

**RIGHTS OF SUSPECTED TERRORISTS: ASSESSING THE CONSTITUTIONAL  
RIGHT OF SUSPECTED TERRORISTS TO BAIL IN KENYA AGAINST PUBLIC  
INTEREST**

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## **TABLE OF CONTENTS**

DEDICATION.....	iv
ACKNOWLEDGMENTS .....	v
DECLARATION .....	vi
ABSTRACT.....	vii
LIST OF ABBREVIATIONS.....	viii
LIST OF CASES.....	ix
CHAPTER 1: INTRODUCTION .....	1
1.1 Background Of The Study.....	1
1.2 Statement Of Problem .....	5
1.3 Justification Of The Study.....	5
1.4 Statement Of Research Objective(s) .....	5
1.5 Research Question(s).....	5
1.6 Literature Review .....	6
1.7 Theoretical Framework .....	7
1.8 Hypothesis.....	8
1.9 Research Design & Methodology .....	8
1.10 Limitations .....	8
1.11 Chapter Breakdown.....	8
CHAPTER 2: THEORETICAL FRAMEWORK.....	10
2.1 Introduction .....	10
2.2 Social Contract Theory.....	10
2.3 Common Good Theory.....	12
2.4 The History of Bail in Kenya .....	14
2.5 Conclusion.....	15
CHAPTER 3: THE CURRENT KENYAN LEGAL FRAMEWORK ON BAIL FOR SUSPECTED TERRORISTS .....	17
3.1 Introduction .....	17
3.2 The Definition of Terrorism.....	17
3.3 The Current Kenyan Legislation on Counterterrorism .....	19
3.31 The Constitution of Kenya, 2010 .....	19
3.32 The Prevention of Terrorism Act, 2012.....	21
3.33 The Security Laws (Amendment) Act, 2014.....	23
3.34 Bail and Bond Policy Guidelines, 2015.....	25

3.4	The Role of the State .....	29
3.5	Conclusion.....	32
CHAPTER 4: COMPARATIVE ANALYSIS.....		35
4.1	Introduction .....	35
4.2	Australia .....	35
4.3	United Kingdom.....	37
4.4	Conclusion.....	40
CHAPTER 5: ANALYSIS OF FINDINGS.....		41
5.1	Introduction .....	41
5.2	The Question of Bail versus Public Interest.....	41
5.3	Conclusion.....	43
CHAPTER 6: RECOMMENDATIONS AND CONCLUSION .....		44
6.1	Conclusion.....	44
6.2	Recommendations .....	45
BIBLIOGRAPHY .....		48
BOOKS .....		48
CONFERENCE PAPERS .....		49
DISSERTATIONS AND THESES.....		49
INTERNET RESOURCES .....		49
JOURNAL ARTICLES.....		50
ONLINE JOURNALS.....		51
NEWSPAPERS .....		52
REPORTS .....		53
STATUTES .....		53
WORKING PAPERS .....		54

## **DEDICATION**

To God for His strength and perseverance throughout this time and to my family who have supported me every step of the way.

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Lastly, I would like to thank Mrs Melissa Muindi and Ms Linet Muthoni for their guidance particularly at the beginning of this study.

## **DECLARATION**

I, \_\_\_\_\_, 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:.....

Date: .....

**Ms Jerusha Asin Owino**

## **ABSTRACT**

On the 4<sup>th</sup> of August 2010, Kenyans enacted a new Constitution. This Constitution stipulates that all accused persons are entitled to apply for bail unlike previous legislation which denied bail for capital offences such as murder. Bail will therefore be granted unless the court deems that there are compelling reasons not to grant it. The Constitution has however failed to define compelling reasons. The main objective of this research is to interrogate the current counterterrorism framework in Kenya with a particular focus on bail so as to determine whether it is sufficient to preserve national security.

This study has been conducted mainly through a literature review of various legislations regarding bail for suspected terrorists using a qualitative approach. It has established that indeed there are various disparities in the law regarding bail for suspected terrorists. This has led to the courts releasing some suspected terrorists on bail who have then gone to commit further acts of terrorism.

Furthermore, the 2015 Bail and Policy Guidelines have failed to clarify matters on bail for suspected terrorists. The Judiciary has therefore had to interpret and define compelling reasons. This has led to inconsistencies in the manner in which bail is granted. The study therefore proposes that public interest in terms of national security outweighs the right to bail for suspected terrorists. It also proposes that clear laws regarding bail specifically creating a presumption against granting bail to suspected terrorists should be enacted. This will help to solve the inconsistencies in the interpretation of the law by the Judiciary.

## **LIST OF ABBREVIATIONS**

<b>ATPU</b>	Kenyan Anti-Terrorism Police Unit
<b>CoK</b>	Constitution of Kenya
<b>CPC</b>	Criminal Procedure Code
<b>CORD</b>	Coalition for Reform and Democracy
<b>EJIL</b>	The European Journal of International Law
<b>eKLR</b>	Kenya Law Reports
<b>POTA</b>	The Prevention of Terrorism Act
<b>SLAA</b>	The Security Laws (Amendment) Act



## **LIST OF CASES**

*Abdikadir Aden alias Tullu & others v Republic* (2014) eKLR.

*Aboud Rogo Mohamed & Another v Republic* (2011) eKLR.

*A(FC) and Others(FC) v Secretary of State for the Home Department* (2004), The United Kingdom House of Lords.

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

*Hassan Mahati Omar & Another v Republic* (2014) eKLR.

*Mahadi Swaleh Mahadi v Republic* (2014) eKLR.

*Oluseye Oledaji Shittu v Republic* (2016) eKLR.

*Republic v Dorine Aoko* (2010) eKLR.

*Republic v John Kahindi Karisa & 2 others* (2010) eKLR.

*Republic v Joktan Mayende & 3 others* (2012) eKLR.

*Republic v Joseph Wambua Mutunga and others* (2008) eKLR.

*Republic v Milton Kabulit & 6 Others* (2011) eKLR.

*Timothy Mwati Mwangi v Republic* (2014) eKLR.

# CHAPTER 1: INTRODUCTION

## 1.1 Background Of The Study

Peace is a global ideal. The reality is that we face ‘premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents that are usually intended to influence an audience.’<sup>1</sup> This is also known as terrorism. The feelings that terrorism elicits are also global; uncertainty, shock, dread and without a doubt, fear.

‘Terrorism is a global crime that threatens state security, life and property of the people.’<sup>2</sup> ‘Kenya, like many countries in the world, is grappling with the complex challenge of terror attacks perpetrated by a mix of international, regional and local terror networks including the Al Qaeda, ISIL, Boko Haram and Al Shabab.’<sup>3</sup> This can be clearly seen in the horrible attack that occurred in Garissa University in April 2015 leaving 147 people dead.<sup>4</sup> Even the recent security drill at Strathmore University, was a failed attempt to mitigate the effects of terrorism that are quite evident in the country.<sup>5</sup>

‘It is a truism that if the events of the recent past are anything to go by, the state of Kenya currently faces a security challenge probably never experienced before.’<sup>6</sup> Consequently, the legal framework that deals with terrorism needs to be interrogated so as to ensure that adequate measures are in place to counter the serious threat of terrorism in the country.

The Prevention of Terrorism Act has defined a terrorist attack as an act or the threat of an action which involves, *inter alia*, ‘the use of violence against a person; creates a serious risk to the life of a person other than the person committing the action; creates a serious risk to the

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<sup>1</sup> Sinai J, ‘How To Define Terrorism’ 2(4) *Perspectives on Terrorism*, 2008 -

<<http://www.terrorismanalysts.com/pt/index.php/pot/article/view/33/html>> on 15 March 2016.

<sup>2</sup> Omondi S, ‘Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya’ 3(2) *Journal of Research in Humanities and Social Science*, 2015, 1.

<sup>3</sup> Preliminary Report of KNCHR Investigations on Human Rights Abuses in the On-going Crackdown against Terrorism, *The Error of Fighting Terror with Terror*, 2015, 2.

<sup>4</sup> Mutambo A and Hajir A, ‘147 students killed in cold-blooded raid on campus’ Daily Nation, 2 April 2015 - <<http://www.nation.co.ke/counties/Garissa-University-College-under-attack/1107872-2673506-lp3f2z/index.html>> on 2 January 2017.

<sup>5</sup> Ombati C, ‘Strathmore employee succumbs to injuries after terror drill’ Standard Digital, 1 December 2015 <<http://www.standardmedia.co.ke/article/2000184090/strathmore-employee-succumbs-to-injuries-after-terror-drill>> on 23 February 2016.

<sup>6</sup> Ongoyaa Z, ‘Legal And Policy Dilemma In The Fight Against Terrorism: The Bail Question In Terrorism Cases In Kenya’ Kenya Law Blog, 25 August 2014 - <<http://kenyalaw.org/kenyalawblog/legal-and-policy-dilemma-bail-question-in-terrorism-cases/>> on 28 November 2016.

health or safety of a section of the public; results in serious damage to property and prejudices national security or public safety.’<sup>7</sup>

The 2010 Kenyan Constitution provides that an arrested person has the right ‘to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.’<sup>8</sup> This means that all offences are bailable. An accused person’s bail is therefore only subject to a competent court finding compelling reasons not to grant bail.

Bail can be defined as ‘an agreement between an accused person or his or her sureties and the court that the accused person will attend court when required, and that should the accused person abscond, in addition to the court issuing warrants of arrest, a sum of money or property directed by the court to be deposited, will be forfeited to the court.’<sup>9</sup> ‘The primary purpose for bail is to secure the accused person’s attendance at court to answer the charge at the specified time.’<sup>10</sup>

‘Security concerns traditionally come under the jurisdiction of both the Legislature and Executive but the determination of bail application forms part of the due process of the law which belongs to the domain of the Judiciary.’<sup>11</sup> ‘Granting of bail entails the striking of a balance of proportionality in considering the rights of the applicant who is presumed innocent at this point on the one hand, and the public interest on the other.’<sup>12</sup>

Kenyan courts have defined the constitutional phrase *compelling reasons in relation to bail* to ‘denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bail.’<sup>13</sup> The courts have held that ‘the burden lies with the prosecution to establish what the compelling reasons are.’<sup>14</sup> They have further determined that ‘bail should not be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution.’<sup>15</sup> The question that

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<sup>7</sup> Section 2, *The Prevention of Terrorism Act* (No. 30 of 2012).

<sup>8</sup> Article 49(1) (h), *Constitution of Kenya* (2010).

<sup>9</sup> National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, March 2015, 3.

<sup>10</sup> *Mahadi Swaleh Mahadi v Republic* (2014) eKLR.

<sup>11</sup> Ongoyaa Z, ‘Legal And Policy Dilemma In The Fight Against Terrorism: The Bail Question In Terrorism Cases In Kenya’ Kenya Law Blog, 25 August 2014 - <<http://kenyalaw.org/kenyalawblog/legal-and-policy-dilemma-bail-question-in-terrorism-cases/>> on 28 November 2016.

<sup>12</sup> *Hassan Mahati Omar & another v Republic* (2014) eKLR.

<sup>13</sup> *Republic v Joktan Mayende & 3 others* (2012) eKLR.

<sup>14</sup> *Abdikadir Aden alias Tullu & others v Republic* (2014) eKLR.

<sup>15</sup> *Republic v Joktan Mayende & 3 others* (2012) eKLR.

then arises is what constitutes these compelling reasons especially in cases where there are suspected acts of terrorism.

It should be noted that the Prevention of Terrorism Act also provides that ‘a police officer who has detained a suspect may apply in writing to the court to extend the time for holding the suspect in custody for a period of up to thirty days. Before this period expires, the police officer may again apply to the court to extend the period of detention.’<sup>16</sup> The court therefore still has to determine whether there are compelling reasons to detain the terrorist suspect.

Determining these compelling reasons or ‘real and cogent grounds’ has been challenging for the courts. This has led to leading to inconsistencies when it comes to the granting of bail to suspected terrorists. In *Hassan Mahati Omar & Another v Republic* the court held that ‘on the one hand is the duty of the court to ensure that crime, where it is proved, is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the Constitution.’<sup>17</sup> The court is therefore faced with the challenge of whether denying terror suspects bail will be an infringement to their right to a fair trial.

The court in the said case, however, decided that ‘the denial of bail when justified in accordance with the law does not amount to the loss of the right to the presumption of innocence or to a fair hearing. The right to bail is not one of the illimitable rights that are found under Article 24 of the current Constitution.’<sup>18</sup> The court then proceeded to grant bail to one of the suspected terrorists and deny bail to the other suspected terrorist.

The former Chief Justice, Willy Mutunga, sought to deal with such inconsistencies in granting bail to suspected terrorists and to also provide a guideline that would define compelling reasons by introducing the Bail and Bond Policy Guidelines in 2015. These guidelines provide that ‘the prosecution shall satisfy the court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail.’<sup>19</sup> Further, the guidelines give circumstances that would constitute compelling reasons such as the accused person is

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<sup>16</sup> Section 33(8) and (9), *The Prevention of Terrorism Act* (No. 30 of 2012).

<sup>17</sup> *Hassan Mahati Omar & Another v Republic* (2014) eKLR.

<sup>18</sup> *Hassan Mahati Omar & Another v Republic* (2014) eKLR.

<sup>19</sup> National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, March 2015, 25.

likely not to attend court proceedings, the accused is likely to endanger national security and that it is in the interest of the public to detain the accused person.<sup>20</sup>

It seems that these guidelines may be insufficient when it comes to defining ‘compelling reasons’ and closing the loopholes that were created by the Constitution. This is because Kenyan courts have continued to grant bail to suspected terrorists in cases where bail should have been denied particularly where ‘while on bail, some suspects are alleged to have participated in subsequent terror attacks in the country.’<sup>21</sup>

In 2013, 21-year old Hussein Nur Mohammed was allegedly involved in planting an improvised explosive device in a *matatu* in Pangani area in Nairobi. The blast from the device led to the loss of 6 lives while 30 others sustained serious injuries. The police later reported that Mohammed had been arrested earlier on terrorism related charges and subsequently released on bail. He therefore committed this terrorist act while released on bail.<sup>22</sup>

On the 4<sup>th</sup> of May in 2014, Jamal Mohammed Awadh and Suleiman Mohammed Said are also said to have carried out terrorist acts in Mombasa while they were released on bail. The two men allegedly hurled a grenade into a vehicle and also detonated an improvised explosive device near the Reef Hotel in Nyali. This led to the death of at least 3 people while 23 others faced serious injuries.<sup>23</sup>

‘One of the proposals, whose origin is the executive arm of government, has been to urge the judiciary to not to grant bail to terrorism suspects. Whereas the executive has made this proposal in the form of roadside declarations, there has been no corresponding policy and legal guidelines to direct the judiciary on how to implement these declarations.’<sup>24</sup>

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<sup>20</sup> National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, March 2015, 25.

