

**THE BREAKDOWN OF INDEPENDENCE CONSTITUTIONS AND CONSTITUTIONAL  
GOVERNMENTS IN COMMONWEALTH AFRICA**

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**-By-**

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## DEDICATION

**To the Young Generation of Leaders who cherish constitutionalism and Democracy under the Rule of Law.**

It is the greatest virtue to view the greatest single obstacle to constitutional government as the absence of a firm and stable basis for political and economic order. The world has been torn by political and economic chaos since the end of the Second World War. The independence movements have not been regarded as mere political and power struggles, but as a struggle for order.

The political class, which has the old generation of leaders that have been responsible for the independence, has discarded the independence constitution as "former" institutions to be altered or suspended in a "parliamentary" form. The aim, they argue, is to end the independence struggle and to bring the "former" institutions and idea of government.

The military class on the other hand is bent on retrograde and unconstitutional moves to effect alternative emergency to political leaders under the pretext that emergency politicians have failed to exercise executive operations which would allow the generation of political leaders to give way to another generation.

## PREFACE

Most of the Commonwealth African Countries have been independent for at least a decade now. Yet not a single of these countries has the independence constitution been maintained. It has either been altered beyond recognition not followed at all or abolished altogether. The aim of this paper is to investigate the root cause or causes of the failure of constitutional governments and constitutionalism in the former British territories in Africa which achieved independence in the late 1950's and early 1960's.

Even though this problem has been the centre of interest and controversy in both academic and political discourses, no systematic study has been done on it. By identifying the genesis of the problem, it is hoped to suggest possible ways as to how best constitutional governments can be restored and preserved in Commonwealth Africa.

In the present writer's view the greatest single obstacle to constitutional government in Commonwealth Africa is power struggle among the political and military elite. The result has been that political expediency has overridden democratic institutions and practice established by the independence constitutions. The independence constitutions have not been regarded as umpires above political and power struggle, but as a weapon in that struggle.

The political elite, mainly from the old generation of leaders that wrenched independence from the colonialists, has discarded the independence constitutions as "alien" institutions to be altered or suspended in a bid to "Africanize" them. The aim, they argue, is to make the independence constitution responsive to the "African" aspirations and idea of government.

The military elite on the other hand resort to extra-legal and unconstitutional means to effect alternative ascendancy to political leadership under the pretext that careerist politicians have failed to observe constitutional conventions which could allow one generation of political leaders to give way another generation.

In the absence of any respect for constitutional traditions, the military elite argue that the coup d'etat or secession is the only method by which another generation can assume leadership.

This paper seeks to diagnose the malady of unconstitutional practice in the Commonwealth Africa and prescribe a remedial dosage for the future practice of constitutionalism. The present writer's view is that respect for constitutionalism will be possible when the various countries emerge with constitutions suited to their needs and circumstances. The Westminster Model Constitution evolved over centuries in response to the changing social, political and economic conditions of the British Society. It therefore embodies the British Philosophical and religious convictions which are not necessarily present in Commonwealth Africa.

The above views, however, are not to be construed as an advocacy for the wholesale rejection of the Westminster Model Constitution. The present writer will argue that a modified model of the Westminster type constitution is urgently needed. Such a modified model should have regard to the political, economic and social priorities in Commonwealth Africa. The modified constitution should be responsive to the needs of a developing and changing society. That constitution should provide for a constitutional succession to political leadership without the disruption of constitutional governments and political institutions, a phenomenon which has plagued independence governments in Commonwealth Africa during the last decade.

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Any judgements expressed in this paper are all mine and do not in any way reflect the views of the faculty of Law or the University of Nairobi.

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CONTENTS

|                                                                                                                     | Page |
|---------------------------------------------------------------------------------------------------------------------|------|
| Preface .....                                                                                                       | v    |
| Table of Cases .....                                                                                                | ix   |
| Abbreviations .....                                                                                                 | x    |
| Chapter One: The Concept of Constitutionalism and its place in<br>British Colonial Territories .....                | 1    |
| Chapter Two: The Value and Contents of Independence Constitutions<br>in Commonwealth Africa .....                   | 9    |
| Chapter Three: The Practice of Constitutionalism in The Emergent<br>States in Commonwealth Africa .....             | 13   |
| Chapter Four: The Breakdown of Independence Constitutions and<br>Constitutional governments in Commonwealth Africa. | 23   |
| Chapter Five: Conclusion; Prospects for Constitutionalism in<br>Commonwealth Africa .....                           | 32   |
| Footnotes: .....                                                                                                    | 36   |

TABLE OF CASES

|                                                          | Page   |
|----------------------------------------------------------|--------|
| Adams v. Adams .....                                     | 28     |
| Adegbenro v. Attorney General .....                      | 19     |
| Awoonor - Williams v. Gbedemah .....                     | 20, 21 |
| Bribery Commissioners v. Ramasinghe .....                | 13     |
| Chipango v. R. ....                                      | 17     |
| Commissioner of prisons v. Uganda, ex parte Matovu ..... | 27     |
| D.P.P.V. Obi .....                                       | 21     |
| Ibiagira v. Uganda .....                                 | 17     |
| Jackson v. Gowon .....                                   | 30     |
| John Joseph Akar v. The A.G. of Sierra Leone .....       | 16     |
| Lakanmi v. Attorney General (West) .....                 | 30     |
| Madhwa v. City Council of Nairobi .....                  | 19     |
| Madzimbamuto v. Hardmer - Burke .....                    | 28     |
| Marbury v. Madison .....                                 | 16, 20 |
| McEldawney v. Forde .....                                | 20     |
| Namwandu v. Uganda .....                                 | 20     |
| Ngwenya v. Deputy Prime Minister .....                   | 15     |
| Ooko v. The Republic .....                               | 18     |
| Ram Krishan v. Delhi .....                               | 17     |
| Sallah v. A.G. ....                                      | 29     |
| Singh v. Delhi .....                                     | 17     |
| The King v. The Earl of Crewe ex parte Sekgome .....     | 5      |
| The Lawless case .....                                   | 16     |
| The State v. Dosso .....                                 | 29     |
| Wallace Johnson v. R. ....                               | 6      |

ABBREVIATIONS

- A.C. - Appeal Cases.
- All. E.R. - All England Reports
- B.Y.B.I.L. - British Year Book of International Law
- E.A.I.S.R. - East African Institute for Social Research
- E.A.L.J. - East African Law Journal
- E.A.L.R. - East Africa Law Reports.
- I.C.L.Q. - International Comparative Law Quarterly
- K.B. - ~~King's~~ Bench
- K.P.U. - Kenya Peoples Union
- W.N.L.R. - West Nigeria Law Reports



## CHAPTER ONE

### THE CONCEPT OF CONSTITUTIONALISM AND ITS PLACE IN BRITISH COLONIAL TERRITORIES.

#### (a) What is the meaning of Constitutionalism?

By constitutionalism we mean the conduct of government and the exercise of state power limited according to certain established and enforceable rules. In other <sup>words</sup> ~~others~~, constitutionalism has to do with the degree to which the constitution itself functions as a real limitation on the way governmental powers are exercised.

The fundamental tenets of constitutionalism are -

- (a) That the constitution itself is the supreme law, i.e. the constitution is hierarchically superior to other legal norms;
  - (b) That the constitution being the grundnorm imposes some enforceable limits on the powers of the government;
  - (c) That there is some degree of entrenchment of the provisions of the constitution; and
  - (d) That there is separation of powers between the three main branches of government that is the Legislature, the executive and the judiciary. This broad division of powers was first promulgated by a French Legal Philosopher, Montesquieu in the 19th century as a reaction against absolute despotism of European monarchs. Constitutionalism is therefore the antithesis of arbitrar or dictatorial rule
- (2) According to Montesquieu, the theory of the separation of powers
- (i) That the powers and functions of any of the three branches of government should be exercised by that branch alone and by no other branch;
  - (ii) That one branch should not control or interfere with another branch in the exercise of its functions; and
  - (iii) That the same person should not form part of more than one of the three branches of the government.

On the doctrine of separation of powers in relation to the judicial function, Montesquieu has commented that there is no liberty yet if the power to judge is

not separated from the legislative and executive power.

The paramount purpose of the doctrine of the separation of powers is to limit and check the arbitrariness inherent in government. One commentator has said that 'It is this limiting of arbitrariness of the political power that is expressed in the concept of constitutionalism'<sup>3</sup> "The crucial test" says Professor Nwabueze, "is whether the government is limited by predetermined rules"<sup>4</sup> either entrenched in the constitution or through other established procedure.

The separation of functions between the legislature, the executive and the judiciary is of crucial importance because it provides ideally at least a machinery in which the three branches are independent of each other and exist to check and balance each other. But in practice a rigid separation of powers is rare except under the American constitution although under the Nixon administration, encroachment was not uncommon. The theory of the separation of powers is an expression of a general altitude. The only token towards the separation of powers is the independence of the judiciary in the Parliamentary system of government. Through the court procedure, the rule of precedent ensures the stability and predicability of the rules which is the core of constitutionalism. The establishment of judicial restraint to check arbitrariness on the part of the executive is the high-water mark of constitutionalism.

