these two entities will enhance their relations.

The purpose of diplomacy is to strengthen the state, nation, or organization it serves in relation to others by advancing the interests in its charge.¹⁴ Diplomacy is therefore aimed at securing the interests of the state. The county governments, whose concerns is the welfare of the people in the respective counties have undertaken many foreign visits and have tried to garner good will for their counties. This may be considered as exercise of diplomacy and by extension the exercise of foreign affairs power.

1.7.2: Devolution

According to Chikulo,¹⁵ Decentralisation is the change in the organisation of the central to the state, which involves the transfer of power or functions to the sub-national level or from one sub-national level organisation to another.

For some authors, devolution is a form of decentralisation. According to Rondinelli and Nellis,¹⁶

“Decentralisation is the transfer or delegation of legal or political authority to plan, make decisions and manage public functions from central government and its

¹³ M Mwangiru, in a paper presented at the Seminar on Diplomacy, Culture and Media, Institute of Diplomacy and International Studies, University of Nairobi, 1-3 August, 1991, Cited by L G Franceschi, ‘The Constitutional Regulation of the Foreign Affairs Power: The Kenyan Experience in a Comparative Perspective’ LL.M Thesis, University of Nairobi 1999.

¹⁴<http://www.britannica.com/topic/diplomacy> on 7 January 2016.

¹⁵Chikulo B C, ‘Decentralization for Good Governance and Development: The Zambian Experience’ *Regional Development Dialogue* 21, 1(2000) 26-48.

¹⁶Rondinelli D A and Nellis JR, ‘Assessing Decentralization Policies in Developing Countries’ *Development Policy Review* Vol. 4(1), (March 1986), 3-23.

agencies to subordinate units of government, semi-autonomous public corporations, area-wide or regional development authorities, functional authorities, local government or non-governmental organizations”.

In this context, devolution, considered as one of the ways in which decentralisation occurs, could be simply defined as the process of transferring decision-making and implementation powers, functions, responsibilities and resources to legally constituted, and popularly elected local governments.¹⁷

Rondinelli, Nellis and Cheema have interrogated the notion of devolution. They have stated that:

“Devolution is the creation or strengthening--financially or legally--of subnational units of government, the activities of which are substantially outside the direct control of the central government. Under devolution, local units of government are autonomous and independent, and their legal status makes them separate or distinct from the central government. Central authorities frequently exercise only indirect, supervisory control over such units. Normally, local governments have clear and legally recognised geographical boundaries within which they exercise an exclusive authority to perform explicitly granted or reserved functions. They have corporate or statutory authority to raise revenues and make expenditures. They should be perceived by local citizens as organizations providing services that satisfy their needs, and as governmental units over which they have some influence. Devolution establishes reciprocal and mutually benefiting relationships between central and local governments. That is, the local governments are not merely subordinate administrative units, but they have the ability to interact reciprocally with other units of government in the political system of which they are a part”.¹⁸

From this it clear that the devolved units are autonomous and should have adequate power to help them carry out their functions while still maintaining their independence. This would mean that it may be appropriate to allow the devolved

¹⁷The Kenyan Section of the International Commission of Jurists, ‘Handbook on Devolution’(2013), 5.

¹⁸Rondinelli D, Nellis R and Cheema G, ‘Decentralization in Developing Countries A Review of Recent Experience’ *World Bank Staff Working Papers, Number 581*, (1983), 24.

units to interact with other units of government even other foreign governments. The authors have also recognised the need for indirect, supervisory control by the by the central government, as well as the need for the devolved units to be allowed to raise funds and revenue to ensure that there are able to perform their duties effectively. If the devolved government, therefore, is to effectively carry out its functions, raise sufficient revenue and still maintain its independence it must be able to interact with other entities, either domestic or foreign. This may led to the exercise of the foreign affairs power by county governments.

According to Oloo, any devolved government must embody three basic features:

“First, autonomy and independence from the national government; secondly, the units of administration must have clear and legally recognised geographical boundaries over which to exercise power and perform public functions; and thirdly, they should be accorded corporate status and the power to raise sufficient resources to carry out functions.”¹⁹

This is similar to the reasoning of Rondinelli et al. Thus, it is evident the devolved units, such as the county governments in Kenya, should have a certain autonomy and independence and should be able to raise sufficient revenue to carry out its functions.

It is evident that for devolution to be effective, the county government should be autonomous and should have the power to raise sufficient revenue to fulfil its allocated functions. This might mean that county governments should enter into relations with other entities so as to fulfil its constitutional mandate. These relations may also include relations with foreign governments. However, the function of conducting international relations has been generally vested on the national government. The dilemma therefore presents itself when it is necessary for a county government to enter into agreements with foreign governments so as to fulfil its

¹⁹Oloo A, ‘Devolution and Democratic Governance: Options for Kenya’ *IPAR Discussion Paper Series, Discussion Paper No.077/2006*. Cited in Lumumba P and Franceschi L, *The Constitution of Kenya, An Introductory Commentary*, Strathmore University Press, Nairobi, 2014, 517. See also Handbook on Devolution, The Kenyan Section of the International Commission of Jurists, 2013, 6.

constitutional mission, yet foreign affairs power in general have been vested on the national government.

1.8: Limitations

The Constitution is fairly new and there has been very little written on it especially in regards to foreign affairs under the 2010 constitution. It will be difficult to do the research due to limited literature on the topic.

There will be limited time to carry out the research.

It will also be difficult to collect primary data which may not be easily accessible to the public.

1.9: Methodology

The research will be based on primary and secondary sources.

The primary sources will be interviews of representatives from the Ministry of Foreign Affairs. The primary sources also include the Constitution and any relevant statutes.

The secondary sources refer to literature produced by scholars in regards to foreign affairs and devolution. These are treatises, books, journal articles and credible newspaper publications.

1.10: Chapter Summary

This is the chapter breakdown of my dissertation.

- Chapter 1: Introduction

This chapter gives the background of the research. It also discusses the problem statement. This chapter sets out the research questions and the research objectives.

- Chapter 2: Theoretical Framework

This Chapter will discuss the theoretical framework that informs this research.

- Chapter 3: Conceptualisation of Foreign Affairs Power and Devolution

In this chapter, there will be a historical perspective on Foreign Affairs Power and Devolution. This chapter will also discuss further the ideas of Foreign Affairs Power and Devolution.

- Chapter 4: Legal and Regulatory Framework of Foreign Affairs Power

In this chapter, there will be a discussion on the current legal and regulatory framework of Foreign Affairs. There will also be a discussion on the steps taken by the national government in dealing with the foreign travels and activities undertaken by the county governments.

