

THE MAINTAINANCE OF PUBLIC ORDER IN NYANZA PROVINCE

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by

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DEDICATION

This paper is dedicated to my dear parents

Mr and Mrs J. Nyamwamu

ACKNOWLEDGEMENTS

I wish to express my gratitude to my supervisor, Mr. Kangwana for his most useful comments on the draft of this paper. I am especially grateful to my cousin Mrs. Yukabeth Mayieka for having transformed what was otherwise an illegible draft into this nice print. Her assistance proved invaluable in the preparation of this paper.

The views and mistakes expressed in this paper are, however, mine, unless otherwise stated.

Table of Statutes

The Books and Newspapers Act [Cap. III] Laws of Kenya

The Chiefs Authority Act [Cap. 128] Laws of Kenya

The Constitution of Kenya (Act No. ⁵3) 1969

The Penal Code [Cap. 63] Laws of Kenya

The Police Act [Cap. 84] Laws of Kenya

The Public Health Act [Cap. 242] Laws of Kenya

The Public Order Act [Cap. 56] Laws of Kenya

The Preservation of Public Security Act [Cap. 57]

INTRODUCTION

The maintainance of Public Order in Nyanza Province is looked at from a Constitutional Law perceptive.

The aim of this paper is to examine the law concerning Public Order in Nyanza. However, other parts of Kenya are also looked into for a comprehensive application of Public Order Laws. The Paper proceeds to examine whether the means of maintaining Public Order operate within our constitutional framework. The concept of Public order should be for the protection of the peoples' rights as provided for in Chapter V of our Constitution. However, this paper shows how these rights have been disrespected by both the Colonial and Post colonial governments and concludes that it is Public Order rather than human rights that is emphasised ~~on~~ by those in power to serve a particular political order. The paper however, ends with a hope that under the new leadership of President Moi the maintainance of Public Order will be for the People of Kenya to realise their philosophy of a good life.

April 1979

C. R. O. N.

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Chapter 1

An Attempt to Define the Concept of Public Order

Early legal-political philosophers often postulated a pre-social and pre-governmental "state of nature" in which no institutions of human government and law existed. For some of them, this was a relatively tranquil and benign condition for mankind, but for others it was quite the opposite. The great English philosopher Thomas Hobbes saw man's life in the state of nature as "solitary, poor, nasty, brutish and short". To ameliorate the evils and reduce the dangers of life (and in Hobbes' Theory to provide a theoretical construct explaining and justifying the institution of civil government), there came into being the organised state. Hobbes referred to the organised state power as "Leviathan, the mortal God". Leviathan then ^ycum^{bed} men's natural aggressive tendencies, ^{and} introduced a measure of peace and order, ^{and} in general improved the quality of life.

It is unlikely that Hobbes and other "state of nature" philosophers revised their accounts of the origin of civil government and law as actual history. For some, the dominant purpose probably was to provide a theoretical justification for the broad, authoritarian powers of a particular government. For others, the theory provided a justification for imposing certain limits upon the power of the government. Certainly human history provides ample support for the proposition that along with the benefits civil government provides come constant dangers that the awesome power of organised society will be misused and abused.¹

The focus of this dissertation is to examine the concept of the maintenance of public order in Nyanza Province and also show whether the state has abused and misused its powers in doing so or whether the maintenance of public order is to enable the people of Nyanza to realise their goals. That it was a purpose for the state to maintain public order so that man could realise his humanity and dignity is clear in Hobbes Theory of justifying the institution of civil government. How far this is true in Nyanza will be examined in this dissertation.

It is not legally logical to talk about the concept of public order without attempting to define its meaning. It is admitted that this is not a simple task. It is attempting to do what many learned legal philosophers have not done - leave alone attempted to do. There is no settled definition of the concept of public order. However an attempt is herein made.

First, the word "public" or "in the interest of the public" in the Kenyan context means nothing wider than the Kenyan public, at any rate, but it does not mean anything so narrow as the general interests of particular localities which may be affected by the matters in question; it means those interests which concern the public at large. It is undoubtedly a most difficult inquiry whether this or that is for the public good. In Murray's Oxford Dictionary, the word public is defined as the community as an aggregate, but not in its organised capacity; hence the members of the community.

Turning to the word "order" The Oxford Advanced Learners Dictionary of current English defines it as a condition brought about by a good and firm government; it also means obedience to law, rules and authority. The word "public" in this dictionary is defined as - "for, of, connected with, owned by, done for or done by, known to, people in general."

From the above definitions of "public" and "order" we could define "public order" as a condition brought about by a government for the community as an aggregate. This includes the obedience of laws; rules and authority as formulated by the government. The definition it is admitted is unsatisfactory. This goes to show how difficult it is to define most legal concepts. It is not possible to define public order with satisfaction. Its legal character or significance as a normative standard which can be used to measure state conduct or the suitability of institutional arrangements within states is not in our view destroyed or diminished without a definition.

- 1) The first condition of public order is the security of life.
- 2) Liberty, to include security of the person, freedom of movement and from slavery or servitude....3/v
liberty is meant the eager maintenance of that

However, it is important, that we should be able to identify the set of principles that constitute the core of the concept of public order if we are to make judgements about what should count as fulfilment or violation of those standards. The public order is concerned with the protection of peoples' rights in the society. It is in this perspective that the dissertation will examine the protection of the peoples' rights in Nyanza. It is suggested that the meaning of public order is commonsensical and must, irrespective of ideological orientation or persuasion, include the following: obedience to law, rules and authority and this should be in a condition brought by a good and firm government. Under this condition every human being's rights should be respected. Every state is known by the rights that it maintains. The method of judging its character lies, above all, in the contribution that it makes to the substance of man's happiness. The state, therefore, is not, at least in political philosophy, simply a sovereign organisation with the powers to get its will obeyed. It cannot, save in a narrowly legal sense, demand allegiance from its subjects save in terms of what that allegiance is to serve. The citizen has the right of scrutinising both the motive and the character of governmental acts. These acts are not right merely by reason of the authority from which they emanate. There is a standard by which they are to be ^{measured?} tried. There is a purpose with which they must be invested. The state, briefly, does not create but recognises, rights, and its character will be apparent from the rights that at any given period, secure recognition.²

Rights, in fact, are those conditions of social life without which no man can seek, in general, to be himself at his best. For since the state exists to make possible that achievement, it is only by maintaining rights that its end, it can be realised.³ Public order must therefore ensure that every human being should have the right to:

- 1) The first condition of adequate living in any society, namely the security of life.
- 2) Liberty, to include security of the person, freedom of movement and from slavery or servitude. By liberty is meant the eager maintenance of that

atmosphere in which men have the opportunity to be their best selves. Liberty therefore is a product of rights. A state built upon the conditions essential to the full development of our faculties will confer freedom upon its citizens. Without rights there cannot be liberty, because without rights, men are the subjects of law un-related to the needs of personality. Liberty is never real unless the government can be called to account, and it should always be called to account when it invades rights.

3) Freedom of conscience, expression, assembly and association. The demands of each citizen for the fulfilment of this freedom must be taken as of equal worth and the utility of a right is therefore its value to all the members. The right of the freedom of expression for instance does not mean that it exists only for those in authority, or for members of some special church or class. Freedom of expression is a right either equally applicable to all citizens without distinction or not applicable at all. For the plane upon which men meet with identical claims upon the common good is that of which the state fixes the horizon. It cannot set bounds to those upon whom the enjoyment of the right is to be conferred. It must assume at some point in its policy, a sufficient identify of nature in men to secure identity of response. Where it differentiates between them, whether in terms of the kind of property they hold, as in the feudal society, or in terms of region they profess, as in the France of the ancient Regime, it is, to the degree of differentiation, denying its claim upon the allegiance of those excluded from the enjoyment of rights. "For in any adequate view of citizenship a state which refuses to me the thing it declares essential to the well-being of another is making me less than a citizen. It is denying that which invests its powers with moral authority. It is admitting that its claim upon me is built not upon its ethics, but its strength".

To allow a man to say what he thinks is to give his personality the only ultimate channel of full expression and his citizenship the only means of moral adequacy. To act otherwise is to favour those who support the status quo, and thus either to drive the activities of men into underground and therefore, dangerous channels, or to suppress experience not less entitled than any other to interpret publicly its meaning. Expression is penalised if it is destructive to the state. A Government can always learn more from the criticism of its opponents than from the eulogy of its supporters. To stifle that criticism is - at least ultimately its own destruction.⁵ *Is this a quotation?*

4) Freedom from discrimination. Discrimination is a difficult term to explain. Its core notion is "exclusion and preference" read within a broad concept of justice and fairness such that non-discrimination and equality to be meaningful it must exist both at the legal and the factual planes. For whereas, equality in law precludes discrimination of any kind equality in fact may involve the necessity of different treatment to attain a result which establishes unequilibrium between different situations. This is an interpretation which has found its way into many national constitutions, especially those former colonial territories where racial distinctions and injustices were carefully woven into the political, economic and legal fabrics of society. The only way in which equality in fact could be achieved in such circumstances was through a measure of colonial "permissive" discrimination. This means discriminating in favour of the economically weak class to achieve equality.

5) Self-determination. This consists of the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives. No form of public order, whether capitalist, socialist or marxist, satisfies the minimum standard unless it ensures free, equal and effective participation in the social process by all the different people or individuals comprised within it. The right to self determination is, inter alia, realised in a system, in which the will of the average citizen has channels of direct access to the sources of authority. This embodies the right to political power. The purpose of maintaining public order in any

given society should be for the people to realise their philosophy of a good life.

It is befitting in this chapter to examine the Kenyan society in relation to the concept of public order. An examination of the role and function of the state as an instrument of class domination should be made and within this is fitted the Kenya situation as it evolved during the colonial and post colonial period. It is argued that the introduction of the capitalist mode of production with its emphasis on private ownership of property necessitated the existence of a class of workers and a class of property owners. The propertied class being the dominant class imposed its ideas and institutions on the working class and institutions and to ensure maximum exploitation of surplus capital, an efficient coercive machinery was necessary not only for the enforcement of the ideas, institutions etc; but also as a warning of what would result from failure to conform with the expectations of the ruling class.

The development of class structure shows that at independence there was no change in the socio-economic structure.⁶ Capitalist mode of production was preferred by the "nascent national bourgeoisie" and because this was a betrayal of the ideas that inspired the nationalist movement, the national bourgeoisie finds that it has to rely on colonial coercive machinery which it now consolidated and reorganised into the law of public order. So when speaking about the maintenance of peace and public order during both colonial and post colonial Kenya, it is not the same thing as saying that the individual is to realise himself fully in a material and spiritual sense, but maintenance of public order rather means conformism with the expectations of the ruling class. This in itself does not make the people of Nyanza and Kenya to achieve their philosophy of a good life. It is for the purpose of enabling the ruling class to reap maximum exploitation of the peasants and workers of this country. The role of the rich, whether landmen or of those who owned industrial capital has been devoted firstly to the accumulation of wealth, and secondly preventing its diffusion. The whole character of social life and, therefore

the whole character of the state, is above all determined by its division into a small number of wealthy persons and a large number who dwell upon the margins of subsistence. We enjoy security and order. But the security we enjoy means the protection of most in their impotence, and the order is, very largely, the safeguarding of the few against the demands of the many for a richer and a fuller life.

