

THE APPLICATION OF THE KENYA LAW OF SEDITION, A
MOCKERY OF MULTIPARTY DEMOCRACY.

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DEDICATION

To mum and dad for a myriad of invaluable things in life. To my late brother John Mugo with living memories of his high intellectual capacity and real courage. And to all my friends past, present and future for whatever influence they have had/will have in my life.

LIST OF STATUTES

1. The Constitution
2. Penal Code Cap 63
3. Evidence Act Cap 80
4. Public Preservation of Security Act
5. Books and Newspaper Act.

TABLE OF CASES

1. De Libellis Famosis (1606) S co Rep.1259
2. R.V. George Gordon 22 st Tr 175
3. R.V. Onyango Oloo (1982) Unreported
4. R.V. Oguda Lawrence (1960) E.A. 745
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10. R.V. Gitobu Imanyara (1991) Unreported
11. R.V. Njehu Gatabaki (1992) Unreported
12. R.V. Blamuel Njururi (1992) Unreported
13. R.V. Pius Nyamora (1992) Unreported
14. R.V. Joe Kimani (1991) Unreported
15. R.V. Lawford Imunde (1990) (1990) Unreported
H.C.G.C. No. 65 of 1991
16. R.V. Koigi Wa Wamwere & 6 others (1993) Unreported.

INTRODUCTION

"It is true that writers and social critics all over the world want to write and critically comment on what is going on in their own country of origin. But one of the most terrible things about the modern world is how writers have had to imigrate to another nation inorder to be able to comment on what is going on in their own country of origin. And it is tragedy because it means that societies are themselves becoming intolerant whereas the true freedom in any democratic system should be as we are trying to do in this country: We have not succeeded yet, but we are trying- that those who differ and those who take a different view of the society we live in must be able to point that picture they see, so that we can have many pictures of the kind of Kenya we are living in now.... at least let us give encouragement to those who spend their lifetime writing, commenting on the society that we live in. There is not very much that we do but at least we can give them that particular kind of recognition....."

The above quoted words are attributed to the then Minister of Finance in Kenyatta's government, Mwai Kibaki.

When he was the guest speaker presiding the launching of Ngugi Wa Thiong'o novel, PETALS OF BLOOD at the Nairobi City Ha..." In the words of Mr. Kibaki, he underlined the necessity of freedom of expression among the individuals, writers and social critics to enable them express their ideas and views in regard to the society they live in. The ideas and views that an individual can express could be of political, social and or economical nature. The minister was acknowledging one of the major aspects of democracy that people in a particular state should enjoy. Perhaps Kibaki was then stating the then government policy in regard to free expression of ideas and views in literature publications. Ironically, Ngugi was detained barely a year later because of expressing incongruous views to those of government in his book, PETALS OF BLOOD inter alia. The Kenyatta government is on record to have used the PUBLIC ORDER LAWS to suppress independent and critical writers who the regime viewed as enemies of the establishment many critics of the government were either detained or charged with offence of sedition. Among those who were either detained or charged with sedition included politicians, writers, interlectuals etc. The government of the day was determined to suppress its critics in order to maintain the status quo.

This dissertation carry^{ies} an examination of the Kenya Law of sedition as it is embodied in the statutes. It will show that the application of the law of sedition is intended to protect the holders of power in a state at a given time. In our examination of the application of the law of sedition. We shall ably show that the law relating to offence of sedition is a serious impediment to the freedom of expression and holding of opinions in a democratic society. Throughout this work, we shall argue that the law of sedition is an oppressive legislation meant to extinguish free expression of ideas and opinions from dissenting quarters, and therefore it is a contravention of ideas of democracy and the Universal Declaration of Human Right which Kenya ratified in 1963 and the International Covenant on Civil and Political Rights which came into force in 1976. In this work we will generally argue that, it is pertinent for Kenya as a state that has adopted multi-party democracy to accord serious commitment to all recognised legal instruments that calls for respect and protection of fundamental Human Rights and Freedoms and for purposes of this paper, freedom of expression and holding of opinions.

This study will adopt the arrangement of three chapters and a final conclusion.

The first chapters is aimed at tracing the historical background and the origin of the state. In the chapter the writer posit that the state is a class institution, a political embodiment articulating and protecting the interests of the rulers. The origin and the essence of the state have been analysed in the context of appearance of private ownership of the means of production and property inequality among the members of the society. The analysis of the concept of state as embodied in the first chapter, reflect a scenario where a small minority of people in the society, declare domination over the majority. This domination is achieved by propagation of laws which are intended to further and even protect the interests of the rulers and at the same time subject the citizenry to observance and adherence of the same. In part B of chapter one, we have discussed the assence of democracy and the rights of an individual vis-a-vis the state. Under the principles of democracy the government is expected to fully recognise, protect and even preserve the fundamentals rights of man. In regard to the freedom of expression, the state has no right however to hinder the enjoyment of the same by an individual. In a democratic state, each individual is supposed to freely exercise the right of holding and expressing his ideas and opinions however strange.

This proposition does not in any way mean that we are calling for absolute freedom of expression, rather we are arguing that the laws which limit the freedom MUST be fair, justiciable and reasonable. Laws should not be formulated to suit the state interests at the expense of the individual's rights and freedom.

The second chapter is a critical examination of the Kenya Law of sedition as embodied in 5.56 and 5.57 of the Penal Code. In this chapter we have traced the historical background of the Kenya Law of sedition. To facilitate a better understanding of the application of the Kenya Law of sedition and its consequences in the freedom of expression of individuals, we have taken a look of several sedition related cases that have been brought before the courts for hearing. These cases revolves in the pre-independence periods and the post independent periods of Kenya political history. We have laid much emphasis on those cases which came up during the clamour for multipartism in Kenya in early 1990's. Among these cases are,

R V George Moseti Anyona & Three others⁴

R V Gitobu Imanyara⁵

R V Njehu Gatabaki and Another⁶

R V Blamwel Njururi⁷

R V Pius Nyamora and Another⁸

We shall also mention a few things arising from other
sedition cases such as:-

R V Lawrence Oguda⁹

R V Wangondu Wa Kariuki¹⁰

R V Willy Mutunga¹¹

R V Maina Wa Kinyati¹²

Onyango Oloo V.R.¹³

We have commented briefly on several other sedition
related cases which have arisen in post independent Kenya.
The poor reporting system of kenyan decided cases is a point
of major concern. While analysing the recent sedition
cases we have substantially relied on newspapers and
magazines reports. In our ~~it is partment~~ that the Kenya
judicial department and other capable organisation, should
come up ^{with} a viable system of reporting and ~~codification~~ of ~~with~~
judicial decisions.

The last chapter is a general examination of the sedition law vis-a-vis the expected and recognised standards of governance in a democratic society. In this chapter, we shall focus on Kenya as a multi-party democracy. In this part, we shall argue that the existing laws must not be used to suppress those who feel unpersuaded by the government policies and ways of administration of the country by those in power. We have posited that the law of sedition is a repressive legislation that has been used by governments in various historical periods to stamp out dissent and therefore it has no place in multipartism. Politics in a multiparty state, are premised on the principle of competition of ideas among the existing political parties. The government in power is supposed to accommodate and tolerate the ideas and opinions of those in opposition however radical or variant. The real essence of multiparty democracy is competition of ideas and views between the government and the opposition, thus giving the people a wider choice of government.

The final part of this work is a conclusion which is a general overview of the whole paper.

The conclusion includes the recommendations which in the writers views are necessary in regard to the application of sedition law. In brief, we posit that the Kenya multiparty parliament should urgently repeal all oppressive laws and enact legislations on Freedoms of expression that no institution can abrogate..

FOOTNOTES

1. See Ngugi Wa Thiong'o DETAINED A WRITER'S PRISON DIARY (Heinmann)
2. See Ngugi Wa Thiongo (ibid) page 123, In the detention camps there were the Members of K.P.U. the likes of Wasonga Sijeyo. There were also the suspects of 1971 alleged military coup the likes of Simba Ongongi Were. Other people in the detention camps included the critics of J.M. Kariuki crisis of 1975 and those of post J.M. crisis of parliamentary challenge in 1975.
3. See Kivutha Kibwana, FUNDAMENTAL RIGHTS AND FREEDOMS IN KENYA (Oxford University Press) Pg. 13
4. See, The Nairobi Law Monthly No. 32 April/May 1991
Cover story Pg 16-26
5. Unreported 1991 see, Finance Magazine December 30, 1992
6. Unreported 1992, Finance Magazine Dec, 30, 1992 Pg. 30

7. Unreported 1972 Finance Magazine Dec., 30, 1992 page 31
8. Unreported 1992 Finance magazine Dec., 30, 1992 Page 29
9. 1966 (E.A.) Pg. 34
10. Criminal case No. 1096/82. For comment on this case see
S.B.O. GUTTO Article, Some Legal Aspects on Waruru Kanja's
Petition for executive clemency (unpublished) 1982.
11. Criminal Case No. 101 / 82
12. Criminal Case No. 1239/83 (unreported)
13. (Unreported) 1982.

1:1 THE ESSENCE OF STATE AND ITS ORIGINS

For the purpose of this paper, the offence of sedition is defined to mean,

'Any person who does or attempt to do or make any preparation to do or conspire with any person to do, any act with a seditious intention, or utter any word with a seditious intention, or prints, publishes, sells, offer for sale, distributes or produces any seditious publication, or imports any seditious publication having reasons to believe that it is seditious.

The above outline of what consist of an offence of sedition should be read together with S.56 of the Penal Code which outline what is a seditious intention. Under S.56 of the Penal Code, a seditious intention is described as the intention to, To overthrow by ^uanlawful means the government of Kenya as by law established, or to bring into hatred or contempt or to excite dissaffection against the person of president or the government of Kenya as by law established, or to excite the inhabitants of Kenya to attempt to procure the alterations, otherwise than by lawful means, of any matter or thing, as by law established;

or to promote feelings of ill will or hostility between different sections of the population of Kenya².

S.56 provide that an intention shall not be taken to be seditious by reasons that it intends,

To show that the government have been misled or mistaken in any of their measures, or to point errors or defects in the government of Kenya as by law established or in any written law or in the administration of justice, with a view to remedying of those errors or defects or to persuade the inhabitants of Kenya to attempt to procure by lawful means the alteration of any matter in Kenya as by law established; or to point out, with a view to their removal, any matter which are producing or have a tendency to produce feelings of ill will or hostility between different sections or classes of the population of Kenya, so long as the intention is not manifested in such a manner as to affect or to be likely to affect any of the purposes specified in paragraphs(a) to (f) inclusive of S.56³.

Both s.56 and s.57 of the Penal Code clearly illustrate that the offence of sedition is an offence against the political order. Infact what constitute a seditious offence is any act that threaten the survival of the political regime in power. It is important to understand the origin and the essence of the state so as to enable us understand the purpose of laws which govern the populace in a state.

Marx and Angels⁴, singled out production relations that is, the relations involved in the production of material goods from the entire system of human relations as the determining factor in the life of the society. It is premised on the basis of growth of production that the social condition of life take shape and a community of interests involving large groups of people emerges. The principal groups of this type are classes. According to Marx and Angels views of concept of classes, they say that classes are large groups of people differing each other by the place they occupy in historically determined system of social production, by their relation in most cases fixed and formulated in law to the means of production, by their role in the social organisation of labour and consequently, by the dimension of the shares of social wealth of which they dispose and the mode of acquiring it.

Classes are groups of people, one that can appropriate the labour of another owing to the different places they occupy in desinate places of social economy. Angels and Mary⁶ holds the view that classes emerges with the appearance of private ownership of the means of production and property inequality among the members of society. The concept of private property bring into being a form of social stratification of the poor, masters and workers whose interests are diametrically opposed. The emergence of antagonistic classes turn the history of the society into one class struggle as each class attempts to articulate in interests. In Angels⁷ view, the state is a class institution, a political embodiment championing and protecting the interests of the economically dorminant class. It is of importance to mention that in class society the means of production are concentrated in the hands of few people. The property owners. This state of affairs create a minority class of the rich controlling the means of production. At national level, the economocally dorminant classes, inorder to protect their wealth and to ensure their supremacy a public power to safeguard these interests and suppress dangerous innovations both material and ideological which threaten their position. The state therefore become this necessary power under the control of the ruling class.

History has known three forms of exploitation of one class by another namely slavery, feudal bondage and exploitation of wage labour under capitalism⁸. As form of exploitation changed the class structure accordingly. We intend to briefly outline the nature of these three historically recorded type of classes. The first division of society into classes in the Fourth Millenium B.C, resulted into two classes, namely the slave owners and the slaves. The slave owners were the minority whereas the slaves were the majority. The slave owners possessed and controlled all means of production including the slaves who had similar status to any other item that the slave owner possessed. The desparetely low estimation of the general statues of a slave is succinctly captured by the fact that a person of slave statues had no legal personality bestowed on him by the then legal systems. He had no rights enforceable in laws and no duties were owed to him by others. The institution of slavery was used by the slave owners to promote their economic interests at the expense of the slaves who were limitless exploited as cheap tools of labour.

The institution of slavery was replaced by feudalism in the 18th century⁹.

Feudal Lords became the absolute owners of land and that grew or lived on it. The serfs were in fact the property of the big landowners but unlike the slaves they could not be killed with impunity. The serfs had few recognised legal rights in the then existing legal systems. They possessed some means of production of their own, for example they could own a house, investock and a primitive plough. He also had a house, and a family. The two classes which emerged under feudalism were as a result of the aspect of the mode of landownership which was in the hands of a few feudal lords.

In the 19th century feudalism was replaced by capitalism¹⁰ as a mode of production. Under capitalist mode of production, the means of production are concentrated in the hands of those holding the private property. As opposed to both slavery and serfdom, the producer who is the wage worker is formally free. Yet his economic survival lies solely upon the capitalist economy, since he must sell his labour to the capitalist who control the means of production. The labourer only gets an insignificant part of what he has produced to sustain his livelihood but the proprietor appropriates the greater part of the entire supply product.

