THE RULE OF LAW AND ITS PRACTICE IN THE 'NYAYO' ERA.

A Dissertation in partial fulfilment of the requirements for a BACHELOR OF LAWS DEGREE, University of Nairobi.

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NAIROBI SEPTEMBER, 1992

A C K N O W L E D G E M E N T

I give special thanks to my supervisor, Sir George Rukwaro and acknowledge the humble time he gave me to present this paper;

To Sylvia Simiyu (Miss) of Kitale, who took time off her busy schedule to put my work into prints;

To my young brother Raphael of University of Nairobi, who supported me financially - blessed is him.

But this acknowledgement would be incomplete without giving my sincere thanks to my parents, under whose tender-care and support, the academic climate was excellent, to concentrate well.

T H A N K S

TO OUR,

LOVING MOTHER.

C O N T E N T S

INTRODUCTION

The rule of Law is a living concept permeating the several branches of Law and having great practical importance in the Life of every human being. Unless a Community lives under a rule of Law, it will tend to be lawless to have no rule and that means more or less an anarchical way of subsisting to the detriment of individual freedom and rights. Acknowledged absolute and autocratic rule has at any rate the merit of frankly and openly conceding that it recognises no individual freedom and rights.

In Kenya in the last few years, as political challenges have intensified, the government's willingness to tolerate independent voices has diminished considerably. It has banned, harassed or threatened to ban a number of magazines, thereby giving notice that one of the few forums for political comentary and criticism will no longer be able to serve that function. It has sought to silence the church as a voice for the expression of moral concern, while academic discussion in the Universities and other institutions of higher learning has been severely contailed. The results is a climate of fear and suspicion, discouraging free discussion on matters of National importance. Until Kenyans can demand more open debate, a more responsible government free association and Public accountability without running the risk of being killed, tortured, or imprisoned, the future is gloomy.

This piece of work is devoted to the rule of Law which springs from the rights of the individual developed through history in the old-age struggle of mankind for freedom. These rights include freedom of speech, Press, Worship, Assembly and association and the right to free elections to the end that Laws are enacted by the duly elected representatives of the people and afford equal protection to all. Thus the maintenance of the foundamental principles of justice is assential to a lasting peace in Country and throughout the World.

The rule of Law therefore is an old phenomenon and can be traced to Aristotle's days when he emphasised the importance of the rule of Law. I have traced the ancient emphasis on the concept starting from Aristotles time. I will, in the first chapter, give a thorough exposition of this concept by a late great Scholar, Dicey; its implications today; and , the weakness manifested in the Dicey's exposition of the doctrine of the rule of Law - which weakness will be reflected in Chapter three of this dissertation. This will be followed by an analysis of international movement to promote the rule of Law.

The stepping Stone in upholding the rule of Law in Kenya is by incorporating the concept in the constitution. In Chapter two, therefore, I have highlighted some of such principles, Institutions, and, procedures as incorporated in the Kenya Constitution.

If the rule of Law is valued in Kenya then this should be reflected in its practice. The three organs of the state should maintain their spirit of upholding the rule of Law. The Legislative should not promulgate Laws that mililate against the principles of the rule of Law, neither should the executive abuse and disregard the established Law. The Judiciary should be accorded its independence, which is the only safeguard of the rule of Law. The so called 'Nyayo' era has tended to obscure the scale of internal repression and loss of life among Kenyan population, hence, Chapter three is quite sensitive because I have printed the Kenyan picture regarding the rule of Law.

CHAPTER ONE

1. THE ORIGIN AND CONCEPTION OF THE RULE OF LAW

The phrase 'Rule of Law' has been and is common in constitutional Law. It springs from the rights of the individual developed through history in the age-old struggle of mankind for freedom: which rights include freedom of speech press, worship, assembly and association and the right to free elections to the end that Laws are enacted by the duly elected representatives of the people and afford equal protection to all. It is an old phenomenon and ancient philosophers like Aristotles alluded to it when he asserted that:

'The rule of Law is preferable to that of any individual' [1]

This was during the days of Greek philosophers and since then there has been recourse to the notion of Law as a primary means of subjecting governmental power to control. Aristotles argued that government by Laws was superior to government by men.

It has been recognised, for many centuries, that the possession by the state of the coercive powers that may be used to oppress individuals presents a fundamental problem both for legal theory and political theory. The Legal theory was further developed in the middle Ages as the basis of the state. The theory was held that the government was founded on the principles of Natural justice which the Romans assumed were of universal application and that there was a universal Law which ruled the world. As Gierke wrote:

> 'Medieval doctrine, while it was truly medieval, never surrendered the thought that Law is by its origin of equal rank with the state and does not depend on the state for its existence.' [2]

The doctrine of the rule of law can again be traced back

to the English Jurisprudence. Even as early as 13th Century Bracton could deduce from the theory of the supremacy of Law that rulers were subject to Law. He maintained that:

'The King shall not be subject to men, but to God and the Law: since Law makes the King.'[3]

According to Law, justice was due both to ruler and subject.

During the Renaissance and reformation in the 16th Century, the idea of a universal Natural Law was weakened. Emphasis shifted to the national Legal system as an aspect of the sovereignity of the state. In Britain, the 17th Century contest between crown and parliament led to a rejection of the Divine Right of Kings and to an alliance between common Lawyers and Parliament. The abolition in 1640 of the Court of Star Chamber ensured that the common Law should apply to public as well as private acts, except as the common Law was modified by Parliament.

The Bill of Rights in 1689 finally affirmed that the monarchy was subject to the Law. Not only was the crown thereby forced to govern through parliament, but also the right of the individual to be free of unlawful interference in his private affairs was established. This was laid down in the case of Entick -v- Carrington, in which case, two King's messengers were sued for having unlawfully broken and entered the plaintiff's house and seized his papers: the defendants relied on a warrant issued by the secretary of state ordering them to search for Entick and bring him with his books and papers before the secretary of state for examination. The secretary of state claimed that the power to issue such warrants was essential to government, the only means of quieting clamours and sedition. (Emphasis added). The court held that, in the

absence of a statute or a judicial precedent upholding the Legality of such a warrant, the practice was illegal. Lord Camden had this to say:

> 'What would the parliament say if the judges should take upon themselves to mould an unlawful power into a convenient authority, by new restrictions? That would be, not judgement, but Legislation... And with respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common Law does not understand that kind of reasoning, nor do our books take notice of any such distinction.'[4]

The rule of Law has been upheld in the recent case of Ireland -v- UK[5]. During 1971, the IRA increased the verocity of its campaign of violence in Northern Ireland, shooting soldiers and police and blowing up buildings. The government of Northern Ireland decided to exercise the power of internment available to it under the Civil Authorities (Special powers) Act (Northern Ireland) 1922[6]. The procedures of interrogation included keeping the detainees' heads covered with black hoods: subjecting them to continuos and monotonous noise; depriving them of sleep; depriving them of food and water; making them stand facing the wall with legs apart and hands raised. It was held by a committee of Inquiry that these procedures constituted physical ill-treatment. Lord Gardiner, a former labour Lord Chancellor held that the interrogation procedures had never been authorised:

'If any document or minister had purpoted to authorise

them, it would have been invalid because the procedures were and are illegal by the domestic law and may also have been illegal by international law'

He viewed with abhorence any proposal that a minister should be empowered to make secret laws in time of civil emergency to fix in secret the limits of permissible ill-treatment to be used in interrogating suspects. Nor could a minister do this without the authority of parliament, that is to say illegally (Emphasis added), and then if found out ask parliament for an Act of Indemnity: that, Lord Gardiner said, would be a flagrant breach of the whole basis of the rule of Law and the principles of democratic government. The European Commission on Human Rights held that the Interrogation procedures amounted to inhuman and degrading treatment and also torture.

At this point, much has been said on this concept of the rule of law which is as old as the notion of state. One has been the legal basis of the other and this was in the minds of the ancient philosophers who argued for government by law as better than that of man. Many critics have submitted that the rule of law concept may as equally thrive in an oppressive government or regime when the parliament enacts discriminatory laws such as the case in South Africa[7] today. This seems likely because Aristotle did not define the contents of the laws which a lawful government was supposed to apply. It appears that Aristotles had in mind a democratic regime freely elected and he referred to Laws enacted by the duly elected representatives of the people and which afford equal protection to all.

II. DICEY'S EXPOSITION OF THE RULE OF LAW

The late A.V. Dicey has been one of the most influential writers on the constitution. Dicey expounded many principles

of the constitution. In his Lectures at Oxford, he had the major aim of introducing students to three guiding principles of the constitution, foremost among these being the Rule of Law, which has had most influence and at the same time has received most modern criticism.

The spirit of Entick -v- Carrington seems to run through all Dicey's arguements, but he expressed the general doctrine of the rule of law in the form of several detailed statements describing the English Constitution, thus giving the rule of Law three meanings:[8]

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

In this sense Dicey contrasted the rule of law with systems of government based on the exercise by those in authority of wide or arbitrary powers of constraint, such as a power of detention without trial. Thus no one could be made to suffer penalties except for a distinct breach of Law established before the ordinary courts.

> 'Secondly, the rule of Law means equality before the Law, or the equal subjection of all classes to the ordinary Law of the Land administered by the Ordinary Law courts...'

This implied that no one was above the Law; that officials like private citizens were under duty to obey the same Law; and that

there were administrative courts to which were referred claims by the citizens against the state or its officials.

> 'Thirdly, the rule of law means that, with us the Law of the constitution, the rules which in foreign countries naturally form part of a constitution code are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; ... thus the constitution is the result of the ordinary Law of the Land'.

Therefore, the rights of the individual were secured not by guarantees set down in a formal document but by the ordinary remedies of private Law available against those who unlawfully interfered with his Liberty, whether they were private citizens or officials.

The above three meanings which Dicey categorized as components of the r le of law raise considerable problems.

1. The principle of Legality

In the first meaning Dicey does not explain what is meant by 'regular Law'. Does it include, for example, social security law, compulsory purchase of Land or a statutory wages and income policy? Dicey ought to have drawn a distinction between what he termed as 'arbitrary power' and the well known concept of 'discretionary power'. As to arbitrary power, does it refer to powers of government which are so wide that they could be used for a wide variety of different purposes; powers which are capable of abuse if not subjected to proper control; or powers which directly infringe individual Liberty (for example, power to detain a citizen without trial)? If arbitrary power and wide discretionary authority alike are unacceptable, how are the limits of acceptable discretionary authority to be

settled? If it is contrary to the rule of Law that discretionary authority should be given to government departments or public officers, then the rule of law is inapplicable to any modern constitution. Discretionary authority in most spheres of government is inevitable. While there are still certain powers which we are unwilling to trust to the executive (for example, the power to detain without trial) except when national emergencies dictate otherwise, our attention now has to be concetrated not on attacking the existence of discretionary powers but on enabling a system of legal and political safeguards by which the exercise of discretionary powers may be controlled. Doubtless Dicey would have regarded as arbitrary many of the powers of government on which social welfare and economic organization now depend.

What Dicey meant by 'breach of Law' was that one should not be punished unless he had breached an ascertainable common law rule or enacted law. Thus the law should be certain and this is an important aspect of the principle of Legality. In Shaw -v- D.P.P[9] the accused was charged and convicted of conspiring to corrupt public morality. No such offence had either been enacted nor known in the common law. This case was criticized for its contravention of the principle of Legality which states that:

> 'No person shall be convicted of a criminal offence unless that offence is defined and penalty thereby prescribed at the time the alleged offence was committed.'

The principle of legality dictates that no person may be deemed to be committing an offence, if it was not an offence at the time of its performance. And a person who has committed

an offence may not be subjected to a punishment other than that prescribed by law. The principle of Legality also implies that any judgement given in accordance with the law must be enforced in the manner provided for by law since failure to comply with the legal provisions regarding execution of judgement may infact result in creating new penalties. It also forbids creation of offences by analogy because of the abuses it may give rise to. Also in cases of doubt the court shall interpret the law according to its spirit, in accordance with the meaning intended by the legislative so that it achieves the purpose it has in view. This means that the courts may seek the meaning from within or without the particular statute bearing in mind the general purposes of the law as defined. Should the rules of construction fail to remove ambiguity or uncertainty of the law, the doubt must be resolved in favour of the accused.

In order to conform with the rules of Law, provision must be made for simplicity, publication and accessibility of the Law to the citizens. This exposition of Dicey has either been accepted with modification or rejected altogether. In developing states especially, regulations are required which cannot be enacted in parliament. This results into several subsidiary Legistlations. This according to Dicey's exposition of the rule of law is not proper but the problem here may not be in the existence of subsidiary Legislation as such but in the fact that such Legislation is not properly published. Such legistlation should be made simple and accessible to the public.

Although the principle of legality is out to achieve noble good, it has some vital inherent weaknesses. The Diceyan concept of legality implies not withstanding the content of

the law that all power should be derived from law and exercised according to it. It assumes that the Law itself is based on respect for the supreme value of human dignity.

