

# Is Agriculture a National or County Governments' Policy Function in Kenya? Interrogating Section 4 of the AFA Act together with the Fourth Schedule and Article 191 of the Constitution

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## Abstract

*As the people of Kenya witnessed the promulgation of the 2010 Constitution, there was so much hope and faith in the atmosphere for a better tomorrow. One of the main reasons for this was the entrenchment of devolution which was expected to lead to better service delivery and promote self-governance. However, almost a decade down the line, the expectations of the people have not been met. The effectiveness of devolution is largely dependent on the nature and extent of powers exercised by the counties and the functions they perform. The Fourth Schedule of the Constitution outlines the functions of the national and county governments. However, some functions such as agriculture seem to overlap. The national government's function with regards to agriculture is 'policy'. The same is true for county governments. The national government, through parliament, has enacted a law, the Agriculture and Food Authority Act (AFA Act), which this study finds to have encroached on the functions of county governments. To demonstrate this, the study relies on Article 191 of the Constitution, which is on conflict of laws; on literature review and comparative jurisprudence.*

**Key words:** Devolution, Agriculture and Food Authority Act, Policy, Article 191 of the Constitution of Kenya.

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## I. Introduction

During the colonial period, Kenya had a centralised system of governance.<sup>1</sup> With the attainment of independence, a system of regionalism commonly referred to as *majimboism* was put in place as a solution to the problems of centralisation.<sup>2</sup> However, not long after, the Independence Constitution was amended to abolish it and the country was back to a centralised system.<sup>3</sup> This happened as a result of two major amendments.<sup>4</sup> The first one took place in 1964 and aimed at vesting more powers in the president and, as a result, weakening *majimboism*.<sup>5</sup> The second one dissolved the Provincial Councils and deleted from the Constitution all references to provincial and district boundaries.<sup>6</sup> This amendment led to the total abolishment of *majimboism*,<sup>7</sup> a move that had adverse effects which included: a restricted political arena, a weakening of parliamentary authority, and finally, the holders of constitutional offices were subordinated to the whim and pleasure of the president.<sup>8</sup>

Unknowingly, an imperial presidency was established resulting in a widespread feeling of alienation from central government as power was concentrated in the president.<sup>9</sup> Furthermore, the people felt marginalised and victimised for their political affiliations and were hindered from managing their own affairs.<sup>10</sup> Making the already-bad situation worse, the economic and development system exhibited regional, ethnic, gender and individual inequalities.<sup>11</sup> As expected, this led to unequal distribution of resources, opportunities and services.<sup>12</sup>

These challenges gave rise to a labored search for a system of efficient governance, making devolution the most contentious issue in the drafting of the 2010 Constitution.<sup>13</sup> After a long struggle, the new constitution was drafted

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<sup>1</sup> Onalo P, *Constitution-making in Kenya: an African appraisal*, Transafrica Press, Nairobi, 2004, 169.

<sup>2</sup> Hornsby C, *Kenya: A history since independence*, 1ed, I.B. Tauris and Co. Ltd, New York, 2012, 28.

<sup>3</sup> Franceschi L and Lumumba P, *The Constitution of Kenya, 2010: An introductory commentary*, Strathmore University Press, Nairobi, 2014, 512.

<sup>4</sup> Mwangi S, *A history of Constitution making in Kenya*, 1st ed, Media Development Association, Nairobi, 2012, 7.

<sup>5</sup> Mwangi S, *A history of Constitution making in Kenya*, 11.

<sup>6</sup> *Constitution of Kenya Amendment Act* (No. 16 of 1968).

<sup>7</sup> Mwangi S, *A history of Constitution making in Kenya*, 13.

<sup>8</sup> Constitution of Kenya Review Commission, *Working draft*, 2004, 176.

<sup>9</sup> Constitution of Kenya Review Commission, *Working draft*, 2004, 291.

<sup>10</sup> Constitution of Kenya Review Commission, *Working draft*, 2004, 291.

<sup>11</sup> Hornsby C, *Kenya: A history since independence*, 219.

<sup>12</sup> Hornsby C, *Kenya: A history since independence*, 219.

<sup>13</sup> Constitution of Kenya Review Commission, *Working draft*, 2004, 291.

to address, among other things, devolution-related challenges that the people of Kenya were facing and was promulgated on 27<sup>th</sup> August 2010.<sup>14</sup>

This was a revolutionary step in the history of Kenya.<sup>15</sup> Devolution is indeed one of the novel principles and most transformative features of the 2010 Constitution of Kenya.<sup>16</sup> It is one of the main solutions to the problem of centralisation as it lessens the government's ability to punish provinces and districts.<sup>17</sup> However, the objectives of devolution will only be realised if it is properly implemented without undue interference from the national government.<sup>18</sup> The Constitution elaborates on devolution and how it is to be implemented in Chapter 11 and in the Fourth Schedule.<sup>19</sup> It further emphasises under Article 173 that the two levels of government are to be guided by the principles of distinctiveness and interdependence.<sup>20</sup> However, concluding that these are the only areas in the Constitution that deal with devolution is far from the truth. Devolution permeates the Constitution as it is a form of governance.<sup>21</sup> Despite the various sources of law governing devolution, it has not yet fully realised its objectives.<sup>22</sup> It still remains a contested subject in Kenya given its history, its central role in the constitutional design and the impact it has had on centralised interests.<sup>23</sup>

Being a novel concept in Kenya, it seems not to have been understood.<sup>24</sup> Some have claimed that the national government may not fully accept the

<sup>14</sup> Hornsby C, *Kenya: A history since independence*, 780.

