

"JUDICIAL INDEPENDENCE IN KENYA"

MYTH OR REALITY?

A DISSERTATION SUBMITTED IN PARTIAL
FULFILLMENT OF THE REQUIREMENTS OF
THE DEGREE OF BACHELOR OF LAWS (LL.B),
UNIVERSITY OF NAIROBI.

BY

SARAH C. ONDEYO

UNIVERSITY OF NAIROBI
LIBRARY

NAIROBI

MAY 1979.

1. ACKNOWLEDGEMENT	(ii)
2. TABLE OF CASES REFERED TO	(iii)
3. TABLE OF ABBREVIATIONS & MODES OF CITATION	(iv)
4. TABLE OF STATUTES USED	(v)
5. INTRODUCTION	1
6. CHAPTER ONE (Origins of the doctrine and philosophy)	2
7. CHAPTER TWO (The Judiciary in British Colonial Africa)	12
8. CHAPTER THREE (The Judiciary in the era of Independent Government).	22
9. Chapter four (Judicial Independence in Practice in Kenya).	32
10. CHAPTER FIVE (CONCLUSION)	43

1. ACKNOWLEDGEMENT	(ii)
2. TABLE OF CASES REFERED TO	(iii)
3. TABLE OF ABBREVIATIONS & MODES OF CITATION	(iv)
4. TABLE OF STATUTES USED	(v)
5. INTRODUCTION	1
6. CHAPTER ONE (Origins of the doctrine and philosophy)	2
7. CHAPTER TWO (The Judiciary in British Colonial Africa)	12
8. CHAPTER THREE (The Judiciary in the era of Independent Government).	22
9. Chapter four (Judicial Independence in Practice in Kenya).	32
10. CHAPTER FIVE (CONCLUSION)	43

ACKNOWLEDGEMENTS

My sincere appreciation goes to all whose co-operation has made me able to write this paper. Besides the hostile attitude of some officials of the High Court of Kenya at Nairobi, who stoutly refused to release the information I wanted from the High Court records, I owe my sincere gratitudes to the following:

Mr. Jason Namasake for the fruitful discussions held with him and all the other help he offered. To Mr. H.W.O. Okoth Ogendo, for his efforts to put me through to the High Court Registrar, who treated me with hostility and suspicion, thereby refusing to release the information I wanted. To Mr. George Rukwaro, for his patient, understanding and helpful supervision, and to Miss Phannice Etemere who patiently did the actual typing.

TABLES OF CASES REFERED TO:

1. Anderson V Gorrie (1895) I Q.B. 670.
2. Andreas s/o Mathias V R (1954) 21 E.A.C.A 285 (T)
3. Bribery Commissioner V Ranasinghe
1965 A.C. 172.
4. Fray V Blackburn (1863) 3 B & S 576
5. Hamand V Howell (1677) 2 Mod 219
6. Liyanage & Others V Republic (1967) I.A.C. 290
7. Marealle V Chagga Council (1963) E.A. 131(T)
8. Mark Mwithaga V Republic Cr. Cas. No. 1135/75
(Nakuru).
9. Mbondo V Paul Ngei & Another.
Weekly Review, October 13, 1975
December, 22, 1975
November, 22, 1975
10. Shimechero V Republic Cr. App. No. 119 of 1974
(Nairobi)
11. Sirrows V Moore (1975) I Q B. 118
12. Terrel V Secretary for the colonies & others
(1953) 2 Q.B. 452

TABLE OF PRINCIPLE ABBREVIATIONS AND MODES OF CITATION

1. A.C.....	Appeal cases Law reports
2. All E.R.....	The all England Law reports
3. B & S.....	Brest and Smith K.B. 1861-70 English reports 121-22
4. Cap	Chapter
5. C.J.....	Chief Justice
6. D.C.	District Commissioner
7. D.M. I, II, III,	District Magistrate of the first second, or 3rd class
8. D.O.....	District Officer
9. E.A.C.A.	East African Court of appeal law reports (before 1957)
10. E.A.L.R.....	The East African Law Reports (From 1957 onwards)
11. E.R.	English Reports.
12. J.S.C.	Judicial Service Commission
13. Mod.....	Modern Reports, K.B. 1669 - 1932, E.R. 86-88
14. M.P.....	Member of Parliament
15. P.C.....	Provincial Commissioner
16. Q.B.....	The Queen's Bench Law Report
17. Reg.....	Regulations (S)
18. RM.....	Resident Magistrate
19. S.....	Section
20. S.R.M.....	Senior Resident Magistrate
21. (T).....	Indicates that a case originated from Tanzania.
22. /=.....	A symbol for the Kenya shilling.

TABLE OF STATUTES USED

1. The Constitution ^{of} Kenya, Act No. 5, 1969
2. The Criminal procedure code - Cap 175 of the Laws of Kenya.
3. The Judicature Act, Cap 8 of the Laws of Kenya.
4. The Judicial Service Commission Regulations (contained in Cap 185 of the Laws of Kenya)
5. The Kadhi's courts Act
6. The Magistrates Courts Act
7. 1889 African Order in Council
8. 1897 East African Order in Council
9. 1902 East African Order in Council
10. 1897 Native Courts Regulations (Reg. No. 15 of 1897).
11. 1911 Native Tribunal Rules.

I N T R O D U C T I O N

The aim of my writing this paper is to show some of the factors leading to the inadequate performances in the Kenya judiciary. It is incomplete to examine the problem without referring to the situation in U.K. from where, Kenya directly borrowed the doctrine of judicial independence. This helps the reader to discover that the doctrine as borrowed is not, the doctrine as applied in Kenya.

In the course of the discussion, the reader will find out that judicial independence would not be totally absent were it not for the interference of the executive. This becomes clear when I discuss the safeguards given to judicial officers and also their tenure of office.

I have also discussed the judiciary in colonial Kenya to show the origins of the present hangover in the judiciary e.g. by echoing government policy or by government interference in judicial functions.

In my attempts to analyse some cases where the judiciary's independence may be questioned, I came across a lot of difficulty to the extent of being unable to get access to the relevant court files. This was because although the Chief Justice gave the consent for me to examine these files, the Senior Deputy Registrar of the High Court of Kenya, at Nairobi was uncooperative, harsh and refused to release the files because they were to him "confidential".

This made me suspicious of the information in the files and convinced myself that there was fear from the Registrar of my unearthing some of the mess in those court decisions. However I managed to get second hand information from elsewhere and realised the reason why I had not been allowed to read the files.

CHAPTER I

ORIGINS OF THE DOCTRINE AND PHILOSOPHY

The judiciary is that branch of the government which deals with the administration of justice. More specifically it refers to the judges and magistrates of a state¹. An independent judiciary is an indispensable requisite of a free society under the rule of law². Independence here implies freedom from interference by the executive or legislative^{we}. ~~the~~ Independence however, does not mean that the judge is entitled to act in an arbitrary manner. His duty is to interpret the law and the fundamental assumptions underlying it to the best of his abilities and in accordance with the dictates of his own conscience³.

Judicial independence, a western concept, may be easily identified with the British constitutional law, yet it may be traced as far back as the time of the writings of Montesquieu (the French political philosopher) and John Locke.

John Locke was among the first people in England to propound Theory of separation of powers which is part and parcel of the doctrine of judicial independence. In the 1690, John Locke stressed the necessity of having the legislative and the executive as separate as possible and argued that if both powers were vested in one hand or the same hands, the rulers will exempt themselves from the law and come to have a distinct interest from the rest of the society. However, if the legislatures are subject to the laws, they will take care that they make them for the public good.

By 1748 when Montesquieu was writing, the cabinet system in England was developing and the king's power to chose and direct his government was being contested. George the 3rd however, until 1783, functioned as the chief executive.⁴

The act of settlement which had been passed in 1701 had made provisions for judicial independence. In 1780, the constitution of Massachusetts provided for a complete separation of powers, aimed at securing judicial independence. This Act provided:

"In the government of this commonwealth, the legislative department shall never exercise legislative and judicial powers, or either of them, the executive shall never exercise legislative and judicial powers or either of them, the judicial shall never exercise the legislative and executive powers or either of them, it may be a government of laws and not of men."⁵

Montequieu had great admiration for this sort of government and contrasted it with the situation in the France of his day where all the three powers were vested in the French Bourbons. It was and is established that in the United Kingdom the executive and the legislature are fused. It was found impossible in England to have a complete separation of the two since the ministers of the crown also sit in parliament and are required to do so by the constitutional principle that they are accountable to that body for the proper discharge of their duties. In terms of personnel and functioning, each is as independent of the judiciary as can be.

SAFEGUARDS FOR JUDICIAL INDEPENDENCE IN U.K.

It is necessary to discuss safeguards for judicial independence in U.K. from where Kenya borrowed this concept. Since the Act of Settlement 1700, the superior court judges have held office during good behaviour and before they attain the prescribed age of retirement, they are irremovable except for official misconduct. During the reign of James I and Charles I, judges other than the Barons of exchequer usually held office at the King's

pleasure. By the provisions of the Supreme Court of Judicature Act of 1925, the judges of the High Court and the Court of Appeal, with the exception of the Lord Chancellor, shall hold their offices, during good behaviour. This is subject to a power of removal by his majesty when a judge loses confidence of the two Houses of the U.K. parliament.

JUDICIAL IMMUNITY:

Brazier Margeret refers to the English judges as:-

"Hot house plants exposed to the frost of public disapproval, they may wither and die, hence they need some protection in the form of immunity which other civil servant may not be able to enjoy".

A U.K. judge is not liable to an action of libel and slander for strictly official acts and commissions during the exercise of his judicial functions. This was stressed by Lord Denning in Sirrows V Moore⁷ as follows:-

"As a matter of principle, the judges of the superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the court of this land, from the highest to the lowest should be protected to the same degree if the reason underlying this immunity is to ensure that they may be independent in judgement. It applies to every judge whatever his rank.....each should be able to do his work in complete independence and free from fear."

What Denning was saying is that protections must go to all judges equally and that there is no judge who needs more protection than the other by reason only that he is in a higher court.