These assumptions prove to be wrong in Nazi Germany and the racist regime of South Africa because not only the contents of Laws applied are bad but the Legislation has no regard for the dignity of certain classes of persons. The principles of Legality only requires that the acts of rulers be in accordance with the law, which means, therefore, the rulers of South Africa respect the rule of law. One would in no doubt discover that there is no real rule of law in South Africa.

Too much emphasis on the rule of law and order as the basic social values may create such a restrictive state of affairs as to be oppressive to the masses. Those who are opposed to the regime may readily rise in arms to overthrow it hence Libertarianism is necessary in a government. This explains the actual downfall of colonial states overseas because colonial masters denied their subjects any rights to liberty.

This in its most direct and literal meaning the rule of law implies certainty on human relation. Men should know their rights and duties in society. The Greeks spoke of law as the principle of political associates which assigns to each citizen his position in society and defines its nature and extent. In 1610 we find the English House of Commons petitioning King James I in the following terms:

> 'amongst many other points of happiness and freedom which your Majesty's subjects of this Kingdom have enjoyed under your royal progenitors, there is one which they have accounted more clear and precious that this, to be guided and governed by certain rule of law' [10]

It is this interpretation of the rule of law which Dicey in his famous work contrasts with every system of government based on the exercise by persons in authority of wide arbitrary and discretionary power and laws of the government.

2. Equality before the law

Dicey's second meaning of the rule of law also requires careful examination. 'Equality before the Law' does not mean that the powers of the private citizen are the same as the powers of the public officials. The specific meaning he attached to the equality before the law was that all citizens (including officials) were subject to the jurisdiction of the ordinary courts should they transgress the law which applied to them, and that there should be no separate administrative courts to hear complaints of unlawful conduct by officials, as it was in France prior to 1789.

Infact, equal protection of law has been a fertile source of constitutional challenges to discriminatory state legislation However, the legislature must frequently distinguish between categories of persons by reference to economic and social considerations or legal status because these categories are subject to differing legal rules. This is qualified by diplomatic immunity and judicial priviledge. What is essential is that decisions should be impartial and that those who give them should not be liable to pressure from the executive. The number of tribunals is considerable and so to expect absolute uniformity of procedure in such circumstances would be unreasonable but there remains the need for vigilance particularly on the part of parliament lest the grant of statutory powers of adjudication be accompanied by a laxity of procedure, thus defeating the ends of justice under cover of administrative

convenience.

What a constitutional guarantee of equality before the law may achieve is to enable legislation to be invalidated which distinguishes between citizens on grounds which are considered irrelevant, unacceptable or offensive (for example, improper discrimination on grounds of sex, race, origin or colour). The rule of law must consequently provide equality of treatment for all persons irrespective of colour, race or religion or any other characteristics. Thus for enjoyment of protection of rights it makes no difference whether the individual occupies a hut or a palace, whether he is a native or not, whether he is white or coloured, European or non-European.[11]

Thus it is common knowledge that it is not always the attitude of the legislative and if a legislative enjoys parliamentary sovereignty then it may 'Lawfully' direct the courts and the lawyers to determine the rights of persons according to their colour, creed or race. Even in South Africa the basic attitude of the lawyer is that justice means equality for all persons in their legal and human rights, whether such rights are proclaimed in a constitution or not.

3. The constitution as the consequence of the rights of the individual

In the third meaning of the rule of law, which Dicey summarized in the conclusion that the constitution is the result of the ordinary law of the Land, he expressed a strong preference for the principles of common law declared by the judges as the basis of the citizen's rights and Liberties. Dicey had in mind the fundamental political freedoms-freedom of the person, freedom of speech, freedom of association.

The individual rights are therefore not dependent on a constitutional code but on the ordinary law. This might be the justification of the lack of a codified Constitution in England. While this concept might have attracted support in England, it hasn't happened in Kenya because Kenya has a codified constitution that purports to give and guarantee the Individual rights. The citizens whose fundamental rights are infringed may seek remedy in the court and will rely on the constitutional guarantee. However, English lawyers have argued that where Individual rights are granted by the constitution, they can easily be taken away either by abrogating these rights during emergency or by suspending the constitution with all the rights and guarantees it had granted.

The belief of Dicey that the common Law gave better protection to the citizen than a written constitution is held in the arguments of Englishmen. To Dicey, the Harbeas Corpus Acts, which made effective a remedy by which persons unlawfully detained might obtain their freedom, were for practical purposes worth several constitutional articles guaranteeing Individual liberty. Today it is hard to share Dicey's faith in the common law as a primary legal means of protecting the citizen'S liberties against the state. This is because, the common law is subject to modification by parliament: the most fundamental Liberties may be removed by statute. By seeing the civil Liberties as safer in the hands of judges than when at the mercy of parliament, Dicey reveals his views of prejudice as to the proper function of parliament. Indeed Common Law does not assure the citizen's economic or social well-being and while it remains essential that legal remedies should be effective, the experience of many western countries is that there can be

value in imposing legal limits upon the legislative power to infringe human rights; and the European Convention on Human Rights has shown the value of supra-national remedies.

All in all as I have indicated the rule of law as expounded by Dicey manifests some weaknesses. Much of the content which Dicey attributed the rule of law is based on a view of the British constitution which today seems in many respects outmoded. He did not adequately resolve the potential conflict between the two notions of the rule of law and the supremacy of the parliament. Instead he carefully avoided the substance of the law and concetrated on the formal legality aspects. While his views have had an important influence upon subsequent attitudes to constitutional law in Britain, wa what follows in this chapter is an attempt to explore the main features of the rule of law within our constitution today.

III. RULE OF LAW AND ITS IMPLICATIONS TODAY

Emphasis will be placed upon three related but seperate ideas. First, the rule of law expresses a preference for law and order within the community rather than anarchy, warfare and constant strife. In this case, the rule of law is a philosophical view of society which in the western tradition is linked with basic democratic notions. Second, the rule of law expresses a legal doctrine of fundamental importance, namely that government must be conducted according to law, and that in disputed cases what the law requires is declared by judicial decisions. Third, the rule of law refers to a body of political opinion about what the detailed rules of law should provide in matters both of substance and of procedure. For example whether the government should have power to detain citizens

without trial, the presumption of Innocence in Criminals and the Independence of judiciary in its procedures. While the second sense is founded on decisions of the courts, and expresses an existing legal doctrine, the third sense is more directly relevant to discussion in Parliament and elsewhere, when present law is criticised and proposals for new law are examined. Proponents of the rule of law are however likely to support constitutional protection for human rights by such means as a judicially enforceable Bill of Rights, so that legislation affecting fundamental rights may be subject to review in the courts.

1. Law and order better than anarchy

The rule of law may appear to be preserved by a dictatorship or a military occupation as well as a democratic form of government. This is so because, the courts of law may continue to function, settling disputes between private citizens and government officials as the regime permits. Even in the restricted sense, the rule of law expresses some preference for human disputes to be settled by peaceful means without recourse to armed force, terrorism or other forms of physical might. Undue stress on law and order as social values leads to the restriction of political liberty, and political groups opposed to that kind of regime dependent on political might rather than popular consent may readily adopt violent means to overthrow it.

Constitutional experience in Britain and other Western countries has shown that the maintenance of law and order and the existence of political liberty are mutually interdependent. As the Universal Declaration of Human Rights said;

'It is essential, if a 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'[12]

2. Government according to Law

It is a basic rule of constitutional Law that the organs of a government must themselves operate through law. If the police need to detain a citizen, or if taxes are to be levied, the officials concerned must show legal authority for their actions. Thus, they may be challenged to do so in a court of Law as in the case of Entick -v- Carrington. Acts of public authorities which are beyond their legal power may be declared ultra-vires and invalid by the court and it is because of this fundamental principle of legality that legislation must be passed through parliament and new powers of government affecting Individual liberty may be conferred only by parliament.

The doctrine of government according to law requires that a person directly affected by government action must be able if necessary, to challenge the legality of that action before a court, and not merely to register a complaint with the department concerned. The rule of law require that public authorities and officials are subject to effective sanctions if they depart from the law. Their acts are declared invalid by the courts and there lies a duty to compensate citizen whose rights have been infringed. Today it is unlikely that the head of state would be sued for damages, not because he is immune from such action but because his political decisions do not have direct legal effect; but the Prime Minister of Quebec was held in the case of Roncarelli-v-Duphesis[13] liable in damages for maliciously and without legal authority directing a Liquor licencing authority to cancel a Licence of

a restaurant proprietor who had repeatedly provided bail for Jehovah's Witnesses accused of police offences.

In Britain, government departments came under a general liability to be sued for their wrongful acts only under the Crown Proceedings Act of 1947. That Act preserved the personal Immunity of the sovereign, an immunity which in other legal systems is enjoyed by the head of state. Thus in the USA, the president while in office is Immune from liability for his unlawful acts. As the watergate affair of 1974 showed in the case of US-V-Nixon,[14] when president Nixon resigned rather than face impeachment proceedings before a hostile congress, thus enabling him to be sued or prosecuted for unlawful acts which he may have committed while in office. The doctrine of government according to law thus implies that even a president while in office is not at liberty to disregard law.

However this doctrine stresses the importance of legal authority and form for the acts of government, political decisions may be readily clothed with legality, so far as it is in a system in which parliament is supreme, and in which the cabinet is supported by a majority in the commons. In the absence of constitutional guarantees for individual rights the need for legal authority does not protect these rights from legislative invasion. For instance, in South Africa as well as in Kenya, government may in form be conducted according to law but a political detainee's right to have recourse to a court for a ruling on the legality of his detention is of little value if the government has taken care to ensure that the detention order is within its statutory powers and issued under the Emergency powers (Laws) Act. So too in the United

Kingdom where the parliament may authorise the executive to exercise powers which drastically affect the liberty of the individual (for example, by authorising, through the Immigration Act 1971, the deportation of citizens from UK) or which retrospectively alter judicial decisions.

If all that the rule of law means is that official acts must be clothed with legality, this gives no guarantee that more fundamental values are not infringed. These limitations on the doctrine of government according to law explain the present demands for incorporating the International Convention on Human Rights in the law of each country.

3. The rule of law as a broad political doctrine

The rule of law must go beyond the principle of legality if the law is not to become merely a means of achieving whatever ends a particular government may favour. The inherited experience and values of the legal system are relevant in determining both the legal authority the governmentshas for its acts and the legal powers it should have. If, for example, the government introduces criminal sanctions for conduct contrary to its economic and social policies, a lawyer will want the new legislation to respect accepted principles of fair criminal procedure, and should a Bill depart from these principles arguments invoking the rule of law are likely to be used in the debates on the Bill. But for a number of reasons the opinion of lawyers may not be unanimous in invoking the rule of law in a legislative context. The question is, what are the essential values which have emerged from centuries of legal experience? Are they absolute values or may there be circumstances in which political necessity justifies the legislature in departing from them? For example, the rule of law requires

that the power of interpreting statutes is rested in the courts, but is this power reduced if the courts look at the report of a government committee or a commission of Inquiry as an aid to interpreting a statute passed to give effect to the report? The implication is that the legal system exists within a social and political context and a legislator's perception of legal values is likely to be affected by his outlook on other social and political questions. For example, a liberal lawyer will be more inclined than a conservative or labour lawyer to support proposals for a Bill of Rights and other means of protecting individuals and minorities.

In this broad political sense, the rule of law seems to be too subjective and uncertain. A new legislation would be unclear if the rule of law were excluded from the vocubulary of debate. Certain values inherent in the system of law should be ascertained. Proffessor Lon Fuller argued that, the enactment of secret laws would be contrary to the essential nature of a legal system, as would be heavy reliance on retrospective legislation, or legislation imposing Criminal sanctions for actions not defined but may be deemed undesirable by an official.[15] But these views have not found universal favour with all legal philosophers and there continues to be a vein of belief, amongst the judges, in certain values that should be upheld in a legal system.

IV. INTERNATIONAL MOVEMENT TO PROMOTE THE RULE OF LAW CONCEPT

Since the creation of the United Nations in 1945, the rule of law, in parallel with the human rights movement, has been a matter of much International discussion. The rule of law concept has undergone tremendous changes. The early form-

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alistic approach to the rule of law concept as posited by Dicey which even Hitler's Nazi regime could claim some adherence to was to change speedily from 1945 by the emergence and spread of the principles of human rights as the basic minimum normative standards of behaviour required of all states. No state henceforth could, boast of the rule of law without incorporating basic human rights in the substantive body of its constitutional practice and laws. In 1948 the United Nations adopted the Universal Declaration of Human Rights which further elaborated the so-called basic rights. This was followed by the European Convention on Human Rights which was signed at Rome in 1950. The Convention recognised that European countries have a common heritage of political traditions, ideals, freedom and the rule of law and sought to create machinery for protecting certain human rights. In the case of Golder-v-UK, which concerned the rights of a convicted prisoner in the United Kingdom to have access to civil action against the prison authorities, the European court of Human Rights referred the rule of law and said:

> 'In civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.'[16]

Two further definitional instruments were passed by the United Nations General Assembly (UNGA) in 1966, the international Covenant on civil and political Rights[17] and its protocal (optional) for individual petitions, and the International Covenant on Economic, Social and Cultural Rights.[18] All these came into force early 1976 and, Kenya is a party to all, except the optional protocal. Kenya ratified the conventions in 1972. There are numerous other international instruments

of legal and quasi-legal nature which define in detail some of the aspects of human rights standards and methods for their achievements.

