POLICE POWERS AND THE CONSTITUTIONAL RIGHTS OF THE INDIVIDUAL IN KENYA:

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BY

MUTEMBEI GILBERT CHABARI.

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DEDICATION:

To my parents; Mr. & Mrs. Chabari Kamanja: Loving parents, wise counsellors.

CONTENTS:

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However, none of these people mentioned share responsibility for any views, errors or omissions contained herein. All such views, errors or omissions are my sole responsibility.

TABLE OF CASES:

TABLE OF STATUTES.

(1) PUBLIC ORDER ACT - cap 56.

(2) PENAL CODE - cap 63.

(3) CRIMINAL PROCEDURE CODE - cap 75.

(4) EVIDENCE ACT - cap 80.

(5) THE POLICE ACT. - cap 84.

(6) FIRE-ARMS ACTS - cap 114.

(7) LIQUOR LICENCING ACT - 121.

ABBREVIATIONS.

E . A - East Africa law Reports.

E.A.L.R - East African Law Review.

Crim L. R.- Criminal Law Review.

"The Constituion" - Constitution of Kenya; Revised Edition 1979 (Government Printer, Nairobi).

INTRODUCTION:

0:1: STATEMENT OF THE PROBLEM (THESIS).

In the twenthieth century, especially since the period after the 2nd world war, the question of human rights has featured promimently and has received worldwide attention. This period has seen great efforts being made to articulate and promote thes rights.[1] In Africa alone, near ly all the post-colonial states have bills of rights incorporated in their constituitons.[2]

But despite the attention which the whole concept of human rights has recieved, ~~their~~ there is continual deprivations of these rights with the continent of Africa ranking prominently as one where human rights are consistently flouted.[3] Such deprivation of human rights may take various forms. Like in the case of South Africa and some of the dictatorial regimes, there is outright violation.[4] In some other countries, the abrogations are more subtle. In the latter, there is an enacted bill of rights but in the same enactment there are

included abrogation clauses which can have the effect of suspending all of the guaranteed rights.[5]

Kenya has a republican constitution which contains a bill of rights. Among the rights recognized and protected by the constitution are the protection of right to life, personal liberty, right to protection from slavery and forced labour, protection from inhuman treatment, deprivation of property, right to protection against arbitrary search and entry, right to a fair trial, freedom of conscience, expression, right to freedom of movement, freedom of assembly and association, and right protection from discrimination. However, all these rights are to be enjoyed subject to respect for the rights and freedoms of others and for public interest.[6] In our view, this raises the problem of whether, consindering the Kenyan bill of rights and its attendant restrictions on the rights guaranteed , the individual rights are adequately protected.

It is arguable that rights cannot be guaranteed in absolute terms for this will hinder the government in discharging its obligations towards the society and also threaten the enjoyment of the same right by other persons.[7] But this raises the question: should the government in discharging its obligations towards the society subordinate and sacrifice the rights of the individual, the very rights it seeks to protect? Between these to competing objectives, where do we draw the line?.

0.2 REASONS WHY THE STUDY IS UNDERTAKEN.

The police Force in Kenya is the one which is charged with the responsibility of preserving law and order in the society. The policemen's main task is to detect and catch people suspected of crime so that the courts may try them for the acts which they are alleged to have done. In doing this, the police are armed with wide powers. One of our reasons in carrying out this study is to carry out an investigation into various police powers and the manner in which they affect the individual rights as enshrined in the constitution with particular emphasis on the right of movement, right to personal liberty, freedom from arbitrary search and entry, and the right to a fair trial. We propose to determine whether the Kenyans cherished idea that his constitutional rights are protected live up to reality.

Another reasons for undertaking this study is that is that the question of police powers as they relate to the rights of the individual has received little attention from among the writers. A study of the subject has been undertaken in Nigeria by Cyprian Okonkwo.[8] Ghai and Mc Auslán have attempted a study but theirs in a general study of the Kenyan bill of rights and they don't dwell specifically on the police powers.[9] We feel that this is an area where more study is needed.

0.3 CHAPTER BREAKDOWN.

We propose to carry out this study in four chapters. In chapter one, we are going to trace the development of the concept of human rights by looking at the various material written on the subject, analyse its content and examine its relevance and applicability to Kenya. In chapter two, we will critically examine and evaluate the powers of the police as enacted in the various statutes and also look at the opinions of various writers on the subject and the judicial rulings on the same and see how these powers affect the constitutional rights of the individual.

In chapter three we propose to examine the attitude of the Kenyan courts in protecting individual rights and how they go about checking the police powers. Chapter four will contain our conclusions and recommendations as regards the police powers vis-a-vis the constitutional rights of the individual.

0.4 METHODOLOGY OF RESEARCH:

The method we are going to use will largely involve library research on materials which have a bearing on the subject. We will also interview members of the legal profession, the police force and the public with a view to getting their opinion as regards the topic which is the subject of this thesis.

FOOTNOTES:

1. Among others; the United Nations has passed "The universal Declaration of Human Rights (U.N. General Assembly, Third session, First Part, OFFICIAL RECORDS,"Resolutions" 1948). Also Amnesty International has grown into an institution of international repute in championing human rights (see: The Amnesty International Reports 1977, 1980 etc).

2. For example Nigeria, Sierra Leone, Uganda, Kenya, etc.

3. See generally AMNESTY INTERNATIONAL REPORTS, 1977, 1980.

4. In its 1980 report, Amnesty International accused South Africa, and the dictaterial regimes of Ghana, Burundi, Cameroon,,Benin etc of flagrant violation of human rights (see: Ibid).

5. The clanses revolve arround the wording that "nothing done under any law will constitute a violation of the rights unless it is not reasonably justfiable in a demoeratic society" where these is no defination of "reasonably justfiable" and " democratic society" This is the wording in the Kenya, Uganda etc constitutions.

6. Constitution of Kenya; chapter five, section-70-82.

7. Nwabueze: CONSTITUTIONALISM IN EMERGENT STATES.
(C. HURST E CO, LONDON: 1973) PP. 45-46.

8. Cyprian Okonkwo: THE POLICE AND THE PUBLIC IN NIGERIA;
(LONDON; SWEET AND MAXWELL. LAGOS: AFRICAN UNIVERSITIES
PRESS: 1966).

9. Y. P. GHAI & J. P. W. B MC AUSLAN: PUBLIC LAW AND
POLITICAL CHANGE IN KENYA. A Study of the Legal frame
Work of government from colonial times to the present;
Oxford University press, 1970.

CHAPTER ONE.

THE UNIVERSAL RIGHTS OF MAN:

We consider that in the kind of thesis that we are going to engage ourselves in, one where the discussion centres on the individual human rights, a general understanding ~~what~~ the term "human rights" is called for chapter, we seek to provide this by tracing the evolution of the idea of human rights from the Ancient times up to the present century.

1:1 WHAT ARE HUMAN RIGHTS?

The concept of human rights is based on the motion that man, by his very nature as a human being, is bestowed with some inherent rights which are inalienable and inviolable ~~i~~ irrespective of his nationality, colour, sex or any other economic, social or political affiliation. According to professor Louis Henkin;

> "--------- human rights are claims asserted and recognized "as of right" not claims upon love, or grace, or brotherhood, or charity, one does not deserve or earn them. -------- They are natural in the sense that nature (and nature's God) created and inspired man's reason and judgement. They are natural in the sense that every man is born with them. They are natural also in a different sense, in that they are man's in the "state of nature" and he brings them with him into society.[2]

This view of human rights is just one approach, the natural

law approach, and may not be acceptable to all. There are other theories which run counter to that and which seek to explain the concept of human rights on some other basis. Among these are the approaches of the positivist and socialist schools of jusisprudence.

The positivist school of jusisprudence emerged as a negation of the natural law teaching that besides the real state and positive law, there existed a far more rational state and law. The positivists sought to replace the ideal of the natural law and the inalienable rights of the individual with a category of subjective rights, interpreted as derivatives of the positive law. Of all the external factors exerting an influence on the law, positivism recognized only the state - the sovereign political power and the legislater. Positivists regard law to be the will of the state and to them, the essence of any law is its functoning and no matter how beatiful the ideal law is, it will not match even the most dreary positive law. They reduce law into a compilation of functioning norms which needs no other substantiation other than the simple fact that they exist. Accordingly, they profess the will of the state to be the direct cause of human rights; rights which are part and parcel of the legal system.[3]

The socialist school of jurisprudence, like the positivist school, rejects the idea of an universal eternal law,

higher than the positive law and informing on it but, unlike the positivist school, it doesn't view law as an aggregate of operative norms but rather, they see law as a component of the social reality. The socialist approach holds that law has no history ot its own and that it is not the determining factor in the social relationships but, on the contrary, the social relationships, themselves determined by the property relations, act as the determinate of law.[4]

Socialism is more concerned with the larger community than with the individual. It emphasises on the society, the group, subordinating the individual or seeing his salvation eventually in the salvation of the group. If at all the individual has any rights at all, those rights should not and can't not override the interests of the larger community.