A judge should not, during the course of his duty, turn the pages of his book with trembling hands asking himself "if I do this, shall I be liable in damages?" So long as he does his work in the honest belief that it is within his jurisdiction,

⁷ Sirrows V Moore, [1964] AC 1372 (HL). However, the Lord Chancellor and the

then he is not liable to an action. Judges are therefore exempt from criminal liability for things said or done while acting within their jurisdiction even if said or done maliciously.

Anderson V Gorrie is the best authority for the above proposition but the supreme court judges are liable to a penalty for wrongful refusal to issue a writ of habeas corpus in the case of a person in custody on a criminal charge⁹. As Hamand V Howell¹⁰ reveals, superior court judges are not held liable for judicial acts done outside their jurisdiction.

These safeguards are aimed at making it possible for the judges to exercise their duty without fear and bias. It appears that even if a judge should abuse his powers from a malicious or corrupt motive, no action will lie, this protection extends to a magistrate sitting as a court of record. The reason behind this protection is that public interest requires that judges and magistrates should not be subject to inquiry as to their motives. Crompton J. in Fray V Blackburn¹¹ refused leave to amend a claim against Blackburn J. to include an allegation of malice. He said:

"No action will be against a judge of one of the superior courts though it be alleged to be done maliciously and corruptly".

Denning in Sirrows V Moore¹² had affirmed that no action lay against a judge acting within his jurisdiction even if he was activated by malice, envy, hatred or all uncharitableness.

JUDICIAL IMPARTIALLY:

The Supreme Court Judges have been excluded from sitting in the house of Commons. This is based on the modern constitutional doctrine that judges should not take part in political and party controversy. However, the Lord Chancellor who is

also a member of the House of Lords is the only exception. Kenya has adopted this approach because there is no judge or magistrate who is also a member of parliament. They have been separated from politics as much as possible.

The tendency of political interference into judicial functions, which is common in Kenya, does not exist in Britain from where Kenya borrowed the doctrine of judicial independence. The tendency in developing countries, of the executive to pass legislation nullifying court decisions does not exist in Britain. The case of Liyanage and others V Republic¹³ is a good illustration. This case originated from Ceylon. Briefly the facts were that the appellants who were involved in an abortive coup d'etat to overthrow the government of Ceylon were indicted for this offence. The offences were that

- (a) They conspired to wage war against the Queen
- (b) They conspired to overthrow, by use of unlawful means, the government of Ceylon.
- (c) They conspired to overthrow by use of criminal force, the government of Ceylon.

Under the existing law, the accused would have gone unpunished. The government therefore wishing to have them convicted enacted two statutes which altered the criminal law and the law of evidence. These statutes were not statutes of general application, they were specifically for the trial of these individuals. They legalised the imprisonment of the appellants while they awaited trial, as a section of the penal code of Ceylon was modified so as to create a new offence under which the appellants would be tried and also enacted a minimum punishment for them. In this case, the newly enacted statutes did not only lack generality, but, amounted to a special direction to the judiciary as to the trial of the particular prisoners already identified.

The substance of both Acts was actually a legislative plan to secure the punishment of those particular individuals.

Now, an Act attaining a named person, of freedom was rather a sentence than a law, it was a legislative judgement hence an unconstitutional exercise of judicial powers by the legislature. The legislature in this case had indirectly interfered with the judiciary's independence and discretion. The court in these circumstances had no alternative but to pronounce what had been dictated to it by the legislature, hence convicting the defendants.

The Privy Council held the Criminal Law Act passed in 1962 purported to create new offenses after the act complained of had already been committed and to alter the rules of evidence for the purpose of having the appellants convicted. This Act had the inevitable effect of sweeping away the protections given by the general criminal law to all accused persons. To prove further that the government was eager to convict, one may also note that special judges had been appointed just for the sake of trying that case. Because of the above reasons the Privy Council set aside the convictions and allowed the appeal. The Privy Council was following the decision in Bribery Commissioner V Ranasighe¹⁴ which had been decided about 4 years before the Liyanage case appeared.

Liyanage's case is a shining example of the tendency of governments in the commonwealth to interfere with judicial functions as contrasted with Britain where great respect is given to the judicial independence. This is made more clear especially when one sees that the Privy Council, an English court is the one which heard the final appeal,

RENUMERATIONS:

The salaries of the judges and magistrates in U.K. cannot be altered to their disadvantage while they still hold their offices. To avoid competition for promotions, for a long time, at least up to mid 1950's all English judges whether of the House Lords or court of appeal earned the same salary. Financial security for judicial officers has been a primary aspect for judicial independence in U.K.

THE SEPARATION OF POWERS:

The doctrine of separation of powers is a fundamental and valid dogma of most commonwealth constitutions. Its object is the preservation of political safeguards against the capricious exercise of power. Incidentally, it lays down the broad lines of an efficient division of functions. History, convention and constitutional power definitely allocate certain functions to one or another of the organs of the government. According to modern notions, the government of a state consists of three branches namely, the executive, the legislative and the judiciary. Whether the government is republican or monarchical, it is the duty of the executive to lay down the national policies as well as carry out the functions of the state. The legislative, whether unicameral or bicameral, makes the laws for the regulation of state affairs which the primary task of the judiciary is to interpret the laws made by the legislative with a view to administration of justice.

Two problems immediately arise out of this doctrine of separation:

- (i) It has been found difficult to ascertain the boundaries of the function of each of the three branches of government.

- (ii) It is not yet clear whether the three jurisdictions are exclusive of each other so that a function logically legislative in character must be performed by the legislative, a matter executive by the executive and a matter judicial by the judiciary or whether the functions of one body can be exercised by another.

Although the idea of a three fold element of government could be traced back to Plato and Aristotle, it is John Lock who expressed the modern views on the subject in a form refined by Montesquieu in his book *L'esprit des Lois* - 1748 for the constitutional lawyer and the political scientist.

The doctrine calls for the organisation of the three branches of the government so as to avoid chances of abuse of the respective powers of the government of the day. To achieve this:

- (i) The various powers should be exercised by different organs of the government.
- (ii) The same persons should not belong to more than one organ of the government at the same time.
- (iii) One government organ should not as a rule exercise the functions properly belonging to either of the other two organs or interfere with their functions. As I will discuss later, the constitution of Kenya has fully made provisions for such separation of powers by specifying that the government consists of three main branches, specifying their functions.

At the time of his writing, Montesquieu lived in a shadow of insecurity which was cast by the despotism of the French Bourbons. He was therefore reacting against the French law and politics of his day which like all the civil law systems, did not recognize even the degree of separation of powers which he found in the British Isles. He saw that in the absence of such separation, arbitrary rule and tyranny

would result. He advocated for a system of checks and Balances like the one in Britain. To him this would give chance to independence of governmental forces of appression. Montesquieu did not advocate for a complete separation of powers. He felt, the situation would be chaotic if, for example, one man had to enact laws, execute the public resolutions and judge the crimes or differences of individuals. Today most commonwealth constitutions vest these three powers in different organs of government. The constitution of the commonwealth of Massachussetts (1780)¹⁵ provides for this separation.

When the founding fathers of the U.S. constitution set up their government, they held the mistaken belief that Montesquieu envisaged complete separation of the organs. However they found such separation impossible since the president has to attend congress to present the National Budget. What has happened in the U.S. therefore is that there has been as complete a separation between the supreme court and the congress as can be but the presidency and the congress are closer to each other in practice than either is to the supreme court, which gives the supreme court a good measure^{of} independence

CONSTITUTIONALISM AND THE RULE OF LAW:

Judicial independence is part and parcel of the concept of constitutionalism. To the layman, constitutionalism means, freedom of movement, belief, association etc. It may be linked with judicial independence in the sense that the constitution may make provisions for the safeguard of the above freedoms. If there are no provisions for judicial independence, they might never be capable of enforcement due to constant interference by the executive or by certain individuals.

Constitutionalism is a legal limitation on the government. It is the antithesis of arbitrary rule and despotic government is its opposite i.e. the government of will, not of law.¹⁶ Its fundamental quality is the division of power among the organs of government, hence judicial independence is a characteristic of constitutionalism.¹⁷ Constitutionalism includes as a primary element, the application of the rule of law and the constitutional state has a tendency to enlarge the jurisdiction of independent courts no constitutional state exists without the rule of law, hence the independence of courts. The courts can only perform their functions adequately if they are independent of external influence which would render the judges or magistrates, biased.

Prof. De Smith considers the minimum restraint necessary for constitutionalism as follows:

"Constitutionalism is practical 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 parties are free to organise opposition to the government and where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary".¹⁸

THE RULE OF LAW:-

One characteristic of constitutionalism is the concept of the rule of law, which means literally what it says, the rule of the law. When one talks of the rule of law, one includes under one expression at least three distinct conceptions; in the first place, one means:

(i) The acts of the government towards the subjects particularly those affecting his right to freedoms e.g. of speech, and association, shall be in accordance with previously established general rules. This means that they should be in accordance with the existing law.

- (ii) That these rights are essential to the operation of law as an order designed to regulate human affairs according to reason. They shall therefore be maintained subject to well recognized limits upon their exercise and qualification in times of crisis.
- (iii) That the interpretation of these general rules referred to above, and adjudication upon the necessary limitations, shall be under the control of an independent judicial body.

In the New Delhi declaration of 1959, organised by the International Commission of jurists, it was stated that:

"An independent judiciary is an indispensable requisite of a free society under the rule of law. Such independence implies freedom from interferences by the executive or the legislative with the exercise of judicial functions, but does not ~~mean~~ mean that judge is entitled to act in an arbitrary manner....."18

The conference considered that an independent judiciary is one of the most important institutional requirements of the rule of law. Almost all studies seem to agree that the requirement of independent courts, if not implicit in the notion of the rule of law, is a necessary practical consequence of it.¹⁹ The results would be that while Dicey tended to place heavy stress on the independence of the English High Courts, other writers today, make the rule of law stand for the right to a fair trial before an independent tribunal. The above conference therefore considered that strengthening judicial independence and ensuring an organized and autonomous legal profession were necessary for the existence of the rule of law. However, I should stress the fact that the establishment of an independent judiciary will not effectively safeguard the rule of law unless adjudication over interferences with basic liberties falls within its jurisdiction.