<sup>21</sup> Omondi S, ‘Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya’, 1.

<sup>22</sup> Habi E, ‘Police release photo of Pangani blast suspect’ Daily Nation, 15 December 2013 - <http://www.nation.co.ke/news/Pangani-Matatu-Blast-Police-Investigation/1056-2112754-89h00tz/index.html> on 2 February 2017.

<sup>23</sup> Bwana J and Oketch W, ‘Mystery Deepens Over Men Linked To Mombasa Explosion’ The Standard, 7 May 2014 - <https://www.scribd.com/doc/222561968/The-Standard-07-05-2014> on 2 February 2017.

<sup>24</sup> Ongoyaa Z, ‘Legal And Policy Dilemma In The Fight Against Terrorism: The Bail Question In Terrorism Cases In Kenya’ Kenya Law Blog, 25 August 2014 - <http://kenyalaw.org/kenyalawblog/legal-and-policy-dilemma-bail-question-in-terrorism-cases/> on 28 November 2016.

## **1.2 Statement Of Problem**

The current Constitution has provided that all accused persons are entitled to apply for bail unless the court finds that there are compelling reasons to deny them bail.<sup>25</sup> However, the Constitution has failed to define compelling reasons. This has given the Judiciary wide discretionary powers when it comes to defining compelling reasons in determining whether bail should be granted. The Bail and Bond Policy Guidelines have also failed to provide clear guidance on the matter of bail for suspected terrorists.<sup>26</sup> This means that the Guidelines fail to curtail the wide discretionary powers of the Judiciary. The inconsistencies in decisions by the Judiciary show the challenge that they are facing in determining what compelling reasons are particularly when it comes to cases of suspected terrorism. This study therefore aims to look at the Kenyan legislation regarding terrorism and focus particularly on the question of bail and whether the legal framework in place is sufficient to ensure national security.

## **1.3 Justification Of The Study**

This study is justified on the basis that without a doubt, there has been a considerable increase in the number of terrorist attacks in the country. Currently, this is brought about by the fact that the Kenya military is involved in the war in Somalia. This means that these terror attacks are unlikely to come to an end. 'Hence there is a need to put in place preventive and mitigative measures to counter the effects of terrorist activities—and the need to examine the legal response to terrorism in the context of legislation and policies.'<sup>27</sup>

## **1.4 Statement Of Research Objective(s)**

The general objective of this research paper is to interrogate the counterterrorism laws in Kenya so as to determine whether they are indeed geared towards ensuring that the responsibility of the State to preserve national security.

The specific objective of this paper is to examine whether bail should be denied to terror suspects so as to ensure public safety thus standardising the judicial approach to bail in terrorism cases and effectively curbing the wide discretionary powers of the Judiciary.

## **1.5 Research Question(s)**

The paper will examine the following research questions:

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<sup>25</sup> Article 49(1) (h), *Constitution of Kenya* (2010).

<sup>26</sup> Chimei H, 'The constitutional right to bail: Taking inventory of the recently launched Bail Bond Policy Guidelines (2015)' LinkedIn, 26 May 2016- <<https://www.linkedin.com/pulse/constitutional-right-bail-taking-inventory-recently-launched-chimei>> on 11 January 2017.

<sup>27</sup> Mwazighe C, 'Legal Responses To Terrorism: Case Study of The Republic Of Kenya' Published LLM Thesis, Naval Postgraduate School, California, 2012, 1.

- a) Is the current anti-terrorism legal Kenyan framework, particularly when it comes bail, sufficient?
- b) Should the discretion to determine bail on a case-by-case basis be removed from the discretion of judges and a definitive law enacted instead?
- c) How have other jurisdictions dealt with this delicate balance between public interest and human rights when it comes to keeping suspected terrorists in custody pending trial?

## **1.6 Literature Review**

There is currently a wealth of information regarding the effect of terrorism on states and the measures that states should take in order to curb these effects.<sup>28</sup> There is however limited information on the correlation between denying terror suspects bail and the reduction of terror attacks particularly in Kenya which is what this paper aims to address.

Scholastica Omondi takes a balanced approach when looking at terrorism. She delves into the rights of suspected terrorists stating that they are entitled to bail; although this right is limited. Further, she analyses the role of the state in protecting its citizens and looks at the roles that the different organs of the state, that is, the executive, the judiciary and the legislature are supposed to play. She posits that the current laws governing bail are insufficient when it comes to the question of bail for suspected terrorists. In addition to this, she takes a case study approach to illustrate the manner in which other states have enacted laws to counter the effects of terrorism in their various states.<sup>29</sup>

David Oramini analyses the impact that counterterrorism measures by the government have on the suspected terrorists and citizens. Additionally, he also looks at the impact that terrorism has on the human rights of citizens and suggests that the state should come up with laws to protect its citizens while still continuing its fight against terrorism.<sup>30</sup>

Patrick Kiage in his book the 'Essentials of Criminal Procedure in Kenya,' provides a detailed analysis of process of criminal procedure and the nature of criminal proceedings in the country. He provides a detailed analysis of the entire process from the moment where one is arrested and charged with an offence to the moment that one is either acquitted or found

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<sup>28</sup> Mwazighe C, 'Legal Responses To Terrorism: Case Study of The Republic Of Kenya' Published LLM Thesis, Naval Postgraduate School, California, 2012, 1.

<sup>29</sup> Omondi S, 'Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya', 21.

<sup>30</sup> Oramini D, 'The Impact of Counter-terrorism Operations on Human Rights in Kenya' *Centre for Human Rights and Peace Studies University of Nairobi*, 2014, 12.

guilty and the process of appealing this ruling. He further expounds on the history of bail in the country and provides insight on how various amendments of the law have changed the manner in which the law is interpreted.<sup>31</sup> This is especially when it comes to the question of granting bail for accused persons.

The report by the Office of the United Nations High Commissioner for Human Rights, on Human Rights, Terrorism and Counter-terrorism, looks at what constitutes human rights and the problems that arise when trying to define terrorism globally. It also delves into the rights that are infringed by acts of terrorism and proposes that the 'promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognising that effective counter-terrorism measures and the promotion of human rights are not conflicting goals, but complementary and mutually reinforcing.'<sup>32</sup>

### **1.7 Theoretical Framework**

This paper will be centred on two main theories. The first theory that the paper will look at will be the social contract theory. This theory states that the 'the most important role of any state is to secure its borders and protect its subjects or citizens and their property.'<sup>33</sup> Based on this, the citizens 'in return are obligated to pay their taxes to the state so as to facilitate it to render basic services which include security.'<sup>34</sup> This theory is therefore important as it shows the obligation that the state has to protect its citizens. Undoubtedly, terrorism challenges the ability of the government to protect the borders and the people of the country.

The second theory that the paper will look at will be the common good theory. Common good is also known as the public good. This theory originated in the works of Plato, Aristotle and even Cicero.<sup>35</sup> The theory denotes that the common good are 'those goods that serve all members of a given community and its institutions and as such, includes both goods that serve no identifiable particular group, as well as those that serve members of generations not yet born.'<sup>36</sup> John Rawls also defined the common good as 'certain general conditions that are...equally to everyone's advantage.'<sup>37</sup> This theory would help in the analysis of the balance between the rights of suspected terrorists and public safety. The question would be whether it

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<sup>31</sup> Kiage P, *Essentials of Criminal Procedure In Kenya*, LawAfrica, Nairobi, 2010, 117.

<sup>32</sup> Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-terrorism*, July 2008, iv.

<sup>33</sup> Rousseau J, *The Social Contract*, Penguin Books Ltd, United Kingdom, 1974, 3.

<sup>34</sup> Rousseau J, *The Social Contract*, 3.

<sup>35</sup> Etzioni A, 'Common Good' in Gibbons M (ed), *The Encyclopedia of Political Thought*, 1<sup>st</sup> ed, John Wiley & Sons, Ltd., New Jersey, 2015, 1.

<sup>36</sup> Etzioni A., *Common Good*, 1.

<sup>37</sup> Rawls J, *A Theory of Justice*, Harvard University Press, London, 1971, 29.



is in the public good to grant bail to suspected terrorists or whether it would be within the public good to deny them this right to bail.

### **1.8 Hypothesis**

This research proceeds on the premise that the current counterterrorism framework, in particular the Bail and Bond Policy Guidelines, is inadequate to provide the much needed legislative framework when it comes to granting bail for suspected terrorists.

It relies on the presumption that the duty of the state to protect its citizens outweighs the right to bail for terror suspects.

### **1.9 Research Design & Methodology**

The method used to gather information for this paper will be qualitative. This will mainly involve library research and the use of internet resources. This will provide an analysis of the effects of terror and the manner in which the state should be protecting its citizens. International and local statute will also be used to provide various definitions and the manner in which various states have reacted to the effects of terrorist attacks.

### **1.10 Limitations**

This paper will limit its research firstly to cases determined after 2010. This is because the current Constitution that contains the provision being discussed was enacted in the said year.

A further limitation that this study may face is the access to adequate secondary data.

It will also be limited to the case study of the following states: Australia and United Kingdom. The reason that this study will focus on these two states is because they have been greatly affected by acts of terrorism just like Kenya. They have then adopted different measures when it comes to the granting of bail. In Australia, the presumption is against the suspected terrorist being granted bail<sup>38</sup> while in the United Kingdom has adopted rather stringent pre-trial detention measures. This paper will therefore inquire into both states to examine the reasons these states have chosen to enact these laws.

### **1.11 Chapter Breakdown**

This research paper will consist of six chapters.

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<sup>38</sup> Australian Human Rights Commission, *A Human Rights Guide To Australia's Counter-Terrorism Laws*, 2008, 12-13.

## **Chapter One - Introduction**

This will be the introduction of the paper which will give an overview of the entire paper. This will include the background of the study, the statement of the problem, the various hypotheses, and the literature review.

## **Chapter Two – Theoretical Framework**

This chapter will delve into the theoretical framework thus expounding on the theories behind the question that this paper aims to examine. It will also look at the history of bail in Kenya.

## **Chapter Three – The Current Kenyan Legal Framework on Bail for Suspected Terrorists**

This chapter will involve a discussion on what constitutes terrorist acts. It shall then have an in-depth look at the current anti-terrorism legislation that exists and focus particularly on bail. It shall also look at the role that the state plays in the fight against terrorism.

## **Chapter Four – Comparative Analysis**

This chapter will involve a comparative analysis of the states of Australia and the United Kingdom. It will look at the laws that these states have enacted regarding the granting of bail to suspected terrorists and the justifications for these laws.

## **Chapter Five – Analysis of Findings**

This chapter will consist of a discussion of the findings of the research which will also include the comparative analysis carried out in the previous chapter. Furthermore, it will also attempt to address the human rights concerns that may arise based on trying to achieve the balance between national security and the constitutional right to bail for suspected terrorists.

## **Chapter Six – Recommendations and Conclusion**

This final chapter will consist of recommendations and the conclusion of the study. It shall aim to suggest a way forward regarding the balance between the constitutional right of bail for suspected terrorists and public safety.

## CHAPTER 2: THEORETICAL FRAMEWORK

### 2.1 Introduction

This chapter will focus on the theoretical framework that forms the basis of this study. The philosophical theories that are discussed will illustrate the manner in which terrorism poses a challenge when it comes to the balance between human rights for suspected terrorists and public interest and the duty that the state has to protect its citizens. It will also briefly look at the history of bail in Kenya.

### 2.2 Social Contract Theory

The main proponents of this theory are Thomas Hobbes, John Locke and Jean Jacques Rousseau. 'Locke and Hobbes both share a vision of the social contract as instrumental in the political stability of a state.'<sup>39</sup>

Hobbes begins by proposing that people in an original state of nature are primarily interested in preserving their own lives, even if that means destroying the life of another.<sup>40</sup> He describes life in this state of nature as 'solitary, poor, nasty, brutish, and short.'<sup>41</sup> 'This proliferation of self-interested individuals creates a state of perpetual conflict with each other or universal war.'<sup>42</sup>

This self-interest in man then compels him to look for an alternative path out of this violent state towards peace and freedom from pain and anxiety, where he can pursue pleasure.<sup>43</sup> Hobbes believes that this need for an alternative path leads to the first steps towards a 'social contract.' In order to preserve peace, all individuals agree to enter into a covenant. Under this covenant or agreement, these individuals must agree not to harm each other. However, this agreement is not enough. Hobbes believes that only a superior power can ensure that peace is maintained.

Thus, in order to achieve this state of peace, all human beings voluntarily surrender all their rights and freedoms to this authority. As a result of this contract, the authority then has a duty

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<sup>39</sup> Mouritz T, 'Comparing The Social Contracts of Hobbes and Locke' 1 *The Western Australian Jurist*, 2010, 123.

<sup>40</sup> Mouritz T, 'Comparing The Social Contracts of Hobbes and Locke', 125.

<sup>41</sup> Hobbes T, *Leviathan*, 2<sup>nd</sup> ed, Dent, London, 1937, 83.

<sup>42</sup> Hobbes T, *Leviathan*, 183.

<sup>43</sup> Brown M, *The Quest for Moral Foundations: An Introduction to Ethics*, Georgetown University Press, 1996, 36.

to protect and preserve the lives and property of these humans<sup>44</sup> while the humans in turn agree to abide by the laws that are set out by the authority.

