

THE EXECUTIVE POWER AND DEMOCRACY IN
KENYA

DISSERTATION SUBMITTED IN PARTIAL FULFILMENT
OF THE REQUIREMENTS FOR THE L.L.B. DEGREE
UNIVERSITY OF NAIROBI.

BY

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PREFACE

Since the beginning of Organized Power in the form of states beginning with the early Greek States, man has always advocated the need, and fought for democracy. Revolutions and Counter Revolutions (including bloody revolutions) have been carried out all in the name of democracy.

And Champions of different philosophies on democracy around the world do not recognise one another as authentic spokesman for it and some denounce democracy as preached or practised by the others as a sham.

This dissertation attempts ^{+ fails} to examine in outline some of the various modern theories of the concept of democracy and their application, and mainly the Kenya's Executive's role in their application or non-application in Kenya.

ACKNOWLEDGEMENTS

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ABBREVIATIONS:

1. A. L. J. East Africa Law Journal

2. A. L. R. East Africa Law Review

3. A. L. REP. East Africa Law Reports

4. K. N. U. Kenya African National Union

5. K. P. U. Kenya Peoples Union.

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7. What the Soviet Constitution Guarantees.

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- E. A. L J East Africa Law Journal
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 K. A. N. U. Kenya African National Union
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CHAPTER ONE

THE CONCEPT OF DEMOCRACY A BROAD PERSPECTIVE:

" The ruling ideas of each age have ever been the ideas of its ruling class.¹"

It has been Universally recognized that a free society and one whose interests are best protected is only a democratic society. Thus the governments of the West European Countries and of the United States claim that they have social and political organizations which cater for democratic and therefore free societies. The Eastern Countries such as the Soviet Union with a fundamentally different social economic and political organization from that of the Western Countries also claim to have democratic societies; so do the newly independent states of Africa, some of which have social and political systems quite unlike those found in the Western Countries or the Soviet Union. This chapter tries to examine very briefly what democracy has been taken to mean in various parts of the world, and which one of these meanings is applied in Kenya if at all.

The different interpretation of the same concept, democracy in different parts of the world is perhaps explained by the world is perhaps explained by the words of professor Macpherson that there has been a good deal of muddle about democracy and at the bottom of the muddle is

"a genuine confusion as to what democracy is supposed to be about The word democracy has changed its meaning more than once and in more than one direction.¹"

He goes on to state that these changes have been from its original Greek use to mean rule by the people or by the government in accordance with the will of the bulk of the people. Expressing the same view professor Nuabwezi observes:

" No word is more susceptible of a variety of undertious interpretations than democracy.²"

What these authors mean is that there is no general agreement as to how best to organize society socially, politically and economically so that the whole society's interests are best safeguarded; and what interests or values should be considered so fundamental as to be so safeguarded.

In the Western Countries, including the United States and the West European Countries democracy has come to be associated with a system of government.³ The prevailing idea in these countries being that democracy exists in a society whose government is limited by pre-determined rules laid down in the country's constitution. In this sense the excesses in the use of power associated with any system of organized power structure are controlled especially as regards its dealings with its citizens or individuals generally, so that government is said to be constitutional.

The most basic of these pre-determined rules are those concerned with the organization of state power. That is those which set up the framework of the government describe the organs of the state and their relationship with each other with the aim of distributing the state power among them so none of them has its (State power's) Monopoly which might lead to its misusing it or abusing it. The other rules relate to the civil and political rights and liberties of the individual which he can legally enforce as against the state or private individuals, and the procedure for the enforcement of these right and liberties. Thus Associated with this control of state power is the idea of its various organs acting as a check and balance on one another and the government action being limited visa vis the individual and being accountable to the people for all its actions. This is effected by giving the people the power to vote out of power a government which has failed in its obligations to its citizens. Thus political freedom, the freedom to vote, form political parties which oppose and vote in and out of power a government is one more of the essential features of democracy in these countries which make the government

..... accountable to an entity or organ distinct from itself..."⁴

A brief examination of some of these major features and the structures of the liberal democracy⁵ will show how they are supposed to operate to create a Constitution of government with a claim of a democratic society under it.

(1) SEPARATION OF STATE POWERS

The powers of the state are divided mainly among three major organs, the constitution giving them essentially different functions and powers and defining their relationship with each other. These are the executive, the legislature and the judiciary.

The executive deals mainly with matters of policy, political direction and administration, Maintenance of peace and order, the Security of the state and the execution of the social services. The legislature has the primary function of making the laws of land ^{4A} while the judiciary is given the function of the primary law intermeting organ, ^{4B} and guarding against excess use of the powers by the other two organs by determining authoritatively any alleged excess use of such power. It is particularly given the role of the guardian of the constitution to determine questions of its interpretation and application of its provisions ^{4C}.

This separation of powers is considered important because if any one organ had the powers of any of the other two the executive would, for example, make laws which would be in its own interests or would interpret them arbitrarily in its own interest against the interests of the individual. Nor should the legislature be given power to intermete its own made laws

" For the Legislature's interpretation of its powers would naturally be coloured by self interest which would operate to make the interpretation biased in favour of itself" ⁵

The Judiciary is given the power to interpret the laws including giving effect to the Constitution at provisions because it is supposed to be ⁶

" unaffected by the self-interest and consequent bias or the executive in upholding their action and apply to the interpretation of the constitution or a statute an impartiality of mind thus ensuring that stability and predictability of the rules which is the core of Constitutionalism" ⁷

This impartiality is reinforced by the doctrine of precedent and the tradition of judicial restraint. In the United States for example the Legislature and the Executive are not accountable to one another in performing their major functions so that the President has only the power to veto a Legislation and the legislature can pass a requisite majority vote to override the veto. The Independence of the judiciary is deeprooted in the country's Constitution. As the Supreme Court said

" Those who wrote our constitution well knew the danger in special legislative acts which take away the life, liberty or property of a particular named person When our Constitution and Bill of Rights were written, our ancestors had complete reason to know that legislative trials were too dangerous to liberty and to exist in a nation of free men they envisioned. And therefore they proscribed bills of attainder(emphasis Mine)⁸".