Constitutional guarantee of fundamental civil liberties is one of the most cherished aspects of constitutionalism. Fundamental human rights, usually called the Bill of Rights, are jealously safeguarded under the Constitution. The guarantee of civil liberties, presupposes a situation whereby individual civil liberties are enforceable by an independent tribunal.

The political theory of 'democracy', a government of the people for the people by the people according to Abraham Lincoln, together with fundamental human liberties are the linchpin of constitutionalism. A democratic government

is one that positively responds to public opinion of the electorate.<sup>5</sup> One of the most distinguished scholars of the constitutional law in the new Commonwealth has said:- stop

"Constitutionalism becomes a living reality to the extent that these rules curb arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for enjoyment of individual liberty. To be specific I am very willing to concede that constitutionalism is practised in a country where the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organise and to campaign in between as well as immediately before elections with a view to presenting themselves as an alternative government and where there are effective legal guarantees of basic civil liberties enforced by an independent judiciary, and I am not easily persuaded to identify constitutionalism in a country where any of these conditions is lacking"<sup>6</sup>

(b) The Place of Constitutionalism in the British Colonial Territories.

Having examined what constitutionalism is all about, we may now consider whether or not it had any functional meaning in the British Colonial territories. From the foregoing propositions and criteria for constitutionalism one will inevitably conclude that there was no constitutional order under colonial regime. The "lawlessness" of colonial governments was manifested in various forms which we shall now proceed to examine.

British imperial designs in the colonies were geared mainly to serving the economic interests of the mother country. A typical colonial territory was an appendage of the British economy<sup>7</sup> involving economic, political and cultural aspects. Frantz Fanon, an extreme critic of colonialism has observed that the colonies were created by the metropole for the metropole.<sup>8</sup>

In order effectively to serve the economic plunder of British imperialism the institutional structures of the colonial territories - the army, the police, the courts and the provincial administration were organised in complete disregard of the concept of constitutionalism, at least for the natives in order to provide for an efficient system of exploitation of wealth from the colonies to the metropolises. The European settlers, the administrators, the missionaries, and the judges were agents of the metropolitan economy within the context of international capitalism. Any notion of the separation of powers was therefore

a contradiction in terms. Representative institutions did not exist in any meaningful sense. Legislative councils were dominated by "officials" (persons holding office, ex-officio) and while there were some non-official members in the settler-dominated countries from the beginning, the legislative council never had more/<sup>than</sup> advisory powers until the dawn of independence.

One might argue that there was an element of the separation of powers in the colonial territories because the colonial governor had power to establish legislative councils, departmental and ministerial and a court system. But it is important to note that none of these could limit his real or reserved power of veto. The Governor could veto Bills passed by the legislative council and rule by decree. The Governor could suspend laws and assume wide powers which he could exercise with impunity by invoking Emergency Powers.<sup>9</sup> The Supremacy of the Governor remained unchallenged except perhaps by the Colonial Office in London until nearly the end of colonial rule in the respective territories. There was therefore no rigid separation of powers in the colonial territories.

Lack of separation of powers had an adverse effect on constitutionalism because the Governor was the executive, the legislature, and in essence the judiciary. This in effect meant that the executive could enact tyrannical laws and execute them in a tyrannical manner. The colonial rule was therefore the antithesis of constitutionalism. Ghai and McAuslan have this to say on colonial bureaucracy:-

"The Governor did not have to act in consultation with any local body; nor was he responsible to any local institution. The legislative and the executive functions were combined in him and there were few, if any<sup>10</sup> limitations imposed on him by the Secretary of State for the colonies to whom he was fully accountable"<sup>11</sup>

The colonial rule was non-liberal and undemocratic. The creation of an autocratic system of government meant that the colonised peoples had no say in the governments in colonial territories. In East as well as West Africa, the imperatives of the British Empire as perceived by the colonial rulers required

authoritarian governments in order to maintain the economic and political control. To allow native participation in the running of colonial governments would have been in direct contradiction with the aims of British imperialism. The position was that whatever constitutional or democratic institutions existed in Britain, their components were excised during their exportation to the colonies <sup>12</sup>

The liberties of the individual were not jealously queried in the colonial territories. The Bill of Rights which was enforceable in England since 1688 was not so treated in the British colonial territories. The supreme example of British constitutional lawlessness in the colonies is illustrated by the notorious case of The King vs. The Earl of Crewe ex parte Sekgome <sup>13</sup>. In this case the High Commissioner for South Africa issued a proclamation authorising the detention of Sekgome, a claimant of the chieftaincy of the Botswana in Bechuanaland Protectorate. The Bechuanaland Order in Council of 1891 provided that the High Commissioner "may do or cause to be done all matters and things within the limits of this order as are lawful". It further empowered him "to provide for the administration of justice, the raising of revenue and generally for peace order and good government of all persons within the limits of this order including the prohibition and punishment of acts, tending to disturb public peace".

Persuant to the above Order in Council the High Commissioner had created a system of Resident Commissioners, judges, magistrates and other paraphernalia of a court system and a system of substantive law to be applied; Nevertheless the judges of the Kings Bench held that the proclamation directed specifically at Sekgome was valid, and that an order of habeas corpus could not issue. Vaughan Williams L.J. expressed a whole philosophy of British colonial overrule when he concluded his judgement that:-

"The ideal that there may be an established system of law to which a man owes obedience, and that at any moment he may be deprived of the protection of that law, is an idea not easily accepted by English Lawyers,.. It is made less difficult if one remembers that the Protectorate is under a country in which a few dominant civilized men have to control a great multitude of the semi-barbarous"<sup>14</sup>

The fact that even those fundamental rights protected in England were not protected in the colonies is further illustrated by the case of Wallace Johnson v. R.<sup>15</sup> The appellant in the instant case was a nationalist from the Gold Coast (Ghana) who had been convicted by the High Court for publishing a seditious editorial challenging the colonial rule generally and with a special reference to Ghana. He appealed to the judicial committee of the Privy Council on the ground that it was not enough in England to show that the words were merely seditious. In addition to an utterance or publication being seditious the prosecution must further prove that the accused had the intention to cause a breach of the peace and that the breach of peace was actually caused. The Privy Council held that the laws of England were not wholly imported by the colonial territories.

The fusion of the functions of the judge and the administrator has been explained by McAuslan, as a necessary tool of colonialism. He says:-

"It must be made quite clear that this combining of functions of the judge and the administrator was deliberate and conscious policy designed to maintain law and order at the expense of justice to the individual"<sup>16</sup>

Police brutality and military action helped the executive to rule with iron hand when legal sanctions were inadequate to achieve economic objectives of British economic imperialism. The colonial autocratic order was exposed to incipient political pressures of nationalism which agitated for majority rule. The racist and minority administrative structure of colonialism was carried along a wave of momentum by the McMillan's wind of change which breaks up with independence.

A former British Minister of State for the Colonies, Iain Mcleod<sup>18</sup> said that this 'Wind of Change' was not a dramatic decision, but rather an individual comment on a decision the tempo of which had been accelerated as a result of a

score of different decisions. In East Africa, for instance, the tempo was inevitably accelerated by the Mau Mau uprising. Whatever the case, Britain needed a change of policy in Africa. She realised that a successful co-operation with nationalism was the pivotal bulwark against communism<sup>19</sup> and the strengthening of the Commonwealth.

The African nationalists on the other hand were zealous to achieve independence under constitutions, that would guarantee 'equal' political and economic opportunities to all their nationals, irrespective of colour or race. The lawlessness<sup>20</sup> of colonialism and the absence or discouragement of constitutionalism in the British Colonial territories challenged the African to re-examine himself and come to a self-realisation that he is a political animal of the same species as the immigrant European races<sup>21</sup>. Under colonial rule, the African was denied political and economic rights and even the barest minimum of justice in keeping with human dignity was not accorded him. It is some of these base treatment of the Africans that fanned the fire of agitation for democratic governments in Africa.

Jomo Kenyatta, a Kenya nationalist leader, (now President of independent Kenya) had this to say during his mock trial at Kapenguria against the lawlessness of colonialism in Kenya and the desire of the Africans to be free under a constitutional government:-

"...Kenya African Union (K.A.U.), the only African political organisation fights for the rights of the African people... But what we have objected to --- and we shall continue to object --- are the discriminations in the government of this country... We as political bodies or political leaders stand constitutionally by our demands"<sup>22</sup>

Throughout British colonial territories, nationalist movements swept away colonialism and established independent nation - states after the British government adopted constitutional reform as a better compromising attitude. This was in response to the reality that change whether violent or constitutional was inevitable following the economic ruin of Britain during the 2nd World War.

This had the effect of weakening Britain and thereby rendering her hopeless in defending her Empire. The military expenses of suppressing the Mau Mau uprising, for example, proved that the trials of force cost money, and Britain struggling to recover from the wounds of war and maintain the value of the pound as well as achieve a transition from a war - to a peace economy required co-operation not antagonism with her colonies<sup>23</sup> In fact Britain had no choice, to but to salvage from a bad situation because the contradictions of colonialism could not contain nationalist quest for a democratic and constitutional system of government.

The British government realised that she could use the independence constitutions as a bargaining weapon to strike a balance between nationalist and the various colonial interests. The result was to bequeath the Westminster Model<sup>24</sup> Constitution to the successor states in Commonwealth Africa.