In conclusion of this chapter it is submitted that every government must assume that its continued orderly existence is within the ambit of such a system of rights as that here outlined, a desirable thing; every government, either public or private, they would involve themselves in endless confusion and would render all government, in a great measure, ineffectual. The private interest of every one is different and though the public interest in itself be always one and the same, yet it becomes the source of great dissensions, by reason of the different opinions of particular persons concerning it were to follow the same advantage, without fundamental freedoms for the individual, or at least an access to them, men are hardly less true slaves than when they were exposed for purchase and sale. Man's initiative then becomes not the free expression of his own individuality, but a routine made from without and enforced upon him by fear of deprivation. ¹⁷ ? This should be in quotation marks!

It is one of the axioms of the traditions of freedom that coercion of individuals within a certain public order is permissible only where it is necessary in the service of the general welfare or the public good. Yet although it is clear that the stress on the general or common or public character of the legitimate objects of governmental power is directed against its use in the service of particular interests, the vagueness of the different terms which have been employed has made it possible to declare almost any interest a general interest and to make large numbers ^{of people} serve purposes in which they are not in the least interested. The common welfare in the public good has the present time remained a concept most recalcitrant to any precise definition and therefore capable

Chapter I

of being given almost any content suggested by the interests of the ruling group. So long as bourgeoisie' interests are not disturbed, there is public order, but if the peasants and workers ask for their humanity to be respected, there is no public order and the government does not hesitate to use its coercive apparatus to protect the interests of the bourgeoisie. ✓

London: George Allen & Unwin Ltd. 5th edition at p. 89.

In conclusion of this chapter it is submitted that every government must assume that its continued orderly existence is within the ambit of such a system of rights as that here outlined, a desirable thing; every government is, within that ambit, entitled as a consequence, to take steps to protect itself. It is therefore, entitled to destroy any group which seeks definitely and presently to using its authority. But no government ought, in its purely executive aspect, to be the sole judge of whether its action is right. It ought always to be compelled to the submission of proof under the fullest judicial safeguards. Without fundamental freedoms for the individual, or at least an access to them, men are hardly less true slaves than when they were exposed for purchase and sale. Man's initiative then becomes not the free expression of his own individuality, but a routine made from without and enforced upon him by fear of starvation. A system built upon fear is always fatal to the release of the creative faculties; and is therefore incompatible with liberty. Whether our system is compatible with the liberty of the people of Nyanza will be shown in a later chapter.

FOOT NOTES Order in Colonial Kenya

1. Harvey, W. B. Introduction to the legal system of Kenya. Structure and method at pp 111/27. To understand the present situation in Kenya we must compare it with the past.
 2. Laski, H. J. A Grammar of Politics. Published by London, George Allen & Unwin Ltd. 5th edition at p. 89. close looking at the historical background during the colonial time.
 3. Ibid at p. 91. The scramble for Africa was a continuous process and not something which sprang up overnight in the 1880s.
 4. Ibid at p. 92. The Berlin Conference of 1885 may be taken as the starting point for the historical survey since it coincided with a change in the attitude of European powers towards East African Coast. It is debatable whether Britain's primary interest in East Africa was the suppression of slave trade taking into consideration Independent Kenya 1976 LLB Dissertation at p. 1. that she was one of the leading imperial powers. Political developments in the former British Colonies go to show that
 5. Ibid at p. 118. *is it a quotation?*
 6. Gitobu Imanyara - Legal Organisation of coercion in Independent Kenya 1976 LLB Dissertation at p. 1.
 7. Hayek F. A. - Law, Legislation and Liberty vol. 2 at p. 1. suppression of slavery was not the primary object of British Imperialism. as per Hume David - an enquiry concerning the Principles of Morals. Sec. III, Part II Works IV at p. 187. Published by London, Routledge and Kena Paul (1976). The year of 1884 was a reasonably definite position of the Coast and mainland of East Africa had been reserved for future British control and occupation by means of various agreements and treaties with other European powers. This had been done without any reference to the desires or views of the local people. It was necessary, however, to consolidate the position obtained by these agreements if they were to be respected by other European powers. For this purpose a convenient body was at hand - The Imperial British East Africa Company - founded by William Mackinnon. (hereafter referred to as the I.B.E.A.C)
- The I.B.E.A.C. which was a chartered company administered the aims and policies of European governments in Africa. It was a familiar disguise in the late 19th century for its grant of the royal charter was an announcement to the powers of Europe that the company was henceforth not merely an agent of the Sultan of Zanzibar but an arm of British Imperial policy. In legal terms this meant that whereas the

Public Order in Colonial Kenya

This chapter will present the colonial background to the law of public order. This is necessary because to understand the present situation in Kenya we must compare it with the past experiences. We shall have, in this chapter, a close look at the mechanism of maintaining public order during the colonial time.

The scramble for Africa was a continuous process and not something which sprang up overnight in the 1880s. The Berlin Conference of 1885 may be taken as the starting point for the historical survey since it coincided with a change in the attitude of European powers towards East African Coast. It is debatable whether Britain's primary interest in East Africa was the suppression of slave trade taking into consideration that she was one of the leading imperial powers. Political developments in the former British Colonies go to show that suppression of slavery was not the primary object of British Imperialism.

By the end of 1886, a reasonably definite portion of the Coast and mainland of East Africa had been reserved for future British control and occupation by means of various agreements and treaties with other European powers. This had been done without any reference to the desires or views of the local people. It was necessary, however, to consolidate the position obtained by these agreements if they were to be respected by other European powers. For this purpose a convenient body was at hand - The Imperial British East Africa Company - founded by William Mackinnon. ¹₂ (hereafter referred to as the I.B.E.A.C)

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association had derived its powers solely from the agreement with the Sultan, the company derived its powers first and foremost from the British government and then from agreements with the Sultan and other local rulers. A reference to the charter shows how this was achieved.²

Due to financial difficulties the I.B.E.A.C. found it difficult to carry out its administration in East Africa. Hence in June 1895 the British government declared a protectorate over the territory administered by the company. It was named the East African Protectorate a year later. A Commissioner was appointed to administer it and in one of the first exercises of his legislative power, the native courts regulations of 1897,³ the Commissioner for the East African Protectorate armed himself with restriction of movement, in respect of any persons subject to the regulations if it was shown to the satisfaction of the Commissioner that the person was disaffected to the government, was about to commit an offence against the regulations or was otherwise conducting himself so as to be dangerous to the peace and good order in the protectorate. There was no appeal against the Commissioner's exercise of this power, though he had to report on the same forthwith to the Foreign Secretary. These provisions provided for special powers which had the effect to deprive a person of his basic rights of movement, and of recourse to the courts. With respect to the basic right of movement similar deprivations obtained in the vagrancy regulations, which provided for the arrest of and detention of any person found asking for alms, or wandering without any visible means of subsistence or employment.⁴ The native Passes Regulations (Regulation No. 12 of 1900 repealed in 1961) enabled the Commissioner to make "such general or local rules for controlling the movement of natives into, out of, or within the limits of the protectorate as may from time to time appear to him to be necessary or desirable. The aims of these Regulations was to control the natives for the benefit of the colonialists.

Full jurisdiction over the natives of the protectorate was not conferred on the British authorities until the East Africa Order in Council 1902. The Order empowered the Commissioner to make ordinances for the peace, order and good government of all persons in the protectorate and established a High Court with full criminal and civil jurisdiction over all persons and matters in the protectorate.⁵ The administration in the protectorate used the law as an instrument of oppression. For example the unnecessary curtailment of the Africans right of movement by the Native Passes Regulations was oppressive on the Africans. This process of oppression on the Africans continued all through during the colonial time.⁶ In 1921 when Kenya was declared a colony, the white minority thought that Kenya was going to be their country for ever, where the African had an inferior role to play if any. The Kenyan colonial state in itself was an epitome of authoritarianism. Its administration was military in conception and organisation and the chain of authority from the top to the bottom was, as is ably demonstrated by Ruth First, untouched by any principle of representation or consultation.⁷ Not only was the state similar to the army in its paramilitary formations and ethos, it was often the tool of military men. Robert Martin points out that it was characterised by authoritarianism, arrogance towards the public and a reliance often to the point of ignoring content.⁸ In the context of colonialism, this was as it should be: had the state been representative; fair and obliging; the ends of colonialism - the exploitation of the African people and their resources in the colony - would have been thwarted. Indeed it would not have been a colonial state. The question that arises out of this is to what extent was this system transformed or eliminated during the period leading to independence? This will be answered in a later chapter.

In the colonial times the maintainance of law and order meant the pacification of the nationalists by all means available. These included physical harassment, unlawful arrests, false imprisonment, detention and indiscriminate killing of "terrorists". The ideology of colonialism itself was a system of rule which assumed the right of one people to impose their will upon another.

This type of rule is predicated upon certain general assumptions. The colonial ruling class held almost without exception the view that the colonised people were not capable of governing themselves; under the strenuous conditions of the modern world.⁹

Which?
(This) view was expressed by the League of Nations. In its view the relationship between the interests of the colonized and the colonies was seen as not an essentially exploitative and contradictory one. Further it was taken for granted that Britain's presence in Africa (and indeed of other powers) was a prerequisite for the promotion of "progress in civilization and justice".¹⁰ It was therefore sought to modify the institutions of the colonized people.

The use of military might was thought to be necessary as Sir Donald Stewart had pointed out. In his view "the country can only be properly administered only when the natives have been knocked into shape".¹¹ The imperial officers at their initial stage in Kenya thought that it was necessary "to tap the undoubted resources of the country without assuming too many responsibilities of the administration". It is pertinent to point out that since at this time the administration was limited in experience and had no clear guidance from above there was no co-ordination and officers had perforce to adopt an ad hoc solution to each crisis as it occurred. This type of administration was not suitable for the tapping of economic resources, *which* required an efficient administration. As a result the administration of the East Africa protectorate was transferred to the colonial office in 1905. *Authority?*

With this transfer a number of significant changes occurred. Under Governor Giround recommendations for the setting up of a provincial administration were effected and accepted by the colonial office. Giround demanded that regular administrative records should be kept, both at provincial and district level. He called for a series of provincial and district reports. He established political record books and

inaugurated a system of regular annual reports. These features of the provincial administration have been maintained from his time. Girouard can therefore properly be called the father of provincial administration in Kenya.¹²

In providing for a chain of command from the governor to the chief the colonial government was in command of colonial activity in Kenya. At the lowest ladder of this hierarchy was the headman who was given wide discretionary powers under the Headman's Ordinance 1902 which has been reproduced as the Chief's authority act in Independent Kenya. As Colin Leys¹³ has shown "The provincial administration was primarily an agency of political control, not of rural development since the primary concern of the government was not development of rural areas generally but to control rural development in the interest of the settler and metropolitan groups".¹⁴

During the colonial period the law conferred great power on administrators in Kenya but there were limitations written into these powers. Again the avowed reasons and objects behind these laws no less than behind international and other treaties were to bring law and order and civilization to East Africa; in modern terminology the benefits of the Rule of Law. When we examine the implementation of these laws, we find that the limitations contained in them and the local agreements were ignored, the exercise of important governmental powers was unchallengeable by the local inhabitants, and the purposes for which the law was used were different from those it was made.

