CONSTITUTIONALISM AND THE RULE OF LAW IN THE MULTI PARTY ERA IN KENYA

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DEDICATION

Dedicated to my parents, Mr and Mrs Azariah Omburah, for their parental love, care and upbringing that they afforded me, more so for seeing me attain this level despite the heavy economic pressure the world exerted on them.

Then to Mr. Philemon Agulo for his hospitality of which he gave me the privilege to enjoy over the exaggerated long holidays.

Finally to Prof. Kibutha Kibwana whose re-election as the Dean of the Faculty set loose the weight of democracy over political whims. Principles must be protected to call them principles.

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INTRODUCTION

Kenya is presupposed to be a civil society where the law governs all acts of the members of society. The duty to set and enforce the law is vested in the government which has the primary authority and machinery to effect this duty. However, for the realisation of the purpose of government in a political set up such duty must be conducted without prejudice. The government is therefore obliged to render its services without discrimination, reservation or favouritism. The underlying idea is good governance which is pre-empted by the concepts of constitutionalism and the rule of law. They set forth the requisite conditions for sound governance capable of holding a society together.

This piece of work is mainly concerned with the above concepts as applicable in Kenya. Kenya as a sovereign state exercises the rights of sovereignty through an autonomous government and must qualify this position by acting reasonably within its powers guided by the constitution. Chapter one mainly covers the theoretical aspects of the concepts, going deep into the origin, evolution and development of the two concepts of constitutionalism and the rule of law. This is intended to clearly give a sound background and significance of the concepts for their present understanding and consequent practical enforcement or application. The background of these concepts is discussed in Chapter one to provide a proper ground for comparative study in application of the concepts in the third world countries like Kenya where they have not gained grounds. Chapter one dwells on this comparative analysis and attempts to set out difficulties met in implementing constitutionalism and the rule of law. The two concepts are tied to the idea of partyism since the Kenyan system is one of the party government. I consider in this chapter the theoretical outlook of the idea of partyism by discussing the

subjective characteristics and functions of political parties which play significant roles in a party government system.

The successive chapters will be based on the theories discussed in Chapter One. Chapter two deals with the practical application of the concepts of constitutionalism and the rule of law with particular emphasis on the single party era in Kenya. This is the period of pre-independence and post-independence in the Kenyan history. Upto the time Kenya became a dejure multi-party state through the repealing of Section 2(A) of the Constitution in December 1991. A clear background of partyism in Kenya is established before discussing the practical application of the concepts. An attempt is also made in this second chapter to discuss the merits and demerits of one party system. In examining the application of the two concepts particular attention is paid to the exercise of the governmental powers designated for the various organs and agencies of the government. A more practical approach is taken to identify how such powers were used in the single party system in relation to the spirit of constitutionalism and the rule of law. At the end of this chapter, a finding will be made whether the concepts were adequately upheld and practised and whether there was need for a remedy by way of change of the whole political set up.

In Chapter three, I intend to deal with a multi-party Kenya and its response to the two concepts calling for good governance. This chapter marks the core of discussion by first outlining the conditions which necessitated change for multi-partyism as earlier on concluded in Chapter two. I proceed to cover the birth of opposition in Kenya and the role of opposition and opposition parties. A comparative analysis of the application of the two concepts of constitutionalism and the rule of law in the single party KANU regime and the multi-party KANU government era is made. The Chapter also covers important events in the transitional period, for instance the general elections. Close observation is made of the treatment of the opposition by the

ruling party, exposing the anomalies perpetrated by the KANU government and its rejection of competitive politics.

Finally, I conclude in Chapter four by recapitulating all that would have been dealt with in the previous chapters and subsequently make recommendations for improved governance. The recommendations are not hypothetical in nature, but can be adopted if there is positive will to actualise change. These recommendations are pulled from the realm of constitutionalism and the rule of law.

CHAPTER 1

THE CONCEPTS OF CONSTITUTIONALISM, THE RULE OF LAW AND PARTYISM

This Chapter's major objective is to outline and analyze the three concepts of constitutionalism, rule of law and partyism. Being separate legal concepts each of the first two will be looked at and examined deeply by tracing the background and the present understanding. Constitutionalism and the rule of law are inter related and inter-twined, and therefore each of them cannot be discussed in isolation of the other. They may have different requisite components, but this does not circumvent their common object for good governance. With the evolution of government systems, what these concepts meant in the last centuries when they were founded could not somehow measure to the present requirements. However, the fundamental premises on which they were based still remain solid.

The Chapter will also cover the possibility of actual application of constitutionalism and the rule of law especially in the third world countries like Kenya where the struggle for good governance is still ripe. This calls for proper examination of the drawbacks that have undermined the concepts of constitutionalism and the rule of law which traditionally are very important for a civil society. On partyism, the chapter is intended to highlight the universal ideas of partyism by covering major aspects of a political party, the qualities of a political party, its characteristics and the general functions

of a political party.

The subsequent chapters as will be seen, will primarily be based on the ideas discussed in this chapter by weighing the theoretical view against the actual practice of concepts of constitutionalism and the rule of law. The idea of partyism comes into play as the whole work is limited to the era of multi-party politics in Kenya.

CONSTITUTIONALISM

1.1 Definition of Constitutionalism

A society as a group of individuals consists of members with a divergent aspirations and inspirations which are successively drawn from nature. Each individual would admire every chance and opportunity where he has the opportunity and liberty to exert himself within the society. If such chances are granted indiscriminately to every individual then such exertions may be overgrown to an extent of undermining the existence of a society as a unit of members who share common background and goals. It is upon this contention that there emanates the necessity of a government as a mechanism for ordering society for every member to realise himself in his creativity and dignity.
These values can be realised through a coherent and consistent civil society. A society therefore needs a form of government to effect equal control over individual powers.

A government is a body of institutions through which the process of government takes place. A government consists of various limbs which differ in their roles, but jointly compose one body of system. They constitute the entirety of the government in which they play complimentary roles, to the extent of powers vested in them which is ordinarily according to the legal principles and sometimes, political norms that give foundation and power to that particular government. However, government must be distinguished from the state. The term state has incompatible definitions, but it is generally assumed that a state is a human institution consisting of and possessing the elements of population, territory, government and sovereignty.[1] Government on the other hand is the agency of the machinery through which common policies are determined and by which common affairs are regulated and common interests promoted.[2] It is the manifestation of the state and it consists of all those persons, institutions and agencies by which the will and policy of the state is expressed and carried out. It is therefore a misnomer to equate the government to state.

From the above, it is evident that a government is vested with a lot of duties which express the will of the state. The

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execution of such duties, to achieve their objectives and good governance must be according to some rules or laws which operate to keep the government on its wheels lest it may abuse those powers conferred upon it. The concepts of constitutionalism and the rule of law come into play in endeavour to achieve the above.

Constitutionalism connotes the entirety of the legal principles that form the base link on which every government is built. Constitutionalism is also understood by other scholars to mean a body of rules and values from which the government and law derive force and legitimacy. This understanding presupposes constitutionalism as the foundation of modern governments and as legality. These ideas, however, share the basic elements of constitutional. Constitutionalism as a concept, nevertheless, lacks independent and countable elements which can be pinpointed but it is the contextual or functional meaning that creates the platform of understanding the concept. Professor Nwabueze in defining constitutionalism in more elaborate terms states,

> "The core and substantive element of constitutionalism is the limitation of government by a constitutional guarantee of individual civil liberties enforceable by an independent tribunal deriving from the fundamental values of society, values which articulated in public opinion, express a society's way of life and upholds its members' personality. Individual civil liberties are indeed the very essence of constitutional government."[3]

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The term constitutional government imports an idea that a government must be in accordance with the terms of a constitution. A constitution of a state consists of the basic and fundamental laws which the inhabitants of the state consider to be essential for their governance and well being. The constitution lays down political and other state institutions and distributes powers among them and puts limitations on the exercise of those powers. There is a presumption that there is a formal written constitution according to whose terms and provisions a government is conducted. This alone does not make a government constitutional for there lies difference between precept and practice. A number of countries in the world today have written constitutions but without constitutionalism. The written constitution is not a yard stick for determining whether there is constitutionalism. A constitution may also be used for other purposes apart from putting restraint upon government. It may merely describe and declare objectives of the organs of government in terms which do not invite any enforceable legal restraints. The government is a creation of the constitution and it is the constitution that creates the organs of the government. The constitution being the starting point of a country's legal order, its 'lawfulness' should not depend upon its enactment through the law making mechanism of the state but rather upon its recognition as such by the people to be governed by it.

Alternatively there are other states which practice constitutionalism yet they have no written constitutions. England, for example, has no formally written constitution yet compared to other states in developing states it is far ahead. The crucial test for a constitutional government is whether the government is limited by pre-determined rules. The question is, does the constitution impose limitations upon the powers of the government? A government operating under a written constitution must act in accordance therewith, any exercise of power outside the constitution or which is authorised by it is invalid. Professor Nwabueze further observes that constitutionalism recognises the necessity for government but insists upon a limitation being placed upon its powers. It connotes in essence therefore a limitation on government, it is the anthesis of arbitrary rule, its opposite is despotic government, the government of will instead of law.

Arbitrary rule is government conducted not according to the pre-determined rules, but according to the momentary whims and caprices of the rulers. A dictatorship is thus clearly not a constitutional government, however benevolent it may be, a totalitarian regime is even less so. [4]

Looseness of the constitution that grants no limitation on power at all only merges and creates a fusion of the organs of the government. Excess of power on the part of the government defeats the spirit of constitutionalism.

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To qualify constitutionalism, therefore, arbitrariness by the governmental organs must be arrested and the government as a collective institution must not overgrow its powers. Constitutionalism as
the foundation of modern government and through the successful working of constitution provides safeguard against such inclinations and simultaneously ensures the realisation of human rights and dignity.

It gives the government only enough power in domestic affairs and in so doing constitutionalism protects the substantive rights of personhood.

Walter Murphy summarises in the following words,

> "Constitutionalism is rooted in certain beliefs, the belief in the dignity of man and the belief of man's inclination to power."[5]

1.2 Historical background and the present African concept of constitutionalism

Constitutionalism emerged in Europe as part of bourgeois revolution. These revolutions were aimed at uprooting the papal

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authority which was aimed at achieving national monarchies. Constitutionalism can also be traced to the need of capitalism for predictability, calculability and security of property rights and transactions. Capitalism was seriously against feudalism and capitalists advocated for the transformation of the serfs into wage earners and the consolidation of national markets. Property rights were to be safeguarded and this called for the limitation of the arbitrary powers of the monarchy. It called for the application of the general rules to ensure independence of the judiciary, absence of arbitrary powers and discrimination and it ruled out any laws that were retrospectively enforceable.

In the nineteenth century the first class society of those who had acquired property gained predominance over others who had no property and for the protection of their property this class controlled the economy. From the economic control, the propertied had a lot of influence on political matters, hence there was need for constitutionalism. [6] The modern constitutionalism also emanated from the Greeks. The religious devotion of the Greeks to the principle of autonomy, or the liberty of the group finally engulfed them. But they only knew the city state. This was the Greek's conception of the state. Aristotle observed that there existed a state not merely to make life possible but to make life good.

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The greatest contribution of ancient Greeks to the sphere of limited government, was emphasis upon the rule of law and upon the sovereignty of law over the ruler.[7]

The ancient political thought concerning limited governmental powers emphasised the necessity of settled rules of law which will govern the life of the state give it stability and assure justice for the equals. In the middle ages, there was always a threat of revolution against an oppressive government. Within the framework of the constitution, government was not limited by any coercive control, but only by the existence of rights definable by law and not by will.

This was a system which lacked effective sanction for these legal limits to arbitrary will. Revolutionary changes were therefore eminent to limit the powers of the state and these were witnessed in the seventeenth century in England and France in the eighteenth century.

During this period in France and England, the Kings had a policy from the eleventh century onwards to concentrate power in their hands and to control and to finally destroy the great feudal fiefs.[8] The principles of nationalism and representative

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democracy were first witnessed in these two countries and this marked the beginning of constitutionalism. First parliaments were called in 1265 and 1302 in England and France respectively and the identity of interests of the subjects of these states was emphasised. [9] The King during this period was bound by his oath to proceed by law and not otherwise. Notwithstanding the fact that ~~the~~ he appointed the judges who were to work in his name alone, they were however bound by their own oaths to determine the rights of the subjects not according to the Kings's will but in accordance with the law.[10] In the course of eighteenth century, the ancient system in England grew up and by the end of the century had become so firmly based that there was added to the powers of parliament the control of the executive also. the principle of the "Rule of Law" had won some recognition and equality before the law of all citizens was recognised. Statutes like the Habeas Corpus (1679) and the Act of Settlement (1701) had secured the immunity of the citizen from false imprisonment and immunity of the Judge from royal interference. Ministers became subjected to the process of the law as any other ordinary citizen.[11] Britain had by second half of the eighteenth century ensured absence of tyranny by the three organs of the government through development of statutes which protected the individual liberties.

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American revolution also saw the birth of constitutionalism in America. The wall of immense powers around the colonists were broken with the result that the individual subject's rights were to be recognised under the laws and constitution of England for they were colonies of England.[12] the American revolution was not only a war of independence but also undertook the form of a series of democratic changes like 'no taxation without representation.'

In the African society, the concept of constitutionalism is not accepted wholly, as developed by the Western countries. What is in Africa is a shadow of the western constitutionalism. Its application has met difficulties and in certain countries the idea of constitutionalism has been rejected as a Western idea. In Africa, constitutionalism has failed to take root because of certain difficulties. Poor political set up has rocked many African countries making it quite hard to practice constitutionalism. Most governments in Africa are authoritarian with wide powers centred around few individuals who consequently personalise the whole government machinery.

There has been lack of political will by the African leaders to rule according to the wishes of the electorate. These

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governments have been given chance to manipulate important instruments of government for their own benefit.

Historical factors have also accounted to this kind of situation. A number of African countries were formerly colonised by foreign powers and in countries where independence has been achieved, it in most cases, has been as a result of armed struggles against the colonialists.

The colonialists resisted revolutionary movements by the power of the gun in such situations, in order to protect their power. At independence, the notion of power protection by power wielders was adopted by the African governments, which in attempt to secure powers, enacted laws or have still relied on the oppressive colonial laws to perpetuate their power over their citizens. This kind of situation has suppressed any growth of constitutionalism because as constitutionalism presupposes some predetermined laws, some of the conditions inhibiting constitutionalism are created by such real laws, which are oppressive on the other hand.

The constitution as the basis of a constitutional government ought to be accurate and reflective of the changes and dynamism in the society. African governments have more often adopted the constitutions of their colonial masters which do not entirely reflect the African position.

Such institutions, still embody laws which the colonialists used to contain their power over Africans. These laws are used by the African leaders till now hence strict observance of such law for the benefit of those in power is still demanded of the citizens by the government. The African constitutions are not home-grown and are quite loose. The African governments have taken advantage of such looseness to suppress the citizens. This grossly makes constitutionalism a dream in the society.

Other factors inhibiting constitutionalism from taking root are economic and social. Lack of economic stability in African countries hinders the establishment of a desirable political arrangement.[13] This condition has immediate implications for schemes of power control as an important ingredient of constitutionalism.

The whole government machinery can only function well if the various organs are financially backed up. A part from political manipulation of those organs, the financial aspect also matters a great deal in prompting their efficacy. The court system for instance needs to act speedily without delay in all matters. This has been curtailed by lack of adequate financial support resulting into accused people, for example, staying longer than necessary in the remand prisons, which amount to illegal detention in some cases.

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Electoral process becomes easily manipulated due to financial constraints which makes the whole system, inefficient in various African governments.

The social development in African countries is slackening and the social life of a typical African pulls back the idea of constitutionalism.[14] High level of illiteracy has a devastating effect on individual rights. Legal awareness is vital on the part of the citizens to keep the government within its powers. Where this is missing, the African governments find it easy to tread on the constitution and entrench the individual liberty for there are little efforts made to counter its activities.

1.3 Characteristics of constitutionalism

Defining constitutionalism to merely mean limitation of governmental powers is making the concept too rigid. Limitation of powers is not intended to disparage or attack the honest fundamental aim of a particular government. Where should the government's powers be limited? Doesn't such limitation still leave the government agents with room for silent violation of the law? If the government is to practice restraint, to what extent should be that restraint, could it cripple down the government?

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Professor De Smith in attempt to cover these questions has set minimum restraint necessary for constitutionalism and observes that constitutionalism is practised in a country where, according to him, four important features are evident and these become the characteristics of constitutionalism.

