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UNIVERSITY OF NAIROBI
FACULTY OF LAW

DEMOCRACY IN COMMONWEALTH AFRICA WITH SPECIAL
REFERENCE TO KENYA

BY

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DEDICATION

To the young generation of leaders and students
who cherish Democracy and Constitutionalism under
the Rule of Law

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The views and mistakes expressed in this paper, are, however, mine, unless otherwise stated.

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TABLE OF CASES

1. Attorney General v. Kathenge (1961) EA 348
2. Adegbenro v. Attorney General (1962) W.N.L.R. 196
3. Andrea v. Republic (1970) EA 46
4. Campbell v. Hall (1744) 1 Coup. 204
5. D.P.P. v. Obi. The Foundations of Freedom, 1961 P.197
6. Kaggia v. Republic (1968) unreported
7. King v. Republic 1968 2 ALL ER 610
8. Kuruma v. Republic (1954) 21 E.A.C.A. 242
9. Namwandu v. Uganda (1972) E.A. 137
10. Ole Njogo & Others v. Attorney General of the East African Protectorate (1914) 5 E.A.L.R.70
11. Ooko v. Republic 1966 unreported
12. Republic v. The Earl of Crew (ex parte) Sekgome) 1910 2 KB 576
13. Republic v. El Mann 1969 E.A. 46
14. Uganda v. Commissioner of Prisons (ex Parte Matovu) 1966 E.A. 514

TABLE OF STATUTES AND DECREES

1. Amendment Act no. 28 of 1964
2. Amendment Act no. 38 of 1964
3. Amendment Act no. 14 of 1965
4. Amendment Act no. 14 of 1966
5. Amendment Act no. 17 of 1966
6. Amendment Act no. 18 of 1966
7. Amendment Act no. 31 of 1968
8. Amendment Act no. 42 of 1968
9. Amendment Act no. 2 of 1975
10. The Constitution of Kenya 1963
11. The Constitution of Kenya 1969
12. The Interim Constitution of Tanzania
13. Constitutional (Suspension and Modification) Decree,
1966 of Nigeria
14. Government (Supremacy and Enforcement of Powers)
Decree 1970 Nigeria
15. The Constitution of Uganda 1962
16. The Dairy Industry Bill 1964
17. The Hire Purchase Act 1968
18. Local Government Regulations Act no. 31 of 1968
Local Government Regulations (Amendment) no. 2

INTRODUCTION

The justification sought by the colonial powers was that the African was at a much inferior stage of evolution and it was therefore necessary to "colonise him and civilise" him. This could not be done unless effective control was imposed upon him by the colonisers and consequently governments were set up directly controlled from the metropolitan state. Whereas the British colonial governments were absolutely dictatorial, the colonised being given no opportunity to determine how he was to be governed, the model of government which British introduced in their former colonies was completely different from colonial model. This is the Westminster Model which was arbitrarily introduced although Legco debates prior to independence gave an impression that there were some consent¹. The model introduced liberal democratic values of which constitutionalism or restraints upon the bounds of governmental actions, was the most important. To the political philosophers, constitutionalism is concerned with the limitation of government powers and the assurance of the individual civil rights.

In this paper, democracy is examined as an ideology originating from peculiar *roots of Western* culture and imposed on these African states by the British. Having made the area of study to be Commonwealth Africa and with special reference to Kenya, the purpose of this exercise is to determine whether the concept of democracy has been known or recognised both theoretically and in practice. The method employed is firstly, to examine the concept of democracy as understood by constitutionalists in the world at large.

Then, to trace the historical evolution of the concept from the earliest times when it has been known. This has to be done because it is apparent that Western Accademicians while writing on democracy, and indeed on any other subject, have used the present very high standards to determine whether constitutionalism or any other concept is honoured in African institutions.² To justify the historical treatment of democracy, it is evident that it could mean different things to different peoples. Furthermore, it cannot be said to have existed in any place to the satisfaction of all classes and without criticism. In greece, for example, the Athenian democracy was called the democracy of the big slave-owners. Socrates criticised the big slave owners for excluding slaves and small slave owners from the affairs of government and practised profit-making at the expense of the slaves in the name of democracy. In the medieval times, the principle vehicles used to achieve constitutionalism and democracy were Barons, Freelords and above all, the Clergy. In these circumstances, one should not be surprised to hear that democracy was held to exist.³ As such, democracy has always retained the element of class content wherever it is said to exist. It has thus come to frustrate its celebrated principle of rule of the majority, because in most cases the ruling class are the minority.

Secondly, I proceed on to examine the extent to which democracy as an element of political ideology has actually been practised in Commonwealth Africa in Chapter Two. To start with, it is vital to consider the establishment of one-party system in some countries and their claim to be democratic.

This consideration is based on whether the One-Party systems have come as a result of the general will of the people or not. A case study of African safeguard of individual rights is dealt with and also the part played by the legislatures in an attempt to uphold the rule of law. It is in the third chapter that case law and the role of the judiciary of Kenya in the operation of this concept since independence will be dealt with. The strengthening of the Executive by successive amendment to the constitution is examined in discussion of democracy in the country.

The concluding chapter is based on the prospects of democracy in Commonwealth Africa. It concludes that democracy has played a very insignificant role in African State, but there is hope for the future. This chapter also seeks to suggest ways and means through which democracy may be achieved in our African operational context.

~~SECRET~~

Readers should be brought to the attention that this paper is written on the basis of constitutional and administrative law in the authors capacity as a lawyer but not as a politician. This is why my study is mostly based on case law.

CHAPTER ONE

THE CONCEPT OF DEMOCRACY

(a) Definition

The term 'democracy' is not ~~not~~^{too} easy to define. It has raised a lot of confusion in peoples' thinking as to what it is all about. Democracy has thus become an ambiguous thing, with different meanings - even apparently opposite meanings for different peoples. Democracy has however in time and space come to wear "a coat of many colours"¹. Dictators have from time to time been compelled to claim that fascism and Nazism were real democracies. The Soviet Union and other Communist countries are represented as "true democracies" or as "peoples democracies" so as to distinguish them from democracies of the West. The Third World countries have fought for emancipation in name of democracy.

The word "democracy" comes from two classical Greek words that mean "rule by the people". Abraham Lincoln defined democracy as "government of the people, by the people, for the people". Others have defined it as "rule by the majority". The majority rule is doubtful in that the minority may be enslaved and this cannot be called democracy where a certain group of citizens live at the expense of others. Therefore, it is necessary not only to ask the question: What does the word "democracy" mean?, but also: "What is the thing?". It is admittedly true that democracy does not mean a particular political system. The meaning is determined by an empirical study of the various systems called democracies and the characteristics it connotes.

The Western liberal democracy upholds the characteristics of a democratic state as named above. But it is necessary to emphasise on the rule of Law which those countries uphold. Democracy cannot exist without the rule of law. The rule of law means regulations of the affairs of society, by a set of rules which are fixed and certain, in so far as rules can reasonably be, and which are impartially applied in all cases. The rules must be in themselves be such as designed to promote what are universally considered to be worthwhile human values. The freedom of individual in its widest sense, including his right to life, liberty, the security of his person and property, his freedom of conscience, of association and of speech must be safeguarded. But all these, of course, being subject to the limitation of the enjoyment by others of the same right.

Thus any society which holds itself out as seeking the achievement of the rule of law must have a government responsible to a freely elected assembly representative of the people, and courts of law which are impartial and free. In the absence of one or both of these prerequisites, there can be no genuine claim of upholding the rule of law, hence, no democracy. Most powers of government are discretionary as to whether or how they will be exercised. This discretion should be limited by law, thus precluding arbitrary exercise of government power. Without the rule of law, the civil liberties of individual cannot be safeguarded, thus undermining very core of democracy.

Liberal democracies of the Western countries reflect the basic requirements that a democratic society should uphold. Such a society should have civil liberties in existence in order to provide an atmosphere of freedom. Individuals must be protected from arbitrary arrest and imprisonment, from the kind of legislative bills of attainder that were used in the past to silence political opposition. ² Individuals must be free to present petitions to the government and enumerate publicly their grievances. Individuals must feel secure against arbitrary taking of their life, liberty, or possessions. There must be individual security against arbitrary searches and seizures.

In addition, democracy requires people's elected assembly to make laws in response to peoples' will. Such an assembly should be representative of the people. Universal suffrage is necessary where age, residence, and citizenship requirements for voting are usually the only legal requirements for voting and for holding office. If the elections are to be genuine and free, the voter must be protected as much as possible from coercion and bribery, and the election results protected from fraud and manipulation. This should really be taken care of because arbitrary impediments often are imposed in fact, if not in law, and that coercion and bribery are common practices.

A democratic government must be constitutional in order to put specific restraints upon will, whether it be the will of one, of a few, or of many. The unbridled rule of majority may lead to mass tyranny.

If democracy means nothing more than giving the majority of people what they want, then it is practically undistinguishable from fascism. There could be and have been constitutional governments which were not democratic, but we cannot have a genuine democratic government which is not a constitutional one. In this instance, it should be noted that a constitutional government does not depend upon a written constitution. The U.S.S.R. has a written constitution but it is not a constitutional government. On the other hand, Great Britain has no written constitution, but it is a constitutional government. The opposite of constitutional government is tyranny and one of the most essential elements is the existence of limitations upon powers and functions of government.

Macpherson has attempted to define in very clear terms the three dimensions of the twentieth century democracies. Firstly there is the liberal democracy confined to the Western world.³ This type of democracy was brought into being so as to serve the competitive market society. The society was liberal first and later democratic. Democracy came as a top dressing. It had to accommodate itself to the soil that had already been prepared by the operation of the competitive, individualist market society, and by operation of the liberal state which served that society through a system of freely competing, though not democratic political parties. In the liberal state, universal franchise for example was non-existent but was firmly established in the democratic state.

Secondly, there is the Communist variant of non-liberal democracy⁴. The Communist theory goes back to the work of Karl Marx from 1840s to 1880s. Marx was a great critic of capitalism. The Capitalist society that he saw was a sharply divided one, and on his analysis, class exploitation was an essential part of the capitalist system. So long capitalist system existed, the state was bound to be an apparatus of force by which one class maintained its power to exploit the others⁵. Capitalism, therefore, had to go: only the productive powers it had developed were to be kept. Marx asserted that the politically - conscious working class or the proletariat were to overthrow the capitalist state in order to end exploitation. Marx called the period of proletariat rule democracy. This was Marx's meaning when he wrote in the Communist Manifesto of 1848, that "the first step in the revolution by the working class, is to raise the proletariat to the position of ruling class, to win the battle of democracy⁶. This was only to be a first step. The class division between proletariat and capitalist was, in Marx's view, the last historically necessary form of class division. Classes would disappear and so would the classless state come into being. The rule of the proletariat would be democratic because it would comprise the great majority of the population, and because its purpose would be the humanization of the whole people. This democracy would be a class rule at the first, for class rule was needed to transform the capitalist economy. When the economic transformation was completed, there would be no need for class rule.

With the 1917 Revolution led by Lenin, the Soviet State started from the original Marxian concept of democracy. Instead of being able to start a class democracy, it had to start as a vanguard (fully-conscious minority) state⁷. Macpherson comes out with the conclusion that the conversion of a vanguard state into a strictly democratic state can scarcely take place while the post-revolutionary state is still a class state. In fact, the one-party Soviet States can be democratic only if there is full intra-party democracy. The membership of the party should be open, and the price of participation in the party is such that the average person can be reasonably be expected to contribute. It appears that none of these conditions have yet been met in the Communist States.

Thirdly, Macpherson discusses the non-liberal underdeveloped variant of democracy, found among the newly independent countries that generally got their independence after a revolutionary struggle. These nations made an organised popular movement under leaders who were able to gain mass support as nationalist leaders. At independence democracy thrived under a single party since the people were united and had no sharp class differences, all with one objective, to raise the level of material production. Presently, the extent of this type of democracy is questionable, since the objectives have not yet been achieved and there has been widespread disillusionment among the people, yet the same countries continue to operate under de facto ~~or~~ de jure single-party systems.

Fragile as they might have been, the democratic institutions established by the independence constitutions provided for the separation of powers, entrenched Bill of Rights (except in Tanganyika), the independence of the judiciary and other fundamental tenets of constitutionalism and democracy. However some of these democratic institutions like the Bill of Rights and Legislatures have been rejected in some Commonwealth African States. A number of these states, Uganda being a good example, have experienced coup d' ⁿ tats by the politically - conscious citizens when the leaders head towards dictatorship, or in fact become dictators. Macpherson ends with the conclusion that these countries have a genuine historical claim to be democratic⁸. Generally, this would be so if we take democracy to mean handing over of power from the colonial masters to the African leaders. In my view, opposition plays a great role in a democratic government and since some of the African States do not allow opposition parties, they cannot genuinely claim to be democratic. It is true that parties represent class interests, for example, the Labour and Conservative Parties in Britain represent bourgeois interests, but a multi-party government has its role to play in a democratic government. In such a society, decisions reached are fairer compared to the decision of one leader, however wise he may be. But compared to the military regimes, the one-party states have not wholly deprived individuals of their rights. At least a general will can be said to be expressed through the single party.