The relation between the labour and the proprietor of the means of production is wanting in harmony. It is characterised by a form of antagonism as each party attempts to protect its social economic rights and interests. In summary, the state activities are basically influenced by the aspects of people united by common interests, that is by classes and social groups. It is the interests of those who are in the control of means of production that the state promotes and protects. In analysis we posit that the institution of state is not static, in control it is dynamic and as the society develop the state undergo change too. The state is influenced by a number of different circumstances, the chief among them being the mode of production prevailing in the society. Each mode of production is characterised by the existance of historically defined classes, and the classes which is dorninant in economic and political terms. The changing circumstances of the means of production can be grasped well thro' tracing the evolution of world economic set up from crude agricultural periods to the present high technological skills era. As new technological skills continue to come up the world means of production will continue to be subjected to rapid transformation.

After all is said and done the bottom line of the matter is that it is the interests of those who dominate means of production at a particular point in time are served by the state.

The first social organisation was the commune members were united by joint labour, a shared dwelling, common property and by the need to acquire the means to maintain life. The commune was self governed, meaning that all members took part in decision making on all essential matters. All members of the commune were equal. The dominant organisation unit of a commune was tribe. The land was property of the whole tribe. The tribal communal system worked out specific ways of exercising power. Clan members elected chiefs, elders and war chieftains at general meetings. These leaders lacked special apparatus of coercion to effect their wills and orders. They commanded authority out of their great personal authority and customs of the people they ruled. According to available historical materials, about ten thousand (10,000) years ago, clan and tribal relations began gradually to change primarily due to division of labour.

Amongst communes and tribes spilt off later artisan followed suit. Labour productivity began to grow consequently more was produced than was needed simply to maintain the strength of each person. As all that was produced could not be consumed, opportunities to accumulate things arose with division of labour and inequality. Power was no longer used in the interests of all the members of the clan but to enrich the chief and elders. In this way a minority which amassed wealth was formed in the commune. Organs of self government began to be changed into organs for suppression of the majority by the minority. The appearance of organs of suppression and coercion ushered in the history of the state. The history of emergence of the institution of state can be traced through the process of evolution of mode of property ownership from communal ownership to private mode of ownership.

The defining characteristics of a state is that it has power over every member of society. Decision and policy reached by the state organs are conclusively binding upon all who fall under its jurisdiction. The state through its organs do formulate rules and standards of behaviour which must be complied with by all those living within the territory of the state without exception and even by those of its citizens who live abroad.

It has the right to use its discretion in making decisions concerning domestic and foreign policies alike. However, it is important to note that the state discretion in making decisions is not unfettered. The development of public international law has ~~is~~ a prescription of internationally accepted rules and regulations which states must observe in exercising their sovereignty within its border and even beyond its borders.

The state major objective is to ensure that it accomplish the role of regulating the conduct of its subjects. This is done by prescribing a code of conduct that is, rules and establishment of coercive machinery of the state to enforce observance of these rules. The state mechanism is the system of state organs and agencies, established to fulfil the functions of the state. The state mechanism consist of the organs of power namely the Head of state, Parliament and the government. It also consist organs of state administration namely the government ministries and other state administrative bodies. Owing to its need for self protection, the state has organs for maintaining public order they en^onc_^mpass the courts of law, public prosecutor, the militia or police.

Another dominant organ of the state is the state owned mass media which is entrusted with the duty of spreading government propaganda to rally public support other notable components of a state are the army and other armed groups who are bestowed with the responsibility of defending state territory from external aggression.

Having outlined the major characteristics and essence of state we shall briefly outline the characteristics of the Kenyan state.

1:2 THE KENYA STATE

Kenya did not undergo all stages of social evolution of a state as formulated by Engels and Marx, but rather she had her origins in imperialism as manifested by British colonialism. The origins of existence of Kenya state can be traced from 15th June, 1895 which was the official date when the British declared most of what makes the Republic of Kenya as a British protectorate¹¹. The legal basis for exercise power in foreign territory was the FOREIGN JURISDICTIONS ACT of 1843, which was later consolidated into the FOREIGN JURISDICTION ACT 1890¹².

At this point it is pertinent to state that prior to the formation of legislation council, judicial and executive powers vested in the commissioner¹³. It is evident that prior to the formation of Legislation council, the Kenya protectorate did not know the fundamental governmental conceptual of separation of power. The concept of separation of power ensure that public powers is not abused by those wielding it.

It is important to address our minds to the reasons which necessitated the imposition of colonial rule in Kenya by British imperialist in the late 19th century. The colonialisaton of Africa cannot be understood outside the aspect of industrial revolution in Europe which had a close nexus with development of capitalism and subsequent scramble for colonies in Africa¹⁴ and Asiatic countries. Colonialism as a social phenomenon was prompted by the objective need of the European capitalist countries to capture new markets for their industrial wares as well as to secure spheres of influence in Africa where they could get supplies of raw materials for their industries in metropolis. Colonialism also provided ideal condition for the investment of finance capital. The need of metropolies powers to settle their population away from their populated lands after European wars also is a factor which fostered the need of colonies. Owing to these economic reasons, it is not hard to explain why Kenya was declared a British protectorate and the subsequent

introduction of all the legal and administrative devices to enable the colonial imperialist to impose their authorities on the local African people and at the same time dominate the social-economic set up in the African land. The imperial British East Africa was the organ which was used to further the British imperialistic venture in East Africa, Kenya in particular. The officials of the Company (I.B.E.A.) entered into agreements with the local chiefs and leaders which enabled them to get land on which they built forts. From these forts the I.B.E.A. could further their imperialistic designs which culminated in the Berlin Conference of 1884 which divided Africa among various European imperialists. Kenya was to become a British protectorate.

With the advent of British colonialism in Kenya, the existing 'tribal' groups were contained in a larger political unit- they imposed modern colonial state, whose basic purpose was to facilitate foreign domination and exploitation of the kenyans and their resources¹⁵. Pre-colonial Kenya consisted of 'tribal' groups which lacked the oppressive political apparatus of the modern state and were generally characterised by a substantial level of social and political participation¹⁶.

Imposition of colonial rule was achieved through deception or violence¹⁷. It is therefore, evident that Kenya is a creature of the economic and political forces in Europe at the turn of the last century, specifically, British imperialism and colonialism¹⁸. The British imperialists seized the African land which was the basic means of production. The acquisition of the African land by the colonialist was effected through passing of various legislations from 1900. In 1902 and 1915 the Crownland Ordinances were passed which declared Africans as tenants at will of the crown. The African communal land ownership system¹⁹ was drastically revolutionised and the colonialists illegally appropriated the land. The two ordinances legitimised colonialists absolute seizure of African land and therefore conferred completed control of the basic means of production process on the British imperialists. The colonialists introduced other legal instruments to regulate taxation, labour laws inter alia. The infamous master and servant ordinance of 1906 which imposed criminal sanctions for breach of employment terms was passed and came into force.

The colonialists introduced the concept of state among the Africans. The state was an important institution for the purposes of protecting the colonialist economic interests and to enhance their venture of exploiting the local resources. In Kenya, the aspects of classes can be traced at the time when the European Colonialists seized the African land which was the basic means of production thus changing the then existing communal land ownership system²⁰. The aspect of class struggle in Kenya is well illustrated by the Africans discontent with colonial laws and policies. This discontent together with other regional and international factors²¹ led to realisation of African nationalism.

The colonial administration was fully determined to extinguish the African nationalistic feelings and to achieve its purpose, the colonialist introduced oppressive and exploitive legal instruments. The colonial state was oppressive and discriminatory against the Africans and it was intended to suit the colonial interests at the expense of the Africans. The colonial court system was biased against the Africans interests. In summary, the Kenya state did not undergo all the stages of development of a state but rather the state institution in Kenya was colonial imposition aimed at suppressing Africans rights and interests in property ownership and subsequently introduce and further colonial control of means of production.

The colonial mode of administration in Kenya will offer better explanation of the reasons why various public order laws were put into use. This will provide a background to the adoption of the Kenya sedition law and its application even after acquirance of formal independence in December, 12 1963.

With the attainment of independence it was the expectation of the Kenya citizenry that the independent state was to dispense with all colonial laws and institutions and replace them with new and popular independent laws and institutions. However, in general terms, independence for most African countries meant nothing more in real terms than mere replacement of colonial administration by regimes which were purportedly independent of metropolis but which were headed by a nascent class of Africans which had interests in perpetuating colonial policies in Social-economic and political sectors. In his work²² Ngugi Wa Thiong'o observe that, at independence Kenya adopted the colonial legal systems to be a tool at the disposal of dorminant political and economical group. Those who ascended to position of power applied laws and used state institutions to protect their own interests in most cases at the expense of the citizenry.

In short, formal independence did not bring any substantive economic and political changes for the people. The transition from colonial rule only led to africanisation of the colonial administration designed to exclude the masses participation as far as possible. The law of sedition and its application is one of the instruments that has continued to be used to eliminate people participation in political leadership in terms of free expression on matters of public policy.

1:3 THE ESSENCE OF DEMOCRACY AND DEMOCRATIC PRINCIPLES

Under this topic we intend to examine although briefly the concept of democracy and the significance of democratic principles. Under this topic we shall juxtapose the state against the democratic principles to facilitate an understanding of the duties and obligations of the state to its subjects. This examination is important to enable an understanding as to what extent the state has applied various legal instruments to suppress the democratic rights of its people. For the purpose of this paper our major concern is the extent to which the state has recognised and respected the citizenry rights to free expression

as enshrined under the democratic principles. From the onset it is crucial to observe that all government world over like describing themselves as democracies. The 1949 UNESCO Inquiry into ideological Conflicts concerning democracy concluded that,

"For the first time in history of the world, no doctrine are advanced as anti-democracy. The accusation of anti-democratisation or altitude is directed against others, but practical politicians and political theorists agreed in stressing the democratic element in the institution they defended and theories they advocate²³.

The UNESCO Committee commented that,

"This acceptance of democracy as the highest form of political or social organisation is the sign of a basic agreement in the ultimate aims of modern social and political institutions²⁴ in simpler terms democracy is essentially a social and political condition under which citizens feel free and are free to criticise and censure in good faith their government, particular senior government officials without fear and the occurrence of any reprisals whatsoever³⁵.

In a democracy, the sovereign power resides in the people enmasse but the whole citizenry cannot rule directly. A fundamental aspect of democracy is the mandating of people's power to legally and periodically elected officials²⁶. Citizenry participation is important in government process in policy and decision making organs of the government. The citizen is involved in the government through active participation in popular interest group and movements such as political parties or party, trade unions, community associations, private associations etc. The government must be positively responsive to the citizens' contribution and constructive criticism. Kivutha Kibwana in his work²⁷ observe,

"It is not enough for government simply to tolerate or even, as a public relations gimmick accept criticism. Overallly government must be accountable to its citizenry. Saitori Giovanni²⁸ asserts that a democracy is a political system in which not only the people are entitled to make basic determining decisions but in which they also actually make such decisions.

It is by virtue of this feature that one can distinguish systems that are not in fact democratic from those that are democratic. The possession of an entitlement and the ability to make the basic determining decisions are fundamental aspects of democracy.

Democracy is also associated with the principle of equality of all citizens in the eyes of the laws in a particular state. In a democratic society, the laid laws apply with equal force to all citizens irrespective of their station in life. However, this proposition is contentious particularly in regard to civil and criminal immunities and privileges accorded to some people in the state²⁹. John Lock³⁰, observe that when any number of men have, by the consent of every individual made a community, they have thereby made that community one body, with a power to act as one body, which is only by will and determination of the majority. And majority having upon men's first uniting into society the whole power of the community naturally in them, may employ all that power in making laws for the community from time to time³¹. In a democratic regime the fundamental truth is that authority in the rulers derives from the right to rule themselves inherent in the people and permanent in them.

A democratic organisation take the form of representative government of people. Modern democracies hinges on majority rule. Those who have most seats in parliament form the government. The people representatives must be elected to parliament in a free and fair elections and it is only after such eventuality that a parliament can be described as legitimate. The liberal concept of democracy outline that what is required and expected from a democratic, form namely a free society that is not exposed to unchecked and uncontrolled political power, nor dominated by a closed inaccessible oligarchy. Democracy therefore exist to the degree that there is an open society in which the relation between the governors and the governed is consistent with the principles that the state is of the service of the individual and not the individual of the state. Abraham Lincoln in his famous address at Gettyburg observed that,

'Democracy is a government of the people, by the people and finally for the people³²'.

Democracy was first practiced in Ancient Greece particularly in Athens³³, because of the small size of the Greece city states democratic self government was direct. The citizenry came together in assembly, discussed and voted on major public issues.

There was no parliament, civil service, officers were generally selected by lot, and served for a stipulated period of time. Slaves, women were excluded from the vote and this made democracy be more of class dominated. In this paper it is not possible to carry an extensive analysis of the evolvement and historical nature of early democratic institutions and practices but for the sake of better understanding of the subject the writings of Macpherson³⁴ is a vital point of reference. The modern democracy is closely associated with the famous French Revolution. The revolution was haralded by work of Rousseau in his SOCIAL CONTRACT OF 1762. The French people were guided by three basic words throughout the revolution namely, liberty, equality and Fraternity. These elements spread democratic ideas in the rest of Europe and it resulted in establishment of revolutionery democratic institutions. Historical experience show that these is no effective democracy, without safeguard to liberty of the individual³⁵. Majority of Constitution documents have a catalogue of fundamental rights and freedoms contained in what is usually called the Bill of Rights. Under chapter V of Kenya constitution Fundamental rights and Freedoms of individual are outlined. The constitution is the fundamental law of the land and it must be observed over any law³⁶.

All government actions must be taken in consonance with constitutional rules and other relevant laws otherwise such actions will be unlawful and invalid³⁷.

Kenya has adopted a western liberal democracy. This type of democracy is said to be superior one in comparison with the Marxian and underdeveloped countries democracies. The aspect which bring out liberalism and democracy can be traced in history. In the constitution the concept of Rule of Law is manifested as a fundamental aspect in a democratic Kenya state. The rule of law means regulation of the affair of society by rules which are fixed and certain. These rules must be reasonably fairly and impartially applied to all citizens. They must uphold human value and dignity. The constitution under Part V of the constitution outlines fundamental human freedoms however it go further to say that these rights are subject to limitation of enjoyment by other of same rights. The constitution, has recognised the right of free expression among many other rights.