Firstly, he imposes an obligation on the government to be genuinely accountable to an entity or organ distinct from itself.[15] Accountability on the government's past involves and presupposes freedom on the part of the people at all times directly or through elected representatives, to question or criticise the action of the government, a duty on the part of the government to explain and to try to justify its conduct, and lastly the availability of sanctions for unsatisfactory or unjustifiable conduct. the government has various institutional branches and agencies. The spirit of constitutionalism requires that the government must respect such arms forming the government and must be allowed to work independently devoid of any interference from the central government. Various agents like local authorities, police force and public corporations must enjoy a free atmosphere in order to operate effectively. Any duties owed to them by the government must be transparently done hence requiring the government to be wholly and fully

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accountable. Individual freedom, especially of speech, must be respected thereby instilling each individual with authority to challenge, question or criticise reasonably any extraneous actions of the government and such authority must not be subject to intimidation. Avenues for expressing such dissatisfaction or discontent must be clearly open and not isolated from the reach of individual citizens. The government is further obliged to explain and try to justify its conduct.

Such conduct may be manifested in policy making process and whether they meet acceptance or rejection from the individual members it is still incumbent upon the government to clothe each conduct with an explanation.

Since the government protects the society before it does the same to each individual, certain policies may encroach on individual rights for the sake of the whole society thereby making them appear negative before the ruled. This limits the governmental heads from making arbitrary recommendations, decisions, policies and denials. The government being for the people and by the people, the public opinion remains paramount over sectional or group desires. The voices of the elected representatives must be understood as the voice of the majority and should be respected. A government which does this promotes constitutionalism. Rulers must be accountable to the governed.

The second characteristic of constitutionalism according to Professor De Smith is the notion of free elections held on a wide franchise and at frequent intervals.[16] Free elections is a compliment of the need for elections, otherwise elections should be replaced with appointments. Elections which are not free and fair are not better that no election at all. This idea of elections is very vital in a government set up for the highest points in the government are elective posts and therefore the abuse of elections to such posts is tantamount to disregarding the opinion and the desires of the majority hence even the government consequently formed is not by any standard a government of the people and for the people. Frequency of elections is not so universal and it depends on individual legal system or political system of a given government. What may be frequent in Britain may not be frequent in Kenya.
Frequency is an objective requirement subject to the dynamism of particular societal interests.

Constitutionalism further requires that political groups are free to organise in opposition to the government in office.[17] This is better said than done and in fact it is from this point in the circle of events that most governments jump out of their powers.

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Political groups emanate from the individual rights of association and assembly and just as an individual has a right or freedom of expression, an association of individuals should even be accorded more freedom of expression. Political groups organising in opposition to the government in opinion is reflective of the public opinion. All co-operation and regulation rest on opinion whatever be the nature and character of government. David Hume said'

> "It is... on opinion only that government is founded and this maxim, extends to the most despotic and most military governments as well as to the most free and most popular."[18]

Public opinion is an organisation of separate individual judgments, a "co-operative product of communication and reciprocal influence," as Cooley observes. Public opinion is a democratic process and a working measure of common agreement and a driving force of governmental actions and policies. It is a truism that constitutionalism is compatible with democracy and that democracy means government by public opinion.

It is, however, a recognised fact that the opinion has often been perverted and distorted by social disharmonies and it has split into sectional opinions, yet despite its imperfections it is an active and propelling factor in a democratic state.

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Public opinion also plays an invaluable role in the working of political institutions and serves as the most potent agency of co-ordination. In the presidential system, it smoothens the functioning of the executive and legislative departments and brings harmony between the two without the one being responsible to the other. Democracy as a compliment of constitutionalism generates freedom and guarantees expressions of views to influence public policy. It lives and thrives on public opinion, provided it is honest, forceful and vigilant.[19]

Professor De Smith finally considers minimum restraint necessary for constitutionalism where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary.[20] Liberty is a word of negative meaning denoting absence of restraint. Its primary significance is to do what one likes, regardless of all consequences. But this is obviously an impossibility. Liberty in the sense of a complete absence of restraint cannot exist for a society cannot be complete without common rules. If one does whatever he wishes there is likely to be perpetual strife and conflict in society,conditions of chaos and anarchy. Liberty is not nevertheless a mere negative condition. It has a positive aspect, too, which is very significant.

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It can exist only when the state maintains those conditions which helps the citizen to rise to the full stature of his personality. It involves the opportunity for many sided cumulative growth which consists in capacity to act, availability of an effective range of choices and spontaneity, that is, the ability to act in accordance with one's own personality, without being subjected to external constraints. [21]

According to Professor Laski, liberty,

> "is never real unless the government can be called to account , and it should always be called to account when it invades rights."[22]

Civil liberty, as opposed to natural liberty, refers to the liberty enjoyed by a man in society. Freedom in isolation is meaningless. Freedom involves the capacity to do or enjoy things in common with others, and no individual can permanently separate his own good from the common good. The civil liberty is the personal liberty of individuals either by themselves or in association with one another, to choose and pursue, objects which they deem good, provided that all enjoy that liberty equally. it is both positive and negative in character and includes individual's rights to free action and interference provided it

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does not interfere with the identical liberties of others. The line of liberty of individuals is protected against encroachment on the part of other individuals or association of individuals by the laws of the state, enforced by the organs of the government especially the police and the court. An independent judiciary is essential to protect the people against the arbitrary interference and oppression. The courts must not only interpret or enforce valid enactments of the legislature according to its intention, but when the legislature in its enactments has transgressed the limitations set upon its powers in the constitution the judicial branch of government must enforce the fundamental and higher law by annulling and declaring invalid the offending legislative enactments.[23]

The judges are to decide between individuals on principle or rights and justice founded on the eternal principle of right and morality. Such judgments must be given without fear or favour. The judges must endeavour to do everything possible to create confidence among the people in the purity, fairness and impartiality of the administration of justice. Independence of the judiciary can be attained by several factors including appointing judges or arbitrators with thorough knowledge of law, ensuring judicial tenure, fixed and adequate salary for the judicial officers and above all restraining the central government from encroaching on the activities of the

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judiciary.[24]

Other characteristics include the separation of powers. The work of the government is so wide and complex that it is imperative to establish for the performance of the several kinds of work to be done. This is necessary for two reasons, first that the benefits of specialisation may be secured and, secondly, responsibility may be more definitely located to avoid overlapping. True constitutional government does not exist unless procedural restraints are established and effectively operating. Such restraints involve some division of power which must be vested in those who are expected to do the restraining. Political liberty is possible only when the government is restrained and limited. The theory that the functions of government should be differentiated, and that they should be performed by distinct organs consisting of different bodies of persons so that each department should be limited to its own

sphere of action without encroaching upon the others, and that it should be independent within that sphere, is called in its traditional form, the theory of separation of powers.
These branches are the Legislature, the Judiciary and the

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Executive.[25] The traditional analysis of the doctrine of separation of powers takes for granted that the three wings of government are co-ordinate or equal but this may not be precisely so. In democratic systems especially in the Western world a governmental arm like the executive has been reduced to a subordinate position to some extent. Despite these evolutionary changes, the traditional meaning of separation of powers remains intact as Anup observes that,

> "The Executive and the Legislature are expected to interpret the law in the course of carrying out their duties of primary functions and to avoid the controversy of overlapping the constitution should expressly empower the courts to pronounce upon the constitutionality of executive and legislative acts."[26]

Supremacy of the constitution is an important requisite of constitutionalism A constitutional government must respect the laws of the land as contained in the constitution.

Constitution acts as the limiting apparatus of the governmental powers. It is the watchdog over the entire government.

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The constitution is or is supposed to be an original act of the people directly, an act of government is a derivative, and ipso facto a subordinate act.

On the supremacy of the constitution Alexander remarks,

> "To deny the supremacy of the constitution is to affirm that the deputy is greater than his principal, that the servant is above his master and that the representative of the people are superior to the people themselves."[27]

It was also held in the case of Liyange as follows,[28]

> "The court should hold void any exercise of power which does not comply with the prescribed manner and form or which is otherwise not in accordance with the constitution from which the power derives."[29]

THE RULE OF LAW

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1.4 Definition

The rule of law is merely a bundle of ideas intended to guide law makers, administrators, judges and law enforcement agencies. The rule of law and the late doctrine of separation of powers are inter-woven and have a common field of operation. These two doctrines provide guidelines for a just and well ordered society. Adherence to the doctrine of separation of powers yields to the absence of tyrannical and arbitrary rule which in the end promotes the rule of law.

Those in authority are expected to act according to the principles of law already established in the land as contained in the constitution, and should there be any deviation from the law, such deviative act must enjoy legal justification. The rule of law has acquired the description of a rule of evidence since those who disregard it are required or called upon to adduce sufficient evidence of justification. The over-riding consideration of the rule of law is the idea that the rulers and the governed are equally subject to law. The fundamental basis of the rule of law is not to strip off the rulers of their powers. It neither advocates for nor operates to incapacitate those in authority but simply to define their limits.

The rule of law precludes arbitrary action on the part of the

executive and members of the government in particular and of anyone else in general. G.W. Kanyeihamba rightly makes an observation that a government which decides to carry on an action which is not supported by law is guilty of violating the rule just as an individual or group of individual who decide to take the law into their own hands.[30] Observation of the rule of law in a legal system or in a government thwarts and blocks any opening through which totalitarianism may grow from. Individuals being the subjects of the state are at the mercy of the governing authority.

For the political and social protection of the individuals who form the state, a government with unlimited powers has every chance and machinery to frustrate and intimidate the individuals. A government accountable for its actions and subject to law as any other individuals has its hands folded and for fear of mounting a substantial justification of its ultra vires activities, it would have no alternative but to accept the supremacy of the constitution from which its powers stem. The equality expected of the rulers before the law is outlined in the constitution which also spells out the rights of a citizen. If a government respects the rights of an individual as enshrined

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in the constitution it nurses very little chances of acting contrary to the expectations of the law. The rulers being equally subject to the law will fail to attain any unquestionable status from which they may render inoperative the pre-determined rules. The rule of law from its definition requires nothing which may be characterised as arbitrary power. The ordinary law should be everywhere supreme, and every person is subject to the ordinary law courts. Every action of the government must be authorised by law passed by parliament, or by the ancient principles of common law. This remains the general rule, though in the modern world and in the recent years there have been encroachments upon it.

1.5 History and Theories of the Rule of Law

The necessity for the rule of law traces back to the origin of the state. The state is a natural, a necessary and a universal institution. It is natural because it is rooted in the reality of human nature. The state is an ideal person, intangible, invisible and immutable. The origin of the state marked the exodus of mankind from the law of nature which Thomas Hobbes described as a condition of unmitigated selfishness and rapacity. Men had no sense of right and wrong and they fell upon each other with savage ferocity. There was a perpetual restless

desire with them to satisfy their appetites and desires with a craving for gain and glory which came to an end only with their death. Natural rights which men enjoyed in the state of nature, were nothing short of might and natural liberty and was nothing more than the liberty that each man has to use his own power for the preservation of his own nature. The state is neither the result of an artificial creation nor can it be said to have originated at a particular period of time. It is the product of growth, a slow an d steady evolution extending over long period of time and embracing many elements in its development, prominent among which are kinship, religion, property and the need for self defence from within and without.

The starting point is the family and the germs of governmental organisation. The earliest states were essentially power and property states, built on wealth and military force. They were primitive and barbarous.

Evolution of the state took a gradual pace thereafter graduating into governments with some kind of coherent political structure like the Greek city states, which were politically organised and independent of others. These states developed to a stage of a conscious effort directed to the realisation of liberty and equal laws.

The abolition in 1640 of the Court of Star Chambers ensured that the principles of the common law should apply to public as well as private law. the rule of law meant the supremacy of all parts of the law of England , both enacted and un-enacted. The supremacy of the law together with the supremacy of parliament were finally established by the Bill of Rights in 1688. The rule of law is therefore the product of centuries of struggle of the people for the recognition of their inherent rights. In Britain, the constitution does not confer specific rights on the citizens. Nor is there any Parliamentary Act which lays down the fundamental rights yet the people enjoy maximum liberty and judiciary is their unfailing guardian because there exists the rule of law. The government has power only to carry out the law, not to do whatever it thinks fit.[33]

The conception of the rule of law was given classical formulation more than three quarters of a century ago by A.V Dicey.[34] He propounded and elaborated the theory in his book, lectures and articles to many institutions and in numerous periodicals in 1885.

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During this period traces of governments could be found which clearly necessitated the application of rule although the doctrine of the rule of law could not have been thought about. More recently in the middle ages, the theory was held that there was a universal law which ruled the world. Bracton, writing in the first half of the thirteenth century, deduced from this theory the proposition that rulers were subject to law.[31] During this time common lawyers had an alliance with Parliament and had a decisive effect upon the contest between crown and parliament. That alliance had its roots in the later middle ages. Medieval lawyers never denied the wide scope of the royal prerogative, but the king could do certain things only in certain ways.

It was not until the seventeenth century that Parliament established its supremacy, but Fortesque C.J. writing in the reign of Henry VI had applied what later became the two major principles of the constitution - the rule of law and the supremacy of parliament and relied upon the rule of law to justify the contention that taxation could not be imposed without the consent of parliament. With the rise in the sixteenth century of the modern territorial state the medieval conception of a universal law which ruled the world gave place to the conception of the supremacy of the common law.[32]

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The constitutional law of today differs in may respects from that of 1885, but the influence of Dicey remains a real force. Of those principles which Dicey explained that which has had most influence and which has simultaneously received the most modern criticism is his exposition of the rule of law. He divided his concept into three categories, containing three meanings. In the first place he says that the rule of law implies that,

> "there is 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 be punished for a breach of law, but he can be punished for nothing else."[35]

This concept means that the executive has no arbitrary powers over the individual, no powers that had not been sanctioned either by Parliament or by the Common Law. It is the paramountcy of law and its sanction is the consent of the people. It further implies that no person may be arbitrarily deprived of his life, liberty, or property, no one may be arrested or detained except for a definite breach of law which must be proved in a duly constituted court of law. Trial must be held in an open court

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with a free access to the public. The accused person has the right of representation and being defended by a counsel and in all cases he should be tried by a jury. The presence of these rights reduces to the minimum the possibilities of executive arbitrariness and oppression. The fact that no one may be detained or arrested except for a definite breach of law established in the ordinary legal manner, before the ordinary courts of law outdoes any retrospective legislation which makes a person guilty of or liable for an act against which when commited there was no law.

The concept also underscores the pre-requisite that for the act to be unlawful, it must have been committed in the ordinary manner. Suspicion or superstitious beliefs which cannot withstand the standards of legal proof must not be the basis for proving the offence committed and consequently punishment must not be inflicted upon them. Clear evidence must be attained before appropriate conviction and offences committed must meet the test of proof beyond reasonable doubt. For the public good, detention without trial under emergency powers, compulsory acquisition of property and illegal arrests are prima facie contrary to the rule of law. In exceptional cases, such extreme acts may be clothed with justification that the law grants their exercise.

The second meaning of Diceys concept of the rule of law advocates for equality before the law. It states that every man, whatever be his rank or condition, is subject to the ordinary law of the realm and is amenable to the jurisdiction of the ordinary tribunals. This implies equality before the law or the equal subjection of all classes of people to the ordinary law of the land administered by the ordinary law courts. In this sense the rule of law conveys that no man is above the law, that officials like private citizens are under a duty to obey the same law. Fundamental liberties must be protected and that police law is not law. For there to be a consitent legal system it must strive to protect essential liberties.

Public officials stand to be tried in the ordinary courts should they exceed the power vested in them by law. The equality of all in the eyes of law minimises the tyranny and irresponsibility of the executive. Dicey, while elaborating the equality of all before the law says,

> "With us every official, from the Prime Minister to a constable or a collector of taxes, is under the same responsiblity for every act done without legal justification as any other citizen."[36]

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The general legal theory holds that an executive is privately liable whenever he overlaps the precise authority which the law assigns him. Any law which gives preferential treatment to government officials or which grants them special privileges is, on the face of it, contrary to the rule of law.

The third concept means that the guarantee against the infringement of personal liberty and rights is not the contribution of the various laws of the state but rather, the unhampered access to the jurisdiction of the ordinary courts by the aggrieved individual. Dicey meant that the legal rights of the subject, for example, his freedom of movement, are secured not by guaranteed rights proclaimed in a formal code but by the operation of the ordinary remedies of private law available against those who unlawfully interfere with his liberty of movement, whether they be private citizens or officials. The courts alone should be able to determine whether a wrong has been committed or not and whether the litigant is entitled to a remedy or not.

1.6 Criticism and Practicability of the Rule of Law.

The rule of law as propounded by Dicey strives for equality before the law, supremacy or predominance of regular law as opposed to the influence of arbitrary power. Several questions

arise. Is the rule of law really tenable? Can it wi
tests? To what extent can it be practical?

