PARLIAMENTARY PRIVILEGE IN KENYA

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By

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C O N T E N T S

ABBREVIATIONS

A.C.	Appeal Case
A.G.	Attorney General
C.L.J.	Cambridge Law Journal
C.J.	Chief Justice
Exch.	Exchequer
fn.	Footnote
K.B.	Kings Bench
K.A.D.U.	Kenya African Democratic Union
K.A.N.U.	Kenya African National Union
K.P.U.	Kenya Peoples Union
M.L.A.	Member of the East African Central Legislative Assembly
M.P.(s)	Members of Parliament
O.U.P.	Oxford University Press
Q.B.(D)	Queen's Bench (Division)
S.O.	Standing Order's of the National Assembly.
U.K.	United Kingdom

TABLE OF CASES

STATUTES

Statutes Contnd.

Legislative Council Ordinance, 1919
National Assembly (Powers and Privileges) Act.
Official Secrets Act (U.K.)
Parliamentary Privileges Act, 1770 (U.K.)
Penal Code (Amendment) Act 1973.
Preservation of Public Security Act.
Societies Act.

INTRODUCTION

The institution of parliament is a fundamental element of any state that professes to have a liberal democratic system of government. This parliament is expected to be free and sovereign in order to discharge its duties effectively.

The various states of Commonwealth Africa (Kenya included) became independent with Westiminister Model Constitution which, inter alia, assigned a central political role to the legislature[1]. In order to perform this central role parliament must be equiped with adequate powers and privileges. In this paper the term Parliamentary privilege includes powers, privileges and immunities of parliament.

Privilege has been defined in Britain as

> "the sum of the peculiar rights enjoyed by each house collectively as as a constituent part of the High court of parliament and by members of each house individually without which they could not discharge their functions and which exceed those posessed by other bodies or individuals."[2]

According to Wood Phillips, parliamentary privilege is analogous to royal prerogatives in that both are exceptional, peculiar and discretionary and both are part of the Common Law not in the sense that they are judgemade, but in the sense that the courts recognise their existence.[3] These privileges are essential to the dignity and proper functioning of parliament or as a former Kenya speaker put it,

> "Public confidence in a parliament depends upon proof of its power and proof of the integrity of its members.

> which in turn depends upon jealous preservation of its constitutional authority, its dignity and its immunities."[4]

Members of Parliament have special privileges though these exist for the benefit of members qua members and not in their personal capacity.

Kenya's parliamentary procedure, like that of the other commonwealth states is modelled on the British House of Commons and it is therefore necessary to look at the English law of parliament from where our parliamentary law is derived.

The present privileges in the U K parliament are as a result of bitter and protracted struggles between the Crown and the commoners Culminating in the supremacy of the Crown in parliament in 1689 after the revolution of 1688.

The English parliament traditionally demands certain privileges at each opening of a new session of parliament. These include freedom of speech in debates and freedom from arrest.[5] Other privileges include the right of the House to regulate its own composition, right to take exclusive cognizance of matters arising within the house and the right to punish members and strangers for breach of privilege. If the rights and immunities of both the house and individual members are attacked or disregarded by any individual or authority, the offence is known as a breach of privilege and (in the British parliament) is punishable under the law of parliament.

The above privileges enabled the House of Commons

to carry out controversy with the King in a parliamentary way and thus to secure the continuous development of the constitutional principle.[6]

Although the privileges of the Kenya Parliament are modelled on those of the House of Commons there are some differences and modifications between the two. As will be shown later, the Kenya parliament has no penal jurisdiction over breaches of privilege as far as strangers are concerned But under the relevant standing orders, the house has wide powers to discipline its members who commit contempt of the house.

Due to the controversial history of parliamentary privileges it is obvious that the present privileges have not arisen from a uniform source but rather partly from statutes such as the Bill of Rights. Privilege is part of "The law and custom of parliament" to be collected in the words of Lord Coke,

> "Out of the rolls of parliament and other records, and by precedents and continued experience.[7]

Although either house may expound the law of parliament and vindicate its privileges neither house can create new privileges. The reason for this is historical.[8]

This paper intends to critically evaluate the privileges posessed by Kenya's National Assembly. The first chapter examines the evolution of the Kenya Legislature. This evolution is seen in the wider context of a general evolution of colonial Legislaturers culminating in the achievement of independence with a Westminister Model constitution which

assigned a central role to the institutuion of parliament.

The second chapter examines in detail the powers and privileges conferred upon our legislatures by statute or otherwise and examines the scope and limitation of such powers.

The third chapter deals with the threats to the privileges of the House. The effect of the Preservation of Public Security Act are critically discussed in order to bring out how the act has undermined the parliamentary privileges. In order to vividly illustrate this point the paper carefully examines individually the cases under which various members of parliament have been detained. It is the writer's hypothesis that both the actual detention of M.P.'s and the ever-present threat of detention has had the effect of curbing the privileges of M.P.'s and in fact the government has eroded the Privileges of Parliament The effect is that the government can with impunity bulldoze any legislation without risking serious opposition from parliament which has been reduced to an institution of rubber-stamping government sponsored bills.

The concluding chapter examines the reasons that account for the failure of Parliament to assert itself vis-a-vis the executive. Modest suggestions for reform are made with a view of strengthening the institution of parliament in order to make it strong enough to meet the challenges inherent in the preservation of democracy in a third world country amidst the general turmoil and turbulence prevailing in these countries

Although the paper deals with parliamentary privileges in Kenya, nevertheless commonwealth examples are freely given where appropriate. The paper heavily relies on the English Law for the reason that our parliamentary practice is based on the House of Commons and our local law on the subject refers us to the Common Practice for some matters.[9] But where it is felt that such foreign law is inappropriate the writer has freely departed from such Law .

CHAPTER 1

THE EVOLUTION OF THE KENYA LEGISLATURE

The modern state of Kenya had its origins in the rivalry between European Powers for the control of Africa. Thus by the Anglo-German Agreement of 1890, the present day Kenya and Uganda were reserved as British Spheres of influence.[1] Consequently, Britain declared a protectorate over the territory in 1895.

The Administrative machinery of the protectorate was set up under the 1897 East Africa Order in council which, inter alia established the legal system. The protectorate was to be administered by a commissioner who, among other powers, was empowered to legislate by Queens Regulations generally

> "for the peace, order and good government of the protectorate".[2]

The import of these words is to confer a plenitude of legislative competence on the commissioner.[3] The Commissioner excercised both judicial and executive powers and he did not have to act in consultation with any local body nor was he responsible to any such local institution. However, he was subject to certain limitation which will be examined later.

After this stage, the development of the legislature followed a general pattern that was evident elsewhere in the British dependencies.[4] Thus in the early period of colonial rule, legislatures did not exist as distinct and separate branches of government.

Laws were enacted by the decree of the governor without any consultation with the colonised people who were affected by such laws. The reason for this has been aptly given as

> "to permit the colonised people to participate in their own government would have been completely contradictory since colonial rule is the antithesis of democracy. They were therefore excluded from any role in state policy making".[5]

Politics was not permitted. Government was carried on through an imposed administrative machinery which was rigidly hierachical in form and predominantly millitary in character. Legislation consisted essentially of administrative instructions from the Governor to his subordinates in the chain of command.

In Kenya, this general pattern was slightly deviated from due to the existence of immigrant races, the British settlers and Indians. The settlers demanded political rights and these were conceded by the colonial governments. These concessions were based on the theory that Englishmen carried their rights with them to the British posessions overseas.[6] Such rights were not extended to "Natives".[7]

Following settler pressures, the 1905 Order in council inter alia provided for a legislative council which initially was to consist of the governor[8] and such other persons not less than two, as may be appointed by the crown. The council was invested with competence to make laws for the peace order and good government of the protectorate. Although in theory

the governor lost competence to make laws on his own, there was actually no real diminution in his powers since the council was to be dominated by "officials" who would take orders from him. The setting up of the legislative council was a significant move in that it marked a shift from the hitherto autocratic powers of the governor to some kind of separation of powers.[9]

Once the settlers were granted the legilative council, they agitated for elected rather than nominated representation. This demand was granted by the Legislative council Ordinance, 1919.[10] Under this ordinance, elections were to be held on universal adult suffrage but only for Whites. Other races were denied similar rights. A settler committee working out the details of the above legilation was

> "of the opinion that at this stage of the protectorate's development when the colonred races outnumber the whites, it is not desirable that the Franchise should be extended to Asiatics or Natives" and instead recommended a small representation for them through nomination.[11]

Under the above ordinance, the settlers were provided with eleven elected seats but this was insufficient to ensure a majority over the official members. In their attempts to achieve supremacy in Kenya, the settlers waged a serious campaign to obtain a majority of elected representatives in the legislative council where the officials were still the majority. However, in this respect, their struggle was complicated by the Indian demands of

elected representation in the legislative council.[12] The Indians claimed equality of rights with the settlers. These claims were vehemently resisted by the settlers who sought to exclude the Indians from any form of participation in the policy formation and administration. Tension between the two communities rose so much that the colonial government was forced to intervene. It did so in the form of a White paper, the famouse Devonshire White Paper of 1923.[13] The paper evaded the Euro-Asian controversy by introducing the African element. The paper pronounced that Kenya is primarily an African territory and His Majesty's government think it necessary definitely to record their considered opinion that the interests of the African Natives must be paramount, and that if, and when these interests and the interests of the immigrant races conflict, the former should prevail.

