FUNDAMENTAL RIGHTS AND FREEDOMS IN KENYA: THE EXTENT TO WHICH THEY ARE PROTECTED.

BY

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A THESIS SUBMITTED IN PART FULFILLMENT OF THE DEGREE OF MASTER OF LAWS IN THE UNIVERSITY OF NAIROBI.

SEPTEMBER 1993
DECLARATION

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DEDICATION

I dedicate this work to Gemma, Linnet, Kenneth and Alvin for their love, support, companionship and encouragement. I also dedicate the work to the memory of my late father who passed away on June 9, 1989 for setting for me good example.
I am greatly indebted to my supervisors for their interest in my work and for their criticisms and suggestions which inspired me up to the completion of this dissertation. My supervisors are distinguished scholars in their respective fields of specialization. Mr. Acheampong, who taught me the law of Human Rights and Self-determination in the first year of my postgraduate studies, is very knowledgeable in this field. Prof. Kibwana is equally knowledgeable in his field of specialization. Not only is he a leading constitutional law lawyer and scholar, but he is also a crusader for the rights of others. For example, in September 1992, when the senate of the University of Nairobi denied thirteen leaders of the disbanded students' union legal representation when they were arraigned before a senate disciplinary committee - which denial was clearly a breach of a basic rule of natural justice - Professor Kibwana, on a matter of principle, disqualified himself from sitting on the disciplinary committee. One of the senate's operational rules stipulated that a student was entitled to representation during disciplinary proceedings. But curiously, in this case, senate ruled that the rule did not envisage legal
representation. When the High Court subsequently overruled senate on the issue, senate amended the rule to ensure that, in future, a student would not be entitled to legal representation during disciplinary proceedings. Professor Kibwana's stand on the issue was undoubtedly an inspiration to every student with an interest in human rights and the legal rights of others, especially the constitutionally guaranteed rights and freedoms.

I am also indebted to the Danish Development Agency (DANIDA) for their sponsorship during the second year of my post-graduate studies. It was during the year that I researched and wrote this dissertation. I wish to thank DANIDA through their Nairobi Embassy Programme Officer, Ms. Karin Steffensen.

WILLIAM MBAYA
ABSTRACT

This work is an attempt to investigate why, inspite of the existing and elaborate constitutional and legal framework for the protection of fundamental rights and freedoms of the individual, these rights are not being adequately vindicated. The thesis starts off by examining the historical and philosophical foundations of human rights, and proceeds to outline the constitutional and legal framework for the articulation and protection of the said rights in Kenya.

The core constitutional provision in the protection of fundamental rights and freedoms is s.84 of the Constitution of Kenya. Section 84(i) guarantees every individual whose rights have been, are being or are likely to be infringed upon, access to the High Court for redress. Under s.84(2), the High Court may make any orders, issue any writs, and give such directions as it may deem appropriate for the purpose of enforcing the rights and freedoms enshrined in the Bill of Rights in Chapter V of the Constitution. On that basis, it appears that the rights and freedoms of the individual are secure because they can be vindicated by the courts. But from the discussions in chapter two, it will be demonstrated that the courts have ousted their own
jurisdiction and in the process have sacrificed the redressing of violated rights and freedoms. This state of affairs results from the adoption by the courts of a narrow and legalistic construction of the provisions of the Bill of Rights. It is clear from the discussions in this chapter that the courts in Kenya will have to adopt a broader and more liberal approach to constitutional interpretation in order to facilitate the maximum enjoyment by the individual of his basic rights and freedoms. That is the position prevailing in other jurisdictions with similar constitutional provisions as Kenya.

Beside the need to adopt the suggested broad approach to constitutional interpretation by the courts, certain other circumstances which whittle down the independence of the judiciary must be addressed. They include the existing flawed procedure for the appointment and removal of judges; the question of security of tenure for judges; poor terms of service for the judiciary; the existence of contract judges; political interference by the Executive with the courts' judicial function, and finally, the inability of judges to individually and collectively assert their judicial independence. These matters are discussed in chapter three.

In chapter four we discuss the judiciary and its
intervention in the protection of fundamental rights and freedoms in the new era of multi-party democracy which was ushered in by the abolition of the one-party system on December 10, 1991. The expectations of Kenyans were that the machinery for the protection of their basic rights and freedoms would improve with the advent of multi-partyism. But as will be observed in chapter four, there has been no significant or meaningful improvement yet, due to the apparent Government’s resolve to maintain the status quo of the single party era. For this reason, we hope and trust that the Government will implement the recommendations we make in chapter five for the sake of greater justice and freedom within Kenya.

In chapter five we make some conclusions. The first of the major ones is that Kenya’s poor record of observance of human rights is as a result of the courts’ failure to zealously protect these rights. The courts lack judicial independence; thus they are easily emasculated by the Executive. Secondly, security of tenure for judges is elusive. This also compromises judicial independence at the cost of protecting fundamental rights and freedoms. Thirdly, we make a finding that there are flaws in the present law on the protection of fundamental rights and freedoms. One major flaw is the
existence of legislation, such as, for example, The Preservation of Public Security Act and The Public Order Act which clearly derogate the constitutionally guaranteed rights and freedoms. The other flaw is the fact that the Court of Appeal has no jurisdiction to hear an appeal from the decision of the High Court given in the latter's exercise of its jurisdiction given under s.84 of the Constitution. We have made certain recommendations in chapter five in the light of these conclusions.
ABBREVIATIONS

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<td>K.A.N.U.</td>
<td>Kenya African National Union</td>
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<td>K.B.</td>
<td>King's Bench Division</td>
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<td>K.L.R.</td>
<td>Kenya Law Reports</td>
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<td>K.P.U.</td>
<td>Kenya People's Union</td>
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<td>O.A.U.</td>
<td>Organization of African Unity</td>
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<td>U.N.O</td>
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INTRODUCTION

This work has been inspired by the comfortless fact that my country Kenya has a bad record on human rights. For the last decade, she has featured almost permanently on the lists of countries which do not respect human rights.\(^1\) Ever since the introduction of a monolithic party-system by a constitutional amendment in 1982\(^2\) and notwithstanding the re-introduction ten years later of multi-party democracy through another constitutional amendment repealing the one of 1982\(^3\), the Government, in an effort to cling to power, has continued to crack down on political activists who undertook the clamour for multi-party democracy. The result has been blatant violations of human rights, culminating in the detention without trial of these activists\(^4\) at the height of multi-party debate and riots that broke out in July 1990.

The major human rights violations have intensified due to continuous, so called "tribal clashes" in the Rift Valley and Western Provinces in which many people have lost their lives and others their limbs and property through police brutality meted to people during these clashes. These so called ethnic clashes broke out immediately on the advent of multi-party political
system which was ushered in by the repeal of s.2A of the Constitution of Kenya on December 10, 1991. It is widely believed that the clashes were fuelled by the KANU Government in order to demonstrate that multi-partyism cannot work in Africa - and Kenya in particular. This is no wonder because the multi-party system was forced on the Government by the international aid donors. And beyond the stated police brutality during ethnic clashes, there have been numerous other sordid accounts of human rights violations reported almost daily by the press.

Kenya's human rights situation remains dismal even after the first multi-party general election since the 1960s on December 29, 1992. This is so because the Government continues to scoff at implementing meaningful democratic reforms. Since the election, the press has remained at the mercy of the Government which has continued to control its citizens' efforts at free expression. The Government suppressed the country's only independent television station, the Kenya Television Network (KTN) by suspending its local news coverage on February 29, 1993. The Government has also tried to muzzle pro-democracy news-magazines by consistently confiscating thousands of copies of these publications on the pretext that they are
seditious. The editors and publishers of these magazines are frequently arrested, detained for weeks, and are then arraigned in court for sedition. But their cases never proceed to hearing. The arraignment in court is just one method of State harassment.\textsuperscript{11} The process of such harassment reached frightening heights on April 30, 1993 when police officers removed parts of eight printing machines belonging to a firm that prints the alleged seditious news-magazines, in order to disable the machines from printing the magazines. Curiously this bizarre action of the police officers was later vindicated by the High Court!\textsuperscript{12} The Government has also failed to state what is seditious in the news-magazines in question\textsuperscript{13} or to proscribe them.

Arising from Kenya's bad record on human rights abuses, one may be forgiven for wondering what is amiss, since there exist elaborate constitutional institutions which should adequately ensure the vindication of fundamental rights and freedoms. The two such major institutions are the legislature and the judiciary.

The legislature is given the mandate under s.39 (3) of the Constitution to scrutinize the activities of the
Government. Under this provision, the legislature can pass a vote of no confidence in the Government which must resign in that event. Members of Parliament may also censure the Government through parliamentary questions directed at Government Ministers. These two methods are, therefore, a means of granting redress in cases of violations of human rights by the State or its officials. But the legislature is not politically equipped for the performance of this task because redress through parliamentary questions is weakened by the vagaries of politics. The Minister is not obliged to answer any question put to him by an MP, and when he does answer, it is the civil servants against whom the complaint is raised who usually draft the answers given by the Minister. The success of the redress depends on the skill of the Minister in sidestepping barbed questions from MPs. As observed by George K. Rukwaro: "A promise to investigate the matter with a few humorous words will often do the trick and after peels of laughter have died, the old lady [a complainant] is forgotten and the house is ready to continue with more pressing matters of the State." And again the legislature in Kenya has now been turned into "a docile and moribund appendage of the executive." To many others, it is a "rubber stamp" for authenticating executive actions.
Furthermore, since Parliament does not sit for most of the year, it would be absurd to expect a parliamentary question when it is not in session. Even when Parliament is in session, it is argued by Kiraitu Murungi\textsuperscript{17} that the ability of the ruling party KANU to sideline and harass MPs critical of the Government has seriously weakened parliamentary protection of human rights. The effectiveness of parliamentary questions has also been discredited by Paul Muite\textsuperscript{19}, the MP for Kikuyu who, deplores the Speaker’s illegitimate way of demanding to vet questions and motions before having them forwarded to the relevant ministries for answer. In this way, numerous questions touching on national issues have been rejected by the Speaker before they could get to the relevant ministry. Muite gives an example of his two questions which were recently rejected by the Speaker on “State Security” reasons. In the first question, Muite wanted to know the expenditure on presidential trips and whether such expenditure could be justified in view of the prevailing economic hardships. In the second question, he sought to know if public funds have been committed to the construction of a private airport at the President’s Kabarak home. On the Speaker’s action Muite said he “would have thought that it is the duty of the concerned minister to advise the House what he considered “state security.”
Said he:

"Until the House is so advised the Speaker has no business imposing his own judgements on members' questions." 20

Beside Parliament, the judiciary is the other major institution assigned the role of protecting fundamental rights and freedoms. Section 84 (1) of the Constitution guarantees every individual whose rights have been, are being or are likely to be infringed upon, access to the High Court for redress. Under s.84 (2) thereof, the High Court may make such orders, issue any writs, and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of fundamental rights and freedoms as enshrined in Chapter V of the Constitution of Kenya. But in spite of these clear provisions, the High Court has not been effective in protecting the rights of the individual. This is because over the years, the High Court of Kenya has adopted a consistent policy of strict legalistic construction of the said s.84 and the rest of the provisions of the Bill of Rights. This has resulted in severe limitation on enforcement of the rights and freedoms enshrined therein. This restrictive approach to constitutional interpretation has been adopted
despite established precedent from locally decided cases\textsuperscript{21}, as well as decisions from other jurisdictions,\textsuperscript{22} to the effect that a constitution, being a special type of statute, must be interpreted broadly, liberally and in favour of maximum enjoyment of guaranteed rights and freedoms. Beside its rather restrictive approach to constitutional interpretation, the High Court has also on occasions used other methods which defeat its constitutional task of enforcing fundamental rights and freedoms. These methods are summarized by Kathurima M'Inoti.\textsuperscript{23} They include summary and often arbitrary procedures; general hostility towards human rights litigation; and sometimes plain expediency. The employment of these methods has minimized the effectiveness and spirit of s.84 of the Constitution.

Besides the legislature and the judiciary, there are a few other less formal institutions through which an aggrieved citizen can put forward his complaints when his rights are violated. These include the press, pressure groups like the Release Political Prisoners (RPP) Group, and certain other institutions like the National Council of Christian Churches of Kenya (NCCK) which enhance public awareness and education on human rights. It is obvious, however, that the
contributions of these less formal institutions can only be minimal.

It is in view of the foregoing constraints that we feel a need arises of looking at ways and means of making the enforcement of fundamental rights and freedoms more effective. This study then seeks to answer the question: To what extent are the fundamental rights and freedoms as enshrined in the Bill of Rights of the Constitution of Kenya protected, especially by the judiciary? In answering this question, we are of the view that the primary responsibility of protecting these rights and freedoms lies with the judiciary; and the assumption is that, in order to fulfill this vital function, the judiciary must be independent of any external influence.

We commence our task of answering the above question in chapter one by examining the existing constitutional and legal framework for the articulation and protection of human rights in Kenya. This framework comprises principally the provisions of the Bill of Rights as contained in Chapter V of the Constitution of Kenya. In chapter two, we examine the judicial intervention in the protection of fundamental
rights and freedoms, by analysing decisions of the superior courts in the field of redressing basic human rights. In this chapter we also demonstrate the issue of the courts' ouster of their own jurisdiction at the cost of not vindicating violated rights of the individual. The chapter also addresses the various other methods which have affected the courts' mandate to enforce fundamental rights and freedoms.

In chapter three, we examine the factors which seem to affect the performance of judges in the protection of human rights. There we analyse the constitutional provisions providing for the appointment and removal of judges, as well as the practice thereof. We also examine whether or not the judges enjoy security of tenure; and whether they are susceptible to political pressure and interference by the executive. In this chapter we also examine the various factors which tend to compromise the independence of the judiciary.

In chapter four, we examine the trend at the judiciary in the protection of fundamental rights and freedoms since the introduction of multi-party democracy by the repeal of s.2A of the Constitution on December 10, 1991. The endeavour is to determine whether or not multi-party democracy has brought any improvement in
human rights' protection from the dismal situation that existed during the single party era.

We conclude in chapter five by making some findings and recommendations. If these recommendations will be implemented the move would certainly enhance the observance of human rights, and this thesis would be worth the effort put in.

In this work we arrive at three major conclusions: First, that although there exist in Kenya adequate legal rules and an institutional framework to ensure the protection and vindication of fundamental rights and freedoms, nonetheless the protection and vindication of these rights is elusive. The main obstacle is the reluctance by Kenyan courts, especially the High Court, to zealously uphold these rights and freedoms. As a matter of fact, and as is demonstrated through decided cases in this study, the High Court has on numerous occasions used all sorts of methods to deny litigants redress for their violated rights. These methods, as are summarized by Kathurima M'Inoti, include a consistent policy of strict and legalistic construction of the Bill of Rights, summary and arbitrary procedures, general hostility towards constitutional litigation, and finally, plain expediency. Our second conclusion is that there is
no security of tenure for judges. For this reason the courts lack judicial independence and have become compliant to the whims of the Executive. Thus the courts are not able to effectively vindicate violated rights of the individual. The Executive can even ignore a court order. Witness this, for example: On December 16, 1986, a High Court judge Mr. Justice Tank, ordered that Mr. Mirugi Kariuki, then in detention, be produced in court on December 23, 1986 at 9.00 a.m. On December 23, 1986 Kariuki’s lawyer complained that this had not been done. The State Counsel, Mr. Bernard Chunga, appearing for the Republic, then began to shout at the judge, who then adjourned the proceedings for one hour and proceeded to confer with the Chief Justice in the latter’s chambers. Upon returning to court, the judge refused to entertain further questions concerning the whereabouts of Mr. Kariuki.25

Our third conclusion is that there exist certain factors which whittle down the independence of the judiciary. These are exhaustively discussed in chapter three.

WILLIAM MBAYA
NAIROBI, SEPTEMBER 1993
NOTES

1. See *Daily Nation* August 12, 1993 p. 3. Two of these groups concerned are Amnesty International and Human Rights Watch.

2. The Constitution of Kenya (Amendment) Act No. 14 of 1982. This amendment inserted s.2A into the Constitution and provided: "There shall be in Kenya only one political party, the Kenya Africa National Unity" [KANU].


4. See chapter 4 n.4.

5. Supra n.3.

6. See a detailed account of the ethnic clashes by Prof. Kibwana in his article "Kenya's Democracy at Dusk" *Society* Weekly Issue No. 21, August 2, 1993 pp. 8 and 9.

7. See chapter 4 n.7.

8. Ibid n.38.

10. In the latest raid on August 1, 1993, heavily armed police confiscated thousands of copies of *Finance, Society* and *Economic Review* from the printers — see *The Standard* August 2, 1993 p.4. The violence meted by police during the raid led *Daily Nation* issue of August 3, 1993 to editorialize at p.6 that ... "in this particular case, considering how the majesty of the law, in all its awesome power, has been brought to bear on the small magazines since KANU won the election, there seems to have been very little in the way of concrete results, i.e. convictions for libel, defamation or sedition ... It all seems rather like using the guillotine to cure a headache." In an earlier similar raid on *Finance* on April 15, 1993 police attack on the magazines' employees left the magazines offices splattered with human blood — See *Society* Weekly Issue No. 16, April 19,
11. Ibid. See quote from *Daily Nation* editorial of August 3, 1993. Editors who are frequently arrested are Njehu Gatabaki of *Finance* and Pius Nyamora of *Society*.

12. See n.64 chapter 4.

13. See Bernd Mutzelburg, "Good Governance and Accountability" *Society* Weekly Issue No. 24 August 23, 1993 p.9. The writer, who is the German Ambassador to Kenya, wonders why newspapers are impounded "without anybody explaining what sedition was, or even bothering to read the papers thoroughly before."


16. Ibid p.49.

17. Supra n.1 p.23.


20. Ibid.

21. See, for example, Stanley Munga Githunguri v. A.G. (Nairobi High Court Misc. Application No. 279 of 1985), and Rev. Lawford Ndege Imunde v. R. (Misc. Civil Appl. No. 688 of 1986. These cases are discussed extensively in chapter 2.

22. See, for example, the Bermuda's case of


24. Ibid

CHAPTER ONE

CONSTITUTIONAL AND LEGAL FRAMEWORK FOR THE ARTICULATION AND PROTECTION OF HUMAN RIGHTS IN KENYA

This chapter begins by defining what is meant by "human rights" and seeks to set out the limit beyond which a civilized society may not transgress into the dignity and freedom of man. The chapter then retraces the history of human rights from the era of the early Greek philosophers, through to the present day 20th century. This is with the view of explaining the factors which influenced the development of the concept of human rights. In this historical perspective, the chapter also discusses the various approaches to the concept of human rights, as well as the emergence by the end of the 2nd World War, of the universal concern for the protection of human rights, which has persisted to date.

1.1 Definition of Human Rights.

Human rights have over the years been accorded a plethora of definitions. They have been variously called "natural rights", "the rights of man" or "fundamental rights and freedoms". Francisco Sourez, a political philosopher in the 7th Century defined a "right" to mean "a kind of a moral power which every man
has, either over his property or with respect to that which is due to him." 4 By calling them "human" Maurice Cranston observes that human rights are those rights which naturally attach to man by fact of his being human. To Cranston a human right is:

"a universal moral right, something which all men everywhere, at all times ought to have; something of which no one may be deprived without a grave affront to justice; something which is owing to every human being because he is human." 5

Louis Henkin defines human rights in another way: that is as:

"claims which every individual has, or should have, upon the society in which he lives. To call them 'human' suggests that they are universal; they are due to every human being in every human society. They do not differ within geography, history, culture, ideology, political or economic system, or state of development. To call them 'rights' implies that they are claims 'as of right' not merely appeals to grace, or charity, or brotherhood, or love; they do not need to be earned or deserved..." 6

Thus, human rights are part of what forms the essence of
man. They are an expression of the worth and dignity inherent in the human being. They are not a creation of political, social or economic institutions. As Judge Tanaka stated in his dissenting judgement in the South West Africa cases:

"A state or states are not capable of creating human rights by law or by convention; they can only confirm that existence and give them protection ... Human rights have always existed with human beings. They existed independently of, and before the state. An alien and even stateless persons must not be deprived of them." 7

Other scholars have also added different shades to the meaning of human rights. Professor R. Dworkin argues that when we say that one has a right to do something, we imply that it is wrong to interfere with his doing it, or at least some special grounds are needed for justifying any interference with his doing it. 8 H.L.A. Hart feels that human rights are only concerned with limitation or distribution of freedom, and if man has any moral rights at all, then he has only one right: the right to be free. 9 According to Rodney Peiffer, there is a distinction between the rights to freedom, the rights to well-being i.e., the right to goods and services which constitute basic human needs, and social contract rights i.e., the rights which human beings
These definitions provide only a central theme of what human rights are. The definitions are not exhaustive, and they cannot be, because these rights are defined, analysed and evaluated in relation to different systems of social and political organizations in which man finds himself, and especially in the context of varying forms of government. Political philosophers make one basic assumption, i.e., that there is, by virtue of human nature itself, an order which human reason can discover, and according to which a human being should be treated by fellow human beings. By this assumption, man has a certain worth, dignity and freedom which operates to prevent any ill treatment that may be meted to him. The assumption also sets out the ultimate limit beyond which an organized society may not transgress in relation to man, and operates as the very purpose of organized society. This assumption about human nature, and thus what should be done, and what should not be done to man because of that nature, is what is generally known as human rights.