Locke, on the other hand, proposed that men live in a state of nature where they live together based on reason but without an authority to follow.<sup>45</sup> 'Naturally, individuals are inclined to avoid a solitary life, and inevitably start a family, which eventually leads to the formation of a political society.'<sup>46</sup> A social contract is then formed where power is vested by individuals in a government voluntarily. Under the contract, man does not surrender all their rights to one single individual; they surrender only the right to preserve or maintain order and enforce the law of nature.<sup>47</sup> The obligation is therefore for the government to serve the people<sup>48</sup> and to ensure the protection of their rights.

'According to Rousseau, the original freedom, happiness, equality and liberty which existed in primitive societies prior to the social contract was lost in the modern civilisation. Through Social Contract, a new form of social organisation- the state was formed to assure and guarantee rights, liberties freedom and equality.'<sup>49</sup> He believed that in an ideal society no one was above the rules. He wrote 'The Social Contract' where he explained that humans do not sacrifice their freedom when they adhere to the state because freedom can be gained from the state.<sup>50</sup> This is because man acquires the civil society and moral freedom which makes him a master of his life.<sup>51</sup>

'For Rousseau, the purpose of the contract was not the protection of rights, but the more nebulous one of establishing a society where the values of liberty and equality would be realised and promoted through the General Will and the total alienation of rights.'<sup>52</sup>

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<sup>44</sup> Laskar M, 'Summary of Social Contract Theory by Hobbes, Locke and Rousseau' Published LLM Thesis, Symbiosis Law School, Pune, 2013, 2.

<sup>45</sup> Mouritz T, 'Comparing The Social Contracts of Hobbes and Locke', 126.

<sup>46</sup> Gough J W, *The Social Contract Theory: A Critical Study of its Development*, Oxford University Press, London, 1936, 128.

<sup>47</sup> Laskar M, 'Summary of Social Contract Theory by Hobbes, Locke and Rousseau' Published LLM Thesis, Symbiosis Law School, Pune, 2013, 4.

<sup>48</sup> Locke J, *Second Treatise of Government in John Locke Political Writings*, Hackett Publishing Company Inc., New York, 1980, 21.

<sup>49</sup> Laskar M, 'Summary of Social Contract Theory by Hobbes, Locke and Rousseau' Published LLM Thesis, Symbiosis Law School, Pune, 2013, 5.

<sup>50</sup> Baillie J, *Routledge Philosophy Guidebook to Hume on Morality*, 1<sup>st</sup> ed, Routledge, London, 2000, 184.

<sup>51</sup> Rousseau J, *The Social Contract*, Penguin Books Ltd, United Kingdom, 1974, 6.

<sup>52</sup> Gricic J, 'Rawls and Rousseau on the Social Contract' Loyola University of Chicago, 76 - <https://kuscholarworks.ku.edu/bitstream/handle/1808/9113/auslegung.v12.n01.070-081.pdf?sequence=1> on 13 December 2016.

Thus, based on the theorists discussed above, the Social Contract theory states that the state has an important duty to protect the lives and property of its citizens. The citizens are also obliged to 'pay their taxes to the state so as to facilitate it to render basic services which include security.'<sup>53</sup>

Without a doubt, 'life under the threat of terrorism has the constant potential of being solitary, poor, nasty, brutish, and short.'<sup>54</sup> Terrorism challenges the ability of the state to carry out its obligation to protect its citizens. This is because 'terrorism acts without distinction and without responsibility for the consequences.'<sup>55</sup> Terrorism is indeed an attack on state security and on the very lives and property of the Kenyan people. It is therefore important to interrogate the various legal institutions that the Kenyan government has established so as to ensure that they are adequate to deal with these threats of terrorism. This is particularly when it comes to the provision of bail for terror suspects.

### **2.3 Common Good Theory**

The common good is a notion that originated more than 2,000 years ago in the writings of Plato, Aristotle, and Cicero.<sup>56</sup> The common good also known as "the public interest" or "public goods" denotes those 'goods that serve all members of a given community and its institutions, and, as such, includes both goods that serve no identifiable particular group, as well as those that serve members of generations not yet born.'<sup>57</sup>

Aristotle defined the common good as 'a good proper to and attainable only by the community yet individually shared by its members.'<sup>58</sup> More recently, contemporary theorist John Rawls defined the common good as 'certain general conditions that are...equally to everyone's advantage.'<sup>59</sup> Thus, the common good approach proposes that ethical actions are essentially those that benefit all members of the community. Furthermore, 'participating in

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<sup>53</sup> Rousseau J, *The Social Contract*, 3.

<sup>54</sup> Sznajder N, 'Terrorism and the social contract' 15(1) *Irish Journal of Sociology*, 2006, 8.

<sup>55</sup> Sznajder N, 'Terrorism and the social contract', 14.

<sup>56</sup> Velasquez M, Andre C, Shanks T and Meyer M, *Thinking Ethically: A Framework for Moral Decision Making*, Centre for Applied Ethics, Santa Clara University - <<https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/thinking-ethically/>> on 18 December 2016.

<sup>57</sup> Etzioni A, 'Common Good' in Gibbons M (ed), *The Encyclopedia of Political Thought*, 1<sup>st</sup> ed, John Wiley & Sons, Ltd., New Jersey, 2015, 1.

<sup>58</sup> Smith T, 'Aristotle on the Conditions for and Limits of the Common Good' 93 (3) *American Political Science Review*, 1999, 625.

<sup>59</sup> Rawls J, *A Theory of Justice*, Harvard University Press, London, 1971, 29.

creating the common good is to some extent a duty, and a right, of all the people'<sup>60</sup> in the society.

Determining what the good of the community is without a doubt beneficial to the state. The state is 'assumed to aim at the common good, that is, at maintaining conditions and achieving objectives that are similar and geared towards benefitting everyone.'<sup>61</sup> This implies that it is the duty of an ethically neutral state to guarantee and distribute equitably the freedoms and resources that individuals need in order to live that they have chosen<sup>62</sup> that is, to promote their good or well-being. Further, the fact that the common good is pursued in an equitable manner implies that the state actually ends up promoting justice.

The question that then arises in this case is whether a focus on the individual rights of terror suspects as opposed to public interest in the form of security is more geared towards the common good and justice. The reality is that although 'the courts have done much to recognise the value of the common good, striking the right balance between the public interest and individual rights can prove to be difficult.'<sup>63</sup>

The common good is said to be specified by the political values of public reason.<sup>64</sup> These are the considerations that promote and maintain the basic interests of free and equal citizens. These political values include public welfare and basic liberties such as civil liberties. Civil liberties have been granted by the Kenyan Constitution in the Bill of Rights to ensure equality. The right to bail is one of these civil liberties. However, the Constitution also provides that 'the national security of Kenya shall be promoted and guaranteed.'<sup>65</sup> Consequently, this illustrates the complex issue that the state faces when it comes to balancing individual human rights while still trying to promote the common good especially in extreme cases such as terrorism. One may conclude that 'it is better to be safe than sorry when it comes to fighting terrorism.'<sup>66</sup>

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<sup>60</sup> Argandona A, 'The Common Good, Stakeholder Theory And The Theory Of The Firm' 1<sup>st</sup> International Workshop on The Role of Business in Society and the Pursuit of the Common Good, Paris, 8 – 9 March 2012, 9.

<sup>61</sup> Rawls J, *A Theory of Justice*, 205.

<sup>62</sup> Argandona A, 'The Common Good' IESE Business School University of Navarra, Working Paper WP-937, 2011, 6 - <<http://www.iese.edu/research/pdfs/di-0937-e.pdf>> on 20 December 2016.

<sup>63</sup> Etzioni A, 'Common Good', 3.

<sup>64</sup> Rawls J, 'The Idea of Public Reason Revisited' 64(3) *The University of Chicago Law Review*, 1994, 766-767.

<sup>65</sup> Article 238 (2), *Constitution of Kenya* (2010).

<sup>66</sup> Peña C, 'Better Safe Than Sorry?' Antiwar.com, 1 October 2010 - <<http://original.antiwar.com/pena/2010/09/30/better-safe-than-sorry/>> on 20 December 2016.

## **2.4 The History of Bail in Kenya**

Bail is ‘an agreement between an accused person or their sureties and the court that the accused person will attend court when required, and that should the accused person abscond, in addition to the court issuing warrants of arrest, a sum of money or property directed by the court to be deposited, will be forfeited to the court.’<sup>67</sup> Bail is granted to ensure the attendance of the suspect at the trial. It therefore consists of the temporary release of an accused person while awaiting trial.

The history of bail in Kenya is founded on the presumption of innocence for all accused persons which places a burden on the state to prove that the accused is guilty.<sup>68</sup> Before the current Constitution was enacted, not all offences were bailable.

The repealed Constitution provided that where an arrested person had been charged with a criminal offence and not tried within a reasonable time, that ‘unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.’<sup>69</sup> This meant that any person who had been accused of an offence that was punishable by death, that is, a capital offence, would not be granted bail by the court.

The Criminal Procedure Code reflects this provision on the denial of bail for capital offences. It stipulates that ‘a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is not entitled to bail.’<sup>70</sup> The Courts therefore interpreted the grounds for compelling reasons for granting bail based on these two provisions of the law. In the case of the *Republic v Dorine Aoko*<sup>71</sup>, the Court held that:

*‘Compelling reasons are the very same ones spelt out in Section 72(5) of the repealed Constitution, and elaborated in Section 123 of the Criminal Procedure Code, namely, that the accused person, as the applicant in this case, is charged with the offence of murder, like treason, robbery with violence or attempted robbery with violence, are offences which are not only punishable by death, but are by reason of their gravity, (taking of away another person’s life, disloyalty to the state of one’s nationality, or grievous assault and injury to*

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<sup>67</sup> National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, March 2015, 3.

<sup>68</sup> *Republic v Milton Kabulit & 6 Others* (2011) eKLR.

<sup>69</sup> Section 72 (5), *The Repealed Constitution of Kenya* (1963).

<sup>70</sup> Section 123 (1), *Criminal Procedure Code* (Cap 75).

<sup>71</sup> *Republic v Dorine Aoko* (2010) eKLR.

*another person or his property) are offences which are by their reprehensiveness, not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kin or kith of the victim, to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk to the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail.*<sup>72</sup>

Notably, the court emphasised that that these offences were non-bailable because of their grievous nature and effect on justice and fairness in the society. Terrorism, as already mentioned, is a 'global crime that threatens state security, life and property of the people.'<sup>73</sup> Indeed, it has a rather grievous nature and threatens the security and territorial integrity of the Kenyan State. Despite this fact, there were no express provisions, at the time, regarding the granting of bail to persons who had been accused of terrorist acts.

The enactment of the current Constitution in 2010 changed the legal position on bail for all accused persons. Presently, an arrested person has the right 'to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.'<sup>74</sup> The terms of bail are supposed to be reasonable without any distinction between bailable and non-bailable offences.<sup>75</sup>

## **2.5 Conclusion**

The social contract theory describes the obligations that a state has to its citizens once they surrender their rights voluntarily to it. The state must ensure the protection of their lives and property. The common good theory proposes that the state should aim at ensuring the society cultivates conditions that allow everyone to achieve their good or well-being. These theories emphasise the role that the state is obliged to play in promoting national security. One may argue that it is within the common good of society to deny bail to suspected terrorists so as to ensure that national security is protected.<sup>76</sup> Indeed, 'terrorism aims at the very destruction of human rights, democracy and the rule of law.'<sup>77</sup>

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<sup>72</sup> *Republic v Dorine Aoko* (2010) eKLR.

<sup>73</sup> Omondi S, 'Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya', 1.

<sup>74</sup> Article 49(1) (h), *Constitution of Kenya* (2010).

<sup>75</sup> Kiage P, *Essentials of Criminal Procedure In Kenya*, LawAfrica, Nairobi, 2010,113.

<sup>76</sup> Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-terrorism*, July 2008, 8-9.

<sup>77</sup> Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-terrorism*, July 2008, 7.



Furthermore, the history of bail shows that there were no express provisions regarding bail for suspected terrorists in Kenya. One reason for this may be the fact that the first serious terrorist attack that the country faced was in December 1980 when a bomb was set off outside the Norfolk Hotel in Nairobi. The next serious attack was almost 20 years later when the Embassy of the United States of America in Kenya was bombed in 1998.

Between 1998 and 2011, the number of acts of terrorism in the country was few. However, once Operation Linda Nchi began in 2011, the militia group Al-Shabaab vowed that they would retaliate against Kenya. Operation Linda Nchi was a response to various acts of terror that the Al-Shabaab militia group had been carrying out in the country such as a series of kidnappings of tourists.

‘Grenades were lobbed in Nairobi, killing at least seven people, within weeks of the initiation of Linda Nchi.’<sup>78</sup> In fact, reports have stated that Kenya has shockingly faced 133 terror attacks since the Somalia intervention.<sup>79</sup> ‘The attacks have also become more ferocious, with deaths and injuries caused by terrorism between October 2011 and July 2015 being eight times as many as the period between 2008 and September 2011.’<sup>80</sup> This can be seen in the Westgate attack in 2013 leaving at least 67 people dead and more than 175 people injured, the Mpeketoni attacks in 2014 leading to the death of 60 people and the attack in Garissa University in 2015 leaving 147 people dead. New laws, such as the Prevention of Terrorism Act in 2012, were then enacted in response to the increase of these attacks as the urgent need to have legislation to counter the effects of terrorism arose.

Based on this alarming increase of terrorist activity in the country, there is a critical need to interrogate the legal response to terrorism in the country. This is especially when it comes to preventive measures, such as bail, which may help to mitigate the effects of terrorism.

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<sup>78</sup> IBT Staff Report, ‘Ripple Effects Of A Terrorist Attack: After Westgate, Kenya And The World Face Changing Times’ International Business Times, 23 September 2013 - <<http://www.ibtimes.com/ripple-effects-terrorist-attack-after-westgate-kenya-world-face-changing-times-1409654>> on 2 February 2017.

<sup>79</sup> Wafula P, ‘Kenya faced 133 terror attacks since Somalia intervention’ HornAffairs, 3 September 2014 - <<http://hornaffairs.com/en/2014/09/03/kenya-faced-133-terror-attacks-since-somalia-intervention/>> on 2 February 2017.