Despite this pompous statement, it was to be many years before Africans were nominated to the legislative council. The development of the legislature was still dominated by Euro-Asian attempts to gain greater elected representation to the council. But these attempts were thwarted by the colonial government. By 1925 when representation for Indians, Arabs and Africans was provided for, the number of official members was increased. There was therefore heavy official majority. It should be noted that though African representation was provided for[14]

the colonial government took a highly paternalistic attitude. Their interests were to be represented by non-Africans.[15]

Despite the changing nature of the composition of the Legislative council, the body was very much subordinate to the governor. In this sphere, Kenya was following the pattern evident elsewhere in British colonies where colonial legislatures were neither supreme nor sovereign. The legislature was merely advisory and therefore could not take active part in law making. The governor summoned the meetings of the council and chaired such meetings. He also had power to veto or suspend enactments and could promulgate legislation on his own initiative. In most cases these powers were not necessary, given the composition of the colonial legislatures. The majority of members were "officials", that is Senior Civil Servants who were the administrative heads of various departments. The governor had also power to nominate other members and these invariably supported the government.

The governor himself was subject to the imperial government. Thus the governor and the council were to act in conformity with Royal Instructions issued to him from time to time. The crown reserved the power of direct legislation for the colony and had powers to dis-allow any ordinance passed by the local legislatures. The governor was also instructed not to assent to a certain class of Bills without

first obtaining the approval of the colonial office.

The above limitations have been summarised by Wight in the form of two principles of subordination. The first one is that the legislature was subordinate to the executive, and the second is that the colonial government was subordinate to the imperial parliament.[16]

Despite the above limitations on the power of the legislature, the settlers saw it as an instrument for ensuring their supremacy over the other races and consequently continued their demands for greater voice in the council. These demands were greatly conceded after the second World War. By 1948 the legislative council was composed of 18 officials and 22 unofficials. Thus after a long struggle, Kenya achieved an unofficial majority in the legislature. For the first time in the history of the colony, it was possible to reject government measures. However, to do so, the unofficials of all the races had to vote together for if the government could win the support of one race, then it would have a majority. The probability of all the unofficials voting against the government was not very high due to the racial tensions existing in those days. The entrance of Asians and Africans to the council despite the vigorous resistance of the settlers meant that the council was disunited. In practice, the white unofficials were ~~more~~ 44 likely to ally with their African and Asian colleagues. Due to the above factors,

the attainment of an unofficial majority did not significantly alter the powers of the government in relation to legislation. As a result the governor did not have to use his powers to enact laws which had been rejected by the council.

Up to 1944 when Eliud Mathu was nominated as the first African representative in the council, African interests had hitherto been represented by non-Africans.[17] Once nomination of Africans was conceded, the development of the African voice in the council was rapid.

Under the 1954 Lyttelton constitution, 6 Africans were to be nominated after consultations with the African Councils. This number was increased to 14 elected Africans by the Lleno~~x~~-Boyd Constitution of 1958 thereby bringing the number of Africans equal to that of the Whites.

All the elected members were invited to the famous Lancaster Conferences to prepare for Independence. It is at these conferences that the Kenya Parliament, based on the Westiminister Model was born. The independence constitution provided for a bicameral legislature composed of the Senate and the House of representatives.

The colonial legislative council was an important forum for debating major policies. As a forum for airing grievances and criticising the government, the council had a vigorous record. With the introductin of millitant Africans in 1957, it became a medium

whereby the major constitutional issues of the day were debated. But most of these debates did not have great significance on the government because of the limitations discussed above. The council could not assert itself effectively vis-a-vis the government. As the various races joined the council, the body was used to represent narrow and racial interests, often to the detriment of the wider national interests.

The procedure of the colonial legislature was more or less a replica of that of the British House of Commons. The Standing Orders provided that in all matters not provided for, the speaker had to be guided by the rules, form and usages of the Commons House of Parliament of Great Britain and Ireland in force for the time being so far as the same can be applied to the proceedings of the council.[18] Therefore the privileges of the council were taken to be the same as those of the British Parliament. This is not surprising since initially the council was established for the English men who carried their political rights to the British possessions overseas.[19] Since both the members of the colonial government and the members of council were nurtured in the same common law tradition, no conflicts arose as to the existence of the privileges. This was made very clear by the Attorney General when he wasmoving the Legislative Council (Powers and Privileges) Ordinance. He said,

> "The Bill envisages the same general principles in relation to privileges which have been established in the

House of Commons".[20]

This shows that the white members of the council saw the body as an extension of the British Parliament, with the difference that it was not supreme or sovereign. It is no wonder that the government did not attempt to infringe the privileges of parliament. In any case, this was unnecessary due to the little influence that the parliament constitutionally possessed.

The present Act Act governing the privileges of parliament is substantially the same act that applied to the colonial Legislative Council. However, at independence, the powers of parliament were abruptly increased enormously under the Westiminister Model Constitution. Parliament was changed from a subordinate body to an important body occupying a pivotal role in the affairs of the government. This abrupt change was not fully appreciated by the new leaders, most of whom had served in the colonial legislature which was subordinate to the government. These leaders could not therefore accept the fact that the executive was to be controlled by the legislature. As Robert Martin states

> "To accept that African politicians have decided to govern their country in the same way that the British did may be discouraging, but to any but the most unhistorical mind, it should not be surprising".[21]

In this respect, Kenya's parliament is not an exception and the following chapters indicate the struggle of parliament in trying to assert itself <u>vis-a-vis</u> the executive. Like its counter-parts in former British colonies, the Kenya parliament has lost the struggle and as will be shown later, it is now properly submissive, like its colonial predecessor.

CHAPTER 2

APPLICATION OF PARLIAMENTARY PRIVILEGE IN KENYA

A. THE NATIONAL ASSEMBLY (POWERS AND PRIVILEGES ACT - CAP. 6)

The constitution of Kenya empowers parliament to pass Laws in Kenya.[1] It further provides that the National Assembly has powers to make standing orders regulating the procedure of the assembly.[2] Under s. 57 of the constitution, the National Assembly is empowered (subject to s. 56) to provide for powers, privileges and immunities of the assembly and its committees. These constitutional provisions in effect empower parliament to enact laws to determine what powers and privileges it should have.

In pursuance of the above powers, the National Assembly (Powers and Privileges) Act was enacted. This act was passed in 1952 by the colonial legislature, the predecessor of the present parliament. At independence, provisions were made for the existing laws to continue in force.[3] Since its enactment, the act has not been substantially amended. The aim of the Bill was given by the mover as to provide for the same privileges as had been established by the British House of Commons.[4]

Under the Act, the members are immune from any civil or criminal proceedings in respect of words spoken before or written in a report to the assembly or its committee or by reason of any matter brought by them therein by petition Bill, resolution,

motion or otherwise.[5] Members also enjoy freedom from arrest for civil debt during session[6] and court process for civil jurisdiction cannot be served on a member within the precincts of the Assembly. But such privilege is not available in respect of a debt whose contraction amounts to a criminal offence.

The Act gives certain privileges to the members of the National Assembly. In addition, it also gives the house certain powers which will be considered later. Thus the house has wide powers to deal with strangers.[7] The House is also granted wide quasi-judicial powers in respect of obtaining and admitting evidence.[8] This is normally done by select committees of the House. In this connection the house has, generally speaking, the same powers as the courts of law.

Sections 16-18 create a multitude of offences connected with the house acting in its quasi-judicial capacity. It's an offence for members to receive a reward either directly or indirectly in the performance of their duties qua members such as promotion or opposition of a bill, petition etc.

Any reports published by the house or under its authority are absolutely privileged while extracts or abstracts of such reports enjoy qualified privilege.[9]

The act also confers certain powers on the officers of the House. Such officers are empowered to excercise police powers for the purposes of enforcing the criminal law provisions of the Act.

Unlike the British House of Commons, the Kenya Parliament has no penal jurisdiction over breaches of its privileges. Any person who contravenes any of the provisions of the Act has to be prosecuted in the ordinary couts of Law. The consent of the Attorney General is necessary before such prosecution is commenced.[10] This inability to prosecute is a serious limitation to the privileges of parliament. This is vividly illustrated by the report of the Select committee investigating the murder of J.M. Kariuki in 1975. Although the committee accumulated sufficient evidence to lead to a successful prosecution, nevertheless the government refused to act upon the report and all the house could do was to sit impotently since it had no powers to proceed further. This matter is discussed later and a solution to the issue recommended.[11]

As far as the members of the house are concerned, only the house has capacity to punish them for contempt of the house or abuse of privilege.[12] With due respect to the integrity of the Honourable members, there have been incidents of unseemly and unruly behaviour in the house. These were so serious that the house found it necessary to amend the Act in order to issue a code of conduct to regulate the behaviour of members within the house.[13] A committee of Privileges was set up under the chairmanship of the Speaker with powers to enquire into any alleged breach of the code, which breach by the member concerned is likely to "reflect adversely on the dignity of the house" and to make appropriate recommendations

to the house. The house has power to discipline the member concerned. This is a more appropriate method of disciplining the M.P.'s than detaining them. It is also in keeping with the spirit of the Act for the mover of the Bill had made it very clear that

> ".....a member is still accountable to this house for his conduct in debate. If his conduct or his speech should transgress the bounds of propriety, he will be restrained by the standing orders".[14]

B. FREEDOM OF SPEECH

Freedom of speech and debate is an essential attribute of every free legislature and may be regarded as inherent in the constitution of parliament. Without this freedom parliament would be incapable of performing its duties. This freedom has been described as essential to

> "every free council or legislature".[15]

This privilege has been recognised in Kenya under the National Assembly (Power and Privileges) Act, (Cap. 6). Under s. 3 of this act, members are immune from any civil or criminal proceedings for any words spoken in the assembly or any matter written before the assembly or any of its committees. But this privilege is subject to the right of the House to control discipline and order in the House.

This freedom has had a very interesting and controversial History.[16] Whereas it had always been accepted in principle that the members of parliament had such freedom, nevertheless, there was sharp

controversy regarding its scope. Parliament asserted that it had absolute immunity for whatever was said during the course of their debates. The other extreme view is glaringly portrayed by Sir Edward Coke (on behalf of the crown) in replying to the traditional speaker's petition. His Lordship replied,

> "liberty of speech is granted you but you must know what privileges you have, not to speak everyone what he listenth, or what cometh in his brain to utter, but your privilege is 'aye' or 'no'...."[17]

This conflict is reflected in the early cases regarding the extent of the privilege.[18] Most of these cases concerned petitions which adversely affected the Monarch.

