

UNIVERSITY OF NAIROBI
LIBRARY

THE RIGHT TO TRIAL IN
KENYA AS AN ASPECT OF THE
RULE OF LAW



THE LIBRARY
UNIVERSITY
OF
NAIROBI

Dissertation submitted in partial fulfilment of the
Requirements for the Bachelor of Laws Degree,
University of Nairobi.

BY

WANDUGI K.K.

NAIROBI

APRIL 1979

ACKNOWLEDGEMENTS

I wish to express my gratitude to Mr. Joseph^{son} Namasake, my lecturer in Constitutional Law and Government. It is his thought provoking and ^{mind} opening lectures that first introduced me into that field and cultivated in me the intense interest in the area of Constitutional Law that led me into choosing this area for my dissertation. Part of the materials particularly in the earlier chapters are borrowed from his lectures.

My special thanks to my Supervisor Mr. K. Kibwana. His constant supervision and assistance throughout the writing of this paper has proved invaluable. Without his assistance this work would never have been what it is.

I am also deeply indebted to Mrs. Nyambura Njunu who very kindly took her time and spared no efforts to make sure that she converted my otherwise illegible handwriting into this legible whole. Last though by no means least I cannot forget to thank all those unnamed persons who have aided me in my research particularly through discussions.

It is hoped that the paper will be of some assistance to students of Constitutional Law. No efforts have been spared to eliminate mistakes, but this being a continuous possibility, the writer accepts responsibility where any mistake, misinterpretation of works or misrepresentation of the law may occur.

II

TABLE OF CASES:

Andrea v R (1970) E.A. 46.

De Souza v Tanga Town Council (1961) E.A.C.A. 377.

Harris v Minister of the Interior (1952) S.A. 76 (A.D)

Mwithaga v R Criminal Appeal NO. 185 of 1975.

Ndegwa v President and Members of Liquor
Licencing Authority (1957) E.A. 709.

People v Silva Freillus (1967).

Shimechero v R Criminal Appeal NO. 119 of 1974.

III

TABLE OF STATUTES:

Constitution of Kenya

Act of Athens

Civil Procedure Code

Criminal Procedure Code

The Evidence Act Cap 80 Laws of Kenya.

Preservation of Public Security Act Cap 57 Laws
of Kenya

Penal Code Cap. 63 Laws of Kenya.

TABLE OF CONTENTS

| | page |
|--------------------------|-----------------|
| Title | I |
| Acknowledgements | II |
| Table of Cases | III |
| INTRODUCTION | 1 |
| CHAPTER ONE | 13 |
| CHAPTER TWO | 42 |
| CHAPTER THREE | 66 ² |
| CONCLUSION | 74 |

THE RIGHT TO TRIAL IN KENYA AS

AN ASPECT OF THE RULE OF LAW

INTRODUCTION

Great stress and emphasis has been put on the subject of human rights and the rule of law in the century's Political systems. The excesses of the Fascist and Nazi Regimes during the Imperialist ^{works} ~~was~~ of 1918 and 1945 have by and large been quoted as having prompted not only a great awareness of human rights but also the need to have the rights safeguarded by the existing governments. It is therefore no wonder that most governmental systems in the World today lay particular stress on human rights. In what has come to be called, rightly or wrongly the Liberal Societies of the West the rights of the individual have been rigorously upheld. This is not to state that there are no violations of human rights in the West. The stress that has been laid on the subject in the West is not characteristic of the Socialist States. In the Socialist States great stress is laid on economic development and the supremacy of the state. Rather than stress on the rights of the individual, Socialist states emphasis the interests of the Community as a whole. Tanzania is a case in point (due to it's socialist experiment). The Policy there is not geared so much on the entrenchment of individual rights, but as to the liberation of the people where liberation ~~relates~~ relates to re-education on Socialist Philosophy among others.

1914.
1939

Our own Government System owes most if not all of it's components to the Colonial power. A'm tempted to quote A. Muhiddin when he states that Independence was not granted on the basis of abolishing the system (colonial) but it's continuation.

This appropriately serves to illustrate in a nutshell the proposition that we owe most of our government machinery to the colonial power. We borrowed the entire (or almost) system of government to him; our constitution being a ^{re} ~~re~~plica of the West Minister Constitution. It is infact termed broadly as 'West Minister Model Constitution.' We inherited almost the entire Corpus of English Law and today we continue to degrade our own customary law where it conflicts with English Law. As if that is not enough the judiciary is ^{manned} ~~named~~ by expatriates, most trained in the British System.

Apart from that we have adopted the economic policy of the Imperial Power. Although Sessional paper NO. 10 of 1965 clearly states that the Government is bound to pursue the policy of "African Socialism " it is ^{ntly} ~~abundantly~~ clear that ours is no longer geared towards that line. The Capitalist system is characterized by the protection of private property. Capitalism makes various assumptions one of which is that all the people have equal opportunities. The idea of equality of opportunities has been used to justify those who have amassed large sums of money at the expense of the others. The process ultimately leads to a situation where the society is stratified, with a small class of rich people who by virtue of their economic dominance wield alot of power. At the bottom are the ordinary people - poor and in most cases exploited.

Capitalist policy is so property oriented that instances are where life is itself assumed as subordinate to property.

Having inherited capitalist policy from the Imperialist, we therefore find that by and large our outlook to society and it's values will be so influenced. On this basis we can well understand the jealous manner in which property is ^{guarded} granted. Section 75 of the Kenya Constitution provides specifically for the protection of private property. It has been noticed that the property section in the constitution remains untouched for purposes of ammendment, since Independence. This cleary signifies the sacrosanct idea in which property is taken. It being a ^utrism that those who are economically dominant also wield the power of government, one can again understand the entrenchment of the property section. There is no doubt in Kenya today that the ruling class has in the course of the time grabbed a great deal of property and hence are eager to protect it (property) from the havenotgs.

It is consequently submitted in this paper that the hostility shown to ~~shown~~ to those who violate the property section has it's origin in this economic policy. We have of late been treated to numerous cases where suspects have been shot dead by the policemen or stoned to death by angry mobs. The resentment shown indicate well the importance of property. On several occassions the daily press (without distinction the Daily Nation and the standard) have published incidents where suspects have been shot dead by police; complete with a bullet riddled body, a gun and several cartridges and the now familiar caption -

"Police in shoot out drama. Most wanted criminal shot dead."

The incidents raise serious implications on the application of the rule rule of law. Still in political rostrums and International Conferences the powers that be keep on stressing the importance for the application of the rule of law and protection of human rights. Kenya is not an exception in emphasizing the need for the application of the rule of law. One cannot make any distinction between the rule of law and human rights. Suffice here to state that human rights are a constituent of the rule of law. Where ~~there~~ therefore there is violation of human rights, there ⁿ serious questions ^{arise} ~~prised~~ as to the application of the rule of law.

Despite the notoriety in occurrence of incidents where human rights are violated, yet little seems to have been said about it. Could this silence be ^{ta} ~~consid~~ ^{er}ed as consent on the basis that property is sacrosanct? Silence it has been said betokens consent², hence one may argue that we have by and large condoned those ~~in~~ violations of human rights. For the author this ^{is} abdication of duty not only to those whose rights are violated, but also to society at large. But what is the view of the Constitutional Lawyer?

The incidences no doubt raise questions and implications which scholars of constitutional law cannot ignore. Basically he will seek to know whether or not justice has been done. When a suspect is shot dead by the police, or is stoned by the mob, the question arises as to whether there has been an infringement of the rights of the victim. It is not enough for society to be mouthed doctrines (ie rule of law) as the legislators and law enforcement officers never fail to impress on the population.

To have any meaning at all we need to see the application of the rights enunciated in the bill of rights (or the constitution). It is not disputed that a bill of rights ~~is~~ ^{is} an important constituent in any legal system but it is here submitted that it is not the ~~fact of~~ the bill of rights being in existence which is important but rather it is the practice of this rights which justifies the place of the bill of rights in the legal system.

Events of the last few years have cast grave doubts as to the validity and practical utility of the bill of rights. The rule of law in this country has come to be identified with the rights of the individual. Hence the question becomes of more than academic interest. Hardly a day passes ^{without} ~~in~~ ^{thought} there being some political or judicial pronouncement as to the centrality and importance of the rule of law. The socio-political implications of the concepts (Rule of law and bill of rights) have been put at issue. Our law sets definite safeguards ~~on~~ various legal situations not least safeguards for human rights. It has been contended that man has rights which are in-alienable. For instance man's right to life is inalienable except by ^{due} ~~one~~ process of law where there are exceptions; so are his rights to liberty and other analogous rights. When therefore such rights are violated and yet our constitutional lawyers and criminologists turn a deaf ear in complete importence one naturally fears for such rights.

It would appear that the rights of the individual as enshrined in the constitution are merely instruments in the Political battle. The powers that be will use the rights to justify themselves and legitimise the political system. But should the same rights stand in their way they will be brushed aside. As such individual rights have been manipulated and treated at the expediency of the powers that be. It is contended in this paper that those who ought and should have done something, and whom justice or sheer humanity demands that they do something have simply kept their peace. It is indeed ironic that the Attorney General's Chambers have not issued any statement regarding violation of human rights by either the police or the public who perpetrate mob justice.

METHOD

The first part will be introductory. It will attempt to bring within a single umbrella all that the paper seeks to portray. It is deliberately general and makes no specific references such an attempt being limited to the more detailed latter chapters. Special regard will be granted to the central theme- the right to trial. This will be analysed in the light of violations of the right by the police and mobs. An attempt will also be made to relate as much as possible the right to trial within its proper perspective as a constituent of the rule of law.

Chapter one will take the issues used in the introduction further. It will be devoted to portraying the relationship between the various concepts mentioned in the paper. The right to trial will be viewed in relationship with human rights and the latter will be placed in the context of the rule of Law. It is submitted that without the Rule of Law, human rights become substitute.

SCOPE:

The paper does not aim to delve into the ambit of the rule of law exhaustively. Rather it primarily concerns itself with the individual's right to trial in the society that we live in today. As stated before there have been blatant violations of the right to trial in the last year or so which demand our attention. There is no indication that such execution of summary justice by both the police and the public has ended, and if anything one would expect the trend to continue. This proposition remains substantially true when one looks at the manner the police have repeatedly violated the right to trial and it would appear that having failed to follow the proper procedure by law established the police have adopted the policy of elimination almost as a last resort. In any case instances of blatant violations continue to occur with disturbing persistence. It is quite clear that the law enforcement officers have elected for the rule of the gun rather than the rule of law. It has been found that the right to trial cannot be scrutinised in isolation of other safeguards in the bill of rights, especially those affecting the liberty of the individual. Hence the paper will look into those provisions in the bill of rights that touch on the right to trial. Above that the rights narrated will be placed within the perspective of the concept of the rule of law.

Extensive work has already been done on the bill of rights and useful insights have been printed out in relation to the rights contained therein. Criticism has been lodged where the rights have been abused or otherwise violated and workable ^{re} ~~re~~ ^e ~~e~~ ^{search} ~~search~~ accommodations given. My records has shown that the guarantees and safeguards dealing with the process of trial have been left largely untouched by Constitutional Scholars and even by Criminologists.

This maybe due to the fact that there have not been any major factors that would make legal scholars adopt more than a superficial or academic interest in the matter. The result is that whereas other human rights have been exhaustively covered and analysed, the right to trial has received only passing comments. As indicated herebefore, events in the not too distant past, events which in all likelihood are bound to be repeated tomorrow impose a duty upon society to reflect upon the right to trial if we are not going to abdicate from our duty. The trend in the ^{violations} ~~isolations~~ of the right to trial or in general on the due process continue with disturbing persistence. For instance the Daily Nation of Wednesday November eighth (1978) reported one such incident under the caption "Bloody end for thieves." The paper then recounted how the suspected men were shot dead when they refused to surrender when confronted by the Police. Two were instantly shot dead while two suffered serious injuries. As will be shown latter this is just one incident among many. It is contended that the course and process of justice is being grossly violated. Granted that society desires all men to live peacefully, that all those who commit crimes be apprehended and there being legal machinery to deal with such people; justice therefore demands without compromise that it (justice) not only be done but that it be seen to be done. Even more, when we make the policemen on the beat the investigator, the prosecutor, judge and executor all in one, we not only make a mockery of the legal system but pave the way for legalised terrorism.

