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THE KENYA PROVINCIAL ADMINISTRATION

A STUDY ON THE CONTINUITY
OF COLONIAL INSTITUTIONS

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A DISSERTATION PAPER SUBMITTED IN PART
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By

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DEDICATION

It would be very wrong,
very wrong indeed!
To think as he was already thinking -
That there would be no change
Maybe in the life of the nation
itself, there would be no change -
There would only be a change of the EMBEZZLERS,
THE HUNTER and the HUNTED
AYI KWEI ARMAH- THE
BEAUTYFUL ONES ARE NOT YET BORN.

This DISSERTATION IS dedicated to the BEAUTYFUL ONES.

PREFACE

The role of the Provincial Administration as an extension of the ideology of the group in power, and its effect on human rights, has never been investigated. This is an attempt at traversing this neglected area. This investigation has in effect been ambitious for it has attempted to bring within its ambit most of the general aspects which underlie the authoritarianism of the provincial administration and the effect of this on human rights. Consequently, an attempt has been made to examine the provincial administration since its inception to the contemporary period. This examination therefore brings into sharp focus the historical element with the hope that this would help explain the nature of this institution. A study of history has been useful in the sense that it has demonstrated that in the last 75 years of its life, the social milieu of the Kenyan society has not changed in any significant way. Consequently, the provincial administration has also not changed and this study therefore has been predicated on a plane of historical continuum. In this respect, there has been therefore a deliberate attempt not to introduce a break into the paper in the form of many chapters, sub-chapters and titles and sub-titles. This exercise has been deemed necessary for it, as it were, mimes the movement, the

outstretching and progress (if only in terms of time) of the provincial administration on the historical plane.

This author, however, hastens to add that this is not a pioneering work on the provincial administration but an analysis that is based on an "economic" approach. It is therefore the approach that is novel.

In this examination certain abbreviations have been used, principal amongst these being, EAS, stands for " THE EAST AFRICAN STANDARD" and P.C., "PROVINCIAL COMMISSIONER", D.C. " DISTRICT COMMISSIONER" and D.O. " DISTRICT OFFICER". Because of its general nature a constant reference to the footnotes and appendixes will be found useful.

Several people have made this examination see the print. Principal of these being Mr. Ander's Karlsoon (SIDA) whose insight into political thought has often guided me through the mysteries of political analysis. Mr. Francis Muchiri for all the help he gave me during the actual writing of the final draft. Mr. Maina Muirāri, a colleague, for his vocal and moral support. Mr. Okoth Ogendo (lecturer) Department of Public Law, who kindly allowed me to use Chief Magero's orders. Mrs and for the actual typing of the manuscript.

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To all of these, I put it on record that I am highly indebted.

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INTRODUCTION

This paper is concerned with an examination of the Provincial Administration in two specific respects. In the first place, it endeavours to trace the history of the Provincial Administration since its inception to the contemporary period. And secondly, it concerns itself with a discussion of the manner in which the Provincial Administration has affected fundamental human rights. These twin aspects of the thesis of this paper necessarily call for a discussion which is both broad in scope and content. However, due to the limitation required of a work of this nature, this type of discussion cannot be effected in great detail. Consequently, the nature of the thesis dictates that the discussion be of a general nature. It therefore is intended to highlight those aspects which touch on the twin problems under investigation. In this respect the discussion on human rights features, though not very significantly (in the independent era) because of the inaccessibility of material relating to actual infringements of human rights. The absence of an ombudsman and the sterility of the High Court in redressing such infringements has meant that during this period only a theoretical approach would be safe. (infringements

of human rights during the colonial period does, however, figure significantly in this discussion).

It is on this basis that throughout this examination, the Provincial Administration is conceived of as a living reality, changing as the society changes. It is seen as the external manifestation of the ideology obtaining in the Kenyan society during specific historical periods. Thus, the provincial administration is not considered as an isolated phenomenon but as the principal institution which translates the needs, aspirations and fears of the group in power. The discussion of human rights in this paper thus comes around in a periphery; it is preceded by an examination of the ideology for it is ultimately the ideology of a certain society which determines and quantifies the rights of the individual.

The central argument in this paper is to the effect that there has not been any significant changes in the functions and the general nature of the provincial administration. This argument is predicated upon a broad theme which proceeds along this basis; that there have been no fundamental changes in the structures of the Kenyan society. Since the attainment of independence, the only

change being that of the colouration of the rulers. Consequently, the provincial administration has been inherited into the independence institutional structures as a central tool in the hands of the executive. The internal themes which are part of the wider theme and which pervade the whole examination concern themselves with; the principal insecurity (factors which brought this about being examined) which obtained in the periods under review. The socio-economic structures which have given rise to a ruling class and in whose service the provincial administration is on the ^ebeck and call.

The first chapter directs itself to an analysis of the genesis of the provincial administration and the establishment of the colonial state in Kenya. The second chapter is deliberately given little significance for it is really a short break in the continuity process, because the structures contemplated therein were never fully implemented, especially in respect to the provincial administration. The third chapter does actually take on from the first chapter and concerns itself with an examination of the provincial period in the contemporary period.

At the onset, however, a word must be said about fundamental human rights in Kenya. The lack of sources for gauging the abuse of administrative powers suggested to the present author that a field research would be helpful and fruitful. But in the event, this exercise was a dismal failure. The unfruitfulness of this endeavour led this author to seeking the reasons underlying its failure- These reasons emerge from the discussion proper. In any event, human rights in Kenya, as in other Commonwealth countries are nothing to be proud of for they are all subject to derogation except those provisions relating to property (defining the ideology of Kenya) and conscience. Coupled with this is the ignorance of the mass of people and the fact that the superior courts, and even the legal profession are somewhat, both culturally and physically, remote from the majority of the people. This is why it is conceded that a discussion on human rights in Kenya within the perimeters of the limitations and approach of this paper during the independence period can only be general and theoretical.

PART I

CHAPTER I

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THE COLONIAL PERIOD

"There can be no thought that the administrative service is a kind of scaffolding to be taken away at some future date, it cannot be taken away, for without it the whole body would collapse."

THE MINISTER FOR AFRICAN AFFAIRS (MR. JOHNSTON) LEG-CO DEBATES, VOL. LXXX, PART I, 20 MAY 1959, COL. 997.

Goran Hyden¹ has argued that a particularly strong force shaping any system of administration in any society is the ideology of political leadership regarding the proper role of the state in that society. The ideology is the principal force which directly or indirectly defines that system of administration for it calls forth and subsumes, as it were, the other factors (such as geographical, historical and peoples attitudes towards the administration) to its service. Consequently, an examination of the provincial administration during the period under review must necessarily be predicated upon the ideology dominant at that time.

I) THE IDEOLOGY OF COLONIALISM

Colonialism has been defined² as a system of rule which assumes the right of one people to impose their will upon another. This type of rule is predicated upon certain general assumptions. The colonial ruling class

shared almost without exception the twin assumptions of virtually any form of colonial system that the colonized people were not capable of governing themselves; "under the strenuous conditions of the modern world."³ This view was expressed by the League of Nations. In its view the relationship between the interests of the colonized and the coloniser was seen as not an essentially exploitative and contradictory one. Further it was taken for granted that Britain's presence in Africa (and indeed of the other powers) was a prerequisite for the promotion of "progress in civilization and justice."⁴ It was therefore sought to modify the institutions of the colonized people.

However, underlying these general assumptions was the imperial economic impulse. In order to create an economic structure viable to the metropolitan country there was a need to create superstructural institutions of which provincial administration was only one. The administrative structure was to service the economy by maintaining law and order, collecting taxes and regulating conflict within the African population and with regard to their relations with expatriates. This structure, to the extent that economic activity was not interfered with, was kept minimal.⁵ (Presumably to avoid overhead costs.)

These assumptions were to be implemented by men who came armed with a tradition of paternalism, assuming as they did the moral superiority of the governors, and the cultural inferiority of the governed. This complex of assumptions conditioned the exercise of all forms of political, economic and social control in the colonial world.⁶ They thus sought to legitimize a political, economic and social system which was geared at creating an optimum economic situation for exploitation.

The colonisers may have believed in the assumptions stated above, but as Roger Van Zwanenberg⁷ has pointed out "ideologies are deeply believed by the participants. The ideas are internalised, which gives all ideologies which have any lasting power a level of autonomy and allows a number of contradictory facts to be accepted at the same time."⁸

In the establishment of the institutions of the colonial state, the provincial administration played a very crucial role and it's to its establishment that the discussion must now turn:

II) THE GENESIS OF PROVINCIAL ADMINISTRATION IN KENYA

The fall of the Imperial British East African company can be said to have provided the incentive for the establishment of administration in the then East African Protectorate.⁹ This was on the basis of recommendations

submitted by Sir Gerald Portal in 1893 who was the agent of the consul General at Zanzibar. He advocated an official administration and the construction of what was to be later called the Kenya-Uganda railway. The railway was to be built pursuant to British signature to article I of the General Act of the Brussels conference.¹⁰ Paragraph III suggested "The construction of roads and in particular railways, connecting the advanced stations with the coast was necessary... substituting economic and rapid means of transport for the present means of carriage by man."¹¹ The significance of the former suggestion was that it meant the increased control of the government and the opening up of the sparsely populated high country to settlers. Accordingly in April, 1893 the administration of Uganda was transferred from the company to the imperial government and the whole area as far East as Naivasha was transferred to the Uganda Protectorate proclaimed in 1894 to be returned later to the East Africa Protectorate (Kenya) in 1902.¹²

By this time Kenya was under the foreign office. This was an old tradition of the mechanics of British imperialism; territories freshly acquired were first entrusted to the foreign office and when it was decided to take a more aggressive stand they were transferred to the colonial office. The establishment of an

administrative structure during the foreign office rule (which lasted until 1905) was effected by means of expeditions. The most significant of which were those against the Nandi in 1901, 1905 and 1906, Embu in 1904, Gusii 1904, 1908, Kipsigis in 1905 and Bukusu and Kabras in 1907.¹³ The use of military might was thought to be necessary as Sir Donald Stewart had pointed out, in his view "the country can only be properly administered only when the natives have been knocked into shape."¹⁴

Thus during the foreign office period the main preoccupation was with setting up a skeletal administrative structure which would facilitate the smooth construction of the railway. The commissioner at Zanzibar was the central figure in this administrative structure, the whole protectorate was carved out into a few large provinces under sub-commissioners (later designated provincial commissioners) who were responsible to the commissioner. Ghai and McAuslan¹⁵ have pointed out that early foreign office legislation¹⁶ in respect to the East African Protectorate did not attempt to provide for a comprehensive system of administration, for this institution was directed only at creating one requisite condition which would ensure that the construction of the railway was carried out without major hindrances.

On this basis the type of personnel and the system of administration was conditioned by the need to bring these areas along which the railway was to be laid under control. The personnel was of a very poor quality. A foreign office official admitted this by commenting¹⁷ "As long as civil servants were enlisted from the gutter, a high standard of administration could not be expected." As the construction of the railway drew to an end it became increasingly clear that British imperial policy was assuming a more aggressive stance in respect to East Africa. This stance could be detected from the opinions of the imperial officers. They thought that it was necessary "to tap the undoubted resources of the country without assuming too many responsibilities of the administration." It is pertinent at this stage to point out that since at this time the administration was limited in experience and had no clear guidance from above there was no co-ordination and officers had perforce to adopt an ad hoc solution to each crisis as it occurred. This type of administration was not suitable, for the tapping of economic resources required an efficient administration. As a result the administration of the East African protectorate was transferred to the colonial office in 1905 which had a lot of experience in the administration of colonial territories.

With this transfer a number of significant changes occurred. Under Governor Girouard¹⁸ recommendations for the setting up of a provincial administration were effected

and accepted by the colonial office. Girouard demanded that regular administrative records should be kept, both at provincial and district level. He called for a series of provincial and district reports. He established political record books and inaugurated a system of regular annual reports.¹⁹ These features of the provincial administration have been maintained from his time. Girouard can therefore properly be called the father of provincial administration in Kenya.

Girouard's reign is also significant in that he was instrumental in setting off the machinery for the creation of the "colonial situation." The concept of the "colonial situation" was created by G. Balandier in 1951.²⁰ This was to enable one to try to capture the dynamics of a colonial society after it was clearly established. That is to say, after the conquest, the basic socio-political fact in the colony proposes "a distinction and a hierarchy based first of all on criteria of race nationality, implying as a sort of postulate the excellence of the white race and more especially of that fraction which is the colonial power. Thus when the social political fact is actualized the result is a stratified society. Central to Balandier's construction therefore is the role of racism. The "colonial situation" in Kenya (which was created between 1905 and 1923) was actualized by the encouragement given

to white settlers to come and settle in Kenya. This encouragement was given cogent inspirations by Girouard who formulated policy in respect to settlers, this was officially accepted in 1909.²¹ Thus the root of the stratification of race in Kenya was planted. This brought about racial segregation and the exploitation of the inhabitants.