Thus in 1397, an M.P. Haxey was charged with treason for introducing a Bill to curtail the King's household expenses. This judgement was later reversed as being

> "against the law and custom, which had been before parliament."[19]

In STRODES CASE[20] (1512), Strode who was a member of the House of Commons was prosecuted in the Stannaries court for having introduced Bills to regulate these courts and he was imprisoned. He was later released on a writ of privilege and an act, Strodes Act, was passed to declare such proceedings null and void and making it clear that any future proceedings against any member for what he said in parliament would be of no effect. The Commons advanced their claims beyond the Strodes Act in

their famous protestation of 1621. The protestation affirmed

> "that every member hath freedom from all impeachment, imprisonment or molestation, other than the censure of the house itself for, or concerning any bill, speaking, reasoning, or declaring any matter touching parliament or parliament's business."

The extent of privilege was put to test in the celebrated case of R v ELLIOT, HOLLIS & VALENTINE[21] In this case, the three members of the House of commons were charged inter alia, with uttering seditious words in parliament. They were found guilty and subjected to a fine and imprisonment. Both houses of the British Parliament passed resolutions against the judgment and it was reversed on a writ of error in 1668. The reason for the reversal was that words spoken in parliament could only be judged in the house and not in the court. This case affirmed that the principle of freedom of speech in the House was now recognised. It settled that no legal proceedings can be taken against a member of parliament for words spoken in parliament.

Ofcourse these cases, being English are not binding on the Kenya courts. However, they have persuasive authority and in the absence of locally decided cases, they are a good guide as to what the Law is. This particulary true since the Kenyan act is a mere codification of the English Law of Parliament which consists partly of statutes and partly of common law. Therefore decisions interpreting this law

are valuable to the Kenyan courts. s. 3 of the Kenyan Act incorporates the English Law on privilege of speech as set in the above cases.

The members of the House have a duty to maintain the privilege by refraining from any cause of action prejudicial to the privilege which they enjoy. Thus the Speaker of Kenya parliament has commented that

> ".....it is a form of contempt of the house by Honourable members if they continue debates outside the house, either by discussing matters which are the subject of a pending debate here, or by answering outside the house, specific matters which have been said by Honourable members within this House. I do believe that kind of conduct is very detrimental to the dignity of this House. There is a similar rule of the House of Commons embodying the same principle, which although not binding on this House, is, in my belief, a very sound principle."[22]

The Speaker pointed out that it was the practice of the members concerned to apologise for that type of conduct and on one ocassion, a government minister had apologised for similar conduct.

Because of this privlege, speeches in parliament are not actionable either civily or criminally.[23] Although the members have freedom of speech guaranteed from external interference, this does not give them a licence to speak and act as they like. The speaker in his capacity as chairman of the House has the power and duty to preserve order and decorum by applying the rules of debate and the House has power to enforce order to members by censure or suspension from the House.[24]

There are numerous examples in the journals of

the House where members have been disciplined or ruled out of order for words spoken in the House.[25] Under the Standing Orders of the House, a member is not allowed to raise a false point of order.[26] In cases of grave disorder, the speaker is empowered to suspend any sitting for a period to be named by him.[27] Under standing order 92, force may be used to remove a suspended member who has refused to go out voluntarily.

Freedom of speech is certainly available to cover all the matters dealt with in parliament such as debates, bills, resolutions, motions, and so forth. Section 3 of the National Assembly (Powers and Privileges) Act does not purport to cover all the matters in respect of which freedom of speech is available. It is therefore possible that a member may be liable for some matter which was done or said in parliament. The English law grants protection only in respect of "proceedings in parliament." The difficulties involved in determining whether or not a matter is protected are clearly seen in the following foreign cases.[28]

In the American case of GOFFIN v. GOFFIN,[29] a member uttered slanderous words to another member in the chamber during the course of the debate. The Supreme Court of Massachusetts held that such words were not protected by parliamentary privilege

> "even though the matter with which the slander was connected had been the subject of debate at that sitting and was still before the house in the sense that it was for consideration in a future day".[30]

Ofcourse this case is not binding on Kenya courts but it illustrates that not everything done or said in parliament will be protected by parliamentary privilege. This case gives a very restricted interpretation of matters covered by privilege and it is submitted that our courts should adopt a wider interpretation.

A general idea of what amounts to a "proceeding in parliament" has been given in the Report of the Select Committee of the Official Secrets Act (U.K.) in the 1938-39 session.[31] The committee said

> "it (proceeding in parliament) covers both the asking of a question and the giving of written notice of such a question in the House as well as everything said or done in the House in the transaction of parliamentary business".

From this definition, it is clear that it is impossible to have an exhaustive definition of what matters will amount to a "proceeding in Parliament." However, it is clear that a casual conversation in the House can't be said to be a proceeding in parliament and a member who discloses information in the course of such conversation would not be protected by privilege.

An interesting issue arose in the British House of Commons in connection with a letter written by an M.P. M. Strauss to the Paymaster General (representing the Minister for Power and Communications) criticising a public corporation. The corporation threatened to commence a libel action against the M.P. unless he withdrew the allegations which were subsequently found to be without merit. The committee of Privileges

held that the letter amounted to a proceeding in parliament and in threatening to sue the M.P., the Board of the corporation was in breach of privilege.

The House sought the opinion of the Privy Council as to whether it would be contravening the parliamentary Privileges Act, 1770 if it treated the matter as a breach of privilege.[32] The judicial committee held that the 1770 Act (which enables a person to bring any action against the M.P. without such action amounting to a breach of privilege) applies to members only in their private capacity (e.g. Action for debt) and does not affect the privleges of parliament as to which the committees opinion had not been sought.

According to Wade, communication between members and ministers already enjoy qualified privilege and as such there is no basis for demanding absolute privilege.[33] Qualified privilege is available only if the matter is written in good faith and there is no malice. On the other hand a matter(such as one arising out of a proceeding in parliament) which enjoys absolute privilege will not be actionable even if made mala fide or maliciously.

Before the discussion of freedom of speech is wound up, it is necessary to examine the scope of criminal law in matters arising within parliament. s. 3 of the National Assembly (Power and Privileges) Act makes it clear that M.P.'s are not amenable to the ordinary courts for anything said in debate however criminal in nature. In R v ELLIOT, HOLES AND VALENTINE,[34]

the judgment of the King's Bench was reversed partly because speeches made in parliament no matter their nature cannot be enquired into outside parliaments. Whereas this issue is well settled, it is doubtful whether criminal acts committed in parliament enjoy similar privilege. In the ELLIOT case, it was left an open question whether assault on the speaker (which is a criminal act) could be properly heard in the court.

In the English case of BRADLAUGH v. ERSKINE,[35] a serjeant-at- arms who had forcefully removed a member from the house in persuit of the order of the house was held to be justified in committing such assault as he was merely carrying out the orders of the house. (In Kenya, a case like this would never arise since Standing Order 92 empowers an officer of the House to use force to remove such a member who has been suspended by the speaker). However, this case is not directly in point since the "offence" was committed in pursuance of the order of the house.

It would seem that there is no clear authority on what happens if amember commits an offence in parliament. According to May,[36] it can be said as a general rule that a criminal act done in the House is not outside the course of criminal justice, but the rule is not without exception and both rule and exception will depend on whether a particular act can or can't be regarded as a proceeding in parliament. In practice, it is difficult to imagine a criminal act

as opposed to words, constituting a proceeding in parliament. It is therefore submitted that a criminal act committed in parliament will be amenable to the processes of the ordinary courts. Privilege does not cover criminal acts such as fighting in parliament.

C. FREEDOM FROM ARREST

Section 4 of the National Assembly (Powers and Privileges) Act (Cap. 6) makes it clear that no member can be arrested for any civil debt (except a debt whose contraction constitutes a criminal offence) whilst going to, attending or returning from a sitting of the assembly or any of its committees.

Section 5 of the same act forbids serving or executing of any process issued by any court in the exercise of its civil jurisdiction within the precincts of the assembly while either House is sitting and no such process shall be served or executed through the speaker or any of the officer of the House unless it relates to the attachment of a member's salary or to persons employed within the precincts of the House.

Freedom from civil arrest was until fairly recently an important privilege necessary for the proper functioning of parliament because arrest was often part of the process for commencing civil proceedings and also for distress. However, as a result of progressive reform in civil procedure, the privilege has lost most of its former importance. In Kenya, arrest for civil matter applies only where a decree

holder applies for arrest and detention of a judgment debtor.[37] This process is complicated and rather restricted. In any case, the court has a discretion to disallow the application of the decree holder taking into account, inter-alia, poverty or other sufficient cause.[38] The sum effect of all these provisions is to restrict very much the circumstances under which a person may be arrested for civil matters. In practice, arrest as a mode of execution of a decree is rarely resorted to except for the purpose of embarassing a wealth, or influential judgment - debtor who is deliberately refusing to satisfy the decree. But the fact of its existence in law makes it important that members of the House should be spared the rigours of such arrest and detention.

The rationale of the existence of this privilege is adequately explained by Hatsel. He says

> "...the members who compose it (parliament) should not be prevented by trifling interruptions from their attendance on this important duty, but should for a certain time be excused from obeying any other call, not so immediately necessary for the great services of the nation. It has been upon these principles, always claimed and allowed that the members of the House should, during their attendance in Parliament, be exempted from several duties, and not considered as liable to some legal processes, to which other citizens, not intrusted with this most valuable franchise, are by law obliged to pay obedience."[39]

The freedom from arrest in civil process protects members from molestation as well as from arrest. This privilege attached from the Anglo-Saxon

between civil and criminal matters was not very clear. As a result, the privilege was held not to the cases of treason, felony or breach of the peace. (These were clear crimes). In Kenya this issue does not arise as s. 4 of the National Assembly (Powers and Privileges) Act covers only civil cases.