Various scholars have criticised the theory of the rule of law arguing that Dicey was only thinking of the individual alone without visualising the community in general. They challenge Dicey as having overlooked the other side of the coin and failing to appreciate situations where individual interests and state interests clash. This seems to have stemmed from his understanding that state authority was there merely to protect the individual but not a society of individuals. It is generally accepted and recognised that the protection of the society is supreme over individual interests. Considering the time when Dicey built up the idea of the rule of law, little development had taken place in the government for the benefit of the society. Basic communal services undertaken by the government like education, health, communication and others necessitate the formulation of policies and the enacting of laws that often clash with individual rights. In the modern society, activities of the government have widened following the changing needs of the society. This has meant that a number of public officials need to be granted special powers of inspection, searching and taxation in order to implement effectively administrative policies. The idea of trial before the ordinary courts has been challenged by the necessity of having specialised tribunals for the disposal of technical and complicated disputes.

Equality on the other hand is not so absolute. Absolute equality before the law is not so possible as it may render the agencies of the government so powerless. They must enjoy certain privileges over individuals for their effective operation. In exercising certain acts especially ones which embrace public security protection it would be very rare for effective execution of such acts without overstepping powers, privileges and immunities over other individuals. It is even difficult for Parliament to find time to discuss the details of bills which must necessarily contain a long string of highly technical clauses.

And in many matters those technical clauses require frequent modifications to meet a changing situation. Therefore, the practice has grown up of enacting skeleton legislation the details of which are to be filled in by the appropriate government department and are to have the force of law. These departmental regulations and orders once made are immune from criticism by courts, unless they conflict with the provisions of the parent law, because they have been given the force of law beforehand. Moreover, whenever there is delegated legislation there is discretionary authority. If discretionary authority is in violation of the rule of law, then the rule of law is inapplicable in modern state. When Dicey in 1885 wrote the first edition of his "Law of the Constitution" the primary function of

the state were the preservation of law and order, defence and foreign relations. Today, however, the functions of the state are more positive and they regulate the national life in multifarious ways. Discretionary authority is, thus, in every detail inevitable. What is essential is that discretionary power should not mean arbitrary power, power exercised by an agent responsible to none and subject to no control.

In conclusion, a few countries in the world, if any, have been known to be able to claim to embrace all the aspects of the rule of law in theory and practice. No state on the other hand can claim its dispensibility. Any endeavours a government undertakes in the journey to a democratic world pulls with it alongside the principle of the rule of law. The germs or seeds of democracy include the rule of law which remains a principle of the consitution. It means the absence of arbitrary power, effective control of and proper publicity for delegated legislation, particularly when it imposes penalties. Every man should be responsible to the ordinary law whether he be private citizen or public officer, that private rights should be determined by impartial and independent tribunals and more fundamentally, the private rights are to be safeguarded by the ordinary law of the land.[37]

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The rule of law is regarded as the mark of of a free society. It seeks to maintain a balance between the opposing notions of individual liberty and public order and is identified with the liberty of the individual. Reconciliation of human rights with the requirements of public interest faces every government and this is only done by an independent judiciary.

1.7 PARTYISM

A political party is an organised group of citizens who hold common views on public questions and acting as a political unit seek to obtain control of government with a view to further the programme and the policy which they profess. It is an association organised in support of some principle or policy which by constitutional means it endeavours to make the determinant of government. Burke in 1775 defined a party as,

> "... a body of men united for promoting by their joint endeavours the national interests upon some particular principles in which they are all agreed."[38]

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A party is also defined as a large scale organisation whose purpose is to control the personnel and policies of the government.[39]

Political parties serve as the motive force in crystalizing public opinion, and as the unifying agency which makes democracy workable. Parties are certainly now the principal organs of political representation. Members are sent to Parliament by the electorate because they represent parties which in turn represent group collective social and economic interests.[40] Parties act as vehicles through which individuals and groups work to secure political power and, if successful, to exercise that power. They are necessary because opinions must be organised if anything resembling representative government is to exist, parties are important because the group glorious at a general election becomes the government.[41]

Political parties have important qualities or characteristics for them to be effective. Members of a political party must be bound together by an agreement on fundamental principles. Members must agree among themselves on proper

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objectives which the party intends to champion. All divergent views should be compromised into a single view or opinion representative of the common interests of members. Proper organisation is a vital pre-requisite for an effective political party. Without this organisation a political party would be no better than a disorganised crowd making it impossible to conform to the common fundamental principles underlying the existence of the party. The power of a political party emanates from proper organisation which attributes to it some kind of a permanent cohesive body capable of acting without fear. Parties can only be organised if they are permanent since short lived parties are just transitory phases of political developments over passing issues or temporary problems. The party must be democratic in its internal operations first, before it may claim to advocate for democracy.

The members banded together and organised should formulate a clear and specific programme which they should place before the electorate to win their support and devise all possible means to maintain it. Such a programme may be contained
in a party constitution which must or should work just as the constitution of the country, making it supreme over any other rules or laws which may be made to govern the conduct of the party.

A political party should endeavour to promote national interests as distinguished from sectarian or communal interests. A party directing its activities in furthering sectional or regional interests or selfish ends risks disintegrating into a fiction. A fiction is a loosely united group of men who unite to achieve sectional interests as opposed to national interests. Constitutionality in the party activities or policies is very vital and most important. It is the ballot box which should decide the fate of a political party and its claim to form the government. Any organisation, therefore, which aims at employing unconstitutional methods, to seize power is not a political party in the sense a political party is understood.

Political parties are important for without them there can be no unified statement of principle, no orderly evolution of policy, no regular resort to the constitutional device of parliamentary elections, nor of course any of the recognised institutions by means of which a party seeks to gain or to maintain power. Political parties thus seek to make government, are permanent organisations with primary business of influencing the electorate to support their programmes, to win election and to form a government in order to pursue the programme endorsed by the electorate at the General elections.

1:8 Functions of political parties

Political parties are the indispensable links between the people and the representative machinery of government. Their role is more obvious when election is in prospect, but they need to be continually operative if a democratic system is to work effectively. It is the political parties that organise the vastly diversified people by nominating candidates for office and by popularising the ideas around which governmental programmes are built.

Political parties, therefore, bring order out of chaos by putting before a multitude of people their programmes and securing their approval on vital issues of policy. By raising issues, selecting from them, taking sides and generating political heat they educate the public and clarify opinion. They create and keep open lines of communication betweeen governors and governed, through which government may work more effectively. The big role of the political parties is to sort out the issues for the elctorate. They select candidates for election, plan and execute the election campaign and present them with alternatives to the people between which they may choose. Finer remarks that without parties,

> "... an electorate would be either impotent or destructive by embarking on impossible policies that would only wreck political machine."[42]

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Political parties also play the role of supplying the majorities without which government cannot remain in power. If there were no parties, members of legislature were completely disorganised and formed only a mass of men voting one way today and another way tomorrow, the government could not be sure how long it could stay in powers.

It would consequently lack stability and power to plan a coherent policy. Parties hold the representatives together subjecting them to the party whip and party discipline. The political parties in Africa, as in other Western countries, play a crucial role in the formation of governments and in setting of elections for political offices.[43]

Parties provide alternative teams to run the government. They prevent the same people remaining in power too long and looking on an office as a matter of right. A party system guarantees to the electorate that change in government can be effected at their will. A party system reminds the rulers that the ultimate appeal rests with the people, and they must remember those to whom they will have to account in future as well as those who entrusted them with power.[44]

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Political parties inculcate civic enthusiasm and help in the realisation of the democratic spirit, that vigilance is the price of democracy. They help the people to feel that they are the masters of their own destiny. They determine for themselves the kind of government they wish to have.

From the discussion in this chapter it features that constitutionalism and the rule of law are immensely relevant for good governance. The two concepts can actually be manifested in a government system where there is political will to administer the functions of the government by the leaders. The constitution can safeguard individual liberties and properly demarcate the powers the government may exercise, but without the political will of those in authority the value and the role of the contitution would be futile.

Inspite of the difficulties retarding the growth of constitutionalism, a democratic government going by the two concepts can still exist. Democracy does not come by riches or by legal awareness, but by restraint being imposed on the government itself. The creation of a civil society from the old state of nature subjects every individual to obey the laws of the state.

In light of the above, the next chapters reduce the theoritical constitutionalism and rule of law into practice. At the end of this chapter, it is evident that the above two concepts pave the way for proper governance which emanates from the parent source which is the constitution. A constitutional government must breathe through the consitution for it to have its powers trimmed and filtered.

CHAPTER TWO

PARTYISM EXPERIENCE IN KENYA

At the end of Chapter one, we have gained ground from which the actual practice of the theories advanced in chapter one can be identified. Chapter one generally furnishes a hypothetical framework for good governance. The idea of partyism becomes important for the analysis of the concepts of constitutionalism and the rule of law from a legal standpoint. Kenya is still in the infant stages of the new political system having undergone a hard political transformation. The present status of the two concepts will be covered in the next chapter. This chapter mainly exposes the past experience and status, with an aim of justifying the transition of the political order in Kenya. It intends to critically appraise the upholding of the two concepts in a one party state in which there is over-concentration of powers in one hand. The chapter also underscores the significance of good governance and an animate civil society. The Chapter attempts deep discussion of the tenets of constitutionalism as outlined in Chapter one. As the chapter ends, there ought to be a critical evaluation of the two concepts in one party state, backing up the change Kenya experienced in the recent past.

2.1 Kenyan One Party System; Origin and Development

Kenya became a British protectorate in the late 1880s, and until then there was a rudimentary indigenous political structure which was confined within the boundaries of each ethnic community. With the coming of the Europeans a new system of political life started to grow up creating more political awareness beyond the ethnic societies. Earlier on, each ethnic community ran its own affairs internally save for the economic relations and interactions which overstepped the societal boundaries. This system gave the Europeans an easy time to

penetrate deep into the Africans both politically and economically. The white man rule tickled the political feelings of the Africans necessitating revolt and dissent. An idea of unity beyond ethnicity and cultural differences became divulged to a few Kenyans, creating in them a sense of nationalism against the foreign rule. There was need for liberation from the colonial rule.

The liberation process from colonialism started in the late 1950's. The colonialists held elections in 1957 and Africans demanded enlarged representation in the Legislative Council. There was concern for an organised support from the people and the few elected Africans consequently formed their own organisation to consolidate their views against the colonialists. This did not take them any far for there was rivalry over power. The result was the formation of the Kenya National Party (K.N..P) in 1959, comprising eight of the fourteen elected members of the Legislative Council. K.N.P. was a multi-racial organisation with members coming from the major two ethnic societies of Kikuyu and Luo. Alongside K.N.P was the Kenya Independent Movement (K.I.M). These groups were not traditionally political parties but merely organisations representative of the native interests and which acted as a united front for negotiations at the Lancaster House Conference. A leader's conference was held on 27th March, 1960, at Kiambu and was attended by majority of the African elected members of the Legislative Council. From this meeting, the first political party called Kenya African National Union (KANU) was formed. KANU however did not enjoy supreme approval to be a national representative party of African interests. Elections were just approaching the following year and a number of smaller ethnic groups stood to challenge the KANU policies by mushrooming alliances like the Kalenjin Political Alliance (K.P.A), Coast African Political Union (CAPU), Kenya African People's Party (K.A.P.P) and Maasai United Front (MUF). These individual alliances had recognised the popularity KANU was netting around and to counter any more popularity, there was a meeting of all

these ethnic alliances on 25th June, 1960, at Ngong, which saw the merging of these alliances into a single political Party called Kenya African Democratic Union (KADU) headed by Ronald Ngala. KADU as a political party rejected KANU's policies and principles. These two major political parties existed until November 1964 when KADU voluntarily dissolved and joined KANU. A splinter group from KANU formed Africans People's Party (APP) in November, 1962, but it was disbanded in 1964 and its members rejoined KANU.[1] This period or phase of multi-partyism composed ethnic clamours, racial interests, contradictions between exotic, pluralistic governmental ideas on the one hand and native unatiristic orientations on the other.[2]

However, there was great need for unity amongst Africans for their interests would be majorly considered if they were united and only if they realised they had a common enemy. ~~Unatiristic~~ Unitarianism was the only rational and pragmatic cause in the organisation of New African States. The late Tom Mboya of Kenya considered unitarianism to be inevitable, in conditions of political struggle and had this to say,

> "In the days of struggle against (foreign rule)... the minds of the people are pre-occupied with their political troubles. They experience these troubles not as individuals, but as a group... The essential point is that all opposition to foreign rule or a mono-racial rule comes from what is to all intents and purposes a single political party."[3]

The fusion of KADU and KANU was contained in the strong statement issued by the KADU leader, Ronald Ngala, who said,

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"For members and supporters of KADU and KANU... I would urge them to regard themselves as one, brothers and sisters, and citizens of Kenya who must now work together to build our nation socially, economically and politically."[4]

The Prime Minister, Mr. Kenyatta was now confident and observed that the 10th day of November 1964 when KADU dissolved to join KANU was a great day on which Kenyans had broken the last chains of colonialism and imperialism. He further remarked,

"It was through a device of these imperialists that we as Africans had to be apart, it was something that was engineered by some of these ingenious imperialists to divide us and continue to rule us, it is for this reason I say that today is a great day and I hope that from today on we will work under the spirit of Harambee to build a new nation. As we said, the wrangling the opposition for opposition's sake has now died for ever and ever, Amen."[5]

It is clear from the words of the Prime Minister that the only obstacle against KANU bringing down independence from the colonialists was the opposition and therefore the merger of the two parties marked the birth of the defacto one party state. However, the government maintained that it did not intend to legislate for a one party state and that it would be a contravention of section 24 of the constitution which safeguards the freedom of assembly and association, if that kind of

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legislation was introduced.[6] This position the government took was not to remain forever as KANU was secretly out to deepen its paws down into the system before it could finally overturn the whole idea. Owing to some extent, to the absence of viable interest - groups to define the lives of party action, the parties of 1960 exhibited extraordinary feebleness and lacked the capacity to present a controlled context for the working of governmental machinery. Thus when KADU existed , it had no been the real challenge to the policy and administration of the KANU government instead KANU's own parliamentary back bench had posed the main challenge. Not only was there no effective party discipline to contain these backbenchers; there was not authoritative KANU stand, and the backbenchers could, as they did, claim that they were also interpreters of KANU policy, and that it was their duty to control departures from that policy.[7]

Internal squabbles had rocked the party and the outward unity created by the defacto one-party system did not heal the wounds which existed in the early 1960's. The national unity of the party began to disintegrate and just as Ghai observes,

> "competition for political power, with its many rewards, becomes acute, and the minority groups, aware of their vulnerability and remoteness from power in unitary type constitutions, start to agitate for safeguards. These safeguards range from outright secession through federalism to bills of rights and the insulation of certain sensitive ideas of adminstration from political control"[8]

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The democratic process within the party had been eroded and over concentration of power was left in the hands of a selfish group. Political radicals in the party had to be pushed out through unconstitutional and undemocratic process. The party went out its powers to incorporate the Executive arm of the government into party affairs. The Executive got deeply entangled in the party running and immensely exerted its powers into the party politics. The party system lost its meaning and operated like another small government within a mother government, both being controlled by one man. In March, 1966, the party took a drastic action to exclude from its leadership all persons considered to be mooting any discontent about party management. A number of members did not identify with the personalisation of the party and its matters as was done by the Executive and the members of the inner circle. Among these discontented members was Oginga Odinga whose conscience compelled him to resign from KANU and consequently formed the opposition, Kenya' People's Union (K.P.U). KANU had to be worried because this would mark the beginning and insurrection of other parties. Odinga was therefore summoned soon after his resignation to justify his actions which were now contrary to his earlier stated commitment to the one-party state. In answering through a press statement, Odinga said,

> "He was a believer in a one-party state of government under which individuals were allowed to express their opinion. However, when a group of individuals tried to suppress the views of those with whom they differed and to appoint themselves the sole spokesmen of the party and the government, a one party state became a mockery."[9]

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Odinga bravely stood for freedom of speech and conscience which he was not ready to compromise with anybody but which the government - invaded party could not allow as that would be tantamount to pulling the officials to one side. This prompted Odinga to form his own party, the Kenya People's Union (KPU) to defend the constitution and individual rights.

KANU was once again forced to put up with an opposition party. However, to test its popularity over KPU,KANU government called for elections on 18th June, 1966 in which KANU won with overwhelming majority.

To gain monopoly over party politics, the government introduced a legislative instrument, the constitutional amendment, which was retrospective in nature, to forfeit the parliamentary seats of the defectors that they seek fresh mandate from the electorate. The amendment provided that,

> "... having stood at his election ... with the support of or a supporter of political party ... either i) resigns from that party at a time when that party is a parliamentary party or, ii) having after the dissolution of that party been a member of another parliamentary party resigns from that other party at a time when that other party is parliamentary party vacates his seat at the expiration of the session then in being or if parliament is not in session next... following... unless...that party of which he was last a member has ceased to exist as a parliamentary party."[10]

Standing orders were also amended which required an opposition party to raise a minimum of not less than thirty members. All these were made to divest KPU of any possible chances of attaining and recording any political growth.

