DEMOCRACY IN A ONE-PARTY STATE - THE CASE OF KENYA

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By:

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TABLE OF CASES

1. Eshugbayi Eleko V. Government of Nigeria (1931) A.C. 662.

2. Kaggia V. R - Criminal Appeal Nos. 589 of 1968 (unreported)

3. Liyanaga V. R (1967) A.C. 259.

4. Mwithaga V. R - Criminal Appeal No. 185 of 1975 (unreported).

5. Ndegwa V. President and Members of the Liquor Licencing court (1957) E.A. 709.

6. Ocko V. R - Civil case No. 1159 of 1966 (unreported).

7. Ram Krishan V. Delhi (1953) A.I.R. 318 (India).

8. Wadhwa and others V. City Council of Nairobi (1968) E.A. 406.

LIST OF ABBREVIATIONS

A.G. - Attorney - General

D.C. - District Commissioner

KADU - Kenya African Democratic Union

KANU - Kenya African National Union

KPU - Kenya People's Union

MP - Member of Parliament

TABLE OF STATUTES

Constitution of Kenya, (Act) No. 5 of 1969.

Hire Purchase Act; Act No. 42 of 1968

National Assembly (Powes and Privileges) Act; Cap. 6

Presidential and National Assembly Elections Act; Cap. 7

Public Security Act; Cap. 57

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INTRODUCTION

The purpose of this study is to establish whether or not there exists any democracy in Kenya. "Democracy" is among the commonest political slogans the world over. Each country and state claims to be democratic. Similarly, almost each state claims the others have no genuine claim to democracy, so much a so that "democracy" has become a word of praise.

Despite its commonness, only a few people have taken the trouble to consider what "democracy" really means, or even denotes. But it is agreed that a democratic government is one that is not despotic, tyrannic, authoritarian etc. It is a government where 'the people', or the masses have political power and where those in the leadership does not misuse power for their own ends. It is a government controlled by the people.

There are a number of reasons why "the people" should exercise control over the government. Firstly, 'the people' forms the society to be affected by the policies of the governors and their opinions should therefore be seriously considered and, where possible, effected. This is so because even where an expert can rightly tell us what is good for us, he may be wrong inasmuch as that under the circumstances it may not be what we need. Our opinion should therefore be given serious consideration.

Secondly, if people have no control on the government, they tend to lose the sense of responsibility and enthusiasm, which is necessary for a healthy society. They are

unable to feel they have a stake in their society. They take no pride and interest in it. They do not strive hard to improve its good points and rout out its deficiencies. But if they feel they are in control they are active, enthusiastic and responsible. They strive to improve society. In times of crisis they take a common stand and fight it off, and control is therefore necessary.

Worse still, where the masses have no political control, the society is divided into two groups: the rulers and the ruled. Although it may be hard to draw the line between them, as many people will be on the borderline, the distinction is there. This distinction militates against the feelings of equality and indipendence that are necessary for a self-confident society. The rulers become arrogant whereas the ruled become insecure, feel inferior and lack confidence. This leads to unnecessary resentment and aggresiveness on the part of the ruled. Class-consciousness flourishes. Equality and fraternity cease and even liberty suffers. Some kind of war develops (strikes, riots, underground opposition etc.) as the ruled feel, and rightly so, that they are being imposed on by the rulers. For the society to be healthy the whole society and not a section thereof should have political control.

The so-called Third World countries ~~are~~ have only recently been
curved from colonialism. The main effect of colonialism was to kill traditional establishments. With it came a new political order and domination. This was maintained by brutal force; the gun and the whip. Equality and

liberty was unknown. Freedom (civil and Political) was foreign and democracy was dead. The government was the all-powerful and the rulers enjoyed unlimited powers of action against the citizenny, as the colonial government had to fight for its very survival.

At indipendence, the colonisers wanted to impose a more democratic government on the same line as that of the colonial master. Equality (in law) and the protection of freedoms were introduced. Competing parties were now allowed and democratic principles were endorsed in the constitutions. But the success of this new system was doubtful. The historical background for such a system was totally absent. The colonial system could really not be forgotten overnight. To date, the colonial hangover still remains within our midst and we cannot help to think that what happened at indipendence was a change of personalities and not the system. This forms our backgro

This dissertation carries three chapters in the first the history and development of democracy is covered and what some political thinkers thought to be the best form of it. Also covered is the trend that democracy has taken today. al

Chapter two carries an examination of the democratic principles in the Kenya Constitution and how they are meant to function. But it is impossible here to cover each and every aspect of democracy gatherable from the Constitution. Therefore, only a few outstanding principles are covered.

In chapter three, the application of these democratic principles is critically discussed.

The last chapter carries the conclusion and observations drawn from the rest of the discussion. To this is added the recommendations which, in many view, need to implimented if democracy is to be realised in Kenya.

PLEASE NOTE: Unless otherwise specifically indicated, all the sections quoted herein are sections of the Kenya Constitution.

CHAPTER 1

HISTORY AND DEVELOPMENT OF DEMOCRACY

(a)

HISTORY:

Democracy can be traced in the history of Western political ideas, from the ancient Greeks to the modern writers. The origins of democracy and its meaning were explained in these terms:

> "The Greek 'democratia', from which our 'democracy' derives, means 'control by the demos'. And though 'demos' means 'the people'; the Greeks did not at least use the words as we sometimes use 'the People! To them it often meant the common people, 'the lower classes', 'the masses', or what a Communist would call 'the Proletariat'; meaning roughly 'the working classes'. In this use, the people contrasts with any other class of individuals within a state; a few aristocrats, a few rich men, a king, or tyrant, or dictator, or any minority class in the society. If this class, rather than 'the people' hold most or all of the power in the state, then the state is not to be called a democracy; we call it an oligarchy (of the few), a plutocracy (of the rich) a tyranny, and so on." (1)

Thus it is clear that democracy denoted a rule by the majority. It was supposed to be the ideal system of Government. But political thinkers have had different ideas as regards the ideal government. Let us look at some of them.

(i) PLATO (2)

Plato advocated that the ideal society would be that ruled by the philosopher - King, as, he said ruling is a skill. To choose him, all children are to be reared by the state (communally) to the age of about eighteen. During this time they are to undergo tests to determine what they are prospectives in. The prospective rulers are to be isolated for further training, mainly intellectual. Studying philosophy will be the last stage as it will lead them to know the 'Good'. King had to keep neither private property nor private family as these are obstacles to impartiality. Then the philosopher-king is to be given absolute power; the other classes are not to interfere as they are not skilled in ruling.

This government appears 'Utopian'. For one, Plato had himself only in mind when he advocated a 'philosopher-king'. Where do we get philosophers of his calibre? On the other hand it is not true that ruling is a skill. It is born with the person. For example, some of the great rulers like Napoleon Bonaparte were not trained to rule - but they were good rulers. It has been said of Plato:-

> "It is usually supposed that Plato turned to a second best alternative in his 'Laws' when an attempt to put the 'Republic' into practise in Dionysian Sicily proved and object failure.(3)

Conditions for such a government are totally absent.

(ii) THOMAS HOBBES (4)

Hobbes saw some unsettled years in England during his time. He argued that people compromise and agree to abide to a set of laws - to avoid conflict. Laws are effective only if enforced: which happens only if the enforcing authority has absolute power.

Hobbes advocated Sovereighty be in the hands of one person, the king: because:

(a) a single ruler has more secrecy of counsel,
(b) if a group has soveneighty it may conflict, unlike one person, and
(c) a monarchis decisions are as inconsitent as human nature; whereas a group has that plus the inconsistency of number.

The powers of the monarch are imposing. Once appointed his power is absolute. Thus, the dissenting minority must subject themselves to his dictates or be destroyed. To Hobbes, the monarch cannot act unjustly. 'Just' behavior emanates from the law, and as the monarchy makes the laws, whatever he does will be law and automatically just, as he is above law and cannot violate it.

It appears that in defeat, Hobbes adopted a "peace-at-any-price" philosophy. He preferred the evils of absolute power to those of internal conflict without such power. He was willing to submit to the evils of tyranny and surrender all liberty in return for security. But a rule at the whims of one person whose power is unchecked is most undemocratic. In fact, Hobbes forgot that it is possible to have both law and order and the absence of tyranny.

(iii) JOHN LOCKE (5)

Locke, lived during unsettled years in England, like Hobbes. But unlike Hobbes, his outlook of nature, was not soured. He was opposed to Hobbes' theory.

Locke distinguished between, 'a state of nature' and 'a state of war'. In the former, the people lived peacefully. They own property disposable at will and are governed by law of nature. But men may transgress the law. Then, the injured party has a right to punish the transgresser. Locke saw three problems in such punishment:

(a) each man being judge leads to bias,
(b) where transgressed, we may lack adequate power to punish transgressors; and,
(c) punishment for the same crime will vary.

Locke saw the solution in the establishment of three institutions:

(i) a judiciary to administer law impartially,
(ii) an executive to enforce the law, and,
(iii) a legislature to lay down uniform laws.