> "That an individual might have rights against the socialist state was unthinkable. The socialist state knows no a prior limitations of individual autonomy of rights on what it may do to realize socialism. Socialism emphasises not rights against society, but duties to Society".[5]

The socialist approach also considers human rights (citizen's rights) as positive rights created by the state. The property relations, being the fundamental institution of society, themselves infuence the state will, thus they are the ultimate determinants of all rights, even human rights.[6] Like the positivist approach, the socialist approach, [redacted] is of the view that

human rights will vary from one state to another thus running counter to the natural law view that human rights are inherent to very individual and that they are extraterritorial.[7]

Since to the positivists the only thing that mattered was the effectiveness of the laws in a purely juridical sense, it being the norms that the state decrees to be law and consequently its refusal to use any economic, social political, ethical or, indeed any other criterial to evaluate the law, it could not bring itself to answer the question: is this a just or unjust law, is it moral or amoral, good or bad? Thus carried to its logical conclusion, positivism can be used to justify any law enacted by the controllers of the state power, even if the law itself is manifestly unjust. From its standpoint it was impossible to disqualify the Nazi legislation which trampled underfoot the elementary principles of humanity, morality and dignity.[8]

The socialist approach can not also be free from such blame. It seeks to justify the sacrifice of individual rights so as to facilitate the social revolution where man will at last regain his dignity when society reaches the perfect state where these will be no expleitation of man by man. As experience has shown, the socialist approach, just like the positivist, can be used to justify the perpetration of ignoble acts against the human race in the name of social advancement.[9]

We submit that the matural law approach which seeks to establish a law higher than the positive municipal laws of a state, to which all legislation must accord to if it is to retain its validity and acceptance, should be the right working principle. It is the one that has stood the test of time. This is born out by the fact that after the collapse of Hitler's National Socialist tyranny, a great many German jurists and law philosophers, who were byfar the greatest proponents of the positivist theory, adopted the natural law view.[10] Also the preamble to the universal Declaration of Human Rights is based on the natural law view in that it recognizes the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.[11] Itself the 'Universal Declaration of Human Rights' is a document which is generally acceptable to all the nation state of the world[12] and this goes to show that the natural law approach, by its insistence that there are some higher norms, like the inalienable rights of the individual, which lie a plane above the positive laws of the state, is and should be the most acceptable. The triumph of natural law theory over the other approaches is put emphatically by professor Henkin when he wrote that:

> "For natural law today, it is human rights which claim to be the natural, higher law, not the divine right of kings or the sovereignty of the state. In positive law today, it is human rights that are national and international law, not the laws of Hitter or some other "jurisprudence of terror" ---------- The idea of human rights

> is accepted in principle by all governments------- However, formally, however superficially, however hypocritically even and however deficient the national or international enforcement, no government dares dissent from the ideology of human rights today.13

Having expounded on the general meaning and content of human rights, we proceed to examine the historical evolution of the concept.

1;2 HISTORICAL EVOLUTION OF THE CONCEPT OF HUMAN RIGHTS:

The interest of the United Nations, from its earliest days, in encouraging and promoting respect for human rights and fundamental freedoms is an expression of the increasing concern of the international community to secure those rights and freedoms for all human beings. Its roots may be traced to humanitarian traditions, to the struggle for freedom and equality in all parts of the world and, as far as more recent developments are concerned, to the English, American, French and Russian pronouncements of the seventeenth, eighteenth,nineteenth and twenthieth centuries.

1;2:1 THE GREEK ORIGIN:

The phrase 'human rights' is a recent coinage. In the early developments in the Ancient Greek civilization, the term used was "natural rights". However, the two terms

refer to the rights of the individual. To adopt the words of Ezejiofor:

> "Human or fundamental rights is the modern name for what had been traditionalty known as natural rights and this may be difined as meral rights which every human being, everywhere at all times, ought to have, simply because of the fact that in contradistinction with other creatures, he is rational and moral. No man can be deprived of these rights without grave affront to justice".14

The motion of human rights as conceived by the Greek is the primary source of the western alliance to the mtotion. It was with the decline of the City-states and the rise of large empires and kingdoms in the Greek world that the concept of natural law, and its attendant motion of natural rights as a universal system came to the fore. The stoic philosophers were particulary responsible for this development. They stressed the idea of individual worth, moral duty and universal brotherhood and although in the early days it was a philosophy which they extended to cover a select few of the wise men alone, in its later developments stress was placed on its universal aspects as laying down a law not only for the wise but for all men.[15] In this early classical literature of the Greeks, as exponded by the outstanding philosophers of the time like Aristotle and Plato, there is a striking expression of the belief in the power exercised by the gods in a human society based on law. The content of this god-made law is that it is a kind of law that stands above the obligations and interdictions imposed

by the rulers of the community. They recognized the freedom and equality of all men as divine rights which should not be abrogated by the rulers.[16]

However these philosophies abounded in a society based on slave ownership and any reference to 'man' meant the free men and not the slave. Nevertheless, this Greek philosophy is important in that it greatly influenced the thinking of the natural law philosophers of the middle age who carried further the idea of natural law with its divine rights, especially the Roman philosophers.[17]

1:2:2 HUMAN RIGHTS IN THE MIDDLE AGES:

The concept of a natural law, a law raised above the positively established rules and regulations of the society, lived on in the middle ages in the works of the Roman juristslike cicero, a disciple of the stoic school of natural law, and church teachers like St. Augustine and St Thomas Aquinas. This existed in form of a belief in a law of God, above all human laws.[18] The thinking of this time emphasized the natural equality of all men, man's right reason and the superiority of natures laws. This can be best summarized in the words of Cicero, a philosopher of that age:-

"------ no single thing is so like another, so

> Exactly its counterpart, as all of us are to one another ----------. There is no difference in kind between man and man; for if there were, one definition could not be applicable to all men; and indeed reasons, which alone raises us above the level of beasts and enables us to draw inferences ----------, is certainly common to all of us ---------- and we are so constituted by nature to share the sense of justice with one another and to pass it on to all men. For those creatires who have received the gift of reasons from Nature have also received right reason and therefore they have received the gift of law".19

CIcero further wrote that:-

> "True law is reason in agreement with nature; It is of universal application, unchanging and everlasting. We can not be freed from its obligation by senate or people ---------- and there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law which will be valid for all nations and at all times, and these will be one master and ruler, that is, God, over all, for be is the author of this law."20

Although this form of thinking may be criticized as being incorrect in some aspects, like the unchanging nature of law, its influence has lived over the centuries, especially the idea of the universal equality of all men as ordained by nature.[21] Commenting on the Roman thinking at the ~~colse~~ close of the nineteenth century, David Ritchie wrote that:-

> "In the application of the idea by Thomas Aquinas and his followers we have the germ of something new; of the use of nature as a court of appeal by those whose consciences or whose political aspirations were affended by the positive law of their country". 22

This statement is valid up to the present day as is evidenced by the relentless fight by peoples of various nationalities against laws which they consider inhuman for example, in South Africa where the blacks are continuously fighting the positive laws of the minority white government which sanction the apartheid policy.[23] This is an echo of the philosophy of the middle ages.

1:2:3 SIXTEENTH TO EIGHTEENTH CENTURIES:

This period marks the so called age of renaissance.[24] The renaissance led to an emphasis of the individual and a rejection of the universal collectivist society of medieval Europe in favour of independent national states.[25] Thought in this period began to take a secular cast and natural law was viewed in the light of naked expediency without regard for its divine prescriptions. The thought characteristic of this period can be best illustrated in the words of one of the outstanding philosophers of this time; Hugo Grotius:

> "The law of nature, again, is unchangeable, by God. Measureless as is the powers of God, Nevertheless it can be said that there are certain things over which that power doesn't extend, for things of which this is said are spoken only, having no sense corresponding with reality and being mutually contradictory. Just as even God, then, cannot cause that two times two should not make four, so he cannot cause that which is intrisically evil not to be evil." 26

The concept of law in this period directed more attention

to the rights of the individual than the objective norms. It found the expression as a theory of rights 'rather than a 'theory of law! This theory of rights recognized the eternal and inviolable individual rights of man and the citizen. The outstanding champion of this theory was John Locke, with his formulation of the doctrine of social contract.

According to Locke's theory all men in the original state of nature were subject to the law of reason which teaches all mankind that no one ought to harm another in his life, health, liberty or possessions. In this state of nature there was no common superior to enforce this law of reason and each individual was obliged to work out his own interpretation. This in evitably resulted in inconveniences and confussion and to alleviate this, men instituted the state of civil society. To this community each individual agreed with each other to give the right of enforcing the law of reason in order that life, liberty and property may be preserved. This power was given to the sovereign community on trust that it will be exercised for the good of all the indivi duals. Only the right of enforcing the law of reason was given up. There were other natural rights that were reserved to the individual which rights were to limit the exercise of the just power of the sovereigh community. These are the inalienable rights of the individual and Locke's stand was that the respect for these rights form the basis of all rightful government.

In this social arrangement the people are the supreme power and should the legislature (sovereigh community) act contrary to their interests, such as to infringe on their natural rights, they have a right to remove or alter it.[27]

Clearly, Locke's expesition of the doctrine of social contract was based on hypothetical and not on proven facts. Viewed against the prevailing political climate of the time, it was directed at justifying the English puritan revolution of 1688. Nonetheless, the writings of Locke had immense influence in England and western Europe at the close of the seventeenth century and the principles of American Revolution were largely an acknowledgement of his ideas. This is well illustrated by the Declaration of indepedence of the United States of America in 1776:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the government, That whenever any form of Government become destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new Government , laying its foundations on such principles and organizing its powers in such form, as to them shall seem most likely to affect their safety and happiness"[28]

In the same century, the American Declaration of

independence was followed by the French Revolution and its subsequent declaration of the rihgts of a man and of the citizen. This declaration was to the effect that:

> "Men are born and always continue, free and equal in respect of their rights ----------The end of all political associations is the preservation of the natural and imprescriptible rights of man; and these are liberty, property, security and resistance of oppression."29

Although the American and French declaration were meant to be justifications of rebellion, in the field of human rights, they are classical documents in the crude for greater respect for the freedom and dignity of the individual and greately influenced the promulation of human rights in the universal declaration of human rights.[30]

1:2:4 HUMAN RIGHTS IN THE NINETEENTH CENTURY.