- Chapter 5: Findings and Recommendation

This chapter will contain a summary of the findings and recommendations suggested as a result of the research. It will also have the conclusion.

CHAPTER TWO: THEORETICAL FRAMEWORK

2.1: Constitutionalism

The State is not an absolute entity. There are limitations on the power that the State can exercise. This is in the form of constitutional checks and balances.²⁰ The State requires the existence of legal systems, checks and balances that secure the rule of law within the political society. The checks and balances act as regulators or valves that limit the strength, technique and manner with which the state may exercise power over its subjects and the extent of those powers.²¹

John Locke, as well as other political theorists is of the opinion that government can and should be legally limited in its powers. The authority or legitimacy of the government depends on its observing these limitations.²²

The legal theory that informs this study is that of constitutionalism. This theory proposes that the constitution of a place should limit the exercise of power by the government. The necessity of limited government is often associated with the idea of constitutionalism. This ideal of constitutionalism is particularly associated with the existence of a written constitution from which the state's authority and legitimacy may be derived, and which limits the power of the state and helps to protect the rights of individuals and minorities.²³

²⁰Franceschi L, *The African Human Rights Judicial System, Viewed from a Foreign Affairs Perspective*, Cambridge Scholars Publishing, 2014, 1.

²¹ Lumumba P and Franceschi L, *The Constitution of Kenya, An Introductory Commentary*, Strathmore University Press, Nairobi, 2014, 1.

²²<http://plato.stanford.edu/entries/constitutionalism/> on 7 January 2016.

²³Bradley AW and Ewing KD, *Constitutional and Administrative Law*. 15th ed, Pearson Education Publishing, New York, 2011, 8.

Constitutionalism is the actual and real exercise of power according to the spirit and letter of constitution, that is, a limited government which shares out authority among a set of different branches in which limitations are implied, or should be implied.²⁴ In the Kenyan context, the constitution has attempted to limit government by providing for separation of power by the executive, legislature and judiciary.

Justice Ringera in the case *Timothy Njoya and other v Attorney General and others*, stated;

‘the concept of constitutionalism betokens limited government under the rule of law. Every organ of government has limited powers, none is inferior or superior to the other, and none is supreme: the Constitution is supreme and all bow to it.’²⁵

Kenya has a written constitution which is the supreme law of the land and any power exercised by the government, must be authorised by the Constitution.²⁶ The 2010 Constitution states that sovereign power belongs to the people of Kenya and shall be exercised in accordance with the Constitution.²⁷ This sovereign power is delegated to the three arms of government, with executive power to be exercised by both the national and county executive.²⁸ This sovereign power is exercised at both the national and county level.²⁹ The Constitution then goes further to state that it is the supreme law of the land and binds all persons and all state organs at both levels of government.³⁰ Therefore all claim or exercise of state authority must be

²⁴ Lumumba P and Franceschi L, *The Constitution of Kenya, An Introductory Commentary*, 8.

²⁵ (2004) AHRLR 157 (KeHC 2004), 29.

²⁶ Article 2, *Constitution of Kenya* (2010).

²⁷ Article 1(1), *Constitution of Kenya* (2010).

²⁸ Article 1(3), *Constitution of Kenya* (2010).

²⁹ Article 1(4), *Constitution of Kenya* (2010).

³⁰ Article 2(1), *Constitution of Kenya* (2010).

authorised by the Constitution.³¹ All laws, including customary law, must be consistent with the Constitution.³²

The courts have asserted the supremacy of the Constitution in unambiguous terms. In the case of *Martin Nyagah Wambora and others v The Speaker of the Senate and others*,³³ the High Court commented the following on Article 2 of the 2010 Constitution:

‘This means that no person or state organ is above the law and above the Constitution. All organs created by the Constitution are subordinate to it.’³⁴

The exercise, therefore, of any power by government must be mandated by the Constitution. This means that the exercise of Foreign Affairs Power must be constitutional.

Eighteenth century writers, particularly Montesquieu and Blackstone, defined “executive” power to include foreign affairs powers. Montesquieu, for example, wrote: “In every government, there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.”³⁵ Montesquieu considered executive powers dependent on the law of nations to include things like war and peace, ambassadors, defense, and national security.³⁶

³¹Article 2(2), *Constitution of Kenya* (2010).

³²Article 2(4), *Constitution of Kenya* (2010).

³³[2014] eKLR.

³⁴[2014] eKLR.

³⁵ Baron de Montesquieu, *The Spirit of The Laws*, Translated by Thomas Nugent, Batoche Books, Ontario, 2001, 171.

³⁶Ramsey M, ‘The Textual Basis of the President’s Foreign Affairs Power’ *Harvard Journal of Law and Public Policy*, Volume 30(2006), 142.

Foreign Affairs and thus foreign affairs law is, at its roots, constitutional law.³⁷ Foreign Affairs Power is therefore limited, in the national and international sphere. In the national sphere it is limited by the constitution and any other valid laws of the state. In the international sphere it is limited partly by the peremptory norms of international law (*jus cogens*), which any foreign affairs power is to abide by, and partly by the specific regulations of any international negotiation that the State gets involved in.³⁸

Supremacy of the constitution means that the constitution is the supreme law of the Republic. Therefore, devolution being an aspect of the constitution binds all persons and all State organs at both levels of government.³⁹ This means that the constitution as the *grundnorm*, must also govern devolution.

There should be limitation of the powers exercised by the government. This is because experience has shown that power corrupts, and absolute power corrupts absolutely. Foreign affairs power therefore is a constitutional power that is to be exercised by the government. This power must be limited and there must be external checks on the exercise of this power. Ramsey in speaking of the Constitution of the United States of America stated:

‘How the United States conducts diplomacy, makes international agreements, follows or fails to follow those agreements, and exerts its military and economic power are questions governed in the first instance by the U.S. Constitution.⁴⁰ We expect the Constitution to tell us which branch of the federal government – President, Congress, President plus Senate – is the appropriate decision maker on

³⁷ Ramsey MD, *The Constitution's Text in Foreign Affairs*, Harvard University Press, Harvard, 2007, 1. See also Franceschi L, ‘The Constitutional Regulation of the Foreign Affairs Power’, 110.

³⁸ Franceschi L, *The African Human Rights Judicial System, Viewed from a Foreign Affairs Perspective*, Cambridge Scholars Publishing, London, 2014, 19-20.

³⁹ The Kenyan Section of the International Commission of Jurists, ‘Handbook on Devolution’ (2013), 5.