It is believed by the advocates for liberal democracy that this check and balance of the State organs against the ~~another~~ and the Independence of the courts and stability of their procedure in interpreting the powers of the other two organs makes the individual know of his stand in relation to the government which in turn create the right climate for a democratic society⁹.

INDIVIDUAL RIGHTS AND LIBERTIES:

With an exception of Britain¹⁰ most other countries practising liberal democracy have a justiciable Bill of Rights written into their Constitutions. These declare and guarantee certain fundamental rights and liberties believed to be inherent in the individual. The guarantee is against their violation either by the private individual but mostly by the government. These include the civil and political rights¹¹ including the right to personal liberty, freedom of speech and expression, freedom of association, of assembly and freedom from deprivation of property without compensation; to mention but a few.

Their being justiciable with an elaborate procedure for their enforcement provided for in the Constitution is believed to limit government ^{action} as regards the individual and therefore makes that government Constitutional and the society under its democratic.

Perhaps the most prominent of the guaranteed rights in these countries' Constitutions are the political rights. These are mainly the right to vote on a wide franchise and have a multi-party system with the freedom to oppose the government and even vote it out of power when it has lost its mandate. This coupled with the right of the people to elect their own legislators is believed to make the people participate in their own government and be able to determine their own destiny. This political freedom is considered to be the very essence of democracy in these countries for it ensures that any government has the mandate and is accountable to the electorate from the citizens. This is in keeping with the emphasis on democracy being a system of government.

But the democracy practised in these Western Countries is finalised as liberal democracy which developed out of an essentially liberal market, or Capitalist Society. In the words of professor Macpherson,

" The job of a liberal state " Multi-party State" was to maintain and promote a liberal society which was not essentially a democratic or an equal society "voting was restricted. Democracy came with an extension of voting on franchise as an adjunct to the competitive liberal society and state; when the lower class took the fully and competitive place within the system of liberal society, democracy was transformed from a threat to liberalism to a fulfilment of the liberal state, democratising liberalism (emphasis mine).¹²

It can clearly be seen that the liberal state extended the voting franchise to stem the discontent of the lower class stabilizing the liberal state's society and perpetuating the market society, or capitalism, thus;

" If the liberal state did not weaken itself [by democratising liberalism] It strengthened both itself and the market Society"¹³.

Having developed out of, and intended to strengthen the liberal society, therefore it is no wonder that liberal democracy emphasises the values of that market or Capitalist Society. These include individual choice and free competition in the fields of politics and Commerce and especially the sanctity of private property and 'freedom' of Contract with the Government imposing through laws only the minimum safeguards for the procedure on this freedom of the individual choice and competition.

These values protected by the liberal democracy are necessarily the values of the bourgeoisie in the Market Society as opposed to the values of the society as a whole; since as seen above ¹⁴ the effect of introducing liberal democracy was to strengthen the market society which is a bourgeoisie dominated society. As Tiger and Levi observe

" Two conclusions emerge from the study of the rise of the bourgeoisie: first the legal ideology (law) is the expression of social struggle and specific elements of a group's legal ideology are the outcome of struggles in which that group is engaged. Secondly the system of bourgeoisie in its grand outlines separates two fairly distinct parts. One reifies into ideology and the principles of property and contract upon which the Capitalism system rests and medictrably allows for the use of state power to protect those freedoms. The other consists of those legal principles which the bourgeoisie promoted as essential to the political task of winning power".¹⁵

This supports the assertion I have made above that liberal democracy protects the interests of the bourgeoisie as opposed to those of the society as a whole. It is for this reason that critics of the Western liberal democracy assert as the succeeding paragraphs will show that these states lose the right to the claim of having democratic societies under them.

iii) THE SOCILAIST DEMOCRACY

In the Soviet Union and the other Socialist States Democracy has been explained not as a system of government but by

" Putting emphasis on ends not means."¹⁶

In these countries it has come to mean

"Rule in the interests of the oppressed class or by the oppressed class".¹⁷

The Proponents of socialist democracy believe that democracy can only exist in a society in which there is no exploitation or domination of one class in that society by another. In this sense therefore a democratic society is an equal society in which humanity is freed from any domination or oppression to realise its full potential.

This Karl Marx believed can be achieved by releasing the workers who form the majority in any society from the domination of the bourgeoisie class and establishing the rule by the working class; proletariat dictatorship with a view to ending all exploitation. When the society is a society of workers without private control of the mean of production which force some to work for those in such control then a classness society on equal and therefore a democratic society would be created. Thus in the Communist Countries

" The first step in the revolution of the working class is to raise the proletariat to the position of the ruling class, to win the battle of democracy."¹⁸

The soviet Union's Constitution also guarantees certain fundamental rights and liberties to its citizens among them, the equality before the law; equality of all peoples; the right to work for all citizens;¹⁹ the right to ~~law~~ criticize freely; religious freedom; personal privacy; a ^{place} ~~peace~~ to live, education; a say in the country's affairs and political freedom.²⁰

Those rights exercisable as political rights are however exercisable only in promotion of socialism.²¹ And unlike those in liberal democracies these rights are not legally enforceable; not justiciable against the state and this is seen as one of the major short-comings of the socialist Constitutions which therefore according to liberal democracies is undemocratic. In the words of proffessor Nuabweze

" A proper interpretation would seem to suggest that the Constitution itself creates no legal guarantee of civil rights which the individual may assert against the state. The so called guarantee of the rights in the Constitution of the U. S. S. R. means no more than a declaration of objectives, a statement of what the state will hopefully do for its citizens".²²

It reads

" like a political manifesto than a legal charter."²³

But Proffessor Nuabweze admits that it is possible for a non legal convention

" Given ideal conditions to compel as much obedience on the part of the government as a legal sanction".²⁴

Now socialism itself is an ideal which aims at creating the necessary conditions for the achievement of these guarantees or objectives as Professor Nuabweze would call them. And that they are actually being realised is shown by the example of jobs for all guarantee contained in Article 40 of the 1977 Soviet Constitution in connection with which Vladimir Lomonosov²⁵ says:

" Not so long ago Moscow journalists hunted up with great difficulty a legendary figure, the last unemployed person in the Soviet Union . He recalled how the unemployment Office had summoned him and told him they had found him a job. After that they closed down for good. That was in 1930."²⁵

The other example showing that the right conditions exist for its fulfilment is the right of Equality of all Citizens before the law of which Albert Digolkim²⁶ says that the difference between the Soviet Democracy and the bourgeoisie idea of democracy is

"..... not in theory but in practice true equality before the law is only possible in a society without social distinctions"

Speaking of the right to a lawyer,

"Formerly this right is recognized everywhere including in the capitalist Countries. But far from everyone in the capitalist world can take full advantage of this right. This requires a lot of money. In the Soviet Union the Services of a lawyer are within everyone's reach".²⁷ of the right of appeal:

" In this country there is no definite form of making an appeal. And there is no fee. In the United States for instance only a lawyer is qualified to make an appeal and the fee is high one person can afford it, another cannot."^{28A}

These examples also enunciate the principles upon which socialist democracy is based. Article 36 of the Soviet Constitution 1977 States

" (Article 36) citizens of the USSR of different races and nationalities have equal rights. Exercise of these rights is ensured by a policy of all round development."^{28(B)}

Explaining the essence of this right Albert Pigolkin says that before the socialist reforms

"Moscow, Petrograd (now Leningrad) and several other large cities were like Islands of Industrial Civilization in an immense peasant sea Now all regions have an approximately equal level of development revenue of these republics consisted of subsidies from the national budget "²⁹:

Commenting on the criticism against the restrictive wording of the Constitutional guarantees particularly of Article 50 of the Constitution which states

" In accordance with the interests of the people and in order to strengthen and develop the socialist system, Citizens of the U. S. S. R. are granted freedom of speech of the press and of assembly" [Emphasis mine]

Leonid Lazarev³⁰ says it is because,

" any encroachment upon Socialist achievements cannot be regarded as anything other than violation of the Conscious will of the overwhelming majority. To permit encroachment of this kind would violate the rights and freedoms of millions of people for the sake of a few. We regard this as unjust Any democracy prohibits something, the crux of the matter is what it prohibits and why".^{30(b)}

So unlike the liberal democratic constitutions which embody principles of free individual choice in the fields of politics and commerce that is safeguarding the politics of competition with the consequence domination and oppression of the working class by the bourgeoisie class, the Soviet Constitution embodies rights and principles which are geared only towards the creation of a socialist society, a classless and equal and therefore a democratic society.

And in my opinion it is evident that from the above examination of the two brands of democracy that the Socialist democracy, which Professor Macpherson calls democracy in the broad sense is the higher brand than the liberal democracy, which he calls democracy in the narrow sense, if the latter retains the right to be called a democracy at all.

Many of the emergent states of Africa and Asia, Kenya included, have inherited the liberal democratic principles from their former Colonial Masters which were West European countries; but they have now largely rejected some of the essential features of this democracy, and they have also, except for a few like Tanzania, not adopted the Socialist brand of democracy.

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Political freedom which is considered so essential for the liberal democracy is seriously curtailed and in some is completely non-existent. crifices and opposition of the government in power is discouraged. The formation of political parties which would oppose the party in power is either disallowed and those parties already in existence are either proscribed or made ineffective. Most of these states are one party states.

Those of the liberal democratic features which have been retained have been so modified as to be made ineffective. The trend in these countries being the ever strengthening of the executive organ of the state and the wakening of the other organs so that the concept of the limited or Constitutional government is severely limited or totally lacking.

Where the separation of power is embodied in the Constitution, it exists in theory only while in practice the Executive has assumed all facts control of the other organs. The courts being unable to effectively enforce the constitutional provisions because the senior officials in the judiciary are appointed by the Executive, and therefore not also free from its control. Yet these states retain free enterprise economies characteristic of liberal societies with free individual choice and competition in commerce. These states have rejected only those principles of liberal democracy which are meant to limit the government power while retaining an essentially Capitalist Society.

The Bills of Rights are so restrictively described with so many exceptions to the guaranteed right and liberties, and even more restrictively interpreted by the courts³¹ as to leave the individual with almost no rights against the state except in theory. ^{And} As Professor Nuabweze observes in regard to their Constitution:

" The claim of the individual upon the state for social services and amenities such as the right to be given employment, education, medical attention etc is not mentioned. These Bills of Rights cannot therefore be said to have entrenched any particular brand of economic philosophy whether laissez fair Capitalism Socialism or Communism"^{31 (B)}.

The suppression of the political freedoms³² to curb opposition to the government in power is usually done in the name of promoting national unity and devoting the energies to and ensuring consistency in development. Professor Macpherson explains this as a brand of democracy peculiar to the newly independent states of Africa thus,

" the general will for modernization be harnessed and continually generated
(.) [T]herefore the new states of Africa cannot afford the politics of extreme choice in their fight against starvation, ignorance and early diseased death."³³

But while not refuting that such a democracy can exist, it does not and could not possibly exist in Kenya³⁴ because the achievement of the objectives of any brand of democracy would involve a conscious effort on the part of the government and would therefore necessitate the formulation or adoption of a clear government economic policy or ideology on how to achieve those goals. Kenya has not adopted any such policy of development. Instead the government encourages private enterprise and control of the means of production.

These are owned and controlled by the bourgeoisie both foreign and local petty bourgeoisie whose interests as a class can only be furthered by the exploitation of the working class which latter class form the mass of the Kenya population. The mode of production therefore practised in Kenya cannot be compatible with the objectives of such a democracy as Professor Macpherson speaks of as existing in Africa States.

It is noteworthy that in most of these countries modernization is seen only in the urban areas while the rural areas remain undeveloped and the mass of the people still remain poor, illiterate, and there is always reports of famine or threat of it in these countries. Kenya for example, an essentially agricultural country, has in 1980 become a food deficit as opposed to a food surplus country.