In the creation of the "colonial situation" British officials had a wealthy source of precedents from which they could draw. The Kenya system of provincial administration was based on the northern Nigerian model. Girouard's formulation of African native policy originated from South Africa. The reservation of white Highlands to the white settlers had its roots in South Africa and in respect to the acquisition of African Labour precedents in the form of Southern Rhodesia²² legislation were adopted and formulated. In all this the provincial administration was seen as the lynchpin of the colonial government.

Girouard's tasks at reorganising the administration may be seen when the type of officer who was to serve the administration is considered. There was a heavy emphasis^s on recruiting men with the qualities of character and broadly humanistic education which the British Public system was supposed to provide.²³

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From 1926 onwards on top of a general degree usually from Oxford, Cambridge or London, there was a one year post-graduate course at one of these universities - This was at first called the Tropical African Service course, later the colonial administration services course and finally the Devonshire "A" course. This course after 1945 provided background knowledge in Law, Anthropology, Economics, Agriculture and History. There was also a Devonshire "B" course which consisted of a year's guided reading and tutorials at one of the three universities.

But as has been pointed out²⁴ these courses were highly general. The real training for administrators had been done earlier in public schools and universities which instilled values which were basically upper middle class in origin.²⁵ This system of training was aimed at internalising the values of the upper middle class in England into the minds of the administrators.²⁶ The significance of this training was therefore to shape a type of administrator who would zealously guard the needs and ideas of the imperialist homeland and at the same time preparing him to justify the "colonial situation" and to be receptive to the settler's ideals.

Van Zwanenberg²⁷ has demonstrated how the provincial administration helped the settler economy through the recruitment of African cheap labour with

the other aspects incidental to this, like the setting up of reserves. It was used in the collection of taxes as the source of revenue to provide an infrastructure to support the settler economy. Finally it was used as the link between the African and the colonial government in the indirect rule system. In this context the African chief was part of the machinery of the provincial administration. The African chief, however, had no independence in his location. This may be well illustrated by the Headman's Ordinance of 1902.²⁸ Under this Ordinance a headman, appointed by the commissioner was required to keep order in areas adjacent to his village or villages. If an outrage (not defined) occurred in any area in which such a headman was responsible for the preservation of order, and the perpetrator of such an outrage could not be discovered, the sub-commissioner (later Provincial Commissioner) could in his discretion impose a fine upon the headman unless he could prove to the satisfaction of the sub-commissioner that the outrage could not have been prevented by reasonable vigilance on his or his people's part.

These functions of the provincial administration were at the very root of the imperial policy. The colony had to produce for the metropolitan country cheap primary products. To that extent the other superstructural

institutions in the colonial society were shaped in such a way as to consolidate this primary objective. The place of the provincial administration in the achievements of this object can be seen at a casual glance on the functions to which it was bestowed. The provincial administration was charged with,²⁹ exercising general control over local political activity, representing the state to the people especially in ceremonial activities and in mobilisation of the populace, serving as the executive officer to the local government, co-ordinating all government departments in the area, holding the ultimate responsibility for law and order, collecting local taxes, arbitrating local disputes and administering justice.³⁰ It was thus the hub of the machinery of the colonial government.

At this juncture it is essential to posit the question, namely, why was provincial administration chosen as the most suitable system of administration? As has been asserted elsewhere,³¹ this system of administration was a colonial device. It had been tried in northern Nigeria and had been found to be portentous. However, before the foregoing interrogatory can be answered, it is important to examine the structure upon which the administration was predicated.

It was predicated upon an essentially explosive situation which was more insecure to the extent that "capitalism (in the form of plantation economy) as a social system of production requires to extract a surplus from labour! Thus 'during the early stages of capitalism the methods of the extraction of a surplus ... are more violent than later on when the system is more widely accepted."³² Thus faced with insecurity springing from this type of economic arrangement, a strong system of administration which was adopted by Britain for her colonial territories had its roots in the Roman system of administration. Roman history has demonstrated that where there is insecurity (for the Romans were ruling people of diverse races, religions, and cultures) a particularly strong administrative system is required. The Romans achieved this by carving out their huge empire into provinces which were under the rulership of a representative from the Roman government at Rome. This representative was designated a governor; Bible readers are familiar with the fact that during the trial of Jesus Christ the Roman governor at Palestine was Pontius Pilate.³⁴ This system of administration provided for a bureaucratic machine which was ultimately controlled from Rome. Thus the Roman government had a bird's view of what was going on in the Empire.

Recent research on field administration by B.C. Smith,³⁵ however, demonstrates that the Kenya provincial administration portrayed features almost congruent to those of the French prefectoral system. Under this system the prefect is a delegate of the central government and the representative of the national interest in his particular prefecture. He is the ranking government officer in his region and all officers of individual ministries are subordinate to him. The prefect is part of the chain of command between the headquarters and the field for all governmental activities. He embodies the authorities of all ministries as well as the government in general. However, as B.C. Smith³⁶ points out, this system has been abandoned by France for it is ill adapted to modern needs. This system provides for a highly bureaucratic and hierarchical government machinery which is the central feature of provincial administration in Kenya. On the basis of these features this system of administration provides for a very autocratic and strong machinery. It was thus very valuable in maintaining stability in a system which was inherently preoccupied with insecurity.

In providing for a chain of command from the governor to the chief the colonial government was in command of colonial activity in Kenya. At the lowest ladder of this hierarchy was the headman who was given

wide discretionary powers under the Headman's Ordinance 1902³⁷ which has been reproduced as the chief's Authority Act,³⁸ in Independent Kenya. This manifests itself when the appendix is examined.³⁹

Thus what emerges from the foregoing is the control⁴⁰ aspect of the administration during the colonial period. As Colin Leys⁴¹ has shown "The provincial administration was primarily an agency of political control, not of rural development since the primary concern of the government was not the development of rural areas generally but to control rural development in the interests (of the settler and the metropolitan groups)".⁴²

As will emerge by the end of this discussion this role of the provincial administration has not significantly changed in independent Kenya. The colonial administration justified this on the basis of the Dual Mandate⁴³ which called for separate development for Africans and Europeans.

The foregoing discussion has been general in the sense that it highlights some of the more important aspects connected with provincial administration. It is thus intended to concentrate the discussion at a selected period in order to demonstrate how the provincial administration functioned on the ground.

III) THE EMERGENCY PERIOD (1952 - 1959)

The selection of this period is in no way arbitrary. It is at this period that the chief characteristics of the provincial administration as a control mechanism emerged. This period is isolated in order to bring into sharp focus the role of the provincial administration when faced with an essentially explosive situation. It is not intended from this discussion to demonstrate that the provincial administration was less powerful before this period, it is merely intended to illustrate the full scope of the nature and power of the provincial administration. This period put the provincial administration to test; it was called upon to control the Mau Mau uprising against the colonial government.

During this period the provincial administration was expanded both in number and in authority.⁴⁴ This gave it a dominant position over the other government agencies. Professor Gertzel⁴⁵ has argued that this dominance manifested itself by the subordination of the police to the administration in matters concerning the maintenance of law and order.⁴⁶ Provincial Commissioners and the District Commissioners chaired the emergency committees which were responsible for law and order as well as existing security and intelligence committees.

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The Provincial Commissioners were empowered by Governor Barring to issue orders to departmental officers in their provinces if the needs of the emergency required. The Governor delegated his power of detention to them. They were responsible for issuing permits for public meetings. They thus occupied a crucial part as the political agents of the executive. Examples of this are not far to seek; administrators were empowered to impose curfew or other restriction orders under the Preservation of order by Night regulations.⁴⁷ Under the outlying Districts Ordinance⁴⁸ the Governor or the administrators to whom he delegated his powers could declare districts "closed", the effect of which was to confer power on the administration to restrict, by means of the issue of licences, persons other than natives of the area from entering the district. These two examples will suffice here and a fuller discussion along this avenue will be relegated to the Human rights section.

All these powers were carried intact into the independence era. They were exercised pursuant to the Public Order Ordinance,⁴⁹ The Penal Code⁵⁰ the Chief's Authority Ordinance⁵¹ and the Agricultural Ordinance of 1955.⁵² On top of these were administrative rules and the Governor's directives. Because of the wide and discretionary powers of the provincial

administration the African nationalists called for its abolition,⁵³ but this demand fell on the colonial government's deaf ears.

During this period the concept of "closer administration"⁵⁴ was initiated. The exponents of this policy assumed that security would be more effective if the administrators were in closer touch with the people. The success of the provincial administration in this "trying" time was hailed by the minister for African Affairs for its performance.⁵⁵ "Closer administration" was not only directed at the central province where the Mau Mau uprising concentrated itself but was applied to the whole of the country. This took the form of District Officers being sent out to the divisions.

IV) THE CREATION OF A "POLITICAL CLASS"

After the 1940's British Official policy in regard to its colonies changed mainly to historical forces.⁵⁶ Lee has discussed how this policy was concretized in the colonies. This policy involved a process of the creation of a "political class" which meant envisaging the creation of a native 'elite capable of running the machinery

required to join the society of states in the comity of nations. The native elite which was recruited mainly (in the case of Kenya) from Africans in the colonial administration was to constitute the ruling class on attainment of independence. The completion of this process was seen as increased familiarity with the British way of life. The effect of this process was the creation of a type of African whose values, fears and inspirations were the same with those of the colonial master. The Times⁵⁸ in 1949 could still say "The people under temporary tutelage shall be enabled and encouraged to participate in the more sophisticated culture and political development of the ruling class".

This process was actualized by channelling educational benefits to this group of people and in central province this took the form of giving land to members of this new class.

During the period of Agrarian reform⁵⁹ the provincial administration played a central role in actualizing this process (the process had begun earlier⁶⁰); By the Forfeiture of Lands Ordinance⁶¹ land was taken away from the "rebels" and given to the loyalists. The administrators were charged with the

duty of achieving this objective. They were indemnified of any unlawful acts which they might have done in this respect by the indemnification ordinance.⁶²

Thus as Kenya approached her independence she was equipped by an African middle class which was to constitute the ruling class. Thanks to Governor Barring, the provincial administration was now organized in an unprecedented manner and was consequently a very powerful tool in the hands of whoever was going to take over. The subsequent history of this institution shows that this fact was never lost sight of.

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The expansion of the provincial administration was relative; the colonial government, as has been pointed out before in this discussion, endeavoured to keep the provincial administration minimal as a general rule. This is the underlying factor behind the indirect rule system which required Africans to govern themselves quite to a large extent as long as such a rule did not affect the interests of the colonial government. Since Kenya's neighbours did not experience an upheaval of such a magnitude as that created by the Mau Mau uprising their administrative structures (similar to Kenya's) were not significantly expanded. This explains

why for instance at independence the Tanzanian provincial administration was two-thirds that of Kenya.⁶³

So far this discussion has directed itself at the role of the provincial administration within the colonial ideology. It is now intended to focus the examination to the sphere of human rights, for the expansion of the provincial administration directly narrowed the ground upon which individuals could enjoy those rights which rightly belonged (and do still belong) to them. It is to this that the discussion must now turn.

V) HUMAN RIGHTS

The "colonial situation" had as its jurisprudential basis the "separate but equal theory" normally associated with professor Hart.⁶⁴ The idea itself had currency in classic Greece, whose main proponent was Aristotle.⁶⁵ Aristotle posited that in a community where there were slaves discrimination could not be said to exist if the slaves were treated "uniformly and equally" but "separately" from the other members of the community. This theory has been used in U.S.A. and Canada to promote segregation as in the case of; PLESSY v. FERGUSON⁶⁶ and discrimination as in the case of

A.G. v. LAVELL.⁶⁷ And it is the theory underlying and justifying fascist South Africa and Rhodesia.⁶⁸ The significance of Hart's theory emerges when it is borne in mind that different laws, as will eventually emerge, were applied to the different races in Kenya. The administration of the natives was entrusted to the Native commissioner who was later to be responsible to the Minister for African Affairs. For clarity of analysis it is intended to focus the discussion on the effect of colonial laws to the African inhabitants who within the "colonial situation" were placed at the lowest ladder of the racial hierarchy.