⁴⁰ Ramsey MD, *The Constitution's Text in Foreign Affairs*, Harvard University Press, 2007, 1.

these matters; to tell us the relationship between the federal government and the states; and to provide a role for the courts.’⁴¹

2.2: Conclusion

Constitutionalism is the idea of a limited government. In jurisdictions such as Kenya with a written constitution, the exercise of power by any arm of the government must be limited by the Constitution. This is espoused in the 2010 Constitution which clearly states that the Constitution is the supreme law of the land. In this regard, the exercise of foreign affairs power by any level of government must be constitutional. This means that there must be a constitutional basis for the exercise of limited foreign affairs power by the county governments.

Moreover, devolution is constitutional good. Therefore all exercise of power by county governments must be constitutional. County governments can only exercise power as derived from the 2010 Constitution.

⁴¹Ramsey MD, *The Constitution's Text in Foreign Affairs*, 1.

CHAPTER THREE: CONCEPTUALISING THE FOREIGN AFFAIRS POWER AND DEVOLUTION

3.1: Historical Perspective of Devolution in Kenya

3.1.1: Colonial Era

British control of present-day Kenya began on 3 September 1888, when a charter was given to the Imperial British East Africa Company (IBEAC) to govern the territory.⁴² Kenya then became a British Protectorate in 1895 when the IBEAC collapsed. This was after experiencing financial difficulties. This caused the British to assert greater control in the territory in order to protect their vested interests in Africa.⁴³

During colonial times, the British developed a unitary system with a highly centralised government. However, the British soon differentiated between the ‘white settlers’ and the ‘native’ people by creating white settler areas (the white highlands) and pushed the Africans to the reserves. There arose different development policies as well as different institutions that dealt with the interests of the two groups.⁴⁴

The first legal instrument establishing an administrative system was the East Africa Order in Council of 1897. At this time a Commissioner was appointed by Her Majesty to be the chief executive officer of the territory with extensive powers. The

⁴² Gustafson L, Kenya: ‘The Struggle to Create a Democracy’ *Brigham Young University Law Review*, 2(1995), 649.

⁴³ Gustafson L, Kenya: ‘The Struggle to Create a Democracy’, 649.

⁴⁴ Mutakha J, *Constitutional Law of Kenya on Devolution*, Strathmore University Press, Nairobi, 2015, 65-66.

Commissioner soon developed a system of provincial administration to help administer the Protectorate.⁴⁵

Gradually there was the development of local government along dualist lines, with a different way of administration for the white settled areas and the African reserves. The involvement of Africans in administration began with the creation of the African native courts under the 1897 East African Order in Council; the appointment of African village headmen under the 1902 Order in Council and Village headmen Ordinance; and the 1902 Order in Council under which the Commissioner created provinces and districts and appointed provincial and district commissioners.⁴⁶ The Provincial commissioners were empowered to appoint chiefs as agents of the central government, and any native or natives to be official headmen or collective headmen of any village or villages.⁴⁷

In 1924, local native councils were established with the district commissioner as chairman and chief executive authority. They were given the power to levy poll taxes, and began, under the wing of the provincial administration, to undertake a fairly wide range of services.⁴⁸ All the officials in this council including the Africans were chosen by the provincial commissioner.⁴⁹ Following pressure from Africans, the 1937 Native Authority Ordinance was enacted, permitting the election of Africans by Africans to the Local Native Councils even though the district commissioner retained the power to remove any elected member perceived to be inappropriate.⁵⁰

⁴⁵Mutakha J, *Constitutional Law of Kenya on Devolution*, 69.

⁴⁶Mutakha J, *Constitutional Law of Kenya on Devolution*, 69.

⁴⁷ Commission of Inquiry on Local Authorities in Kenya, *Report of the Commission of Inquiry on Local Authorities in Kenya: A Strategy for Local Government Reform in Kenya (1995)*, 6 as Cited in Mutakha J, *Constitutional Law of Kenya on Devolution*, Strathmore University Press, 2015, 69.

⁴⁸ Local Government Commission of Inquiry, *Report of The Local Government Commission of Inquiry*, 1966, 1.

⁴⁹Mutakha J, *Constitutional Law of Kenya on Devolution*, 70.

⁵⁰Mutakha J, *Constitutional Law of Kenya on Devolution*, 70-71.

The subsequent African District Councils Ordinance of 1950 replaced the Local Native Councils with African District Councils. This was a major step towards a democratic system of local government in the African areas. Though the district commissioner still remained the chairman of the council, with considerable powers of control, and the administrative chiefs still made up a proportion of the membership, there was usually a majority of elected members, and the new councils had greatly enhanced status and powers.⁵¹

Generally between 1952 and 1963, the country developed three parallel systems of local government: municipalities, white settler areas and African areas.⁵²

3.1.2: Post-independence Era

During the negotiations of independence, those agitating for independence were divided into two main groups. The members of the Kenya African Democratic Union party (KADU) pushed for a federal system of governance while those in the Kenya African National Union party (KANU), wanted Kenya to be a unitary state with a centralised system of governance. Finally KANU decided to accept the federal constitution so that the country can finally achieve independence.⁵³ Therefore at independence the country had a devolved system of government with the country divided into different regions or *majimbo*. The Independence Constitution created three levels of government; the national and regional government as well as the local government. There were seven regions, each with a president and vice president as well as a legislative assembly. The Independence Constitution provided for three structures. The first was the devolution of certain tax and financial powers to seven newly created Regional Authorities. The second vested control of Trust Land in the County (formerly African District) councils.

⁵¹ Local Government Commission of Inquiry, *Report of The Local Government Commission of Inquiry*, 1966, 1.

⁵² Mutakha J, *Constitutional Law of Kenya on Devolution*, 71.

⁵³ Khaunya FM, Wawire PB, Chepng'eno V, 'Devolved Governance in Kenya: Is it a False Start in Democratic Decentralization for Development?' *International Journal of Economics, Finance and Management*, Vol. 4, No. 1, January 2015, 29.

Thirdly, is set up a bicameral legislature with a House of Representatives and a Senate. The Senate was to represent district interests. A regional assembly composed of elected member was established at a regional level with the responsibility to make laws. The Assembly elected a president amongst themselves.⁵⁴

When elections were carried out in 1963, KANU won majority of the seats in Parliament and formed the government, under the Independence Constitution which provided for a regional system of government.