<sup>15</sup> Hornsby C, *Kenya: A history since independence*, 779.

<sup>16</sup> Franceschi L and Lumumba P, *The Constitution of Kenya*, 511.

<sup>17</sup> Ghai Y 'Could 2002 draft have saved us from current problems?' The Star newspaper, 19 March 2013 -<[https://www.the-star.co.ke/news/2013/03/19/could-2002-draft-have-saved-us-from-current-problems\\_c751443](https://www.the-star.co.ke/news/2013/03/19/could-2002-draft-have-saved-us-from-current-problems_c751443)> on 14 February 2018.

<sup>18</sup> Ghai Y 'Could 2002 draft have saved us from current problems?' The Star newspaper, 19 March 2013- <[https://www.the-star.co.ke/news/2013/03/19/could-2002-draft-have-saved-us-from-current-problems\\_c751443](https://www.the-star.co.ke/news/2013/03/19/could-2002-draft-have-saved-us-from-current-problems_c751443)> on 14 February 2018.

<sup>19</sup> Chapter 11, *Constitution of Kenya* (2010).

<sup>20</sup> Article 173, *Constitution of Kenya* (2010).

<sup>21</sup> See Kangu JM, 'An interpretation of the constitutional framework for devolution in Kenya: a comparative approach', LL.D Dissertation, University of Western Cape, 2014. See for example; chapters on public finance, land and environment, public service and leadership and integrity are all related to devolution.

<sup>22</sup> Ghai Y 'Could 2002 draft have saved us from current problems?' The Star newspaper, 19 March 2013- <[https://www.the-star.co.ke/news/2013/03/19/could-2002-draft-have-saved-us-from-current-problems\\_c751443](https://www.the-star.co.ke/news/2013/03/19/could-2002-draft-have-saved-us-from-current-problems_c751443)> on 14 February, 2018.

<sup>23</sup> Ghai Y 'Could 2002 draft have saved us from current problems?' The Star newspaper, 19 March 2013- <[https://www.the-star.co.ke/news/2013/03/19/could-2002-draft-have-saved-us-from-current-problems\\_c751443](https://www.the-star.co.ke/news/2013/03/19/could-2002-draft-have-saved-us-from-current-problems_c751443)> on 14 February, 2018.

<sup>24</sup> Kangu JM, *Constitutional law of Kenya on devolution*, Strathmore University Press, Nairobi, 2015, 2.

consequences of devolution as provided in the Constitution.<sup>25</sup> As of 2015, the main challenges facing devolution were mistrust between the two-levels of government and inadequacy of clarification on roles and responsibilities of the two levels of government.<sup>26</sup> The cause of the confusion is the fact that the Constitution is open to more than one form of interpretation.<sup>27</sup> As a result, the disputes that arise concern the meaning, form and extent of the devolution adopted, the functional and responsibility distribution among the different levels of government, and the resource sharing and entitlement by the different levels of government.<sup>28</sup>

Of interest to this study is the distribution agricultural functions and responsibility between the two levels of government. The Fourth Schedule of the Constitution divides the functions between the two levels of government to ensure autonomy in the execution of functions without any form of interference.<sup>29</sup> According to the Schedule, the functions and powers of the national government in relation to agriculture are that of policy-making while those of the county governments include: crop and animal husbandry; livestock sale yards; county abattoirs; plant and animal disease control and fisheries.<sup>30</sup>

However, a closer look at the county governments' functions reveals that in their execution as required by the Fourth Schedule, a policy is likely to be of need by these governments so as to efficiently carry out their functions. This oversight creates an atmosphere that may pave the way for the encroaching of functions between the two levels of government. It seems accurate to state that the Constitution had envisioned such scenarios, and it has in response provisions on conflict of laws under Article 191.<sup>31</sup> One may also argue that this is a difficult assertion to make as it is not substantiated by the country's case law.<sup>32</sup>

<sup>25</sup> The Council of Governors, *Devolution conference report*, 4 April 2014, 23.

<sup>26</sup> United Nations Development Programme, The Integrated United Nations Development Programme support programme to the devolution process in Kenya, *Annual progress report*, 21 December 2015, 31.

<sup>27</sup> Kangu JM, *Constitutional law of Kenya on devolution*, 4.

<sup>28</sup> United Nations Development Programme, The Integrated United Nations Development Programme support programme to the devolution process in Kenya, *Annual progress report*, 31.

<sup>29</sup> Franceschi L and Lumumba P, *The Constitution of Kenya*, 511.

<sup>30</sup> Fourth Schedule, *Constitution of Kenya* (2010).

<sup>31</sup> Article 191, *Constitution of Kenya* (2010).