We should regard the legal framework created for the assumption of power in Kenya as a sham designed to disguise what was really planned to be done. There was too little control of senior officials by whitehall, and by senior officials of their juniors. Equally, administrators in the protectorate often did not know what the law allowed or forbade them to do or, if they did, sometimes considered that it was unrealistic and ignored it.

There was, too, a lack of control by the courts. The Masai case¹⁵ highlighted the lack of remedies, but other cases concerned with Africans spelt out very clearly the courts'

unwillingness to allow challenges to the legal basis of colonialism. Denning L. J. (as he then was) summing up a succession of cases on Jurisdiction in protectorates when he said in Nyali Ltd. V. A.G. (1956) IKB at p. 15,¹⁶ that : "although the Jurisdiction of the crown in the Protectorate is in law limited jurisdiction, nevertheless, the limits may in fact be extended indefinitely so as to embrace almost the whole field of government The courts themselves will not mark out the limits. They will not examine the treaty or grant under which the crown acquired jurisdiction : nor will they inquire into the usage or sufferance or other lawful means by which the crown may have extended ~~its~~^{its} jurisdiction. The courts rely on the representatives of the crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the crown, the courts will not permit it to be challenged."

The rationale of such an approach had been provided many years earlier. In ^acase from the Bechuanaland Protectorate, quoted with approval in the Masai case. ~~This was the case of~~ R. V. Earl of Crewe ex Parte Sekgome (1910) 2KB. 576. It was stated thus : "The idea that there may be an established system of law to which a man owes obedience and that at any moment he may be deprived of the protection of the law is an idea not easily accepted by English Lawyers. It is made less difficult if one remembers that the protectorate is over a country in which a few dominant civilized men have to control a great multitude of the semi-barbarians."

This is difficult to reconcile with earlier intentions to bring the benefits of "civilization" to Africa. A system of rules which weighed the balance so heavily against those most in need of its protection must be regarded as a very dubious benefit indeed.

It is unrealistic and a little hypocritical to suggest that one of the main benefits of British colonialism was the introduction of the Rule of Law into Africa, for if the Rule of Law means anything, it means that the law should help the weak

and control the strong and not vice versa. But in Colonial Kenya, the law helped the strong and controlled the weaker. From the African point of view the English Law introduced in Kenya was one of the main weapons used for colonial domination, and in several important fields remained so for most of the colonial period, only changing when Africans began to gain political power. The role of the received law then from the beginning of the colonial period in Kenya was to be a tool at the disposal of the dominant political and economic groups. This has not changed with Independence.

During the colonial rule, virtually every institution was based on the view that Europeans were first-class human beings, the Asian second class human beings and the Africans third class human beings. Chanan Singh says this about the public policy during colonial rule where he discusses human rights :

"As should be apparent from the preceding section of this paper, the chief characteristic of the public policy in Kenya was its recognition and enforcement of distinctions based on race"¹⁸

NYANZA UNDER THE COLONIAL RULE

Nyanza Province being part and parcel of Kenya was very much affected by the colonial authoritarian rule. As early as 1900 the European settlers had occupied some parts of Nyanza and in order to facilitate their economic exploitation, they used the law as ^{an} instrument of maintaining "peace and order". Peace and order meant that the Africans were to remain in their indigenous economy. The people of Nyanza and their transactions in the colonialist period were to be governed by English law. The labour market in Nyanza as elsewhere in Kenya was highly structured by the use of a variety of compulsions on the Africans to work for European enterprise. Overall, law and order were maintained by the monopoly of violence embodied in English criminal law, with control over petty offences within the subsistence sector delegated to customary courts and customary law. fine of such amount as the Provincial Commissioner recommended and the Governor approved.¹⁹

Under the Special Districts (administration) Ordinance (Cap 105) a denial of human rights was contained in laws obtaining in this ordinance which allowed collective punishment to the disregard of individual guilt or responsibility and the imposition of responsibility for the misconduct of others on one deemed to be in authority over them. This also obtained under the Stock and Produce Theft Ordinance (Cap 355). Section 15 of the Stock and Produce Theft Ordinance authorised a magistrate not necessarily acting in a judicial capacity, on a complaint of stock theft to order all or some members of a tribe or a sub-tribe to pay compensation to the aggrieved party in specified portions (one of the factors to be considered was the ability to pay) if it was established that any member of that tribe or sub-tribe had been implicated in the theft.

It is important not to lose sight of the fact that the powers of the commissioner as discussed earlier were discriminating for they were to be used only against those subject to the Native Courts Regulations - Africans.

The people of Nyanza during the colonial rule were subjected to oppression through the application of law. The collective Punishment Ordinance was applied whenever the provincial commissioner was satisfied by reason that the native population of the area were habitually screening offenders or taking no adequate steps to bring them to justice. The Provincial Commissioner had to state a case to the Governor with all supporting evidence to show that such a state of affairs does in fact exist and if the Governor on having considered the advice of the Attorney General is satisfied that the case is proved, he may authorise the Provincial Commissioner to make an announcement that if any other stock theft occurs within one year of the date of such announcement and if the stolen stock are proved as a fact to have been traced to a place within the area in question, then the inhabitants of the area would be liable to be commercially fined. If such theft took place after the date of such announcement the inhabitants were to be liable to a fine of such amount as the Provincial Commissioner recommended and the Governor approved.¹⁹

Are there any examples?

The colonial administration in Nyanza dealt with disorders and strikes in a very ruthless unconstitutional manner. For example, there was a strike in Victoria Nyanza Company Limited Miwani by the whole field labour. This was during the war time. The factory sustained a serious loss of production. The strikers were charged, but the penalty for such offence was a fine of fifteen days pay. *Is this recorded anywhere?*

It was recommended by the factory management and Provincial Commissioner at that time that a more serious penalty should be imposed to deal more drastically with offences of this nature at any rate until the war was over. In reply to this the colonial government was sensible for it said that it had decided not to take the action then recommended as it considered that the penalties which already existed were adequate and that it is not feasible to increase them as it should rather be aiming at the abolition of penal sanctions.²⁰ But such a statement was not enough. A legal framework that imported justice to the people was needed. Such a framework was non-existent in the colonial administration. This is further illustrated by another event.

In Kisumu there were strikes in April 1947 in the government offices. The Africans at this time demanded for an increase in their salaries. However, the colonial administration used a crude method of intimidation by dismissing or threatening to dismiss those who did not report at work. This was for the sake of maintaining law and order. But in whose interest was this? Some of the workers who absented themselves from work were suspended without proving that they actually participated in the strike.²¹ Whereas ^{as} a matter of law strikes may not be encouraged as a constitutional right, it must be realised that they are at times necessary if the workers claims are not listened to by those in authority. Such heavy repression as here denied the workers their right of expressing their dissatisfaction about their employment. As a matter of interest it should be noted that the African in April 1947 was being given a wage ranging from twenty to thirty five shillings per month. *Does not strike happen*

The application of the collective Punishment Ordinance, the Stock and Produce Ordinance and the way the strikers were dealt with are only a few examples of a contradiction of the fact that British Justice is based on the principle that it is better that many guilty men should go free rather than that one innocent man should be punished. However, it was argued that white British laws and procedures having evolved over more than a thousand years, may be adequate in England in the circumstances there prevailing, that is no criterion as to their adequacy in Kenya. If criminal justice is to be efficient and had to appear to the "natives" to be just, it is necessary somewhat to modify this basic principle and to reduce as many as possible of the loopholes through which at the present time guilty men do in fact escape justice to continue unfettered with their nefarious anti-social activities. It is to the native just as much a traversy of justice when a guilty man goes free as when an innocent man is punished. It was to destroy such injustice by the colonial administrations that the people of Nyanza joined hands with the other Kenyans in the nationalists struggle which we now turn to for a brief examination.

The Nationalist Movement

Kenya's politics before independence as we have seen in the preceding paragraphs had a racial background. The existence of immigrant, economically differentiated racial communities, to whom the government alienated the best land, resulted in a situation in which racial categories provided "decisive divisions" in the colonial situation. The Europeans though in the minority were entrenched in the "White Highlands" and they enjoyed the dominant political influence until the late fifties. Their informal influence gained them most of what they demanded. Government policies in land, labour and the distribution of services favoured the European minority at the expense of the African majority. The European presence created acute social and economic grievances which led Africans as early as 1920's

forget the nationalist struggle by the trade union movement led by the dynamic late Tom Mboya.

to demand a share of political power as the only sure method of removing those grievances. The nationalist movement in Kenya had, consequently from its inception, a strong economic basis. This was particularly the case among the Kikuyu, the largest tribe, who felt the impact of the Europeans most strongly and who suffered the greatest restrictions from the Europeans' presence. After the second world war, the Kikuyu sense of economic and social grievances led to the growth of the "Mau Mau" and the outbreak of violence in 1952.

The outbreak of violence led to a declaration of an emergency in Kenya from 1952 to 1959. During this period the chief characteristics of provincial administration as a control mechanism emerged. During this period the provincial administration was expanded both in number and in authority.²² This gave it a dominant position over the other government agencies. It is argued that this dominance manifested itself by the subordination of the police to the administration in matters concerning the maintenance of law and order. Provincial Commissioners and District Commissioners chaired the emergency committees which were responsible for law and order as well as existing security and intelligence committees.

The colonial government recognized that the final responsibility for good government and preservation of order clearly lay with the provincial and District Commissioners who represented the governor in their areas. These officers were entitled to give general directions concerning the preservation of peace and order. In all such matters the police force was subordinate to the government.²³ It was the administration, not the police, which was therefore ultimately responsible for law and order.

Although the government was able to contain and finally destroy the Kikuyu move in the forests, it was forced to concede to the need of constitutional reform. In this respect Mau Mau certainly hastened independence. But we can not forget the nationalist struggle by the trade union movement led by the dynamic late Tom Mboya.