The second assumption that is made by political philosophers is that all human organizations are by nature not necessarily just. Political systems are oppressive, and the economic, social and cultural set-
ups the world over, comprise deprivation, which has led man to make the assumption on human nature, and appeal to human rights based on that basic assumption. In this context therefore, human rights are taken to imply those basic concepts which man has used in the various stages of development to enhance freedom, as well as economic and social justice in society.

1.2 The Origins and Nature of Human Rights.

(a) The Natural Law Approach.

The history of human rights goes back to the Greek philosophers of 5 B.C. who postulated the existence of certain fundamental principles of justice based on the theory of natural law which emphasised reason emanating from man, a creature of the Universal God. Some natural law philosophers explained the origin and nature of human rights by reference to God, yet most of them explained human rights by reference to the nature of man. They looked into history to determine the natural state of man. Thomas Hobbes deduced man's right to be self-preservation, this because in the state of nature, man's life was mostly "brutish and short, and that the most powerful of all his passions was his fear of death. John Locke envisaged that man in his original state of nature lived in freedom and sought his own good as well as the good of others. But when he joined the
civil society, he lived in insecurity and his task became that of merely protecting his life, liberty and property. Hobbes, therefore, identifies these as the natural rights of man.\textsuperscript{14}

The prevailing natural law approach today is as propagated by a political philosopher, Kant. His approach presupposes that there is a certain inherent dignity in the human being, absent from animals and plants, and that there are certain ways of treating human beings which are inconsistent with his dignity. According to Kant's approach, human rights simply emanate from the very nature of man. They came before the state, and they are not dependent on any act on the part of the state, as was also pronounced by Judge Tanaka in his dissenting judgement in the South West Africa cases.\textsuperscript{15}

Natural law and, therefore, natural rights were interpreted in terms of a social contract whereby man yielded to the sovereign, not all his rights, but only the power to preserve order and enforce the law of nature.\textsuperscript{16} The natural law school of thought did not, however, appeal to other thinkers, who argued that natural law was based on the abstract, immutable principles which could only be enforced by moral force. That is why in the nineteenth century there emerged
analytical positivism to remedy this perceived weakness of the natural law.

(b) The Positivist Approach.
According to Jeremy Bentham, the father of English positivism, positive law alone was the real law and that natural law was not law at all. This, he argued, was because natural rights have no authority backing them, except the command of justice and morality. For the positivists, the will and action of the state is the direct source of human rights. Thus the human rights embodied in natural law are neither laws nor rights. They are merely moral pretentions mistakenly conceived as rights. Bentham postulated that a "right is a child of the law, that real laws come from real rights; but from imaginary laws of nature only come imaginary rights." In reference to the French Declaration of the Rights of Man and of Citizen, he states:

"Natural rights is simple nonsense: natural imprescriptible rights, rhetorical nonsense - nonsense upon stilts. But this rhetorical nonsense ends in the old strain of mischievous nonsense: for immediately a list of pretended natural rights is given, and those are so expressed as to prevent to view legal rights."
The positivist approach received judicial boost only recently in the South West Africa cases.\textsuperscript{21} In rejecting the argument that humanitarian considerations are sufficient in themselves to give rise to legal rights and obligations, the International Court of Justice stated:

\begin{quote}
"The court simply holds that \textit{such rights} or \textit{interests, in order to exist must be clearly vested in those who claim them, by some text or instrument or rule of law}.\textsuperscript{22}
\end{quote}

Like the natural law approach, the positivist approach does not pass without criticism. The positivist approach is criticised for its narrowness of focus, in that the approach links human rights with the types of instruments in which they are incorporated. By emphasizing the formal and procedural aspects of human rights, the approach seems to confuse the instruments stipulating human rights with the human rights themselves. Furthermore, as has already been discussed, human rights are not 'human rights' because they are articulated in legal instruments such as constitutions, treaties, conventions or statutes. The rights are articulated in such documents because they are 'human rights', and it is found necessary to give them legal protection. The positivists are not concerned with the
extra-judicial origins of human rights. They are merely concerned with the legal expression of these rights, but not in the context of the rights' social-economic and political foundations. The positivist approach is, however, invaluable in identifying the precise rights to be protected and for ensuring their protection.

(c) The Marxist Approach.
According to this approach, human rights are the socio-economic and political conditions prevailing in a given society at any given time that shape and create human rights. Karl Marx emphasised this when he wrote:

"My investigations led me to the result that legal relations as well as forms of state are to be grasped neither from the so-called general development of human mind, but rather from their roots in the material conditions of life" ... 25

According to Marx, real liberation of man could only be attained by the betterment of his economic conditions, and that people cannot be liberated if they are unable to obtain adequate food, clothing and shelter. He considered the human rights of the bourgeois society sham human rights which merely enabled the oppression of labour by capitalists. Marxists see the liberation of people in terms of the liberation of labour from
domination by capitalists and the elimination of the exploitation of the working people. Thus, there is a genuine manifestation of freedom in society which is possible only when man is liberated from all forms of exploitation.

Arising from the above varying definitions and approaches to human rights, it is quite clear that the definitions might not be acceptable to everybody. However as Gros Epiell once wrote:

"...there is today an unquestionable acceptance of the fact that the State is an institution in the service of man and that human rights, whatever one's views regarding their origins and nature, must be recognized and protected." 28

1.3 Historical Origins of Human Rights.

(a) The Ancient and Medieval Times.
The history of human rights is the history of man's endeavours to create a free and just society by repulsing excessive political power. The concept of human rights as we know it today was absent from the legal conceptions of the Jews, the Greeks and the Romans. 29 The limits to political power were fixed by a correlation of human authority with the divine or
natural law. In Sophocles' tragedy *Antigone*, a classical Greek play written around 422 B.C., Antigone rebelled against King Creon's decree that the body of Polynicles be exposed to vultures and dogs, asserting that a mortal man could not "by a breath annul and override the immutable unwritten law of heaven."³⁰ King Creon had ordered that Polynicles could not be buried, being a traitor, and rather his body should be exposed to vultures and dogs. Under Roman Law, the concept of *jus-naturale* was used to limit the use of law as an instrument of power, since legislation which ran counter or tried to restrict it was considered immoral.³¹ Scholastic philosophers such as St. Augustine and St. Thomas Acquinas used the concept of sin to explain the existence of tyrants and social and political inequality.³² According to St. Acquinas, a man is only obliged to obey the secular princes as far as the order of justice requires. Should the princes command that which is unjust, a subject is not obliged to obey, and he has the duty to resist any unjust exercise of power.³³

The law of God or the law of nature in ancient and medieval times was not strictly speaking "human rights". It merely imposed duties upon rulers to act in accordance with it. A ruler acting contrary to it could be resisted, not for any violation of human rights, but
for violation of the law of nature or the law of God.

In the feudal system, privileges and grants conferred as a result of royal favour were the natural order of things. The nobility therefore used the idea of royal grant to curb the abuses of power perpetrated by the feudal Kings. These abuses included things such as compulsion of widows to marry, confiscation of property, excessive taxes, and irregular trials. In 1183, the Cortes, the feudal assembly of Leon, received from King Alfonso IX, his confirmation of a series of rights including the right to a regular trial and the inviolability of life, honour and property. In 1215, King John, in the famous Magna Carta granted the nobles and the barons of England such rights as the establishment of courts, trial by peers, and the right to property and security of the individuals.

These feudal compacts were not catalogues of the human rights of the nobility of the day. In their form and language, they were unilateral grants, made by the King "by the grace of God", to a tiny land-owning aristocracy. The idea of delimiting political power through human rights as such, had not been born.

b) The Seventeenth and Eighteenth Centuries.
The modern concept of human rights can be directly traced to the civil war and the bloody reign of the Stuarts in England. Wedgewood says that the theory of the divine right on which the Kings based their powers was defied because there was "little in the scriptures to support, and much to contradict it." Attempts were therefore made to trace the origins of state power with a view to establishing the proper function of the state. Thomas Hobbes, writing during the period of the civil war was obsessed with the security of the person. He had been born at a time when reports of the Spanish Armada were causing much panic and general alarm in England. It is this general fear of upheaval best expressed in the civil war that caused him to be particularly obsessed with peace and stability.

Hobbes, in his work, *Leviathan* postulates that man in his natural state of nature was one of anarchy in which people went for each other's throats so that at the end of the day life was simply a precarious existence; it was "nasty, brutish and short." According to him the most powerful of all man's passions was his fear of death. From this nature of man he deduced man's natural right to self-preservation: that to ensure his self-preservation, man entered into a social contract, whereby he surrendered all his rights to the sovereign. The sovereign in return for absolute subservience,
guaranteed peace and security. Hobbes advocated resistance if any state threatened man's right to self-preservation. This right was then regarded as a reserved right of every human being.

Another philosopher, John Locke,41 revolting against the murderous reign of the Stuarts in England, sought to discover the purpose of government. He found that man in his original state of nature had natural rights to life, liberty and property. These, he said, existed with man before the advent of civil society and the state power that went with it. He argued that man was to suffer in his enjoyment of these rights. Accordingly, man entered into a social contract pursuant to which he yielded to the sovereign, not all his rights, but only the right to preserve order. To Locke, the purpose of the government was only to protect the lives, liberties and possessions of members of society. So long as the government fulfills this purpose, its laws are binding. However, once a government begins to trespass on these natural rights, its laws are deprived of their validity and such government may be overthrown by popular revolt.

During the second half of the 18th century, Locke's ideas of natural rights and the social contract were used by the American settlers to justify their struggle
for independence. The revolution arose from the breach of the Mayfair contract in 1620 between King George III of Britain and the settlers in America. As a result of the breach, the American settlers asserted that their natural rights had been violated. They further argued that their relationship with the sovereign was governed by a social contract which enjoined the sovereign to seek to rule in the best interests of the subjects. They argued that they were justified to rise against their sovereign. That is why Thomas Jefferson asserted that his countrymen were a "free people claiming their rights as derived from the laws of nature and not as a gift of their chief magistrate". In writing the inspirational Declaration of Independence, he stated, inter-alia:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights governments are instituted among men deriving their just powers from the governed, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it and institute a new government."

Other philosophers such as Montesquieu, Voltaire and
Jean Jacques Rousseau made challenges to intolerance, oppression, censorship and other unjustified socio-economic restraints of the day. These philosophers argued that government was duty bound to preserve its subjects' natural rights to life and liberty. The French regime of Louis XVI had failed to do so and was overthrown by angry citizens whose rage could no longer be contained. The French Revolution was a prelude to The Declaration of the Right of Man and Citizen which was declared in 1789 and which proclaimed a similar position as the American Declaration of 1776.

Both the American and the French declarations were beacons on the tortuous road of human rights development and acted as reference points for later developments in the 20th century.

c) The Nineteenth and Twentieth Centuries.

This period saw the broadening of human rights by the incorporation of economic and social rights, and also the internationalization of the protection of human rights. The Congress of Vienna in 1815 demonstrated international concern for human rights for the first time in history. The congress dealt with religious freedom, civil and political rights, and heard petitions by individuals and groups seeking protection of these rights. In addition, the congress, agreed in principle
to abolish slavery. Although the congress was mainly concerned with the maintenance of the political status quo, it should have served as a good beginning for the international popularization of the concept of human rights. But this was not to be. Many of the ideas that flourished in the nineteenth century provided an antithesis to the ideology of individual rights and popular sovereignty. Natural rights were an anathema to some people. Natural rights were also rejected by highly moral human progressives and libertarians as anarchical nonsense. Rationalism, secularism and humanism rejected natural rights based on divine natural law; the foundation of rights in the equality of all men as children of God, descended from the common ancestor was dealt a stunning blow by the theory of evolution.

In condemning the concept, Edmund Burke contended that public affirmation of natural rights would lead to social upheaval. He criticized the drafters of the Declaration of the Rights of Man and Citizen as trumpeting the "monstrous fiction of human equality which only served to inspire false ideas and vain expectations in men destined to travel in the obscure walk of laborious life." Similarly, Jeremy Bentham was sceptical about natural rights. Bentham's vitriol upon the doctrine of human rights was as scathing as it was scornful.
The idea of human rights had also to contend with the rise of socialism. Socialism, though not outrightly opposed to human rights emphasizes the society, the group, subordinating the individual or seeing his salvation in the group. Christian Socialism, while rejecting Marxist materialism, also attacked the individualism and egoism that led to the inequalities of capitalist society. Marx and Engels wrote a great deal ridiculing freedom and equality in bourgeois society. They argued that such freedom was a fraud as it was the freedom of the rich to make profits and of the poor to die of starvation. To them, human rights could only be attained in a classless society, free from exploitation of man by man. Josef Stalin argued that the liberation of the individual could come only after the mass has been liberated. "Everything for the mass", true individual welfare could only come after society was cleansed and reordered; then "the narrow bourgeois horizon of rights" can be left far behind and in a nod to anarchism - state would wither away and the individual would be free.

The socialist antithesis to individual rights implied more than a subordination of individual to group, of rights to duties. It put economic advance before political-civil rights, welfare before and above liberty. If socialism resorted at all to the language
of rights, it asserted them not as limitations on government but as obligations upon it, not freedom from government but demands upon it. It evoked not a right to think or speak or assemble, or even to be secure, but a right to work and eat. The influence of this kind of thinking is explicit in the writings of F H Bradley who asserted that:

"the rights of the individual are today not worth serious consideration, and that the welfare of the community is the end and is the ultimate standard."

Despite these views on human rights, the idea endured in one form or another. These included the abolition of slavery, factory legislation, popular education, trade unionism and the universal suffrage movement. Moreover, the 1919 peace conference at Versailles demonstrated concern for the protection of the minorities. Several treaties were concluded with the new states stressing minorities' rights, including the right to life, liberty and freedom of religion, the right to the nationality of the state of residence and the exercise of civil and political rights. Minorities were placed under a system of international guarantees with the Council of the League of Nations acting as guarantor. Violations were to be referred to the International Court of Justice.
d) The International Protection of Human Rights.
The concern for the protection of human rights after the Second World War can best be understood only in the light of the international, political and economic situation prevailing at the time. Never before in world's history had mankind witnessed such gross violations of human rights as Adolf Hitler's extermination of six million Jews and Stalin's liquidation of the Kulaks of the Soviet Union. The world was appalled, conscience stricken and there was a renewed interest in the promotion and protection of human rights. Furthermore, the nations of Europe emerged from the war badly bruised and with their economies in disarray. Thus the need for international peace and security was a real one, not just for economic purposes, but more so because it was seen as the best safeguard against abuse of human rights and a future major war. So in August 1941, Roosevelt and Churchill, the United States' and British helmsmen, respectively, issued a joint declaration - The Atlantic Charter expressing their conviction that complete victory over their enemy was essential to preserve human rights and justice in their own lands as well as in other lands.

At the San Francisco Conference in 1945 The Charter of the United Nations was signed. The authors of the Charter recognized that maintenance of international
peace and security was not solely a matter of settling disputes, or dealing with threats to peace or acts of aggression; it was necessary to create conditions which were favourable to the existence of peace. It was not lost to them that one of the conditions precedent was the global respect for human rights.\textsuperscript{53} To this end the Charter declared that:

"......the UN shall promote.....universal respect for and observance of human rights and fundamental freedoms for all..."\textsuperscript{54}

The United Nations went a step further in 1948 by adopting \textit{The Universal Declaration of Human Rights} at its General Assembly. The Preamble to the Declaration forges a clear link between protection of human rights and international peace and security. It recognises "the inherent dignity and.....inalienable rights.....as the foundation of freedom, justice and peace in the world..." The Declaration was, however, not generally conceived as law but as "a common standard of achievement"\textsuperscript{55} for all to aspire to.

In efforts to concretize the rights established in the Declaration, to make them binding and to provide for their implementation, the United Nations Human Rights Commission drafted two covenants, viz, \textit{The International Covenant on Civil and Political Rights} and \textit{The International Covenant on Economic, Social and Cultural...}
Rights. The drafting of these two covenants was the culmination of an ideological struggle between the capitalist and the socialist states, with the socialist states insisting on recognition of economic, social and cultural rights and most of the capitalist states opposing them. Though approved by the General Assembly in 1966 it was not until 1976 that the two covenants came into force.

The International Covenant on Civil and Political Rights embodies what has come to be referred to as the first generation rights which are captured in Articles 2 to 21 of the Universal Declaration. These are the product of reformist theories of the 17th and 18th centuries discussed earlier. They reflect the liberal individualism in the political arena coupled with the socio-economic doctrine of laissez-faire. This triumph of liberty for the individual as advocated by Locke and Hobbes sees the state as a usurper in the province of individual freedoms which it must, therefore, abstain from interfering with. Indeed at that time, the idea was, as H. L. Mencken would put it, that "all government is, of course, against liberty."56

The International Covenant on Economic, Social and Cultural Rights contains the second generation rights which are to be found in Articles 22 to 27 of the
Declaration. This group of rights is geared towards a demand that a state should come in and actively provide for some rights. They are couched in terms of "rights to" rather than "freedom from".

Over the years there has arisen what has been dubbed the third generation rights which stress more on the solidarity of states (Fraternité). These are a memorial to the rise and decline of the nation-state and insist on the international aspect of human existence which must, therefore, entail equal rights to sharing in the common heritage of mankind. They are closely linked with the breaking of the shackles of colonialism which saw the hitherto oppressed people, arousing themselves and asserting their rightful place in the international community.

e) Regional Efforts to Protect Human Rights.
The pioneering work on regional efforts was the drafting and adoption of The European Convention for the Protection of Human Rights and Fundamental Freedoms by the Council of Europe in 1950. This Convention, which entered into force in 1953 represents the most advanced and successful regional experiment in the field. The organs created under the Convention are the European Commission of Human Rights and the European Court of Human Rights.
In the Americas, The American Convention on Human Rights was adopted in 1969 which, among other things, made the existing Inter-American Commission on Human Rights an organ for the Convention's implementation and established the Inter-American Court of Human Rights.

The African Charter on Human and Peoples' Rights represents the most comprehensive treatment of human rights concerns in this region. Notably, it places emphasis on the inherence of African values. Its peculiar character is underscored by the inclusion of duties in the provisions. Additionally, it adopts an approach to socio-economic and cultural rights which gives these rights equal emphasis as given to civil and political rights. In this regard the Charter states that:

"civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality and the satisfaction of economic social and cultural rights is a guarantee for the enjoyment of civil and political rights."

This provision provides a clear break from the western world's emphasis on civil and political rights. Unlike other human rights instruments, the African Charter
places some obligations squarely on the state. The Charter also recognizes the rights of groups e.g. the family, women and children in addition to those of the individual. The aged and the infirm are also protected. So is the right of people to self-determination. The Charter also embraces the so called third generation rights - the right to economic, social and cultural development; the right to national and international peace and security; the right to development, and the right to a general satisfactory environment favourable to people's development.

The Charter became effective on October 21, 1986 three months after the Secretary-General of OAU received notification on July 21, 1986 that Niger had ratified the Charter. As at that time the OAU was made up of 50 member states. The ratification by Niger, the 26th State to do so, meant that Article 63(3) of the Charter requiring ratification by a single majority had been fulfilled.

e) The Kenya Bill of Rights.

The struggle for independence saw a rebellion against the unchecked and all-pervasive powers of the colonial administration under which the people of Kenya had suffered for over seventy years. The need for a limited constitutional government was thus not lost to the fathers of the nation. They found it necessary and
important to have a code of fundamental rights and freedoms written in the Constitution as a safeguard to abuses of basic human rights. But the concern of the colonialist minority was to preserve their property rights and their privileged position.

At the dawn of independence, a constitutional conference was called in London in 1960. The white colonial minority pressed for substantial safeguards, especially for their property rights which was opposed by the African representatives at the conference. The Colonial Secretary dictated that the proposed constitution would "provide for the judicial protection of human rights" and that it was "important to include protection of property rights." These proposals were incorporated in the 1960 Constitution which contained a Bill of Rights modelled on the European Convention on Human Rights and Fundamental Freedoms, except for its emphasis on property rights.

The 1960 conference was followed by another in 1962 which charted out the outlines of the Independence Constitution of 1963. This Conference set up a committee on the Bill of Rights whose terms of reference were "to consider and report to the conference on the provisions to be included in the Bill of Rights." The committee used the Uganda Bill of Rights as a working
paper and recommended certain amendments and modifications which were accepted by the conference. 67 These recommendations were incorporated as Chapter One of the Kenya Constitution, and was published in a schedule to The Kenya (Independence) Order in Council, 1963. 68

From the foregoing, it is clear that there was no Bill of Rights in the colonial era in Kenya though there existed elements of human rights in the traditional society. The colonial government showed concern for human rights only at the dawn of independence; that is when it was necessary to safeguard and protect the colonialists' property and their minority privileges in a society which was soon to be dominated by Africans. The Bill of Rights was, therefore, a device for protecting proprietary interests of the minority groups, to wit, Europeans, Asians and Arabs. The Bill of Rights now comprises Chapter V of the Constitution.