What these international standards setting instruments have done is to remove the ideological veil of Laisser faire role of states in the socio-economic activities within their territorial jurisdiction and internationally to demand of them more and open participation so as to redress internal inequalities in the distribution of social wealth. Whether by free consent or coercion states are required to adopt the stipulated standards of behaviour which greatly add to that contained within the earlier limited conceptualisation on the rule of law in constitutional and political spheres. The extend of adherence depends to a great extent on the historical backgrounds and the magnitude of internal and external pressures particular states are exposed to. It is also clear that the expanded scope of state duties and powers carry with it equal dangers of abuse which may erode most of the traditional rights without necessarily adding to them or replacing them with better, more meaningful ones. It should be noted that, it is not only at the United Nations level that that the Rule of Law concept has received expansion; it has received expansion at regional level.

1. Perception of private International bodies: The International Commission of Jurists

The International Commission of Jurists (ICJ) is an International organisation of Lawyers who are devoted to the rule of law based on the fundamental principles of freedom and justice. Article 4 of its statute states that:

'The commision is dedicated to the support and advance-

ment of those principles of justice which constitute the basis of the Rule of Law.'

The Article concludes with the following statement of the commission's intentions:

'The commission will foster understanding of and respect for the Rule of Law and give aid and encouragement to those peoples to whom the Rule of Law is denied.'

The international commission of jurists regards the Rule of law as a living concept permeating several branches of the law and having great practical importance in the life of every human being.

The International Commission of Jurists is a non-political organisation whose object is the mobilization of the legal proffession for the protection of human rights and the expansion and fulfilment of the Rule of Law. It was formed in the summer of 1952 when a few prominent lawyers from different parts of the world met in West Berlin to discuss reported violations of fundamental rights of some parts of Europe. The commission has undertaken a series of studies which have been discussed at successive congresses in various parts of the world. I will summarily examine the ideas and its resolutions in the Athens Declaration of 1955; Declaration of Delhi in 1959; and the Law of Lagos of 1961.

2. Athens Declaration of 1955

The International Commission of Jurists held its first international congress in Athens in June 1955. Its theme was to consider what minimum safeguards are necessary to ensure the just rule of law and the protection of Individuals against arbitrary action by the state. The early stages of

The commission's activities revealed that while there was agreement on how the Rule of Law ought to manifest itself in its daily application, there were some differences of emphasis with regard to certain specific institutions and procedures. These differences notwithstanding, the commission held that the term Rule of Law stands for a universally applicable set of principles, joined by respect for the individual and by abhorrence of any arbitrary rule withdrawn from effective control by the people over whom it is exercised. Its applicability is not therefore limited to a specific legal system, form of government, economic order or cultural tradition, as long as the state is subject to law and the individual assured of respect for his rights and of means of their enforcement. The participation of lawyers from forty-eight countries who attended the congress in Athens stimulated an exceptionally broad response to the commission's first step. The outstanding result of thorough discussions was the acceptance of the Act of Athens,[19] a document that laid the groundwork to the commissions worldwide undertaking to formulate a statement of the principles of the Rule of Law. This Act spelled out the basic requirements that the state be subject to the law and that governments respect the rights of the individual and provide effective means for their enforcement.

A major emphasis was that an independent Judiciary and legal profession are essential for the maintenance of the rule of law and proper administration of justice. Thus the organised legal systems do not have to adhere to the Dicey's expositions so long as they are capable of administering justice. Of special importance is the position of the judiciary and of the individual judges. It is through the Independence of Judiciary that effective and efficient administra-

tion of justice can be maintained. The 3 expositions of Dicey would be of minimal use if such Independence of the Judiciary is non-existent because the arbitrary acts of the executive would be unchecked. The Act of Athens thus declared that Judges and Lawyers should preserve independence of their profession and should be guided by the Rule of Law, protect and enforce it without fear or favour and resist any encroachments by the governments or political parties on their independence as judges and lawyers. It is through this, that an acheivement of what Dicey had in mind would be got.

3. Declaration of Delhi 1959

In the congress held at New Delhi in 1959, lawyers from 53 countries, under the aegis of the International Commission of Jurists, reaffirmed the principles expressed in the Act of Athens, particularly that an Independent Judiciary and legal profession are essential to the maintenance of the Rule of Law and to the proper administration of Justice. It was declared that the rule of law is a concept which should be employed to safeguard and advance the political and civil rights of the individual in a free society. The congress examined traditional safeguards required for the maintenance of the law: for example, the need for adequate controls against abuse of power by the executive, the essentials of fair criminal procedure and the maintenance of Independent Judiciary.

The congress on the other hand stressed the need for an effective government capable of maintaning law and order and of ensuring adequate social and economic conditions. This seems to be a modern concept of the rule of law which concerns itself more with values that are essential to a free society.

And this modern concept derives its legal validity from the Dicey's concept because it is not until a state stabilizes politically and institutionally, that social and economic conditions will be adequately assured. Thus the International Commission of Jurists after reaffirming the Dicey's principles went further and exposed the social and economic values necessary and relevant to the achievement of justice. For example, without some education and economic ability, all the rights we have been talking as being constituted by the rule of law are of lesser or no value. People should be able to understand the substance of the law and the procedures involved after which economic power comes in the exercise of these rights. The congress also emphasised that the legislature must be democratically organised and must not pass discriminatory laws in respect of individuals or minority groups, nor restrict the freedom of religious belief, speech and assembly.

It should be noted that the congressmen at Delhi worked alot for an acceptable definiton of the rule of law, not because Dicey had not adequately defined this concept, but because Dicey's exposition seemed formal and weak in a free society. Thus the rule of law was defined as:

> 'The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man'[20]

This definition associates legal principles, institutions

and procedures with the values they are designed to protect. The values found in the conception of dignity of man recognises that, without a minimum standard of education and economic security, political and civil freedom may be more formal than real.

4. Law of Lagos 1961

The meeting of International Commission of Jurists in Lagos, Nigeria, was an expression of the particular preoccupation of Jurists with the relationship of the state and the individual in national societies undergoing a revolutionary development and creating institutions commensurate with their newly acquired sovereign rights. It thus projected the vital components of the Rule of Law as earlier formulated in general terms against the background of a dynamic reality represented by the emancipated African Continent. The intention was to measure against the tradition the legal systems which are the legacy of the colonial powers and to assess the political situation in the newly independent states in the light of the guiding principles of the rule of law.

The main conclusion that emerged from the Lagos Conference was that the dignity of a person is a universal concept, regardless of the different forms it may assume in one or another cultural environment. The Law of Lagos observed and stated that the rule of law cannot be fully realised unless legislative bodies have been established in accordance with the will of the people. In respect to the colonial territories and the administration of justice, the law of Lagos came up with a new element of the concept of the rule of law:

> 'In order to maintain adequately the Rule of Law, all governments should adhere to the principle of demo-

cratic representation in their legislative'[21]

Thus the rule of law could not truly prevail in the colonial territories until they achieved political independence simply because the colonial government had not been freely elected by the people thus all its institutions hardly represented the people.

In countries where firm legal traditions have still to be established and where the complexity of simultaneous economic social and political tasks strains the imagination of the observer, the Rule of Law is undergoing crucial tests of its modern meaning. The warm response with which the commission's activities have been meeting in Africa has already indicated the outcome, that, the Rule of Law as formulated in Delhi is not a weapon to protect vested rights and to stifle social progress. It is infact a living instrument devised to suit the requirements of justice under conditions of man's accelerated march towards freedom and happiness.

It is my conclusion in this chapter that, there seem to be no clear cut statement of the Rule of Law as a broad political doctrine. As society changes and the tasks of government change, new values of law are received to meet the changing needs. Therefore, both Dicey's exposition of the Rule of Law and the modern concept of the Rule of Law are out to achieve a common object, that is, 'human dignity' and we cannot maintain that Dicey's exposition is outdated. Therefore, in the succeeding chapters both Dicey's exposition and the modern exposition of the doctrine will be utilised.

CHAPTER TWO

THE INCORPORATION OF THE RULE OF LAW CONCEPT IN THE KENYA CONSTITUTION

The main purpose of the concept of the Rule of Law in modern states is the preservation of the rights of the individual against unwarranted executive interference. For the rule of law to be a reality, that is, a legal concept with practical application, there are some constitutional practices that must be attained. The Delhi Declaration clearly stated that the rule of law would only be practicable in a free society. It is this freedom that the constitution of a country seeks to guarantee and protect and this is done by the incorporation of the rule of law concept in the constitution. Kenya has embodied in its constitution provisions which ensure that human rights and freedoms are guaranteed and kept sanrosanct.[1] The fact that colonial administration had exercised an effective and perpetual restraint on the fundamental human rights and freedoms of the individual, led to the struggle for independence with this on the agenda of African Nationalists and when Kenya became independent, a chapter had to be promulgated which guaranteed the so-called fundamental human rights and freedoms of the individual. This chapter is meant to discuss three separate but related subjects on the Kenyan constitution; chapter V of the constitution, doctrine of separation of powers and the concept of constitutionalism.

1. THE FUNDAMENTAL RIGHTS

In Kenya the fundamental rights are provided for by chapter V of the constitution. This chapter is modelled on the European convention of human rights which is geared towards the protection of individual rights as against the state

with a view to providing the individual with maximum freedom and for the achievement of human dignity.[2] The summary of these fundamental human rights is provided for by section 70 of the constitution which briefly in so far as it is material reads in part:

> 'Every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to the respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:
>
> (a) life, liberty, security of the person and protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and
>
> (c) protection of the privacy of his home and other property and from deprivation of property without compensation,...'

By providing these human rights in the constitution, the state has expressly indicated that these rights are superior to other legal norms in the land.[3] The constitution is thus a document of special legal sanctity. It overrides other legal documents in a state. It is the torch bearer in the development of a legal system. It supplies the test for validity of the other laws in a legal system thus ensuring the practice of the rule of law in a free state.

For the purpose of this dissertation, instead of taking each and every right as provided in the constitution, I find

it expedient to classify these rights in two broad categories -viz- Substantive Rights (classified as - personal freedoms, civil rights, property rights and freedom from discrimination) and Procedural Rights (classified as - protection of the law and the legal process).

(a) Substantive Rights

The Substantive Rights provided for in the constitution are a clear indication that Kenyan government recognised and incorporated the Rule of Law concept in its constitution after independence. Unlike the colonial administration, the new self government established a genuine parliamentary democracy with the concept of separation of powers as a means of ensuring the rule of law which was better than anarchy. The constitution began by making provisions to personal freedoms which lacked during the colonial era. As I indicated earlier in chapter 1, the rule of law could only be applicable in a free society, therefore then the constitution of Kenya has provided for personal freedoms as the basis of the rule of law. The first of these personal freedoms is the protection of life itself.[4] That is, no one to be deprived of his life intentionally save in the execution of a court sentence in respect of a criminal offence or in the circumstances termed as reasonably justifiable. Indeed this provision guarantees the most important of all human rights in so far as the rule of law requires because under circumstances where life of citizens is at risk, we can hardly talk of there being the rule of law. For example, there was no protection of right to life in Uganda during the Idi Amin era; Ugandans used to hear of the rule of law and nothing in the style of human rights was existent in Uganda.[5] As I had said earlier several regimes

have fallen under the guise of the rule of law and this explains why there are occassional military coups and assassinations.

The second right in this group is the protection of right to personal liberty.[6] Although the constitution does not define what is personal liberty, it is understood in contemporary language that personal liberty is freedom, that is, a state of being free from conditions that limit one's actions. It is this personal freedom that is required if the rule of law will be of any applicability. This was clearly stated in the Delhi Declaration. To the framers of the constitution this right was to be exercised and enjoyed in parallel with both private and public freedoms and at times the private freedom has been curtailed unlawfully (for example, unlawful arrests and detentions). With this possibility in sight, the constitution has further provided for compensation should this freedom be tampered with. In addition there is the freedom of movement which is defined widely to include freedom to move freely throughout Kenya, the right to enter and leave Kenya, and immunity from expulsion from Kenya.[7] There is also protection from slavery or servitude[8] and protection from torture or inhuman treatment.[9] This is a right which seems to favour victims of conviction and it is essential because if, for instance, prison authorities are left at discretion to handle prisoners and detainees, there would be so much physical ill-treatment yet against the spirit of the rule of law. Yet another personal freedom is the protection of the privacy of the individual.[10] That is, no person without his consent shall be subjected to arbitrary search of his person, premises, or his property.

Tied to personal freedoms, the constitution of Kenya has also guaranteed civil Rights which include the freedom of conscience,[11] freedom of expression,[12] freedom of assembly and association.[13] Freedom of conscience is defined to include freedom of thought and religion hence one can change religion and belief without being compelled to take an oath contrary to his religion or belief. In Kenya, this right has been extended to all institutions of learning and recruitment such that no one attending any place of education shall be required to receive instruction or take part in any religious ceremony of a religion other than his own. This is a fundamental human right because law and religion are inseparable. It is a realization that should be respected because the society is not homogenous, and for an heterogenous society like Kenya, this freedom should be exposed to the people to make choice of the law which is to govern their civic rights. For example, it will be against the very essence of the rule of law and administration of justice if a court of law will decline to hear and determine a matrimonial cause just because the marriage was celebrated under one of the customary laws. It should be noted that, this section provided for the various religions and sects we have in Kenya.