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The death of KPU was finally inflicted by amending the Preservation of Public Security Act [11] to enable the President to order the detention of persons at any time without Parliamentary approval. Consequently, thirteen officials of the KPU were detained. Odinga was also detained in 1969 and his party, KPU,banned. The amendment was malicious, and it abused the principle of legality because of its retrospective effect. Yash Ghai comments in relation to African constitutions by saying,

> "We have to look at (them), not as providing neutral framework for political competition, with the right within fairly recognised and impartial rules, to organise and contest, but a weapon in the political struggle itself, so that the constitution.....is made a handmaiden of the party in power as a means to the retention of power"[12]

The government therefore unwisely and improperly used State machinery and the constitution in defining and determining the political trend of a party which by any standards ought to be independent in its own affairs. The detention of KPU officials and the banning of KPU marked the end of multi-partyism. This, however, as was proved later, was not going to be the dead end of multi-patyism in the Kenyan history.

KANU wielded a lot of political power for the next sixteen years without encountering any opposition until 1982 when Odinga made a second attempt. His attempt was met with opposition from both the government and members of Parliament whose heated debates were directed at total rejection of his move. The rejection was hurriedly followed by another constitutional amendment which was

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made in disregard of the legal process in the house. The amendment[13] which was made on 9th June, 1982 made Kenya a de jure one-party state after having been a de facto one-party state for a period of fifteen years. The amendment introduced a new section which provides,

> "There shall be in Kenya only one political party, the Kenya African National Union."[14]

Further consolidation of the party took place in June and July 1985, with the holding of national grassroots elections. This is revealed in the commentary,

> "The year 1985, will no doubt be remembered as the year of party politics in Kenya. It is the year that KANU elections were held for the first time in eight years and in which the party began to play a more prominent role in the politics of the country.... The whole country was involved in a massive party recruitment drive."[15]

KANU had a total blow finally when Kenya had to revert to the earlier political standing it enjoyed before and after independence upto 1982. Pressure has ever since mounted beyond the expectations of KANU, and whether united, consolidated or protected by the government machinery, enough was enough. The gates to multi-party politics were constitutionally open despite the turmoil, loss of life, loss of property, illegal detention, political intimidation and other ugly incidents. The change was there with us and the monopoly of power KANU had exercised for over twenty - seven years sunk down through a famous constitutional amendment of 1991 which repealed the infamous section 2A of the constitution lifting Kenya into a multi-party

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de jure. Before we look into the practical application of the rule of law and the spirit of constitutionalism in a one party state with specific reference to the KANU government, it would be appropriate to give a brief appraisal for one - party system and weigh this against the demerits.

2:2 Significance of One-Party System and Its Demerits:

From the background of partyism in Kenya and Africa as a whole, the idea of partyism was conceived as a unit of consolidated opinion representative of the African interests against the oppressive colonial rule. Africans, in order to drive out the colonialists had realised that egocentric interests and desires based on ethnic grounds could not move the colonialists an inch from the African land, hence there was need to pull ideas together beyond the ethnic boundaries. Most colonial governments only granted independence to the African states after armed insurrection. Africans therefore needed to unite now that they had a common enemy and such unity could only be achieved through a forum which disregarded one's ethnic origin and in which equality irrespective of one's social status in his society could be considered. Unity was paramount if independence was to be granted.

It was logical therefore at this time to discard any tribal inclinations and to cultivate a sense of nationalism. Nationalism started with the formation of parties like KANU, KADU, APP and others which claimed to work for the liberation of Africans form the colonial yoke. Since there was only one common enemy it was very necessary by any measure to have only one body representing the Africans in their fight for liberation. A

single party was therefore very necessary to hold Kenyans together and this marked Mr. Kenyatta's happiness.[16] One party,

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during this time, served as the meeting point between the colonial government and the people therefore creating a unity of purpose and facilitating the process of liberation through negotiations.

One-party system is also vital for it is the means by which emergent African states build a foundation on which collective effort and unity can be realised for the smooth and effective restructuring of all facets of society. There would be no reason for uniting to fight for independence to be later undermined by disunity. A stable government is one of the fruits of independence and to build a foundation government for future governments, consolidation of views and ideas is vital. Kenya was undergoing the transformation of governments and as an emergent state, one party,KANU, did not need any opposition if the above were to be achieved.

One - party system is significant in holding the government firm by cementing the ideology of nationalism in the entire country. It works as a family and limits any chances of anarchy and rivalry which exists in a multi-party system. This ensures easy running of the government machinery, but this is subject to proper democratic process of the party affairs and the government.

However, the significance of a one-party system cannot be over-emphased as its demerits are more pronounced than the significance. In one-party system, all the authority of government is concentrated in a single integrated political party. It even absorbs the state instead of merely acting on its behalf. Through the single party the government and the party boss finds it easier and more convenient and even legally to consolidate and personalise political power in himself. This sets totalirarianism on motion where the head of the government and leader of the party dominates every power and every sphere of the action of the state.

There is no separation of powers in such a government. The concept of constitutionalism does not find a place and democracy is only practised in the dark within a specific special class. The ills of the government remain a secret for such can only be disclosed by opposition which is often stifled. The freedom of individual action which is the cardinal element in the whole concept of limited government is negated. Public opinion is disregarded and funny machineries are set to censor any hot minds that may want to challenge the government of the day. The system is monolithic and pays scant regard to individual enterprise, which is economically undesirable as human resources are wasted. The system is excessively bureaucratic.

2:3 The Protection of Constitutionalism and the Rule of Law in the Kenya One-Party System:

Before I discuss the rule of law and constitutionalism in the multi-party era in the next chapter, it is desirable to briefly examine the precedent conditions which saw Kenya make a step into the world of multi-party politics, which step was made in December, 1991. Having outlined the two concepts of constitutionalism and the rule of law in Chapter 1, it would not furnish us with enough background to merely jump into the multi-party era, in which as will be realised, there are traces of constitutionalism and the rule of law. This area is very important in the political history of Kenya for Kenya was in the verge of collapse and had drawn some international concern in her domestic affairs, particularly in relation to human rights.

The twenty - seven year rule of KANU government could be equated to the dark ages in History. Inasmuch as we appreciate the role of KANU in the ~~liberalisation~~ liberation process from colonialism, I strongly abhor the trend KANU had taken from 1966 to the end of one-party system in 1991 and beyond. Sometimes it is not easy to appreciate that there ever existed a constitution during this

period to set forth the functions and limits of the governmental powers. The rule of law, once more,demands that,

> "there is the absolute supremacy of 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 be punished for a breach of law, but he can be punished for nothing else."[17]

Constitutionalism on the other hand embraces limitation of governmental powers, supremacy of the constitution, separation of powers, accountability on the government as the major tenet of the concept.[18]

The purpose of this sub-topic is to appraise the extent to which the KANU government upheld the two concepts of constitutionalism and the rule of law which for the purpose of this sub-topic will appear to be synonymous. The KANU regime was a totalitarian regime manifested in the excessive abuse of the fundamental rights and liberty of the individual. For proper discussion of the application of constitutionalism and the rule of law, I intend to examine the protective mechanism employed by KANU government to safeguard the single party system. The government in attempt to do this maximumly used the loose laws in the Kenyan legal system besides outright violation of adequate protective laws.

Detention by Executive.

Detention literally means the deprivation of an individual of his personal liberty. It is wrongful confinement of an individual against his wishes. Detention can be legal where the law permits the act of confining an individual. Detention

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without trial imports the legal aspect in depriving a person his personal liberty. Detention without trial in Kenya traces back to 1952 during the Kenya's state of emergency (also known as 'Mau Mau') which was inspired by land shortage and political grievances. Wholesale detention without trial occurred and estimates of detainees range upto 80,000[19] with some prisoners being held as long as eight years.

At independence, the colonial government's Emergency powers were repealed, but a provision of the new constitution gave the new African government special power to deal with any emergency situation proclaimed by the President. Section 72(1) of the Kenyan constitution states that,

> "No person shall be deprived of his personal liberty. Save as may be authorised by law in any of the following cases..."

The situations listed deal with conviction of crime,[20] the execution of contempt of court orders,[21] fulfilment of other legal obligations,[22] securing an appearance in court upon court orders,[23] apprehension upon reasonable suspicion of the commission of a crime,[24] securing of the education and proper care of youths,[25] controlling disease,[26] control of the insane,

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drunkards, addicts and vagrants,[27] extradition[28] and the control of the movement of certain persons in certain areas.[29]

It is evident from the above that notwithstanding the constitutional provision for the protection of personal liberty, such liberty is not absolute and can be deprived by the court, or on other social justification. Further deprivation of a person's personal liberty is sanctioned by section 85 of the constitution which provides,

> "Subject to this section, the President may at any time, by order published in the Kenya Gazette, bring into operation, generally or in any part of Kenya Part III of the Preservation of Public Security Act or any of the provisions of that part of that Act."[30]

The constitution is silent on whether the President in exercising his powers under the above provision ought to be reasonable or bring the said Act into effect under reasonable circumstances that reasonably justify such an order. Preservation of Public Security Act[31] is one of the legal instruments that were inherited from the colonial government to suppress internal strife, subversion, external aggression, problems related to the economic order and natural disasters.[32] Where this Act is

invoked, an order made by the President shall only be effective within twenty eight days unless approved by the National

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Assembly, during the time the Assembly is in session.[33]

Inasmuch as we may appreciate the role of the Security Act, its main objective has been overestimated and it has been used almost exclusively as a weapon against political dissenters. The Act has been used to imprison without trial those who mount constructive criticism against the government. Since independence consistent trends can be seen in Kenyan law and politics, increasing power for the Executive, decreasing power for the legislative and judicial branches.[34] Under the one party KANU rule, the government used this detention law not as a shield but as a weapon against its hot critics. Soon after the enactment of the Preservation of Public Security Act, eight persons were detained, four K.P.U. Trade Union leaders and four K.P.U party officials.[35] On 31st December , 1977, Ngugi wa Thiongo was detained under the Security Act for his radical play which depicted criticism of political and economic injustice in post independent Kenya.[36]

Detention law as contemplated in the constitution is not a prima facie bad law, but its usefulness has continuously been overlooked by the President. Despite the powers conferred on the president by S 85(i) of the constitution to so invoke the Preservation of Public Security Act to therefrom detain, the constitution demands an approval by the National Assembly if the detention is to exceed the stipulated period of twenty eight days.

However, the objective of S85(i) of the constitution has been

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watered down and diluted by the arbitrary constitutional amendment of 1966 which empowered the President to detain any time without parliamentary approval.[37] This has overclothed the Executive with excessive powers to detain any person at will and for as long as the President himself may wish thereby totally discrediting the motive and essence of detention law.

A person can consequently be detained for as long as five years without trial which does not seem to conform with the spirit of the constitution in providing for detention law.

The former Attorney General of Nigeria and President of the International Court of Justice,Mr Elias T.O., set out three conditions which are requisite before as state can resort to detention.[38] These are,

i) there must be a breakdown of law and order,
ii) there must be such a grave situation that no measure short of detention of individuals could contain, it,
iii) there must be an official proclamation of emergency.

It is incredible to note that none of the above conditions has ever in history of KANU regime occurred in Kenya. Kenya since independence has never experienced any proclamation of emergency warranting any detention, apart from the status in North Eastern Province of Kenya which was recently withdrawn. There has never been any breakdown of law and order which could not be quelled by any other method apart from detention.

The year 1982 may be declared as a year of detention in Kenya. More than ten people were detained including Mr. Mukaru Nganga and George Anyona.

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Mr Anyona giving an account of his experience during his second detention on 31st May, 1982 says he was served with a detention order by the security officer, Munene Muhindi which order stated as follows,

> "You have engaged yourself in activities and utterances which are dangerous to the good Government of Kenya and its institutions and in the interests of the preservation of public security your detention has become necessary."[39]

He was driven to Kamiti Maximum Security Prison where he was placed in solitary confinement in the infamous Block G section of the prison. He was in Kamiti for twenty two days during which he greatly suffered sadistic torture from the officer-in-charge, Mathenge.[40]

His detention was illegal because the Preservation of Public Security Regulations, 1978, were not properly laid before or sanctioned by Parliament, contrary to section 85(2) of the Constitution which requires the approval of the National Assembly.

There was no breakdown of law and order nor was there an official proclamation of emergency. In the absence of the above, there was no grave situation that no measure short of detention could contain. No public security had been threatened hence there was abuse of powers to deprive individuals of their personal liberty.

The High Court of Uganda in the case of Re Ibrahim[41] observed,

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> "Emergency regulation deal with public safety and subversive activities outside the purview of crime. Emergency regulations were designed to deal with public safety and good order and not crime as such. There is a very comprehensive code dealing with crime and procedure in criminal case."

It is also appalling to note that Kenya invited some international concern regarding its failure to perform an international obligation of which it became a signatory on 23rd of March, 1976. Article 4 of International Covenant on Civil and Political rights 1966 states that,

> "Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention."

The arbitrary detention did not end in 1982 but spread in the following years with a number of incidents recorded in 1990 when there was massive disaffection and discontent against KANU government. Political activists and multi-party advocates, Kenneth Matiba, Charles Rubia and Raila Odinga joined the detention camps in July 1990. The following day advocates, John Khaminwa and Gitobu Imanyara were also detained. These events and detention were followed by political unrest throughout the republic with a number of deaths resulting from the Police shooting innocent Kenyans on 7th July, 1990 which became to be known in the Kenyan History as the "Saba Saba". Kenyans were denied their right of expression and KANU government resorted to using extra powers than those given by the constitution to help it remain in power. All these acts leading to their detention were constitutional and individuals involved were exercising their constitutional rights which turned out to be illegal of which illegal means was to be used too to suppress. Allen observes,

"It is of course mere fiction to say that individual was not imprisoned but 'merely' detained, that he was not 'charged' with any 'offence' and he was not 'punished'. Control which may go on indefinitely without accusation or defence is far more worse experience than imprisonment of a defined duration and suspicion is often more damaging than indictment."[42]

From the foregoing it is very eminent that the Executive arm of the government acted without limitation to violate the provisions of the constitution thereby denying the constitution the supremacy it was supposed to enjoy. Kenyans suffered greatly under the arbitrary powers exerted on them by the Executive. The Executive interference rendered the parliamentary instituions functionless. Members of Parliament had to toe the line of the Executive. Parliament merely acted as a rubber stamp since the Executive controlled everything. Ministers were appointed on tribal basis and were fired at the will of the President in case they differed in opinion with the President. Ministers in their ministerial duties were not autonomous because of the intrusion of the Executive powers. Policies which were inconsistent with the will of the President were cancelled and the KANU regime was a one man government which violates the spirit of constitutionalism. Detention without trial was given the royal blessings besides political intimidation just as the then minister of state, Mr. Angaine rightly observed,

"The public has seen what KANU can do, for if one fools around with KANU, he is likely to get into the kind of trouble which our two colleagues have suffered... I would like to tell my fellow MPs that it is not only in this house that you watch what you say about KANU, even outside if you do not follow the policies of KANU, you will get what those others have got."[43]

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This statement from a whole government minister supports the idea of the supremacy of the party over the constitution of the republic. Mr. Angaine was referring to the detention of Mr. Shikuku and the Speaker of the National Assembly, Mr. Marie Jean Seroney. It is even strange that the statement was being made to fellow MPs who then were being censored, resulting into one sided debates in Parliament. The legislature was pocketed by the Executive with a result that any motion which could injure the feelings of the government were easily thrown out. The rule of law requires that such misuse of powers by the government should be followed by legal justification which was too remote, if there was any.

Freedom of the Press

A free and impartial press is indispensable for the successful functioning of a constitutional government. It acts as a jealous guardian of the rights and liberties of citizens and is a forum for the discussion of public policies enabling the government to feel the pulse of the people.

The constitution also provides,

> "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence."[44]

The constitution itself limits this freedom for purposes of defence, public safety, public order, morality or public health.[45]

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However, these exceptions must be reasonably necessary for the limitation of this freedom. Suppression of the freedom of the press is one of the best lethal weapons KANU used to thwart and intimidate Kenyans holding any opinion contrary to the wishes of KANU. Various trumped up charges were mounted against those expressing their divergent political opinions.

Nwabueze appreciates the limitation imposed by the constitution on this freedom of press[46] and remarks,

> "It is obvious that rights cannot be guaranteed in absolute terms if for no other reason than to protect the rights of other persons. To guarantee rights without qualification is to guarantee licence and anarchy. The freedom of the just man is worthless if it can be preyed on by thieves and murderers."[47]

The constitutional amendment of 1982[48] which made Kenya a one party state has violated Kenyan's fundamental rights to free expression, free conscience and free assembly and association. It altered the basic structure of a constitution as was held in the Indian case of Kesarananda v State of Karali.[49] Constitutionalism requires that the governmental powers should be limited and the individual's civil liberties which are fundamental must be respected. A number of magazines like "Beyond" were banned on grounds that they disclosed sinister motives. The magazine clearly reported the massive rigging in the 1988 elections in which the government directly played a major role in choosing and appointing candidates that were not meeting the taste of the majority of Kenyans.