<sup>32</sup> Currently, there is no case law regarding the distribution of the agricultural functions in Kenya. A case was filed, but it was dismissed for not exhausting the alternative dispute resolution mechanisms as provided by the Inter-governmental Relations Act. See generally, Muthoni K, 'Governors lose agricultural battle' The Standard Newspaper, 17 November 2018, --< <https://www.standardmedia.co.ke/article/2001303017/governors-lose-battle-to-control-agriculture>> on 20 November 2018.

An instance where functions of the national and county government seemed to overlap was when, the national government, through parliament, was exercising its mandate with regards to 'policy'. It passed the Agriculture and Food Authority Act (hereinafter AFA).<sup>33</sup> Section 4 of this Act establishes an Authority under the national government, and assigns to it agricultural functions which seem to fall under those constitutionally given to county governments.

This study argues that the national government carrying out such functions is unconstitutional as they should be performed by county governments. In addressing this issue, this study will first demonstrate how Article 191 of the Constitution may help clear out the confusion over the circumstances under which the national government may make an agricultural policy and the circumstances under which county governments may do so. Thereafter, the study will progress the discussion to demonstrate that the agricultural mandate that the AFA Act in its Section 4 has vested in the national government via the Authority established is inconsistent with Article 191 of the Constitution. Finally, given the lack of any judicial pronouncements on this matter, the study will engage in comparative jurisprudence by relying on South Africa and the United States of America (USA) to suggest alternative constitutional interpretation approaches that may help define when the national or county governments are to intervene in the policymaking of agricultural-related matters. Reference is made to South Africa because of the striking similarities that exist between the Kenyan and the South African Constitutions. The same is done for the USA with respect to the Commerce Clause, as this country has come up with a narrow constitutional interpretative approach which may prove also to be critical in clearing the confusion in terms of policy-making by the national and county governments.

## **II. Article 191 of the Constitution to clear out the Policy-Confusion under the Fourth Schedule**

Before the promulgation of the new Constitution in 2010, Kenya's agricultural sector was previously managed by over one hundred and thirty one pieces of legislations.<sup>34</sup> Historically, these legislations provided for the creation of

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<sup>33</sup> This Act was previously known as the *Agriculture, Food and Fisheries Act*. See *Agriculture and Food Authority Act* (No. 13 of 2013).

<sup>34</sup> Simiyu F, 'Demystifying the quest for devolved governance of agriculture' 1 *Jomo Kenyatta University of Agriculture and Technology Law Journal*, 2015, 6.

specialised authorities which were in charge of the various sectors in agriculture.<sup>35</sup> From the early 1990s, it became apparent that legislations on agriculture were causing contradictions or were obsolete.<sup>36</sup> Subsequent agricultural policies agitated for a review of the legal and institutional framework for agriculture, in order to consolidate and harmonise existing legislation.<sup>37</sup> It was not until the new Constitution was promulgated that there was some form of order in the agricultural sector.

However in 2013, the national assembly enacted the AFA and assigned to it functions which many county governments have complained contravene the county government's functions.<sup>38</sup> This has created a chaotic situation and made accountability on the specific government hard as was seen in the 2017 food crisis where the national government was blaming the county government while the county government blamed the national government.<sup>39</sup>

There is therefore a need for clarity as to which functions shall be exercised by the two levels of government. As was noted in the previous part of this paper, it is clear that under the Fourth Schedule of the Constitution, the role of the national government is 'policy'. According to the Black's Law Dictionary policy is defined as 'the general principles by which a government is guided in its management of public affairs, or the legislature in its measures'.<sup>40</sup> From this definition, it is clear that despite the fact that the county governments' functions include crop and animal husbandry; livestock saleyards; county abattoirs; plant and animal disease control and fisheries, they still need to put in place guidelines to manage the above functions assigned to them. This creates a situation where both governments have concurrent functions that may result in a conflict of laws.<sup>41</sup>

To clear out this conundrum, Article 191 of the Constitution provides for the circumstances under which the national and the county governments may make policies. With respect to the AFA, Article 191 provides that national legislation will only prevail if it is aimed at preventing unreasonable action

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<sup>35</sup> Simiyu F, 'Demystifying the quest for devolved governance of agriculture', 6.

<sup>36</sup> Muriu A and Biwott H, 'Agriculture sector functional analysis: A policy, regulatory and legislative Legislative perspective', International Institute for Legislative Affairs, 2013, 3.

<sup>37</sup> Simiyu F, 'Demystifying the quest for devolved governance of agriculture', 6.

<sup>38</sup> Gachagua N, 'New agriculture laws may hurt economic growth, leave millions of Kenya jobless' *Business Daily*, 15 January 2014.

<sup>39</sup> Oruko I, 'Governors, State blame one another over food crisis' *Daily Nation*, 28 May 2017.

<sup>40</sup> *Black's Law Dictionary*, 2 ed.

<sup>41</sup> Article 191 (1), *Constitution of Kenya* (2010).

by a county that is prejudicial to the economic, health or security interests of Kenya or impedes the implementation of national economic policy.<sup>42</sup> Under this exemption, the agricultural functions given to the Authority do not fall within this criteria as there is no evidence showing that they are a threat to economic, health or security interests of the nation. The over-reach seems thus unnecessary.