Whether the expression of this will through the single party can be called democratic, depends on how much control there is of the leaders within the party, and how strenuous the degree of activity is required as the price of membership in the party. This is discussed in the next chapters of this paper.

Unlike the Western countries, courts in the Commonwealth Africa have shown to be a bit reluctant to enforce the civil liberties of individuals whereby the government has wronged a particular individual⁹. This is contrary to the principles of the rule of law which serves as the watchdog to democracy. The historical background of these states shows that democracy in its real sense of representing majority interests was non-existent in the colonial states. The colonialists did not only refuse to observe the rule of law but in fact legalised its breach. Rejection of the rule of law leads to tyranny which is the opposite of democracy. As the paper shows below, the Commonwealth African States, generally speaking, have rejected democracy and turned towards authoritarianism and dictatorship. This experience cannot be allowed to make us believe that there is no hope for democracy in future because even the developed countries had a long tradition of democratic institutions. Moreover, former military dictatorships like Ghana and Nigeria are now multi-party states. Our task is to organise a form of limited government to suit our needs in Africa. The masses, who are usually kept in the background, must be effectively represented in the government.

(b) Origins and Historical Evolution of Democracy

Democracy was first experimented with in ancient Greece, particularly in Athens. Because of the small size of the Greek-city State, democratic self-government was direct: the people in Assembly discussed and voted on the major public issues. There were no parliaments, no cabinets and no civil servants¹⁰. Officials were generally selected by lot, and served for only one year or so. Slaves, women and aliens were excluded from the vote, but even with these limitations democracy functioned with vigour and self-confidence. It must be noted that, even from the very early stages, democracy has always been class dominated. In Greece this was referred to as the slave economy where the big slave owners made profits at the expense of the slaves. However, the Athenian democracy did not escape criticism of Greek philosophers. The most famous critic was Socrates who felt that there was no real democracy because the small slave owners and the slaves themselves were excluded in the control of the state. The higher aristocrats had rejected the notion of natural law which is divine and advocates for human equality and justice. Aristotle also criticized this democracy saying that the middle class should take control of the state and overthrow the higher aristocrats. But historically Athenian democracy was perhaps the most successful experiment ever made in direct democracy. The will of the majority was expressed at a fair degree, but not as full as Socrates demanded since slaves and women could not vote.

The ancient Romans experimented some elements of democracy, without ever practising it as fully as it was done in some parts of Athens.

At first only the aristocratic families had the right to vote for major government and public issues, and to govern. After centuries of struggle, the poorer classes won the right to vote, and to participate in the process of governing.

After the fall of Rome, democracy lay almost dormant for about a thousand years, until it was rekindled by the Renaissance and the Reformation¹¹. Renaissance led to an emphasis on the individual and a rejection of the universal collectivist society of medieval Europe in favour of independent national states, and, where the Reformation followed, separate national churches. Men became more daring in religion, philosophy and politics¹². Many recognised no authority unless it could prove its claims and validity in the court of reason. Machiavelli examined human institutions without regard for divine prescriptions, and in light of naked expediency. Inevitably this spirit of critical individualism permeated political thinking. The divine right of kings was challenged by the new humanism with its confidence in human affairs. It is in this period of feudalism that Natural law theory was at its height.

In England Magna Carta 1215 was simply what the moderate group among the barons felt to be the true statement of the law. In time the rights they claimed were granted to all free men and the rise of parliament in the 13th century gave further impetus to the ideas of joint consultation on the affairs of the realm. Following was the petition of Rights (1628) which put forward further rights on behalf of the people, while the Bill of Rights (1689) gave parliament its supremacy.

The example of England contributed a lot to modern democracy together with the American Revolution, the French Revolution and the Industrial Revolution. These revolutions brought together masses of the people whose needs were expressed in pressure groups and finally in reform. During this era of capitalism, Jeremy Betham emerged with his concept of utilitarianism that government should be carried on to suit the greatest number. This, together with the first stages of parliamentary reform in 1832, marked the beginning of modern democracy in Britain. Further reform acts were passed which eventually achieved complete adult suffrage, where even women had the right to vote by 1918, and anyone over eighteen by 1970.

The United States democracy is said to be more thorough - going form of representative democracy established in 1787. But its thoroughness at that time can be rejected on the grounds that slaves were still excluded from the affairs of government. Separation of powers was recognised which was taken over from John Locke and Montesquieu's "The Spirit of Law" as a way of preventing any part of government from becoming omnipotent. The first ten amendments to the American constitution enhanced the individual civil liberties. The belief of separation of powers, together with the ten amendments and the emancipation of slaves in the 1860s form the basis of modern American democracy.

The French Revolution 1789 made an important contribution to the democratic thought which the French people expressed in terms of "Liberty", "equality" and "fraternity".

The revolution was heralded by the work of Rousseau in his "Social Contract" of 1762. These elements spread democratic ideas to the rest of Europe and the result was establishment of revolutionary democratic institutions.

Karl Marx in his Communist Manifesto 1848 challenged the exploitation practised by the capitalists over the other classes of society. He said the capitalist society was a sharply class divided one and in his emphasis, he said that capitalism had to be overthrown by the working class who would rule before the complete transformation of capitalist economy to socialist economy would take place. Finally, the society would be classless, and this he called democracy. These springs of thought produced the more radical ideas of socialism and communism. The countries which took up Marx's ideas claim to be democracies.

Historical experience shows that there was no effective democracy without safeguards for the liberty of individual. Today, the term democracy has taken a much wider significance than it had at first in the Western countries. The Western liberal democracy is said to be the superior one in comparison with the Marxian and underdeveloped countries' democracies. But from our historical experience, democracy has never been perfect and has always embodied a class content. The attributes that bring out liberalism and democracy can be traced in history. The market economy which was capitalist in form developed first and then need arose for liberalism. Liberalism is a political and social philosophy which characterises a society based on individual choices.

To make such a society work, a responsible form of government was needed. The people had to have their political choice of candidates and parties¹³. Certain liberties were needed to effect this political choice like freedom of association, freedom of speech and publication. After a time, this liberal state developed a need for democracy. Those who had no vote felt they were denied a right because their interests were not represented, or their views forwarded to the machinery of government. Ultimately, the democratic franchise was introduced into the liberal state. So democracy came as a later addition to the competitive market society and the liberal state.

At independence, the Commonwealth African countries took on the Western parliamentary democracy. This kind of democracy has failed to work in these countries and the result is that it has turned out to non-liberal democracy. This is not surprising since it was a foreign concept which was transplanted to Africa without the basic foundations with which it was borne in the West. Modifications have been made to suit the conditions in Africa without success. However, leaders have realised that the problems of these new countries require stringent methods of social organisation, but not the British Parliamentary democracy.

(c) Historical Background of Commonwealth Africa

In the very early period of colonial rule in Africa, constitutionalism was not known. Laws were made by the governor who was also the executive. The reason is fairly obvious.

Colonial rule is the antithesis of democracy and popular participation in the institutions of government. To permit the colonised Africans to play a part in their own government would have been completely contradictory¹⁴. The people of the colonial states were, therefore, systematically excluded from any role in state - policy making. Government was carried on through an imposed administrative machinery which was rigidly hierarchical in structure and predominantly military in character¹⁵. Legislation consisted largely of administrative instructions passed on by the governor to his subordinates in the chain of command.

The colonial administration denied colonial subjects the minimum of personal rights and freedoms. Absolute political power was vested in the government. This arose out of the objective of colonial administration which was a tool of imperialist exploitation of the natural resources of the colonies. Its role was, therefore, the establishment of optimum conditions for maximum exploitation. This was euphemistically described as the maintenance of law and order. If the colonial subjects were allowed fundamental rights and freedoms, this would have interfered with the so - called maintenance law and order and the profit objectives of British imperialism. For it would have meant allowing the natives freedoms of association which would have led to the formation of labour unions. Such conditions would have agitated for higher wages and better working conditions for their members. Such an attitude would not only disturb the political calms required to develop the colonial economies, but if such calms were granted, they would reduce the profits

earned from the employment of cheap native labour. Hence, a form of legalised servitude was instituted, which held African servants to their masters by supporting private contracts with Penal Sanctions¹⁶.

The rule of law was completely rejected in the administration of colonial states. The term 'rule of law' envisages a government according to law, administering its subjects by fair laws, which do not discriminate but binding on the generality of citizens. This was of course impracticable in the colonies because it was a society based on inequality. It existed for the exploitation of the colonised and for the benefit of the colonisers. It was a struggle for racial and class survival. Lord Lugard one of the Chief architects of British imperialism put it succinctly:

"Let it be admitted at the outset that European brains, capital and energy have not, and will never be expected in developing the resources of Africans from motives of pure philanthropy, that Europe is in Africa, for the benefit of her own industrial class"¹⁷.

The structure of colonial governments was thus completely opposed to the concept of democracy. Administration was carried on through an imposed machinery, rigidly hierarchical and predominantly military in character, in that the governor was the executive himself. Under him were officers, chiefs and headmen. Each administrator was responsible to his immediate superior and was not answerable to those over whom he ruled. The whole administration was totally unrepresentative of its subjects, who did not participate in its selection.

By virtue of the Foreign Jurisdiction Acts, applicable to all colonies, the Governor was empowered to hold courts and promulgate regulations by Ordinances-in-Council in order to create a comprehensive framework for administration. In essence, therefore, the colonial administrative hierarchy combined in one body the executive, legislative and judicial functions. The Governor made regulations by proclamation, which were executed by administrative officers of whom he was the head. The same officers organised and supervised Native Courts and staffed subordinate courts as ex-officio judicial officers.

Observance of the Rule of Law and practise of democracy was not allowed in Africa by the British. The maintenance of government was geared towards the achievement of maintenance of law and order and dispute settlement. So the essential political and judicial protection which give effect to the rule of law were envenomed by the activities of colonial administrators. In pursuit of law and order the administrations not only refused to observe the rule of law but legalised its breach. The administrators were enabled to deport any person they were satisfied to be dangerous to peace and good order. Bills of Attainder, forbidden in England since the Bill of Rights 1688 were extensively used against Africans. In The King V Earl of Crewe, ex Parte Sekgome¹⁸, the respondent applied for an order of habeas corpus against a proclamation of the British High Commissioner for South Africa authorising his arrest and detention. The King's Bench held that despite the proclamation being an act of attainder, the detention was valid and habeas corpus would not apply.

The defence of Act of State was used to avoid redress even where the liability of the government to an individual arising out of arbitrary use of its power was not in question. An Act of State has been defined as essentially an exercise of sovereign power and hence cannot be challenged, controlled or interfered with by Municipal Courts. Its sanction is not that of law, but that of Sovereign power, and whatever it be, Municipal courts must accept it, as it is, without question. In Ole Njogo & Others v. Attorney General (East African Protectorate)¹⁹, the plaintiffs brought an action against the British Government and claimed damages for confiscation of some cattle. It was argued on behalf of the Government that the Municipal courts had no Jurisdiction for that was an act of state. These contentions were successful against the plaintiffs.

As we have seen, the pre-requisites of a democratic government were missing in colonial Africa. There was no separation of powers. Judicial independence meant little to the African. Their cases were mainly decided in the administration -controlled courts (native courts) and their appeals rarely went beyond the administration - staffed subordinate courts. It must not be overlooked that the superior courts, no less than the lower courts were organs of colonialism and in the last analysis were required to support the order of which they were an important part²⁰. Constitutionalism which is an important aspect of democracy was non-existent.

The present structure of governments in Commonwealth Africa were introduced at independence. The colonial background did not set a background for democracy and this as a result has given rise to a lot of problems in African Politics. The ideologies inherited in the Westminster model constitutions are foreign and incompatible with the present conditions of economic and political set-up in Africa.

The structure and ideology of the new African States are inevitably affected by their pre-colonial and colonial background, but possibly still by their leaders own experiences, and their evaluation of their countries particular needs²¹.

Few forms of organisation have given rise to more differences of opinion than that of the one-party state. In traditional comparative analysis the number of political parties in a country has been considered a sound index to the character of its rule. One-party rule is associated not only with dictatorial but also with quasi-or wholly totalitarian rule. This judgement seems to be confirmed by the experience of one-party regime in Nazi Germany, the Soviet Union and the "peoples' democracies" of Eastern Europe²². Majority of the Commonwealth countries in Africa have this political system. The representatives of many of those states also claim that they are democratic rather than dictatorial in character since their governments are selected, or at least endorsed by popular election, they rest on mass-party support, and in addition, there is a considerable interplay between groups within these mass parties as well as broad base of popular participation and consent.

To term these states democratic when they provide little or no chance for an opposition party to play a role within governmental

structure would be to violate a basic criterion of a democratic system that it institutionalizes public criticism of governmental measures and provides a method for the peaceful change of leaders and of ruling groups.