The theory of human rights as a form inalienable and inviolable rights has never gone unchallenged. The greatest challenge was in the nineteenth century especially from among the positivist philosophers. As fore mentioned, the positivist of the nineteenth century are people like Jeremy Betham who was of the view that:

> "Right is a child of law, from real laws come real rights, but from imaginary laws, from "laws of Nature" come imaginary rights. Natural rights

> is simple non-sense, natural and imprescriptible rights, rhetoric nonsense, non-sense upon stilts"[31]

Betham was of the view that natural rights were unreal metaphysical entities and believed that any talk about them was mischievous. He objected to the proclamation of natural rights since they strove to take the place of ordinary and effective legislation.[32] The primary aim of Betham and the other legal positivists was to distinguish positive law from morality. They wanted to relegate the idea of natural law and natural rights to the domain of moral philosophy, which is no part of the professional concern of the lawyer. To the positivists. whose thinking was largely felt in the nineteenth century, all power belonged to the state and all pronounciations of rights could be derived from laws legislated upon by the state and not from the motion of a merely obstract higher law.[33]

1:2:3 HUMAN RIGHTS IN THE TWENTIETH CENTURY:

As stated in the preceeding paragraph the disagreement between the natural law and positivist philosophers centred on the question as to whether we should regard human rights as the natural birth rights of the individual or whether we should regard as human rights only those rights which are provided for in the positive laws of the nations. In the twentieth century, this

disagreement seems to have been resolved infavour of the idea of the inherent natural rights of the individual. The argument for these rights, which had been propagated over the centuries, has now been incorporated into the positive international law.

Human rights are no longer mere aspirations or moral assertations but legal claims under some applicable law. The instrument most responsible for the elevation of these rights into universal positive law is the universal declaration of human rights, 1948.[34] The declaration echos the Roman thinking of the medieval times, as propounded by philosophers like Cicero, with the idea of an universal law applicable to people of all nations. Inter alia, the declaration provides that:-

Article 1:-

> "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in the spirit of brotherhood"

ARTICLE 2:

> "Everyone is entitled to all the rights and freedom set in this declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall he made on the basis of political, jurisdictional or international status of the independent, trust or non-self-governing or under any other himitation of sovereignty."

The declaration has been described as a document which has a moral and political authority not possessed by any other contemporary international instrument, It has become the international standard by which the conduct of governments is judged both within and outside the United Nations.[35] In the years subsequent to the declaration, this process of standard selting has been carried further in the drafting of conventions and declarations in various specialized fields such as the two covenants on civil and political rights and on economic, social and culhira/[1] rights.[36]

Having given a general outline of the historical development and content of the concept of human rights, we next look at the relevance and applicability of this concept to Kenya.

1:3 THE RELEVANCE AND APPLICABILITY OF THE CONCEPT OF HUMAN RIGHTS TO KENYA:

Kenya is a former colony of the British and she attained independence in 1963 with a West Minister Model of a constituiton. The constitution contains a bill of rights[37] which has the individual as the beneficiary of these rights. The bill of rights is modelled along the lines of the universal declaration of human rights, 1948.[38] Among the individual rights recognized and

protected by the constitution are the protection of right to life, personal liberty, protection from slavery and forced labour, protection from inhuman treatment and deprivation of property, protection against arbitrary search and entry, right to a fair trial, freedom of conscience, expression, freedom of movement, freedom of assembly and association and protection from discrimination on grounds of race etc.[39] The inclusion of all bill of rights in the highest law of the land[40] underlines the importance of the concept of human rights in the country.

In addition to the inclusion of a bill of rights in her constitution, Kenya has also adopted the universal declaration of human rights and has also ratified the international convention on civil and political rights.[41] So she is under an international and national obligation to implement and give effect, in her municipal jurisdiction, to the human rights as formulated in the articles of these instruments. Essentially the provisions of these international instruments are similar to those contained in the constitution of Kenya,[42] if a little less detailed.

But the fact that there are treaties and a constitution guaranteeing enjoyment of rights to the individual does not mean that the same will be realised in practice. The rights have to be enjoyed in conformity with ~~regret~~ respect for the rights of others and the public interest. Those may have the effect of making inroads into the rights

of the individual thus limiting their enjoyment, In the next chapter, we will examine the extent to which the rights of the individual, especially the protection from arbitrary search and entry, the right to liberty and freedom of movement and aslo the right to a fair trial are enjoyed given the wide powers vested on the police in their discharge of the public task of maintaining law and order,.

CHAPTER ONE, FOOT NOTES:

1. In this thesis the word "man" shall embrace "woman"

2. HENKIN, L; THE RIGHTS OF MAN TODAY: (STEVENS & SONS LONDON, 1978) pp. 4-7.

3. IMRE SZABO: "Theoretical Foundations of Human Rights" in ASBJORN EIDE (Editor) INERNATIONAL PROTECTION OF HUMAN RIGHTS: (INTERSCIENCE PUBLISHERS, 1968) p.35.

4. ADAMANTIA POLLIS (EDITOR) HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES: (PRAEGER PUBLISHERS, 1979) p.34.

5. MAURICE CRANSTON: WHAT ARE HUMAN RIGHTS:(THE RODLEY HEAD LTD, LONDON, 1973) p.3.

6. OP. Cit. Note 4.

7. See. MCDOUGAL MYRES: HUMAN RIGHTS AND WORDS PUBLIC ORDER: (Yale University Press, 1980) p. 63-80.

8. TUMANOV. V.I: " Juridical Positivism" Photocopy (University of Nairobi, Reserve section).

9. Stalin pleaded the need for the advancement of the social revolution to justify the persecution of his political opponents and others whom he considered to be dissidents

(see: DEUTSCHER, I: STALIN; A POLITICAL BIOGRAPHY (Oxford University Press, 1966) Chap 8 and 9 generally.

10. FREDE CASTBERG; "Natural law and Human Rights. An idea - Historical survey" in ASBJORN EIDE: OP. CIT.

11. The preamble: UNIVERSAL DECLARATION OF HUMAN RIGHTS: (U.N. GENERAL ASSEMBLY, THIRD SESSION; First part: OFFICIAL RECORDS; Resolutions", 1948.

12. DOWRICK, F.E (Editor) HUMAN RIGHTS: PROBLEMS PERSPECTIVES AND TEXTS: (SAXON HOUSE, 1979), Appendix,

13. HENKIN, L. OP. CIT. pp. 27-28.

14. PROTECTION OF THE RIGHTS UNDER THE LAW: (BUTTER-WORTHS, LONDON, 1964) p.3.

15. LLOYD: INTRODUCTION TO JURISPRUDENCE: WITH SELECTED TEXTS: Revised Edition (New York, Praeger, 1966)p.57.

16. Frede Castberg: Loc. Cit (Note 10).

17. This is a point where most writers are in agreement; (see LLOYD: op cit, RITCHIE: NATURAL RIGHTS (Swan Sonnenschien & Co., New York, 1895), MCDOUGAL; op.cit etc).

18. RITCHIE: NATIONAL RIGHTS: (SWAN SONNENSCHIEN & CO. CO, NEW YORK, 1895) pp.35-42.

19. Cited by ABERNETHY: THE IDEA OF EQUALITY: (JOHN KNOX PRESS, 1959) pp.53-54.

20. Ibid p.55.

21. Article 1: UNIVERSAL DECLARATION OF HUMAN RIGHTS: op. cit.

22. RITCHIE: op. cit. p.41.

23. The question of apartheid has featured prominently in world affairs and international sympathy is with the South African blacks in their effort of self-determination (see: THE UNITED NATIONS AND HUMAN RIGHTS;, United Nations office of public information (UNITED NATIONS, NEWYORK, 1973) p.10. Also many inhabitants of the latin American are at arms with their governments in an attempt to depose for being oppressive. (see. JANET G. TOWNSED, "A Latin American Perspective," in DOWRICK, F. E, op. CIT. p. 107.

24. The period of revival of arts and literature in Europe in the 14th, 15th and 16th centuries based on Ancient Greek learning: (see. HORNSBY: THE ADVANCED LEARNER'S DICTIONARY OF CURRENT ENGLISH: 2ND EDITION (Oxford University Press, 1963).

25. LLOYD: op. CIT: Chapter Three p.58.

26. Cited by FREDE CASTERBERG: LOC. cit.

27. JOHN LOCKE: PHILOSOPHY OF CIVIL GOVERNMENT (J.M DENT & SONS LTD, 1924) Introduction.

28. Resprinted by RITCHIE; OP. CIT: Appendix p. 289.

29. Ibid p. 291.

30. Among the rights which appear in the French Declaration of Rights of Man and also in the Universal Declaration of Human Rights are the right to equal treatment before the law, freedom of conscience, freedom from arbitrary arrest and detention etc.

31. Cited by Maurice Cranston from BETHAM'S ANARCHICAL FALLACIES: (see CRANSTON: OP. CIT. P.13.)

32. IBID p. 13.

33. STEINTRAGER: BENTHAM (GEORGE ALLEN & UNWIN PUBLISHERS LTD, 1977)p. 24.

34. UNIVERSAL DECLARATION OF HUMAN RIGHTS: OP. CIT.

35. See. RAMCHARAN, B.G. HUMAN RIGHTS; THIRTY YEARS AFTER THE DECLARATION (MARTINUS NIJHOFF PUBLISHER, 1979) p. 28.

36. International Covenant on Civil and Political RIGHTs and Inernational Covenant on Economic, Social and Cultural Rights (Reprinted in DOWRICK, F.E, OP. CIT; APPENDIX).

37. Chapter Five: Constitution of Kenya (GOVERNMENT PRINTER, NAIROBI) REVISED EDN. 1979.

38. Compare art 1 to 12 of the Universal Declaration Human Rights with section 71,72,73,74 and 77 of the constitution of Kenya.