Hence this paper aims at dealing with all the implications that have been raised by the events mirrored in the narrative above. While not making any apologies for the victims of either the police or mob justice, the paper attempts to look more objectively into their rights. One question that should occupy our mind is whether by the events of the last year or so we are getting closer to the Rule of the Gun or Rule of Law.

The paper will also attempt to analyse not only the manner in which the rights referred to are imbedded in our legal system, but also the manner of their application. The bill of rights will in the light be considered on the basis of it's social utility not by virtue of it's incorporation in the constitution. When looking into the right to trial, Judicial interpretation and attitude will also be considered and time will be given given to look into various decisions that reflect the attitude of the Judiciary. It hardly need be said that the Judiciary plays a great part in the exercise and application of the bill of rights and the Rule of Law in general. The statement does not ignore the influence of the executive in the matter.

The right to trial will further be analysed in it's relationship to the preservation of Public Security Act which provides for detention without trial. Are such detentions without trial justified in our society today? If so is the discretion and wide powers concentrated on the president in the exercise of such powers justified in the light of socio-Political factors of our times? We may not be the worst state in the exercise of detention powers but nevertheless one must seek to justify or condemn any detention order depending on the merits or demerits of such order.

What effect does detention without ^{trial} that have on the due process? It is contended in the paper that detention has adverse effects on man's right to fair trial.

Obviously the legal provisions which govern the process of trial and indeed that deal with the whole realm of the bill of rights will be analysed. It has been argued that for law to be valid it should have minimum effect and be for the good of society. Thus if the law governing a situation is not for the good of the public but is an expression of official arbitrariness, then it is not good law. ^Could this be the case with emergency regulations? I naturally wish to avoid ^{start} ~~abated~~ debate but it is nevertheless my opinion that such law is invalid - since law ought to be for the good of the public to be valid. I hasten to point out here that there will be no attempt to describe the law as it ought to be. The argument of the law as it is and as it ought to be has wearied ^{ny} ~~may~~ legal scholars and is yet inconclusive. What will be done here is to take a critical look at the law applicable to the situations referred to; and portray it's justification or otherwise in so far as the due process is concerned. In the last year or so no less than fifteen people died, mostly victims of, mob justice and police bullets. The standard reported five such cases between the months of April and July (1978) alone. Most were suspected to be thieves. The point stressed here is the authors submission that suspicion alone is no ground for conviction and it does not establish guilt. One is presumed innocent until proven otherwise - the police presume suspects guilty and shoot on sight. If we are to live and judge by mere suspicion alone, we would revert to that fearful state of nature referred to by Hobbes as solitary, poor, nasty, ~~br~~ish and short, it being a war of all against all.

NOTE.

1 - A Mohiddin - Reference. The Independence Bergain
By Garry Wasserman.

2.- Robert Boit - Man for all Seasons

CHAPTER ONE

RULE OF LAW AND HUMAN RIGHTS

"It is essential if man is not to be compelled to have recourse as a last resort to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." 1

This statement from the Universal Declaration of Human Rights well summarises the vital role played by the Rule of Law in our societies today by safeguarding human rights. It hardly needs mention that man has always been and is at liberty to rebel against Governmental tyranny and oppression in a bid to assert his rights. There can be no doubt that the Rule of Law is a vital component in any legal system. Even further the statement from the Universal Declaration of Human Rights at once illustrates the truism that human rights can only (at least in the majority of cases) be protected and safeguarded within the context of the Rule of Law. For many ^{Centuries} continues it has been recognised that the possession by the state of Coercive powers that maybe used to oppress individuals presents a fundamental problem for both legal and political theory. A realization and proper appreciation of the wide and extensive powers that the state has amassed upon herself at the expense of the individual, and her monopoly of the pockets of violence best portrays the problems that such a phenomenon may create if not checked. Indeed it is accepted that the history of man can be seen in his struggle against the state with it's massive power. This fact is demonstrated by the struggle of colonised people against the oppressive colonial state in abid to assert their legitimate rights. Man has therefore always tried to evolve safeguards by which to check the state from taking away his individual rights. Greek philosophers had the notion

that the law was a means of subjecting governmental power to control. The issue of Human Rights and the Rule of Law must therefore be seen in this light.

RULE OF LAW

Although the concept of the Rule of Law was evolved and developed by Greek Philosophers, it is not true to assume that the idea was non-existent in pre-colonial African Systems. Some African tribal communities had elaborate systems for the solving of disputes. Such regular methods in the solution of disputes is one of the attributes or characteristics of the Rule of Law. For instance among the Meru² there was a system whereby disputes were presented to the elders. There was a supreme council of elders whom it is claimed did in fact promulgate laws for the governance of the people. Among the Kikuyu there was also an elaborate system through which disputes were solved. An individual was not allowed to seek his own remedies say by taking the law into his own hands. Disputes were settled by a council of elders called Kiama and the decision of the Kiama was binding. Disputes between clan and clan were solved by a council of elders from the different clans who had a dispute. The process warrants notice in that it tried to instil among the people a regular ordering and obedience to certain names. This is similar to the emphasis of rule by regular law which is a characteristic of the concept of Rule of Law.

Though there may have been a notion ^{of the} practice of Rule of Law in the African set up, we must trace it's history in Greek thought for an application of the modern approach as stated here before. It has already been stated that the concept of the Rule of Law was evolved and developed by the Greek Philosophers - at least in the way and form we understand

it today. The idea was later borrowed by the European Countries and ultimately reached the third world merged in the democratic principles of the Western World. It is not intended here to deal with the whole history of the concept as formulated in Greek thought but a few illustrations will suffice.

Aristotle³ argued that govern^ment by laws was superior to government by men. Hence according to Aristotle the government should be a government founded upon the law. What he meant by government by man is a situation where man takes it upon himself to conduct the affairs of the government not according to the law but by his own ^{cre}discretion. Aristotle on the same issue further stated -

"He who commands that law should rule may ^uthis be regarded as commanding that God and reason ^{alone} should rule; he who commands that a man should rule adds the character of the beast. Appetite has that character; and high ^ospirit, too, pervets the holders of office, even when they are the best of man. Law (as the pure voice of God and reasons) may thus be defined as Reason free from all passion."

The emphasis that is laid down by the Philosopher is the notion of the supremacy of the law. This is the force behind the whole ^oconcept of the Rule of Law. ^{ou}Through the middle ages there was the idea of a Universal law or law of nature which was taken as the basis of the state. The idea of Universal law goes back to the Greeks. Bracton in the 13th century maintained that rulers were subject to the law. He stated -

"The ^king shall not be subject to man, but to God and the law; since law makes the King."⁵

This statement is liable to criticism due to its insistence that the King^{is} legally set up in that position. This is not necessarily true in all cases; it does however further illustrate the centrality^{of} of law and its supremacy. This fact is true through the middle ages and holds good in this 20th century.

Writing on the "Rule of Law and the Executive" the Honourable James Nyamweya further reinforces the idea when he states -

"The best government is a government under the law and this can be achieved only by upholding the Rule of Law in all its aspects."

This is an acceptance of the idea of the operation of the Rule of Law in Kenya. Certainly it would not be enough to base a general proposition that the Rule of Law is upheld in Kenya on an isolated pronouncement^{as} as the one above. It is submitted however that by and large the idea is accepted. Whether or not it is practised is a different matter. Writing for a conference of the Law Society in 1977, Hilary B. Ngweni stated -

"If we now turn to the reality in Kenya, it is true that we live in a Constitutional democracy that values the Rule of Law.⁶

He starts from a prima facie assumption that the Rule of Law is upheld in Kenya. It is submitted here that this is generally true but as^{oi} printed above the practice of it is a matter of fact. One may hold the view that the idea is theoretical not practical. My own view is that if the concept is not applied in its entirety, there are instances when it is upheld. In short it is used to suit the expediency of the powers that be. The general idea in Kenya is that the law is supreme as against both the ruler and the ruled. The statement as will be shown later is not without its exceptions.

The position in Kenya exemplifies the practice in most developing countries. It must be noticed however that acceptance of the idea of Rule of Law is not synonymous to its rigorous application.

But what does the concept mean? There is no universally accepted definition of the term Rule of Law. It has been contended that the idea or concept is capable of various and varied definitions. The arguments on the definition of the term hinge solely or at least almost so, on the definition propounded by A.V. Dicey.⁷ Dicey defined the term by analysing its three ingredients. Rigorous scrutiny of the definition propounded by Dicey has resulted in a lot of criticism as to the validity of Dicey's definition. In the first essence Dicey said -

"It means in the first place the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the government, a man may with us be punished for breach of law but he can be punished for nothing else."⁸

In this sense Dicey contrasted a Government honouring the concept of rule of law with systems of government based on the exercise by those in authority of wide or arbitrary powers of constraint. By insisting that one could not be made to suffer save for breach of law established before the ordinary Courts, Dicey here in essence states, what has come to be referred to as the principle of legality.

In the second place Dicey took the Rule of Law to mean Equality before the law, or the equal subjection of all classes of people to the ordinary law of the land as administered by the ordinary Courts of the Land.

Various implications are made by this second sense of the concept. It is implied firstly that no man is above the law, secondly that officials like subjects are also under a duty to obey the same law.

In the third sense Dicey wrote -

"That with us the law of the constitution, rules which in foreign countries naturally forms part of a constitutional code are not the source but the consequences of the rights of individuals, as defined and enforced by the Courts; that in short the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the crown and of it's servants, thus the constitution is the result of the ordinary law of the Land."⁹

The implication here is that the rights of the individual were not secured by the Constitutional document but were guaranteed by the ordinary laws available against those who unlawfully interfered with the liberty of an individual. In this light Dicey had in mind the protection of the rights of the individual not by the Constitution but by the common law. He was of the opinion that remedies provided by the Courts where the rights of individuals were infringed were more effective than the inclusion of the same rights in a Constitutional document. Here the Independence of the Judiciary is important.

These propositions by Dicey have been the subject of numerous criticisms by legal scholars.¹⁰ In the first postulate of Dicey he stresses the supremacy of regular law as opposed to arbitrariness by officials. In this sense the meaning is rather obscure. In his concept of regular law for instance Dicey has been criticised on the basis that he failed to define what he meant by regular law.¹¹

Various implications are made by this second sense of the concept. It is implied firstly that no man is above the law, secondly that officials like subjects are also under a duty to obey the same law.

In the third sense Dicey wrote -

"That with us the law of the constitution, rules which in foreign countries naturally forms part of a constitutional code are not the source but the consequences of the rights of individuals, as defined and enforced by the Courts; that in short the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the crown and of it's servants, thus the constitution is the result of the ordinary law of the Land."⁹

The implication here is that the rights of the individual were not secured by the Constitutional document but were guaranteed by the ordinary laws available against those who unlawfully interfered with the liberty of an individual. In this light Dicey had in mind the protection of the rights of the individual not by the Constitution but by the common law. He was of the opinion that remedies provided by the Courts where the rights of individuals were infringed were more effective than the inclusion of the same rights in a Constitutional document. Here the Independence of the Judiciary is important.

These propositions by Dicey have been the subject of numerous criticisms by legal scholars.¹⁰ In the first postulate of Dicey he stresses the supremacy of regular law as opposed to arbitrariness by officials. In this sense the meaning is rather obscure. In his concept of regular law for instance Dicey has been criticised on the basis that he failed to define what he meant by regular law.¹¹

~~For~~ does Dicey ~~set~~ the limits of acceptable discretionary powers granted that the powers that be must of necessity be granted some discretion.