<sup>80</sup> Otieno D, ‘Like every nation on earth that has had to deal with terrorists, Kenya suffered from a lack of imagination’ Daily Nation, 16 October 2015 - <<http://www.nation.co.ke/newsplex/newsplex-Linda-Nchi-Terrorism/2718262-2917062-9fm054/index.html>> on 2 February 2017.

## CHAPTER 3: THE CURRENT KENYAN LEGAL FRAMEWORK ON BAIL FOR SUSPECTED TERRORISTS

### 3.1 Introduction

This chapter will look at the definition of terrorist acts and what these acts constitute. It will also delve into the current counterterrorism legal framework in Kenya and focus on the provisions dealing with bail for suspected terrorists. Further, it will look at the role that the State plays in the fight against terrorism.

### 3.2 The Definition of Terrorism

There is no universally agreed definition of the term terrorism. There are different opinions on what constitutes terrorism and terrorist activities. ‘Attempts towards a universal definition of terrorism have not achieved a complete consensus. ‘Terrorism is indeed an emotionally charged, morally laden and politically contentious concept, which has nevertheless emerged as a critical and unavoidable feature of the legal landscape both internationally and domestically.’<sup>81</sup> Thus, everyone seems to have their own idea of what should constitute terrorism. ‘Trying to define terrorism has produced endless debates, at both the political and legal levels.’<sup>82</sup>

‘The definition certainly requires something more than what looks, smells and kills like terrorism is terrorism.’<sup>83</sup> It is generally accepted that the lack of a definition of terrorism may actually hinder the efforts to develop effective international and domestic counter terrorism mechanisms.<sup>84</sup> Furthermore, the lack of a universally accepted definition, coupled with a ‘mandate for strong counterterrorism laws and policies, has opened the door for potential abuse by member states in those areas in which the piecemeal international definition does not provide clarity.’<sup>85</sup>

The General Assembly has repeatedly attempted to create a universally agreed upon definition. ‘Each effort, however, failed based on the perceived subjectivity of any such

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<sup>81</sup> Ramraj V, Hor M, Roach K and Williams G, *Global Anti-terrorism Law and Policy*, 2<sup>nd</sup> ed, Cambridge University Press, 2012, 2.

<sup>82</sup> Filippo M ‘Terrorist crimes and international co-operation: Critical remarks on the definition and inclusion of terrorism in the category of international crimes’ 19(3) *The European Journal of International Law*, 2008, 541.

<sup>83</sup> Greenstock J, ‘General Assembly Debate on Terrorism’ 1 October 2001 - <<http://www.un.org/terrorism/statements/ukE.html>> on 3 February 2017.

<sup>84</sup> Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-terrorism*, July 2008, 11.

<sup>85</sup> Setty S, ‘What’s In A Name? How Nations Define Terrorism Ten Years After 9/11’ 33(1) *University of Pennsylvania Journal of International Law*, 2011, 8.

definition, as certain elements of a proposed definition were rejected by various nations whose interests were not served.’<sup>86</sup>

However, there are areas of consensus in terms of the core elements and devastating effects of terrorist activities.’<sup>87</sup> It has been commonly accepted, for example, that terrorism is primarily geared towards violence and it is designed to instil fear whether at a localised or international level.<sup>88</sup> Consequently, various states have chosen to develop their own definitions on what constitutes terrorism ‘due to the legal effects of falling within that definition.’<sup>89</sup>

The current Kenyan legal framework does not define the term ‘terrorism.’ However, the Prevention of Terrorism Act does define a ‘terrorist act.’ It is defined as ‘an act or threat of action 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.’<sup>90</sup>

It further explains that this terrorist act should be carried out with ‘the aim of intimidating or causing fear amongst members of the public or a section of the public; or intimidating or compelling the Government or international organisation to do, or refrain from any act; or

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<sup>86</sup> Setty S, ‘What’s In A Name? How Nations Define Terrorism Ten Years After 9/11’, 9.

<sup>87</sup> Omondi S, ‘Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya’, 26.

<sup>88</sup> Jenkins B ‘International terrorism: Trends and potentialities’ 32(1) *Journal of International Affairs*, 1978, 115.

<sup>89</sup> Cassese A, ‘Terrorism as an International Crime’ in Bianchi A (ed), 1<sup>st</sup> ed, *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 213.

<sup>90</sup> Section 2, *The Prevention of Terrorism Act* (No. 30 of 2012).

destabilising the religious, political, Constitutional, economic or social institutions of a country, or an international organisation.<sup>91</sup>

Thus, although Kenyan legislation has not provided for a definition of the term terrorism, the Prevention of Terrorism Act is instrumental in providing a definition for a terrorist act. It has provided a yardstick that ensures that all acts that directly or indirectly threaten the sovereignty of the Kenyan state while also causing fear among the public can be defined as acts of terrorism and thus punished accordingly.

### **3.3 The Current Kenyan Legislation on Counterterrorism**

‘Terrorism remains a major threat to Kenya’s national-security interests. However, efforts to combat the menace are hampered by an insufficient legal framework. Previously, terrorism-related offenses were primarily handled under the provisions of the Penal Code, with the result that offenders received lenient sentences or even were acquitted.’<sup>92</sup>

Since the Mau Mau revolution, Kenya has changed, as has the nature of terrorism. For one thing, Kenya has been a target of both domestic and international terrorism. Today, it must balance its counterterrorism measures with its obligations to protect the fundamental civil liberties of its citizens. That is, terrorism legislation is meant to address the crime of terror and mitigate the risks posed.<sup>93</sup>

#### **3.31 The Constitution of Kenya, 2010**

‘A Constitution is a set of laws and rules establishing the machinery of the government of a state and which defines and determines the relations between different institutions and areas of government - the Executive, the Judiciary and the Legislature including the central, regional and local governments. A Constitution is the source, the jurisprudential fountain head from which other laws must flow, succinctly and harmoniously.’<sup>94</sup>

Kenyans voted in the current Constitution in a referendum in August 2010. The Constitution of Kenya is ‘the supreme law of the Republic and binds all persons and all State organs at

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<sup>91</sup> Section 2, *The Prevention of Terrorism Act* (No. 30 of 2012).

<sup>92</sup> Mwazighe C, ‘Legal Responses To Terrorism: Case Study of The Republic Of Kenya’ Published LLM Thesis, Naval Postgraduate School, California, 2012, 5.

<sup>93</sup> Mwazighe C, ‘Legal Responses To Terrorism: Case Study of The Republic Of Kenya’ Published LLM Thesis, Naval Postgraduate School, California, 2012, 56.

<sup>94</sup> Nderitu M, Wasike I, Guandaru T, Momanyi D, Kwamboka J and Kibugu J, *History of Constitution Making in Kenya*, Media Development Association & Konrad Adenauer Foundation, 2012, 1.

both levels of government.’<sup>95</sup> It is therefore the main legal instrument that should be considered when looking at the question of public interest and bail for suspected terrorists.

The Constitution provides that ‘an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.’<sup>96</sup> This means that all offences are bailable. Every accused person has the right to apply for bail. These accused persons include terror suspects. The granting of bail for an accused person is only subject to the court finding compelling reasons not to grant bail.

During the bail hearing, the prosecution, on behalf of the state, makes an application to the court citing compelling reasons why bail should not be granted. The court then has the discretionary power to determine whether or not the compelling reasons presented are sufficient to deny the accused person bail. Consequently, although the right to bail is constitutional, it is not absolute. It can be limited by compelling reasons.

The question that then clearly arises is what these compelling reasons would include. This is mainly because the Constitution fails to define compelling reasons. This lack of clarity gives the courts wide discretionary power to determine these compelling reasons. One may argue that terrorism, based on its rather grave nature, should be sufficient to qualify as a compelling reason and thus the suspect should be denied bail. However, some judges have disagreed and granted some suspected terrorists bail. This can be seen in the *Hassan Mahati Omar & Another v Republic*<sup>97</sup> case, which was discussed earlier, where there were 2 persons who had been accused of committing acts of terror. The court granted bail to one of the accused and denied the other accused bail based on a previous charge of terrorism where the accused had been acquitted. The court however failed to give reasons why it deemed that the interests of justice would be best served by granting one of the suspected terrorists bail. This shows inconsistencies in the decisions of the court when it comes to the granting of bail for suspected terrorists.

Furthermore, ‘while on bail, some suspects are alleged to have participated in subsequent terror attacks in the country.’<sup>98</sup> This is seen in the already discussed cases of Hussein Nur Mohammed who was allegedly involved in planting an improvised explosive device in a

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<sup>95</sup> Article 2 (1), *Constitution of Kenya* (2010).

<sup>96</sup> Article 49 (1) (h), *Constitution of Kenya* (2010).

<sup>97</sup> *Hassan Mahati Omar & Another v Republic* (2014) eKLR.

<sup>98</sup> Omondi S, ‘Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya’, 1.

*matatu* in Pangani area in Nairobi while he had been released on bail<sup>99</sup> and Jamal Mohammed Awadh and Suleiman Mohammed Said who are also said to have carried out terrorist acts in Mombasa while they had been released on bail.

Consequently, the former Chief Justice, Willy Mutunga, attempted to define these compelling reasons in the Bail and Bold Policy Guidelines that are discussed below.

It is also noteworthy that the Constitution also provides that ‘the national security of Kenya shall be promoted and guaranteed.’<sup>100</sup> Based on the Social Contract Theory and this provision, the state has an obligation to ensure the security of its citizens. This security is without a doubt threatened by terrorist acts. The crime of terrorism has peculiarities, which result in serious issues of national security, peace and unity. ‘The granting or denial of bail to individuals arrested on suspicion of terrorist activities, thus calls on the courts to exercise care and due diligence when making such orders so as to strike a balance between the freedoms and rights of suspects and state security.’<sup>101</sup>

### **3.32 The Prevention of Terrorism Act, 2012**

The Prevention of Terrorism Act was enacted to ‘provide measures for the detection and prevention of terrorist activities.’<sup>102</sup> It replaced the 2003 Suppression of Terror Bill following sporadic attacks by the Al Shabaab terror group.<sup>103</sup>

It is currently one of the main legislative instruments in Kenya that deals with counterterrorism measures. It was enacted in the midst of heavy international pressure to enact an anti-terrorism law. There were also protests by the Muslim community to have it amended as they claimed that certain sections of the Act would infringe on their civil liberties.<sup>104</sup> The Act was therefore passed after these concerns were addressed and the Act subsequently amended.

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<sup>99</sup> Habil E, ‘Police release photo of Pangani blast suspect’ Daily Nation, 15 December 2013 - <http://www.nation.co.ke/news/Pangani-Matatu-Blast-Police-Investigation/1056-2112754-89h00tz/index.html> on 2 February 2017.

<sup>100</sup> Article 238 (2), *Constitution of Kenya* (2010).

<sup>101</sup> Omondi S, ‘Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya’, 37.

<sup>102</sup> Preamble, *The Prevention of Terrorism Act* (No. 30 of 2012).

<sup>103</sup> Mwazighe C, ‘Legal Responses To Terrorism: Case Study of The Republic Of Kenya’ Published LLM Thesis, Naval Postgraduate School, California, 2012, 75.

<sup>104</sup> Oluoch F, ‘Kenya under pressure to pass anti-terrorism law’ The EastAfrican, 29 September 2012 - <http://www.theeastafrican.co.ke/news/Kenya-under-pressure-to-pass-anti-terrorism-law/2558-1521092-13h3eymz/index.html> on 3 February 2017.

In accordance with the Constitution, the Act provides that a suspected terrorist ‘shall not be held for more than twenty four hours after his arrest unless the suspect is produced before a Court and the Court has ordered that the suspect be remanded in custody.’<sup>105</sup> This provision has been interpreted as where the accused is not produced before the Court within the stipulated time; the prosecution must provide a reasonable explanation to the Court about the delay.<sup>106</sup> The Court then has the discretion to determine whether or not the explanation is reasonable. Where the delay is deemed to be too long and unreasonable then the question of an acquittal for the accused person may arise.<sup>107</sup>

Based on this, the police cannot detain a suspected terrorist arbitrarily; there must be compelling reasons for the detention. Furthermore, the suspected terrorist must be brought before the Court for it to determine whether they should be detained.

The Act also provides that where a police officer deems that this detention period prescribed by the Constitution is insufficient, the police officer can apply to the court, in writing, for an extension of this stipulated period.<sup>108</sup> When making the said application, the police officer has to specify: ‘the nature of the offence for which the suspect has been arrested; the general nature of the evidence on which the suspect has been arrested; the inquiries that have been made by the police in relation to the offence and any further inquiries proposed to be made by the police; and the reasons necessitating the continued holding of the suspect in custody, and shall be supported by an affidavit.’<sup>109</sup>

Additionally, the Act provides that ‘a police officer who has detained a suspect may apply in writing to the court to extend the time for holding the suspect in custody for a period of up to thirty days. Before this period expires, the police officer may again apply to the court to extend the period of detention.’<sup>110</sup> Similar to Article 49 of the Constitution, the Act provides that the ‘court shall not make an order for the remand in custody of suspect unless there are compelling reasons.’<sup>111</sup> These provisions further illustrate the wide discretionary powers of the Court when it comes to determining both pre-trial detention and bail for suspected terrorists. They also intensify the need to define these ‘compelling reasons’ to ensure that the

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<sup>105</sup> Section 32 (1) (a), *The Prevention of Terrorism Act* (No. 30 of 2012).

<sup>106</sup> Kiage, *Essentials of Criminal Procedure In Kenya*, 46.

<sup>107</sup> Kiage, *Essentials of Criminal Procedure In Kenya*, 46.

<sup>108</sup> Section 33 (1), *The Prevention of Terrorism Act* (No. 30 of 2012).

<sup>109</sup> Section 33 (2), *The Prevention of Terrorism Act* (No. 30 of 2012).

<sup>110</sup> Section 33(8) and (9), *The Prevention of Terrorism Act* (No. 30 of 2012).