"That Except with his own consent no person shall be hindered in the enjoyment of his freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons and freedom from interference with his correspondence³⁸.

The offence of sedition falls under the classification of offences against Public Order Law and the application of sedition law aims at checking freedom expression among the citizenry. Multiparty politics is premised on the existence of a myriad of ideas and opinions from individual persons, political parties or party and other organised interest groups. All the expressed ideas must be tolerated by the government in power and the state should not use the legal framework to eliminate those who express dissenting ideas and views. In a multiparty democracy political parties serve as vehicle of delivery of peoples ideas and grivances in regard to political policies and administration. They maximise people participation in political affairs of the country. Political parties subject to government policies to thorough scrutiny hence making it (government) run its affairs cautiously to avoid losing public confidence.

Ghai and MacAuslan postulate³⁹ that at independence, Kenya was a multiparty state. In April, 1964, she became a de facto one party state this meant that formation of other political parties was not outlawed. In April, 1966 the then Vice president Oginga Odinga resigned and formed KPU another political party, in company of twenty (20) other M.Ps (members of parliament)⁴⁰.

K.P.U did not last for a long period, Kenyatta government determined to extinguish opposition used the state machinery to stop all opposition and to create a relatively monolithic system within one party and with state president as its head. The difference between KPU and KANU was purely ideological with KPU learning toward socialistic policies while KANU haboured conservative ideas leaning to the west. The KANU government felt threatened by the 'radical' nature of the KPU M.P. To invalidate their (M.Ps) occupancy of parliamentary seats the government brought a bill to parliament which led to the enactment of S.40 of the constitution. Under S.40 an MP who abandoned his party was to outomatically lose his parlimentary seat. The provision acted in retrospective. In 1969 the KPU was banned. Its members were detained. The adiminstration had been used to suppress the activities of KPU as a political party. K.P.U was denied licences to hold political meetings. The party was banned on 28th, August, 1969. Later on 9th, June 1982 Kenya became a de jure one party state after a constitutional ammendment which introduced S.2A. The advocates of one party state argue that a single party system is unnecessary owing to haterogenous nature of African society such that tribalism and nepotism are in the hearts of the people.

Majority of Africans leaders such as Nyerere, Kenyatta⁴², Kwame Nkrumah favoured introduction of one party system in their respect countries. These leaders argued that multiparty politics was only suited for developed countries in Europe and America and not African states whose main agenda was development. Critics of one party system of democracy argue that in absence of opposition parties it is not possible to control arbitrary government action. The unchecked holding of power by the government in power is normally prone to brutality, dictatorship fascism, autocracy and authoritarianism. The introduction of a multiparty democracy was adopted in Kenya in 1992 after repelling of 5.2A. In their campaign for introduction of a multiparty democracy in Kenya, the multiparty advocates argued that due to absence of substantial opposition in the country, KANU government had turned dictatorial and it no longer respected the principles of democracy. They also observed that KANU was ruling in total disregard of respect of fundamental human rights as provided in the constitution. One advocate for introduction of multiparty democracy observed,

"KANU use public power for private ends.

The provincial administration and the police were used to manipulate the electors system.....

President Moi ran the country like a patrimony

using public office to eliminate potential contender

for power, allowing scores of others to enrich

themselves through graft, corruption.....

Having surrounded himself with an impenetrable bulk

of incredibly sycophanic supporters who thieved

on Public Funds"

With the introduction of multiparty in Kenya we shall examine the application of the law of sedition to facilitate an assessment whether the law has any place in a multiparty democracy.

FOOTNOTES CHAPTER ONE

1. Cap 63 §.57
2. Cap 63 §.56 (1) (a) to (f)
3. Cap 63 §.56(i) to (iv)
4. Lennin Collected Works Vol 29, (Progress Publishers) Mosco) 1977 Pg 21, Quoted by Belor Gennsdy
What is a state at Pg 14
5. Ibid Lennin collected works Vol 29
6. Ibid Lennin collected works vol 29
7. Ibid pg 15
8. Ibid pg 17
9. Ibid pg 22
10. Ibid pg 23 - 24
11. Ghai and McAuslan, Public Law and Political change in Kenya, (Oxford University Press) 1970 pg 2
12. Ibid pg 20
13. Ibid pg 138-139
14. Lennin, Imperialism The Highest stage of capitalism, (Progress Publishers Moscow) 1970 pg. 46
15. See, Walter Rodney, How Europe underdeveloped Africa, (Dar-es-salaam T.P.H. 1972) Leys, C Underdevelopment in Kenya (London Heinmann 1975)
16. See Ogot B.A. (ed) Kenya Before 1900; Eight Regional studies (nairobi E.A.P.H) 1976 pg 52
17. As Sir Arthur Harding explained".... In Africa to have peace you must first teach people the aspect of obedience, and the only tutor who impresses the lesson properly is the sword.

18. Kenya was a British colony from June, 15th, 1895, to December 12th, 1963. The distinction between "protectorate" and "colony" are ignored. See Ghai Y.P. and MacAuslam J.W.P.B, Public Law and political change in Kenya (Nairobi OUP 1970) pg 3-35
19. See, jomo Kenyatta Facing Mount Kenya (Kenway Publication) pg 20-52
20. Ibid pg 55
21. There were Kenyans who had taken part in the first world war in Abyssinia (Ethiopia) and also the "Islamic propaganda" which was advocating "Africa for Africans". The second World was of 1945-1949 etc This factors awoke the African nationalism.
22. Ngugi Wa Thiong'o detained (Heinmann Kenya Limited) Nairobi pg 44-45
23. See, Democracy in a World of Tension - A symposium prepared by UNESCO 1951 Mckeen Richard (Ed) 522. pg 14
24. Ibid pg 16
25. Kivutha Kibwana, Development of Democratic culture and civil society in Africa (Unpublished).
26. See, Afrifa Gitonga, The meaning and Foundation of Democracy, (Heinmann Limited)
27. Kivutha Kibwana, Development of Democratic culture and civil society in Africa (Unpublished)

28. Sartori Giovanni, Democratic Theory 1962 (Indian Edition 1965) pg 4-5
29. See, The international Diplomatic and Consular laws: Also refer to recognised immunity laws.
30. Sartori Giovanni, Democratic Theory 1962, (Indian Edition 1965) pg 6
31. John Locke Two Treatises on Civil Government 1690, P Laclelt (1960) pag 98.
32. See Professor W.O. Oyugi and Dr. Afrifa Gitonga (Eds) Democratic Theory and Practice in Africa (Heinmann Limited) 1987 at pg 12-15
33. See, Macpherson C.B. The Real World of Democracy() pg 351
34. Ibid 357
35. Ibid 392
36. The Kenya constitution 5.3
37. See, General exposition of constitutionalism in Africa context see, B.O. Nwabweze, constitutionalism In Emergent state (Rutherford, Fairleigh Dickson University Press) 1973
38. The constitution 5.57(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to public generally or to any person or class of persons and freedom from interference with his correspondence.

39. Supra, Ghai, Y.P. and MacAuslan at pg 221
40. Supra, Ghai Y.P. and MacAuslan at pg 197
41. Julius Nyerere, freedom and unity (OUP)
Dar-es-salaam
42. See, Jomo Kenyatta, Toward a one party system
Kenya News Agency Bulletin No. 1414/1964
43. Nairobi Law Monthly, No. 40 of 1992 of pg 18
see Oginga Odinga statement.

CHAPTER TWO

2:1 THE LEGAL SET-UP OF THE KENYA LAW OF SEDITION

This chapter examines the law of sedition in Kenya as embodied in §.56 and §.57 of the Penal Code.

In this chapter we shall focus on several sedition related cases decided by courts in Kenya. The cases as we intend to show reveal one fundamental aspect of sedition offence which we have already stated elsewhere in this paper, that the offence of sedition is a political offence aimed at protecting the interests of those in power at a particular time.

Despite its presence in the law books, the offence of sedition is a clear manifestation of how legal system and instruments can be applied to hinder enjoyment of peoples democratic rights to free expression. The individual right to free expression and holding of opinion without interference from any quarters; is guranteed under the international convention on Civil and Political Rights³, whose article 19 recognise individual right to hold and expression opinions without interfearence. Kenya acceded to the International Convention on Civil and Political Rights on 1st May,1972.

The Kenya Law of Sedition has its background, in the English Legal System. In their work⁴, Professor Ghai and MacAuslan have shown, with detailed evidence and comments, the colonial basis of Kenyas Laws including detention laws, regulations and rules. In order to clearly understand the offence of sedition it is pertinent to trace the evolution of sedition law in England as an offence against public order. The offence of sedition developed as a branch of the Law of defamation. In ancient England the offence of defamation consisted of publication of seditious, obscene or blasphemous (words of speech or publication of seditious, obscene or blasphemous) writing against another person or legally recognised institution in the British Empire⁶. Owing to the historical emergence of relationship between the church and the state, the law relating to offence of sedition was significantly altered to reflect the new found relationship. The act of publishing blasphemous speeches was held to amount to sedition. The modern law of sedition as evidenced by S.56 and S.57 of the penal code does not envisage the church as an institution which can be aggrieved by the offence of sedition. The principles of law touching on sedition were laid and formulated by the star chamber especially as laid down by Justice Coke in De Libellis Famosis,⁷ in this case it was observed,

"Every Libel is made against a magistrate private person or public person.

If it is against a private person, it deserve severe punishment for although the libel be made against one, yet it incites all those of the same family, kindred or society to revenge and breach of peace and may lead to shedding of blood. If it is against a magistrate or other public person it is greater offence because it concern; not only the breach of peace but also the scandle of whole government can there be than to have corrupt or wicked magistrate, to be appointed and contributed by the king to govern his subject? And greater imputations to the state cannot be than to suffer such corrupt men to sit in sacred seat of justice or to have any meddling in or concerning the admistration of justice⁸."

The above quotation point to the fundamental aspects of what constitute seditious libel. In the quotation the two offences which are more or less revealed are the offence of defamation and the contempt of court. Under 5.56 of the Penal Code any person who attempt; to bring into hatred or contempt or to excite dissaffection against the administration of justice in Kenya is deemed to have a seditious intention. In R V. Lord George Gordon,⁹ the court it was held that to impute corruption to a judge amount to seditious libel although it would be punished under contempt of court. In the 17th century England any form of publication which had not received authorisation of

the government even if it not scandalous to the establishment was as termed as seditious. It is our argument that the political establishment used its executive powers to censor and control publications through issuance of licences of publication. Holdsworth in his text observe that at the time of abolition of the court of the Star Chamber, there were two branches of rules relating to ^{law}detemation. One branch of the rules regarded defamation as a tort while the other branch regarded ~~defamation~~ as a criminal offence. It is the branch of defamation law which was regarded as a crime and whose rules were codified into the Indian Penal Code¹⁰, which was later introduced in colonial Kenya, that this paper intend to deal with. The Kenya Penal Code is a replica of the Indian Penal Code.

§.56(1) of the Penal Code, if read alone, is a total grant of liberty to individuals to exercise the right of freedom of expression in commenting on matters touching on political governance and other social-economic matters in a country. Under the said section, an individual will not be held to have committed a seditious libel simply because he has criticised the government in power.

There is a provision under 5.56(1) that an intention shall not be taken to be seditious by reasons that it intends.

- (i) to show that the Government have been misled or mistaken in any of their measures or:
- (ii) to point out an error or defects in the Government as by law established or in any written law or in administration of justice with a view to remedying of those errors or defects; or
- (iii) to persuade the inhabitants of Kenya to attempt to procure by lawful means the alteration of any matters in Kenya as by law established; or
- (iv) to point out with a view of removal, any matters which are producing or have a tendency to produce feelings of ill will or hostility between different sections of the population of Kenya.

In a fully democratic state the people have a right to comment and even to call for rectification on the mode of political governance. Since it affect them directly. Further the constitution provides for individual freedom as under §.79(1). However §.56(1) of the Penal Code must be read together with §.56(1a) upto (f). The Penal Code under §.56(a)-(f) makes the freedom of expression criminal since even if a person makes criticism against the political establishment in good faith and that criticism is misconceived as being aimed at the accomplishment of the seditious purposes cited as in §.56 it will amount to seditious intention.

In R.V. Onyango Oloo the accused was charged and convicted of publishing and being in possession of a seditious publication headed A Plea to Commrades. In his defence the accused argued that,

"As a student of social science, he had the capacity, moral obligation and academic freedom to critically analyse issues of public debate without victimization and without considering it to be raising disaffection, ill will or promoting the overthrowing of government".

In this judgement Sachdeva J and Abdallah J observed,

"Constitutional rights are guaranteed subject to limitation designed to ensure that one does not prejudice the freedom and rights of others... After a careful perusal of the publication the court was convinced that the document was blatantly and manifestly seditious in almost each and every part of it".

Under the principles of criminal law there is a requirement that an individual must have a guilty mind and that he commits a guilty act except in offences of strict liability so as to amount to a criminal offence. This basic requirement is contained in the concept of Mensrea and Actus reus. Under ^{s.} 5.56(2) every person is deemed to intend the consequences which would naturally follow from his conduct at the time and in the circumstance.

in which he so conducted himself. Under 5.56(3) a seditious publication is defined as any publication containing any word, sign or visible presentation expressive of a seditious intention. It therefore, follows that the motive of the publisher of an alleged seditious publication is no material in determination of guilt. The seriousness of the offence of seditious is vividly seen by a look at the limited defences which are available in law for a person charged with the offence of sedition.

Although the constitution guarantee freedom of expression, it is of great importance to state that this freedom is not absolute and this necessitate a need of review of §.59(2)¹². The constitution guarantee of individual rights and freedom under §.59(1) is invalidated by the provisions of §.79(2). Unlike the offence of defamation, justification or plea of fair comment is not known in the offence of sedition.

. Having endeavoured to show the historical basis of sedition law examine has been applied by the executive arm of the / how it government to suppress its critics, who the government consider adverse to its interests. Our analysis of the application of sedition law by the government in its effort to eliminate criticism will be carried in two phases namely pre-Independence period and post Independence period.