Where in the second place Dicey takes the rule of law to indicate Equality before the law, one notes that there is an apparent error. Dicey implied the equal subjection of all classes to the ordinary law courts. It is further implied firstly that no man is above the law and secondly that officials like subjects are also under a duty to obey the law. It may be pointed out that apart from his failure to admit of the need for Administrative^{ve} law, his concept of equality before the law is watered down by the capitalist mode of production^{which} is characterised by socio-economic inequalities. It would be fallacious therefore to hold that in such a system "all are equal before the law." Instances are when the economically dominant buy their way out of the process of law. This same group can afford the serious^{vice} of advocates, a task which the economically subordinate can ill afford. It has also been pointed out that the notion of equality before the law ignores instances when certain persons are exempted from the operation of the ordinary law. Thus Diplomats enjoy Diplomatic immunity and are consequently exempted from the operation of the lawⁿ in their place of work. In Kenya again the Head of State is exempted from both Civil and Criminal liability by SI4 of the constitution as long as he is in office. Apparently whether or not he can be tried on

leaving office has not been Judicially Stated, but he does not seem to be protected in that capacity.

In the third place Dicey maybe criticised in that he laid too much faith in the Courts and the common law. Maybe the historical circumstances of the time justified his views but today they are untenable. It leaves individual liberty at the hands of the legislature which may modify or remove them (rights) by statute. There is no doubt that today it is important to have the rights entrenched in the Constitution. Where they are not so entrenched but remain as nominal rights it needs the will of the powers that be to maintain it coupled by a high degree of Political consciousness. A notable example is Britain where the rights are protected even though they are not written but remain as mere conventions. Again, the faith that Dicey had in the Courts may not prevail today, particularly in places where there is no Judicial Independence.

RULE OF LAW TODAY

The rule of law today has more and more been identified with the rights of man. It has come to Express a preference for law and order as opposed to constant strife, anarchy and warfare. It has come to mean certain notions of Democratic Society. The concept expresses a legal doctrine of fundamental importance, namely that the Government must be conducted in accordance with the law. Even further the concept refers to a body of political opinion about what the detailed rules of law should provide in substantive and procedural matters.

In short the term has come to be identified firstly with a desire for the prevalence of law as opposed to anarchy. Herein is expressed a desire for human disputes to be settled peacefully rather than through force or terrorism.¹³ It must be noticed however that undue stress on the law may lead to the suppression of liberty. Maintenance of law and order and the existence of political liberty are not mutually exclusive but mutually interdependent.

Secondly as viewed by Dicey the concept is an expression of ^fGovernment according to law. The Rule of Law in this context requires that Public authorities and officials are subject to effective legal Sanctions if they depart from the law. In this sense ^sthe concept serves as a guardian to the democratic principles in so far as it insists that the Government must act in accordance with the law and it could only acquire ^{re}new power through Parliament. It maybe argued that in this sense the concept is only largely true in the developed ^wWestern Democracies but is largely disregarded in the developing World.

Thirdly the concept must be seen as a broad Political doctrine. This is the most important characteristic of it and it embraces all the ingredients of the term. Since the events of the first and Second World Wars,¹⁴ characterised by the Nazi and other Fascist excesses, the International Community has attempted to promote the idea of the Rule of Law. The concept was invoiced ^kduring the Universal Declaration of Human Rights in 1948. Similar sentiments were expressed by the European Convention in Human Rights.

The Rome Convention in 1950 recognised that European Countries have a "Common heritage of Political traditions, ideals, freedom and the Rule of Law." It sought to create a machinery for enforcing human rights.

The International Commission of Jurists¹⁵ has also been active in promoting the concept. It ~~was in~~ the Act of Athens, it attempted to define the concept. It was described -

"As springing from the rights of the individual developed through history in the age old struggle of mankind for freedom - which rights include freedom of speech, worship, assembly, Association, Right to free elections; to the end that laws are ^{not} ~~erected~~ by the duly elected Representatives of the people and afford equal protection of all."

Notably the Athens congress emphasized the rights of the individual. This emphasis on the rights of the individual as opposed to the good of the Community should not surprise us if we bear in mind that the Jurists in attendance were mostly from the Western World. The definition may not be appropriate in the third World where the need for National development takes preference ^{over} ~~are~~ the rights of the individual.

In the New Delhi Congress of 1959 there was a substantial Jurist, attendance from the Asiatic and other third world countries. The concept was defined thus -

"The Rule of Law is a dynamic concept for the expansion and fulfilment of which Jurists are primarily responsible and which should be employed not only to safeguard and advance the Civil and Political Rights of the individual in Society, but also to establish Social, Economic Educational and Cultural conditions under which his legitimate aspirations maybe realized."

As in the former Congress, this congress recognised the role of the Rule of Law as a buttress for individual liberty. It's acceptance of the dynamic nature of the concept is a recognition of the multiple functions of the term. Though the term 'dynamic' as used in the congress is not explained, it is not wrong to interpret it to mean that the concept is capable of varied interpretations and functions. Such dynamism should be apparent at the date of the congress - a time when most states were under the colonial yolk^o and were trying to overthrow colonialism. The implication is that the term should not be confined to stereotyped ideas say equality before the law. In the era the concept could be in^{ve}looked to raise and advance political rights among the other rights enumerated. It is notable that the Delhi congress differed from the Athens Congress due to the formers insistance on political, educational, Cultural, Social and Economic rights of the individual as opposed to the emphasis on individual rights in the letter^o. The difference maybe explained not only by the differences in Historical settings but primarily by the incⁿcrization of the Jurists who attended. As stated before the Delhi Congress had a substantial Asiatic and 3rd World Jurist attendance.

As part of the dynamic nature of the concept it should be observed that there is an indication that the concept is also capable of developing. The Delhi Congress also emphasised the role of the Judiciary in the promotion of the Rule of Law. The Declaration of the Delhi Congress was largely followed by the latter Lagos Congress.

In this Congress the interpretation given at the Delhi Congress was followed. But again there was a greater emphasis on the African Concept. It emphasized that the functions of the Rule of Law should not be ~~moved~~^{altered} by whether the state is independent or not. The implication is that the concept can flourish in an Independent or even in a Colonised State.

When all is said and done, it is submitted that the problem of definition remains as ~~elusive~~^{elusive} as ever. There can be no universally accepted definition of the term and it would appear that the best solution would be to compromise the various ideas on the concept. Today the term has come to be associated with the promotion of justice and the maintenance of public order. To the argument that Bourgeois scholars insist on "Rule of Law rather than Rule of Law and Justice," my opinion is that the distinction is at best superfluous. Whether in the Bourgeoisie World or the Marxist World the measure of justice (if whether it is done or not) is a matter of subjective judgement. In it's entirely the concept of the Rule of Law has at it's core an emphasis on justice. This is made true when one observes the stress on the rights of, and protection of the rights of man. Be that as it were, it is further submitted here that the concept has been ~~involved~~^{involved} as a custodian of human rights against state encroachment. The view expressed by Kanyeihamba¹⁶ may serve to rationalise or at least to act as a guide as to the idea of the concept. He expresses the view that the Rule of Law is not a rule ~~horse~~^{per se}.

It is a collection of ideas intended to guide law makers, administrators, judges and law enforcement officers in the so called free and democratic societies. Like the doctrine of separation of powers it provides guidelines for a just and well ordered society.

Although the concept has been accepted in East Africa¹⁷, it is more so in theory than in practice. This is due to the undue emphasise placed on what is broadly termed "Public Safety and order." More often than not the phrase is evoked for the protection of the dominant class. There have been cases of political liquidations particularly in Uganda,¹⁸ detention without trial¹⁹ and suppression of individual freedom particularly that of expression. There is a general feeling in Kenya that for instance the murder of J.M. Kariuki on 2nd March 1975 was politically motivated. Certainly the Report on the probe team and the reaction of the Government particularly failure to apprehend those implicated and extreme hostility to student demonstrations further heightened those feelings.

Such was evidently a violation of the concept of the Rule of Law. In Uganda there has been numerous cases of mass murder, political liquidation and widespread suppression of human rights perpetrated by the Military regime.²⁰ The law has by and large been manipulated and used as a vehicle of repression to the detriment of the operation of the concept.

HUMAN RIGHTS

The concept of rights fundamental to man must be traced back to the Greek Philosophers, at least in the sense that we understand such rights. This is not to say that African's did not recognise the rights of man. But by and large in the African systems the rights of an individual were subordinate to those of the Community at large. The idea of fundamental rights originated in natural law theories propounded by Greek Philosophers, in their notion of Universal ~~&~~ Law, a law served from reason and Universal application to mankind^d. Aristotle echoes this notion when he states -

"Of political justice part is natural, part legal, natural that which everywhere has the same force and does not exist by people's thinking this or that²¹

Similar sentiments as these were expressed by the Romans. The great Roman ^otrator Cicero observed -

"True Law is right reason in agreement with nature; it is of Universal application, unchanging and everlasting. It summons to duty by it's commands, and averts from wrongdoing by it's prohibitions."²²

The Greeks believed in a fundamental law in the City States which was unchangeable and often unwritten. The Stoic Philosophers postulated natural law as a Universal system. They stressed the ideas of individual ^{of}with, moral duty and Universal brotherhood. In the medieval period there prevailed the idea of the supremacy of the law derived from God. The renaissance led to an emphasis on the individual and a rejection of the Universal collective society.

Law took a secular outlook divorced from Divine prescriptions. The trend of the Renaissance is observable in the works of Machiavelli who for instance taught that Religion was the ^{um}opinion of the people.²³

The 19th century was characterized by a rejection of natural law theories. Rousseau postulated his idea of the general will as the basis of society and the state. This follows closely his (Rousseaus) idea of the social contract whereby the individual surrenders some of his rights to Civil Government. By the social contract theories all the people bound themselves to ^bobserve the same conditions and consequently enjoyed the same rights.²⁴ Hegel took up the idea of Rousseau and declared the state as supreme and Sovereign. The state was seen as an end in itself.

There is still an idea of an overriding law expressing higher truth and a higher standard of justice than that possible under man made law. Have an natural points out that there are certain substantive rules which are essential if human beings are to live continuously together in harmony,²⁵ what is observable in all this is the admission of a minimum content of law, which maybe likened to the idea apparent in Greek natural law theories; for therein existed the idea of human equality latter manifested in the American Declaration of Human Rights.²⁶

Our Bill of Rights takes to the idea of the bill of rights of the former colonial master. Britain, it must be noted, has not written constitution. However the Magne Cota maybe regarded as having laid the foundation of the bill of rights which are presently protected by conventions.

The most apparent borrowing of natural law ideas must be seen in the American Declaration of Human Rights and later the Declaration of the Rights of man of the French Revolution. The concept of inalienable rights was well brought out in a passage from the American Declaration of Independence of 1776, where it was stated-

"We hold these truths to be self-evident that all men are created equal, that they are endowed by their creator with certain inalienable rights; that among this are life, liberty and pursuit of happiness."²⁹

In America the first ten Amendments to the Constitution constitute what has come to be called the Bill of Rights. The Imperialist wars between 1914 - 18 and 1939-45 created a great awareness for the existence of human rights. This was a natural reaction to the excesses of the Fascist and Nazi regimes of Mussolini and Hitler respectively. The reaction led to the Universal Declaration of Human Rights and latter to the European Convention of Human Rights. The Kenya bill of rights²⁸ follows closely on the model adopted by the convention.

It is accepted that the Governments of the present day face the problem of protecting human rights while at the same time maintaining Public Order.²⁹ The problem has not been solved by the Bill of Rights. The history of human rights in Kenya must of necessity be traced to the colonial period. This is not to ignore the fact that even our communal systems before colonialism had some idea of these rights. But that period suffers from lack of documented information and hence the return to the colonial era.