## CHAPTER TWO

### THE VALUE AND CONTENTS OF INDEPENDENCE CONSTITUTIONS IN COMMONWEALTH<sup>1</sup> AFRICA.

What is the significance or symbolic value of independence constitutions? In the eyes of the nationalist freedom fighters, independence constitutions, to some extent, symbolise a rebirth, a mile-stone recording progress from colonialism to independence. The independence constitutions represent an important advance from colonial territories to the acquisition of nationhood. The constitution marks a new beginning. It becomes a charter and a focus for national aspirations. Independence constitutions mark a break with the past and the beginning of a road to a bright future. The independence constitutions sealed the formal transfer of political power into local hands. Independence constitutions represent a triumph of the nationalists.

We shall now examine the nature and contents of independence constitutions. All commonwealth African states without exception became independent under the Westminster Model<sup>2</sup> constitution. This is the standard form constitution bequeathed to ex-British colonies in Africa. The Westminster Model independence constitution was a bargain which sought to balance nationalist interests and the diverse colonial interests. Under this standard form constitution, the departing power were willing to transfer political power to the indigenous people as long as this did not endanger their economic interests. As a general rule, the departing masters wanted every state to achieve independence under the Westminster Model constitution. Any attempt to reject this model and adopt an autochthonous constitution was resisted by the Colonial Office<sup>3</sup>. That being so nationalist leaders accepted the Westminster, Export Model constitution but only to avoid delay in the attainment of independence knowing well that once they had power changes could be made.<sup>4</sup>

All the Commonwealth African constitutions contained varying types of entrenched provisions. The Constitution was to be the supreme authority unlike in Britain where Parliament is supreme. From the outset, therefore, the

independence constitutions put limitations on the powers of the legislature. Important in this respect was the Bill of Rights<sup>5</sup> which was specially entrenched in the independence constitutions. The legislatures were prohibited from enacting law which infringed any of the rights guaranteed. But by way of contrast the Parliament at Westminster is unlimited. Obviously such limitations on the legislature were unheard of during the heyday of colonial rule in Africa. Robert Martin has remarked that the British were taking with one hand what they were giving with the other<sup>6</sup>. These legislative limitations created by the independence constitutions weakened the independence Parliaments.

The Westminster Model constitution had some modifications in it to meet the peculiar problems of certain countries for instance, Nigeria. The Nigerian independence constitution contained provisions of devolution of power between the federal central government and regional authorities. This was the continuation of the colonial legacy of divide - and - rule. Whatever public explanation given by the British for introducing such a system, it appears that their real intention was to pay lip-service to the interests of the minority groups. It is doubtful that the British aimed at securing a hopeful future for the minority tribes after British 'trusteeship' came to an end<sup>7</sup>.

The United Kingdom has a unitary and centralised government because the British are a relatively homogeneous people with centuries of allegiance to the crown. In Africa the position is rather different as exemplified by the Biafran decision to secede from the federal state of Nigeria. The realities of tribal antagonism in Kenya was perhaps what the British feared when they incorporated regional autonomies under the Kenya Independence Constitution<sup>8</sup>.

The constitutional devolution of power to authorities independent of and antagonistic to the central government was also notoriously incorporated in the Ugandan independence constitution. A strongly entrenched constitutional independence of Buganda and other Kingdoms resulted in a protracted antagonism

between the prime Minister, Dr. Milton Obote, and the Kabaka which was not resolved until 1966 through military suppression of the Kabaka of Buganda, then the president of Uganda.

The other basic feature of the Westminster Model independence constitution was the principle of parliamentary government. The Westminster traditions of Parliamentary democracy evolved through British conventions in which the exercise of government powers has been accepted as the responsibility of the cabinet. The cabinet advises the prime Minister, but the principle of collective responsibility of the cabinet implies that the role of the cabinet is more than advisory.

The independence constitution, provided for periodic elections to the national assemblies. Unlike the Westminster principles of government, the independence constitutions exported to Commonwealth Africa provided for insulation from direct political pressures the independence of the judiciary, the civil service and the police. Governmental control of these organs of the state was reduced to a bare minimum. These provisions were safeguarded by a high degree of entrenchment. In Kenya, for example, provisions relating to the Bill of Rights could not be altered without 75% support in the Lower House and 90% in the Senate. The powers of judicial review were vested in the courts and jealousy entrenched in the independence constitution to avoid the upsetting of the independence constitutional balance. The aim was to provide a machinery for review and rectification of constitutional infringement. On this point the Westminster Commission on the Uganda Independence constitution said:-

"We believe that by far the best guarantee for the entrenched provisions will be found in the Courts of Law"<sup>9</sup>

As can be seen the independence constitution was obsessed with the problem of balancing various conflicting interests of the various actors in the constitutional drama. Independence under a constitution then became not so

much moving out of the colonial sphere as moving into a larger one with the colonial patterns emerging relatively unscathed. As Gary Wasserman has pointed out, the independence constitution marked a successful socialisation process in which the nationalists were as much acted upon as the colonial actors.<sup>10</sup> However, we are consoled by the argument that all the African nationalists wanted was independence. The problems of ideology and the kind of constitutional arrangements workable under African conditions would be worked out after the attainment of independence.

The British no doubt felt some pride in bequeathing their system of government to their former dependencies. However before the end of the decolonisation process, the British had realised the futility of forcing every newly independent country into the straitjacket of the standard form Westminster Model constitution.<sup>11</sup> Under the earlier constitutional arrangements, the compromise nature of the independence constitutions prior to the Zambian case in 1964 provided for fragile and weak institutions of government. This state of affairs was in contrast with the colonial administrative edifice which was erected on absolute and autocratic power.

Fragile as they might have been, the 'democratic' institutions established by the independence constitutions provided for the separation of powers, entrenched Bill of Rights (except in Tanganyika) the independence of the judiciary and other fundamental tenets of constitutionalism. The concept of constitutionalism, however, remained to be tested in practice under the political, economic, social and cultural realities in the newly independent states of Commonwealth Africa.

THE PRACTICE OF CONSTITUTIONALISM IN THE EMERGENT STATES IN COMMONWEALTH AFRICA.

In spite of the criticisms levelled against the Westminster Model Constitution, on the ground of its irrelevance to the aspirations of African governments, the leaders of the successor states were zealous to prove to their former colonial masters that they have politically come of age and could govern themselves according to modern ideas of democratic government. The imported independence constitutions, therefore, worked for some time before they encountered obstacles on their process of experimentation. All Commonwealth African states encountered one or more of the following problems which generally undermined the independence constitutions. The principal stresses and strains on the independence constitutions were either generated by the realisation, by the governments of those countries of the futility of transplanting a standard form of government in countries widely divergent in the levels of development and cultural heritage, or the realisation by inheritors of the colonial state that the constitutional restraints posed a threat to their personal rule.<sup>1</sup>

The latter alternative has been tested under the doctrine of the separation of powers which as we saw in the preceding chapters is an essential element of the concept of constitutionalism. In the case of Bribery Commissioner v. Ranasinghe<sup>2</sup> the issue was whether Parliament could extend the powers of the ordinary courts, conferred upon them by the independence constitution. Early in the 1960's Ceylon (now Sri Lanka) was faced with the problem of corruption. The legislature felt that the ordinary courts could not adequately probe into all aspects of alleged corruption. The legislature therefore, unconstitutionally amended the constitution and gave itself powers to appoint a special Bribery Commission to inquire into cases of alleged corruption and to impose sanctions like the ordinary courts. There is nothing wrong in the appointment of a Bribery Commission, to probe corruption, but the determination of the question of guilt or innocence of a criminal offence lies within the province of the ordinary courts.

The Respondent in this case was a victim of such sanctions imposed by the Bribery Commission. He challenged the constitutionality of the appointment of the commissioners, arguing that there were certain judicial matters which could not be determined by any other institution except the ordinary courts established by the constitution. The Privy Council held, affirming the decision of the Ceylon Supreme Court, that the setting up of the Bribery Commission was null and void because it was Ultra Vires the provisions of section 55 of the Ceylon Constitution Order in Council which provided that Judicial Officers can only be appointed by the Judicial Service Commission.

The introduction of 'alien' or untried institutions such as Parliamentary opposition in Tanganyika by the independence constitution, for instance, created unnecessary hurdles to the independence government. Such institutions found themselves in the dustbins of independent states shortly after independence<sup>3</sup>. Nevertheless, the independence constitutions were respected for some time as exemplified by the shortlived regionalism in Kenya. In Nigeria, also there was a fairly perfect practice of constitutionalism prior to troubles in the West region which precipitated the events of 1966.

The Multi-party politics in Kenya until the Kenya People's Union was proscribed in 1969, the multi-party constitutional respect in Nigeria until the Civilian government abdicated its powers to the military in 1966 are evidence of the democratic principle of fair play in the concept of constitutionalism. In Uganda, Ghana and Tanganyika, for instance, the concept of constitutionalism was admired and respected and it was only after the lapse of some time that symptoms of encroachment appeared. As recent as 1974, the late J.M. Kariuki could publicly criticise the government and claim that the Kenya Government had moved from democracy to hypocrisy with impunity<sup>4</sup>. This is a clear proof that the freedoms of speech and the press guaranteed by section 79 of the Kenya Constitution are still respected in spite of the implicit censorship of the press.