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Freedom of expression had since then been curtailed as evidenced by a number of sedition cases which were half baked and tried on mere malice and suspicion. The KANU government detained, arrested and falsely charged anybody challenging the policies it made. The notorious Criminal Investigations Department which was unreasonably over-staffed to waste public funds was easily manipulated by the government to harass innocent Kenyans who were suspected to be opposing the government. Not only were they arresting those found in possession of the alleged ill conceived publications, but were also used to force possession of the same by damping those publications in offices and residential places of the suspects to facilitate their illegal arrests and charges. Maina wa Kinyati[50] was a victim of this unlawful act perpetrated by the government officials. He was consequently charged with sedition and jailed for six years.

Sedition law[51] was maximumly twisted by the government to suit its interests. David Onyango Oloo v. R[52] a University of Nairobi student was jailed for six years for possessing seditious documents. He raised a preliminary objection demanding to be told where the boundary line between constructive criticism as an exception under section 56(i) - (iv) and sedition could be placed. He was denied his right and freedom of expression and punished instead for the exercise of that freedom. This manifests clearly that the KANU government was not a government of the people and for the people. It rejected public opinion which is a democratic process and a working measure of common agreement and a driving force of governmental actions and policies. Public opinion is regarded in many countries and its absence implies tyranny.

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The KANU government was marked with official tribalism and nepotism practiced at the highest level by the Executive. Top political and non-political posts were distributed on ethnic ground and the country for some time was ~~under~~ almost controlled by one ethnic tribe. This was done irregardless of the qualifications necessary for those particular posts. It was the regime where a medical doctor could head a financial institution and a preacher becoming a director in an academic institution.

It took the Editor of Nairobi Law Monthly quite a number of hours to prepare a list of all top positions ~~had~~ held by one ethnic society. He earned much by being arrested and falsely charged with sedition due to his views he had expressed in the magazine.[53] These were results of arbitrary powers exercised by the arms of the governments in violation of the constitution hence derogating from the spirit of constitutionalism and the rule of law as the constitution provides. A Counsel in the Nigerian case of Obi v. Opp stated that,

> "Any law which punishes a person for making a statement which brings a government into discredit or redoubt or creates ~~dissatisfaction~~ disaffection against the government irrespective of whether the statement is true or false and irrespective of any repercussions on public order or security is not law which is justifiable in a democratic society."[54]

Police force

Kenya was described as a police state in the last years of KANU government rule as a single party state. Police officers acted as they wished and shot innocent Kenyans aimlessly in what used to be called 'stray' bullets. They opened fire on citizens

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while executing their duties which allows them to use reasonable force in effecting arrest.[55] What amounts to reasonable force to policemen was setting loose the power of the gun. Fire, a reasonable force was used in even raiding 'illicit' brew dens. It is pathetic that a Kenyan who has taken some illicit brew who should be punished by due process of the law is shot dead as he merely tries to run from the gun-totting, ill trained policemen. Such misuse of firearms was reported in several areas in the country but no perpetrators were ever taken to court. Probably the police force was motivated by the Presidential speech which he gave at the Jomo Kenyatta International Airport on his way to the Middle East in which the President said,

> "Some people are of the opinion that armed robbers should not be killed, but I am saying that they should be killed."[56]

How does a policeman prove someone guilty, what then is the role of the court? This was a grievous misdirective coming from the Head of State calculated to cause terror and anarchy among Kenyans.

The police force as expressed in their motto, *"Utumishi kwa wote"* is charged with the duty of maintaining order and providing necessary security to the citizens. The force is to maintain peace, by arresting law breakers and handing them over to the courts which sets out the punishment should they be found guilty.

Until then, an accused person is presumed innocent. The Police Act therefore does not authorise any officer to ill treat suspects in the

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course of arrest and investigations of a crime and cautions that only reasonable force is to be used.[57] This provision dispels any attempt or any act which may amount to torture.

In violation of this legal requirement, the KANU government 'legalised' torture of suspects in police cells and erected buildings and special rooms for this inhuman treatment. The headquarters was in the infamous "Nyayo House" where inhuman activities which could not even be imagined of in human language and life were carried out in large scale. Innocent people who had only registered their discontent with the government in public were tortured and some were permanently maimed. The victims were blind folded from the arresting scenes into the Nyayo House. Koigi wa Wamwere who was illegally abducted from the borders and blind folded to Nyayo House lived to tell the agony he underwent in his case.[58]

This dehumanising police activities were totally unlawful, undesirable and above all violation of the fundamental procedures as required by Section 77 of the constitution. The Criminal Procedure Code emphasises that the function of the police is to enforce all the laws and regulations and not to subject suspects to torture.[59] Imunde, a Kenyan was tortured and forced to write incriminating entries in his diary.[60] Torture was always inflicted by way of beating, starvation, forcing suspect to sleep naked on a cold floor, stepping on the genital organs of the suspects, immersing the suspects in cold water shoulder high for long hours and forcing them to sit on a dusty floor littered with

human waste. Imunde was finally charged with sedition. Joseph

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Wekesa Barasa[61] met his death in the torture chambers in very pathetic circumstances after extreme interrogation, thorough beating, deprivation of sleep, rest, food and water. No police officer was charged in court. There were several other similar cases which were not reported. The government was not accountable to the citizens for these illegal acts as the rule of law stipulates. Constitutionalism was driven out following improper violation and encroachment on individual liberties. Individual's constitutional rights as embodied in the constitution were trampled on, subjecting the individual to the mercy of the police and other oppressive arms of the government. In Botswana case of State v.David Modukwe,[62] the Chief of Botswana observed,

> "The outlaw of torture is complete, the prohibition of inhuman or degrading punishment is total."[63]

Torture was a means of extracting information from the suspects which were later tabled in court as confessions, upon which convictions were based. The suspects were forced to sign such documents under threat. Following the kind of court system during this period, such evidence was relied upon contrary to the Evidence Act which requires that confession should be voluntary.[64]

Independence of the Judiciary

The primary function of the Judiciary is to determine the legality of the various kinds of behaviour in society by applying rules or discretion to the facts of a particular case.

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The court may also examine the behaviour of the executive and the legislature upon the same principles. The Rule of Law is practised where the judges exercise unfettered discretion in the interpretation of laws and administration of justice, and they remain uninfluenced by any authority, in the discharge of their duties. The maintenance of the independence and impartiality of the judiciary both in letter and in spirit is the basic condition of the Rule of Law and , as such, that of the liberty of the people, and human progress.

The judicial tenure is as important as the method of appointment in securing the independence and impartiality of judges. In 1985 the KANU government removed the constitution's security of tenure of office hitherto enjoyed by the Attorney General and the Controller and Auditor General.[65] This declothed the Attorney General of his immunity to interference from the Executive. The Attorney General for years acted with one hand while the other was held by the Executive. The KANU President usurped the powers of the Attorney General as the legal advisor to the government.

The Executive totally infiltrated the jurisdiction of the Attorney General and the Judiciary, rendering the judges and magistrates functionless as far as their impartiality is concerned. A number of judges entertained half baked political cases and virtually based their convictions on such inadequate evidence. The judiciary was totally weakened and swayed sideways at the mercy of the Executive.

This undemocratic system was as a result of heaping enormous powers on the Executive to appoint the Chief Justice and Judges of the High court. [66] The Chief Justice is the country's chief judge and the embodiment of ~~the~~ justice and its administration.

This embraces the idea of contract judges, who in Kenya operate

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on renewable contract basis. The office of Chief Justice in the one party government was for a long time held by foreign judges who naturally performed their duties in conformity with the wishes of the appointing authority, the Executive. Consulting the wishes of the Executive in dispensing important legal services only strengthened the government in cementing itself in power, a practice which gradually eroded the independence of the judiciary. Immature cases went through at the expense of justice, the achievement of which is the sole responsibility of the judiciary. Democratic process in most countries is enhanced by an independent judiciary which pays homage only to the law and not political whims.

The erosion of the independence of the judiciary was experienced in several cases in which the judges, stood influenced and tutored by the Executive. In such situations the discretion judges enjoy was not balanced, and the benefit of the discretion was enjoyed by the Executive. In some of these cases touching on KANU party affairs in which the court had jurisdiction judgments delivered left no doubt that KANU operated as an extra-legal body. The court abdicated its role as a guardian and a watchdog of the people. In the case of James Kefa Wagara and others V.G. Ngaruro Gitahi,[67] the Plaintiff , a candidate in the preliminary election wad declared unsuccessful. He applied for a declaratory judgement in the High court. In dismissing the application, Justice Akilano Akiwumi said,

> "I would content myself by saying that the reasons why this court may be unwilling to interfere in the internal management of the affairs of KANU are that the members of KANU have deliberately, consciously and voluntarily chosen

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to accept a set of rules and regulations that they want to regulate their activities as members of KANU including the nomination exercise."[68]

This judgment was malicious and improper since civil rights had been alleged to have been infringed. This holding contradicts the ruling in Barker v. Jones[69] where it was held that members of a club can make a tribunal or a council the final arbiter on questions of fact. The court should have interfered, notwithstanding what the learned judge described as voluntary acceptance of the rules and regulations. This submission concurs with the holding in the case of Forbes v. Eden[70] that the courts will not interfere with the rules of a private association, except in protecting some civil right or interest which is found to have been infringed by their operation.

In Koigi wa Wamwere v. Attorney General,[71] the Plaintiff who had been charged with treason sought to challenge the constitutionality of the charge and the illegal torture he had received in the police hands. The learned magistrate subjecting himself to the tune of political desires of the government which was secretly determined to hang Koigi dismissed the case. The court process was merely intended to camouflage their hidden intention. Kamau Kuria[72] in his suit against the Attorney General seeking to have a constitutional court set to hear the impounding of his passport, was denied justice. Justice Miller

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acting on a predetermined misunderstanding between Kuria and the government held that section 84 of the constitution was inoperative.[73] The section provides for a person whose fundamental right and freedom (as provided in section 70 to 83) has been violated to seek redress from the High Court. Robert Martin remarks that in Africa the courts have been unwilling to exercise control over emergency powers.[74] Kiraitu Murungi, a Nairobi Lawyer also argues in his paper that despite the lack of initiative by the judiciary to question detention by the Executive, detention without trial should not be used as a convenient way to short-cut established criminal procedures.[75]

KANU as a Party and the Government

A party and government are two different entities and consequently a party should only form the government but should not run the government. KANU government created an impression that KANU was the government and the government was KANU. This opinion was still common with some illiterate Kenyans especially during the last General Elections. A member of Parliament, Mr. Mulu Mutisya, during these days, commenting on the Gulf War warned Saddam Hussein to stop the war and retract from Kuwait lest he risked being expelled from KANU. This statement verifies the notion KANU had created in the society where people felt that there could never be any other government on earth without KANU. The party was given special responsibility, in terms of section 5(3) of the Constitution (as), which stipulates,

> "Every candidate for President shall be a member of KANU and shall be nominated by that party in the manner prescribed by or under an Act of Parliament,[76] and in terms

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of section 34, which provides that for one to qualify as a candidate for a parliamentary seat, one is to be "a member of KANU and be nominated by KANU."[77]

The tenor and effect of such general provisions would lead to the interference that the intention of the legislature was that the party should operate essentially as an extra-legal body.[78] These provisions led to absurd results, seeing the government being run as if it were a branch of KANU.

KANU as a party used the government machinery to compel and force people to join the party, in violation of its own constitution which provides,

> "Any Kenyan citizen who is of the age of 18 or above, or who accepts the objectives, policy, programme and discipline of KANU shall be eligible for membership."[79]

The government using the provincial administration forced people to join KANU. In certain areas like Kendu Bay Division and Yala in Siaya nobody could get into a market place without the KANU membership card. I was personally denied passage into a local market unless I bought the membership card. Fishermen with fishing nets could not lay their nets in the lake, around Kendu Bay without acquiring membership card which implied forced membership of the party. Registration of Persons Act[80] allows free registration of persons unconditionally provided a person is a Kenyan Citizen. The process of acquiring an Identity Card

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was not a cheap process as local chiefs were charging fee for the necessary forms, pretending to be acting under the notorious Chief's Authority Act.[81] The KANU regime introduced forced Harambee in the Kenyan Society, thereby undermining the spirit of Harambee. Poor people in the rural who could not contribute to those harambee were deprived of some of their property.

The KANU government introduced a military wing within the party which was commonly called KANU Youth Wing. This group of idle men caused terror in the society by beating,caning and unlawfully arresting people in the neighbourhood who opposed their views. This extended even to improperly victimising citizens with whom they had personal differences. There was a case in Kasipul Kabondo where members of this illegal body beat a person to death. The group consisting of illiterate, idle, poor and ill-informed giant men usurped the powers of the police who had resorted to high level torture and use of guns. Other Acts were put into play to keep an individual to himself. The Societies Act[82] was used by the Registrar of Societies to deny registration of opinion groups.

From the foregoing, there was total abuse of the rule of law which imposes limitation on the governmental powers. Constitutionalism was not practised to a large extent. These arbitrary powers were constantly exercised and have totally discredited the one party system which did not recognise the individual liberties, especially expression of opinion. The government itself was not accountable. Several people lost their lives in the one-party system period through political manoeuvres Prominent politicians like Dr. Robert Ouko were murdered in cold blood. A commission of inquiry was set but which in the process

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of disclosing the perpetrators of the crime was dissolved after wasting enormous sums of money for calling the Scotland Yard whose findings became useless. Equality before the law as a principle of the rule of law was not exercised. Some people named in the murder case were found to be too special to be arraigned in a court of law. Corruption was at its peak, flowing from the Head of the State to government officials at District level. A lot of money was stashed in foreign accounts, denying the country useful resources for the growth of the economy. The ills of the one party rule in Kenya are innumerable and to avoid more tyranny, strong men came in the cold despite the untold suffering they underwent to deliver the common man from the paws of a beastly government. A change was necessary if Kenyans were to avoid anarchy as is experienced in several African countries and the change was to introduce the multi-party system in Kenya as the best alternative.

In the next chapter, I will discuss the origin of multi-partyism in Kenya. The transitional period was marked with a number of undesirable events which must not go unmentioned. I will endeavour to appraise the need for multi-partyism, covering the need, quality of opposition and role of opposition. More emphasis will be on the Elections and its aftermath, extending into the desirable position of opposition after losing in the last General Election.

More discussion will reflect the multi-partyism on constitutionalism and the Rule of Law. How can the two concepts apply, now that there is opposition, besides KANU still retaining power? Why did opposition fail in the last General Elections if the KANU government was oppressive before, does it mean that the ills of the KANU government were only known to a few people?

CHAPTER 3

MULTI-PARTYSIM IN KENYA

3:1 Introduction and Establishment of the Present Kenyan Multi-Party System:

At the end of Chapter 2 which highlights the conditions necessitating political change, we are left with distressed feelings about the position of innocent Kenyans who have endured innumerable suffering in the cruel hands of KANU government. The government which has a fundamental responsibility of ensuring inter-alia that every Kenyan citizen enjoys equal protection under the law is clearly seen to have outrageously abdicated its moral and legal responsibility. We have learnt how several people have been falsely charged and imprisoned for expressing their views and opinion about the government set up. Several violations of human rights have been orchestrated by the government for years, resulting into massive derogation from the constitutional provisions.

Kenya had become a police state where the police acted as they wished by inflicting dehumanising torture and beatings on innocent Kenyans as if there were no courts of law. Public opinion on government policies and practices were graded as toxic, subversive and undesirable nonsense aimed at undermining the constitutionally elected government. A government that could tolerate individual opinion and sentiments became necessary. The suffering experienced by Kenyans were only attributed to holding views different from those in authority. Extreme encroachment on individual fundamental rights had become a game of chance to the KANU government. The constitution had been hidden somewhere, thus the Nyayo government was 'drafting' its own constitution allowing for large scale intimidation of Kenyans. There was no respect for the Kenyan constitution. Okoth-Ogendo rightly observes that,

"Constitutions are largely political documents and while they pay homage and expediency they pay lip service to the doctrines of legality and constitutionalism."[1]

The journey to multi-party politics was first mooted by Reverend Timothy Njoya in his New Year Sermon in January, 1990 where he warned of a wind of change sweeping across from the collapse of the monolithic communist regimes in Eastern European states. The situation was aggravated by the murder of Dr. Robert Ouko who until his death was a government Minister for Foreign Affairs. Eyebrows were raised at the approaching mayhem that would soon swallow lives of Kenyans. To avert further loss of life in the hands of the government, Mr. Kenneth Matiba, Charles Rubia and Raila Odinga came in the open on 3rd May, 1990 to denounce the ill-mannered activities of the KANU government. They seemed to have assumed the leadership of multi-party movement. The move they took only earned them bitter, unlawful and arbitrary detention. These three Kenyans had initiated an irreversible liberation move, which unknown to them would later overhaul the whole government machinery. Their detention had no legal justification whatsoever for there was no national security threat. They had merely exercised their freedom of conscience and speech by calling a press conference at which they made impassioned pleas for immediate political changes which by any valuation did not amount to a criminal offence.