If a member of Parliament commits a crime, he is arrested like veryone else and if he is convicted, he is punished under the general law. However, if the member is imprisoned for a period of more than 6 months, he loses his seat.[43] In Kenya, there have been cases where members have been arrested within the precincts of the Assembly. Since in all these cases detention has followed, this issue will be dealt with in Chapter 3 which deals with detentions and privilege.

It must be noted that in Kenya, there is no law to prevent a member from being arrested in the chamber for a criminal offence. The common law cases cited above, though not binding on Kenya, serve as a useful guide in the absence of a local decision. They are of a persuasive authority. However it must be noted that even in Britain there is no direct authority on whether a member can be arrested for a criminal offence while in the House. It is submitted that a member of the House can be arrested for a criminal offence anywhere. If for example an M.P. commits murder, he can properly be apprehended even if he is in the House.

D. OTHER PRIVILEGES OF THE HOUSE

(a) Exclusive Right To Regulate Its Own Procedure

Section 56 of constitution empowers the House to regulate its own procedure and in particular to provide for an orderly conduct of its proceedings. In this matter, parliament has no rival and no court has jurisdiction to question the proceedings of the House. In the words of Hood-Phillips,

> "The courts must presume that so august an assembly as the House discharges its functions lawfully and properly. They will therefore not take cognizance of matters arising within the walls of the House and they will accept the interpretation put by the House upon a statute affecting their internal proceedings."44

The House is not responsible to any external authority for following the rules it lays down for itself and may depart from them at its own discretion. The privilege is not confined only to the debating chamber, but also to the precincts of the House. Thus in R v. GRAHAM-CAMPBELL, exparte HERBERT,[45] a Divisional court held it had no jurisdiction to try alleged breaches of a licensing act by the Kitchen Committee of the House of Commons. The courts have jealously protected the right of the House to control its internal proceedings. Similary in BRADLAUGH v. GOSSET,[46] the court held that it had no jurisdiction to declare an order of the House void (on the grounds of being beyond its powers) and of restraining

the Serjeant-at-arms from carrying out such an order. However, this privilege does not appear to cover crimes or breaches of the peace committed in the House. Thus in the celebrated care of R v. ELIOT AND OTHERS,[47] the members might have been properly charged with assaulting the speaker. If for example one member killed another in the House, it is probably true that the courts would assume jurisdiction rather than leave the matter to the internal disciplinary machinery of the House.

The above authorities indicate the position at common law. It is submitted that this is the position in our local statute. Thus the House's exclusive right to regulate its own procedure does not cover crimes occuring within the House. This is strengthened by the fact that unlike the House of Commons, the Kenya Parliament has no penal jurisdiction and therefore the courts have to be resorted to where crimes are committed.

(b) Right To Control Strangers

The National assembly (Power and Privileges) Act gives the assembly wide power over strangers, s. 2 of the Act defines a stranger as "a person otther than the speaker, a member of the House or an officer of the House." No stranger is entitled as of right to enter or remain within the prencincts of the Assembly and the speaker is entitled to issue orders regulating the admission and conduct of strangers.

The House exercises, through the speaker, absolute powers over strangers. Even where such strangers have been lawfully admitted, the speaker, Serjeant-at-arms or any person authorised by the speaker may order the stranger to withdraw. If any member "spies strangers," the speaker must put the question "that strangers do withdraw." The speaker has pwers Powers to expel a press representative who "persistently misreports the proceedings of the House."[49]

In addition the House has powers to sit in camera in which cases strangers are withdrawn and the secret matter may not be published in the public journals of the House.[50]

(c) Quasi-Judicial Powers Of The House:

The House posesses wide quasi-judicial powers in respect of obtaining and admitting evidence either by the whole House or committees of the House.[51] In general, the House has the same powers as a court of Law in matters relating to obtaining and admission of evidence; admission and production of documents and privileges of witnesses. The import of all these privileges is to empower the house to conduct inquiries in any matter it deems fit and to recommend the necessary action to be taken by the appropriate government department since the Kenya Parliament unlike its British counterpart cannot exercise penal jurisdiction.

In exercising its quasi judicial power, the House may summon witnesses and examine them on Oath and such witnesses may not refuse to answer

any question or refuse to produce any document except with the permission of the speaker and only on the ground that the same is of a private nature and irrelevant to the subject matter of the enquiry.[52] No documents relating to security matters may be produced except with the consent of the president and no secondary evidence of their contents may be given or received but documents relating to civil departments shall not be withheld except upon the direction of the president.[53] Whereas the withholding of evidence on security matters is understandable, nevertheless, there is no justification of providing similar protection to the Public Service. In most cases, parliamentary select committees are sut up to probe certain administrative Acts. The above protection can only frustrate the work of the committee since a president will be inclined to protect his own administration at the expence of condoning the the misdeed. It is suggested that parliament should have access to civil departments so that it can act as a public watchdog on administrative misdeeds. The 1975 select committee proving the murder of J. M. Kariuki complained of lack of co-operation from senior civil servants who withheld vital information, presumably taking advantage of the provision and thereby frustrating the efforts of parliament.

From the discussion in this chapter, it is

clear that there are two types of privileges. There are privileges which attach to individual members of the House such as freedom of speech and freedom from arrest. There are other privileges which attach to the House such as power to control strangers, to regulate its own proceedings and to obtain evidence.

The two types of privileges are essential for the proper functioning of parliament and a threat to any of them will adversely affect the effectiveness of parliament.

CHAPTER 3

THREATS TO THE PRIVILEGES OF PARLIAMENT

A. THE PRESERVATION OF PUBLIC SECURITY ACT

Every sovereign state reserves to itself power to take emergency measures in order to maintain government and preserve law and order in moments of instability or turbulence. The Kenya Parliament has therefore enacted the preservation of Public Security Act[1] to eal with such an eventuality. The scope of the Act was vastly enhanced by the 1966 amendment.[2]

During the colonial times, Emergency Powers were exercised under the 1939 Emergency (Powers) Order in Council which inter-alia enabled the governor to declare an Emergency and detain or restrict people during the operation of the Emergency. Under this Order, a state of Emergency was declared on 20th October, 1952 and thousands of people were detained or restricted during the Mau Mau uprising of 1952-59. This Order in Council was repealed at independence.[3]

At Independence, Emergency powers were provided for under the then s. 29 (now s. 85) of the constitution and were not very extensive. They only became operative when Kenya was at war or there was a declaration of Emergency by the Governor-General. But these emergency measures were subject to considerable parliamentary controls. Between 1963 and 1966, the president did not invoke such powers outside the North Eastern Province and the contiguous Districts.

However, a dramatic turn took place in 1966, with the amendment of the constitution in order to give the president more powers to deal with emergency situations. This constitution amendment amended the preservation of Public Security Act and linked its operation to the constitution.

The reasons for these changes are important in order to understand the subsequent application of the Act. It will be recalled that at Independence Kenya had two political parties, K.AN.U. and K.A.D.U. Eventually, K.A.D.U. was voluntarily dissolved and all its members joined K.A.N.U. Within K.A.N.U. itself, ideological differences began to emerge. The radicals, who favoured socialism, were led by the then vice president, Mr. Odinga. The conservatives (who were very much strengthened by the basically conservative ex-K.A.D.U. men) were capitalists and were led by the then Minister for Planning and Economic Development, the late Mr. Mboya.

Differences between the two factions came to a climax during the 1966 Limuru Conference when largely due to the machinations of Mboya (acting on behalf of the government of Kenyatta), Odinga failed to secure any seat in the ruling party KANU.[5] As a reaction to this, Odinga's supporters formed an opposition party, K.P.U. and on 22nd April, 1966, Odinga, leading a group of 28 M.P.'s requested the Speaker to formally recognise them as an opposition party.

K.A.N.U. reacted swiftly. The constitution was amended[6] within one day providing that any member who joined a party other than the one under which he was elected automatically loses his seat at the end of that session. The amendment operated retrospectively and President Kenyatta prorogued parliament and all the K.P.U. M.P.'s had to seek reelection. Only 13 were returned. There followed a general outcry by the government against the K.P.U. whom they labelled communists and saboteurs. It is with this hostility that the crucial constitutional amendment was made in order to contain K.P.U. activities. The KANU government supported the amendment by strongly arguing that the country was threatened and very sweeping measures were needed to restore the country to normalcy.[7] With this background in mind, perhaps it is not difficult to understand why the act is so wide.

The Act is a difficult and confusing piece of legislation. Under s. 2 of the Act preservation of Public Security is defined very widely and this definition is not exhaustive as is indicated by the word "includes" rather than "means".

The Act distinguishes between Public Security Measures under part II and Special Public Security Measures under par III. The president can bring either part into operation by a gazette notice, the effect of which is to confer upon him power to make regulations for the purposes specified in s. 4(2). These powers are very extensive and include detention

and compulsory movement of the person.

Under s. 3 the president may bring the operation of the Act into effect

> "if it appears to him that it is necessary for the preservation of Public Security to do so."[8]

If part II is brought into operation, then his powers are more restricted. Regulations made under this part are invalid if inconsistent with the constitution or any other written law[9] except if made when Kenya is at war or if they apply to the parts of Kenya where s. 127 of the constitution applies.[10]

s. 4(2) provides a common list of purposes for which regulations can be made under either part II or III. Although s. 3(3) empowers the president to make regulations for any of the purposes specified in s. 4(2) when part II is in operation, nevertheless the president cannot actually do so. For example, he cannot under part II make regulations for pruposes specified in s. 4(2) (1) which relates to amending or suspending existing laws.[11] The president does not need parliamentary approval to bring part II into operation. This is obviously a very dangerous provision since it enables the president to assume enormous powers including powers to tamper with the liberties of the individual. It is suggested that such power should not be assumed without the sanction of parliament. Under the present law the president can impose a bogus emergency and empower himself to detain his political or personal opponents when there isn't the slightest threat to public security.