We now turn our attention to an examination of the practice of enforceable Bill of Rights, another fundamental feature of independence is constitutions. In retrospect we recall that the Bill of Rights were unheard of during the heyday of colonialism. Until early in the 1960's, Britain had not been converted to the gospel of the Bill of Rights at least for the colonies<sup>5</sup>. With the only exception of Tanganyika (now Tanzania) all Commonwealth African countries had a Bill of Rights in their independence constitutions, guaranteeing basic civil liberties. The inclusion of the Bill of Rights in the independence constitutions was in response to the United Nations Universal Declaration of Human Rights (1948) embodying the philosophy that all men have a common humanity. This Declaration was followed by The European Convention on Human Rights (1950) which was incorporated in the Commonwealth Model of the Bill of Rights<sup>6</sup>. The position introduced at independence by the Bill of Rights was the reverse of the circumstances prevailing under colonial rule<sup>7</sup>.

The change of attitude by the colonial office in acquiescing in the inclusion of Bill of Rights in the independence constitutions may be seen as a device to prevent, as far as possible, the effective exercise of power by the independence governments. It appears to the present writer that this process fitted the British design to create weak governments which they could manipulate and control to further their economic interests.

Let us have a close analysis of the practical application of the Bill of Rights in Commonwealth Africa. In the Swaziland case of Ngwenya v. Deputy Prime Minister<sup>8</sup> the issue was which branch of the government could determine and resolve constitutional issues, in this case the citizenship and liberty of the Appellant. The legislature purported to set a special tribunal to declare that Ngwenya was not a citizen. Such a declaration would make, Ngwenya lose his parliamentary seat, the appellant being the only surviving member of the opposition. As expected the Special Tribunal ruled that the Appellant was not a citizen. A deportation order was subsequently issued against him.

He appealed to the Supreme Court of Swaziland contending that the Special Tribunal had no power of judicial review which is inherently within the province of the courts as was established in the American case of Marbury v. Madison<sup>9</sup>. The Swaziland Court of Appeal accepted the Appellant's plea and ruled that the Act setting up the Special Tribunal was unconstitutional and suspended the deportation order. But two weeks later the King suspended the constitution, declared a state of emergency and detained all the dissidents.

In the Sierra Leone case of John Joseph Akar v. The A.G. of Sierra Leone<sup>10</sup> the Court was deciding the constitutional position of the fundamental human rights and the freedoms of the individual. The Supreme Court attempted to delimit the legislative powers of the legislature by declaring as unconstitutional the amendment to the Sierra Leone constitution which allowed the legislature to legislate with an ordinary majority on representation and citizenship. The decision was overruled by the House of Lords on the authority of The Lawless Case<sup>11</sup>. The Appellant in the Lawless case was a member of the Irish Republic Army who was detained by the Irish government under emergency Regulations. He was arrested, detained and he was never tried. He applied for an order of Habeas Corpus but his application was rejected. He appealed to the European Court of Human Rights which also dismissed the application.

Taking the Lawless case at its face value, one might be tempted to conclude that the courts are always prepared to legalise illegal acts of the executive. But a deeper evaluation of the case shows that it is necessary to allow executive to make use of reserved powers beyond the purview of the ordinary courts at times of emergency situations which pose a threat to state security. The problem is to determine whether there was use of emergency powers to derogate from individual rights. In the Lawless case the European Court established that where a government derogates from individual liberties, the government must be given some "margin of appreciation" having regard to all the circumstances because the government might have intelligence information which cannot be made public that certain people are engaged in subversive



activities. This problem is more political than legal and the question which has not been convincingly answered is whether in the case of African states real emergency situations have existed or they have been fabricated to justify the suppression of the opponents of the wielders of power.

The Indian Supreme Court is the best upholder of the fundamental human freedoms. In the case of Ram Krishan v. Delhi<sup>12</sup> the supreme court of India set aside a detention order because of the insufficiency of the details.

The Court asserted:-

"preventive detention is a serious invasion of personal liberty and such meagre safeguards as the constitution has provided against improper exercise of the powers must be jealously watched and enforced by the Courts<sup>13</sup>."

Similarly in the case of Singh v. Delhi<sup>14</sup> the supreme court of India affirmed its stand when it declared:-

"It must be emphasized that those who are called upon to deprive other persons of their personal liberty in the discharge of their duty must strictly and scrupulously observe the forms and rules of the law"<sup>15</sup>

The Indian Supreme Court is to be commended for its bold stand in defending fundamental human rights. In 1975, the same court ruled that the election of the prime Minister, Mrs. Indira Gandhi, was unconstitutional. However this decision was set aside because of the recent subversive activities of the opposition which justified the use of wide and sweeping emergency regulations to preserve the state from the danger of disintegration.

The validity of a particular preventive Detention Order may be affected by a failure to observe the procedural requirements of preventive Detention Laws. In the case of Chipongo v. R.<sup>16</sup> the High Court of Zambia held that where procedural requirements are not complied with a detention order is invalid. But the problem may arise where the released person is rearrested and the procedural defect is cured. This was the problem in the case of Ibingira v. Uganda<sup>17</sup> when the East Africa Court of Appeal said that the inconsistencies

that are alleged are of so fundamental a nature that a finding in favour of the appellants would, for all practical purposes, amount to a finding that the ordinance (Preventive Detention Act) was abrogated by the enactment of the constitution. The appellants were released, but the police took them to Entebbe Airport within the areas affected by the Emergency regulations and they were re-arrested and detained with the proper procedure being followed.

The courts have been rather shy in Commonwealth Africa to firmly enforce the Bill of Rights and defend the freedoms of the individual<sup>18</sup>. In the Kenya case of Ooko v. The Republic<sup>19</sup> the doubt in the law was resolved against the liberty of the individual. The judge said:-

"I think that in view of the seriousness of the conditions precedent to the issue of a detention order in as much as the Minister must be satisfied that the detention is necessary for the preservation of public security a partial mistake in naming the person to be detained should not necessarily have the effect that that person should be released from detention. When he is the person intended to be detained and there is in fact no confusion as to the real identity of that person".

Ooko was detained on 4th August, 1966 under a detention order, with his surname but different first names, signed by the Minister. On 27 September, 1966 he filed a complaint in the High Court alleging that his detention was unlawful for a number of reasons; he was not given the reasons for his detention within the prescribed period; the reasons were not sufficiently detailed as required by the constitution; he was detained under the wrong name; and outsiders were present when his detention order was being reviewed by the tribunal. The court nevertheless held that the detention was lawful. As to the wrong name in the detention order, the court accepted that a warrant of arrest applied for in a name which was not the name of the person arrested and intended to be arrested does not justify the arrest of the person. The court ruled that the presence of outsiders (a senior police officer and a state counsel) was desirable and necessary and dismissed the ground that it was unlawful for them to be present at the Review Tribunal. The court agreed with the Plaintiff that

the reasons were not sufficiently detailed, but did not think that there was sufficient cause for his release<sup>20</sup>.

Section 85 of the Kenya Constitution allows the executive to derogate from the fundamental rights and freedoms when a real emergency exists in Kenya. However, where a person is detained by virtue of such law as referred to subsection (1) of that section, the primary concern of the courts is to ensure compliance with the procedural requirements under subsection (2) of that section. The problem that arises before the courts is to determine the adequacy or the truth of the grounds for the detention. In the Ooko case the court held that the new details supplied by the government were satisfactory. It further held that if further details were required, a request could be made to the tribunal. As far as the court's limited jurisdiction was concerned, the particulars given were adequate. The court concluded by saying:-

"The grounds if true could justify his detention. The truth of those grounds and the question of the necessity or otherwise of his continued detention are matters for the Tribunal and ultimately for the Minister rather than for this court"<sup>21</sup>

In the case of Adegbenro v. Attorney General<sup>22</sup> interpreting a similar phrase on the adequacy of reasons for detention to be given to the detainee under emergency regulations the court held that there was sufficient reason for the restriction order<sup>23</sup>. The court in Adegbenro's case did not discuss when an emergency could be validly declared, but was prepared to test the validity of the orders to examine if they were reasonably justifiable in the circumstances of each case.

The fundamental freedom from discrimination under section 82 of the Kenya Constitution was enforced in the case of Madhwa v. City Council of Nairobi<sup>24</sup>. In this case the action of the City Council of Nairobi in serving notices of eviction on its tenants of Asian origin who were holders of stalls in the municipal market in order to re-let them to Africans was held to be unconstitutional.

The English notion of the enforceability of fundamental freedoms was underlined in the case of McEldowney v. Forde<sup>25</sup>. In this case the court refused to interfere in the interpretation of Emergency Regulations applying in Northern Ireland. Under the independence constitutions the executive's adherence to the strict letter and spirit of the Bill of Rights was qualified by the inclusion of far-reaching qualifications and exceptions for instances in which reasonable use of the powers of derogation can be invoked<sup>26</sup>. The problem however, as the present writer sees it, is not so much on the checks and balances exercised by the courts as such, but a reasonable use of the powers of derogation. In this respect derogation need not necessarily take the form of an enactment. It can be an executive order or decree<sup>27</sup>. Whatever the case, there must be some machinery to oversee the protection of constitutional guarantee of civil liberties against the excesses of the executive.