39. Constitution of Kenya ss. 70-82.

40. S.3, Constitution of Kenya "---------- if any other law is inconsistent with this constitution, this constitutions shall prevail and the other law shall, to the extent of the inconsistency, be void".

41. See DOWRICK, F.E, OP. CIT, Appendixes: p. 159.

42. Compare PART III - International Covenant on Civil and Political Rights with chapter five of the Constitution of Kenya.

in the constitution to ensure that the individual's enjoyment of the fundamental rights "does not prejudice the rights and freedoms of others or the public interest.[3]

From the above, it is clear that the government has two desirable obligations which it must discharge: to ensure that law and order are mantained by routing out elements in society who are criminally motivated and thus are bent on disrupting law and good order while at the same time ensuring the right of the citizen to go about his business without unnecessary interference from the authorities. Essentially, the discharge of these obligations is contradictory and presents a real problem as to where to draw the line; where to draw it so as to leave ample room for the enjoyment of individual rights and at the same time it possible for the government to discharge its obligation towards the society. This would involve a delicate balancing of objectives. The police Department is the major governmental agency charged with the obligation of mantaining law and order. In their discharge of this obligation, they are to have due regard to the rights of the individual and should not unjustifiably trample on them. How they go about discharging their obligations is our concern in this chapter.

2:2. THE ROLE AND FUNCTIONS OF THE POLICE:

The police in Kenya are charged with many duties connected with the maintenance of law and order and the security of the state. These duties include "the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders and the enforcement of all laws with which the police are charged."[4]

For the effecient performance of their duties, the police are vested with wide and discretionary powers. These powers include powers of arrest, questioning, detention, search and seizure, powers to regulate, stop and disperse assemblies and processions and powers to conduct criminal prosecutions. A casual look at these powers show that the exercise of them by the police, ostensibly, involve derogation from the constitutionally protected fundamental rights and freedom of the individual. These powers to interfere with the individuals fundamental rights are conferred on the police by law as a qualification to the provisions of the constitution creating them and thus they must be exercised within the law and according to the law. If a policeman exceeds or abuses these powers then be runs the risk of losing the protection given

to him by the law thus incurring criminal of civil liability.

2:3 POWERS OF ARREST:

Arrest is a distinct operational step in the criminal law process, involving all police decisions to interefere with the freedom of a person who is suspected of some form of criminal conduct. Wayne Lafave defines arrest as:

> The total restraint of the liberty of another, whether by constraining him, or compelling him to go to a particular place, or confining him to a particular place, or by detaining him in a public place"5

Another writer defines arrest as:

> "------ the total restraint of a person's liberty in the public interest, so as to bring him before a court or to prevent him from committing a crime or -------- to prevent him from injuring himself."6

The criminal procedure code only attempts a description:

> "In making an arrest the police officer or other person making the same shall actually touch or confine the body of the peron to be arrested, unless there is submission to the custody by word or action"7

Whatever the definition of the word 'arrest' one clear thing is that it is an interference with the individual's personal liberty as enshrined in section 72 of the

constitution. Therefore it is clear that in Kenya these are no general powers of arrest. The powers of arrest in certain situations, are specifically provided under the constitution, Acts of parliament and the common law.[8]

2:3:1: POWERS OF ARREST UNDER THE CONSTITUTION:

Section 72 of the constitution guarantees the rights to personal liberty and provides also for situations which would justify derogation from this guarantee.[9] Under these exceptions a person may be arrested and detained lawfully. However, certain conditions must be complied with if such arrests were to be lawful. For example, the person arrested and detained must be informed as soon as is practicable the reasons for his arrest or detention.[10]

Section of the constitution guarantees freedom of movement to all citizens. However the section also provides for circumstances under which a person's movements may be restricted. Under this section, an individual's freedom of movement may be trestricted in the interests of defence, public safety, public order, public morality or public health. Under these exceptions a person may be lawfully arrested and detained.

The above two sections, which are ostensibly meant

to guard the individual against unreasonable inerference with his liberty and right to free movement, are couched with so many exceptions which are themselves worded in very wide and loose language. For example one may be arrested "upon reasonable suspicion of his having committed, or being about to commit a criminal offence under the law of Kenya."[11] What would be "resonable suspicion" will depend on the circumstances of the case and the opinion of the person arresting: wrong or right. Such loose wording of the exception combined with the lack of a definitive meaning of such phrases as 'public safety, public defence, public morality' etc may have the effect of denying the citizen almost all the rights and freedoms puported to be protected.

2:3:2: STATUTORY POWERS OF ARREST:

The criminal procedure code[13] and the police Act[14] are the major sources of the law of arrest in Kenya. Both Acts are closely linked to corresponding Indian legislation which in turn drew heavily from English legislations.[15] Thus the Kenyan law of arrest is substantially the English law of arrest. Apart from the powers of arrest conferred by the criminal procedure code and the police Act, there are other statutes that supplement them.

2:3:2:A. POWERS OF ARREST UNDER THE CRIMINAL PROCEDURE CODE.

Powers of arrest under the criminal procedure code are divided from the exceptions under the constitution.[16] Sections 21 to 39 of the criminal procedure code cover the manner of making arrests, who can arrest the rights of arrested persons and their disposal thereafter etc. The power's of arrest under the code may be divied into two categories-those that can only be effected with a warrant of arrest and those that can be effected without a warrant of arrest.

(i) ARREST WITH WARRANT:

A warrant of arrest has been defined as:

> "------ a written authority, signed bya a magistrate directing the person or persons to whom it is addressed to arrest an offender and bring him before a particular court to be dealt with according to law"[17]

A warrant of arrest may be obtained by a police officer or any ordinary citizen presenting to a magistrate or judge information or statement which is sworn or affrimed to be a true statement of facts.[18] If the magistrate is satisfied that there is reasonable cause to apprehend that an offence has been committed for which an arrest is justifiable, he will issue a warrant directing it to one or more police officers or to all police officers within

the courts area of jurisdiction generally or if its immediate execution is necessary, and no police officer is immediately available to any person or number of persons.[19]

The warrant will include a short statement of the offences and the name and description of the person to be arrested.[20] A warrant of arrest may be issued on any day and may be executed on any day, at any time and place.[21] However it may not be executed in a courtroom where a court is sitting and within the prescinets of parliament without leave from the House.[22]

The desirability to arrest with warrant whenever it is feasible to do so rests on the belief that, by allowing judicial participation in the decision to arrest, there is a greater protection against unwarranted police interference with an individual's liberty. This is desirable in a criminal justice system in order to ensure a fair balance between the interests of society and those of the individual. This is better achieved where there is a neutral and detached judicial officer, but in the words of Foote.

> "------ arrest is too serious a matter to entrust to the judgement of the police alone ------- except where circumstances require immediate action, some more disinterested observer should pass on the case before a deprivation of personal liberty occurs."23

There are certain offences the commission of which a police officer can not arrest for without a warrant. This is protective of the citizen's rights for he cannot be unreasonably arrested. However, this protection in the Kenyan case is minimal as these offences which are arrestable with warrants are extrmely few in comparison to the vast number of offences for which arrests may be made without warrants.[24]

(ii) ARREST WITHOUT WARRANT:

Majority of statutory offences are arrestable without warrants. The rationable for allowing arrests without warrant is that in certain situations, there is needfor the police officer to make prompt arrests and where it would be impracticle to go looking for a warrant of arrest, for example where the action of going to look for the warrant will enable the suspect to escape.

A police officer may arrest without warrant any persons whom be suspects on reasonable grounds of having committed a cognizable offence, any person who commits a breach of peace in his presence, a person who obstructs a police officer while in the execution of his duty, or who has escaped or attempts to escape from lawful custody, any person in whose possession anything is found to be stolen property, any person whom he suspects on reasonable grounds of being a deserter from the armed forces, any person whom he finds in any

highway yard or any other place during the night and whom he suspects upon reasonable grounds of having committed or being about to commit a felony, any person whom be finds in any streat or public place during the hours of darkness and whom he suspects upon reasonable grounds of being there for an illegal or disorderly purpose, or who is unable to give a satisfactory account of himself. etc. The list extends to include a power to arrest anyone whom the police officer believes a warrant of arrest has been issued, even if he doesn't have the warrant in his possession. Also an officer can arrest anyone who refuses to give his name and adress when so demanded.

There are other statutes conferring on police officers powers to arrest without warrant.

(i) THE POLICE ACT:

Under s.25 of tha Act a police officer may stop and detain any person whom he sees doing an act or sees in possession of anything, or suspects of doing any act or in possession of anything for which a licence is required under a written law.

(b) LIQUOR LICENCING ACT, CAP 121.

Under S.41, a police officer may enter and search any

unlicenced premises which he has reason to suspect that any liquor is sold or kept for sale, seize and remove any liquor he finds therein and demand the name and adress of anyone found in the premises. Any person who fails to comply may be arrested without a warrant.

Under S.42 of the same Act, apolice officer may arrest anybody whom he finds incapably drunk or disorderly in any public place, road or street without a warrant.

(c) FIRE ARMS ACT-CAP 114.

Section 42 of the Act permits a police officer to arrest without warrant any person whom he suspects of having committed an offence under the Act.

(d) PUBLIC ORDER ACT: CAP 56.