In rejecting liberal democracy therefore the governments of the newly Independent States of Africa are not motivated by any need for a new brand of democracy but by the desire to curb opposition which would threaten their positions of power and what Professor Nuabweze says, that

" Personal love for power provides a ^{same} ~~same~~ opportunity to acquire wealth and prestige. It is then impossible for them to develop any real Commitment to democracy [here he meant Liberal democracy]. So long as that might entail the loss of power and its benefits!" ³⁶

Kenya is one of the African States whose Constitution embody the major features of liberal democracy. The next chapter is concerned with how it was supposed to apply or operate in Kenya.

CHAPTER TWO

INTRODUCTION OF LIBERAL DEMOCRACY

IN KENYA

Before relinquishing her last political stronghold on Kenya, Britain ensured that the new African Government would be organized on liberal democratic lines. Therefore, the 1962 Conference ~~to take~~^{talks} in London were to discuss Kenya's Independence Constitution which was to form the basis for such a government. This constitution became the West Minister Export Model Constitution which was the Independence Constitution for many of the former British Colonies.

The scope of this work allows me to deal with the nature and content of this Model Constitution only so far as it is necessary to show how it was intended to form the basis for the liberal democracy in Kenya. Its most significant features according to the Constitutional Structure are the diffusion of the Executive Powers; the separation of ^{state} powers; the Central position of the legislature in the whole state power structure, especially its control of the government; the inclusion in it of a justiciable Bill of Rights and the independence of the judiciary each one intended in its own way to limit and control government power. Each will be briefly examined in turn to show how it was intended to fulfil its function.

DIFFUSION OF EXECUTIVE POWERS

The Executive Authority of the government of Kenya was vested in the Queen³⁷ and exercised on the spot on her behalf by the Governor General. So the Governor General was the Executive Head of the Government. But all the executive functions were actually exercised on his behalf by the Prime Minister who was also the head of the Cabinet. The Governor General was left with no specific executive functions and was more or less a figure head. Whenever he acted in matters of government it was to be on the advice of the Cabinet or some other independent body (independent of the government) dealing with the matter in question. Moreover parliament had authority to confer executive functions on other persons than the Governor General³⁸. He did not even have the discretion to determine the composition of his own government. He appointed and dismissed the Cabinet Ministers only after consulting with the Prime Minister.³⁹ The work of government was the collective responsibility of each and every Cabinet Minister and the Prime Minister.⁴⁰

The constitution also established regional governments based on the federal structure with the Executive Authority of the Regions vested in the respective Regional Executive Heads with little intrusion from the Central Government in matters regarding their regions.

The constitution also established Independent Public Service bodies to deal with certain matters in the public service instead of such matters being directly under the Government. These included the Public Service Commission,⁴¹ the Police Service Commission,⁴² the Judicial Service Commission⁴³ and the Central Land Board. Thus public power was fairly diffuse and the Executive had very little direct influence on public life.

The Governor General had emergency powers but their exercise was very restricted. He could declare a state of emergency only after due authorisation of any one of the two houses of the National Assembly given in a resolution supported by 65% of the members of that House⁴⁵ and the declaration remained valid for only seven days unless the other House also with a similar resolution ratified it. Even after the approval of the two Houses, the state of Emergency could last for a maximum period of two months and could only be extended by further such solutions.

The 1963 Independence Constitution therefore gave the Executive very restricted powers in matters affecting public life, and it had little or no chance to abuse public power.

THE LEGISLATURE

Great importance was attached to the Legislature as a Government Control Institution besides its other function as the Primary Law making body. It was intended to be the but work of democracy in Kenya. It is the institution through which the people are supposed to be involved in the work of the government because it is in it that the people were supposed to be popularly represented by its elected members and hence the need for the government to be responsible to it for all its policy decisions, direction and expenditure. At Independence the Kenya Parliament Comprised the House of Representatives and the Senate. The House of Representatives had the power of internal regulation and the discharge of its own duties.⁴⁶ The government was responsible to the legislature through the collective responsibility of the Cabinet to the legislature.⁴⁷ The legislature had the right and obligation to call upon it to account for its actions. Furthermore parliament had ~~no~~ power to pass a vote of no confidence in the government⁴⁸ after which the government would have to resign or parliament would dissolve. All government policies and actions were supposed to be discussed in Parliament and approved or rejected, and the government Bills also to be properly examined before they could become law.

The Legislature had also power to control government spending by delaying its Finance Bills.^{48(B)} These provisions were supposed to make it therefore a strong fetter on the government power.

THE BILL OF RIGHTS

Liberal democracy as seen in chapter one considers a justiciable Bill of Rights as essential in controlling or limiting government power in its actions with regard to the individual.⁴⁹ In the Kenya Independence Constitution a bill declaring and guaranteeing the individual rights and liberties was incorporated and an elaborate procedure for the enforcement of these rights and liberties included. So everyone had access to the supreme Court to have those of his rights guaranteed by the constitution determined.⁵⁰ For example in the case of Wadhwa V City Council of Nairobi⁵¹ in which the plaintiffs non citizen stallholders in the City Market sought to have the City Council's quit notices to them issued on the ground that they were not Kenya citizens of African origin, declared void as they infringed upon the guaranteed right of freedom from discrimination as embodied in section 26 (2) of the Constitution. The court found for the plaintiffs and declared the quit notices void. This case exemplifies the curbing of government power by the provisions in the Bill of Rights.

THE JUDICIARY

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As seen in chapter one the judiciary is considered very important in liberal democracy especially as the guardian of the constitution. The courts are supposed to determine authoritatively any dispute regarding the interpretation and enforcement of its provisions; and therefore it is also expected to resolve any conflicts regarding the extent and exercise of the other two organs of the State, the legislature and the Executive. This is done for example by declaring a law void as unconstitutional if the government supports to enforce any such law which has not been enacted as such by the legislature or its passing been duly authorised by the constitution or some other valid law; and also by declaring void any law passed by the legislature if it has not been enacted according to the laid down procedure or if it conflicts with some substantive provision in the constitution.