In this category of civil rights we have also the freedom of expression and the right to hold opinions, receive and impart ideas and information generally. This fundamental right is relevant to the extent that the government accomodates the opinions of its critics. Having mentioned earlier that the rule of law is a broad political doctrine, then without the freedom of expression it might not be practiceable because it is only through political participation that the government will keep its wheels on the track of the rule of law. This freedom

goes hand in hand with the freedoms of assembly and association which are defined respectively to include the right to assemble freely and associate with other persons in particular form or to belong to trade unions and other associations for the purpose of protecting one's interests. It appears that Kenyans are free to belong to any political party without any intimidation or coercion whatsoever. However, the consitution of Kenya was amended sometimes early in the 'Nyayo era', in which amendment this fundamental right of assembly and association was snatched from the Kenyans when the ruling party, Kenya African National Union (KANU), was declared as the only political party in Kenya.[14] Such instances, of derogation from fundamental rights and freedoms, will be detailed in the succeeding chapter. What we should note is that, it was declared in Delhi that free association is a fundamental element of the rule of law.

The constitution also made provisions to ensure that private property is respected.[15] However, I should say that this right has been jeolously guaranteed by our constitution and this much affects the substance of the right. We can never talk of human dignity if the government in power confiscates personal property as the Minister may deem fit (emphasis added). It is not contrary to the rule of law if private property is taken through what is known 'eminent domain' for public purposes. But it is against the rules of nature if the government will exercise this right of itself without adequately compensating and giving the affected person disturbance allowance.

Another substantive right guaranteed by the constitution as the supreme law of the land is protection against discrimination on grounds which I had earlier considered as Irrelevant.[16] This provision, as provided for in the constitution of Kenya,

incorporates the Dicey's concept of equality before the law. In whatever form or language it provides that all persons irrespective of tribe, race, colour, place of origin or residence or other local connexion, and political opinions should be treated equally before the law. And if there is any law which seems to give preferential treatment on the above irrelevant basis, then it should be nullified by the constitution which supplies the test for the validity of the other laws in a legal system and which overrides other legal documents in a state.

(b) Procedural Rights.

As far as the 'Principle of Legality' is expounded by A.V. Dicey, Kenya has, since independence, incorporated in whole or part this principle of the rule of law through making provisions which secure protection of law[17]. This principle of legality operates together with the rules of Natural justice, that is, the rule against bias (Nemo Judex in causa sua), and the right to be heard (Audi Alteram Partem). These rights mainly concern safeguards in a criminal trial. The most important include the fact that no one can be tried of an offence if it is not defined and penalty prescribed by written law. In this sense the constitution contrasted the rule of law with the Kenyan government (I mean executive) exercising any authority of wide and arbitrary powers of constraint, such as power of detention without trial. Our constitution has thus assured that none could be made to suffer penalties except for a distinct breach of law established before the ordinary courts.

The Kenyan Constitution which is written unlike the British constitution, has incorporated the common law presumption of innocence in its chapter V as a clear indication that it is

dedicated to the Rule of Law and respect human dignity. A person is presumed innocent until he is proved guilty or has pleaded guilty. Other provisions in respect to the principle of legality include that a person is entitled to a fair trial, the right to call and cross-examine witnesses and protection against double jeopardy. There is also protection against retro active legislation, that is, a law should not be used to punish yesterday's acts. If a person cannot understand the language used in court, free services of an interpreter are provided, such that, that person will not complain of prejudiced hearing on grounds that the case was heard and proceedings carried in a language foreign to him. A person is also allowed to argue his case personally or through his legal representative. Indeed in so far as criminal trial and administration of justice is concerned, our constitution has adequately provided for that and we can hardly speak of inadequate incorporation of this doctrine of the rule of law in the Kenya Constitution. And should there be any miscarriage of justice and rule of law in criminal matters, then it might have been caused by what I shall soon or later discuss in the succeeding chapter, such factors as, executive invasion of the judiciary and legislature, executive excesses in exercise of it's power and many others whose tendency and effect is to derogate unlawfully from our well-moded constitution.

In so far as civil matters are concerned, one is entitled to have his claim vindicated by an independent court or authority established by law.[18] The constitution provides for a fair hearing within a reasonable time for the purpose of administration of justice. It has also established a Court of Appeal with jurisdiction and powers in relation to appeals.[19]

Kenya's constitution, which was promulgated in 1964

making Kenya a Republic, is the progeny of the independence bargain which took place in a big hall in Westminster, London called 'Lancaster House' between Kenyan Nationalists and British Colonial agents in the late 1950's and early 1960's. The first thing Kenyan (African) Nationalists did was to guarantee what they had been denied by their colonial masters and with that spirit, there was embodied in the constitution provisions which were to ensure that human rights and freedoms were guaranteed in the chapter V of the Kenya's Constitution. The constitution also made provisions to ensure that private property is respected and provision for universal adult suffrage both of which were absent during the colonial era.

So as to prevent the constitution from being rendered 'toothless bull dog' the framers thereof provided for an independent judiciary with full powers of review of all laws passed by Parliament to make sure that they were in conformity with the constitution and consistent with declared individual rights. The judiciary was also to check on any excessive or abusive use of power.

2. SEPARATION OF POWERS

The doctrine of separation of powers evolved from the ideas of early contemporary writers like John Locke and Baron Montesquieu. Montesquieu defined three types of government: republican, monarchical and despotic whereby only the republican and democratic government could have check to the power of the Prince and limitations to safeguard the individual. Otherwise the idea of separation of powers was foreign to despotic governments. Western Institutional theorists have concerned themselves with the problem of ensuring that the exercise of governmental power should be controlled in order that it should not

itself be destructive of the values it was intended to promote. In the so called democratic government the corruption of the government sets when the executive forgets its duties and confuses them with those of the legislature and judicature. As montesquieu puts it:

> '.... when the people attempt and try to debate for the senate, to execute for the magistrate, and to decide for the judges.'[20]

Montesquieu implied, then, that some form of separation of powers is necessary to a democracy.

The great theme of the advocates of Constitutionalism, in contrast either to theorists of utopianism or of absolutism, of the right or of the left, has been the frank acknowledgement of the role of government in society, linked with the determination to bring that government under control and to place limits on the exercise of its power. Of the theories of government which have attempted to provide a solution to this dilemma, the doctrine of separation of powers has been the most significant.

The doctrine of separation of powers has developed from the concern with the subjects' political liberty and rights. Like Montesquieu, he was greatly influenced by the political conditions prevailing in France and he saw decentralization of power from the hands of the king as the surest way to guarantee the individual liberty and rights. John Locke, on the other hand, promulgated the doctrine of separation of powers after observing all those events in England in the Seventeenth Century. There was a civil war after which there ensued a struggle between the supremacy of the King and that of parliament. He talked of certain innate rights emanating from the very nature of man which should not be dictated upon and that the individuals'

paramount rights were those of liberty and life. And governments existed to ensure these rights. Wherefore, it was necessary to limit or control governmental powers so as to guarantee these rights. Locke, thus advocated for the creation of legislative, Executive and Federative Organs in a government.[21]

Locke's and Montesquieu's theories have found adherents in practice with the framers of the constitution. For example, the main concern of the framers of the American constitution was the fundamental rights of the citizens. To preserve these they followed the two scholars theory and clearly divided the three organs. For instance, the constitution of the state of Virginia states that:

> 'The legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other, nor shall any person exercise the powers of more than one of them at the same time .....'[22]

Today, America is perhaps the only country which can be said to follow the doctrine of separation of powers in its strictest terms. Strictly speaking, the doctrine embodies three major features:

(i) that the same persons should not form part of more than one of the three organs;

(ii) one organ should not control or interfere with the functions and exercise of power of another organ; and

(iii) one organ should not perform the function of another.[23]

This is what has been labelled the 'pure doctrine' where the three organs are completely separate and no overlapping in their functions. Another facet of the doctrine is what has been termed as the 'partial-mixing' whereby the functions of the three organs

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sometimes overlap. This is the type of the constitution where the executive is part of the legislature and takes part in legislative matters.

Both facets have been subject to criticism. The pure doctrine is seen as impractical and undesirable because it gives too much liberty to the subject which may result in anarchy. By totally separating the three organs, it would weaken the government and as such it would not be able to guard the citizens' rights effectively. Paradoxically both advocates and critics have based their arguments on the protection of liberty and the rights of the individual; it is when we shall talk of the rule of law in a certain government.

To investigate the operational aspects of this philosophy in Kenya it is necessary, first, to identify this country's approach to public regulation of society. Under Kenya's constitution it seems that Montesquieu's trichotoncus structure of government was in contemplation. Under the constitution, which has been imported form the Westminster model of constitution, partial-separation of powers is recognised. Thus in Kenya today, we have a constitution which incorporates the doctrine of separation of powers. However, theory and practice are two different things. Under the constitution the three organs - the legislature, the executive and the judiciary - are treated separately and each invested with specific powers.[24] The president of Kenya is the Head of government, Head of State and Commander-in-Chief of the Armed Forces of the republic[25]. He is the chief Executive and is entrusted with the responsibility of executing all the laws made by the parliament.[26] Under section 30 of the constitution the legislative power is rested in the parliament. While there is no express vesting of the judicial

power in the judicature, it is clear that this organ is expected to play an important role. This is implicit from the fact that the High Court is given the ultimate powers of Constitutional interpretation in respect of claims based on the fundamental rights of the individual.[27] The High Court also enjoys exclusive adjudicatory powers in disputes regarding membership of the National Assembly.[28]

While Montesquieus philosophy definitely influenced the constitution makers, as in most other countries, the degree of separtion did not go far. The Kenya Constitution, as already noted, does not reserve certain powers known as 'Judicial powers' for the judiciary alone. The necessary implication is that it would not be unlawful for other organs to undertake the interpretation of law and adjudication of disputes if this did not offend any specific legal provision. Further, under Section 5 of the constitution the President must be an ordinary member of Parliament elected in that behalf, with the tied capacity of President, at the same elections. Section 30 states:

> 'The legislative power of the Republic shall rest in the parliament of Kenya which shall consist of the President and the National Assembly.'

The implication is that the President is a legislator in a dual capacity: first as an elected member of parliament; and then as the President. Apart from the president all the ministers are required to be members of parliament.[29]

This physical fusion, which of itself places the executive in a strong position in law-making, leads to abuse and departure from the spirit of the Rule of law. The late Judge Learned Hand's view of Constitutions and laws is cynical because in themselves these norms will play no functional role vis-a-vis the aspirations of men. According to him, to conceive of the

Mechanics of Power distribution as critical to the attainment of the Rule of Law is to beg the even more important question whether or not the instrument which allocates the powers is itself any guarantee at all, he says:

> 'I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes.... liberty lies in the hearts of men and women, when it dies there, no constitution, no law, no court can save it.... while it lies there it needs no constitution, no law no court to save it.'[3]

However, while we are in substantial agreement with Learned Hand's persuasive argument we do not share the implied statement that a written constitution embodying a society's goals is in itself not a meritorious thing. Such a normative document, I think, is the most solemn voice through which a society can address factions or other instrumentalities of political life.

3. CONSTITUTIONALISM

The concept of constitutionalism has been very vital in the adoption of the so-called constitutional documents in the establishment or rebuilding of a government machinery in a newly independent or reconstituted state. In adopting the constitutional documents, most of these countries believe that the document will help in the control and exercise of governmental powers, and thus serve in the advancement of the concept of constitutionalism.

Constitutionalism today has been given divergent interpretations. According to De Smith, constitutionalism:

> 'means the principle that the exercise of political power shall be bounded by rules which determine the rules of legislature and executive action by prescr-

ibing the procedure according to which it must be performed, or by delimiting its permissible content.'[31]

According to De Smith, these rules may be mere conventional norms or prohibitons, set down in a basic instrument, the disregard of which may be pronounced ineffective by a Court of Law. Constitutionalism therefore, is the conduct of government and the exercise of state power, limited according to certain established and enforceable rules. It deals therefore with the degree to which the constitution functions as a real limitation on the way governmental powers are exercised. 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.'[32]

Under constitutionalism, power is prescribed and procedure is prescribed. These are the libertarian and procedural aspects of the constitutionalism. In the first instance, the state is forbidden to trespass in areas reserved for private activity; and in the second instance, government institutions are established, and their functions, powers and interrelationships are defined. Constitutionalism thus emphasises that:

'Certain rights of the individual citizen are protected (i) against the government, even against popular government and majority rule.'[33]

This means that an intellectual distinction exist between constitutionalism and democracy.