Thus, he said, society originates in the attempt to establise these institutions.

A state of war is characterised by one man on a group of men seeking absolute domination over the others; whereupon a struggle for survival ensues. Opposition to such person (or group), Locke said, is not only justified but required too.

Locke's government will have law, not force, as its basis. Laws are to be arrived at after long deliberations by people's representatives. Despite

over-emphasising on right to property, Locke said certain areas of conduct are immune to governmental interferance.

Most important, the government is to be appointed by the people, who are the source of authority. If government tries to usurp this authority, it should be dismissed.

Fearing concentration of power, Locke's government is to be divided into three branches: Executive and Legislative (functioning as today), and the Federative (for diplomatic negotiations). Each branch would act as a check against the other with the supremacy of legislature. If the legislature is not in session, the government has a prerogative to act for public good in case of emergencies.

Locke is among the greatest architects of modern democracy, and his ideas are the basis of ~~liberal~~ liberal democracies. His majority government is more democratic than those of Hobbes and Plato. But, according to Stuart Mill, Locke forgot that even the majority can be tyrannical.

(iv) JOHN STUART MILL (6)

It was agreed that a ruler was necessary; and that in protecting society a ruler may overstep his authority and become tyrannical. Liberatians sought ways of limiting the ruler's authority - and Mill was an ardent libertian. But it was argued that it was unnecessary to limit the ruler's authority. Being the people's representative, it would mean limiting the people's authority.

Mill argued this was theoretically correct; but actual development showed the need for limitation. The rulers and ruled are not the same. Rulers not only develop their own interests but also are influenced by pressure-groups to work against social welfare, and limitations is necessary.

Mill supported the majority government of Locke but added that the threat of majority tyranny over minorities is dangerous. According to Mill democracy allows individualism, either through ligislation or public opinion. Mill advocated limitation of government power and said:-

> "The object of this essay is to assess one very simple principle -------- That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightly exercised over any member of a civilised community, against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

"He cannot ~~is~~ be rightfully compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others to do so would be wise and even right ---------- To justify that, the conduct from which it is desired to deter him must be calculated to cause evil to someone else. --------- In the part which merely concerns himself, his indipendence is, of right, absolute. Over himself, over his body and mind, the individual is sovereign".(7)

Thus Mill adds minority (and individual) protection to the majority government. Majority power must be curbed as individualism will be destroyed if majority likes and dislikes are to act as unwritten laws. This also conforms with the modern understanding of democracy. Although it may be hard to impliment, the principle is commendable as it says it is for the government, in any legal issue, to prove that an individual's behavior is undesirable. Although it may not guarantee complete immunity, the weight of proof provides considerable security. Surely, if we accept that Locke laid the foundation of democracy, we cannot refute that Mill built it for him.

(v) KARL MARX (8)

Karl Marx also believed in a government by the people. His political philosophy appears to have been founded on the 'dialectic' from Hegel. Hegel saw all historical changes as being in accordance with the dialectic; and it could be understood by observing the development of nations. The dialectic has three stages: the thesis, the anti-thesis and the synthesis. Hegel saw the nation (the thesis); it breeds opposition within itself — antithesis The two conflict and therefrom emerges a new civilisation of a higher order - the synthesis; and the process continues ad infinitum.

Marx agreed with this, but he preferred a materialistic dialectic~~tic~~ process in terms of economic and social terms. Marx argued that everyone belongs to a certain class in society and that the class system is determined by the prevailing economic system. For example, during hand-mill production feudalism prevailed, whereas during steam-mill production capitalism prevails.

According to Marx, capitalism has three classes: the capitalists (owning means of production), the working-class (dependent for livelihood entirely from working for the capitalists) and the middle-class (falling under neither of the above two, like small businessmen and white-collan workers). Due to advance-ment in technology, there will be increase in

~~in~~ production and a corresponding increase ~~in~~ of wealth in the hands of those owning the means of production. To acquire more profit, the capitalist will pay low wages and sell commodities at high prices. The condition of the worker will get worse. The middle-class will be dissolved into the others.

We therefore will have two opposing classes: a small wealthy class (the bourgeoisie) analogous to the thesis, and a large indigent working class (class proteteriat) analogous to the anti-thesis. The workers will demand higher wages and to purchase goods cheaply.

Conflict will rage between them and a revolution will occur, culminating in the establishment of a classless society led by the majority (workers) - the synthesis: This synthesis will be a socialist society that is more superior than its capitalist counterpart.

Marx lived in the era of industrial revolution in England and may have been influenced by the deplorably poor conditions the worker lived in. Today, the working lot lives under better conditions, earns more money and works less hous. Although the salary of the worker does not rise proportionally with the cost of goods, and the worker receives less remuneration for his labour than he deserves, Marx's theory appears overcritical. May-be if he were living today, his opinion would be different in view of social security laws.

Otherwise it appears that the capitalists are cunning enough to hold revolution at bay.

Here we see that the original idea of ideal government (democracy) connoted a rule by the people. But some thinkers thought that an ideal government could be attained otherwise. But it has to be seen in the light of its propagation. For example, when propagating the rule by philosopher-kings, Plato thought he, himself was best suited to rule. Hobbes's monarchy was advocated so as to stop the wars of the kind that Hobbes had experienced. Otherwise we see the rule by the people being emphasised by the others. But in the practical development, democracy has taken a completely different meaning from its original one. Let us look briefly at its development.

(B) DEVELOPMENT

In its development, democracy has taken many forms and it has deviated from its original meaning. In fact, with the differences in the systems claiming it, it is hard to know what it really is, C.F. strong summarised it thus:

> "—— we must be ready to admit that democracy can take many shapes and that it may be necessary to experiment greatly in order to discover the ideal form of it ——"(9)

It is in the course of these experimentations that democracy has altered.

One of the main alterations is in the meaning of "the people". Today, "the people" means the adult members of the society without special reference to the lower classes or the masses. This distinction can be seen in that in ancient Athens, a large proportion of adults were slaves without a vote, yet it was democracy. Or in England, democracy would have been claimed notwithstanding the fact that:

> "With the first Reform Act (1832), the vote was given to men only on a restrictive property qualification and in 1867 it was extended to all ~~the~~ householders in borough constituencies. In 1884, the same general principle was applied to all county seats. The 1918 Act enfranchised all men over 21 and all women over 30, the younger women being included in 1928." (10)

The voting age was lowered to 18 in 1969. All along, the system had denied more than half the population the right to vote. Such systems would not be 'democratic' today. There may not be much practical difference as the majority adults belong to the 'lower class' today, but the distinction is there.

Democracy has become an ambigous term. Some, like the French, think it connotes "the sovereignty of the people" but the 'sovereignty' itself is ambigous and a government claiming majority support can borrow it despite its being undmocratic. Legal and political sovereignty (as of parliaments) means that body whose will is ultimately obeyed by the people, and doublessly, the people cannot be sovereign in this sense. The fact that parliament may be elected by the people does not make the people sovereign as parliament may, and often does, pass laws against the will of the people, which the people would not do.

Seeing democracy as "majority rule", as in Kenya, is misleading. Normally, government does not express issues involving majority claims. If anything minority claims are upheld. Take a money-bill for instance. The issues involved are that complex that the layman, the majority, cannot form an opinion about it. Government relies on the estimation of a few experts, whose opinions are enforced. Even most parliamentorians cannot make an opinion and their being representatives of the people does not alter a thing. This is not majority, but minority, rule.

It is debatable whether a democratic government can exist at all, and this task is beyond this dissertation. And for our purposes, we can assume that democracy is not merely institutions like universal suffrage, parliamentary government and decisions by majority procedure but also principles that they seek to realise, viz:

> "....(the) responsibility of the governors, or the right which a subject has of having the reasons publicly assigned and canvassed of every act of power exerted over him ..... the liberty of (expression); or the security with which every man .... may make his complains ..... the liberty of association; or the security with which the malcontents may communicate their sentiments, concert their plans, and practice every mode of opposition short of actual [illegible] revolt". (11)

This would include both single and multi-party states so long as they honour these principles.

Macpherson[12] argues that democracy has taken three major dimensions. The first is the liberal-democracies of the western world. These have adopted the systems advocated by Locke and Mill. The main characteristics include a government chosen by the people in periodic free elections by universal suffrage, more than one parties which compete freely, the separation of powers between the executive, the legislature and the judiciary with the supremacy of parliament to check concentration of power and a guarantee of human rights. These liberal-democracies are inherently capitalistic. To them government is not an end but a means to an end, and the end is 'the greatest good for the greatest number'. But they have been criticised by the Marxists on grounds that capitalism is inherently oppressive on those not propertied. It caters especially those with property and hence it is not democratic. It is argued that the protection extended to the others is only to enhance the favourable position of those with property. But despite the economic inequalities, the protection extended to 'the others' makes the systems close to being democratic.