In 1954 the Lyttelton Constitution provided for a "multi-racial" form of government in which Europeans, Asians and Africans were to have a significant voice. This brought modification but not destruction of the European leadership in Kenya. The fundamental constitutional change was finally conceded by the Sultan government at Lancaster House Conference of 1960 when the Secretary of State imposed the principle of majority and ultimate independence of Kenya as an African and not a "White man's" country. But full executive power passed into African hands on 12th December 1963.

On 12th December 1963 Kenya had moved from colonialism to independence. It has sought to shape its inherited institutions to the changing circumstances and ideas of that independence. Seeking to move away from the colonial past we are concerned with adopting a political system ^{responsive} to the needs of our independent society. But our new state has often, seemed never than in fact it is, for we have to work within an inherited framework which is more difficult to change than it might appear. This will be shown in the next chapter.

7. Ruth First : The Barrel of a Gun; Political Power in Africa and the Coup d'etat, Penguin 1970. p.27.
8. Martin Robert. "Legislation and socio-economic Development in Commonwealth Africa. "Discussion Paper Conference on Legislative in contemporary societies, Albany, N. Y. January 20-24, 1975).
9. Carson, J. B. The administration of Kenya colony and Protectorate; Oxford University Press 1949. p.75.
10. Emersion R. From Empire to Nation, Oxford University Press, London 1965. pp. 125-134.

Chapter 2 ard, Sir P. D. The Dual Mandate in British Tropical Africa, Edinburgh, Blackwood 1922 pp.137.

FOOT NOTES

1. Chai and Mc Auslan. Public Law and Political Change in Kenya. Oxford 1970 at p.3. *Kenya 1977 p.13.*
2. Mc Dermoth, British East Africa or I.B.E.A. 1975 p.180. (London, Chapman and Hall 1893) Appendix II articles 2-4, 7-9 and 22. The full text of the charter is in Mc Dermoth, I.B.E.A. Appendix II.
3. 1897 (E.A.P.G. Orders and regulations, Vol. 1 p.65 Sections 77-79). *56 KB at p.15.*
4. Regulation No. 2 of 1898 replaced by ^{Regulation ?} No. 3 of 1900. *576 at pp. 609-610. Quoted at p. 97 of the Masai case.*
5. E.A.O.I.C. 1902 (S.R. 661 sections 12(1) and 15(1)).
6. Seidman R. B. The Reception of English Law in colonial Africa Revised. 1969 E.A.L.R.147. *Asian Protest Movement in politics and Nationalism in colonial Kenya edited by*
7. Ruth First: The Barrel of a Gun; Political Power in Africa and the Coup d'etat, Penguin 1970. p.27.
8. Martin Robert. "Legislation and socio-economic Development in Commonwealth Africa. "Discussion Paper ; ? Conference on Legislative in contemporary societies, Albany, N. Y. January 20-24, 1975).
9. Carson, J. B. The administration of Kenya colony and Protectorate; Oxford University Press 1949. p.75. *Kenya E.A.P.H. 1970 p.23.*
10. Emersion R. From Empire to Nation, Oxford University Press, London 1965. pp. 125-134. *Sessional Paper No. 24 of*

11. Lugard, Sir F. D. The Dual Mandate in British Tropical Africa, Edinburgh, Blackwood 1922 ap.132.
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12. Kamau A.G.N. Kenya Provincial Administration . A study of the continuity of colonial institutions of the present law. LIB Dissertation 1977 p.13.
Colin Leys
13. Heineman, Undevelopment in Kenya, London 1975 p.180. ?
14. Ibid. theme of the government, like it was during the colonial time.
15. O'Leary and others V. AG of the EAP (1914) 5 EALR70.
the role of public law in the colonial era,
16. Nyali Ltd V. AG (1956) KB at p.15.
when looked at through the eyes of the colonized, provides one of the best examples there is of the operation of law as expounded by adherents of the "orders backed by threats" theory.
17. R. V. Earl of Crewe ex Parte Sekgome (1910) 2KB 576 at pp. 609-610. Quoted at p. 97 of the Masai case.
large". These phrases most adequately describe what is more usually called the reception of the English common law as a system of law.
18. Chanan Singh. The Republican Constitutions of Kenya in 14 ICLQ 878; 909. For the racial classification of people see also his later "Asian Protest Movement in politics and Nationalism in colonial Kenya" edited by B.A. Ogot EAPH 1972 pp.164-205. ?
19. Provincial Commissioner's Report.
PC/NZA/Z/7/1930.
and of the fact that there was little difference between the way they were both used to implement the policy with which to coerce the African. Law was a system of orders backed by threats. There was no practice of the knowledge that law has traditional associations with nations of justice which in turn were concerned with equality before the law, regularity and impartiality in the administration of the law, and the use of law to protect the citizen against oppression, public or private, economic or political.
20. PC/NZA/2/7/4 ✓
21. Ibid
22. Gertzel C. J. The Politics of Independent Kenya E.A.P.H. 1970 p.23.
Africans were to be coerced into performing their duties, to pay taxes, to occupy a particular place or to move about the country and thus the criminal law and courts to enforce.
23. Baring Government of Kenya Sessional Paper No. 24 of 1954.
administration for they under-pinned the whole approach of the colonial administration.

Chapter 3

Law and Public Order in Nyanza in Post Independent Kenya

This chapter is intended to examine the purpose of the present laws relating to the maintainance of public order in Nyanza Province in post-independent Kenya. It will also be shown in this chapter that maintainance of public order rather than human rights still remains the dominant theme of the government, like it was during the colonial time.

The role of public law in the colonial era, when looked at through the eyes of the colonized, provides one of the best examples there is of the operation of law as expounded by ^{the} adherents of the Austinian theory of law - "orders backed by threats", "the gunman situation whit large". These phrases most adequately describe what is more usually called the reception of the English common law. Law was second only to weapons of war in the establishment of colonial rule, and, for the early settlers and officials there was little difference between the two; they were both useful implements with which to coerce the African. Law was a system of orders backed by threats. There was no practice of the knowledge that law has traditional associations with notions of justice which in turn were concerned with equality before the law, regularity and impartiality in the administration of the law, and the use of law to protect the citizen against oppression, public or private, economic or political.

Africans were to be coerced into performing their required role in society whether it was to work, to pay taxes, to live in a particular place or to move about the country and thus the criminal law and courts to enforce it, were in many respects the key institutions in native administration for they under-pinned the whole approach of the colonial administration.

Kenya became independent with a most intricate constitution that was imposed by the British colonial office as a compromise between the various conflicting parties,

There was a system of inequality before the law. To introduce such a system into Kenya together with a whole "battery" of repressive and regulating laws on Africans was to introduce an unequal system of law from the start. It was a system which the ruling minority knew and could operate, and the ruled majority did not know and could not operate. Thus a rule which the former class of persons would regard as basic to the system and evidence of its essential fairness - for example the right to challenge the actions of government officials in open court - was virtually denied to the latter class either by the iniquitous doctrine of act of state, itself a rule of the common law, or by the ignorance of this class coupled with the fact that courts and access to them were often controlled by the very administrators whose conduct one wished to challenge.

It is a truism that until very late in the colonial era, Kenya had no constitution and political activity took place without regard to a constitutional framework. The ultimate arbiter of power was the colonial secretary in London, and he was not bound by legal rules, though political considerations at home and in Kenya might have had a limiting effect on his exercise of power. The orders in council and Royal Instructions which provided the legal backing for administration in Kenya were not concerned with limitations on power or even very often with the way power was to be exercised, rather they were concerned firstly with broad divisions of functions between executive, Legislative and Judiciary, always reserving final power for the executive in the person of the Governor, and secondly, with providing outlets for the ventilation of a small section of public opinion. The autocratic basis of colonial rule coupled with frequent changes of Governors and Foreign secretaries, with the consequent shifts in policy which that entailed, hindered the development of the idea of a government of laws, not of men.

Kenya became independent with a most intricate constitution that was imposed by the British colonial office as a compromise between the various conflicting parties,

mainly KANU (which stood for a strong central government) and KADU (a political party of minority groups who were for a federation with considerable limitations to the powers of the central government).

The politics of minorities, as embodied in the KADU party was their fear of domination by the Kikuyu - Luo alliance. To ally ^{fa} their fears the colonial office conceded to their demands for geographical distribution of power in a quasi-federal arrangement and entrenchment of basic human rights in a Bill of rights. The result was that at independence Kenya was saddled with eight governments (seven Regional Governments and the Central government). This came to be known as Majimboism. *Was this not the desire of the Europeanised minorities and the British Government?*

However, the system of "Majimbo" was unworkable. Hence the KANU government set to itself the task of dismembering the Regional assemblies to establish a unitary

Republic with a strong central government. This dismemberment was legal means (amendments to the Independence Constitution) and extra-legal (delaying the implementation of "Majimbo" generally). Majimboism finally came to an end with the voluntary dissolution of KADU by

its leaders and in November 1964 Kenya became a de facto one party state. On 12th December 1964 Kenya became a Republic with an executive president who was both Head of State and Head of Government.

The attainment of Independence on 12th December 1963 meant for Kenya, as for all newly independent states, the beginning of a new phase of consciously building a nation out of the different peoples encompassed within the borders of the new state. To build the nation Kenyan leaders had to unite the racial and tribal groupings, whose differences were intensified by the economic imbalances of a dual economy inherited from the past imbalances between subsistence and modern sectors and African and non-African.

The continuation of the legal system as it was during the colonial time has affected the people's view towards the new institutions and new rulers.

With the achievement of Independence and Republican status respectively, Kenya was to be guided by the supreme law of the land, namely the constitution. Section 3 of our constitution provides that the constitution should have the force of law throughout Kenya and subject to Sec. 47 of the constitution, if any law is inconsistent with the constitution, the constitution shall prevail and the other law shall to the extent of inconsistency be void. Our constitution is meant to be a check upon power, a limitation upon the arbitrariness of discretion. But the politicians' orientation is authoritarian. They tend to be impatient and want to break away from all constitutional restraints, and if the constitution proves an obstacle, then it must be by-passed or made to bend their desires. The result as we shall see is a systematic perversion of institutions and processes of government coupled with a spate of amendments to the constitution where it is thought necessary to maintain a facade of legality. In Kenya the politicians have perpetuated their rule with the result that society has been divided into two groups: the rulers and the ruled, a division that has created a continuous struggle between the two classes of people.

At independence it was thought by the populace that the government could attempt to improve the daily life of the peasants and workers. An important task for the new government was to create confidence in and respect for the institutions of government as such so that they become legitimate in the eyes of the populace. The role of law was crucial for it is usually the means whereby these institutions are created, used and altered, so that both rulers and ruled will come to associate law and its process with the development or otherwise of legitimacy.¹ The institutions of our independent government were new but our legal system, that is, the laws and the way they have been used were not new. The continuation of the legal system as it was during the colonial time has affected the people's view towards the new institutions and new rulers.

is used by the executive and its provincial administration which is within the limits of specified areas the principal executive agent of the government, responsible for the peace

Whereas confidence in the institutions and mode of government was generated in the first two and half years of independence, a turning point seems to have occurred in mid 1966. From that time the government became increasingly careless of the need of legitimacy, and the dictates of constitutionalism, in the alterations of the constitution and the administration of the laws relating to government and administration and there was a corresponding loss of confidence in, and increase of cynicism about, the above matters amongst some important sections of the ruled.