The Historical development of this concept of Constitutionalism, in the study of the modern constitutional state, does not seem to be different from the historical development of the doctrine of separtion of powers. For the purpose of this dissertation, I will rely on the historical developement of the

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concept of separation of powers which goes together with constitutionalism and which sometimes should be treated as one; separation of powers being one of the aspects of constitutionalism. I did not intend to discuss this concept but for the purpose of chapter 3 of the dissertation, it is necessary to highlight some of the important aspects which will assist in the succeeding discussion of the practical application of the rule of law in the 'Nyayo era'. The most important to note is that constitutionalism spread to Third World (and Kenya specifically) in the 20th Century and in the form of Constitutional documents on the attainment of independence and the right of self-determination. This was, as I earlier indicate, importation of the Westminster model.

The Constitutionalism prevailing in Kenya is demonstrated by the Constitutional provisions which I have already discussed. The question which many people desire to ask is whether the Kenyan Constitution, a duplicate of the Westminster model and so properly written down, is an effective document of Constitutionalism? In answer to this question, we may quote Professor De Smith who has thought to be necessary for constitutionalism the following restraints:

(i) The government must genuinely be accountable to an organ distinct from itself;

(ii) Elections should be free and held in a wide franchise at frequent intervals;

(iii) Political groups should be free to organise in opposition to the government in office; and

(iv) There should be effective legal guarantees of fundamental civil liberties enforced by an independent judiciary.[34]

The limitation of government by a constitutional guarantee of civil liberties enforceable by an independent tribunal is therefore the core of constitutionalism. Another fundamental tenet of constitutionalism is the separation of powers. Therefore, if constitutionalism is to be maintained, the separation of the three organs (legislature, executive and Judiciary) is essential. It may then be said that:

> 'Constitutionalism requires for its efficacy a differentiation of governmental functions, and a separation of the agencies which exercise them'[35]

As this chapter ends, I would like to lay my emphasis on the fact that, Kenya's constitution has indeed incorporated in itself the concept of the rule of law. As the supreme law of the land, the constitution has been a guardian on every legislation to the effect that, should there be enacted any laws which have no spirit of the rule of law (that is, spirit of achieving human dignity), then the constitution will declare them null and void. The authority of the Kenya constitution is stated in Section 3 of the constitution, on a similar scheme to that of the American Constitution, Article VI, Section 2, as follows:

> 'This constitution is the constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to Section 47, if any other law is inconsistent with this constitution, this constitution shall prevail and the other law shall, to the extend of the inconsistency, be void.'

In many ways the 'human rights' chapter reproduces the Universal Declaration of Human Rights formula which I mentioned in Chapter one of this dissertation. The necessary implication is that our avowed goal is that of equality and human dignity.

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What follows in the next chapter is the degree and extent of the rule of law in the 'Nyayo - era', that is, the period in the Kenyan history between 1978 and today. In very simple terms, the chapter will examine the concept of Constitutionalism and the rule of law as guaranteed in the constitution. In other words, has the Kenyan Constitution effectively maintained the rule of law in the independent Kenya? Since independence Kenyan constitution has been amended several times and this one is questionable as far as the rule of law is concerned.

CHAPTER THREE

THE APPLICATION OF THE RULE OF LAW IN THE NYAYO ERA

It is now that time in the Kenyan history when we need to sit down and take stock of the events of the past 14 years, a period politically adored by many or a few Kenyans as the 'Nyayo era'.[1] Time to figure out what went wrong and why; what we could have done better; what to do to ensure that we do not repeat the same mistakes. What has Kenya achieved since the year 1978? Is the country stronger politically and economically? Are we certain that the next few years will be stable, free and tolerant? Or has a spark been lit that waits for the wind to literally set the country on fire?

In this chapter, we aim at understanding the observance and respect of human rights and the rule of law in the Nyayo era. It is important to note that civilised world judges nations by their degree of observance and respect of human rights and the rule of law. And now Kenya is rated very low in the family of nations in terms of the quality of leadership and governance. Events tell us that Kenya has joined China as the remaining authoritarian states that result to terror and violence and refuse to permit public expression of legitimate peaceful dissent. As soon as President Daniel Toroitich arap Moi (popularly known as Nyayo) came to power in 1978, he sought to deny potential critics a platform. The 1964 constitution was repaired in order to merely accomodate the misguided ambitions of the Comprador ruling clique. For instance, the constitution was amended to make the Kenya African National Union - KANU in June 1982,[2] the sole political party in the country, so that those who express variant views against the Nyayo government are not only robbed of their political rights

by kicking them out of the party, but also subjected to arbitrary arrest, detention, exile and confinement, which is against the spirit and letter of articles of the Universal Declaration of Human Rights, to which Kenya is signatory.

In 1985, the government removed the constitution's security of tenure of office hitherto enjoyed by both the Attorney-General and the Controller and Auditor-General.[3] Consequently, it is an open secret that the Attorney-General can no longer perform his duties as the director of prosecutions without interference from the Executive arm of the government. As a result of a holding by the High Court of Kenya that certain provisions of the Criminal Procedure Code[4] were unconstitutional, an amendment was brought which denied to persons charged with capital offences the right to bail, which is guaranteed in S.72(5) of the constitution.[5] This amendment was introduced following the decision of the High Court of Kenya in the case of Margaret Magiri Ngui -V- Republic[6]. In this case the High Court held that it was unconstitutional to impose a restriction on the power of the High Court to grant bail, since it is contrary to S.72(5) and S.60(1) of the constitution. This was a straight-forward case in which the individuals' constitutional right to bail was upheld, and a derogating statute was struck down as being in departure from the principle of the supremacy of the constitution and for taking away this right. However, in practice this amendment has not got recognition as we shall see later.

The most far-reaching amendment to the constitution is that which removed hitherto the constitutional security of tenure of Judges of the High Court and Court of Appeal in the Kenya judiciary as well as enhancing the period of detention of

suspects by the police, who have acquired real and dubious honour of murdering innocent individuals while under their custody.[7] As a result of this amendment members of the judiciary held office at the pleasure of the President and the police were then empowered to hold suspects in all offences punishable by death for a period of up to 14 days without taking them to court. This goes a long way to show how the very basis of the rule of law was being whittled. The constitution is paramount and any interfernce with it may result to disregard of the rule of law. Debating on constitutional amendments in Parliament Mr. Khalif said:

> 'Sir, we can interfere with members sitting but we (should) never interfere with the constitution ... The constitution is the most paramount of our laws... and without the Kenya Constitution this country is not even worth mentioning'[8]

We are getting more and more alarmed at the manner in which the Nyayo government has reacted to the intensified and increasing political challenges. The government's willingness to tolerate independent voices has diminished considerably. It has banned, harassed or threatened to ban a number of magazines thereby giving notice that one of the few forums for political commentary and criticism will no longer be able to serve that function. It has sought to silence the church as a voice for the expression of moral concern, while academic discussion within the universities has been severely curtailed. The result is a climate of fear and suspicion, discouraging free discussion on matters of national importance. Civic organisations have been proscribed unless they are sponsored and controlled by the government. There has been no free press; the media is

owned and operated by the government and subject to tight censorship. Every form of communication and cultural expression is closely monitored by security agents. Controls on political life have been enforced, above all, by the coercive power of the state's armed forces and by a network of newly formed security agencies with unlimited powers of arrest and detention. This is a flagrant denial of basic human rights enshrined in the Kenya Constitution and International Charters.

As with Liberia, Somalia, and other countries, deprivation of human rights is a poor guarantor of internal peace and regional stability. When all other avenues for the expression of dissent are closed, an underground movement committed to violent struggle becomes the principal vehicle for mobilising public conscience towards the redress of grievances. When the challenge came in Somali, it was able to tap into a well-spring of popular sentiment. Inevitably, people had lost confidence in a system where the law did not apply to men in uniform, whether those men are soldiers, intelligence police or regular police and they were ready to support those willing to take Law into their own hands. Somali is an example about what happens in a society where the government deliberately stiffles the space for independent initiative and thereby denies its citizens the opportunity to engage in peaceful political discourse.

The year 1982 is a year few Kenyans are going to remember with much pride or joy. It was the year in which an attempted coup shook the country's political system almost to its foundation, a year in which Kenyans came face to face for the first time with the twin threat of political instability and economic calamity.[9] The death toll and blood shed over the few hours of the coup is comparable to only the recent Burkina Faso massacre.

Losses in property due to the mindless looting in the capital city of Nairobi which followed the abortive coup were put in the millions of dollars, and overnight Kenyans realised just how fragile, and valuable, were the institutions which they had been building over the years to safeguard democracy in the country.

The coup attempt was itself the climax of a period which had been building up with a lot of tension. Throughout the first half of 1982, the political atmosphere in the country was fraught with confrontational rhetoric. Dissident voices were heard on the campuses of the University of Nairobi and among politicians, particularly former detainees and a number of back-bench parliamentarians, who felt that they were being left out of the mainstream of political decision-making. A number of government critics had been detained without trial.

After what has happened in Liberia and Somalia, one hopes that neither the people nor the government of Kenya will fail to recognise the long-term cost of forfeiting human rights for the illusion of a 'stability' based largely on the denial of human rights. In both countries, whether one counts this cost in terms of people dead, those who are physically injured or psychologically damaged, the thousands who are refugees or displaced persons, the economic devastation, the destruction of cities or the loss of hope and confidence, it amounts to a devastation that no society free to choose its political leaders would willingly have brought upon itself.

The most disquieting development, however, has been the recent ethnic violence in Western Kenya. It has claimed hundreds oflives, left thousands homeless, and displaced inculculable number of persons. Many observers believe the Nyayo

government is behind these tribal clashes whereas the government believes the opposition is instigating the clashes to create disfavour with the government. While this cannot be confirmed, it does appear that, at first, security forces did little to stop the violence. The President of the Republic of Kenya has done alot to assist the victims of these bitter and painful clashes. In his capacity, as the head of state, he has given out over Ksh. 10 million to assist the displaced people and also he has directed the Commissioner of Police to arrest and charge rumour-mongers whom he claims are fuelling the clashes. There are incessant cries from Kenyans that with its military prowess, the Kenya government seems unwilling to firmly clamp down on the continuing political terrorism that threatens to explode into an unparalleled civil strife. Various antics are instead being used to play down what has now become a national catastrophe, and the expensively trained military personnel continues to stay inside the barracks or to be sent to Yugoslavia as 'peace-keeping' forces, leaving behind their brothers and sisters dying. In a screaming contradiction, the Kenyan authorities are seemingly condoning the local tribal attacks on the one hand, while on the other hand, contigent after contigent of crack military personnel are being flown to join other United Nations peace-keeping forces in Yugoslavia to control similar civil strife there, completely oblivious of the untold suffering other Kenyans are being subjected to in their own motherland. The Kenyan situation has now qualified for attention by the United Nations as well and, perhaps, a vote for an emergency deployment of U.N peace-keeping forces to the parts of Kenya currently under the wave of political massacres, would be an outrageous resolution.

Whatever strange logic guides African politics, Kenya defies it. No wonder the nation is moving towards discarding its clarion call: peace, love and Unity. It is difficult to understand why the police finds it easy to arrest 'rumour mongers' while those actually spreading mayhem, the legitimate murderers, go scot-free. More difficult to understand is the disappearance of government opponents in the torture chambers, mysterious assasinations and unconvincing road accidents. For instance, the Anglican Bishop who was killed in an unconvincing road accident two days after death threats from the then Minister for Labour, Peter Okondo.[10] Kenyans want to know who is killing their illustrious sons like Dr. Robert Ouko, the country's then Foreign Affairs Minister.[11] Despite the government's assurance that no stone will be left unturned, and that any suspect will be charged in a court of law, the same government, that is, Nyayo government has prematurely dissolved or stopped inquiries at a stage when the truth about the killers is almost unearthed.[12]

Following the Kenya government's crackdown on democratic activists, Kenya has lost its diplomatic relations. For instance, U.S.A and German governments register stronger protests. Having been given 6 months by its financiers to clean its economic and political house, Kenya has alot to learn from the experiences of other countries. Another remarkable effect of violation of human rights and failure of Kenya government to adhere to the principles of the rule of law was the shifting of the International Bar Association Conference from Nairobi to Newyork.[13] In his letter to IBA members, Kenya, the IBA President, William Recce Smith Jr. expressed stronger concern with the state of human rights and the rule of law in Kenya. He condemned the detention of persons without charging them, especially the

detention of 4 lawyers one of whom was arrested when he went to a police station to interview his client.[14] If the Bar lost the prestige of hosting the 23rd Biennial Conference, due to the state of insecurity in Kenya, the country lost substantial foreign exchange.

After a decade of official terror against the advocates of political changes in Kenya, Nyayo government finally concedes to the immediate introduction of multi-party democracy, seemingly advancement towards the rule of law and civilization in Kenya. It is crystal clear to everyone that Section 2(A) of the constitution of Kenya was obsolete and by repealing it our beloved country will return to the track of democratic rule where people will be the final arbiter in any matter touching on their rights. It is not possible for human rights to be observed and strictly adhered to in a one-party state. And if it is possible, then not Kenya where there is confusion of the two notions of the state and the party.

In the light of the above events, I will discuss the ups and many downs of the rule of law in the Nyayo era making reference to court cases.