2:2 THE APPLICATION OF THE LAW OF SEDITION IN 2:2

PRE-INDEPENDENT KENYA

The declaration of protectorate over much of what is now Kenya on 15th, June 1895 marked the beginning of official British rule in Kenya, a rule which was endured until December, 12th 1963. The British Colonial rule in Kenya was authoritarian and dictatorial in nature. The colonial rulers introduced laws that were basically intended to safeguard their political and social economic interests in Kenya. The first specific legislation was the East Africa order in council of 1897¹³ that established administrative machinery in the protectorate. The legislation made an emphasis on judicial powers and regulations¹⁴. Under the legislation the pivotal position of the commissioner as the chief executive officer of the territory was underlined. The Commissioner was given immense powers for establishment of administration. He had the responsibility of maintenance of law and order, for which he had powers to legislate, to establish court and even deport natives. The Commissioner introduced several laws to deal with public order and to regulate the Natives Conduct.¹⁵ The colonial laws and administration were oppressive and discriminative against the Africans and this state of matter led to hostility between the Africans and Colonial regime.

The events of international nature for instance the first and second world wars of 1914-1919 and 1945-1949 respectfully aroused the African people nationalistic feelings. The Africans were determined to overthrow the colonial regime and its exploitive and repressive tendencies. The Africans wanted to reposses their land, their civil liberties and their rights as human beings. The colonial administration applied PUBLIC ORDER LAWS to stamp out African nationalism. The law of sedition was one of those laws that the colonial regime used.

In R.V. Lawrence Oguda¹⁶ the accused was charged in a colonial court of sedition. He was convicted of two courts of sedition. Oguda was a member of the then Legislative Council (LEGCO). He had given a daring political speech of Awendo in South Nyanza, where he strongly urged his audience to struggle against the colonial political order in Kenya. The particulars of the case was that Oguda had uttered words with a seditious intention. In a speech which was tape recording was made and from that a transcript. pt, Oguda was quoted as having said,

"Does such a government(colonial government) want Europeans to get rich? Is this a g@vernment which want to build up the people or which causes ill feelings amongst them? Is this government not a smuggler? Is it not like the owner of a house who looks down upon a woman because he thinks she is an idiot and therefore does not care what she say?"

Is that not the government which is led by the Governor. The chief Native commissioner the D.O followed by the chief, by the Headman? Who appointed the chief, the D.O..... "

Oguda was charged with a second count that with seditious intent he uttered the following words on may 24th 1959 at Awendo,

"This whites can only be gotten rid off by making a lot of noise at them. I will tell you how they have been evicted in other countries. When time will be near and they have refused to do what we want, then those who feel that the issues of this country is really affecting them will sit down together with us whom you have elected, and refuse to pay tax.... The people of United States when they realized that they were fed up they got hold of guns and there was bloodshed, they fought against their own people(British) and even to their own brothers.... Therefore, note as we stand here now we are in one battallion which fights for one aim. We are fighting for one aim, our land, for the truth of this country (emphasis added).

Oguda appealed against the conviction and the appeal was dismissed. In his dismissal judgement, Justice O'connor, President of the court of appeal of E.A. observed that,

'By the accused reference to guns and bloodshed, the force and unlawful refusal to pay tax, the appellant made it perfectly plain that he intend to excite his listeners to redress their grievances by emulating the examples that he cited and to procure the subversion by force and otherwise than by lawful means of the government of Kenya as by law established'.

R.V. Oguda revealed that the offence of sedition cannot be understood in isolation to the prevailing political atmosphere in a state at a particular time. For instance, if post independent Kenya executive officials were asked to describe Oguda's words, we have not doubt in our minds that they would describe those words as being of "great courage and inspiration to the cause of freedom struggle". In contrary the then colonial executive viewed the same words as 'subvesiveness of the highest degree'. Therefore to understand the nature of existing political establishment and what interest the political establishment is protecting..

The colonial administration used sedition law to suppress the African agitation for independence. The colonialist were determined to maintain the status quo.

2:3 POST INDEPENDENT KENYA AND THE APPLICATION OF
LAW OF SEDITION

Kenya acquired her independence from the colonial domination in 1963, after a long period of struggle for independence; in his address to Addis Ababa conference of Heads of independence African state Jomo Kenyatta observed,

"Our long struggle for African freedom has finally achieved most of our cherished desires. Neither persecution, nor deprivation, nor torture nor banishment, could ever kill that deep sealed longing and determination to be free¹⁷.

First the Kenya independence Act 1963 was passed by the British Parliament which renounced British's rights of government and legislation in Kenya and repealed all the limitations on the Kenya and of Kenya's legislation. It eradicated the marks of dependence, secondly, there was the independent order in council, statutory instrument of 1963 which provided for transition of matters including the continuance in force of existing laws but whose second schedule was more important. It contained the Constitution Document of independent Kenya¹⁸.

The independent order in council, statutory instrument of 1963, strengthened the argument that the acquireance of independence in Kenya, did not mean more than de-africanisation of the colonial administrative and government institutions since the independent government inherited the colonial laws and institutions. These colonial laws have continued to be applied in post-independent Kenya; The most notable of these laws is the PUBLIC ORDER LAWS under which the sedition law squarely falls.

Contrary to the expectation of the African leaders at independence, not all the people were contented with the new independent governments. Some people particularly the elites felt that the new African leadership was equally oppressive or worse as compared to the colonial administration. These discontented personalities urged for better governance and justice in running of state affairs. This *preposition* indicate diversity of opinions among the people in the independent African states. Threatened by dissenting voices and determined to cling in power albeit the people expression of discontent, the rulers have continued to apply the public order laws to wipe out criticism and critics.

In R.V. Wangondu Wa Kariuki,¹⁹ the accused was charged with the offence of possessing a seditious publication entitled PAMBANA ORGAN OF THE DECEMBER TWELVE MOVEMENT on May 1982 at his Kariobangi home. The case was brought under §.57(2) of the Penal Code. We have argued in this paper that the offence of sedition is a political offence and hence it is pertinent to understand the political background of a sedition victim like Wangondu. Wangondu at the time of his arrest was an editor of a Kikuyu language publication, MASHABANI until his declaration to contest Nyeri Town Parliamentary seat which had fallen vacant after conviction and imprisonment of the then immediate M.P., Waruru Kanja in mid 1981. Waruru Kanja was and is a known critic of Kenyatta regime and Moi's political regime. Kanja was critical against the Kenyatta government in its alleged role in in murder of J.M. Kariuki in 1975 the then M.P. for Nyandarua North. Wangondu identified himself by taking stance similar to that of Kanja of criticising the political establishment on matters touching public administration. Later before the by-election a number of M.Ps who included Koigi Wa Wamwere, Mwashengu Wa Mwachofi, George Anyona²⁰ expressed their support for Kariuki saying that he was the true representative of the people of Nyeri and he stood for what the former M.P (Kanja) believed in. All these M.Ps who declared their support for Kariuki were known for their constant criticism against the political establishment. The government was apprehensive of the relationship between Wangondu and its critics. Perhaps this explain why Wangondu was arraigned

publication. In his sworn defence Wangondū alleged that the seditious publication had been planted on him among other writings and books that the police collected after conducting an arbitrary search of his private house. According to Wangondū the police did not make a list of the document they seized and it follows that he did not sign for any list of seized publications. During police investigation the accused was asked to give details of his political alliance with George Anyona and Koigi Wa Wamwere²¹. It is apparent that the state was more concerned with the political beliefs and connection of the accused than the material offence he was alleged to have committed of possessing a seditious document.

Wangondū Case raises the issue of burden of proof in criminal law. Under the criminal law prosecution must discharge this burden beyond any reasonable doubt. In Wangondū's case the prosecution did not satisfactorily discharge its onus rather it only produced the alleged seditious publications and left it upon the court to form its own opinion in regard to the documents. The prosecution did not prove each and every ingredient of the charge as the law requires.

Perhaps the political nature of sedition offence can be an explanation of reasons why the court contravened this basic requirement in criminal law. The opinion of a magistrate or a judge cannot be a sufficient basic of conviction. The court in Wangondu case emphasis the paramouncy of state security at expense of an individual right to a fair trial. In this case the alleged seditious documents were read in privacy and their material content was not revealed. In George Anyona Sedition Case it is clear the nature of handling of the alleged seditious document mostly depend on the expertise applied by the defence counsels in conduct of their case and also the degree of seriousness of the content of the document as estimated by the government in power. In R.V. George Anyona and Three others²² and Wangondu Case illustrate how the law of sedition has been applied by the Kenya political establishment to stamp out dissent.

In R.V. Willy Munyoki Mutunga²³ the accused was charged before a resident magistrate in Nairobi on 12th, June, 1982 for being in possession of a seditious publication titled, J.M. DAY SOLIDARITY DONT BE FOOLED, REJECT THESE NYAYOS contrary to S.57(2) penal code. At the time of his arrest he was a senior lecturer in the Faculty of Law in University of Nairobi. He was also the sitting Secretary General of the then University Staff Union (USU). The Union was banned later by president Moi on grounds that it was engaging in subversive activities detrimental to law and order in the

country. In his 1st June, 1982 presidential speech in Kiswahili, president Moi made a scathing attack against Mutunga, accusing him of articulating radical ideologies of in the University. The President extended his attack to all university teachers who in his own view harboured revolutionary ideas. It is evident that president Moi and his government either did not understand the views expressed by the university teachers or they absolutely lacked knowledge of what radicalism means. This is well illustrated by utterances of a one time nominated M.P. Kariuki Chotara when he criticised Karl Marx for misleading the university students. [He called for expulsion of Karl Marx from university premises.] After Moi's June 1st speech, many academics of both Nairobi and Kenyatta Universities were arrested and subsequently detained. Others were arraigned before courts and charged with offence of sedition. Many university teachers were picked by police for questioning on matters related to their political beliefs and convictions. Among those arrested, charge in courts or detained included Kamonji Wachira, A.L. Mazrui; Edward Oyugi and Maina Wa Kinyatti. R.V. Mutunga, was never heard but rather the state entered a nolle prosequi and later Mutunga's detention was gazzeted in the official Kenya Gazette. It is our argument that due to lack of evidence against Mutunga in the sedition case, the state opted to use the Detention Law to incarcerate Mutunga.

The main intention of the penal laws is that punishments should be meted for the purpose of reforming the errant person. It is our argument that the public order laws have ~~disas~~trously failed in this aspect. Looking at later records of those who have been victims of public order laws due to their political beliefs and conviction, the futility of these laws becomes more clear. Victims of the public order law more than any other persons have reflected their commitment and desires for a democratic society which cannot be achieved in existance of oppressive laws.

Mutunga Case reveal how the state has used sedition --law to elimanate and silence those who it view to harbour revolution-ary ideas. It is important to mention that Mutunga is not only known for commenting on matter of public concern but more for advocating for revolutionising of approach of legal studies at the university of Nairobi.

In R.V. Maina Wa Kinyatti²⁴, the accused was charged with offence of being in possession of a seditious publication contrary to 5.57 of cap 63. The said seditious publication was entitle, Moi's DEVISIVE TACTICS EXPOSED. The accused was a lecturer at Kenyatta University. The case has at least two important legal points in relation to offence of sedition. First, it raises the question as to

when a person is said to be in possession in criminal law. We are at the view that ~~mere~~ finding of documents in an accused persons premises is not sufficient to base a conviction. In order to successfully prove possession, the posecution must show existance of Knowledge on the part of the person alleged to have had the custody of the thing. The prosecution must also show the intention of the accused to have custody of the thing in question. S.4 of the Penal Code, define the concept of possession. In this case the aspect of possession becomes more important particularly when the accused (Maina) alleged in his mitigation that the publication might have been planted in his files since his office where he normally kept his files was a public office where his students and even other college workers had access.

The prosecution produced books to prove seditious intention of the accused. This act of prosecution is wanting in legal content. The prosecution produced before the courts books which it termed as revolutionary or radical literature to prove guilt on the part of the accused. The political opinion and belief of the accused seem to be the actual aspect that the court relied on since the books were ~~no~~^{not} the subject matter of the case.

The seditious document was the subject matter of the case and not those other books. The court was influenced in reaching at its decision by an irrelevant fact. We are at the view that Kinyatti was being tried because of his political and ideological inclination in guise of a sedition offence. In Kenyattis case we clearly see the state using the sedition law to criminalise a citizen's political belief.

In R.V. Titus Adungosi²⁵ the accused was charge under S.57(1) of the penal code. He was alleged to have taken part in and or organised an illegal demonstration whose purpose was to excite disaffection against the government on August 1st, 1982. Adungosi pleaded guilty to the charge and he was sentenced to maximum imprisonment permissible by law that is ten years²⁵. This case cannot be understood in isolation of the university student politics in the university of Nairobi Vis-a-vis the government.

Adungosi was student organisation of Nairobi University (S.O.N.U) first Chairman . SONU was established in 1982, as a central body representing students. It replaced the interim committee formed as an informal group after banning of controversial Nuso.

The new student organisation under Adungosi had taken a revolutionary stance. SONU had urged president Moi KANU government to allow multi-party democracy in the country²⁶. President Moi, the chief spokesman of the government issued a stern warning to the university community citing its unwanted criticism. He said that the government would act swiftly in disciplining those bent in subversing the government.

On August, 1st, 1982 the university student community took to the streets as a sign of their solidarity with the members of the then Kenya Airforce who had staged an abortive coup. Adungosi and other student leaders were alleged to have addressed a student rally popularly known as 'Kamukunji' among the university members. In the meeting Adungosi was said to have denounced the 'fallen' regime and in turn supported the military government. In this case the government determination to eliminate those who hold dissimilar views to those it advocate, the likes of Adungosi.

Another sedition case that show how students in Kenya have had their exercise of freedom of expression and academic freedom criminalised by the state is R.V. Onyango Oloo²⁷.