At this stage it becomes necessary to see if the British carried the doctrine of judicial independence to the Kenya Colony. This is because the colonial era has left an impact which Kenya has been unable to forget.

CHAPTER TWO

Before considering the administration of justice in Kenya in colonial times, I find it necessary to summarise the situation in all British African colonies in general. My reason for doing so is to show that there was no judicial independence at that time and it is this colonial hangover that is the cause of the lack of judicial independence in Kenya at the moment.

THE JUDICIARY IN BRITISH COLONIAL AFRICA:

Generally in all the British African colonies, until just before independence, the judiciary was part of the colonial civil service. Judicial decisions were supposed to conform to colonial policy. There was thus a tendency of the British African colonial courts to promote colonial interests, and not the interests of the people they served.

There was discriminatory justice characterised by a dual court system whereby different courts served different races. In practice, the functions of the administrative officer were not exclusively administrative. In the administrator-judge system, the administrative officer also found himself faced with judicial functions.

The Judiciary, a career job, was operated mainly on a system of promotions whereby appointments to judgeship for example, vested mainly on promotions from the magistracy. This system as I will show later, may be criticised for interfering with judicial independence on the ground that:-

"It is bound to induce in the mind of the person expecting that promotion, some kind of fear and respect for the authority which he considers will have to promote him".¹

Like other civil servants, colonial judges held office during her majesty's pleasure, this means that they could be dismissed at any time and without reason and the crown would not be called upon to give an explanation.² However, the supreme court judges in England enjoyed maximum judicial independence and security of tenure. They held office during good behaviour, the effect of this being that, save for gross misconduct e.g. accepting bribes, they were actually irremovable until they reached a specified age of retirement.

During colonial times, the public never knew that the superior High court judges received more protection than the colonial legal service. Their knowledge would have led to a loss of public confidence in the administration of justice. Such confidence is necessary for judicial independence.

Another practice which went against judicial independence was the tendency of the chief justice to give reports about the Puisne judges to the secretary of state through the governor. If the governor did not like any judge, one would contemplate a situation whereby the governor's report could not be accurate. The governor could as well add his own comments perhaps untrue of the judges. This, according to Sir Kenneth Roberts Wray,³ is in principle out of harmony with judicial independence." This is true because the reputation of the judge was not adequately protected. However, as Wray continues to say, such a system of reporting was argued to be inevitable since the state secretary who held the responsibility for the promotion of such judges, needed to be well informed about their performance. Since he did not come in contact with them, he needed report from those who came in contact

with them.⁴

This was the situation in nearly, if not all, the British African colonies. The examination of the colonial state now calls for my attention.

Administration of Justice in a colonial State (Kenya)

There was actual system of justice, in Kenya by then. The whites were considered superior to the Kenyans and they were given separate courts and were tried by separate judges. This was because it was felt that they needed more justice than the black man.

Native Justice:

The British government took over the administration from the Imperial British East African Company (IBEAC) in 1895 making it clear that the system of Muslim courts at the coast will continue to be preserved. The administrative officers in the interior were empowered judicially to exercise judicial powers as well. One clearly notices that at this stage, there was no separation of functions between judicial and administrative bodies. The administrative officers were to exercise their judicial powers in accordance with the Indian ^{Pemi} code.⁵ Most of these officers did not know the law and therefore, one can see that it would be very difficult to administer justice. One would perhaps imagine a situation whereby the administrative officer could convict or acquit depending on whether they felt it would please the colonial government or not.

According to the letter of the Africa order in council of 1889, councils and other judicial officers in the interior were empowered judicially to exercise the substance of English law. It was specified that British subjects and protected persons were to be tried and have their disputes settled by administrative officers. Such administrative officers instead of administering justice, would most likely administer order from the colonial government, hence they were not free

from influence from the government. The above administrative instructions were confirmed and given the force of law by the East African Order in Council (E.A.O. in C) of 1997.⁶

This orderⁱⁿ council was important since the regulations made under it established a legal system based on a tripartite division of subordinate courts; native, Muslim and colonial courts (staffed by administrative officers and magistrates).

A dual system of superior courts was also established. One court, styled, her Majesty's court for East Africa from which appeals lay to her Britannic Majesty's court at Zanzibar, was established. The other was styled, The chief native court from which appeal lay to a High Court.

The 1997 native court regulations⁷ established the other types of courts. At the top was the High Court consisting of the commissioner and two judges of Her Britannic Majesty's court at Zanzibar. Below this was a chief native court staffed by a judicial officer who had powers to supervise all inferior native courts in the protectorate. The^{ree} types of native courts came below this, colonial and indigenous.

Colonial native courts:⁸

Apart from the coastal regions where they were guided by the general principles of ~~insurance~~ ^{muslim} law, these courts applied native laws and customs not opposed to natural justice and morality. Their jurisdiction went up to a radius of 15 km from the administrative station, beyond this, the cases were heard by tribal authorities. There is not much to discuss about the indigenous native courts.⁹

Generally therefore, there were two final courts of appeal. A judicial one for non-africans and a semi-administrative one for Africans, where judicial independence was very much lacking.

Besides introducing a racial division into the legal system, these two final courts of appeal, also hinted at different conceptions of the role of courts depending on race. This is a clear indication that there was bias in the administration of justice, and the African usually suffered injustice in these courts.

The only problem with the use of the traditional elders in the colonial judicial system was that there was no standing judicial body. Disputes were adjudicated upon by councils of elders usually within the framework of the lineage system. The composition of each judicial body varied with the nature and importance of each individual case. Sanction was decided by the whole group and not by one man. There were therefore dangers of judgement being passed by a group of angry and emotional elders which would amount to administration of immotions not justice. Such, would not be an independent group, it would be under the influence of anger which is not in accordance with the principles of an independent judiciary.

The only step ~~to~~ towards the recognition of an organized judicial system, according to Phillips,

"Was the recognition of certain elders as traditionally qualified to participate in adjudication, and this recognition was based on their seniority as member of the social unit".¹⁰

Her Britannic Majesty's court of ~~court~~ appeal for East Africa was established in 1902¹¹ and a High court for the East African Protectorate was also established in the same year".

The Native Tribunal System:

By virtue of the provisions of the village Headman Ordinance¹³, the commissioner could appoint headmen, charging them with the duty of maintaining order within the village. At the sametime, powers could be confered on these headmen to listen to and

determine petty native cases. They therefore owed their authority to the administration. The Provincial as well as the District Commissioner, however had powers to revise all cases decided by the Headman. This system was strengthened by the courts ordinance of 1907¹⁴ which was replaced by the courts ordinance of 1931.¹⁵ The 1931 ordinance formed the basic framework of colonial subordinate courts which lasted for about 60 years.

Three classes of subordinate courts were established

- (i) Resident Magistrate Senior (later called Provincial Courts) commissioner Courts, constituted the first class subordinate court.
- (ii) The second class magistrates court, held by a district commissioner.
- (iii) The third class Magistrates court, held by an assistant district commissioner later to be called a district officer.

The 1911 Native Tribunal rules¹⁶ enabled the administrative officers to retain their revisory powers over cases decided by the Native tribunals. Although the headmen still retained their administrative powers they resented the curtailment of their judicial authority

The defects of the administrator judge system and the tribunal system were unearthed by the "administration of justice in Kenya..... in criminal matters"¹⁸ Report. This commission considered that a district commissioner or his assistant were first and foremost administrative officers charged with the maintenance of law and order in their province or district. A district officer had to police the law, as well as investigate the crimes, in these circumstances, it was not always easy to assume the judicial role and to proceed calmly and dispassionately and arrive at a proper judgement or sentence without being biased. A shining example of this system is the case of Andreas s/o Mathias V R¹⁹. This case

which originated from Tanganyika, as it was then called, serves as a good example to show the defects of administrator judge system. The appellant had been convicted together with one Simeon S/o Mathias of common Assault, contrary to section 240 of the Penal Code of Tanganyika. This assault is alleged to have been done on the D.C. of their region. Were "lined and convicted" by a D.O. acting as an administrator who held magisterial powers. When they appealed to the High Court, and their ground of appeal was that the D.O had no judicial capacity to listen to the case, their appeal was ~~discussed~~ ^{dismissed}. Their argument was that as a D.O. he was subordinate to the respondent hence he had an interest in the matter and was likely to be biased. This was true because, although, it is difficult to prove bias, it would have been equally difficult for the D.O. to hold against his boss the respondent. The High Court held that the D.O. had the capacity to listen to this case because on the relevant day of the assault, he was not present. Infact to create bias, the D.O. need not have been at the scene of crime, it is important and enough that he has an interest in the matter. The High Courts reasoning above, very much offends the cannons of judicial independence because even in U.K. from where, Kenya directly borrowed this concept, the judiciary was separated from executive influence by making the functioning of the two bodies as separate as possible.

A further appeal to the East African Court of Appeal (E.A.C.A.) was allowed. The High court was ordered to have a retrial of case and the results were amazing! The conviction was quashed because the D.O had erred in trying the case since there would be a likelihood of bias. The judiciary, it was held, should have sat independently, because, if influenced, no justice would be done or seen to be done. The amalgamation of Native tribunals and native administrative

Via the village headmen or other government officials gave rise to situations of inefficiency or abuse of power through corruption. The judiciary could therefore not be said to be independent in decision making under such circumstances. Reorganization was necessary.²⁰

Besides their appellate powers, these administrative officers had access to all case records. They could revise or transfer them to subordinate courts where they could sit as Magistrates. They could also order for a re-trial of the case during the course of which they sat in the tribunal as advisers. It therefore followed that under such circumstances, the tribunal had no freedom of decision. There was also a grave risk of administrative pressure to convict being brought to bear on the tribunals which if left on their own, they would have acquitted. This is true because neither the members of the tribunal nor the community at large approved the legislation. There was therefore the tendency of the tribunal convicting or acquitting because they feared the disapproval of the district Commissioner. It is really difficult to expect justice under such circumstances.