1. HUMAN RIGHTS AND DEVELOPMENT

All rights guaranteed by the constitution are enjoyed subject to respect for rights and freedom of others and for public interest. Rights cannot be guaranteed in absolute terms for this would hinder the government in discharging its obligations towards the society and threaten the enjoyment of those same rights. There is a conflict of interest between the citizen's liberty which ought to be respected, and public security, safety and good order which have to be preserved.

Personal freedom cannot exist where social security is

lacking. This freedom must therefore, be matched with social security. The freedom of any citizen is worth little to him if he can be preyed upon by thieves anytime. It's therefore upon the society to have the means to protect itself from criminals and other law-breakers. It must have powers to arrest, search and imprison those who break the laws. So long as the state exercises these powers properly, they are themselves the safeguards of freedom. But powers may be abused, and if abused there is no tyranny like them. It may lead to a state of affairs when police officers may arrest any person without a reason. This lead to a state where illegal detentions are common. A true balance must therefore be kept between personal freedom and social security.

Any country which subscribes to the concept of the rule of law must guarantee its citizens the sanctity of life and liberty. This is largely the work of the Attorney General as the Chief Legal adviser. In early 1980, the then Attorney-General of Kenya was heard telling the parliament that he had given the order to the police to 'shoot suspects' of armed robberies. This order was further strengthened by the President of the Republic of Kenya when he ordered that no mercy should be shown to armed robbers. Speaking at the Jomo Kenyatta International Airport on his way to the Middle East, the President said:

> 'Some people are of the opinion that armed robbers should not be killed, but I am saying they should be killed.'[15]

However, the president did not specify whether he was ordering that suspected armed criminals be shot on sight by police or be hanged after being convicted by the court. It he meant they

should be shot on sight, and actually that is what he meant, it was in contravention of section 71 of our constitution as it deprives a citizen of his right to life without recourse to law. This was a misfortune for Kenyans to have a President who had no respect of the most fundamental right. If it was not a slip of the tongue to order the shooting of suspects, then as we shall see later, Kenyans read and hear of rights and freedoms of expression, movement, assembly and property as a myth because they cannot exist in a mind which takes life to be that of a hen.

In a heated opposition from some members of parliament, the then MP for Nakuru North Honourable Koigi Wa Wamwere, who wanted the house to censor the government order (any order from the president is in Kenya a government order) to the police to shoot and kill suspects, said:

> 'Given that parliament has not empowered the office of the Attorney-General to either contravene Section 71 of Chapter 5 of the Constitution of Kenya, or Part III Section 3 of Criminal Procedure Code in ordering the police to shoot suspects to kill, this house urges the government to withdraw the order given to the police to shoot to kill which might result in killing of innocent citizens on mere suspicion.'[16]

At this juncture we may say that 'Nyayo' did not refer to the footsteps of the founding father of this nation but it meant that Kenyans or rather the political sychophants should follow his footsteps. This is explained by the so many police shootings which have been recorded in the period of 14years. Nowadays contravention of Section 71 of our constitution has reached its peak with executive officers of sound mind like the Director of Motor Vehicle Inspection Unit, Lucia Kanyingi,

wrongfully and illegally shooting and killing a 13 year-old Mary Wanjiru Kiarie.[17] The shooting was wrongful, illegal, unjustifiable and flagrant homicide of a little girl exemplifying the director's blatant abuse of firearm and utter disregard for life. He was following the footsteps. Kenyans are very bitter to imagine that no action was taken to prosecute the said murderer until the parents of the deceased filed a civil suit. We shall wait expecting to see how sound is our beloved judiciary as far as the rule of law prevails.

A substantive human right which has been disregarded by the Nyayo government is the right to free speech, expression, association and assembly. This is why Kenya has been rated very low in the world civilisation. However, Section 2(A) of the constitution was repealed, but Kenyans have tolerated a decade of silence. It was now two-fold: you either sing the tune of the only political party KANU or, you go to exile lest you are detained for years unless your life goes away under the heavy torture in the police custody or the so called 'Nyayo torture chambers.'[18] The government has made great use of prosecutions for sedition in an attempt to restrict criticism of its conduct in the press and elsewhere. In the case of David Onyango Oloo -V- Republic,[19] a young University of Nairobi student was charged with the offence of sedition allegedly for, writing, publishing and possessing a seditious publication "A plea to comrades." After a number of defence lawyers had withdrawn from the case, the accused conducted his own defence. He sought to know from the prosecution and the court how his unfinished paper analysing contemporary social issues could promote disaffection, ill-will or try to overthrow the government. He further sought to know the definition of sedition

and in particular the demarcation point where somebody says here is where constructive criticism stops and this is where sedition begins. The accused was jailed for 6 years for sedition. His appeal on conviction was rejected by the appelate Court. The Courts took the view that the issues raised in his paper, while definately topical and relevant, were raised in a manner that amounted to sedition.

In the above case sedition was used against student learning, for public interest. The alleged publication was not read out in the Magistrate's judgement in the interest of public! It is important to note that it was in the chilling aftermath of the attempted coup and the government's existence and its complacement feeling of security were threatened. Since the year 1982, the government has increased its seditious trials in order to punish the intellectual voices. The press was censored and every form of communication and cultural expression is closely monitored by security agents. Journalists are being charged with sedition and intelligence officers are ever chasing to impound and arrest any publications they feel are not favourable to the personal interest of the president. In a very recent case, two directors of Nyamora Communications Ltd were arrested together with three of their journalists employees. An intelligence officer had stated that the arrested publichers were to be charged with writing articles 'contrary to laws governing the freedom of the press'. What I am saying is that the law of sedition has been wrongfully applied in order to silence the democratic activists with the mind to build a strong government. I wish to submit that the only way the law of sedition can be constitutional in post independent Kenya is, if it is seen as a law for maintenance of public order and tranquility. In deciding whether any statement or conduct is seditious,

it is mandatory according to the constitution, to show first that the statement or conduct complained of could have led to public disorder or imminent threat thereof. Any interpretation of the law of sedition independent of the question of public order is unconstitutional.

The government has in the alternative resorted to sacking journalists and publishing employees from employment thereby giving them a choice of either losing job or going to detention. This started immediately Nyayo government came to power and it was the procedure after the attempted 1982 coup. On a Friday July 23, 1983 George Githii, the then Editor-in-Chief of the Standard newspaper, was sacked from employment. The paper had published an uncompromising attack on political detention, calling for release of all detainees and repeal or amendment of the preventive detention act. The editorial had submitted that the detention law was inconsistent with the bill of rights incorporated in the Kenya constitution. The then Minister for Constitutional Affairs, Charles Njonjo condemned the challenge of the existence of the rule of law by an editor of a newspaper. He argued that Section 85 of the constitution provided for detention or in his other language preservation of public security. He consciously held that:

> '... for an editor of a newspaper to challenge the existence of the rule of law in this country, he must be crazy.'

Kenyans least expected this one to come from a Minister for Constitutional Affairs. The only point he said without understanding is that <u>the rule of law can only exist where you have political stability</u> (emphasis added). The question is, do we achieve this political stability through detention and making Kenya a dejure?

A cursory glance at events leading to the people's cry for democracy xxxx in Kenya tells us that all was not well in the political and economic spheres of life. In a period of less than two years, fundamental changes have taken place ushering the country into a sudden multi-party scenario, something that would have been a terrible debate. Throghout the Nyayo era association and assembly have been the right of the ruling party KANU. With Section 2(A) in the constitution Kenyans were only free to associate and assemble in the name of KANU. Civic organisations were proscribed unless they were sponsored and controlled by the government. The provincial administration has been streamlined to issue no licence for meetings unless it bears a stamp of the ruling party. In effect, democratic activists have been detained for attempting to call for unlicenced meeting. Whenever such arrests are made by the police, a charge of sedition is drawn. The government has used the police force to disperse by shooting at innocent citizens trying to exercise their constitutional right of assembly and association. The police at one time invaded worshippers at the All Saints Cathedral, Nairobi. I condemn unreservedly the latest crackdown and arrest of democratic activists and the brutality meted out by police on thousands of Wananchi who tried to attend the so called unlicenced Kamukunji meeting.[20] This is the rule of man as opposed to the rule of law. And the rule of man is characteristic of human tendency like greed and animosity.

It is recently when a group of peaceful Kenyan mothers converged at Nairobi's popular Uhuru Park where they embarked on an indefinite hunger strike to protest what they perceived as the Kenya government's gross interference with Kenya's

fundamental freedoms. The women, a number of them mothers of political prisoners, called for the unconditional release of their sons, while in the same breath asking President Moi and his Nyayo government to resign for threatening to plunge the country into chaos.[21] No sooner had their call been put in the diaries of the intelligence department, that the mothers were invaded by a horde of ruthless anti-riot policemen who brutalized and dispersed the sympathisers of the strikers before clobbering the women. The exasperated women, most of them aged over 60 years stripped naked infront of the charging policemen, throwing the entire country into confusion and disbelief.

Stripping in public by women is said to be Africa's rarest curse. One of the hunger-striking mothers who predicted that Moi's government would fall in a matter of days declared that:

> 'No person, and no government can ever stand after this type of curse.'[22]

It is in the final days of the Nyayo rule and Kenyans are eager to welcome any other type of government after a decade and half of authoritarianism whereby the rule of law was a dream with only one man above the law and thus at a position to abuse it to the length of his foot.

In cases whereby Kenyans have been denied their right to assemble and associate freely, they have filed petitions seeking redress in the office of the Attorney-General. Responding to a petition for the release of 52 political prisoners presented to him by the mothers, relatives and friends of these prisoners, the Attorney-General, Amos Wako had the following to say:

> 'We may not agree that those you call political

prisoners are necessarily so; infact, technically some are not even prisoners because they are awaiting trial.'[23]

Mr Wako seemed to suggest that an accused person facing trial is not a prisoner let alone a political one. Its hard to follow that argument.

We can hardly talk of the rule of law in a country where its citizens are restricted from movement. This is what has been happening in Kenya for the last 14 years. There is restriction of movement within and without the country. In Kenya, after the attempted coup of 1982 the political temperature rose to a very high degree. Those who had fallen in disfavour of the Nyayo 1982 government had to go in exile. They were not being afforded any hearing at all. It was therefore a matter of saving one's life. The immigration department undertook the impounding of passports of Kenyans who were well recognised to be government critics. For example, the passport of George Githii, the editor-in-chief of Standard newspaper was seized after his expulsion from job in 1982. In the same year the passport of the now aspiring Kenya's president Jaramogi Oginga Odinga was seized after his expulsion from KANU. This has been the government's weapon against its critics who attempt to run for their most fundamental right, that of life. Once your movement has been curtailed by seizure of one's passport, then you either sneak out of the country or you become a political prisoner. Impounding of passports has been the routine and almost all the government critics have had their passports at one point in time. There is no procedure properly used in the seizure of passports; it is done at the airport when one is ready to leave the country, yet there is no remedy.

In the case of Re Application by Mwau[24] the applicant's passport had been impounded by the Immigration Department and he sought the order of Mandamus directed to the principal Immigration Officer compelling him to return his passport. The applicant argued that Section 81 of the Constitution guaranteeing his freedom of movement had been infringed. The court held that Section 81 of the constitution recognises that a citizen has a right to leave Kenya but the right is not absolute and that in any event the Immigration Officials had no legal duty and therefore Mandamus could not be used against them. The Court was in essence saying that every citizen has a constitutional right to travel to and from Kenya which right is depended on his having a passport, but the passport may be impounded by the government for any reason or no reason at all and the courts provide no remedy.

In this case the court was faced with two conflicting but important values; the right of the state to regulate immigration and the right of the individual to travel and to have full protection of law. In ruling the way it did the court was in effect allowing further abridgement of individual rights beyond the limitations already imposed, by bureacraticcand political ill-will. This attitude is clearly wrong and against the spirit of the rule of law. The former president of the World Bank, Barber B. Conable hit the nail on the head when he thus said:

> '... I have been struck that it is often easier for me- a MZUNGU- to travel from one African country to another or even within a given country, than it is for the African citizens...'[25]

The other issue of violation of human rights and the rule of law in the Nyayo era is [illegible] politics. [illegible] 'political [illegible]' [illegible] characterized by tortu[illegible]

and inhuman and degrading treatment, violation of right to a fair hearing by one or other means and denial of right to counsel. The police interrogation techniques are unconstitutional and affront to human dignity. For instance, in 1981, Reverend Simon Makokha OKòthe was forced to swallow coins in police custody. Despite this, he was charged and sentenced to 3 years of impersonating a public officer. We read with a lot of humility how Mr. Joseph Wekesa Barasa died of the extreme interrogation which involved deprivation of sleep, rest, food and water.[26] In the case of Republic -V- Lawford Imonde,[27] Reverend Imunde was tortured and forced to write incriminating entries in his diary. The torture methods included actual beating, starvation, being forced to sleep naked on the cold cell floor, being forced to take cold shower and thereby contracting pneumonia despite protests that he was allergic to cold water. When his lawyer sought to see Imunde in prison, the prison security officer informed him that he had instructions from 'above' not to allow any person, including lawyers to see the Reverend. A Church Minister, Reverend Imunde had been charged of being in possession of a seditious publication; to wit his personal 1990 desk diary, and of printing seditious words and the remarks in the diary. The political element is visible in this charge that, his release after inhuman and degrading torture was made conditional upon his helping the government hit out at the Presbyterian Church of East Africa (PCEA), the Church Province of Kenya (CPK), the National Council of Churches of Kenya (NCCK) and the Law Society of Kenya (LSK).