Part III of the Act can be brought into operation by an order under s. 85 of the constitution. When this part is in operation, the president is empowered to make regulations for any or all of the purposes specified in s. 4(2). Although the section is far reaching, nevertheless s. 4(2)(m) empowers him to make rules for any other matter if "it is necessary in the interests of the public security to do so."

Regulations made under this part are valid even if inconsistent with any other law[12] (including the National Assembly Powers and Privileges Act) and under s. 83 of the constitution, substantial derogations from some of the fundamental rights are allowed. However this part must be approved by parliament within 28 days after the order is made.[13] If approved it virtually remains in force indefinitely.[14] There are three ways by which the order can cease to have effect.

The president may revoke it at any time.[15] Alternatively, parliament may revoke it by a resolution of the Assembly supported by the majority of all the members. It is interesting to note that to approve the order, only a bare majority is necessary whereas revocation requires the majority of <u>all</u> the members. Obviously the government can always bulldoze enough M.P.'S to support the order especially since Kenya has only one party and through its device of patronage. It would need a brave M.P. to propose the revocation of the order. The threat of detention looms over all the M.P.'s and in any event, it would be unlikely to get the high number of M.P.'s necessary for revocation.

Finally, the order automatically ceases to have effect seven days after a new president has been sworn in.

The Act was swiftly brought into operation after its enactment. Part II was brought into operation on 20th July, 1966 in so far as it relates to matters specified under s.4(2)(a) and (b).[16] By legal Notice 212 of 1966, regulations[17] were made pursuant to powers conferred by s. 4 of the Act and by L. N. no 263 of 1966, part II of the Act was brought into operation generally. No sooner did the act come into operation than the government embarked on a campaign to harass leaders and members of the K.P.U.[18] This pattern of using the act to harass government opponents, evidenced so soon after its enactment, has proved to be the main purpose of the act, rather than the professed aim of preserving Public Security.

B. DETENTION OF MEMBERS OF PARLIAMENT

It has already been noted in chapter 2 that members have absolute freedom of speech for matters spoken in the House and no criminal or civil proceedings can be instituted in respect of such words. In view of the wide scope of the preservation of Public Security Act, the issue to be examined is whether a member of parliament can be detained as a result of matters spoken in parliament.

This issue is subject to great controversy and

in one instance even the Speaker himself did not know the the correct position.[19] The immunity of M.P.'s is provided for under the National Assembly (Powers and Privileges) Act, which is an ordinary Act of parliament. s. 6 of the Act gives them immunity from any civil or criminal proceedings for words spoken in parliament or its committees. The problem posed by this section is whether detention is a civil or criminal proceeding, so that M.P.'s are immune from matters spoken in parliament. It is submitted that detention is neither a civil, nor a criminal proceeding and as such members are not protected by the Act from detention. Unless there is therefore some other law to protect the members from dtention, then such members are liable to detention since the Act does not address itself to detention. It is silent on the matters.

s.7(3) of the Preservation of Public Security Act provides that if nay law is inconsistent with subsidiary legilation made pursuant to that Act, then such law is overriden by such subsidiary legislation. It follows therefore that even if there was any law that granted M.P.'s immunity from detention, then such law would be overriden and as such, M.P.'s would not be immune from dtention. The legal position is therefore that M.P.'s, like other citizens can be detained under the Preservation of Public Security Act.

The problem posed here has also arisen with respect to emergency legislation in other parts of the commonwealth. Thus in 1939, the committee of privileges of the U.K. parliament reported that there

was no breach of privilege. where a member was detained under Regulation 18B of the Defence (General) Regulations, 1939 made under the Emergency Powers Acts of 1939 and 1940.[20] In this case, no criminal charge was involved and the Home Secretary had power to certify that "he had reasonable cause to believe"[21] that a person had been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it was necessary to execise control over him. It should be noted that in this case, the detention had nothing to do with anything done or said in parliament and the privileges committee expressly said that were the M.P. detained for his activities in parliament, its decision would have been different.

It is strongly submitted that whereas an M.P. can be detained like anybody else, nevertheless, his privileged speech should not be used as a basis of such detention. This is the position under English law as indicated in the above case and this should be the correct law in Kenya. If M.P.'S were to be detained for what they say in parliament, then the institution of parliament which is the core of a democrative government would be killed. It is submitted that Parliament could not have intended to introduce such a substantive change of the law (virtually killing itself) without express words. In the absence of express words to the contrary, the correct interpretation of the law is that no M.P.

can be subjected to detention for his contribution to the debates in the House. If such contribution poses a threat to the state, then the House itself can restrain him. If the Standing Orders do not provide adequate powers to do so, then new ones can be made.

However the above view runs into practical difficulties. Under s.83(2)(a) of the contitution a detained person shall be furnished with detailed reasons for his detention. Unfortunately, such details are confidential and it is difficult for the public or even M.P.'s (other than those detained) to know them. As such the M.P.'s cannot raise the issue of privilege and the reasons for detention are left to rumours and speculation. An M.P. who is conscious of the privileges of the House would have to be content with the government assurance that the M.P. in question was not detained for what he said or did in parliament and cannot make any further inquiries as to the cause of detention.[22] Gicheru's view that refusal to furnish the details is the "inevitable right of the government" is wrong. This kind of view has led the government to act in a very high handed and cavalier manner. In fact an incorrect statement that the M.P. in question was not detained for his contribution in the House when in fact that was the reason would amount to contempt of the House since this would mislead the House and ofcourse the government has no right to do this.

Another issue that arise in connection with

detention is the members' immunity from arrest. This issue arise out of sheer ignorance of the Law. Under s.4 of the National Assembly (Powers and Privileges) Act, the immunity from arrest granted to M.P.'s is only in respect of a civil debt as explained in Chapter 2. This problem arise because in all cases where Kenyan M.P.'s have been detained, this has obviously been preceded by an arrest, sometimes within the precincts of the House itself. This is illustrated below where individual cases of detained MP.'s are examined.

DETENTION OF JOHN KEEN (M.L.A.)

The first case in which an "M.P." was detained arose in May 1967 when Mr. John Keen, who was then a member of the East African Central Legislative Assembly was detained. There were no reasons given to the public for his detention but it was widely believed that he was being detained for his criticism in the C.L.A. of the failure of East African governments to bring about a federation.[23] Although the vice president denied that this was the reason,[24] it was very clear that he was obviously misleading the House and from the question of M.P.'s, nobody believed Mr. Moi's statement. This is a glaring example of the government hiding under the cloak of "being unable to state the reasons in the interests of pubblic security" to mislead the House. The Speaker assured the anxious members that arrest and detention are prohibited by the National Assembly

(Powers and Privileges) Act in so far as it relates to anything said by the members of the House (Emphasis mine)[25]

Following this debate, it was pointed in the daily press that members were not immune from detention as s.7(3) of the Preservation of Public Security Act overrode the Powers and Privileges Act.[26] In view of this opinion, the matter was raised in parliament and the speaker promised the matter would be clarified in the near future. However, the matter was not clarified till 20th November when the notion for the extention of the Public Security Order was being debated.[27] The Vice President and Minister for for Home Affairs stated that the Privileges Act does not protect M.P.'s from detention but he added that

> "I would like to give assurance that the government recognises the principle that no member of parliament may be detained on account of anything said by him. However, the government expects members will behave responsibly... they must not be careless and irresponsible."[28]

In a subsequent communication from the chair, the speaker reiterated the government assurance and explained it is not law. However he promised the government (on behalf of the members) that "they (members) will be careful not to abuse the privilege of speech they have in the House."

DETENTION OF K.P.U. M.P.'S 1969

Although a number of K.P.U supporters had been detained as early as 1966, no M.P. suffered the same fate until 1969, when the K.P.U. M.P.'s were detained en masse and blamed for the tragic incident that preceded their detention. On 25th October, 1969, a mob, allegedly of K.P.U. supporters threatened the life of the President. The security forces opened fire and a number of people lost their lives.[30] The government reacted very swiftly and on 28th October, 1969 all the K.P.U. M.P.'s were in detention. Their leader and his deputy were put under house arrest.[31] The KANU MP.'s blamed the K.P.U. members for the incident and in an emotional debate,[32] the leader of government business had the audacity to say

> "I have always said that K.P.U. is not an ordinary poltical party, it is a subversive political party backed by foreign powers."[33]

As a result of all these developments, K.P.U. was banned on 30th October, 1969.[34] Despite the blame levelled against the K.P.U. M.P.'s by the KANU government, the allegations were never proved. It is quite possible that the K.P.U. members were detained for what they did both within parliament and without. Immediately after the ban, parliament adjourned sine die and members began campaigning for the general elections. Since K.P.U. had been banned and its M.P.'s detained, it is obvious one of the intention of the government in taking

all these measures was silence all K.A.N.U. opponents before the general elections.

THE CASE OF SERONEY AND SHIKULU

Perhaps the most notorious detention of Members of Parliament occured when on 15th October, 1975, the Deputy Speaker (Mr. Seroney) and an M.P., Mr. Shikuku were picked from parliament and subsequently detained. The circumstances surrounding this detention are rather interesting.[35] The House was debating a motion recommending action against a nominated M.P. who in a public meeting had labelled a Parliamentary Select Committee investigating the disappearance and subsequent murder of J.M. Kariuki a "bunch of rogues." In his contribution, Mr. Shikuku said,

> "..... anyone who tries to lower the dignity of parliament is trying to kill parliament the way K.A.N.U. has been killed (emphasis mine)."[36]

An M.P. demanded substantiation but the Deputy Speaker (Mr. Seroney) ruled that

> "there is no need to substantiate the obvious"[37] (emphasis mine)

The Deputy Speaker maintained that

> "I have already made my ruling and if you wish to oppose it, you may do so by bringing a substantive motion for that purpose but not through any other way."[38]

After this ruling, the leader of government business led a group of M.P.'s who walked out in protest.