At independence the aim of the people of Nyanza as those of other citizens was to cultivate a social and political order which was consistent with their needs and conditions. It was therefore necessary to formulate a legal system to control and contain the power of the power holders. The constitution was at hand for the purpose even though soon after independence it suffered several amendments to suit the whims of those in power. In order to protect their interests and those of their former colonial masters the government under the leadership of the late President Kenyatta used the law to this purpose. It was a government that was founded on fear and not respect. A useful instrument that the government used to control the people of Nyanza and Kenya in general was the law of public order. Thus the emphasis was the maintenance of public order for the protection of the interests of the ruling class and not on the respect of human rights of the ruled. It is appropriate now to turn to the laws that have been used for the maintenance of public order in Nyanza and Kenya at large.

THE PUBLIC ORDER ACT (CAP 56)

This is one of the most effective colonial legislation that independent Kenya has retained for purposes of the maintenance of public order. The Act is used by the executive and its provincial administration which is within the limits of specified areas the principal executive agent of the government, responsible for the peace and good conduct of all public business.

The P.C. must supervise not only the work of his own administrative staff but also the activity of all departmental officers in the province.² Under this Act the police and other administrative officers below the P.C. are also empowered to act to maintain public order.

The creation of an incipient African middle class by the Kenyatta government meant that the colonial economic infrastructure and superstructure was in effect reconstituted and as a result the role of the provincial administration acquired the same roles as its colonial counterpart. This was brought about by the strengthening of the powers of the executive presidency. Thus by 1968 the President's powers as the head ^{like} of the colonial governor, ~~which powers~~ were exercised directly through the provincial administration. And since these powers were discriminating in the colonial era, it can be asserted that in independent Kenya they are discriminatory, not on the basis of colour, but on the basis of property ownership and in sustaining the survival complex of the government. In this order of things the role of the provincial administration has been increasingly that of control arising from insecurity emerging from the socio-economic arrangements of the Kenya society.

Maintainance of "law and order" or "political stability" are noble ideals. "Law and order" and "political stability" however are high prices to pay if their maintainance entails the perpetuation of savage regimes like the one existing in South Africa. Law then is significant as an instrument of exploitation and oppression.

During the colonial era in Kenya law existed to serve the interests of a minority class. Colonial evolution as a stage in the process of imperialism gave way to neo-colonialism and instead of one imperial nation exercising exclusive rights of exploitation, exploitation became multi-nationalised and the local white settlers together with the so called "labour aristocracy" became agents and tools for exploitation. Throughout this period public law and especially the law of public order becomes a very effective means of coercion at the expense of individual human rights.

The public order Act (Cap 56) is a child of the colonial legislation that was passed in 1950 to serve the purpose of oppressing and controlling the African during the emergency period declared in Kenya due to the nationalist struggle.

During the second reading of the Bill the then colonial Attorney General said "The provisions of this Bill follow provisions of laws which have been familiar law in England since 1st Jan 1937 "....."³

First, the Bill made it an offence to be a member of, or take part in the control or management of an association organised, trained or equipped to usurp the functions of the police or of the armed forces of the crown, or organized, trained or equipped either for the display of physical force in promoting any political object or in such a manner as to arouse reasonable apprehension that it is organised and either trained or equipped for the purpose. Secondly, the Bill made it an offence to carry offensive weapons at public meetings.

Thirdly, the Bill enabled the Governor in Council to prohibit the wearing of uniforms in connection with political objects.

The Attorney General then proceeded to say that the provisions in the Act were familiar law in England and had been widely adopted in other colonial territories. "They are put forward for the public's benefit and I hope that they will be generally recognized." "He concluded.

The then acting solicitor general was of the view that the bill prohibited even meetings in "private premises". That people should not meet anywhere at all except with permission. But to this the Attorney General replied that to say so was to misapprehend the scope of the Bill. The contents of the Bill did not prohibit meetings on private premises. The Attorney General stated.

During the Committee stage on the Bill a Mr. Patel moved an amendment to the effect that to give an ordinary "Askari" who is near a meeting power to arrest anyone, because he thinks someone at the meeting has used threatening and

The purpose of the Act is disguised by its opening and insulting words was in his opinion giving power to a person who will not be able to exercise his discretion properly. He therefore suggested that such powers should not be in the hands of a police officer, but a police officer not below the rank of sub-inspector. The amendment was accepted but what was overlooked here is the fact that even a sub-inspector started his police duties as a mere "Askari" and was promoted ~~on~~ on the basis of the number of people he arrested. Hence giving him such powers, was not proper for they were vulnerable to abuse.

The Bill finally became law and started its commencement on 13th June 1950. The main purpose of this law at the time it was passed was not to maintain public order for the benefit of the Africans. It was a weapon with which the colonial government armed itself to stifle the nationalist movement. This was to perpetuate the oppressive colonialist rule and not to benefit the Africans at all. After all, as it has already been stated, in the colonial times the maintenance of law and order meant the pacification of the nationalists by all means available. These included physical harassment, unlawful arrests, false imprisonment, detention and indiscriminate killing of "terrorists".

Why then has the Public Order Act been retained in Independent Kenya? Has its purpose changed? With the attainment of independence law and order has come to mean the maintenance of political stability. The maintenance of this stability entails the wiping out of what politicians refer to as "agitators, disgruntled elements and other malcontents". Hence the retention of this law is to serve the interest of the rulers as opposed to those of the peasants and workers.

The provisions of the Act when applied as they have been ~~the case~~ in many places in Nyanza lead to the denial of people's fundamental rights of freedom of expression, association and movement.

in Sec. 3(1) that a police officer in charge of a province or division may if it appears to him to be necessary or expedient in the interests of public order ~~section~~, in such a manner as he may think fit.

The purpose of the Act is disguised by its opening statement that it is an Act of parliament to make provision for the maintenance of public order and for purposes connected therewith.

Sec. 2⁴, a definition section, defines "meeting" as meaning any gathering or assembly of persons convened or held for any purposes which include any political purpose but does not include any gathering or assembly convened and held exclusively for social, cultural, charitable, recreational, religious, professional, commercial or industrial purposes to and for the promotion of which any political purpose pursued by or at such gathering or assembly is directly related and limited.

"Offensive weapon" in this Act means any article made or adopted for use for causing injury to the person, or intended by the person having it in his possession or under his control for such use.

"Public gathering" is also defined as a public meeting, a public procession, and any other meeting, gathering or concourse of ten or more persons in a public place and "public meeting" here is given the meaning of any meeting held or to be held in a public place and any meeting which the public or any section of the public or more than fifty persons are or are to be permitted to attend whether on payment or otherwise.

"Public place" is defined as any place to which for the time being the public or any section of the public are entitled or permitted to have access whether on payment or otherwise and in relation to any meeting to be held in future includes any place which will, on the occasion and for the purpose of such meeting as a public place.

Part III of the Act specifically deals with Public Gatherings. Here Sec. 5 provides for the control of public gatherings.

It is provided in Sec. 5(1) that a police officer in charge of a province or division may if it appears to him to be necessary or expedient in the interests of public order ~~so~~^{so} ~~to~~^{todo}, in such a manner as he may think fit.

a) control and direct the extent to which music may be played or human speech or any other sound may be amplified, broadcast, relayed or otherwise reproduced by artificial means, in public places within the area of his responsibility.

b) control and direct the conduct of all public gatherings within the area of his responsibility

c) for any of the purposes aforesaid give or issue such orders as he may consider necessary or expedient.

Sec. 5(2) a public meeting or public procession must be licenced and shall take place in accordance with the terms and conditions of the licence issued under this section and no such meetings or procession shall be advertised or otherwise publicized unless such a licence therefor has been issued. Sec. 5(3) application for licence is to be made to the District Commissioner who should be satisfied that the meeting or procession is not likely to prejudice the maintainance of public order or to be used for any unlawful or immoral purpose before issuing the licence. The District Commissioner also defines the conditions upon which the meeting or procession may take place.

Under this section the District Commissioner may refuse to grant licence if

- 1) The applicant has or in the opinion of the District Commissioner has recently contravened the provisions of the Act or any other written law or any condition of a licence issued under this section or such written law or
- 2) The meeting or procession has been advertised or otherwise publicized in contravention of subsection (2) of this section.

sub section 4 of Sec. 5 empowers the District Commissioner to amend or cancel the licence at any time if it appears to him to be necessary or expedient in the interests of public order or for preventing the carrying out of any unlawful or immoral purpose.

Notice of ammendment or cancellation shall be given to the licencee or if he is not available to any person concerned with the organization of the meeting or failing any such person, by publication in such a manner, or by posting in such place or places, as the District Commissioner may think fit.

Sec. 5(5) the licencee is required in law to be present in the meeting from its start to the end.

Sec. 5(6) Gives powers to any administrative officer or police officer to stop

a) unlicensed meetings or a meeting that has contravened conditions of the licence.

b) a meeting whether licensed or not if in his opinion the meeting is likely to cause a breach of the peace.

Sec. 5 (7 and 8) empowers an administrative officer or police officer of or above rank of Assistant Inspector to prevent the holding of a public meeting if it is not licensed. He may cause access to such a place of the meeting to be barred. He is also allowed to use such ~~force~~ ^{force} as may be necessary to prevent any person from entering or remaining in any public place to which access has been closed for him under this section.

Sub section 9 provides that any dissatisfied licencee or applicant for licence may appeal to the minister i.e. minister for the time being responsible for the administration. Sec. 5(ii) defines unlawful assembly.

Part VI of the ACT stipulates further safeguards for public order. Under this part possession of offensive weapon in a public place is prohibited.⁵

The public order Act in its endeavour to legislate for the maintenance of public order mainly affects people's freedoms of assembly and associations. Since independence changed the colour of some of the faces in the colonialist enclave, but did not of itself change either the ~~structure~~ structure of the economy or the basic character of the legal system; maintenance of public order is done in disregard to the peoples fundamental rights much like in the colonial period.

The public order Act when taken together with the Police Act⁶ shows the emphasis the government puts in the maintenance of public order. The latter Act provides that the force "shall consist of such maximum number of officers as shall be determined by the President and its functions are the maintenance of law and order, the preservation of peace and the protection of life and property, the prevention and detection of crime, the apprehension of offenders and the enforcement of all laws and regulations with which it is charged."

Under both the Public Order Act, the Police Act, Police powers of arrest are extensive and since they are based on a policeman's "reasonable suspicions" they are subject to abuse.