Even after the decisionⁱⁿ Andreas s/o Mathias v Republic the government still retained administrative officers as judges, arguing that such work would enable them to know what was going on in the provinces and Districts. However, towards independence, the African started expressing his ^{views} ~~news~~ towards this system.²¹

MUSLIM COURTS

These were classified as subordinate native courts rather than Native courts²². Their appeals lay to the supreme court which also had supervisory powers over them

THE ENGLISH COURTS:

The English colonial courts had a tripartite jurisdiction i.e. over Africans, Asians and Europeans in the sense that the powers and procedures varied, depending upon the race of the person before them. From the time of the 1907 ordinance in civil matters, a characteristic tecture of jurisdiction over Africans was twice that of jurisdiction over non-Africans.²³

By 1960, it can be said in summary, that the judges and administrators were victims of their own propaganda. The courts, no less than the administration were part of the colonial orders and had to and were prepared to support that order whenever it was essential to do so. Towards independence the Africans were hostile to the system of administrative officers in developing the African courts²⁴. The problem was whether after independence, the new government would bring about a separation of the judiciary from the administration or whether it would altogether introduce safeguards and measures associated with the British conception of justice.

SUMMARY:

I have generally observed that throughout colonial era, there was no separation of powers as we know it today. As a result, judicial as well as administrative personnel were not separate. While performing their duties, bias was not unlikely unlike the British magistrates and judges and judges in U.K. who enjoyed maximum security of tenure, the judicial officer at a lower level were usually afraid since they were not independent in thought. They always, while making decisions turned the pages of the books with trembling fingers, wondering whether their decisions would meet administrative approval or not.

Towards independence the Africans had started expressing his resentment to this judicial system and reform was found very necessary.

TENURE OF OFFICE:

The supreme court judges held office on good behaviour which meant that save for grave misconduct, they were actually irremovable until they reached resignation age. Their colonial counterparts held office at the crown's pleasure. This also applied to the judges of the High Court in Kenya and the court of Appeal. It is surprising that this aspect of judicial independence (tenure of office) which was in the united Kingdom from where Kenya borrowed this concept, was very much lacking. The case of Terrel V Secretary for the colonies and others²⁵ also serves as an example of what the practice was in Kenya.

The plaintiff in the above case, a colonial judge in Malaya had been dismissed before he attained the prescribed age of retirement which was 62 years. The dismissal came 17 months to his 62nd birthday. On claim that he was not liable to be dismissed before reaching his 62nd birthday, when he would be entitled to a larger pension, it was held that he was a colonial judge. Judges in Malaya held their office at the crown's pleasure and he had held office in the same manner. The claim was dismissed. This was contrary to the principles of judicial independence as practiced in the united Kingdom. It ~~revealed~~ revealed to the colonial judges that they were not at all protected by the Government. Such a revelation was likely to shake public confidence in the judiciary.

The Judiciary in the era of Independent Government

As pointed out in the previous chapter the courts in the colonial era, having been agents of modernisation introduced concepts and rules quite alien to the traditional pattern of life. It was expected that an African government would wish to abolish such a system. It would further wish to loosen the ties between the courts and the administration. The reforms brought about by the magistrates' courts Act (1967) form the basis of Kenya's present court structure.

Legislative reform in 1967:-

Three interrelated Acts were passed in 1967, responsible for the present court structure. The judicature Act¹ was concerned with the type of law applicable to the newly established courts.

(i) The Kadhi's courts Act:²

It established 6 kadhi's courts in the country, subordinate to the High Court. Theirs was to deal with Muslim personal matters.

The Magistrates Courts Act³

This was the main piece of reforming legislation. It established the RM's court constituted a senior Resident or a Resident Magistrate having civil and criminal jurisdiction throughout Kenya. The Act also established the District Magistrates court of the first, Second and Third Class having civil and criminal jurisdiction throughout a district. The RM's and first class DM'S courts are equated in that both are Magistrates courts of the first class. This however refers to the supervisory, revisory and appellate powers but not original, criminal and civil powers. All these courts are subordinate to the High Court.

Jurisdiction:

There is a limitation as to the type of offences triable by the subordinate courts and a limitation as to the fine or imprisonment period imposed by them.⁴

Before independence, as I have pointed out earlier, there was no separation of personnel between the administration and the judiciary. An administrator, as shown by the administrator - judge system, could also perform judicial functions. The independence constitution clearly indicated that there were three arms of government namely, the executive, the judiciary and the legislature (Chapters 2, 4 and 3 of the constitution) respectively. One would expect that there would be the least interference in the functions of either of these branches. Before examining judicial independence in practice it is necessary to consider the safeguards given to our magistrates and judges, their tenure of office and remunerations.

According to Sirrows V Moore,⁵ Denning MR was of the view that both higher and lower rungs of the judicial hierarchy should be more or less equally secured against executive influence if the aim is to enable them be independent in thought. In Kenya this protection is not given equally. The state's normative framework appears on the face of it to lay considerably greater emphasis on the independence of the High Court judges than of the Magistrates. The truth is that in fact, Magistrates in this country have got heavier work than the judges. They handle a majority of the cases in the country. Over $\frac{3}{4}$ of these cases do not even reach the High Court. They are the people who come in contact with a majority of the citizens. Because of this, I tend to feel that Magistrates in this ^{country} need just as much independence as that given to the judges, if not, more.

Practically, all the provisions securing the independence of judges are contained in the constitution e.g. all candidates to the High court Bench are required to satisfy defined professional requirements. This is aimed at ensuring High Standards in the courts' adjudicatory performance. These requirements, stipulated in S 61 (3) of the constitution require, among others, that ^{To} qualify for the High Court Bench, the candidate

should be an advocate of Kenya, of not less than seven years standing. Alternatively, he should be, or have been a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in the Republic of Ireland, or a court having jurisdiction to hear appeals from such a court.

The appointment of judges is done by the president (S.61 (1) of the constitution) with the help of the judicial service commission, (an independent body which ensures that the appointee satisfies the stipulated standards and is not appointed purely on political grounds.

Safeguards for judicial Independence: (Judges)

Elaborate provisions are made to safeguard judicial independence during the judges' tenure of office. When compared to that of the Magistrates, the judges emerge with more protection. In the first place, their salaries are charged on the consolidated fund and cannot be altered if such alteration will be disadvantageous to the particular judge during the tenure of his appointment.

The judge enjoys maximum security of Tenure in that according to section 60(4) of the constitution, his office cannot be abolished while there is a substantive holder. Like the English judge, a Kenya High Court judge vacates office when he has attained such age as may be prescribed by parliament.⁶ Notwithstanding this requirement, such a judge may continue in office after attaining that age if this is necessary to enable him deliver judgement or to do any other thing in relation to proceedings which should have started before he attained that prescribed age.⁷

Like the English judge also, the Kenyan judge holds office during good behaviour. This means that before he attains the age of retirement, he may be removed from office only for inability⁸ to perform his duties or for misbehaviour. This also means that the present judges are in a better position than the colonial judges

who only held office at the pleasure of the crown as indicated in my previous chapter.

Further protection is seen while considering the removal of judges from office. Their removal from office calls for a very complicated procedure to be followed. Failure to comply with this requirement renders the removal invalid. First of all an independent tribunal is required to investigate the question, and any removal from office may only be effected by the president, on the affirmative recommendation of this tribunal. The rationale of these safeguards is to enable ~~its~~ judges to do justice to all manner of people according to the laws of Kenya, without fear and favour, affection or ill-will.

Procedure:

If the president considers that the question of removing the Chief justice needs investigation, then he will instruct the Chairman of the public service Commission to select the members of the tribunal which will carry out the investigation. After the inquiry, this tribunal reports to the president its findings, and also recommend whether the Chief justice should be removed or not.

On the side of the Magistrates, the constitution vests all powers of appointment, promotion, discipline, dismissal etc in an independent judicial service commission.⁹ This is in accordance with section 69(3)(6) of the constitution.

Composition of the Judicial Service Commission (JSC)

The body consists of the Chief Justice as Chairman appointed by the president under S61(1) of the constitution¹⁰. The Attorney General is appointed by the president in accordance with S109 of the constitution, to serve as a public officer.¹¹ The president also appoints two judges and the Chairman of the public Service commission¹² as other members of the JSC.

Decisions of this body are by majority vote (S68(4) of the constitution),¹³ and it is an independent body in the sense that in the exercise of its functions, the commission is not subject to the direction or control of any other person or authority. Its proceedings cannot be invalidated by the presence or participation of any person not entitled to be present at, or to participate in those proceedings.

Whenever the Chief justice is away or on leave, S.61(4) of the constitution empowers the acting Chief justice to assume the powers of the Chief Justice. Such an acting Chief Justice is a puisne judge appointed by the president. The other ~~for~~ members have no powers of being represented if they are away and the commission may act, notwithstanding any vacancy in its membership or the absence of any member. This ofcourse does not apply to the Chief Justice because he must be represented whenever he is away.

In theory, the chief Justice and the two puisne judges can overrule the other members of the commission. In practice however, I highly doubt if the C.J. and the two puisne judges can go against the Attorney General's decision. Kenya has got a very strong and influential Attorney General and it is likely that his word would be the commission's word.

One problem with the J.S.C. is that since the number of the top decision makers is three i.e. the C.J. and the puisne judges, it may be difficult for the public to be convinced that the J.S.C. can be a truly independent body. All its members are public servants, the majority of whom are appointed by the executive. Ofcourse there is nothing wrong with this and it would be wrong to argue that judicial independence would be interfered with just because these members are chosen by the executive. The only problem is that the public is likely to associate the judiciary with the executive, especially if we can remember that the public has not

forgotten the close association of these two organs, during colonial era. This is important because, the judiciary, in its operation, needs public confidence.

To remedy the situation, I suggest that this body should not be a monopoly of senior public servants. It should be controlled by Senior Judges and the Magistrates could therefore be led into adopting, for their own convenience, the values of the Senior judges who are likely to affect their promotion prospects.