The purpose of the Bill of Rights is clearly stated to be the entitlement of:

"... every person in Kenya to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, tribe, place of origin or residence or other local connections, political opinion, colour, creed or sex, but
subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following namely;

(a) life, liberty, security of the person and protection of the law;

(b) freedom of conscience, of expression and of assembly and association, and

(c) protection of the privacy of his home and other property and from deprivation of property without compensation."69

This provision is followed by a detailed definition of these rights. The rights and freedoms protected under the Kenyan Bill of Rights,70 include the rights to life and to personal liberty; the protection of all persons from slavery, servitude and forced labour, as well as the protection of all persons from torture, inhuman or degrading punishment, or treatment. The Bill of Rights also preserves the sanctity of property and prevents the compulsory acquisition of property without adequate compensation; it saves all persons from arbitrary search of their person or property; it secures the right to the due process of law by guaranteeing all persons the right to a fair and speedy hearing by an independent court. In addition, there is secured the freedom of conscience, of thought and of religion. All persons are also
guaranteed the freedom of expression: to hold opinions, to communicate and to receive ideas and information as well as to correspond without interference. All persons have also the freedom to assemble and to associate with other persons; they may form and belong to trade unions or other associations to protect their own interests. Lastly, the Bill of Rights preserves the freedom of movement. Every person may move freely and may reside in any part of the country.

In order to facilitate the enforcement of these fundamental rights and freedoms, the framers of the Constitution inserted 5.84 which gives every aggrieved individual the right of access to the High Court for a quick and efficient remedy above any other remedies that are available to an aggrieved party under the general law. Subsection one of 5.84 provides that:

"... if a person alleges that any of the provisions of 5.70 to 83 (inclusive) has been, is being, or is likely to be contravened in relation to him (or, in the case of a person who is being detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for
In the exercise of its jurisdiction under S.84, the High Court may make such orders, issue such writs, and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the rights guaranteed in the Bill of Rights.

1.4 Machinery For Enforcement of Human Rights.

(a) The International Scene.

The international covenants on human rights, and similar multi-lateral treaties, do provide for certain enforcement measures. States parties to such covenants undertake to respect and observe the declared rights and freedoms, and also to place them under international protection. The international covenants which became effective in 1976, provide for three main types of enforcement mechanisms. There is first, the reporting system. This consists of reports submitted by state parties on the domestic measures of implementation adopted, and the progress in the realization of human rights. Different organs examine the reports on the basis of varying procedures. Under The Covenant on Economic, Social and Cultural Rights, the task of examining the reports is placed on the Economic and Social Council (ECOSOC) which submits its report and recommendation to the General Assembly on the measures...
taken and the progress made in achieving observance of the rights in the covenant. Under The Covenant on Civil and Political Rights, there is a special Human Rights Committee, elected by state parties and composed of eight persons acting in an independent capacity. The committee is required to study the reports submitted by state parties, and to transmit its report and general comments to the state parties.

The reporting system has two major weaknesses — viz — that it depends entirely on the co-operation of the concerned governments in providing full information which would enable the concerned UN organ to reach a tangible conclusion, and secondly, the information available may not represent the true human rights situation. This is because reports by states will obviously give only the official version of facts as it is in the interest of each government to give the most favourable facts. The other method of enforcement is the settlement of disputes system which applies to states which have declared and recognized the competence of the Human Rights Committee to receive and consider complaints by other states.71 A third method is the technique of individual petitions. Any individual claiming to be a victim of rights violation can petition the Human Rights Committee under the Optional Protocol to the Covenant on Civil and Political Rights. But this
remedy is available only as against state parties to the Protocol who have recognized the competence of the Committee to receive and consider such petitions.72 Furthermore the complaining individual can only apply to the Committee after exhausting all available domestic remedies.73

(b) The Regional Levels.

We would like to deal with the European experience as an example of regional enforcement of human rights before reverting to the African and Kenyan scene. We do this because the system under the European convention is the most advanced for enforcement of human rights at the regional level so far. There are two methods of seeking redress under the European Convention. First, any contracting party is empowered to refer any alleged breach of the provisions of the Convention by another contracting party74 to the Human Rights Commission established under the convention. Secondly, any individual, non-governmental organizations or group of individuals, claiming to be the victim of violation by any one of the high contracting parties of the rights set forth in the Convention, may petition the commission, provided that the high contracting party against which the complaint has been lodged has declared it recognises the competence of the Commission to
receive petitions.

After receiving a petition, the role of the Commission is conciliatory, i.e. to ascertain the facts and bring about a friendly settlement. Where a friendly settlement is reached, the Commission submits its report to the contracting party or parties concerned and to the Committee of Ministers established under the Convention. The Secretary-General of the Council of Europe will publish a report containing a brief statement and terms of the settlement reached. If no friendly settlement has been reached, the Commission will send a report to the Committee of Ministers with such proposals as it deems appropriate. During the period of three months following the transmission of the report to the committee, the Commission must consider in a plenary session whether or not to bring the case before the European Court of Human Rights created under the Convention. In those cases where the Committee of Ministers decides that there has been violation of the Convention, it prescribes a period of time during which the state concerned must remedy the situation, and at the end of this time if nothing is done then the committee is required to decide what steps shall be taken thereof.

When the Commission, or one of the contracting parties
or the individual, has considered to refer a case to the Court, the Court will conduct hearings and arrive at a judgement which is sent to the Committee of Ministers. The Committee is empowered to execute the judgement.

The African Charter on Human and Peoples' Rights establishes a Commission "to promote human and people's rights and to ensure their protection in Africa." The Commission consists of eleven members who are elected by the Assembly of Heads of State and Government of the Organization of African Unity (OAU). The members of the Commission serve for a six year term, but they are eligible for re-election.

The Commission is charged with four functions. The first is to promote human and people's rights, and in particular (a) to collect documents, undertake studies and researches on African problems in the field of human and people's rights; to organize seminars, symposia and conferences; to disseminate information and to encourage national and local institutions concerned with human and people's rights; (b) to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations; and (c) to co-operate with other African and international institutions concerned with the
promotion and protection of human and people's rights. The second function of the Commission is to ensure the protection of human and people's rights under conditions laid down by the Charter, and the third is to interpret all the provisions of the Charter at the request of a State party, or any institution of the OAU or any African organization recognized by the OAU. Lastly, the Commission may perform any other task which may be entrusted to it by the Assembly of Heads of State and Government.

The procedure for making a complaint to the Commission is by a "communication" written by a State party concerned. If a State party to the Charter has reason to believe that another State party has violated the provisions of the Charter, it may draw the attention of that State to the matter by a written communication. The communication shall also be addressed to the Secretary-General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which it is addressed shall give the enquiring State written explanation elucidating the matter. If within three months from the date on which the original communication is received by the State to which it is addressed the issue is not settled to the satisfaction of the two States involved through bilateral negotiation, either State shall have the right
to submit the matter to the Commission through the Chairman and shall notify the other State involved. Despite the procedure for complaint under Art.47 which we have outlined, there is an alternative procedure for complaint. If a State party considers another State party to have violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing the communication to the Chairman, to the Secretary-General of OAU and the State concerned. The Commission can deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted. When the Commission is considering the matter, States concerned may be represented before it and may submit written or oral representations. After its deliberations, and after having tried all appropriate means to reach an amicable solution based on the respect of human and people's rights, the Commission shall prepare a report stating the facts and its findings. The report shall be sent to the States concerned and communicated to the Assembly of Heads of State and Government. The report shall contain such recommendations as the Commission deems useful. The Assembly may then ask the Commission to study the cases reported to it (Assembly) in greater depth and make a factual report accompanied by its findings and recommendations. In emergencies, the Chairman of the Assembly may request for an in-depth study. The
Commission may publicise the report of the indepth study after approval by the Assembly.  

The above elaborate procedure has never been put into practice. It is, therefore, not clear how it will work. So far the Commission has not yet asked the OAU Assembly to publicise its observations on any case. Neither has the Commission been detailed to conduct any indepth study by the Assembly. Nonetheless, the Charter is one of the finest goals for Africa, and a starting point towards consolidating and setting goals for the realization of human rights. There have been calls for the amendment of the Charter so as to make it possible to establish an African Court of Human Rights to superintend observance of human and people's rights.

(c) The National Level in Kenya.

Since the role of courts in enforcing human rights is the major focus of this study, and is covered in chapter two, in this section we address, and only in outline, the other means of enforcing human rights.

Besides the courts, there are other institutions through which fundamental rights and freedoms may be protected or enforced at national levels. These institutions include Parliament, the Office of Ombudsman and Statutory Tribunals. As regards Parliament, an
aggrieved citizen can turn to his Member of Parliament (MP) to forward his grievances by complaining to the Minister concerned through the mechanism of asking questions in Parliament. Through parliamentary questions, the government, or the department concerned, becomes morally responsible and feels compelled to redress the violations complained of.

The institution of the Ombudsman was first created in Sweden in 1809. Today, the institution has been recognized and established in many countries, such as Denmark and New Zealand, and nearer home, in Uganda, Tanzania, Zambia and Ghana. Kenya has consistently resisted the establishment of such an institution on the basis that there is in existence sufficient machinery to cater for all grievances of an aggrieved citizen. But recently, Attorney-General Amos Wako has hinted that the government is considering the idea of establishing the office of Ombudsman. An Ombudsman is an independent and impartial person who receives and investigates individual complaints of bureaucratic abuse by the government or any of its departments. He has the power to criticize the government or the department in his findings, and at the same time he can recommend a remedy for the complaining citizen. An Ombudsman would definitely provide a direct and an easily accessible
promote public discussion of specific cases of violations. Other similar bodies are the Africa Watch, the Lawyers Committee for Human Rights, and the Committee to Protect Journalists (CPS). There are also local bodies, the most recent of them in Kenya being the Release Political Prisoners (RPP) group which similarly promotes the protection of human rights. The group lobbies to get political prisoners released since such prisoners are usually held on framed-up charges. The National Council of Christian Churches of Kenya (NCCK) is the leading body that sponsors activities towards public education and awareness on the protection and enforcement of civil and political rights.

From the foregoing, we come to the conclusion in this chapter that human rights have been adequately defined, and that the need to protect them has been universally accepted. A lot of efforts have been made throughout history to lay the legal rules and the necessary machinery for the enforcement and protection of these rights at the international, regional and national levels. But as we have observed and as will emerge from this study the established machinery at the stated levels has not been adequate enough to enable the full protection of these rights.


20. *Ibid*


22. *Ibid* (The Majority Judgement) p. 34. (Emphasis added)

23. *Supra* n. 7.


27. Marx, K., "The Holy Family." in Marx and Engels,

42. Of July 4, 1776,

43. Adopted by the French National Assembly on August 27, 1789.


45. Lovis Henkin op. cit, p. 16.

46. Ibid p. 18

47. Supra n. 19

48. Lovis Henkin op. cit p. 17.

49. Stalin, J., Anarchism or Socialism as quoted in Lovis Henkin, Supra. n. 6 p. 17.


51. Abdul Aziz Said op. cit p. 3.


55. Lovis Henkin op. cit, p. 96.

56. Supra n. 41 p. 264.

57. See, for example, Preamble para 6: "Considering that the enjoyment of rights and freedoms also implies the
performance on the part of everyone."

58. Preamble, para 7.

59. The obligations, for example, the duty to protect the health of people, Art. 16(2); and morals and traditional values recognized by the community, Art. 17 (3).

60. Art. 18.

61. Art. 20.

62. Art. 22.

63. Art. 34.

64. Report of the Kenya Constitutional Conference,


66. Report of the Kenya Constitutional Conference


68. Legal Notice No. 718 of 1963.


70. SS.71 to 83, Ibid.

71. Art. 41, Covenant on Civil and Political Rights.

72. Art. 1 Optional Protocol of the Covenant Ibid.

73. Art. 3 Ibid.


75. Ibid. Art.25

76. The African Charter on Human and People's Rights
Art. 30

77. *Ibid.* Art. 31

78. Art. 33.

79. Art. 36.

80. Art. 45.

81. Art. 47.

82. Art. 48.

83. Art. 49.

84. Art. 50.

85. Art. 51(2).

86. Art. 52.

87. Art. 53.

88. Art. 59.

89. The idea was discussed in Windhoek, Namibia at a conference of 47 media practitioners from 14 African countries held in September, 1991.
CHAPTER TWO

JUDICIAL INTERVENTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

This chapter examines the principle governing interpretation of constitutional provisions with a view of establishing the best approach which would enable courts to effectively protect the constitutionally guaranteed rights and freedoms of the individual. This principle is basically that, since the Constitution is the supreme law of the land, it is a special type of statute which is not suited for the ordinary rules of interpreting statutes. In that case, it should be interpreted liberally, especially when determining the rights of the individual as contained in the Bill of Rights. Through a review of decided cases, we demonstrate that, in general, Kenya courts have adopted too a restrictive approach to constitutional interpretation, especially of the all important s.84 of the Constitution, with the result that the protection of fundamental rights and freedoms is seriously compromised. The chapter proceeds to contrast the Kenyan approach with the more liberal and broader approach used in other jurisdictions in order to show that the latter approach is more suited to the protection of fundamental rights and freedoms. The chapter concludes by showing that the approach by Kenya
courts has led to a denial of justice since very few litigants, who have sued over their violated rights and freedoms have obtained any redress. As a matter of fact, litigants who have obtained redress are those on few occasions who have come before one or two individual judges who rise to the occasion to vindicate these rights.

2.1 The Supremacy of the Constitution.

A Constitution of a country is conceived as the fundamental law of the land. The Constitution of Kenya provides that "if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall to the extent of the inconsistency, be void."¹ One of the early cases illustrating the supremacy of a Constitution is the U.S. Supreme Court decision in Marbury v. Madison.² The case rested on Article VI, §2 of the U.S. Constitution which provides:

"This Constitution, and the laws of United States which shall be made in pursuance thereof; and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land and the judges in every State shall be bound thereby, anything in the Constitution or
laws of any State to the contrary notwithstanding"

In this case, Marbury applied to the Supreme Court by virtue of the Judicature Act 1789 for a writ of mandamus to compel the new Secretary of State James Madison to deliver a Commission which had been signed and sealed by the Secretary of State in the outgoing administration Mr. John Marshall. Marshall, who was now the Chief Justice, decided not to disqualify himself from this case, and instead proceeded to hold that by virtue of Article III, s.2 of the Constitution, he had the jurisdiction to issue a writ of mandamus (which was held to be rightly sought) when exercising an appellate jurisdiction but not an original jurisdiction. He held that in so far as the Judicature Act authorized Marbury’s direct suit, it offended against the Constitution, and to this extent, the Act was null and void. In emphasizing the supremacy of the Constitution, Marshall C.J. stated:

"the Constitution is superior to any ordinary act of the legislature [and that] the Constitution and not such ordinary law must govern the case to which they both apply"

The supremacy of the Constitution of Kenya was given judicial boost by the High Court of Kenya in Margaret Magiri Ngui v. R. In this case, the applicant, who was
aged 34 had been charged with the offence of robbery with violence contrary to s.296 (2) of the Penal Code. The offence carries a mandatory death penalty. The applicant who was ailing in custody as she awaited her trial applied for bail in the trial Magistrate's Court. Her application was refused because s.123 of the Criminal Procedure Code, as amended in 1978 and 1984, prohibited the granting of bail for offences carrying the death penalty. In her application to the High Court against the refusal of bail, the applicant sought an order that s.123 as amended was void as being inconsistent with s.72(5) of the Constitution which provides that any person arrested or detained for any offence "shall be released either unconditionally or upon reasonable conditions ... as are reasonably necessary to ensure that he appears at a later date for trial."

In its judgement, the court observed that the state of The Criminal Procedure Code, prior to the 1978 amendment, "was in accordance with the common law and with section 60 (1) of the Constitution, which gives the High Court unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."

Counsel for the Republic had submitted that Parliament had the power to reduce the jurisdiction of the High
Court, so long as the process of so doing fell within the terms of the Constitution; that the said amendments to s.123 (3) of the Criminal Procedure Code were not contrary to the Constitution, and hence were correct in law. The court disagreed by stating:

"We cannot agree that s.123 (3) as amended is in conformity with the Constitution. Whereas s.72 (5) of the Constitution makes release on bail mandatory only in certain prescribed circumstances it is applicable to all offences. The amendments to s.123 (3) have the effect of prohibiting the High Court from granting bail in the cases of murder, treason, robbery with violence and attempted robbery with violence in any circumstances."

Counsel for the Republic had also argued the State's case on the basis of s.70 of the Constitution which provides that any "fundamental right" is to have effect for the purpose of affording protection subject to:

"such limitations of that protection as are contained in these provisions, being limitations designed to ensure that the enjoyment of these rights and freedoms by any individual does not prejudice the rights and freedoms of others for the public interest."
He thus argued that the said amendments to *The Criminal Procedure Code* "were an expression of the legislature's concern for the public interest".

The court rejected this submission by stating:

"The Constitution...gives the legislature no power to make such amendments unless enacted under the provisions of and embodied in the Constitution. The limitations referred to in s.70 are limitations in provisions of Chapter V and there is no limitation qualifying the mandatory provisions in s.72 (5)."

It was therefore held firmly that s.123 of *The Criminal Procedure Code* was void as it was inconsistent with ...not only s.72 (5) but also s.60 (1) of the Constitution. Thus the court underscored that the Constitution is supreme and that the other laws must conform with it.

2.2 Interpreting the Constitution.

Ever since *The Universal Declaration of Human Rights of 1948*, the trend has been to concretise human rights especially by spelling them out in national Constitutions. The general statements on human rights which embrace the language of universality and inalienability has thus been transformed into more
particular stipulations. When this was accomplished, the judicial process was found to be the best mechanism to spell out the perimeters, the limitations, the exceptions and the significance of human rights. As Alexander Hamilton states:

"Constitutional limitations and prohibitions can be preserved in practice no other way than through the medium of the courts of justice...without this, all the reservations of particular rights and privileges would amount to nothing".5

It follows from the doctrine of the supremacy of the Constitution that a Constitution is a special type of statute which is not suited for the ordinary rules of interpreting statutes. For this reason the courts in most of the jurisdictions with written Constitutions have adopted the liberal approach to interpreting constitutional provisions. As far as the interpretation of the Bill of Rights is concerned, the presumption is in favour of maximum enjoyment of the freedoms and rights guaranteed therein. The interpretation that best ensures that end should therefore be preferred. A strict interpretation leading to denial of the guaranteed rights and freedoms should give way to a liberal one. This proposition is supported by many court decisions the world over.
In the Bermudan case of the Minister of Home Affairs v. Fisher\(^6\) Lord Wilberforce said that the way to construe a constitution is to treat it not as if it were an Act of Parliament but "as sui generis, calling for principles of interpretation of its own, suitable to its character... without necessary acceptance of all presumptions that are relevant to legislation of private law."\(^7\) In construing the fundamental rights and freedoms guaranteed in the Bermudan Constitution, Lord Wilberforce stated that the provisions should be given interpretation avoiding what has been called "austerity of tabulated legalism", suitable to give individuals the full measure of fundamental rights referred to.\(^8\)

The same principle was repeated and re-affirmed by the Privy Council in Attorney General of Gambia v. Momodue Jobe\(^9\) where Lord Diplock said that "a Constitution, and in particular that part which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposeful construction."\(^10\) In Dato Othman bin Baginda v. Dato bin Syed\(^11\) the court stated that a constitution being a living piece of legislation should be construed broadly and not in a pedantic way, whereas in Attorney General of Saint Christopher, Nevis and Anguilla v. Reynolds\(^12\) the Privy Council enunciated the same principle that the constitution should be interpreted broadly so as to conform with the protection
of fundamental rights and freedoms contained in it. In particular it cited the statement in Minister of Home Affairs v. Fisher that "a Constitution should be construed with less rigidity and more generosity than other Acts.\textsuperscript{13} The Supreme Court of Canada also stated this settled principle in Hunter v. Souther\textsuperscript{14} when it held that a Constitution is construed more broadly than a statute as it is a living document enabling many generations to live through it.

Against the multitude of cases calling for a broad and generous construction of the constitution, the High Court of Kenya has for two decades since independence in 1963 consistently opted for a strict, restrictive and legalistic construction of the Constitution, especially s.84 which creates the judicial machinery for enforcement of fundamental rights and freedoms guaranteed in the Bill of Rights. The result has been to render the enforcement of these rights practically impossible as is acknowledged by Kathurima M’Inoti\textsuperscript{15}. It is this section which gives every aggrieved person whose fundamental rights and freedoms have been violated, the right of access to the High Court for quick redress.