In most instances the single or dominant party in a developing state is an outgrowth of the mobilization of persons and groups in the pre-independence period. In the former British territories, the existence of a cohesive political party under a dominant leader was a sine qua non for the transfer of political power to local hands²³. Since the British were empirical, reacting to and through a "process of interrelated pressure", to quote Sir Andrew Cohen²⁴, the conditions for extension of local power remained relatively common while the timing differed. Thus the colonial regimes stimulated through by different means, the mass-dominant parties, which form the decisive link between the pre-independence and post-independence periods.

There has been a remarkable degree of continuity between pre - and post independence periods, not only in local governing groups but also in relations with the former Metropole. All African territories which have graduated from the British colonial control have sought to retain a considerable number of former colonial administrators, turn first to Great Britain for economic aid, and have acquired membership in the Commonwealth Nations.

The mass party is looked on in most countries (Tanzania and Kenya included) as the purveyor of plans and precepts, the stimulator of new projects, and the educator of the young and

of the peasants, and the emancipator of women. The political party has far more than a governing role, for it is seen as additional objectives, the Liberation of the people of its country from poverty, illiteracy and apathy. In such tasks many Africans feel that, with more than a little justification, that there is no room for disagreement or divided efforts.

The Commonwealth African States at independence became parliamentary democracies. The formal structure of government was very British in tone and entirely in pattern²⁵.

CHAPTER IIUNIVERSITY OF NAIROBI
LIBRARYPRACTICE OF DEMOCRACY AND ONE-PARTY SYSTEM IN COMMONWEALTH AFRICA

(a) The Origins of One-Party System

In Commonwealth Africa today, there are four Presidential systems which are one-party states, either de jure or de facto, namely Kenya, Tanzania, Zambia and Malawi. However, States like Botswana, Ghana, Nigeria, Sierra Leone, Gambia and Mauritius still uphold the multi-party system. Ghana and Uganda were one-party states, then ruled by military for several years till 1979 when civil governments were established. Uganda today has again fallen under the grips of the so-called Military Commission which hopes to rule the country until Presidential elections are held late this year. In examining the origins of one-party systems, it is necessary to pose the question: Has this move towards one-party system been as a result of the general will of the people of the respective countries? If not, can the systems have a genuine claim of being democratic, governments by free consent of the people.

In a democratic government, the people at large must be the effective wielders of power. This can be done through the people's own representatives in Parliament who are fairly and freely elected. These representatives must effectively perform their major role of educating the masses on government affairs. Whatever form the government takes must be the people's free consent. Obviously free consent carries no assurance of just or wise decisions. But Sidney Hook has pointed out, so long as that consent is contingent, that is,

it can be granted or withheld or periodically renewed - the consequences of the policies pursued upon the future contingencies of consent will usually be considered. That is why it is better to accept a foolish decision of a democratic community, provided we are able to agitate against it, than to insist on our dose of wisdom, about which we may be wrong anyhow. The risks in accepting decisions that rest, directly or indirectly upon freely given consent are far fewer than the risks involved in the only alternatives - anarchy and despotism¹.

In Kenya the voluntariness of one-party system rests upon two bases: it has originated from a "voluntary" merger of existing parties and it has never been established by law. On the eve of independence, Kenya had three main political parties, the Kenya National African Union (KANU), the Kenya African Democratic Union (KADU), and the African People Party (APP), with sixty-four; thirty-two; eight members respectively in the House of Representatives. In September 1963, the APP, which originated as a splinter group from KANU, dissolved itself and returned to the fold.

President Kenyatta launched a campaign in meetings with chiefs and elders. His aim was to use their influence over the opposition. Later on in November 1964, the leader of KADU, Mr. Ngala, announced in the House of Representatives that in the interests of the people of Kenya, he declares the dissolving of the Official Opposition party and the joining of its members into KANU, Kenyatta described the event as a great victory for Kenyans.

The question that arises here is: Was this merger voluntary? Clearly, it was forced upon KADU by the mass defection of many of its parliamentary members. KADU was forced into it as a face-saving device, not out of a free choice. They were procured by the pressure exerted on members by the chiefs and elders.

A split occurred in Kenya in 1966, when the Vice-President of KANU Party and of the Republic, Mr. Oginga Odinga, led a faction in a dispute and broke away to form his own party the Kenya Peoples' Party (KPU). To halt this, the government as a first measure, introduced a constitutional amendment, which forfeited the parliamentary seats of the defectors². It provided that all members who had resigned from the party which had supported them at the time of election should resign and seek re-election with the backing of their new party.

Owing to concern about peace and order, (the reason given), another amendment was passed a month later altering both the constitution and the Preservation of Public Security Act to empower the president to apply Part III of the Act by Order³. The Little General Elections were held in 1966 where only nine KPU members retained their seats.

In 1969, Odinga himself was detained and KPU banned. Kenya was again restored to the cherished status of a de facto one-party State. The Amendments to the constitution were used as a weapon to frustrate the opposition. In a democratic society opposition parties are necessary in order to balance

decisions to be taken and as a fair representation of the peoples' general will. Detentions without trial are contrary to the requirement that individuals freedom of speech and security of their persons should be safeguarded against the arbitrariness of government in a democratic state. The one-party state in Kenya is not by free consent of the citizens but by the exercise of sheer political power.

In Tanzania, 1960 Parliamentary elections, just on the eve of independence, TANU won all but one of the seventy-one constituencies. This might prove that at that time the electorate desired no other party. But that vote was certainly not a decision to bar forever the formation of new parties. It must be noted that the same electorate that voted unanimously for TANU might have recoiled if asked to vote on whether TANU should be established as one and only party. That was not the issue before them in 1960: the choice that they expressed then was for TANU as the government of the day.

In 1962 the Peoples' Democratic Party (PDP) was formed by Tumbo, former leader of the Railway Union, and lately Tanganyika High Commissioner in London. Subsequently, the party was proscribed and Tumbo detained. It can be clearly seen that the opposition party was given no chance by the government. The peoples' opinion to dissolve the Party was not sought but the government was determined to do away with opposition as later events show. Undemocratic actions are used where possible to ensure the existence of only one party.

In 1964 TANU was established as the only political party in the country under whose auspices all the political activities have to be conducted⁴. The decision was taken by the National Executive Committee of TANU and announced by President Nyerere on January 28, 1964. Was this action in accordance with the peoples' will? The people were not consulted upon it either in a referendum or otherwise. A presidential Commission was appointed to consider "the changes in the Constitution of Tanganyika and the TANU, and in the practice of government that might be necessary to bring into effect a democratic one-party state in Tanganyika"⁵. Therefore, the principle of a one-party state was decided, and was not open to discussion either by the Commission or by the people. Although the Commission consulted widely on the form of the new constitution, not a word was said for or against the principle of a One-Party State itself during the consultations. This method of government rule contravenes the principles of democracy. The core of democracy is a choice among a number of ideas. Its essence is fair treatment of a plurality of ideas. The democratic way of life makes possible the widest forms of mutual consultation and communication.

Tanganyika and Zanzibar formed a Union of the two countries in 1964 and adopted the name Tanzania. Zanzibar was ruled by decree for fifteen years till October 1979 when she adopted her own constitution, which, according to its provisions, is in conformity with the Union Constitution.

The sole political party in the mainland and Zanzibar, Chama Cha Mapinduzi (CCM) nominates the sole candidate, who, however, must obtain a simple "yes" majority of votes cast in a presidential election⁶. The fact that the sole party is to nominate the sole candidate for presidency clearly shows that there is no probability of allowing other candidates to stand, other than those the party believes to be wholly in its support. The new Constitution provides for a chairman who is chosen on a universal franchise to nominate not more than 35 members of the Revolutionary Council (or CCM). Why are the people not allowed to choose these members directly? It is obvious that the nominees of the chairman would not be the ones the people would elect if they were given the opportunity to cast a vote. Democracy requires that the people freely elects their own representatives.

In Zambia a similar method was used. President Kaunda announced at a Press Conference the decision of his government that Zambia was to become a One-Party participatory democracy, and that a Commission was duly appointed on March 1, 1972. But the Commission was precluded from entertaining submissions for or against the principle of One-Party State. Earlier on measures had been taken to suppress opposition to the United National Independence Party (UNIP). In 1968, the former Minister for Commerce in UNIP, Mundia, formed the United Party (UP). It was banned and its leaders detained because of violent clashes with the UNIP Youth Brigade⁷. The remaining opposition was denied recognition as a Parliamentary party in 1970, for having less than the number of members required to form an official opposition.

In 1971 elections the ANC won back five of the seats vacated by its members who had crossed the floor to the UNIP. A split in UNIP occurred resulting in the formation of United Progressive Party (UPP) led by a former UNIP Vice-President, Simon Kapwepwe. It was banned in February 1972 and its leaders were again detained. This was the course establishing a One-Party State. An amendment to the constitution implemented the government's decision to make Zambia a full-fledged One-Party State. It established the UNIP as the "one and only political party in Zambia", and prohibits the formation of other political parties.

The course of establishing Zambia as a One-Party State was not justified. As in Kenya and Tanzania opposition leaders were subject to arbitrariness of the UNIP government. The return of the ANC to parliament is a clear indication that people were not satisfied with the UNIP rule. No consultation of the public was made as to the decision of making the UNIP the only political party. It was imposed on them by authority of the government. Conclusions reached by mutual consultation, as democratic way of life requires, possess a quality that can never be found where conclusions are imposed by force.

As for Malawi, she has always had one political party the Malawi Congress Party (MCP). The party was established as a national party in the Republican Constitution of 1966 which was enacted by parliament without consultation of the people.

It is, therefore, justified to come to the conclusion that the One-Party States, either de jure or defacto have not been a product of the peoples' general will. In Africa, floor-crossing from the opposition to the government party has perhaps been the most decisive single factor undermining the position of opposition in Africa. B.O. Nwabueze says of it:

"The technique has been to make life as intorelable as possible for the opposition members by various forms of discrimination and victimisation, ranging from denial of amenities or rights to physical molestation and even lynching and death, until, their will broken, they are obliged to join the ruling party"⁸.

When such harsh methods are used against opposition, the opposition members have no otherwise but to seek the security of the membership of the ruling party. The existence of opposition is vital in a democratic government because the method of democracy consists in holding together a number of different ideas with a view to comparison and composition of their difference. But with such brutal measures and vitimisation, even the parliament of the ruling party will fear to criticize government, thus failing in one of the most important of their functions. It should not be presumed, therefore, that the One-Party States have been voluntary. Unconstitutional and undemocratic means have been used to suppress opposition. A claim by any such a state to be a democratic one pary state is not genuine.

(b) Incompatibility of Decomocracy with Economic Development

A number of reasons have been given for the justification of a One-Party systems in Commonwealth Africa. The most emphasised is the argument based on national unity and economic development, admittedly the most imperative needs of all developing countries. It is argued that in new nations a single political party is necessary for stability and economic development. The task of development is said to be the most challenging one. This is because unlike the developed countries where the pressure on the government is for more social services for a society already at an advanced stage of development, in which most of its members passes and enjoy the basic necessities for a decent life, in a new nation, even those basic necessities for a decent life are either non-existent or minimal for the vast majority of the population. Development in these countries require the whole population to team up together as one people in a concerted efforts. Inter-Party bickering only undermines the ability of the nation to organise the supreme efforts called for. Moreover the task is an urgent one for it depends upon the very survival of nation itself.

The colonial experience of these nations show clearly that independence was achieved after decades of colonial exploitation. The independent governments were confronted with a lot of serious and pressing economic and social problems. Indigenus technical skills are still very limited and the majority of people are still engaged in subsistence agriculture. Investment capital and opportunities for such capital as existed were limited. Manufacturing industries were either primitive or non-existent. These basic economic realities passed into independence unaltered.

The leaders who had inherited a neo-colonial economy had no option but to adopt the same ideologies and administrative approach as the colonial governments. They were also forced to accept a new class position for themselves, which was formerly occupied by the colonialists. The inheritance of liberal democratic values in their respective constitutions which were filtered underdevelopment economy meant problems in administration.

If the economic deprivation suffered by the new states under colonialism was to be alleviated and the economy developed for the benefit of the indigenous people, there was need for a dynamic and revolutionary rehabilitation programme of national resources. Such a programme required strong executive governments to overcome the resistance of the class-vested interests, which were already entrenched in the constitutions.

The constitutions did not address themselves to the solution of the serious economic problems which plagued the emergent states. Rather, they restricted themselves to the declaration of what rights individuals had against the government. Apparently, their framers did not realise that certain rights and freedoms are only valid in certain circumstances. President Nyerere has stated that freedom without development is impossible⁹. The Tanzanian Presidential Commission on the establishment of a democratic One-Party State addressed itself to the question of priority of development vis-a-vis, the need to limit the powers of government by provision of constitutional guaranteed individual rights.

Political unity is posited as necessary to contain the turbulence and tension following in the wake of change engendered by economic development. Free competition and political power would enable the opposition to cash in on this turbulence and tension to discredit the government with a view to displacing it¹⁰. Also political unity is necessary to fight neo-colonialist forces trying to subvert the newly-won independence. Having taken a forced exit, the imperial powers are suspected of wanting to exploit in the inexperience and poverty nation in order to perpetuate their economic strangle-hold or to discredit it as incapable of self-government. Only by imposing unity through the medium of a single party can the insidious evil of neo-colonialism be avoided.