This matter generated a lot of heat both inside and outside the parliament. The Nandi branch of KANU purported to expel Seroney from the party and requested KANU headquarters to ratify the expulsion. The then KANU's assistant Organising Secretary Mr. Gachago (an M.P.) promised to take disciplinary measures against the M.P.'s who had said KANU was dead. When parliament convened on Wednesday, 15th October, 1975, Mr. Seroney demanded to know from the Speaker, the privileges he had as a deputy speaker, to reply, the Speaker said

> "The protection you have as deputy speaker is that once you make a ruling, it can only be challenged through a substantive motion ..... However, your protection is under the Powers and Privileges Act."[39]

On the same day, Mr. Anyona sought to know what privileges and immunity they have or whether they speak at their own peril. In a rather non committal attitude, the speaker said it was all in the books.[40] Another M.P., Miss Mutai sought an assurance from the Chair that the two M.P.'s would not be arrested for their remarks in parliament. In substantiation she alleged there were many policemen outside the chamber who were waiting to arrest the two MP.'s. In a rather cowardly and timorous action, the Speaker refused to make a ruling on the flimsy ground that he could not rule on a matter that has not been proved.[41]

At 6.30 p.m. that day, both Seroney and Shikuku

were arrested inside Parliament buildings and subsequently detained Perhaps the attitude of the Speaker is understandable since as the Seroney case has shown, the speaker can even be detained for ruling he makes in parliament. This is a very undemocratic law since not only the members are threatened, but also the speaker who symbolises the dignity of the House. The effect of the threat of detention is therefore to sweep away the privilege of speech.

THE CASE OF ANYONA

Like his colleagues, George Anyona, the fiery M.P. for Kitutu East was picked from Parliament Buildings and detained on 4th May, 1977. The circumstances surrounding his detention left no doubt that he was detained for his contribution in the House.[42] No reasons were given (to public) for his detention other than that he had been detained in the interests of Public Security!

On 21st April, while contributing to a debate, Anyona alleged that Mr. Bruce Mckenzie had worked towards the downfall of East African Airways. The Attorney General vigorously defended Mckenzie and Anyona was suspended from the chamber for failing to substantiate this allegation.

On 22nd April, Anyona alleged that Mckenzie, Njonjo(A.G.) Power and Communications Minister Omollo-Okello and the British Ambassador to Kenya Sir Stanley Fingland had been pressurised by the British government to cancel the tnder awarded to

a Canadian firm for certain railway contrcts and instead awarded it to a British firm which had failed to win the tender. He supported his allegation with documentary evidence. He thereupon gave notice of a Private Member's motion to set up a select committee to look into the matter. The motion was scheduled for debate on 6th May, 1977. Anyona was detained on 4th May, 1977. On the day the motion was to be debated, parliament was adjourned for 5 weeks!

It was widely thought he was detained because of the pursuit of the rail matter and before the motion could be debated On the day following Anyona's detention a nominated M.P., Bishop Lawi Imathiu vividly expressed the anxiety of the M.P.'s when he challenged the government through the Chair to explain to the public why Anyona was detained saying that if that was done,

> "It would seem that the arrest was precipitated by what he said to parliament."[43]

The government did not ofcourse bother to respond to the challenge. The government continued to act with impunity and arrogance. This attitude was well displayed by Mr. Njonjo on 6th May, 1977 (immediately after Anyona's detention) when he was contributing to the adjournment motion He expressed the wish to have the Privileges Act repealed due to what he termed

> "misuse of the Act by certain M.P.'s who say things in parliament which they cannot substantiate and are afraid to say outside parliament. If the Act is repealed, newspapers would publish such matters at their own risk."44

This unfortunate remark by the A G need not have arisen. From the way the government has handled its critics inside parliament, there is little doubt that few, if any, M.P.'s would dare say the things Njonjo had in mind. In any case there is no need to repeal the act since the government has always disregarded it whenever it suits its purposes Ofcourse if affords some little protection to M.P.'s but the government can always apply indirect means to defeat this protection.

From the above survey, it is manifestly clear that there is little parliamentary immunity in Kenya. Thus a KANU Official could with impunity threaten to punish the Deputy Speaker for a ruling he made on the Chair. This has made the position of the Speaker himself rather precarious. He too can be detained. It is therefore no wonder that the Speaker has failed to assert the rights of the members for fear of the government But since he has sworn to uphold the dignity of the House then he must do so even at the risk of the displeasure of the government He has tended to be rather timorous even where the dignity of the Chair itself is abused as in the Seroney case Even if he does not have powers to protect M.P.'s from detention, a ruling from the chair pointing the inappropriateness

of such conduct is likely to produce some effect.

In addition to the above direct threats to the privileges of the House, nevertheless the government uses other subtle methods to undermine the privileges of the House.

C. OTHER FACTORS ERODING PRIVILEGES

Although the factors considered here operate indirectly, nevertheless they have a profound bearing on privileges of parliament.

Under the National Assembly (Powers and Privileges) Act, no M.P. can be prosecuted in a court of law for what he has said in parliament. The government has devised a way of going round this provision. This is best illustrated by the case of Mwithaga (former M.P. for Nakuru Town). This vocal M.P. was never a favourite of the government and when he ably served in the 1975 J.M. Probe committee, he gained greater displeasure from the government. Mwithaga was subsequently charged with assaulting his wife This charge was brough about 12 months after the alleged offence was committed In normal circumstances, such a domestic dispute is never taken to court. At the trial, which was widely suspected of being rigged, Mwithaga was not afforded adequate facilities to defend himself. As a result he was jailed by a magistrate who showed open bias against him.

Another critical M.P., Miss Chelagat Mutai was jailed by the same magistrate. She had been charged

with inciting people to damage property by uprooting sisal from an estate This case cas political because the "offence" was committed in the course of a political meeting she held with her constituents. The trial magistrate was not completely impartial and the trial was held by many to be a mere show trial.[45]

On another ocassion another M.P. (Mr Seroney) was charged with dubious offences and his colleagues requested the speaker to assure them that the charges (though not directly related to what the M.P. had said in the House) were not framed on account of his contribution to the House. The response of the Speaker was most disheartening. He said that

> "if Honourable members are afraid of those who expose themselves being chased outside for what they have said in this House, they should also advise those members to be all the more careful not to give an opening by breaking the law, if indeed the member has broken the law."[46]

Due to fear of these prosecutions, the members do not fully exercise their privileges and the speaker (who can also be similary treated) cannot guarantee his members that they will not be victimised for exercising their privileges. As a result parliament cannot exercise fully the few privileges that are left with it The sum total of all these pressures, whether direct or not is to considerably erode the privileges of parliament. Without its privileges, parliment is not very effective and with a weak parliament then the government has a free hand to run the country unchecked and ofcourse the tendency is to abuse its powers to the detriment of the citizens, hence the necessity of giving parliament adequate privileges to enable it to check the government among other functions.

CHAPTER 4

CONCLUSION

The establishment of the Kenya parliament followed the general pattern of the evolution of legistlatures in other British dependencies. These countries achieved their independence with Westiminister Model constitutions. Under this type of constitution, a central role was assigned to parliament. To meet this challenge, parliament was constitutionally equipped with the necessary powers and privileges.

Soon after independence, it became clear that although the parliament was constitutionally equipped with the requisite powers and privileges, nevertheless, the political circumstances were not conducive to the exercise of such privileges. This is shown by the fact that in most ex-colonies, the institution of parliament has either been abolished or so weakened so as to amount to little more than an executive appendage.[1]

At Independence, Kenya inherited an active and rigorous parliament. The colonial legislature enjoyed the privileges normally granted to parliament. Although the powers of the colonial legislature were limited in scope, nevertheless the members enjoyed full parliamentary privileges. Thus rigorous criticisms were levelled against the colonial government, particulary when Africans joined it. The conduct of the Emergency was a subject of great clashes between the government and the members

of the legislative council. It goes to the credit of the colonial government that no attempts were made to interfere with the privileges of the members. Perhaps this is due to the background of the members of the government and the White dominated legislative council, all of whom were nurtured in the British tradition which respects the institution of parliament and its privileges

Unlike the majority of other newly independent countries, Kenya maintained a relatively free parliament whose privileges were not interfered with. However, this situation did not continue for long due to the changing political situation. When an opposition party was formed in 1966, the tolerance of the governement was very much tried and most members of parliament felt that the stability of the Nation was at stake. It was a time of tension. It is therefore not surprising that the notorious Preservation of Public Security Act (under which members of parliament are now detained for their conduct in the House) was passed without much opposition except by the K.P.U. MP.'s. This is the act which had the effect of eroding the privileges of the House, particulary the privilege of freedom of speech and freedom from arrest Kenya has had a relatively free parliament and it is only during times of crisis that the privileges of the House have been tampered with. After the K.P.U. was banned, the KANU M.P.'s were quite active criticising the government although indirect

pressures were used to limit their powers and privileges,[2] After the 1974 elections, a strong parliament emerged which promised to exercise its privileges without fear of the government The government viewed this strong parliament with apprehension and it was not long before the governemtn embarked on a campaign to reduce the privileges of the House With the murder of J.M. Kariuki, (a popular government critic) and the subsequent political turmoil, a serious struggle emerged between Parliament and the government. Ofcourse parliament lost after its privileges had been completely eroded.[3]

Various factors account for the erosion of the powers and privileges of parliament. In the first place, the strong personality and charisma of president Kenyatta inspired respect and awe among the Members of Parliament. As a result, very few members were prepared to challenge his government even if the government took a view that was not consonant with the interets of Parliament. As a result very few M.P.'s were prepared to challenge the government even after it had breached the privileges of the House. This is vividly illustrated by the reaction of the House following the detention of the Deputy Speaker and another M.P. (Mr. Shikuku) on 15th October, 1975. Parliament passed a motion re-affirming their loyalty to the President Kenyatta and his government! This is indeed a shocking reaction to the abuse of parliamentary

privilege by the government.