The second dimension is that of the Eastern Bloc, the communist democracy; based on the theory of Marx. The rule of the proletariat makes it close to the old idea of democracy. Whoares Marx thought the transition to socialism would be a matter of course, Lenin twisted this and said only a revolution would realise the socialist state, by liquidating capitalists and

reactionaries. These democracies are normally single-party systmes as demonstrated by the soviet Union. It has been siad that:

> "Soviet society is monistic and therefore that minority or sectional rights must be eliminated. It is denied that government ought to recognise various sections and undertake to conciliate (their) claims ---------- on the contrary, only one section of the society - the proletariat and its allies - is worthy, and the government has the duty of suppressing all other sections and governing in the interests of this worthy section alone.".(13)

This is done through violence and murder during and after the revolution. Worse still, the party is supreme:

> "No important political or organisational problem can ever be decided ---------- without directions from the Party"! (14)

Despite their laudable ideals of creating equality the means are loathsome. The system advocates violence and killings. Freedoms, especially of speech, are, to say the least, limited and minor criticisms carry harsh sentences. The party, being supreme, has taken it upon itself to dictate what persons are to be elected. The party cannot rightfully be equated with 'the people' and it is doubtful whether these systems are democratic at all.

The third dimension is that prevalent in the emergent states - the so-called Third World. These are recent and have had a chance to pick what they consider good from both the liberal-democratic and communist democracies. They have more or less adopted a middle-of-the-road course between the other two systems. They had been colonised by the liberal-democratic European powers and normally inherited liberal-democratic systems at independence. But the system was sooner rejected

Notable among the rejects was the principle of multi-parties; on ground that circumstances so demanded. Freedoms, especially of expression have been violated and treason and opposition are synonymous. They are engaged in national development and require a lot of capital which may explain their rejecting outright Marxism. As to whether they are democratic will emerge from the discussion in the other chapters of the dissertation.

From all this, it becomes clear that 'democracy' is ambigous and its development shows its meaning depends on the system one is affiliated to. We can now examine the democracy in a one-party state, as is demonstrated by Kenya.

Chapter I

FOOTNOTES

1. J. Wilson: Philosophy, London (Heinemann) 1972 P 48.
2. Plato: The Republic
3. Llyod D: Introduction to Jurisprudence (3rd edition), 1972 P 90 footnote 88
4. Thomas Hobbes: The Leviathan (Penguine Books) 1972 chapters 8 and 9
5. John Locke: Second Treatise on Civil Government
6. J.S. Mill: On Liberty (Penguine Books) 1978
7. Ibid: at PP 68 - 9
8. Karl Marx: Capital
9. C.F. Strong: Modern Political Constitutions, London (Sidgwick & Sons) 1966 P 364
10. J.P. Mackintosh: The Government and Politics of Britain (Hutchinson & Co.) 1977 P 23
11. J. Bentham: A Fragment on Government (edited - W. Harrison), 1948 PP 94 - 95
12. C.B. Macpherson: The Real World of Democracy (Oxford University Press) 1975
13. S.E. Finer: Comparative Government, (Allen Lane) 1970 V 43
14. J.V. Stalin: Leninism, Vol 1 P 33

CHAPTER II

DEMOCRACY IN A 1 - PARTY STATE

THE DEMOCRATIC PRINCIPLES IN THE CONSTITUTION AND THEIR FUNCTIONS

It is common knowledge that Kenya had been a British colony for a long time. When the Britishers established themselves in Kenya, they manipulated laws to acquire control of government and land. This led to the dissatisfaction of the so-called natives who had a better claim to land and government. But a recognition of these claims would mean an end to British supremacy and the colonialists were unwilling to concede. As such, the administration was characterised by utmost brutality and suppression, culminating in total oppression of the so-called natives. Any ~~more~~ move opposed to the system was ruthlessly suppressed.

This only helped to mount dissatisfaction and ended up in the liberation struggle in the early 1950's, which continued to the late 1950's. By the mid-1950's it was clear the Britishers would not hold out much longer. But it was not until 1963 that the Union Jack was lowered and the Kenyan flag raised, marking independence.

During the independence conference of 1960, in London, the aim was to set up a constitution based on the Westminister model. Negotiations then followed and in 1962, the outlines of the independence constitution were drawn up. The constitution was for a Westminister (liberal-democratic) system.

Although a number of changes have been injected such as those ending Regionalism, the current 1969 constitution is basically founded on the 1963 one and incorporates a liberal-democracy, or rather, liberal democratic ideals as we are going to see.

(1) ELECTIONS

The procedure for elections is extensively laid down in Chapter III of the constitution and persuant thereof has been passed the Presidential and National Assembly Elections Act. It is based on a wide franchise. S32 provides that Kenya shall be divided into constituencies (inaccordance with S42) and each constituency shall elect one member to the National Assembly. It further provides that every person registered in a constituency as a voter shall be entitled to vote in that constituency unless he is detained in lawful custody or is disqualified from voting for having been convicted of an election offence or having been reported guilty of such an offence by a court trying an election petition. S43(1) provides for qualifications for a person to be registered as a voter: viz. he must be a citizen who has attained the age of eighteen years, he must have been ordinarily resident in Kenya either for a period of not less than one year or periods totalling not less than four years in the eight years immediately preceeding the date of registaration and he must have, for a period of not less than five months of the twelve immediately preceeding the date of registration, have been ordinarily resident or has carried on business or has held land or buildings in that constituency. S43(2) says that a person shall be disqualified from registration as a voter if he is of unsound (insane) mind, or he is an undischarged bankrupt, or he is detained under lawful custody or he is disqualified for conviction or for being reported guilty of an election offence.

S43(4) provides that a person who qualifies to register in more than one constituencies shall only be registered in the one constituency he applies first.

Then S34 states the qualifications for a person to be elected. He must have attained the age of twenty-one years, he must be registered in some constituency as a voter (not necessarily in the constituency he intends to contest in), he must be well-versed in the English (and Swahili) languages to enable him to follow proceedings in Parliament and he must be nominated by a political party. Under S35 no person will qualify to be elected if he, by his own act, is under allegiance or adherance to a foreign state, or he is under sentence of death or imprisonment for over six months, or he is of unsound mind, or is an undischarged bankrupt, or has interest in certain Government contracts (to be prescribed by Parliament), or is a civil servant or judicial officer.

The essence of all this is that liberal-democracy, whose principles are enshrined in the constitution, signifies a rule by the people. The machinery of Government must therefore be run by the people. But it is impossible for every member of society to take a direct role in the running of Government, as in ancient Athens. It can only be done if the Government, is run by the people's chosen representatives, who are to act on behalf of the masses. This can only be done where free and fair elections are exercised on a wide franchise based on secret ballot, To maximise and realise people's participation, the elections must be periodic so that people can change the Government if they feel it is not living up to their desire

For this reason, S59(4) provides that Parliament shall stand for five years and then stand dissolved, whereupon new elections must take place. Although the right to vote and be voted for is not included in the fundamental rights, it does not make much difference in practive as the provisions of the constitution are to prevail over any other law(1).

(II) POLITICAL PARTIES

One of the cardianal characteristics of liberal-democracy is that it stands for a multi-party system. There must be more than one parties. This is, intended to foster and maximise the people's participation in political affairs. The fact is that:

> "We have ----- a Government in office that is ---------- trying to do its best. It is introducing measures which it believes to be for the good of the country. It is administering the whole machinery of state as efficiently as it can. (But the opposition) is to take the maximum advantage of the Government's mistakes, to insist that (the Government) is ruining the country, to extract from it, if possible, information by which this can be proved, and to feed the electorate with propaganda intended to show that the Government, however good its motives, is in fact doing the worst possible things in the worst possible way." (2)

This is because the opposition is ready, able and willing to provide an alternative government. It must discredit the ruling party, especially where there is concrete evidence of detrimental policies to the state.

Opposition parties are important as they keep the electorate well-informed of the activity of the Government. But they are more so as they form an important check on government excesses. As the ruling party is always under a threat of overthrowal, it takes a lot of trouble to see that its policies are right and acceptable to the electorate. Policies must be carefully thought out and mistakes, as far as possible, avoided. This way the government cannot assume powers it does not posses and will provide excellent services.

It cannot be doubted that Kenya was intended to be a multi-party state, although this is not expressely provided in the constitution. The Independence Constitution was a 'compromise' between KANU and KADU the dominant parties, which co-existed until KADU was outlawed in 1964, and later in 1966 the KPU was formed and existed until 1969 when its leaders were detained and it was banned(3). It is definitely within the spirit of the constitution that there be more than one political party, as it based on the 1963 one. Although not stated point-blank, it can be gathered from the wording of some of the sections. For example, S5 provides that:

> 5(3) Whenever parliament is dissolved an election of a President shall be held at the ensuing general election and at that election -

(a) one candidate shall be nominated --- by each political party taking part in the general election;

(5) In the election of a President otherwise than at a general election - (a) every candidate shall be nominated by a (not by the) political party ---

This clearly presupposes more than one party and bearing in mind that the 1963 constitution on which the 1969 one is based, was meant to cater for more than one party, we cannot help concluding that it is within the spirit of the constitution that there be more than one party.