The same Article goes on to provide another instance where national legislation may prevail over county legislation. This is in the event that the national legislation is crucial for the protection of the environment, equal opportunity to access government services, protection of common market amongst others.<sup>43</sup> Again, it has not been demonstrated that agricultural policies of the county governments risk the common good as contemplated here. The national legislation prevails only if a matter cannot be regulated effectively by county legislation or uniformity is required across the country.<sup>44</sup> However, from the diversity of the countries, (for example Laikipia which specialises in livestock keeping,<sup>45</sup> Nakuru which focuses on irish-potato and bean growing<sup>46</sup>, Kilifi in sisal growing<sup>47</sup> amongst many others) it can be argued that a uniform agricultural policy binding on county government functions may tie down the counties, especially in light of their different climatic conditions and development stages.

It seems accurate to conclude that county policies that do not fall within the categories contemplated under Article 191 will override those of the national government. Similarly, for agricultural policies, it may be concluded that in the event that national legislation contradicts county legislation, then county legislation will prevail. Having established this, the study will look into whether the Authority as established by the Act contravenes the policy functions of the county government.

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<sup>42</sup> Article 191 (2), *Constitution of Kenya* (2010).

<sup>43</sup> Article 191 (3), *Constitution of Kenya* (2010).

<sup>44</sup> Article 191 (3), *Constitution of Kenya* (2010).

<sup>45</sup> See the official county website: <<https://laikipia.go.ke/agriculture-livestock-and-fisheries/>> on 12 June, 2018.

<sup>46</sup> See the official county website: <<https://nakuru.go.ke/departments/housing-sectors/>> on 12 June, 2018.

<sup>47</sup> See the official county website: <[www.kilifi.go.ke/content.php?com=3&com2=15&com3=20](http://www.kilifi.go.ke/content.php?com=3&com2=15&com3=20)> on 12 June, 2018.

### **III. Inconsistency between the Mandate of the Authority Established under Section 4 of the AFA and Article 191 of the Constitution**

According to the AFA Act, the Authority will be managed by a Board comprising of a non-executive chairman appointed by the President; the Permanent Secretary responsible for the Ministry of Agriculture, Finance and Land; and eight persons being farmers representing farmer organisations in the major crop subsectors in Kenya appointed by the Cabinet Secretary in consultation with the County Governors.<sup>48</sup> From the composition it is clear that the county governments have not been involved, despite agriculture being largely a function of county governments as is demonstrated under Article 191 of the Constitution discussed in the preceding Part of this paper.<sup>49</sup> This is seen from Section 4 of the AFA Act, which gives this Authority the following functions:

Promoting best practices in, and regulate, the production, processing, marketing, grading, storage, collection, transportation and warehousing of agricultural products excluding livestock products as may be provided for under the Crops Act; collecting and collating data, maintain a database on agricultural products excluding livestock products, documents and monitor agriculture through registration of players as provided for in the Crops Act; being responsible for determining the research priorities in agriculture and to advise generally on research thereof; advising the national government and the county governments on agricultural levies for purposes of planning, enhancing harmony and equity in the sector; carrying out such other functions as may be assigned to it by this Act, the Crops Act, and any written law while respecting the roles of the two levels of governments.<sup>50</sup>

The Crops Act referred to in Section 4 of the AFA gives the Authority even more functions, which again as per Article 191 of the Constitution should have fallen under the ambit of the county governments. With regard to the promotion of scheduled crops, they give the Authority the mandate to facilitate marketing and distribution of scheduled crops through monitoring and dissemination of market information, including identification of the local supply-demand situation, domestic market matching, and overseas market intelligence and promotion activities; conduct farmers training programs aimed at increasing their knowledge on production technologies and on market potentials and prospects for various

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<sup>48</sup> Section 5, *Agriculture and Food Authority Act* (Act No 13 of 2013).

<sup>49</sup> Council of Governors and United Nations Development Project, *Sectoral policy and legislative analysis*, April 2015, 15.

<sup>50</sup> Section 4, *Agriculture and Food Authority Act* (No 13 of 2013).



types of crops; establish linkages with various governments and private research institutions to conduct research designed to promote the production, marketing and processing of scheduled crops, amongst other functions.<sup>51</sup> The Crops Act also establishes a supersession provision over other Acts with respect to development, management, marketing or regulation of a scheduled crop.<sup>52</sup> It also gives these functions to the Authority; this therefore means that the Authority has supreme power over matters with respect to development management, marketing and regulation of a scheduled crop.

In a report by the Council of Governors, governors have been quick to point out that their views as county governments presented during the development and enactment of the AFA Act were not considered.<sup>53</sup> It is not surprising, therefore, that the Act fails to capture the views of county governments; which, after a careful reading of Article 191 of the Constitution, should be given special attention as this Article maintains that in matters of agriculture, the national government shall only intervene under exceptional circumstances. It might be for this reason that the Council also noted that a number of laws passed including the AFA Act had provisions which had the potential to infringe on county powers and functions as a result of vaguely and generally stated provisions.<sup>54</sup> For instance, there are provisions which allow the Authority to 'regulate, the production, processing, marketing, grading, storage, collection, transportation and warehousing of agricultural products excluding livestock products' yet the county governments are given the agricultural function by the Constitution.