In one of the first exercises of his legislative power, the Native courts regulations of 1897,⁶⁹¹ the commissioner for the East African protectorate armed himself with restriction of movement, in respect of any persons subject to the regulations if it was shown to the satisfaction of the commissioner, that the person was disaffected to the government, was about to commit an offence against the regulations or was otherwise conducting himself so as to be dangerous to the peace and good order in the protectorate. There was no appeal against the commissioner's exercise of this power, though he had to report on the same forthwith to the

Foreign secretary. These provisions provided for special powers which had the effect to deprive a person of his basic rights of movement, and of recourse to the courts. With respect to the basic right of movement similar deprivations obtained in the vagrancy regulations⁶⁹² which provided for the arrest of and detention of any person found asking for alms or wandering without any visible means of subsistence or employment.

The Native Passes Regulations⁷⁰ enabled the commissioner to make "such general or local rules for controlling the movement of natives into, out of, or within the limits of the protectorate as may from time to time appear to him to be necessary or desirable. The Preservation of order by Night Regulations⁷¹ (which have been commented about before) should also be seen in this vein.

The outlying Districts Ordinance⁷² has also been considered before in this discussion. Suffice it to say that there was a complete absence of any or adequate provisions for appeal, though this lack was offset by the residual supervisory powers of the colonial office, its powers of disallowance of, or prior approval for, legislation and the requirement that the action taken by local officials had to be

reported in certain circumstances. It is very doubtful whether in practice these provisions had a significant ameliorative effect.⁷³

As has been illustrated⁷⁴ under the special Districts (Administration) Ordinance⁷⁵ a denial of human rights was contained in laws obtaining in this ordinance which allowed collective punishment to the disregard of individual guilt or responsibility and the imposition of responsibility for the misconduct of others on one deemed to be in authority over them. This also obtained under the Stock and Produce Theft Ordinance.⁷⁶ Section 15 of this Act, authorised a magistrate not necessarily acting in a judicial capacity, on a complaint of stock theft to order all or some members of a tribe or a sub-tribe to pay compensation to the aggrieved party in specified portions (one of the factors to be considered was the ability to pay) if it was established that any member of that tribe or sub-tribe had been implicated in the theft.

It is important not to lose sight of the fact that the powers of the commissioner as discussed above were discriminatory for they were to be used only against those subject to the Native Courts regulations, Africans.

Manifesting professor Hart's theory as it was applied in Kenya to justify discrimination. It is also important to bear in mind that the powers of the commissioner were normally delegated to the officers of the provincial administration. It need also be added that during the creation of the "political class" in Kenya the administrators role in taking away land from the rebels and giving it to the loyalists was a deprivation of the right to property,⁷⁷ a basic human right.

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The courts attitude in this period was the upholding of racial discrimination. This may be illustrated by two cases where the court could have opted for different interpretations on the ground that such discrimination was repugnant to public policy. In the COMMISSIONER FOR LOCAL GOVERNMENT, LAND AND SETTLEMENT v. KADERBHAI,⁷⁸ The power of the commissioner of lands to impose restrictions on who could bid at auction sales was in issue. The commissioner had advertised the auction of town plots at which only Europeans were allowed to bid and purchase and had stipulated thereon that during the terms of the grant, the grantee should not permit the dwelling house to be used for the residence of any Asiatic or any African who was not a domestic servant employed by him. The commissioner's powers

were exercised pursuant to the Crown Lands Ordinance of 1915. This Ordinance made a distinction between the disposal of agricultural and urban land and the power to impose racial restriction or covenants was expressly granted only in the case of Agricultural land. It was argued by the appellants that therefore the commissioner had therefore no power to impose these restrictions on the disposal of land in towns. The judicial committee holding that prima facie the rights of the crown and its servants to dispose off crown property were analogous to those of the private owners, they had to observe the express terms of the statute, but apart from that they were free to impose what restrictions they chose. They thus held against the appellants. In the case of: A.G. v. KATHENGE?⁷⁹

The validity of curfew orders whose application was restricted to Africans only was challenged. Such orders were made under the public order ordinance of 1950 (as amended) section 10 of which provided that the curfew orders may be applied to "every member of any class of persons" specified therein. Without considering what might have been intended to be the proper purposes of this phraseology, the court held that it permitted discrimination against Africans as a race.

In the absence of written formal guarantees of human rights, at certain instances, the colonial courts could apply what was their view of the fundamental rights to the Africans. This obtained normally when the courts were considering certain statutory enactments. This manifests itself when recourse is had to case law;

In the case of KOINANGE MBIU v. REPUBLIC⁸⁰ The High Court struck down the African Grown coffee regulations which by section 3 (1) permitted discrimination, holding that the Governor's powers to make such discriminatory regulations were ultra vires.

In MUHURI v. ATTORNEY GENERAL⁸¹ The Court had to determine the validity of an order for compensation made under section 15 of the Stock and Theft Produce Ordinance (which statute allowed collective punishment). The court held that the effect of this section amounted to a deprivation of property and that since it was not an "order of the court in proceedings for the determination of civil rights or obligations." It was unconstitutional. This decision suggests that such provisions for collective punishment as still exist in the law must now be regarded as void.

In the case of DAVID KALATA S/O KINTY v. R.⁸² It was held that an accused native had the right to address the court at the conclusion^C of the case though

it was not the duty of the magistrate to inform the accused of this right. In R. v. BARNT BIN HASSAN⁸³ The court was of the opinion that an accused native had the right to legal representation. In WAMUTHANDI v. REPUBLIC⁸⁴ it was held that there was the necessity for the plea of accused to be recorded in the accused's own words in native cases. The case of R. v. RUKAGERI⁸⁵ stated that in order to avoid a miscarriage of justice to the natives the necessity for evidence to be offered before a charge could be framed was very important. Most of the cases discussed above related to the individual's right of the protection of the law and the legal process.⁸⁶

It is with this broad background that the Kenya society, a society characterised by racial discrimination which was predicated upon the false assumption of social Darwinism was to march boldly to the 'independence' era.

P A R T II

THE INDEPENDENCE PERIOD

THE PROVINCIAL ADMINISTRATION UNDER THE MAJIMBO
CONSTITUTION

The dominant features characterising Kenya on the eve of independence was a multiplicity of political parties ⁸⁸, representing the various interests of the different groupings in Kenya. This meant that there was not a single powerful political party in the country. This in 1963 the constitution which Kenya adopted has been seen ⁸⁹ as being a result of compromises in order to contain these different interests. Because of its compromise nature the constitution

"showed an amazing distrust of power . . . the underlying philosophy being that power is evil and that a weak if need be, incoherent government is a reliable safeguard against despotism"⁹⁰

In order therefore to reconcile the various conflicting demands , two safeguards were deemed necessary. Thus during this period (1963-1964) the constitutional document contained two elaborate schemes of power limitation - the first provided through the regional system itself and the other through the Bill of Rights provision ⁹¹.

During this time, however, the KANU officials had embarked on a country-wide campaign whose main objective was the establishment of a unitary form of government. At one such rally, rallies which were normally directed at organising public sentiments favourable to the objectives of the KANU officials, held at Ofafa Jericho in Nairobi, the then KANU secretary general Mr. Tom Mboya moved a motion where it is alleged that :

" thousands of KANU supporters rejected regionalism and gave KANU a mandate to establish a unitary government"⁹².

Mr. Ronald Ngala, the president of KADU at the time had foreseen the main objective and is reported ⁹³ as having said:

" KADU was prepared to defend the constitution which it had fought for"

Mr. Ngala must have recognised the fact that KANU had never really accepted the constitution and made no secret of its desire to change it, so as to abolish the safeguards to the regions. Mr. Ngala is reported as having added that this trend of affairs

" is not democracy , but the road to a one party state".⁹⁴

Mr. Ngala's prediction was accurate for the KANU officials who had a majority ⁹⁵ of members in the bicameral legislature and who formed

the government were able to delay the full implementation of the majimbo constitution ⁹⁶. In 1964 the death knell of this constitutional structure was sounded by a constitutional amendment which took the form of Act No.28 of 1964 whose effect was to delete all the non-entrenched regional provisions ⁹⁷.

The significance of the foregoing observations proceeds along the basis that an examination of the provincial administration during this period can only be effected theoretically for the constitutional structure was never translated into reality. This contention should be borne in mind when the analysis under the period in review is in consideration.

During this period the P.C. (with the title of Civil Secretary) was the head of the civil service in the region and responsible to the regional authority (the elected body) for co-ordination of the specific functions which the constitution allocated to the regions. In addition he was responsible for central government decisions as they were conveyed to him through the regional authority. Unlike in the colonial days the responsibility for law and order was taken out of the hands of the provincial administration. The standard, on the wake of controversies between KANU and KADU officials, carried an editorial on the exercise of powers and matters relating to law

and order, the standard, however, was used by the KANU officials to organise public opinion in favour of a unitary system of government. The standard stated that:

" the inspector-general at the centre was to appoint the civil secretaries in the exercise of powers relating to law and order. The civil secretaries were to be responsible in the first instance to their own regional authorities with a right of appeal to the Inspector-General. In a conflict of opinion, the dispute was to be referred to the national security council which was charged with keeping watch and ward-over national security".

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Therefore during this period the central government was in theory not to have direct control over the provincial administration. The responsibility for provincial administration lay with the minister for Home Affairs, then Mr. Odinga Oginga. This situation was to change by transferring the responsibility of provincial administration later to the President's office. However, this purported decentralisation had really no effect for the appointment of administrative officers lay with the central government. Professor Leys ⁹⁸ has commented on how Mr. Odinga claimed to have used the provincial administration for purposes of the central government. Consequently, the central government used the provincial administration to maintain a direct link between the central government and all parts of the

country independent of the regional framework.⁹⁹
This experience illustrated to the government the value of an administrative machinery that gave it a direct chain of command from the centre to each district and an effective communication network.

What emerges from the foregoing is the conclusion that provincial administration during the regional system of government had no impact at all in the country in the context of the regional structure. For the administration was responsible to the central government and was charged with the duty of co-ordinating those functions which were allocated to the regions by the central government. Consequently, one would need to be hesitant to make the submission that under the regional authority this system of administration would have been less dictatorial for the ultimate control of it lay with the central government. This is all the more true when it is borne in mind that the decentralisation of the administrative structures in Tanzania and Zambia (which are similar to Kenya's) did not substantially affect their authoritarian nature.¹⁰⁰

The other safeguard which was both internal and normative was provided for by the Bill of Rights provisions.¹⁰¹

THE BILL OF RIGHTS

The general scheme of this limitation had one remarkable feature - it distinguished between personal guarantees on the one hand and proprietary interests which KADU and its allies sought to sanctify on the other hand. These interests :

"were basically economic on the one hand and related to political victimisation of political groupings on the other".¹⁰²

With the dismantling of the majimbo structure this part of the constitution¹⁰³ in its historical perspective has suffered so many inroads that it forms a strong argument for discrediting such formal guarantees.

The effect of the majimbo constitution was intended to decentralise the highly hierarchical and bureauratic structure of the provincial administration. This was of course never implemented in practice. However, an important effect of the dismantling of the safeguards obtaining during the regional system was the disappearance of the important safeguard against political victimisation of those groupings which were not congenial to

those who were in power. Political victimisation of persons considered as being hostile to the government was an important pre-occupation of the KANU government . The provincial administration was to prove a deadly and effective machinery in discharging this duty. This, however, should form the subject of the next chapter.

CHAPTER III

THE PROVINCIAL ADMINISTRATION UNDER THE REPUBLICAN
GOVERNMENT

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" Kenya's system of provincial administration is one of the best in Africa - Although it is a colonial relic"

RIFT VALLEY P.C., MR. ISAIAH MATHENGE ON THE OCCASSION OF A PUBLIC LECTURE, DELIVERED BY THE SAME, AT MENENGAI MUNICIPAL SOCIAL HALL, NAKURU TOWN. DAILY NATION 12 DEC. 1975.

On the attainment of independence Kenya did not only inherit a powerful provincial administration, it also inherited the legacy of a weak party machinery. The importance of this observation emerges for it raised the fundamental question of who could legitimately claim to represent the people; the administrators within the provincial administration or the members of Parliament who were the elected representatives of the people? This is because the provincial administration was used by the government as the link with the people rather than the party machinery. On this basis it can be argued that the people were not represented by those persons whom they had elected but by persons appointed by the executive. The key to the question posited above lies in the weakness of

the ruling party. It is therefore imperative to examine the reasons underlying the weakness of the party.

THE RULING PARTY (KANU)

The weakness of the KANU party after independence has its roots in the past. Fundamental to the disunity within KANU, and indeed other party organisations in Kenya has been tribal parochialism¹⁰⁵ and the fact that party politics in Kenya are rooted in personalities rather than in structures. The former observation manifests itself when it is borne in mind that before independence there was a multiplicity of political parties based on ethnicity,¹⁰⁶ prominent among these were; KAU which was a Kikuyu party¹⁰⁷, there was the Coast African Peoples Union, the Masai United Front, the Taita Citizens Union, the Baluhya Political Union, the Northern Province People's Progressive Party¹⁰⁸ and Archdeacon Owen's Kavirondo Taxpayers Welfare Association¹⁰⁹. This situation can be explained by the fact that in 1955 the colonial government had permitted Africans to establish political associations at district level. What even made this situation worse was the fact that leaders were encouraged to maintain or develop their own source of power.