The colonial period was one based on exploitation of Kenyans by the colonialists and this was facilitated by an authoritarian, racist administrative system. The system was characterized by regulations which among other things tended to deprive colonized peoples of their fundamental rights. For instance by the Native Courts Regulations of 1897 the Commissioner was empowered to, inter alia, detain and restrict movement in the interests of Public Safety. Where such power was used there was no machinery for appeal.³⁰ By and large the colonial system was characterized by such laws which denied the colonised human rights. Law was intended to facilitate the process of European Settlement and exploitation of the Natives.

By the advent of Independence it was clear that changes were inevitable. It was realized that there must be Rule of Law to protect the rights of the individual in the context of a non-discriminatory society. This was a contrast to the discriminatory colonial regime. The process involved administrative changes and incorporation of a Bill of Rights in the constitution. The Bill of Rights was deemed essential for the protection not only of individuals but also of minorities like the Muslim Coastal people (this group was a minority both in terms of religion and population). As stated before, our Bill of Rights was adopted from the model of the European Convention of Human Rights, borrowed through Nigeria which had already provided for the Bill of Rights.

INCORPORATION IN THE CONSTITUTION

The Bill of Rights was incorporated in our Constitution and today forms Chapter Five of the Independence Constitution. It should be noted that the Bill in it's present form also appeared in the self-government constitution which was replaced by the Independent Constitution. The rights are enunciated through sections 70 to 86.

The contents of the Bill of Rights maybe divided into two broad categories -

- (a) Substantive - Rights - These contain the individual liberties.
- (b) Procedural - Safeguards.

These include minimum safeguards in the Civil and Criminal Process.

This same classification will be adopted in this paper.

S70 of the Kenya Constitution states inter alia -

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

- (a) life, liberty, security of the person and the protection of the law
- (b) freedom of conscience, of expression and of Assembly and Association and
- (c) Protection of the privacy of his home and other property and from deprivation of property without compensation."

This then is the content of the Bill of Rights. It is cautioned at this juncture that this paper will not analyse all the rights granted that such an exercise demands much more than is intended in this paper. All that will be done here is to examine the manner in which this rights are incorporated in the Constitution.

Only such rights as are directly relevant for the purposes of this paper - that is those rights dealing with the process of trial will be commented upon. All the other rights will simply be placed within their context in the constitution.

Substantive Rights

For purposes of easy comprehension this category will be divided into several sub-categories.

Personal Freedom

Personal freedoms include the right to life,³¹ prohibition of slavery and servitude,³² Protection of right to personal liberty,³³ Protection from being subjected to inhuman torture or degrading punishment,³⁴

It must be observed that all these rights are subject to exceptions. The right to life is qualified for instance where death results from force reasonably needed to defend any person from violence or to effect lawful arrest. In general all the rights are qualified in so far as they are subject to the rights and freedoms of others and for public interest.³⁵

Freedom of Movement:

Protected under S. 81 of the constitution. The right includes the rights to move freely throughout Kenya, the right to reside in any part of Kenya, the right to leave Kenya and immunity from expulsion from Kenya. As with the other rights the right of movement is also qualified by exceptions. For instance it maybe restricted when one is placed in lawful detention or is restricted in movement or residence within Kenya or right to leave Kenya.

Such restrictions will be imposed in the interests of defence, public safety or public order as provided for under S 81(3).

It should be noted as a weakness in the ^{Section} ~~section~~ that for instance what is lawful detention is not defined. This may well lead to conflict between state and personal interests as in Doko V R.³⁶ The right to free movement maybe variously restricted. For instance the application of the outlying Districts ordinance 1902, in the North Eastern Province has been used for along time to restrict movement in the Province.

Freedom of Conscience: Is protected under S 78 of the Constitution. S 79 protects freedom of expression and S 80 protects the right of Assembly and Association. All this rights are also qualified and they maybe waived in the interests of defence, Public Safety, and public order to name but a few exceptions. The rights where qualified can only be so qualified if such limitation as is imposed is reasonably justifiable in a Democratic Society.

Property Rights

These are the most comprehensively protected rights; and are provided for under S 75 of the Constitution. The protection of property rights in the constitution is very rigid but this is a natural consequence of capitalist system which lays great emphasis on property rights. Property is held as sacrosanct in the capitalist mode of production. Under S75 of the constitution it is provided for instance that no property maybe compulsorily acquired except for purposes of defence or public interest among others. Where property has been compulsorily acquired the constitution provides that prompt and adequate compensation shall be made.

It has been observed that S75 is one of the very few Constitutional provisions which have not been ammended since Independence.

Freedom from Discrimination

Is provided for by S82 of the Constitution. The section provides for the fundamental right to equality and non-discrimination. The section raises problems. It seeks to make people equal who by virtue of historical, social and economic reasons are unequal. In this sense the provisions may be criticised on the basis that their effect is to maintain the status which is one of inequality. The provisions of S82 are also qualified so that there are instances when the Constitution allows discrimination under sections 82 (6), (8) and (9). Such instances include for instance discriminatory law with respect to persons who are not citizens of Kenya.

Procedural Rights:

These rights can fall under two categories :

- (a) Criminal safeguards.
- (b) Civil safeguards for trial.

In both cases the provisions provide minimum safeguards for trial or the due process. These safeguards are contained in S77 of the Kenya Constitution.

S77 (i) states inter alia -

"If any person is charged with a criminal offence then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

This then is the safeguard for fair trial which will be taken up in the next chapter. Under the provisions of S77 it is provided for instance that no man can be convicted for a criminal offence unless that offence is defined and the penalty thereof prescribed.³⁷ This is a restatement of the principle of legality. In general³⁸ the rights recognised include ~~to~~^{the} right to a fair hearing, protection against double jeopardy, presumption of innocence, right to prepare a defence and facilities to do so, right to counsel and protection against retrospective legislation.³⁹

Under S77 (2)(a) and (b) the presumption of innocence and the right to be informed of the offence one is alleged to have committed in a language he understands is provided for. This particular provision will be looked at in more details later. It is the view of the writer that in cases of summary justice where the police are given a clean slate to liquidate suspects, they act in complete violation of these Constitutional Provisions.

The above are criminal safeguards. Civil safeguards are also provided for. For instance it is provided that a court adjudicating on civil matters shall be duly established by law and shall be impartial. The hearing is to be in an open court unless otherwise agreed.⁴⁰ The Jurisdiction of the High Court is absolute in all matters, Civil and Criminal ~~are~~^{as} provided for by S60(1) of the Constitution. If one feels that his fundamental rights have been infringed he has ~~one~~^a right to apply to the High Court for redress.

It is printed out that due to the sensitive nature of Constitutional issues the Court maybe reluctant to redress the right of the individual particularly where his rights conflict with the interests of the state. In Shimechero V R Court of Appeal, criminal appeal NO 119 of 1974. The accused was prosecuted for corruption in office. He was detained for five weeks without either being told of the reasons for his detention or his arrest. On appeal against conviction the Appellant argued that his Constitutional rights had been violated. The High Court was reluctant to quash the conviction despite the blatant violation of the rights of the accused as in S77 (1) and 2(b), of the Constitution. The Court contended itself with criticism of such practice by the prosecution. It is clear therefore that redress maynot be so readily forthcoming.

In general therefore the aforementioned are the constituents of the celebrated bill of rights. It maybe inferred that the state has made huge inroads into the rights by the inclusion of very wide ranging exceptions. Notably the rights are also negatively expressed that is they stated things that the state^t may not do. In socialist states the rights are positively expressed; i.e. like the granting citizens the right to work and education. In practice the difference need not raise misgivings since what is important is not the way they are expressed, but that they are expressed and practiced.

It is submitted that due to their being too-open textured the rights may ultimately be no more than psychologically comforting. They have been so extensively qualified as to be left with little if any substance. It must be conceded that if the concept of inalienable rights is not altogether alien to us it's application is a matter of political expediency and discretion. Apart from the dilution of the rights through the qualifications individual rights may further be abrogated through the application of other rules whose operation is inconsistent with the enforcement of individual rights. For instance the President is endowed with massive emergency or special powers which are^a relic₄₁ of colonial times.

By involv^king say the preservation of public security Act⁴² which the President can bring into operation at his discretion,⁴³ he may impose curfews, order detention or otherwise restrict individual freedom in the interests of public safety, defence and others~~g~~ related although specified reasons. It is contended that particularly that Act is an example of statutory denial of human rights and should be abrogated from the statute books.^s Speaking on the issue of detention in relation to the Act, Professor Ngugi wa Thiong'o expresses the sentiments of most people he states -

"Detention without trial is really a denial of the democratic rights of a Kenyan National. I believe that every Kenyan has a right to a fair trial in an open Court of Law. I was not tried in an open Court of Law. I have never, even now, been told any specific reasons for my detention. I was therefore stripped arbitrarily of my democratic rights as a Kenyan."

Speaking further on as to whether he was bitter about the detention he stated -

"Detention is a horrible institution. It should be abolished."

These sentiments expressed by Ngugi are an expression of most Kenyans who are desirous that such powers as the power to detain should be abrogated from our law. The preservation of Public Security Act has been invoked to justify the detention of people like J.M. Seroney, Martin Shikuku, Oginga Odinga and Ngugi Wa Thiong'o to name but a few. To go further and give the discretion to invoke such an Act (i.e. Cap 97) to one person is, to say the least, a denial of the concept of humanity and individual worth.

In conclusion it is contended that the substance of human rights and the Rule of Law is very wide and it is beyond the scope of this paper to deal with it exhaustively. Suffice here to state that an attempt has been made, albeit in a very generalised manner, to at least lay out the concepts as they are provided for in our legal system. Little has been said about the practical application of the rights. However in the small space which a limited work of this nature allows a few words have been thrown into indicate whether or not they ~~or~~ are applied. The question here is factual and one may ^{ess} ~~experience~~ his individual opinion as to whether or not Human Rights are protected within the framework of the Rule of Law. My own opinion is that both concepts are applied or abrogated at the expediency of ~~the~~ the ruling class.

Human rights are treated as second class to what is broadly termed public interest or policy. The interests of the 'Nation' comes first. It has been observed -

"Without National Unity, it is not possible to achieve any of the other values which are implied in the concept of the Rule of Law. The high premium we have placed on National Unity has, as in the case in many other developing nations meant certain deviations from the theoretical ideal of constitutional democracy."

The commentator places undue emphasis on National Unity. The phrase seems to be apologetic for the dominating class, but be that as it were, it expresses the practice in Kenya. One would rather, while accepting and recognising the need for National Unity and development, have the Human Rights granted a bigger part in the legal system.

I

NOTES

1. Universal Declaration of Human Rights 3rd paragraph to the Preamble.
2. It is unfortunate that there is no written material as to the operation of this system. However among that Community, disputes at clan level were settled by clan elders. At village level there was a Kiama which by attempting to settle disputes helped in the proper ordering of the people. Disputes which were beyond the Kiama or in which the decision of the Kiama was rejected were heard by the supreme body of elders - The Njuri Ncheke which acted as a final court of appeal. This body could make pronouncements governing the people which were accepted as binding.
3. D¹ EntreMes - Notion of the state pg. 71.
4. Aristotle in the Politics - see introduction to the legal systems in E. Africa by Harvey at page 217.
5. Constitutionalism - Ancientⁱ and modern by d'EntreMes pg 86
6. Hilary B. Ngweno - Rule of Law and the Press in Kenya; Nairobi Times 14/5/77. (see Generally)
7. A.V. Dicey - Introduction to the law of the Constitution.
8. Ibid at page 202
9. Ibid
10. See Generally Harvey - Introduction to the Legal Systems - E. Africa pg. 214.
11. Ibid - See Generally Harvey.
12. Kenya Constitution - S 14 (11) and S14 (12)
13. It is here contended that the exercise is possible even where there are conflicting classes. Law is aimed to resolve disputes not only between individuals qua individuals ~~the individuals~~ but also between different classes of people. The operation of Trade Unions and the role of the Industrial Court expresses how different classes ie Employers and Employees can have their disputes settled amicably.
14. The Imperialist Wars - 1914 - 18 and 1939 - 1945 respectively.