In 1964, there was the first amendment to the Independence Constitution through the Kenya Amendment Act number 28 of 1964. This amendment altered the regional government through the following changes;

- a) It repealed the provisions that allowed for independent revenue of the regions thus making the regions wholly dependent on the centre;
- b) It deleted most of the regional provisions for the exercise of power over agricultural, veterinary and educational matters;
- c) It revised the regional taxation powers;
- d) It abolished the regional contingency provisions;
- e) It vested parliament with the power to establish and supervise local authorities;
- f) It vested the president with sole exclusive power over government land; and
- g) It abolished the central land board.⁵⁵

The third constitutional amendment of the Independence Constitution was another blow to the devolved system of government. This amendment constituted through the Constitution of Kenya (Amendment) Act No.16 of 1995 completely abolished *majimbo* government and replaced these with Provinces and Councils.⁵⁶The Senate was abolished in December 1966 through the seventh amendment to the

⁵⁴Omolo A, 'Devolution in Kenya: A Critical Review of Past and Present Frameworks' *Devolution in Kenya Prospects, Challenges and the Future, IEA Research Paper, Series No.24, 2010, 27.*

⁵⁵ Lumumba P and Franceschi L, *The Constitution of Kenya, An Introductory Commentary*, Strathmore University Press, Nairobi, 2014, 32.

⁵⁶ Lumumba P and Franceschi L, *The Constitution of Kenya, An Introductory Commentary*, 33.

Independence Constitution. The Ninth Amendment to the Independence Constitution was effected through the enactment of the Constitution of Kenya (Amendment) Act No 16 of 1968. This amendment eliminated the provincial councils, repealed all past laws of the regional assemblies, and deleted from the Constitution all reference to the provincial and district boundaries and their alteration.⁵⁷ Therefore between 1964 and 1970, the Kenyan government effectively did away with the regional governments, centralized authority over finances, and abolished the Senate.⁵⁸

After abolishing the regional governments, the central government also weakened the local government firstly through political and administrative mechanisms where the District Commissioner, an agent of the central government, was represented in the local authorities; secondly through lack of adequate funds in the local authorities and lastly through stringent legislation controlling the activities of the local government.⁵⁹

The 1990s marked the beginning of a long process of agitation for constitutional reform. One of the major reforms suggested aimed at adopting a devolved structure of power.⁶⁰ This finally culminated with the adoption of the Constitution of Kenya 2010. Under this Constitution, a system of devolved government was introduced to try and remedy some of the abuses from the highly centralised system such as bureaucratic inefficiencies, lack of accountability and transparency, unequal distribution of national resources and minimal community participation in local development, amongst others.⁶¹

The Constitution established forty-seven county governments, based on the districts established by the Provinces and Districts Act of 1992. A new development of the

⁵⁷ Lumumba P and Franceschi L, *The Constitution of Kenya, An Introductory Commentary*, 35.

⁵⁸ Khaunya F M et al, 'Devolved Governance in Kenya', 28.

⁵⁹ Mutakha J, *Constitutional Law of Kenya on Devolution*, 76-80.

⁶⁰ Mutakha J, *Constitutional Law of Kenya on Devolution*, 84.

⁶¹ Khaunya FM et al, 'Devolved Governance in Kenya', 28.

system of devolution created under the 2010 Constitution is the guarantee of 15 per cent of national revenues to be transferred to the county governments on an unconditional basis. Similarly, important is the assignment of major state functions in the areas of health and agriculture.⁶²

3.2: Historical Perspective of the Foreign Affairs Power.

There is a long history of the exercise of foreign affairs power going back more than the last two millennia. Sovereigns sent envoys to other sovereigns for various reasons: to prevent wars, to cease hostilities, or merely to continue peaceful relations and further economic exchanges.⁶³

In the Ancient world, there was already foreign affairs power that was exercised by many of the kings or emperors in the most notable empires. Diplomacy was exercised in ancient Greece and Rome. Specific works such as Homer's Iliad and Thucydides' The Peloponnesian Wars contain many references to diplomatic missions, treaties, negotiations, and other concepts associated with foreign affairs. Despite the fact that the Roman Empire is known for its military conquests, Ancient Rome was also engaged in extensive diplomacy.⁶⁴ In 2300BC, the first known peace treaty was signed between the King of Assyria and the King of Ebla, in what is present day Syria. From the eighth to the third century BC, China was divided among several "warring states". These states conducted diplomacy as well as fight each other.⁶⁵ There is also evidence from about 1280 BC of treaties concluded between Ramses II of Egypt and Hittite leaders.

⁶²Khaunya F M et al, 'Devolved Governance in Kenya', 32.

⁶³<http://www.publicdiplomacy.org/70.htm> on 7 January 2016.

⁶⁴ Richard Rousseau: From Ancient Greek Diplomacy to Modern Summitry, September 20 2011, <http://www.diplomaticourier.com/from-ancient-greek-diplomacy-to-modern-summitry/> on 7 January 2016.

⁶⁵Nigro L J, 'Theory and Practice of Modern Diplomacy: Origins and Development to 1914' *USAWC Guide to National Security Issues, Vol I: Theory of War and Strategy*, Strategic Studies Institute of the US Army War College (SSI), Carlisle, United States, 2008, 195. <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id=57393> on 7 January 2016.

In Kenya, The Ministry of Foreign Affairs was established in 1963, as the External Affairs Department under the office of the Prime Minister. The Prime Minister was then the first Minister for Foreign Affairs in Kenya. The Ministry was later renamed the Ministry of State for Foreign Affairs still under the Office of the President.⁶⁶

Historically, the foreign affairs power is considered to be, in English constitutional history, a "royal prerogative" which is exercised by the British Crown.⁶⁷ Through the first amendment to the Independence Constitution, all privileges and prerogatives enjoyed by the Queen was vested in the Government of Kenya and was to be exercised by the President. The foreign affairs power was then vested in the executive.

3.3: Foreign Affairs Power and Devolution

'Foreign affairs' is a wide term which expresses more than mere relations. It includes matters and things as well as relationships and a constitutional grant of legitimate plenary power. This entails that foreign affairs are matters relating to foreign countries, specifically, matters having to do with the interests of the home country in foreign countries.⁶⁸ This foreign affairs power consists of 4 distinct elements: treaty making power, the making of war and peace, diplomatic relations, recognition of foreign states and governments.⁶⁹ Of interest to this research are the elements of diplomatic relations and treaty making.

⁶⁶Ministry of Foreign Affairs and International Trade, Strategic Plan 2013 /14 - 2017/18, 18.

⁶⁷Ojwang J B. and Franceschi L, 'Constitutional Regulation of the Foreign Affairs Power in Kenya: A Comparative Assessment' 46 *Journal of African Law*, (2002), 47.

⁶⁸Ojwang JB and Franceschi L, 'Constitutional Regulation of the Foreign Affairs Power in Kenya: A Comparative Assessment', 43.