A police officer may arrest without warrant any person he reasonably suspects of committing or having committed an offence under ss.4-6.[26]

The overall effect of the Kenyan law of arrest is to render the fundamental rights to liberty and movement of the individual precariously prone to abuse with impunity. Much discretion is left to the police in the exercise of the powers conferred by law and in exercise of this unbounded discretion the police often abuse it thus violating the rights of the individual. Ussually

it would be very hard to tell when these rights have been abused for, as it is what is reasonable suspicion will depend on the opinion of the arrester, even if it is wrong. Given this imprecission of the law of arrest and also the fact that it is found in a number of statutes, this is bound to bring uncertainty and confusion. The resulting confusion not only makes it difficult for the police officer to know the circumstances and the manner in which he may effect on arrest, it also makes it almost impossible for the average citizen, who would want to ascertain his rights, to do so. The result is a high incidence of illegal and arbitrary arrests which are, not suprisingly, never contested in court.

The consequence of this state of affairs is that it has ended up in giving police officers a free-hand to interfere with the liberty of the citizens. The police use this power indiscriminately and have been known to arrest on insufficient grounds or mere suspicion. Also a common feature of the police force in Kenya is the so called 'police raids (swoops) where police arrest people indiscriminately amidst violence which is unleased on those who are in the vicinity. While addressing a conference of Kenya Association of Magistrates, Fildahussein Abudulla made the following observation about the police practices:

> "It may be observed that in many appeals which come to the R.M courts from the D.M courts the record shows that the police officer who stops searches and detains the suspects fails to state why such officers stopped, searched and detained the suspect (reasonable grounds of suspicion). There have been cases where a person who goes about a normal course of business in broad day light in the main streets of Nairobi carrying a fountain pen, knife or screw driver is convicted under s.232 of the penal code; simply because such a person cannot produceea recept or cash sale for the same ----------"28

This statement is still relevant as regards the police practices. It is a clear indication that, the law of arrest, in as far as it erodes on the constitutional rights of the individual, leaves a lot to be desired. It has the effect of sacrificing the liberty of the citizen at the altar of police powers.

2:4: POWERS OF DETENTION AND BAIL.

Police powers of detention are subsequent upon the powers of arrest. So custody or detention will only follow after an effective arrest. Section 81 and 72 of the constitution form the basis for police detention. The exceptions to the provisions give the police powers of arrest and dention and also powers to restrict the movement of the citizens.

Section 72 (2), (3), (4) and (5) provide for the rights of a person in custody. Any person who is arrested or detained shall be informed as soon as is reasonably

practicable in a language that he understands of the reasons for his arrest or detention and such a person shall be brought before a court within twenty-four hours, where the person is not tried within a reasonable time, then he shall be released either unconditionally or upon reasonable conditions necessary to ensure that he appears at a later date for trial. The latter is the constitutional right to bail.

2:4:1 BAIL.

Bail has been defined as:

> " a recognizance or bond taken by a duly authorized person to ensure the appearance of the accused person at the appointed place and time to answer the charge made against him."29

Section 123 to 133 the criminal procedure code contain provisions as to availability of bail to detained persons. Under these provisions any person who is arrested without warrant, or appears or is brought before a court, may be released on bail after executing a bond, with or wit hout sureties .

Provisions as to bail, if utilized to the maximum, can ensure the unnecessary deprivation of personal freedom in many cases. This is the very essence of the law relating to the granting of bail: to act as a measure against unnecessary encroachment of the state into the citizen's

personal freedoms.[30]

However, good as the reasons for granting bail may be, the operation of the law relating to bail is something quite different. In practice, the granting of bail depends on the initiative of the accused person. This presupposes that the accused knows his right and will therefore petition for release on bail either by the police or the court. Majority of the people are unaware of the law of bail and will therefore not ask to be released on police bond. Also the aggressive nature of the police will scare even those aware from asking.

The police as a matter of practice will not grant bail where the accused is likely to abscond, where the charge is serious, where a person granted bail fails to appear in court and is re-arrested, where they doubt the reliability of sureties, where there is a possibility of interference with, or intimidation of police witnesses, or the possibility of evidence being destroyed or where there is a possibility of interference with police inquiries.[31] These factors are invariably used by the police to oppose bail applications in court. However it is not uncommon to find police officers arresting persons for very minor offences and keeping them in custody for a number of days without producing them in court or granting them bail.[32]

Another limitation on the availability of bail to a detained person is that sureties are hard to get. Unless one has a very

close relative the accused might be unable to get someone to stand surety for him for, usually, many people are scared of the terms of standing surety for an accused person. Also the accused may be required to deposit a sum of money before he is released and more often than not, the accused is a poor man and is thus denied a chance to be released on bail.

Consequently, long periods may be spent in custody for very minor offences or for no offence at all (in case of acquital). Thus the provisions of law relating to bail become a dead letter in asfar as the majority of the citizens are concerned thus entailing continued deprivation of their right to liberty in the name of public interest.

2:5: POWERS OF INVESTIGATION:

2:5:1 POWERS OF INTERROGATION:

Police interrogation is one means through which they manage to detect crimes and be able to apprehend the perpetrators of such crimes. However the police have no common law or statutery powers to detain any person for questioning.[33] But section 22(1) of the police Act gives a police officer power to compel attendance at the police station of any person whom

he believes has information which will assist him in investigating an alleged offence. Non-compliance with such a requisition, or after complying, refusing or failing to give ones correct name and address and answer truthfully all questions put to him (subject to the right against self-incrimination) is an offence.

The concepts of justice underlying our criminal justice system, while recognizing the need for police to make interrogations for investigative purposes, nevertheless require the interrogation to be done through fair questioning. No unfair or high-handed methods should be used in order to obtain an admission of guilt. Most important, a person has a right not to disclose information which would be self-incriminating.[34]

The Kenyan judicial system is an advesary system which involves two parties before a courtof law, in case of criminal proceedings, the prosecution and defence. In a criminal trial, the accused person is presumed to be innocent and it is therefore for the prosecution to prove the guilt of the accused beyond any reasonable doubt.[35] Therefore, the business of the police officer who is preparing a case against the accused is to acquire as much evidence as possible to enable him to prove the case against the accused. This state of affairs create conditions

which makes it prone for the police to result to many tricks of acquiring evidence. In this connection the police have often been accused of using torture, deception, threats and inducements in order to acquire evidence to prove their case. These unscrupulous abuses and tricks done by the police insome cases result in grievious bodily harm and are in all a blatant violation of the right of the citzen to the security of his person and freedom from harrasment.[36]

It may be argued that the law relating to confessions, in sofar as it maintains that no statement made by an accused person, which is incriminatory and tends to show the guilt of the accused, may be admitted in evidence where it appears to have been obtained by threats or inducement,[37] is protective of the rights of the citizen against violation and abuse by the police.

However section 31 of the Evidence Act provides that evidence of confession leading to discovery is admissible notwithstanding the illegality of the confession. The effect of this is to encourage injustice to be done to the individuals by allowing police officers to coerce persons to make confessions they would never have made thus violating the accused's right against self-incrimination.

2:5:2: SEARCH AND SEIZURE:

Section 76 (1) of the Constitution provide that

> "Except with his own consent, no person shall be subjected to the search of his person or property or entry by others on his premises".

But this same section qualifies this right of the individual to the privacy of his person and home and it is under t this exception that section 118 of the Criminal Procedure Code allows a magistrate to issue a search warrant authorizing any person or police officer to enter into any building, ship, aircraft etc. and search for anything which is necessary for the conduct of an investigation into any offence.

Thus, considering the above, it would be unjustifiable and actionable trespass for a police officer to enter, search or seize any property of a citizen unless his action is covered by some special authority resting on the law. In this connection he can proceed on the authority of a search warrant or, where the police officer is of the opinion that the delay occassioned by obtaining a search warrant would substantially prejudice the investigation of the offence, he may, after writing the grounds of belief and such description as is available to him of the thing for which search

is to be made, enter any premises in or which he expects the things to be and there search or cause search to be made for, and take possession of, such thing.[38]

However, like other areas of law which seek to regulate and harness the police powers, the p rocedures laid down exist in some cases, only in theory but not in practice. Police have and actually do enter into private premises and conduct searches of the premises, the persons therein and seize evidence which is later used in court. Usually, they do this without following the laid down procedure. Technically, once they do this, they act outside the law and thus loose its protection thus exposing themselves to civil liability towards the person against whom they have committed the trespass. But thanks to the ignorance of the public of their rights and the constraints they face in instituting judicial proceedings; the police are able to escape with their unlawful actions.

Indeed thanks? Educate the

2:6: SUMMARY:

As has been shown, the police, in their duty to maintain law and order to detect crime and apprehend wrong-doers, are given wide powers to make arrest, interogate suspects and also to enter, search premises and persons, and seize evidence. The exercise of these powers necessarily involve interference with an individual fundamental rights and as such have has got to be justified under the law. But as has been argued, the

police flout the requirements as to the manner of exercise of these powers with impunity, largely due to the ignorance of the populace of its rights and also the inability of many people to start litigation.

This state of affairs raises some very fundamental questions, considering that the courts have traditionary been considered as the custodians of justice and the citizens rights, should they fold their hands and watch the police break the law and trample on the citizen's rights? In the occassion where a conflict between the exercise of police powers and the rights of the individual arise, in whose favour is the court likely to decide? These are the questions which we will seek to examine in the next chapter.

CHAPTER TWO, FOOT NOTES:

1. Chapter five, - constitution of Kenya, Revised Edn 1979 (Gov't printer, Nairobi).

2. NWABUEZE: CONSTITUTIONALISM IN EMERGENT STATES (C. HURST & CO., LONDON: 1973) p.44.

3. Proviso to s.70 of the constitution.

4. S. 14(1) - THE POLICE ACT, Cap 84.

5. LAFAVE: ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSRODY (LITTLE, BROWN & CO, 1965)p.3.

6. WEGG-PROSER: THE POLICE AND THE LAW (OYEZ PUBLISHING LTD, LONDON; 1973)p.31

7. S.21 (1) - CRIMINAL PROCEDURE CODE: CAP 75.

8. Common law applies in Kenya by virtue of the judicature Act, cap 8, s.3 (1) - however it is hardly evoked because the statutes have expressly provided for the law.