15. Act of Athens (1955) was a result of the deliberations of the International Commission of Jurists held in Athens in that year.
16. Kenyeihandle^{ba} - Constitutional law and Government in Uganda.
17. See Foot note six and the pronouncement of Kenyas Attorney General on the copy of Daily Nation of Friday 7th January 1977 whereby the A.G. speaks of the concept in a developing nation.
18. Nairobi Times May 7th 1977.
19. See January issue of Viva magazine (1979) where detainee^{CKhorji wa Isamwe} expresses his feelings on detention. The same views are expressed by Professor Ngugi Wa Thiong'o in the Weekly Review January 5th 1979.
20. See note 18
21. Aristotle - Natural and legal justice.
22. See Introduction to Jurisprudence by Lloyd at pg 92.
23. See Generally his work in the 'Prince'.
24. Lloyd - Introduction to Jurisprudence at pg. 182.
25. Ibid at pg 85 - see Hart's idea of a minimum content in Law.
26. Liberalism: It's meaning and History at pg 124.
27. See generally footnote 41 at pg 113 of Lloyd - Introduction to Jurisprudence.
28. Chapter V - Constitution of Kenya.
29. The phrase public order is rather vague. It is here used to indicate order in Society as opposed to anarchy.
30. Ghai^d McAusttan - Public Law and Political change pg. 407.
31. S71 Kenya Constitution
32. S73 Ibid
33. S72 discussed Under Procedural Rights.
34. S74 Kenya Constitution.
35. S70
36. High Court Civil case NO. 1159 of 1966 (unreported)
37. S 77 (8)
38. Ibid
39. Read through S77 of the Kenya Constitution.

40. S77(9) Kenya Constitution.
41. Refer to S85 of the Constitution.
42. Cap 57 - Laws of Kenya.
43. Some parts of Cap. 57 cannot be invoked.
(Without Parliamentary approval eg Part III)

CHAPTER TWO

RIGHT TO TRIAL:

When formulating and analysing the concept of the Rule of Law in chapter one, it has been observed that Dicey set out three features for the concept. His first proposition is most appropriate to the subject matter of this chapter and will be briefly restated here. Dicey propounded of the Rule of Law-

"It means in the first place the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power; and excludes the existence of arbitrariness of prerogative or even ^{wide} ~~under~~ discretionary authority on the part of the government ... a man may with us be punished for a breach of law but he can be punished for nothing else."

In the ^{is} sense Dicey has been taken to have laid down the principle of legality which operates on the premises that one cannot be punished for anything other than breach of an offence the penalty of which is dully prescribed and such offence should have been proved against him in a court of law. This is indeed what Dicey had in mind when he argued that no one could be made to suffer penalties except for distinct breach of law. Such breach should be established before an ordinary Court.

This then is the subject matter of this chapter. It is contended that the application of the right to trial is only possible in a framework that has a genuine desire to uphold the Rule of Law and human Rights. The interdependence between the concepts should be apparent at once. Human rights can only be applied and enforced in a framework that lays regard to the Rule of Law.

Without the Rule of Law, any Government can act in total disregard of human rights. Needless to say, the right to trial takes an important part in the interaction between Human Rights and the Rule of Law. It is true for instance to say that the principle of legality would have no meaning in a government system based on arbitrary power.

Reference has been had to the constitutional provisions regarding sanctity of life and personal liberty. In both cases it should be noticed, the rights can only be derogated from only by due process of the law. For instance the law provides that non shall be deprived of his life ^{except} ~~save~~ in execution of an order of the court. Likewise, personal freedom may legally be abrogated in order to effect lawful arrest. The law also provides that non shall be deprived of his personal liberty save as maybe authorized by law. Hence it is clear that in this context individual rights cannot otherwise be abrogated except by due process of the law.²

This then is the Constitutional theory embodied in chapter V of the Kenya Constitution. The question that the paper will seek to answer in the latter part is whether this theory is practiced or not.

The provisions in subsection (2) of section 72 are directly related to the right to trial. They provide for the procedure to be followed where one has been arrested or detained. In such cases the person arrested or detained must be informed as soon as is reasonably practicable of the reasons of his arrest or detention. Where one is arrested or detained in accordance with this section and is not released, he must be brought before a Court of Law as soon as is practically

possible and if this is not done within twenty four hours of his arrest or detention, the burden of prove that the provisions of the section have been upheld is upon the arresting or detaining authority. S72(6) provides for compensation where one has been unlawfully arrested or detained. The substance of S72 as a whole is strikingly similar to the provisions in S77 which specifically deal with the right to trial. One need only look at S77(2)(b) and S72(3) to note the apparent similarities. ^{Since} ~~Since~~ the matter in question that is the right to trial will be discussed later, very little will be said here. It is however pointed out that the provisions have been violated to the detriment of the individual. In Shimochero VR³ the accused had been convicted of two counts of corruption in office contrary to section 3(1) of the Prevention of corruption Act. The acused was convicted and sentenced to five years imprinsonment. There was evidence that the acused had been detained for five weeks despite the provisions for an acused to be brought to Court as soon as is reasonably practicable but nevertheless the Court of appeal upheld the conviction. Evidently there was clear violation of the right of the ^c~~ac~~used as provided for under section 72(3) and (5). The decision may therefore be seen as an illustration of the suppression of the liberty of the individual. It is contended here that this right is directly related to the right to a fair trial. A simple illustration should suffice to show the relationship. If A is arrested ^{and} ~~and~~ for instance tried after 3 days on arrest and is denied the right to an interpreter^e despite his plea for one, then obviously his trial is not fair and just.

Should he be convicted of the offence charged, his imprisonment where such a sentence is imposed will directly be an unlawful denial of his freedom and liberty. The word unlawful in the context denotes not the use of law but failure to apply the strict provisions of it. At least the effect of the miscarriage of justice in the example above would be to unlawfully derogate from A's personal right to liberty as by * law provided.

With this few observations in mind, we should now turn to the specific provisions that deal with the right to trial. Section 77 of the constitution provided^s for the protection of the law and the legal process. S 77(1) provides -

"If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The first part of S77 incorporates what has come to be defined as criminal safeguards⁴ as opposed to civil safeguards which come later in the same section. Among the criminal safeguards granted to one charged of a criminal offence is included the presumption of innocence until one is proven guilty or pleads guilty; right of ^a accused to be informed as soon as is reasonably practicable in a language that he understands and in detail, of the nature of the offence charged, right to adequate time and facilities to prepare ⁱ his defence and the right to plead his case ^{either} either in person or by a legal representative of his own choice.

It is further provided that one cannot be tried for a criminal offence for which he has been pardoned, protection against double jeopardy, right against compulsion to give evidence and perhaps even of greater importance the provisionⁱⁿ S78(8) which provides that -

"No person shall be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law."

This later provision protects the individual from arbitrary deprivation of his legal rights. It enunciates the principle of legality which operates on the basis that non should be punished for anything other than breach of an established offence whose penalty is prescribed by law. It may be pointed out here that at least in the Kenyan context the provision abolishes customary criminal offences since these are not defined and set out in writing.

The substance of S77 is very wide and therefore only parts of the section will be analysed for the purposes of the right to trial. As stated before, S77 (1) provides that once apprehended an accused shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. How far has this safeguard been upheld in Kenya? To what extent are the Courts in Kenya independent and impartial? This are only some of the perplexing questions that may arise in the interpretation of the section. It is the opinion of the writer that though in theory, the Judiciary is independent, in practice it may not be so. As the South African case of Harris V Minister of the Interior⁴ shows, the Government may influence the decision by various ways.

In Kenya this is possible particularly because the Judiciary is mostly manned by expatriates whose terms of service are contractual. Their services may be terminated if they oppose government policy. The best illustration of how this may come about is shown by the Zambian case of the people v Silva Freillus (1967).

Portuguese Soldiers had entered Zambian territory from Angola. They were arrested and charged with illegal entry. The trial Court convicted them and imposed shs 20,000 fine; upon which they appealed on the ground that the sentence was excessive. It was heard per Sir Justice Evans -

"What the soldiers had done was trivial being merely breach of Technical Regulations."

The decision was definitely very lenient and prompted heated criticism, so much so that President Kaunda declared that the Independence of the Judiciary and its criticism can only be accepted if constructive. As a result of the pressure Justice Evans and the then Zambian Chief Justice who supported him were forced to resign. Such an event has not occurred in Kenya but it is still a possibility. Hence it should be clear that the Judiciary, though theoretically independent can be pressurized by the Government in various ways.

The presumption of innocence is provided for by S77(2)(a). The principle of the law is that when one is arrested, he is presumed "not guilty until proven guilty or pleads guilty."

It is submitted that at least when cases come up before the Courty, this presumption is upheld. On the other hand, when the policeman on the beat is turned into an investigator, prosecutor, judge and executor all at the sametime and the verdict all too often being "suspected criminal" and therefore guilty and the sentence always a fatal bullet, there can be no question as to what presumption is adopted.⁵ It is not of innocence as provided by law but one of guilt as comparative practice has shown.⁶

How are the provisions granted to an accused for reasonable time to prepare his defence enforced? It is again contended here that if and when deemed necessary, this right has been violated. In Mwithaga v R,⁷ the accused was a controversial politician who was charged with the assault of his separated wife. The offence charged had been committed twenty months before the trial. The accused was also alleged to have done damage to property. Defence counsel argued that he had not been given time to prepare his defence since the case was mentioned in the morning and called up for hearing in the afternoon. The trial Court convicted the accused and defence counsel appealed tp the High Court on the ground that he had not been given adequate time to prepare the defence. The appeal was rejected. Apparently the rights of the accused had been violated.

Even the right for an interpreter as provided for in S77(2)(f) has been violated in Kenya.

In Andrea v R (1970) E.A. 46, the accused was a Portuguese Citizen who was found in possession of prohibited literature. He was tried in Swahili and English neither of which he could understand. The accused was not granted the services of an interpreter and appealed on that ground. Although the High Court allowed the application and ordered a retrial, the fact is clear that at least initially his Constitutional rights had been violated.

Among the rights granted to the accused by the Constitution is the right of the accused to either defend himself or to appear by a legal representative of his own choice. This may appear to be a most liberal provision but with all due "respect" to the Constitutional draughtsman it is submitted here that this right is almost discriminatory in its effect. The economically dominant will no doubt find it easy to pay for the best services that the legal profession can offer to defend their cases. But this leaves out a large part of the population, ~~to~~ particularly the rural population since they cannot afford to pay for legal representation.

It is contended here that giving a people right to legal representation and in the majority of cases failing to provide the means whereby such representation can be obtained is in effect an exercise in futility. The right of an accused to be informed as soon as is reasonably

possible and in detail the nature of his offence has already been discussed partly in reference to section 72 (3) and (5). The right as opposed to S72(3) which deals with provisions of the accused to be brought to court within twenty four hours deals with his right to be informed of his offence in a detailed manner. In Ooko v R High Court Civil case NO. 1159 of 1966, the appellant had been detained on 11th August, 1966. The detention order correctly stated his surname but the first names were different. The appellant contended in appeal that he was not given the reasons for his detention within the prescribed period and that the reasons were not sufficiently detailed as required by the law. The Court found out that the appellant had been given the reasons within the prescribed period. It accepted the ground that the reasons were not sufficiently detailed but the Court nevertheless went on to uphold the detention order. Although the issue was one of detention as opposed to a criminal charge, it is here submitted that it still does show the truism that *ejusdem generis* even the provisions of S77(2)(b) could be easily violated.

As it was pointed out earlier, it is impossible to analyse all the factors and legal provisions that should be followed in the process of trial. It has been found impossible here even to exhaust the provisions of the constitution. Thus little has been said about the provisions in the penal code, for instance the incidences of intention and motive⁸ and nothing has been said on the burden of proof as entailed by the Evidence Act.⁹

It is however hoped that the little that has been said will suffice to highlight the importance attached to the right to trial and the manner that the right is related to individual liberty. A few court decisions have also been analysed so as to express the attitude of the Courts vis ^{avis} ~~but~~ the accused.