The accused was a university of Social science in the University of Nairobi. He was charged and convicted of publishing and being in possession of a seditious publication headed, A PLEA TO COMRADES. Oloo was arrested barely three days after the attempted coup. The prevailing political climate can be used to explain the circumstances which led to the arrest and conviction of the accused. He appealed against the conviction without success. In their judgement Sachdeva J and Abdallah J held that the sentence was not excessive in the light of the period when it occurred. The court found that Onyango admitted having been in possession of the alleged seditious document. In his defence he contended that he had no seditious intention, but that as a student of social science he had the capacity, moral obligation and academic freedom to critically analyse issues of public debate without victimization and without considering it to be raising disaffection, ill will or promoting the overthrowing of government. The accused in his lone defence wondered where the demarcating line lies in regard to the right of freedom of expression in a democratic society and the offence of sedition. In our view the court by convicting Onyango Oloo was saying that the borderline between what is sedition and what is free speech can be redrawn by considering the political interests of those in power at a particular time.

It is our argument that the right to comment on matters of public nature is a fundamental right of an individual and any attempt to suppress this right is a clear reflection of the authoritarianism and dictatorship of the regime in power.

THE APPLICATION OF THE LAW OF SEDITION AND THE CLAMOUR FOR MULTIPARTY DEMOCRACY IN KENYA IN THE 90s'

"We have been falsely told that forming another political party is illegal in Kenya. It is not. The Kenya constitution allows for freedom of association and Assembly. And a political party formed so that people can freely associate so as to pursue certain political interests is legal to the letter²⁸ ."

The campaigns for reinstatement of multi-party democracy in Kenya is probably the best illustration of how the Kenya government have used the offence of sedition to silence advocates of political change in the country. This period saw the government applying the sedition law to criminalise the citizenry right to free expression in regard to introduction of multiparty democracy in the country.

The period between 1990 and 1992 was marked by banning of independent newspapers and magazines²⁹, harassment of journalists who supported introduction of multipartism, arrests and charged in courts of multi-party democracy advocates.

This period saw the government applying the public order laws for purposes of self preservation. The government was determined to resist the calls of change from the single party state to a pluralistic society. The state applied the Public Order laws to silence the multiparty advocates. Unprecedented detention of politicians, lawyers, journalists and musicians who were perceived by the government as anti-establishment was witnessed. Information disseminators such as musicians had their music banned and declared illegal. The government declared for instance declared songs by J.J. Wanyeki, a local gospel singer seditious. One of his songs "Mahoya ma Andu a Muoroto" (Prayers of people of Muoroto) which was a against the government for demolishing people's houses in a Nairobi slum. The then Attorney General Mathew Guy Muli declared that any person found in possession of such cassettees was to be charged ^{with} of being in possession of a seditious music composition³⁰.

Other Music production that was banned was that of Joseph Kamaru and Joe Njoroge. It is pertinent to say that this music was advocating for a need of replacement of KANU government since it had ceased to be democratic enough. It is worthy noting that the government did not only suppress the independent source of information but it went further and turned the state run radio into a KANU propaganda machinery.

Independent newspapers and magazines were at the forefront of calling for introduction of multiparty politics in Kenya. The magazines that identified themselves fully with the clamour for multipartism were the society, Nairobi Law Monthly and the Finance. The government showed its determination to suppress and silent the independent press. It applied extra-legal measures such as harrassment, intimidation, arrest and pre-trial detention. Outright banning of periodical was also applied. The Nairobi Law monthly was banned by the then A-G in September, 1990³¹ following the release of an issue entitled, KENYA WANT CHANGE: KANU REVIEW COMMITTEE TOLD. The banning order proscribed also all past, present and future issues of the magazine. In October, the High Court lifted the ban pending appeal. On July 1st, 1991 the ban was by the new Attorney General Amos Wako.

With the banning of the Nairobi Law Monthly in September, the magazine had joined the list of many other banned periodicals namely Beyond, Finance Review, Development Agenda and Viva.

The law of sedition was also applied to silence the independent press. In R.V. Gitobu Imanyara the editor of the Nairobi Law Monthly magazine, the accused was charged with publishing a seditious editorial entitled "Tribalism" in his monthly production. The editorial suggested clear favourism towards the Kalenjin, President Moi ethnic group in the distribution of public offices.

The editorial appeared at a time when Moi was perpetually preaching against tribalism, calling his critics "worst tribalists" and repeatedly defending the one party state on the ground that political pluralism would lead to tribal rivalries chaos and bloodshed³². In his editorial Imanyara had written

"We are getting an increasing number of letters from every part of the country about absence of equal and/or proportionate distribution of Public Offices. One reader wrote to us asking us to name who head the following organisations: The Central Bank, Criminal Investigation Department, Kenya Assurance Company, The Nyayo Tea Zone, The K.G.G.C.U., The National Youth Service, Controller of State House, Director of Agriculture, Commissioner of Social Services, Commissioner of Co-operatives, Kenya Medical Research Institute....

The same readers raised similar issue regarding areas of public administration particularly the provincial administration..... Our concern is that our government professed commitment to build a 'cohesive' one nation where Kenya of all ages races and tribes share equally the fruits of our heritage is grossly undermined by those responsible for appointment that arouse suspicion on parts of Kenyans... We raise this issue in the full knowledge that all will cause anger in certain quarters, that we may be accused of being "seditious"... Those however, are risks every patriotic kenyan must be prepared to take as our nation struggle to build a nation ruled by law³³".

The prosecution argued that the editorial by Imanyara was aimed at causing disaffection against the government and it was inciting the citizen against the government. It was a fact that the holders of public offices named in Imanyara's editorial had a thing in common. All of them were members of Moi ethnic community, however as we have indicated else where in this paper, the offence of sedition does not recognise the defence of fair comment on a matter in question.

R.V. Gitobu Imanyara, does not raise a lot of legal issue because the case was not fully heard and determined. The state ended it, when it entered a nolle prosequere. Perhaps for lack of evidence or apprehension of exposing the state to an embarrassing position during the trial.

In R.V. Njehu Gatabaki³⁴, the accused was arrested and charged with eight counts of publishing a seditious publication "Intended to bring into hatred or contempt or to incite disaffection against the person of the president of the Republic of Kenya and the government of Kenya as by law established".

The prosecution alleged that on or about November 20, 1992 in Nairobi, jointly with other not before the court, Njururi published a seditious stories entitled, Moi Bloody Money. Njururi also faced another charge of offering for sale copies of the magazine. At apposing the bail application by the accused, the prosecution told the court that the accused was charged with another similar offence in a Mombasa court and was released on bail on the understanding that he would not commit another offence until the case was finalised. Njururi was remanded in prison custody for eight days despite having been detained in police cell without charge for five days. The case has not been determined by the court and hence it does not give us a new development of the sedition law in Kenya.

Another publication that has been subject to state harassment for expressing divergent views to those of the state is the Society Magazine. The Society Magazine have been expressing views opposed to the government of the day or which exposed misconduct of holders of office, the president included.

The accuse at the time of his arrest was the editor of Finance Magazine. The periodical contained articles that directly implicated president Moi and his senior aides in the ethnic violence that ravaged most of the Rift Valley and outlying provinces and which pitted his Kalenjin Community against the other communities, notably the Luo, the Luhya, the Kisii and the Kikuyu. The periodical was entitled, THE MOLO MASSACRE "MOI is the villain"³⁵. The editor was later to be charged with several other sedition cases arising from later editions of the Finance Magazine. None of the sedition cases against the editor had been decided upto date rather the state has been entering nolle prosequere in these sedition cases.

In R.V. Blamwell Njururi³⁶, the accused was arrested and charged with publishing sedition articles contrary to S.57(1) of the penal code. Njururi was the editor of the Nairobi Weekly Observers, a periodical that had identified itself as critical against president Moi government.

R.V. Pius Nyamora³⁷ illustrate how the government has applied sedition law to criminalise the freedom of expression among the journalists. The editor of the Society Magazine, Nyamora was arrested and charge with publishing a seditious publication. In his publication Nyamora had alleged that president Moi knew Robert Ouko's killers.

The case was never fully and determined. Thereafter the heard editor has continued to have sedition charges leveled against him by the state in regard to his publications. The Society Magazine was one of those magazines that openly called for introduction of a multiparty democracy in Kenya so as to replace the undemocratic tendencies in the country of KANU government.

In R V. Joe Kimani³⁸, the accused was charged with importing into the country 798 copies of seditious publications namely African Events Vol 6 No./8/9 of 1990 containing an article, MWAKENYA DEMANDS. The article was calling for change in the Kenya political order and consequent introduction of multiparty democracy.

Kimani was convicted and jailed by a Nairobi court. In R V Ngugi Magugu³⁹, the accused was charged for being in possession of a seditious publications, UZALENDU MWAKENYA NEWSLETTER, dated July, 11, 1992. The article contained writings critical to the government and it advocated for radical change of the status quo. The accused was convicted and sentenced to imprisonment sentence of four (4) years.

R V George Anyona and Three Others⁴⁰ reveals how the state applied the law of sedition to suppress those political personalities who it viewed as strong advocates of or multiparty democracy. Anyona and three others were arrested in a Nairobi restaurant, Mutugi Bar and Restaurant on July, 11, 1990. The prosecution alleged that the four person, George Anyona, Edward Oyugi, Isaya Ngotho Kariuki and Augustine Njeru Kathangu were arrested while holding an ilegal meeting with a seditious intention to overthrow the government of Kenya as by law established. They were also faced with another count of being in possession of seditious documents. Their arrest came soon after the Saba Saba unrests which marked the peak of the Kenyan people to have a multiparty^{40(b)} democracy.

The accused persons were known by the political establishments as harbouring ideas and views that advocated for change of the status quo. Anyona, a known critic of the establishment. He was detained in 1976 by Kenyatta government and later 1982 by Moi's government. In 1982 Anyona and other people were alleged to have intention of forming a second political party in Kenya (Kenya Africa Socialist Association). Edward Oyugi and Ngotho Kariuki are known radical accademician who have been victims of detention law in post independent kenya. The ideological backgrounds of the three persons can explain why the state was panicky at the alleged meeting of the accused people during a time of political unrest in the country.

According to the prosecution the accused persons were found in a bolted room and they had a note bearing the name, KEN and CHARLES. The arresting officers interpreted the words to mean Kenneth Matiba and Charles Rubia respectively. The two personalities were in the frontline of calling for introduction of multi-partism and subsequent replacement of one party authoritarianism⁴¹.

The prosecution also alleged that after a search of Anyona's car and his house some seditious publications were found. Among these books was the Green Book by Muammar Gadaffi, An Article from Africa Confidential entitled, THE SECURITY HOMEBOYS, a foreign newspaper article entitled OUKO's DEATH THREATENS MOI's GOVERNMENT, a handwritten paper entitled NEW DEMOCRACY FOR KENYA MANIFESTO FOR CHANGE DIVIDE AND RULE and article and an alleged shadow cabinet list. One of the accused Njeru Gathangu was alleged to have been found in possession of a banned magazine, the Financial Review.

In his defence Anyona stated that the charge against him and his colleagues were a state fabrication aimed at persecuting him for his political beliefs, particularly in regard to multiparty democracy. He argued that the sedition trial was a political machination to keep him out of society. Anyona in lengthy discussed the content in all the alleged seditious documents and he stated that there was nothing seditious contained in those publications since it was factual and true as evidenced by Kenya political history.

In regard to the prosecution assertions that he had censured some holder of public office Anyona argued,

"In public life, there is the issue of accountability. It is not wrong for one to say what he thinks about the holder of any public office".

Anyona and his co-accused were convicted and sentenced to seven years imprisonment. In his sentence the learned trial magistrate said,

"The offence which the four are charged with is extremely serious. It is quite clear to my mind that the accused met at Mutugi Bar and Restaurant plotting how to distablise the security of the state. It was the duty of the courts to impose severe punishment on anybody found threatening the security and stability of the state".

The words in this judgement adds weight to our argument that the offence of sedition is aimed at protecting the political order and its interests.

In appeal, the High Court allowed the appeal and quashed the conviction and did set aside the judgement.

The sedition cases that we have discussed in this work clearly reveal how the state has used the offence of sedition to suppress any voice of dissent emanating from various quarters of its citizenry. It is our observation that such acts by a government are undemocratic and a contravention of Fundamental Human Rights of free expression and holding of ideas and opinions. In words of John F. Kennedy,

"Democracy depends on independent voices and it is risky whenever such voices are silenced. When civil liberties are restricted democracy is at risk".

This words by J.F. Kennedy outline how a democratic society ought to behave in regard to the freedom of expression among its citizens.

FOOTNOTES: CHAPTER TWO

1. Cap 63 Laws of Kenya
2. §.79 the constitution
3. May 1st, 1972
4. Y.P. Ghai and J.P.W.B. MacAuslan, Public Law and Political change in Kenya (O.U.P) 1970 Pg 27
5. See, Holdsworth, A History of English Law (Sweet and Maxwell) Vol. 8 Pg.8
6. Ibid pg. 338
7. (1606) 5 Co. Rep. 1259
8. Supra Holdsworth pg 25
9. 22 St. Tr. 175
10. Supra Ghai and MacAuslan pg 129
11. (1982) Unreported
12. 5.79(2), Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision:-
 - (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health.

13. Supra, Ghai and MacAuslan pg 37
14. Ibid pg 37
15. Some of these laws were,
 - The pass system (Regulation 12 Nature Passes)1900
 - The vagrancy law (Regulation 3)1900
 - Preservation of order by Night (Regulation No.15)
It banned Africans night dances and festivals
 - Outlying Districts (Reg. No. 31) of 1900
16. 1960 (E.A.) 745
17. Jomo Kenyatta written address to Addis Ababa Heads of Independent Africa states (Quoted in his, Suffering Without Bitterness pg 200)
19. Criminal case No. 1096/82, see S.B.O. Gutto comments on this case "Some Legal Aspects of Waruru Kanja's petition for executive clemency (unpublished) 1982.
20. Weekly Review February 5,1982 pg 15
21. Daily Nation of July 9,1982
22. See, Nairobi Law Monthly No. 32 April/May,1991(1)1982
23. See Weekly Review , June,1982 pg 10
24. Criminal case No 1239(Unreported) 1982
25. See Daily Nation of 25.9.82 pg 1
26. See press statement issued by SONU Leaders
. as reported in Daily Nation on 29.5.82
27. (1982) unreported
28. The Nairobi Law monthly No. 301, February 1991 pg 29.
Jaramogi Oginga Odinga Interview on his newly launched party National Democratic party.