This restrictive and narrow approach by the High Court has its origins in the inflexible and conservative judicial culture inherited from the colonial judiciary.
Githu Muigai\textsuperscript{16} sees this culture as an abdication by the judiciary from the responsibility of adjudicating constitutional claims which are conceived as politically sensitive. It must also be remembered that up to the second half of the 1980s the Kenya judiciary was dominated by British expatriate judges, most of whom served in the pre-independence era. The philosophy of the conservative approach by the judiciary is evident from the words of Sir Charles Newbold, the then President of the Court of Appeal for East Africa, when he wrote in 1969:

"The courts derive a considerable amount of their authority and perhaps, even more (importantly), the acceptance of their authority from their independence of the executive, from their disassociation from matters political... the judiciary is not elected and should not interfere in a sphere which is outside the true function of the judges... It is the function of the courts to be conservative, so as to ensure that the rights of the individual are determined by the rule of law.\textsuperscript{17}

The nature of the High Court's jurisdiction under s.84(1) and the effect of availability of alternative remedies in that jurisdiction have been the bone of contention in cases dealing with the Bill of Rights.
The High Court is without doubt the court that is granted original jurisdiction to superintend over the Bill of Rights by s.84 (2) of the Constitution. There is no other purpose of the jurisdiction under s.84 (2) other than enforcement of the fundamental rights which are guaranteed by ss.70 to 83 of the Constitution. This jurisdiction granted to the High Court is in addition to the original jurisdiction in civil and criminal matters conferred to the High Court by s.60(1) of the Constitution. It is important to note that s.84 is meant to create a new jurisdiction over and above the ordinary jurisdiction of the court. That jurisdiction is solely for the purpose of enforcement of fundamental rights. It is a new and revolutionary remedy devoid of the technical structures which usually bog down the ordinary jurisdiction of courts. The jurisdiction is independent of availability or non-availability of other remedies.

The fact that s.84(2) is couched in very broad terms suggests that the intention of the drafters was never to restrict or otherwise curtail access to the High Court when issues of enforcement of fundamental rights and freedoms were involved. This fact is clear from our preceding review of decided cases from other jurisdictions. It is also instructive, for example, that section 84(1) expressly recognises the right of
persons who, because of restriction (detention) are unable to assert their fundamental rights by themselves to do so through others. The nagging problem of *locus standi* in the ordinary jurisdiction of the court is thus constitutionally disposed of in enforcement of fundamental rights cases. The same section is not concerned only with enforcement of fundamental rights after they have been violated; it offers redress even for a continuing violation and above all for an anticipated violation. The one month's notice ordinarily required by the *Government Proceedings Act* to be furnished to the Attorney General prior to institution of proceedings against the Government is not necessary for applications under s.84. Finally, the rights of access to the High Court for enforcement of fundamental rights is expressed to be without prejudice to any other available remedy.

Inspite of the clear provision in s.84 (2) giving the High Court jurisdiction to redress violated rights, the court has not always lived to the expectation of facilitating access to it as envisioned by s.84 (1) of the constitution as is discernible from the court decisions discussed in the following sub-heading:

2.3 The High Court's Compromise of the Right of Access Under s.84 (1).
The restrictive approach by the High Court of Kenya in interpreting s.84 (1) can be traced to the 1969 case of Republic v. El Mann\textsuperscript{19} where the court favoured the rules applicable in interpreting ordinary statutes as compared to rules which treat a constitution as a special statute. In this constitutional reference from the court of the Senior Resident Magistrate the question was whether the Republic might put in evidence against an accused person charged with contravening The Exchange Control Act\textsuperscript{20} certain answers which had been extracted from the accused by way of a questionnaire. It was contended for the accused that the admission of this evidence would be contrary to the then s.21 (7) [now s.77 (7)] of the Constitution which stipulates that "No person who is tried for a criminal offence shall be compelled to give evidence at his trial." The admission of the questionnaire would have amounted to compelling the accused to give evidence. In its task of interpreting the above constitutional provision, the court preferred the ordinary rules of interpreting statutes. Reading the judgement of the court, Mwendwa C.J. stated:

"We do not deny that in certain contexts a liberal interpretation may be called for, but in one cardinal respect we are satisfied that a constitution is to be construed in the same way as
any other legislative enactment, and i.e. where the words used are precise and unambiguous they are to be construed in their ordinary and natural sense. 21

This narrow and strict interpretation adopted in Republic v. El Mann was followed with approval ten years later in Anarita Karimi Njeru v. R. (No. 1) 22 and thereafter in many other cases at the cost of denying aggrieved persons the right of access given to them under s.84(1) for redress of their violated rights and freedoms.

In Anarita, the applicant was charged with stealing by a person employed in public service. Her application for an adjournment to enable her call a witness in her favour was refused and she was convicted. She applied for leave to file an appeal out of time which application was refused. She then applied under s.84 (1) for a declaration that the refusal by the trial court to adjourn her case to enable her call a witness was a violation of her right to a fair trial under s.77 of the Constitution.

At the hearing of the application, the state took a preliminary objection and the court was called upon to determine the meaning of the phrase "without prejudice"
to any other action with respect to the same matter which is lawfully available" in s.84 (1) of the Constitution.

The court stated that "without prejudice" meant "without derogating from" and proceeded:

"which leads us to the conclusion that you can apply under s.84 (1) before but not after you have taken other action, and it is to be observed that S.84 (1) says "any other action... which is lawfully available, it does not say 'which was lawfully available.'"

According to the reasoning of the court, if the applicant has already taken some action lawfully available to him, he cannot bring an application under s.84. The taking of such alternative action amounts to forfeiting the constitutional remedy. As that decision now stands, it forces an applicant to elect between any other action lawfully available to him or the constitutional application. If the applicant opts first for any other action that is available to him, that is conclusively fatal to any subsequent constitutional application he may contemplate. He can only start with the constitutional application and thereafter resort to
any other action which may still be open to him.

As is argued by Kathurima M'Inoti\textsuperscript{23}, s.84 does not allow such a conclusion. Only express rules made under s.84 (6) can bring about such a restriction and qualification to s. 84 (1). In the absence of such rules, it is not for the court to contrive and apply restrictions to s.84. The right of access to the High Court remains broad and free of strictures. Further, the decision of the High Court was wrong in two other ways. First the right of access to the High Court under s.84 is not meant to be a last resort remedy (i.e., where there is no other adequate remedy or where all other remedies have been exhausted). Similarly, it is not perforce a first resort remedy (i.e. whether the applicant has not availed himself of any other remedy). Its existence is completely independent of availability/non-availability or utilisation/non-utilisation of any alternative remedy.

Secondly, in arriving at its decision, the High Court argued that it should not be asked to adjudicate more than once on the same issue. This argument cannot be used in all cases to debar an application under s.84 where the applicant has already availed himself of other remedies. Like the Anarita case itself, the court by entertaining an application under s.84 to determine
whether the applicant's rights under s.77 were violated could not be adjudicating the same issue as the alternative remedy because that remedy was concerned only with an application for leave to appeal out of time. This application for leave was dismissed. Possibly the court could only reach such a conclusion if the appeal had been heard and determined on merit.

The restrictive approach of the High Court in the *Anarita* case is also clearly evident in *David Mukaru Nganga v. Republic*. In that case the applicant filed a constitutional application under s.84 seeking to restrain the police from illegally arresting, detaining or harassing him. Notwithstanding the fact that s.84 provides "if any person alleges that any of the provisions of ss.70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him ..." Dugdale J. dismissed the application primarily on the grounds that the proper remedy for the applicant was an order of prohibition under Order LIII of *The Civil Procedure Act*. The court reasoned that since an application for an order of prohibition cannot be brought without leave of the court, the application before the court must fail as no such leave had been granted.
With respect to the learned judge, this was a mix up of the issues. What was before the court was a constitutional application of enforcement of fundamental rights under s.84, not an application for an order of prohibition. The application did not require leave of the court, and it was not open to the court to consider whether leave had been granted. The applicant was entitled under s.84(1) to bring a constitutional application, without prejudice to any other remedy he may have had in respect of the same matter, in this case an order of prohibition. It is quite evident, therefore, that in spite of the clear words of s.84, the fact that the applicant had an alternative remedy, was used to deny him a remedy under s.84 of the Constitution.

Koigi wa Wamwere v. A.G. is another case which illustrates the use of the Anarita decision to deny a citizen redress for fundamental rights violations. In this case, the applicant, a former member of Parliament, was charged with 7 others with the offence of Treason contrary to section 40 of the Penal Code. While pending preparation of committal documents before the Chief Magistrate's Court, the applicant filed a constitutional application in the High Court seeking several of his constitutional rights which he contended were being violated by the state. These included his
right to personal liberty under s.72 (1) of the Constitution, his right not to be subjected to torture or inhuman and degrading punishment or other treatment under s.74 (2), his right to adequate facilities and time for the preparation of his defence under s.77 (2)(c) and his right to defend himself before the court by a legal representative of his own choice under s.77 (2)(d). The court found that none of these rights had been violated by the state. In disposing of the allegation of violation of the applicant's right to adequate time and facilities for the preparation of his defence under S.77 (2) the court relied on the Anarita case to deny the applicant redress. The applicant had complained that the preparation of his defence was being hampered by the prison authorities who had demanded that his lawyers seek prior clearance from the Attorney General each time they wanted to see the applicant in prison. Further, the applicant complained that the preparation of his defence was being hampered by the prison authorities who had transferred him from a prison in Nairobi to another in Naivasha, about 100 kilometres away, at a time when he was scheduled to meet his lawyers in the Nairobi prison. In addition, he complained that the prison warders were raiding his cell and confiscating written notes prepared for his lawyers and that he was being denied pen and paper.
The court stated that the applicant could not be heard on allegation of breach of his right to adequate time and facilities for the preparation of his defence under s.77 (2)(c) because he had filed similar complaints before the principal magistrate alleging breach of the prison rules. The court stated:

"In the event the decision of this court in the case of Anarita Karimi Njeru v. Republic [1979] KLR 154 applies. By raising the matters before the principal magistrate the applicant availed himself other actions available to him within the meaning of 3.84 (1) of the Constitution and the court should not be asked to adjudicate more than once on the same question."

It is submitted that the decision herein was erroneous. The mere fact that the applicant in the Wamwere case had taken some other action did not bring him within the Anarita case. To do so he must have exhausted such remedy or action. He had not done so for he still had a valid right of appeal. In fact there was even nothing barring him from bringing another application before the magistrate.

The Anarita decision was again invoked in Kenneth Njindo Matiba v. Attorney General. Here the applicant moved
the court for a declaration that the failure of the detaining authority to arrange for him to swear an affidavit in support of a motion challenging the constitutional validity of his detention was a violation of his constitutional right to a fair trial and a further order that the detaining authority should facilitate the swearing of his affidavit.

Bosire and Mango J.J. dismissed the application on the ground that the applicant had not identified the provisions of the Constitution which had been contravened by the denial quoting with approval the Anarita case. The court stated:

"The jurisdiction of the court to entertain an application pursuant to s.84 (1) is specific ... The applicant is obliged to bring his application within the limit of that section before the court can have jurisdiction to entertain and determine. As was stated by this court in the Anarita Karimi Njeru case he must state the complaint he has, the provisions of the Constitution which he considers have been infringed in relation to him, and the manner in which he believes they have been infringed."

The court therefore ruled that it had no jurisdiction to
determine the matter because there had been insufficient identification of the specific constitutional provision which was allegedly violated. It is submitted, however, that this decision was erroneous. In laying down this very high standard of pleadings, the court was suggesting that fundamental questions of law would be settled on questions of form and not necessarily of substance. Yet it was manifest that the applicant's application clearly invoked s.77 of the Constitution which guaranteed him the protection of the law i.e., protection by the remedies available under s.84 of the Constitution. To ask the applicant to do more than that was to elevate form to the level of substance. Surely, it is not right that even where it is manifest that a detainee's right has been violated, the court will offer no remedy unless his application can be fitted in a specific constitutional provision.

The holding in the Anarita case received a challenge in Rev. Lawford Ndage Imunde v. A.G. In this case, the applicant, who was a priest of the Presbyterian Church of East Africa (PCEA) was committed on a charge of possessing a seditious publication contrary to s.57 (2) of the Penal Code. He challenged his conviction by filing an application under s.84 (1) of the Constitution since he maintained that his plea of guilty on his trial was induced by a combination of false promises, torture
and inhuman treatment. These were violations of his rights guaranteed by s.74 of the Constitution.

One of the preliminary objections here was that the applicant was barred by the Anarita case from bringing a constitutional application under s.84 because prior to that he had filed an application for leave to appeal out of time which application he later on withdrew without the same being heard on merit. By filing the application it was argued, the applicant had availed himself another remedy and therefore could not come under s.84.

For the applicant it was contended that Anarita laid down no such rule. It only bars an application under s.84 where the applicant has utilised and exhausted any other remedy available to him. In the Imunde case the applicant had filed an application for leave to appeal out of time but withdrew the same before it was heard on merit. Whereas he had therefore taken some other action, he had not exhausted it because there was nothing to prevent him from bringing a fresh application for leave to appeal out of time (which in fact he ultimately did).

Agreeing with the applicant's submissions, the court stated:
"In Anarita's case an application for leave to appeal out of time had been made and finalised before the application under s. 84 was made, the application was finalised in such a way as to determine the right of appeal once and for all, for leave was refused. But here the application for leave to appeal out of time has not been heard in fact, apart from having been filed and withdrawn nothing has happened in respect of it at all".

In concluding the court had this to say on the Anarita case:

"In view of our reluctance to impose any conditions on access to the High Court in these cases, we might take the view on full argument ... that perhaps this decision [Anarita] should go before a greater number of judges on a later occasion for further consideration."

The opportunity presented itself in the 1992 case of Harun Thungu Wakaba v. Republic. This case arose from the same circumstances as those of Koigi wa Wamwere v. Attorney General. The applicant was one of the eight people facing charges of treason. His contention in the constitutional application under s. 84 (1) was the Chief Magistrate who had committed him and his co-accused for trial to the High Court for treason did not comply with
the procedure provided for in the Criminal Procedure Code. As a consequence, he argued, his rights under s. 70 (a), s. 72 (1) and s. 77 (1) of the Constitution had been violated. It was submitted for the state that the applicant's co-accused had already raised similar complaints before other courts and in line with the decision of Anarita they should not ask the court to adjudicate over the same issue twice.

The court did not only reject the argument founded on Anarita but also refused to follow its reasoning, and held that it was wrongly decided. Said the Court:

"The learned judges did not address themselves to the fact that the section did not appear to intend limitation to the operation of the Constitution in ensuring that all grievances are redressed and not merely glossed over as it is the inherent duty of this court to do justice unless specifically barred by law".

The court continued:

"We would as such interpret the words in issue as meaning 'Without dismissing or detracting from' any action which may be available to the person. In our view therefore the statement only saves the future rights which a person may have but does not
specifically bar any person from seeking redress thereunder if such a person had availed himself of any other action previously ... With due respect to the learned judges who decided the Anarita case, we feel that the interpretation given to the words without prejudice to any other action was too restrictive.

2.4 High Court Uses s.84 (6) to Oust its own Jurisdiction.

Beside the harm caused by restrictive approach to interpreting s.84 (1) of the Constitution, another threat to the enforcement of fundamental rights and freedoms has been a series of cases which have declared the whole of s.84 inoperative on the basis that the Chief Justice has not promulgated any rules under sub-section 6 of the section. This sub-section provides:

"The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this section, including rules with respect to the time within which applications may be brought and references shall be made to the High Court."

Thus in Kamau Kuria v. A.G. the court held that
without procedural rules having been promulgated by the Chief Justice as envisioned in s.84 (6) of the Constitution, a constitutional court could not even be set up to determine whether the government’s action of withdrawing a passport violated the holder’s fundamental rights to travel under s.81 of the Constitution. In this case, counsel for the applicant had sought to have a constitutional court set up to hear and determine the issue of whether the impounding of the passport abridged his right to travel. The decision in Kamau Kuria was later cited to reach a similar conclusion by Dugdale J. in Maina Mbacha & 2 Others v. A.G. The applicants had sought to have a resident magistrate’s court restrained by an order prohibiting continuation of a case against them because the continuation of the case would have infringed their fundamental rights as set out at ss.72, 77, 79 and 82 of the Constitution. Without entertaining any arguments, Dugdale J. made a novel move in judicial decisions by reading a pre-typed ruling during a mention of the case. He dismissed the applicant’s application by holding that s.84 was inoperative because the Chief Justice had not promulgated any rules under s.84 (6) aforementioned.

The decisions in Kamau Kuria and Maina Mbacha are remarkable in that they demonstrate the court’s indifference and hostility towards constitutional
arguments. They also defy precedent, for the question of whether rules had or had not been made under s.84 (6) did not arise as the issue had long been settled by Madan C.J. in Raila Odinga v. A.G. & The Detainees Review Tribunal where it was held that failure of a rule-making authority to make rules to enforce legal rights does not defeat those rights. In any case, one wonders why the respective Chief Justices since the Constitution was enacted have failed to promulgate rules if they were to facilitate litigation under the vital s.84 of the Constitution. When asked recently why he had not promulgated any rules under s.84 (6), Chief Justice Hancox responded that he had not had the time to do so!

But even a literal reading of the Constitution itself makes the reasoning of these decisions untenable. The operative word in s.84 (6) is the word *may* which denotes a discretion. As stated in Massy v. Council of the Municipality of Yass “the use of the word ‘may’ *prima facie* conveys that the authority which has power to do such an act has an option either to do it or not to do it.” It is not mandatory for the Chief Justice to make the rules otherwise the constitution could have used such terms as “shall” or “must”. If the task of Chief Justice is not mandatory, then it means that in the
absence of the rules the right of access shall remain. It is also primarily because the making of the rules is not mandatory that successive Chief Justices have not bothered to make the rules since independence.

2.5 Liberal Approach to Constitutional Interpretation.

The restrictive approach to constitutional interpretation discussed hereinabove was abandoned in the 1980s when the Kenya High Court rose to the occasion in the liberal tradition of other jurisdictions to redress violated rights and freedoms. This trend has already been demonstrated in the Imunde and Wakaba cases. The following are a few other landmark cases:

In Stanley Munga Githunguri v. A.G.\(^3\)\(^4\), the question for determination was whether the Attorney General could institute criminal proceedings against a citizen despite the lapse of 8 years and repeated assurances that the matter had been put to rest. The case turned on the interpretation of s.26 (3) of the Constitution empowering the Attorney General to commence and terminate criminal proceedings at his discretion. When the question came on for determination, it was as a reference from a subordinate court under s.67 of the Constitution. It was held that the right to continue with the proceedings was lost if the accused had publicly been informed that he could not be prosecuted.
This would be so because acting in such assurance, the accused might have destroyed evidence in his favour. The court could not, however, bar the State from prosecuting the appellant for its task was merely to give an interpretation as envisaged by s.67 of the Constitution. The best it could do was to hope that in view of this interpretation, the Attorney-General would terminate the prosecution of the applicant. But in spite of its ruling, the Attorney-General persisted in prosecuting the applicant. The applicant had no illusion that his prosecution was politically motivated and that he was targeted for harassment and destruction. The Attorney-General’s move forced the applicant to file another application, this time seeking an order of prohibition against the Attorney General. A new bench came to a similar conclusion that the Attorney General’s powers under s.26 (3) were not absolute but were to be exercised reasonably with regard to the rights of the accused person. Reading the judgement of the court Madan Ag. C.J. stated:

"We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the Constitution if it fails to give effective protection of their fundamental rights."
It may be emphasized that when the suit first came as a reference from the subordinate court it was observed that the case could have been heard through the alternative jurisdiction founded in s.84 of the Constitution. In this regard it was stated:

"In some countries the power to prevent abuse of process, because it is oppressive and vexatious, is to be found in common law and it also exists in the inherent power of the court. The great importance of this power is illustrated by its being statutorily enacted in s.84 of the Constitution.

The importance of the Githunguri cases is the emphasis placed on the principle that the Constitution must not be interpreted as an ordinary statute and that it must be interpreted to give effect to the basic rights and freedoms of the individual.

This principle was given a boost in Felix Njage Marete v. A.G. In this suit the plaintiff was a technical assistant in the Ministry of Agriculture and Livestock Development. On December 15, 1982 the District Development Officer purported to dismiss him. The plaintiff objected to the alleged dismissal, but that notwithstanding the Permanent Secretary in his ministry on January 25 1983 informed him that he had been
suspended. He was not to leave his duty station without permission and he was not to receive any salary during the period of his suspension. From January 1983 to August 1985 he was without pay and work. In December 1986 he commenced an action in the High Court, praying for a declaration that he had been subjected to inhuman, and degrading treatment contrary to s.74 (1) of the Constitution and was entitled to damages under s.84 (2) of the Constitution.

Shields J. had no hesitation in granting the orders as prayed. He went further and pointed out that had he been invited to hold that the plaintiff had been held in servitude contrary to section 7.73 of the Constitution he would have held so. In awarding 100,000/= as general damages for violation of constitutional rights, Shields J. made an immortal pronouncement:

The Constitution of this Republic is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and in particular these are found in s.84. Both s.74 and s.84 are similar to the provisions of other Commonwealth Constitutions. It might be thought that the newly independent states who in their constitutions enacted such provisions were eager to uphold the dignity of the human person and to provide remedies
against those who wield power.

2.6 Comparative Perspective: The Approach by Other Jurisdictions.

We have already considered the liberal tradition of interpreting constitutional provisions. We now turn specifically to how the courts of other jurisdictions have interpreted the nature of the right of access under s.84(1) and the effect of availability of alternative remedies. As we stated in the introduction to this chapter, the purpose of comparing Kenya's judicial approach with that of other jurisdictions, is to demonstrate that perhaps Kenya should borrow the liberal approach of the other jurisdictions if she hopes to improve on her performance in protecting the rights and freedoms of the individual.

In the famous case of Maharaji v. Attorney-General of Trinidad & Tobago the Privy Council, in construing s.6(10) of the Constitution of Trinidad and Tobago, the equivalent of our s.84, observed as follows:-

"The right to apply to the High Court for redress conferred by 56(1) (read s.84(1)) is expressed to be without prejudice to any other action in respect to the same matter which is lawfully available. The clear intention is to create a new remedy
whether there was already some other existing remedy or not."  