III PARLIAMENT

It is also an established rule of liberal democracy that there must be a Parliament elected by the people. In Kenya, it is provided for in Chapter III of the constitution. S30 provides that Parliament shall consist of the President and the National Assembly. S31 then provides that the Assembly shall consist of elected members (elected by universal suffrage), nominated members (appointed by the President) and 'ex officio' members (neither elected non nominated, i.e. the Attorney General and the Speaker). Each elected member represents a constituency and it is the candidate winning the majority of votes that is declared elected.

The functions of Parliament are threefold. The first is to legislate. S30 expressly provides that the legislative power of the Republic shall vest in Parliament. There is no other competitive power and it can make laws, other than those making acts or ommissions criminal, with retrospective effect(4).

It has even the authority to alter the constitution(5). S46 provides that the power shall be exercised throu h Bills passed by the Assembly. After discussing and accepting the Bill it is taken to the President for his assent whereupon it is published in the Kenya Gazette and attains the force of law(6). Parliament may refuse to accept any Bill whereupon it is withdrawn(7). Private members are also free to introduce Bills which, if accepted will become law but as we shall see later, this is made almost impossible by the executive.

The second function is financial control. The principle (8) is that Parliament is vested with the power of raising money through taxation and also scrutinising government expenditure. Also, public money Bills must come from the executive, and all withdrawals from the consolidated fund must be sanctioned by Parliament (9).

The third function of Parliament is to criticise and control the executive. This is entrenched in S59(3) which gives Parliament power to pass a 'vote of no confidence in the Government'. If this happens the President has to resign or dissolve Parliament. It not the sub-section provides that Parliament automatically stands dissolved on the fourth day. As Gatzel puts it:

> "(Parliament has the) right and indeed the duty to seek an explanation from the Government and to criticise and advice in the exercise of its executive authority" (10)

It is not uncommon to hear criticisms levelled against the misconduct of Government agents such as police brutality. And occasionally, Ministers have been put to task when the answer questions unsatisfactorily.

(v) THE JUDICIARY

The judiciary is provided for in Chapter IV of the Constitution. S60 establishes the High Court, which is to have unlimited original jurisdiction - both civil and criminal. Also, the appointment of judges is covered (11). S64 provides for the establishment of the court of Appeal. S65 empowers Parliament to establish other courts subordinate to the High Court; done through the Magistrates' Courts Act, 1967. To cater for the muslim minorities S66 establishes Kadhis' Courts to apply Muslim Law.

The function of the judiciary, for our purposes, is basically to act as a Constitutional watchdog by upholding the rule of law. Its task is to review the legality of legislative executive acts, and also quasi-judicial administrative acts. As Nwabueze puts it:

> "The court's jurisdiction for this purpose may be invoked by an aggrieved party --- provided he can establish a 'locus standi' entitling him to challenge the act in question. This condition means that what can be challendged is an actual --- act in being ---"(12).

As the executive has no power to act against the individual, yet almost every executive act bears on the individual, the principle acts as a guarantee against arbitrariness in executive Government. In a Nigerian case where the Governor purported to have power to act against the citizen, the Privy Council said:

> "As the executive, he can only act in persuance of the power given to him by the law. --- no member of the executive can interfere with the liberty or property of a --- subject except on the condition that he can justify the legality of his action before a court of justice"(13).

To effectuate the proper working of the judiciary it should be indipendent of both the executive and the legislature. This can easily be gathered from S77(1) which provides that every person charged with an offence shall be afforded a fair hearing "by an independent and impartial court". This is strengthened by the fact that judges have a security of tenure as, under S62(3), a judge can only be removed from his post for inability due to infirmity (of body, mind or otherwise) or for misbehavior.

(IV) HUMAN RIGHTS

The origins of a guarantee of human rights can be traced to the common law, which has been a zealous protector of these rights. These not only include civil and political liberty, but also freedom of action generally. But these have been entrenched in the Constitution, especially in the newly-formed states.

The Kenya Constitution guarantees human rights in Chapter V. The guarantee is summarised in S70 which provides:

> 70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely: -

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) Protection for the privacy of his home and other property and from deprivation of property without compensation,

The provisions in this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limi tions designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of the others or the public interest".

Then follows lengthy and detailed provisions of these rights and how they are to be enjoyed - including limitations in SS. 71-85.

The purpose of entrenching these rights and freedoms thus was to put a check on arbitrary executive and legislative action against the individual. To achieve this it has been said that it is the tradition of justice that judges should not shrink from upholding the lawful rights of the individual(14).

But under common law, the guarantee only avails against the executive and not against the legislature. Legislative interferance with these rights is not questionable; and here the courts have to play an important role to avoid their encroachment by legislation during its interpretation unless, from the wording of the statute, it is unavoidable. This was mainly based on the effectiveness of the separation of powers between

the executive, legislature and the judiciary. But failing to include legislative interference in the protection would be fallacious in a country like Kenya where practically all legislation stems from the executive and the legislature only plays the role of 'rubber-stamping' it. It would amount to nothing as the legislature has acted as an extended arm of the Government. This fallacy is taken care of by S3 which provides that 'if any other law is inconsistent with this constitution this constitution shall prevail and the other law shall, to the extent of the inconsistency, be void'. Therefore, unless the constitution grants power to the legislature to pass laws interfering with these rights in certain circumstances, the individual is protected as much against the legislature as the executive. Such an extension is necessary if we bear in mind that the legislature may not be free of tribal and racial sentiment and even more so when we consider the power wielded by the executive over the legislature. Otherwise, the executive would more or less have a free hand to interfere with these rights.

These are some of the liberal-democratic principles we inherited from Britain. But things said are not the same as things done. We can now proceed to see how these principles have been employed in practise.

CHAPTER II

FOOTNOTES

1. S3
2. Harold J. Laski: Parliamentary Government in England - London: George Allen & Unwin, 1952, page 72.
3. This will be covered in Chapter III.
4. S46(4)
5. S45
6. S46
7. The Dairy Industry Bill, 1966 (Official Report, House of Representatives Vol X, part 2, Nov. 23rd 1966 Col, 1902-31 & Nov. 24th, Col. 1965) was withdrawn due to back-bench opposition. And Three times, the Marriage Bill has been withdrawn after opposition by the members - Daily Nation, July 27th, 1979.
8. S99
9. S100
10. Gatzel: Policies of Indipendent Kenya (E.A.P.H.), 1970 page 166.
11. S61
12. Nwabuaze: Constitutionalism in Emengent states - Associated University Presses, 1973 pages 36-7.
13. Eshugbayi Elako V. Government of Nigeria (1931(AC 662 at 670, per Lord Atkin.
14. Ibid at 670 (Lord Atkin)

CHAPTER III

APPLICATION OF THE DEMOCRATIC PRINCIPLES IN THE CONSTITUTION

As we saw in Chapter II the democratic principles are based on the Westiminister model of Government. This kind of liberal - democratic system is especially based on the separation of powers whereby the executive, the legislature and the judiciary are completely independent of each other; with the supremacy of the legislature. This was meant to avoid dictatorship as each would check any excesses of the other. But despite the clarity of these provisions actual practice shows otherwise and leaves a lot to be desired. The executive, both by hook and crook, has manipulated the Constitution to suit its desired goals. Lawful and unlawful means have been emplo yed, depending on the demands of the moment. Eventually, the principles serve little purpose - if any - as will appear.

(i) ELECTIONS

We saw that any person who has qualified either to vote or contest a seat in Parliament can do so as of right. The Constitution provides that for a person to qualify to contest, he must be nominated by a political party under S34(i)(d). After banning the K.P.U. in 1969, Kenya became a de facto one-party state and still is. As such, the candidates that are nominated by KANU, ~~therefore~~ are declared elected unopposed.

By banning opposition parties our constitutional right of electing those we want has been taken away.

To add insult to injury even the nominations in KANU the only party are not democratic. After banning K.P.U. the Government was not satisfied and began to take offence against individuals. Complications were infected into the procedures of nomination to bar the undesired elements. For example in the ~~year~~ 1969 elections, ex-K.P.U. members were not eligible for nomination. This was because one condition was that to qualify, a candidate had to show that he had been a member of KANU for a period of not less than six months prior to the nomination date - unless this condition was waived by the President.(1) Being afraid of the ex-K.P.U. revolutionaries all the ways of preventing them from making impressions on the public were welcome.