Tradition is another argument advanced in favour of the One-Party systems. It is said that the idea of an organised opposition is foreign to the African concept of government. Communities where decisions were reached through open discussion of all the members present. But it must be noted that the conditions and sanctions which make up a "consensus democracy possible in the tradition set up are not present in the modern states. The functions and procedures of the modern state have no parallel in African traditional communities. The modern state is a large-scale organisation and from this arises the necessity that those who compete to control its power should similarly organise themselves on a large scale. Its politics cannot be confined within the frontiers of tradition. As such tradition has no relevance to modern states and so it is not a reasonable justification.

Indeed, given a government based upon a free coalition, African consensus democracy can have great value in promoting greater harmony.

It has been said that the colonial economic infrastructure was retained intact and after independence, the government attempts to raise the level of material production and development through foreign aid and encouragement of foreign investment¹¹. This has led to the growth of the new national bourgeoisie that continue to exploit the masses like the colonial government and "use its political power to alter the social relations of production to the extent and only to the extent of giving a greater share in the national wealth"¹². This leads to contradictions and disillusionment among the masses who see it as a betrayal by the ruling class, the government is forced to become more authoritarian and oppressive. It has therefore taken a half-hearted approach towards socio-economic development thereby adversely affecting its institutional legitimacy. Democracy finds little or no place in the underdeveloped countries. To solve this problem, the political ideology must be defined and outlined within the context of our own experience. Relevant institutions of democracy should be established and those incorporated at independence discarded for they hinder the objectives of the people of these countries. The constitution must acquire a degree of legitimacy. Parliament should carry out its functions in socio-economic development and the public should be more involved in the development plan through their representatives.

(c) The Party Whip: Forfeiture of Seat in the Legislature

Under the Westminster model constitutions with which allowing for some degree of national variation, all the states of Commonwealth Africa became independent, a central political role was assigned to the Legislature. It was hoped that the legislature would become a pivot for the entire machinery of government, but unfortunately this has not turned out to be so. The role of the legislature is three fold: to control and criticize the government, to make laws, and to represent the people in government. Observation shows that M.P.'s have failed to perform any of the above mentioned roles effectively. In a country that claims to be democratic, the executive must be responsible to a freely elected assembly. Such an assembly should be representatives of the people. This has been due to a number of reasons of which one is the fear to forfeit their seats or go to detention without trial.

Party discipline is necessary in any form of government based upon organised party or parties. Where there is the duality of a government and an opposition party, there is need to maintain the unity of one against the other. For the government, this is of far greater consequence because of the need to avoid risk of defeat, and possible dismissal from office. But discipline is necessary for effective government whether a multi-party or a One-Party one. In absence of an opposition party against whom it is necessary to unite means that a government can allow its M.P.s greater freedom of debate and criticism, but it certainly does not mean that parliament will be allowed unfettered freedom, not only to criticize but also to modify or reject government measures at its whim and pleasure.

If such freedom was allowed parliament would appear to have the "football politics" instead of serious discussions for the benefit of the people as a whole. Clearly restrictions on M.Ps freedom of voting do not, as Julius Nyerere says, become unnecessary under a One-Party system¹³. However the M.Ps should be protected in order to play their role of criticising government reasonably. Where they are subjected to violence and threatened with detention so that they say nothing against the government, a fundamental principle of democracy is undermined. In practice this has been, and still is the position in some countries in Commonwealth Africa.

In Africa the 'whip' has been applied so stringently as to become a negation of parliamentary independence in One-Party States. All government M.Ps, both office -holders and non-office holders, are subject to the party whip, Kenya not being an exception. The reason is because Party Unity is interpreted as demanding that an MP must never speak, much less vote against the government¹⁴. Kenya's parliament was regarded as the most dynamic prior to independence, this was due to the active role that African members had taken in debates prior to independence. They took the colonial government to task over its repressive conduct over natives. Today the most blatant corruption and illegality pass without comment. In 1974 the late J.M. Kariuki publicly criticized the government and claimed that Kenya had moved from democracy to hypocrisy with impurity¹⁵.

However with such open criticism against the government he did not have long to live before his assassination in March, 2 1975. J.M. was right for it is a matter of fact that democracy has been rejected in Kenya but the leaders continue to hide under its cover.

In 1968 Tanzanian Legislature became extremely critical of a number of government policies. The members who had led the attack were removed from their seats. It was made absolutely clear that only the most limited and innocuous criticism would be tolerated¹⁶. A criteria was laid down for the M.Ps that they may not criticize policies or programmes and must restrict their comments to minor administrative matters. Without performing this role of criticism on government policies, how then can democracy be honoured? Its principles require that the government or the executive be responsible to a freely elected assembly.

In Zambia critical M.Ps have been placed in preventive detention. The adoption of a One-Party State can be seen in part as a response to parliamentary criticism. Under the Westminster model, the executive stays in office because the legislature agrees, but this is only a theory. Governments have refused to accept that they can be removed from power at the instance of the legislature. However, there are exceptions to this rule in the multi-party system.

Botswana today has three political parties, namely the Botswana Democratic Party, the Botswana National Front and Botswana Peoples' Party.

Nigeria, after thirteen years of military rule has changed to civil rule with five political parties established in October 1979. Ghana, also returned to civil rule on September 25, 1979. It has two parties, the People's National Party, and the popular Front. Multi-party system is still flourishing in other countries like Gambia and Mauritius. These States should serve as an example to the other African States.

The effect of the Party whip is to impose a total ban on deviation, by word or vote from the party line. It is clear that the legislatures in Commonwealth Africa at independence were constitutionally equipped for performance of the role assigned to them. Today it is equally clear that the legislatures were not politically equipped for the performance of this role. The constitutional arrangements established at independence and principles of liberal democracy entrenched were shortlived. Parliaments in some countries have had their powers very much weakened, and in others, they have simply been abolished. Ghana's legislature (now restored) had disappeared with the military coup of 1966. In Nigeria before the present civil government, legislation at Federal level was enacted by the Federal Military government, and at State level by the Military Governor of the particular state¹⁷. In Lesotho the Prime Minister abolished the legislature after losing an election, and in Swaziland, the King did away with Parliament because he could not tolerate the presence of opposition M.Ps. All this indicates the failure of liberal democracy in the respective States. For most of this Century, most African States have been governed in an authoritarian, undemocratic manner.

Examples of tyrannical regimes have been Uganda under the dictatorship of Idi Amin, Central Africa under Bokassa II and Equitorial Guinea under Francisco Nguema, all of which have been deposed.

In One-Party States, only candidates supported by the ruling party can stand for election and the party will always be able to exercise some degree of control over its members. In Kenya, at the 1969 General elections, candidates were prevented from contesting through administrative action and intimidation. For the 1974 elections, this was not necessary. Only one critical M.P. was refused to campaign. In 1979 General Elections, the former KPU leaders who had been released from detention were refused to contest. This is a violation of individual liberties. Democracy is an important safeguard of individual liberty and when such a safeguard remains a dead letter, democracy dies with it.

Furthermore the government in order to avoid risk of being removed from office at the instance of the legislature, about half of the M.Ps hold some official post, the new Kenya parliament being an example. This makes it very hard to oppose a government motion. This is very undemocratic for it makes criticism of government and opposition very weak, thus making parliament nothing more than a stooge. In Tanzania, a de jure one-party state, the party through its power to control and discipline party members is able, indirectly to unseat incumbent M.Ps¹⁸.

Thus, the party whip in Commonwealth Africa has contributed a lot to the weakening and disappearance of the legislatures.

Without a legislature or with one that has been completely waeakened that is unable to play its role, democracy cannot exist. The Constitutions which still have the entrenchment of liberal-democratic principles are no more than theories. It should not be overlooked that the multi-party systems are outside this category. The declines and fall of legislatures are because the executive would not have permitted promotion of their duties, M.Ps feared to forfeit their seats, or even worse, to go to detention. Furthermore the M.Ps were not politically equipped for the performance of the role assigned to them. The threat that critical members will not be nominated by their party at a subsequent election has been employed at an advantage. Constitutional amendments have been introduced to unseat members and to prevent an organised opposition¹⁹. And finally where all else have failed, preventive detention laws have been pressed into service²⁰. To the M.Ps the rewards of political power are too great for them to contemplate losing them. The methods used to curb opposition are tyrannical and thus the celebrated Western Liberal democracy has no place in these states.

(d) Indivindual Liberty Versus State Security

It is essential at this juncture to pose the question whether the centralised governments of the Presidential regimes in Africa permit adequate enjoyment of human rights. If not, can these regimes be called democratic without these safeguards? The records seem to indicate a negative answer. It is significant to note that two of these regimes, Malawi and Tanzania have rejected a bill of rights.

Ghana had no bill of rights till the return of a civil government in September 1979.

Naturally, centralised power is very sensitive to criticism and very jealous and suspicious of rivals and competitors. In the One-Party States, the President is a personal ruler. He is indeed the government, and as such is identified with the State. National security is also given a personal dimension, too. It involves not only the security of the state and its institutions, but also the security of the President's tenure of office. Anything that threatens the security of his continuance in office is also the security of the nation²¹. He is the symbol of the nation, and the instrument through which this personal identification is achieved in the single or dominant party. A threat to the security of the party is also viewed as a threat to the security of the nation. The emergency powers given to the president for the preservation of the nation is perhaps the greatest source of authority in the whole machinery of government.

There is no dispute as to the fact that government must take sufficient power to preserve itself. The rights of individuals depend on the very existence and implementation upon the continuance of the organised political society, established by the constitution. The continuance of that society itself depends upon national security, for without security any society is in danger of collapse or overthrow. National security is therefore necessary not only in the interests of the state, but also in the interests of each individual member of the state. But the point of controversy is:

In what circumstances and subject to what safeguards should individual rights yield to the claim of extra-ordinary powers by government to preserve the nation? Should every threat to the peace and security of the state, whether real or imaginary, justify the encroachment upon the rights of individual? If so, isn't this a fundamental violation of democratic principles?

The unwillingness of the courts in Commonwealth Africa to enforce the Bill of rights is clearly seen in decided cases. In the Kenyan case of Ooko v. Republic²², the doubt in the law was resolved against the liberty of the individual. The judge said:

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

Ooko was detained on 4th August, 1966 under a detention order with his surname but different first names, signed by the minister. On 27th September, 1966 he filed a complaint in the High Court alleging that his detention was unlawful for a number of reasons. He was not given sufficient reasons for his detention within the prescribed period;

the reasons were not sufficiently detailed as required by the Constitution; he was detained under the wrong name; and outsiders were present when his detention order was being reviewed by the tribunal. The court nevertheless, held that the detention was lawful. As for wrong name, the court said that Ooko himself was the person intended to be detained. The court ruled that the presence of outsiders (a senior police officer and a state counsel) was desirable and necessary and dismissed the ground that it was unlawful to be present at the Review Tribunal. The court agreed with the plaintiff that the reasons were not sufficiently detailed, but did not think there was sufficient cause for his release.

In a democratic state, individual rights are reasonably safeguarded and any irregularities are not to override them as happened in this case. The separation of powers requires the judiciary to be independent and impartially committed to its duties of checking the arbitrary exercise of state power which may deny the individuals their rights that are safeguarded by democracy. But it appears that the independence of the judiciary is losing meaning. The courts are reluctant to protect an individual who conflicts with the state.

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

No doubt, the authoritarian nature of most of the Commonwealth African states has made mockery of the independence of the judiciary as exemplified in the Ugandan case of Namwanda v. Uganda²⁴ which involved the abuse of emergency powers by soldiers. The issue was whether an emergency existed in Uganda at that time. The court held that the emergency powers were intended only for real emergency situations which did not exist in Uganda in 1972. The use of emergency powers was therefore improper, but the judges were not willing to interfere for their security reasons²⁵. Unlike in the Western countries, the rule of law is not upheld in most African states. The judiciary have shown an attitude of self-preservation rather than uphold their independence. The rule of law is the very essence of democracy but has been mercilessly ignored in Africa.

The derogation from strict adherence on the constitutionalism has been justified on the grounds that fundamental freedoms should neither act as obstacles to development or endanger the security of the state. This is the argument used to justify curtailment of fundamental freedoms by invoking exceptions as being "reasonably justifiable in a democratic society" In the Nigerian case of D.P.P. v. Obi,²⁶ the freedom of the press was undermined on the principle of qualification to the fundamental civil liberties. Obi, the leader of the Dynamic Party published a pamphlet entitled "The People: Facts which you must know," in which appeared the words: "Down with the enemies of the people, the exploiters of the weak and the oppressors of the poor the days of those who enrich themselves at the expense of the poor are numbered".