⁶⁹Ojwang J B and Franceschi L, 'Constitutional Regulation of the Foreign Affairs Power in Kenya: A Comparative Assessment', 45-46.

3.3.1: Diplomacy

The term *diplomacy* is derived through French from the ancient Greek *diplōma*, composed of *diplo*, meaning “folded in two,” and the suffix *-ma*, meaning “an object.” This folded document conferred a privilege—often a permit to travel—on the bearer, and the term came to denote documents through which princes granted such favours.⁷⁰

The purpose of diplomacy is to strengthen the state, nation, or organisation it serves in relation to others by advancing the interests in its charge. To this end, diplomatic activity endeavours to maximize a group’s advantages without the risk and expense of using force and preferably without causing resentment. Diplomacy normally seeks to develop goodwill toward the state it represents, nurturing relations with foreign states and peoples that will ensure their cooperation or—failing that—their neutrality.⁷¹ The goal of diplomacy is to further the State’s interests, which are dictated by geography, history, and economics.⁷²

Diplomacy has a long history, as long as that of civilisation. As far as is known, the first professional diplomatic corps appeared in the Byzantine Empire following the collapse of Rome in 476 AD. Byzantium established the world’s first department of foreign affairs, developed strict and complex diplomatic protocols, and actively sought intelligence about friend and enemy alike.⁷³

The art of diplomacy was carried to the next plane in Italy during the fifteenth and sixteenth centuries. The Italian city-states of the era engaged in constant intrigues

⁷⁰<http://www.britannica.com/topic/diplomacy> on 7 January 2016.

⁷¹<http://www.britannica.com/topic/diplomacy> on 7 January 2016.

⁷²Franceschi L, *The African Human Rights Judicial System, Viewed from a Foreign Affairs Perspective*, Cambridge Scholars Publishing, London, 2014,59.

⁷³ Richard Rousseau: From Ancient Greek Diplomacy to Modern Summitry, September 20 2011, <http://www.diplomaticourier.com/from-ancient-greek-diplomacy-to-modern-summitry/> on 7 January 2016.

against each other. During this era, diplomacy became identified with behind-the-scenes scheming, duplicity, and double-dealing.⁷⁴

Modern diplomacy's origins are often traced to the states of Northern Italy in the early Renaissance, with the first embassies being established in the thirteenth century.⁷⁵

Western European diplomacy continued to evolve in the seventeenth and eighteenth centuries, particularly in France.⁷⁶ The first foreign ministry was created in Paris by Cardinal Richelieu in 1626. Other European countries soon followed the French example.

With the Signing Treaty of Westphalia in 1648, there was the creation of the modern day state which is now the body that can exercise foreign affairs power.

In the nineteenth century, absolute monarchs gave way to constitutional monarchies and republics. Embassies and legations thus became more institutionalized all over Europe, and by the end of the nineteenth century European-style diplomacy had been adopted throughout the world.⁷⁷ Throughout the nineteenth century, diplomatic practices were formalized and regularized.⁷⁸

⁷⁴ Richard Rousseau: From Ancient Greek Diplomacy to Modern Summitry, September 20 2011, <http://www.diplomaticourier.com/from-ancient-greek-diplomacy-to-modern-summitry/> on 7 January 2016.

⁷⁵ <http://www.ediplomat.com/nd/history.htm> on 7 January 2016.

⁷⁶ Richard Rousseau: From Ancient Greek Diplomacy to Modern Summitry, September 20 2011, <http://www.diplomaticourier.com/from-ancient-greek-diplomacy-to-modern-summitry/> on 7 January 2016.

⁷⁷ <http://www.publicdiplomacy.org/70.htm> on 7 January 2016.

⁷⁸ Richard Rousseau: From Ancient Greek Diplomacy to Modern Summitry, September 20 2011, <http://www.diplomaticourier.com/from-ancient-greek-diplomacy-to-modern-summitry/> on 7 January 2016.

The period after World War 1 saw the creation of a string of International Governmental Organisations.⁷⁹ This has brought about a system of "multilateral diplomacy" which is still in place today.

Diplomatic relations are usually carried out through diplomatic missions which consist of active engagement with foreign countries. Article 3 of the 1962 Vienna Convention on Diplomatic Relations states the functions of a diplomatic mission to be as follows:

- i. Representing the sending State in the receiving State;
- ii. Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
- iii. Negotiating with the Government of the receiving State;
- iv. Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
- v. Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

In the case of county governments, they cannot have a permanent diplomatic mission in a foreign state; however when a county sends a delegation to foreign country, this delegation aims to carry out some of the functions that a diplomatic mission carries out. There might be a delegation from county government that aims either to represent its county in the receiving state; to protect the interests of its county in the receiving state; to negotiate with the receiving state, or to promote friendly relations between the county and receiving state. This means if one is to consider the functions of a diplomatic mission and the goals of diplomacy; it would seem that county governments to a limited extent carry out diplomacy.

⁷⁹ Richard Rousseau: From Ancient Greek Diplomacy to Modern Summitry, September 20 2011, <http://www.diplomaticourier.com/from-ancient-greek-diplomacy-to-modern-summitry/> on 7 January 2016.

3.3.2: Treaty Making

Treaties are international agreements concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.⁸⁰ From this definition, the key elements that differentiate treaties from other written agreements is that it is between two states and that treaties are governed by international law. Under international law, only states are allowed to make treaties as they are the main subjects of public international law. County governments cannot make treaties as defined by the 1969 Vienna Convention on the Law of Treaties, but they can make agreements with foreign public entities. As these contracts have a public aspect as both parties are public entities, they can be likened to treaties.

County governments are also autonomous and independent governments that should be able to manage their own affairs. County governments should also be able to determine how they will relate with other governments and other public entities. Section 6 of the County Governments Act, 2012 states that a county government may enter into partnerships with any public or private organisation in accordance with the provisions of any law relating to public or private partnerships for any work, service or function for which it is responsible within its area of jurisdiction.⁸¹ This Act does not limit such partnership to public entities within Kenya. It is possible, therefore, for county governments to make such partnerships with foreign governments.

From a purposive approach, county governments exercise some aspect of the foreign affairs power. Considering the aims of diplomacy and treaty making, county governments are able to exercise some limited form of foreign affairs power.

⁸⁰Article 2, Vienna convention on the Law of Treaties, 21 March 1969, 1155 UNTS 331.

⁸¹ Section 6, *County Governments Act* (No.17 of 2012).