The judiciary therefore enforces the principle of separation of powers which is also considered as one of the basis for a constitutional or limited government. Thus provisions for the safeguarding of the independence of the judiciary were included in the constitution (1963). Section 184 established the Judicial Service Commission to deal with the appointment discipline and dismissal of the judicial officers.⁵² The Chief Justice was appointed by the Governor General after consulting with the Regional Authorities and the

Prime Minister.⁵³ *puisne* The *puisne* judges were appointed by the Governor General acting in consultation with the Judicial Service Commission.⁵⁴ Thus the constitution ensured that the judiciary was in a position to effectively control excesses in the exercise of state power.⁵⁵

As argued in the first chapter any brand of democracy has the major aim of protecting the values which its architects consider as crucial in the place where it is intended to apply. The interests protected by liberal democracy are also highlighted in the first chapter.

Before quitting formal political control of Kenya, Britain had invested in it substantially in Commercial firms, large farms and other industries. Her citizens had acquired substantial control of the means of production in Kenya and a bourgeoisie or capitalist class had emerged with its emphasis on the individual. It was these and their interests that the liberal democracy in Kenya was intended to protect. In negotiating for this protection the Secretary of State in the 1962 Constitutional Conference had this to say:-

"....the future viability of Kenya's economy depends primarily on the restoration of confidence both on the part of the inhabitants who have a significant contribution to the economy and on the part of the outside investors"⁵⁷

This is because it was *feared* that the new Nationalist Government might deprive the non-citizens and foreign investors of the property they had acquired and give them to its citizens, and also of other benefits given especially to the former British Civil Servants resident in Kenya such as pensions and other facilities; and also that the new government might ally politically and economically with the Eastern Socialist Countries by which alliance British diplomatic and commercial interests in Kenya would be at stake.^{57(B)} Hence the demand for official protection of these interests which was given by the adoption of the liberal democracy with principles severely limiting government power and especially the justiciable Bill of Rights. Worth of particular note is section 65 which entrenched the property rights of the individual. It is also worth noting that it is the section with the least of exceptions in the Bill of Rights. It was also feared that the minority African Communities would be dominated and discriminated against in the economic and political field hence the establishment of Regional Governments with the minimum of interference in matters regarding their respective Regions from the Central or Federal Government.

The constitution also established the procedure for elections on a wide franchise to the legislative and executive bodies with which ^{gives} goes the idea of popular participation in matters of government and the accountability of the government to the electorate.

The Independence Constitution therefore ensured that the government was fairly limited and constitutional and therefore democratic in the liberal sense.

The adoption of this brand of democracy was a pre-condition to the granting of independence and not because it was acceptable to the parties negotiating for the independence.⁵⁸ No wonder then that it has been largely rejected; or its most salient principles whittled down.

CHAPTER THREE

REJECTION OF DEMOCRACY IN KENYA

The Executive of the modern State is but a Committee for the management of the affairs of the bourgeoisie."^{59A}

Since independence in Kenya the constitutional developments have been towards a progressive suppression of liberal democracy, those of its salient features which form the basis for a limited or constitutional government. At the same time amendments to the constitution have enhanced the powers of the executive so that the government has tended to be more and more authoritarian, thus liberal democracy existing only on paper.⁵⁹ More, the emphasis in these developments show a tendency towards presidential rather than parliamentary supremacy. Instead of the parliament controlling the executive as is the case in liberal democracies the executive in Kenya has assumed de facto control of the legislature and also the judiciary which institutions are supposed to share and help to limit state power. I shall now briefly examine how these changes have been effected.

As early as 1964 the first of the amendments to the constitution brought the birth of the Republic and the presidency.⁶¹ This ended to a large extent the diffusion of the executive powers and concentrated them on the person of the president whose powers were consequently widened. The post of Prime Minister was abolished. The president became the Head of the State, the Head of the Government and Commander-in-chief of the Armed Forces.

He could appoint and dismiss the Vice-president and any or all the Cabinet Ministers at his own discretion. He also acquired the power to appoint and dismiss the senior officers in the public service at his own discretion. These include the attorney general the controller and Auditor General, the Permanent Secretaries and the Chief Commissioner of police⁶².

Schedule 1 of the Independence Constitution which described the executive and legislative powers of the regions was repealed. These powers were now brought under the Central Government. The public service Commission was brought under the close control of the president while the Police Service Commission and the Central Land Board were abolished. The direct and most important of these changes was the consolidation of all the executive functions on the president thus giving the person of the president greater and direct control of public life and national direction.

The arguments in favour of such strengthening of the executive power has been given in the line that Kenya being a young nation with a weak economy and people of diverse tribal and ethnic affiliations needed a strong Executive

for national integration and development; that the diffusion of executive functions among the different bodies prior to this amendment was detrimental to integrated development policy and direction. So Kenya needed,

".....a strong and wise government founded on the will of the people by a constitution which embodies the fact of national leadership"⁶³?

These arguments reveal good or nationalist motives for giving power to the executive but later developments reveal that these were just cover up arguments for other motives,⁶⁴ or if they were bona fide statements the nationalist motives they supported were overtaken by these other motives, quite inconsistent with nationalism.⁶⁵

By further amendment⁶⁶ the President had full discretion to appoint the Chief justice.

Yet another amendment gave him gave him extraordinary emergency powers which he could use to do anything including suspending the whole or part of the constitution, and detain persons without trial⁶⁷ all in his absolute discretion. By this amendment a simple majority of the voting members in either House of the national Assembly sufficed to approve a declaration of the state of emergency and even without approval by the requisite simple majority could last for as long as twenty-one days and after such approval can last as long as the president wishes.

Another amendment gave the president power to constitute and abolish offices for the public and making and terminating appointments to such offices.⁶⁸ The aim of this provision being to enable the president to win favour with the part of the public affected by such constitution of offices and appointments and also gain support from the section of the public threatened with doing the opposite or intimidating the political opponents where the discolutions and dismissals would affect them. In support of the aim of this provision, S 25 of the 1969 Kenya constitution states that all persons in the ^{public} civil service hold office at the pleasure of the president.

These later changes clearly go beyond the purported purpose of consolidating decision making centres for the purpose of national integration and consistency in development and reveal the intention of inducing more allegiance to the person of the president so as to entrench his position of power. They give him direct control over and his power is felt in every sphere of public life; and directed against any political opposition to his position for by declaring that a state of emergency exists he can authorise the detention of his political opponents without trial.⁷⁰

An examination of the decline of the institutions and structures aimed at limiting the state power visa vis the individual will further show the plight of liberal democracy.