Membership should also be increased as well as the quorum for decision making. The additional members should be nominees of the Kenya Law Society. These members should have security of Tenure. Having the law society represented on the J.S.C. is not a new thing. In Ghana, the judicial council which performs similar functions as the Kenyan J.S.C. has 8 members, three of whom are nominated by the Ghana Bar Association.¹⁴

Appointment of Magistrates:

According to S.69(1) of the constitution, the power to appoint persons to hold or act in any office to which this section applies (office of the Magistrates included) is vested in the J.S.C.

S.69(3) specifies that the offices referred to are those of Registrar or Deputy Registrar of the High Court, office of the SRM, RM and DM.

Promotions:

In accordance with the Judicial Service Commission Regulations, Reg. 12, appointments may also be on contract, and if any officer wishes to extend his contract, he is required to acknowledge the Chief Justice before the expiration of the existing contract.

The criteria for promotions in the judiciary is efficiency, merit, ability and experience (Reg.10(1), J.S.C. Regulations)

(Reg. 22(1) & (2))

Discipline:

There are various ways of disciplining magistrates for misconduct.

(a) Retirement on grounds of public interest

Reg. 28(1) of the J.S.C. Regulations, makes provision for the retirement of a magistrate or any other judicial officer, if he has conducted himself in a manner which makes it necessary for him to retire on grounds of public interest.

(b) Interdiction:

According to Reg.17(1), a judicial officer may be interdicted on public interest so long as proceedings which may lead to his dismissal are underway. While on interdiction, such an officer may receive not less than one half of his normal salary. If he is not punished or dismissed, then his salary will be restored. If any punishment other than dismissal is inflicted, he will be refunded all proportions of the salary withheld as a result of his interdiction (Reg. 17(4)). While on interdiction such an officer may not leave his station without permission from the C.J. or any officer empowered to give such permission on behalf of the C.J.

(c) Suspension:

If a judicial officer is convicted of a serious criminal offence, the C.J. may suspend him pending consideration of his case Reg. 18(3) while on suspension, he will be entitled to no salary unless the C.J. feels that he can get some allowance (Reg. 18(3)). Such an officer will not be able to leave his station without the permission of the C.J.

(d) Dismissal:

If a magistrate absents himself from duty for 24 hours and is not traced within 10 days, or if traced, no reply to a charge of absence is received, he will be dismissed. (Reg. 22(1) & (2)).

Security of Tenure:

The J.S.C. is given under discretionary powers in respect of matters of discipline promotion, dismissal etc. It is further empowered to delegate its powers to any one or more of its members. Disciplinary action is done by a sub-commission of the J.S.C. This sub-commission is established by Regulation 26(3) of the J.S.C. Regulations.¹⁵ If it is a question of investigation of a magistrate, the Magistrate in question can appear in person or can be represented by an advocate. The sub-commission then makes a report of its findings to the J.S.C. which decides the appropriate punishment to be given or whether, as I have pointed out earlier, he should retire on public interest (26(11) of the J.S.C. Regulations).

This method is a reasonable safeguard since it allows thorough investigations before any steps are taken and further more, since it gives the magistrate being investigated time to defend himself before the sub-commission makes the final decision. However, if a Magistrate has been convicted of a serious offence which requires a prison sentence only, he can be dismissed without recourse to the above procedure. Such a person is not worthy of being Magistrate and so that disciplinary action is alright.

Remuneration of Kenyan Magistrates:

Judicial independence can make more practical sense if the pecuniary interests of the judicial officers are taken care of. This is in order to safeguard them against temptations motivated by pursuit of personal interests especially within the ranks of lay Magistracy who have got no hopes of advancing beyond the rank of acting R.M.

In England, from where Kenya borrowed most of her safeguards for judicial independence, financial security for judicial officers has been a primary aspect for judicial independence. By mid 1950^s all English

judges whether of the House of Lords or court of Appeal earned the same salary. Now, appointment to the House of Lords carries with it an increament in salary.¹⁶ The aim of this was to avoid a judge seeking promotion since his objectivity and impartiality might lead him to seeking personal advantage.¹⁷

The lower judicial hierachy i.e. the magistrates like those in Kenya at present, never hoped to become judges, they stayed where they were and were given excellent remuneration.¹⁸ This could enable them to work with an independent mind, having no thirst for bribes. This historical note places the issue of remunerations in the overall picture of judicial independence.

The emoluments of our magistrates vary according to their classes of appointment.¹⁹ They are appointed in four classes with the DM 3 as the most junior and the SRM as the most senior in rank among the magistrates.

The emoluments of the DM 3 are similar to those of civil servants like the information officer Grade II Immigration Officer II etc, while those of the RM are similar to those of the senior DC, Senior Personnel officer etc.²⁰

These salaries are not adequate considering the laborious work of the Kenya magistrates which involves writing and taking the whole day ~~completed~~^{coupled} with a lot of reasoning. It is unfortunate that their salaries are at par with officers whose work is far less than that of the magistrates. They have got junior officers to do the ~~tension~~^{tiresome} or unpleasant work, and the big officer perhaps has to recive afew visitors everyday sign afew documents and make telephone calls on business matters ofcourse. When there is anything to be written down, he has got a secretary to do it. Although the nature of the work of such an officer may be heavy, it is hard for him to feel that weight because he does not do it himself. For this reason, I feel it is rather unreasonable and unfair for such an officer and a magistrate

to receive the same salary.

The ideal that most of the magistrates in England depend on one source of income is not true for Kenya at present. So, although some time back, this could be used as a good ground for calling for increments in the salaries of the Kenyan magistrates, it can no longer be used because most of our Magistrates are business men as well. But even before this, it was never considered that the other officers with whom the magistrates' salaries are at par, had more time to run business as another source of income, while our magistrates did not have such time.

To feel more independent I tend to feel that judicial officers need special or different treatment in all fields of life. I do not see why salary is an exception. There should be an increment in the salaries of our magistrates, this would help them feel more different from the other public officers. This is necessary because in our bench, promotions are hard to get while these are easy to get in the executive sector, because, there, one only needs to compete for promotions. Such competition would destroy any independence that might be there in the judiciary. An increment in salary of the Magistrates, would place them in a position where they might not feel like competing for higher positions.

I have tried to point out what safeguards have been provided for the independence of the judges and magistrates. The reader would notice that, not much efforts have been made to protect our magistrates to the same level as the judges have been protected. Upto this point, judicial independence is not totally absent, traces of it can be seen here and there. I am now left with judicial independence in practice and it is after this that I will decide whether it is a myth, a reality, or somewhere between myth and reality.

CHAPTER IV

JUDICIAL INDEPENDENCE IN PRACTICE IN KENYA:

As pointed out in my previous chapter, the constitutional layout suggests that Kenya aimed at having a separation of powers, so that each of the three arms of government is manned by different personalities. The sort of protection given to the Magistrates and judges suggests that the government was making a move towards judicial independence. Unfortunately as I will show in this chapter, it has proved hard for this independence to be achieved in total in Kenya. I proceed to discuss the factors which have made the achievement of total independence very difficult.

Executive Interference:

For a judge or Magistrate to have a free mind either to acquit or to convict, he needs freedom from any influence, direct or indirect. It is immaterial where this influence comes from, if it is able to make judge or magistrate who is sitting, to be biased, that is enough. It is hard to prove executive interference, because most of the time, it is never direct, however when it takes the form of legislation which reverses court decisions, one can clearly make out what the aim is.

In Kenya this practice was clearly seen in the case of Mbondo V Paul Ngei & Another.¹ The respondent was and is the present Minister for Local Government.

The brief the facts were that the respondent was charged with an election offence. The petitioner who was also contesting the Kangundo seat with the respondent arrived at the DC's office on nomination day 24/8/75 to present his nomination papers. He found the respondent addressing a crowd around the office and on seeing him, the respondent was heard to say,

"I told you I have learned there is somebody who intends to oppose me, he is no one other than

that little man over there....."

He stirred the crowd against the petitioner and threatened to kill him if he did not step down in his favour. Seeing how wild the crowds had become, the petitioner sought police help. The police asked him to step down because if the crowd killed him, it would be difficult to single out the murderers. As a result of these events, the petitioner withdrew from the elections.

The High Court, which heard this petition found the respondent guilty of an election offence. The consequences of being convicted of an election offence, at that time, was, nullification of the election as well as disqualification from election to parliament for 5 years.² After reaching this verdict, the High Court pronounced the above sentence. It is at this level that executive interference could be looked at.

After conviction and 15 days to the date of the by-election in the constituency of which the respondent had been representative, there appeared, a constitutional amendment, almost from nowhere. This amendment gave the president powers to pardon any MP³ who had been convicted of an election offence by the High Court, and to give him a chance to stand in the forthcoming by-election instead of having to wait for the mandatory 5 years. This amendment surprisingly was to have retrospective effect from January 1 1975, and was to cover virtually all cases involving election offences arising out of petitions which had already been heard.

Definitely, this amendment was aimed at benefiting a particular individual. This is evident because of the speed and hurry involved in passing the Bill. A day before adjoining for Christmas recess, this Bill was introduced to parliament. Normally, a bill seeking to amend the constitution of Kenya must be published at least 14 days before presentation to the National Assembly for debate⁵ on this particular day, parliament not only

reduced the duration of notice from 14 days to one, but on the same afternoon also went through all the three readings⁶ and passed a Bill amending the constitution. This empowered the president to set aside the High Court judgement in respect of election offenses arising out of elections petitions. The speed with which this Bill went through parliament was amazing. "Why the hurry?" some MP's questioned. The Attorney General endeavoured to tell them not to think of the amendment in terms of personalities, but it proved difficult not to question oneself who was going to be the immediate and most likely beneficiary of the amendment.

The likely answer, which turned out correct was Mr. Paul Ngei, Minister for Local Government. The extra powers would not have drawn much attention were it not for the timing of the amendment and the way it was passed with little substantive debate. The only person who could benefit from it, although it was a general amendment, was Paul Ngei (the second respondent) who had been ousted from parliament in November, 1975 following a successful election petition. The fact that it was to have retrospective effect upto January 1975 was for purposes of confusing the public. He was thus the only person who could benefit from this amendment directly and immediately.⁷ For the other MPs who had also been ousted by election petitions and debarred, by-elections had already taken place in their constituencies and their former seats had been occupied. Now all that they could hope for was a chance to stand in the next general election due in 1979.