<sup>111</sup> Section 33 (5), *The Prevention of Terrorism Act* (No. 30 of 2012).

Court interprets the law regarding bail in the same manner for all suspected terrorists to avoid inconsistencies.

The Prevention of Terrorism Act has been said to make Kenya a much safer place than before.<sup>112</sup> This may not necessarily be true as the number of acts of terrorism in the country have increased significantly from 2012. Perhaps the Act needs to have more stringent measures when it comes to its counterterrorism measures in response to this increase in terrorism. The reality is that ‘Kenyans seem to have accepted that in order to achieve a certain level of security; a certain amount of civil liberties must be compromised.’<sup>113</sup> This means that it may be within the common good of the society to simply deny bail to suspected terrorists in order to achieve those conditions that benefit everyone.

In fact, some courts have even ruled that suspected terrorism is too serious a charge to be granted bail. In *Oluseye Oledaji Shittu v Republic*, the court held that although ‘the law presumes the Applicant to be innocent until proven guilty in a court of law, the court could not ignore the fact that persons charged under the Prevention of Terrorism Act may potentially cause harm to the people of Kenya if released on bail pending trial and that the court could not be sure that such an accused person will attend court when required to do so.’<sup>114</sup>

Certainly, as one of the main legislative instruments on counterterrorism in the country, this Act should provide a definition for compelling reasons for bail when it comes to suspected terrorists so as to remedy the failure of the Constitution to provide the definition.

### **3.33 The Security Laws (Amendment) Act, 2014**

Following several incidents of terrorist attacks in the country in 2013 and 2014, after extensive consultations within the Executive, President Uhuru Kenyatta instructed Parliament to amend security laws so as to enable the government to deal with terrorism in the country.<sup>115</sup> This Act faced a lot of contention with many claiming that it was rushed and failed to comply with the public participation requirement of the Constitution.<sup>116</sup>

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<sup>112</sup> Mwazighe C, ‘Legal Responses To Terrorism: Case Study of The Republic Of Kenya’ Published LLM Thesis, Naval Postgraduate School, California, 2012, 85.

<sup>113</sup> Kenya National Commission On Human Rights, *Are We Under Siege? The State Of Security In Kenya An Occasional Report (2010 – 2014)*, 2014, 6.

<sup>114</sup> *Oluseye Oledaji Shittu v Republic* (2016) eKLR.

<sup>115</sup> Lohner J, Banjac S and Neverla I, ‘Mapping structural conditions of journalism in Kenya’ *Media, Conflict and Democratisation*, June 2016, 22.

<sup>116</sup> Article 118, *Constitution of Kenya* (2010).



The President however argued that the law ‘would improve state capacity to detect, deter and disrupt threats to the security of Kenya. In addition, the President lauded the law for giving security actors a firm institutional framework for coherent co-operation and synergy within the national counter-terrorism centre.’<sup>117</sup> He further stated that this law would help to protect the lives and property of Kenyans. This ideally is in accordance with the obligations of the state to protect its citizens based on the Social Contract Theory.

Subsequently, a Petition was filed by the Coalition for Reform and Democracy (CORD), the Kenya National Commission on Human Rights and Samuel Ng’ang’a to challenge the constitutionality of the Security Laws (Amendment) Act. Some of the sections of the Act that the Petitioners cited included those which criminalised the publication of certain material, the imposition of restrictions on refugees and asylum seekers and provisions amending the Prevention of Terrorism Act thus broadening the surveillance powers of the police.<sup>118</sup>

The High Court temporarily suspended the implementation of certain sections of the Act after determining that parts of it raised human rights concerns. ‘On the 23<sup>rd</sup> of February in 2015, five judges — Isaac Lenaola, Mumbi Ngugi, Hillary Chemitei, Hedwig Ong’udi and Joseph Onguto — ruled on the constitutionality of the sections that had been suspended.’<sup>119</sup> The judges held that the 8 sections that had been suspended were indeed unconstitutional and thus set them aside. Notably, Section 20 of the Act which had amended the Criminal Procedure Code and allowed the police to detain suspects without bail or bond was one of the sections that was declared unconstitutional.

Despite the rather controversial nature that the Security Laws (Amendment) Act was enacted, it certainly contains provisions that are more stringent when it comes to the fight against terrorism such as Section 64 which amends the Prevention of Terrorism Act to criminalise inducing another person to commit an act of terrorism. Indeed, the Security Law (Amendment) Act was enacted with a main objective, that is, to amend the laws that relate to security in the country.<sup>120</sup>

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<sup>117</sup> Omondi, *Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya*, 31.

<sup>118</sup> *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* (2015) eKLR.

<sup>119</sup> Kagwanja P, ‘Ruling on anti-terrorism law a triumph for Kenya’s Judiciary’ *Daily Nation*, 28 February 2015 - <<http://www.nation.co.ke/oped/Opinion/Security-Laws-High-Court-Ruling-Terrorism/440808-2638706-bhuv6f/index.html>> on 3 February 2017.

<sup>120</sup> Preamble, *The Security Laws (Amendment) Act* (No.19 of 2014).

The Act has amended section 36 of the Criminal Procedure Code and reiterated section 32 of the Prevention of Terrorism Act discussed above. It states that ‘pursuant to Article 49(1) (f) and (g) of the Constitution, a police officer shall present a person who has been arrested in court within twenty-four hours after being arrested.’<sup>121</sup> It further provides, similar to section 33 of the Prevention of Terrorism Act, that where a police officer has reasonable grounds to believe that the detention of the arrested person beyond the stipulated 24 hours is necessary, the police officer has to apply, in writing, to the court for an extension.<sup>122</sup>

‘A court shall not make an order for the remand in custody of a suspect unless there are compelling reasons.’<sup>123</sup> This is similar to the provision in Article 49 of the Constitution. The Act has also attempted to define some of these compelling reasons. They include circumstances where ‘there are compelling reasons for believing that the suspect shall not appear for trial, may interfere with witnesses or the conduct of investigations, or commit an offence while on release; where it is necessary to keep the suspect in custody for his protection, or, where the suspect is a minor, for his welfare; the suspect is serving a custodial sentence; or the suspect, having been arrested in relation to the commission of an offence, has breached a condition for his release.’<sup>124</sup>

The main purpose for granting bail is to ensure that the accused person attends court so to answer to their charge. Where the court has reasons to believe that the accused will not attend the trial, then it should not grant them bail. Terrorism is a rather serious charge. This means that the probability of the accused absconding is quite high. The Security Laws (Amendment) Act is another leading instrument in counterterrorism measures in the country. Accordingly, I would propose that this Act simply includes acts of terrorism in its definition of compelling reasons due to the gravity of the offence.

### **3.34 Bail and Bond Policy Guidelines, 2015**

The enactment of the current Constitution rendered all offences bailable. ‘The judges who dealt with the question of bail for defendants who were facing capital charges expressed the need for clear guidelines to govern bail in Kenya.’<sup>125</sup> In the *Republic v Joseph Wambua Mutunga and others*, Justice Ochieng’ observed that Kenya needed to pass a legislation

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<sup>121</sup> Section 15 (1), *The Security Laws (Amendment) Act* (No.19 of 2014).

<sup>122</sup> Section 15 (2), *The Security Laws (Amendment) Act* (No.19 of 2014).

<sup>123</sup> Section 15 (5), *The Security Laws (Amendment) Act* (No.19 of 2014).

<sup>124</sup> Section 15 (5), *The Security Laws (Amendment) Act* (No.19 of 2014).

<sup>125</sup> Kiage, *Essentials of Criminal Procedure In Kenya*, 134.

dealing with the issue of bail as other countries such as Eritrea and Uganda had done.<sup>126</sup> He stated that such structures would put structures and instruments in place to assist the Judiciary in ensuring that the accused persons who are granted bail actually turn up for trial.<sup>127</sup>

In order to remedy the contradictory and inconsistent decisions within the Judiciary when it comes to the granting of bail for terror suspects such as in the case of *Hassan Mahati Omar & Another v Republic* where one suspected was granted bail while the other was denied bail, the former Chief Justice, Willy Mutunga, set up a Task Force on Bail and Bond through a gazette notice in 2014. The Judiciary solicited public views on whether or not suspected terrorists should be granted bail following Executive concern about suspects fleeing justice.<sup>128</sup> Consequently, this Task Force was created ‘after several terrorism suspects were released on bail, sparking protests from Kenyans, amid rising terror attacks in the country.’<sup>129</sup>

The mandate of this Task Force was mainly to ‘develop a National Bail Policy that would guide the police and judicial officers on the application of laws that provide for bail and bond and to make appropriate recommendations on legislative and regulatory amendments necessary for addressing inconsistencies and enabling fair administration of bail and bond measures.’<sup>130</sup>

The Policy that the Task Force developed was ideally also meant to limit the wide discretionary powers of the Judiciary and provide guidelines on bail. This is because the courts were of the opinion that ‘what amounts to compelling reasons as envisaged in Article 49(1) (h) of the Constitution was a matter of judicial discretion and that Kenya did not have statutory guidelines to govern the granting of bail.’<sup>131</sup> Therefore, the courts have faced a particular challenge since the promulgation of the Constitution of 2010 in determining the

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<sup>126</sup> *Republic v Joseph Wambua Mutunga and others* (2008) eKLR.

<sup>127</sup> Kiage, *Essentials of Criminal Procedure In Kenya*, 134.

<sup>128</sup> Otuki N, ‘Judiciary seeks views on bail for terror suspects’ Business Daily, 18 August 2014 - <<http://www.businessdailyafrica.com/Judiciary-seeks-views-on-bail-for-terror-suspects/-/539546/2423226/-/afg284z/-/index.html>> on 10 January 2017.

<sup>129</sup> Otuki N, ‘Judiciary seeks views on bail for terror suspects’ Business Daily, 18 August 2014 - <<http://www.businessdailyafrica.com/Judiciary-seeks-views-on-bail-for-terror-suspects/-/539546/2423226/-/afg284z/-/index.html>> on 10 January 2017.

<sup>130</sup> Chimei H, ‘The constitutional right to bail: Taking inventory of the recently launched Bail Bond Policy Guidelines (2015)’ LinkedIn, 26 May 2016- <<https://www.linkedin.com/pulse/constitutional-right-bail-taking-inventory-recently-launched-chimei>> on 10 January 2017.

<sup>131</sup> *Hassan Mahati Omar & Another v Republic* (2014) eKLR.

existence of compelling reasons for denying an accused person bail, particularly in serious offences like terrorism.<sup>132</sup>

The Guidelines provide that the court should hold a bail hearing where the Prosecution opposes the granting of bail for the accused person. At this hearing, the Prosecution needs to satisfy the court, on a balance of probabilities of the existence of compelling reasons that justify the denial of bail. This standard of a ‘balance of probabilities’ is one that has been widely accepted as the standard in bail determinations.<sup>133</sup>

These compelling reasons include: ‘the accused person is likely to fail to attend court proceedings; or the accused person is likely to commit, or abet the commission of, a serious offence; or the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or the accused person is likely to endanger the safety of victims, individuals or the public; or the accused person is likely to interfere with witnesses or evidence; or the accused person is likely to endanger national security; or that it is in the public interest to detain the accused person in custody.’<sup>134</sup>

The Guidelines refer to the exceptions to the right to bail stipulated under the Criminal Procedure Code as a compelling reason. These offences are capital offences such as murder, robbery with violence, attempted robbery with violence and treason.<sup>135</sup> These are crimes that can be said to be quite heinous in nature thus it is reasonable to deem that those who are accused of such crimes are likely to try to abscond bail. Terrorism can be said to be a rather deplorable crime. Its effect may even be more grievous than the crimes listed above. I would therefore argue that it should be afforded similar, if not more stringent, measures when it comes to the granting of bail. The Guidelines should definitely include terrorism in this definition of compelling reasons.

The Guidelines also reiterate the provisions of the Prevention of Terrorism Act allowing police officers in cases involving terrorism to apply to the court for an extension for the prescribed period of detention. This period, however, cannot exceed 90 days and this includes the period for which the terror suspect was first remanded in custody.<sup>136</sup>

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<sup>132</sup> National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, March 2015, 16.

<sup>133</sup> National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, March 2015, 25.

<sup>134</sup> National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, March 2015, 25.

<sup>135</sup> Section 123 (1), *Criminal Procedure Code* (Cap 75).

<sup>136</sup> National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, March 2015, 29.

Additionally, the Guidelines prescribe that in cases of transnational crimes such as terrorism, the court may impose the conditions when it comes to the grant of bail. These include: 'requiring the accused, while on release, not to commit an offence, interfere with witnesses or the investigations in relation to the offence for which the suspect has been arrested; requiring the accused person to avail himself or herself for the purpose of facilitating the conduct of investigations and the preparation of any report to be submitted to the court dealing with the matter in respect of which the suspect stands accused; or requiring the accused person to appear at such a time and place as the court may specify for the purpose of conducting preliminary proceedings or the trial or for the purpose of assisting the police with their inquiries.'<sup>137</sup>

This implies that the court has the discretionary power to release terror suspects on bail pending their trial subject to the conditions discussed above. This is certainly surprising as the Guidelines also acknowledge the fact that Kenya currently lacks a bail supervision system.<sup>138</sup> This means that the enforcement of bail conditions cannot be effective as there is no one to actually ensure that the terror suspects are complying with the conditions that the court has prescribed for them. 'This partly explains why there is a high rate of absconding among persons granted bail or bond, particularly free bonds and cash bail.'<sup>139</sup>

Drug trafficking and terrorism cases are said to present challenging scenarios to courts. 'Although accused persons charged with these offences may be able to produce collateral, required sureties, there is still possibility of them being flights risk given the nature of offences they are facing.'<sup>140</sup>

This is certainly alarming especially in serious cases such as those involving terrorism. Some of those who have been given bail have been said to have left the country which means that there is not much hope that justice shall be delivered.<sup>141</sup> This also means that others can commit subsequent acts of terrorism which may lead to the loss of more lives and property for Kenyans. This is seen in the cases of Hussein Nur Mohammed and Jamal Mohammed

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<sup>137</sup> National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, March 2015, 28.