Obi was charged with having published these words with intent to excite hatred, contempt and disaffection against the Federal government. To this, he replied that having regard to the freedom of speech in the Constitution, it was not reasonably justifiable in a democratic society to punish a person for making a statement which merely exposed the government to discredit or ridicule without any repercussion to public order or public security. Obi was nevertheless, convicted. The court observed that the fundamental freedoms were not a licence to commit seditious or treasonable acts.

In the spirit of democracy, individuals must be free to present petition to the government and enumerate publicly their grievances. If then an individual is to be convicted for exercising this fundamental right, the democracy loses meaning in such a society. It seems that, what the African presidential systems want is that corruption and other malpractices should not be done away with in order to facilitate exploitation of the masses and denial of freedoms by the ruling class. For awhile it appears that the new African nations have generally failed in a moral sense, to meet the challenge of human rights and the dignity of man, held to be especially dear to them after the experience of colonialism. It is apparent that the challenge these nations must meet is that of governance and the establishment of an institutionalised and legitimate political order. The conventional wisdom offered by the Western countries seems not only irrelevant but insolent. It is not wise to mechanically transfer institutions developed in different industrial societies whose ~~whose~~ conditions are radically different.

Though democracy has not achieved perfection in the West despite its long history and relevant bases of its foundation. Africa should not start from the middle of nowhere and follow the Western trend. We should develop our own legitimate governments which will safeguard human rights to the extent of our socio-economic conditions.

CHAPTER 111INDEPENDENT KENYA AND DEMOCRACYa) The colonial Legacy

The colonial state was essentially contrary to one of the fundamental principles of democracy, that of self-determination "the right of people to choose the form of government under which they wish to belong."¹ As already discussed in chapter II, the laws were made not by an elected and independent parliament but by the governor exercised both legislative and executive powers, hence the Executive was in on way responsible to the legislature.

The "Machinery of justice was used to justify and maintain the continuity of the colonial state lawlessness was made lawful, the most extreme example being the use of Act of state defined as "an exercise of the sovereign power which cannot be challenged, controlled, or interfered with by municipal courts. Its sanction is not that of law but that of the sovereign state, and whatever it be, municipal courts must accept it as it is without question." It was used to avoid emberassment of having to justify colonial states actions in court, hence the government in the case of Ole Njogo & Others V. The A. G. OF the East African Protectorate⁴ could force an agreement on the Masai to vacate their land for the settlement of Europeans, could enforce their obedience to it and when challenged, could refuse to allow the matter to be judged in the courts and punish any exercise of extra-legal remedies.

As for settlers they carried their rights with them to British possessions overseas.⁵ THE result of this was an institutional racism in the system of "Justice" since the law was not seen as an impartial arbiter between the indigenous people and Europeans, but an ardent supporter of the stronger side against the weaker. The courts went further to justify the dual systems of law and this is illustrated by a classical case from Bechanaland:

" the idea that there be an established system of law to which a man owes obedience and that at any moment may be deprived of the law, is an idea not

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easily accepted by English lawyers.

It is made less difficult if one remembers the protectorate is over a country in which a few dominant civilized men have to control a great multitude of semi-barbarous."⁶

This passage was quoted with approval in the Masai case. The dual system did not, therefore, imply in any way equality in different courts, but rather it provided a facade of compromise in the application of customary laws. Customary law could be modified or ignored according to the will of the administrations.

The freedom of individual which is an essential tenet of democracy did not exist in colonial Kenya. Freedom of movement was severely curtailed.⁷ Native Passes Regulations enabled the commissioners to "make such general or local rules for controlling the movement of natives travelling into, out of or within the limits of the protectorates, as may from time to time appear to him to be necessary."⁸

In sum, the colonial state was an authoritarian non-liberal democratic state which used the so called institutions of control to suppress the indigenous people in order to justify and maintain its own existence.⁹ The law represented the pervasion of western ideas of democracy and it maintained a rhetoric of justice and the rule of law which was nothing more than an illusion of a repressive regime. At independence, Kenya was suddenly to be a country where the rule of law was to reign supreme, individual rights were to be fundamentally safeguarded, the executive was to be responsible to the legislature and judges were to make sure that the system worked. At transitory stage, it seemed as if the system would work, but the historical roots of authoritarian colonial government were too deep to overcome at once. The institutions of control as will be seen, have failed to perform as required by the independence constitution and are gradually turning into institutions of neo-colonialism.

b) The Executive and the Judiciary

Under the independence constitution, the Judiciary was to be the watchdog of individual liberty, the interpreter of the constitution, and was to guard against possible arbitrary and authoritarian inclinations by the Executive. Under the liberal democratic concept of separation of powers, the judiciary was to be independent and had to acquire absolute isolation from possible influence by the Executive. The Judicial Service Commission was, therefore, given the ultimate responsibility over the Judiciary.

In the liberal democratic sense, the concept of 'independent Judiciary means that the Judiciary is to decide cases before it on the basis of the facts of the case and apply the rule of law. A caveat should be raised here in that it does not mean that judges can apply rules of law as they please. One author has prescribed the extent to which the judiciary can be said, at least in theory, to be "independent."¹⁰ He asserts that judges can be independent in circumstances where "a government formed by members of party "X" is in power, it should not meddle with the judges who were appointed by party "Y" at some earlier time ! One can clearly see the practical problems that may arise especially where Party "X" represents values and norms contrary to those of their predecessor. The courts like other institutions of control, have also failed to perform the role required under the independent constitution. It has even been worse for the courts, as "Federalist" says the judiciary is the weakest institution in the government system, without any force or will."¹¹ The Judicial independence, however, is tenable when a judge is, for instance, dealing with the sale of Goods Act, but controversies arise where he is dealing with cases of political matters and individual rights.

At the outset, the Judiciary is no longer isolated since the Chief Justice is appointed by the President.¹² The ⁵ puisne judges are appointed by the President acting on the advice of the Judicial Service Commission.¹³ Removal of a High Court

judge can be initiated by the President, only for inability to perform the functions of his office or misbehaviour. When the removal of the Chief Justice arises, members of the Tribunal are selected by the chairman of the Public Service Commission and on the removal of a puisne judge, they shall be selected by the President.¹⁴ The Judiciary cannot be expected to be independent even if the present constitutional provisions are followed. In practise the Judiciary is not more than an arm of the Executive. This fact is contrary to democracy which calls for the separation of powers or organs of government. One then wonders what "democracy" is claimed in Kenya in the present circumstances. The independence of the Judiciary must be upheld to preserve the tenets of liberal democracy.

The courts are not willing to draw attention to constitutional law cases and it is not surprising that such cases are never reported in the East African Law Reports. In very few cases, the courts have, however seen it as their duty to protect the individual even against the unlawful exercise of the Executive power. But each case strictly depends on its own facts, that is, the degree of political sensitivity involved in each case. An extremely politically sensitive case will not be reported and it is possible that government will pass legislation to nullify such a judgement.¹⁵ The best examples can be taken from the Bill of Rights, where the courts in cases involving a mere question of protecting the rights of the accused. In Andrea V. Republic,¹⁶ Retrial was ordered by the High Court where the accused had been prevented from obtaining an advocate. In R. V. Elmann¹⁷ THE ACCUSED HAD BEEN CHARGED WITH AN Exchange control offence and evidence against him was largely based on a questionnaire which he had been required to fill by the Central Bank. It was held that the only evidence that could be relied on was that given in court alone. On the other hand, however, the government had refused a British lawyer to come to Kenya and represent a member of the former KPU¹⁸. courts have not been available for comment. Therefore it would be very hard to draw a fine line as to where the court stops and the government takes over, but it will sustain to say as it was held in KURUMA V.R., that generally a violation of one's fundamental right will not lead to an acquittal. This case was decided in the colonial era when there was nothing like basic human rights existence. It appears to be the same position today when suc

rights are entrenched in the constitution. Democracy is the safeguard of individual rights and with the evidence in the cases quoted above, it can just be fair to conclude that Western liberal democracy has totally failed in Kenya.

The case of OOLO V. Republic.²⁰ is a unique and of course, unreported case illustrating the facts that the courts are not willing to interfere with the Executive decisions under the Emergency powers, when actually the protection of freedom of individual is needed most.²¹ In this case,²² the court was reluctant to challenge a preventive detention order even where they found that the relevant minister had not strictly complied with the procedures laid under the constitution. Ooko was not given reasons for his detention within the prescribed time provided for in the constitution and the reasons for his detention were vague. However the detention order was held valid. The court left individual liberty entirely dependent on the subjective assessment of the relevant minister by stating the

"The grounds, it is true, could justify his detention.

The truth of those grounds and the question of the necessity or otherwise of his continued detention are matters for the tribunal and ultimately for the minister rather than for this court."²³

It is clear that the courts find themselves in a helpless situation especially where they have to decide a case which involves and Executive action. Professor Ghai has observed with apprehension the attitudes of judges who, on a mere question of constitution when face to face with claims involving liberty of the subject, show themselves more Executive minded than the Executive²⁴ itself. It could be argued that the reason for this self-preservation of the judiciary is fear for its destruction by the Executive. This self-preservation leads to infringement of democratic freedoms and finally destroys separation of powers, without which democracy cannot exist. Naturally, no justice can be achieved if the power of the judge is not separated from that of the Executive.

Since democracy is founded on allowing minimum individual liberties, it desperately fails when these liberties are not safeguarded by the courts show that the rule law is not practised in independent Kenya. Though Chapter V of the constitution providing for these rights remains unchanged from its original form, it is only in theory that liberal democratic principles can be said to exist in Kenya, but not in practice.

(c) THE EXECUTIVE AND THE LEGISLATURE.

In the provisions of a limited government in the independence constitution the Executive was supposed to be responsible to the legislature

and stayed in office because the legislature permitted it to do so. The government is supposed to resign at a vote of no confidence by the legislature. As a representative of the people in parliament the legislature was given the most important role. The legislature has failed to perform this role in that most members of parliament disappear from their constituents after election, only to return to them again to seek votes on the eve of the next General election. The third role assigned to the legislature was to make laws. In this respect, the legislature has done no better than being a rubber stamp of the Executive in passing government bills. Furthermore, amendments to the constitution have been made to strengthen the executive thereby weakening the legislature. These two factors will be dealt with separately.

i) The Decline of Legislative Powers

The three key roles assigned to the legislature under a liberal democratic constitution are representing the interests of their people, making laws and criticising and controlling government. The law-making power was confined to the legislature, thereby applauding the idea of separation of powers, so as to prevent as Montesquieu said, the government making laws and executing them, which would lead to arbitrariness. This, however is not true in Kenya because in some instances the Executive possesses certain powers to legislate by decree. This is particularly the case where wide regulation making powers are delegated to the executive under emergency provisions.²⁵

Legislative power is normally vested in the legislature, but this power is neither absolute nor exclusive to facilitate practice of democracy. Entrenched constitutional provisions protecting fundamental rights, limit the powers of the legislature, though such provisions have not, due to restricted approach on the part of the courts proved to be of great significance.

The legislature, nevertheless, has the capacity to make laws for peace, order and good government within the limits of the constitution. Legislatures have failed to perform this role. Firstly it has been argued that the legislative proposals, ^{process comes at a very advanced stage} formulation and the legal drafting of the Bill are made before the bill is tabled in the Parliament, what the legislature does is no more than rubberstamping. Secondly, bills are hardly initiated by members of parliament, there has only been one private member bill since independence.²⁷ These problems are also present in the Western liberal democracies to a varying extent. Thirdly, little or no attention is paid to the bill in way of criticism. Most of the members in any case are not educated as to understand niceties of legal language. A good example of this may be drawn from the petition filed against an MP elected in the 1979 General Election who was neither well versed in English nor Swahili.²⁸ The language test before elections was ^{alleged} to have been done by another person for him. Such a person neither participate in parliament debates nor understand what is being discussed, Although at times members have been able occasionally to secure amendment of Bills,²⁹ generally bills pass through all the necessary stages without much controversy, most of which have reduced their powers immeasurably. Finally the Executive is capable ^{of} exerting great pressure on a bulky legislature. In 1973 the Kenya Parliament was coerced into accepting an amendment to the Penal Code which it had originally rejected.³⁰ From this a conclusion can be drawn to the effect that Parliament's role in the legislative process is that of legitimator. It exists to give measures of a formal, legal sanction. Policies are debated and discussed elsewhere in the upper reaches of party or government. The legislation to implement these policies is sent to parliament to receive its lawfully required imprimatur.

The other role of the legislature as an institution of control is to criticize and control government, as the theory goes, the government stays in office because the legislature allows it. This has not been the case for the government has refused to uphold criticism and has resorted to detaining, jailing and even physical elimination of the radical members of parliament. Since the murder of the late J.M. Kariuki, MP for Nyandarua North, a murder which parliamentary debates seem to suggest was connected with critical attacks on the government,³¹ Parliament has often become more inactive. The detention of several members of parliament,³²

The legislature has played a very passive role and had made no efforts to criticize and control the government. Though the members are often threatened with detentions imprisonment and sometimes physical torture, they are partly to blame in that they take to fruits of political power to be too great to contemplate losing them. As such they do not lift a finger to uphold the democracy provided for by the constitution by playing the roles assigned to them. The legislature is no more than a half-dead institution of control. "Checks and balances" and separation of powers are no longer practical. In pervasion of the constitutional provisions the legislature now seems to be responsible to the Executive.

ii) Strengthen of the Executive power.