However, the national government claims that the Authority's function still fall under the policy functions.<sup>55</sup> What is more unfortunate is that there has not been any judicial pronouncement to this matter.<sup>56</sup> At this point, this study will now engage into comparative jurisprudence, relying on South Africa and the USA, to define the bounds within which policy functions of the national government and to county governments are to be confined as far as agriculture is concerned.

<sup>51</sup> Section 8, *Crops Act* (No 16 of 2013).

<sup>52</sup> Section 39, *Crops Act* (No.16 of 2013).

<sup>53</sup> Council of Governors and United Nations Development Project, *Sectoral policy and legislative analysis*, April 2015, 15.

<sup>54</sup> Council of Governors and United Nations Development Project, *Sectoral policy and legislative analysis*, April 2015, 15.

<sup>55</sup> Muthoni K, 'Governors lose agricultural battle' The Standard Newspaper, 17 November 2018, Muthoni K--< <https://www.standardmedia.co.ke/article/2001303017/governors-lose-battle-to-control-agriculture>> on 20 November 2018.

<sup>56</sup> A case regarding this matter was filed, however it was dismissed for not exhausting the Alternative dispute resolution mechanisms as entailed in the inter-governmental relations.

## IV. Comparative jurisprudence: What Kenya Can Learn from South Africa and the USA

### i. Lessons from South Africa

Conflict regarding distribution of functions may be a novel aspect in Kenya but it is surely not a novel aspect for other countries which have had devolved governments for a longer period. In this sub-Part of the paper, the author shall analyse the approach taken by the courts in South Africa, when resolving a dispute regarding distribution of functions between the two levels of government. South Africa has been chosen purposefully owing to the striking similarities that exist between the Kenyan and the South African Constitutions.<sup>57</sup>

Just like our Constitution, the Fourth Schedule of the South African Constitution provides for the concurrent functions of the various levels of government.<sup>58</sup> While our Constitution does not expressly state ‘concurrent functions’, a keen look at its Fourth schedule reveals an overlap of functions, hence concurrent functions.<sup>59</sup> As a result of these concurrent functions, more often than not disputes arise as to the extent of the functions of each level of government.

Further, just like our Constitution under Article 191, Section 44 of the South African Constitution also provides for the conflict of laws. In fact, Article 191 of the Kenyan Constitution seems to be, in significant ways, a carbon copy of Section 44 of the South African one.<sup>60</sup> Devolution being fairly new in Kenya, there are no existing case laws as to the distribution of concurrent functions. However, an analysis of how the courts in South Africa have reasoned while faced with disputes as to such functions may shed some light on the proper approach to the distribution of such functions that Kenyan courts may borrow from in determining whether the policy functions of the AFA should fall under the ambit of county governments.

One important case speaking to this is the *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill*. This case was instituted by the then President of South Africa -Nelson Mandela- in

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<sup>57</sup> The Constitution of Kenya in many ways is similar to the Constitution of South Africa.

<sup>58</sup> Fourth Schedule, *Constitution of South Africa* (1996).

<sup>59</sup> Fourth Schedule, *Constitution of Kenya* (2010).

<sup>60</sup> Section 44, *Constitution of South Africa*, 1996.

relation to the Liquor Bill that had been passed by parliament.<sup>61</sup> The President had reservations about this Bill and instituted a case to determine whether this Bill was constitutional.<sup>62</sup> These reservations arose since the Bill touched on liquor which was a function exclusive to the provincial level of government.<sup>63</sup> The national government could however, intervene in matters relating that were exclusive to the provincial governments in the instances where it is necessary to maintain economic unity; to maintain essential national standards; to establish minimum standards required for the rendering of services; or to prevent unreasonable action taken by a province which is prejudicial to the interest of another province or to the country as a whole.<sup>64</sup> These are the same requirements stipulated under Article 191 of the Kenyan Constitution.<sup>65</sup>

The Court in deciding this matter, used the same reasoning emphasised herein; that the national government should not confer on any other body the same functions assigned to the other levels of government by the Constitution.<sup>66</sup> In Kenya's case, it was therefore wrong for the national government to confer upon the Authority established under the AFA Act functions which constitutionally fall under the ambit of county governments. In Addition, the court advised on the importance of looking into the history to help in the defining such functions. One of the counsel contended that 'liquor license' only went as far as the retail sale of liquor.<sup>67</sup>

However, this view could not be sustained as the history of liquor licensing in South Africa shows that the area of application of liquor licenses was the whole field of production, distribution and sale of liquor.<sup>68</sup> Due to the above findings of the court, the bill was declared unconstitutional.<sup>69</sup> Using this approach, one

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<sup>61</sup> *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* (1999), Constitutional Court of South Africa.

<sup>62</sup> Section 79 (4), *Constitution of South Africa* (1996). This section provides that if after reconsideration a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either; assent to and sign the Bill; or refer it to the Constitutional Court for a decision on its constitutionality.

<sup>63</sup> *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* (1999), Constitutional Court of South Africa.

<sup>64</sup> Section 76 (1), *The Constitution of South Africa* (1996).