29. The N.L.M. No. 30 Feb 1991 pg 31
30. The People Newspaper, Feb,28th 1992 pg 6
31. See Daily Nation 14/9/90 pg 1
32. See N.L.M. No. 30, February 1991
33. Ibid pg 27
34. The Finance Magazine, December 30th,1992 pg 27
35. Finance Magazine May,1992 (19,000 copies of the publication were confiscated by police because they were critical against president Moi and his government).
36. Finance magazine, December,30,1992 pg 30
37. (Unreported) 1992 see Finance Magazine pg 31
38. See Daily Nation 2.2.91
39. See, Daily Nation 2.2.91
40. See, N.L.M. No. 32 April/May 1991
41. Ibid pg 28

40(b) Saba Saba unrests refers to political unrests that ensued on 7.7.90 when multiparty advocates led by FORD leaders namely Paul Muite, Oginga Odinga, Martine Shikuku, James Orendi, Goerge Nthenge, Ahmad Balhamariz, Late Masinde Muliro, Japheth Shamalla and other sympathisers defied the government order to bar their pro-democratic meeting scheduled at Kamukunji play ground.

CHAPTER 3

3.1 THE 1952

The state mobilised its security forces to arrest the organisers, the attendants of this 'illegal' meeting. After the cancellation of the intended meeting owing to mass arrest of Ford leaders, there were unrests in Nairobi as supporters of the FORD engaged the police in running battles in the streets of Nairobi and this state of insecurity spread in other outer-districts.

CHAPTER 3

3:1 THE LAW OF SEDITION VIS-A-VIS LIBERAL DEMOCRACY

In our thesis, we have argued that the offence of sedition is a political offence committed against the political establishment of the day. We have also posited that the Kenya law of sedition as embodied in **S.56** and **S.57** of the Penal Code is meant to protect the political interests of the executive. Throughout our argument and with illustrations of sedition cases. We have shown how the government in power has applied the law of sedition to suppress individuals and institutions such as the press that have attempted to criticise its (government) mode of government. R V. Ogunda' illustrate how colonial regime in Kenya applied the law of sedition to suppress the African nationalism. Ogunda in his political speech at Awendo in South Nyanza had highlighted the oppressive and exploitative nature of the colonial regime in Kenya and he had urged his fellow Africans to get prepared and organise for the purpose of driving away the colonial rulers.

In our considered view, the colonial regime was undemocratic and anti-people. In that, it was not ready to accept even genuine criticism that emanated from the Africans. This assertion can be supported by looking at the existing colonial policies of administration as juxtaposed to Oguda's political speech. Oguda had accused the colonial regime of being oppressive, exploitive and one that lacked legitimacy to govern. In our view, Oguda's assertions were absolutely correct because the basis of European imperialism in Africa was to exploit the local resources and manpower to the maximum. The colonialists had taken away the control of land from Africans and through introduction of new ordinances, Africans had been relegated to the status of tenants of crown². It was the African people who laboured in the newly established European estates for minimal salaries or nothing at all. The Africans were heavily taxed. Their movements were limited through the introduction of the system "Kipande"³. In brief, the African people were subjected to harsh and dictatorial circumstances under which their civil rights were not recognised or were deemed to be non-existent. The colonial government had been imposed on the people without their consent thus it was an undemocratic government that had not been brought to power by the people.

After outlining some of the characteristics of the colonial regime it is evident that the colonial government was determined to suppress genuine criticism from the Africans. Oguda's political speech in our view was made in good faith and it aimed at seeking the people's unity in effort to eliminate an oppressive regime which had been unlawfully imposed on the Africans by British colonialists. The Kenya Penal Code is a replica of the Indian Penal Code which was the one that was applied in pre-independent Kenya. According to the Penal Code 5.56 and 5.57 for a 'thing to amount to a seditious intention it must be prejudicial to,

"The person of president or the government of Kenya as by law established inter alia".

In our view the charges against Oguda were void in that the colonial government was not a legitimate one to the Africans.

By looking at several sedition cases, it is clear how the post-independent Kenya state has applied the law of sedition to suppress its critics. Having argued that the law of sedition is a seriously hindrance to the enjoyment of the freedom of expression in a democratic state, we shall examine the place of the law of sedition in a multiparty state. In this work it will be submitted that the law of sedition is an impediment to free expression, a necessity in a multiparty democracy and should be scrapped from the law books, because it defeat the the purpose of having a

democratic system. In a multiparty democracy the ~~existing~~ political parties cannot ably achieve their objectives in existence of intimidating laws. Such as the law of sedition and other PUBLIC ORDER legislations.

Kenya, is now a liberal democracy⁴ and one of the cardinal characteristic of a liberal democracy is that it stands for a multiparty system of government. The existence of multiparty system is intended to ensure that the citizenry participate fully in the political and social-economic affairs in the country. Kenya became a multiparty democracy in December, 1991⁵. Democracy is essentially a social and political condition under which citizens feel free and are free to criticise and censure in good faith their government, particularly the senior government officials without fear and the occurrence of any reprisals whatsoever⁶. As we have stated in this work, in a democracy, the sovereign power resides in the people enmasse but the whole citizenry cannot rule directly. The citizenry participation is important in policy making organs of the government. The citizen is involved in the government through active participation in popular interest groups and movements such as political parties or party, trade unions, community association, private associations and profession associations.

The government must be positively responsive to the citizens' contribution and constructive criticism. The Western liberal democracy which Kenya has adopted is said to be superior in comparison with the Marxian and under developed countries democracies. The liberal democracy is premised on the concept of Rule of Law.

The rule of law, refers to regulation of affairs of the state by laws which are fixed and certain. These rules must be reasonably fair and just and must recognise and uphold human value and dignity. In other words in a democratic society an individual civil rights must not only be recognised but must be respected. Avenues of remedying these rights in event of breach should be provided.

It is pertinent to observe that, the simple fact that a country allow operation of opposition parties does not mean that such a state is democratic. Even in a multiparty state, authoritarianism and fascism can be practiced, for instance in a situation where the government in power use laws to intimidate the opposition parties and groups. In a multiparty democracy, the laws ought to be fair and just to ensure that both the government and the opposition are accorded equal rights and protection in law to enable the two to pursue their activities effectively.

It is automatic that in existence of laws that suppress free expression of ideas and views of individuals, interest groups and institutions such as the press in regard to government conduct, do violence to the survival of democratic society. The law of sedition therefore, does not augur well with the expected freedom of expression in a multiparty state. In R V David Onyango Oloo⁷, the accused had been charged for being in possession of a seditious document. He also faced another count of Publishing this 'seditious' document entitled, "A PLEA TO COMRADES". In his defence the accused raised a fundamental question as to how an individual can determine in regard to the right of freedom of expression in a democratic society what is seditious and what is to be termed as free expression;

"Where is the demarcating line on what is sedition and what is free speech in a democratic state"?

In R V. Gitobu Imanyara⁸, the Editor of The Nairobi Law monthly was faced by sedition charges for publishing a seditious editorial column in the magazine. Despite, the case having not been fully heard and decided it raises a similar controversy to that in R V Onyango Oloo.

According to Imanyara he had published his editorial entitled "Tribalism" without any seditious intent but rather out of patriotism and out of duty bestowed on him as an editor of a magazine to shape public opinion on matter of public concern. In R V. George Anyona and Three Others⁹, the first accused, Anyona in his defence argued that the freedom of expression is wide enough and there is nothing wrong for a citizen to say what he thinks of any holder of public office including the president. The question determining what is sedition and what is free expression in a democratic society become more complex in a multiparty democracy, where diversity of ideas and opinions need to be expressed by various political parties, the press, workers unions, interests groups and even private individuals.

§.2A of the constitution was adopted in 1982, by way of constitutional Amendment Bill¹⁰. The new section provided.

"There shall be one political party in Kenya the Kenya Africa National Union".

The Introduction of this section came soon after the government sensed that a former legislator George Anyona and other people were intending to launch a second political party¹¹. In Kenya because the constitution had room for such party or parties. The Bill to turn Kenya into a ~~dejure~~ one party state was tabled in parliament by the then Minister for constitutional Affairs, Charles Mugane Njonjo. In his speech to the House of Parliament the then minister said,

"Kenya had for the past nineteen(19) years been a de facto one party state and the Constitutional Amendment is just to legalise what already existed and making the country rightfully a one party state¹²."

It is pertinent to observe that the minister was deliberately misleading the parliament since he wanted the parliamentarians to believe that in a de facto one party state, formation of a political party or political parties is illegal in law.

Our line of argument is that, despite the fact that Kenya was a de facto one party state by 1982, the executive made it totally impossible to form another political party or parties. The executive achieved this end by use of its extra-legal powers and other intimidating machination,

and application of Public Order Laws. The banning of the Kenya People Union in 1969 and the subsequent detention of its leaders is an illustrative example of the executive determination to monopolise power by maintaining a one party state in post-independent Kenya. With the enactment of S.2A of the constitution in 1982, the government had the opportunity and security of monopolising political power and decision making institutions in the country for almost twelve years with no substantial opposition. The few dissenting voices which expressed divergent views to those of the government were silenced by use of the legal machinery. R V Onyango Oloo¹³ and R V . George Anyona and Three Others^{14(a)} are good examples of how the government used sedition law to silence those who expressed ideas and opinions which the government viewed as oppositionist. The institutions which exercised the right of freedom of expression against the government policies and administration were also antagonised by the state through the use of sedition law. The press was one institution that had the law of sedition applied against it to hinder the freedom of expression. This preposition has been illustrated in the cases of R V Gitobu Imanyara.

R V. Jehu Gatabaki , R V. Blamwell Njururi and R V. Pius

Nyamora and Another. Apart from the application of sedition law, the government proscribed several magazine which it viewed as anti-government, among these periodicals were Beyond, Financial Review, Development Agenda and The Nairobi Law Monthly. However, the ban of The Law monthly, was lifted after a court order to the effect pending the hearing of the matter related to the ban.

Apart from the press the government systematically weakened other institutions which it saw as presenting opposition against it. These institutions included the Trade Unions, Public Universities, Professional Organisations, entertainment and Theatre groups. The central Organisation of all the trade unions was affiliated to the ruling party KANU^{14(b)}. The affiliation reduced the organisation's independence. In voicing the workers grievances. In the days when the COTU was an independent entity from KANU, the organisation had identified itself as a firm defender of workers rights against oppressive and exploitative policies of the government. The public universities particularly Nairobi university and Kenyatta university colleges whose students and teachers had been vocal in criticising the government and its policies were substantially weakened.

The state picked and interrogated university teachers who harboured dissenting views. The government censored theatre activities at the university by declaring most of the theatre productions as seditious and aimed at subversing the government of the day. In Onyango Oloo case, the accused a first year political student at the university of Nairobi was arrested and charged of publishing and possessing an article which he honestly believed was not seditious but rather was a forum of exercising his academic freedom on commenting on issues of public concern. Several professional and interest organisation were disbanded by the government since they held and expressed inconsistent views to those of the state. Thus posed as potential opposition. One of this organisation was the University Of Nairobi¹⁶, 16 Staff Associations, Nairobi University Student Organisation¹⁷ and Kenya Union of Civil Service¹⁸. Music production by some musicians such as J.J. Wanyeki and Joseph Kamaru was declared to be seditious and was banned from being offered to the public for sale¹⁹. The government also censored theatre production. Plays, poems and other performances that expressed views that were opposed to the government policies and mode of governance were either banned or licences to facilitate their performance was denied altogether.

In brief the one party state government suppressed the people right to free expression.

The introduction of multiparty state democracy was introduced in Kenya because of local and international pressure to the government. The desintegration of the Soviet Union and fall of its communist allies in Eastern Europe, marked the end of cold war and consequently establishment of a new world order. With the ending of cold war, need for, democratisation of world states became a necessity. In Kenya the forces that were at the centre stage in agitation for introduction of multiparty state were the Imperialistic International Monetary Fund, the Western Media, some Foreign mission accredited to Kenya, Human Right activists in Kenya, the church and the local independent Press. With the introduction of multiparty democracy, in Kenya it is imperative that individual liberties be fully recognised and various institutions be empowered to ensure that they ably exercise their right of participating in the decision making and policy formulations in the country.

The empowerment of these institutions can be achieved by creating an atmosphere in which these institutions or people composing these institutions as functional elements can express their ideas and opinions without fear or intimidation. This points to the urgent need to eradicate all those laws that tend to muzzle the freedom of expression.

3:2 FREEDOM OF EXPRESSION IN A MULTIPARTY STATE

Multiparty democracy is premised on the democratisation of governments and the importance of recognising and safeguarding human rights. These rights are framed on terms of individual liberties. The Kenya constitution has outlined these individual rights and liberties under its chapter V for the purposes of this work, we are interested in examining the right to freedom of expression in a multiparty democracy. For democracy to prevail citizens basic rights must be guaranteed and be respected by the government. Most constitutions have a catalogue of fundamental rights and freedoms contained in what is usually called the Bill of Rights. The Kenya Bill of Right is contained under chapter V of the constitution. It is important to note that these rights are not absolute, rather, the constitution underlined the limitation of these rights. In our view, the constitution of Kenya is not in harmony with the concept of Human Rights, since under 5.79(b) of the constitution, individual enjoyment of these rights is sacrificed to the interests of the state.

Under §.79(2) it is clear that when an individual rights as guaranteed under chapter V of the constitution are in conflict with interests of the state, interests of the state will prevail and the rights of an individual will be relegated to the background.

Under §.79 of the constitution the right of holding of opinions and ideas and expression of those ideas is guaranteed. The present position of the constitution make it impossible for an individual to fully exercise his rights to freely express ideas and views due to the provision of §.79(2).²⁰ The concept of Human Rights is promised on allowing the individual to exercise his rights in absence of any undue governmental interference.

As stated else where, the offence of sedition is a political offence. It has also been illustrated through analysis of case law how the political establishment both at pre-independent and Post-independent Kenya has applied the sedition law to suppress its critics. In this work we have also stated that one of the primary principles of democracy is the peoples' entitlement to make comments in matters pertaining to the government in power and its policies and conduct. An individual is also entitled under democratic principles to criticise even the holder of the highest office, the Chief executive without fear of reprisal.