It is not the intention of this paper to deal with the provisions for civil procedure but a brief mention is deemed necessary. S77(9) and (10) deal with civil procedure. As opposed to criminal procedure, civil procedure is less weighty due to the different effects on the persons concerned; understandably the constitution says very little about it. Under subsection (9) of section (77) the case in a civil procedure shall also be given a fair hearing by an Independent and impartial court dully established by law. Subsection(10) provides that except with the agreement of the parties thereto, the proceedings shall be in Public. As in the criminal process, litigents in civil procedure have a right to either defend themselves or to appear by their legal representatives. In general civil process is similar to criminal procedural^o with differences only occurring in the instances of burden of proof which is on the prosecution in criminal cases and on he who initiates proceedings (usually) in civil procedure.¹⁰ There are also differences in that criminal process is usually though not invariably instituted by the prosecution while civil process is instituted by the aggrieved parties.

Other Factors that Negative the Right to Trial:
Mob Justice

The incidence of what is generally termed as mob justice is a very frequent occurrence particularly in the urban areas, invariably a person or persons is suspected of pickpocketing or otherwise trying or actually stealing from either the person or from some premises. The mere ^ushot of 'Mwizi' (thief) is enough to have the immediate populace on the heels of the suspect. Whenever one is caught by the multitude 'justice' is always meted swiftly and without any regard to technicalities of procedure. As a fact the fact of suspicion to a mob is sufficient proof of guilt and it is not even necessary that the ~~cul~~^{cul}prit be got with any property that he allegedly stole.

The most tragic of this incidences occurred in Nairobi in the month of August 1977. The issue of the Daily Nation dated 2nd August, 1977 reported that nine men had been killed at Wakulima Market. The nine men were suspected to be coffee robbers and the period was characterized by the massive coffee boom and a consequent ^ospate of coffee robberies. Commenting on the issue, a Senior Police Officer remarked in the same issue of the Daily Nation-

"While the Police appreciate public co-operation, the public should hand over any suspect to the Police to be dealt with accordingly to law not to take the law in their hands".

My investigation in the Police Department has shown that this is the official attitude of the Department. On few occasions the Police arrive in time to save suspects from rough and ready justice meted by civilians.

If the police do not reach the scene within a very short time, the suspect would never stand before a Court of Law. I was informed by ^a Senior Police Officer who wished his name not to be disclosed that the incidences are a result of and an expression of Public abhorrence to the incidences of pickpocketing and so on. An outraged Public has no regard to the constitutional or other legal rights of a suspect as to trial. The view was expressed that though the police would like to stop that ^e ~~kind~~ ^{trend} of instant justice it has proved ~~extremely~~ ^x difficult. The only positive effect of such incidences is that they have more deterrent effect on would be thieves due to the psychological impact. My informant however commented that the police cannot use this fact to encourage mob justice and would rather that the public handed over the suspects to the ^{Police} ~~Public~~. In the face of 'Police justice' as will be discussed later, it is difficult to reconcile the bonafide of the information. It is however, the view of the writer that the public should not take in their own hands the roles of investigators, judges, prosecutors and executors all at the same time. One shrinks to think of the very possibility of an innocent man being beaten to death by the public.

The incidence of mob justice is a very real menace to the right of one for a fair trial. As observed before, once one has been caught by the public on suspicion it then becomes largely superfluous to speak in terms of his right to be tried - unless we speak of the right he had to trial.

A few figures should serve to illustrate the danger poised by mob justice. In June 1977 at least one person was reported killed by a mob on suspicion. In August of the same year the nine mentioned above were stoned to death,¹¹ of total of ten in two months only. One has to remember that not all cases are reported. There must be other cases that never find their way to the press. In 1978 four cases of mob justice were reported between the months of April and August. My research revealed that in only one case has there been trial after death had resulted from such incidence. The incidence was first reported ⁱⁿ the issue of the standard April 5th 1978, that a man had been beaten to death on suspicion of theft outside the Survey of Kenya Headquarters. Investigations were instituted and two men were charged with the murder and both were found guilty and convicted of the offence.¹²

As stated earlier,, the incidences of mob justice pose a grave threat to the right to trial. It may be difficult to prevent such incidences but nevertheless no efforts should be spared to re-educate the public. The law is that one is innocent until proven guilty - hence even the public has to at least observe the maxim for only then can justice be attained. ^m there suspicion is no conclusive evidence to convict.

Theory of Police Justice

Although very little will be said as to the fact of Police Justice here, it has been the force behind the ^{of this paper Mr. S.W. Gachuki writing} writing on the Hanging Bill observers that faced with increase in the rate ^{of} robberies with violence, the authorities "had

to resort to making the cop on the beat the prosecutor, the judge and the jury and the verdict all, too often being "suspected criminal" and therefore guilty." He further comments on the sentence which is always an instant and fatal bullet.

It is observed in the paper that the law enforcement officers have shown ready willingness to ~~usurp~~^{assume} all the functions of the judge and executor and to add to their powers of investigations. Faced with a spate of armed robberies the Police Force has retaliated by shooting suspects on sight. Such conduct by the Police is in complete violation of the rights of the suspects and goes against the principles of separation of powers. The role of the Policemen is to investigate, apprehend and prosecute. It is the duty of the Court to Judge. It goes against the principles of natural justice for one to take up the investigations, prosecute and judge all at the same time.¹³

I will use a few figures to illustrate the occurrence of police justice - and wherever the term is used it should be taken to denote justice meted out by the police upon suspects which is all too often capital in essence.

| <u>Date</u> | <u>Name</u> | <u>Offence & Sentence</u> |
|-----------------|---|---|
| 2nd August '77 | Mathenge | suspected thief: shot dead for resisting arrest. |
| 16th August '77 | Peter Gichuki ^{Mwaniki} Isuruli | Wanted criminal. Shot for resisting arrest. |
| 27th August '77 | Samuel Kamau and Karanja | Both on police wanted list. shot as they fled when apprehended by the police. |

| Date | Name | Offence & Sentence |
|------------------|--|---|
| 26th July '77 | S. Gakuo | Shot(not dead) in a cross ^{fire} , First between Police and the robberies ^{over} Nairobi. |
| 28th June '78 | Nicholas Muta ^{wea} Wakinyonga | Described ^{as} a most wanted man. Shot dead on shoot out with Police. |
| 26th October '78 | 3 men (unnamed) | All shot as they tried to brake into a clothes shop. |
| 8th October '78 | Anthony Kung'u Kamau | Suspected robber. Shot dead when he refused to stop at a roadblock. |
| 2nd July '78 | 1 termed 'gangster' | Shot on resisting arrest at Kakamega. |
| 24th January '78 | 2 'bandits' | Shot while fleeing after a bank robbery at Machakos. |
| 10th June '77 | Francis Danson Gachuhi | Described as one of the most wanted man in Kenya. Shot while fleeing arrest after shoot out with Police. |

Without more it is submitted that the figures show the extent to which the Police are ready to go in their bid to eliminate what they usually term as "most wanted men". Granted that S71 (1) provides for the protection of life unless by due process of law it is contended that by their modus operandi in the cases cited the Police at in direct contradiction of the right. No doubt S71(2)(b) which makes it permissible to take the life of another "in order to effect a lawful arrest or to prevent the escape of a person lawfully detained and S72(e) which allows restriction of ones liberty upon reasonable suspicion of his having committed or being about to commit, a criminal offence in Kenya will be cited as justifying the conduct of the Police.

I however find it very difficult to accept that the police ^{were} justified in all these cases to kill. In order to effect arrest or to defend some other people the police are allowed by the law to use such force as is reasonable.¹⁵ I do submit in this paper that am not prepared to accept that in all the cases ~~tabulated~~, the Police used reasonable force.

There can be only one reasonable explanation - that the police intended to eliminate these people. It matters not that this people were suspected of having committed violent robberies, it matters not that they were on the 'wanted list', what matters is the law-and the law provides machinery whereby such people ought to be taken for fair hearing until they are tried and proven guilty, ~~then~~ the maxim of the law is that they are innocent.

7 The taking of a human life is a very grave issue indeed. The Kenya Constitution as seen protects the sanctity of life. It is therefore a matter of very deep concern that those entrusted with law enforcement should take the law in their own hands. That they should constitute themselves into investigators, prosecutors, judges and executors goes against all the principles of natural law. There might have been cases when the police were justified to shoot - but one needs concrete evidence to accept that they were justified in all these cases. The informant quoted before did try to justify the conduct of the police. He ^{admitted} ~~claimed~~ that such measures were, as I pointed out to him, extreme; but that in all the cases they were absolutely necessary. The theory is that there are some criminals who are so hardened that they will never allow themselves to be arrested.

He argued that before such people were apprehended, concrete data was initially collected and analysed. The suspects who are in most cases known to the police are identified firstly by their mode of operation and then by person. In the latter exercise he indicated that some technical gadgets like 'lighter cameras' are used to identify the people positively. Only when the police are sure do they apprehend these suspects and since they invariably resist arrest, then they are shot dead.

Unfortunately all this information was oral. It was claimed that the criminal files being classified ~~as~~ ^{and} confidential cannot be disclosed. It then becomes a question of fact as to what weight to attach to this information. ^Wwhereas one would concur with the police that suspected criminals should be apprehended, one would also prefer that this people be granted their constitutional right to trial. If the police must shoot, why not shoot to maim rather than to kill? It is submitted that killing is by its very nature most extreme and being a denial of the very right to life should be done under very extreme cases. Mere suspicion that a suspect is armed or that he will resist arrest need not be any justification to shoot him on sight. I did learn that at times some of these suspects (names not disclosed) had been brought to court but discharged due to lack of evidence mainly because there are no witnesses willing to testify against them for fear of their lives. This could well be the reason why the police adopt the extreme attitude, but it is ^{still} ~~still~~ the contention that it ~~is~~ violates the supreme law of the land.

My honest opinion after painstaking^{king} research is that the police force, out on a campaign of elimination have converted the presumption of innocence and perverted it. To them a suspect is presumed guilty and shot dead.¹⁶ This is so at least in the cases cited in this chapter.

Detention without Trial

The institution of detention without trial in Kenya is provided for by the preservation of public security act. The Act must be viewed from a colonial perspective. The Governor was legally empowered through the passing of emergency Regulations to deal with specific areas. At Independence the President inherited these powers. S127 of the Kenya Constitution empowers him to make such Regulations for the good governing of the North Eastern Province as he may deem expedient. Such Regulations would be valid notwithstanding that they be inconsistent to the Constitution. The powers granted under these Regulations ^{are wide} ~~was~~ ~~under~~ ranging. They established a "prescribed area" in the Province (North Eastern) and among other things provided for restriction of movement and prevention^{ive} ~~tive~~ detention.

It is contended that this emergency powers negative the right to trial though it could be more appropriate to state that they violate generally the personal rights of an individual granted by the constitution. Possibly the most controversial legislation in Kenya today and this is true in Africa generally is the preservation of Public Security Act (cap 57).

The Act is closely tied to the use of special powers of the President. The Act distinguishes between Public Security measures provided for under Part II of the Act and special public security measures provided for under Part III of the Act. As opposed to special public security measures, the President can invoke the operation of Part II (public security measures) without the approval of Parliament. The President however needs the assent of Parliament to invoke Part III of the Act (special public security measures). The effect of the application of either measures is to confer upon the President powers to make laws by Regulations. A declaration can be made when in the opinion of the President, such powers are necessary for the preservation of public security. The preservation of public security is as observed by Ghain "Public Law and Political Change in Kenya" at page 434 "widely defined and covers situations of political instability or subversion, breakdown of the economic order and natural disasters. Under S42 of the Preservation of Public Security Act are listed the purposes for which the Act may be invoked. Among other things the President is given power to detain without trial. This is probably the most contraversial purpose that of late has become the interst of the people.