Factions were fostered in competition for influence and control of the party, they became an end in themselves, being more important than the success of the

party itself. The Reserve system also encouraged this.

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What was, however, the greatest factor in rendering the party weak was personality clashes. These clashes assumed a serious dimension after independence and pervaded the whole party machinery. The Standard ¹¹⁰, for instance, printed a picture of minister for Housing Paul Ngei and backbencher William Malu wrestling on the ground outside the Machakos KANU branch office of which they both claimed control. The most serious personality clash was, however, that between Odinga and Mboya. This was based on ideological differences and personal ambitions especially in regard to the competition on who would be most likely to succeed Kenyatta. This personality clash had the effect of realigning the party between the Mboya and Odinga ¹¹¹, factions. This split was so serious that it has been considered as being a factor in the assassination of M.P. and Odinga advisor P.O. Gama Pinto on February 24th 1965 ¹¹², Odinga by resigning from the party in 1966 lost to Mboya. However, the resignation of Odinga did not eliminate factionalism in KANU. To fill the vacuum left by the Odinga wing, a new group with support from Kenyatta began to organize against Mboya and Ngala. These leaders were; Njoroge Mungai, Mbiyu Koinange, Charles Njonjo, Paul Ngei and Daniel Arap Moi. Like the Mboya - Odinga split, the new clearage

involved maneuvering over the succession to Kenyatta and attempts to block a likely candidate (in this case Mboya)¹¹³. At this time, President Kenyatta is reported as having been very ill ¹¹⁴. But before the drama could be played out Mr. Tom Mboya was assassinated on July 5, 1969 in a Nairobi street.

Mboya's assesment of the factionalism that was endemic in the KANU leadership in 1963 is very close to the truth,

" Iam not saying there are no differences between African leaders, but I think the difference centre not so much on ideology as on the ambitions and personalities of the leaders ¹¹⁵ ".

It was thus the weakness of the party organisation that was the most significant factor in establishing parliament as a public forum for national debate. Members of parliament thus sought to control their party executive from within, the significant bddy was the KANU parliamentary group. This group was disbanded by President Kenyatta in 1965 after defeating the government on two major issues in Parliament.¹¹⁶

~~The~~he parliamentary group was critical of the government's policies, ~~this was~~ because of the accomodation of new recruits from KADU. This caused considerable realignment within the parliamentary party. The effect of this according to Odinga ¹¹⁷ was that it

"introduced dangerously divisive policies and forces into KANU and made possible the dilution of KANU's policies from within".¹¹⁸

Although the party was inherently weak and President Kenyatta's power was unquestioned there were many conflicts between administrative officers and the party officials and members of parliament. In 1967 one of the backbenchers commented (in a debate about the behaviour of the provincial administrations); " in my opinion sir, I tend to think that the present government is a government of civil servants.¹¹⁹ And as early as 1965 the M.P. for Butere, Mr. Shikuku had moved a private members motion that civil servants should be responsible to the elected representatives of the people.¹²⁰ The fundamental cause underlying this conflict was one of leadership. For the decision to use the provincial administration, which had been transferred to the President's office in 1964, as the agent of the executive brought into sharp focus the conflict which has been considered before in this examination. This was a role assigned to the provincial administration by the president ¹²¹. With the ever increasing conflict between the administrators and the politicians ¹²² President Kenyatta sought to resolve it. In 1968 therefore he convened a meeting of administrators and politicians at Nakuru ¹²³. The clear implication of this meeting was that it associated the administration with the party, it, however, became clear that where the administrators and the politicians were in conflict it was the former

who were to prevail. This fact was viewed with consternation by seminar on local government ¹²⁴, which was convened in the wake of the transfer of most of the essential services from the local government to the central government, and hence within the ambit of the provincial administration, it put its views bluntly in these words,

"The central government be requested to examine the possibility of the immediate abolition of the provincial administration whose continued existence . . . is a demise of self-government to the people of this country ¹²⁵".

The views of the local government delegates contained a lot of truth for by the end of the first decade of independence Kenya had clearly become what has been called a "party state". This term was first used by Professor Aristides Zolberg ¹²⁶ to describe regimes in West Africa. These regimes were characterised by the blurring of the boundaries between the ruling party and the government. In Kenya, at least from the proclamation of the Republican system of government, the boundaries between the parliamentary party of KANU and its external party, and between the ruling party, the provincial administration and the government became too difficult to define. This blurring of these boundaries made Kenya similar to a "party-state". The provincial administration's functions were considered to be those of the government itself; nation-building,

security and development. The provincial administration in the context of the "party-state" was thus mystified, this ~~is~~ clearly emerges when it is considered that the powers of the Provincial Administration spring from the President himself; a highly mystified figure. President Kenyatta is president of KANU, Chairman of the parliamentary group, Head of the government and Head of the State. A constant symbol manifesting the "Party state" in Kenya is the frequent singing of "KANU Yajenga Nchi"¹²⁷ by high officers of the armed forces and Police and at public ceremonies.

From the outset the KANU Government had been convinced of the need to have a strong central government and consequently a powerful provincial administration. This need was predicated upon a situation of insecurity which pervaded the whole country. This took the forum of factional bickering within KANU (a factor considered before in this account) and concerned the role of the state in respect to the economic plight of the Kenyan people. These factions translated themselves into the "radicals" and the "conservatives" within the ruling party ¹²⁸. The latter's pre-occupation was with the ownership of private property. This was first stated explicitly by Mboya in a speech at the then University College, Nairobi ¹²⁹. In 1974 President Kenyatta could still say,

"

nationalisation will not serve to further the cause of African socialism . . . there would be a partnership of private enterprise and government participation".¹³⁰

The former faction did not necessarily advocate for a socialist system of government and its emphasis was on the need to create an egalitarian society. It was against this background that sessional paper number ten ¹³¹ was introduced by the Conservative Wing of the party. The paper stressed the view that for development, private enterprise should be more encouraged than the public participation in the economy.

The conservatives ¹³² were not in any way concerned with the creation of an egalitarian social system and pre-occupied themselves with the enlargement and consolidation of the "political class", a process dating back from the colonial times. Consequently, the KANU Government through foreign aid and the creation of credit finance institutions embarked on this process ¹³³. These institutions were; the A.F.C., the I.C.D.C. and the Commercial Bank and were used to finance the members of the intended "middle class". The financing was heavily directed to-wards the Kikuyu tribe and this led to fears of Kikuyu dominance. In 1965, Mr. Okelo Odongo (then Assistant Minister for Finance) speaking at a United Club luncheon said:

"There is no place for establishing one clan or one tribe as a ruling class in African society".¹³⁴

In respect to the bureaucracy the Ndegwa Commission ¹³⁵ was instrumental in promoting class inequalities. Having the "functional theory" ¹³⁶ as its assumption, this commission made recommendations which made the highest salary scale in the civil service thirty-eight times more than the lowest salary ¹³⁷. The development of an incipient social class has in fact been an issue in two elections in Kenya ¹³⁸. One characteristic of this middle class was its managerial nature. Thus conflicts which might arise between the civil service and other political structures are mediated by a basic convergence of interests between civil servants, politicians and other members of the middle-class.

The creation of the class structure was effected when the promises which independence could bring to the people were still fresh in their minds. Since the KANU government was not devoted to the aspirations and the economic welfare of the people the omnipotence of the government was asserted time and again. That the KANU government was concerned with consolidating the interests of the "middle-class" is well illustrated by their claims to rural development. Typical of this rhetoric was President Kenyatta's address to administrative officers in 1965 when he said that of the

"from now on civil servants' merits will be judged by their contribution to the development plan. They will be called upon to explain their failure to achieve their targets".¹³⁹

But since the colonial economic infrastructure had not changed, the government sought to raise the economic welfare of the majority of the people through their own efforts by personal contributions to Harambee projects. The government was represented at these occasions by members of the Provincial Administration. The self-help projects by 1966 provided a significant contribution to rural development in Kenya. Between 1964 and 1967 their contribution to capital formation increased from K.£.0.06 to K.£.1.03m. Amongst the prominent completed projects at the time were 1,148 primary schools, 70 secondary schools, and 90 health centres ¹⁴⁰. In this light, it can be asserted with Professor Leys ¹⁴¹ that the provincial administration as the government's agent was not minded to assume a direct and active part in rural development.

It is significant that the Ndegwa Commission recommendations called for the introduction of specialist services within the provincial administration for purposes of rural development. The administrators ¹⁴² were "generalist" cadres many of them having been promoted from subordinate ranks during the wave of Africanisation. Except for the senior members of the administration (who were brought up in the colonial tradition) the administrators were the same

officers as in the colonial period. The University of Nairobi had replaced the universities of London, Cambridge and Oxford as the training ground for administrators. The graduates from the University of Nairobi, many of them personally ambitious and leftist-petty-bourgeois¹⁴³ were given the type of training which would help further the interests of the ruling class in the rural areas. Their alliance is well illustrated by the fierce demonstrations which they waged against the Kenya government following the slaughter of J.M. Kariuki, himself a symbol of petty-bourgeois reformism in Kenya¹⁴⁴.

The bottlenecks created by the Kenya government in rural development administration can only point to the conclusion that even if any development was to be effected in the rural areas it would only help further the interests of the national ruling class.¹⁴⁵

What emerges from the foregoing is the fact that the mass of people were alienated and the alienation process left the country woefully insecure. Consequently, between 1964 and 1969 there were eleven¹⁴⁶ constitutional amendments whose ultimate objective was the strengthening of executive power. By 1969 therefore, Kenya had moved even closer to the concept of an administrative state. The provincial administration as the executive arm of the government and its link between the government and the people

grew even more powerful. This was because the provincial administration derived its legal powers from the powers of the executive¹⁴⁷ as provided for in chapters two and three of the Kenya constitution¹⁴⁸. Thus the Provincial administration became even more identified not only with the executive arm of the government but on the basis of the "party state" with the whole government machinery. The role of the provincial administrations in this respect would be seen during the National Day Celebrations where the members of the public are normally addressed by the P.C.'s, the D.C.'s, D.O.'s and the chiefs. The provincial administration also became increasingly political.

It took an active part in political rivalry. Mr. Ronald Ngala had, at one point, claimed that the administration was assisting Msanifu Kombo's faction at the Coast.¹⁴⁹ Consequently, Coast P.C. Mr. Isaiah Mathenge had suspended all KANU election meetings in the Coast province¹⁵⁰. The best illustration of the political role of the provincial administration is in respect to their licensing¹⁵¹ power on political meetings. This is well illustrated by the case of KAGGIA v. REPUBLIC¹⁵². This licensing power is given pursuant to the Public Order Act¹⁵³. Kaggia, the vice-president of the

opposition K.P.U. was invited to attend a ceremony for the opening of an office for the sub-branch of the party in South Nyanza, where he was holidaying nearby.

When he arrived there, he went to a shop which also served as the office of the sub-branch and met the members of the local committee. Though there was a great conflict in the evidence, it was accepted by the court that a large number of people crowded inside and outside the shops where Kaggia made a speech of a "strongly political flavour". All this time, including the journey to the place of the sub-branch, he was followed by the Police with whom he had been chatting previously. After he had spoken for about fifteen minutes the senior police officer who was present asked him to stop, whereupon Kaggia "promptly complied" and the people were asked to leave. It was not disputed that the meeting dispersed in an orderly manner. On these facts Kaggia was charged with holding an unlawful meeting or, alternatively, taking part in such a meeting. The lower court convicted him on the first charge and sentenced him to one year's imprisonment. On appeal, which was both against conviction and sentence, it was argued that the meeting was not of a political nature but merely a meeting of party officials, that there were not fifty persons present to constitute it a "public meeting" (as required by the Act) and

that the accused had not held it or convened it. The High Court held that it was a political meeting for the purposes of the Act since the content of the speech was so heavily political and that there was also present persons other than officials, whose actual number was immaterial. The Court was also of the opinion that Kaggia had "held" the meeting. The Court, however, reduced the sentence, which it found excessive, to six months and was impressed by the fact that there was no premeditation, and the meeting was orderly and dispersed promptly after the request of the police. Kaggia was incarcerated because he had not acquired the prior permission of the D.C. for this "political" meeting. This power of the provincial administration is supplemented by the wide powers given to the police for the control of public gatherings under the Police Act ¹⁵⁴.