9. See the constitution s.72(1) a to J.

10. S:72 (2) of the constitution.

11. Ibid s.72(1) (e).

12. See M'IBUI V. DYER (1967) E.A 315.

13 Cap 75

14. Cap 84

15. See Legislative council Debates, 1929, p.468

16. S. 72 (1) (e) - constitution.

17. WEGG-PROSSER OP.CIT. p.33.

18. CYPRIAN OKONKWO: THE POLICE AND PUBLIC IN NIGERIA (LONDON; SWEET AND MAXWELL, 1966)p.14.

19. S. 104 - criminal procedure code.

20. S.102 (2) Ibid

21. IBid s. 109.

22. See CYPRIAN OKONKWO: OP. CIT: Chapter two generally.

23. Foote: "Problems of the protection of Human Rights in criminal law and procedure (Santiago, Chile, May

19-30, 1958) UN. DOC. TE 326/1(40-42) LA p. 41-42.

24. A look at the first schedule to the CPC will show that only about $\frac{1}{8}$ of the offences created by the penal code are arrestable with warrant only.

25. See S.29 - criminal procedure code

26. S.4 makes it a crime to wear prohibited uniforms at public meetings. S.5 and S.6 makes it an offence to engage in an unlawful meeting.

27. M'I BUIV. DYER Supra

28. See THE WEEKLY REVIEW; NOV. ', 1977.

29. WEGG-PROSER OP. CIT P. 70.

30. See Sam Bass Warner; "Investigating the law of Arrest" (1940-1941) Journal of criminal law, criminology and police science, vol.31, p.1111at p. 114.

31. Archibold: PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES (LONDON, SWEET & MAXWELL, 39TH Edn) para: 201.

32. The author has had occassion to interview a number of policemen informally and they admit that they don't fear keeping a suspect in custody for a number of days unless they suspect him of being "well-connected".

33. See: S.H. BAILEY AND D. J. BIRCH "Recent Developments in the law of police powers" (1982) criminal law review 475.

34. S.77(7) of the constitution

35. S.77(1) of the constitution.

36. This is the spirit embodied in the constitutional provisions protecting the fundamental rights and freedoms of the individual .

37. The evidence Act, cap 80. s.26.

38. S.20: The police Act: Cap 84.

CHAPTER THREE.

3. THE JUDICIAL PROTECTION OF THE FUNDAMENTAL RIGHTS IN KENYA:

3:1: INTRODUCTION:

Traditionally the role of the judiciary is to act as custodians of justice. In this connection, the courts have a duty to protect and give meaning to the fundamental rights of the individual; to make sure that individuals actually enjoy them, for rights only on paper serve no purpose. Sir charles Newbold, president of court of appeal for East Africa (as he then was), in a paper read to the staff seminar of faculty of law; University of Dar-es-salaam,[1] most ably summarized the role of the judge as the protector of the fundamental rights of the individual when he said that:-

> "Let us never forget that in this day and age when activities of governments fill and ever increasing place in the household of the individual, the courts by insisting on the rule of law, are the last bastion in defence of the freedom of the individual"[2] (emphasis mine).

To effectively discharge their duties as custodians of individual rights, the courts have been vested with powers to do so emanating from the constitution itself. Section 67 of the constitution gives the high court power to interprete the constitution on substansive questions of law being disputed in the lower cousts

and thereby make binding decissions.

A person whose fundamental rights have been infringed or are likely to be infringed can apply to the high court for redress and the High Court shall have original jurisdiction to hear determine any question arising therefrom, make such orders, issue such writer and give directions as it may consider appropriate.[3]

The constitution is the supreme law of the land[4] and thus its provisions, fundamental rights inclusive, must be regarded as the basic norm of legal system. So all laws and statutes must be subjected, as occassion arises, to vigorous tests and meticulous scrutiny to make sure that they are in consenance with the declared basic norm. Towards this end of making sure that all the laws, and thus action, comply with the constitution, the courts have a really great task. According to Dr. Akinola Aguda:-

> "Judges ---------- have the extremely exciting task of interpreting written constitutions. If they deliberately tie their own hands in fear of the executive, they will have only themselves to blame. The field is fertile and the harvest to the people they are supposed to serve may be plenty".5

The role of the judiciary and the constitutional provisions as above outlined, if adhered to strictly,

can serve as a very good bulwark against the encroachment of the individual rights by the authorities. However, in practice, the case is different and the performance of the courts in this area has been very disappointing. This has been occassioned by a number of factors.

3:1:1: THE INDEPENDENCE OF THE JUDICIARY:

The Kenyan constitution applies the doctrine of separation of powers and under the doctrine, the judicial arm of the government is independent of the other two; the executive and the legislature. This is intended as a safeguard against the possible misuse of powers if the powers were vested in the same organ.

In addition to these, there are other provisions which seek to ensure that the judiciary remain independent. Among these are that the office of a High Court Judge can not be abolished while it still has a substantial holder.[6] In essence, this means that a judge should not be afraid of making decisions which might antagonize the executive for fear of losing his job. This is a theoritical assumption because all judges are appointees of the chief executive[6A] and it is unlikely that he will appoint a judge who will 'disappoint' him. Further a High Court judge can only vacate office when he attains an age to be prescribed by parliament.[7] Only inability to discharge his duties can make a judge he removed

from office.[8] When such is the case the President first refers the case of the intended removal to a tribunal which makes its recommendations to him.[9]

Judicial officers are also entitled to judicial immunity to ensure that their acts and utterances do not warrant their harassment from the executive. In this respect they are free from criminal liability for acts done while they are on duty.[10] They also can't be sued on criminal defamation for any utterances made in course of the proceedings.[11]

Despite the safeguards to ensure that the courts are independent, the courts have not execrised their duties independently. This is so because all High Court judges are direct appointees of the chief executive and they may possibly be appointed because they are found to be people who will make decisions in line with the political wishes of the executive. Where the judge is unwilling to bind to the political wishes of the executive, the tendency in East Africa has been that political pressure is brought to bear on the judges thus forcing him to vacate office. This has resulted in a situation where the judiciary is only too ready to uphold the legality of executive action and interpreting the law to be in line with government policy.[12]

A further erosion on the independence of the judiciary

has been occasioned by the continued maintenance of a cadre of expertriate judge who are employed under specified centractual terms and therefore do not benefit from the provisions of section 62 of the constitution, which ensure security of tenure. The contract of service states that the services are renewable and given that it is the executive arm of the state which will determine the question of renewal,[12A] then the men who man the judiciary stand in a master-servant relationship with the executive and naturally, it would be too much to expect, and also unwise for such a judge to adopt a view which is contrary to that of the executive.

3:1:2 JUDICIAL INTERPRETATION OF CONSTITUTIONAL RIHGTS:

Where civil rights are guaranteed under the constitution the judge is expected to uphold these rights and refuse to apply statutes or judicial decisions which are inconsistent with guaranteed rights. Where there is a threat to these rights the judge must feel called upon to uphold these rights unless it is obsolutely impossible to do so.

However, the Kenyan Courts do not seem to operate from this premises for, when called upon to interprete a question involving the guaranteed rights, they have largely failed to protect the individuals fundamental right. When called upon to interprete the meaning of

a right protected by the constitution, they have tended to construe the words conferring the right literary and restricted meaning to the right. A few examples wil l suffice to illustrate this:

In ELMAN V. R, Elman, on a criminal charge in connection with the Exhange Control Act,,was required by law to answer a questionare the ~~fachire~~ failure of which was an offence. The facts he was to disclose, and which were to be used in evidence, were so incriminating that he sought the protection of section 77(7) of the constitution to the effect that 'no person who is tried for a criminal offence shall be compelled to give evidence at the trial" The accused's counsel in this case argued that a liberal interpretation should be adopted when matters affecting fundamental rights came for interpretation because only in this way could the courts seek to discover the true spirit of the constitution and effectively enforce these rights as the constitution required. However, the court rejected this contention and ruled that "at the trial" meant the actual time when the case was in court and not its pre-trial stage and thus it was proper for the accused to be compelled to answer the questionare although he will incriminate himself.

In R. V. THE COMMISSIONER FOR PRISONS EXPARTE KAMONJI WACHIRA & OTHERS[14] several detainees applied for the writ of Habeas Corpus and subjiciendum on the grounds that the

Rules and Regulations under which they were detained having not been properly tabled before parliament as re required by law, were null and void. They further challenged their detention on the ground that section 83(2) (a) of the constitution, which require the grounds upon which a person is detained be specified in detail, were not complied with. Despite authorities to show that the manner in which the Rules and Regulations challenged in this case were tabled in parliament rendered them null and avoid and aslo that failure to furnish the detainees with detailed grounds for their detention rendered their detention void, the court nevertheless agreed with the contention of the state and disregarded those of the applicants and held that the manner in which the rules and regulations were tabled in parliament was proper and that failure to give sufficient and detailed grounds of detention did not invalidate the detention. Here again it was the fundamental rights to liberty which was being abrogated by the state and the court, although it had the opportunity to do so, failed to give protection to it.