It seems that the Nyayo government has utilised the criminal process, to intimidate and attempt to annihilate the opposition. It is also clear that Kenya's Criminal Justice abounds with

instances of executive perversion of the judicial process. Use of political trial started with the coming to power of the Nyayo government. In the case of R-V-Waruru Kanja[28], we note two developments that took place since Waruru Kanja's imprisonment in 1981 and which strengthen the evidence that the prosecution was actuated by political motives. There was summary dismissal of a Chief Prison Officer at Kamiti Medium Security Prison where Kanja was imprisoned and, the government's refusal to grant Kanja a remission on his sentence as is the prevelent practice under the relevant laws. The prison official was charged with inter alia the nebulous offence of allowing a prisoner (Kanja), to be visited whereas the prison rules recognise no such offence. It would appear that his real crime was political in that one of the visitors in question was Koigi wa Wamwere, the then MP for Nakuru North, a consistent and articulate critic of government policies. This case is Locus classicus and an eye opener because Kanja had petitioned for clemency under Section 27(a) of the constitution which empowers the President to pardon any person charged of any offence. It is interesting that the then speaker gazetted Kanja's Parliamentary seat vacant even before the President made a decision on the petition.

In another case, R -v- Mwanzia Kikuyu,[29] the accused was charged with sedition contrary to Section 57(1)(b) and 56(i)(b) of penal code. The relevant section make it an offence, for any person to utter any words with an intention to bring into hatred or contempt or to excite disaffection against the person of the president or the government of Kenya. The facts were that, Kikuyu who was engaged in a political discussion in a Machakos bar with 8 other people, uttered words to the effect:

'You people will be surprised one of these days to find

Hon. Ngei as V-P and you will see me flying a flag from Nairobi to this place (Machakos) being a Minister.'[30]

Proving beyond any reasonable doubt that Kikuyu had seditious intentions was almost impossible task in purely evidentiary terms. The words constituting the actus reus of the crime were at best innocuous and alleged to have been uttered before only 8 persons, late at night in a drinking place. Therefore, probably these considerations, plus the fact that his personality as a first-term legislator posed very little or no threat to anybody, which led the state to prefer the lesser and alternative charge of conduct likely to cause breach of peace contrary to Section 94(i) of the Penal Code. He pleaded guilty, was convicted and sentenced to 3 months in jail, served the sentence never losing his parliamentary seat.

All evidence available in the above case suggest that there was nothing at stake politically in this case. It is however illustrative of how some ambitious official or an overzealous state informer hoping for promotion can trigger the process of political justice. For the prosecution 'to achieve' political justice', it has to argue for custodial sentence, for this would ensure that one lost the political platform which he successfully used to embarass people in power. In R -v- Mark Mwithaga,[31] the accused had been charged with assaulting his former wife, and damaging her property. It is not possible, given the political atmosphere in the country at the time of the trial of Mwithaga, to believe that the learned judges were too naive as to suggest that one fact that the trial came up during the week in which the accused was supposed to campaign for a by-election, was merely coincidental. Every time the accused was whisked away in a special police van, this making it difficult for client and counsel to have adequate time for consultations. The prosecution

commenced almost 20 months after the commission of the offence and for no good grounds Mwithaga was refused bail. All this suggests that no better time to put him in jail would have been better than immediately before the by-elections were held in his constituency and that the executive was determined that Mwithaga should not go back to parliament.

The trend in Kenya is such that whenever there has been a conflict between the rights of a citizen and those of the government, the judiciary has given judgement favourable to the government.[32] The executive may take advantage of this situation to rid the political arena of 'disgruntled elements'. This can be skilfully done by finding an opportunity to charge the particular person with an ordinary criminal offence, but the beneath the veil are the political connotations of the case. In the more recent case of Republic -v- George Anyona and three others,[33] the four had been charged with the offence of holding a seditious meeting with intention to overthrow the government of Kenya as by law established. Even before their arrests therefore, the accused persons had already highly checquered political careers. Three of them had been very critical of the way certain things had been done by the government and as a result they had suffered long incarceration under the preservation of Public Security Act. It was perhaps not surprising that the backbone of their defence was the argument that theirs was a politically motivated case and that the government was only charging them so as to give a cloak of judicial respectability to repression. The accused persons narrated a long history of repression, thus said by one of the accused:

> 'this is a political trial in the guise of a criminal trial.'

The most hotly contested case in Kenya today is the treason charge facing Koigi and his co-accused.[34] These are some of the political prisoners who have been denied their constitutional rights by way of suffering in police custody and detention camps. Besides the now universally alleged police methods of torture to extract confessions, these political prisoners have been psychologically and mentally tortured. Koigi states that he was psychologically tortured when his mother and sister were arrested and incarcerated for questioning, from the cell he was being interrogated, he could hear coughing sounds, sobs and low cries of anguish emanating from the cell adjacent and was informed by his interrogators that the cries were his mother's who was incarcerated therein. Summed up, the purpose of his torture was to entrench the rule of fear, arbitrariness and unaccountability.

It is known that very considerable powers, often in derogation from the Bill of Rights, are exercised under the concept of preservation of public security. It is clear from caselaw that the exercise of such powers has not lent itself to easy control by the courts of law, or indeed any other institution. It has already been observed that the practising lawyer has been lucky with the rights of his client in the more straight-forward, somewhat technical matters, such as, for example, acquisition of private property without paying full and fair compensation; discrimination on racial grounds; etc, than in the cases where the rights in question have far-reaching implication for law and order, for state security, etc. Might it be argued that constitutional Liberties in this latter category are inevitably at risk, for the reason that they relate so closely to the nerve-centre of high political power? If such an argument be tenable,

then it may be remarked that the normal organs of power control in their very nature, will tend to lack the strength which depends on their independence.

2. EXECUTIVE ABUSE AND DISREGARD OF ESTABLISHED LAW

Kenya is now rated very low in terms of the quality of leadership and governance. This is simply the problem facing Kenya in the Nyayo era and there seems to be no better solution other than electing and appointing a sound executive body which will not interfere with the legislative and judicial organs of state. At present, the executive has assumed the role of legislature and judiciary to strengthen itself in a one-man rule as opposed to the rule of law. As the head of the executive, the President of the Republic of Kenya has messed up with all the institutions that ensure that justice prevails in Kenya. He has made himself the Attorney-General and Chief Justice by appointing to these crucial and sensitive posts personalities who are seemingly capable but incapacitated by their insecurity of job. It is least expected of a Chief Justice to address intellectuals to effect that they should give full support to the President on whose competence a true democracy depends. It is even more ridiculous for the Attorney-General to say that the President is above the law, a characteristic of the rule of law. Of all the characteristics of the rule of law, I do not think it correct that the immunity of the President is one. The Attorney-General, Amos Wako, could be misleading the entire nation which depends on his integrity to enhance the rule of law, when he said that:

> '.... a characteristic of the rule of law is that no man, save for the President is above the law.'[35]

As soon as President Moi ascended to power in 1978, he knew he was above the law and therefore could not be reprimanded for

his unlawful actions as the head of state. To establish his one-man rule, the president was very busy in the early years implementing a philosophy of government of terror and intimidation. He sought to eliminate his political critics using the law which I must say he had the wrong interpretation of. It is on record that the highest number of political detainees was recorded under the Nyayo rule. Some individuals had to run for their lives in exile, probably to go back to their motherland after this infamous Nyayo era. The arbotive 1982 coup explains how Kenyans had suffered under the newly formed Nyayo government.

What forms our discussion hereunder is, in what areas has the executive abused and disregarded the laws. In so many ways the executive has appeared to apply law into their hands. For example, The Public Collections Act[36] has been wrongly invoked by the administration officials who have been organising the so called 'Harambee Fund Raising' meetings. It is contrary to the rule of law because the Act does not apply to harambees. This seems to be ignorance of the law by the executive since there is no legal framework for such concept of harambee. Licences have been issued under the Act and this enable Ministers, MP's and senior government officials to coerce people and intimidate them to make contributions which amounts to abuse of the right of property. This is one of the areas whereby the executive has assumed to itself unlawful authority which is unquestionable because the whole concept of harambee is initiated by the only man who is above the law.

The executive has also disregarded the law relating to licences. There has been very many cases of trade licences being cancelled in the pretence of public interest and yet the proper legal procedure is ignored. We have heard of cases

whereby a Provincial Commissioner, District Commissioner or officer passes a decree of closure to a business whose owner is not favourable to a government personality. Concerning the issue of licences to hold a meeting, the government has been vigilant and very strict as to the nature of the meeting. There are so many cases in which political rallies have been denied licence unless they are for the ruling party. To ensure that such rallies are not held in Kenya, the executive has been using the police power to disperse such meetings. With the recent multi-party developments in Kenya, there has been so may applications to the Attorney-General for denial of licence to hold meetings, yet the applicants get no redress.

Administrative officials have been so arrogant as for as the knowledge of law is essential. Some officers have gone to an extent of beating wananchi yet they should know it is unlawful. The situation in Kenya has gone back to colonial times when a chief or district officer could claim title over your property. This is what is happening in the Nyayo era and it is even more worse. A most bizarre case is a June 1988 trial of one Peter Kitavu Makau who declined to grant the Rift Valley Provincial Commissioner, Mr. Mohamed Yusuf Haji a lift in his car after the PC's government vehicle had had a breakdown. A charge of undermining the authority of a public officer contrary to Section 132 of the Penal Code was preferred against Makau. He was subsequently jaildd for 3 months without the option of a fine. The learned Magistrate erred in law and infact in failing to appreciate that in the circumstances of the case before him, Mr Mohamed Yusuf Haji could only have made a request for assistance but could be defied or disobeyed.

It is a situation to sympathize with and I unreservedly

condemn this primitive act of PC's and DC's to exercise unlawful authority over the people they are supposed to ensure proper administration. In another similar incident, Mr. Krop Moroto, a confidant of the late Bishop Alexander Kipsang Muge, and critic against corruption in West Pokot was arbitrarily and unlawfully arrested and his health clinic closed for having differed with a former West Pokot District Commissioner, Mr. Peter Lagat. Moroto's demand for truth and accountability led to his persecutions on trumped up charges, and later took him through tribulations and molestations in the infamous Nyayo House 'torture chambers'.[37]

The above stories send signals of fear to the hearts of those who love freedom; or at least those who have not undergone similar experiences. But one significant question it raises and leaves unanswered is this, that, when ordinary citizens are tortured and suppressed by the government through her public authorities, who will safeguard public security? If a section of a building bearing the national motto is just set aside for torturing and intimidating free individuals, where would the peace we sing about reside?

3. JUDICIAL INDEPENDENCE

Beneath the facade of the legal structure provided in the constitution, for Judicial independence, is the reality that the purpoted independence is a mere sham. In practice the President is the controlling mind of our judicial system. We cannot assert that we have full confidence in the integrity, impartiality, and ability of our judiciary, to dispense justice according to accepted principles of jurisprudence, without yielding to direct or indirect presidential pressures. The president is in a strong

and influential position in that he has got wide appointive powers over the judiciary. Thus the appointive structure is built, with the president as its pinnacle, so to speak. He is in a position in which he can demand and rely on receiving the total loyalty of the judiciary.

In the light of the above, it is apparently unconvincing that the judges can be fully independent of the President's wishes in performing their role. This is due to the fact that they owe their appointments(s) to him. Thus, they may find themselves unconsciously biased in favour of the executive. It does not suffice to allege that the mere fact of appointment makes them biased, but there is the danger or an apparent likelihood of it.

Judiciary is reluctant to hear and determine issues in which a stand has been taken by the executive already. Thus, there is a tendency by the courts to recoil from their task of arbitrating impartiality between the state and the individual. One commentator has remarked that:

> 'While the courts are free to decide for or against the the government in constitutional matters, if they do the matter, and the matter is judged by the government concerned to be important, it is more than likely that it will pass legislation to nullify the decision, and the courts will have little option but to acquiesce in this'[38]

Perhaps this could have been the reason for the court's adamance and refusal to inquire into the validity of the Minister's grounds for issuing a detention order in the case of Raila Odinga -V- Republic. The stand taken in this case shows that the court has no authority to question executive decisions in some cases even if such decisions are in derogation of rights guaranteed under the constitution. It is the sole duty of the Judiciary to ensure

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that the law is not distorted and that the rule of law should be respected by those who call themselves rulers.