The political role of the provincial administration is also illustrated by the first test between K.P.U. and KANU which took place during the local government elections of 1968. In late July of that year at Nakuru, President Kenyatta presided over a KANU conference. This was attended not only by party officials but also by the country's P.C.'s and D.C.'s. Shortly thereafter, the D.C.'s in their capacity as returning officers, ruled that the nomination papers of almost all the K.P.U. candidates had been completed incorrectly,

a deficiency found on none of the KANU papers ¹⁵⁵.

The elimination of the K.P.U. candidates demonstrates the power of the provincial administration for the members of this institution were the returning officers during elections. This power also reared its ugly head when political squables threatened to erupt in violence during election campaigns.

Wide discretionary powers have been given to the provincial administration under the outlying District Act, and the Special District (administration) Act ¹⁵⁶, under which operation by 1967 there were 19 wholly or partly closed districts ¹⁵⁷. In respect to the latter Act; if the P.C. or the D.C. is satisfied that a person is conducting himself as to be dangerous to peace or good order, or has a blood feud, he may order his removal to another place. The more significant provisions are those which enable control to be exercised over whole groups of people through collective orders. If in the opinion of the P.C. or D.C. any tribe or a section of a tribe is acting in a "hostile manner towards the government . . ." he can order the arrest of all or any members of such a tribe or prohibit them from leaving the areas reserved for their use and order the seizure and detention of all their property. The former Act has been brought into operation in the North Eastern province and the situation there has close parallel to the emergency period.¹⁵⁸ The exercise of the powers granted under this Act were considered in the case of R.v. HAJI

MOHAMED JAMA¹⁵⁹ which demonstrates how arbitrary such such powers may be exercised.

One other important function of the provincial administration which is almost an everyday occurrence in present day Kenya is their role in leading delegations to the president. Most of these delegations come from particular districts, accompanied by teams of traditional dancers and choirs of school-children, organised by the provincial and district officers and led by the MPs and local councillors from the particular area. They give displays of dancing and singing, the leaders present cheques for various causes sponsored by the President and they express their sentiments of loyalty and respect and finally outline various needs and grievances, in return the President thanks them, commends the dances and songs, exhorts the delegation to unity and hard work and discusses its requests, explaining why some can be met, and undertaking to attend to others¹⁶⁰. The foregoing is an illuminating example of Kenya as a "Party State".

At this stage, it is necessary to draw some general conclusions which emerge from the foregoing account. The inherent weaknesses of the ruling party has meant that it is not the elected representatives of the people who are the link between the people and the government, but members of the provincial administration. It is significant to note that in Tanzania

members of their equivalent to the provincial administration are also required to be party members. The Tanzanian situation is important in this respect; that it gives credibility and legitimacy to this institution, a situation lacking in Kenya. In Kenya the politicisation of the provincial administration has been advocated for especially by the former M.P. for Butere, Mr. Shikuku ¹⁶¹ and also by the late senator Makasembo ¹⁶², along the lines of the Tanzanian system of administration. But this politicisation presupposes a powerful party which has yet to be constituted in Kenya. The creation of an incipient African middle class by the Kenyatta government meant that the colonial economic infrastructure and superstructure was in effect reconstituted and as a result the role of the provincial administration acquired the same roles as its colonial counterpart. This was brought about by the strengthening of the powers of the executive presidency. Thus by 1968 President Kenyatta's powers as the head of the government were similar to those of the colonial governor, which powers were exercised directly through the provincial administration. And since, as has been argued, these powers were discriminatory in the colonial era, it can be asserted that in independent Kenya they are discriminatory, not on the basis of colour, but on the basis of property ownership and in sustaining the survival complex of Kenyatta and his government. In this order

of things the role of the provincial administration has been increasingly that of control ¹⁶³ arising from insecurity emerging from the socio-economic arrangements of the Kenya society.

The accretion of power to the President and hence the provincial administration was effected at the expense of individual rights and it is now pertinent to examine this area.

HUMAN RIGHTS

The accretion of power to the executive led to the derogation of all individual rights in chapter five of the constitution ¹⁶⁴. This was explicitly stated by section 83 which derogated all the fundamental freedoms except those of property (under s.75) and conscience (s.78). This derogation was carried out on the basis of a vague statement of public security ~~and public morality~~ (which underlie the insecurity pervading the country). This had been aptly put (in a nutshell) by the late Tom Mboya when he said:

"The rights of freedom to assemble are not absolute rights . . . They are bound to be curtailed by the necessity to ensure that they are only used as long as they promote national interest and are used responsibly ¹⁶⁵".

What even affected the whittling down of human rights in Kenya was the creation of the "party state", which undermined the concept of constitutionalism;¹⁶⁶ which latter concept which calls for a clear separation and exercise of the powers of the executive, the legislature and the judiciary in order to guarantee the liberty of the individual. The High Court's functions in redressing infringements of these rights was merely reduced to that of ensuring compliance with procedural requirements. This was stated by Justice Rudd in the case of P.P. Ooko v. Rep. of Kenya¹⁶⁷. When he said:

" The truth of those grounds (i.e. alleged threat to security) and the question of necessity or otherwise of . . . continued detention are matters ultimately for the minister rather than this court".

Field research¹⁶⁸ carried out by the present author to determine the views of the people on infringements of their human rights has been unfruitful. The research was carried out though it was clear that on the basis of the voluminous literature¹⁶⁹. In this area such rights do not obtain.

During the research the following phenomenon suggested itself as being central to the unfruitfulness of this exercise; in a country where the personalisation of rulership rests from the need to legitimize the

system, the government is a mere abstraction, incomprehensible to the majority of the people. However, a national leader is visible to them. The idea then in making him an incarnation of the state is to create a visible focus of loyalty.

"The personalisation of loyalties and movements; writes Rupert Emerson, must be attributed in large part to the lack of experience and sophistication of the mass of the people who require the personal figure of a leader to bring political abstractions down to the level of comprehensive reality"^{L70}

The concept of a "party state" which has been discussed before in this account clearly emerged from the responses of the people who were interviewed. No distinction could be detected from the answers given between the provincial administration, the party, or the government at large. The mystification of the institutions of government has been commented upon, this was in this author's view the greatest obstacle to the field research. The research was deliberately carried out amongst people who had little or no formal education, the majority of who are poor people- for they represent the majority of the people of Kenya and the derogation of human rights affect them more seriously than the other members of the Kenya society. For clarity of perspective it was sought to educate a few of those who were interviewed on demystifying the governmental institutions. The impression given was that such education was very abstract though the questionnaire was deliberately made simple and straightforward ¹⁷¹. These people also are not cognisant of rights

they may have in law-mainly because the superior courts and even the legal profession are somewhat remote-both culturally and physically from them and relatively inaccessible. Consequently, questions put forward about the provincial administration were directly linked to President Kenyatta's government and ultimately to the President himself and hence no useful criticisms were offered.

One conclusion is, however, quite clear; the tremendous accretion of power to the executive, which translated itself at eliminating all possible opposition to it at the expense of other balancing institutions¹⁷², has seriously affected human rights. This is very true of the provincial administration which is tool in the hands of the executive. Coupled with this is the fact that its powers are not defined in a comprehensive legal manner, and because of their discretionary nature, are subject to abuse¹⁷³. The executive and hence the provincial administration is the basis of the whole governmental edifice in Kenya. It is on this basis that the recommendations¹⁷⁴ for the setting up of an ombudsman in Kenya to review abuse of administrative powers was rejected.¹⁷⁵ This was obvious; for the encouragement of such a review would strike at the highest authority in the land. From all the evidence available, no person or body of persons is prepared to do this at the present.

CONCLUSION

" FOR WE MUST STRIVE FOR A FORM OF SOCIAL ORGANISATION, THAT WILL FREE THE MENACLED SPIRIT AND ENERGY OF OUR PEOPLE. SO THAT WE CAN BUILD A NEW COUNTRY AND SING A NEW SONG".

NGUGI WAS THIONG'O - HOMECOMING : ESSAYS ON AFRICAN AND CARRIBEAN LITERATURE CULTURE AND POLITICS P.50.

Throughout this paper, I have endeavoured to show that there have been no fundamental changes in the institutional structures which Kenya inherited on the eve of independence. It is now necessary to draw some general parallels. Just as the provincial administration was used during the colonial period to service the colonial economy so is it used in Kenya today to promote the interests of the ruling class.

The state of insecurity obtaining in the colonial period due to the economic exploitation of the inhabitants by the settler is translated today by the insecurity directly related to the alienation of the mass of the people due to the failure of those in power to create at least an egalitarian system of government. The use of the provincial administration during the colonial days against the nationalists is today manifested by the use of the same institution to stifle any organized

or disorganized opposition to the government.

The type of administrator is significantly the same in contemporary Kenya as in the colonial period. (this is well demonstrated by appendix 2).

The infringements of human rights documented in this account during the colonial period may be said to obtain in contemporary Kenya on two grounds. Firstly, because colonial enactments have been adopted and simply given the stamp of the present Parliament. And secondly, the accretion of power to the president had by 1968 made him as powerful (is not more powerful) as the colonial governor and since the authority of the provincial administration springs from the president this has in effect become a very powerful institution. This state of affairs has been brought about by the restructuring of the socio-economic structures so that now instead of talking about the settle superiority one may talk of the middle class (or comprador) superiority and instead of "social Darwinism", of " economic-Darwinism".

Within this general structure of the Kenyan society the provincial administration has emerged forcefully as a control mechanism to those who are either unfavourably placed with the group in power

or to those who have to labour and toil in order to perpetuate the present stratification of the Kenyan society.

With this background in mind, it is safe to argue that the provincial administration is not for the general welfare of the common Kenyan. In this respect it would be naive to attempt to enumerate reforms which would help cushion its adverse effects. This is because it is animated, and given direction by the ideology of those in power. A reformation of this institution must therefore ultimately aim at the ideology in existence - it is only when the structures underlying this ideology have been removed that the "beautiful ones" shall be born, they can then, and only then, join hands together, and sing a new song!

FOOTNOTES

1. GORAN HYDEN, ROBERT JACKSON AND JOHN OKUMU (ED) - DEVELOPMENT ADMINISTRATION, THE KENYAN EXPERIENCE - E.A.P.H. , NAIROBI (1966) p. 15.
2. BRETT .E.A. - COLONIALISM AND UNDERDEVELOPMENT IN E.AFRICA, LONDON, HEINEMANN, 1973 p. 36.
3. ARTICLE 22 OF THE COVENANT OF THE LEAGUE OF NATIONS.
4. LUGARD, SIR , F.O., THE OUAL MANDATE IN BRITISH TROPICAL AFRICA, ENDINBURGH, BLACKWOOD, 1922 p.132.
5. Supra BRETT.
6. IBID BRETT , see also; RODNEY, WALTER, HOW EUROPE UNDERDEVELOPED AFRICA, DAR-ES-SALAAM, TANZANIA PUBLISHING HOUSE (Third impression, 1974)
7. ZWANBERG, ROGER VAN, COLONIAL CAPITALISM AND LABOUR IN KENYA 1919 - 1939, NAIROBI, (ealb) 1975.
8. IBID ZWANBERG P. 282.
9. MUNGEAM G.H.,BRITISH RULE IN KENYA 1895 - 1912 London , Ch.1.
10. CARSON, J.B. THE ADMINISTRATION OF KENYA COLONY AND PROTECTORATE, OXFORD UNIVERSITY PRESS. p.20 (1949)
11. 1889:
12. During this period the head of the administration had the title of Commissioner and Consul General. He was stationed at Zanzibar.
13. OGOT B.A.,KENYA UNDER THE BRITISH 1895 -1913 IN B.A. OGOT AND J.A. JUERE E.D. ZAMANI, NEW YORK. Humanities Press 1968, p.25.
14. Supra MUNGEAM, P.85 - This is reported by Hollis who served on the persnnal staff of Stewart who was at the time the Commissioner. A fascinating picture of the system of making appointments is given in;

FURSE, AUCUPARIUS, Ch.1 THE OLD COLONIAL OFFICE, London, 1962.