Speaking of a provision in the Constitution of Guyana which is identical to section 84, the Judicial Committee of the Privy Council, in *Jaundoo V. Attorney General of Guyana* 40 said:

"To apply to the High Court for redress was not a term of art at the time the Constitution was made. It was an expression which was first used in the Constitution of 1961 and was not descriptive of any procedure which then existed under Rules of Court for enforcing any legal right. It was a newly created right of access to the High Court to invoke a jurisdiction which was itself newly created.

Williams J. In *Aoko V. Fagbeni* 41 a Nigerian case, stated that the whole purpose of a special procedure for the enforcement of fundamental rights was to provide an easy and speedy access to the courts.

In India, the nature of the court's jurisdiction in enforcement of fundamental rights has received comprehensive pronouncements. In *Kharak Singh V. State of Uttah Pradesh* 42, the Supreme Court of India was considering, *inter alia*, the circumstances under which
it could be moved for the purposes of enforcing the fundamental rights in the Constitution of India. Article 32 of the Constitution of India which deals with enforcement of fundamental rights provides:

"The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed."

The court made the following observations regarding the right of enforcing fundamental rights:

"The fact that an Act by the state executive or by a state functionary acting under a pretended authority gives rise to an action at common law or even under a statute and that the injured citizen or person may have redress in the ordinary courts is wholly immaterial, and we would add, irrelevant to considering whether such action is an invasion of a fundamental right. An act of the state executive infringes a guaranteed liberty only when it is not authorised by a valid law or by any law as in this case, and every such illegal act would obviously give rise to a cause of action - civil or criminal - at the instance of the injured party for redress. It is wholly erroneous to assume that before the jurisdiction of this court under Article 32 could be invoked, the applicant must either
establish that he has no other remedy adequate or otherwise or he has exhausted such remedies as the law affords and has yet not obtained proper redress, for when once it is proved to the satisfaction of this court that by state action the fundamental right of a petitioner under Article 32 has been infringed, it is not only the right but the duty of this court to afford relief to him by passing appropriate orders in that behalf."

Three years earlier, Chief Justice Das had set the pace in the case of *K. K. Kochuni Vs. State of Madras* by his memorable words:

"Neither the existence of an adequate alternative remedy, nor the fact that the petition raised disputed questions of fact justified the rejection of a petition under Article 32 if it established a *prima facie* case of actual or threatened violation of fundamental rights. This view might encourage persons to proceed under Article 32 instead of filing suits, but that was no reason for denying the fundamental rights conferred by Article 32(1) if a *prima facie* case of violation of fundamental rights was made out."

In Trinidad and Tobago, the courts have sustained views
similar to those of the Supreme Court of India. In the case of *Ramlogan Vs the Mayor, Aldermen and Burgesses of San Fernando*, the court was considering an application for enforcement of fundamental rights under s.14(1) of the Constitution. The respondent argued that the application under the Constitution was an abuse of the process of the court since the ordinary process of the law gave the applicant ample redress. Rejecting that argument, the court stated:

"The applicant is well within the ambit of the provisions contained in the Constitution for protection of rights to property. While it is true that the applicant may have been able to pursue her claim by way of judicial review and also in private law by an action for trespass to property, there is nothing to prevent her from invoking the fundamental rights provision in the constitution. By section 14(10) of the constitution, she is entitled to do so without prejudice to any other action lawfully available to her. I rule therefore that the instant proceedings have been properly instituted."

Similar views have been expressed by academic lawyers regarding the court's jurisdiction for enforcement of fundamental rights. For example, Alan Gledhill, in a
commentary on the 1962 Constitution of Pakistan observes that the constitutional right of enforcement of fundamental rights defined the rights in very wide terms and made absolutely no restrictions on the nature of orders which the court could pass for purposes of enforcing fundamental rights. Similar sentiments have been expressed regarding the independence constitutions of Nigeria and Uganda. In Kenya, academic lawyers have also made a contribution to the need for a liberal interpretation of s.84 of the Constitution of Kenya so as to enhance the protection of fundamental rights and freedoms. One of the most distinguished contributors in this area is Kathurima M’Inoti, who combines legal private practice and teaching at the University of Nairobi’s Faculty of Law. He has thoroughly and exhaustively analysed the application of s.84 by our courts, and has compared and contrasted it with the practice in the other jurisdictions with a similar provision. We have acknowledged M’Inoti’s contribution elsewhere in this work.

In concluding this section, we may sum up the broad principles which emerge from these authorities regarding right of access to the High Court under Section 84 of our Constitution as follows:

a) The jurisdiction under s.84 is a new remedy
over and above the normal remedies and is meant only for enforcing fundamental rights.

b) The jurisdiction is meant to provide a quick and efficient remedy and is thus devoid of the technical hitches that bedevil the ordinary jurisdiction of the court.

c) It is irrelevant whether or not an Applicant has other remedies available to him before proceedings under s.84. Once any of his rights have been violated, he can proceed under s.84 irrespective of any other remedies at his disposal.

d) The mere fact that the application for enforcement of fundamental rights raises disputed questions of fact or "triable issues" is no bar to an application under Section 84.

e) The court is not to use the excuse that Applicants will be tempted to opt for constitutional applications instead of ordinary suits as a basis for not entertaining a constitutional application. That is the price to be paid for recognition of the citizens' fundamental rights.

Turning to the situation in Kenya as observed earlier, one finds an approach completely at variance with the foregoing principles. This is so notwithstanding the striking similarity between the provisions relating to
enforcement of fundamental rights in the Constitution of Kenya and those of the jurisdictions considered above. In Kenya, the High Court has interpreted the right of access under s.84 in such a restrictive manner as to deny redress to an applicant who has availed himself of any other remedy lawfully available to him prior to filing a constitutional application under Section 84; an applicant seeking to prevent an impending as opposed to a realised violation of his fundamental rights, and an applicant who has other remedies which he has not exhausted.

In concluding this chapter, we feel we have demonstrated that Kenya courts have not effectively vindicated the fundamental rights and freedoms of those Kenyans who have sought redress. The vindication of these rights has been the exception rather than the rule. In the multitude of Kenya cases reviewed in this chapter, it was only in few cases, such as Stanley Munga Githunguri, Felix Niaxe Marete and Harun Thungu Wakaba that the applicants received redress from the High Court. As a matter of fact, not a single detainee, since independence in 1963, has ever obtained his liberty through intervention by our courts!
NOTES

2. [1803] I Cranch 137.
3. Nairobi High Court Crim. Appl. No.39 of 1985. The writer was a member of that Bench comprising Simpson C.J., Sachdeva and Mbaya J.J.
4. Federalist Papers No.78.
6. Ibid., at p.329.
7. Supra, n.6.
9. Ibid., at p.691.
21. Supra n. 19 at p.360.
23. Supra n. 15.
29. High Court Civil Appl. No. 550 of 1988
   see Nairobi Law Monthly No. 15 March/April 1989 p.33-35.
30. High Court Misc. Appl. No. 356 of 1989,
pp.142-173.


34. Nairobi High Court Misc. Crim. Appeal No. 271 of 1985. The writer happened to be a member of the Bench comprising Simpson C.J., Sachdeva & Mbaya J.J.

35. See the Applicant’s Advertisers Announcement in *Daily Nation* Dec. 18, 1991 pg. 19.


41. [1961] I ALL NLR 400.

42. [1963] SO AIR 1295.

43. [1959] I AIR SC 725.


47. Kathurima M’Inoti *op.cit* n. 15 p.17-26.
CHAPTER THREE

FACTORS AFFECTING JUDGES IN THEIR TASK OF PROTECTING FUNDAMENTAL RIGHTS.

This chapter defines what is meant by the independence of the judiciary and examines the effect of the independence, or the lack of it, on the protection of fundamental rights and freedoms of the individual. The factors that are considered important in securing judicial independence are also highlighted, as well as those factors which whittle down that independence.

3.1 Meaning of the Independence of the Judiciary.

The judiciary must be independent in order to administer justice in accordance with the law. The doctrine of separation of powers requires that the three organs of government should exercise their respective functions without interference from each other or from outside. It was Montesquieu, a French jurist, after the writings of Aristotle and John Locke, who postulated clearly the doctrine of separation of powers. Montesquieu was concerned with the preservation of political liberty. He recognised that power was often abused and, therefore, government should be checked by the creation of separate centres of power. He envisaged that there are three main classes of government functions - viz -
legislative, executive and judicial. So, there should be three main organs of government: the legislature, the executive and the judiciary. Each was to perform a specific function. The legislature was to enact laws; the executive to enforce and administer laws as well as determine policy, and the judiciary to interpret the laws and adjudicate over disputes. Montesquieu thought that to concentrate more than one of the functions in any one body was a threat to individual liberty.\(^7\)

The doctrine of separation of powers as postulated by Montesquieu became popular due to the dictates of authoritarian rule in France at that time. Although Montesquieu intended total, rigid and absolute separation, the doctrine is not so rigidly applied in modern times. What we have today are checks and balances written in the constitutional framework of each individual state. In Kenya, for example, the separation is not absolute. The President is a member of the legislature\(^8\) as well as of the executive.\(^9\) He is the one who appoints judges,\(^10\) and the one who assents to Bills before they become law.\(^11\) There is no perfect separation in the British experience either.\(^12\) In reality, extreme separation is not possible due to the multi-functional complex set-up of governments of today. The business of a constitutional government is so complex that it cannot define the area of each of its
departments in such a manner as to leave each completely independent of each other. There is, therefore, always a certain degree of overlapping of functions. But the doctrine in its broader sense does mean that each organ of government should refrain from interfering with the functions of the others. It is, therefore, not permissible for the legislature or the executive to encroach upon the judicial function of the courts. The judiciary must be free from control and interference. The reason for this was not lost to Montesquieu who, speaking on the role of the judiciary, wrote:

"There is no liberty if the power to judge is not separated from the legislature and the executive powers. Were the judicial power joined to the legislature, the life and liberty of citizens would be subject to arbitrary power. For the judge would then be the legislator. Were the judicial power joined to the executive, the judge would acquire enough strength to become an oppressor." 

Yash Vyas\(^{14}\) has given the traditional definition of judicial independence. He asserts that the independence exists where "the judicial arm of the government and individual judges are left free to operate without any undue pressure or interference from either the legislature or the executive."\(^ {15}\) He quotes David Harris who stated that:
"The primary meaning of "independence" is independence of other organs of government in the sense of separation of powers; in particular a judge must not be subject to the control or influence of the executive or the legislature."16

The above traditional definition is obviously narrow and requires elucidation. The concept of impartiality requires a judge to be free of personal biases and prejudices. He must not be committed to a political party or to one side in a litigation; or to his race, tribe, class, caste, community or religion when he comes to judgement.

The independence of the judiciary, therefore, includes "independence from political influence whether exerted by the political organs of the government or by the public or brought in by the judges themselves through their involvement in politics."17 By politics we mean politics in its narrow sense, organized or party politics.18 Judges are part of the machinery of authority within the state and as such cannot avoid performing political function. In the words of J.A.G. Griffith:

"In both capitalist and communist societies the judiciary has naturally served the prevailing political and economic forces. Politically, judges
are parasitic ... Their principal function is to support institutions of government as established by law. 19

In supporting the institutions and stability of the system of government, the judges do perform a political function. The judiciary is not only a legal but also a government institution and therefore political in nature. Apart from independence from the executive, the legislature and political pressures, the concept of independence of the judiciary has some other dimensions. At times threat to individual's rights may come from influential individuals or private groups in society or powerful economic interests may try to influence judges to invalidate statutes which are not to their liking. This then requires that the judiciary must also be free from pressures from private powers. As observed by Teleford Georges, a former Chief Justice of Tanzania, independence, "must be defined in terms of the absence of domination by the executive, political functionary or pressure groups." 20

Bhagwati J. put it more bluntly, in S.P. Gupta v President of India, 21 when he emphasised that:

"The concept of independence of the judiciary is not limited only to independence from executive pressure or influence but is a much wider concept
which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely, fearlessness of the power centres; economic or political, and freedom from prejudices acquired and nourished by the class to which the judges belong.22

A Committee of Experts organised by the International Association of Penal Law, the International Commission of Jurists and Centre for the Independence of Judges and Lawyers suggested the following definition in its draft proposals adopted at Siracusa, Italy in May 1981:

"Independence of the judiciary means (1) that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and (2) that the judiciary is independent of the executive and legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature."23

This definition is quite comprehensive so as to cover practically all factors which may whittle down judicial independence including private pressures and financial or other beneficial inducements. But the expression "in
accordance with his assessment of facts and his understanding of law" is somewhat confusing. Instead of giving an impression that judges should not take instructions or give in to pressures from others, it gives an impression that they may decide matters before them by applying subjective standards. What is required on the part of judges is objectivity. An independent judiciary does not mean that judges can resolve specific disputes entirely as they please. There are both implicit and explicit limits on the way judges perform their role. Implicit limits include accepted legal values and the explicit limits are substantive and procedural rules of law. Justice Cardozo makes the point more succinctly when he explains:

"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from concentrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinate to "the primordial necessity of order in the social life." Thus, the taught tradition of law must guide and
motivate judges in their decisions. These guidelines include adherence to precedent, procedural guidelines and presumption of constitutionality of legislation.\textsuperscript{26}

Desai J. even went further in saying that:

"The judiciary like any other constitutional instrumentality has, however, to act towards the attainment of constitutional goals ... the independence of judiciary is not to be determined in all its ramifications as some a priori concept but it has to be determined within the framework of the constitution ... It is not as if judicial independence is an absolute thing like a brooding omnipresence ... Nor should judges be independent of the broad accountability to the nation ... One need not too much idolise the independence of judiciary so as to become counter productive."\textsuperscript{27}

This means that independence of judiciary can only be within the framework of the Constitution. Independence does not mean independence from broad accountability to the nation or its goals and objectives.

The independence of judiciary, therefore, has to be understood to mean the judge's freedom of operation within these limits. And in view of the above, the first part of the definition adopted in \textit{Draft Principles}...
on the Independence of the Judiciary\textsuperscript{28}, should therefore be revised to read:

"Independence of the Judiciary means (1) that every judge is free to decide matters before him in accordance with the cannons of the taught traditions of the law and respect for the principles of the rule of law, and for the attainment of the constitutional goals without any improper influences, inducements or pressures direct or indirect from any quarter or for any reasons, and . . ."

3.2 Factors Affecting the Independence of the Judiciary.

The extent of the independence of any judiciary will depend on a variety of factors. First, there are the safeguards of the independence. They include security of tenure\textsuperscript{29} and reasonably good salaries\textsuperscript{30} for judges, as well as immunity and protection for judges and all judicial officers for any acts done in good faith in the discharge of their judicial duties.\textsuperscript{31} Additionally, judges and magistrates have absolute privilege not to be compelled to answer any questions regarding their conduct in court.\textsuperscript{32} They shall also not be compelled to disclose their source of information regarding the commission of an offence.\textsuperscript{33} These safeguards are designed to ensure that a judge has a secure career,
that he is well paid to avoid financial anxiety, and that he is not victimized for any judgement he gives. These safeguards are the major prerequisites for the independence of the judiciary.

Despite these safeguards, there are a number of factors that whittle down judicial independence. In Kenya, we posit that the judges are generally subject to the exercise of political influence by the executive. This arises partly because of the constitutional set-up for the appointment and removal of judges. Though in theory it is the Judicial Service Commission (JSC) [whose members are appointed by the President] which recommends judges for appointment, the recommendations are, however, not binding upon the President, so that, in practice, it is the President who selects the judges. This appointment process obviously paves way for extra-judicial pressure to bear on the judiciary. The removal process does not help matters either. Although a judge may be removed only for inability to perform his functions or for misbehaviour and on the recommendation of a tribunal, it is the President himself who chooses members of the tribunal. This raises questions about the protection provided by the process of removal, since the President has great discretion in determining the make-up of the tribunal. Worse still, the executive has always been loath to
utilize the constitutionally laid-down procedures for removal as envisioned by s.62(5) of the Constitution and has instead opted for forced or coerced removal of judges as has been common in the recent past. The methods used to force or coerce a judge to quit vary. A judge on permanent and pensionable terms will be coerced to apply for retirement under a threat of severe consequences including dismissal with loss of all benefits. A judge on contract will be forced to resign, or will have his contract terminated or not renewed at its expiry. The consequences of a judge not complying may be imagined. Mr. Justice Schofield says that such a judge's life will be made uncomfortable and intolerable. Added to the chilling fact that a judge can be removed at random and at the whims of the executive, there is the consequential difficulty which faces a judge once removed. That is the difficulty of finding alternative employment because of the rule that a former judge, like in Britain, should not practice in his former courts. As the present writer told the Robert Kennedy Memorial Center's delegation in an interview on July 20, 1991, this predicament of removed judges, especially the indigenous judges, is a serious set-back to the independence of the judiciary.

There is yet another factor that whittles the
independence of the judiciary. This is the existence of
non-citizen contract judges. Contract judges are
usually British citizens who receive a regular salary
from the Government of Kenya, supplemented by the
British Overseas Development Administration (ODA). ODA
contracts are renewed every two years, and only if the
Government of Kenya so requests. It is obvious
therefore, that since renewal depends on government's
approval, a contract judge is likely to be susceptible
to political interference or influence, hence the
weakening of the independence of the judiciary.39

3.3 Judicial Independence as it Relates to Magistrates
and Other Judicial Officers.

The expression "judiciary" in its strict meaning refers
to "judges of a state collectively", but in the wider
sense it embraces both the institution of courts and
the persons who compose it.40 It is, therefore, clear
that magistrates and other judicial bodies are also part
of the judiciary and should be given consideration when
discussing the independence of the judiciary. Judicial
independence must be that of judges and the magistracy.
The magistracy must also be freed from pressures which
will cause it to discharge its judicial function with
partiality. Also included are the judicial officers in
such bodies such as the rent courts, the Industrial
Court, the Courts Martial, Insurance Appeals Tribunal, the Liquor Licencing Boards, etc. These officers must also practice impartiality in dealing with people's legal rights.

It may be stated however that magistrates and these tribunals are not mandated to adjudicate on violations of fundamental rights and freedoms, as is the case with the High Court. Kivutha Kibwana\textsuperscript{41} has suggested that senior magistrates should be allowed to deal with infringements of human rights so as to cater for aggrieved persons from rural areas who may not have quick access to the High Court. Nonetheless the magistrates do usually get involved in determining human rights issues, especially on the question of granting bail to accused persons who appear before them. In politically sensitive cases, certain magistrates have come under criticism, because they have appeared to be pro-establishment. The State would ensure that it takes before such conformist magistrate cases involving political activists in order to secure convictions on the preferred charged. An example of such manouvres took place this April\textsuperscript{42}, when five people were charged before the Senior Resident Magistrate, Nakuru, with the offence of taking an illegal oath binding them to kill some unnamed persons. The offence was allegedly committed on April 22, 1993. The magistrate discharged
the accused persons on the basis that the charge against them was defective. They were re-arrested soon after and taken before the Principal Magistrate, Mr. Tuiyot of Kericho, 30 kilometres away from Nakuru. They were charged with the same offence, save for the modifications that they had taken an oath binding them "to kill Kalenjins." They were remanded in custody to await trial. The People was to comment in its issue of May 23, 1993 that this magistrate "was calling the shots from Kericho where his infamous rulings are fast earning his court the nickname: 'export processing zone'".

3.4. Political Influence and Interferences with the Functioning of the Kenya Judiciary.

As we have already observed, the doctrine of separation of powers is the basis for judicial independence. In situations where the judicial function is subjected to political influence and interference by the executive, there is no guarantee of fuller enjoyment of rights and freedoms because the courts are not free to enforce them. In Kenya, there have been, in recent times, numerous instances of the exercise of political influence on the judicial functions. It will, however, suffice to highlight only some of the glaring ones, along with stating the factors which we think keep
sustained such political influence and interference.

We have in the preceding chapter noted that the constitutional set-up for the appointment of judges does give room for political influence since the President is not bound to receive or consider recommendations from any independent body. It may be observed further as regards appointment of judges that, in general, judges are drawn from the ranks of the magistrates rather than from private practice or the universities. Since many magistrates' posts are patronage jobs, it follows that these are the magistrates who are quick at rendering services to the political system in order to secure appointments as judges. Because of this appointment process, such judges become susceptible to extrajudicial pressure. So susceptible also are contract judges for the reason we have already observed in the preceding section.