The struggle was carried through to the 1974 elections. It was put as a condition that for ex-K.P.U. members to qualify to be nominated on a KANU such person had to show they had been out of detention for over three years, and they had been ideologically rehabilitated.(2) The struggle continued further, to be nominated, one had to be a life-member of the party. In 1979, ex-K.P.U. members were banned for dubious reasons such as they "have not been discharged". The 'procedure' for being "discharged" was confused and it was quite impossible to know how it would be done or even by who, let alone what it meant. The manner the KANU Secretary-General did explain it, left everybody wondering whether it was the head

or the district Kanu office or the mere fact of contributing to "harambee" projects that would occassion the discharge. This was clear in showing that although the Government wanted to stop them but was lacking the opportunity as no reasonable reasons were readily available. But it came when some of the ex-K.P.U. members brought an action in court against Robert Matano - who happened to be KANU Secretary-general - for saying derogatory things about them. KANU immediately said it is the party that was being sued. The matter came to a head when, in a party meeting chaired by President Moi on 4th October, 1979 in Nairobi, a resolution was passed that ex-K.P.U. members were barred from nomination.(3)

All this was geared towards frustrating revolutionary patriots like Oginga-Odinga, Ochieng-Oneko and others politically. The Government has been afraid of them due to their 'Socialistic' ideals and therefore all these measures were directed at driving them into political oblivion. But such frivolous and ambigous grounds are most unconstitutional, whatever their justification under the KANU Constitution or even the Presidential and National Assembly Elections Act - though humbly submit they have none. In the first place S82 provides that any law that makes provision that is discriminatory either of itself or in its effect shall be void. All these acts are discriminatory in that their effect is geared at frustrating a specific group of persons, the ex-K.P.U. members, due to their political opinions and under S82(2) treating them thus is void completely.

In the same way, such grounds as that to qualify to be nominated on a KANU ticket one has to be a life-member is unconstitutional. It is geared toward eliminating defection from the party and therefore preventing the formation of an opposition party. It is within the spirit of tne Constitution that we should be a multi-party state. All attempts to suppress this spirit are definitely unconstitutional. The effect of all this is that those holding high office in our Government are in a big breach of their Oath of service. The Constitution they swore to uphold is the same Constitution they are striving to suppress. The rule of law they always preach to us is the same one they are making a laughing-stock of. All this is contrary to democracy and can only lead to a dictatorship that every democrat loathes.

But even where many canditates want to/nominated /be people are still denied their Constitutional rights to choose their favourite leaders. This was clear during the 1979 "Nyayo" elections (nominations) in the South Baringo Constituency.(4) Here three candidates were contesting. They took the symbols of Saa (clock), Taa (Lamp and Funguo (Key). Incidentally then the MP, Saa, was a personal friend to the President. A series of events led to his "re-election" (5)

Most influencial among these was the idea of "Presidential Campaign", Firstly, the President started making occassional tours especially through the populous areas as Eldema-Ravine, Kabimoi, Maji-Mazuri etc.

He would address people and very indirectly ~~would~~ tell others to vote for Saa. About three weeks prior to the elections, a public rally was held at Kabaraka and the President told them to vote for somebody they knew he could get along with. But all along, the people seemed determined to vote Saa out of Parliament, and Funguo was more popular. On 7th November, 1979, the day preceeding election day, the President made a tour through Makutano - Maji - Mazuri - Eldama - Ravine - Kabimoi - Esageri on his way to Kabarak. All along the route, he told people that "Funguo" belongs to thieves and when electing they must remember that "Funguo" cannot open his office.(7)

But this was not all, ~~and~~ a more effective means had to be employed. Saa was most unpopular in the Southern parts where population density is high. To make sure that many people did not vote, only a few ballot papers were supplied. In fact, most of the stations had no papers long before mid-day on the polling day. Even where a few were later brought it was so late in the evening and quite a large number of people did not vote.(8)

In the evening of 8th November, 1979 the ballot-boxes were to be assembled at Kabarnet (the Headquarters) for counting. But boxes from certain stations did not appear untill about three O'clock in the morning of 9th. The D.O. (9) then alleged that a certain station near Kisanana

had exercised the voting wrongly and it would have to be repeated on Friday 9th, and new presiding officers were appointed. (10) This was seen as a move to inject substitute boxes. And counting was not untill the evening of 9th November.

There are things that would lead to the conclusion of downright corruption. Firstly, the overall votes counted was over 29,000. Bearing in mind that quite a substantial number of people did not vote, it is impossible to believe that over 90% of the registered boters did, in fact cast their votes, as the figure suggests. Secondly at the counting table, I witnessed some ballot boxes from thinly populated areas (around Kisanana) from which an unbelievably large number of votes were poured. And lastly, after the elections some ballot boxes were seen in the forests near Navasha, Maji-Mazuri and Simotwet. All these, when added to the events that preceeded counting of botes at Kabarnet support the fact of corruption.

The events that go with these nominations show that there cannot be democracy. People/supposed /are to elect the members they please. By barring some people from contesting or intimidating people to vote for a certain candidate or even corrupting the votes, it is clear that the electorate are denied the free choice of candidates. This is a dictatorship contrary to democracy where Parliament must be elected in fair and free elections.

(ii) POLITICAL PARTIES

Political parties were not allowed during the colonial period. In the late 1950's when the political ban was lifted, there was no national party in existence and even the first African elected members to Legco in 1957 were unable to accept the Leadership of one of themselves. KANU was then formed as a Mass-Party. But it was dominated by the Kikuyu and Luo tribes which aroused fear in the smaller tribes. The later formed tribal association which later merged to form KADU. During the independence negotiations rivalry was between KANU and KADU, the latter in a bid to champion minority rights. At independence, KANU won majority seats and formed the Government.

But KADU's life was short due to a number of reasons. Firstly, KADU had failed to win many votes. KANU seemed to have overwhelming support and KADU's hopes of winning mass support to form a Government seemed rare. Secondly, the two mainly differred in approach rather than ideology. After a guaranted of the fundamental rights and freedoms in the Constitution, the desires of KADU were implemented and members were not unwilling to join KANU. Lastly, the Government had all along been doing its best to frustrate KADU. For example, the Government was opposed to Regionalism (majimbo) which were the best armoury of KADU in controlling the Government. It was argued that Regionalism would retard nationhood and Economic development; and the

Government even refused to hand over funds allocated to the Regions. Due to frustration, the members of KADU saw no future in their party and crossed the floor to join KANU. On 10th November, 1964 KADU was declared dissolved.(11)

Kenya became a de facto one - party state. But in April 1966 then the Vice-President mr. Oginga-Odinga, resigned. With about twenty others they crossed the floor and applied to be recognised as the official opposition. The application was accepted on 28th April 1966 and KPU was born.(12) This alarmed the Government. For one, KPU differed fundamentally with KANU ideologically. Whereas the former had revolutionary policies leaning to socialism the latter ~~was~~ had conservative, capitalistic policies leaning to the West. On the other hand, KPU was composed of radicals who had resigned from KANU.

The Government took offence against KPU immediately. An amendment (13) which forms S40 of the Constitution was introduced. By it, a parliamentarian who resigns from one party to join another loses his seat. The reason was to stop these political acrobats from fooling around with the public. (And in the mini - elections that resulted therefrom, KPU won a number of seats and showed it was a power to reckon with!) Although this may be good in principle if we argue that a member is elected due to the policies of the party he supports, ~~But~~ this cannot hold water in the case here.

When KADU members crossed thefloor to join KANU in 1964, no-one raised a finger and it was only introduced when members began to leave the Governing party. It is therefore obvious that this was a Government move to curb further defection in any case I do not think the section should have applied to the KPU members as they had crossed the floor when amendment was effected. This can be supported by the fact of employment of laws in relation to the preservation of public security. Under them, some KPU officials (including the secretary) were detained in 1966. Further frustration was effected through civil servants. For any person to hold a public meeting he had to have a licence, issued by civil servants who owed allegiance to the Government. Such licencing was withheld from KPU members thereby denying them communication with the masses (14). These frustrations continued until 28th August, 1969 when, just before elections, KPU leaders were detained and the party was banned.(15) From then to date, Kenya became a 'de facto' one-party state.

A number of reasons have been advanced in favour of one-party system(16). Firstly, it is argued that successfully meeting of the enormous task of development demands a strong leadership, which is easier in one-party systems than in multi-party systems. If parties keep taking leadership,

it is detrimental to development in this age of ideological differences. Each party may implement policies the effect of which is to undo what the other has done. But this is not so. One-party systems expose the electorate to the dictatorship the very idea of democracy opposes. It is the electorate who know what policies they like. If they like the policies of one party, they will keep electing it. With only one party it is hard to control arbitrary Government actions and this then encourages the power-hungry leaders to ban opposition parties.

Another argument is that in developing countries where disease and other calarmities are the order of the day an emergency may occur needing instant action. If it be a multi-party system, the procedural requirements may cause delay, unlike in one-party systems. But this also is a blanket. Whenever there is a genuine emergency the tendency is for all parties to unite and take a common stand and act accordingly. In Italy for example, when "terrorists" kidnapped and later killed Aldo-Moro in 1978, all the parties including arch-rival communists rallied support behind the government and appropriate measures and means of dealing with the "terrorists" were endosed. The danger with one-party states in this regard is that they encourage corruption. Since there is no opposition to scrutinise and criticise government maladministration corruption is rampant.