15. PUBLIC LAW AND POLITICAL CHANGE IN KENYA, NAIROBI, OXFORD University Press, p.134.
16. EAST AFRICAN ORDER IN COUNCIL, 1897 S.R.O. , 1575/189.
17. HILL, Minutes by Hill n.d. and Landsdowne, n.d. Private 15 May 1901, f.o. 2/447 (Kenya Archives).
18. Appointed Governor in 1909.
19. President Kenyatta adopted this system and regularised it by requiring P.C.'s to meet him on a quarterly basis every year.
20. BALANDIER, G. LA SITUATION COLONIELLE APPROCHE THEORETIQUE CAMIERS INTERNATIONALUX DE SOCIOLOGIE, XI, 1951 PP.44-79. Translation by WAGONERS, ROBERT A. IN IMMANUEL WALLERSTEIN (ED) SOCIAL change; THE COLONIAL SITUATION A THEORETICAL APPROACH, NEW YORK, JOHN WINEY 1966 , pp.34-68.
21. JOINT SELECT PARLIAMENTARY COMMITTEE REPORT ON KENYA, NAIROBI, GOVERNMENT PRINTER, 1931.
22. Supra Ogot.
23. LEYS, COLIN- DILEMMAS OF ADMINISTRATIVE TRAINING IN KENYA (Bound manual, University of Nairobi Library).
24. SINCLAIR, C.E.C. - ADMINISTRATIVE TRAINING IN KENYA - Unpublished M.A. Thesis, Makerere University College, Kampala, 1968, pp.52-3.
25. Ibid Sinclair.
26. Supra Brett Colonialism and Underdevelopment.
27. Supra Zwanenberg.
28. Ordinance No.22 of 1902.
29. KURIA, GEOFFREYS - THE DISTRICT OFFICER AS A COLONIAL SHELL - Rural Administration in Kenya, p. 41.
30. The administration of Justice in Kenya was taken away from the administrators by the MAGISTRATES COURTS ACT, 1967 OP.CIT. GHAI AND MCAUSLAN.
31. OP.CIT. CARSON.

32. OP.CIT. ZWANENBERG

33 Supra CARSON.

34 AN ILLUSTRATED EDITION OF THE LIVING NEW TESTAMENT -KEN TAYLOR - ST. LUKE CH.23
p.120 - World Home Bible League, London

35 FIELD ADMINISTRATION, LONDON,
ROUTLEDGE AND KEGAN PAUL.

36 Ibid p.28.

37 OP.CIT.

38 CAP. 128.

39 Titled Ref. /CL.11/1 F O/14 issued on
4th Jan. 1977 by chief E.A. Magero of
Chemilile location.

40 Since independence writers on Provincial
administration have attempted to argue
that at least until 1968, it was a development
institution. This was merely justifying
government propoganda and these arguments
ignored the economic arrangements in
Kenya. Prominent of these are:

- 1) NELLIS, JOHN - Is the Kenya Bureaucracy
Developmental?
IDS Staff Paper No.103, June 1971
(Now withdrawn).
- 2) NDEGWA COMMISSION REPORT, NAIROBI
GOVERNMENT Printer, 1971.
- 3) OP.CIT. HYDEN, OKUMU AND JACKSON
- 4) Montgomery J.D. and Siffin W.J. (EDS)
THE POLITICS OF DEVELOPMENT ADMINISTRATION,
NEW YORK 1968.
- 5) NG'ETHE, NJUGUNA - DEV. ADMINISTRATION AND
DECENTRALISATION AND POLITICAL CONSIDERATIONS
NAIROBI, IDS Working Paper No.257.
- 6) GERTZEL, Cherry - The PROVINCIAL ADMINIS-
TRATION AND DEVELOPMENT IN KENYA, 1965-1968,
1970 U E A S S C , D.S.M. Dec. 27-31st.

41. UNDERDEVELOPMENT IN KENYA, London, HEINEMANN
1975.

42 Ibid. p. 180.

43 OP.CIT. Lugard.

- 44 OP CIT Gertzel - THE POLITICS OF INDEPENDENT KENYA - The Police was also expanded . p.23.
- 45 Ibid. Gertzel, POLITICS.
- 46 Ibid Gertzel ; p.23.
- 47 Regulation No.15 of 1901.
- 48 Regulation No.25 of 1902.
- 49 Now cap. 56
- 50 Now cap. 63.
- 51 OP.CIT.
- 52 CAP 218.
- 53 LEG-CO DEBATES VOL LXXX, Part 1, May 20, 1959 Col.997, also Pritchard Report on SIMPLIFICATION OF GOVERNMENT PROCEDURES , NAIROBI (1958) Unpublished.
- 54 Ibid - Leg-co Debates.
- 55 Ibid- Leg-co Debates
- 56 The loss of Singapore to the Japanese in February 1942, contributed a great deal in concentrating the mind of the official classes upon the part played by the indigenous peoples in the development and destiny of their countries. Increasing American criticism of British imperialism was also an important factor in shaping the Ruling class idea of the indigenous people. See, Times, 11 Jan. 1943.
- 57 LEE J.M. - COLONIAL DEVELOPMENT AND GOOD GOVERNMENT, Clarendon Press, Oxford - 1963 P.13 ff.
- 58 22 June, 1949.
- 59 The Sywnnerton Plan, Government Printer, NAIROBI.
- 60 MUTISO, GIDEON - The Political Sociology OF THE KENYA BUREAUCRACY , E.A. U.S.S.C. proceedings' Vol. 1, 1972 pp.179 - 180
- 61 No. 11 of 1954.
- 62 No. 36 of 1956.
- 63 OP.CIT. HYDEN
- 64 THE CONCEPT OF LAW (CLARRENDON, OXFORD, 1961.

- 65 Lloyd INTRODUCTION TO JURISPRUDENCE (3RD Edition, London, STEVENSONS and SONS 1972) p.91 titled ARISTOTLE, NICOMACHEAN ETHICS.
- 66 (1896) 41 Lawyers Edition , 256.
- 67 (1873) 38 D.L.R. (3rd Edition) 481.
- 68 A useful discussion on the morality of a legal system is the one shared by Prof. H.L.A. Hart, and Lon. L. Fuller. These discussions are respectively; POSITIVISM AND THE SEPARATION OF LAW AND MORALS (1958) Vol.11, H.L.R. 593 and POSITIVISM AND FIDELITY TO LAW - A REPLY TO PROFESSOR HART (1958) Vol. 71 , H.L.R. 630.
- 69¹ EA.P.G. , orders and regulations, volume 1, page 65 sections 77-79.
- 69² No. 2 of 1898 replaced by No.3 of 1900.
- 70 Regulation No.12 of 1900, repealed in 1961
- 71 No. 15 of 1901.
- 72 OP.CIT.
- 73 SUPRA GHAI AND McCAUSLAN.
- 74 Ibid.
- 75 Cap, 105.
- 76 Cap, 355.
- 77 Now s.75 of ACT NO.5 of 1969.
- 88 (1930) 12 K.L.R. 12.
- 79 (1961) E.A. 348.
- 80 (1951) 24 (2) K.L.R. 130.
- 81 Crown Case 1021 of 1964.
- 82 24 (1) K.L.R. 64,
- 83 2 EALR. 103.
- 84 3 EALR 107.
- 85 7 EALR.35.
- 86 OP.CIT. Ch.5 ACT NO.5
- 88
- 88 GHAI Y.P.(Inaugural lecture) No.10

CONSTITUTIONS AND THE POLITICAL ORDER
IN E.AFRICA (Faculty of Law Handout)

- 89 Ibid, Ghai.
- 90 Ibid, Ghai
- 91 OP.CIT.
- 92 EAS, Monday May 20th , 1963.
- 93 Ibid, p.1.
- 94 Ibid.
- 95 After dissolution of KANU, the 129 elected members in KANU Parliamentary Party entered the house in the following way; 67 popularly elected with the backing of KANU, 31 popularly elected with the backing of KADU, 1 especially elected with KANU ENDORSEMENT, 7 popularly elected with the backing of A.P.P., 12 popularly elected as independents or members of other parties.
- 96 OP.CIT. HYDEN.
- 97 ACT NO.28 of 1964, see schedule 1, which deleted chapters VII and IX, and schedule 2 which deleted s.21 . And also made extensive amendments to schedule 1 and chapter XIII of the 1963 constitution.
- 98 OP.CIT. - LEYS, UNDERDEVELOPMENT IN KENYA.
- 99 Gertzel - THE PROVINCIAL ADMINISTRATION IN KENYA, Journal of Commonwealth Political Studies 4,3 (1968)
- 100 OP.CIT. Gertzel Provincial ADMINISTRATION AND DEVELOPMENT.
- 101 OP.CIT. ACT NO.5 of 1969.
- 102 OKOTH OGENDO- THE POLITICS OF CONSTITUTIONAL CHANGE IN KENYA SINCE INDEPENDENCE, 1963-1969, AFRICAN AFFAIRS, THE QUARTERLY JOURNAL OF THE ROYAL AFRICAN SOCIETY VOL. 71 NO.282 JAN. 1972.
- 103 Ibid.
- 104
- 105 HAKES, JAY.E. - THE PARLIAMENTARY PARTY OF THE KENYA AFRICAN NATIONAL UNION; CLEAVAGE AND COHESION IN THE RULING PARTY OF A NEW NATION . A PH.D. Dissertation (Dept. of Political Science in the

Graduate School of Arts and Sciences)
Duke University, pp.25 ff.
Also see; THE DEVELOPMENT OF POLITICAL ORGANISATIONS IN KENYA, Political studies Vol v, No.2 June 1957.

- 106 Ibid 1 takes.
- 107 See generally , Okumu , J. , CHARISMA AND POLITICS IN KENYA, East Africa Journal , Feb. 1968 (Vol.5) p.5.ff.
- 108 See generally, D. Nnoli, SOCIO-ECONOMIC INSECURITY AND ETHNIC POLITICS IN AFRICA, THE AFRICAN REVIEW VOL.4 NO.1 OF 1974.
Also; G. BENNET, THE DEVELOPMENT OF POLITICAL ORGANISATIONS IN KENYA- Political studies , vol.v. No.2, June, 1957.
Also, MAKERERE UNIVERSITY COLLEGE, Dept. of Political science and public administration; PARTIES, PART TWO KENYA (East African study materials).
- 109 See C.S. ANGER AND J. NOTTINGHAM, THE KENYA GENERAL ELECTIONS OF 1963. Journal of modern African studies. Vol. 2 No.1, March 1964.
- 110 July 2, 1968.
- 111 Supra, Haykes
- 112 Ibid, Hakes.
- 113 A good illustration of this power struggle manifested itself early in July, 1968. Moi replaced Nyamweya (a Gusii) as leader of Government business and Ngei was made the Deputy leader. Later in the month the Parliamentary group elected new officers, Moi for Ngala as vice-chairman of the party. F.M.G.Mati (a Kamba) as secretary and Shikuku for Malu as chief whip and Sammy Omar for Too as deputy whip. Thus all officers identified with Mboya were replaced.
- In May 1968, the Moi-Njonjo group staged a power play in the guise of constitutional reform. The constitution of Kenya (amendment) (No.2) Bill drafted by Njonjo (as Attorney-General) was first debated in parliament on May 28, . It provided that on the death of the President, the vice-president would hold office until general elections were held, whereas previously a new president was to be elected immediately by parliament. The Bill also required a presidential candidate to be 40 years of age, thereby eliminating Mboya who was only 38. The Bill came under attack from Mboya's

supporters including ministers and assistant ministers. As a result a new amendment which placed strict limitations on the exercise of presidential authority by a vice-president who succeeded to the office and lowered the age of president back to 35, and was eventually substan substituted and on June 25 passed its final reading. Mboya fared well in this test of strength.

114. McAUSLAN - Prolegomenon to the rule of Law in E. Africa, proceedings of the E.A.I.S.E.R., Kampala (Mimeo) 1963.
- 115 MBOYA, Freedom and after, HEINEMANN, LONDON, p.77.
- 116 In 1964, the Group , Joining hands with KANU was able to defeat the government on the issue of federalism . In February, 1965 the group defeated the government on a purely procedural motion concerning the formation of a new sessional committee on the grounds that it was not sufficiently representative of their group.
- 117 Odinga, NOT YET UHURU , NAIROBI. HEINEMANN, 1967.
- 118 Ibid, pp.283-84
- 119 Debate on Land Control Bill, National Assembly, 1st Parliament, 5th session. Vol. XII, 7th November to 22nd November, 1967.
- 120 OFFICIAL REPORT, HOUSE OF REPRESENTATIVES, 5th March, 1965, (569-92)
- 121 OP.CIT. Gertzel.
- 122 EAS AND DAILY NATION, 29TH JULY, 1968
- 123 EAS , 13th March, 1965.
- 124 Held in 1967.
- 125 Report of the seminar on local government. Kenya Institute of Administration Dec. 1967 (mimeo).
- 126 CREATING POLITICAL ORDER, THE PARTY STATES OF W. AFRICA (Chicago , Rand Mcually, 1966.
- 127 KANU Song translated "KANU Builds the Nation".
- 128 OP.CIT. Gertzel- Politics.
- 129 3rd Nov. 1966.