In consonance with this total lack of concern for the fundamental rights of the citizen, the Kenyan courts operate on the premises that the sole purpose of the court in a criminal trial is determining the truth of the criminal charges and thus evidence should be admitted or rejected purely on the grounds of its reliability and not because of the illegality of its procuration. Thus in R V. SHIMECHERO, the defendant was arrested

in connection with an allegation of corruption. He was detained at the C.I.D. Headquarters for five weeks before being taken before a court. During that time, he made several statements to the polcie which were admitted in evidence at his trial. He was subsequently convicted. He appealed to the High Court which dismissed his appeal and he appealed to the East Africa Court of Appeal. On the ground of illegal detention the court said that it was an error of ommission on the High Court not to have dealt with it. The court went on to say that;

> "We must state that the practice of illegally detaining a person for a long time in order to question him or obtain evidence is repugnant to the principles of the law of the Republic and we reassuredly condemn it. We strongly deprecate the practice which appears to be growing of rounding up all and sundry who may be connected, however remotely, with the subject of criminal investigation, and detaining them unlawfully in police custody whether or not reasonable grounds for suspicion exist".....[16]

However on submission of the counsel for the appelant that any statement obtained from a person illegally detained be rejected by the court, it said, [redacted]; dismissing the appeal:

> "The fact that an innocent person has been detained for a period, during which he has provided the police with a statement of facts to the matter under inquiry as known to him does not in itself raise a doubt as to the reliability of evidence consutent with the statement."

From the above, it is clear that in case of a conflict between the action of the state and the fundamental rights of the individual unless it is impossible, the courts will decide in favour of the state. Thus, as it is, the

Executive in Kenya sees itself free to trample on the rights of the citizen with impunity since the "co-operation" of the Judiciary is assured. In this field of human rights, the judges have become complaisant towards governmental power and have thus largely failed as the protectors of fundamental rights.

3:1:3 THE NATURE OF THE JUDICIARY.

Our court structure was inherited from that of the colonial government. This fact has very much influenced the peoples' attitude towards the courts. During the colonial period, the courts were regarded as part and parcel of the whole governmental system, where the government sent wrong-doers for punishment. This attitude still persist among many Kenyans and they continue to regard the courts with perpetual awe and would not like to have anything to do with the courts.

Also given the ceremonies and technicalities in the court procedure, even the few who may be willing are put off from making any application to the courts to have their rights redressed. The court proceedings are usually very expensive and take a very long time and with the possibility that one may not be remedied, then not many would, if at all they are able to afford, be willing to put their little savings on such risky ventures.

3:2 OTHER POSSIBLE JUDICIAL CHECKS AGAINST THE ABUSE OF FUNDAMENTAL RIGHTS OF THE INDIVIDUAL BY THE POLICE:

In theory, the law provides certain remedies and liabilities against improper police action which are meant to discourage any such abuses. But in practice the liabilities imposed upon the offending police officer and the remedies available to the offended member of the publice under the law are usually unenforceable.

3:2:1 INTERNAL DISCIPLINE :

Force Regulations and Standing Orders under the police Act prescribe for disciplinary action to be taken against any police officer committing any impropriety.[17] The underlying assumption is that if effectively utilized, internal discipline may constitute an effective check against police illegality. However, this depends on the offended person lodging a complaint. This may not be possible where a member of the public is ignorant of his rights or fears police intimidation as is usually the case.

Towards this end of ensuring that a disciplinary action is taken against an offending officer, the courts may be very helpful. They could recommend disciplinary action to be taken against such officer or order an inquiry into the conduct of such police officer(s) with a view to commencing criminal proceedings against him. However, this may not

be a very effective sanction because the inquiries are understaken by fellow police officers and]bias in favour of the offending officer can't be ruled out.

3:2:2 HARBEAS CORPUS:

A person detained by the police may apply, to the High Court for the precogative writ of HABEAS CORPUS to have the legality of his detention tested. The writ will command the person detaining the other to bring him before the court and show cause why the detainee should not be released forth with. If the court is satisfied that the detention is unlawful, it will order the immediate release of the person unlawfully held.

However, the writ is hardly ever used to secure the release of persons in unlawful police detention. This is partly because mostly, many an ordinary member of the public is un aware of its availability or lacks the finances to set the judicial process in motion. Also police detentions of over twenty four hours are legalized by the police charging the detainee with a "holding charge" and then getting a remand warrant signed bya a magistrate. After such a warrant has been issued, the writ of habeas corpus is of no avail to the prisoner.

3:2:3 CRIMINAL LIABILITY:

A police officer may be criminally liable for the wrongful performance of his duties or when he does anything beyond the powers conferred on him by the law. Thus a policeman who unlawfully detains a person in a place against his will or otherwise deprives another of his personal liberty is guilty of a misdemeanour.[18] A police officer who uses unlawful or excessive force on another person may be criminally liable for assault.[19]

However, due to fear of police intimidation, majority of persons assaulted or unlawfully confined by the police do not complain. Such persons may also be ignorant of their rights under the law and can not therefore enforce them. To many people there can be no issue of illegal arrest and confinement by the police or unlawful assault by police for it is their work to arrest and lock people in cells and police beatings are incidental to such work.

Even where a person complains, for example of having been assaulted by police, the courts are more likely to believe the story of the police than that of the complainant. For one, where this happens, the police most probably will take care to see that there will be no independent witness available to support the complaint, and generally there will be two police witnesses to corraborate each other indenial. The chances of the victim being able to corroborate his allegations by independent evidence as to injuries or bruises found on him can be greatly reduced

either by delaying his opportunity to see a doctor until the outward evidence of injury has faded, or confining the beatings to parts of the body that will show no outward signs. Also if two policemen give evidence that the victim attacked them violently and incurred all his injuries as a result of their legitimate acts of self-defence and efforts to control him, it is generally impossible to substantiate the complaints. Consequently, criminal liability has also proved to be an ineffective deterrent to police abuses.

3:2:4 CIVIL LIABILITY:

Civil action lies for a police officer who commits a tort in the execution of his duty.

A: ASSAULT OR BATTERY:

A police officer who wrongfully and unlawfully threatens to apply unlawful force or actually applies such force may be sued by the victim of his act for assault or battery.

B: FALSE IMPRISONMENT:

Unlawful restraint on a person's freedom of movement gives rise to an action for false imprisonment.

C: MALICIOUS PROSECUTION:

This test is actionable against a police officer who without reasonable and probable cause initiates judicial proceedings against a person and such proceedings terminate in favour of that person and also results in some personal or proprietary damage. The plaintiff must prove that the defendant was actuated by malice in instituting the proceedings and was actively instrumental in the proceedings.

D: TRESPASS TO LAND OR CHATTEL:

A police officer who negligently or intentionally enters upon private premises and remains therein without lawful excuse or the occupier's authority is liable in damages for trespass. Likewise a police officer who negligently or intentionally interferes with a chattel in the possession of the plaintiff (like in cases of search and seizure) is liable for the tort of trespass to the chattel if he has no lawful excuse for doing so.

E: DEFAMATION:

Where illegal police activity damages the reputation of the plaintiff, he can be able to sue and recover damages from the concerned police officer for defamation.

The possibility of paying damages to the plaintiff for wrongful police activity is, in theory, possibly one of the most effective deterrents against police illegality. However, in practice, this is not so. Due to the high incidence of ignorance of personal rights by the majority of the people and also given the very many financial constraints leading to inability to raise legal fees, many people are unable to intiate legal proceedings against the offending police officer.

Civil action may therefore only be resorted to by the rich minority who can afford legal services and are thus able to set the judicial process in motion. Again, civil actions are clouded with uncertainty. Damages may at times be so nominal as to make the action not worthwhile. There is also the possibility of paying costs to the defendant if the action fails. They also drag over a long period of time consuming a lot of time and money. Fear of publicity and police reprisals may also act to discourage the wronged party from suing in court for damages. As a result of this most police abuses go unchallenged and thus, civil liabiltiy, like the other judicial remedies, has largely failed as a sanction against wrongful police acts.

CHAPTER THREE: FOOTNOTES:

1. "The role of A Judge" - Article reproduced in (1969) E.A.L.R. 127.

2. Ibid at p.132.

3. S.84 of the Constitution.

4. S.3 - Constituition of Kenya.

5. "The judge in Developing Countries;" Nigerian Institute of Advanced Legal Studies: Occassional Paper No. 6, 1980.

6. S. 60(4) - Constitution of Kenya.

6A. S. 61 of the Constitution.

7. S. 62(1) - Constitution of Kenya.

8. S. 62(3) " " ".

9. S. 62(4) " " ".

10. S. 15 - Criminal Procedure Code - Cap 75.

11. S. 198(e) - The Penal Code - Cap 63.

12. For a full discussion of this, see: J.W. KATENDE and GEORGE W. KANYEI HAMBA; "Legalism and Politics in East Africa:" Transition No. 43, 1973 pp. 43-54.

12A. See J.W. KATENDE; Loc. cit for a detailed discussion of the manner of employing expatriate judges.

13. (1969) E.A. 357.

14. High Court (Nairobi) Misc. Civil Case No. 60 of 1984 (Unreported).

15. Resident Magistrate's Court (Nairobi) Criminal Case No. 2705 of 1973 (Unreported).

16. East African Court of Appeal; Criminal Appeal No. 119 of 1974.

17. Cap. 84: Part IV.

18. S. 263 - Penal Code Cap 63.

19. S. 250 - 251 - Penal Code.

CHAPTER FOUR.

CONCLUSIONS AND RECOMMENDATIONS:

This study set out to investigate the nature and content of the concept of the undamental rights of the citizen as guaranteed in the constitution and also the extent to which we can say that the individual enjoys these rights given that the police, in their task of preserving law and order in the society, are given powers to interfere with these constitutionally guaranteed rights.