The executive, must also demonstrate its respects to democratic principles by being tolerant to criticism leveled against it. It must also learn to accommodate ideas and opinions of its critics and those of existing political parties. In a democratic society the conduct of the governors should always be object of constant watchfulness by all and their judgements and policies subject to freest criticism; As Cockburn C.J. said, In SEYMOUR V. BUTTERWORTH,

Those who fill public positions must not be too thin skinned in reference to comments made upon them^{21"}

It is important to state that neither the president nor the minister enjoy immunity from criticism in performance of their duties. Criticism and constant censorship of the performance of those occupying public offices is a necessity so as to check against abuse of public power by those in positions of authority. It is unfortunate therefore, that the Kenya law of sedition as embodied in 5.56 and 5.57 of the Penal Code has been used to term even genuine criticism of the government and its policies as an offence of sedition.

In R V Gitobu Imanyara, the Editor of The Nairobi Law monthly was in his own view expressing his honest and genuine observation in regard to allocation and distribution of public offices in Kenya. His observation was factual because it was evident as to who held the offices in question. However, the state termed his editorial as one aimed to excite disaffection against the person of the president or the government of Kenya as by Law established. It is regrettable that under the offence of sedition unlike that of defamation the defence of fair comment is not recognised and this position manifest the law of sedition as a harsh piece of legislation. Its application is repressive and unfair to the victims of sedition since despite the true nature of the assertions by the critic he cannot plead fair comments. This preposition was clearly illustrated in George Anyona Case. Despite Anyona's lengthy justification of the document which were alleged to be seditious the court convicted him of possessing seditious document inter alia.

In its attempts to maintain the status quo, the colonial government applied the law of sedition to uproot the African nationalism which was a force to reckon with²².

In R V Oguda, the accused had expressed his political opinion in relation to colonialism and colonialists in Kenya. Oguda, had underscored the necessity of bringing political change in Kenya Colony. The colonial administration was an undemocratic regime since it was determined to use the public order laws to silence even the members of legislative council, the likes of Oguda, who were the representatives of the Africans. It is our observation that during the colonial period most of violations of human rights and denial of democratic government in Africa were carried out by colonialists in the interests of the European imperialists. Africans were denied licences to hold political meetings under the PUBLIC ORDER LAWS²³. The colonial administration was determined to ensure that the Africans did not manage to import their ideas to the masses. This was one way of suppressing freedom of expression in pre-independent Kenya. In post-independent Kenya the PUBLIC ORDER LAW is still in operation and it is a requirement that for an individual to hold a public meeting and or a procession he must seek a licence from the provincial administration. This requirement has in the past made it impossible for opposition leader and government critics to exercise their right of assembly association and free expression

The provincial administration has in the past frustrated the opposition leaders in their efforts to seek a licence to hold a public political meeting through which they can exercise their right to free expression²⁴. 5.80 of the constitution has a provision which guarantees the coming together of like minded persons in an association.

In a multiparty democracy the enjoyment of individual freedoms should be fully recognised and be made a reality. This can be achieved by repealing and or amending as the circumstance deserves all those laws that militate against enjoyment of individual rights and freedoms as expected in a democratic society. These laws has an inhabiting and unhealth effect on the assertion of democratic rights, and their prolonged use is clearly inimical to the growth of democratic institutions. It is only after these repressive public order laws such as the sedition law have been repealed that the freedom of expression inter alia will be a reality in Kenya.

A total guarantee of freedom of expression to the people would eventually have a positive effect in that various institutions in the country will fully exercise this freedom and in long run, national institutions will be empowered to safeguard the rights of the citizens from breach by those in power.

We shall briefly discuss the role of the parliament, the judiciary and the press vis a vis the executive in a multiparty democracy. We shall state the reasons as to why these institutions need total guarantee of the freedom of expression.

3:3 THE NATIONAL ASSEMBLY

Since independence, Kenya has been a Parliamentary democracy.

This means that the people are entitled in law to vote a person of their own choice to represent their interests in the House of Parliament. The National Assembly and Presidential Election Act²⁵ set out the framework that regulate and govern the presidential and parliamentary Elections.

For peoples grievances to be represented effectively in parliament, it is vital that an atmosphere conducive for free debate be guaranteed. This requirement become more important in a multiparty democracy where parties with different ideologies and political interests are represented.

The National Assembly Power and Privileges Act guarantees members of parliament freedom of expression in all matters and areas while in the parliament.

The interpretation of this Act is that no member of parliament can have a legal action or an extra-judicial action taken against him in regard to his utterances during parliamentary debates.

The guaranteed freedom of debate and speech in parliament must be fully recognised and put in practice. In the past, incidents have arisen where members of parliament have either been subjected to detention under the Public Order Act or have been picked by police for interrogation in regard to their radical ^t utterances in the parliament. Perhaps, the best example is Martin Shikuku's assertion that "KANU" is dead as a mass political party²⁶. The assertion was made in parliament. The then deputy speaker ruled out an assertion by a member that Shikuku's statement needs substantiation. The deputy speaker, said that the assertion was precise and absolute. Both Shikuku and Saroney were detained despite the National Assembly (Powers and privileges) Act-provisions.

Another illustrative examples of how the freedom of expression in the Parliament has been threatened is the arrest of George Anyona²⁷ the then member of Parliament for Kitutu Masaba. Anyona was arrested within the parliament premises contrary to the provisions of the said statute. Perhaps, Anyona who was a critic of the government was detained because of a statement that he had made in parliament²⁸. Such like events militates against free debate in parliament.

In multiparty parliament the legislators have an arduous task to debate vigorously and thoroughly a myriad of public matters. In a multiparty parliament the leader of the opposition is the chairman of the Public Accounts Committee. He is therefore, at a better position to scrutinise and criticise the government in power. Prior to the banning of the K.P.U. legislators in parliament contributed much to debates in the parliament. At one time/moment they attempted to bring a vote of no confidence against the KANU government, but they could not garner enough support. The present Kenya multiparty parliament which has legislators from about seven political parties²⁹ duly registered by the Registrar of Society, has within its brief period of sitting been involved with a great number of important

debates of national importance. The seventh parliament has credit in debate of motions seeking repeal of the Public Order Law³. The motion had originated from the members of the opposition. However the motion was defeated owing to lack of the necessary support. The opposition has a credit for its capability to reveal government misdeeds and mismanagement of the national economy. The recent revelation of the government misdeed is the Goldenberg Scandle that implicated senior officials of the government³¹.

The Institution of parliament being the supreme organ that is entrusted with the making of laws should be guaranteed the freedom of expression to facilitate free debate by members. Oppressive laws such as the law of sedition and other public order laws should never be used to intimidate the legislators. In absence of intimidating machineries legal or otherwise, a democratic parliament will exist.

3:4 THE JUDICIARY

The institution of judiciary is a fundamental institution to a democracy. The importance of the judiciary as a democratic institution is borne out by its establishment by the constitution which is the paramount law of the land³². The judiciary stand at par with the legislature and the executive arms of government. It is to the judiciary that citizens in a particular state turn to when they have their rights aggrieved by either the executive-or the legislature. The highest hierachy in Kenya of judiciary is the court of Appeal. Below there is the High Court which is a court of unlimited original judisdition. Under the High Court there are other surbodinate courts. One of the fundamental requirement of the judiciary is that, it must manifest total independence in the course of its activities. The independence of judiciary is a cardinal principle for the protection of individual liberties as guranteed in the constitution.

5.84 of the constitution (originally 5.28) empower the High court with protective jurisdiction in respect of Human Rights and liberties. The High Court has original jurisdiction to hear and determine application and references brought to it for adjudication and interpretation. In R V Benjamin Modukwe³³, it was held that the High court has an onerous duty to hear and determine applications made to it and references made to it from subordinate courts alleging violations of fundamental human rights. Akinola J Observed,

"A judge is expected to uphold civil rights of an individual as guaranteed in the constitution unless it is totally impossible for him to do so".

The need to have an independent judiciary become even more necessary in a multiparty democracy. In a multiparty state, the judiciary must not only be independent but it must be seen by the citizenry to be independent and unbiased so as to enjoy public confidence among the citizenry. To ensure total independence of the judiciary, the constitution provision³⁴ in regard to appointment of judges need urgent amendments.

As a fundamental law which stands at the head of the country's hierarchy of laws the constitution must keep pace with political changes. Under the constitution, the president has the power to appoint all judges. This mode of appointment makes the appointment of judges in Kenya look more of a political affair. There lies a danger in appointment of judges in Kenya in that the president may be tempted to appoint those persons whose ideas are consistent to those of the government as judges. The issue of appointment of judges should be left in the hands of the judicial service commission. The hiring of expatriate judges in Kenya, complicates further the question of judicial independence since some of these judges are tempted to become conservatists in their duties in bid to mitigate renewal and extension of their contracts.

The High Court has a duty to protect individual rights which are provided under the constitution. It is important to note that fundamental human rights are not a gift by the constitution to an individual, but they are inalienable and inherent. What the constitution has done is to put them in a written legislation.

In ANDREA V.R.³⁵ and R V KADHI OF KISUMU EXPARTE
and OGOLA V.R.³⁴, the High court rose to the
occassion and protected individual rights. In
the Kenya multiparty democracy where there are
several competing ideas and opinions from the
political parties and other interests organisations
that are inconsistent with those of the government,
the judiciary should never shy away from independently
interpreting various legislations and granting
remedy as each circumstance merits. The courts, should
be in the forefront in promoting the freedom of
expression since this freedom is the primary aspects
of a multiparty democracy.

3:5 THE PRESS

The institution of press is an important one
in a democratic society. The press is an assential
source of information and enlightenment of the
public. The institution of press make it possible
for the public to comprehend the government policies
and activities of administration.

The press has another important role of safeguarding the rights of individuals and serving as watchdog of society against the government excesses. These fundamental roles of the press goes along way to explain why the press must be free from executive control. In a multiparty democracy the press should be allowed to undertake its activities of imparting information through printed words without interference from any public authority. The preposition can be vividly explained under the concept of freedom of the press. From the onset, it is important to observe that there is no freedom that is absolute rather freedom carries with it reciprocal duties, and obligations. It follows therefore that, the press is not free from the responsibility in the exercise of its freedom. A free press must be responsible to the society for promoting the general interests of the public including the maintenance of the rights of the citizens.

§.79 of the constitution guarantees freedom of holding ideas and opinion. It also guarantee the right to free expression of those ideas and opinions either to the public or to a particular group of people.

It therefore follows that the constitutional provision do recognise the freedom of press. The international covenant on civil and Political Rights interalia provides for freedom of holding of ideas and opinions and expression of the same. Despite the existance of these legal instruments, that gurantee freedom of expression, there are other laws in Kenya that inhibit the freedom of press. The freedom of press in Kenya is hindered by legal meaning of libel, phonography, contempt, obsenity, blasphemy, malicious representation and most notably the sedition law. These restrictions to the freedom of press can be used to explain the the existance of many banned and prohibited publications in Kenya³⁸. In this work, it is the law of sedition as an impediment to freedom of expression that we are interested in.

The offence of sedition for the purpose of this work has been stated to be a political offence. We have attempted to show how the political establishment has applied sedition law to suppress dissent from its critis.

One of the most effective instrument through which people can express their views and opinions in regard to matters' of public concern is the press. Elsewhere in this work, we have discussed how the state has applied the law of sedition to silence those periodicals that have identified themselves as critical against the political regime of the day. In R.V. Gitobu Imanyara, the Editor of The Nairobi Law Monthly was charged with sedition for publishing a 'seditious' editorial. R V Onyango Oloo, illustrate how the Kenya government has in the past applied the law of sedition to extinguish ideas that it saw as a threat to its survival. Several other cases discussed in this work, are illustrative example of how the Kenya press has faced difficulties in its persuit of freedom of expression, due to the application of the sedition law.

In our view, laws controlling the press should not be undully repressive or restrive. They, infact should not subject the press to the executive control. In a multiparty democracy, the government should realise the importance of freedom of press and hence resist the temptation to intimidate the press in execution of its duties, by using sedition law among other repressive laws.

In a multiparty democracy, justified opinions on a government in a democratic society and the mere desire for a government to preserve itself must be distinguished. The democratic principles are premised on concept of peoples equality and in the light of this concepts, an individual is free to express himself on what he knows is the truth. The law should not be used to stifle criticism.

It is expressly clear that the publications that are considered by the state to be seditious are those which express opinions and views which are inconsistent to those of the government in power. In a multiparty state, it is important that the state avoid reliance on sedition law since multiparty is founded on the basis of articulation of economical, social and political ideas of diverse nature. Professor Carl Backer observed,³⁹

"The democratic doctrine of freedom of speech and freedom of press whether we regard it as natural and inalienable right rests on certain assumptions. One is that men desire to know the truth and will be guided by it.

Another one is that the sole method of arriving at the truth in the long run is by free competition of opinions in the open market, another is that since men will inevitably differ in their opinions provided they accord the other the same rights".

The introduction of multiparty democracy in Kenya has led to emergence of an unprecedented dissemination of news and views. Indigenous newspapers, and magazines covering diverse social-economic and political issues from various points are available to the citizenry. The recent periodicals include, The Weekend Mail, The People, The Watchman, Jitegemee, The Thika Times, The Weekly News and The Observer. In our view, these new indigenous publications should be allowed to continue disseminating information since they will break the monopoly in the newspaper publishing industry The Observer.

In our view, these new indigenous publications should be allowed to continue disseminating information since they will break the monopoly in the newspaper publishing industry.

In Kenya the major newspapers are foreign owned.

The Nation Group and The Standard Group are foreign owned whereas foreigners hold majority of the shares in The Kenya Times Newspaper Limited⁴⁰. Due to the foreign ownership attribute in the newspaper industry, most newspapers tends to censor their extent of expression. Their mode of analysing and reporting of public matters and their editorial policy are in most occassion tailored to suit the wishes of those in power. It is important to note that, the state authorities have constantly showed their displeasure with those newspapers and magazines that have adopted a radical stance on public affairs. In R V Njehu Gatabaki, the Editor of the Finance Magazine was charged with offence of sedition for publishing an article, THE MOLO MASSACRE? MOI IS THE VILLAIN. This particular case show how the state is determined to repress ideas which criticise it or its officials for any misdeed. In a democratic society the institution of the press should not be unnecessarily harassed with sedition law rather it should be allowed to authenticate its source of information and its claims.