- 130 E.A.S. 30th Sept. 1974. On this conflict see Kaggia - Kenyatta confrontation on land EAS July 1964.
- 131 NAIROBI, GOVT. PRINTER, 1965.
- 132 There was a lot of talk on "Communists" (meaning radicals) by the conservatives . See EAS 1st April, 1965 on; SHIPLOAD OF COMMUNIST ARMS TO KENYA.
- 133 OP.CIT. Leys underdevelopment.
- 134 Then Minister for Economic Planning.
- 135 OP.CIT.
- 136 A useful discussion on this aspect is provided by Kenneth Prewitt. THE FUNCTIONAL JUSTIFICATION OF INEQUALITY AND THE NDEGWA REPORT, SHAPING AN IDEOLOGY, E.A.U.S.S.C., p. 445
- 137 REPORT OF THE SALARIES REVIEW COMMISSION NAIROBI, GOVT. PRINTER, 1967, p.23, £.4584 for super-scale positions at the top and £120 beginning salary for subordinate workers (annually).
- 138 In 1969 by -election in GEM, the K.P.U. banner attacked the present salary structure for promoting rapid class formation in Kenya, On this, John Okumu, THE BY-ELECTION IN GEM; AN ASSESSMENT E.Africa Journal (June) 1969 pp.9-17. Also supra Gertzal Politics.
- 139 GOVERNMENT MANUAL, NAIROBI, GOVT. PRINTER, 1965.
- 140 Revised Development Plan, 1966-67. NAIROBI GOVT. PRINTER, 1967.
- 141 OP.CIT.
- 142 GERTZEL, Cherry, ADMINISTRATIVE REFORM IN KENYA AND ZAMBIA, in A Decade of Public administration in AFRICA, NAIROBI (EAPH) 1968 , p. 185. Most of these administrators had been recruited through patronage. This was nothing new in Kenya. The earliest example of this in independent Kenya involved; John Konchellah, the founder of the Rift Valley People's Congress and Daniel Moss, president of the West Kalenjin Congress. They had both ran as independents and both were appointed assistant ministers upon joining KANU. One of the adverse effects of patronage in the civil service is that it undermined the growth of a professional ethic in the civil service. Further, the rapid upward mobility of these administrators took place within the old structure of the civil service which

displayed above all a high discriminatory salary structure which was an integral part of the colonial hegemony. By July, 1969 a total of 229 men had attended the D.O.'s course at K.I.A. equivalent to 38% of the administrative cadres in the establishment. In 1960 the proportion of African administrators in the provincial administration was 2%, by 1965 it was virtually 100%. The achievement of such rapid africanization was that from late 1963 until early 1966 every available African graduate had to be thrust into an administrative post, trained or not.

- 143 This is manifested by the root causes of disturbances in the University of Nairobi. In July 1974, for instance, the lecture boycott concerned poor catering services, congestion in the halls and student opposition to the loan scheme, consequently the University was closed for five months. The most recent disturbance (Nov. 1976) at Kenyatta College concerned the uplifting of benefits to be given to Diploma graduates of this college which is part of the University of Nairobi. The students (1st and 2nd years) were sent home.
- 144 Martin, Robert - A Personal footnote, TEACHING LAW IN KENYA, paper presented before the Canadian Associations on African Studies.
- 145 OP.CIT. LEYS UNDERDEVELOPMENT.
- 146 OP.CIT. OKOTH
- 147 CAPS, TWO AND THREE.
- 148 Supra.
- 149 EAS, Feb. 27, 1969, p.1.
- 150 EAS, Jan. 31st, 1969, p.1.
- 151 In a continuation of colonial policy, M.P.'s had to apply for licences in order to hold public meetings for discussions in parliament of licensing of public meetings; see REPORT; JUNE 17, 1964 c.c. 297-304; FEB 10, 1966; c. 795; OCT 7, 1966 c.c. 580-606; MAR.7, 1968 c.c. 1287-88; SEPT.30, 1969, c.1419; OCT.23, 1968, c.c. 2181-90; NOV.4, 1968 c.c. 2701-05; NOV.19, 1968, c.c. 9194-3204 and OCT.28, 1968, c.c. 1133-34. Administrators for instance, intervened in KANU Branch

elections at Machakos - official report, National Assembly, 1st Parliament, sixth session vol. XV, 28th June, 1968.

- 152 Criminal Appeals No.582 and 583 of 1968 (unreported).
- 153 OP.CIT.
- 154 Cap, 84.
- 155 Supra, Hakes.
- 156 OP.CIT.
- 157 NATIONAL ASSEMBLY , VOL. XII (26th MAY, 1967, col. 252).
- 158 OP.CIT. GHAI, Ch.XI.
- 159 22 (1) K.L.R. 27.
- 160 For such an example, see; Daily Nation , 26th July, 1971.
- 161 Official REPORT, House of Representatives, 5.3.65, 569-92.
- 162 Official Report, Senate, 1.4.65; 441-68.
- 163 This was illustrated by the retention of what was formerly the tribal police in the form of the Administration Police.
- 164 The executive powers of control .
- 165 were further enlarged by the Public Order (Amendment) ACT 1968, ACT NO.16 of 1968. This finally abolished the provincial advisory councils and removed definition of provincial and district boundaries from the constitution. This should be read together with Districts and Provinces Bill 1968, Kenya Gazette Supplement No.28 (Bill No.6) 5th April, 1968.
- 166 BEN.O. NABWIEZE - Constitutionalism in the Emergent State
- 167 Civil Case No. 1159/1965 (unreported)
- 168 Between July and Sept. 1976, at Uasin Gishu District.
- 169 JAMES S.READ, BILLS OF RIGHTS IN THE THIRD WORLD- some Commonwealth Experiences - Verfassung and Rect in Uebersee, 1973 vol.1 No. 1.21, OP.CIT. OKOTH OP.CIT. GHAI- Underdevelopment.
- 170 FROM EMPIRE TO NATION, LONDON 1962 , p.281.
- 171 APPENDIX, 2.

- 172 The Judiciary and the Parliament.
- 173 See notes to appendix one, also see generally
Ragui, Karanja, E.
The Role of D.O. in Kenya Today-Journal
of Administration Overseas vol. 11 (3)
July 1972. p. 182.
- 174 OP.CIT. Ndegwa Report Cap. XXII
- 175 Sessional Paper No.5 of 1974 ch.XXIII.

APPENDIX

QUESTIONNAIRE:

1. Do you think that the District Commissioner or the Chief plays an important role in the National Development endeavour?
2. What has he contributed to the development of your district or location?
3. What in your opinion is the significant difference between the local D.C. and the former (colonial) D.C.?
4. Who do you think should play an important role in your relations with the government, the D.C., the local councillor or your M.P.?
5. Do you regularly attend barazas?
6. Are they congenial to an exchange of views?
7. The D.C./D.O./Chief is a very important government official - do you know that?
8. He is in charge of law and order and police usually act on his orders on the vagrancy swoops and in arresting people who drink local liquor - what do you think of these powers?
9. The D.C./D.O./Chief is also charged with issuing permits for circumcision ceremonies - do you know anybody who has ever been refused/granted the permit. Do you think it necessary to get a permit whenever you have such a ceremony?

10. The D.C./D.O./Chief is responsible for giving permits for transporting such basic foodstuffs as maize, beans and so forth. Do you think that he should have such a power?
11. Do you think that the post of D.C./D.O./Chief is indispensable to the conduct of public affairs?
(if so state reasons)
(If not state reasons)
12. If it was intended to abolish these administrative posts who would you like to replace him and in what capacity?
13. Do these administrative officers play an important role in Harambee projects and in rural development?

APPENDIX

THE CHIEF'S AUTHORITY ACT, CAP. 128
LAWS OF KENYA

In exercise of the powers conferred upon me by the Chief's Authority Act, Cap. 128 (10) (11) Laws of Kenya.

I Chief Ezekiel Aloo Magero of Chemilil location hereby issue the following orders to be obeyed by all the persons residing or being within the local limits of my jurisdiction.

1. (a) No person shall set fire on any grass or bush or any ground reasonably near any sugar plantation.
 - (b) No person shall carry fire splinter, burning wood, remains of burning cigarette between the sugar-cane plots within the area of my jurisdiction thus by carrying such objects he/she will cause grass-fire.
 - (c) No person should break sugar cane from any sugar plot carry or chew on the road in my location.
2. No person shall take bath in any river, stream, water hole or any watercourse in my location, making sure that by so doing such they are liable of polluting water.

3. All persons in my location should attend every "BARAZA" without any failure.
4. No persons in my location should hold any dance or perform any public indecent dance without any permission.
5. (a) Everybody in my location is required to plant early, maize (subsistence crop).
(b) Everybody is therefore, required to see to it that the maize so planted is not destroyed by the wild pigs and as such everybody is required to hunt these notorious wild pigs weekly on every Tuesday.
6. No person shall manufacture or distill illegal native liquor. Also no person shall supply such liquor to young persons within the area of my jurisdiction.
Anybody who, without lawful excuses, neglects to obey these orders issued under this ordinance shall be guilty of an offence and liable, on conviction before a Magistrate.

NOTES ON APPENDIX ONE

It is a fundamental principle of law that " no person can be convicted of a criminal offence unless that offence is defined and the penalty prescribed in a written law" . As provided for by the Kenya Constitution. Section 3 of the constitution also provides that the constitution is the supreme law of the state. The implication of these two provisions when read together is that, conduct which is designated criminal even pursuant to an act of parliament and is not defined is unconstitutional for it restricts the freedom of the individual as in the case of SHAW v.D.P.P

On this basis chief Magero's pronouncements are unconstitutional. This is clear when section 5 (b) of his order is examined. It means that (read together with section 6 of the order) Anybody who does not hunt wild pigs on Tuesdays is in criminal default. This cannot be the case for criminal offences in Kenya are defined under the Penal Code, the Traffic Act and other statutes, and their definition are not at the behest of an individual. This order demonstrates the wide, discretionary and dictatorial powers given to the administrators. The calibre of such administrators leaves much to be desired. This order is purported to be issued pursuant to the chief's authority Act, but the word ordinance appears also. The inescapable conclusion reached is that this

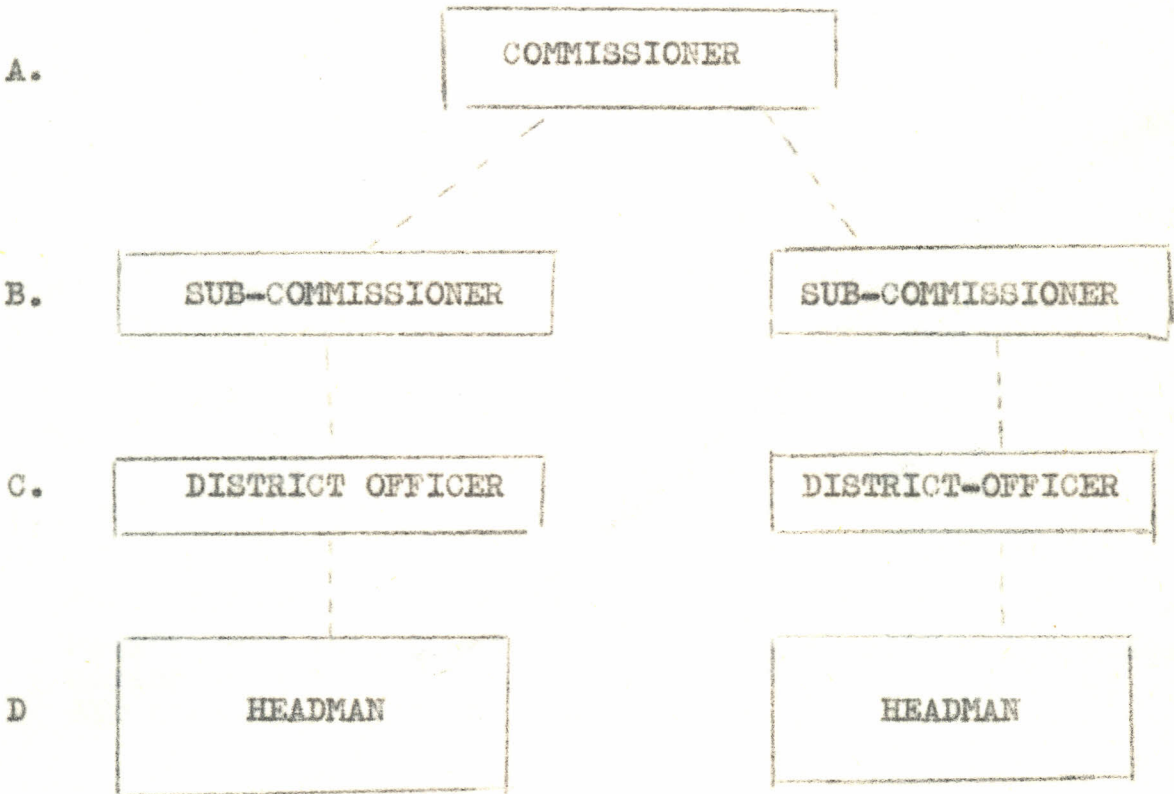
was a reproduction of a colonial order demonstrating that the powers of the provincial administration still obtain as in the colonial period.