The truth was exposed when actually, none of them a part from Ngei was pardoned and allowed to stand in the by-elections which brought him back to parliament.

This legislative intervention into judicial decisions, really exposed how un-independent our judiciary is. It also demonstrated the fact that the government did not have confidence in the judiciary and could therefore reverse its decisions, especially if an important person like the Minister for local government was involved.

Legal observers whose view I share look at the timing of this amendment as an abuse to judicial power and independence. I see it as a slap in the face of the High Court for its judgement on the Ngei election petition. Certainly the lone voice in parliament against the amendment was former kitutu East M.p, George Anyona who saw it as an indication of lack of confidence in the judiciary. Other legal observers think differently. They argue that the amendment's timing has demonstrated the independence of the Kenya judiciary. They argue that if the government had wanted to interfere with judicial process in order to effect a different outcome in the Ngei election petition it need not have waited until after the High Court ruling.⁸ That the alteration of Ngei's fate was effected through proper parliamentary procedures proves, to these observers, that the government is committed to the rule of law and the principles of an independent judiciary, with respect I differ from these observers. If the amendment was a general one, it should not have had ~~retroactive~~ ^{retrospective} effect just for the sake of going to single out Paul Ngei for Presidential pardon. To constitute executive influence or interference with judicial procedure, the time of interference is immaterial. What is important is the fact that such interference has been made, and in this case, that as a result, a court decision has been reversed. Therefore, what one would consider in the Ngei case is the fact that constitutional amendment has resulted into reversal of the High Court decision.

This Kenyan case could be contrasted with the Tanzanian case of Marealle V Chagga Council.⁹ In this Case Tanzanian Government, wishing to a void a multiplicity of suits of the nature in the above case, passed legislation barring any future suits, but this legislation did not have effect on the already decided case above. The government felt that legislation with retrospective effect would interfere with judicial functions.

The Kenya situation could be compared with the practice in Zambia where President Kaunda at one time exercised his powers of clemency in favour of the Lusaka constituency secretary of the Youth League. This secretary had been convicted and sentenced to 12 months imprisonment for contempt of court where Kaunda pardoned him, thus, nullifying the court decision.

The Kenyan and Zambian situation could be contrasted with Tanzania which has got a lot of importance attached to judicial independence. Although the preamble to the Tanzanian constitution makes provision for judicial independence, this was tested in 1964. In that year, very lenient sentences were passed against the mutineers, this leniency met criticism from the Government, Nyerere's attitude to the situation is worthy looking at because it shows how much importance he attaches to judicial independence. He said,

"To interfere with the courts' discretion is to do exactly that thing for which the nation condemns the soldiers....."¹⁰

As a result, the lenient sentences remained and although the whole nation was criticising this leniency President Nyerere maintained that they could not be interfered with, since this would amount to disrespect for judiciary.

Close examination of another of Ngei's cases, now reveals that while convicting or acquitting the courts consider the status of the person before them. If he is a prominent person, he stands a chance of escaping heavy punishment or rather, the prescribed punishment.

This was a case in which Mr. Paul Ngei¹¹ pleaded guilty to two charges.

(a) driving an uninsured car without due care and attention.

(b) Threatening to shoot Mr. Washington Muthami. The Chief Magistrate¹² who tried this case noted that the accused was a responsible senior Minister, mature and experienced, to whom everybody would look as an example of good conduct. He had behaved in a bad manner which would bring a bad name to Kenya, and he also noted that this was not the first time, the accused had been found guilty of a similar offence previously. Now, this was a proper case for a custodial sentence but because the accused belonged to a certain class of people, the Chief Magistrate felt it would not be proper to imprison such an important man. Passing sentence he had this to say:-

"This mountain out of a mole hill was caused by Ngei, a responsible Senior Minister..... I felt this may be a proper case for a custodial sentence but this court will not ignore the fact that he is fully sorry for what he did. A custodial sentence may deprive the country of the services of an important, able and dedicated minister...." The court described the accused's behaviour as "diploable" and "frightening" and "capable of bringing into bad repute Kenya's name abroad....."

However, due to the courts' attitude towards the accused, he did not get the proper sentence (custodial). Instead, he was fined 4000/= and ordered to surrender all his guns to the government for 5 years, except to keep only one for self defence.¹³

Events became more dramatic when one realises that two years before this case, it had been alleged that judicial independence was being frustrated in the Chief Magistrate's court for he was delivering judgements on political grounds.

In his interview with the Sunday Nation¹⁴ he had this to say:-

"I have never delivered any sentence on political grounds. I therefore would take this opportunity to refute and dismiss such allegations as totally unfounded and untrue. Courts do not take politics into consideration."

An English man says that where there is smoke, there must be fire. The public could not allege that the courts were being biased when there was no reason from which the allegation stemmed. The last case I have discussed shows that there are times when the courts are biased and decide cases bearing in mind the status of the parties involved.

While the courts continue to function they have been largely reduced to impotence. The constitution¹⁵ and the criminal procedure code¹⁶ lay down rules designed to protect the rights of persons who become caught up in the process of the criminal law. Whenever these rules are violated, the courts do not intervene. The case of Shimechero V Republic¹⁷ should make the situation clear.

Shimechero, a public servant, was charged with an offence under the prevention of corruption Act¹⁸, which offence arose out of transactions involving Medical Supplies. There would seem to be little doubt that the accused committed the acts with which he was charged. He was arrested unlawfully and detained for five weeks without being charged.¹⁹ Prosecution witnesses were also kept in prison for 5 weeks.

The main evidence against Shimechero was given by a Mr. Patel, the man who had been involved with him in the corrupt transactions which led to Shimechero being charged, prior to Shimechero's trial, Patel had been already convicted and sentenced to thirty months imprisonment. Following Patel's evidence, Shimechero was convicted and shortly thereafter, Patel was pardoned by President Kenyatta and released from prison. From these events, one would think that Patel might have been persuaded to give evidence for Shimechero's conviction, and it seems as if the court had been instructed to find Shimechero guilty. The government should have been responsible for this conviction, otherwise why did the president have to pardon Patel after giving his evidence, which was relied on for conviction? Patel's release was another slap in the face of the court which had decided his imprisonment. When counsel for Shimechero attempted to suggest to the court of Appeal a rather obvious conclusion that might be drawn from these facts, he was severely rebuked and the appeal was denied.

Another case where the court did not seem to sit with an independent mind was that of Mark Mwithaga²⁰ Mwithaga a former MP for Nakuru Town was found guilty in August 1975 and sentenced to two years imprisonment for assaulting his former wife and damaging her property. The offence was committed on 14/1/74 and the proceedings started almost 20 months afterwards. No explanations were made for this ~~deby~~^{delay}. Right from the beginning, the accused had been treated with prejudice and it seems as if the court had pressure from somewhere, to convict. On appeal, his grounds were

court had waited so much time before trial, witnesses and had not given word cases from the attorney general that the proceedings should terminate. This is well seen in a case, recalled in the 1978...
1978... while the accused had been

(a) He was convicted after his constitutional right had been eroded,

(b) The prosecution started immediately before the by elections in which the accused was one of the contestants. The trial Magistrate had not allowed counsel for the accused enough time to take instruction from his client in order to prepare an adequate defense. This is because the trial usually started and ended at odd hours e.g. 1.15p.m. for lunch break and 5.15 p.m. in the afternoons each time the accused was whisked away in a special police van making it very difficult for client and attorney to have adequate consultations.

(c) He was refused bail on no good grounds, this seems to be a reason for barring him from contesting.

(d) There was a big hurry to conclude proceedings and as such, it seems as if the court had already been asked to pass a specified verdict, that is why they could not give themselves time to decide fairly.

The state counsel objected to the second ground saying that the twenty minutes which were usually given were enough since "after all" he said, "it was a simple case of assault and did not need more time." It does not really matter how small or big a case may be, what is important is that the parties should be given adequate time to prepare their defence. The attitude of the prosecution towards this case as well as the hurry to conclude proceedings seemed to suggest to many people that the government was determined not to see Mwithaga back in parliament²¹.

Executive interference may take the form of terminating proceedings. This usually comes after the court has wasted so much time listening to witnesses and then one morning, word comes from the Attorney General that the proceedings should terminate. This is well seen in a case, reported in the Daily Nation in December 1978²² where the accused had been charged with forgery, conspiracy and stealing.

When the case came for hearing before Magistrate Derek Schofield, the prosecutor told the court that he had been instructed to terminate the proceedings i.e. to enter "a nolle prosequi." The angry Magistrate was recorded to have said;

"It seems extra ordinary that we have wasted so much of the courts time only to be informed at this stage, that the state for reasons of its own does not wish to continue with the case."

When no reasons are given by the state, the impression usually is that perhaps some prominent member of government is involved.

What I have been discussing falls under one head, "the colonial hangover". As I pointed out in my second chapter, in the colonial state, one man (the D.O) could perform both judicial and administrative functions and in Africa most of the Nationalist leaders were send to detention or prison by the courts acting under direct pressure of the government. Most African countries are still ^{nursing} missing this hangover that the judiciary must echo government policy and so this is infact the way it is. Perhaps this is the reason why judicial independence has never been a reality in these countries. This hangover may be used to explain constant executive interference into judicial functions, even in Kenya.

Appointments on Contract:²³

A number of the Kenyan Bench are appointed on contractual basis. It is rather obvious that a Magistrate or judge on contract will try to echo the policies of that authority responsible for his appointment so that it might be easy for him to renew his contract when it expires. Such a person cannot be said to be in a neutral position while deciding cases. He must be biased. It would even be more dangerous if such a person is a foreigner.

It is common knowledge everywhere that a foreigner will lean more towards the government. It would therefore be unlikely that he would decide against the government in critical political questions especially. The Attorney General's feelings about foreign manpower on the Kenyan Bench, that they would be more neutral, being on neutral grounds,²⁴ are not practical.