We also alluded earlier to coerced or forced removal of judges as short-cuts to the constitutional set-up for such removals. We now give some illustrations. In 1987 Mr. Justice Dereck Schoffield resigned in protest against unjustified interference in a case he was handling. He was hearing an application filed by a widow whose husband was shot and buried by police without notification to her. The body was not found and
a subsequent application was made by the widow for the
committal of the Director of CID for contempt of Justice
Schofield's order. Before the judge could complete the
case, the then Chief Justice C.H.E. Miller intervened
and transferred the case away from Justice Schofield.
In the face of such interference by the Chief Justice
acting in his administrative capacity, Justice Schofield
felt forced to resign. The Chief Justice later
confirmed that he had taken this action after having
received "secret documents" from the Office of the
Attorney-General. The sequence of events that led to
the resignation of Justice Schofield are vividly
demonstrative of the vulnerability of contract judges.
Said Mr. Justice Schofield:

The Chief Justice made reference to my contract of
employment. I, like expatriate judges in Kenya,
was on a contract renewable every 30 months.
Kenyan judges including the Chief Justice of the
day were on permanent and pensionable terms. My
contract was due for renewal in October of that
year and I had already indicated my desire to renew
it. The Chief Justice told me he hoped I would not
put him in a difficult position whereby he could be
faced with having to advise non-renewal of my
contract."
demonstrated by the victimization of judges who presided over the controversial and politically sensitive Stanley Munga Githunguri cases. Kamau Kuria has this to say while lamenting the impotence of the High Court in redressing violations of fundamental rights:

"There are developments in the judiciary which cannot fail to exercise some influence over the bench. The Stanley Munga Githunguri case referred to above was heard by eight judges between 1976 and 1985. Of the eight judges who heard the three suits in which the same issues were considered, five, namely Simpson C.J., Madan C.J., Sachdeva J., Mbaya J. and Schofield J. left the bench abruptly." 49

There could never have been a more cruel assault on the independence of the Kenyan judiciary than the removal of security of tenure of the judges by a constitutional amendment which was rushed through Parliament in 1988. 50 As a result of that amendment, judges began to serve merely at the whim of the President. The move provoked so much criticism from domestic and international circles that Parliament was forced to restore security of tenure for judges by passing another constitutional amendment in 1990. 51 But even with the restoration of security of tenure, there was in fact no actual
protection in place because, as stated earlier, the executive has adopted a machinery to circumvent the constitutionally set procedures for removal under s.62(5) of the Constitution. Furthermore, the move of removing security of tenure was a fact that will always continue to remind Kenyan judges that they are subject to the exercise of political influence by the executive.

3.5. Adverse Public Pronouncements by the Executive.

Public pronouncements by government officials and the Chief Justice have been another disturbing factor affecting adversely the independence of the judiciary. These government officials include no lesser a person than the President himself. Chief Justice Hancox, while inaugurating a Court of Appeal session at Nyeri on March 14, 1990, is on record as urging all judges and lawyers "to be loyal to the government and the Head of State." Such a pronouncement was clearly a message that might have made some judges to feel that by granting reliefs on violations of basic rights by the executive would be tantamount to challenging the authority of the government. After the pronouncement by the Chief Justice, it was not surprising to see open hostility from some judges who had to adjudicate over violated basic rights. For example, in In the Matter of the
National Democratic Party. Dugdale J., a contract judge, saw in the application "open hostility expressed in the documentation against the government and KANU", the ruling political party. The judge saw this as an exacerbating element to warrant the dismissal of the application summarily. The application had been brought before him after the Registrar of Societies had refused to register the National Democratic Party (NDP) as a political party or association, and after an appeal against the Registrar's decision to the Attorney-General had failed.

The Chief Justice made a similar public pronouncement to that he made at Nyeri at yet another function. This was at the Law Society of Kenya (LSK) dinner in March 1990 where he extolled what he considered to be "virtues" of Kenya's political system. He stated that it was due to the government's "reputable administration" that the judiciary in Kenya had been "impartial." Mark you that as he made these pronouncements, the security of tenure for judges had already been removed by legislation. The Chief Justice proceeded to say that "Kenya had outstripped everybody" including our neighbours who were envious of her achievements. A Meru lawyer, Mr. Mburugu Kioga, had to sarcastically agree with Hancox that indeed Kenya had outstripped everybody: judges had lost
independence after losing security of tenure. Some such pronouncements have also been made by the Head of State. A recent example is where he extolled the courts not to interfere with party matters. Justice Schofield has also alluded to the fact that the Head of State does at times interfere with court cases.

Narrating the events which led to his resignation the judge stated:

"I told the Chief Justice to explain to the President why he should not interfere with a case before the court and that if he did not have the courage to tell the President not to interfere then let me have an audience with him. The Chief Justice told me to stand by because that audience may come about. It never did."  

From this, it is evident that the Chief Justice was not ready to protect the independence of the judiciary by explaining to the President the stand of Mr. Justice Schofield.

When all is said, however, the greatest enemies of judicial independence are the judges themselves. As the authors of *Justice Enjoined* have stated:

"By its individual and collective silence in the
face of such executive and legislative interference, the Kenyan judiciary has, in effect, ratified an intolerable undermining of the independence of the judiciary.  

It is worth noting that the executive pressure on the judiciary is not always exerted through direct methods. The emasculation of the judiciary may be, and is often achieved through subtle ways, by letting the judges to take cue of what needs to be done. Judges should, of course, avoid such pathetic situations as they compromise their independence. But as Justice Schofield has stated:

"There are, and have been Kenyan judges who succumb to interference because misguidedly they feel they owe allegiance to the executive, or because they fear transfer to unpopular stations or other administrative action which will make their position uncomfortable or intolerable."

3.6 Origins of Political Influence on the Judiciary.

The manner in which the High Court has handled cases involving fundamental rights over the years generally bespeaks of a "conservative frame of mind, in favour of the executive." It is in the realm of constitutional law that the clearest expression of judicial
independence or lack of it, will be found, for it is in this area that the greatest contrasts are likely to exist as between the goals of the state and those of the individual. The general approach followed by Kenyan courts in cases involving fundamental rights has been one of restraint, more often in favour of the state than in favour of the individual. The restraint is exemplified in the words of Sir Charles Newbold, a former President of the Court of Appeal for East Africa when he wrote in 1969:

"The courts derive a considerable amount of their authority and perhaps ... the acceptance of their authority from their independence of the executive, from their disassociation from matters political. In a democracy, ... the determination of matters political ... rests ultimately with the will of the people through the ballot box. For that purpose the people elect the executive and the legislature and it is on these two branches ... that the primary responsibility rests. The third branch ... the Judiciary - is not elected and should not seek to interfere in a sphere which is outside the true function of the judges ... It is the function of the courts to be conservative, so as to ensure that the rights of the individual are determined by the rule of law."
The main theme of this statement is that judges ought to avoid all issues laced with "politics" and that they ought to be conservative. This judicial attitude of the time is explained by Kuria, G.K. and Ojwang, J.B. when they assert that the judicial structure at the time was a device for vindication of prevailing political interests. The early years of the sixties held many doubts as to the future course of government. But once independence was granted, the course of government took a fairly clear form. It became particularly clear in the latter half of the 1970s that a neo-presidential system had been set up, which was attended with unprecedented political stability on the African continent. The new system of government soon established its credentials of respectability both internally and externally. The other government organs - the legislature and the judiciary - soon found out that they had to accommodate themselves to the unquestionable primacy of the President and his government.

Despite this submission by Kamau and Ojwang, there is really no proof of the existence of the supremacy of the Executive. The interference by the Executive on the judicial function, which we have focused on in the preceding section, is, therefore, most unfortunate.

The two different political systems of the monolithic one-party states and the multi-party democracies have their own impact on the independence of the judiciary. Kenya has practised both systems at different times of her political history.

At independence most African countries, including Kenya, adopted the Westminster model constitution. The underlying idea was to impose liberal democracy through elaborate constitutional provisions. There was to be supremacy of the constitution, and separation of powers among the government organs - namely the executive, the legislature and the judiciary. The separation was seen as a basic requirement for democracy. To guard the individual against government arbitrariness, bills of rights were included in the constitutions to protect the individual. But soon after independence, most African states made a sharp departure from the Westminster tradition to become monolithic one-party states. Kenya was no exception. She was a one party state from 1964 to 1966 and again between 1969 and 1991. The one-party system has its own advantages and disadvantages. In his book, *The Real World of Democracy*, MacPherson discusses these advantages and disadvantages but here we
concern ourselves with the disadvantages. The major disadvantage in the one-party system is that it is difficult to control arbitrary government actions since the ruling party faces no challenge from any other party. This sense of security encourages power-hungry political leaders to be dictatorial. Thus they are in a position to interfere with the independence of the judiciary; and this has been the prevailing situation in Kenya during the one-party political system. The result has been, as we conclude this chapter, a poor record on the observance of human rights because the courts have been disabled from protecting these rights. It remains to be determined in the following chapter whether or not the position on the protection of human rights has improved with the introduction of a multi-party political system on December 10, 1991.
NOTES


11. See William Mbaya, Commercial Law of Kenya
   (Lengo Press 1991) "How a Bill Becomes Law"
   p. 8 - 9.

12. See O. Hood Phillips "A Constitutional Myth:
    Separation of Powers" (1977) 93 Law Quality Review.
    p. 815.

13. M. Richtel, The Political Theory of Montesquieu,

14. Yash Vyas "The Independence of the Judiciary: A
    Third World Perspective." (Forthcoming in the Third
    World Legal Studies Journal, 1993) p.5-7. I am
    grateful to the author for allowing me to quote
    extensively from the stated pages of his article.

15. Ibid p.4.

16. David Harris "The Right to Fair Trial in Criminal
    Proceedings as a Human Right" (1967) 16
    International and Comparative Law Journal,
    p. 352 at p.354.

17. B.O. Nwabueze, Judicialism in Commonwealth Africa
    (1977) p. 280. But see S.B.O. Cautto, "Judges and
Lawyers in Africa Today” in The Independence of the Judiciary and the Legal Profession in English-Speaking Africa (1988) ICJ Bulletin p.54 "Judges are creatures of politics, and attempts through law or otherwise, to claim that they can distance themselves from politics is not realistic. The real question is whose politics and not whether they ought to participate in politics."


20. Georges supra n. 18 p.28.


22. Ibid., 198.


24. See Robert Martin, Personal Freedom and the Law in
Tanzania, 1974 p. 54-55. See also Justice S.M.N. Raina, Law, Judges and Justice 1979 p. 144-145
- "Independence of the judiciary does not mean licence to discharge the function in whatever manner one pleases."


27. Supra n. 21 at p. 445.

28. Supra n. 23.

29. S.62, The Constitution of Kenya. According to subsection 5, a judge may be removed from office only for his inability to perform his functions or misbehaviour. He may not be removed until his removal has been sanctioned by a tribunal appointed by the President.


Simpson J. successfully invoked the protection of
this provision when he was summoned to give evidence on a case he had previously handled at the Judicial Commission inquiring into conduct of Mr. C.M. Njonjo in 1983.


34. Supra, n. 10.

35. Supra, n. 14.


38. Ibid n. 39 p 74.


40. Nwabueze, Supra n.17 p.265.


44. Only five judges of the entire establishment have evacuated from the private practice.

45. *Justice Enjoined Supra* n. 39.


49. *Supra*, Gibson Kamau Kuria’s article, footnote 21 at p. 28.


52. See No. 23 *Nairobi Law Monthly* (April/May 1990) "The Judiciary: Chief Justice Criticized" with sub-titles "Lawyers Loyalty should be to the Constitution" and "Chief Justices Pronouncements; Are they Law or Politics" by Paul Muite and M.M. Kioga respectively, p. 6 & 7.


57. See n. 30.


59. *Ibid*, p. 73.


61. C. Newbold "The Role of a Judge as a Policy Maker"
CHAPTER FOUR

THE PROTECTION OF FUNDAMENTAL RIGHTS IN MULTI-PARTY KENYA

This chapter seeks to examine the trend in the protection of fundamental rights and freedoms since the re-introduction of a multi-party political system by the repeal of S.2A of the Constitution of Kenya on December 10, 1991. Section 2A had been inserted in the Constitution by an amendment in 1982 making Kenya a de jure one-party State.

4.1 Background to the Repeal of Section 2A.

On the eve of independence in 1963, Kenya had two main political parties, namely, the Kenya African National Union (KANU), and the Kenya African Democratic Union (KADU). After independence, KANU made concerted efforts to woo KADU into a merger with itself. The efforts of KANU came to fruition in 1964 when KADU accepted the merger, thus making Kenya a one-party State. The position did not, however, remain so for long because in April 1966 the then Vice-President Oginga Odinga resigned his office and left KANU to form his own political party, the Kenya Peoples' Union (KPU). Odinga's party also had a very short life. It was banned on October 30, 1969 after disturbances following
the stoning of President Kenyatta's motorcade by KPU followers during an official tour of Kisumu, a stronghold of KPU, following which Odinga and some of his colleagues were placed under preventive detention. With the banning of KPU, Kenya again became a de-facto one-party State.

The period between 1969 and 1982 witnessed a growing desire by Kenyans for democratization of governance, but KANU, which was now ruling with an iron hand, would not fulfill the wishes of Kenyans. Instead KANU embarked on shielding itself from any potential challenge. The greatest challenge came in 1982 when Odinga again tried to form another opposition party, the Kenya Socialist Alliance. KANU blocked the formation of the party by spearheading the 1982 constitutional amendment we have already referred to, thus now making Kenya a de jure one-party State.

The birth of a de jure one-party system was not only a mark of victory for the KANU Government, but also the rekindling of the demands by Kenyans for democratization of the political system. These demands culminated into the debate for multi-partyism during the period 1990-91. By 1990, there were increasing demands by Kenyans to be allowed to participate effectively and determine the destiny of their country. Such demands, which coincided
with the crumbling of eastern bloc communist regimes, were world-wide within nations under the bondage of dictatorships. Pressure for democratic changes in Kenya continued in earnest during this period with calls for the repeal of S.2A of the Constitution. The Government responded by detaining the leading proponents of the multi-party debate after riots broke out in Nairobi upon the refusal by the Government to grant opposition politicians a licence to hold a public meeting in July 1990.

In 1991, the pressure for democratization accelerated as court proceedings challenging the validity of Kenya's de jure one party status were un-successfully instituted. In another suit, following the Registrar of Societies' refusal to register a new political party, the National Democratic Party (NDP), the applicant, argued that S.80 of the Constitution, which secures freedom of association, gave him a right to register a political party inspite of the provisions of S.2A of the Constitution. The High Court, however, dismissed the argument by holding that S.80 did not grant any right to form a political party. The section was, therefore, not inconsistent with S.2A that provided for one political party, KANU! But as the Registrar of Societies and the High Court refused to register or recognise the NDP, the KANU government was facing strong and persistent
criticism from the international community on human rights abuses and corruption in the country. In a meeting of international aid donors on November 16, 1991, aid and all assistance to Kenya was suspended because Kenya did not demonstrate progress in implementing political and economic reforms that had earlier been demanded by donor countries. This move at the donors' meeting was the biggest blow for the KANU Government. Barely a week later the KANU National Governing Council met and recommended the repeal of S.2A. On December 10, 1991, Parliament repealed the section at one sitting and in a time as short as it took to enact it in 1982. The repeal was a happy re-birth, at least then, of the multi-party political system of the present day Kenya.

4.2 The Judiciary in Multi-party Systems.

In this section, we seek to analyse the situation in the traditional western multi-party systems and compare it ultimately with that in a one-party system prevailing in Kenya during the larger part of her independence. This analysis will help us determine whether or not the adoption of the multi-partyism in Kenya has made any difference in the protection of human rights.

At independence, Kenya inherited a judicial system
modelled on that of the United Kingdom where multi-party democracy has existed for centuries. In the United Kingdom, there was a time when judicial appointments were based on the candidates' party political service, loyalty, or upon their political affiliations or known views. It is possible to identify the effects of such system of judicial appointment in decided cases such as Quinn v Leatham and the Taff Vale Railway case, where Lord Halisbury, then Lord Chancellor and a judge with extremely conservative and anti-union views, attempted to 'pack' the bench with colleagues having similar attitudes to his own. The net result of these decisions was such that trade unionists were left in no doubt that the judges (and by implication the law itself) were anything but their allies.

The most remarkable fact about the appointment of judges in the United Kingdom is that it is wholly in the hands of politicians. At the lower levels of judicial appointment, the appointments are made by or on the advice of the Lord Chancellor who is both a member of the cabinet and also a judge in the House of Lords. In the case of judges of the Court of Appeal and the House of Lords, appointment is made by the Prime Minister on the advice of the Lord Chancellor. In essence this implies that the judiciary, at all levels of the court structure is a part of the overall political structure.
Griffith\textsuperscript{12} has catalogued and discussed the extent to which the role of the judiciary (in particular the judges in the higher courts) can be seen to overlap into the sphere of political decision-making. In particular, he discusses the broad areas of personal rights and freedoms and cases involving students and trade unions. He argues that judges are part of the machinery of the authority within the State and as such cannot avoid the making of political decisions.

The judges in the United Kingdom have always regarded national security as being of paramount importance, even to the extent of displacing individual claims of right, as, for example, in \textit{Duncan V Carmel Laird}\textsuperscript{13} where the admiralty objected to the disclosure of some documents in court because it might prejudice national security. Campbell\textsuperscript{14} in particular examines the Scottish judiciary, and the extent to which there has been a decrease in public confidence in the independence, and ultimately credibility of the judiciary. He states:

"The national press no longer takes it for granted the impartiality of our judges, rather there are inquiries into their social and educational backgrounds and the importance of their political affiliations".\textsuperscript{15}
In the United States, the procedure for appointing judges is complex. Almost invariably the names of candidates are put up by political parties and campaigns waged on their behalf. After victory, it is difficult to accept that the judges are not in one way or other obliged to those whose efforts have secured their success. But the theory still remains that the performance of a judge's duties does not depend on party considerations.16


It has often been debated whether or not basic human rights can obtain in a one-party system. In certain quarters it is argued with force that just as in a multi-party system, such rights are safeguarded in a one-party system.

Any political system is a goal-seeking entity, which is made up of people who constantly place demands on it, and recognise its control or authority over them. It is also a demand-processing entity, and in order to continue to exist, a political system must satisfy some demands, moderate others, and ignore still others.17 The way in which a system actually operates is the most crucial factor in determining the extent to which the members of its society enjoy human freedom in its widest
Rights cannot be guaranteed in absolute terms. Generally to guarantee rights without qualification is to license anarchy. In a one-party state, how can it be ensured that people do have the freedom of expressing differing viewpoints? How can the judiciary be made more effective in serving the citizens so that everyone can get genuine protection from the law enforcement agencies of the system? It is often argued that one functional advantage in the maintenance of an opposition is an effective way of channelling dissatisfaction through legitimate filters, thus enabling dissenting elements within the body politic to let off steam. In that way, so the argument goes, an opposition acts as a safety valve because, by offering a legitimate avenue for criticism and protest, it discourages those who are dissatisfied from seeking redress out of the legal framework.

In multi-party systems, the organs of popular participation are normally limited to Parliament at the national level. If the ruling party decided on an issue which would be contrary to particular human rights, the opposition party would no doubt exploit such a situation for their own electoral gain and in order not to give them such an easy opportunity, the party
would take prompt corrective action.

The dilemma in which a judge in a one-party state finds himself is not different then, from that of an American judge who obtains his office through the political efforts of his party, or the English judge who does so partly by recognition of his services to his party. What is needed in both cases is that the judge should have professional integrity and competence. These qualities should enable him, in spite of a background of political activity, to be as objective as possible in the analysis of his problem and to make it clear to the public that justice is in fact being done. This is the hallmark of judicial independence.

The absence of political commitment has never been required as a necessary qualification for appointment to the bench in the US and Britain. Similarly, the commitment to a political party by a judge in a one-party state need in no way interfere with the impartiality of the judge in the performance of his duties.

4.4 Human Rights Trend in Multi-Party Kenya.

The repeal of S.2A of the Constitution was followed by the first multi-party election in 26 years on December
29, 1992. KANU won the election which was marred by serious irregularities. Jonathan Klaaren\textsuperscript{22} and the National Elections Monitoring Unit (NEMU)\textsuperscript{23} have respectively catalogued these irregularities which included manipulation of the electoral process and political organization. Having won, the KANU Government has shown no intent of presiding over the political transformation of the country to a true democracy. After all, S.2A was removed from the Constitution due to external donor pressure. This fact leads Kivutha Kibwana\textsuperscript{24} to the conclusion that "the ghost of S.2A, very much like colonialism, continues to rule Kenyans from the grave."\textsuperscript{25} He continues:

"the current power holders seem to believe that their interests - especially economic interests - would be terminally threatened by democracy, pluralism, accountability and transparency ... [they also] believe that if the system was improved in a \textit{bona fide} manner, the floods which would be released would sweep it away. The \textit{status quo} must then be preserved at all costs.\textsuperscript{26}

Thus the official thinking and policy has been to stall multi-partyism by frustrating the multi-party process "to the extent that the country continues as a \textit{de facto} one party state."\textsuperscript{27} Kanyi Kimondo\textsuperscript{28} thinks the Government is wrong by thinking that the scrapping of
S.2A is proof of commitment to pluralism. Kimondo asserts that multi-party democracy cannot be secured where the ruling party and the executive relegate the opposition to the periphery and operate in total disregard of the wishes of the opposition. Like Kibwana, he observes that S.2A was scrapped due to external donor pressure. He therefore sees the scrapping of S.2A as "just a starting point in a long legal journey towards a true foundation for multi-party democracy." Kimondo concludes that the present impasse could be overcome if the executive, the legislature and the judiciary became committed to the rule of law and pluralistic democracy.