The reason for favouring one-party systems seems to be in the fact of colonialism. The colonial administration was characterised by brutality, suppression and unlimited power, ~~where~~ Opposition was rare, as the colonial government could not allow formation of parties, so as to contain nationalists. Our leaders were brought up in this system, and are foreign to multi-party systems. Added to this are

the unlimited temptations and open chances to accumulate wealth when one is a leader. Any move that threatens his position must be suppressed, as he would not like to give way to others. But whatever the case, one thing is clear; that:

> "..... nothing appears to us so definite a proof of dictatorship as when the dictator destroys, as he is logically driven to destroy, all political parties sace save his own".(17)

Thus, it is personal ambitions that drive the leaders to ban opposition parties.

(iii) PARLIAMENT

Parliament has failed miserably in its functions. In legislation, Parliament only plays the formal role of "rubber-stamping"(18) executive legislation. Although any member can introduce a bill in Parliament, it is only the Hire Purchase Act(19) that originated from a private member (the late J. M. Kariuki) has been enacted in independent Kenya. The reasons are that to introduce a bill, the member must seek leave and explain its reasons and objects. Also, he must meet all legal and drafting expenses. These, especially the later discourages members since there is no guarantee it will be accepted. This leaves legislation to stem from the executive.

Although extended discussions of bills ought to take place, a number of reasons have made this impossible. Firstly, the executive rushes bills very fast through Parliament. The best example would be the infamous "Ngei" Constitutional Amendment Act.(20). This Act was rushed through Parliament at tip-top speed to amend S27, with retrospective effect, to give the President power to pardon

people barred from contesting elections due to bein guilty of election offences (purpose was to pardon Ngei who had been so barred). Secondly, MPs are not given ample time to study and understand Bills. Being full of legal terminologies and the Mps lack the expertise to enable them to appreciate the language or its effects; they rely on explanaions by the executive. Lastly, the tendency is to amend the laws by adding to or, substracting from the existin sections of the Acts. It becomes impossible to assess the general effect of only a few words on the whole Act. The effect of all these is to make the executive the real legislator and Parliament only sanctions executive policy. Maybe the MPs should group and hire trained ~~law~~ lawyers for advice and the government should aid them by providing funds.

The provisions for financial control are complicated. But money bills must originate with the executive, and no public money can be expended without the sanctions of Parliament. Parliament should also control matters regarding the consolidated fund. This function is strengthened by the office of the Auditor-General. Although appointed by the President, he is an officer of Parliament. His function is to audit Government ministries and S105 gives him accoss to any documents he deems necessary. After auditing, his report is sent to Parliament. His reports are especially important to the Public Accounts Committee whose function is to see that public money has been lawfully used for the purposes designated. If there is an opposition party, the chairman and most members must be from the opposition. But on the whole, Parliament lacks basis of control. Without an opposition party, due to the increasing complexity of estimates and the fact that the Auditor-General's report

is given after the money has been expended, parliament can, only offer mild criticisms and not really control finances. Consequently, mismanagement and outright corruption are not uncommon.

Parliament has hopelessly failed in controlling the executive. The strong point of this lies in the no confidence vote.(21) But this has not been a threat to the Government due to certain reasons. First, is the lack of an opposition party. We saw in Chapter II that one of the main uses of an opposition is that it scrutinieses Government policy critically and make use of Government mistakes to win votes. The battle is usually in Parliament and the opposition can easily exploit the power of the vote. And due to fear the Government cannot be lax in formulating policy and as such an opposition party helps control the executive. Second, the executive wields enormous power which can be applied against critical MP's. For example in 1975, MartinShikuku, a fiery MP, contended in Parliament that KANU was dead and in this was supported by the then deputy-speaker Marie Seroney. Contrary to the absolute privilege granted by law (22) to communications in Parliament, the two MP's were detained.(23) Although the Government denied that the detentions resulted from the allegations in Parliament, the Public Security Act was invoked only to legalise its actions. This instills fear of criticism of the executive in Parliament. Third, a seat in Parliament promises benefits. Since the President has power to make most of the beneficial appointme

and since criticising the executive may be interpretted as an affront to the President, no MP is willing to fall out with the executive. If anything, MP's go to sing praise to the executive in Parliament.(24) Last, though not least, the vote is impossible due to Government trickery. To keep it out of reach, the executive in Parliament has been enlarged by appointing many ministers and many more assistant-ministers(25) Being part of the executive, they have sworn to support the Government, and even if the vote of " no confidence" were attempted it is unlikely it would win the necessary majority.

The consequence of all these is that Parliament is important vis a vis the executive. Instead of Parliament controlling the executive, the executive controls parliament. It has been summarised thus:-

> "For radicals (add dictators) ----- the task of the House was not to talk over and often talk out measures. If a party has been elected on a given programme ---- the public wanted these measures passed. This was an early sign of the leaderships reach over the heads of the House to the electorate. The voters had pronounced and (radicals said that) the House should give up its extensive powers; the measures endersed by a majority at the polls should be passed with reasonable rapidity. This view, the increasing tempo of legislation and the use of procedures of the House to obstruct measures ---- led to the first restrictions on the private member's capacity to interupt or hold up business whenever they liked -------". (26)

This in effect has left us under the dictatorship of the executive. This is contrary to democracy as envisaged in the Constitution.

(iv) THE JUDICIARY

The judiciary in Kenya cannot be hailed for its implementation of the law. As the constitutional "watchdog", the judiciary should come to the aid of the aggrieved party. The judiciary should not shrink in the face of the executive or rather;

> "It is clearly of great importance that justice be dispenced even - handledly in the courts and that the general public feel confident in the integrity and impartiality of the judiciary. Where the Government of the day has an interest in the outcome of the proceedings, the court should not act merely as the mouthpiece of the executive". (27)

This is only possible where the courts are ready to uphold the law fearlessly. If an executive act is ultra vires its lawful authority it should be restrained accordingly. For example, in Wadhwa and Others V. City council of Nairobi (28) the defendent, in persuance of the policy of "Africanisation" sent notices to the plaintiffs, who were Asians, asking them to quit market-stalls in the City - so that the stalls may be given to "Africans". The plaintiffs challenged the validity of the notices contending that the action by the city council was discriminatory contrary to the Constitution. They therefore sought the court to declare the notices void and grant an injuction restraining the defendant from implimenting them. The court found that in fact the action of the defendant was discriminatory and said:

> "------- I am satisfied that the plaintiffs are entitled to declarations to the effect that any acts done or to be done by the defendant by way of implimentation of the resolution (to Africanise) are or would be contrary ---- to (the Constitution) and therefore unlawful and --- that the notices to quit ---- are void ----, In addition, it is reasonable that the plaintiffs be protected from further disturbance in purported persuance either of the resolution --- or of the notices ---- and there will be an order restraining the defendant in that behalf".(29)

The injuctions were issued against the Council but this may have been because the Government had no direct interest. But the principle is good.

But Generally, courts have not refused to act as the mouthpieces of the executive. The general public has in fact no basis of feeling confident in the integrity and impartiality of the judiciary. Where the executive has an interest, the courts have favoured it. For example in Ooko V R (30) the plaintiff was detained in 1966. The detention order contained his surname but different first names. He challenged the dention alleging that first, he was detained under the wrong name, sedond, he was not furnished with the reasons for his detantion within the prescribed time (31) and last, the reasons furnished to him were not detailed. To the first allegation, the court ~~told~~ held that inasmuch as the Minister was satisfied that the detantion was necessary for public security "a partial mistake in naming the person to be detained should not necessarily have the effect that the person should be

released from detantion when he is the person intended to be detained". The court further found that the grounds were furnished in time but they were not sufficiently detailed. But, refusing to be persuaded by an Indian decision (32) where the release of a detainee had been ordered due to insufficiency of similar details, the court held these was not sufficient to warrant the detainee's release; and the remedy was for the Government to furnish him with detailed reasons. It appears the detainee should have been released as his rights had been violated. The court shrank in the face of the executive.

Another case casting doubt on the indipendence of the judiciary is Mwithaga V.R. (33) The appellant, who was a controversial MP, was arrested and charged for an offence alleged to have been committed twenty months earlier, and no reasons were given for the delay. Prosecution was commenced just before by-elections in which Mwithaga was candidate. Despite the triviality of the offence (causing harm to wife in assault), the accused was refused bail. Eventually, the two - and - a - half year imprisonment given him, though legal, seems to have been out of proportion. Reasonable persons concluded that all this was done persuant to the executive desire to put Mwithaga out of the election race.

Lastly in 1979, Anyona brought an action seeking a temporary injuction against the Kisii receiving officer to restrain him from refusing to accept his nomination papers. The High court found that the plaintiff's rights had not been infringed.

infringed. Consequently, the court refused to grant the injuction and, although Anyona had qualified to contest, the receiveing officer refused to accept his nomination papers. (34) Anyona had been a fiery MP before he was detained in 1976, coincidentally.