<sup>65</sup> Article 191, *Constitution of Kenya*, (2010).

<sup>66</sup> *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* (1999), Constitutional Court of South Africa.

<sup>67</sup> *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* (1999), Constitutional Court of South Africa.

<sup>68</sup> *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* (1999), Constitutional Court of South Africa.

<sup>69</sup> *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill*

can easily conclude that with regards to Kenya, since the country has a history of a centralised form of government where resources were not distributed equally,<sup>70</sup> there is need to protect the county governments from interference by the national government to prevent history from repeating itself.

Another case relevant to this discussion is the *City of Johannesburg Metropolitan Municipality Appellant v Gauteng Development Tribunal*.<sup>71</sup> This case involved the constitutionality of Chapter V and VI of the Development Facilitation Act 67 of 1995.<sup>72</sup> The Town Planning and Township Ordinance (TPTO) of 1986 confer upon municipalities the power to regulate land use within their municipal areas.<sup>73</sup> This TPTO survived the transition to the present constitutional regime, which was promulgated in 1996.<sup>74</sup> The functions established by the TPTO to the municipal authorities include: preparing a town planning scheme, with regards to the use of land activities such as car parks, new streets; the widening of existing streets; public and private open spaces; the zoning of land to be used for specific purposes, including agricultural purposes; the area of erven; the regulation of the erection of buildings with particular reference matters such as: the position of buildings on any surface or other area of land in relation to any boundary, street or other building; the character, height, coverage, harmony, design or external appearance of buildings; and decide whether and on what conditions townships may be established within its municipal area.<sup>75</sup>

Parliament went ahead and enacted the Development and Facilitation Act.<sup>76</sup> This Act established general principles which were in line with those of the TPTO.<sup>77</sup> And on the face of it all, there seemed to be no problem. It, however, established tribunals and conferred to them functions such as authorising the tribunals to approve or refuse such an application of land development, and if it is approved, to impose any one or more of the conditions referred to in the

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(1999), Constitutional Court of South Africa.

<sup>70</sup> Constitution of Kenya Review Commission, *Working draft*, 2004, 291.

<sup>71</sup> *City of Johannesburg Metropolitan Municipality Appellant v Gauteng Development Tribunal* (2009), Supreme Court of South Africa.

<sup>72</sup> *City of Johannesburg Metropolitan Municipality Appellant v Gauteng Development Tribunal* (2009), Constitutional court of South Africa.

<sup>73</sup> *Town Planning and Township Ordinance* (No 15 of 1986).

<sup>74</sup> *City of Johannesburg Metropolitan Municipality Appellant v Gauteng Development Tribunal* (2009), Constitutional court of South Africa.

<sup>75</sup> *Town Planning and Township Ordinance* (No. 15 of 1986).

<sup>76</sup> *City of Johannesburg Metropolitan Municipality Appellant v Gauteng Development Tribunal* (2009), Constitutional court of South Africa.

<sup>77</sup> *City of Johannesburg Metropolitan Municipality Appellant v Gauteng Development Tribunal* (2009), Constitutional court of South Africa.

article.<sup>78</sup> It can therefore be concluded that such tribunals are authorised to do everything that municipal authorities have been given the mandate to do by the TPTO. Furthermore, such tribunals are able to override any and all control that a municipality is capable of exercising over the use of the land, and to do so notwithstanding opposition by the municipality, and notwithstanding that it will conflict with the objectives and plans of the municipality.<sup>79</sup>

The Court, while making their decision on which level of government had the constitutional authority on the regulation of land, stated that with regards to the land use, both the municipal and national legislatures are in a position to legislate. However, and remarkably, the Court concluded by saying:

It will be apparent, then, that while national and provincial government may legislate in respect of the functional areas in schedule 4, including those in Part B of that Schedule, the executive authority over, and administration of, those functional areas is constitutionally reserved to municipalities. Legislation, whether national or provincial, that purports to confer those powers upon a body other than a municipality will be constitutionally invalid. None of that is controversial'.<sup>80</sup>

Accordingly, while there was nothing wrong in the Kenyan national government enacting a law, the AFA Act, on agricultural policy-related matters, delegating matters falling largely under the province of county governments to the Authority was misguided. Therefore, just as the Court declared that Chapters V and VI of the Development Facilitation Act 67 of 1995 was unconstitutional on this basis,<sup>81</sup> Kenyan courts should also do the same of Section 4 of the AFA Act. Hence using the approach of these two cases, one cannot help but admit that the functions of the Authority established under the AFA Act encroach into those of the county government which will hinder the counties' performance.

## *ii. Lessons from the USA*

In understanding the provisions of the law, it is common for confusion to arise over the interpretations given to the law. There is no case law in Kenya, as was noted, which explains explicitly what the Constitution has meant by 'policy'.

<sup>78</sup> *City of Johannesburg Metropolitan Municipality Appellant v Gauteng Development Tribunal* (2009), Constitutional court of South Africa.

<sup>79</sup> *City of Johannesburg Metropolitan Municipality Appellant v Gauteng Development Tribunal* (2009), Constitutional court of South Africa.