The KANU government was aroused by the unfolding events which threatened its roots. There was growing demand for political changes which had been initiated by the now called detainees. The political temperature had risen regardless of the detention of the three strong men. Consequently, KANU government engaged in time buying tactics to kill the spirits of change by appointing the Saitoti Review Committee on the "Kenya we Want" following the party's delegates conference in June, 1990.

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The committee was charged with the responsibility of hearing and entertaining all national issues of concern which had invoked the idea of change. A number of radical changes were proposed to this committee which sat in every province. The committee was amazed to learn of the enormous discontent that had brewed amongst Kenyans. Kenyans had called for the amendment of the constitution to allow multi-parties besides calling for the limitation of presidential terms of office, restoration of the security of tenure of affected offices, abolition of detention without trial and immediate release of detainees. There was also a demand for strict observance of fundamental rights and freedoms. The public's intensity, forcefulness and enthusiasm in their presentation and the seeping extent of their demand obviously depicted the feelings of the majority. Despite the setting up of the committee to listen to the public outcry which constituted the statement of the three detainees, KANU government still confined Matiba's group unjustifiably. KANU government got a rude shock when Oginga Odinga, former Vice-President of Kenya in a press statement urged KANU expellees to launch a political party to safeguard democracy in the country.

The illegal detention of Matiba, Rubia and Raila came in the wake of a public meeting which they had called notwithstanding the denial of licence by the Provincial administration, contrary to the constitutional provision for freedom of assembly.[2] The KANU government had no respect for the late Jomo Kenyatta's speech on August 13, 1964 where he warned that,

> "Although conditions for a one party state are evident and such a development appear inevitable, should relevant grounds for multi-party state evolve in the future, it is not the intention of my government to block such a trend through prohibitive legislation.[3]

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Even though Matiba, Rubia and Raila were languishing in detention camps, their message had sold through and Kenyans were sincerely ready for change. The government, scared of the growing opposition, warned against attending the meeting which was called 'illegal'. The driving force for change was too strong pushing a number of people to Kamukunji grounds, only to be intercepted by a combined force of regular riot police, the administration police and the paramilitary General Service Unit (G.S.U) that opened fire on innocent Kenyans, maiming wounding and killing fellow Kenyans who had not committed any offence punishable by the force of the gun. These barbaric activities exemplified the fact that the KANU government had equated criticism with enemity and subversion. It could not be able to accommodate even mild critics like Waruru Kanja who was sacked from his ministerial post after he demanded in Parliament that the government disclose to Kenyans who had murdered Dr. Robert Ouko.

There was a coincidence of the press statement released by Matiba group with the US Ambassador to Kenya, Mr. Smith Hempstone's remarks while addressing the Rotary Clubs of Nairobi where he pointed out that,

> "Strong political tide is flowing in the (American) congress, which controls the purse strings, to concentrate our economic assistance to those of the world's nations that nourish democratic institutions, defend human rights and practice multi-party democracy."[4]

The KANU government interpreted these statements to imply that Hempstone's remark was an attempt by the US government to dictate terms to Kenya and on the other hand that Matiba and his group were funded by a foreign body.

The Minister of State in charge of Provincial Administration ordered the Provincial Administration to keep tabs on the activities of the diplomats in the provinces.

This was a further violation of international law on diplomats which guarantees their immunity from the local jurisdiction of the receiving state.[5]

The pressure to effect political change was not only in built within the Kenyan borders. There was international concern over human rights violation in Kenya compelling the International community to exert pressure from outside to push Kenya government into adopting change. Since international law does not allow military intervention of a sovereign state to enforce observance of fundamental human rights, a better but painful method was reached in forcing the government to be responsive to change. The decision of the Paris Club, constituting major world donor countries and their umbrella bodies, the International Monetary Fund (IMF) and the World Bank, to withdraw any foreign aid to Kenya until the KANU government satisfied the whole world that it could respect human rights was timely. Besides observance of human rights there was 'institutionalised corruption' by top government officials in which large sums of money were stashed in foreign individual accounts. The money consisted of looted funds, which left many important local projects funded by the international donors completely paralysed. There was exposed wide economic mismanagement by government ministers and parastatal heads, some of whom were unqualified for the posts.

The conditions set by the international community meant that Kenya had to adopt a multi-party system. Such conditions together with the brooding domestic discontent necessitating change stung and pushed the KANU government hard to the wall. The Saitoti Committee had also wasted public funds without any fruitful outcome to resist change. The KANU government had become intolerant of the opposing views. President Moi condemning multi-party advocates while in Mombasa said,

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"Multi party advocates are tribalists surviving on borrowed ideas, incapable of helping in the development of Kenya."[6]

Other government ministers like Mr. Joesph Kamotho ordered their faithfuls to take pangas and attack multi-party advocates. KANU leaders persistently opposed the introduction of multi-parties on the grounds that Kenya was "a collection of warring tribes". They asserted that the liberties of multi-party would inflame ethnic rivalries and bloodshed, an assertion which was meant to instill fear in Kenyans who advocated for change. This assertion as will be seen later was qualified by the government in introducing and maintaining ethnic clashes.

President Moi on being interviewed on violation of human rights in Kenya by a London News Reporter in Zimbabwe, during his visit to attend the Commonwealth Heads of Government Conference said,

> "I do not agree, I do not agree at all, why pick on Kenya and yet Kenya is a peaceful country. Kenyan children go to all institutions of learning from the primary level all the way to University. If Kenya was a bad country these children would not be going to school."[7]

Overpowered by the ever mounting pressure for change, the KANU government at Kasarani on 3rd December, 1991 through the voice of the KANU governing council accepted to repeal the notorious section 2(A) of the constitution. On December 29th, 1991 Kenya became a multi-party state dejure following the repeal of section 2(a) of the Kenyan Constitution. This marked the end of single partyism in Kenya, and ushering in multi-party politics. A new era had been opened in the history of Kenya.

The transitional period was marked with a chain of unlawful events imposed by the government which was adamant to the wind of change. As will be seen later, the introduction of multi-party per se did not mean liberation from tyrannical rule of the government because mere introduction of multi party alone without the political will did not limit the governmental powers. When examining the impact of constitutionalism and the rule of law later in this chapter, it will unfold that the pre-election era was a stormy period. The KANU government instead of facilitating smooth transition for a better conception of the new system to be well understood, used all dirty tactics to discredit the system in the eyes of Kenyans. The concept of multi party politics was accepted in bad faith by the government.

With the repeal of Section 2(A) several parties were formed, marking the birth of opposition in Kenya. The first party to be formed was Forum for the Restoration of Democracy (FORD) which garnered overwhelming support over KANU in its infant stages. Other parties like Democratic Party of Kenya (DP), Kenya National Congress (KNC) and others were formed. However, due to manipulation of politics by KANU, FORD had to disintegrate into FORD-Kenya, headed by Oginga Odinga and Ford Asili under Kenneth Matiba, shortly before elections, to the advantage of KANU.

3:2 Merits and Demerits of Multi Partyism

Multi-partyism is a political set up in which more than one political party is constitutionally allowed. It is a system involving competitive politics between or among different political parties. The system is valid and so desirable for a democratic government due to its tolerance of the requisite tenets of democracy.

Multi-party political system entertains discussion, criticism and compromise due to the presence of plurality of associations and currents of opinion.

It rejects compulsory uniform of society, regimentation of opinion and stifling of the electorate demands. Public opinion is the most important instrument in democratising the actions of the government. This makes the government responsive to the public call and minimises chances of arbitrary rule according to the wish of the rulers. The rulers therefore do not serve their own individual interests but the collective interests of the citizens, reducing them to servants of the people and not masters of the ruled.

Multi-partyism provides an alternative government and gives the electorate a choice between parties. Under the one party system there is no alternative government and no genuine choice before the electors so that influence of the people on political decisions is reduced to a minimum. There is always a standby government should the government in power collapse or be rejected by the majority. As will be seen later these merits of multi-party system are only achievable in the Western world and not in the African societies, where there is no positive political development yet.

This political system is the only method by which the people can at the electoral period directly choose its government. It enables the government to drive its policy to the statute book, making known and intelligible the results of its failure. This brings an alternative government into immediate being. Where it is well developed the true desires of the electorate is reflected in the results of elections. The electoral process in such circumstances are respected and no party can be able to manipulate the system to outdo the essence of elections. The United States of America conducted its elections last year in this democratic manner and everybody was pleased with the results for there are no ways through which an unwanted leader may climb the political ladder.

In Multi-party system there is a distinction within the state, and the different organs of government are alloted their own spheres of jurisdiction and powers. This ensures the important doctrine of separation of powers, which therefore provides check against the abuse of the rule of law. All evils committed by a government have their base in the non-observance of the rule of law. A government which respects itself cannot condone misuse of powers by any governmental organ. The independence of the judiciary which is vital for achievement of constitutionalism is eminent and easily workable in the multi-party state unlike the one party state in which the Executive patronises every governmental organ.

Distinction between the ruling party and the government is easily discernible. Party activities are not inter-mingled with the governmental activities. This further creates a distinction between the society and the state, though they are kept in connection with inter-action. In the one-party system the distinction between the two is blurred or confused by the party, which controls them both alike.

However, multi-party political system is not only one sided. It has disadvantages which are, nevertheless, overweighed by the merits. The system blinds politicians who instead of promoting the wishes of the electorate , try to engage in the party politics. A lot of effort is used in protecting party interests, especially where there are more than two parties. Multi-party system, where it is poorly conceived and practised has the risk of making cracks in the opposition along tribal lines where tribal feelings are still nursed. It builds animosity between parties and where a party has won and formed the government, there comes a feeling of denying the opposition-oriented communities some essential commodities and services. The governments formed in states where the above feelings are paramount are always discriminatory. Because of the above,

multi-partyism imposed without political will retards economic growths as a result of economic imbalance. On the other hand, where the system receives the necessary support it requires, it has proved to be the best political system capable of giving the common man a say in the community and in the government set up.

3:3 The Opposition and its Role in the Multi-Party Politics.

An opposition party in the layman's language means a party which offers an alternative government. It is a party that has not been able to form the government in regime. According to the Kenyan Standing orders of the National Assembly,

> "An opposition party or coalition of opposition parties consisting of not less than 30 members; opposition party means a party offering to form an alternative government, party means a Parliamentary party consisting of not less than seven members."[8]

From the above, the Standing Orders categorises opposition into two, the parliamentary party, a party which has an MP in Parliament and official opposition which by definition is a party with 30 MPs and more.

The opposition has a vital role in a multi-party system. The opposition ensures organised expression of opinion in a democratic and constitutional system of government. The presence of an active and articulate opposition is vital in the democratisation process by increasing the accountability of the government. It is an alternative government and must therefore potray itself as a better alternative by championing the interest of the majority and guarding the government against misusing and operating outside its powers. The opposition strikes a balance between public interests and government policies, as Rose observes,

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"An opposition has to conduct a war against the government while at the same time considering the problems that it will face in the task of post war reconstruction."[9]

The function of the opposition is to scrutinise the regime within which it functions with a view to improving them and adapting them to the changing conditions of political life. The opposition does not control or hold the instruments of government, it operates by exerting pressure through which the process and directions of government with regard to policy matters is influenced. It can do this through the electoral process and criticism and debate in parliament. Opposition must be recognised or appreciated in the various forms in which it manifests itself in plural society. The role of opposition is summarised by Crick in the following words,

"The opposition needs to show the influence of the modern "Executive" mind and to see, itself again as an opposition whose primary duty is to oppose, not to preen and muzzle itself too much conceit of being an alternative go government."[10]

The opposition alone cannot achieve the above roles without the will of a constitutional government. The government must learn to accommodate the views of the opposition to promote the growth of understanding between the two. The government must view and understand the opposition as capable of forming an alternative government. Opposition must be given equal opportunity for mature and competitive politics to achieve fully democratic government. There should be equal treatment for all members of Parliament irrespective of party differences. The ruling party should avoid confrontational politics to antagonise the opposition.

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The opposition has a duty of keeping united to form a front in the endeavour of correcting the government. It must be organised in itself and carry out its activities within the spirit of the constitution. The opposition must work to promote national interests. The organisation of opposition must be well knit to present or to promote its programme. The opposition should pull its acts together and any differences from the election campaigns must be forgotten, not carried into parliament.

3:4 Multi- Party, and its influence on Constitutionalism and the Rule of law in Kenya

When Section 2(A) of the Constitution of Kenya was scrapped and new political parties registered, everybody thought that democracy had finally found its way in Kenya. Kenyans believed their hitherto enslaved conscience had found a relief by anticipating the pruning of excessive governmental powers. The origin of transparency and accountability on the government had been thought to be restored even though there was still intimidation and violent reactions the government used to intercept and counter the multi-party advocates.

Contrary to majority's expectations of multi party system, the true meaning of the new political system was not to be clearly exemplified and amplified in Kenya. To KANU government multi-party was understood to mean an open war against the legitimate government.The legacy of ill will was imported from the former authoritarian one party government into the multi party government. The slackening pace at which the KANU government was adopting and giving in to the voice of reason is supportive of the conservative culture and attitude with which multi-party politics was viewed in Kenya.

Constitutionalism as earlier seen in chapter one, connotes limitation on government and is the antithesis of arbitrary rule.

Arbitrary rule is government conducted not according to pre-determined rules, but according to the momentary whims and caprices of the rulers.[11] De Smith in his book lists the minimum restrain necessary for constitutionalism as accountability of the government, free elections, freedom of organising in opposition and guarantee of fundamental civil liberties enforced by an independent judiciary.[12]

The rule of law on the other hand as theorised by Dicey calls for absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, equality before the law and non-infringement of personal liberty and rights.[13] In the light of the above constitutionalism cannot be realised without observance of the rule of law.

With the introduction of multi-party politics in Kenya, the situation in terms of exercising governmental powers should have taken a positive dimension with the birth of the opposition as a shadow of the institution of ombudsman to keep the government on its toes. Having analyzed the observance of the rule of law and constitutionalism in one party state in Kenya in the last Chapter, we need to underscore any positive change of direction under the major features or instruments in which the KANU clearly manifested itself government which until now has failed to reckon with the reality of multi-partyism has adopted several avenues in perpetuation of the old one party government with ill-conceived activities. We are going to unearth these anomalies outrightly attesting to the absence of the absolute practise of the rule of law and constitutionalism. These include the abuse of the electoral process, undermining of the individual liberties, political coercion, and perversion of the processes and institutions of constitutional government.

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Electoral Malpractice.

Elections provide the opportunity to choose representatives and, depending on the regime, a degree of opportunity to be chosen. Elections also provide for a concentrated period of politics, and through elections the idea of mass government is paraded and the right of the few to rule is legitimised. It is a complex political event which provides a mandate specific enough to be meaningful. Elections may decide who governs, but constitutions decide what the government is.

From the foregoing, just as De Smith points out, elections should be conducted freely and fairly lest there are no elections at all.

KANU government in its endeavour to remain in power against the common will or multi-party used and abused the electoral process, creating an impression that absolutely free elections are a dream in the developing countries, save for the isolated case of Zambia. Besides using additional infamous tactics to outdo the opposition in the elections, the government manipulated the electoral procedures to suit the intentions of the ruling party. The President appointed the Electoral Commission chaired by Mr. Z. R. Chesoni, to oversee the electioneering period. The Commission was charged with the duty of registering voters, conducting nomination of candidates and generally ensuring impartiality as an independent body. Unfortunately there was a growing discontent with the formation of the Commission for the opposition had registered its negative feelings about this body which was appointed by the KANU government. In a free democratic process, such a commission was supposed to be unanimously set up by both the opposition and the ruling party as the opposition had requested for.

The opposition had pointed out with some justification that the Commission was wholly a KANU selection of known KANU apologies

with no apparent practical independence of operation. The President's refusal to sit down with the opposition arguing that would be tantamount to undermining his powers prompted the Law Society of Kenya 1992 Conference on "The Rule of Law and Democracy" held in Nairobi, to call for an interim government to undertake various duties, one of which was to create an independent electoral commission.[14]

The KANU government anticipating hard times ahead sought refuge in the constitution which was easily twisted to reflect the wishes of the ruling party. There was a constitutional amendment which required a presidential candidate to receive a minimum of 25% of the valid votes cast in at least five of the eight provinces.[15] This requirement was ill-intended and malicious in nature, for KANU which as the ruling party knew that its wings had been spread nationwide unlike other newly formed parties. The constitutional amendment was therefore so unnecessary and unlawfully motivated.