The question of who is to exercise the protection and how this is to be done becomes paramount. It is clear from the American case of Marbury v. Madison<sup>28</sup> and Section 67 of the Kenya Constitution that the function of judicial review is vested in the courts under the constitution.

The authoritarian nature of most of the Commonwealth African states has made mockery of the independence of the judiciary as exemplified by the Ugandan case of Namwandu v. Uganda<sup>29</sup> which involved abuse of emergency powers by soldiers. The issue was whether an emergency existed in Uganda at that time. The court held that the emergency powers were intended only for real emergency situations which did not exist in Uganda in 1972. The use of emergency powers was therefore improper, but the judges were not willing to interfere for their security reasons.<sup>30</sup>

The independence of the judiciary was also practically tested in the Ghanaian case of Awoonor-Williams v. Gbedemah<sup>31</sup>. The 1969 Ghanaian Constitution which restored a civilian government under Dr. Kofi Busia vested the judicial function exclusively in the courts as in the United States and

Australia. In the Gbedemah case, the respondent seeking to know the meaning of 'judicial power' challenged the constitutional status of a commission of inquiry and its powers to summon, investigate and apply sanctions to anybody involved in bribery. The majority judgement held that there are no functions which are inherently judicial in nature. This case clearly shows how the courts can sometimes behave when they act in fear or favour of the executive.

The derogation from the strict adherence of constitutionalism has been justified<sup>32</sup> on the grounds that fundamental freedoms should neither act as obstacles to development nor endanger the security of the state. This is the argument used to justify the curtailment of fundamental freedoms by invoking exceptions as being "reasonably justifiable in a democratic society". In the Nigerian case of D.P.P. v. Obi<sup>33</sup> the freedom of the press was undermined on the principle of qualification to the fundamental civil liberties. In 1961, Dr. Chike Obi, the leader of minority Dynamic Party published a pamphlet entitled The People: Facts you must know, in which appeared the words: "Down with the enemies of the people, the exploiters of the weak and the oppressors of the poor... the days of those who enrich themselves at the expense of the poor are numbered". Dr. Obi was charged with having published these words with intent to excite hatred, contempt and disaffection against the Federal government. To this he replied that, having regard to the freedom of speech in the constitution, it was not reasonably justifiable in a democratic society to punish a person for making a statement which merely exposed the government to discredit or ridicule without any repercussion on public order or public security. Dr. Obi was nevertheless convicted. The court observed that the fundamental freedoms were not a licence to commit seditious or treasonable acts. Freedom of expression, like any other freedom must be contained under the law, otherwise it creates confusion.

It has been convincingly argued that unfettered power is despotism or tyranny; unfettered freedom is licence or anarchy. But between these two extremes there is a midway, where power tamed by law guarantees true freedom<sup>34</sup>

The strains and constraints of the practice of constitutionalism were not easily contained under the independence constitutions. Constraints call for sacrifice and self-denial in upholding the constitutional guarantees even if it means a change of the ruling oligarchs. In Britain the traditions and conventions have taught the leaders to respect the rules of the political game as embodied in the constitution. In Commonwealth Africa the reverse is true.

The authoritarian nature of the ruling oligarchs and their concerted tendency to pervert the constitutions where they serve their personal ambitions is not uncommon. There is a determination to perpetuate their personal rule even against the established procedure laid down in the constitution. The perversion of the constitutional system has resulted in the subsequent breakdown of independence constitutions and constitutional governments in Commonwealth Africa.

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## CHAPTER FOUR

### THE BREAKDOWN OF INDEPENDENCE CONSTITUTIONS AND CONSTITUTIONAL GOVERNMENTS IN COMMONWEALTH AFRICA.

As indicated earlier, all Commonwealth African countries rejected the imported Westminster Model constitutions. But this did not happen immediately on attainment of independence. Those constitutions were tried for some time before <sup>being</sup> rejected or altered. In any event those constitutions were doomed to failure because of the introduction by them of alien or untried institutions, such as for example Parliamentary opposition in Ghana and Tanganyika. In less than two years, Kenya for instance, revised the provisions of the independence constitution relating to 'Majimbo' - regionalism'.

The Westminster Model constitutions had been readily accepted not because of their relevancy to the African conditions. They were accepted to avoid delaying independence knowing that once the African leaders had political power changes could be made<sup>2</sup>.

The breakdown of independence constitutions has taken many forms ranging from (i) the subtle but devious amendments to the constitutions (ii) the suspension and (iii) the extreme cases of complete overthrow of the constitutional system of government through military coups. An example of blatant amendments to the independence constitution is to be found in Kenya. The power of derogation from the 1963 independence constitution in Kenya was very limited. The limited power of derogation from constitutional provisions that may have existed could only be exercised if certain procedural requirements were complied with. For example, the independence constitution required at least two thirds majority to amend any of the fundamental provisions. Subsequent amendments<sup>3</sup> to the independence constitution tended to lean heavily in favour of the executive.

By 1969 the Kenya independence constitution had been shattered in ruins and an entirely new constitution had been produced<sup>4</sup>. Section 85 of the 1969 constitution gave the president power to derogate from any of the provisions of the fundamental freedoms under chapter 5 of the said constitution when the country was under a state of emergency<sup>5</sup>. In both Kenya and Uganda, the courts have been reluctant to challenge preventive detention orders even when they found that the relevant Minister had not strictly complied with the procedures laid under the constitution<sup>6</sup>.

The most recent amendments to the Kenya constitution was made in December 1975<sup>7</sup>. Before this amendment, the president had only power to exercise the prerogative of mercy in respect of persons convicted of ordinary criminal offences. The new amendment was designed to extend the power in respect of persons convicted of election offences. The intended and immediate beneficiary of this amendment was Mr. Paul Ngei, a Cabinet Minister and a Kenyatta colleague in detention. Mr. Ngei had his election to Parliament nullified by the High Court after petitioner proved that Ngei had used undue influence, and election offence, to ensure his being returned unopposed. The nullification of Mr. Ngei's election had been aggravated by the fact that the commission of an election offence barred him from standing for re-election. The amendment had, therefore, operated to return one of the Kapenguria old guards back into the fold. ✓

The second aspect on the process of constitutional breakdown has been exemplified in the suspension of the independence constitutions. ✓ Lesotho provides a striking example of the way in which the independence constitution was suspended because it acted as an obstacle to the perpetual rule of the prime Minister, Chief Leabua Jonathan<sup>8</sup>. In January 27, 1970, elections were held for the first time since 1966. Normally the elections should have been due on April 30, 1970 according to the Lesotho independence order-in-Council of 1966. But the prime Minister hoped that an earlier election would increase the number of seats held by his Basotho Nationalist Party (BNP) from a tenuous to a comfortable majority. When opposition, the Basutoland Congress Party (BCP)



overwhelmingly won the elections, the Prime Minister suspended the constitution, declared a state of emergency, detained all the members of the opposition and instituted a rule by decrees.

The suspension of the independence constitution also happened in Swaziland when the Swaziland Court of Appeal enforced the fundamental right of citizenship in respect of one of the most radical and the only surviving member of the opposition, Mr. Thomas Ngwenya<sup>9</sup>, King Sobhuza II suspended the constitution. He argued that the independence constitution was 'alien'. He further alleged that the constitution had been the cause of growing unrest in the country. He said it was an impediment to free and progressive development of all spheres of life<sup>10</sup>. The same argument has been advanced by all African leaders in either first amending or secondly suspending the independence constitution. We shall now turn to the examination of the genuineness of the reasons given for amendments or suspensions of constitutions. According to Michel<sup>11</sup> the argument that the independence constitutions have failed because they were 'alien' would not hold water. The breakdown of independence constitutions can be attributed to the realities of the Michelian 'iron law of oligarchy'. According to Michel the party and the state must be of necessity oligarchical if political power is to remain in the hands of a few members of a dominant clique. Power, corrupts and the wielders of political power resort to misuse of state apparatus of violence to retain power irrespective of their failure to fulfil the promises made before and immediately after independence.

The third aspect of constitutional breakdown which also ends up in the breakdown of the constitutional government is coup d'etats in the emergent states might suggest that the coup-makers come to save the nation from disrespect of the constitutional system, electoral malpractices and maladministration of

the economy. These factors are important, but the underlying reasons behind the coup d'etat are power struggle and the ambition for political leadership by the young elite, the army and the intellectuals. The military men, for example, covet the life of splendour enjoyed by the politicians at State Houses and foreign embassies.

The military as an institution is not a closed system insulated from economic and political realities prevailing in the country. Pareto<sup>12</sup> has argued that the military men take over governments essentially for their own reasons. The Paretonian doctrine of the 'circulation of elite' implies that the civilian elite is toppled by the military elite who also believe they have a right to rule<sup>13</sup>. The young intellectuals who rally behind the army in a coup d'etat argue that when the government abdicates constitutionalism then unconstitutional methods to overthrow it are justified<sup>14</sup>. The military and the intellectuals have acted to provide a breathing space before, hopefully, constitutional governments can be restored again.