The state should neither apply repressive laws nor apply extra-judicial powers to silence these publications.

Some of the measures that the state has applied to suppress those publications that have identified as critical against it, are the impounding of the publications, dismantling of printing facilities and subsequent forfeiture and arresting of individual ⁴¹journalists. Perhaps, the best example is the recent arrest of the Editor of The Watchman Newspaper. He was later charged with the offence of sedition. This explain how the government despite the introduction of multipartism in Kenya, has continued to suppress the fundamental human freedom of expression.

The state is charged with an obligation to respect the freedom of expression in the mass media. The 1961 KANU manifesto⁴² promised to remove all oppressive and arbitrary colonial instruments and subsequently replace them with independent democratic principles aimed at granting African people their civil rights.

The 1966 KANU manifesto echoed the same proposition even in stronger terms and language. Apparently the executive in post-independent Kenya has not outlived the temptation to muzzle the press.

The danger of existence of a free press particularly in a multiparty society is that the party in power will always be faced with challenges arising out of public scrutiny and criticism of its policies. However, it is important for those in power realise that freedom has a risk. The practice of democracy is never easy and convinced democrats must learn to live with unity in diversity.

3:6 SUMMARY

In this chapter, we have briefly discussed the essence of three institutions namely parliament, judiciary and the press in a multiparty democracy. We have observed that it is important to guarantee these three organs adequate independence to facilitate them achieve their role in multiparty Kenya. In the case of parliament and the press we have stated that if at all they shall achieve their objectives as expected in a liberal democracy, all repressive legal instruments must be scrapped.

In the case of judiciary, in dependence of judges while executing their duties must be recognised. Such guarantee will instil confidence on people while approaching the courts for purpose of seeking legal and equitable remedies whenever their fundamental human rights are breached by the executive.

FOOTNOTES: CHAPTER THREE

1. 1960 E.A., 745
2. See, The 1902 Native Land Ordinance and The 1915 Native Land ordinances
3. The Pass System Regulation No. 12 of Native Passes, 1900
4. Kenya adopted a multiparty system of government in December, 1991. See the Kenya Jurist publication March, 1992 pg. 15
5. See, Kenya jurist publication, March pg. 15-16
6. See, Afriga Gitonga, The meaning and Foundation of Democracy (Heinemann Limited) 1987 at pg. 17
7. (1982) Unreported see Daily Nation 27.10.82
8. See, Nairobi Law Monthly No. 32 April/May, 1991
9. See, The Nairobi Law Monthly No. 32 April/May
10. Constitutional Amendment Bill No. of 1982
11. See, The Nairobi Law Monthly No. 32 April/May 1991. Anyona nad others were intending to form the second political party in Kenya, The Kenya Africa Socialist Association (KASA) in 1982 (pg 25 of NLM).

12. See, The Kenya Jurist: Publication March 1992 pag 9
13. Ibid pg 11
14. Nairobi Law Monthly No. 32 April/May, 1991 pag 25
The Central Organisation of Trade Union was
affiliated to the ruling party in 1987
15. The University Staff Union was banned by Moi
on July 20 1980 together with the Union of Kenya
Civil Servants.
16. See, Kenya Human Right Commission Report November
16, 1992 pg. 6 SONU was established in 1982, as
a Central body representing students. It replaced
the interim committee formed after NUSO (Nairobi
University Student Organisation). SONU was
banned in 1987.
17. Ibid
18. The Union of Kenya Civil Servants was banned in
1980, on 20, 7. 1980.
19. The People Newspaper, February, 28, 1993 pg 6
The A-G declared songs like J.J. Wanyeki, Mahoya
Ma Andu A Muoroto (Prayers of Muoroto slum Dwellers)
seditious productions.
20. S.57(2) Nothing contained or done under the
authority of any law shall be held to be
inconsistent with or in contravention of this
section to the extent that the law in question
makes provision

20. Cont.. (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health.
21. (1862) 2F and F pg 377
22. Supra Ghai Y.P. and McAuslan pg 20
See, also R.V. Oguda (1960) E.A. 745
23. Supra Ghai and McAuslan pg 21
24. See Daily Nation 8.7.90 and 7.7.90, The government through a government statement declared the proposed political meeting by a pressure group turned political party, FORD as illegal since the necessary licences to facilitate holding of such meeting had not been granted.
25. See, The Constitution of Kenya
26. See Weekly Review No. 37 October, 20, 1975
27. See Weekly Review No. 17 May 4, 1977
28. See, Anyona's defence N.L.M. No. 32 1991. Anyona stated that his arrest and consequent detention might have been actuated by his corruption allegations in awarding of contract tenders on the part of the government

29. The duly resistered political parties in Kenya in accordance with the society Act Cap 108 are KANU, DEMOCRATIC PARTY, FORD ASILI? FORD KENYA, K.S.C., K.N.C, Pick
30. See Daily Nation 1993, The motion was moved by Pau- Muite but it was sefeated because of want to recognised number of supporters.
31. See, Daily Nation Goldenberg Serialisation in August 1993
32. 5.3 of the constitution
33. Review case No. 117 of 1980 (High court of Botswana)
Unreported
34. Chapter IV Judicature
35. (1970) E.A. 153 (K)
36. (1973) E.A. 153 (K)
37. (1973) E.A. 227(K)
38. See Table of Penal Code (Prohibited publications order under 5.52 (duplicated back pages)
39. Indian supreme court Decision (Unreported)
40. See Finance Magazine, December, 30,1992 pg 28
41. Ibid pg 29
42. The 1961 KANU manifesto
The 1966 KANU manifesto: What KANU will do for you.

CONCLUSION

Radbruch defines law as a sum of general rules for the common life of man the ultimate aim of which is the achievement of justice. He goes on to say that justice demands, that all those who are equal be treated equally to their differences. The ordering of the society demands that there be law to order the society, law must take into consideration all existing factors within the society. In other words, the law must not be static but it must cater for the new development in the societies as old challenges become obsolete. Our conclusion in regard to the application of the law of sedition as it is embodied in S.56 and S.57 of the Penal Code, is based on the argument that this law need urgent repealing. The abolishing of law of sedition is a necessity because as we have shown by illustration of case law, the sedition law to the common man, is a law that helps the state as an institution to protect its interests. This view in regard to the offence of sedition is well brought out by the argument advanced by George Anyona in R V. George Anyona and Three others.

This argument is quoted elsewhere in this work.

The law of sedition as stated elsewhere falls under OFFENCE AGAINST PUBLIC ORDER which are intended to give political establishment absolute of all public matters and at the same time suppress peoples desires for change of the status quo. Those who feel unpersuaded by the policies of the government are exposed to a situation where their democratic right to dissent is criminalise.

After tracing instances where the government had applied the law of sedition to stamp out criticism, it is our assessment that the application of the law of sedition is a great failure, since it offer protection to the state for a brief period. It does not offer total security to those in power. The law can suppress dissent at a particular period by the critics will always remain and new circumstances will prompt them to respond accordingly or even new critics will be built by the prevailing characteristic of the government in regard to public affairs. History has record that people world over have always responded according to Social-economic and political circumstances despite the dangers involved.

Perhaps the best example are the historically famous French Revolution of 1789, the American War of Independence and the Mau Mau Independence Unprising. The recent clamour for introduction of multiparty democracy is another authoritative example of a people determination for change despite existence of repressive laws. It therefore follows that, a government cannot rest assured of absence of criticism from its critics by mere application of repressive laws. It is advisable for a government to be tolerant enough to such criticism and even give room to such criticism and even give to free expression. This is in consonance with the spirit of democracy. The principles of democracy, sanctifying the right to dissent since there is no a time when unanimous viewpoint on public affairs and policies can be achieved in a society unless, in a situation of absolute sycophancy and abscond from good reason.

The Introduction of multiparty democracy in Kenya should be backed with a thorough and objective review of the legalframework.

This is the only way to make multiparty democracy a reality. Perhaps and hopefully, the recent formation of Law Review Task Forces³ by the Attorney General is a start of amending, repealing and enacting laws as circumstance deserve to facilitate achievement of a real democratic society. The PUBLIC ORDER LAWS are among those laws targeted for review, by one of these Task Forces.

Multiparty democracy has room for expression of diversity of ideas and views touching on public matter. Oftenly an individual or an institution or an interest group will feel compelled to criticize the government in power and specifically the leaders of government.

The existance of the law of sedition among several other repressive laws make it almost impossible for various individual and interest groups to criticise the government and the executive. In most third world states, the chief executive is held very high up and he is seen as synonymous to the institution of the state.

This position has resulted in a lot of confusion because whenever the president personal interests are threatened they are interpreted to mean that the state interests are at jeopardy. Owing to this state affairs it is impossible to criticise the person of president without ~~running~~ the risk of being accused of engaging in subversive activities against the state.

In response to the great need of freedom of expression, we shall make recommendation which in our view are an essence in enhancing the existance of a democratic state in Kenya. It is only in a state where democratic ethos are fully recognised and practised that an individual the press and interest groups can express themselves freely without fear of falling prey of the abhorred sedition law.

The constitution should be ammended to reflect a situation where individual human rights and liberties are absolutely guaranteed. S.79(2) of the constitution which limit the enjoyment of individual rights and liberties should be ammended.

There is a need of reviewing laws that are inconsistent with democratic principles. The recently constituted LAW REVIEW TASK FORCES by the Attorney General should thoroughly and objectively make recommendations that reflect well on the needs of a democratic society. Among other things, the Task force that is charged with the review of PUBLIC ORDER LAW should recommend the abolition of the Detention law and sedition law since the two are a mockery to the spirit of democracy and respect of individual rights and freedoms. Private individuals, political parties and interested group should come forward and submit their views to these task forces to facilitate them ~~executiveve~~ their assignment.

The Law Reform commission which is constituted under the law Reform Act 1982, must make the necessary recommendations in regard to the existing law, so that they will be in harmony with the principles of democracy. These proposals should include the public order laws. It is our believe that the aim of law Reform process is to:

- (a) Repair inadequacies in the law
- (b) Remove outmoded laws
- (c) Reflect new social values and replacing those that have turned absolute
- (d) Remedying injustices

The Law Reform Commission need to urgently target the sedition law for reform because as it now stand it is an unjust, undemocratic and an outmoded piece of legislation that mocks the ~~unconstitutional~~ declaration of multipartism in Kenya. In the words of a former Australian Prime Minister,

"Reform is needed, whenever our democratic institutions work less well than they might Reform is needed whenever the operation of the law show itself to be unjust or undesirable in its consequences. Reform is needed whenever our institution fail to enhance the freedom and self respect of the individual⁴."

The laws must be dynamic and they must stand the test of time.

In our view, if at all the law of sedition was of any moral or legal value to the citizenry's need for an orderly state when it was introduced in Kenya, (which we highly doubt) the passage of time and changing order of things has tendered it an outdated and repressive legislation that invite urgent repeal. The law must serve the interest of the people but not to antagonise their interests, to enable achievement of a free and orderly society. Since the law is there to gratify the demands, interests or wants of the society and is not a tool manipulated to suit the states purpose and interest, the law of sedition should be repealed and consequently replaced with other reasonably justiceable relevant laws.

With the introduction of pluralistic democracy in Kenya, circumstances have changed so much that the political and legal approach of issues too has to shift. The government in power must learn to be positively responsive to individual opinion. It will be taking everything for granted to assume that kenyans will be subservient as they were during the one party era.

The government on its part should learn fast to be sensitive to the needs of the people it governs and to answer its critics as reasonably required not by criminalising their dissent through application of legislation such as sedition law.

We have no intention to pretend that this piece of work is a conclusive analysis of the application of the law of sedition in post-independent Kenya. A further development and increase in precedence is expected regarding the law of sedition in Kenya. The expected development of this topic renders this dissertation in the future not to be regarded as conclusive. However, it is our realisation that the society is a dynamic entity and as the set up of things in the society continue to change the law is also bound to change.

There are some sedition cases that we have found ourselves → unable to discuss in our work due

to either shortages of research time or because they are still sub-judice. Among these cases are R V. Koigi

Wa Wamwere and six other⁵ in which the accused are charged with possessing seditious documents namely

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Despite the fact that the law of sedition remains the same, it is our expectations that the judiciary will approach sedition cases much more objectively particularly now in the atmosphere of multiparty democracy.

In conclusion it is our great wish to see the legislature repealing the sedition law. If such repealing is not forthcoming, the judiciary should administer justice in all sedition matters in regard to multiparty democracy practises.

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FOOTNOTES, CONCLUSION

1. Radbruch, Grundzuge Der Rechtsphilosophie
(3 Ed 1932 4 Ed Post Translation, E Wolf 1950.
2. Public Order Law encompass, The Detention Law
3. See Daily Nation 26th July, 1993. The Attorney General constituted a Law Review Task Force in regard to Public Order Laws.
4. See Daily Nation 23rd September, 1993
See, R V Francis Kipyego Rotich as reported in Daily Nation Saturday 18.9.1993. In this particular sedition case, the accused a Ford Asili activist was charged with sedition and resisting lawful arrest. The accused was alleged to have said
" The police were arresting him on direction of a blindman, the President". The prosecution alleged that Rotich had uttered the words that, "the police were dogs and stupid and they could take' him to Got Alila where they took the late cabinet minister, Robert Ouko". In his learned submission, the lawyer for the accused submitted that, those words even if uttered by the accused could not be seditious as they could not have incited the police or the public into overthrowing the government by unlawful means.

If anything they were only vulgar and obscene.
In acquitting the accused the learned senior resident magistrate held, that , "the" words did not have a seditious intention....there was no sufficient evidence as required by the Evidence Act cap 80 to show that the words were uttered against the Head of State. The counsel for the accused, Messers Nganga Thiongo described the judgement as "a courageous judgement and augurs well for freedom of expression in multiparty Kenya.

4. Address to Melbourne Rotary Club on 21st April, 1976,
Quoted in J Kirby-Law Reform Why- 50 American Law
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