As of 1978, the powers conferred by the Act had been invoked for the detention of at least twenty seven people. The number included people like Sijeyo who had been in detention for ten years, George Anyona who was a former M.P., Jean Marie Serroney and Martin Shikuku both of whom had been picked for priviledged statements made within Parliament.

Also among the group of detainees was the famous Kenyan writer Professor Ngugi Wa Thiong'o who had been detained for unknown reasons. There was speculation that he had been detained due to his controversial Kikuyu Play 'Ngahika Ndenda'¹⁰ or alternatively due to being in possession of prohibited literature. However none of this has been established as the truth so far and Ngugi himself says that he does not as yet know the reasons that had led to his detention. Other detained persons at one time or another included former Vice-President Jaramogi Oginga Odinga, Bildad Kaggia and Achieng Oneko. The last 27 detainees in Kenya were released by President Moi on December 12th 1978.

As of today there are no detainees in Kenya, but the institution still remains. There can be no doubt that detention is a really extreme punishment and it fundamentally derogates from the principles of individual liberty. It has been widely criticised by many people and the general feeling is that the preservation of public security Act should be erased from the statute books. All the detainees released on the 12th of December 1978 have expressed their abhorrence of the institution and voiced the opinion that it should be scrapped. In the words of Professor Ngugi Wa Thiong'o²¹ -

"Detention without trial is really a denial of the democratic rights of a Kenya National. I believe that every Kenyan has a right to a fair trial in an open Court of law. I was not tried in an open court of law. I have never, even now, been told any specific reason for my detention. I was therefore stripped arbitrarily of my democratic rights as a Kenyan."

Further on in the same statement Ngugi remarked that "the treatment of a detainee in Kenya reduces human beings to the level of animals. The treatment strips every detainee of every human right." Asked as to whether he was bitter about his detention, he stated -

"Well, frankly, I'm very bitter. Detention without trial is nothing not to be bitter about. Detention is a horrible institution. It should be abolished."

I doubt that any amount of words can serve to illustrate better the general feelings as to the institution of detention. Professor Ngugi, out of the experience of his own detention, speaks and briefly stated without so many words undisputable truth - Detention is a horrible institution that should be abolished. It derogates not only from the principles of human rights but is tantamount to a denial of humanity.

There maybe no more detainees in Kenya today, but the relic of detention - the so called preservation of Public Security Act as strengthened by S85 of the constitution prevail. All lovers of the principles of human equality and social justice voice the opinion that the Act should be abolished. For at the pretext of Public Security Political opponents are whisked away and stripped of their liberty. What security threat did such like Anyona, Shikuku and Seroney pose by open criticism in Parliament? What kind of security threat was Professor Ngugi Wa Thing'o when he was detained? It is submitted that public security is only a pretext to curb dissent and criticism and consequently the democratic ideals that we cherish so much.

We have witnessed people facing trial on charges of treason and one wonders why such should not be the case with people considered as security threats. It is laughable to imagine what kind of security threat one armed with a small play poses! As Ngugi says detention should be abolished and such people granted their democratic rights of trial before an open court. Democracy it is pointed out, involves the right of people to criticise freely without being detained in prison. This should be the policy.

Other Considerations:

Apart from the considerations so far dealt with and their effect on the right to trial, there maybe some other factors that will negative or adversely affect the right of an accused to a fair trial. The most important of this it is contended ^{never} ~~have~~ is the financial limitation that weighs on the majority of the people. Litigation, both civil and criminal involves considerable expense²² and this at times do affect the process of trial. For instance when in litigation an illiterate rural farmer is faced with an astute counsel engaged by the other litigant, his morale is broken and without ~~more~~ he is placed at a disadvantage. Even the filing of proceedings particulrally in civil cases is an expensive business. One has to buy a plaint and pay further fees for documents filed with the plaint. In making interlocutory applications the applicant has to pay fixed fees. For instance one has to pay for an application for exparte judgement and a further shs. 4 for the order. Beyond doubt the most expensive part is the payment of legal fees. Particularly in criminal cases advocates' fees are at times beyond the meagre means of at least the less priviledged Kenyans.

Since this is ^athe financial handicap, one would wish that especially in criminal litigation, the government would provide counsel for those unable to pay for themselves. This is done in murder cases but not in other offences. For instances, counsel should be provided for an accused charged under the Hanging Bill who cannot pay for his own Counsel. It is obviously quite true that it does not help the people by giving them a right to defend themselves or by counsel of their choice when infact most can ill afford the services of counsel not withstanding their dire need for one.

Ultimately it is submitted that though the Constitution provides for the right of one to a fair trial, there are very many factors that vitiⁱate the right. Apart from procedural difficulties and financial limitations, one would urge for the immediate repeal of the preservation of Public Security Act. The operation of the Act while denying and abrogating the human rights of the people involved promotes no public security. The latter is a myth. All that the Act does is help to curb criticism consequently maintaining and perpetu^uat^{at}ing the ruling class. One would also urge the public to refrain from meting 'mob justice to suspects' and the police to cease being too trigger happy.

NOTES

1. Dicey - Introduction to the law of the Constitution at page 202.
2. Kenya Constitution - see 70-72
3. Criminal Appeal NO. 119 of 1974.
4. (1952)(4) S.A. 76 (A.D.)
5. See D.W. Gachuka - The Hanging Bill at page 6
6. Ibid
7. Criminal Appeal NO. 185 of 1975.
8. S.9 of the Penal Code.
9. S. 107 of the Evidence Act (cap80)
10. Ibid Ss 107-112
11. Standard June 4th 1977 and Standard August 2nd 1977.
12. Ibid 15th August 1978.
13. Read De Souza v Tanga Town Council (1961) E.A.C.A. 377 and Ndegwa v President and Members of Liquor Licencing Court (1957) E.A. 709.
See Harvey Introduction to Legal systems and methods at pages 210-411.
14. Dates shown indicate the times when the cases were reported. They can be found in the issues of either the Daily Nation or the Standard on the relevant dates.
15. Ss. 17 and 18 of the Penal Code.
16. This perversion of the presumption is also identifiable in the numerous cases where the Police have used torture which is expressly prohibited by the law, to coerce suspects to confess. Such confessions are then used to seek conviction for the accused. Refer for instance to the claim of torture in the issue of Daily Nation on 27th March 1979.
17. Cap 57 - Laws of Kenya.
18. As a matter of fact, most African states have legal provisions that provide for detention without trial.

19. Both were picked outside Parliament. The role that sparked their detention was a statement by Shikuku that KANU was dead. When asked to substantiate Seroney who was then Deputy Speaker ruled that "one need not substantiate the obvious." Their detention raised doubts as to the issue of Parliamentary Privilege.
20. Translated literally as "I will marry when I want."
21. Weekly Review January 5, 1979.
22. See Generally McComb - Guide to Civil Procedure.

- CHAPTER THREE -

NICHOLAS MWEA WAKINYONGA - A CASE STUDY

It has been shown else-where in this paper that the law in Kenya guarantees the rights and freedoms of the individual. Among others, the fundamental rights and freedoms protected are the right to life and personal liberty. These rights are well set out under S70 of the Constitution of Kenya.

S71 provides -

"No person shall be deprived of his life intentionally save in execution of the sentence of a Court in respect of a criminal offence under the law of Kenya of which he has been convicted."

Not suprisingly the rights to life and liberty are qualified - For instance the life of an individual can be taken in the execution of a Court sentence in respect to a criminal offence for which a person has been convicted nor will the life of one be deemed to have been taken illegally if death results from force reasonably used in the defence of property or another person from violence.²

It is interesting at this point to note therefore that the law allows the taking of life in reasonable and justified defence of property. Property is further protected under S75 of the Constitution of Kenya. A major characteristic of a society based on a capitalistic mode of production is the jealousy with which property is safeguarded. Here in Kenya we have borrowed a capitalistic mode of production despite any protestations to the contrary.³

It is therefore no wonder to note that property is specifically provided for by the constitution. It is only against this background that we can appreciate the savagery with which any attempt to violate the property section has been met. By this is included the attempt by those whom the capitalistic mode of production has thoroughly sucked and having denied them any means of earning a living they turn to crime. It is in this light that the writer seeks to analyse the case of Nicholas Mwea Wakinyonga. When discussing this study case one must always have regard to the Constitutional provisions that protect life, liberty and the right to trial.

The issue of the standard Newspaper on Wednesday 28th June, 1978 reported in the Headline "Killer dies in Hail of Bullets." The issue showed a photograph of the bullet riddled corpse of the late Mr. Nicholas Mwea Wakinyonga. The victim was said to have been "one of the most dangerous criminals in Nairobi, second only to one Francis Danson Gachuhi another 'wanted man' who had been shot dead by Police in June 1977. Before analysing the rights of the victim under the law, I would like to point out the crimes that Wakinyonga was credited with.

The report held him out to have been in his early thirties and termed him as an outlaw. Wakinyonga was reputed to have been a member of Gachuhi's ^{gang} which in addition to armed robberies also specialised in car robberies. Consequently Wakinyonga was credited with what was termed as a string of armed car robberies."

Among the most gruesome of this was the robbery of a car that belonged to one Stephen Block an oil Executive with Shell. Wakinyonga was also alleged to be responsible for the death of Block, who was shot dead while resisting the attempt to steal his car. Wakinyonga was also alleged to have been involved in bank robberies in Kakamega, Thika and Nairobi. According to police reports he was responsible for the disappearance of shs. 585,000 from the banks that he robbed.

It was also alleged that Wakinyonga openly boasted that he was not afraid of the authorities and that he would die after killing Mr. Partrick Shaw - an officer in the Kenya Police Reserve. Indeed at the fatal night of his death Wakinyonga was said to have been boasting of how he could shoot any C.I.D. bastard. True to his word, when he was surrounded at Nyakiambi Night Club in Kangemi he is said to have ^llunged at the nearest policeman ^ushooting ^y-you bastards upon, which he drew his gun. In the ensuing gun battle, three people including a woman and one policeman were ^jinjured. Those escaped with their lives but Wakinyonga lost his.

His house in Kangemi was consequently searched and found to have a lot of amenities - allegedly from the proceeds that he had stolen. The houses were also said to have had "security ^lrights."

- 68 -

In addition to a Czechoslovak pistol found in him when he was gunned down and 15 rounds of ammunition, more ammunition was found hidden in the ceiling of his house.

When his police file was submitted to a Resident Magistrate's Court in Nairobi, Senior Resident Magistrate J.S. Patel ruled on perusing the file that no inquest was necessary as to the death of Wakinyonga. In the file Wakinyonga was described as a "trained jungle marksman who could not hesitate to shoot at anyone while on a robbery mission."⁷ It must therefore be presumed that the Magistrate was satisfied on perusing the file that the Police were justified in killing Wakinyonga. It is contended here that when coming to such a ruling the magistrate either believed as true all that was contained in the police file or a substantial amount of it. The question that arises is whether or not, having shot the man down couldn't the police enter in the file only such data as would absolve them of any guilt in case of an enquiry? The author finds this a great possibility considering the fact that there would be nobody to refute the allegations made. My investigations at the police Headquarters revealed that the file that was presented to the court was not complete. Infact I was informed that only a skeleton file was taken. The explanation as to why the whole file should not have been brought before the court was simply that this would have led to a disclosure of the ^uMod_zs Operandi of the Police, which they felt should not be disclosed.

Was there not a possibility that such contents of the files as were not disclosed could have changed the opinion of the Magistrate? Such would be possible for instance if there were some mitigating factors in Wakinyonga's case or alternatively some objectionable factors in the manner that the police conducted their operations.