<sup>138</sup> National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, March 2015, 29.

<sup>139</sup> Akech M and Kinyanjui S, 'Pretrial Detention in Kenya: Balancing the Rights of Criminal Defendants and the Interests of Justice' 19 (1) *East African Journal of Peace and Human Rights*, 2011, 71.

<sup>140</sup> National Council on the Administration of Justice, *Report Of The Task Force To Develop Bail And Bond Policy Guidelines*, March 2015, 25.

<sup>141</sup> Onyango P, 'Kenya entangled in proscribed crimes of terrorism and violations of human rights law', 3 - <[https://profiles.uonbi.ac.ke/peter\\_onyango/files/terrorism\\_and\\_human\\_rights\\_in\\_kenya.pdf](https://profiles.uonbi.ac.ke/peter_onyango/files/terrorism_and_human_rights_in_kenya.pdf)> on 20 December 2016.

Awadh and Suleiman Mohammed Said which have been discussed where these terrorism suspects committed further acts of terror while they had been released on bail.

Additionally, the Guidelines also note that the police are in a dilemma when it comes to balancing the rights of the arrested person and public expectations of detaining the arrested persons. The Office of the Director of Public Prosecution has stated ‘that the nature and gravity of the offence ought to compel the court to deny bail. For example, cash bail may not be appropriate in drugs, terrorism and terrorism related acts. No amount of cash bail may guarantee the accused persons attendance in court.’<sup>142</sup> Thus, the police and the prosecution strongly believe that bail should be denied for serious offences such as terrorism.

Although, the Bail and Bond Policy Guidelines were only enacted in 2015 and were meant to provide guidance to the Judiciary on matters to do with bail, the reality is that since the launch of the policy guidelines, the lack of clarity and perceptions continue to blight bail applications by the police and the Judiciary.<sup>143</sup> Despite the circumstances discussed above, the courts continue to grant bail for terror suspects at the expense of national security.

‘Questions abound: Is there lack of sensitisation of the judges, magistrates and the police on the Policy Guidelines? Does the answer really lie in the Policy Guidelines? The bail picture painted of “an expensive, inconsistent and uncertain procedure in the administration of bail and bond by both the police and the courts...” still exists if little has or is shifting. The tide seems to have maintained the same position.’<sup>144</sup>

### **3.4 The Role of the State**

The Kenyan government is comprised of three arms; the Legislature or Parliament, the Judiciary and the Executive. These three arms ‘must exercise their authority, as provided by the Constitution to protect the lives and property of every person in Kenya. Protection of life and property is indeed the core function of any government.’<sup>145</sup> This is also supported by the Social Contract Theory that proposes that the state has an obligation to protect the lives and property of its people in exchange for these people surrendering their rights to its authority.

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<sup>142</sup> National Council on the Administration of Justice, *Report Of The Task Force To Develop Bail And Bond Policy Guidelines*, March 2015, 26.

<sup>143</sup> Chimei H, ‘The constitutional right to bail: Taking inventory of the recently launched Bail Bond Policy Guidelines (2015)’ LinkedIn, 26 May 2016- <<https://www.linkedin.com/pulse/constitutional-right-bail-taking-inventory-recently-launched-chimei>> on 11 January 2017.

<sup>144</sup> Chimei H, ‘The constitutional right to bail: Taking inventory of the recently launched Bail Bond Policy Guidelines (2015)’ LinkedIn, 26 May 2016- <<https://www.linkedin.com/pulse/constitutional-right-bail-taking-inventory-recently-launched-chimei>> on 11 January 2017.

<sup>145</sup> Larrabee F, *Functions of Government: A Development of Principles That Necessitate the Existence of Government*, Kimball & Storer Company Printers, Minneapolis, 1897, 35.

The Legislature, which is comprised of the Senate and the National Assembly, is tasked with the mandate to enact laws that are based on the discussed Social Contract Theory, that is, to protect the lives and property of Kenyan citizens. This is also because it ‘derives its authority from the people of Kenya.’<sup>146</sup> The Legislature is therefore tasked with the mandate of creating the laws that address terrorism. ‘In this respect, the National Assembly is obligated to provide for the limitation of the rights and freedoms of those suspected and or convicted of terrorism. Any such limitation must, however, be within the constitutional limits and must follow the due process and the rule of law.’<sup>147</sup>

The Judiciary plays an interpretive role where disputes arise. It interprets the law and resolves disputes and ensures that those who are guilty are punished. It also derives its authority from the Kenyan people.<sup>148</sup> ‘In exercising judicial authority, the courts and tribunals are guided by the principles of—justice, irrespective of status, without delay, administered without undue regard to procedural technicalities; and the protection of the purpose and principles of the 2010 Constitution.’<sup>149</sup> In this case, the Judiciary has wide discretionary powers that are granted by the Constitution when it comes to determining whether suspected terrorists should be released on bail.

The Executive enforces the law that has been enacted by the Legislature. It is bound by the National values and principles of governance as it enforces these laws.<sup>150</sup> ‘Thus, any Executive action directed at quashing terrorism must be in line with these principles.’<sup>151</sup> The Executive has faced challenges in balancing the rights of individuals suspected of terrorism with its responsibility to protect the citizens of Kenya.<sup>152</sup> It has repeatedly berated the Judiciary for granting bail to suspected terrorists.

Although these three arms of the Government are meant to work together to counter terrorism in the country, a blame game has been going on among them. This regards which one of them is liable when it comes to frustrating efforts to curb terrorism. The Executive in particular

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<sup>146</sup> Article 129, *Constitution of Kenya* (2010).

<sup>147</sup> Omondi S, ‘Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya’, 30.

<sup>148</sup> Article 159 (1), *Constitution of Kenya* (2010).

<sup>149</sup> Article 159 (2), *Constitution of Kenya* (2010).

<sup>150</sup> Article 10, *Constitution of Kenya* (2010).

<sup>151</sup> Omondi S, ‘Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya’, 35.

<sup>152</sup> Resmini M, ‘Limiting Judicial Discretion In Kenya's High Court: Towards A Statutory Framework For The Denial Of Bails For Persons Arrested On Suspicion Of Crimes Of Terror’ Published LLM Thesis, St. John's University, New York, 2015, 18.

claims that its efforts to protect Kenyan citizens from the effects of terrorism are frustrated because the Judiciary releases terror suspects on bail who go to commit further acts of terrorism.<sup>153</sup> The Executive has therefore proposed that that suspects to such offences should not be granted bail. It is basically arguing that it is within the common good of the society to focus on national security and in the process promote justice. However, such proposals have been made to the Judiciary through ‘roadside declarations’.<sup>154</sup>

‘Security concerns traditionally come under the jurisdiction of both the Legislature and Executive but the determination of bail application forms part of the due process of the law which belongs to the domain of the Judiciary.’<sup>155</sup> Bail jurisprudence involves the balancing of the values relating to the rights of the individual and the security of the state; it involves the balancing of the dictates of positivism and rationality and how these choices impact on the individual and the society; it is a cultural phenomenon since the values of the society dictate the content of bail jurisprudence.<sup>156</sup>

However, due to the lack of laws that fully address the inconsistencies when it comes to the granting of bail and further that curtail the wide discretionary powers of the Judiciary when it comes to such matters then the Judiciary ends up making mistakes. Terrorism, as already mentioned, is a rather gruesome crime. The public in some cases may decide to take the law into their own hands where they feel that the state is failing to fulfil their obligation to protect it. This can be seen in the case of *Aboud Rogo Mohamed & another v Republic*,<sup>157</sup> where both the accused had been charged with committing acts of terror by being members of the militia group Al-Shabaab. The Court granted both accused persons bail in February 2012 after determining that the main consideration when it comes to bail is whether the accused person will show up for trial.<sup>158</sup> This is despite the fact that the first accused, Aboud Mohammed, had been labelled as a terrorist by the United States and even been put on a sanctions list by

<sup>153</sup> Otuki N, ‘Judiciary seeks views on bail for terror suspects’ Business Daily, 18 August 2014 - <<http://www.businessdailyafrica.com/Judiciary-seeks-views-on-bail-for-terror-suspects/-/539546/2423226/-/afg284z/-/index.html>> on 10 January 2017.

<sup>154</sup> Orina N, ‘Independence of criminal judges in Kenya – current issues’ KAS African Law Study Library – Librairie Africaine d’Etudes Juridiques, 2016, 456 – 457- <<http://www.nomos-elibrary.de/10.5771/2363-6262-2016-3-453/independence-of-criminal-judges-in-kenya-current-issues-jahrgang-3-2016-heft-3>> on 22 December 2016.

<sup>155</sup> Ongoya Z, ‘Legal And Policy Dilemma In The Fight Against Terrorism: The Bail Question In Terrorism Cases In Kenya’ Kenya Law Blog, 25 August 2014 - <<http://kenyalaw.org/kenyalawblog/legal-and-policy-dilemma-bail-question-in-terrorism-cases/>> on 28 November 2016.

<sup>156</sup> Ongoya Z, ‘Legal And Policy Dilemma In The Fight Against Terrorism: The Bail Question In Terrorism Cases In Kenya’ Kenya Law Blog, 25 August 2014 - <<http://kenyalaw.org/kenyalawblog/legal-and-policy-dilemma-bail-question-in-terrorism-cases/>> on 28 November 2016.

<sup>157</sup> *Aboud Rogo Mohamed & another v Republic* (2011) eKLR.

<sup>158</sup> *Aboud Rogo Mohamed & another v Republic* (2011) eKLR.



the United Nations Security Council.<sup>159</sup> A few months later in August, the first accused, was shot dead by unknown persons.

Perhaps when it comes to grievous crimes such as terrorism it may in their best interest to always deny the suspects bail so as to ensure that they are protected from the wrath of the public. ‘The possibility of hostility from the victims kin who do not expect to see the accused back on their streets before justice is done to them cannot be overlooked. They have in fact stated that they will not be comfortable with it at all.’<sup>160</sup>

Furthermore, the Bail and Bond Guidelines have failed to guide judges when it comes to cases where the accused had previously been charged with acts of terrorism but acquitted then has been charged with the same offence again. The question in this case is whether the court should consider this previous offence in its determination regarding bail.

In the case of *Hassan Mahati Omar & Another v Republic*,<sup>161</sup> there were two persons who had been charged with committing acts of terrorism as they were in possession of hand grenades. The court granted one of the accused persons bail and denied the other one bail. The accused person who was denied bail had been previously arrested and later acquitted on similar terrorism charges. The court therefore held that it was within the interests of justice not to grant him bail.<sup>162</sup>

The question that arises is whether it is just to deny an accused person bail based on previous terrorism related charges. I would argue that it is within the interests of justice to do so. Terrorism is too grievous an offence to be taken lightly. Therefore where one can be said to have been accused of such crimes previously then it is just to deny them bail. In fact, previous terrorism related charges should fall within the definition of compelling reasons in the Bail and Bond Guidelines.

### **3.5 Conclusion**

The 2010 Constitution grants all arrested persons bail unless there are compelling reasons not to grant bail. The Constitution has then failed to provide a definition for these compelling reasons. This has created a gap in the law and given the Judiciary rather wide discretionary powers when it comes to the granting of bail in this case for suspected terrorists. Further, it

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<sup>159</sup> Mukinda F, ‘Obama blacklists three Kenyans over links with Al-Shabaab militants’ Daily Nation, 6 July 2012 - <<http://www.nation.co.ke/news/-/1056/1446980/-/njs1cd/-/index.html>> on 3 February 2017.

<sup>160</sup> *Timothy Mwati Mwangi v Republic* (2014) eKLR.

<sup>161</sup> *Hassan Mahati Omar & Another v Republic* (2014) eKLR.

<sup>162</sup> *Hassan Mahati Omar & Another v Republic* (2014) eKLR.

has led to inconsistencies in the granting of bail for suspected terrorists. The much anticipated Bail and Bond Policy Guidelines that were supposed to provide objective guidelines on this issue have seemingly failed to do so thus leaving the state of national security in the country uncertain.

The question therefore posed earlier of whether the Kenyan government has put in place adequate measures in the fight against terrorism is not fully satisfied on the basis of the above laws. In order to tackle the serious threat of terrorism, a balance has to be achieved between the positive obligation that the state has to protect its citizens while still protecting human rights. This positive obligation requires that the State not only punishes terrorists but that it also prevents the attacks.<sup>163</sup> The Social Contract also supports this notion as the state has an obligation to preserve the rights of its citizens and to protect their lives and property in exchange for the citizens surrendering their rights to them. The current Kenyan legislation does not provide enough protection for Kenyan citizens when it comes to preventing terrorist acts. As discussed above, the current bail provisions may allow some suspected terrorists to flee without being punished for their acts or for some to even perform subsequent terrorist acts.

When the Task Force was formed the Inspector General of Police Joseph Boinnet in a speech that was read by the Director of the Criminal Investigations Ndegwa Muhoro welcomed the Guidelines saying they will assist judges more so when dealing with terror suspects. 'He noted that terror threat in the country remains real saying the Bond and Bail Policy Guidelines would ensure terror suspects are not granted bond without due consideration of the danger they pose to peace and tranquillity of the county.'<sup>164</sup> It seems that his expectations have failed to be fully met.

Further, the fact that the current counterterrorism laws are insufficient also means that the three arms of the Government are engaged in a blame game as to which one of them is failing to protect Kenyan citizens. This is based on their obligation that arises from the Social Contract Theory to preserve the peace in society by protecting the lives and property of its citizens. If the legislation regarding Bail was more definite, then the courts would apply the

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<sup>163</sup> Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-terrorism*, July 2008, 1.

<sup>164</sup> Muraja J, Kenya: CJ Issues New Guidelines for Granting Bail or Bond' Capital FM, 21 March 2015 - <<http://allafrica.com/stories/201503210363.html>> on 11 January 2017.

laws in the same manner for all accused persons. It seems that the court has failed to administer this discretionary power that it has been justly afforded according to its mandate.