The members of parliament themselves are to blame for failure to assert their privileges. They have been rather short sighted and selfish in passing legislation. This attitude is manifested when the 1966 constitutional Amendment was passed. This amendment gave the government wide powers to tamper with the fundamental rights of the citizens. It is the legislation under which members of Parliament and others are detained. At this time, the "stability of the country" was "threatened by the K.P.U." and tensions were high between the two parties. Most members thought and intended that this law was to be used against the K.P.U.[4] Even those M.P.'s who were aware of the double edged nature of the Bill supported it. Thus although Mr Shikuku made many material objections to the Bill, he supported it. He said,

> "you never know when something you do here might bounce on you later on .... some of us might be in detention tomorrow and would like to know how long that will be for."[5]

It is interesting to note that this Bill was introduced as a result of a resolution of the KANU parliamentary group,[6] presumably to eradicate the K.P.U. menace.

At other times, the M.P.'s have been over zealous in adopting the wishes of the president. Thus in 1974, when in a public rally the president stated that Swahili should be the official language, parliament immediately started conducting its

debates in Swahili although the constitution stipulated that such debates were to be conducted in English.[7] Although this move was long overdue,[8] the hasty and chaotic manner in which it was implemented is attributable to the president's public wish.

Our M.P.'s have also been coerced into passing legislations that they don't like When in another public rally the president and his audience demanded the death penalty for robbery parliament refused this legilation. On the third attempt after a warning to the M.P.'s, the parliament reluctantly passed the legislation.[9] These indirect pressures have had the effect of curbing the privilege of freedom of speech by M.P.'S.

The government has also extensively used the device of patronage to weaken parliament. Many M.P.'s are heads of staturoty bodies. These positions carry huge financial rewards and a critical member stands to lose such a position. Other ambitious M.P.'s who hope to be appointed ministers will rarely oppose the government no matter how innocuous the government move might be This lesson has not been lost to incumbent ministers When Muliro and John Keen (then Minister and assistant Minister, respectively) voted to adopt the J.M. report, they were immediately relieved of their posts by president Kenyatta.

In view of the above factors, it becomes very

difficult for members of parliament to exercise their theoretical privileges

At other times, the government has directly threatened and intimidated critical M.P.'s, ignoring whatever privileges are enjoyed by the M.P.'s Both Margaret Mutai and Mark Mwithaga were jailed on very dubious charges in order to get them off the political scene. Those members who fall out of favour with the government have been refused licences to hold meetings. In other case, detentions, have been resorted to. Even assasinations cannot be ruled out.[10]

It is therefore clear that whereas at independence the Kenya parliament posessed several privileges, such privileges have by now been eroded and consequently parliament has been subordinated to the government Parliament's ability to criticise government sponsored legislation is seriously curbed since whatever is said in parliament can always be used as a basis for detaining an M.P. This proves that there is no privelege of the important freedom of speech without which a parliament cannot perform its duties effectively.

To re-activate the Kenya parliament, various reforms are necessary in order to give it powers and privileges necessary for a strong and independent parliament.

The greatest limitation to the privileges of parliament in Kenya is ofcourse the Public Security

Act. It is therefore suggested that this act should be amended to provide that no member of parliament should be detained for the performance of his duties as an M.P. Such amendment should require the detailed grounds for detention to be laid before the house and the house shall have the capacity to determine whether or not such detention is contrary to the privileges of the House. If it is, (as it would be if he was detained for matters arising in parliament), then he must be released forthwith.[11] The discretion as to whether a person is a threat to the public security, now vested in the Minister, should be transferred to the parliament where an M.P. is concerned.

In order to increase the effectiveness of parliament it must be given the privilege of punishing offenders who are in breach of its privilege. The present situation is very unsatisfactory. Whereas parliament can investigate certain matters, it cannot implement its recommendations Thus although the select committee did a marvellous job in investigating the J.M. murder, it has no powers to act on the report and cannot compel the government to act on it. Parliament should be empowered to implement its recommendations and any person or body that interferes or refuses to co-operate with it should be held to be in breach of privilege.

At the moment, parliament has powers only to punish its members who are in breach of privilege,

It is suggested that such powers recommended above should cover even outsiders whose conduct may in the opinion of the House amount to a breach of privilege. If this were so, then any outsider who threatened to punish an M.P. for what he had said in the House would be held to be in breach of privilege and punished accordingly.[12]

The conduct of the speaker in matters pertaining to the Privileges of the House is rather unfortunate. As seen in Chapter 3, the present Speaker, unlike his predecessor has refrained from making rulings on this senstivé matter. The speaker must protect whatever privileges the house still posesses. He has a duty to preserve the independence of the House and he must do so without fear or favour With the erosion of the powers and privileges of the house, this duty cannot be over-emphasized. Perhaps the conduct of the speaker should be seen in the light of the fact that he too is not immune from detention. It is also noteworthy that the present speaker was nominated by the president at the same time the President announced his cabinet. But this is no excuse for the speaker to behave like a civil servant to the detriment of the Privileges of the House.

In order to have a free and independent parliament, the process of election must also be fair. At present there is a tendency by the government to support some candidates and deal harshly with their

opponents.[13] Such government sponsored candidate cannot maintain the privileges of the house against government encroachment.

In order to maintain the privileges of the House, the members themselves have a duty to defend their privileges vigorously when such privileges are threatened by the government. They must realise that even the British parliament obtained its privileges after bitter struggles with the Monarchy.

Both the government and parliament must cooperate in order to maintain a free and independent parliament. In this connection the relaxed political atmosphere and the openness of the new president[14] must be exploited by parliament to re-assert its privileges which have been seriously eroded by the government.

FOOTNOTES

INTRODUCTION

1. For a general discussion of the Westminister model, see S. A. de SMITH, The new Commonwealth and its Comstitutions, (London, 1964) and K. ROBERTS-WRAY, Commonwealth and Colonial Law, (London, 1966)
2. E. MAY, Treatise on the Law, Privilege, Proceedings and Usage of Parliament, (18th Edition).
   It is clear May had in mind the British Parliament but the definition covers our parliament which has borrowed heavily from the British Parliament.
3. O. HOOD PHILLIPS, Constitutional and Administrative Law, (third Edition, London, Sweet and Maxwell, 1962) P. 170.
4. Humprey Slade's address on "The preservation of parliamentary powers and immunities with particular reference to the Newer Parliaments of the Commonwealth" at the Commonwealth Speakers Conference at Ottawa, 1969.
5. The Lord Chancellor, on behalf of the Crown answers that the freedoms are most readily granted.
6. HOLDSWORTH, History of the English Law, Vol. VI, P. 92.
7. HOOD PHILLIPS, (Supra) at P. 171.
8. In 1704, the House of Lords proposed by resolution that "neither House of Parliament hath any power, by any vote, or declaration to create to themselves any new privilege that is not warranted by known Laws and customs of the parliament," This was

assented to by the House of Commons and it binds both Houses. See Journals of the House of Commons (1702-1704) P. 555, 560.

9. s. 15 of the National Assembly (Powers and Privileges) Act provides that questions relating to the production of documents before the House or its committee are to be determined in accordance with the usage and practice of the Commons House of the United Kingdom.

CHAPTER 1

1. For a detailed historical account, see OLIVER AND MATHEW (Eds), History of East Africa, (oxford, Clarendon Press, 1963), Vol. I Charter 10, pp. 369-74.
2. Article 45 of the East Africa Order in Concil, 1897.
3. This interpretation has been given by the Privy Council in the case of CROFT v. DUMFY [1933] A.C. 156.
4. For a general account of constitutional development in the British dependencies, see M. WIGHT, British Colonial Constitutions, 1947, (Oxford, Clarendon Press, 1952), K. ROBERTS-WRAY, Commonwealth and Colonial Law, (London, Stevens and Sons, 1966); M. WIGHT, The Development of the Legislative Council, 1906-1945, (London, Faber and Faber, 1946).
5. ROBERT MARTIN, "Le gislation and Economics Development in Commonwealth Africa," Public Law, 1977 P. 48 at P. 50
6. CAMPBELL v. HALL, (1774) 1 cowp. 204.
7. R. v. EARL OF CREWE; ex parte sekgome, (1910) 2 K.B. 576.
8. In 1905, the designation of the Commissioner was changed to Governor.
9. Up to 1905, the Commissioner exercised both executive and legislative powers. The 1905 Order in Council established legislative and executive councils to advice him on the exercise of legislative and executive powers respectively.

10. No. 22 of 1919.

11. DILLEY, British Policy in Kenya, (New York, Thmas Nelson and Sons, 1937) PP. 49-52.

12. The first Asian menmber of the legislative Council, Jeevanjee had been nominated in 1909.

13. The paper was called Indians in Kenya, Commad paper, 1922.

14. This was under the Additional Royal Instructions, 1925.

15, The 1923 paper stated the policy of nominating a missionary to the Council to Act on African matters, "until the time comes when natives are fitted for direct representation."

16. WIGHT, Ibid. P. 17.

17. fn.15 (supra)

18. See for example, Standing Orders of the Kenya Legislative Council, 1957, S.O.I.

19. See footnote 3 (above).

20. Legislative Council Debates 1958, Vol. 48-47, Col. 46.

21. ROBERT MARTIN, Ibid. p.58.

CHAPTER 2

1. Constitution of Kenya Act, (~~59~~ 57, 1969), s. 30.
2. s. 56 Op. Cit.
3. The Kenya Independence Order in Council, 1963 (L.N. 718 of 1963), s. 4. This provision made it very clear that the existing laws were to continue in force as if they had been made in pursuance of the above Order in Council (which contained the Independence constitution as schedule 2) but they had to be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Order in Council.
4. Legislative Council Debates, 1952, V. 48, Col. 46.
5. s, 3 of the National Assembly (Powers and Privileges) Act, Cap. 6.
6. s. 4 Op. Cit.
7. ss. 6-8, Op. Cit.
8. Sections 9-15.
9. s. 23 and 24.
10. s. 27.
11. This matter is discussed in Chap. 4. (Infra).
12. However, as will be shown in Ch. 3, members have often been detained under the preservation of Public Security Act (Cap. 57) for matters arising within the House. The legality of such detention is subject to a lot of controversy.
13. National Assembly (Powers and Privileges), (Amendment) Act, No. 14 of 1966.