We have shown that the concept of human rights is one which has lived on for centuries and as epitomized in the Universal Declaration of Human Rights and also in chapter five of the Kenyan Constitution, it is a concept promised upon recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family and represnts a reaffirmance of faith in the dignity and worth of the human person.[1]

However, whereas that is the esteem in which the fundamental rights of the individual are to be held, it is recognized that the individual's enjoyment of these rights may be in such a way that the interests of other persons, or societal interests, may not be prejudiced. Thus they can't be guaranteed in absolute terms.[2] This places the government

under two obligations: the obligation to ensure that law and order, which is the basis upon which human rights can be can be enjoyed, are maintained by routing out elements in society who are criminally motivated and thus are bent on disrupting good order in society and also at the same time ensuring the right of individual to go about his business without unnecessary interference from the authorities.

The police Department is the main governmental agency charged with this responsibility of maintaining law and order. To enable them to do this, they are vested with powers of arrest, detention, interrogation, search and seizure and also powers to conduct criminal prosecutions. These powers involve a derogation from the constitutionally protected fundamental rights and freedom of the individual. Such powers are confered on the police by law as a qualification to the provisions of the constitution creating them and thus must be exercised within the law and according to the law.

The exercise of the police powers involve a delicate balancing of the individual and society's interests. The powers of the police are not to be lightly conferred or wantonly exercised and the police officer must be vigilant both to use his authority adequately and instantly as occassion demand. To achieve this certain

controls exist in varying forms in our legal sytem. These controls are the limitation on the powers of arrest by requirements that before a person can be deprived of his liberty, certain conditions established by law must be satisfied and certain procedures followed.[3] A system of checks and controls, which forms part of the process of arrest a detention, provides built-in safeguards against illegal or arbitrary action. There are also legal remedies designed to permit the arrested or detained person to obtain speedy adjudication of the validity of his arrest or detention.[4] Also there exists civil, criminal and disciplinary sanctions which act as deterrents to violations of the safeguards established by law against improper exercise of the powers cpnferred on the police.

However, our analysis has shown that despite the various safeguards which are pegged around the constitutional rights of the individual to ensure that they are not unreasonably interferred with, the safeguards are inpractical terms uneffective in curbing police mal-practices and as such police have ended up with emmense powers which they can exercise in any manner to infringe on the rights of the individual with little or no impunity.[5] This state of affairs has been made possible by a number of factors.

In the first place we have argued and shown that the police powers of arrest, detention, entry, search and

seizure etc are found in a morass of statutes with many variations in the nature and manner of exercising them. This makes it very hard for the police officer and the general members of the public to ascertain their rights and duties if they wanted to. Also the high rate of illetracy is a contributary factor to this state of affairs.

Other factors which have enabled the illegal and arbitrary use of power by the police to go unchallenged in courts or be the subject matter of disciplinary action in the police force include the constraints in which the would-be complainant finds himself in while pressing forward his case. For one, initiating a civil action involve a lot of expenses in terms of time and money which are unaffordable by the poor majority. The wronged person, due to fear of police resprisals and intimidation may fail to contest any police impropriety perpetuated against him. He may have no faith in the judicial system and therefore fail to initiate any legal proceedings. Uncertainty as to the damages to be awarded, which are sometimes minimal and the possibility of paying costs to the defendants are other factors contributing to the scarcity of legal action against police illegality.

The courts in their role as the custodians of Justice and the individual's rights have fared no better in providing checks against the exercise of police powers

which infringe on the rights of the individual. This is so because the Kenyan courts operate on the premises that the sole purpose of a court in a criminal trial is the determination of the truth of the criminal charges and thus evidence should be admitted or rejected purely on the grounds of its reliability and not of the illegallity of its procuration. Thus where evidence is obtained after an unlawful detention of a person or after an illegal entry and search, it is nevertheless admissible. Also where an involuntary confession leads to discovery of evidence, the evidence is admissible against the accused despite the illegality in the manner in which it is obtained. Consequently, this is an indirect judicial sanction of police illegality for as it is, in our adversary system where the burden of proof lies on the police to prove their case, they would resort to any means which will help do this. Again, as has been argued by the author,[6] the tendency of the courts in Kenya, where there is a conflict between the interests of the state and the fundamental rights of the individual, unless it is impossible, the courts will decide in favour of the state.

The courts have an inherent power to grant bail to accused persons to secure their release pending trial on such conditions as the court would consider appropriate to guarantee their attendance for trial at a later date.

This right of the accused to be granted bail is self-initimative in practice and majority of the citizens are unaware of this right to bail and cannot, therefore, ask for it. Where bail is granted, it is almost invariably excessive requiring sound and creditworthy sureties, conditions that cant be fulfilled by the financially disadvantaged. It is our contention that unless the right to bail before trial is preserved, the presumption of in nocence, would loose meaning. Thus, given these factors, a person in Kenya can languish in jail for weeks or months, not because he is guilty or that he is likely to abscond before his trial, but for the one reason only because he is poor. He may spend such time in jail only later to be found out that the charges for which he is held are false or to subsequently acquitted.

Given the above considerations, It is desirable and necessary that other ways and means, as an addition and improvement to the existing ones,be devised to ensure that every citizen of Kenya actually enjoy the fundamental rights which are guaranteed in the constitution, free from any unlawful and unnecessary interference by the police. Towards this end, we recommend a number of ways and means.

We would recommend that the police be denied the fruits of their illegal labour by the courts excluding all evidence procurred through improper police activity. It

would be too unbecoming of a government to require of its citizenry to abide by its laws whereas the same government goes on infringing the laws which it has set. This view may be countered by the argument that give the rising tide of crime in our society, it would be unfair to the police effort to wipe out crime, if we were to require the strict adherance to procedure by the police-men in their exercise of power. It is our contention that crime and other evils are signs of deprivation at the bottom of society and to point at them as the main fault of society is to confuse effect with cause, to obscure the real reasons behind the rise in the crime rate and thus making it more difficult to tackle. It is our submission that the best hope of crime control lies not in increasing the police powers in dealing with suspects, or in more convictions and longer and harsher sentences. Rather, it lies in the creation of material conditions which will assure the individual an adequate income such as would enable him to cater for the needs of his family and to have a place to live decently and comfortably.

The exclusion of illegally obtained evidence would go a long way in safeguarding the personal right to liberty and also the right to the privacy of one's home and person. By excluding evidence acquired through the improper and unlawful detention of the person this will help in checking the unlawful detention of persons for days on end, by the police, hoping to get incriminating

statements from them for such statements will serve no purpose. Exclusion of evidence obtained by illegal entry and search would help in ensuring that the police adhere to the laid down law of entry, search and seizure and thus promote the individual's enjoyment of the right to protection against the arbitrary intrusion in his house, goods or person.

We futher submit that it is better for several guilty persons to go free than for one innocent citizen to have his rights unlawfully invaded. It should be impressed on the over-zealous police officer that their making of short-cuts in law, by making in-roads into the constitutional rights of the citizen won't be condoned. The rights of society should not in any way be allowed to supersede or override, unreasonably, the rights of an individual member of the society. Whether a person is a suspected criminal or not, he is still entitled to the protection of the law and a violation of any of his rights should be prevented by putting a check on the police excesses.

We would also recommend the establishment of an ombudsman type investigatory institution. This would provide the clearest possible evidence of the government's commitment to redressing individual grievances and asserting the rights of the individual to protection from abuse of authority by any organ of the state, fro example, the police force.

As set criteria for appointment to membership of the institution should be provided by law and as a minimum should include an element of security of tenure. This institution should publiccize itself as widely as possible so that everyone should know of its existence, and how to use it. To this end, the institution should set up officers in every division or even location where any citizen can make complaints against any arbitrary or unlawful exercise of power by the police. The institution should investigate all complaints made by the citizens and where the complaints are proved, seek redress for the aggrieved party. It should make reports of its investigations and endeavor to ensure that its reports are given wide publicity in the press and on the radio. The officers of the institution should tour the country as extensively and frequently as possible. In their tours, they should hold seminars and offer education on human rights directed both to the public at large, so that they can learn what rights they have and how to assert them, and to the members of the police force, so that they can appreciate the general limits on the exercise of their powers which derive from the recognition of fundamental rights and the rule of law.

We further suggest by way of improvement to the already existing judicial remedy for rights infringed that civil action the courts can enhance their protection of the

fundamental human rights of the citizen by awarding to a succesful plaintiff such damages as would make it worthwhile to initiate an action. Further as already pointed out the occassions are many when the police exceed their powers and violate the rights of the citizen. Yet very few actions are brought to seek redress for such violations. The reasons is either that the person is unaware, of the rights or, when he is aware of them, such a person lacks the means of setting the law in motion. It is suggested that a system of free legal aid be introduced to enable poor persons whose rights have been violated to seek redress in courts. It is only by being, in fact, able to enjoy a right that we can say that an individual has a meaningful right.

As a dessert, we would further suggest that posters should be displayed in all police stations and cells informing the public of their rights with regard to arrest, questioning, detention, bail and so on.

We reiterate that the fundamental rights of man are inviolable and sacrosanct. They are rights which allow a person to lead a good life in society and to do so infull dignity. They are rights which should be guarded jealously against any abrogation resulting from any whimsical exercise of authority. It is our hope that the means through which these rights are protected at present will be improved as recommended and that all the individuals in the human family will continue thinking

of ways and means to further enhance and promote the protection and enjoyment of the fundamental rights and freedoms of the individual.

CHAPTER FOUR; FOOTNOTES:

1. See chapter one (supra)

2. This is the priciple that under this the proviso to s.70 of the constitution.

3. These are provided for in the constitution, the criminal procedure code and the police Act (see Supra: chapter two).

4. S.77 of the constitution.

5. Supra. chapter two.

6. Supra: chapter two.

7. Such a view was expressed at one time by the commissioner of police: see: THE SUNDAY TIMES; DECEMBER 2, 1984.

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(4) NEWBOLD, C. "The Role of a Judge" E.A.L.R. 127.

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