3.4: Conclusion

Present day Kenya was first managed by the British as a territory by the Imperial British East Africa Company (IBEAC), then later as a Protectorate and finally as colony. During the colonial times there was some aspect of decentralisation of government local government which was built along racial lines. At Independence, KANU led by MzeeJomo Kenyatta formed the government in 1963. During the negotiations for independence, KANU had wanted the independent state to be a unitary state with a centralised government. In a bid not to delay independence, however, KANU accepted a constitution which provided for a regional government structure for the young nation. At independence therefore, Kenya had a regional government structure where there were autonomous regional units called *majimbo*. After Independence, MzeeJomo Kenyatta proceeded to amend the constitution and stripped the *majimbo* of their power and made Kenya a unitary state.⁸²

The practice of foreign affairs is an old activity with communities in the ancient world entering diplomatic relations with each other. The exercise of foreign affairs has evolved over time as well as the actors who exercise foreign affairs power. After the seventeenth century, the state emerged as the major actor on the international field. Since then it is states that are recognised as those with the authority to carry out foreign affairs power often through the executive.

Foreign Affairs Power has various elements, some of which is diplomacy and treaty making power. Diplomacy is aimed at strengthening the relations with foreign states as protecting the interests of the state. To this end, states such as Kenya establish diplomatic missions in other foreign states. County governments have made a number of visits to foreign states and have established relations with other foreign states. This can be considered to be a limited form of diplomacy. Some county governments have also entered into agreements with foreign public entities. These agreements are not treaties in the strictest sense but are very similar to them.

⁸²Mutakha J, *Constitutional Law of Kenya on Devolution*, 73.

In conclusion, county government, *strictusensudo* not exercise foreign affairs power in the traditional sense. Only states can exercise this power in the fullest sense. However, the county governments seem to be able to exercise to a limited extent, some power similar to this foreign affairs power.

CHAPTER FOUR:THE LEGAL AND REGULATORY FRAMEWORK GOVERNING THE EXERCISE OF FOREIGN AFFAIRS POWER

4.1: Introduction

The Constitution of Kenya, 2010, is the supreme law of the land.⁸³ All laws must be in tandem with the Constitution or they will be considered to be null and void.

The sources of law in Kenya are set out in the Constitution of Kenya, 2010 (2010 Constitution),⁸⁴ as well as in the Judicature Act.⁸⁵ Article 2 of the 2010 Constitution declares that the constitution is the supreme law of the land and that all laws must be in line with the constitution. The constitution also recognises customary law⁸⁶ as well as international law in form of custom⁸⁷ or treaties⁸⁸ to be sources in law in Kenya.

The Constitution, written laws in the form of Acts of Parliament and its subsidiary legislation and the unwritten sources of law such as customary law, the substance of common law, the doctrines of equity and the statutes of general application in force in England on 12th August 1897 are all sources of law in Kenya.⁸⁹

⁸³ Article 2, *Constitution of Kenya* (2010).

⁸⁴ Article 2, *Constitution of Kenya* (2010).

⁸⁵ Chapter 8, *Laws of Kenya*.

⁸⁶ Article 2(4), *Constitution of Kenya* (2010).

⁸⁷ Article 2(5), *Constitution of Kenya* (2010).

⁸⁸ Article 2(6), *Constitution of Kenya* (2010).

⁸⁹ Section 3, *Judicature Act*.

Foreign Affairs Power, as well as Devolution, is thus regulated by the Constitution as well as Acts of Parliament. The exercise of limited foreign affairs power by the county government is also limited by the national government. This is because the national government has limited powers of supervision and intervention in county affairs which are constitutionally circumscribed. This supervision, however, must be exercised within the framework of cooperative government.⁹⁰

These are the sources of law in regards to Foreign Affairs.

4.2: The Constitution of Kenya

The Constitution of Kenya, 2010, has clearly delineated the functions of the National and County governments in the Fourth Schedule. The First Part of this schedule clearly states that the National Government will be in charge of Foreign affairs, Foreign policy and International trade.⁹¹

In the previous constitutional context, the conduct of foreign affairs was wholly the prerogative of the chief executive, i.e. the President of the Republic. This is because the independent government of Kenya inherited all the prerogative powers that the Queen could exercise in relation to Kenya in 1964, via S.16 of the repealed Constitution of Kenya and Amendment Act, No.28, of that year.⁹² The 2010 Constitution has given the president and generally the executive the bulk of the foreign affairs power. This is clearly seen in Article 132 which gives the president the power to appoint high commissioners, ambassadors and diplomatic and consular representatives,⁹³ to receive foreign diplomatic and consular representatives,⁹⁴ and

⁹⁰Mutakha J, *Constitutional Law of Kenya on Devolution*, Strathmore University Press,2015, 10

⁹¹ Fourth Schedule, *Constitution of Kenya* (2010).

⁹²Bonaya B A , *Constitutionalisation of Foreign Policy and Diplomatic Relations.*, A presentation to the Constitution of Kenya Review Commission, 13 November 2001 <http://www.commonlii.org/ke/other/KECKRC/2001/11.html> on 7 January 2016.

⁹³ Article 132 (2) (e), *Constitution of Kenya* (2010).

⁹⁴ Article 132 (4) (b), *Constitution of Kenya* (2010).

with the approval of Parliament to declare war.⁹⁵The President also has to ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries.⁹⁶

From all the functions of the president as enumerated in Article 132 of the 2010 Constitution, read together with the fourth schedule which clearly states that foreign affairs, foreign policy and international relations, are to be dealt with by the national government, it is the president and the national government that exercises foreign affairs power.

The 2010 constitution also gives the legislature some foreign affairs power in regards to declarations of war. Article 95 (6) gives the National Assembly the power to approve declarations of war and extensions of states of emergencies.

4.3: The Treaty Making and Ratification Act No.45 of 2012

The Treaty Making and Ratification Act is an Act of Parliament to give effect to the provisions of Article 2(6) of the Constitution and to provide the procedure for the making and ratification of treaties and connected purposes.⁹⁷

This Act defines a treaty as an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation and includes a convention.⁹⁸This Act has allocated the responsibility of initiating the treaty making process, negotiating and ratifying treaties to the national executive.⁹⁹ This means that a county government strictly

⁹⁵Article 132 (4) (e), *Constitution of Kenya* (2010).

⁹⁶Article 132 (5), *Constitution of Kenya* (2010).

⁹⁷Long Title, *Treaty Making and Ratification Act*, (Act No.45 of 2012).

⁹⁸Section 2, *Treaty Making and Ratification Act*, (Act No.45 of 2012).

⁹⁹Section 4 (1), *Treaty Making and Ratification Act*, (Act No.45 of 2012).

cannot enter into a treaty as they can only be entered into by the national government.