## CHAPTER 4: COMPARATIVE ANALYSIS

### 4.1 Introduction

This chapter will look at the manner at which other jurisdictions have dealt with the delicate issue of national security versus the right to apply for bail for suspected terrorists in comparison with the current Kenyan legislation that has been discussed in the previous chapter. The chapter will focus on two states namely; Australia and the United Kingdom.

### 4.2 Australia

Australia has long played a leading role in the development of laws to combat terrorism.<sup>165</sup> Like Kenya, Australia has been largely affected by terrorist attacks. In 2014, the terrorist alert level was raised from medium to high posing a threat feared to be of a similar degree as that of the tragic Bali Bombings of 2002 which killed 202 people including 88 Australians and injured a great number.<sup>166</sup>

Australia has defined a terrorist act as ‘an action or threat of action which is done or made with the intention of advancing a political, religious or ideological cause and coercing, or influencing by intimidation, the government of the Commonwealth, State or Territory or the government of a foreign country or intimidating the public or a section of the public.’<sup>167</sup> This definition is different from the Kenyan definition of a terrorist act as it includes advancing a political, religious or ideological cause. A similar provision did exist in the unamended version of the Prevention of Terrorism Act. However, Muslims protested the said provision stating that it could be used to ‘infringe on the freedom of worship or advancing religious faith.’<sup>168</sup> It was thereafter struck out of the Act.

The Australian Government has also enacted two laws that deal with the provision of bail for suspected terrorists, that is, the Anti-Terrorism Act of 2004 and the Bail Amendment (Terrorism) Act of 2004. These two Acts have had the effect of reversing the presumption in

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<sup>165</sup> Rix M, ‘Australia's anti-terrorism legislation: the national security state and the community legal sector’ 24(4) *University of Wollongong Research Online*, December 2006, 431.

- <<https://www.nationalsecurity.gov.au/WhatAustraliaIsDoing/Pages/Laws-to-combat-terrorism.aspx>> on 11 January 2017.

<sup>166</sup> Lipman R, ‘Spy chiefs believe terror attack in Australia on scale of Bali bombing may be inevitable, says senior MP as he backs bid for greater surveillance powers’ 14 July 2014 - <<http://www.dailymail.co.uk/news/article-2691714/MP-warns-Bali-bombing-scale-terrorist-attack-Australia.html>> on 11 January 2017.

<sup>167</sup> Section 100.1, *The Criminal Code Act* (1995) (Australia).

<sup>168</sup> Oluoch F, ‘Kenya under pressure to pass anti-terrorism law’ *The EastAfrican*, 29 September 2012 - <<http://www.theeastafrican.co.ke/news/Kenya-under-pressure-to-pass-anti-terrorism-law/2558-1521092-13h3eymz/index.html>> on 3 February 2017.

favour of bail in terrorism cases.<sup>169</sup> Additionally, the Crimes Act provides that a ‘bail authority must not grant bail to a person charged with a terrorism offence unless the bail authority is satisfied that exceptional circumstances exist to justify bail.’<sup>170</sup>

These provisions are different from the current Kenyan bail provision found in the Constitution. As discussed in the previous chapter, the Kenyan Constitution provides for a presumption that is in favour of granting bail for all accused persons. Australia, on the other hand, has enacted provisions where the presumption is against granting bail to a person who has been accused of a terrorism offence.

In Kenya, the Prosecution adduces evidence to the court stating reasons why the suspected terrorist should not be granted bail. The suspected terrorist is then allowed to state reasons why they should be granted bail. The court then determines whether the reasons that have been presented by the Prosecution are compelling enough to deny the accused bail. In Australia, the presumption is against the suspected terrorist being released on bail. Therefore, the suspect actually has to convince the court that there are exceptional circumstances why they should be granted bail to the satisfaction of the Prosecution.<sup>171</sup>

Furthermore, in 2015, the Australian Government decided to introduce new ‘laws to ensure that, except in the most exceptional circumstances, anyone with links to terrorism or violent extremism, including returned foreign fighters, will be refused bail.’<sup>172</sup> This means that if this law is passed anyone who is suspected of carrying out a terrorist act will be automatically denied bail.

On the 22<sup>nd</sup> of January this year, an accused murder was released on bail and subsequently allegedly drove his car into pedestrians. This led to the death of five people including ‘a three-month-old baby boy, 10-year-old Thalia Hakin, 22-year-old Jess Mudie and 33-year-old Matthew Si’<sup>173</sup> while 30 others were injured. Based on this, the 48<sup>th</sup> Premier of Australia,

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<sup>169</sup> Omondi S, ‘Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya’, 40.

<sup>170</sup> Section 15AA, *The Crimes Act* (1914) (Australia).

<sup>171</sup> Omondi S, ‘Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya’, 40.

<sup>172</sup> Nedin U, ‘Bail Laws To Get Tougher For Suspected Terrorists’ Student Criminal Lawyers, 1 September 2015 - <<http://www.sydneycriminallawyers.com.au/blog/bail-laws-to-get-tougher-for-suspected-terrorists/>> on 12 January 2017.

<sup>173</sup> Nearmy T, ‘Melbourne car attack: Bail law reform announced by Daniel Andrews in wake of Bourke St rampage’ ABC News, 23 Jan 2017 - <<http://www.abc.net.au/news/2017-01-23/bourke-st-rampage-prompts-bail-law-review-in-victoria/8202300>> on 4 February 2017.

David Andrews, announced that there would be a complete overhaul of Australian laws regarding bail.

Some of the new ‘changes include introducing an after-hours magistrates court to hear bail requests at the weekend and after normal court hours, and a requirement that all bail applications on serious matters, and those opposed by police are heard by a magistrate, not a bail justice.’<sup>174</sup> Currently, efforts to hire more magistrates have begun in order to implement these changes.

#### **4.3 United Kingdom**

The United Kingdom has faced the issue of terrorism for several decades. It has more recently faced the issue of legislating against the terrorist threat whilst complying with the European Convention on Human Rights.<sup>175</sup> It is also well-known for having one of the longest time periods for pre-charge detention. It is currently twenty eight days.

It has defined terrorism as the use or threat of action where ‘the action involves: serious violence against a person; serious damage to property; endangers a person’s life, other than that of the person committing the action; creates a serious risk to the health or safety of the public or a section of the public; or is designed seriously to interfere with or seriously to disrupt an electronic system.’<sup>176</sup>

Terrorism also includes ‘the use or threat of an action which is designed to influence the government (or an international governmental organisation) or to intimidate the public or a section of the public, and the use or threat of an action which is made for the purpose of advancing a political, religious (radical) or ideological cause.’<sup>177</sup>

Firstly, the United Kingdom has defined terrorism whereas Kenyan law only provides for terrorist acts. Furthermore, similar to Australian law, it has included the proviso that terrorist acts include those carried out for the purpose of propagating a religious, political or ideological view. As discussed above, a similar provision that existed in Kenyan law was struck out after Muslim protests that it would interfere with their religious freedoms.

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<sup>174</sup> Nearmy T, ‘Melbourne car attack: Bail law reform announced by Daniel Andrews in wake of Bourke St rampage’ ABC News, 23 Jan 2017 - <<http://www.abc.net.au/news/2017-01-23/bourke-st-rampage-prompts-bail-law-review-in-victoria/8202300>> on 4 February 2017.

<sup>175</sup> Feikert C, ‘Pre-Charge Detention for Terrorist Suspects: United Kingdom’ The Law Library of Congress, October 2008 - <<https://www.loc.gov/law/help/uk-pre-charge-detention.php>> on 12 January 2017.

<sup>176</sup> Section 2, *Terrorism Act*, (2000) (The United Kingdom).

<sup>177</sup> Section 1, *Terrorism Act*, (2000) (The United Kingdom).

The current legislation that provides for bail in the United Kingdom is the Bail Act of 1976. Similar to the current Kenyan legislation on bail, the Act provides that all accused persons who have been brought before the court or have applied to the court are entitled to apply for bail.<sup>178</sup>

However, there is an exception to this law that is found in the First Schedule of the Bail Act. This right to bail may be limited where the court has reasons to believe that ‘the defendant, if released on bail would: fail to surrender to custody, or commit an offence while on bail, or interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.’<sup>179</sup> These provisions are similar to the ones found in the Kenyan Bail and Bond Guidelines.

Other reasons that have also been provided include if the court believes that the defendant should be kept in custody for their own protection or where they are a child or young person for their own welfare.<sup>180</sup> Further, ‘the defendant need not be granted bail where the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this Part of this Schedule for want of time since the institution of the proceedings against him.’<sup>181</sup> The defendant will also not be granted bail they having been released on bail in or in connection with the proceedings for the offence, he has been arrested because it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody.<sup>182</sup> These provisions allow the court to deny the accused person bail where it has not received enough information regarding the question of bail. This particular provision is not reflected in Kenyan legislation.

The laws therefore do not have an express provision for bail for suspected terrorists. However, the courts have interpreted terror attacks to be instances that may constitute a public emergency. This is seen in the case of *A(FC) and Others(FC) v Secretary of State for the Home Department*<sup>183</sup> the House of Lords held that threats of terror may constitute public emergency but measures taken by the member state of the European Union in derogating its obligation to the European Convention on Human Rights should not exceed the limits of what is statutorily required of exigency situation. The court ruled that in this case the

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<sup>178</sup> Section 4, *The Bail Act* (1976) (The United Kingdom).

<sup>179</sup> First Schedule Section 2, *The Bail Act* (1976) (The United Kingdom).

<sup>180</sup> First Schedule Section 3, *The Bail Act* (1976) (The United Kingdom).

<sup>181</sup> First Schedule Section 5, *The Bail Act* (1976) (The United Kingdom).

<sup>182</sup> First Schedule Section 6 & 7, *The Bail Act* (1976) (The United Kingdom).

<sup>183</sup> *A(FC) and Others(FC) v Secretary of State for the Home Department* (2004), The United Kingdom House of Lords.

circumstances did not justify denial of bail and detention without trial of non-British nationals.<sup>184</sup>

In July 2005, the United Kingdom experienced a serious terrorist attack known as the London Bombings. Bombs were detonated in London trains and on a double decker bus leading to the death of 52 people while over 700 people sustained serious injuries.<sup>185</sup> The government responded to these attacks by amending their counterterrorism laws. The Terrorism Act was introduced in 2006. Notably, it allows the police to detain suspected terrorists for a period of 28 days without charging them.<sup>186</sup> The number of stipulated days thus increased from 14 to 28. The United Kingdom believes that this authority of the police to detain individuals based on reasonable suspicion is an effective preventive measure against terrorist attacks.<sup>187</sup> This is despite the backlash that it has received from various human rights activists who claim that this provision infringes on democratic rights. Furthermore, in 2008, the United Kingdom tried to extend these detention days by enacting the Counter Terrorism Bill. It proposed that the days should be increased to 42 days. This provision was however rejected.

Although the laws regarding pre-trial detention were amended, there have been no amendments made to the laws regarding bail. Thus the provisions discussed above continue to apply currently. These laws are without a doubt different from the Kenyan provisions on terrorism. To begin with, a police officer must produce an accused person in court within 24 hours unless it is not reasonable to do so according to the Constitution. Police officers cannot simply detain suspected terrorists based on reasonable suspicion without getting a court order allowing them to do so.

In June last year, the United Kingdom voted in favour of withdrawing from the European Union.<sup>188</sup> Although it is yet to happen, it will certainly be interesting to see the manner in which the United Kingdom may enact laws that they previously could not as they were not

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<sup>184</sup> Omondi S, 'Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya', 41.

<sup>185</sup> Rodgers L, Qurashi S and Connor S, '7 July London bombings: What happened that day?' BBC News, 3 July 2015 - <<http://www.bbc.com/news/uk-33253598>> on 4 February 2017.

<sup>186</sup> Feikert-Ahalt C, 'The UK's Legal Response to the London Bombings of 7/7' The Library of Congress, 13 May 2013 - <<https://blogs.loc.gov/law/2013/05/the-uks-legal-response-to-the-london-bombings-of-77/>> on 4 February 2017.

<sup>187</sup> Feikert-Ahalt C, 'The UK's Legal Response to the London Bombings of 7/7' The Library of Congress, 13 May 2013 - <<https://blogs.loc.gov/law/2013/05/the-uks-legal-response-to-the-london-bombings-of-77/>> on 4 February 2017.

<sup>188</sup> Hunt A and Wheeler B, 'Brexit: All you need to know about the UK leaving the EU' BBC News, 12 January 2017 - <<http://www.bbc.com/news/uk-politics-32810887>> on 12 January 2017.



approved by the European Union. Perhaps this may lead to even more stringent measures regarding pre-trial detention for suspected terrorists.

#### **4.4 Conclusion**

Both Australia and the United Kingdom have suffered the terrible effects of terrorism just like Kenya. In dealing with this global menace, Australia has decided to enact legislations that stipulate a presumption that is not in favour of bail for suspected terrorists. Furthermore, as it has decided to review its bail laws after the rather grievous incident that took place last month then it will be intriguing to see the stricter measures that it may opt to enact. However, a lesson that Kenya may borrow is that the law should not always be reactive. This means that now that the gap in the Bail and Bond Policy Guidelines has been identified with specific regard to bail, the country should not wait for a suspected terrorist to take advantage of this gap. The laws should be progressive so as to preserve national security.

The United Kingdom does not have any express provisions for granting bail to suspected terrorists. This may be because it already has a rather lengthy pre-charge detention period which is not present in current Kenyan legislation. Due to the rather controversial nature of terrorism in Kenya, adopting a lengthy pre-charge detention period may not work in the country. The Anti-Terrorism Police have already been accused of bias and corruption when it comes to the manner in which they handle terrorism cases.<sup>189</sup> Increasing the period of pre-charge detention would give them too much power that needs to be regulated by the Judiciary and the law. This form of regulation occurs when they have to apply to the Judiciary so as to increase the amount of time that they can detain a terrorist suspect so that this is not done arbitrarily.

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<sup>189</sup> Oramini D, 'The Impact of Counter-terrorism Operations on Human Rights in Kenya', 14.

## CHAPTER 5: ANALYSIS OF FINDINGS

### 5.1 Introduction

This chapter will look at the challenge that the court is faced in finding the balance between national security and the right to bail for suspected terrorists. It will also address the human rights concerns that may arise based on trying to achieve this delicate balance.