Secession of a section of the country is the final aspect of constitutional breakdown. A secession is a rebellion against the law and the government in effective control of the rest of the country suppresses the rebellion and restores the constitutionally recognised government in power if it has the means to do so.

We shall now look at the nature and constitutional effect of a coup d'etat. The government brought into permanent or semi-permanent power by a coup d'etat or a revolution is, according to the principles of international law, the legitimate government of the state. The identity of the state is not affected by the events of the coup<sup>15</sup>. According to Kelsen, a successful revolution begets its own legality.

The Kelsenite doctrine of 'state necessity' justifies the recognition of the new order as opposed to the grundnorm established by the constitution. The doctrine of 'state necessity' simply means that the state should not be

allowed to disintegrate into a lawless jungle of disorder merely because change has come in a manner not contemplated by the constitution. The paramount aim of the doctrine of 'state necessity' is to allow for continuity. The doctrine suggests that constitutional breakdown should not be equated with the breakdown of the state itself, de Smith has summarised the position of the constitutional order after a coup or a revolution has been staged, "... at such moments like these public law should not be found in the books; it lies in the events that have appened"<sup>16</sup>.

One would expect the courts, as the upholder of the constitution and the 'Rule of Law' to react sharply when the constitutional order is violated in a manner not contemplated in the constitution. By and large, however, the judges have accepted Kelsen's theory on the ground that the courts should not sit back and watch the state being plunged into anarchy and lawlessness simply because a change of power has been effected in an unconstitutional manner. In Uganda, for example, the independence constitutional imposed restraints that seriously retarded the government policy of integration because it had legalised the existence and continuity of autonomous kingdoms, for instance, Buganda. These restraints could not be easily removed because they were specially and jealously entrenched in the constitution. The result was the destruction of the constitutional framework in 1966. On this crucial date Dr. Milton Obote, then Prime Minister of Uganda, suspended the independence constitution. He procured the adoption of a new constitution by a procedure not sanctioned by the 'legitimate' independence constitution. In the Matter of an Application by Matovu<sup>17</sup> the very legality of Obote's government was under review. The judges agreed that certain procedural requirements in the detention of the applicant were not complied with, but the court was not prepared to pronounce on the legality or illegality of the Obote regime. Judges seem to accept the view that their functions can be rendered meaningless if they turn a blind eye on the realities of politics and stick too much on constitutional ideals<sup>18</sup>.

The doctrine of 'state necessity' however, should not be stretched so far as to legalise illegality. The courts should take judicial notice of the fact whether or not the coup d'etat or a revolution has been so effective as to replace the lawful constitution as the grundnorm. The test applied here is more political than legal in determining whether or not the general will of the new government is being generally obeyed and accepted<sup>19</sup>.

The acceptance of the reversion of the constitutional order by reason of 'state necessity' has been accepted elsewhere out of the Commonwealth. In the Rhodesian case of Madzimbamuto v. Hardner-Burke<sup>20</sup> the appellant was detained by the Rhodesian authorities under Emergency regulations validly proclaimed by the Governor on November 5, 1965. The proclamation expired on February, 4, 1966, but his detention was continued under fresh emergency regulations promulgated by the illegal rebel regime brought to power by the Unilateral Declaration of Independence on November 11, 1965. An application of habeas corpus made by the applicant was dismissed. The court took the view that although the Smith regime was illegal, the Rhodesian government being the only effective government (as it turned out to be) should be given power to deal with emergency situations. The fresh emergency regulations were therefore 'lawful'. A subsequent appeal to the Judicial Committee of the Privy Council was allowed. However, the Privy Council, held that the Smith regime could be said to be the lawful government if it acquired full and effective control in the country. For the meantime, the court ruled that the rebellion had not been completely successful to have become a revolution. The Rhodesian case of Adams v. Adams<sup>21</sup> reflects the dicta of the Privy Council in the Madzimbamuto case. It was held in the instant case that the Smith regime had acquired effective control over the country. The regime was accorded legitimacy.

J.M. Ekelaan<sup>22</sup> has summed up the legal and constitutional effect of a coup d'etat or a revolution by suggesting that the courts can adopt any one or more of the following propositions:-

- (a) The adoption of a rigid concept of constitutionalism in which case they will not be tolerated<sup>23</sup>.
- (b) The adoption of social realism which finds its expression in the admission of the doctrine of 'state necessity'. This is the popular view with the justices who justify their action by quoting Kelsen's 'bible' - 'The General Theory of Law and State.'
- (c) The judges/courts may abdicate their role in watchdogging constitutionalism because, the argument goes, the measures of the group that wields the actual power within the state are ipso facto laws to which judicial duty compels obedience. This was the view by the Rhodesian judges to justify the retention of their judicial offices.

The intrinsic effect of a revolution to the existing legal status was examined in the Ghanaian case of Sallah v. A.G.<sup>24</sup>. When the army ousted Mr. Nkrumah on February 24, 1966, the National Liberation Council (NLC) issued a decree to the effect that the existing laws would continue to have legal effect unless repealed, amended or suspended by the decree(s) of the NLC. The reinstated civilian government of Dr. Busia dismissed the Plaintiff as the manager of the Ghana National Trading Corporation (GNTC). The GNTC was a statutory body established by a Parliamentary Act which had not been repealed, amended or suspended by the military regime which surrendered power to the civilians in 1969. The Plaintiff therefore challenged the validity of his dismissal. The Ghana Court of Appeal awarded damages to the Plaintiff. The court further held that the NLC proclamation after the 1966 coup meant that the old legal order was not completely destroyed. The court further held that too much reliance on the Kelsen theory can lead to absurdities. It suggested that each case should be decided on its own peculiar facts.

The legal effect of a coup as a tool of destroying the old legal and constitutional order was discussed in the Pakistani case of The State v. Dosso<sup>25</sup>. This case was cited with approval in the Matovu case<sup>26</sup> and in the Nigerian case of Lakanni's v. The Attorney General (West)<sup>27</sup>. The Lakanni case proves beyond doubt that the separation of powers and the independence of the judicial under the federal military government are more easily said than observed. A coup or a revolution brings an end to the constitutional order.

The breakdown of the constitutional system means that the arrangements of the 'legitimate' constitution are over-riden by the pronouncements or decrees of the coup-makers. Those who have effective control of the state and their pronouncements and decrees become the grundnorm of state power and authority. This view derives support from the Nigerian case of Jackson v. Gowon<sup>28</sup>. The Plaintiff in this case challenged the constitutional legality of a special Tribunal set by General Gowon to probe into alleged unlawful acquisition of property under the Nkrumah regime. If one did not satisfy the Tribunal that one had lawfully acquired certain property, the property was confiscated and forfeited to regional authorities. The Plaintiff was a victim of this Tribunal and appealed to the Western Region Court of Appeal on the ground that the activities of the Tribunal infringed section 22(1)<sup>29</sup> of the Nigerian Constitution (1961) which guaranteed the sanctity of title to property. To overcome this problem, the Federal Government passed Decree No. 6/1966, 'Validity of Decree' which overrode the 1961 constitution. The court held that the right to own property had been infringed, but the Plaintiff could not succeed because the Decree settled the matter. The Plaintiff appealed to the Supreme Court of Nigeria which held that Decree No. 6/1966 was unconstitutional. The military regime reacted by enacting Supremacy of Enforcement Powers Decree (1970) which

emphasized its absolute law making powers. The Decree was to apply retrospectively invalidating all laws purporting to override any decree. In Nigeria, however certain provisions of the independence constitution are obeyed by the military government. The military coup epidemic as a final tool in the breakdown of constitutions and constitutional governments in Commonwealth Africa established authoritarian governments. This is a reversion to the colonial concept of unlimited power. Some coups, however, like the Ugandan one in 1971 might have provided a breathing space by toppling Dr. Milton Obote who was becoming extremely vindictive to his opponents. He had began a systematic detention of would be political opponents. Undocumented evidence suggests that he had ordered the arrest and detention of General Amin, as he then was. The information was leaked and Amin acted in self-preservation when Obote was attending a Commonwealth summit in Singapore in 1971. The hunter became the hunted. Unfortunately, the military government in Uganda has been more vindictive to its opponents than the Obote regime. The coup in Uganda did not provide a path for a Uganda better than Obote's one. One hopes that the military men will pave a path for a revolution which will teach the politicians to respect the constitution as a charter embodying the philosophy and aspirations of the rulers and those governed through it. One hopes that the army will go back to the barracks (or be constitutionally elected to Parliament) once they have cleansed the political platter. But is there any hope for constitutionalism in Commonwealth Africa? This question is answered in the last chapter of this paper.

## CHAPTER FIVE

### CONCLUSION: PROSPECTS FOR CONSTITUTIONALISM IN COMMONWEALTH AFRICA.

The fundamental question to be answered in this concluding chapter is whether Africans are capable of running a constitutional system of government after the pathetic experience of the last decade.

It is important to bear in mind that the Westminster constitutional democracy, which was imported by African states at independence, is deeply rooted in the dependent upon social, political, economic, cultural and religious and philosophical convictions of the British people, extending over centuries. Unfortunately, the new Commonwealth African States do not have similar traditions behind the new constitutional order<sup>1</sup>. The greatest mistake made by the departing colonial power during the constitutional development to independence was to adopt the old paternalism of seeing London as a Standard norm which could easily be transplanted and bequeathed to the successor states of colonial territories in Africa to follow.