APPENDIX TWO

GRAPHIC ILLUSTRATION OF FLOW OF POWER OF PROVINCIAL ADMINISTRATION

1. COLONIAL PERIOD

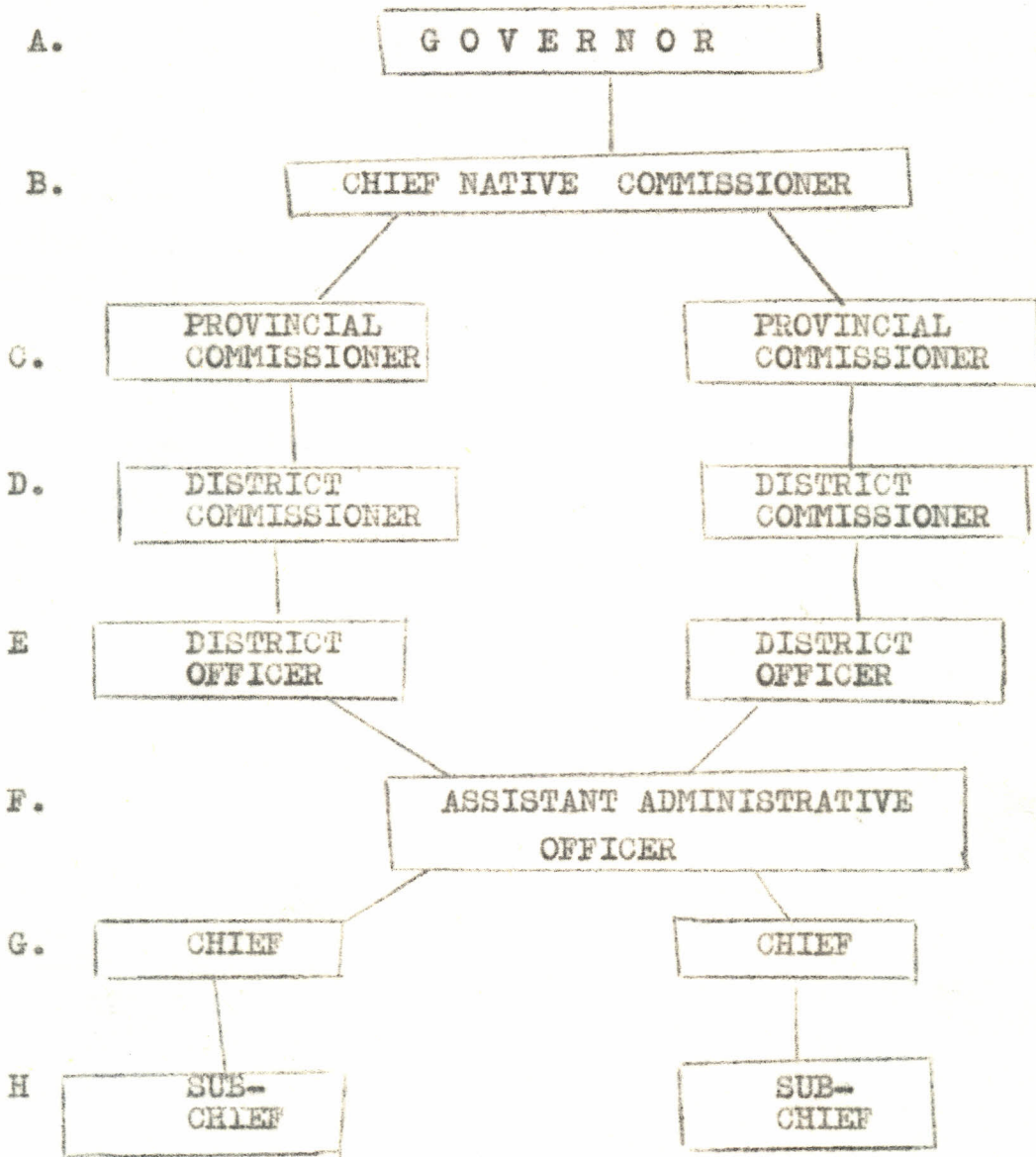
A. UNDER FOREIGN OFFICE RULE (1902 - 1905)



Positions A-C occupied by Europeans.

Position D by Africans.

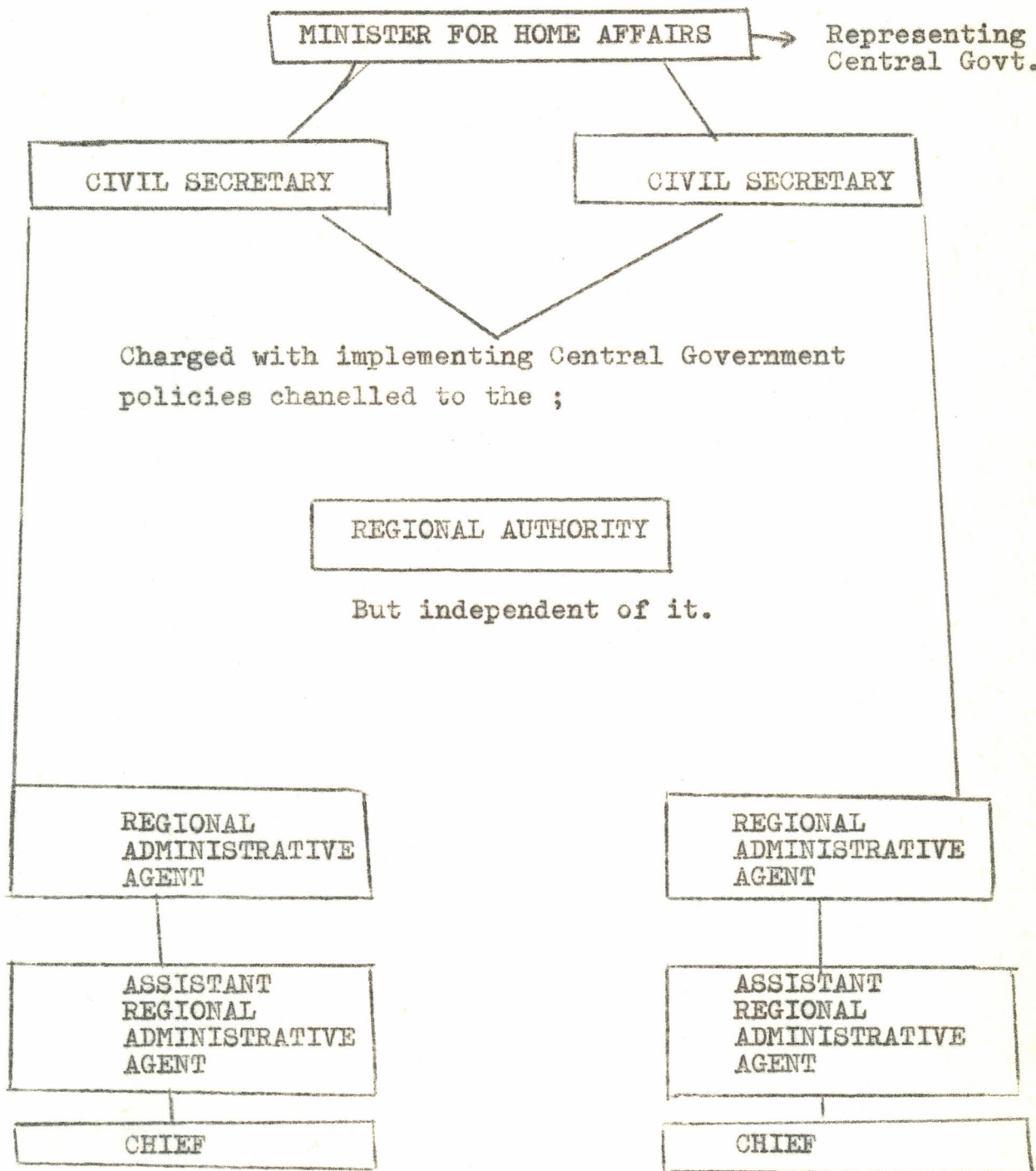
B. UNDER COLONIAL OFFICE (1905-1963)



Positions A-E occupied by Europeans.

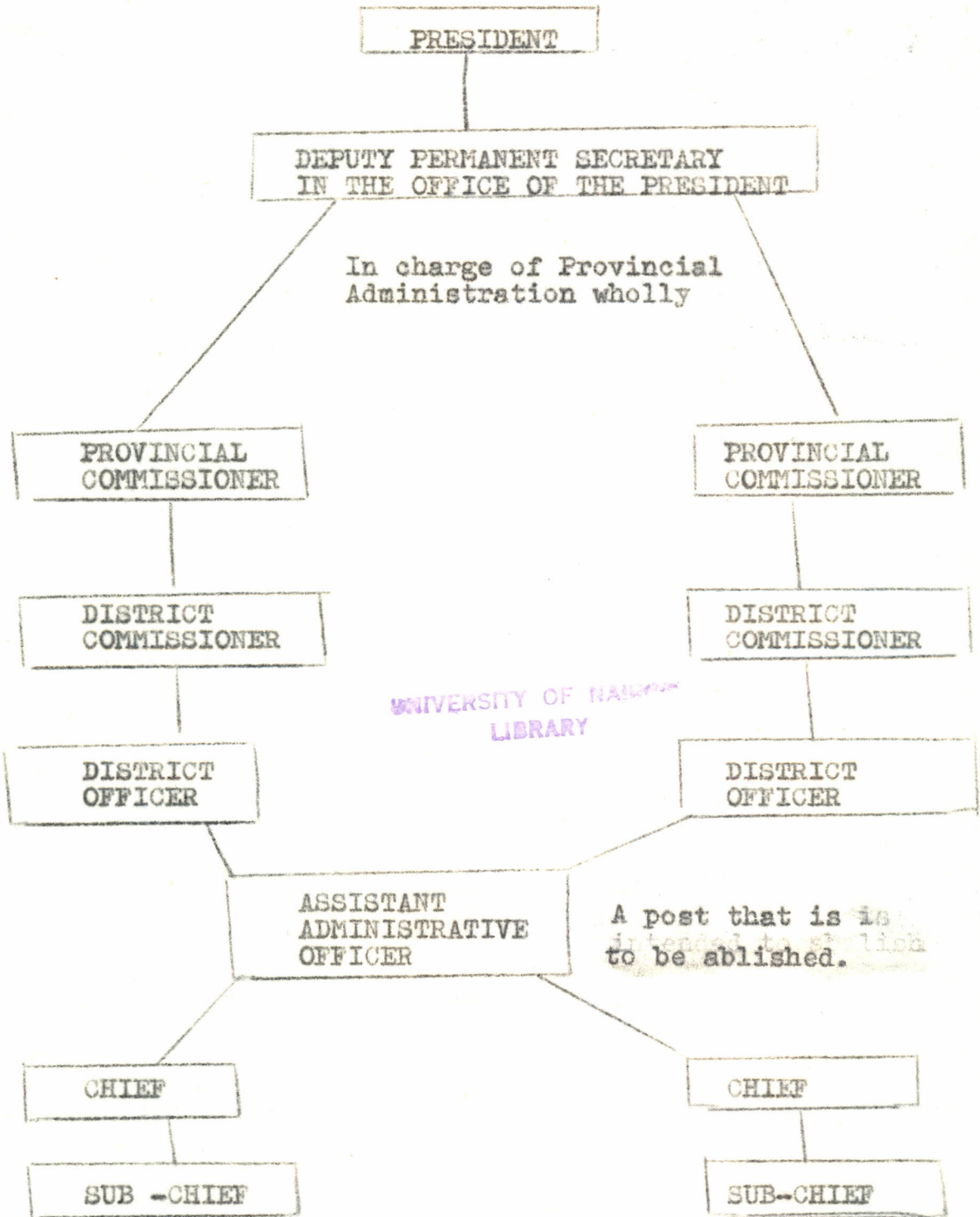
PositionssF introduced when Kenya approaching independence- during creation of "political class" and occupied by Africans, also, positions G and H.

LI UNDER THE REGIONAL GOVERNMENT



This chart was drafted with in consultation with Dr. Dyugi of the Dept. of Government, Nairobi University, to whom I am grateful.

IV. UNDER THE REPUBLICAN GOVERNMENT 1964



This

Thus this system of administration corresponds to the one under II

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