But the executive has its ways where outright pressure may fail, by passing Acts that nullify court decisions. In 1975, the High court nullified the election of Paul Ngei and barred him from contesting for five years (under S35(4)) after finding him guilty of election offences. Immediately, the Kenya Constitution (Amendment) Act (35) was rushed through Parliament. It amended S27 and gave, with retrospective effect, the President power to pardon those barred from elections after being found guilty of election offences; and Ngei was pardoned. The Acts successful aim was to nullify the decision of the court; the executive had what it wanted.

The main reason advanced for the failure of the judiciary in its function is that:

> " --- courts in colonial times were by and large deliberate allies of the regime, and this long-standing attitude is not one that can be forgotten overnight". (36)

Bu t this is not so true. In an executive bid to have a free hand in carrying out its desires, the control of the judiciary is paramount. This is more so when we consider the fact that the judiciary is Kenya is run by "marcenary" judges of foreign origin (37) These "marcenaries" are easy to intimidate by using such threats as deportation, especially bearing in mind that it is doubtful they can make a career in

their countries of origin. The security of tenure under S62 cannot act as a bar as the executive can manipulate the tribunal to recommend a removal. As such they do not want to fall out with the executive and even act as the mouth piece of the executive. It is hard to feel confident in the impartiality and independence of the judiciary.

(v) HUMAN RIGHTS

Despite the clarity of the provisions for the protection of fundamental rights and freedoms, the practice has been to violate then uncompromisingly. They have been made a mockery of, and they have proved to be of no effect against the executive. The executive does what it wants, whether or not it is contrary to these provisions.

Among those most abused is the right to life. It is guaranteed thus:

> 71(1) No person shall be deprived of his life intentionally save in the execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.

Sub-section (2) enlists circumstances where the deprivation of life is not contrary to sub-section (1)ie. if it is the result of reasonable force employed in defence of any person or property, or to effect a lawful arrest or preventing escape of a person lawfully detained, or in suppressing a riot, or to prevent commission of an offence by that person, or as a result of war.

But during the last few years it has been the 'order of the day' that newspapers would carry headlines like "Police Shoot Down Gangster". The fact is that the police had been authorised to shoot dead "gangsters". When an MP questioned under what law the police murders were perpetuated, then the Attorney-General, Njonjo, said that "they have my authority". (38) Despite the withdrawal of this "shoot - to - kill" order by the successor to the office of Attorney-General Mr. ~~Mr~~. James Karugu(39) the "shoot - to - kill" order must be condemned with the bitterest of terms. It is among the most violent violation of the Constitution. But the new ruling by Mr Karugu is most welcome as it had been too long overdue, and we wait to see how it works.

To begin with such an 'authority' was ultra-vires the Attorney-General, and void as he was not a court. The right to life is sacred and nobody should be denied it unless it is absolutely necessary. The supposed gangsters were killed if they refused to obey a police "stop" order. S77(2)(a) provides that persons charged with an offence will be presumed innocent until they plead or are proved quilty; and this should apply with more force to persons neither arrested nor charged. Therefore, the policemen were killing innocent persons. As such, the Attorney-General who "authorised" the murders and the policemen who perpetuated them were principle offenders and should have been ~~tired~~ tried accordingly.

By analogy to the privy council decision in Liyanage v. R (40) the directive to kill was void ab initio as its effect was to oust the jurisdiction of the court. S77(1) provides that each person charged with an offence shall be afforded a fair hearing by an "impartial and independent" court. The effect of the directives was to give the police the role of prosecutor - witness - judge - executioner. If the directive was null and void, the Attorney-General and policemen were just like any other murderers. In any case, the supreme court of Kenya held in Ndegwa V. President and Members of the Liquor Licencing Court, (41) where some defendants had acted as prosecutors, witnesses and judges and cancelled the plaintiff's licence, that "we have no doubt ---- that according to a line of authorities (they) must be held to have been biased". Therefore, with lack of jurisdiction and impartiality, the policemen ought to have been punished severely.

It may be argued that the police murders were perpetuated in a bid to effect an arrest or in preventing a crime and therefore justifiable. But such an argument holds no water, unless the gangsters were shooting at policemen. S71 says a killing is ~~only~~ justifiable only if the use of force is to the extent "reasonably justifiable in the circumstances". S77(4) further provides that "no penalty shall be imposed for any --- offence that is severer in degree" than the maximum provided by law. Most of the so-called gangsters were would be thieves and burglars, though they were branded 'robbers'.

Some of them were not even carrying firearms. Such offences as thievery carry a much less severe sentence than death. To kill in their prevention would be ultra vires S77(4). And to kill in their prevention would be applying unreasonable force and cannot be justified; it should be condemned.

Even the freedom of expression has not been honoured as per S79, which provides that no person shall be hindered from enjoying this right without his consent. In 1975 for example, Martin Shikuku contended in Parliament that "KANU" is dead", and was supported by the then deputy-speaker Marie Seroney. In defiance of S3 of the National Assembly (Power and Priviledge) Act (cap 6) which guarantees freedom of speech in the Assembly, the two MPs were detained,(S42) under the blanket of the Preservation of Public Security Act. On the other hand, in 1979, some people were barred from contesting the elections. On 17th October, the University students demonstrated in the streets saying that such barring was wrong as it violated a persons constitutional rights. Two days later, a directive from President Moi (who is the Chancellor) ordered the insitution closed from 13th October for students to "participate fully" in elections.(43) But in reality, it was a "disciplinary" action for the students "misbehaviour".

It has been argued that :

> "No knowledgeable person has ever suggested that Constitutional safeguards provide in themselves a complete and indifensible security. But they do make the way of the transgressor, the tyrant, more difficult. They are ..... the outer bulwarks of defence." (44)

But in Kenya, this seems to be a dream. With the power wielded by the executive both over the judiciary and Parliament, the guarantees are nothing more than typed pieces of paper. With the power to bring into operation Part III of the Preservation of Public Security Act under S83 Constitution, the Kenya tyrant, has a free hand and the guarantees in no way make his way difficult.

CHAPTER III

FOOTNOTES

1. The East African Standard; 17th & 18th November, 1969
2. Weekly Review; 3rd January 1970
3. Daily Nation; 5th October, 1979
4. He is now Assistant Minister in the Ministry of Water Development.
5. I am a member of this constituency
6. Those I talk to could not remember the dates whereas the others denied knowledge of the incidents.
7. I was among the audience at Eldama-Ravine
8. In stations like Maji-Mazuri, Baringo Secondary School, Narasha etc. only a fraction of those registered voted; according to eye-witnesses.
9. He was promoted to D.C. after the elections.
10. The presiding officer and the assistant swore nothing had gone wrong. They had carried out the instructions on which they had been briefed with all others.
11. Ghai & McAuslan: Public Law and Social Change in Kenya - Nairobi (OUP) 1970, P 212.
12. Ibid at 322
13. Act No. 17 of 1966
14. Kaggia V R, Criminal Appeals Nos. 582 & 583 of 1968 (unreported).
15. Politics and Public Policy in Kenya and Tanzania (edited Barkan & Okumu), 1970 P 90.
16. Macpherson: The Real World of Democracy - (OUP) 1975 PP 24 - 26
17. G.J. Laski: Parliamentary Government in Great Britain - London (Allen & Unwin) 1972, P. 71

18. Griffith: 14 M.L.R. (1951) PP 279 - 96

19. Act No. 42 of 1968. By the time it was passed, it had been watered down to suit the executive and not what Karituki intended it to be.

20. Kenya Constitution (Amendment) Act No 2) of 1975

21. S59(3)

22. National Assembly (Powers & Privileges) Act (cap 6; S3)

23. Weekly Review: 20th October, 1975

24. For example when the President directed that primary school children be served with milk, the Parliament praised the directive instead of evaluating it first; it was going to mean a heavy burden on the Public Fund whereas the milk would mean almost nothing as it was taken once or twice a week, not to add that it was at a time when the Republic was under an acute financial stress and hence the directive should have been opposed.

25. There are today 26 Ministers (excluding Attorney-General) and 51 Assistant Ministers; out of 158 elected and 12 nominated members.

26. J. Mackintosh: The Politics and Government of Britain - London, Hutchison & Co. 1977 P 136

27. de Smith: Constitutional Law and Administrative law - Harmondsworth, 1973 P 336.

28. (1968) E.A. 406 (High Court)

29. Ibid. at 415; per Harris J.

30. Civil Case No. 1159 of 1966 (High Court) (unreported)

31. S83(2)(a)

32. Ram Krishan V Delhi (1953) A.I.R. 318

CHAPTER III

33. Criminal Appeal No. 185 of 1975 (S.R.M's Court, Nakuru)

34. Daily Nation; 17th, 18th and 19th November, 1979.

35. Act No. 2 of 1975.

36. Robert Martin: Personal Freedom and Law in Tanzania - OUP - 1974, P 56.

37. Out of the 23 judges in Kenya only about 3 are black.

38. Daily Nation May 27th 1980.

39. Weekly Review, 20th June, 1980.

40. (1967) A.C. 259.