THE LEGISLATURE

The role this institution was expected to play in furthering the liberal democracy has been seen in the preceeding chapters. ^{But} In the Kenyan Parliament there is virtually no politics. While it has been seen that opposition to the government action and policies is essential in liberal democracy.

In 1969 the executive, to suppress political opposition proscribed K.P.U. then the only other surviving political party and its leaders were detained without trial under the president's emergency powers. So Kenya became a de facto one party state with K.A.N.U. the ruling party as the only party in parliament. In such a situation especially as the president of K.A.N.U. is also the president of the Republic and the Head of the government there can be no serious politics in the parliament which would lead to criticism and opposition of government action and policies. It is clear then that the Kenyan Parliament has been rendered incapable of effectively curbing any arbitrariness in use of government power in this respect. Therefore the government is able to ride roughshod over the legislature and by this and by use of other methods (which will proceed to examine present by) is even able to dominate and control it.

The individual members of the legislature are also incapacitated by this executive domination and by other factors in the performance of their duties as critics of government action and laws and as legislators. The very procedure for election into parliament creates a situation whereby there is the tendency for every member to feel that he owes a duty of allegiance to the president and the member cannot therefore feel free to criticize and oppose his government. A person seeking nomination for candidature must state in his ballot paper who he supports as the presidential candidate, that is, one ballot paper pairs the parliamentary candidate with the presidential candidate. Since there is only one political party whose president invariably gets elected as the president of the republic, the candidate for the legislature has no choice but name that person. It would then appear that the member of parliament enters the legislature under the umbrella of the presidential candidate and this has the effect of creating the feeling of allegiance to the elected president. This feeling of duty of allegiance is even more enhanced by the constitutional provision that the president may pardon an M.P. whose election has been nullified by the High Court for committing an election offence so that he is free to contest the following by-election.

Also before one can contest the elections one must get party clearance as a viable candidate. If one has ever been too critical of the government or the party it is unlikely that he would get the clearance. This is exemplified by the refusal of the clearance for the ex-K.P.U. Leaders in the 1979 National Elections because they had been opponents of the ruling party K.A.N.U.

This therefore negates the idea of free elections to the legislature.

Moreover if any individual M.P. becomes too critical of the government he is apparently considered a security risk and is intimidated particularly by detention without trial.⁷⁴ This then shows how impracticable it is for the legislature to curb the executive power the latter which in fact controls and dominates the former and by use of the above methods is able to introduce the changes into the constitution giving itself more power or simply accomplishing its wishes with ease. For example on the 4th July, 1974 the late president Kenyatta gave an order that thenceforth deliberations in Parliament were to be conducted in Kiswahili (the constitution (1969) stated that the official language for deliberations was English. One of the members⁷⁵ raised the objection to the order as unconstitutional. On the 10th of June the then Attorney General introduced a constitutional amendment Bill to comply with the president's order and the provision for the deliberations in Kiswahili was to apply retrospectively as from the date of the president's order.

In its role of the primary law making body the legislature is equally ineffective and has had this function in practice usurped by the executive.

The parliamentary Bills are usually either government Bills or private members Bills. The Private Member's Bills are difficult to draft as this is done in the necessary legal language requiring an experienced lawyer. This entails a lot of expenses for the individual member since the government neither provides the services of a lawyer nor the funds to engage one. Consequently practically all the Bills introduced in parliament in the whole history of the Kenya Legislature⁷⁶ are Government Bills which are never effectively criticized or opposed because of the intimidation and domination of the legislators seen above and also because the legal language used in these bills is difficult for most of the members to understand, and therefore they become law unopposed and even unamended. It can be safely argued then that the executive actually 'makes' the laws with the legislature only performing the role of a legitimizer. It is in this respect that Robert Martin says of the legislatures in Commonwealth Africa that they have become,

".... rubber stamping institutions"⁷⁷ for the government drafted and government discussed Bills.

It is clear then that the legislature is most ineffective in its roles of controlling the government and of primary law making and therefore failed in its intended role as the buwork of liberal democracy in Kenya.

It is quite clear then that the Bill of 'Guaranteed' Rights is quite ineffective in its application and in curbing the arbitrary use of power by the government. Moreover, what Professor Nuabweze observes⁸⁴ that the Bills in African states do not mention the economic rights is also true of the Kenyan Bill and even without the above limitations on its application, the guarantee of political and civil liberties and rights in a society such as Kenya's where the mass of the people are poor and illiterate and oppressed by a Capitalist class would still be meaningless.⁸⁵

THE JUDICIARY

As revealed by the discussions on the interpretation of individual Rights Provisions in the constitution the courts are not themselves free of influence from the government. The bourgeoisie class both foreign and local has entrenched itself in Kenya and being the dominant class has its interests protected by the laws, which laws are enforced by the coercive power of the state.

The courts in the modern state also have their role to play in maintaining the status quo; hence the,

"Judges are members of the ruling class by birth or assimilation (regardless of what class they may be) and hired employees of the state who depend ultimately on the coercive power of the executive for the enforcement of their decisions."⁸⁷

This is even more so in Kenya where the executive has assumed an extraordinarily strong position and the courts must therefore echo their wishes.

The conclusion to be drawn about liberal democracy therefore is that it does not exist in Kenya except on paper. It was argued in chapter Two, that liberal democracy was allowed in the Western Capitalist States to stem the rising discontent of the lower class, the workers. So democracy was allowed to stabilize the market society by allowing the lower class a measure of competition in it. By denial of liberal democracy in the Kenyan Capitalist Society then it means that the lower (working) class is denied even the little bargaining power accorded to their Western Counter Parts; so that what we have in Kenya is blatant exploitation of this lower class without the means for even the minimum of checks.