14. Legislative Council Debates, (Supra), Col. 47.

15. MAY, Parliamentary Practice, (Supra), P. 70.

16. The concept of parliamentary privilege in Kenya has its roots in the British House of Commons. In order to understand the scope of the privilege, it is therefore necessary to look at its evolution.

17. Parliamentary History of England, Vol. I, P. 862.

18. These cases are discussed in MAY, Op. Cit., P.71 ff.

19. This cas and the following cases are discussed in MAY, Op. Cit., P. 71.

20. See footnote 18.

21. (1629) 3 St. Tr. 294.

22. Kenya National Assembly, Official Report, 1969, Vol. XVIII, Col. 17.

23. DILLON v. BALFOUR, 20 L.R. Ir. 60.
In this Irish case, the court held that it had no jurisdiction to entertain a cause of action based on words spoken in the House of Commons though the words were actionable.

24. Standing Orders of the National Assembly, 1969, S.O. 82-93.

25, See National Assembly Official Report, (1973) Vol.XXX; member suspended for failing to substantiate the allegation that ministers' wives have secured employment by virtue of their husband's positions (Col. 87-91); member ruled out of order for repetitive and absolutely irrelevant speech (Col. 1337); member forced to withdraw his remark and apologise for using offensive language.

Also Official Report, 1970, Vol. 19, for using unparliamentary Language - bastard (Col. 1149); Shifta (Col. 1523). Shut up (Col. 1530) and selfish (Col. 649).

26. S.O. 88. This is deemed to be disorderly conduct.

27. S.O. 93.

28. This issue has not yet arisen in Kenya.

29. 4 Mass.1.

30. Per Parsons C.J., Ibid,.

31. H.C. 101 p.v. 1938-39.

32. The reference was under s. 4 of the Judicial Committee Act, 1883. See Re parliamentary Privileges Act, (1958) A.C. 331.

33. For a scholary analysis of the case, see a note by E. C. S. WADE, 1958 C.L.J. p. 134.

34. Supra.

35. 12 Q.B.D. 276.

36. MAY, Supra, P.87.

37. Civil Procedure Act (Cap 21), Sections 40-43.

38. Civil Procedure Act (Supra), Order XXI, rule 35. See also rules 32-35.

39. Hatsel, Precedents of Proceedings in the House of Commons, Vol. I, P. 1-2.

40. C. 13.

41. See footnote 32.

42. (1847) 1.Exch. 435.

43. s. 35 (1) (b) of the constitution,.

44. HOOD PHILLIPS, Constitutional and Administrative Law, 3rd Edition, P. 184.

45. (1935) I.K.B. 594.

46. (1884) 12 Q.B.D. 271

47. Supra.

48. See ss. 6-8.

49. S.O. 52.

50. S.O. 29.

51. National Assembly (Powers and Privileges) Act; sections 9-15.

52. s. 12 ibid.

53. s. 13 ibid.

CHAPTER 3

1. Cap. 57, Laws of Kenya. The Act is so wide that it is capable of being applied in situation where no emergency can be said to exist. This is the legislation under which many people (including members of parliament) have been detained.

2. The Amendment of the Act was provided for under the Constitution of Kenya Amendment (No. 3) of 1966, Act No. 18 of 1966. The operation of the Act is cosely tied to the constitution.

3. s. 10 of the Kenya Independence Order in Council, S.I. 1968/1963.

4. s. 127 of the Constitution gives the president wide powers to ensure effective government in the North Eastern Province.

5. During the conference, KANU was "re-organised" and the post of Party Deputy president (held by Odinga) was abolished and replaced by elected provincial vice presidents. Odinga was not elected

in any of the posts.

6. Constitution of Kenya (Amendment) Act, No. 17 of 1966, now s. 40 of the constitution.

7. See particulary Mboya's contribution to the Amendment Bill, National Assembly, Official Report, 1966 Vol. 9, part I, Col. 283 ff.

8. The Act does not specify what criteria the president uses to be satisfied that it is necessary in the interests of Public Security to bring it into operation. Quare, whether the criteria is subjective.

9. s. 3(3)(i) and s. 3(3)(ii) of the preservation of Public Security Act.

10. s. 3(4).

11. Under s. 3(3)(ii) regulation under this part cannot amend or suspend existing laws (except when Kenya is at war or s. 127 of the constitution is in operation). He cannot therefore suspend the national Assembly (powers and Privileges) Act under this provision.

12. s. 7(3).

13. s. 85 (2)(a) of the constitution. However,, in reckoning the period of 28 days, no account shall be taken of any time during which parliament is dissolved, per s. 85(2)(b) of the constitution.

14. The requirement that parliament must renew the order every 8 months was deleted by Act No. 45 of 1968. At Indepencence, the period was 2 months.

15. s. 85 (3) of the constitution.

16. L.N. 211 of 1966. The matters specified include detention and restriction of persons.

17. Detained and Restricted Persons Regulations, published in the Kenya Gazette on 25th July, 1966.

18. For the detentions of K.P.U leaders and members, see Daily Nation of 5th August, 1966.

19. This was in the case of the detention of John Keen, then a member of the Central Legislative Assembly. It is examined below.

20. It is interesting to note that the emergency Powers Bill, 1939 passed through the three readings in the House of Commons in less than one hour!

21. These words (like the Kenyan ones) are wide and there is no criteria to determine what factors are to enable the Home Secretary to "have reasonable cause to believe" that a person was prejudicing public safety.

22. NDORIA GICHERU, parliamentary practice in Kenya (Nairobi) P. 151.

23. See National Assembly, Official Report 1967, Vol.12 Cols. 258-261. Despite denial by the vice-president, it appears that the member was detained in connection with his debates in the C.L.A. This is borne out by the fact that the government publicly took great exception to his criticism and the K.A.N.U parliamentary group which met on 23rd May, 1966 discussed the matter and K.A.N.U Headquarters issued a statement to the the same effect.

24. Col. 293, Op. Cit.

25. Col. 261, Op. Cit.

26. See E.A. Standard, 2nd June, 1967. The letter was written by Mr. Patric McAuslan, a foreign legal expert.

27. National Assembly Official Report, 1967-68, Vol. 13, part 2 Col. 211 ff.

28. Col. 2159, Ibid.

29. Col. 2162, Ibid.

30. See Sunday Nation, 28/10/69. +The detained M.P's

+31. were: Luke Obok (Alego); Okuto Bala (Nyando); Odero Sar (Ugenya); Wesonga Sijenyo (Gem) and Ondiek Chilo (Nyakach). The K.P.U leader Odinga (Bondo) and his deputy J. M. Nthula (Iveti South) were put under house arrest and subsequently detained.

32. National Assembly Official Report, 1969, Vol. XVIII, Col. 1163-1189.

33. Col. 1188, Op. Cit.

34. The ban was under s. 12 of the Societies Act.

35. For a full account of the incident, see Weekly Review, October, 20, 1975.

36. Baraza La Taifa, Taarifa Rasmi 1975 Vol. XL, Col. 293.

37. Ibid.

38. Ibid.

39

44. Ibid.

45. The same criticism is made by Robert Martin, (Supra), at P. 65.

46. National Assembly Official Report, 1969, Vol. XVIII, Cols. 21-22.

CHAPTER 4

1. See generally ROBERT MARTIN, "Legislatures and Economic development in Africa", Public Law, 1977 P. 48 at 58.

2. These pressures are discussed below.

3. ROBERT MARTIN, Op. Cit. 65. See also chapter 3.

4. See the debate on the constitution of Kenya (Amendment) (No. 3) Bill in National Assembly Official report, Vol. I, part I, 1966 Col. 273 ff.

5. Col. 302, Op. Cit.

6. See above debate.

7. s. 53 of the constitution (which provided that English should be the language of the assembly) was amended by Act. No. 10 of 1974 to provide that Swahili was to be the language of the House. This amendment was given retrospective operation to cover the period when debates were conducted illegally. This ill conceived amendment compounded confusion and a further amendment to s. 53 was enacted in 1975. This amendment requires debates be conducted in Swahili but allows Bills and other legislative documents to be drafted in English. Paradoxically s. 34 of the constitution

which requires that candidates for election to the National Assembly be literate in English has not been amended.

8. A resolution to the effect that Swahili be made the National Language had been passed by KANU National governing council as early as 1969. See resolution No. 4 of 1969 of the KANU Governing Council held at Mombasa on 28th August, 1969

9. Penal code (Amendment) Act No. I of 1973 ss. 296 and 297 were amended to provide for a mandatory death sentence for armed robbery.

10. The select committee investigating the death of J. M. implicated highly placed government officials.

11. In general this act as it stands at present should be repealed since a citizen can be detained for no reason at all, or vague ones. It is a threat to the process of democracy.

12. On 8th December, 1976, Anyona (then M.P. for Kitutu East) attacked the coast provincial commissioner and alleged that the P.C. had misused government property. Thereafter the P.C., allegedly armed with a gun, came to the precincts of parliament to look for him. The matter was brought to the attention of the deputy speaker. He recommended that the matter should be investigated by the privileges committee. To date nothing has been hear of the matter.

13. Koigi Wa Wamwere (Wawere) was detained in 1975. He was given very vague reasons for his detention. He believed that he was detaied for challenging the powerful government supported M.P. for Nakuru North, Kihika Kimani in the 1974 general elections. See his own account in VIVA, January, and February-March issues, 1979.

14. On 23rd August President Kenyatta died and the then Vice-president, Mr. Daniel Arap Moi was subsequently elected president. On 12th December, 1978, he freed all the 26 detainees who had languished in detention for many years.

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