The present generation of African and foreign magistrates and judges, is handicapped by the fact that their education in England and in techniques of English law, has insulated them from the values of their people. By following the English law as it changes from time to time, the Kenya courts cannot claim to be independent being slaves of the English laws,²⁵ so that as it changes the Kenyan courts just follow without proper reasons.

Promotions:

Since 1974 Kenya has accepted the policy of having the judiciary as a career service. Professional Magistrates appointed as DM II's are expected to work their way up the ladder. There is almost no chance that a DM II will work his way upto the post of Chief Justice. Because of this, promotions are done on merit²⁶ and as a result, there is a lot of competition. While a magistrate sits with his mind expecting to please somebody in order to get promotion, surely, he can not be said to be independent and neutral. This competition might be another cause for the inadequate performance of the judiciary.

Corruption:

Once corruption finds its way into the Bench, the Magistrates concerned can not be said to be independent any more. This is a situation whereby a magistrate receives a bribe to favour a party who has a case in his court. Between 1976 and 1975, 2 magistrates have been convicted of this offence. This means that our judiciary is a victim of this corruption and perhaps there are many more magistrates involved in such practices but have not been discovered.

CHAPTER 5

CONCLUSION

The picture that emerges from the survey of the preceding chapters is that of the inadequate performance by the Kenyan courts. In this conclusion, I will summarise the causes of this poor performance and suggest the necessary reforms.

In the first place, the contractual appointment of Magistrates is common practice in Kenya. Such appointments might have one effect. A Magistrate so appointed might feel obliged to please the person responsible for his contractual appointment. There is nothing wrong in this pleasing especially if it means dedication to ones duty. He however fails in his duty if such a magistrate decides to favour the government while deciding cases where the government is involved for the sake of renewing his contract. Under such circumstances, a magistrate cannot be said to be independent in mind since contractual appointments can go against the spirit of judicial independence, they should be discouraged.

Employment of expatriate Magistrates should be discouraged. As I pointed out, quite a number of the Kenyan Magistrates are foreign. Foreign Magistrates, by wishing to be loyal to the government might be able to do their duty perfectly well but there is a tendency of leaning too much on the side of the government, especially, if they wish to stay longer in the country. As a result, a magistrate will tend to favour the government while performing his duty. Logically, a foreign Magistrate will fall victim of this problem more than a Kenyan magistrate would.

Corruption in the Bench is also upsetting judicial independence. Perhaps one of the reasons for Magistrates accepting bribes is their low salary. I am not suggesting that, that of the judges is satisfactory either. But, the salaries of our judicial officers should be increased in order to correspond to the heavy work they do in the Bench.

I also noted that promotions in the Bench are on efficiency basis. This has encouraged competitions for these promotions. Such competition may lead to bias because, while hearing cases, Magistrates will decide them, expecting some favour in terms of promotion. Their mind not being clear, they might even decide wrongly. I have got a feeling that promotions should consider ones length of time in the Bench so that unless one has served for a certain period, he should not be eligible for promotion. Then ofcourse efficiency should be the next qualification. This will minimise competitions and give some measure of judicial independence in the Bench.

The question of the ignorant litigant also interferes with judicial independence. In Kenya the sort of system used in solving disputes in court is the adversary system where each party is expected to argue out his case. This may interfere with independence especially if the ignorant party is unrepresented while the other is represented by an advocate. Such a litigant gets confused because to him, the advocate asks scaring and confusing questions. At the same time, he gets scared of the court atmosphere and as a result, may become unable to put his case more clearly just because he is scared. If the Magistrate is not careful, he will find himself bending towards the side which is represented and ignoring the other party. My recommendation is that, a magistrate in such a case should try as much as possible to assist the

ignorant party especially by asking him questions about what he has said in court. By so doing, the magistrate might discover what exactly that party intended to say but what he could not actually say because he was confused. This will lead to proper administration of justice and a good measure of judicial independence in the courts.

Judicial officers are restricted from too much mixing with the masses. Such restriction is good especially if it enables the officers not to take sides in life. If they did, they would find themselves unable to perform their duty with an impartial mind. However, too much restriction may be disadvantageous because it will cut off these judicial officers completely from the rest of the masses, making it difficult for them to identify themselves with the problems of the people they serve. This will mean applying the law as it is in the books but not interpreting it to suit the ways of life of the people. The Magistrate will therefore be more independent if he is free enough to interpret the law to suit the people. It is therefore necessary to allow magistrates some little freedom to mix with the people they serve.

UNIVERSITY OF NAIROBI
LIBRARY

It is not also good to apply the law as it is. Most of our law is actually English law, or rather, it has its origin in Britain. If the Magistrates apply it whole, they will be slaves of English law having no choice but to apply English law. Kenyan law needs modification in order to reflect the Kenyan philosophy of life. A good example of a law which is out of place in Kenya is the Kenyan law of contract which states that acceptance of an offer by post, is taken to have reached the offeror, as soon as the letter of acceptance is put in the post. This is an English law reflecting the English way of life because, there, the means of communication is faster

and it is possible that such a letter can ~~reach~~^{reach} the same ^{day}. In Kenya where the letter might take days to reach, or never reach at all, it is not reasonable to apply such a law. When a magistrate applies it, he is only a slave of the english law and is influenced by it. I cannot say he is independent until the law is modified to suit the Kenyan conditions of life

The biggest threat to Judicial independence in Kenya, as I have pointed out earlier on, is executive interference into judicial functions. The only way independence can be achieved in the judiciary is by stopping the government to interfere into judicial functions. But apart from the government deciding by itself to keep off judicial functions there is no authority, higher than government, which can order it to stop this interference. It is difficult to stop this practice, but it must be stopped. How does one do it?

Judicial independence in Kenya remains a myth until a solution is found.

1. The Commission of Kenya, Vol. 2, 1961
2. The Constitution of Kenya
3. The Judicial Service Commission Report
4. The Report of the International Commission on the Rule of Law in a Free Society
5. The Report of the International Commission on the Rule of Law in India, January 8-10, 1955
6. The Report of the Commission on the Rule of Law in Kenya
7. The Report of the Commission on the Rule of Law in Kenya
8. The Report of the Commission on the Rule of Law in Kenya
9. The Report of the Commission on the Rule of Law in Kenya
10. The Report of the Commission on the Rule of Law in Kenya

B I B L I O G R A P H Y

1. Allot A.N, Judicial and Legal systems in Africa. 2nd Edition. Edited by Allot A.N. University of London, London Butterworths 1970.
2. A.S. Mathiews, Law, order and Liberty in South Africa.
3. Griffiths J.A.G., The Politics of the Judiciary.
4. Hood Phillips, Constitutional and administrative law. 5th Ed. London Sweet & Maxwell, 1973
5. Nwabueze, Constitutionalism in the Emergent States. The Role of the courts in Government. with a foreword by Chief Rotimi Williams. C. Hurst and Company, London.
6. Nwabueze, Judicialism in Commonwealth Africa.
7. R.W. James, Law and its administration in one party state. (selected speeches of T. Georges) compiled and edited by, R.W. James and F.M. Kassam, East Africa Literature Bureau Nairobi.
8. The Constitution of Kenya. Act No. 5 of 1969.
9. The Daily Nation Newspapers.
10. The Judicial Service Commission Regulations (Contained in Cap 185 of the laws of Kenya).
11. The Rule of Law in a Free Society. (A Report on the International Congress of jurists, New Delhi, India. January 5-10, 1959). Prepared by Norman S. Marsh.
12. Ghai & J.W.P. McAuslan, Public law and Political change in Kenya.
13. The Weekly Review Magazines.

FOOTNOTES TO CHAPTER ONE.

REFERENCES:

1. The concise oxford Dictionary
2. Statement of the New Delhi conference Organised by International jurists in 1958.
3. Clause one of the conclusions reached at the above conference.
4. 10 encyclopaedia Britannica, George III 14th Ed. 1936
5. Article xxx of the constitution of the commonwealth of Massachussetts.
6. Brazier Margeret, Judicial immunity and the independence of the Judiciary. 1976, public Law, P397.
7. (1975 I Q.B. 118
8. 1995 I Q.B 670 or (1895) I A B 668.
9. Habeas Corpus Act 1679, S.10
10. (1677) 2 Mod 219
11. (1863) 3 B & S 576
12. Sirrows V Moore (Supra)
13. (1967) I.A.C. 290
14. 1965 A.C. 172

UNIVERSITY LIBRARY

This was an appeal in which the respondent had been convicted on a charge of bribery and sentenced. The tribunal which tried him was not lawfully appointed to do so according to the requirements of the Bribery Act 1954. The appeal was allowed and the supreme court held that the connections and orders made against the respondent were null and in operative on the grounds that the members of the bribery Tribunal not having been appointed in accordance with the constitution of Ceylon, and had unlawfully exercised judicial functions because they did not constitute an independent judicial body.

15. Article xxx (Supra)
16. Prof McIlwain, Constitutionalism ancient and modern cornell university Press, Rev. Ed. 1942 PP. 21-5).
17. See also C.J. Friedrich, constitutional Government and Democracy.
18. De Smith, The New Commonwealth and its constitutions. 1946 P. 106.
19. Clause L of the conclusions reached by the New Delhi Conference (Supra).