The Kenyan executive has endeavoured to discard liberal democratic principles the application of which would threaten the positions of those already in seats of power. It is therefore the need to safeguard their interests as members of the ruling class which entail acquisition of wealth, personal ^{aff}grandisement and the other benefits associated with power, and the interests of the foreign bourgeoisie who are the main source of this wealth and with whom the local bourgeoisie therefore collaborate, rather than the need for national integration and development that the executive in Kenya has manouvered for changes in the constitution giving itself more and more power. This is so because despite the professed intentions for ^{the} enhancing ^{of the} executive powers the mass of the people in Kenya remain poor and illiterate and the level of development in the whole country is insignificant, while the bourgeoisie class is controlling more and more of the country's limited resources. As Robert Martin observes of Kenya,

"..... the economic conditions remain unchanged"⁸⁸

From what they were in pre-independence Kenya — the exploitation of the mass of the people and their subjection to ^overty for the benefit of a minority class.

For a comparison Tanzania has also rejected liberal democracy but unlike Kenya has voiced this rejection in her policy statements and statutes for example the Arusha Declaration of 1967 declared Tanzania a de Jure one party state. The executive is also given tremendous powers. The policy is to the effect that Tanzania aims at carrying out a successful revolution to achieve socialist goals, what to them is a better brand of democracy of,

"..... a first society of free and equal citizens who live in healthy conditions who control their own destiny

.

the liberal democratic theory of politics with its emphasis on the individual and on political freedom may be of very little value in a society where intense poverty and economic inequality are the essential national problems"⁸⁹

C O N C L U S I O N

It is for this brand of democracy that the Africans in Kenya hoped for when they sought for their independence from colonial domination. The fight for freedom was aimed at ending exploitation of them as the majority by the minority class of the Europeans. It was aimed at gaining for themselves an equal and just society. This would be achieved by the mass of the people acquiring and controlling the means of production mainly the land and the industries through state

It should have been expected of the Nationalist leaders to make these hopes a reality by reshaping society into the free and equal society, a democratic society as envisaged at Independence.⁹⁰ This democracy would as of necessity have to be socialist democracy for as Nyerere said :

"Lenin does not belong only to the Soviet Union his work and his ideas are part of mankind's heritage and are relevant to us all."⁹¹

But those interested with power at independence to lead in the fight for democracy betrayed and have continued to betray the cause of the people and the cause for democracy for their personal greed, for more power wealth and personal prestige.

It is because of this unchecked exploitation of the mass of the people and the rejection of any form of democracy that there is ever rising discontent against the state in the form of students demonstration, workers' strikes and boycotts and more militancy in the Trade Union Movements. This is because even the 'Stabilizing of the market society' by liberal democracy is lacking. These developments of instability are clearly then a reassertion of the demands to end exploitation and domination of the mass of the people by a minority class; a reassertion of the need for equality and dignity; for democracy.

For example :

On July 29th 1978 Shopstewards of Kenya Union of Commercial Food and Allied Workers called for a national wide strike of all bank employees in protest to an alleged refusal by the management to raise salaries ... 37 workers were arrested by the police who denounced them as the ring leaders ... Mr. Akumu stated "We cannot fight the government of Kenya."¹⁹

Here Mr. Akumu who was a Trade Union Leader, Secretary General of COTU, clearly meant that the government of Kenya was out to suppress their cause and they lacked the necessary strength of force to fight the organized power of the state which had declared strikes illegal. Also

"in 1974 COTU threatened a nationwide strike against failure of government guidelines for wages to reflect the galloping inflation and the cost of living. It is difficult to see the dividing line between economic and political motivations (Emphasis mine).

In calling this strike COTU also called for a demonstration in memory of an M.P. who was murdered. But the Minister for labour disallowed the application (for permission to demonstrate) on the ground that the matter was not relating to employment".⁹³

Also in the University of Nairobi there is constant students' unrest and demonstrations directed against mainly the government ⁹⁴ and its actions and the general economic domination of the people by a bourgeoisie class.

These developments show that Kenyans have not lost the will power to fight to end exploitation and arbitrary use of Executive power and win equality, and democracy for the society despite the struggle by the Executive to thwart their efforts. They are also a positive indicator of the lack of democracy in Kenya.

1. Proffessor Macpherson: The Real World of Democracy: The Massey Lectures 1966.
1 A Marx And Engels: The Communist Manifesto, (infra) PP
2. Proffessor Nuabweze: Constitutionalism in The Emergent States (1973) page 1 paragraph 2
3. This is the explanation advanced by Proffessor Macpherson in The Real World of Democracy (Supra) page
4. Proffessor De Smith: The New Commonwealth and Its Constitutions (1964) page 106
5. Proffessor Nuabweze: Constitutionalism in The Emergent States Page 15 paragraph I
6. But see footnote No. 87 below
7. Proffessor Nuabweze: Constitutionalism(I bid) page 15 paragraph 2
8. In U.S V. LOVETT 1945 328 U.S 303 cited in Nuabweze: Constitutionalism (I bid) page 16.
9. But see Footnote 87 below
10. Britain's Constitution is not Written but established by long tradition yet the individuals enjoy justiciable rights like in other Western States. This may also support the argument for the guarantee of individual Rights in the Soviet Union. See Footnote No. 24.
11. Note that these Bills do not include any **Justiciable** economic rights and as argued in the Introductory part of the Interview^e on What The Soviet Constitution Guarantees (1978): Novosti Press Agency Publishing House:

" Every Constitution must be judged within its Social and economic context. Otherwise even the loftiest laws isolated from reality and from their foundations in life are only empty words"
12. Proffessor Macpherson: The Real World of Democracy
13. Ibid
14. Ibid