### 5.2 The Question of Bail versus Public Interest

The question of bail for suspected terrorists is a rather controversial one. This is based on the fact that it involves attempting to balance their right to bail while trying to promote public interest in the form of national security.

The right to bail for all accused persons including suspected terrorists is based on the presumption of innocence; where one is deemed to be innocent until the contrary is proven by the prosecution.<sup>190</sup> Furthermore, the main purpose for granting bail is to ensure that the accused person attends court so to answer to their charge. Where the court has reasons to believe that the accused will not attend the trial, then it should not grant them bail. The question that arises in this case is whether denying the suspected terrorist bail would be trying them before the actual trial has begun. This would mean that their right to be presumed innocent has been infringed upon.

I would argue that this is not the case. In the recently determined case of *Oluseye Oledaji Shittu v Republic*, the court held that although ‘the law presumes the applicant to be innocent until proven guilty in a court of law, the court could not ignore the fact that persons charged under the Prevention of Terrorism Act may potentially cause harm to the people of Kenya if released on bail pending trial and that the court could not be sure that such an accused person will attend court when required to do so.’<sup>191</sup>

Additionally, ‘the denial of bail when justified in accordance with the law does not amount to the loss of the right to the presumption of innocence or to a fair hearing. The right to bail is not one of the illimitable rights that are found under Article 24 of the current Constitution.’<sup>192</sup>

The High Court in the case of the *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others*<sup>193</sup> case discussed earlier, the High Court attempted to find a

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<sup>190</sup> Article 50 (2) (a), *Constitution of Kenya* (2010).

<sup>191</sup> *Oluseye Oledaji Shittu v Republic* (2016) eKLR.

<sup>192</sup> *Hassan Mahati Omar & Another v Republic* (2014) eKLR.

<sup>193</sup> *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* (2015) eKLR.

balance between national security and the right to bail for suspected terrorists in determining whether sections of the Security Laws (Amendment) Act were constitutional. The Court in trying to find this balance relied on the South African case of *S v Zuma & Others*<sup>194</sup> where it agreed that:

*‘Where a party is alleging that a constitutional right or freedom has been violated then the party must demonstrate that the exercise of a fundamental right has been infringed upon or limited. Once a limitation has been demonstrated, then the party which would benefit from the limitation must demonstrate a justification for the limitation. As in this case, the State, in demonstrating that the limitation is justifiable, must demonstrate that the societal need for the limitation of the right outweighs the individual’s right to enjoy the right or freedom in question.’*<sup>195</sup>

Therefore, in circumstances where it is in the interest of countervailing public interests such as national security then it may be necessary to limit other rights for security reasons. ‘The limitation should be justifiable in a free and democratic society and all relevant factors should be considered including the need to balance the rights and freedoms of an individual against the rights of others.’<sup>196</sup> Furthermore, the Court also held that the limitations imposed in the legislation under consideration should be justified by the realities that the State is confronted with and that they have a rational nexus with the purpose they are intended to meet.<sup>197</sup>

The reality that the State is faced with today is that Kenya has shockingly faced 133 terror attacks since the Somalia intervention.<sup>198</sup> In addition to that, ‘the attacks have also become more ferocious, with deaths and injuries caused by terrorism between October 2011 and July 2015 being eight times as many as the period between 2008 and September 2011.’<sup>199</sup> The State has a fundamental obligation to ensure that the lives of its citizens are protected as stated in the Social Contract Theory and further stipulated in the current Constitution which provides that ‘the national security of Kenya shall be promoted and guaranteed.’<sup>200</sup>

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<sup>194</sup> *S v Zuma & Others* (1995) Constitutional Court of South Africa.

<sup>195</sup> *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* (2015) eKLR.

<sup>196</sup> *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* (2015) eKLR.

<sup>197</sup> *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* (2015) eKLR.

<sup>198</sup> Wafula P, ‘Kenya faced 133 terror attacks since Somalia intervention’ HornAffairs, 3 September 2014 - <<http://hornaffairs.com/en/2014/09/03/kenya-faced-133-terror-attacks-since-somalia-intervention/>> on 2 February 2017.

<sup>199</sup> Otieno D, ‘Like every nation on earth that has had to deal with terrorists, Kenya suffered from a lack of imagination’ Daily Nation, 16 October 2015 - <<http://www.nation.co.ke/newsplex/newsplex-Linda-Nchi-Terrorism/2718262-2917062-9fm054/index.html>> on 2 February 2017.

<sup>200</sup> Article 238 (2), *Constitution of Kenya* (2010).

Consequently, based on the rather grievous nature of terrorism then limiting the right to bail for suspected terrorists can be justified based on the high rate of insecurity that is in the country. 'The objective of terrorism is to put the rights of people at stake, destroy the rule of law and democracy. Terrorism jeopardises the value and security of human beings globally causes deaths of innocent people, bring forth an atmosphere that instills fear in people, threatens basic freedoms and focuses on destroying rights of the people.'<sup>201</sup>

However, I also recognise that in making this proposition that the reality in Kenya is that the Kenyan Anti-Terrorism Police Unit (APTU) has been highly 'criticised for perpetrating most human rights in the course of the activities to curb terrorism.'<sup>202</sup> The Police are said to carry out arbitrary arrests without evidence that one may be actually carrying out terrorist acts which means that some people are falsely accused and wrongfully arrested. They carry out 'detentions before laying charges against an individual to allow more investigations on whether they were part of the act or supported the act of terrorism.'<sup>203</sup>

Although this is a reality in the country, the fact that there has been a great increase in the number of terrorist attacks still remains. Therefore, in order to ensure that national security is maintained, the right to bail for suspected terrorists still has to be limited to a certain extent.

### **5.3 Conclusion**

In the comparative analysis carried out in the previous chapter, Australia has enacted laws that create a presumption against bail when it comes to terrorist suspects. This may help to create somewhat of a balance between the public interest in the form of national security and the right to bail for suspected terrorists in Kenya. Legislation should therefore be enacted which provides that when it comes to terrorist acts, suspected terrorists should not be granted bail unless there are exceptional circumstances that prove why they should be released on bail. This will ensure that they do not evade the trial or commit any further acts of terror.

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<sup>201</sup> Oramini D, 'The Impact of Counter-terrorism Operations on Human Rights in Kenya', 2014, 15.

<sup>202</sup> Oramini D, 'The Impact of Counter-terrorism Operations on Human Rights in Kenya', 2014, 14.

<sup>203</sup> Oramini D, 'The Impact of Counter-terrorism Operations on Human Rights in Kenya', 2014, 26.

## CHAPTER 6: RECOMMENDATIONS AND CONCLUSION

### 6.1 Conclusion

The Social Contract Theory and the Common Good Theory have provided a good basis for this study. The state has an obligation to preserve the state of peace in the society by protecting the lives and property of its citizens. Further, it is within the public good or common good to ensure that national security is preserved. Certainly, ‘life under the threat of terrorism has the constant potential of being solitary, poor, nasty, brutish, and short.’<sup>204</sup> It is therefore within the common good or public interest to ensure that counterterrorism measures are effective and sufficient.

This study has looked at the global menace known as terrorism and focused on the legal counterterrorism framework that Kenya has put in place particularly when it comes to the granting of bail for suspected terrorists. As the study has shown, ‘terrorism remains a major threat to Kenya’s national-security interests. However, efforts to combat the menace are hampered by an insufficient legal framework.’<sup>205</sup>

‘The Judiciary, while making decisions on bail matters, exercises judicial authority on behalf of the people of Kenya. Therefore, judicial officers have a duty to ensure that granting bail to terrorism suspects does not jeopardise state security and the safety of the people of Kenya. Likewise, limiting suspects rights to bail must be lawful and within legal limits.’<sup>206</sup> This delicate balance between the rights of terrorism suspects and public safety has clearly not been achieved under the current legal regime.

It seems that the Courts have focused too much on ensuring that the rights of suspected terrorists are protected which has been to the detriment of public interest in the form of national security.<sup>207</sup> This is seen in cases that have been discussed where the suspected terrorist is released on bail and decides to perform subsequent acts of terrorism. Without a doubt, this is against the Social Contract Theory and the Common Good theory as the state has failed to protect its citizens. Furthermore, it is not within the common good to fail to promote national security.

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<sup>204</sup> Sznajder N, ‘Terrorism and the social contract’ 15(1) *Irish Journal of Sociology*, 2006, 8.

<sup>205</sup> Mwazighe C, ‘Legal Responses To Terrorism: Case Study of The Republic Of Kenya’ Published LLM Thesis, Naval Postgraduate School, California, 2012, 5.

<sup>206</sup> Omondi S, ‘Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya’, 43.

<sup>207</sup> Resmini M, ‘Limiting Judicial Discretion In Kenya's High Court: Towards A Statutory Framework For The Denial Of Bails For Persons Arrested On Suspicion Of Crimes Of Terror’ Published LLM Thesis, St. John's University, New York, 2015, 28.

‘Those who are concerned about the human rights compatibility of counter-terrorism laws have been accused of defending terrorists or failing to take the threat of terrorism seriously.’<sup>208</sup> Such opinions are inaccurate. Although it is self-evident that terrorism is a gross violation of fundamental human rights and that the threat is quite legitimate, to suggest that democratic rights and freedoms should be abandoned when dealing with terror suspects would be incorrect as well. The state has a duty to protect its citizens while still ensuring that gross violations of human rights do not occur in order for them to do so.

However, I would propose that the security or a threat to others should be deemed as a reason that is compelling enough for terrorism suspects to be denied bail. The main purpose of granting bail is to ensure that the accused person attends their trial. When it comes to a serious offence such as terrorism, the suspected terrorist is likely to abscond. Thus, the Bail and Bond Policy Guidelines should include terrorism in its description of compelling reason. The court in the case of *Hassan Mahati Omar* held that ‘the denial of bail when justified in accordance with the law does not amount to the loss of the right to the presumption of innocence or to a fair hearing. The right to bail is not one of the illimitable rights that are found under Article 24 of the current Constitution.’<sup>209</sup>

Amending these Bail and Bond Policy Guidelines in such a manner will curb the wide discretionary powers of the Judiciary that they are clearly unable to implement as shown. It will also remove these inconsistencies in the granting of bail to suspected terrorists. ‘Ultimately, discretion to make bail decisions on a case-by-case basis for persons arrested on the terror offences should be taken out of the hands of judges and magistrates, and denied indiscriminately by statute to all such suspects.’<sup>210</sup>

## **6.2 Recommendations**

Based on this study, I would recommend the following:

- A. The introduction of a bail supervisory committee

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<sup>208</sup> Doussa J, ‘Reconciling human rights and counter-terrorism – a crucial challenge’ The Annual James Cook University Mayo Lecture, 12 September 2006 - <<https://www.humanrights.gov.au/news/speeches/reconciling-human-rights-and-counter-terrorism-crucial-challenge>> on 12 January 2017.

<sup>209</sup> *Hassan Mahati Omar & Another v Republic* [2014] eKLR.

<sup>210</sup> Resmini M, ‘Limiting Judicial Discretion In Kenya's High Court: Towards A Statutory Framework For The Denial Of Bails For Persons Arrested On Suspicion Of Crimes Of Terror’ Published LLM Thesis, St. John's University, New York, 2015, 5.

This committee would ensure that terror suspects who may have been granted bail adhere to the bail conditions that they have been prescribed. It would also help to monitor these suspects to ensure that they do not flee or engage in further acts of terrorism.

B. Better guidelines when it comes to bail for terrorist suspects

The Bail and Bond Guidelines specifically need to be amended so as to include terrorism in the definition of compelling reasons. This will ensure that the inconsistencies by the Judiciary in interpreting what constitutes compelling reasons are dealt with. Furthermore, it will curtail the wide discretionary powers of the Judiciary when it comes to granting bail for suspected terrorists.

C. The use of new technology

If the state fails to amend these guidelines regarding bail for suspected terrorists then it should make use of new technology such as use of detecting devices to be able to monitor the movement of the suspected terrorist pending the trial. This would give an even balance between personal liberties and national security.<sup>211</sup> This recommendation is on a long term basis as it will involve training the Bail Supervisory Committee and the Police on how to use this equipment.

D. A separate bail and bond court should be formed for terrorism cases

Such a court should have access to detailed material that the prosecution may have against the accused person. This would give the court firm foundation for determining the bail question. Such court should be separate and distinct from the trial court to prevent perception of prejudice.<sup>212</sup>

E. The Prosecutors and Investigators of terrorism cases should ensure that they adduce sufficient evidence that would prove the existence of compelling reasons

This would apply in the interim period as the state works on amending the Guidelines. 'It is the duty of the investigators and prosecutors to prove the existence of these compelling reasons, even in terrorist related offences, on a balance of probabilities. Even though terrorism is a indeed heinous act, the law does not change. In response to accusations against the courts, the Chief Justice rightly shifted the blame to the investigators and prosecutors for

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<sup>211</sup> - <[http://ilaw.co.ke/blawg/terrorist-suspects-too-have-a-right-to-be-released-on-bail/#.WHawW\\_197IV](http://ilaw.co.ke/blawg/terrorist-suspects-too-have-a-right-to-be-released-on-bail/#.WHawW_197IV)> on 12 January 2017.

<sup>212</sup> Ongoyaa Z, 'Legal And Policy Dilemma In The Fight Against Terrorism: The Bail Question In Terrorism Cases In Kenya' Kenya Law Blog, 25 August 2014 - <<http://kenyalaw.org/kenyalawblog/legal-and-policy-dilemma-bail-question-in-terrorism-cases/>> on 12 January 2017.

not placing sufficient evidence before the court to prove the court to prove the compelling reasons.’<sup>213</sup>

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<sup>213</sup> - <[http://ilaw.co.ke/blawg/terrorist-suspects-too-have-a-right-to-be-released-on-bail/#.WHawW\\_197IV](http://ilaw.co.ke/blawg/terrorist-suspects-too-have-a-right-to-be-released-on-bail/#.WHawW_197IV)> on 12 January 2017.



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