The registration process was marked with a number of anomalies and illegitimate acts. In order to register a few opposition supporters in the opposition zones, the government through the office of the Attorney General unlawfully changed statutory wording by inserting "not less than" in place of "not more than" to qualify the 21 days required for the purpose of registration before the General Elections. The opposition challenged the move by seeking a legal redress in Court where Justice Mbaluto of the High Court of Kenya nullified Amos Wako's (A.G) decision and described the action as misuse and abuse of powers, thereby pushing the election date from 7th to 29th December 1992.[16]

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Criminal acts like the registration of refugees considered as aliens also took place. This was express violation of the constitution which does not allow for registration of non-Kenyan citizens. [17]

Registration of refugees was carried by the government to win more votes for the ruling party. A lot of public money was wasted in this illegal exercise.

Inspite of such cases being highlighted by the press, the government took no action but only issued warnings to the press.

The government also corrupted the electoral process by printing paper money and pumping it into the economy with its devastating effects on the economy, to buy votes and destroy them.[18] Throughout the electioneering process the KANU government openly mobilised the provincial administration to work for KANU. Government vehicles were used to ferry KANU supporters to political rallies. Many opposition candidates were disqualified on minor technical faults. The nomination process was abused by abducting opposition candidates in opposition dominated areas. An Administration Policeman who grabbed nomination papers from a lawyer representing Mr. Eliud Longacha, the Democratic Party of Kenya's parliamentary nominee for Turkana south earned promotion to Senior Sergeant for frustrating the electoral process.[19] There was illegal trafficking in ballot papers by the government party agents who were also found in illegal possession of wads of ballot papers. Such a case was reported in Jamuhuri polling station in Nairobi. On the polling day, balloting were delayed in several areas to deny others the chance of voting while in other areas the elections were extended into the night, where there were organised power failures to give the ruling party an advantage in the dark.

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The electioneering period was also tainted with violence initiated by the ruling party. The KANU government kept a band of thugs and party stalwarts whose job was to act as bodyguards to top politicians and to make life uncomfortable for opponents. The thugs operated as a body of youth or militant wing under the groups like Operation Moi wins and KANU Youth Wing. Their activities included breaking up meeting, beating opponents and burning properties. In case they were confronted by a group the police always took sides and supported the ruling party.

Frequent police raids on homes of political opponents and prosecutions on trumped up charges were familiar techniques of political coercion.

According to the opposition, the manner in which the election was conducted was so massively compromised as to make the results a farce and accordingly in a joint statement the three major opposition presidential candidates declared a rejection of the results even before final results were announced. The essence of elections was totally abused and the elections were not free and fair as the law requires. The Executive arm of the government did not adhere to the principle of separation of powers which is a vital requisite in a democratic state. There was planned abuse of the rule of law which restrains the violation of predetermined electoral laws. Top ranking officials of the government played roles in the malpractice were reported but the government failed to take action against them.

Freedom of the press and of Assembly.

While freedom of expression in Kenya has increased to some extent, the government however continues to intimidate some of its critics. The government has continued to harass members of the opposition and to prevent them form exercising their newly granted rights. Since the introduction of multi-party politics, continued detections without trail which were prevalent and frequent in the transitional era have not been recorded.

The police raid on the premises of a Nairobi printing house and subsequently impounding 30,000 copies of "Society" magazine of January 13, 1992 issue was in complete violation of freedom of expression as provided for in the constitution.[20] this raid did not only fail to augur well for the future democratisation process in Kenya, but also undermined a vital component of any democratic process. The KANU government exercised and practised political selfishness by patronising and personalising the public media, the Kenya Broadcasting Corporation which is a public apparatus meant to adequately and impartially serve the public who maintain the station. For pure democratisation process, the role of the public media as the only extraordinarily powerful agency of communication cannot be underestimated. It provides a forum for the expression of the views and opinion of the people in matters of public importance, policies of the government and ventilation of grievances. A free and impartial press is indispensable for the successful functioning of a democratic government. The public media remained and has remained constrained by the ruling party, constantly and incessantly ignoring any opposing views. It had been reduced into a KANU station, subjecting any news item to KANU's approval before sending it on air, culminating into opinion enslavery and misinforming millions of Kenyans, generally.

The war on oppressing freedom of assembly did not die with the one party system. The government has continued to maximise the use of Public Order Act to extend the powers of the control of governmental administration .[21] Section 5(3) empowers the District Commissioner to decide whether to issue licenses for public meetings or not if they are prejudicial to public order.

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What remains unknown is what amounts to public disorder in this context since this section has occasionally been invoked where public order is not threatened.

Various opposition party rallies were denied permits or if permitted, the permits were revoked in the last minutes after huge sums of money had been spent to organise for such meetings. There were restrictions in party activities banning opposition parties from reaching some parts of the country. There were public declarations from prominent KANU stalwarts on some specific districts being out of bounds to the opposition. Mr. Mwai Kibaki, the Democratic Party leader had to ground his motorcade as the police conducted 'security searches' in all the cars in the convoy on his way to Western Kenya.[22]

Political coercion

Political coercion in the multi party era has been manifested through victimisation, tribal defections discrimination and actual violence. The KANU government having had a rough time during the elections has reciprocated by embarking on intimidating communities which voted against the ruling party in the last General elections. Soon after elections, and until now, the President has engaged in a series of political rallies in regions where he received great support during the elections to thank them for 'electing' him. Public money is used in these circumstances to popularise party politics. He has abused the discretion accorded to the institution of the Executive by the constitution by making appointments based on party and tribal affiliations.[23] Recently the President announced that civil servants who undermine KANU government would be sacked. The government involvement in the local authorities dominated by the opposition testifies to the threat imposed on these agents of the central government which ought to be autonomous.

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Mr. Ole Ntimama, Minister for Local Government in an attempt to use his ministerial powers announced in February that town clerks, who are directly under the central government, were to usurp some mayoral powers. This was a move calculated to extend the tentacles of the KANU government in the control of local authorities with particular interest in Nairobi council, which is dominated by the opposition, the FORD Asili.
A few controversial KANU councillors have been sponsored by the government to pull strings in the council making it appear weal in public eyes and therefore necessitating its replacement by a government appointed commission. Such sensitive decisions which should be handled by experts are arbitrarily taken by Ministers.

Constitutionalism and the rule of law in a multi-party era calls for a government with trimmed powers and efficient machinery to firmly undertake its major roles of protecting its citizens. Political coercion does not conform to the requirements of a constitutional government which respects the will of the majority and accept the public opinion. Political rewards to certain communities is a poor way of distributing and sharing power in a national society. It is grossly reversing to the one man authoritarian rule where tribalism had become part of the official consideration for public posts.

Police Brutality

The Police force by statute has the main purpose of protecting life and property and to prevent crime generally. This must be done in conformity with the pre determined rules as the rule of law requires. The Police Act says that the main function of the force is to maintain law and order, to preserve peace, to protect life and property, to prevent and detect crime, to apprehend offenders and to enforce all laws and regulations with which it is charged.

Notwithstanding the political change, the KANU government continues to use the force to reduce the number of government critics in the multi party era, which should naturally allow freedom of speech. Kenyans thought that the police terrorism had sunk with the one party rule, but to their amazement the culture is growing stronger than expected. The police behaviour implies a secret legislation which charges them with alternatives of inventing crimes, apprehending innocent people and where possible terminating life.

The KANU government even in the multi party era still feels insecure and resort to the power of the police to dismantle any person with opposing views. A number of ugly incidents involving loss of property, and loss of life have been experienced after the repeal of section 2(a) of the constitution which allows for formation of political parties, an allowance which is complimentary with the freedom of speech. The raiding of "Freedom corner" by police on 2nd March, 1992, unleashing untold suffering and beatings on the innocent mothers who were peacefully demonstrating against the continued illegal detention of their sons was an outright manifest of extreme violation of human rights.[24] The mothers were exercising their democratic right of assembly as the constitution allows. Public protest against the illegal act by the police was met with a powerful justification from the Head of the Public service, Prof. Philip Mbithi who said,

> "... the involvement of the police was necessitated by the hijacking of the mothers strike by the opposition to hold unlicensed public meeting."[25]

The statement meant no otherwise than justifying and praising the police for a commendable job done. That was the best way the government could be accountable to Kenyans.

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Barely ten days after the "Freedom Corner" raid a similar situation was experienced in Kisumu and Homa-Bay. Police fired live bullets at rioters seriously injuring more than 45 people. The rioters were said to be demonstrating against the politically motivated tribal clashes in which their relatives and friends had lost their lives. The police also invaded Kisumu Boys High School, shooting dead a man and injuring several others. Nairobi was not to be spared as the 'usual' battle between the police and hawkers raged on. A barmaid in Dandora Estate who refused to sell beer to a policeman because it was after hours had herself hand-cuffed to the staircase rails as the happy policeman slowly seeped his beer in the next bar.[26] In the same Estate a woman had a soda bottle pushed into her private organs by policemen. On March 22nd policemen shot dead four people including children aged twelve and five at the Matisi Trading Centre in Kitale during a raid on illicit brewers. This sent wild feelings in the society prompting the members of parliament from Western Province to demand the resignation of the Minister in-charge of internal security.[27]

The police force is contaminated by acts of indiscipline perpetrated by most members of the force who have been found to be collaborating with criminals, thereby inventing and abetting offenses. In such cases, because the policemen are arrested by fellow colleagues, their cases mostly end at the police stations without being taken to law courts. They also enjoy the arm of protection extended by the Executive. The police force has become the most abused force by the Executive, constantly called whenever some kind of suppression is to be inflicted on the common citizen. University students felt obliged on 27th August, 1993 to condemn the government on the Goldenberg scandal for its persistent refusal and reluctance to prosecute the corrupt officers involved in the scandal in which Kenya lost millions of

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shillings. The idle and notorious police force had gained another ground for muscling innocent students who were expressing their freedom of association and speech. There was unlawful invasion into the University compound where total war was declared against the students with the policemen breaking doors windows to beat and maim innocent students who were not even aware of the demonstration.

The Kenyan police have been used in almost every occasion where some overt discontent has been manifested, making members of the force appear public enemies because they are so brutal, unreasonable, undisciplined, uncivilised, beastly, militant and often lacking human judgment. The whole force has interpreted multi party politics to mean a revolution against the government. A part from their inability to appreciate the individual rights, they have no respect for their fellow citizens. Fundamental rights which ought to be respected have constantly been violated by the force hence repressing the spirit and practice of constitutionalism. Equality before the law has had no meaning if police officers victimised in offenses are not tried in law court.

Ethnic Clashes

Militarism in a constitutional government is a major political crime. It is a serious indictment of the KANU government system whose fidelity to the constitutional order has now descended to the lowest levels possible. It is nauseating to trace the origin of the foolish tribal clashes. The government has a primary duty of protecting its citizens from internal and external threats, but not to abet and fuel the same. Security of a state is the sovereign duty of every government. The clashes have been the most inhuman and arbitrary acts ever orchestrated by a government approaching the twenty first century. KANU government has

seemingly made an irreversible decision to stick to and widen power at whatever cost. This is power paid for by human blood of Kenyans, of which the same power is supposed to protect.

When local Minister William ole Ntimama sounded a warning and ordered non-Maasai people living in Narok district to 'lie low" or risk being shot with arrows, little did Kenyans know that the Minister was conveying an official message from the government. This came about due to the conception by the government of multi-party politics in which the government intended to scare people who were advocating for change, that the new system would brew division on ethnic grounds. Several questions have not been answered. Was multi party politics negatively conceptualised only by one ethnic society, the Kalenjins? Was it to bring tribal war between Kalenjins and Luo or Kikuyu or Kisii one at a time, only? Why don't the Giriamas fight the Taitas? Those notwithstanding, does the government lack the necessary machinery to quell this hooliganism?

Short history tells that the fighting was a result of a strategy adopted by KANU leaders to intimidate and terrorise the ethnic groups who were supporting the opposition, especially FORD, the first opposition party after the repeal of Section 2(A). In August and September 1991, the KANU government leaders from the Rift Valley Province publicly urged the people to take up arms against the anti-government activists in FORD.[28] Where lies the rule of law of a government minister publicly incites a society against another and does not get arrested? A number of Kenyans have lost their lives, property and others have been displaced. By December 27th,, 12 people had been killed and 100 injured, and hundreds of homes set on fire along the Nandi-Kakamega border.[29]

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The clashes which are still on to date have acquired a new dimension where crops, homes and personal property have been burnt by marauding mobs, armed with arrows, bows, axes, knives, clubs, spears, stones and guns.

As unfortunate as it may sound, a Commission of Inquiry under the chairmanship of Mr. Kennedy Kiliku was appointed to investigate the causes of the clashes. This turned out to be the most successful commission ever set in Kenya in which a number of top government officials including the Vice-President Prof. Saitoti, Mr. Nicholas Biwott, the Head of State were implicated. Every mature and sensitive mind would expect these 'strange' human beings to be arraigned in a court of law, but the whole affair tool an interesting twist when the President challenged the findings of the Kiliku report arguing further that Saitoti and Biwott were 'honest' men. A testimony by a Mr. Uhuru Kodipo who claimed to have been recruited by Mr. Biwott into a private army that was behind the clashes alleged that Mr. Biwott had actually financed the perpetrators of the violence by dishing out Kshs.500 for each operation done, Kshs.2000 for each person killed or grass thatched house burnt and Kshs.10,000 for burning a permanent house.[30] There was also widespread deep involvement of the Provincial Administration from the Kiliku report. Military helicopters and government vehicles, with their registration numbers given were disclosed as having been seen dropping fighters and weapons in the affected areas. Imported arrows were intercepted at the Airport which meant that there was a planned terrorism on innocent Kenyans.

Constitutionalism demands accountability on the part of the government. However, the government, until now, has not issued any convincing reason if at all there may be one, to justify the setting in motion of this ugly incident. The KANU government has clearly told Kenyans that equality before the law does not find a chance in the Kenyan political dictionary or in the supreme constitution.

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Prof. Saitoti and Mr. Biwott are too heavy to appear before a court of law. They are moreover too special to be arrested by police for questioning as is done with common Kenyans. The force of the law is therefore only felt by the poor Kenyans and the few courageous men who talk on behalf of the poor majority and end up earning years in jail for their views. The constitution has become meaningless in terms of directing the government in its activities. I categorically submit that there would be no sin or crime that the KANU government will ever commit in Kenya which may be worse than the fuelling and sponsoring of the tribal clashes, however much the government may stand to protect its face. Until the clashes end, the image of Kenya in the international community will remain satanic.

The Multi party Parliament

Parliament is one of the three big arms of the government. It should not be subject to any other authority, either the judiciary or the Executive but each should work independently and act as a check on the other two. The parliament as the legislature should enjoy some supremacy over the Executive and the Judiciary for smooth co-ordination of the whole machinery of the government.

Under a multi-party system it is the duty of the government to ensure meaningful Parliament where views are accommodated and debated upon freely. The opposite is the case in Kenya, where the supremacy of Parliament as the law maker has been torn apart despite the existence of opposition in Parliament. The KANU government has unfortunately extended its dirty tactics of

oppression into the multi-party Parliament. The Parliament has been given the image of a confrontational ground between the opposition and the ruling party. Insults have been traded, a lot of bickering and political animosity have characterised this

important institution which is the only one of its kind in reflecting the constitutional provision for multi-party politics. All these are attributable to the non-observance of the rule of law and constitutionalism that tenderly provide for the separation of powers. The Executive has pocketed parliament thereby repressing any growth of strong and meaningful debate.

The government and the opposition have failed to accommodate each other in providing services to the people. Motions set by the opposition have often met a lot of resistance from the government directed speaker. Partiality has been and continue to be exercised in parliament. Recently the KANU government engaged the police even into the activities of parliament, grossly contrary to the immunity of the house to any invasion by the provincial administration. The MP for Molo, Mr. Njenga Mungai was shamefully arrested by gun-totting policemen within the parliament precincts for criticizing the government on the land clashes. The government has unreservedly thwarted competitive debate in the house, by constantly interpreting the loose standing orders of the Parliament to accommodate only the interests of the government. This is carried out through the partial speaker of this important house.

In disregard of the spirit of constitutionalism and the rule of law which stress the separation of powers, the Executive has used the discretion bestowed on the institution to operate the house as a toy by dissolving the house at will in a bid to fall off from hot debates mooted by the opposition. A living example is the sensitive Goldenberg scandal issue which has been thrown out despite the undying call from the opposition to debate on the matter. Members of Parliament have not grown beyond party politics but instead give priority to individual party politics, giving the house a poor image that falls short of confirming to the reflection of a multi-party parliament.