15. Tiger And Levi : Law And The Rise of Capitalism: New York Monthly Review (1977)
16. Proffessor Macpherson: The Real World of Democracy (Supra)
17. Proffessor Macpherson: The Real World of Democracy (Supra)
18. Marx and Engels: The Communist Manifesto.
19. Interviews on What the Soviet cited in the The Soviet Constitution Guarantees. (Supra)
20. I bid
21. I bid
22. Proffessor Nuabweze: Constitutionalism(Supra)
23. I bid page 2
24. I bid page 4
25. Chairman of the state Committee on labour and Social Questions under the U. S. S. R. Council of Ministers; in What the Soviet Constitution Guarantees (Supra)
26. What the Soviet Constitution Guarantees (I bid)
27. I bid page 22
- 28.(A)Ibid page 8
28. (B) Cited in What The Soviet (Ibid)
29. What The Soviet (I bid) pages 12 and 14
30. Senior Lecturer at The National Research Institute of Soviet Law Under the U. S. S. R. Minister of Justice.
- 30B. What the Soviet (Supra) page 75 and 76
31. See footnote No, 87
- 31B. Nuabweze: Constitution (Supra)
32. Those most suppressed by their restrictive Interpretations and Intimidations by the Executive include those related to the right of Assembly, Association and freedom of expression.
33. Proffessor Macpherson: The Real World (Supra)
34. Because of the reasons argued out in the last paragraph of the chapter Three.
36. Proffessor Nuabweze Constitutionalism (Supra) page 162

CHAPTER TWO:

37. S 72 (1) The Kenya Constitution (1963) before the Republic was established in 1964.
38. I bid S 72 (2)
39. I bid S 73 (3)
40. I bid 76 (2)
41. I bid S 176 (1) The public Service Commission dealt with appointment, discipline and dismissal of the Senior Officers in Public Service
42. I bid S 150 (1) section 153 gave the Commission power to appoint discipline and dismissal Officers in the police force of or above the rank of Assistant Supritendents.
43. Footnote 52 (Supra)
45. I bid S 29 (2)
46. I bid S 62
47. I bid S 76_(2)
48. I bid S 75 (4)
- 48B.
49. But see footnote 27
50. But see the discussion of the role of the judiciary below
see Also 57 A and footnote No. 27 A above
51. 1968 E. A. 406 But this case is one of the exceptions to the general restrictive interpretation of the rights by the courts
Certainly because it concerned the sanetity of private property;
and also the court wanted to restore the confidence of the foreigners. see footnote no. 57 below, and also
52. S 176 (2) Kenya Constitution (1963).
53. I bid S 172 (1)
- 54.
55. But see footnote 87 (below)
57. *Cmd 1700 London HM Stationery Office 1962 PP12*
- 57B. Glary Waserman The Politics of Consesual Decolonization
The African Review Vol 15 (1975) page 1- 15
58. Haberson J. W. in Nation Building in Kenya *PS8*
59A Marx and Engels: The Communist Manifesto (Supra)

CHAPTER III

- 59 The Kenya Constitution embodies the theory of liberal democracy.
- 59A MarxArid Engles : The Communist Manifesto (Supra)
- 60 In practice though not sanctioned by law
- 61 The first Constituional Ammendning Act No. 28 of 1964
- 62 Hitherto the Governor General could make and terminate appointments after consulting the relevant public service bodies.
- 63 The Kenya House of Representatives reports Vol. 3 October 27th 1964 3881
- 64 These will be revealed in the last part of this chapter *ie pp 24 Para*
- 65 Perhaps the proffessed aims of these changes is what professor Maepherson:In the real world ... (supra) refers to as the brand **of democracy** peculiar to African States.
- 66 The second^{constitutional} ammendment Act No. 38 of 1964
- 67 These powers have been used mainly to suppress polical opposition to the government
- 68 The 4th Constistitutional ammendment Act No. 16 of 1966
- 73 These persons include a former Vice President Mr. Oginga Odinga
- 74 Many M.PS have been detained including Mr. Shikuku, Mr. Seroney Mr. Oginga Odinga to metion but a few; (although they have now been released), and none has yet been detained by the Second President of the Republic.
- Other forms of intimidation include the denial of job apportunities for the critics of the government. For example in expressing outrage against the Ex-K.P.U. Officials who had instituted court proceedings against the K.A.N.U. Officials for refusing to give them the required clearance so that they could contest the 1979 National Elections the president said that he had, as reported in the Daily Nation 22 October, 1979 Page 13;
- "Contemplated giving these Ex-K.P.U. people jobs but his feelings had now been hardened because of their Court action"
- 75 This is one of the members, Mr. Seroney, who later got detained under the Surgency Powers because he was too critical of the government and the ruling party.
- 76 Except just one Private Members Bill, the Hire Purchase Bill introduced by the late J. M. Kariuki,
- 77 Martin Robert: Legislatures and Social Economic Development in Commonwealth Africa 1975.
- 78 But see footnote 27 above

- 79 See the general discussion on the role of the judiciary and especially
footnote 87 below
- 80 Unreported High Court (K) 1966
- 81 1970 E 46
- 82
- 83 The Kenya Constitution (1969)
- 84 See footnote 31 (B)
- 85 See ~~also~~ footnote No. 11 and also No. 27
- 86 Marx and Engles: The Communist Manifesto
- 87 Martin Robert: Personal Freedom and the Law in Tanzania 1974
P 55 citing Nyerere
- 88 Martin Robert: Legislatures Social Economic Development (Supra)
- 89 Martin Robert: Personal Freedom and the Law in Tanzania (Supra)
P 1
- 90 This is the necessary conclusion since the struggle for Independence
was waged by mainly the peasants and the workers, the class
exploited by the minority class of the uropeans; who sought to ~~join~~
win for themselves control of the means of production and therefore
and equal society. They certainly would not expect to continue
being dominated over and exploited by a bourgeoisie capitalist class
whether local/^{or} ^{after the} foreign overthrowal of a similar class from political
control.
- 91 Martin Robert_ : Personal Freedom and the Law ... (Supra)
Citing Nyerere on "Freedom and Unity: Oxford University Press (1966)
- 92 Gilmore Jacobson Ingrid: Organized Labour and Government Controls
in Kenya 1975 E.A.L.J. Vol II PP 31
- 93 I bid PP 33
- 94 An example of these demonstrations is the one of these demonstrations
is the yearly demonstration in memory of the same murdered M.P. COTU
sought to demonstrate in commemoration of. This is not as a
coincidence but because this particular M.P. advocated and voiced the
need to improve the economic conditions of the workers.
Another one of these demonstrations was that in opposition to the K.A.N.U.
officials refusal to give clearance for the candidature of the former
Ex K.P.U. officials for the 1979 National Elections which demonstration
led to the temporary closure of the University by the government; Still
in effort to suppress the struggle for democracy.