The relevant national executive or state department shall initiate the treaty making process subject to the manner prescribed by the Cabinet Secretary in charge of foreign affairs matter.¹⁰⁰ This provision will ensure that there is uniformity on the initiation of the treaty making process among all state departments as they will be following the same guidelines as set out by the Cabinet Secretary. In regards to the agreements concluded by county governments, it is not clear whether there are set guidelines that dictates how the treaty making process will be undertaken.

During the treaty making process, the national executive or relevant state department are bound by the values and principles of the Constitution and shall also have to take into account the regulatory impact of the proposed treaty.¹⁰¹ This is to ensure that the treaty embodies the spirit of the constitution. A consideration of the regulatory impact is also important as it affects how the enforcement of the treaty will take place.

The Treaty Making and Ratification Act also states that persons appointed to negotiate a treaty should be competent to undertake such negotiations in the interests of the people of Kenya.¹⁰² It is very important that all those negotiating treaties especially technical treaties are competent persons who are able push the interests of the people of Kenya. In regards to agreements entered into by county governments, it is also important that those who negotiate these agreements are competent and are able to adequately articulate and present the interests of the county.

According to the Treaty Making and Ratification Act, ratification has been defined as the international act by which the State signifies its consent to be bound by a treaty and includes acceptance, approval and accession where the treaty so

¹⁰⁰Section 5 (1), *Treaty Making and Ratification Act*, (Act No.45 of 2012).

¹⁰¹Section 6(1), *Treaty Making and Ratification Act*, (Act No.45 of 2012).

¹⁰²Section 6(2), *Treaty Making and Ratification Act*, (Act No.45 of 2012).

provides.¹⁰³ This Act also outlines the process of ratification. If the government intends to ratify a treaty, the Cabinet Secretary of the relevant state department shall in consultation with the Attorney General, submit to the Cabinet the treaty, together with a memorandum outlining the following:

- (a) the objects and subject matter of the treaty;
- (b) any constitutional implications including—
 - (i) any proposed amendment to the Constitution; and
 - (ii) that the treaty is consistent with the Constitution and promotes constitutional values and objectives;
- (c) the national interests which may be affected by the ratification of the treaty;
- (d) obligations imposed on Kenya by the treaty;
- (e) requirements for implementation of the treaty;
- (f) policy and legislative considerations;
- (g) financial implications;
- (h) ministerial responsibility;
- (i) implications on matters relating to counties;
- (j) the summary of the process leading to the adoption of the treaty;
- (k) the date of signature;
- (l) the number of states that are party to the treaty;
- (m) the views of the public on the ratification of the treaty;
- (n) whether the treaty sought to be ratified permits reservations and any recommendations on reservations and declarations;
- (o) the proposed text of any reservations that should be entered when ratifying the treaty in order to protect or advance national interests or ensure conformity with the Constitution; and
- (p) whether expenditure of public funds will be incurred in implementing the treaty and an estimate, where possible, of the expenditure.¹⁰⁴

¹⁰³Section 2, *Treaty Making and Ratification Act*, (Act No.45 of 2012).

¹⁰⁴Section 7, *Treaty Making and Ratification Act*, (Act No.45 of 2012).

At this stage it is expected that the Cabinet will critically analyse the treaty and thus be able to decide whether it is that treaty is in the best interests of Kenya. After the treaty has been approved by the Cabinet the next step in the ratification process, is consideration by the National assembly. At this stage the treaty is presented to the National Assembly and discussed by the relevant parliamentary committee. Public participation must be done in line with parliamentary procedures. The National Assembly may approve the treaty with or without reservations.¹⁰⁵

Once a the ratification of a treaty has been approved by the National Assembly, the Cabinet Secretary in charge of foreign affairs matter will be requested to prepare the instruments of ratification of the treaty.¹⁰⁶ All the instruments of ratification of a treaty shall be signed, sealed and deposited by the Cabinet Secretary in charge of foreign affairs and deposited to the requisite international body and a copy will be filed with the Registrar¹⁰⁷. The Treaty Making and Ratification Act creates an office of the Registry of Treaties which will be a depository of all treaties Kenya is a party to and contain the status of all treaties pending ratification or domestication and the timelines for such ratification and domestication create and manage a database containing all the treaties that Kenya has ratified.¹⁰⁸ This Act also requires that every financial year there be a report before the National Assemble outlining the treaties that Kenya has ratified and which may bind Kenya to specific actions. The Cabinet Secretary also has a responsibility to notify the public of any treaty which may bind Kenya or to which Kenya is a party through two newspapers of national circulation.¹⁰⁹

In this Act, there has been an attempt to provide for public participation. This occurs during the stage when the treaty is being considered in the National Assembly.

¹⁰⁵Section 8, *Treaty Making and Ratification Act*, (Act No.45 of 2012).

¹⁰⁶Section 9, *Treaty Making and Ratification Act*, (Act No.45 of 2012).

¹⁰⁷Section 10, *Treaty Making and Ratification Act*, (Act No.45 of 2012).

¹⁰⁸Section 13, *Treaty Making and Ratification Act*, (Act No.45 of 2012).

¹⁰⁹Section 15, *Treaty Making and Ratification Act*, (Act No.45 of 2012).

Moreover, there has been a provision for public awareness in regards to treaties where the Cabinet Secretary must inform the public of the treaties that Kenya is a party to. This is a new development in foreign affairs law. This is to enable conformity with the democratic principle that the government should consult the public either in parliament or elsewhere before finally approving a treaty.¹¹⁰

The Treaty Making and Ratification Act creates a process to be followed when the national government wants to be bound by a treaty. This process allows for public participation and scrutiny from the Cabinet and the National Assembly. There is also a provision in the Act, for the publication of all the treaties that Kenya is a party to. In the case of county governments, they have concluded agreement with other foreign governments but there is no set procedure to govern this action.

4.4: Executive Order No.2 of May 2013

The Fourth Schedule of the Constitution of Kenya identifies Foreign Affairs, Foreign Policy and International Trade as a function of the National Government. The Executive Order No. 2 of May 2013 reorganised the government and clearly outlined the tasks that each government ministry should deal with. The Executive Order outlined the functions of the Ministry of Foreign Affairs and International Trade as:

- Management of Kenya's Foreign Policy;
- Management of Bilateral and Multilateral Relations;
- Liaison with International and Regional Organizations;
- Management of Kenya's Missions and Embassies Abroad;
- Liaison with foreign Missions in Kenya;
- Ratification of Treaties, Conventions and Agreements; Management of Diplomatic Privileges and Immunities; Coordination of State and Official Visits;
- Handling of Protocol Matters; Provision of Consular Services;

¹¹⁰Muriithi J, International Law Implications of The Treaty Making and Ratification Act, No. 45 of 2012, Unpublished LLB Dissertation, University of Nairobi, 2014, 36.