The opposition on the other hand is not a solid opposition, setting itself loose and easily penetrable by the repressive

government which maximises any loopholes to its advantage. There is no united front opposition for each individual party strives for recognition over others. Nevertheless, this does not in any way provide a justification for the ruling party to abuse the role of the house by marrying the house and the Executive which is a serious trespass by the Executive. The rule of law must be carried into parliament too.

CHAPTER FOUR

4:1 CONCLUSION

Following the analysis of the two concepts of constitutionalism and the rule of law and their application in both single party system and multi-party system in Kenya, a multitude of observation can be made.

Constitutionalism, the allocation of a higher sanction to the basic laws than to the immediate wishes of a ruler, marks an important stage to a democratic regime. Power in a constitutional regime is limited, diffused and competitive and a large number of persons who wield it are directly and periodically accountable to the people from whom they ultimately derive power. There is a continuous public scrutiny of what the ruler does and he is subject to daily and periodic assessment.

The rule of law is the crucial factor which ensures legal impartiality and absence or reduction to a minimum of arbitrariness. There is only one kind of law and one set of courts to which those who make and enforce law are amennable together with the citizens. All governmental acts are according to the law and subject to control by appropriate authorities and effective remedies are available against the state, if ever it ventures to transgress the law. Constitutional democracies invariably ensure the presence of an independent and impartial judiciary which protects individual rights. There is only one commitment of the judiciary, to uphold the constitution and the law.

Both of the two concepts answer to the call for good overnance where each citizen feels protected from fellow itizens and from any attack by the government. From the study f their application in Kenya in the last two chapters, what hould have been practically felt has been replaced by their lmost total absence.

The government in Kenya does not understand the question of accountability to the people it governs. There is no established machinery through which the rulers can be assessed. The government has overgrown its powers which have been used to attenuate any chances of political growth and democracy. The marriage of the Executive and the Judiciary attest to the poor system of governance.

In the single party era, the Kenyan citizen was left at the mercy of the cruel hands of the government, which constantly violated the fundamental rights of the individual. The government was intolerant of public opinion which is very essential for democratic growth. The KANU government had resorted to dehorning its critics using the police who have no faith in constitutional government. The authority of the government was vested in the Executive undermining the principle of separation of powers. The government used force as the criterion for its political authority and remained in power as long as force could retain it. The government leaders were not responsible to any authority except themselves while the rule of law subjects every citizen to equality before the law. The whole authority became vested in one individual and a few members of the inner circle.

With the advent of multi-party politics radical changes have caught the KANU government unawares by realising that the ills of the government have been exposed. Kenyans can now discuss political matters in public, quite strange from the past experience. There is some toleration of public opinion although the government still suppresses the freedom of expression and press. Some notorious colonial legislations are still finding themselves in Kenyan law, long after the colonialists had out-used the laws. From the last General Elections, experience shows that the Kenyan Govenment does not believe in or cherish free elections. A government by the people and for the people has not

been created in Kenya. The Kenyan rulers do not rule according to the predetermined rules to go by the requirements of the rule of law. The society has been absorbed by the state where the President not only monopolises the actual power but denies to others the right to power. The President has become the state and the government has become omnicompetent. The state embraces all activities of the individuals and subordinates them to national ends. The government has been hostile to individual liberty, by denying Kenyans absolute enjoyment of the right to speech, the right to press, the right to assembly and all those rights which characterise the individuals life in democratic state. The whole nation must think in one way, talk in one way and act in one way. Free discussion and criticism of government are ruthlessly suppressed.

All the above activities of the government are in complete violation of the constitution which essentially safeguards the rule of law and practice of constitutionalism if its provisions are adhered to.

RECOMMENDATIONS

It is my strongest conviction that Kenya should undergo more changes besides the newly introduced multi-party system which has not reaped its intended fruits. My recommendations will be based on moral and legal reasoning and will cover every area in which violation of the rule of law and lack of willingness to practice constitutionalism have been outrightly displayed.

Regarding the freedom of the press and assembly I would recommend that the KANU government understands well the constitution. It should discard its hostile attitude towards the press, but instead create a free working environment for the independent press since it was the government which created those problems complained about in the first place. Some Laws like sedition law which explicitly forbid criticism of the government should be thrown out from the Kenyan law. The government should welcome criticism for it is through this method that it can weigh and test its arbitrariness or lack of it. There should be a national convention to debate on the constitution and if possible rewrite it to reflect the constitution of a multi party government. The powers and discretion given to the institution of the Executive should be limited to avoid the institutions interference on other organs of the government like the Parliament. The constitution should maintain its supremacy and section 14 of the constitution which protects the President from criminal proceedings should be repealed to adjust to the requirement of the rule of law which guarantees equality before the law. There should be decentralisation of the Executive powers to ensure efficiency. The government should be made aware that the Kenya Broadcasting Corporation is a public asset and not KANU's property and hence it should set it free and share it with the opposition. The public media must be made available to every political party. The right of a political party or individual to obtain a licence to convene a political meeting should be determinate and should not be dependent on the good will or otherwise of an administration official.

The Parliament which has become the Executive toy must be divorced from the Executive. Parliament should enhance its role as countering force to hold the Executive accountable and transparent in its management of public affairs. Repressive Standing Orders preventing effective and mature debate in Parliament should be amended to promote free discussion in the house. If the legislative powers and executive powers are combined in the same person or body of persons,there can be no liberty, because the same agency becomes the maker and executor of laws. Each organ of government should be obliged to explain itself to see that it acted within law and not beyond it. If the authority exercised is in excess of that permitted by law, it should be checked by the other in order to restrain its encroachment.

The notorious police force must be disciplined at all costs. The force should be separated from politics and promotions of officers should be on merit rather than favouritism. Their basic training should be intensified and should dwell more on intellectual development than physical. The course should be made thorough and extended to be covered in two years from the current six months which is too short to teach them any morals. Recruitment should be based on better intellectual development and better academic qualifications. In the past recruitment has been based on the physical size of the chest, tallness and physical strength. Such a person cannot be trusted with dangerous firearms because some of them are even illiterate and do not understand the code of ethics. Legal awareness should form part of their compulsory studies, if ever there were any. The Police Act should be amended to list down cases in which the police are allowed to use 'reasonable force' to effect arrest, because in the past the 'reasonable force' has meant shooting even where their duty is to arrest chang'aa brewers. The amended Act should allow the police to carry firearms only where necessary. There should be formed an independent body within the force to follow the activities of the policemen who carry

firearms on duty and prosecute any one who misuses the arms, where the arms become necessary to form part of the duty.

The independence of the Judiciary must be preserved. Appointment of Judges should not be political and should not be made by the Executive. Promotion should be on merit and not on political or tribal feelings.

Finally, the government should adjust to live with the reality that multi-party era is already with us, we are not approaching it. It should govern by the wishes of the majority. it ought to remind itself of the fundamental liberties of the individuals. The government must wake up for the sun is high above.

CHAPTER 1 FOOTNOTES

1. Anup Chand Kapur :Principles of Political Science (16th ed. 1987, New Delhi) p. 82

2. Supra pg. 73

3. Nwabueze B.O :Consititutionalism in The Emergent States, (London, C. Hurst and Co. 1973) pg 1.

4. Supra pg. 4

5. Murphy W :An odering of Constitutional Values (1980) Vol. 53 Southern California Law Review, p. 12

6. Yash Ghai :Constitutionalism: Challenges of Religion, Pluralism and Nationhood (chaigmai, Thailand, (1989) p2

7. Ville M.J.C : Constitution and the Separation of powers (Clarendon Press, Oxford 1967) p 23

8. Strong C.F :Modern Political Constitutions, 1966 p 359

9. Supra FN 8 p 25

10. Mcilwain C.H :Constitionalism: Ancient and Modern (Cornell University Press, 1940 revised ed.) p 88

11. Supra

12. Kelley A.H : The American Constituion: Its origins and Development 6th ed. 1986, p 68

13. Ojwang J.B : Constitutionalism in classical Terms and in African Nationhood, 1990, Lesotho Law Journal

14. Mugambi J.N.K :The African Heritage and Contemporary Christianity, 1989 p 188

15. De Smith S.A : The New Commonwealth and its constitutions, 1964 p 106

16. Supra

17. Supra

18. Hume David :The First Principles of Government 1948, p 420

19. Ibid FN 1 p 259

20. Supra FN 15

21. Karl Deutsch W : Politics and Government: How People Decide Their Fate, 1958 pg 36-37

22. Laski M.L : Introduction to Politics, (1957) 2nd ed. p 40

23. Supra FN 1 p595

24. Supra pg 546

25. Henry B. :Introduction to Democratic Theory (Sterling Publishers, Delhi, 1967) p 167

26. Supra FN 1 p 413

27. Alexander Hamilton : Federalist, p 78 as cited in FN 3 p 5

28. Liyange V.R (1967) 1 A.C 259

29. Ibid

30. Kanyeihamba G.W : Constitutional Law and Government in Unganda, (Nairobi E.A.L.B., 1975) p 154

31. Supra FN 10 p 74

32. Wade E.C.S. :Constitutional Law (7th ed. Longman, Green and Co. Ltd, 1965) p 60

33. Ibid.

34. Dicey A.V : Introduction to the study of the law of constitution (9th ed. 1914) pg xxvii

35. Supra chapter 4 p 188

36. Ibid.

37. Ibid.

38. Keir and Lawson : Cases in Constitutional Law (2nd ed. 1933) p 130

39. Ridges : Constitutional Law of England (6th ed. 1937) p 25

40. Burke John : Judicial Dictionary of words and phrases 3rd ed. 1775

41. Rose Richard : Ranny and Kendall, 1956 p 146 cited in Richard Rose's : The problem of Party Government (Peguin Books) 1976

42. Beer S.H : Modern British Politics, 2nd Ed. (London Faber and Faber, 1965) p 16.

43. Supra note 41 p 1

44. Herman Finer : The Theory and Practice of Modern Goivernment, p 363

45. Tribe L.H : American Constitutional Law (Mineola, New York : The Foundation press, 1978)p 788

46. Supra note 1 p 570

CHAPTER TWO FOOTNOTES.

1. Ochieng T.N : A history of Kenya (Nairobi, 1985) p 14

2. Gertzel : Politics of Independent Kenya (Heinmann, London, 1969) p 103-110

3. Mboya Tom : Freedom and After (Andre - Deutscht London 1964) p 48

4. Republic of Kenya official report, House of representatives vol. 3 parte Nov. 10th 1964 cols 4414-4415.

5. Republic of Kenya Official Report, House of Representatives, First Parliament, second session Vol. 3 part 3, 10 Nov. 1964 cols 4414 - 4417.

6. The then sec. 24 is embodied in the Kenya constitution Act 5 of 1969 as sec 80.

7. Ibid note 3 p 39

8. Ghai Y.P & Mcauslan J.W.B : Public Law and Political changes in Kenya (Oxford University Press Nairobi 1970) p 201

9. East African Standard, 19th May, 1966.

10. The Constitution of Kenya (Amendment) No. 4 Act of 1966 sec 42A

11. Preservation fo Public Act Cap 57 sec 2.

13. The constitution of Kenya (Amendment) Act No. 5 of 1969, 52A. This is not true

14. Supra Sec. 2A

15. The weekly review January 3rd 1986, p4

16. Supra note 5

17. Dicey A.V : Introduction to the Study of Law of the constitution (9th ed. chap 4) p 202

18. Mwambueze B.O : Constitutionalism in the Emergent States (London C. Hurst & Co. 1973) p 4

19. Rosberg & Nottingham : The Myth of `Mau Mau' Nationalism in Kenya, 1966, p 334 - 47

20. S 72 (1) (a)

21. S 72 (1) (b)

22. S 72 (1) (c)

23. S 72 (1) (d)

24. S 72 (1) (e)

25. S 72 (1) (f)

26. S 72 (1) (g)

27. S 72 (1) (h)

28. S 72 (1) (i)

29. S 72 (1) (j)

30. S 85 (i)

31. Reservation of Public Security Act cap. 57

32. Act No. 18 of 1966 past I (2)

33. The Constitution of Kenya sec 85 (2)

34. Conbon K : Detention without trial in Kenya (aticle) p 449.

35. Okoth Ogendo : The Politics of Constitutional Change in Kenya since Independence 1963 - 1969 (1972) Afr. Aff. p 71

36. Supra note 34

37. Supra note 33 (Amendment) No. of 1966

38. General Report on Government Action, State Security and Human Rights, 1961 p 16

39. The Nairobi Law Monthly (1990) No. 23 p 32

40. Ibid

41. Re Ibrahim (1970) E.A 162

42. Allen C.K : Law and Order (2nd ed.) p. 415

43. The Nairobi Law Monthly No. 24 Sept 1990 p 18

44. Supra note 33 (Rev 1987) S 79 (i)

45. Ibid S 79 (2)

46. Ibid

47. Supra Note 18 p 43

48. Supra Note 13.

49. Kesarannanda V state of Karali A.I.R 1973 S.C 1261

50. Maina wa Kinyati VR H.C.C. rim. App No. 1002 of 1982

51. Penal Code cap 63 sec 57 (i)

52. David Onyango Oloo VR Daily Nation Wed. Oct 27, 1982

53. February 1991, Editorial.

54. Obi V Opp All N.L.R. 184

55. Police Act cap 84 S 14 (i)

56. Weekly Review, May 30, 1980 p 9

57. Supra note 55

58. Koigi wa Wamwere High court crim. case 574 of 1990.

59. Criminal Procedure code cap 75 S 21 (3)

60. R V Lawford Imunde crim. case No. 1550 of 1990

61. Baraza Inquest, University of Nairobi Law Journal No. 1 1990

62. Botswana High Court Review case review no. 117 of 1980.

63. Ibid.

64. Evidence Act cap 80 sec 26

65. The Constitutional of Kenya (Amendment) of 1985.

66. Ibid section 61

67. James Kefa Wangara and others V G Ngaruro Gitahi Ureported H.C.C.C No. 724 of 1988

68. Ibid

69. Barker V Jones (1954) I.W.L.R 1005

70. Forbes V Eden (1867) L.R.I Sc 8 Div 568

71. Koigi wa Wamwere V AG No. of 1990

72. Kamau Kuria V AG Misc. Civil Application No. 550 of 1988

73. Ibid

74. Robert Matin : Legislature and Economic Development in Commonwealth Africa 1977, p 68

75. Karaithi Murungi : Administration of preservation of the Public security Act Cap 57 (reported in the Nairobi Law Monthly issue no. 16) p 27

76. The constitution of Kenya sec. 5 (3)

77. Ibid.

78. Ojwang J.B & P.N Okowa : The one-party state and Duw process of law: The Kenyan case in cooperative perspective (1989) 1 African Journal of International and comparative Law p 177 - 205

79. KANU Constitution S 3 (a)

80. Registration of Persons Act cap 107

81. Chiefs Authority Act cap.

82. Societies Act Cap.

CHAPTER 3 FOOTNOTES.

1. Okoth Ogendo :The Politics of Constitutional Change in Kenya since Independence 1963-1969

2. The constitution of Kenya section 80

3. Republic of Kenya Official Report, House of Representatives, First Parliament, second session Vol. 3 part 3, 13 Aug, 1964 cols 4414-4417.

4. As cited in the Nairobi Law Monthly (1990) No. 23 p 26

5. 1961 Vienna Convetion on Diplomatic Relations.

6. May 24th 1991 at Mombasa.

7. Society Weekly issue No. 2 Nov 11 1991 p 19

8. Standing Orders, National Assembly (Nairobi) 1968

9. Richard Rose : The Problem of Party Government (penguin Books) 1976 p 377

10. Crick B : The Reform of Parliament (London) 1964, p 193 - 194

11. Nwabueze B.O :Constitutionalism in the Emergent States, (London, C.Hurst & Comp 1973) p 3

12. De Smith S.A :The New Commonwealth and its Constitutions, 1964 p 106

13. Dicey A.V : Introduction to the study law of the constitution, 9th ed. 1914 pg xxvii

14. The Kenya Jurist, March 1992 p 24

15. The Constitution of Kenya (Amendment) Bill of June 1992

16. Supra Note 14 p 13 - 14

17. Supra Note 2 sec 43 (i) (a)

18. The Kenya Jurist, January 1993 p 15

19. Ibid p 22

20. The Nairobi Law Monthly issue no. 40 Jan 1992

21. Public Order Act cap 56

22. Supra Note 18 p 14

23. Supra Note 15 sec 24

24. Daily Nation, March 3rd, 1992

25. Ibid.

26. Supra Note 10 p 21

27. Ibid.

28. Weekly Review, September 13 and 17, 1991

29. The Standard 27th Dec, 1991

30. Supra note 18 p 17