Similar misgivings as Kibwana's and Kimondo's have been expressed by ICJ Secretary-General Adam Dieng. Speaking recently on the unceremonious cancellation of matinee stage production of Ngugi wa Thiongo's play *Ngahika Ndenda* by police at gun-point, Mr. Dieng said:

"It only substantiated the ICJ mission's findings that the current climate in Kenya is inhospitable to people's enjoyment of their human rights."

The Secretary-General was categorical about the need for Kenyans to cultivate a "democratic culture" as the surest means of promoting the freedom of expression and other basic human rights. It was also the most
effective way, he said:

"to eliminate the mono-party mentality which still pervades Kenya's political sphere ... it's actually a problem of culture in so far as you cannot simply legislate social change. You can't just end (a single-party system and culture) with one constitutional reform (i.e. the repeal of S.2A)." 32

The impasse created by the KANU Government is regrettable and a big blow, if not a negation of the optimism expressed by U.S. Assistant Secretary of State on African Affairs Herman Cohen during the "Africa In Transition Forum" sponsored by the Voice of America in Washington in September 1991. 33 Speaking then of the revolutionary change sweeping through the continent of Africa, Cohen stated:

"Africans have examined their circumstances and have decided what kind of change they want. Africans want accountability and transparency in their government. Africans want meaningful participation in the decision making process. In short, Africans want liberty - freedom from both economic and political authoritarianism." 34

Replying to a question, Cohen said that "Africa has a tradition of consensus where you talk things out." In his view, the one party state had not been true to the African tradition. He added:
"I think pluralism is true to African tradition and what we are looking for is not a multi-party system necessarily, but we are looking for the right to speak out, the right to associate, the right of the press. If someone goes around Nairobi and says 'I am for multi-party democracy', we don't like it if he gets arrested." 35

Ironically, Cohen's fears of anti-democracy police arrests in Nairobi are real even today two years into multi-party democracy. Witness the example we have already referred to of police interference with freedom of expression, by stopping the production of a play at gunpoint. 36 Such violations of human rights are so frequent now; they have not escaped the attention of the press media. For example, on June 6, 1993, The People 37 published a catalogue of Kenya's human rights abuses for the period January 9 to June 1, 1993. The abuses were legion, at least relatively in view of the short duration of time during which they were committed. 38 They also demonstrate lack of improvement on the poor rights record that plagued the pre-multi-party era. This prevalence of human rights abuses has led The People's editor Bedan Mbugua to comment 39 thus:

"Kenyans have become so used to interference from police and the provincial administrators that they have forgotten that their basic human rights are God-given and not government given." 40
The editor, who was condemning the armed police raid that disrupted the staging of Ngahika Ndenda on July 17, 1993 continued:

"The problem with Kenya is that, at the surface, a casual observer may easily conclude that citizens of this country enjoy an unparalleled level of freedom and human rights. The truth is that underneath the thin veneer of their normal activities, the people are tightly suppressed through an intricate network of administrative and pseudo-legal requirements." 41

4.5 Political Interference with the Judiciary Lingers on.

It was envisaged that the type of political interference with the judiciary, which we discussed in chapter three, would come to an end with the advent of multi-party democracy. This optimism was based on the assumption that in multi-party democracy the executive would respect the cardinal principle not to interfere with the judicial function of the judiciary. But Kenyans' expectations were shattered barely a year into the multi-party era when on December 7, 1992 President Moi, at a public rally 42 castigated the judiciary and directed the courts not to "interfere" with political parties' matters. The President was riled by the courts' entertainment of complaints arising from the
KANU nominations for the pending parliamentary and civic elections of December 29, 1993. On ordering the courts to stop arbitrating on KANU matters the President is quoted as having instructed Chief Justice Hancox "to ensure that the courts do not interfere with KANU party's affairs and expressed concern that KANU was being pushed to the wall. The competence or otherwise of the courts over party matters aside, one would be forgiven for feeling that the President's public censure was a big blow on the morale and the independence of the judiciary.

The judiciary was once more under censure when on February 17, 1993 the President, again at a public rally in Nakuru, directed magistrates not to release on bond suspects charged with illegal possession of firearms. The Presidential order was followed by a circular from Chief Justice Hancox ordering magistrates to report to him directly, "any situation where the prosecutor does not oppose bail in criminal proceedings relating to the possession of firearms." In the same vein the Chief Justice also "advised" magistrates against granting bail to those arrested for allegedly being in illegal possession of firearms. He further instructed the magistrates to "ask the prosecution to make its position relating to the accused person's application for bail known."
The reaction to the Chief Justice's directions was that of anger from opposition leaders and lawyers. His critics claimed that his directive had brought about "detention through the back door." Opposition FORD-A activist Wanguhu Ng’ang’a asserted that the directive was meant "to please President Moi and his government rather than to enhance the course of justice." He continued:

"The Chief Justice’s action is a direct interference with the process of justice and further proof that he takes direct orders from President Moi contrary to the provision of law which requires him to act independently."

Kibwezi Member of Parliament Agnes Ndetei also had something to say:

"This is interference with the judiciary ... Magistrates should be allowed to make their own judgements ..."

The ICJ (Kenya Chapter) reacted to the Chief Justice’s circular in a statement issued by its secretary Githu Muigai. The statement said:

"The order by the Chief Justice is truly dismaying as it clearly curtails the independence and impartiality of the judiciary. The Chief Justice’s note is further erosion of the judicial independence."

And The People editorialized:
"To say the least these instructions are unacceptable; they are intended to muzzle the independence of the judiciary; they intimidate the magistrates and prosecutors who are rightly becoming more and more accountable and transparent in handling and dispensing justice according to law of the land in this era of multi-partyism."

The official reaction of the Law Society of Kenya was conveyed by its Chairman Dr. Willy Mutunga at the LSK annual dinner held on March 6, 1993. Said Mutunga:

"The circular destroyed judicial discretion and greatly compromised its independence. How are we to protect and defend the independence of the judiciary if its head does not set an example?" 52

The Chairman then exhorted the Chief Justice to resign "in the name of patriotism and nationalism." He did not resign but barely a month later, even before dust had settled over the matter, Hancox was suddenly retired and replaced by new Chief Justice Fred Apaloo, a Ghanaian, on April 1, 1993.53 Hancox properly fell prey to machinations he had supported, which we have alluded to in this section.

4.6 Unfulfilled Expectations for the Judiciary in Multi-Party Kenya.
It is no secret that during the one-party era that preceded the repeal of S.2A of the Constitution in December 1991, the judiciary was exceedingly compliant to the whims of the executive. For example, from 1964 to 1991, not a single citizen subjected to the harsh detention law had secured liberty through the courts. In addition, the judiciary increasingly allowed the executive to get away with very serious violations of fundamental rights and freedoms. Kathurima M’Inoti has catalogued the nature of the violations as they emerged from mid 1980s. Many Kenyans were subjected to a witch-hunt and lost their lives in police custody, only for the courts to rule in subsequent inquests that such suspects had died of “natural causes.” Over the same period many Kenyans were arraigned and jailed in suspicious circumstances. Such people would be arrested without warrants and held incommunicado for as long as three weeks. They would then be taken to court at odd hours. They would be unrepresented by lawyers and almost always would face similar charges namely seditious, taking illegal oaths, or being members of illegal associations. They would plead guilty and the prosecutor would furnish the court with confessions “voluntarily” made by the accused persons. In instances when the accused persons protested that they had been tortured in the police process of eliciting the purported confessions, the courts would routinely hold
that such allegations were baseless and that the suspect had no tangible evidence to prove the torture. Thus, the courts were very reluctant to investigate torture allegations.57

This modus operandi of the compliant courts continued even in April - May 1990 when a wave of repression took place in the country as a result of the call by Government critics for multi-party democracy. The repressive measures employed in this period included involuntary disappearances, public interferences with privacy and physical and/or psychological abuse of detainees.58 Violent riots also broke in July 1990 when people gathered at Kamukunji grounds in Nairobi to hold a pro-democracy rally.59 As many as 23 people died when the security police and paramilitary forces used teargas and arms against the demonstrators. None of the Government critics arrested, detained, or tortured during this critical period of political persecution received any remedy or liberty from the courts for their violated fundamental rights.60

The march to multi-party era did not bring any difference at the judiciary because as we observed earlier61 the KANU Government has stalled multi-partysm in order to retain Kenya as a de facto one-party state. For that reason, nothing has changed significantly
within the three arms of government, i.e. the executive, the legislature and the judiciary since the government is not committed to change. Consequently the judiciary remains condemned for remaining compliant to the whims of the executive. This is why as recently as March 1993 the Chairman of the Kenya Social Congress, George Anyona, called for the overhaul of the judiciary. He was guest speaker at a Law Society luncheon where he said:

"There is lack of impartiality and independence in the administration of justice. Above all, there is gross manipulation of the judicial process in Kenya."

Because of such constant and persistent criticism of the judiciary Chief Justice Apaloo felt constrained to defend it. Addressing judges, magistrates and lawyers during a ceremony at Mombasa Law Courts on July 19, 1993 he denied international and local claims of Government interference with the work of the bench members. But in view of the facts we have narrated earlier on the political interference on the judiciary, one will be forgiven for taking with caution the Chief Justice’s denial. As a matter of fact the goings-on at the judiciary are so flawed that the press is at times led to be cynical. In a recent article entitled: ‘Are they KANU judges?’ Eric Mugendi has lamented the
'derailing' of the Kenyan judiciary by the executive. He says that there is a clique of judges who are used by the Executive to defeat the course of justice. He observes:

"The judiciary has slowly but surely been emasculated to a pale shadow of its former self. To facilitate this process has been a clique of ... judges and magistrates who have come to be sarcastically known in some circles as "KANU judges" ... such as Mr. Justice Norbury Dugdale ..."

Klareen is also blunt about the prevailing state of the judiciary. Says he:

"Kenya does not have an independent judiciary - one of the components of a free political democracy. Occasionally, courageous individual judges render decisions protecting human rights. But few steps to restore the independence of the judiciary have been taken ... and the judiciary remains differential to the President and to KANU."

With the above reputation, it is our view that the judiciary is not performing any better as compared to the single-party era. Recently, the High Court failed to rise to the occasion to protect fundamental rights in a suit filed against the Government. The facts giving rise to the suit were that on April 30, 1993 police
officers moved into the premises of Fotoform Printers, a British firm, and dismantled their eight printing machines in order to disable them from printing certain publications which the Government alleges are seditious. The officers had no warrant of search, neither were they executing any lawful order. They took away parts of the machines. Aggrieved by the police action, Fotoform and the owners of the affected publications brought a notice of motion in the High Court under S.84 of the Constitution seeking the enforcement of their fundamental rights under sections 75, 76, 77, 79 and 82 of the Constitution. These rights are: protection from deprivation of property; protection against arbitrary search or entry; the right to secure protection of the law; protection of freedom of expression; and protection from discrimination on the grounds of race respectively. Thus, in their application the applicants sought the return of the impounded parts of the machines, and an injunction to issue against the Government to prevent it from committing similar violations of the applicants' human rights in future. The suit commenced hearing before Owuor J. on May 3, 1993.

Opposing the application, Counsel for the State advanced three arguments. The first was that the seizing and detaining of the machine parts were not illegal because S.57 (4) of the Penal Code allows the State to seize
any printing machine reasonably suspected of printing a seditious publication, pending the trial of the person accused of printing the seditious publication. Secondly, no injunction could issue against the State in view of provisions of S.16 of the Government Proceedings Act which bars any court from issuing an injunction against the Government and its servants. Thirdly, counsel argued that the rights of the applicants were not absolute, for they were subordinated to public interest considerations by S.70 of the Constitution.

Kamau Kuria and Kathurima M’Inoti, appearing for the applicants, advanced two arguments. First they argued that S.57(4) of the Penal Code and S.16 of the Government Proceedings Act respectively, were, by virtue of S.3 of the Constitution ultra-vires S.84(2) of the same Constitution. Secondly, Counsel urged the court to be liberal in its interpretation of the Constitution by holding that in the circumstances of the case, considerations of public interest could not override the fundamental rights of the applicants. If the court obliged, that would have been in line with the progressing liberal tradition demonstrated by the High Court decisions cited in chapter two herein.

None of the arguments for the applicants received favour from the court, as Owuor J. declined to rule that S.57(4) of the Penal Code and 16 of the Government...
Proceedings Act were **ultra-vires** the Constitution because as she vaguely stated, "it could not have been meant by the makers of the Constitution that S.84 should operate in a vacuum whereby the general law would have no application." The court also referred to the fact that the Chief Justice had not made any rules under the provisions of S.84(6) of the Constitution. With this narrow and legalistic approach to interpreting the Constitution, we are of the view that the court fell into the same trap as it did in the Kamau Kuria and Mbacha cases which were examined in chapter two. The court also felt that public interest considerations outweighed the individual rights of the applicants. Again, we submit that this approach failed to uphold the spirit of S.84 of the Constitution of granting individuals the maximum enjoyment of their fundamental rights and freedoms.

4.7 The Court of Appeal Shows the Way.

The recent Court of Appeal decision in **Wanyiri Kihoro vs the Attorney General** is a mile-stone in Kenya's poor history of constitutional litigation. This timely decision by the country's highest appellate court heralds a new dawn in the protection and vindication of fundamental rights and freedoms against their consistent abuse by the State.
The background of the case was that Wanyiri, then a law student undergoing pupilage in a Mombasa firm, was held incommunicado for 74 days after being unlawfully arrested by police on the night of July 29, 1986. During his 74-day confinement, Wanyiri was assaulted, tortured and subjected to inhuman and degrading treatment. He was forced to undress before a panel of police officers, beaten with pieces of timber and broken chairs and kept naked in a cell flooded with cold water. He was not given any food, was denied any opportunity to sleep, and his feet got blistered due to standing for many hours in the cold water. For these breaches of his human rights, Wanyiri filed a suit for damages against the State.

In his plaint dated May 2, 1987 and filed in the High Court on May 4, 1987, he claimed that his rights under sections 72 and 81 of the Constitution had been derogated. These rights are protection of right to personal liberty; protection from inhuman treatment, and protection of freedom of movement respectively. The State admitted during proceedings before Rauf J. of the High Court that it had arrested Wanyiri Kihoro but asserted that his arrest was consistent with the requirements of The Police Act and The Criminal Procedure Code. The allegations of severe torture, debasing, inhuman and degrading treatment were denied.
The State also alleged that Wanyiri was not accorded any special treatment from that of other prisoners. The proceedings before Rauf J. proceeded *in camera* "for obvious state security reasons", as he put it in one of his court orders.

During the proceedings at the High Court, the judge was faced with the question as to the standard of proof required to prove an allegation of a breach of a right or freedom. He wrapped up the evidence without making a finding as to its truth. After examining various contradictions and variations of the evidence before him, he preferred not to make a holding on the evidence although as a judge in a court of the first instance, and having seen and heard the witness, he really ought to have come to a finding. Having come to no conclusion on the evidence before him, he proceeded to set out the standard of proof required in view of the allegations in question. He stated:

".... in a case where the claim for damages is based on allegations of serious criminal nature such as assault, torture and violation of fundamental rights, the standard of proof is much higher than just a balance of probabilities. It is not as high as in criminal cases, beyond reasonable doubt," and certainly not as low as in general civil cases. Applying that standard one does not
require to emphasize strongly that the allegations of torture and violations of fundamental rights are of outmost gravity; so the standard of proof ought to be considerably high".  

On appeal, the Court of Appeal felt obliged to reverse the high standard of proof set up by Rauf J. in the High Court. On his part Kwach, J.A. held:

"Faced with sharply conflicting factual and medical evidence the Judge naturally found it difficult to decide where the truth lay and took refuge in purporting to raise the standard of proof required in a case such as the one before him. In taking this course, the Judge was plainly wrong because he was faced with a straight-forward civil claim involving allegations of assault and torture."  

Kwach J.A. then held that he was satisfied that the appellant had on a balance of probabilities, proved that he suffered mental torture at the hands of his captors and that he was entitled to judgement on that basis. But the Court of Appeal never answered the submission by the Appellant's lead counsel, Gibson Kamau Kuria, that since Wanyiri was held in a protected area, the State by virtue of having special knowledge of that area had the burden of proving any special information. That notwithstanding, the Court of Appeal was emphatic that the standard of proof in cases involving breach of
rights is not higher than that in civil cases. In the submissions of the State in the High Court, it had also been argued that Wanyiri Kihoro was arrested on suspicion of having committed a cognisable offence, i.e. treason, which fact justified his 74 days' detention. The State relied on S.36 of The Criminal Procedure Act which enables police officers to hold suspects for more than 24 hours where the "offence appears to the officer to be of a serious nature".

Rauf J. rightly observed that section 36 of The Criminal Procedure Act seemed to be inconsistent with Section 72(3) of the Constitution. That is so since the former purports to enable police officers to hold suspects for more than 24 hours before charging them in cases where the offence "appears to the officer to be of a serious nature", while the Constitution makes no such exception and requires suspects charged with any offence to be brought to court within 24 hours of their arrest or within two weeks if they are charged with a capital offence. The judge, however, agreed with the submission of the State that it had not been practicable to bring Wanyiri before the court earlier than October 10, 1986 (after holding him for 74 days) when his continued custody was "eventually legalised by the detention order." Curiously, Rauf J. said:

".... the serious and complex nature of the offence
involved, namely possessing seditious documents and treason, perforce required the police to hold the plaintiff for 74 days as it was not practicable to complete the investigations before 10-10-1986. The time taken by the State to decide on the course of action was reasonable. This is simply demonstrated by the State's eventual resort to The Preservation of Public Security Act. 83

In addition to the foregoing, Rauf J. went ahead to hold:

"I need not state that "Mwakenya" group has been recently enjoying a perverse notoriety in the local press and radio for its anti-government activities as revealed in our courts during numerous trials in which many a culprit was put behind the bars for long periods. I take a judicial notice of this fact." 84

Though "Mwakenya" was obviously anti-establishment, the court did not invite any evidence how that was so or if the movement had the capacity to endanger public order. In essence, the court validated the widely held government view that divergence of opinion was treasonable.

The Court of Appeal did not agree with Rauf J. It held that Section 36 of The Criminal Procedure Code was inconsistent with Section 72(3)(b) of the Constitution
in so far as the former purports to empower policemen to detain suspects longer than 24 hours, or two weeks in case of capital offences. Kwach, J.A. said:

"The Judge held that the holding of Kihoro for 74 days was legal, and the reason he gave was that treason is a grave offence, and that investigations are usually complex in nature..... With respect, I am unable to agree with the learned Judge's reasoning because the police said right from the beginning that they arrested the appellant on suspicion of being a member of an unlawful society and being in possession of seditious documents."\textsuperscript{85}

Kwach, J.A. further observed that the State had always resorted to the device of holding a suspect without charge where it was not immediately possible to take a final decision on the offence with which the suspect is to be ultimately charged. Kwach J.A. in his leading Judgement, found that Rauf J.'s finding that Kihoro was held for a reasonable period was not only illegal but was unsupported by any evidence!

The Court of Appeal restated the 1954 East African Court of Appeal decision in \textit{Njuguna s/o Kimani and Others vs R}\textsuperscript{86} to the effect that:

"The notion that the police can keep a suspect in custody and prolong their questioning of him by
refraining from formally charging him is so repugnant to the traditions and practice of English Law that we find difficulty in speaking of it with restraint".  

The Court of Appeal proceeded by awarding the appellant Kshs.400,000/= as damages for unlawful confinement; although the appellant did not succeed on the allegations of inhuman and degrading punishment, the Court of Appeal held that the appellant was entitled to a declaration that his rights under Sections 72 and 74(1) of the Constitution had been infringed upon.

The Court of Appeal's decision in the Wanyiri Kihoro case is indeed a milestone in the field of human rights in Kenya. As observed by James T. Gathii, it is "a very welcome development in Kenya's constitutional jurisprudence .... as it gives hope to Kenyans that they will enjoy fundamental rights and freedoms under the Constitution". Mwenda Njoka was equally enthusiastic over the decision. Said he:

"The recent ruling that lawyer Wanyiri Kihoro's rights were infringed during his 74-day police ordeal - prior to his 1988 detention - has raised hopes that the high-handed days of the police may come to an end".  

The decision was also hailed by Kivutha Kibwana of the University of Nairobi and Mr. Maina Kiai of the United
Another welcome development at the Court of Appeal was the unanimous decision on March 7, 1993 in *Madhupaper International Ltd. v. The Attorney-General and Others* to convene a bench of five judges to review and possibly overrule the *Anarita Karimi Njeru* No. 2 case in which it was held, as will be recalled from the analysis of the case in chapter two, that the Court of Appeal had no jurisdiction to hear an appeal or application from the decision of the High Court given in exercise of its jurisdiction under S.84 of the Constitution, irrespective of whether such decision is final or interlocutory. The facts giving rise to the ruling in the *Madhupaper International* case are that the applicant, Madhupaper International Ltd. had applied to the High Court for declaratory orders within S.82 of the Constitution; an order for injunction; and for an award of damages against the State. The originating motion was set for hearing before Dugdale J. Before the actual hearing of the motion, the applicant filed an application in which he prayed Dugdale J. to disqualify himself from hearing the motion on the ground that he would favour the State at the expense of the applicant as he had done previously in all the constitutional suits which went before him. This application was
dismissed. The dismissal was followed by an application for leave to appeal. The same was also dismissed by the judge on the ground that there was no right of appeal provided for by S.84 of the Constitution. So, the applicant proceeded to the Court of Appeal under Rules 5 (2)b and 39(b) of the Court Rules for stay of the proceedings in the High Court and for leave to appeal respectively.