- Management of Joint Commissions and joint trade committees with other Countries;
- Official Communications on Foreign Affairs and Global Images;
- International Trade Affairs;
- Trade Representative – Special Advisory/negotiation services;
- Management of Kenya’s Diaspora issues.¹¹¹

4.5: Ministry of Foreign Affairs and International Trade

The Ministry of Foreign Affairs and International trade is the government ministry tasked with foreign affairs issues .With the new government structure of National and County Governments, the Ministry has additional responsibility to coordinate engagements of County Governments with the rest of the world on matters of foreign affairs and international trade and provide protocol and consular services to County Governments among others.¹¹²

The Constitution of Kenya fundamentally changed how the country is governed leading to introduction of two levels of government, National and County Governments. This has widened the scope of activities of the Ministry to include support to County Governments. But the lack of legislation or framework to guide the engagement of County Governments with the Ministry has a bearing on the extent to which the Ministry can engage with them.¹¹³

The Ministry has established the Liaison, Parliamentary and County Services Department which provides the link between the Ministry and County Governments and Parliament.¹¹⁴This Office was set up to help coordinate the foreign trips of members the county government. If there is a delegation from the county government that intends to travel abroad, the delegation must first inform the

¹¹¹Executive Order No 2 of 2013.

¹¹² Ministry of Foreign Affairs and International Trade, Strategic Plan 2013 /14 - 2017/18, 32

¹¹³ Ministry of Foreign Affairs and International Trade, Strategic Plan 2013 /14 - 2017/18, 35

¹¹⁴ Ministry of Foreign Affairs and International Trade, Strategic Plan2013 /14 - 2017/18

Ministry of Devolution. The delegation must fill a concept note explaining the purpose of the intended trip and the proposed benefits of the trip.¹¹⁵ The Liaison office in the Ministry of Foreign Affairs then informs the Kenyan diplomatic mission in the country that the delegation intends to visit and thus makes the necessary preparations.¹¹⁶

The Ministry through the Liaison, Parliamentary and County Services Department has also ensured that the governors and members of their executives from various counties have received a basic training on protocol.¹¹⁷ The Ministry also avails a brief on the relations between Kenya and the country that the delegation intends to visit.¹¹⁸ This brief states the current relationship of Kenya and the country to be visited. This is to generally inform the delegation of the state of diplomatic ties.

The Ministry however has no control over the activities that the delegation carries out once in the foreign state. Moreover, the Ministry of Foreign Affairs does not receive any report from the delegation from the county governments as to the output of any of the negotiations or agreements.¹¹⁹

Generally the Ministry has taken steps to try and regulate to a certain degree the foreign visits of delegations from county governments. The Ministry, however, has no control over substantial issues such as the negotiations with foreign governments.

4.6: Conclusion

Generally, foreign affairs power is regulated first and foremost by the Constitution. The Constitution then vests the executive with foreign affairs power. The National government exercises this power through the Ministry of Foreign Affairs. This

¹¹⁵ Interview with Musyoka R, Liaison, Parliamentary and County Services Department, Ministry of Foreign Affairs on 11 December 2015.

¹¹⁶ Interview with Musyoka R on 11 December 2015.

¹¹⁷ Interview with Musyoka R on 11 December 2015

¹¹⁸ Interview with Musyoka R on 11 December 2015

¹¹⁹ Interview with Musyoka R on 11 December 2015

Ministry has developed internal guidelines and policy that help it actually exercise this power well while regulating to a certain extent the powers of the county government.

In regards specifically to treaties, there is the Treaty Making and Ratification Act, 2012. This Act sets out the process of ratification of a treaty so as to give effect to Article 2(6) of the Constitution. This Act, however, does not apply to county governments. Thus there is no regulation of the negotiating process of county governments with foreign governments.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1: Findings

The 2010 Constitution brought many changes to the governance system in Kenya. It re-introduced a system of devolved government. Such a system was envisioned in the Independence Constitution, albeit differently. This system of government seeks to bring government closer to the people. It is hoped that by doing so there will be increased and faster development and that generally there will be a more efficient government.

The 2010 Constitution recognises the fact that Kenya as a state needs to interact with international community. The government does so through the exercise of Foreign Affairs Power. This power includes four distinct elements: the treaty-making power, diplomatic relations, the making of war and peace; and the recognition of other foreign states and government. If the specific purposes of the two elements of diplomacy and treaty making are considered, the county government can be considered to be loosely exercising some limited form of foreign affairs power. Therefore the county governments can exercise some limited form of foreign affairs power.

Article 1 of the 2010 Constitution, declares that all sovereign power belongs to the people and that this power will be exercised at both national and county levels.¹²⁰ Thus executive power is delegated to the national executive and the executive structures in the county governments. Like all sovereign power, power exercised by the devolved units, the county government, is limited. In the case of Kenya, this limitation is done by the Constitution. Therefore any act by governors, their executive members and MCAs must be in accordance with the Constitution.

¹²⁰ Article 1, *Constitution of Kenya* (2010).

The County Government are autonomous units but the National Government is granted some limited powers of supervision and intervention in county affairs which are constitutionally circumscribed, and must be exercised within the framework of cooperative government.¹²¹ Based on this the National government has therefore put in some measures in place to regulate the actions of the county government on the international arena. This is because like all power that the government exercises, foreign affairs power must be limited and is subject to checks and balances. This is in line with the doctrine of constitutionalism.

5.2 Recommendations

There should be a clear legal framework that deals with the aspect of foreign affairs power as exercised by the county government. Therefore there should be an Act of Parliament that should be passed that clearly outlines the limits of power that county governments can exercise. This can probably be discussed under the draft Foreign Service Bill that is being developed by the Ministry of Foreign Affairs, or through a stand-alone act.

There should also be a set procedure to govern the process of county governments negotiating agreements and the procedure by which the government can show consent to be bound by these agreements.

The Liaison, Parliamentary and County Services Department in the Ministry of Foreign Affairs should also be strengthened to be able to play a more supervisory role over the county governments. At the moment this department mainly coordinates the trips of the delegation of county government and deals with protocol issues. This department should be given the powers to oversee the trips of delegations from the county governments and also to review the progress made during the trip as well as review the agreements negotiated before they are finally concluded.

¹²¹Mutakha J, Constitutional Law of Kenya on Devolution, Strathmore University Press, 2015, 10

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