In Kenya the Executive power is analogous with presidential power.³⁶ Under the independence constitution the Executive was to operate in the sphere of the United government, which was unheard of in the colonial state. Constitutional development in independent Kenya, however focuses in ^{the accretion of Executive powers, consequently rendering} ~~in~~ the provisions of the independent constitution inoperative. Presently the President is the Head of State, Head of Government and Commander of the Armed Forces,³⁷ This concentration of power in the hands of one man is clear departure from the West Minister model of the independence constitution. But it has been argued, though not convincingly, that a strong Executive is best for a developing country rather than a dispersion of power at the top which would invite clashes of personalities and therefore fail to provide a focal point for loyalty and support of charismatic leader. No proceedings either criminal nor civil can be instituted against the President so long as he is in office.³⁸ He appoints and dismisses the vice President, Ministers and Assistant Ministers, a power which he may make use of any time to dismiss those members who fail out of his favour.³⁹ He also has powers to summon and prorogue parliament at any time and nominate twelve members of parliament.⁴⁰ Among other powers, he has the power to patronage and the exercise of the prerogative of mercy.⁴¹ Presently the power of the president has become too much that it could be similar to that of the monarchies of Europe before the advent of constitutionalism and democracy.

Firstly, the Regional system was abolished by the first three amendments to the constitution, thereby centralising the power of government.² The significance of the third amendment was the

alteration of specially entrenched clauses in the constitution.⁴³ It altered the procedure for constitutional amendments and lowered the required majority from 90% in the Senate, and 65% in Parliament to 65% in both Houses for all purposes. This, of course, gave the government a lot of power in respect of acquiring the needed majority in the future and foreseeable constitutional amendments.

To affectuate the centralisation of power, the government realised there was need to reorganise the party. This led "inter alia", to the recognition of a defacto one party system and the consequential resignation of 29 MPs from the ruling party.⁴⁴ To avoid further defection from the party, the Executive again chose to solve this problem within a constitutional framework. Under the fifth⁴⁵ amendment, any MP who resigned from the party that had supported him at election was to resign his seat and seek re-election of his party. The reason given for this, was the "desire to ensure democratic institution in the country"⁴⁶ This reason was not genuine since the government had the sole motive of suppressing opposition. Again the prescribed procedure was not followed in that the Act was passed in a day instead of the required lapse of time (14 days). This was unconstitutional and when MPs filed a suit in the High Court claiming that they were still MPs, another amendment was passed to clarify that the Act applied retrospectively.⁴⁷ This use of the constitution as a means of retaining power for selfish purposes and frustrating a few individuals who are to be protected by the constitution is infringing the practice of democracy which calls for the fairness to all members of society.

The final stages of destroying limitations imposed upon by the government by the 1963 constitution was marked by the sixth amendment,⁴⁸ which in fact enlarged the government's emergency powers. It enabled the president to make regulations that may prevail over existing legislation and in certain circumstances, over constitutional guarantees of human fundamental rights, except those relating to property and freedom of conscience. It is necessary even in Western democracies to ^{have} emergency regulations at the time of war or other dangers. In the context of democracy the question is not as to the enactment of an emergency regulation, but whether the prevailing circumstances called for promulgation of such provisions, which resulted in detentions of prominent leaders who had joined K.F.U.⁴⁹ Furthermore, the remaining members of parliament did not question the regulation, though democratically it is their responsibility. The court too only address themselves to assess the legality of the detentions⁵⁰ without questioning whether a real state of emergency exists.

The amendments depict a clear departure from the independent constitution providing for a limited government. Democracy as the rule by the people requires that people make their own laws. The members of parliament, though held out to be people's "Representatives" have failed to represent them. When they give consent to the passing of laws, it cannot be genuinely claimed that the public are the makers of their own laws. Further, in these amendments, no public participation either by referendum or otherwise was resorted to. Bills were also rushed through all the required stages in three or four hours⁵¹ instead of 14 days, and amendments were made to apply retrospectively. Naturally, when the Executive acquires such a stronghold in the government, and unconstitutional passing of bills to secure its position is practised, a limited democratic government miserably fails.

(d) The Dominant Party State

An opposition has a vital role to play in a democratic society. The Westminster model allows multiplicity of parties in a state in order to keep the tenets of Western liberal democracy. At independence Kenya operated as a multi-party system where there were two parties, namely KANU and KADU. Both parties were fairly balanced in terms of political strength. KADU was dissolved in 1964 and its members joined KANU⁵². The dissolution increased the strength of the conservative wing of KANU, and was seen by the former president Kenyatta as "our greatest triumph as a party and as a nation".⁵³ Odinga, on the other hand thought that "the merger of KADU and KANU far from strengthening the party introduced dangerously divisive policies and forces into KANU from within. As shown by the events that followed the merger, it appears that Odinga was right. Crisis from within the party discipline with accusations and ministers attacking each other in parliament. The radicals were bent on voting against the government even in major debates. These cleavages were intensified by the mysterious murder of Pio-Gama Pinto, a murder whose cause is yet to be known in Kenya political history. Nobody was prosecuted for the shooting. Odinga and his supporters alleged it to be a political assassination rooted in the West.

These events led to the Limuru conference on April 13, 1966 and the split group led by the Vice-president of the Republic and KANU which formed the new defunct Kenya People Union (KPU). KANU could not tolerate the multi-party system once again. Legal mechanisms and intimidation were used by the government to wipe away the opposition party^{and} establish Kenya as a de facto one party state. The legal mechanisms or the use of law to suppress opposition, and in particular the KPU is perhaps the most effective technique that the government has used. The role of opposition is very vital in a democratic society so that the will of the majority be represented. When opposition is killed in this way, it is the decisions of the minority which will govern society. The amendments to the constitution as I have discussed earlier

* in this chapter ^{have} crippled opposition and suppressed anti-KANU elements, as Oboth Oendo writes, these amendments have been used to ensure "Political Survival" 55 Bildad Kaggia the Vice-president of KPU was imprisoned under the Public Security Act due to their constant scathing attacks which were proving embarrassing to the government. Even at the little General Elections in 1966, KPU candidates were restricted in their campaign. There was marked tension throughout the campaign period in several constituencies particularly in Central Nyanza, Nakuru Area, and Kandara where Kaggia came from. In Nakuru town the KPU candidate, Achieng' Aneko's first meeting was brought to a standstill after five minutes by KANU Youth Wingers, and police moved in to prevent further rioting. His second meeting was as a result cancelled by the police. Other KPU rallies in Nakuru were reported to have been stopped by KANU Youth Wingers. The Press did not report any matter in favour of the KPU candidates. KPU matters were reported only where they related to KANU. The KPU members complained of increasingly official refusals to issue them with permits of holding ^{diag} public meetings. This was because the Provincial and district administration which are directly under the president would not entertain any KPU public gatherings, lest KANU lose in the elections. Not only were KPU members denied licence to organise mass meetings but also licence to convene and Annual Delegate Conference elections and decide on party policy and strategy. 57 These incidents depict open suppression of opposition in Kenya government which is provided for by the democratic model of independent constitution. Such a denial of political participation in the government is undemocratic and will result in frustration of the persons who happened to become victims thus arousing unrest and disagreements in the party that happens to survive. The KPU members, therefore could not get public support for they had no chance of expressing their ideas and views to the people. However, they managed to win a few seats in parliament.

In 1969 KPU was banned and Kenya became a de facto one-party state. One party systems have been justified to be best suited for developing countries. But the degree of legitimacy of one-party system varies greatly from one state to another, hence it would be inaccurate to make generalisations. As I have mentioned earlier, it is possible to have democracy in one-party states only in certain circumstances. That is if there is full intra-party democracy, that party membership is open

and, that the price of participation in the party is not a greater degree of activity than the average person can reasonably be expected to contribute. As a matter of fact, Kenya has not yet achieved these conditions and we can expect them to take a little longer to be met. In its history KANU has never been a strong party and has at times been vehemently attacked by its members for its failure to define and realise its constitution. 58 The matter has thus, become a nationally sensitive issue. For example, two MPS were detained. In 1976 for alleging that KANU is dead. The cause of this failure of the party and its organs to function has been partly, because the party has tended to rely largely on the personality of the President. At the time of crisis or where there is a dissent on passing government measure in the National Assembly, the party resorts to the wise leadership of the President. The stature of the party is therefore emasculated because of the president's unique position in the political system. The party does not even allow full intra-party democracy. An MP who criticizes the party is detained or silenced in other ways. The party membership should open to all interested citizens. KANU has operated as a mere facade in the past. There has been no membership drives except at the eve of the General elections. Looking at the incident of the Ex-KIU members who were barred from standing for the General elections in 1979, one can draw the conclusion that the price of participation in the party is beyond that which an average person can be expected to contribute. Such members of former opposition parties are referred to as "Security Risks" and, therefore, denied their democratic rights of participating in the political system.

In theory, the de facto one-party state has many features of the Westminster model of limited government, but in practice there is yet a lot to be done. The party organs do not function and meetings are rarely held.

In the context of a limited democratic government, what role if any has been played by the opposition. As we have seen, parliamentary opposition has not had an encouraging history. The role played by the KPU during its short period of existence can not be underestimated. It was active and critical and gave full contribution to debates, regardless of its smallness. The main problem was that it lacked influence on government policy, mainly because of the government attitude towards

opposition. In its three years of existence, it led a life of frustration, Oppression, imprisonment, detention, and finally in 1968, all KPU candidates were disqualified in allegedly having filled their nomination forms for local authority wrongly. 59 The Vice-President Kaggia was imprisoned for six months for having allegedly made a speech of "Strongly Political favour" 60 No arguments were entertained as to the constitutionality on the Act under which he was jailed. Likewise the President's efforts to seek an international platform were futile and was refused to address University students.

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The introduction of a de facto one-party state by unconstitutional means has, no doubt destroyed the backbone of democracy, where opposition has a vital role to play. Furthermore, the party itself has not allowed intra - party democracy and has not gained any legitimacy.

(e) SUMMARY AND CONCLUSION

Constitutionalism and democracy operates on the institutions of limited government. Yet, in Kenya there seems to have been something unrealistic about these limitation placed on the government. In the first place, the whole idea of a limited government was non-existent in the entire epoch of about seven decades. The governor and his bureaucracy had untrammelled powers. It had apparently not been considered that the process of government should be guided by such ideals as constitutionalism. Secondly, while a strong executive has been accepted in Britain, the independence constitution failed to draw from that experience, and sought to institutionalise a concept of weak government. In an impoverished former colonial state, it was bound to prove necessary for the executive to have fairly wide powers for the readjustment of social - economic conditions and the uplifting of material life of the masses.

In an important sense the constitution forecloses the judicial suprintendency of guaranteed rights. This considerably devalues the whole concept of guaranteed rights, which like the "non-confidence rule" becomes more important for purposes of public relations than for self-realisation of the Individual. Furthermore the judiciary tends to be unwilling to disturb executive decisions, even where they could be examined and possibly quashed for procedural irregularity. These appears to be a tendency for the judges to rec^oil from their control function where the executive act in question involves political considerations. This being the case, the role of the Judiciary in a democratic government, to ^{be} a watchdog on the executive, frustrates the foundation of democracy.

We have seen that the relationship between the executive and the legislative is sensibly inclined in favour of the executive. It may be said that the only real power that parliament has in relation to the executive is that of the resolution of no-confidence. On the contrary that device is hardly available to the legislature. The "no confidence rule" is designed for a multi-party state. By the principle the president is supposed to resign or dissolve parliament. The first alternative presupposes that there is an alternative party

capable of being returned as the government. In so far as Kenya has been a one-party state there is little hope of change), the no-confidence rule as an executive control device has little practical meaning. In the circumstances Parliament has not been effective as a power - control device.

The conclusion to be drawn is that the formal power control devices are unequal to their task. The essence of democracy as we have seen, is that the powers of government should be kept under control and individual rights be protected. Democracy in Kenya has not been achieved. In a state which has just freed itself from the bonds of colonialism it will be desirable that the government should have sufficient powers of attempting to reorganise the nations socio-economic institutions. Such powers need not offend the principles of constitutionalism. All that is necessary is to make power exercise accountable and responsive to objective needs of the people. If a government is find favour with its people it must ensure that their interests are represented. It should not be centred on class interests of the ruling class alone and leave the masses oppressed and exploited. The relaxed version of the constitution is by no means inconsistent with the normative aspect of constitutionalism. The occasion of making such amendments to the constitution should only arise when objective national interests are concerned.

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From this discussion, it appears there have been a departure from the principles of a limited government. The constitution has not only been amended in a rather too quick succession but also on considerations of political expediency and subjective matters. The effect of the amendments is that the constitution is no longer a truly limiting framework. On one hand, it secures important individual rights and rests their supervision in the High Court; on the other hand it allows for material derogation from these rights Via emergency provisions. The effect is that the secured "rights" practically become a favour depending on the Executive good will.