41. (1957) E.A. 709.

42. Weekly Review 20th October, 1975.

43. Daily Nation 18th October, 1979.

44. Cower: The foundation of Freedom - 1960, P 119.

CHAPTER IV

CONCLUSIONS AND RECOMMENDATIONS

(A) CONCLUSIONS

We have seen that democracy denotes a government where the power is in the hands of "the people". "The people connotes "the masses" or members of the "lower class" - who are the majority in society. To avoid a cumbersome and unstable government this power can only be used indirectly by controlling the government. In Kenya, and other liberal-democratic systems, ways and means of exercising this indirect control have been evolved. Prime among these is to give the people the power to oust the government through the legal means of elections. This long-range control is effective in that the government has to pass acceptable measures in order to woo the confidence of the electorate. But as we have seen, this long-range weapon has been deprived the masses of Kenya. The constitution has been rendered more or less useless by the establishment of a de facto one party state, as it was intended to cater for a multi-party system. There being only one party, the need to vote has been eliminated as those who are nominated by the party are automatically declared elected. Worse still, the party lacks a precise ideology on which it could claim to be elected. We may be fooled by the fact that the constitution establishes the electoral commission, an independent body, to deal with voting matters, whose members have security of tenure.(1) This may give us the impression that at least in the nominational elections, the people can still exercise their power. This belief may be strengthened by the fact that at

every election a number of the sitting MPs and Ministers lose their seats. But as we have seen, KANU has ordained itself with the untimely and uncalled-for power to determine what persons are to contest and who are not to. By so doing, the executive has usurped the power belonging to the masses. In this regard, Kenya falls far short of a democracy.

This long-range control was to be effected by the establishment of more than one political parties. With many parties, the electorate will have the ~~opportunity~~ variety to choose a government ~~power~~ from. Being better-placed to know the activities of the government, the opposition will transmit the knowledge to the electorate who then become a real threat to the government. Due to this threat, the government will avoid blunders as far as possible. But opposition parties in Kenya have been suppressed by hook and crook. This leaves the executive to be the all-powerful and in control. In this direction, there is no democracy in Kenya.

The masses' power is strengthened by the establishment of an elected Parliament. It is the supreme body in the state and is the people's representative. It is suppoesed to control the executive by refusing to sanction unbecoming measures. Being the representatives of the people, this ensures that power is still vested in the people. But in practice, the executive has manipulated everything and now ends up controlling Parliament. Over the parastatal bodies and the civil service, which bodies effect a lot of government business, Parliament has no control. It may be true that

occasionally, critisism has been devastatingly levelled at the government by the MPs and even Ministers and their assistants. But these have not been carried through to their reasonable end. With the shadow of the Preservation of Public Secturity Act hovering all over, and the fact that the executive has the power to make appointments and dismissals to lucrative jobs and ministries the role of control has been curtailed and such critism are at most luke-warm. The executive has therefore hijacked the power vested with Parliament and this is an abuse to democracy.

To enable the people to execise their power without fear the constitution has extensively provided for the protection of the fundamental rights and freedoms. Most important in this regard is the freedom of expression. Through it, the people, and especially the malcontents, can concert their plans and consolidate their opinions. The electorate can be served with thought-provoking ideas so as to decide what they want and what they do not, whereupon they execise their long-range control accordingly. But practise has shown that anything said that is compatible with reason is interpretted by the executive to be treason. Through the deployment of the Public Security Act the freedom of expression has been totally suppressed. By the use of this Act and other cunning methods, the people and their representatives live in a state of fear, and due to this fear they have conceded to the executive. This is nothing other than a direct affront to democracy.

To effect the fundamental rights and freedoms (inter alia), and to curb arbitrary, action by the executive against the citizenry, the constitution has established an independent and impartial judiciary. It is to champion the people's rights. All unjustifiable and unlawful acts by the executive and its organs are to be declared to be unconsitutional and of no effect. That is why its independence and impartiality is of prime importance. But practice has made us lose confidence in the judiciary. Where the executive has an interest, the judiciary has shrunk and refused to champion these rights. If anything, the judiciary has become the mouthpiece of the executive . With this lack of proper protection, the executive has been left to have unfettered powers, rather than the people. This surely has strungled democracy in our system of government.

The result of all this is to make one point clear. That is that Kenya has fallen victim of what was envisaged when it was said that the American and British systems of government:

> "could easily evolve into dictatorships of the the executive in the absence of an organised opposition, free elections, (freedom of expression) and deeply rooted traditions of individual rights". (2)

Practice shows that this is exactly what is happening in Kenya. Despite the fact that our leaders are always preaching liberal-democratic principles that we inherited from Britain, there are no institutions to support them. In fact, the constitutional provisions intended to incorporate these principles into our political system in practice, are made to work against the very ideal of democracy. They tend to promote, to the delight of the

ruling clique, authoritarianism and dictatorship. And surely, if we are not ready and willing to admit that we in Kenya are not living under a democracy but rather under a dictatorship or an authoritarianism or a funny mixture of both, we cannot deny the fact that at best, ours is the rule of a minority, a few and consequently an oligarchy.

(B) RECOMMENDATIONS

If democracy is to be realised in Kenya, in my opinion, three BASIC things are necessary.

(1) First I think the Public Security Act should be repealed or at least thoroughly revised. It was passed by the colonial authorities for the sole purpose of perpetuating their dictatorship by the suppression of nationalist opposition. It gave the colonial government unlimited powers whenever it was employed. Its continued existence after Independence is abhorent. It gives the executive the power to act without limitation and even to derogate from the Constitution. This is incompatible with democracy and only enhances dictatorship. By legalising detention without trial, it denies us the liberty of expression and the freedom of association which are of prime importance to democracy. As we have seen, it has occationally been deployed to abate mode of opposition. In any case, as the African Bar Association resolved in 1971, the use of detention without trial is contrary to the rule of law as it amounts to a denial of justice and should not be resorted to.(3)

(2) Also the amendment of the Constitution (and other laws) with retrospective effect should be discontinued forthwith. It amounts to a defeat of Constitutionalism and the rule of law. The rule

of Law demands that every act done must be justifiable in accordance with the Law. By effecting amendments with retrospective effect, it means that an act that can be justifiable today may be declared unlawful a few months later. This is surely a serious derogation from the rule of Law. It keeps the citizenry under a constant state of fear and denies them that freedom of action generally. And as we have seen, retrospective amendments to the Constitution have been aimed at undesirable ends such as frustrating opposition or in a bid to defeat justice. Such uncalled-for amendments can only promote dictatorship.

(3) Thirdly, I think, the ban on political opposition must be lifted. This will culminate in the formation of opposition parties. With opposition parties, the long-range control can be fully utilised at the polls. It may be that there will emerge more than one opposition parties and in any case the opposition may not capture as many seats as would threaten the Government. But even if it were so, the Government would not consciously pass unacceptable measures lest the opposition wins more confidence with the electorate. This way, the executive will be contained in its rightful place. On the other hand, the now-domant Parliament will be re-activated. As the opposition

members will not be seeking or expecting favours from the Government they will not shrink in the face of the executives. They will thereby be doing exactly what democracy demands, that is, Parliament as the representative of the masses is to criticise and control the executive.

CHAPTER IV

FOOTNOTES

1. S40
2. Brown: New Dimentions in comparative Politics - Bombay (Asia Publishing House), 1962, pp. 18-19.
3. East African Standard, 14th August, 1971.

SELECTED BIBLIOGRAPHY

BOOKS

1. Barkan & Okumu: Politics and Public Policy in Kenya and Tanzania, 1970
2. De Smith: Constitutional law and Administrative Law (Harmondsworth) 1973
3. Gatzel: Politics of Independent Kenya (East Africa Publishing House) 1970
4. Ghai & MacAuslan: Public Law and Political Change in Kenya (Oxford University Press) 1970
5. Laski H.J: Parliamentary Government in Great Britain (Allen & Unwin), 1972
6. Mackintosh J: The Politics and Government of Britain (Hutchinson & Co.) 1977
7. Macpherson: The Real World of Democracy (Oxford University Press) 1975
8. Nwabueze B. O. : Constitutionalism in Emergent States (Associated University Presses) 1970
9. Wilson J: Philosophy (Heinemann) 1972

ARTICLES

10. Clair-Palley: "Rethinking the Judicial Role" (1969) Zambia Law Journal 1
11. Ghai T P: "The Government and Kenya Constitution" (1967) E.A.L.J. (December)
12. MacAuslan: "The Evolution of Public Law" (1970) Public Law 5
13. Roberts-Wray: "Human Rights in the Commonwealth" (1968) I.C.L.Q. 908
14. Scotton J.F.: "Judicial Independence and Political Expression in East Africa (1970) 6E.A.L.J.

OTHERS

15. Daily Nation
16. East African Standard
17. Weekly Review