<sup>80</sup> *City of Johannesburg Metropolitan Municipality Appellant v Gauteng Development Tribunal* (2009), Constitutional court of South Africa.

<sup>81</sup> *City of Johannesburg Metropolitan Municipality Appellant v Gauteng Development Tribunal* (2009), Constitutional court of South Africa.

Other countries such as the United States have had the same challenge with respect to the interpretation of the Commerce clause.<sup>82</sup> This sub-Part of the paper attempts to look into the evolution of the interpretation of this clause so as to inform Kenya with the best way forward with regards to the interpretation of ‘policy’.

The Commerce clause states that ‘the Congress shall have power to regulate Commerce among the several states’.<sup>83</sup> This has been a disputed clause which has generated the most number of cases.<sup>84</sup> To this day, the powers of the Congress in commerce are disputable. The extent of the powers rely on the definitions of ‘to regulate’, ‘Commerce’ and ‘among several states’.<sup>85</sup> The history of the Commerce clause at the Supreme Court of the United States can be divided into three historical periods; pre-1937, between 1937 and 1995 and post 1995.<sup>86</sup> The first period which is pre 1937 was characterised by the courts struggle to define the powers of the Congress.<sup>87</sup> This was seen in *Gibbons v Ogden* where the courts stated that the powers vested in the Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those that are prescribed in the court situation.<sup>88</sup>

The courts first experimented with different notions of the commerce power. This trend continued until 1937 when the courts signalled that it was abdicating any serious role in monitoring Congress’ exercise of this delegated power.<sup>89</sup> This was seen in the case of *NLRB v Jones and Laughlin Steel Corp* where the courts stated that the commerce power of the Congress could reach activities for as long as they were not indirect and remote.<sup>90</sup>

<sup>82</sup> Barnett R, Koppelman A, ‘The commerce clause’ Constitution Resource Center, --<<https://constitutioncenter.org/interactive-constitution/interpretations/section8-commerce>> on 20 October, 2018.

<sup>83</sup> Article 1(8)(3), *The Constitution of the United States of America* (1787).

<sup>84</sup> Forte D, ‘Commerce, commerce everywhere: The use and abuse of the commerce clause, constitutional guidance for lawmakers’ 5 (1) *The Heritage Foundation Journal*, (2011), 1.

<sup>85</sup> Forte D, ‘Commerce, Commerce everywhere: The use and abuse of the commerce clause, Constitutional guidance for lawmakers’, 2.

<sup>86</sup> Conery B, ‘Commerce Clause at center of battle over health reform’, Washington Times, 29 December 2010-<<https://www.washingtontimes.com/news/2010/dec/29/health-reform-battle-hinges-on-historic-clause/>> on 31 January, 2018.

<sup>87</sup> Forte D, ‘Commerce, Commerce everywhere: The use and abuse of the commerce clause, Constitutional guidance for lawmakers’, 1.

<sup>88</sup> *Gibbons v Ogden* (1824), The United States Supreme Court. This case involved a steamboat owner who challenged a move by the New York state legislature giving two other steamboat owners exclusive rights to the state’s waterways.

<sup>89</sup> Forte D, ‘Commerce, Commerce everywhere: The use and abuse of the commerce clause, Constitutional guidance for lawmakers’, 6.

<sup>90</sup> *NLRB v Jones & Laughlin Steel Corp* (1937), The United States Supreme Court. This case involves

In *Wickard v Filburn*, the powers of Congress were given a broader interpretation. The facts of this case were that Filburn was a small farmer in Ohio. He was given a wheat acreage allotment of 11.1 acres under a Department of Agriculture directive which authorised the government to set production quotas for wheat.<sup>91</sup> Filburn harvested nearly twelve acres of wheat above his allotment. He claimed that he wanted the wheat for use on his farm, including feed for his poultry and livestock. He argued that the excess wheat was unrelated to commerce since he grew it for his own use.<sup>92</sup> The issue that arose in this case was whether the amendment subjecting Filburn to acreage restrictions, was constitutional as Congress has no power to regulate activities that are local in nature.<sup>93</sup> The courts held that even if an activity is local and not regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'.<sup>94</sup> Scholars have noted that at this point the Supreme Court adopted arguments that 'the activities Congress was regulating had a substantial impact on interstate economy'.<sup>95</sup>

The last period, post 1995, was characterised by a narrow application of the clause. This was seen in 1995, in the case *US v Lopez* where the Supreme Court struck down a statute relying on the Commerce Clause that made it a federal crime to carry a gun on school grounds.<sup>96</sup> The court chose to apply this narrow application as Congress was interfering with functions that were originally the federal governments.<sup>97</sup> Five years later, in the case *US v Morrison*, the courts struck down the part of the Violence Against Women Act that relied on the Commerce clause to make domestic violence a federal crime as it went beyond the functions of the Congress.<sup>98</sup> The Court still applied a narrow interpretation of the clause as they felt that the part of the Act intruded on traditional authority

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the constitutionality of the *National Labor Relations Act* of 1935 (the Act) when the Act regulates activity that occurs solely within the boundaries of one state. The decision in this case limited the application of the Commerce clause as it established that Congress has the power to regulate intrastate activities that potentially could have a significant impact on interstate commerce.