From the apparent dominance of the Executive, both politically and under the constitution, it seems to follow that any effective initiatives for the creation and maintenance of limitations on government will have to come from that organ. The stage for realising democracy will only be ^{set} if the new nation is given time to raise its socio-economic situation, and when the Executive confers meaningfully control functions upon the legislative and the judiciary. Otherwise, the detailed provisions of the constitution as they are do not facilitate effective control of the executive power by the formal devices of control.

CHAPTER IV

THE PROSPECTS OF DEMOCRACY

a) Democracy and Legitimacy

The future of democracy in the New Commonwealth states of Africa will depend mainly on the constitutional and institutional legitimacy. To achieve such legitimacy other mutiproblems that militate against the prospects of constitutionalism should also be investigated. At the outset, political stability is a prerequisite to viable long term prospects of democracy. Liberal democratic institutions of control can ensure the continuity of political stability, thereby restoring the ideology of constitutionalism. The government should therefore ensure that it is an elected government responsible to the electorate. It should avoid falling back on the tradition of colonial regime, and be committed to the needs of the nation. The states should have development - oriented constitutions which will meet the desired ends of the respective nations in terms of socio-economic development. Development plans made should not depend heavily on the advice of foreigners. The Legislatures should be given the biggest part to play in initiation and actual working of development plans, being representatives of the masses. Money allocated for such plans should be ensured that it is used for the actual intended purposes. Confidence on the government will only depend on the effectiveness of its policies. Fundamental trust and commitment is essential and the political leaders must not regard themselves as above the law, but be charged with responsibilities. The law should not be used as a weapon to ensure political survival and the constitutions should be amended only on matters of sound national needs. This can only be done through parliament as the centre of gravity of the whole system.

The freedom to propagate ideas and organise politically even in opposition to the government is vital to the long terms prospects of democracy. Election should be often held so that the people can choose who is to represent them. If such elections are to be genuine and free, the voter/must be protected as much as possible from coercion and bribery, and the election results protected from fraud and manipulation. The 1979 General Elections in Kenya shows that bribery and fraud are common practices. The High Court nullified elections of ministers just for the same reasons. Opposition parties should be given a chance to try their wits for their role is valued in democratic traditions to a large extent. In the one-party states, the states, the government has failed to appeal to national unity and fuction on ethnic lines.¹ On the other hand, opposition parties have tended ^{to gain their strength mainly on ethnic} grounds. It must not be forgotten as Wallerstein says, that it is the attempt of the rulling parties to impose political unanimity by force, to perpetuate their rule by suppression of

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 the opposition that drives the opposition to extremes.² The strength of the ruling party will, only be revived when there is an opposition party to challenge it, that is when the elections are about to take place³. The opposition on the other hand, should only engage itself in constructive criticism and avail itself from conspiracy and subversion.

Other problem is that of succession. Leaders have in the past refused to accept the fact that they can legally step down for others. Powers are vested in the hands of one man, the government and the party becomes, weak and needless to say, democracy is emasculated. Charismatic leadership presently tend to lead to authoritarianism and destroys the whole foundations and prospects of democracy. It has also failed to serve as an impetus for development^{et}. This kind of leadership should be turned to institutional legitimacy, whereby, political leaders can succeed each other within the framework of the constitution⁴. Transition to democracy will depend on the willingness and ability of our rulers to decide rationally and consciously establish democratic institutions.

Freedom of expression, press and association should be entertained in an attempt to establish institution of public opinion at all levels. The masses should be politically educated by the government, especially through their representatives in the legislative assemblies. The legislators should make laws which that will meet the social and economic needs of the public at large. Such developments would lead to legitimacy of governments in commonwealth Africa.

The institutions of control should be allowed to operate freely in order to keep in line with a limited democratic government. The judiciary, for example, should be independent. The courts should work for the welfare of the citizens and achieve the social economic goals aimed at by respective Africa States. Respect of the law and concern for the proper administration of justice must spring from the people, they cannot be imposed from above⁵. The courts should be free of bondage of colonial state and be run by citizens instead of the expatriates. It has been suggested that the governments should introduce, as in Tanzania, cheaper and quicker means of obtaining redress and challenging administrative action by introducing an appeal tribunal or an ombudsman⁶. This would stop the practice of using law as a weapon of oppression thereby hundering the prospects of constitutionalism.

In commonwealth Africa, while the ruling class disposes of almost total political power and controls the state machine, it does not have unqualified control over the economy. The major industries, if any

the plantations, the mines, the communication system, the banks, general remains in the hands of foreign big business. National government must try to establish their own independent economy where possible, and where foreign business must operate temporarily, exploitation should be controlled by the government.

b) The African Choice

The emergent states must first be nurtured to maturity, for they provide the best hope of salvation through economic development. Instead of secession, we should be working towards greater regional co-operation. The picture of democracy may seem somewhat unduly pessimistic. The first thing which these states should do is to decide on what sort of government they want. When the leaders of these re-emergent states examine Western Parliamentary manifestations at least, they are genuinely puzzled. Which of the many variants, exactly is "best" democracy - the British, French, or American systems? And if each of these "democratic" countries had evolved its appropriate variant of democracy, so that none can be said to be "Better" than another, why not similarly develop a democracy relevant to Africa contemporary needs? African countries as they ^{are} should develop a system of government suitable to their own culture and history. Adoption of western democracy in the constitutions have, in majority of cases proved a failure. This is because the foundations and conditions on which western parliamentary democracy was founded, are totally different from our own. Though the past leaves legacies which hold the new commonwealth countries back, it also offers living and positive traditions which are a powerful source of democratic, egalitarian and socialist sentiment and action. Leaders should learn from the past experience and decide on what government is relevant to African needs and how it should be controlled to uphold the spirit of democracy.

c) Conclusion

Each generation of rulers learns from the experience of its predecessors and the accumulation of this experience will after many generations infuse into the population the habit and ideals of democratic behaviour.

Furthermore, in spite of the erosions of constitutional democracy, instead of the tendency towards authoritarianism, none of these states can be said totalitarian. In these states with a single party, the party is usually a mass party, thriving upon popular consultation, though controlled as it may be in each case, The one-party system has been

described as a kind of "tutelary democracy".⁹ As a transitional phase to prepare the ground by creating the conditions needed for the evolution of full democracy at a later stage. These conditions are said to be a relatively high standard of living, mass education, a substantial middle class, industrialisation and urbanisation.¹⁰ But it should be noted that these requisites cannot create democracy by themselves, if the democratic tradition requires a spirit of tolerance and respect for differing opinions which in turn depends upon the existence of a broad consensus on fundamentals. Nwabueze writes.

"Democracy cannot thrive in a country where the contenders for power disagree so sharply on matters which they consider fundamental that they are not willing to allow their opponents to govern, whatever the ballot box may say."¹¹

In the new African states the democratic spirit is largely lacking. The fact should not be overlooked that there are several countries with multi-party systems and doing quite fairly in limited government for example Botswana, Nigeria, Mauritius, Sierra Leone and Gambia. The future of democracy is not a dark one. What must be done is to decide what democracy we want in Kenya and Africa as a whole. I believe it the view of majority that we want a democracy where the public interests are represented. The local public should not be ignored but their needs should be met by the government. The ruling class must realise that it is not they alone who make the government. The public at large must participate in decision making if democracy is to be achieved. This can only be done through their representatives properly and fairly elected in Parliament. It is a high time that the legislature woke up to perform its roles as required. The constitution should not be a dead letter; ^{rules to be made and adhered to,} legitimised to serve public needs. As time goes on the one party will split into separate groups.

From this study, it might indeed be harsh to conclude that democracy has failed to commonwealth Africa. Does failure not connote more or less permanent state of affairs and is the present state of democracy in these countries not a manifestation of the normal teething trouble associated with infancy?

Erosion of foundation and principles of democracy have taken place as we have seen. One of the causes of this erosion is the constitutions lack of legitimacy for the masses, and perhaps more disastrous for the ruling politicians politicians in the developing countries are yet to develop the right attitude.

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towards the constitution, they are yet to learn to regard and respect it as an "umpire above the political struggle", and not as a "weapon in the struggle which can be used and altered in order to gain temporary and passing advantages over one's political opponents." The constitutions lack sanctity because the values and ideas which it enshrines are different and opposed to those of the rules and society alike. The result of all this is a systematic perversion of the institutions and process of government coupled with a spate of amendments of the respective constitutions where it is though necessary maintain some facade of legality.

We must accept the natural laws of war and tear and age. Given time African states will pull up their socks and organise constitutional democracy within their own context. Even in the west, there is a long history of parliamentary democracy, and up to this day, perfection has not been attained. There is hope for the future in our African states in relation to democracy. One hopes that time will come in Africa when a leader, after two terms of office will retire to make way for a new man with a fresh idea and a new approach.

It is not surprising to encounter authoritarianism in the first generation of rulers. A new thing has a flattering and unflattering appeal, and the inheritance of power from the white colonisers, with all its glory must be more than unflattering it has indeed been intoxicating. The present generation of rulers were the leaders of nationalist movement and have rightly considered themselves as the founders of the nations. As such, they feel they have a peculiar title to rule in order to safeguard the fruits of their revolution, a struggle which they had sacrificed so much, borne so much humiliation and deprivation. This state of things, it is hoped; will not last long. As a matter of fact, government is an art, and like all other arts, it grows by experience gained by practice over a long period of years. Which may then come together again for free coalition. Such a development should be the beginning of the democratic road, whence a spirit of compromise and mutual tolerance may be gradually nurtured.

FOOTNOTESINTRODUCTION

1. First, Ruth. The Barrel of a gun Penguin African Library 1972 PP. 50-53
2. For example, "The marriage institution"
see R v. Amkeyo (1917) 7 E.A.L.R. 14
3. Frendrich, Carol Joachim, Limited Government
Prentice - Hall inc. P.13

CHAPTER I

1. Odegard P.H. American Government New York, 1961 P.105
2. In the case of The King v. The Earl of Crew, (ex parte Sekgome) 1910 2K.B. 576, the respondent was convicted under a Bill of Attainder that had been abolished in England since the Bill of Rights 1688. This shows how the colonial administration could use arbitrariness to depot any person they were satisfied to be dangerous to peace and good order.
3. Macpherson C.B. The Real World of Democracy O.U.P. London 1972 Chapters I & IV
4. Ibid P. 8
5. Ibid P. 4
6. Ibid P. 14
7. Ibid P. 17
8. Ibid P. 3
9. This point may be illustrated by the Case of Ooko v. Republic, Unreported, KHCD 1972 where the appellant was denied his constitutional rights in that a detention order was held to be valid despite the fact that there were no detailed reasons for the appellant's detention and other irregularities.
10. Colliers Encyclopaedia Vol. 8 P.80
11. Ibid
12. Macpherson (Supra) P.8
13. Ibid
14. Robert Martin, Legislatures and Socio-Economic Development in Commonwealth Africa P.2
15. The Barrel of a Gun, Ruth First London 1972 P. 25-58. The military form and character of the colonial states is well illustrated in this book.

16. Employments of Native's Ordinance (1910) Kenya
17. Lord Lugard, The Dual Mandate in British Tropical Africa
Frank Cass & Co. Ltd. London, 1965 Ch.4
18. (1910) 2 K.B. 576
19. (1914) 5 E.A.L.R. 70
20. Ghai, Y.P. McAuslan P. Public Law and Political Change in Kenya, Nairobi 1970 P.139
21. Cater G.M. Africa One Party States
22. Ibid
23. Ibid P.3
24. Evanston, British Policy in Changing Africa
25. See Tanganyika Constitution Order-in-Council, 1961 and Kenya Independence Order, 1963.

CHAPTER II

1. Hook Sidney, Political Power and Personal Freedom:
Political Studies in Democracy, Communism and Civil Rights
1959 P. 31
2. Amendment Act No. 2 of 1966
3. Amendment Act No. 3 of 1966, Application of Part III of the
Preservation of Public Security Act by order does not require
approval of Parliament though it ceases to be effective if not
approved within 28 days when National Assembly is in session.
4. S. 3 of the Interim Constitution of Tanzania, 1964
5. Nwabueze, Presidentialism in Commonwealth Africa P. 221
6. The Weekly Review, October 19, 1979
7. Nwabueze (Supra) P.223
8. Ibid P. 219
9. Nyerere K. Freedom and Development, see generally
10. Nwabueze, (Supra) P. 230
11. In 1976 it stood at the staggering amount of 2,040,000,000,000
shillings. See Daily Nation, March 2, 1976
12. Martin R. Legislatures and Socio-Economic Development in
Commonwealth Africa P. 20-24
13. Nwabueze (Supra) P.246
14. Ibid P.283
15. Daily Nation February 13, 1974
16. Hopkins, The Role of an M.P. in Tanzania, 1970 see generally
17. Constitutional (Suspension and Modification) Decree, 1966,
Decree no.1 of 1966. See also Federal Military Government
(Supremacy and Enforcement of Powers) Decree 1970, Decree no.28
of 1970
18. Interim Constitution of Tanzania SS.27,30,32,33.