In the Court of Appeal the respondents raised a preliminary objection, relying on the decision in Anarita. Mr. Kamau Kuria for the applicants responded by submitting that Anarita was wrongly decided. He cited a few authorities, among them Commissioner of Income Tax v. Ramesh Menon where Madan J.A. said that "some day either the legislative will ponder the issue or a full bench will grapple with" the Anarita holding. Mr. Kuria applied for a full bench of five judges. Agreeing, the court noted that the point raised by Mr. Kuria was of considerable public interest which called for an urgent thorough research and submission. Stated the court:

"We note that the predecessor of this court was faced with the same situation when the court was requested to depart from its previous judgement in the interest of justice. We therefore call upon
the Chief Justice, as a matter of urgency, to convene a bench of five judges or so as he may deem fit, to hear this application and come with a binding decision.\textsuperscript{95}

The Chief Justice has since then announced that he will convene a full bench as requested.

In the light of the Court of Appeal’s decisions in the \textit{Wanyiri Kihoro} and \textit{Madhupaper} cases, we are of the view that the Court of Appeal is more independent than the High Court in dealing with violations of fundamental rights and freedoms. But that is only at the appellate stage. The Court of Appeal comprises three judges at a sitting; in which case they are more likely to collectively be more independent than a single High Court who normally sits to determine violations of fundamental rights and freedom under the original jurisdiction referred to the High Court by S.84 of the Constitution.

4.8 The Future of the Judiciary in Multi-Party Kenya.

There have to be changes at the judiciary if it is going to effectively play its role of protecting fundamental rights of the individual. Although some of the desired changes will be canvassed in the concluding chapter, it is fitting to re-emphasize briefly two points. The
first is that the Government must be committed to constitutional principles, the rule of law and pluralistic democracy to prop the judiciary to keenly protect human rights. The Government should realize that the repeal of S.2A of the Constitution was just the beginning of a long journey to true democracy where rights of the individual are upheld. Without the commitment as stated, there is no guarantee that the letter and the spirit of the law will be followed, even by the courts. Kanyi Kimondo\textsuperscript{96} rightly points out that "the right given by statute amount to little when the institutions that are supposed to enforce it or follow it ignore it". It is quite obvious from the goings-on in Africa in general, that there are constitutions without constitutionalism. We have constitutions assuring fundamental rights and freedoms; yet the constitutional provisions are not adhered to by the State, or worse still, not enforceable before the courts.

Second, security of tenure for judges must be created once and for all. Kathurima M'Inoti\textsuperscript{97} raises, in our view, quite a valid point that we have been wrong to all along have been preoccupied with discussing security of tenure \textit{per-se} On so doing, we have lost sight of the fact that security of tenure is never meant to create
independence of the judiciary. It only protects that independence, if it exists in the first place. Says he:

"..... that independence must exist initially and security of tenure merely comes to prop it up. The question which was not addressed in the one party judiciary and which must be addressed in multi-party Kenya is how to ensure that initial independence". 98
NOTES


3. Supra n.2.

4. Among these were politicians Kenneth Matiba, Charles Rubia, Raila Odinga and lawyers Gitobu Imanyara, John Khaminwa and Ibrahim Mohamed.


8. Phil Harris; Law in Context: An Introduction to Law
11. Supra n.8 at p.148.
15. Ibid p.258.
19. Supra n.17.
21. Ibid.


25. Ibid. p.7.

26. Ibid.

27. Ibid.


29. Ibid.


31. Ibid.
32. Ibid.


34. Ibid.

35. Ibid.

36. *Supra* n.30.


38. The abuses were Government refusal to licence an opposition rally at Uhuru Park: 9.1.93; the barring of two opposition FORD-K party officials who were invited to address Kenyatta University Students: 28.1.93; cancellation of opposition FORD-A rally in Eldoret: 13.3.93; the barring by an Embu District Officer of opposition Democratic Party party officials who wished to address a scheduled bursary fund meeting: 20.3.93; heavily armed policemen with sniffer dogs bar FORD-K officials from a church compound at Nakuru where they were to attend a seminar to discuss resettlement of victims of tribal clashes: 25.3.93; opposition Democratic Party Kitui Central Member of Parliament forced to flee from a KANU Rally by unruly KANU supporters: 9.4.93; scores of people seriously injured when KANU armed youth invaded opposition FORD-K rally at Kisii: 24.4.93; police raid offices of Fotoform Printers and remove
vital machinery parts to paralyse the printing press (Fotoform are printers of SOCIETY and FINANCE publications which are alleged by the Government to be seditious): 30.4.93; opposition FORD-A Molo Member of Parliament arraigned in court for addressing kiosk owners whose property had been destroyed by police and KANU youthwingers in Nakuru: 11.5.93; police swing in action and disperse a public rally of opposition FORD-A at Nakuru: 16.5.93; policemen at a by-election in Bonchari brutally beat up opposition FORD-K Member of Parliament: 19.5.93; opposition FORD-A rally at Nakuru foiled by security officers posted at the venue: 23.5.93; Government cancels opposition FORD-A rally scheduled at Kakamega: 26.5.93; police disperse a licenced FORD-A rally injuring scores of people at Banana Hill: 30.5.93 and Butere opposition FORD-A Member of Parliament arrested by Kiambu District Commissioner when he went to inquire on the whereabouts of a fellow Member of Parliament who had been picked and detained by Kiambu police: 1.6.93.


40. Ibid.

41. Ibid.
42. See The Standard December 8, 1992 p.3.

43. Ibid.


46. Ibid p.28. The writer notes that "Chief Justice Allan Hancox seems to have stirred a hornet's nest with his rather unorthodox order....". The writer's caption is a reminiscence of the controversies which Hancox aroused in the past. These have been discussed in chapter 3.

47. Supra n.44 p.2.

48. Ibid.

49. Ibid.

50. Supra n.45 p.23.


56. See, for example, Republic v. George Anyona & Three Others as discussed in “What Are Political Trials? by Wachira Maina, Chris Mburu and Edward Muriithi in Nairobi Law Monthly No.41 Feb./March 1992 pp.15-21 at p.17. Anyona and his co-accused were on July 11, 1990 at the peak of pre-democracy riots which rocked Nairobi, arrested at Nairobi’s Mutugi Bar and Restaurant. They were charged with the offence of holding a seditious meeting with intention to overthrow the Government of Kenya. There was no iota of evidence against the accused persons. Nonetheless, they were convicted by the trial magistrate but were subsequently released on appeal by the High Court. In their defence during trial, the accused persons quite rightly said their trial was “politically motivated”, and that the “government was only charging them so as to give cloak of judicial respectability to repression”. Anyona, in narrating a long history of repression, said that the trial was “political....in the guise of a criminal trial".
57. *Supra* n.53 p.41.

58. Bard - Anders Andreasen & Theresa Swindehart (eds): *Human Rights in Developing Countries: 1990 Yearbook* (Strasbourg: N.P Engel Publisher, Strasbourg, 1991) p. 221. Among persons who disappeared (and subsequently appeared in court) were Reverend Lawford Imunde who was held incommunicado for 10 days. He alleged torture and threats of torture while in detention.

59. Kamukunji grounds symbolize the struggle for independence. Most pro-independence political rallies were held there, especially after the release of Jomo Kenyatta from detention in 1961.

60. See n.4 *Supra* for names of those who were detained. Of the detainees only Kenneth Matiba, Raila Odinga and Gitobu Imanyara filed suits against the State. All their suits, which have been discussed in chapter two, were dismissed.

61. *Supra* n.27.

62. *Supra* n.29.


65. Eric Mugendi: "Are They KANU Judges" *The People*
March 7, 1993.

66. **Supra** n.22 p.8.


69. During the hearing of this application there were seditious proceedings against the applicant pending in the Magistrate's court.


71. S.16 stipulates that in any civil proceedings against the Government the court may make any order that it may make in proceedings between subjects; but the court may not grant an injunction or order specific performance on the part of the Government or a Government officer acting on its behalf.

72. S.70 provides that the entitlement of fundamental rights and freedoms of the individual must "not prejudice the rights of others or the public interest"

73. S.3 provides "... if any other law is inconsistent
with the Constitution, this Constitution shall prevail and the other law shall to the extent of the inconsistency, be void."

74. S.84 (2) gives the High Court original jurisdiction to determine any application alleging contravention of provisions of Chapter V of the Constitution.

75. Such as Imunde, Wakaba, Stanley Munga, Githunguri, Felix Njagi Marete, and Olive Casey Jaundo cases cited in chapter two herein.

76. Owuor J’s judgement p.18.

77. See chapter 2 n.32 and 33 respectively.


79. Cap.84 Laws of Kenya.


83. Supra n.78 p.24.

84. Ibid.
85. Supra n.79 p.29.


87. Ibid p.198.


89. Mwenda Njoka "Legal Milestone" Society Weekly Issue No.16 April, 1993 p.10.

90. Ibid.

91. Ibid. p.13.


93. [1979] KLR 162. This authority was discussed exhaustively in chapter 2.

94. Court of Appeal Civil Case No.19 of 1963 (Unreported).


96. Supra n.28.
97. *Supra* n.55.

5.1 Conclusions.

We stated in the introduction that the purpose of protecting human rights is to ensure peace, freedom and justice in society. In the preceding chapters we have looked into the existing legal rules and framework which have been set up in order to bring about a free and just society in Kenya. It is our thesis that there exists in Kenya adequate legal rules and institutional framework to ensure the protection of fundamental rights and freedoms. But within these legal rules and framework, there are constraints which make the vindication of fundamental rights and freedoms somewhat elusive.

In chapter one, we examined the historical and philosophical foundations of human rights and demonstrated how human beings throughout history have endeavoured to achieve social justice and freedom. We also examined the established legal framework for the protection of human rights at the international, regional and national levels. We concluded the chapter by acknowledging the fact that human rights and their protection are today a matter of universal concern. That is why there have been created legal rules and the
necessary machinery for their protection and vindication at the international, regional and national levels. Unfortunately, however, the machinery established at these levels has not been adequate enough to ensure the full protection and vindication of these rights.

In chapter two, we analysed the judicial intervention by Kenya courts in the protection of fundamental rights and freedoms. We lamented the reluctance of Kenya courts to vindicate human rights as evidenced by their adoption of a narrow and strict construction of the provisions of the Bill of Rights, especially the all important S.84 of the Constitution of Kenya. This approach by Kenya courts appears to be based on their down-grading of constitutionally guaranteed rights and freedoms. We contrasted Kenya's approach with that appertaining in various other jurisdictions where similar constitutional provisions have been interpreted more liberally in order to provide for substantial enjoyment of fundamental rights and freedoms by the individual. We concluded the chapter by demonstrating that the approach by Kenya courts has led to denial of justice since very few litigants have obtained redress for their violated rights. As a matter of fact, the few litigants who have obtained redress are those who have been lucky to have their cases listed before the few of our judges who have
In chapter three, we defined what is meant by the independence of the judiciary and considered the various factors which are vital for securing judicial independence. We also highlighted those factors which whittle down that independence. We concluded the chapter after demonstrating that the Executive in Kenya does interfere with the independence of the judiciary, thus making it difficult for the courts to vindicate violated rights and freedoms of the individual.

In chapter four, we considered whether or not there was improvement in the protection of fundamental rights and freedoms with the advent of multi-party democracy which was ushered in by the repeal of s.2A of the Constitution on December 10, 1991. Our conclusion was that there was no tangible improvement owing to the reluctance of the KANU Government to open up for true multi-party democracy. The elite in the Government fear to lose their privileged positions of power on account of the competitive nature of politics in multi-partyism.

We end this work by stating briefly our findings:

1. Kenya has a poor record on observance of human rights. This is mainly because the courts, which are the last bastion in the protection of these
rights, are neither wholly nor substantially independent. The courts have been emasculated by the executive through censure at public rallies and official functions by both the Head of State and the Chief Justice; and through the threatening and intimidation of non-compliant judges who are forced or coerced to vacate office otherwise than in the established constitutional procedure for their removal from office. These methods of emasculation have been outlined in chapters three and four.

2. The Executive has made some judges tools for denial of fundamental rights and freedoms. These judges have become compliant to the whims of the Executive. They are, therefore, not independent for they also do not enjoy security of tenure. The security of tenure is elusive because the method of appointing judges is flawed; the Chief Justice and several judges are non-pensionable and are engaged on periodically renewable contracts; the remuneration of judge is poor; the judges have failed to individually or collectively fight for their judicial independence and most important, the Government is not committed to establishing and sustaining security of tenure for judges because that is the surest way of ensuring the Executive's control over the judiciary. All these factors have been canvassed in the preceding two
3. The lack of security of tenure which leads to lack of judicial independence, has resulted in the consistent refusal of courts to vindicate fundamental rights and freedoms. This situation is a reality because the Executive has always had its way in influencing the allocation of sensitive cases against the State to a certain judge, or clique of judges, who have always ruled in favour of the State. One such judge was mentioned in the discussion of the Madhupaper International Case in chapter four. But in spite of this dismissal scenario, all was not lost because occasionally some judges have individually risen to the occasion to vindicate fundamental rights and freedoms. These few judges were able to interpret the Constitution broadly and liberally. The fruits of their efforts are the progressive landmark decisions, which we have cited in chapters two and four.

4. The present law touching on fundamental rights and freedoms does not induce the maximum protection of those rights because it has several flaws. First, there are certain statutes with colonial legacies, notably The Preservation of Public Security Act and The Public Order Act, which sanction preventive
detention and the denial of licences to convene public meetings respectively; and which are, therefore, a clear derogation of the constitutional guarantees of fundamental rights and freedoms in Chapter V of the Constitution. Second, all constitutional provisions guaranteeing fundamental rights and freedoms have written limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights of others, or the public interest. In these limitations, the courts have found a loophole for refusing to vindicate fundamental rights and freedoms. Third, the Court of Appeal has no jurisdiction to hear an appeal from the decision of the High Court given in exercise of its jurisdiction under s.84 of the Constitution. This obviously is a devastating lacuna in the law.

All the above shortcomings in the law are evident from the court cases analysed in chapters two and four.

5.2 Recommendations.

In the light of our findings, and with the hope of creating a better machinery for the protection of fundamental rights and freedoms of the individual, we recommend that:
1. The Government should *practice and be committed* to constitutional principles, the rule of law and pluralistic democracy in order to lay a firm basis for the vindication of fundamental rights and freedoms of the individual.

2. The Government must consciously take steps to accept, establish and sustain the security of tenure for the judges in order to nurture and preserve judicial independence. Specifically, the Executive must cease to censure the courts in public.

The Government can eventually be made to take the above two steps by the concerted efforts of Kenyans through the electoral process of voting out this intrasigent Government and such future Governments.

This Government can also be pressured to honour the international instruments which it has ratified, such as the 1948 *Universal Declaration of Human Rights*. The pressure must emanate from Kenyans and the international community.

3. The legislature, as an independent body, must play a role in the appointment of judges by being required to confirm a candidate for the office of judge. This would remove the main flaw of the present appointment procedure whereby the Executive and the Chief Justice,
as a matter of fact, select judges with the result that the appointees are a favoured group of cronies who tend to owe loyalty to their appointers rather than to the Constitution of Kenya.

The removal of a judge must be only for the reasons specified by s.62(3) of the Constitution of Kenya and must be undertaken in strict conformity with the provisions of s.62(4) and 62(5) of the said Constitution. Judges must be adequately remunerated to insulate them from financial anxiety so that they may perform their onerous duty unencumbered.

4. All judges must be seen and heard to individually and collectively proclaim and fight for their judicial independence.

They can do this by protesting publicly whenever their independence is threatened. We also urge that the Chief Justice should speak out publicly as their spokesman whenever their independence is individually or collectively challenged from any quarters.

5. There should be no contract judges.

6. The Office of the Chief Justice must always be held by a Kenya national. The contention here is that a non-Kenyan Chief Justice, being a contract judge, is
subject to the trappings which are discussed in chapter three regarding contract judges.

7. There should be created in the High Court divisions, among them, a Constitutional and Administrative Law Division, to adjudicate inter-alia on constitutionally guaranteed rights and freedoms. Other divisions could be perhaps a Personal Law Division and a Commercial Law Division. If the High Court had such divisions, judges could be specifically appointed according to their specialization into one division or the other. With such a system, human rights may receive greater protection by appointing persons with good track records in the field of human rights.

8. Kenya should urgently create the Office of an Ombudsman. Such a person or tribunal listens to complaints against members of the civil service, the local authorities and political parties who misuse or abuse public power to the detriment of the citizen. An Ombudsman usually offers a more informal setting for the resolution of cases, which process is less intimidating than in the ordinary courts. Expenses before an Ombudsman are also minimal. The establishment of an Ombudsman would go a long way in inducing bureaucratic accountability, which in turn would minimize human rights abuses.
9. There must be some changes in the law. All statutes which are *ultra-vires* the constitutional guarantees of fundamental rights and freedoms, such as *The Preservation of Public Security Act* and *The Public Order Act*, must be repealed. The constitution itself must be reviewed in order to remove the provisions delimiting enjoyment of fundamental rights and freedoms by the individual. This, like the situation in the United States of America, would leave alone the courts with the discretion of deciding when there is justification in delimiting a right or freedom of an individual. Parliament should also enact a law to reverse the holding in the *Anarita* case in order to facilitate appeals to the Court of Appeal by individuals whose rights are not vindicated by the High Court in the exercise of its jurisdiction under s.84 of the Constitution.
1. For the last decade, Kenya has been permanently blacklisted for not respecting human rights by such groups like Amnesty International and Human Rights Watch; see n.1 in the introduction to this thesis.

2. According to a recent Government announcement, Judges' salaries were however increased by up to 85% effective July 1, 1993.

3. These include Lawford Ndege Imunde v. R.; Harun Thungu Wakaba v. R; Stanley Munga Githunguri v. A.G. and Felix Njoge Marete v. A.G. which are discussed in Chapter Two. In chapter four we have the Madhupaper International case and Wanjiri Kihoro v. A.G.

4. Emphasis added.

5. Mr. Justice Daniel Aganyanya set a good example recently; see Standard on Sunday December 5, 1993, at p.3. Speaking to a gathering of the legal profession at Eldoret, he expressed concern over political statements that tend to undermine the independence of the judiciary. The judge cautioned politicians "that members of the Bench know how to operate according to the laws of the land and, therefore, did not need outside interference."
The late Mr. Justice Fidahussein Abdullah also added his voice with similar concern when he, as chief guest during speech day at the Alliance High School several days before his death on November 19, 1993 (see Daily Nation, November 20, 1993) he castigated the Kenyan society for a variety of ills. Though not speaking specifically on the independence of the judiciary, his pronouncements were well received by the majority of Kenyans as he lamented "...that the guilty go scot free but the innocent are incarcerated..." Justice Abdullah's pronouncements demonstrate that judges can publicly speak in defence of their independence and call for justice in society.

We may also observe here that, arising from our interviews with several judges in the course of our research, we became aware that the judges are not willing to state publicly that they do not enjoy independence. That is perhaps natural. Mr. Justice O’Kubasu says categorically that: "I think we enjoy independence and we would like to continue enjoying it. We must reciprocate by acting independently ourselves"; see Sunday Nation December 12, 1993 p.12. The judge’s contention is against widespread belief to the contrary. In fact on the same page of the Sunday Nation, Law of Kenya Society Chairman Dr. Willy Mutunga asserts that there has always been pressure from the Executive because "if there is no pressure...they (the judges) would operate freely". The Chairman adds
that: "Judges talk of receiving telephone calls and the
like, but I do not have evidence of that and, therefore, I
would not be able to say so categorically. I also think
that judges might sometimes be doing what I call self-
censorship. The judges know what the forces are like."
Indeed we agree they know, especially those who have been
forced or coerced to resign or retire because they will
not compromise their judicial independence. The most
conspicuous case in point is that of Mr. Justice Schofield
which we highlighted in chapter three.

6. At present there are 6 judges on contract. They
include Chief Justice Apaloo and Justices Akiwumi, Togbor,
Dugdale, Shields and Coudley.

7. Since independence in 1963, only 2 Kenyans out of 10
appointees have held the post of Chief Justice! They
are Chief Justices Kitili Mwendwa (1967-1971) and Madan
(1985-86); and their tenures were short indeed. The non-
Kenyans have been Chief Justices Sir Ronald Sinclair, Sir
John Ainley, C Furrel, Sir James Wicks, Sir Alfred
Simpson, Cecil C.H.E. Miller, Alan Robin Hancox and Fred
K. Apaloo, in that order.

8. Prof. Kibwana and the present writer made a similar
suggestion in Kibwana's paper "Courts, Lawyers and the
Judicial System" presented at the ICJ (K) Seminar at Nyeri
in April 1993.

9. The Attorney-General has already set up task forces to reveal and consider the repeal of various statutes including these; see "A Perchant for Task Forces" The Economic Review Weekly Issue No. 44 August 9, 1993 p. 28.

10. This would fulfil the hope expressed by Madan J.A. in Commissioner of Income Tax v. Ramesh Mevin (supra chapter 4 n. ) that "some day ... the legislature will ponder the issue ..."
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