At the Police Headquarters in Nairobi a police official in charge of Administration informed me that I could not read the police file since the matter is not yet completely closed and hence remained confidential. The official tried to justify the police conduct on the basis that Wakinyonga and such others as Dan Gachuhi were very hardened criminals and since they could never allow themselves to be arrested peacefully left the police with little alternative. This fact is rather suspect since the same informant did admit that Wakinyonga had been picked up earlier but he was discharged for lack of evidence. It then seems that the argument that he could not be picked peacefully raises some doubts. The fact that Wakinyonga had earlier been discharged by a court of law further raises doubts in the Police case. Since they still had a file on him with some if not all of the allegations made after his death, why did they find it difficult to prove a case against him? There is the chance that having failed to establish guilt, the police opted to eliminate one whom they felt a perpetual nuisance. This is an assumption but it is an assumption well founded upon the facts and one that is perfectly tenable.

The police informant also told me that Wakinyonga was a well known figure and the police kept checks on his house but found it difficult to arrest him since he kept changing homes. I was further informed that the culprit had been suspected of other crimes some of which were never reported. It was dubiously pointed out that he was suspected, had indeed shot dead a police sergeant at Parklands but the incident was not reported. It would appear that after this escapes the police felt that he left them with no other alternative but to shoot him. At the fatal right that he was first positively identified, not only by the tip off ^o when ~~an~~ informed the police that he was in another night club but also by photographs taken with what he termed "lighter cameras."⁹

The information that I got from the police was apologetic. It sought to justify and exonerate the police from any liability on the death of Wakinyonga. When I enquired as to the panicky measures displayed by the police during Wakinyonga's funeral when ^e ~~an~~ the police raided the funeral and were reported to have picked hundreds of mourners,¹⁰ I was informed that such was only a routine measure since the police expected to fund Wakinyonga's associates at the funeral.

It may therefore be admitted that the police had substantial information relating to Wakinyonga. Nevertheless we have to enquire as to whether the circumstances justified their eliminating him. It should also be also be remembered that whatever answers we get do not only affect that particular suspect but also others shot dead in similar circumstances.

The law presumes an individual innocent until proven guilty unless the individual pleads guilty. A person is also accorded right to a fair trial by an Independent and impartial Court.¹¹ It is then contended that it was not enough for the police to have had a lot of information against Wakinyonga. Even if the law exonerates the police from death where such results as a consequence of force reasonably justified to effect an arrest,¹² The question that one should seek to answer is "whether or not the force used is reasonably justified to effect arrest. Between 1977 and 1978, I counted fourteen incidences of police shoot outs from the newspapers. In all those cases only ~~one~~^{one} suspect recovered, from the wounds and lived to face trial.¹³ It then appears that wherever the police are confronted by these type of suspects they resort to extreme measures. It is difficult however to establish as a matter of fact whether the force used is reasonable or not, suffice here to state that it is possible that the force used is excessively, if out of fourteen cases only one has survived then it would appear that there was often an intention to kill.

The case against Wakinyonga might have appeared overwhelmingly incriminating. Infact I believe that on the evidence reported in the papers a proper conviction could have been reached using the proper legal procedure. Sources who were close to him in Kangemi did indicate that they have always suspected Wakinyonga.

In fact most of them uphold the police statements reported in the Newspapers as true. Thus a conviction may have been got in a court of law.¹⁴

My contention in the ⁱpart of the paper is that Wakinyonga died on mere suspicion. It matters not that the police had ample evidence against him. Such evidence would only have been material if presented before a court of law. The law demands much more than mere suspicion in order to deny one of his life. The law demands and we must uphold this principle, that one is innocent until proven guilty. I refuse to agree that the police shot Wakinyonga dead because he left them no alternative. Why for instance did they not shoot him (or for that matter any other of the robbers shot dead) to maim rather than to kill? Whether or not Wakinyonga was guilty of the crimes alleged will now never come to light. Suffice here to state that such summary execution of suspects by the police constitutes a grave threat to the operation of one's right to trial. In Wakinyonga's case it is deemed largely superfluous in this paper to consider any other rights in the criminal process. Normally one would have been speaking of such factors as the ones of proof upon the prosecution, but such issues do not obtain in my study case and it will therefore leave them out.

Wakinyonga might have committed the crimes that were alleged against him.

He might have resisted arrested and thus justified the police to use reasonable force to arrest him. If he died due to the use of such force as was claimed then the police were exonerated. However it is my contention that, the law required much more than a 'might' or a suspicion. In cases of a criminal nature the law requires proof beyond reasonable doubt.¹⁵ The law requires that one be given a right to ^{be} heard and to defend oneself. None of these things were done and as long as none was done, the constitutional rights of the person were violated. My opinion is that if the police must shoot robbers, they should do so with the intention to injure not to kill. Consequently, for the likes of Wakinyonga, Gachuhi and the others, I find only one rational explanation. They were victims of the class struggle that prevails.¹⁶ Having been deprived of a means of livelihood they turn to crime. As a result they threaten the property interests of the propertied classes. Property being the basis of a capitalist system, all that threatens property must go. As a logical conclusion therefore, Constitutional rights or none, Wakinyonga and his like had to go the way they did.

C O N C L U S I O N

The paper has attempted to analyse the legal rights accorded to a person in the process of ^{trial} ~~that~~. However the right to trial could not be analysed in isolation and therefore the writer has tried to place the right to trial within the broader concept of the Rule of Law. An attempt has been made in the analysis of human rights in general. It is submitted in the paper that the ~~right~~ ^{right} to trial is merely a constituent of Human Rights and as such the right to trial has been analysed within that context. The work was extended further by an analysis of the ^o ~~in~~ ^{ter} ~~action~~ ^{action} between the concepts of human rights and the rule of law. The contention is that with a few exceptions say of Soviet Russia where the concept of the Rule of Law has been replaced with what they term "Socialist Legality" human rights can only attain ^o ~~an~~ ^{practical} application in a society that pays reverence to the Rule of Law as opposed to the use of arbitrary powers.

Granted then the fact that Human Rights can best be applied in a system that honours the idea of the Rule of Law, one need not over-emphasise the importance of the later concept in the 20th Century. The Nazi and Fascist excesses as ^{amplified} ~~exemplified~~ by what has been termed as the holocausts best illustrate the ~~dire~~ ^{dire} need by humanity to practice these ideals.

It is hoped that the paper will bring out the importance that ~~men~~ should impose upon the rights analysed. When discussing the concepts of Human Rights and the Rule of Law it was shown that there are places where Governments have shown total disregard to these noble ideals.

In our own context it is submitted that our governmental system has shown itself ready to apply and practice the ideals expressed in the two concepts stated. However it is sadly admitted that even such acceptance is with its own reservations. It is noted how individual rights are incorporated into the Constitution and the subsequent qualification. The fact here is that Human Rights as enshrined in our Constitution have been so extensively qualified as to ^{be} left with little substance. Ultimately therefore, the consequence is to make the application of Human Rights a matter of political expediency. Our capitalistic economy has, not surprisingly placed undue emphasis on property and this at times has been placed above any other rights fundamental to man. It is hoped that the tendency will be changed for only then can we realize the idea of human equality and dignity as enshrined in the spirit of S82 of the Kenya Constitution.

The right to trial has suffered from excessive qualifications as is the case with the other rights guaranteed by the Constitution. Various factors that viti^{ate} the right to trial ^{av} here been analysed. ^{2nd} On the whole it is submitted that the Judiciary has tried to apply the right to trial. It is also contended that the Government has by and large promoted the application of the right by not interfering with this right in the majority of ^{cases}. One wishes that he could say the same for our sister State Uganda but that state leaves a lot to be desired. This is not only with the right to trial but the general application of the ideals of Human Rights and Rule of Law. Uganda is not a lone example. Violations of human rights are numerous in Africa they are commonplace in apartheid South Africa, in the Central African Empire, Ethiopia, Equatorial Guinea, Mozambique and Guinea to state ^{but} a few. It is hoped that the ideals of humanity

will find expression in these areas so that the people all over can enjoy their natural rights to life and liberty among others.

The paper has also touched on the incidences of mob 'justice' and Police 'justice' both of these phenomena ^{none} ^{are} at a contradiction of the right to trial. The phenomenon of mob justice is particularly perplexing due to the extreme difficulties in ^{investing} ~~divesting~~ it. However, it is hoped that the law enforcement officers will spare no efforts in their campaign to check occurrence of mob justice. It is also hoped that the public will exercise restraint on the basis that all without exception are entitled to a fair trial. The fact of police justice is possibly easier to check. The courts especially should scrutinise all circumstances particularly where death has resulted due to a measure of force used by the police. As far as possible the law should restrict the rights of the police so that even where they have to use force, they should only use such force as will effect arrest but not such force as will cause death.

It has also been ^{briefly} ~~brightly~~ shown that there is a general public outcry against the institution of detention without ^{out} ~~in~~ trial. It is the submission of the writer that detention without trial should be abolished. The ~~presentation~~ ^y of public security Act should cease to be in the statute books. It is the considered opinion of the writer that the Act has been misused by the ruling class to keep themselves at the helm. People have been detained at the guise of public security or as security threats but it is submitted here that if people ^{are} ~~of~~ such a threat to security, then they should be tried and such allegations be proved against them.

If however the Act is to be retained and detention remain legal, the law should be amended so that power to invoke the preservation of public security Act or to detain should be Vested in Parliament and not in the executive. This would check political victimisation at the perferxt of Public Security.

It is submitted in conclusion therefore that, though we have tried to cooperate and practice the principals of human rights, we still have some way to go if we are to fully realize full human dignity. This is also true of the concept of the Rule of Law. It is not enough to accept the concept in theory, rather we should seek to apply it for the betterment of society. It is due to a failure to realize full human dignity that injustice has cropped in our midst. My view is that such people as Mwea Wakinyonga were in a way victims of a Society based on a mode of production that by stratifying societies leads to injustice. They were eliminated and denied of their rights to be tried because they threatened the property interests of certain groups in our Society. The contention here is that the right to trial, together with all the other rights ~~estinned~~ ^{enshrined} in the Constitution are fundamental and should not be subordinated to any other interests. We have as yet to fully realize the right to trial through the establishment of a fully independent Judiciary ready and willing to apply human rights, and also it is hoped that in cases where litigants cannot afford counsel, then the state should aid them to produce them. This is particulary important in cases of a criminal nature. Just as it is not enough to accept in theory the ideas embodied in the concepts analysed so it is not enough to guarantee a peoples' rights the exercise of which is not within their ability.

Only when such exercise of the rights ^{is} as made practicable will "Justice be seen to be done!" This is the principle of the law, that justice should not only be done, but that it should be seen to be done.

FOOT NOTES

1. S71 (1) Constitution of Kenya.
2. Ibid - S71 (2) - see section generally.
3. According to sessional paper NO. 10 Kenya was to pursue a policy of African Socialism, a political ideology that would ~~slum~~^{slum} both capitalism and communism.
4. See Ss 70, 71, 72 and 77. Respectively for the provisions as to this rights.
5. Refer to Nation 16th June '77
6. See standard 21st June '78.
7. Standard Wednesday 3rd January 1979.
8. This was a further interview with a Senior Inspector of the C.I.D. who also wished that his name ~~should~~^{to} not be disclosed.
9. This gadget is actually a minute camera which operates disguised as a cigarette lighter.
10. Nation 10th June 1977.
11. S77 of the constitution.
12. Ibid S71
13. Daily Nation 26th July 1977.
14. Members of the family were unwilling to volunteer any information. But neighbours did confirm the police statements. They desired not to be named for their own Security.
15. S11(1) of the ~~E~~^vidence Act.
16. For a good discussion on the point see D.W. Gachuki's article on the Hanging Bill, particularly at pages 8, 13, 20 and 21.

SELECT BIBLIOGRAPHY.

- 80 -

1. Man For All Seasons.
2. Notion of the State.
3. The Politics.
4. Constitutionalism.
5. Introduction to Legal Systems and Methods
in East Africa.
6. Introduction to Jurisprudence.
7. Liberalism.
8. Public Law and Political Change.
9. Introduction to the Law of the Constitution.
10. Guide to Civil Procedure.