Sholnick H. J. has written :⁷ "The police in democratic society are required to maintain order and to do so under the rule of law. As functionaries charged with maintaining order they are part of the bureaucracy".

Noting that the ideology of democratic bureaucracy emphasises initiative rather than disciplined adherence to rules and regulations, Sholnick concludes that it is this tension between "the operational consequences of ideas of order, efficacy and initiative on the one hand, and legality on the other; that constitute the principle problem of police as a democratic legal organisation." He suggests that the common juxtaposition of "law and order is an oversimplification. Law is not merely an instrument of order, but may frequently be its adversary."

Sholnick further notes: "There are communities that appear disorderly to some but which nevertheless maintain a substantial degree of legality. The contrary may also be found : a situation where order is well maintained, but where the policy and practice of legality is not evident. The totalitarian social system, whether in a nation or an institution is a situation of order. Without the rule of law such a situation is probably best illustrated by martial rule, where military authority may claim and exercise the power of amnesty and detention without warrant."

remedy?

If, in addition, the unit of habeas corpus, the right to inquire into these acts, is suspended, as it typically is under martial rule, the executive can exercise arbitrary powers. Such a system of social control is efficient, but does not conform to generally held notions of rule of law.

For the rule of law implies the maintainance of the principle of legality, nulla poena sine lege which imposes certain restraints upon the definition of criminal conduct."

Order under law does not mean the achievement of social control through threat or coercion. It implies the achievement of regularised social activity within a society of equal opportunities and equality before the law. Applied in any other manner law would cease to be a means of regularised social activity and would become an instrument of oppression. In our context the constitutional guarantees of liberty, freedom of movement, and freedom of speech, become meaningless under the application of the law for monitoring public order in disregard of human rights.

The freedom of assembly and association is recognised by our constitution as a fundamental right of the individual. This freedom is given protection under section 80(i) of our constitution. It is provided that except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.

However, sub section (2) provides exceptions that render this constitutional freedom meaningless. It provides: "nothing done under the authority of any law shall be held to be inconsistent with the constitution. For example nothing that is required in the interests of public order will be inconsistent with the constitution.

This exception gives validity to anything that is reasonably done under the public order act for the maintainance of order. But the difficulty here is that how should reasonably be defined. As it will be seen below, it appears that anything done to suit those in power will be deemed to be reasonable. This has so happened in Nyanza as far as the peoples freedom of assembly and association is concerned.

There is more than ample evidence to show that those in power have used the law unfairly to deny the opposition parties the freedom of assembly and association. This has happened since independence, when for a short time we had KADU as an opposition party. The government used the Public Order Act to ban KADU's political meetings. This was not for the maintainance of public order but it was calculated at stiffling KADU as an opposition party.

Shikuku, who then belonged to KADU was to hold a meeting on 26th July 1964 at Kisumu. But this meeting was cancelled at 2.30 p.m. on 25th July 1964. Raising the matter in Parliament Mr. arap Moi who then belonged to KADU on behalf of Mr. Shikuku asked the Minister of State in the Prime Minister's Office to show cause why the licence for the meeting was cancelled. In reply it was said that the meeting was cancelled in the interests of security of the Hon. member who asked the question and his colleagues. The Prime Minister of Kenya was coming from Cairo and hence the meeting was cancelled. This was a very flimsy reason given for the cancellation of the meeting. It is no good to say that the returning Prime Minister was to hold a meeting at Kamkunji in Nairobi so the Kisumu meeting was cancelled to enable the people to attend the Prime Minister's meeting bearing in mind the distant between Nairobi and Kisumu the people would not have come to Nairobi to listen to the Prime Minister. If the people came to Nairobi then it seems that KADU meeting would not have taken place which would have been better than a cancellation.

There was no iota of evidence that the members who were going to address the meeting at Kisumu were in a security danger. If this was so then the licence should not have been issued. It is probably because the government feared criticism by the opposition that the meeting was cancelled. By the cancellation of such a meeting, the opposition was not being given a fair chance by the government in that the Voice of the opposition was not being heard throughout the country freely. Even though the superintendent of police had assessed the situation as secure, he had been instructed from Nairobi to withdraw the licence. In refusing the opposition to hold meetings the government was acting undemocratically.

In his fiery speech Mr. Shikuku reminded the government that the conservative party of Britain was in power for 13 years but it is no longer today. So shall be the position for this government. He begged for the freedom of speech and freedom of association in the country which we have long fought for and we shall never give up easily. It is clear that independence will be meaningless if the people are denied their freedoms of assembly and association just the way it was during the colonial time.⁹

KADU times came to pass at its dissolution. But when KPU came into existence in 1966 as an opposition party it had also to meet a lot of frustrations from the government as far as the holding of political meetings was concerned.

The banning of public meetings particularly to the KPU was very unwarranted. There were two legitimate parties at the time with different views. Both should have been given fair and equal opportunities to hold public meetings. When the House goes into recess, a minister usually says that the members of Parliament should actually try to meet their constituents and try to tell them what the government development projects are. However, it was difficult for the KPU members of parliament to do this for it was denied the right to hold public meetings in their constituencies.¹⁰

It was alleged by the KANU government that KPU had no supporters. But it should be understood that whereas KANU officials were allowed to hold meetings everywhere in their campaign against KPU, KPU was denied the right to hold meetings. This was a mockery of democracy which guarantees freedom of assembly and association.

In 1966 for some time public meetings were banned in Nyanza. This was to frustrate KPU as an opposition party.

People were even denied the right of social assemblies like funeral ceremonies, because the government thought them to be political.

In connection with this Mr. Odinga had this to say:¹⁰ was charged with holding an unlawful meeting or, alternatively, taking part in such a meeting.

"I want to draw the attention of this House and the public to the fact that the principles of election and those of democracy must be observed, and each individual must be given the chance to exercise his own selection according to his own wishes. If this is respected and done in Kenya and as soon as everybody particularly all leaders understand this, you will find all will be well. Otherwise there will be instability and the country will be thrown into chaos".

In effect what Mr. Odinga was saying is that the democratic rights of the individual to assemble and associate should be respected and then the individual from listening to both opposition and ruling party will exercise his right of election. Otherwise the continuing frustration of the opposition may lead to chaos in the country.

The banning of political meetings in Nyanza in 1966 was lifted after the tabling of a motion in Parliament. In this motion it was agreed by the opposition that there was more freedom of assembly and association during the colonial time than there was during independence. *where, which motion?*

The case of Kaggia V. Rep. 1968¹² illustrates the operation of public order act in practice as far ^{as} the right of assembly and association is concerned. Kaggia a Vice President of KPU was invited to attend a ceremony for the opening of an office for the sub-branch of the party in South Nyanza. When he arrived there he went to a shop which also ~~seemed~~ ^{served} as the office of the sub-branch and met the members of the local committee.

Though there was great conflict in the evidence, it was accepted by the court that a large number of people crowded inside and outside the shop, where Kaggia made a speech of a "strongly political flavour." All this time, including the journey to the sub-branch, he was followed by the police with whom he had been chatting previously. After he had spoken for about fifteen minutes, the senior police officer who was present asked him to stop, whereupon Kaggia

"promptly complied" and the people were asked to leave. The meeting dispersed in an orderly manner. On these facts, Kaggia was charged with holding an unlawful meeting or, alternatively, taking part in such a meeting.

The lower court convicted him on the first charge and sentenced him to one year's imprisonment.

On appeal, against both sentence and conviction, it was argued that the meeting was not of a political nature, but merely a meeting of party officials, that there were not fifty persons present to constitute it a "public meeting" and that the accused had not held or convened it. The High Court found it was a political meeting for the purposes of the act since the content of the speech was so heavily political and that there were also present persons other than officials, whose actual number was immaterial. The court was also of the opinion that Kaggia had held the meeting, it is true that the occasion of the meeting was an invitation to him but the meeting would not have been held without his acceptance and when he did arrive it was he and his party who took charge of the proceedings. The court, however, reduced the sentence, which it found excessive, to six months and was impressed by the fact that there was no premeditation and the meeting was orderly and dispersed promptly after the request of the police.

The arguments for the appellant were confined to the interpretation and application of Part III of the Public Order Act. No arguments were offered as to its constitutionality, perhaps because no application had been made for a licence to hold the meeting and hence there was no refusal. It would, however, have still been possible to base the defence on the constitutionality of the section of the Act under which the charge was preferred. Any form of prior censorship or approval has an inherent tendency towards denial of freedoms and rights, and it may be questioned whether the requirements in the act do not infringe these rights under the constitution.

The maintenance of public order was mainly for stiffling KPU as an opposition party. Kenyatta alleged that KPU was the greatest enemy of Kenya because its officials were being bribed and used as stooges by foreign countries.

When the Bill for this law was introduced in Parliament it was stated by the Attorney General that it was to amend the constitution and provide the

KPU was finally banned in 1969 after riots which broke out in Kisumu, a KPU stronghold, where Kenyatta was officially opening a USSR aided hospital though it had been in operation for the past year. Demonstrations against Kenyatta stemmed from the bitterness following former planning minister Tom Mboya's assassination three months earlier. This had caused Luo-Kikuyu antagonism.

The Kisumu demonstration was the country's first major post-independence public outcry against the government. Not accustomed to such protest, Kenyatta ordered his GSU troops to fire which resulted in at least eleven deaths and many hundreds injured (according to official estimates). Two days later, KPU was banned and Odinga and all KPU members of parliament were detained without trial "for security reasons".

It must be borne in mind that at this time when Kenyatta went to Kisumu, there had been a campaign by the government against KPU. The general elections were also near and Kenyatta could not imagine contesting against an opposition leader. The hospital had operated for a year. It is possible to say that Kenyatta mainly went to Kisumu expecting or intending to create trouble so that he could get an opportunity to ban KPU. After all Kenyatta openly stated that if any KPU supporters demonstrated against him, he could show them that Kenya had a government. They would suffer as the forces of law and order would deal with them.¹³

After the demonstration Kisumu was declared to be on dusk to dawn curfew orders under Part IV of the Public Order Act.

Commenting on the dusk to dawn curfew in Kisumu Odinga said that he did not understand its need. However, Kenyatta had achieved his purpose of banning KPU and controlling the Kisumu people by the application of the law.

Odinga and his other KPU members of Parliament were detained under detention without trial powers vested by Parliament in the President under the Preservation of Public Security Act (Cap 57).¹⁴

When the Bill for this law was introduced in Parliament it was stated by the Attorney General that it was to amend the constitution and provide the

President with extensive powers covering preventive detention. Censorship, and a general tightening of security was passed by the House of Representatives on June 2nd 1966. Several members opposed the request by the Attorney General, that the Bill should be hurried through in a day asking for time to study the sweeping provisions of the Bill. The Attorney General explained that the government was not seeking powers to oppress people and impose a rule of tyranny. The Bill sought to cope with the security of the state if it were menaced in any of four ways - war, internal disorder, the breakdown of the economic system and natural disasters. He stressed that the powers which the Bill sought to give the President would in every case have to be approved within 28 days by Parliament, and if not, they would be annulled. This was and is still a good intention.