FOOTNOTES TO CHAPTER 2

1. Per Mr. Briggs, House of Representatives Debates, 16th April, 1963, Col. 1392, Nigeria.
2. Terrel V. Secretary of State for colonies (1953) 2 All ER 490
3. Kenneth Roberts Wray, Independence of the judiciary in commonwealth countries, (in changing law in developing countries) ed. Anderson 1963.
4. Kenneth Roberts Wray (ibid)
5. This proved impracticable since these officers did not know the Indian penal Code provisions, neither did they have them Ghai & McAuslon, Public law and Political changes P.130.
6. S.R.O. 1897 No. 575
7. E.A.P.G. Orders and Regulations Vol, 1 P 65.
8. These were provincial, district and Assistant collector courts, having the powers of magistrates courts set out on the Indian Penal and procedure codes. In the coast, they were also to be guided by the general principle of Muslum law when deciding a civil case between Muslims. In the rest of the country, they were to have regard to Native laws.
9. There were of two types.
 - (a) Those deriving from the old administration of the sultan and having jurisdiction in the coastal strip only.
 - (b) Those deriving from tribal societies having jurisdiction over the particula tribe only.
10. Arthur Phillips, Report on Native Tribunals in Kenya, 1945 para 520. (Nairobi, Legal Department).
11. Creeted by S.R.O 1902 No.661 and Appeals ordinance No. 28 of 1902.
12. S.R.O. 1902 No. 661.

... respect of offences carrying a maximum sentence of more than six months imprisonment.

24. Legislative council debates Vol. XLI. 21-3-57.

25. (1953) 20.B. 452.

It had jurisdiction over all persons and things in the protectorate. Below these two courts, the E.A. Native courts, ordinance 1902, introduced special courts, constituted by the collectors of a district which had been declared a special district. Jurisdiction was to be exercised according to the laws in force in the protectorate at the time every court was to be guided by customary law in all civil cases to which parties were natives.

13. No. 22 of 1903
14. No. 13 of 1907
15. No. 16 of 1931
16. E.A.P. G. orders and regulations P.53 as revised in 1913 by the E.A.P.G. orders and regulations P.54.
17. Arthur Phillips (Supra)
18. CMD 4623, 1934.
19. (1954) 21 E.A.C.A. 295 (T)
20. The appellate system was later reorganized so that African courts of appeal were to be established in each province. These were to be the first appellate courts in the hierarchy. From them, there was a limited liberty of appeal to a D.C. or in the absence of such a court to a first appeal to the D.C.
21. Legislative council debates vol. XL 1 February 21 1951. The African members who spoke at this debate were Mr. Mathu Cols. 1 83-8, and Mr. Ohanga Cols. 207-208. (Chief Native commissioner in the second reading debate on Native courts Bill). They resented the administration control of the courts and the ban of Advocates in the courts. They demanded a separation of functions in the African courts system. They resented the administration officer's supervisory powers and control over these courts. In reply, these African members who spoke were told that Africans did not understand or like the separation of powers and advocates should not be allowed in these courts because they administered customary law and a person trained in another system could not give them help.
22. Courts ordinance No.13 of 1907, section (4) and also courts ordinance No.16 of 1931 §.2.
2. Under the 1931 courts ordinance the civil jurisdiction of a second class subordinate court, generally held by a D.C. was upto 1000/= for non-Africans and 2000/= for Africans. In the supreme court, there was trial by jury available to Europeans only in respect of offences carrying a maximum sentence of more than six months imprisonment.
24. Legislative council debates Vol. XLI. 21-2-57.
25. (1953) 20.B. 452.

FOOTNOTES TO CHAPTER 3

1. Chapter 8 of the Laws of Kenya. (S.3).

2. Act No. 14 of 1967.

One court has jurisdiction in Nyanza, Western and parts of the Rift Valley Provinces, while the other has jurisdiction within Garissa, Wajir and Mandera districts. The remaining four courts have jurisdiction within the area of the former protectorate.

Its jurisdiction is not exclusive. The high Court and other subordinate courts are not excluded from exercising jurisdiction over muslim personal matters, while exercising jurisdiction they would not necessarily apply Muslim law. However the Kadhi's courts are limited in that they have no jurisdiction over mixed cases. see. Y.P Ghai & J.P.W. McAuslan, public law and political change in Kenya. PP.367 - 8.

3. Act No. 17 of 1967.

4. The criminal jurisdiction of all Magistrates courts is extensive but their powers of punishment are different. The S.R.M. as well as the R.M upon whom powers have been conferred may pass sentences upto ten years imprisonment, fines not exceeding 1000/= and corporal punishment not exceeding 24 strokes. Other 1st class magistrates have the same fining and whipping powers but may only pass sentence of upto 5 years imprisonment. A second class magistrates may pass sentence of not more than 1 year imprisonment, upto 2000/= fine and upto 12 strokes of corporal punishment.

Civil Cases:

The SRM may exercise jurisdiction where the claim does not exceed 6000/=, the RM, where it does not exceed 3000/=. Neither court has jurisdiction over claims arising under customary law.

ADMs court of any class has unlimited customary law jurisdiction and, limited jurisdiction in other civil cases.

1000/= for the DM II & III and 2000/= for D.M. I.

5. Sirrows V Moore Supra.

6. S 62(1) constitution of Kenya provided;

".....a judge of the high court shall vacate his office when he attains such age as may be prescribed by parliament."

7. S62 (2) ibid.

8. Such inability may arise from infirmity of body or mind or from any other cause, for inefficiency and misbehaviour (s62(3) Supra.

9. S 68(1) & (2).

10. S 61 (1)
"The chief justice shall be appointed by the president (as a High Court judge).
11. S 109 provides for the appointment of the attorney General as a public officer.
12. S68 (c), (d).
13. "Subject to any Regulations made under sub-section 3 of this section, the commission may act notwithstanding any vacancy in its membership.....and its proceedings shall not be invalidated by the presence or participation of any person not entitled to be present at or to participate in those proceedings. Provided that any decision of the commission shall require the concurrence of a majority of all the members there of s. 68 (4)
14. See Hon. E.N. Moore, The Role of a lawyer Attorney General in a military Regime, (repeated in report of the 4th commonwealth magistrates conference pp. 84 - 89 at p. 88).
15. The sub-committee of the JSC is established by Regulation 26 (3) of the Judicial service commission regulations.
16. S. A. Smith, constitutional and administrative law PP 367 - 8.
17. Sir Alfred Denning, The road to justice (London, Stevens & Sons 1955 P. 18).
18. Sir Alfred Denning *ibid*
19. The Kenyan magistrates are divided into four classes H, J, K, L corresponding to 3rd, 2nd, 1st, and SRM respectively. The DM III who belongs to job group 4 has got a starting scale of 1800/= per month. The DM II belongs to job group J, starts with 2250/= the DMI starts at 2690/= while the SRM starts 3,350/=
20. Report of the commission of inquiry, public service structure and remuneration committee, Nairobi, Govt. Printer, 1971.
21. The Standard, March 10, 1971, p. 1.
22. The Standard, May 25, 1971, p. 1.
23. The Standard, May 25, 1971, p. 1.
24. Cap. 70 of the Laws of Kenya.
25. Court of Appeal, criminal appeal, 1971, p. 1.

Footnotes for chapter 4

1. Weekly Review, October 13th 1975, December 22nd, 1975.
PP. 3-7, November 22nd 1975.
2. Section 9(c) of the election offenses Act (Cap 66) of the Laws of Kenya.
provides:
"The offence of undue influence is committed if any person directly or indirectly ~~makess~~ ^{force} sure of or ~~the~~ threatens any ~~force~~ or ~~is~~ violence for the purpose of inducing or compelling a person to refrain from becoming a candidate or to withdrawa if he has become a candidete."
3. M.P. to stand for member of parliament
4. The constitution of Kenya Amendment Bill number 25 of 1975.
5. Unless the National Assembly decides otherwise.
6. There are usually three readings made before a Bill is passed as law.
7. An indication of the probability of the president's scope of forgiveness came on the eve of jamhuri Day ^{when} the president gave an amnexty to 10,000 convicted prisoners throughout the country. The mood was clearly set for the subsequent forgiveness of Ngei's election offense.
8. But if this a mendment was genuine, then it should have been general and not have had retrospective effect just for the sake of going to single out ^{Ngei} for presidential pardon.
9. (1963) E.A. 131 (T).
10. J.K. Nyerere, "comment on the mutineers' sentenses" in, Freedom and unity (1966) pp. 298-9
11. Minister for Local Government.
12. Fida Hussein Abdallah.
13. The standard, March 17, 1978 Colum 2.
14. Sunday Nation. *May 20th 1974*
15. Section 72 and 77 of the Kenya constitution (Act No. 5 of 1969.)
16. Cap. 75 of the Laws of Kenya.
17. Court of Appeal, criminal appeal No.119 of 1974.

18. Contrary to section 3(1) of the prevention of corruption Act (cap 65) of the Laws of Kenya.
19. The constitution of Kenya Provides that anyone who is assested ordetained shall normally be brought before a court of law within 24 hours, which means that he should be charged within that length of time. S 72 (3).
20. Weekly Review December, 1975.
21. The prosecution did not commence proceedings until almost 20 months afterwards i.e. after the commition of the offense. No Explanation was given for this delay^s, and this peculiarity and the russy^{case} to conclude proceedings leaves a lot to be descried^{desired}.
22. Daily Nation, Friday, December 8, 1978 at page 3 col. 2 entitled;
"Court angry as big case is axed"
The three were jointly charged with forgery, conspiracy and stealing. The first accused was charged with forging a goods form on or before 27th of May 1978. The 2nd and 3rd accused were charged with conspiracy with others to effect the sale of 500 bales of jute to the 2nd accused through customs, by the transfer of bales from Kenya Cargo Handling services to customs, on a forged form. The three were also charged with conspiracy to effect delivery of the bales by unlawful means.
23. Reg.10 (1) of the judicial service commission Regulations, L.N. 163/1966.
24. The Weekly Review
25. Regulation 10 (1), Judicial service commission Regulations (Cap 185) Law of Kenya.

POST SCRIPT:

Originally I had the intention and determination to include in this research paper, some data, showing:

- (i) The quantity of foreign manpower in the Kenyan Bench.
- (ii) The number of Magistrates and judges, appointed on contractual basis, if possible, since Independence.

Eventually I failed in getting this data because the Senior Deputy Registrar of the High Court of Kenya, refused me access to the data arguing that, he did not understand why I should get such information. Due to this difficulty, I found it very hard to get most of the relevant material for my paper since most of it should have come from the High Court.

Perhaps this is a problem which the Faculty of Law and the examiners should consider as they go through My paper.

UNIVERSITY OF NAIROBI
LIBRARY