Africa should wake up and learn from the past mistakes inherited from her colonial masters. It is high time Africa was judged by African needs and wants<sup>2</sup>. It is the contention of the present writer that if constitutions and constitutional governments are to be maintained in Commonwealth Africa, such constitutions must be responsive to the needs and aspirations of the people of the various countries<sup>3</sup>. Independent constitutions lack this vital criterion.

It would be wrong to jump to the conclusion that the demise of constitutionalism in the emergent states will be a permanent feature. A decade or so is such a short time in the life of a nation and the lawlessness of colonialism is still fresh in the minds of African leaders. Within that short period the democratization of the colonial institutions, for instance, the executive, has not been rapid enough to receive acceptance by both the rulers



and the ruled. The truth is that independence meant little more than the Africanization of the colonial state. A relevant and acceptable constitution and other democratic institutions have to grow and develop in response to the African ideas of government if their respect and permanence is to be achieved or assured.

Another pressing problem to be solved in the 'Third World' before constitutions can acquire relevancy and legitimacy is the transformation of charismatic leadership into institutional legitimacy. In the latter case, elections should be held regularly to erect farsighted and objective leaders who understand the politics of development. The monarchical notion of dwelling on myths, messianic and charismatic authority of the generation of leaders that fought for 'Uhuru' must also be discarded<sup>4</sup>. This generation of leaders who claim that it was only through their efforts that independence was 'wrenched' from the colonialist have for the greater part of the last decade of independence resorted to repressive and perverse methods of manipulating the independence constitution to perpetuate their personal rule as a reward for their 'singular' role in the struggle for independence.

It is hoped that the oncoming generation of leaders will allow respectable political institutions to grow because they cannot claim any special role in the 'creation' of the independence states. Political institutions based on tradition will mean that one generation of leaders can hand over power to another within the framework of a constitution. Such institutions, and especially the constitution, must provide a solution to the problem of succession of top leadership in Commonwealth Africa. Virtually all the presidents in Africa who have not died naturally or been overthrown in a military coup, Dr. Hastings Banda of Malawi, for example, have made themselves 'life' presidents. Other presidents like Jomo Kenyatta of Kenya have had such a strong influence that people have come to symbolise them with the very fabric of the existence of

the state. In fact some apologetics of the present system in Kenya have prophesied that the constitutional government will collapse with the Mzee<sup>5</sup>.

The problem of succession to top leadership could be solved by having meaningful elections in which the electorate are provided with an alternative leader. The problem arises where an incumbent president does not wish to leave power. The only way out is the acquisition of legitimacy of the constitution so that even an incumbent president (c.f. NIXON IN AMERICA) can also be forced to respect the constitution as an "umpire above the political struggle, and not as a weapon in that struggle which can be used and altered in order to gain temporary and passing advantages over one's political opponents". The opposition if any, must be allowed to present their candidates to the electorate<sup>7</sup>. But if there is only one 'legitimate' party as in Tanzania, the ruling party should always nominate more than one candidate to contest the elections.

The author would like to suggest that a fundamental reappraisal of the independence constitutions is required in the light of national needs and aspirations. This will not be an easy exercise for the older generation of leaders. Ruth First has suggested that this task will be met with an acceptable solution by a different generation of political leaders<sup>8</sup>.

A meaningful constitutional structure must be modified from time to time to meet the challenges which the Westminster Model failed or ignored to meet. The Westminster Model constitution addresses itself to the needs and aspirations of an industrial society while the African societies have a relatively undeveloped economy. It is fallacious, for example to talk of the freedom of the press while 75% of the people are illiterate and cannot buy or read a newspaper or listen to the radio. It is hypocritical to imagine that political independence is enough to ensure respect for the constitutional arrangements in any given

state. It is the view of the present writer that 'political' independence without economic independence is like a wedding without a bride. That is why amendments, suspensions or overthrow<sup>9</sup> of independence constitutions have a great deal of economic overtones.

In the Interim Constitution of Tanzania<sup>10</sup> Dr. J.K. Nyerere has given us a criterion for a constitution designed to achieve economic development to raise the standard of living of the masses. Dr. Nyerere lays great emphasis on the question of priorities. He says that state security both from external aggression and internal subversion must be guarded to achieve economic development even if that means limiting freedom of opposition. He however insists that this has to be done without losing sight of the need to guarantee minimum freedoms of the press, speech, association and political organisation. To avoid any open conflict between economic development and constitutionalism, a balance has to be struck between both extremes of development and the fundamental civil liberties.

The Westminster Model Constitution does not address itself to this problem. It is high time a relevant constitution was legitimized even if this means adopting an autochthonous ('home grown') constitution. Otherwise the chaotic state of constitutionalism in Commonwealth Africa will continue for the foreseeable future until such time that constitutional form of government is accepted as a form of the formal political way of life.

Developed countries like Britain and the United States have had a long tradition of democratic institutions and they have not yet attained perfection. It is therefore only fair to conclude that there is hope for constitutionalism in Commonwealth Africa after a few generations of experimentation and adaptation of the constitutional system of government.

CHAPTER ONE

FOOT NOTES

- (1) Montesquieu, The Spirit of The Laws.
- (2) C.H. McIlwain, Constitutionalism: Ancient and modern; (Cornell University Press: revised ed, 1947), PP 21-2
- (3) Mwabueze, O.B. Constitutionalism in The Emergent states (London 1973) P. 1.
- (4) Op. cit P.2
- (5) Carl J. Friedrich, Impact of American Constitutionalism abroad 1967, PP. 22-3.
- (6) S.A. de Smith in (1962) 4 Malaya Law Review.
- (7) On the argument that British imperialism was an economic imperialism - see Tarsis B. Kabwegyere, The Pl Politics of State formation, Nairobi 1974, P. 199.
- (8) The Wretched of The Earth, London, 1963, P. 162.
- (9) For instance the Emergency order in Council of 1939 applied in Kenya between 1952 - 1963.
- (10) Emphasis mine.
- (11) Ghai and McAuslan, Public Law and Political cChange in Kenya, Nairobi 1970 P. 38.
- (12) Robert B. Seidman, The Reception of English law in Colonial Africa Revisited (1969) East African Law Review P. 47 at P. 83.
- (13) (1910) 2 K.B. 576.
- (14) At P. 610.
- (15) (1940) A.C. 231
- (16) J.P.W.B McAuslan, Prolegomenon to the Rule of Law in East Africa, E.A.I.S.R. Conference Proceedings, Kampala, 1964.
- (17) Montagu, Slater, The Trial of Jomo Kenyatta, London (1955) pp 240 - 241.

- (18) Iain Macleod, Daily Telegraph 12th March, 1965.
- (19) Sir Andrew Cohen ( a former Colonial governor and head of the African division of the Colonial Office,) British Policy in Changing Africa, London 1959, p 61.
- (20) A typical colonial territory was a military organisation and all questions were resolved by executive/administrative action backed by police brutality and military action. The military form and character of the colonial territory is brought out in Ruth First, The Barrel of a Gun, London 1972, pp 25 - 58.
- (21) The reverse position, prevailed under colonialism - see R.V. Earl of Crewe, ex parte Sekgome op. cit P
- (22) Montagu Slater, The Trial of Jomo Kenyatta, London (1955) p. 240 - 241.
- (23) First, op. cit. P 41.
- (24) For a thorough discussion on the Westminster Model Constitution, see A.S. de Smith, The New Commonwealth and its Constitutions, London 1964.

CHAPTER TWO

FOOTNOTES

1. The use of the term "Commonwealth" does not imply a fascination with that particular organisation. It is much more convenient to say "Commonwealth Africa" than to stumble over "Ghana, Nigeria, Sierra Leone, The Gambia, Tanzania, Uganda, Zambia, Malawi, Botswana, Lesotho and Swaziland". "Commonwealth Africa" can also be defended as having some analytical value, referring as it does to countries whose historical experience is in many respects similar.
2. For a thorough discussion on the Westminster Model Constitution, see A.S. de Smith, The New Commonwealth and its Constitutions, London 1964.
3. Geoffrey Bing, Reap The Whirlwind, London 1968, pp. 179 - 194; 451 - 495 Ghanaian leaders suggested certain ideas to the colonial office about the kind of constitution which they wished to have at independence. These ideas were rejected by the Colonial Office which stated that if Ghana wanted independence it would get it only with a constitution provided by the colonial office.
4. The ease with which Kenya's leaders have dismantled the independence constitution in a very short time is illustrative, see H.W.O. Okoth-Ogendo, The Politics of Constitutional Change in Kenya since Independence 1963 - 69 (1972) JOURNAL OF AFRICAN STUDIES.
5. For example the Provisions of Chapter 5, Kenya Constitution Act No. 5 of 1969. For a comprehensive study of the Bill of Rights - see James S.S. Read, Bill of Rights in The 'Third World': I Verfassung and Recht Ubersee 21, and A.S. de Smith op cit, Chapter 5. Only Tanganyika gained independence without a Bill of Rights in Commonwealth Africa.
6. R. Martin, Legislatures and Socio-economic Development in Commonwealth Africa, unpublished, (1975) p. 7. This paper was prepared for discussion at the Conference on legislature in Contemporary Societies held in Albany New York.