But from the way the Act has been applied, it becomes clear that the law has been abused. The Act was used by Kenyatta indiscriminately against his political opponents. The detention of Odinga and KPU members of Parliament, and the other detentions of Seroney, Shikuku, Anyona and Professor Ngugi to mention only a few, go ^{to} show that the late President used the Act against his political opponents even where the security of the state was not at stake. Thus the government sought and got its powers to oppress people and impose a rule of tyranny. It amended the Kenya constitution arbitrarily, to suit the whims of those in power.

Although emergency powers such as those under which the detentions were ordered may be necessary to preserve the security of the state, the powers themselves should be used only in cases of extreme emergency. And the way the the Act has been used in the cases stated above, leaves a lot of dissatisfaction that the cases had reached such extremity.

The Public Order Act restricts not only the freedom of association but also the freedom of expression and communication. The statute that restricts this most is the Books and News-papers Act which regulates the printing of books and newspapers.¹⁵ While few of its provisions can be said to impose a serious restraint on publication there is one provision which has been criticized as tending to restrict the right to publish^e - "no person can print or publish a

newspaper unless he has executed a bond in the sum of Shs. 10,000/- with one or more sureties as required and approved by the Registrar". The bond is required as security for any fine imposed on the printer or publisher for contravention of any law or for damages for libel. The sum of money required is quite substantial in Kenya's conditions and its requirement acts as a discouragement to individuals or small groups wishing to start newspapers.

The real instrument for control, however, is not the Books and Newspapers Act, but certain provisions in the Penal Code. Sec.57 of the code provides that any person who prints, publishes, sells, offers for sale, distributes or reproduces any seditious publications, or imports such publication unless he has no reason to believe that it is seditious, is guilty of an offence. It is also an offence to have a seditious publication in ones possession. These offences are punishable by imprisonment for up to seven years, unless a person proves that he did not know that it was seditious when it came into his possession, and that he handed it to a police or administrative officer as soon as he realized its nature. These are serious penalties under this Act and possibly in ~~ex~~cess even of the restrictions of the freedom allowed by the constitution.

Section 52 of the Penal Code enables a minister if he considers it necessary in the interests of public order or security to prohibit the importation of any publication. This minister's power is arguably excessive and unconstitutional in that it inhibits the right of Publication.

Even though the provisions for sedition were enacted after independence, their constitutionality may be questioned. The freedom of expression and communication is seriously undermined by them, the restraints are imposed for many of the purposes not permitted under the exceptions in the constitution to the freedom; in particular they do not all have a relation to public order. "sedition" is an offence notoriously susceptible of abuse by those in authority. As the counsel in the Nigerian case of Obi V. D. P. P. (1961) All N. L. R. 187, said:¹⁶

"Any law which punishes a person for making a statement which brings a Government into discredit or ridicule or creates disaffection against the government irrespective of whether the statement is true or false and irrespective of any repercussions on public order or security is not a law which is reasonably justifiable in a democratic society".¹⁷

Other laws that are used for maintenance of public order are the Chief's authority Act (Cap. 128) and the Public Health Act (Cap 242 42). Under both statutes orders can be made for the maintenance of public order. It is arguable, that most of the chiefs are not well educated and thus are likely to misunderstand and abuse the law. The public Health Act (Cap. 242) has been used in Nyanza to deny the peoples right of association, both political and social e.g. funeral ceremonies. This it has been maintained was for preventing the spread of such diseases as cholera. But the way the government has applied the law, raises a lot of doubt. It might as well have been for the purpose of stifling the government's opponents in the area.

The result of all these provisions is that it is difficult for the opposition or even sympathetic critics to express themselves freely, and communicate their views to the public. The provisions are hardly necessary for public security and seem to stem from a fear that too much free speech might lead to subversion or instability. No one disputes that there must be some restrictions on freedom of expression in every state or that more restrictions may be permissible in a state such as Kenya which can so easily be thrown into thermoil^{by} over - zealous political activity on the part of the opposition and indeed the Bill of Rights attempts to allow that, but the laws discussed above go beyond that and turn a right guaranteed and defined in the constitution into a privilege, the extent and existence of which is wholly dependent upon the Government. Both the letter and spirit of the constitution are ignored by the government's over - zelousness to maintain public order in disregard of human rights.

Chapter 3

FOOT NOTES

13. The Standard Newspaper 26th October 1969 p.4.
1. Chai Y. P. and Mc Auslan J. P. W. B. : Public Law and Political Change in Kenya, Nairobi. Cap. 37. Oxford U.P. 1970 at p. 506.
14. The Press and Newspapers Act Cap. III.
2. Government Office Manual Nairobi : Government Printer 1968 Paragraph 189.
16. Chai V. D. P. (1961) All K. L. R. 187 at 191.
17. Ibid.
3. Legislative Council Debates Official Report. 1950 Vol. XXXVI p. 192.
4. Public Order Act Cap. 56 Section 2.
5. Ibid ~~Sub~~ section II
6. The Police Act Cap. 84.
7. Sholnick Jerome H. - Justice Without Trial. Law Enforcement in Democratic society. New York Willey 1961 at p.7.
8. Kenya House of Representatives Official Report Volume III Part III (21 October 1964) Column 3739-3750.
9. National Assembly Official Report Volume 14 1968 Column 154.
10. Ibid Column 284.
11. National Assembly Official Report Volume 10 Part I 1966 column 580.
12. Kaggia V. The Republic (1969) E. A. 451.

Chapter 4

FUNDAMENTAL RIGHTS, THE RULE OF LAW AND THE MAINTENANCE

13. The Standard Newspaper 26th October 1969 p.4.
14. Preservation of Public Security Act Cap. 57. question as to what extent public order is maintained within the
15. The Book and Newspapers Act Cap. III. the Rule of Law, we shall look into whether the people's constitutional rights
16. Obi V. D. P. P. (1961) All N. L. R. 187 at 191. of public order, in addressing our minds to the concept of
17. Ibid. now we shall consider the question as to whether the administrative machinery of maintaining public order is answerable to the people it is supposed to serve. Lastly
for the time being, this chapter will also deal with the courts' success or failure in upholding the constitutional rights of the individual vis-a-vis the executive interest of maintaining public order. It will be necessary to look into court decisions that are related to the area of public order.

The fundamental rights of the individual we discussed in the first chapter are incorporated in our Bill of Rights - chapter 4 of our constitution. That these are embodied in a formal written constitution according to whose provisions our government is conducted is not necessarily conclusive evidence that the government acts constitutionally. The determining factor is the practice of constitutionalism which recognises the necessity for government but insists upon a limitation being placed upon its powers. It connotes in essence therefore a "limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law".

"Constitutionalism becomes a living reality to the extent that there are rules that curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not encroach there is significant room for the enjoyment of individual liberty. To be specific I am very willing to concede that constitutionalism is

Chapter 4

FUNDAMENTAL RIGHTS, THE RULE OF LAW AND THE MAINTAINANCE OF PUBLIC ORDER IN NYANZA PROVINCE

This chapter will address itself to the question as to what extent public order is maintained within the constitutional rights of the individual and the Rule of Law. We shall look into whether the peoples constitutional rights are respected or disregarded just for the mere interest of public order. In addressing our minds to the concept of the rule of law we shall answer the question as to whether the administrative machinery of maintaining public order is answerable to the people it is supposed to serve. Lastly but not least, this chapter will also deal with the courts success or failure ⁱⁿ up-holding the constitutional rights of the individual vis-a-vis the executive interest of maintaining public order. It will be necessary to look into court decisions that are related to the area of public order.

The fundamental rights of the individual we discussed in the first chapter are incorporated in our Bill of Rights - chapter V of our constitution. That these are embodied in a formal written constitution according to whose provisions our government is conducted is not necessarily conclusive evidence that the government acts constitutionally. The determining factor is the practice of constitutionalism which recognises the necessity for government but insists upon a limitation being placed upon its powers. It connotes in essence therefore a "limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law".

"Constitutionalism becomes a living reality to the extent that there are rules that curb the arbitrariness of discretion and are in fact observed by the wilders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty. To be specific I am very willing to concede that constitutionalism is practised in a country where the government is genuinely

accountable to an entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organise and to campaign in between as well as immediately before elections with a view of presenting themselves as an alternative government and where there are effective legal guarantees of basic civil liberties enforced by an independent judiciary, and I am not easily persuaded to identify constitutionalism in a country where any of these conditions is lacking".² The quotation from de Smith, a leading scholar in constitutionology, emphasises the point that having a written constitution is not the criteria of judging a government's constitutionality but the practice of the concept of constitutionalism.

This is a western outlook though!

The concepts of constitutionalism and the Rule of Law can not be divorced from each other. They are inseparable. The Rule of Law sprung ".....from the rights of the individual developed through history in the age-old struggle of mankind for freedom. "This is what the 1955 Athens Jurist Conference declared the Rule of Law to the 3rd World where this age-old struggle for freedom had not really began. A later congress held at Delhi in 1959 revealed a more concerted effort by the jurists to give a vivid and practical meaning to the Rule of Law. In this conference the jurists gave a proper definition of the Rule of Law which recognised the fact that the application of the Rule of Law cannot be universal but that it varies from place to place. They concluded:

"..... The Rule of Law is a dynamic concept which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised."

The definition of the Rule of Law given at the Delhi conference introduced a positive element; whereas the conference of Athens stressed that the Rule of Law should be used to protect the rights of the individual, the conference at Delhi realised that this alone was not enough. The Rule

of Law could only be realised if it was employed not only to safeguard these rights but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity are fully realised.

As it can be seen the Rule of Law has throughout its evolution had a practical relation and involvement in the protection of individual freedom and has constantly sought to uphold fundamental rights and human dignity. In seeking to safeguard these freedoms and rights the Rule of Law has the following objectives; namely that in order to guarantee personal security there should be no arbitrary legislation to restrict or suppress any fundamental rights. Secondly, the Rule of Law tries to guarantee civil rights by requiring that everyone should have the right to freedom of opinion and expression. This implies the right not to be molested or presented for holding opinions and not to be ~~free~~^{forced} to express an opinion contrary to one's belief. Furthermore the Rule of Law seeks to guarantee the privacy of a person's life, secrecy of mails, freedom of religion, the right of education and the freedom of assembly and peaceful association. The free primary education to standard six in Kenya is to some extent a recognition of the right of education. The resolutions of the Jurists' conference at Lagos reiterated the importance and meaning of the Rule of Law as outlined by the Delhi conference and also reaffirmed the act of Athens.