19. Amendment Act no.2 of 1966. It provided that all members who resign from the party which supported them at election, must resign and seek re-election in support of their own party.
20. As happened in Zambia in 1971. See Hall, The High Price of Principles, 1973 P.269-273. In Kenya it has been stated that M.Ps will not be detained as a result of anything said in Parliament. Presumably, this implies that they may be detained for things said outside parliament. Even though, two M.Ps were detained in 1976 for saying that the ruling Party is dead. This was said in Parliament.
21. At the eve of the 1979 General Elections a suit against the Secretary-General of KANU was said to be one against KANU itself. It had been filed by the former KPU members.
22. 1966 KHCD unreported
23. (1962) WNLR 196
24. (1972) EA 137
25. Chief Justice B.M. Kiwanuka was subsequently murdered for passing a judgement unpopular with the military regime. See also Veitch, Justice at the End of its Techer 1973
26. The Foundations of Freedom (1961) P. 197.

CHAPTER THREE

1. The concept of self-determination in the UN AL Jadida, Damascus, 1965. P.S. quoted from Okoth Ogendo "The Frontiers of Self-Determination" (K) where he gives a detailed analysis of the concept.
2. Wade, ES. "Constitutional Law" P.249-253 on the concept of Act of State.
3. As per Fletcher Martin L.J. in Salaman V. Secretary of State for India (1966) I.K.B. 613 at P. 639
4. (1914) 5 EALR 70
5. Campell v. Hall (1774) 1 Coup 204 on selfter politics in Kenya. See Dilley, British Policy in Kenya Colony (10)
6. A.G. v. Kathenge (1961) E.A. 348 where curfew orders were restricted to Africans only.
7. Regulations no 12 of 1900.
8. For a detailed State see Ghai & McAuslan Public Law and Political change in Kenya (14) P. 3-174; Norris & Reed, Indirect Rule in Search of Justice" (24) P. 3-70.
9. See generally Ghai, Ibid Chapter IV
10. Martin, R., Personal Freedom and the Law in Tanzania (22) P.55
11. Hamilton, A. (ed) Op cit. No.12
12. The Constitution of Kenya S. 60 (1)
13. Ibid S. 60(2)
14. Ibid S. 62(6)
15. The latest example is the Constitution of Kenya (Amendment) Act no.2 of 1975 which gives the President powers to nominate a member of Parliament who has been ousted by the High Court on account of an election offence. Although it is an extension of the prerogative of mercy, it has been applied and was in fact

enacted for the purpose of a single ousted member of parliament. This was Paul Ngei a Cabinet Minister and a Kenyatta colleague in Detention in the colonial rule period. His election had been nullified by the High Court for using undue influence, an election offence, to ensure his being returned to parliament unopposed. The amendment had therefore operated to return one of "Kapenguria odl guards" into the fold.

16. (1970) EA 46 cf Nuranda v. Arizona U.S. (1966) 489
17. (1969) E.A. 137
18. Ghai Op. cit - P.425
19. 1951 21 EACA 242
20. Unreported, High Court Decision. Civil Case no. 1159 of 1966.
For facts of the case see Ghai Op. cit P. 437-440
21. See SS 83 and 85 of the Kenya Constitution
22. For facts see fn 33 of chapter II
23. Ghai op.cit p. 439
24. Ghai was reviewing the judgement of Uganda v. Commissioner of prisons, ex parte, Matovu 1966 E.A.L. Review Vol I No.1 of 1968
25. See S. 85 of the constitution
26. Criffith, The Place of Parliament in the Legislature
27. Act no.42 of 1968, The Hire Purchase Act by the late J.M. Kariuki
28. Petition against M.P. for Garissa.
29. For example the Dairy Industry Bill 1964
30. S. 296 of the Penal Code Cap, 63 Kenya Laws.
31. See J.M. Report Daily Nation 5th June, 1975. Top government officials were implicated. See also the whole debate.
32. East African Standard, October 16th 1975
Messrs Shikuku and Seroney were detained
33. Daily Nation, June 13th 1975 and June 13th 1976
Weekly Review, November 1, 1976

34. Daily Nation, June 13th 1975 and June 23, 1979
35. The Constitution of Kenya (Amendment) Act no.10 of 1974 amended as S.53 of the Constitution to provide that Swahili should be the National language of the Assembly.
36. See Ghai generally, Ibid Chapter IV
37. Act no. 28 of 1964 established a Republic with an Executive President.
38. S. 14 of the Kenya Constitution.
39. The late President Kenyatta has had three Vice-Presidents from 1963 to 1978 when his reign ended. He has also exercised the power of dismissal among ministers and Assistant Ministers e.g. Murilo, John Keen and J.M. respectively.
40. For example the late President Kenyatta prologued parliament on the election of Seroney as the Deputy Speaker. He also nominated a member of parliament who had fallen out of favour with his constituency in the 1974 General Elections.
41. The powers of prerogative of mercy have been extended to nominating a member of parliament whose election has been nullified by the High Court on grounds of an election offence. Act no. 2 of 1975.
42. Act no. 28 of 1964, see schedule 2, S. 21 and also made extensive amendments to Schedule I and Chapter XIII of the 1963 Constitution. The second amendment Act no. 38 of 1964 amended S.105 of the constitution. The third amendment Act no. 14 of 1965 amended S.71 and deleted Schedule 4 of the Constitution.
43. Ibid
44. See Gertzel, The Politics of Independent Kenya Chapter 3.

See generally the politics that accompanied constitutional changes at that time.

45. Act no.17 of 1966
46. House of Representative, Debates, Vol VII 28th April, 1966
Col. 2015
47. Amendment Act no.14 of 1966
48. Amendment Act no. 18 of 1966
49. The first detention included two Administrative Secretaries, three Executive members, the Youth Wing leader and organiser of KPU, the Party President's Private Secretary and bodyguard, See Kenya Gazette L.N. nos. 2983 - 8, 3094-5 and 4101 of 1966.
50. See Ooko v. Republic
51. For example, Act no.18 of 1966
52. See Chapter II
53. EA. Standard March 12, 1964
54. Oginga Odinga, Not Yet Uhuru P. 283-284
55. Okoth-Ogendo, The Politics of Constitutional Change in Kenya Since Independence P.28
56. Gertzel, The Politics of Independence in Kenya P.82
57. Ibid P.90 "Kaggia was overwhelmingly defeated by a man who had a year before failed to retain his senate seat". See also Odinga, Not Yet Uhuru, Kenyatta asked Kaggia at a public meeting in Murang'a "What have you done for yourself?" P. 310
58. In May 1970, Seroney sponsored an amended motion which urged parliament to take drastice steps to ensure:
 - (a) that KANU is organised and kept distinct from the government ministers and Provincial administration and;
 - (b) that KANU strictly adheres to the letter and spirit of the provisions of its constitution and law.

59. Local Government Regulations (Amendment) Act no. 31 of 1968.
60. Kaggia v. Republic KHCD, unreported, see Ghai & McAuslan (Supra) P. 447-450.
61. See McAuslan's letter to the EA Standard June 2, 1967.

CHAPTER IV

1. For a comparative analysis of one-party system in Tanzania See Cliffe L One -Party Democracy E.A.P.H. 1967
c.f. Busia K. Africa in Search for Democracy Rontledge & K. Paul 1967
2. Weekly Review March 22, 1976 P. 8-9 Article entitled How Stable is Africa? 23 governments have been overthrown by the army; even more than once, Benin five times.
3. Daily Nation 1-10 October 1974 where series of meetings were held in Nakuru to "revitalise" the party in preparation for the General Elections.
4. Ghai, Op cit P. 519 on charismatic leadership. See Weber, The Theory of Social and Economic Organisation. On the criticism of the concept see Rattran K.J. Political Leadership Peter Worsely, The Third World
5. See Report On The Presidential Commission On The Establishment of a Democratic One-Party State P. 33 also P.T. George The Courts in Tanzania One-Party State, East African Law and Social Change
6. Ndegwa Commission Report Pars. 50-55, 691-700
See Rukwaro, Redress for Grievances: The case for an Ombudsman. For a rejoinder of Ndegwa Commission Report see Sessional Paper No.5 of 1974 Par. 107. On the Performance of the Permanent Commission of Enquiry in Tanzania See Martin R. Personal Freedom and the Law in Tanzania Ch.5
7. Nwabueze B.O. Presidentialism in Commonwealth Africa P.236
8. Ibid
9. Lipset, Some Social Requisites of Democracy: Economic Development and Political Legitimacy, 1959 Vol. III P.69-105

10. Ibid
11. Nwabueze, Op.Cit. P. 236.

(a) BOOKS

1. Busia K, Africa in Search for Democracy Rontledge & K. Paul 1967
2. Carter G.M. Africa One Pary States Cornell University Press 1962
3. Cliffe L. One Party Democracy Kampala 1967
4. Dicey, Law of the Constitution 1885
5. de Smith S.A. The New Commonwealth and its Constitutions 1964
London Stevens
6. Evanston Britich Policy in Changing Africa
7. Gertzel C. Kenya, The Politics of Independence 1970 E.A.P.H.
8. Ghai Y.P. & McAuslan P. Public Law and Political Change in Kenya Nairobi 1970
9. Hall The High Price of Principles, 1973
10. Hallowell J.H. The Moral Foundations of Democracy 1954 London
11. Hook Sidney Political Power and Personal Freedom: Political Studies in Democracy, Communism and Civil Rights 1959
12. Hopkins The Role of an MP in Tanzania 1970
13. James R.W. Law and its Administration in One Party State 1973
E.A.L.B. (Nairobi)
14. K. Mathew Democracy, Equality and Freedom 1978 Delhi - India
15. Lloyd D. Introduction to Jurisprudence 1972 Stevens & Sons.
16. Lugard, L The Dual Mandate in British Tropical Africa Frank Cass & Co. Ltd. London, 1965
17. Macpherson C.B. The Real World of Democracy 1966 London
18. Martin R. Personal Freedom and the Law in Tanzania O.U.P.
Nairobi 1974
19. Nwabueze B.O. Presidentialism in Commonwealth Africa
20. Nyerere K. Freedom and Development
21. Nyerere K. Democracy and the One Party System 1972.

23. Odegard H.P. American Government New York 1961
24. Oginga Odinga Not Yet Uhuru
25. Wade E.S. Constitutional Law London 1960
26. Wheare, Modern Constitutions London O.U.P 1966
27. Worsley, The Third World University of Chicago Press 1964

(b) ARTICLES

1. Bennet, Kenya's Little General Elections World Today 1967
2. Ghai Y.P. "Constitutions and the Political Order in East Africa" (1972) 21 International and Comparative Law Quarterly 409
3. McAuslan, "The Evolution of Public Law in East Africa in the 1960s" Part I and II Public Law 1970
4. Griffith J. "The Place of Parliament in the Legislature" Modern Law Review 1951 279
5. Harvey W.B. "The Rule of Law in Historical Perspective", 59 Michigan Law Review 487
6. Loewenstein C. "Reflections of the value of Constitutions in our Revolutionary Age", Ackstein and Apter(eds) Comparative Politics New York 1963 P. 149-163
7. Martin R. "Legislatures and Socio-Economic Development in Commonwealth Africa", Conference on Legislatures in Contemporary Societies. Albany New York 1975
8. Mohiddin, "Socialism or Capitalism: The Sessional Paper no.10 Revisited" East African Journal 1969
9. Mueller S.D. "Statist Economies and the Elimination of the K.P.U.". African Studies Association, Philadelphia 1972
10. Okoth-Ogendo H. "Constitutional Change in Kenya since Independence" Journal of African Affairs 1972

11. Okoth-Ogendo "The Frontiers of Self-Determination" (Mimeo)
12. Rattran K.J. "Charisma and Political Leadership"
Political Studies Vol XII No.3 of 1964 P.341-354
13. Rothschild, "Majimbo Schemes in Kenya and Uganda"
Boston University Papers Transition in African Politics
J. Nutler (ed)
14. Rukwaro "Redress for Grievances : The Case for an Ombudsman"
(1973) East African Law Journal
15. Shils, "Intellectuals in the Political Development of New States" World Politics Vol. 12
16. Shils "Government and Opposition in New States of Asia and Africa," World Politics Vol I No.2 1966

(c) NEWSPAPERS AND MAGAZINES

1. The Daily Nation, Nairobi
2. The Standard, Nairobi
3. The East African Standard, Nairobi
4. The Kenya Gazette
5. The Weekly Review

(d) COMMISSIONS AND REPORTS

1. The Ndegwa Commission Report
2. Sessional Paper no.10 of 1964
3. Sessional Paper no.10 of 1974
4. Report on the Presidential Commission on the Establishment
of One-Party State.
Government Printers, Dar-es-Sallam
5. House of Representative Debates
6. National Assembly Debates

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LIBRARY

(e) ENCYCLOPAEDIAS

1. The New Caxton Encyclopaedia, London 1977
2. Colliers Encyclopaedia

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LIBRARY