CHAPTER THREE

7. It is clear that the par departing colonial settlers included themselves as one of the minority groups whose property rights were to be protected see section 75 of the Kenya Constitution, op. cit.
8. see generally chapter 7 of the Independence constitution. The regions were: Coast, Eastern, Central, Rift Valley, Nyanza, Western and North-Eastern. For a detailed analysis of the Kenya Independence constitution, see Ghai and McAuslan, op. cit, pp 177 - 219.
9. The Munster Commission, p 58.
10. Gary Wasserman, Kenya Europeans and The Land Issue 1960 - 1962, Journal of Commonwealth Political Studies (1973) Vol II No. 2 p. 79.
11. Zambia, for example, became independent in 1964 under the Presidential Constitutional System.

CHAPTER THREE

FOOTNOTES

1. It appears to the present author from the way some d leaders have conducted themselves that they regarded their leadership as a birthright. The famous saying of Dr. Kwame Nkrumah, the late President of Ghana, "Seek ye first the political Kingdom and all things else shall be added unto you", tends to suggest that Nkrumah regarded himself as a semi-god propagating a political gospel in Ghana.
2. Ceylon (Sri Lanka) (1964) 2 All ER 785.
3. The Interim Constitution of Tanzania. (Consequential, Transitional and Temporary Provisions) Act, 1965, Act No. 45 of 1965. In Kenya, for example, the provisions catering for regionalism were repealed and abolished within one year of independence.
4. Daily Nation, February, 13, 1974.
5. James S. Read; Bill of Rights 'in The Third!' Some Commonwealth Experiences, op. cit. p. 21.
6. Article 17 of the U.N. Universal Declaration of Human Rights is an exact carbon copy of S. 75 of the Kenya constitution c.f. Article 18 U.N. Declaration - S. 78 Kenya constitution  
Article 20 similar to S. 80, Kenya constitution.
7. Ol le Njogo v. A.G. (1914) 5 E.A.LR. 70.
8. Unreported, 1973, Swaziland Court of Appeal.
9. (1803) 1 Chrauch 137 U.S.
10. C.C. 58/67 A No. 30, 26th October, 1967.
11. The Year Book of the European Convention on Human Rights (1961) p. 438. see also Robertson: The Lawless case 37 B.Y.B.I.L. (1961) and O'Higgins The Lawless case Cambridge Journal (1962) p. 280.
12. (1953) A.I.R. 318.
13. op. cit. p. 329.



14. 16 Supreme Court Journal p. 326.
15. M.C.J. Kagzi, Judicial Control of Discretion under Preventive Detention Law; An Indian Experience; Public Law, 1965, p. 30.
16. (1970) HP Ccst/Ref/2, unreported
17. (1966) E.A. 306.
18. It would be an unfair generalisation to confine this problem to Commonwealth Africa alone. In the British case of Liversidge v. Anderson, (1942) A.C. 206, the court could not interfere with a detention order issued under emergency regulations.
19. (1966) unreported.
20. The Plaintiff had referred the Court to the Indian case of Ram Krishan v. Delhi, supra at page , when the supreme court ordered the release of the detainee because of the insufficiency of the details.
21. In Williams v. Majekodunmi (1962) W.N.L.R. 174, under a similar phrase the Nigerian Federal Supreme Court examined the evidence in favour of a particular restriction order and set it aside as being not reasonably justifiable.
22. (1962) W.N.L.R. 196.
23. The appellant in Adegbenro's case had referred to the Indian case of Ram Krishan v. State of Delhi, op, cit, at p
24. (1968) E.A. 406.
25. (1969) 2 All E.R. 1039.
26. Every section in Chapter 5 of the Kenya Constitution called 'Protection of Fundamental Rights and Freedoms of the Individual' - contains an expression with the meaning equivalent to 'except such a derogation is reasonably justifiable in the circumstance of the case in the interests of defence, public security etc' - see for instance S.67(1)(9) of the said constitution.
27. See the Presidential Decree dated 16th August, 1974, banning strikes, boycotts, processions etc., in Kenya. The Decree was made pursuant to Emergency Regulations made under the Preservation of Public Security

Act, Cap. 57, Laws of Kenya.

- 28. Op. cit. supra p.
- 29. (1972) E.A. 137.
- 30. Chief Justice B.M. Kiwaauka was subsequently murdered for passing a judgement unpopular with the military regime.  
see also Veitch, "Justice at the End of its Tether", (1973), Public Law.
- 31. Const. S.C., 1/69, digested (1970) cc 18, S.C.
- 32. J.K. Nyerere, Freedom and Development.
- 33. The Foundations of Freedom, 1961, p. 197.

CHAPTER FOUR

FOOTNOTES

1. In Kenya the 'Majimbo' provisions in the independence constitution were scrapped off within a year - see Ghai and McAuslan op. cit. pp. 295 - 6.
2. The ease with which Kenya's leaders dismantled that country's independence constitution in a very short time is illustrative - see Ghai and McAuslan op. cit. pp. 177 - 219.
3. H.W.O. Okoth - Ogende: The politics of Constitutional Change in Kenya since Independence 1963 - 69 (1972) JOURNAL OF AFRICAN STUDIES
4. The revised independence constitution acquired an entirely new outlook and the fragmentary amendments were consolidated by Act No. 5/1969.
5. See part III of the preservation of public Security Act, Cap. 57 Laws of Kenya. The problem here is that although the state should have reserved powers to deal with emergency situations, these powers have been invoked to deal with fake emergency situations.
6. Uganda v. Commissioner of Prisons, ex - parte Matovu (1966) E.A. 514.
7. Act No. /1975 amending S. 27 of the Kenya Constitution.
8. See Steins "Legal Aspects of the Lesotho Constitutional Crisis" (1970)7 E.A.L.J. p. 210.
9. Ngwenya v. Deputy P.M. op. cit supra p.
10. Speech of Sobhuza II, King of Swaziland on April 12, 1973.
11. political parties in Western Europe.
12. Pareto "Circulation of Elite" in Amtai Etzioni, Patterns of Social Change and First op. cit. p. 44.
13. In a speech made in Paris, 11 September, 1968 Captain Raoul of Congo-Brazzaville said, "... I do not see why it is necessary to give back power to civilians, there is no problem of military government".

14. A.M. Babu in Walter Rodney, How Europe Underdeveloped Africa, London, 1974, 315, and First op. cit p. 149.
15. Hans Kelsen, The General Theory of Law and State.
16. S.A. de Smith, Constitutional Lawyers in Revolutionary Situations (1968) 7 University of Western Ontario Law Review, p. 98 and First, op. cit. p. 6.
17. Uganda v. Commissioner of Prisons, ex parte Matevu (1966) E.A. 514.
18. See Sir Charles Newbold, "The Role of a Judge as a Policy Maker", Eastern Africa Law Review, Vol. II, no. 2, 1969.
19. de Smith, op. cit., supra p. 98
20. (1969) I.A.C. 645.
21. (1970) 3 All E.R. 576
22. J.M. Ekelaan, Rhodesia; "The abdication of Constitutionality"(1969), Modern Law Review, p. 19
23. Uganda's Chief Justice after the military coup, Justice B.M. Kiwanuka, was murdered for sticking to strict legal niceties against the military regime.
24. (1971) I.C.L.Q. p. 315.
25. P.L.D. (1958) S.C. 533.
26. op. cit. supra p.
27. S.C. 58/69 of April 24, 1970, unreported.
28. (1967) 8 N.B.J. 87.
29. c.f.s. 75 of the Kenya Constitution.

CHAPTER FIVE

FOOTNOTES:

1. First, op. cit, p. 51 and Ghai Constitutions and political Order in East Africa, (1972) I.C.L.Q. p. 54.
2. Friedrich in Spiro, Patterns of African Development, Englewood Cliffs, N.J. 1967, p. 9.
3. J.K. Nyerere, President of Tanzania, also shares this view. see J.K. Nyerere Essay on Freedom and Economic Development.
4. E.S. Atieno Adhiambo, Charismatic Leadership and politics in Kenya. East African Journal 1968.
5. Target, May 30, 1973. A front page headline read like this: After Mzee, What?
6. Ghai and McAuslan, op. cit, p. 511.
7. In Kenya during, The Little General Election of 1966, K.P.U. candidates were not given ample time to campaign by the Kenya Government. Instead K.P.U were coerced and harressed by use of 'legitimate' means of violence. see Bennett, 'Kenya Little General Election; World Affairs Today, 1966 p. 336.
8. First, op. cit, p. 158.
9. So far in Commonwealth Africa succession to political leadership has only been through coups because of economic greed **which** is satisfied by constitutional manipulations to ensure one clings to power indefinitely in order to grab as much wealth as possible for oneself, family and for one's political supporters. Coups bring a complete Breakdown of the constitutional system and one hopes that the military will go back to the barracks once the politicians learn to respect and uphold the constitutions. The military in Ghana handed back power to the civilians in 1969, but took over again 1972 because the politicians under Dr. Busia had not learnt their lesson well enough. Dr. Busia was repeating the mistakes of Dr. Nkrumah.
10. Act N. 45/1965.