For the concepts of the Rule of Law and constitutionalism to be realised in any given society the government should adhere to the principle of democratic representation in the Legislature. The following are considered to be essential for a democratic government : discussion, equality and freedom - the last being implied by the other two.³ It is not easy to define the term democracy and there is no settled universal definition of the term. However, its essence should be understood. President Nyerere in his contribution to African democracy states that, "Those who doubt the Africans ability to establish a democratic society can not seriously be doubting the African ability to "discuss". That is one thing which is as African as the tropical sun. Neither can they doubt the African sense of equality for aristocracy is something foreign to Africa."⁴

The traditional African society, whether with a chief or not, was a society of equals and it conducted its business through discussion. The elders talk till they agree.

"They talk till they agree" gives the very essence of traditional African democracy. It is rather a clumsy way of conducting affairs, especially in a world as impatient for results as this of the 20th century, but discussion is one essential factor of any democracy; and the African is expert at it. Democracy is a "government by discussion" and it is a discussion by equals and since all people are equal, it is a discussion by all people. We should not live in a world that excludes masses of human beings from its idea of "equality".

If a government is freely elected by the people, there can be nothing undemocratic about it simply because nearly all the people rather than merely a section of them have chosen to vote it into power. *There can be a parliamentary dictatorship.*

The two essentials for "representative" democracy are the freedom of the individual, and the regular opportunity for him to join with his fellows in replacing, or reinstating, the government of his country by means of the ballot-box and without recourse to assassination. An organised opposition is not an essential element, although a society which has no room and no time for the harmless eccentric can hardly be called democratic. Where you have those two, and the affairs of the country are conducted by free discussion, you have democracy. An organised opposition may arise, or it may not, but whether it does or it does not depends entirely upon the choice of the people themselves and makes little difference to free discussion and equality in freedom.

With the above definitions of the concepts of constitutionalism, the Rule of Law and democracy, we can authoritatively state that they have not been upheld in Independent Kenya during the Kenyatta regime. The application of the Public Order Act and the Preservation of Public Security Act, inter alia have denied the people their fundamental rights of association, expression and equality before the law all of which are protected by the three concepts. The unconstitutional ban of KPU and subsequent

detention

detention of its members, the ~~names~~ of Seroney, Shikuku, Anyona and Ngugi go to show how democracy and the Rule of Law were defiled by the Kenyatta government. The parliamentary elections that we had under Kenyatta left a lot to be desired as far as democracy is concerned. Those who were ~~opposed~~ to the government found it difficult to contest. The dubious means of declaring some candidates as being elected unopposed was as unconstitutional as it was undemocratic.

The greatest malady of the politics of the Kenyatta government was his unwillingness to relinquish power. His political office was a life appointment, resulting in a stratification of society between the under privileged masses on the one hand and ~~a permanent class of rulers on the one hand~~ and a permanent class of rulers on the other. To perpetuate their rule the politicians prevented the political and electoral systems and stifled any kind of opposition. To the late Kenyatta, to be a president meant to undergo a complete personality transformation.

Under the late Kenyatta's regime the judiciary was not completely independent in its functions. The courts mostly manned by the ~~expatriate man power~~ continued to play the role of validating ~~executive~~ ^e executive acts just as they used to do during the colonial time. During the colonial time the courts sided with the colonial government to perpetuate the oppression of the Africans. This can be illustrated by the case of The A.G. V. Kathenge Njoroge (1961) EA 348⁵. In this case the accused was charged with contravening the provisions of a curfew order issued under The Public Order Ordinance 1950, Sec.10(1), as amended by Public Order (amendment) Ordinance, 1960. The order provided that in the area specified and between 7 p.m. and 6 a.m. "every African shall" except in accordance with the terms of a written permit granted by an authorised officer "remain indoors in the premises in which he normally resides". Eventhough this order was racially discriminative and hence unconstitutional, the accused was convicted. This was during the emergency era, and the courts lost their independnece and purpose of protecting human rights and instead sided with the colonial government to oppress the Africans.

Even in ~~post~~ independent Kenya the courts have developed the tendency of siding and protecting the executive interests as opposed to the people's rights. For example, ~~in~~ the case of Ooko V. Republic.⁶ In this case, under a detention order issued on 30th July 1966 and signed by the minister for Home Affairs, the plaintiff was detained on 4th August, 1966. The detention order did not refer the plaintiff by his "proper or real name and in fact referred to him by a name which was not his name" although as the court found out there was "no doubt that he was in fact the person that the detention order was intended to apply to". In this respect the court stated that:

"In as much as the minister must be satisfied that the detention is necessary for the preservation of public security a partial mistake in naming the person to be detained should not necessarily have the effect that that person should be released from detention where he is the person intended to be detained and there is in fact no confusion as to the real identity of that person". There is one fundamental weakness in the courts argument. This is the failure to consider the reasons for such detention as in this case. The liberty of the individual was at stake. The court should have looked into the question as to whether there was a threat to public security. This weakness shows the courts tendency to support the executive in the elimination of its political opponents. The concept of constitutionalism calls for a clear separation and exercise of the powers of the executive, the legislature and the judiciary in order to guarantee the liberty of the individual. The High Court's functions in redressing infringements of these rights was merely reduced to that of ensuring compliance with procedural requirements. This was stated by Justice Rudd in this case when he said:

"The truth of those grounds (i.e. alleging threat to security) and the question of necessity or otherwise of continued detention are matters ultimately for the minister rather than this court." This is an escapist statement. The duty of the court is to protect the individual's rights within ~~whether~~ the constitutional frame work. Hence the court should have looked into those grounds for detention.

In Nyanza province the people's rights of freedom of movement have been controlled by chiefs' orders prohibiting unemployed persons to move within certain townships during certain hours. The majority of the accused people in such cases end up being convicted. It is contended that unless such people actually threaten public peace and security, they should not be taken to court. The over-zealousness of the police in rounding up people has led to untold and unnecessary suffering of innocent people who are rounded up by the police without any reasonable cause and charged with the petty offence of loitering in towns at late hours of the night and thus disobeying a chief's order. The police have misused this law even to the point of arresting innocent people. The people's liberty should be respected and if such laws do not do so then they should be scrapped off from our statute books.

In conclusion it is stated that there are many different meanings for words like "freedom" and "democracy". For example, the liberal democratic theory of politics, with its emphasis on the individual and on political freedom, may be of little value in a society where intense poverty and economic inequality are the essential national problems. In fact, in such a society the state apparatus which with dedicated staff to the preservation of the "individual rights" of liberal democracy would be the opposite of democracy. By putting the needs of individuals above the needs for independence and development of the masses, a government would forfeit the right to be called democratic.⁷

"If one person uses his freedom of speech and organisation in a manner which will greatly reduce our prospect for economic development, or endanger our national security, the Government should act against this. Freedom of speech, freedom of movement and association are valuable things which must be secured for all our people. But we can not allow the abuse of one freedom to sabotage our national search for improving the people's life".⁸

Independence of the judiciary for there to be efficiency in the protection of the peoples fundamental rights. The judiciary in Kenya has not always been a significant bastion against arbitrary exercise of state power. It acquiesced to the

Democracy is of little benefit to the people if they are to remain uneducated and the number of illiterate remains high".⁹ This suggests that freedom, or any particular aspect of it, can never be an absolute. The extent to which an individual will be able to act freely will ultimately depend on the nature of his acts and the context in which they take place.

It is argued that the all-important goods of high standards of living and rapid economic development are best realized under a regime in which a highly centralized and authoritarian government, immunized against the excesses of opposition functions, has unfettered power to mobilize the resources of a united country into achieving the quickest results in social and economic development. On the other hand, it is stressed that there can be no meaningful concept of progress in Africa that does not ensure respect for human dignity and encourage the widest possible participation in the decision making process and further, that the baffling problems of economic and social development can only be solved by utilizing all available intellectual resources, not by autocratic regimes intolerant of sensible criticism.¹⁰

It will not be an exaggeration to assert that any regime will collapse if it loses sight of the basic tenets of African humanism. Modern developments in Africa have shown that the process of social change is far more involved than the rash pronouncements of the ruling elite would suggest. The essential ingredients of the English concept of the Rule of Law are sufficiently rooted in the Kenyan public life to generate revolution against wanton totalitarianism.

In Kenya for there to be peaceful co-existence between all peoples of our country there must be a respect and practice of constitutionalism. This should be for the masses to realise a better life. This calls for the independence of the judiciary for there to be efficiency in the protection of the peoples fundamental rights. The judiciary in Kenya has not always been a significant bastion against arbitrary exercise of state power. It acquiesced to the

broadest construction of the Preventive Detention Act despite a number of avenues by which it at least might have been furnished with a procedural basis to somewhat alleviate its arbitrary character. This piece of legislation has ^{disturbed} distributed people and has been taken to be evidence of a departure from fair government. Preventive detention first appeared in British East Africa in 1897 in Section 77 of the Native Court Regulations of the East Africa Protectorate which empowered the commissioner of the Protectorate to intern anybody whom he was satisfied was disaffected with the government. There was no appeal from such a decision. In one way or another Preventive detention has existed in Kenya from that time to date onwards. The late President Kenyatta misused this piece of legislation to detain his political opponents, mostly in cases where public order was not threatened. This left little room for the Rule of Law which means more than imposing law and order, but mainly refers to justice and fairness.

5. A.G. v. Kathenge Njoroge (1961) EA 348.
6. Ouko v. K. (unreported) civil case No. 1159/1965.
7. Martin R. Personal Freedom and the Law in Tanzania, Nairobi, Oxford 1974, at p.1.
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Chapter 4

FOOT NOTES

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Conclusion

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This paper has argued out that the maintenance of Public Order in Nyanza and in Kenya in general in both colonial and post-colonial Kenya has been for the protection of a particular class of people; namely those who wield both economic and political power. Orders made for the maintenance of public order are not necessarily for the public interest, but a manipulation for the creation and protection of a particular political order. For any government to have meaning to its people, the peoples rights must be respected. In our situation our government should not only maintain public order but also that this should be accompanied with respect for the peoples rights within the Rule of Law and the concept of constitutionalism. The concept of constitutionalism must be observed, otherwise there will be instability and the country will be thrown into chaos. It is essential if man is not to be compelled to have recourse as a last resort to rebellion against tyranny and oppression that human rights should be protected by the Rule of Law. However, it is also admitted in conclusion that expression should be penalised if it is destructive to the state. A Government can always learn more from the criticism of its opponents than from the eulogy of its supporters. To stifle that criticism is - at least ultimately its own destruction. To avoid this it means that in our political lives we should have a spirit of fair play, self restraint and mutual accommodation of differing interests and opinions as prerequisites to the preservation of the concept of constitutionalism. Our aim in Kenya is to cultivate a social and political order which is consistent with our needs and our condition. The government under President Moi has promised this. To a large extent the realisation of our aims will depend solely on the human element in politics.

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