Courts are more likely to be indifferent and liberal in the exercise of discretion when the parties are private, than when the private case is pitted against the public case, and, in particular when the public case rests upon a duly formalised state instrument. For instance, in issues of jurisdiction relative to KANU, a very worrisome trend has emerged. The courts have gone out of their way to deny themselves jurisdiction to hear matters or have denied the plaintiff Locus Standi: to raise the matters desired or worse still to follow clear law or binding precedent. In most of these cases the issues never go far for trial as the matters are ususlly determined at the level of preliminary objections. The most significant of these cases is the case of James Ketta Wagara and Rumba Kinuthia =V= John Anguka and Ngaruro Gitahi.[39] This case involved the intecpretation of the issue whether the court could offer redress to a member of the ruling party KANU who alleged that the nomination process of the party had not been fair. The court entertained a preliminary objection raised by the counsel for the defendants relating to the courts jurisdiction to hear the matter. It was argued that the matter was entirely regulated by the KANU nomination rules and therefore could not be the subject of the court's scrutiny, as KANU was in the nature of a domestic body which was self-regulating.

Arguing constitutionally, the plaintiff said that the constitution of the party was subject to the national constitution and could not take away freedoms granted by the latter. Akiwumi, J in upholding the preliminary objection relied on the East African Court of Appeal decision in Patel and others -V= Dhanji and Others.[40] which case dealt with the 'hands Off' approach to club or party affairs. He

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stated:

> If the rules and regulations are not illegal or repugnant to justice and morality and no property rights are involved this court would be most reluctant to interfere with the decision of the office bearers of KANU taken in the discharge of their powers denired from the constitution of KANU or the rules, unless bad-faith is proved against them. Decisions arrived at honestly and fairly or even mistakenly will not be disturbed and prepared to go further and say that in appropriate cases a court would give effect to them
>
> (emphasis added)

In the case of Mathew Ondenyo Naribari -V- David Onyancha and others[41] the same issues of junsdiction relative to KANU arose again. The same preliminary objection was taken up again. Tamui, J. upheld the objection and court rejected the argument that the unlimited civil and criminal junsdiction conferred upon it by the constitution could not be abridged other than by express constitutional provision and that in any event the high court maintained a supervisory role over all judicial quasi-judicial and other offices concerned with the administration of law. The court attempted to show that the administration of justice was entrusted to other tribunals as well and therefore that section 60 of the constitution did not greate exclusive junsdiction. It should be noted here that the court refused to grasp the fact that the high court retained constitutional junsdiction to review all other surbordinate tribunals.

These cases raise a number of legal issues, To begin with they depart from legal principle and ignore binding precedent

to deny jurisdiction. Secondly, the decisions are misinformed on anumber of issues. They equate a mass political party which is the sole avenue of political participation in the entire country with a mere club. They ignore constitutional principles to concentrate on an issue of private law. The larger cases in this
larger question raised by the two cases in this regard is whether the constitutional right to vote and to participate in the political process may be abridged by a party through its own rules. Thirdly the courts intimated that they would only interfere if the plaintiffs property right had been interfered with this reinforces the view that the courts most feel comfortable addressing seeming non-controversial issues as property issues in a political set-up dedicated to the preservation of private property.

The question has arisen as to the rights of a person who fears that his constitutional rights are in inmminent danger. The manner in which the high court has handed this matter will bespeak a conservative frame of mind, in favour of the executive. Two types of human rights have been coming up for decision before our courts. The first type is straight forward and largely technical . The second type is more political and complex. It seems that in the case of the first type, the courts readily find in favour of the individual , if the individual has a clear case. In the case of the second type, judicial reasoning would appear to entail abstruse argument and(possibly) subterfuge, that uttimately produces a result favourable to the state.

In Margaret Magiri Ngui -V- Republic[42], it was a straight forward case in which the individuals constitutional right to sail was upheld,and a derogating statute was struck down for being in

departure from the principle of the supremancy of the constitution and for taking away this right.

It is very accurate to say that as regards the freedoms of movement and of person, of expression, and of assembly and association in particular, judicial constitution has tended consistently to favour the state, rather than the individual. In the case of Republic-V- Maina wa Kinyatti 43 the accused was jailed for 6 years on being found guilty of prossessing a seditiona publication Moi's Tactics Exposed, in violation of section 57(2) of the penal code.

In passing sentence on the accused, chief magistrate, Abdul Rauf, rejected the contentions of the defence lawyer that the accused was a first offender and that the document may have been planted on Kinyatti by the police officers who searched the home of the accused. Non did the chief magistrate accept the argument by Kinyatti's wife that the study room where it was found was accessible to outside lecturers and students. He said:

'In the chilling aftermath of the attempted coup, one does not have to strain one's intelligence to imagine the consequences of this document...it is by far the worst document, I have come across so far.'

Although bias in judicial decision is always very difficult to prove it is almost always a matter of impression. In this case we find that presidential powers Vis-a-Vis the judiciary have created scope for judicial involvement in politics. In kenya the courts have had to hear and determine red-hot political cases.

What the judiciary lost sight of was that it is not the courts' function to support the state. It is not the courts' function

to support the state. It is not the courts' function to support any arm of state such as the police. It is not the courts function to support the citizens against the state . It is the courts function to administer even-handed justice between parties in the case given before it. A strong and independent judicial headed by a strong and independent chief justice can honestly, endeavour to provide that balance between citizen and state which is so necessary in a free society. And we should not forget that the judiciary needs the assistance and support of strong,fearless, and ethical bar if it is to function to proper effect.

In the case of Kamau Kuria -V- AG 44 the courts' denial of its own jurisdiction reaches new heights. In this case the plaintiff sought to have a constitutional court set upto hear and determine the issue of whether the improunding of his paas-port abridged his right to travel,to and from kenya in the manner protected by the constitution. Chief justice miller in an unprecedented act of judicial ingenity held that section 84 of the constitution was inoperative as no rules had been made thereunder and as such juvisdiction could not be involved throughsection 84. This decision was cited as authority to reach the same conclusion by dugsale J.in the case of Maina Mbacha and 2 others -v-AG 45

Both cases of Kamau Kuria and Maina Mbacha are remarkable for a number of reasons first because of their unprincipled rejection and indeed hostility to precedent. It is very hard to believe that both courts were unaware of close to twenty years of litigation centered on section 84 of the constitution especially when in both cases the list of authorities were laid before the court before commencement of argument. In respect of chief justice,miller,it is even more surprising as he sat in the court

of appeal when that court decided the case of Anarita Karimi -V- Republic[46] and when that court ruled that section 84 of the constitution rested original juvisdiction in the high court.47

The question of whether rules had not beem made under section 84 of the constitution did not arise at all as the issue had long been settled by chief justice madan in the case of Raila Odinga -v-AG.48 Relying on the judgement of the supreme court of Guyana in the case of Olive carey Jaundo -v-Ag 49 Madan C.J held that:

'The failure of a rule making authority to m make rules to enforce legal rights does not defeat those rights.'

In most cases the courts are reluctant to give a constitutional remedy when a crimimal trial is pending; they also find it difficulty to declare a trial illegal. In the case of Koigi wa Wamwere -v- Ag,[50] Koigi had applied for remedial measures and thus his constitutional rights which would be violated by the continuation of the treason charge he was facing in the chief magistrates court. The court having found that the facts deponed by the applicant were not challenged by the responded(state) it ought to have proceeded to the next logical step and found them as admitted by the state. Instead ,the court reached for the chiefs magistrate's file on the treason trial and in its evaluation of the prayers of the applicant the court ruled that only one prayer the allegation of torture,was a triable issue but refused to make a finding on it. On the contrary,it evaluated the other prayers and dismissed them either as lacking in merit or as unconstitutional prayers. Indeed at certain points the court impeached the competency of the counsel which mirrored hostility from the bench to the bar.

In this case justices Dugdale, Mbaluto, and Mango, missed the point when they remanked that:

> 'Finally, we wish to point out that not every alleged infringment of a rule, regulation, or law calls for a constitutional Court.

As much as we might associate ourselves with the general import of this observation, it cannot be said to set down any particular rule or standard for the operation of Section 84(1) of the Constitution. In this case the Court went out of its way to aid the Attorney - General in the Litigation.

In short the Courts relingrished much of their independence to the government and failed properly to safeguard the citizen's rights and the rule of Law. The exercise of Judicial independence depends upon the strength of the judges and whether or not they have a correct perspective of their role. It is this lack of Judicial independence in Kenya that forced justice Dereh schofied, then a Judge of the High Court of Kenya, to leave Kenya in protest. In an application for habeas Corpus by a Mrs Karanja, to have the Body of her husband produced, Schofied I. found that the director of CID had full information that Mr. Mbaraka Karanja (the husband of the applicant) had been shot dead and buried by Police in a Public Cemetry. Schofied, J. was pressurised by the Chief Justice to disqualify himself from the case as he had been directed by the President. We, Kenyans shall live to remember that schofield, J. did not heed to the President's order to disqualify himself from that case, he instead told the Chief Justice to tell the President not to interfere with a case before the Court.

As I had earlier said, the security of the state cannotes that inherent impulse of any state to self-preservation. Construed narrowly, it means the preservation of the Government in power. The individual being part of the state, he has duty to contribute to its preservation.

But he is handicapped because he has surrendered much of his powers to the popular government that he elects. The only ovenue open to him is to exercise the most accepted freedom, that is, to praise, criticise or discuss as he sees fit, all governmental policies. This is foundamental because free speech and press are the foundation of a free government by free men. But this approach would not normally be acceptable to those who wield power and sometimes its enjoyment only remains in the wordings of the Law but without practical utility. In such extremes one witnesses the banning of Magazines, interrogations of Citizens for what they said, prosecutions mainly on seditious offences, and above all detentions.

CONCLUSION AND RECOMMENDATIONS

The concept of the rule of Law as expounded by Dicey shows alot of weaknesses. In brief, the main weakness of the Diceyan formula, in my view, is its ineducible confidence in mere forms and institutions as the basis of the rule of Law. The doctrine, according to Dicey, thrives on one intitution - the Judiciary; the Judiciary must redress all wrongs, interpersonal or as between the state and individual, through the application of the established Laws.

As concerns the rule of Law and its implications today, the three principles related to it i.e. Law and Order better than anarchy, government according to Law and the rule of Law as a broad political doctrine, they could mean as little as the Dicey's Principles to the attainment of human dignity if an executive is not genuinely committed to the attainment of such. The states that adhere to Dicey's Principle and these modern attributes should whole-heartedly consider and adopt the substantive social and economic inputs that are stressed by the international movement in promotion of the rule of Law.

In the second chapter, I have made it clear that the fundamental rights are essential if man is to retain human dignity and realise human equality. The fundamental rights assume that man in the ordering of human affairs is the 'end' in itself to use Emmanuel Kant's own words. The fundamental weakness on the other hand of the whole constitution, as Professor Yash Ghai and Mc Auslan[1] have printed out, is that it sought to put all people with different social and economic privilages at par. Given however, the disparities between the races in all aspects of life at the time of independence, a formal equality under the Law would have the effects of preserving the status quo and thus to some extent perpetuating the unfairness and injustice ot the colonial system. Therefore, the foundamental rights as incorporated in our consitution[2] can serve little to the attainment of human dignity.

As I have indicated in my third Chapter, the doctrine of separation of powers is non-existent in Kenya. It has failed because in a way the executive has encroached on the functions of the Judiciary i.e. no justification is given by any section of the constitution why the President should be involved in appointing the Chief justice. To ensure the independence of the judiciary, the Chief Justice and Puisne Judges should be appointees of the Judical service Commission. On the other hand, Legislative Power of Kenya is not indepenent from the executive. Some provisions exist which make the executive and the Legislature almost one thing i.e. Cabinet Ministers and the President are members of the Legislative. Most of the instances when the Government encroaches on the Legislative's independence occur when the executive's interest as opposed to the Public interest is threatened. I hold the view that the Present Kenyan State is based on a Capitalist mode of production and therefore there are several social classes and of course the dominant economic class is the ruling class. Therefore, in order to sustain the conflicting interests of the state vis-a-vis Public interests, the state has to resort to arbitraviness.

As concerns the rule of Law in the Nyayo era, I have come to the conclusion that this doctrine has been subjected to much abuse. Executive-cum-administrative abuse and disregard of established Law is clearly manifested in my third chapter, and it strictly goes against the principle of Legality. I therefore recommend that as far as the executive members are concerned, the Legislative should come out with more criticism of their acts. Such a Legislative should be an independent one. The Judiciary should also help in this case by sticking to the Law and punishing such officials if the Law so says. Such a Judiciary as I have explained else where should be independent.

I submit and recommend in this discertation that, Kenya needs a Political theory that will enable the majority of Kenyans to attain human dignity and enable them to make their lives meaningful and thus making the rule of Law concept more meaningful. The Political theory must be based on the equality of all men. It is only by having such a theory put in actual practice that the recommendation of the Declaration of Delhi[3], such as, the establishing of economic, Social, educational and cultural conditions through which man's Legitimate aspiration and human dignity can be achieved.

It is by having serious respect for the noble Principle of the rule of Law that the Kenyan state would prosper.

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(3). Public Collections Act, Cap. 106, Laws of Kenya.

(4). General Law Amendment Act No. 37 of 1963, Laws of South Africa.

(5). Suppression of Communism Act of 1950, Laws of South Africa.

(6). Northern Ireland (Emergency Provisions) Act, Laws of Northern ireland.. Now: Civil Authorities (Special Powers) Act (Northern ireland), 1922.

********** E N D **********