<sup>91</sup> *Wickard v Filburn* (1942), The United States Supreme Court.

<sup>92</sup> *Wickard v Filburn* (1942), The United States Supreme Court.

<sup>93</sup> *Wickard v Filburn* (1942), The United States Supreme Court.

<sup>94</sup> *Wickard v Filburn* (1942), The United States Supreme Court.

<sup>95</sup> Conery B, 'Commerce Clause at center of battle over health reform' Washington Times, 29 December 2010- <<https://www.washingtontimes.com/topics/supreme-court/>> on 31 January, 2018.

<sup>96</sup> *United States v Lopez* (1995), The United States Supreme Court.

<sup>97</sup> *United States v Lopez* (1995), The United States Supreme Court.

<sup>98</sup> *United States v Morrison* (2000), The United States Supreme Court.



given to the states.<sup>99</sup> It is such a narrow interpretation of the ‘policy’ that this study suggests that Kenyan courts attach to the ‘policy’ function that the Constitution provides the National government with under its Fourth Schedule. This will require declaring Section 4 of the AFA Act unconstitutional as it epitomises a broad interpretation of ‘policy’. It is only then that the objectives of devolution in the agricultural sector may be achieved.

Another interesting test on the limits of the power of Congress was established in the case *Pike v Bruce Church* where the courts held that ‘where the state statute regulates even-handedly to effectuate a legitimate public interest and its effect on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits’.<sup>100</sup> Using this test, it can be inferred that functions by a certain arm of government can only be allowed to interfere with functions of another arm if the interference is incidental. Relating these lessons to the debate on the policy functions of the national government, they should be applied narrowly by giving them a limited scope. This is crucial so as to realise the objectives of devolution which were to bring the policy and decision making process at a level closer to the people. This approach gives more powers to the counties as opposed to the national government in relation to agriculture.

## V. Conclusion

This study argues that the national government carrying out such functions is unconstitutional as they should be performed by county governments. To substantiate this, it has examined the Fourth Schedule of the 2010 Constitution as read together with Article 191 so as to prove that agricultural functions fall largely under the ambit of county governments and national government may intervene only under exceptional circumstances. Despite this, the national government has gone on to enact a legislation, the Agricultural Authority Act, which vests almost all agricultural functions in the national government via an Authority that it establishes. This is not entirely surprising as the Fourth Schedule of the Constitution states that the national government indeed plays a policy function with respect to agriculture. However, the same Schedule provides an inexhaustive list of the functions that county governments are to perform

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<sup>99</sup> *United States v Morrison* (2000), The United States Supreme Court.

<sup>100</sup> *Pike v Bruce Church* (1970), The United States Supreme Court.



with respect to agriculture and, as it has been shown in this study, they are also policy-making in nature. This, therefore, creates a conundrum as it then becomes unclear under what circumstances the national government shall be performing its policy functions and under what circumstances the county governments shall be doing the same.

A partial reading of the text of the Constitution is dangerous to a constitutional democracy such as Kenya; the constitution should be read as a whole. Article 191 of the Constitution of Kenya seems to complement the reading of the Fourth Schedule as it is on conflict of laws. This Article states clearly functions that may be exclusively exercised by the national and the county government with respect to agriculture. It is only after a meticulous reading of this constitutional provision, together with the Fourth Schedule, that one cannot help but admit that the Authority established under Section 4 of the Agricultural Authority Act should be declared unconstitutional.

Devolution being new on the country's jurisprudential landscape, this study has relied on comparative jurisprudence to suggest the way forward for Kenyan courts to embrace in terms of settling this issue as there is a scarcity of matters related to devolution rooted in the country's case law. This comparative jurisprudence was with reference to South Africa and the USA. The author has chosen South Africa given the immense influence that its Constitution has had on the making of the Kenyan Constitution. In fact, the Fourth Schedule of the South African Constitution is strikingly similar to that of Kenya. Furthermore, the provision of Article 191 of the Kenyan Constitution seem to have been copied from Section 44 of the South African Constitution, which like Article 191, is also on conflict of laws. It seems therefore accurate to conclude that case law from South Africa may play a critical role in helping Kenyan courts to build a comprehensive jurisprudence on the confusion that the Fourth Schedule of the Constitution as well as Section 4 of the Agricultural Authority Act have brought about.

The study has relied on South African case law to suggest constitutional interpretation approaches that may help define when the national or county governments are to intervene in the policymaking of agricultural-related matters. South African case law has revealed that while face with interpretation, the judges shall bear in mind the historical causes that led to the entrenchment of agriculture as a devolved function in the Constitution and that it does not matter whether the national government has enacted a law detailing agricultural functions so long as such functions are to be exercised in line with Article 191 of the Constitution.

Reference was also made to the USA. Regarding the Commerce Clause, this USA has come up with a narrow constitutional interpretative approach which may prove also to be critical in clearing the confusion in terms of policy-making by the national and county governments as far as agricultural-related matters are concerned. As per this method of interpretation, in case of concurrent policy functions such as in Kenya with respect to agricultural-related matters, the functions of the national government shall be given a broad interpretation as the Parliament of Kenya seems to have done when it enacted the Agriculture and Food Authority Act.