

THE JUDICIARY AS A CONSTITUTIONAL WATCHDOG IN COMMONWEALTH
AFRICA.

A Dissertation submitted in partial fulfilment of
the Requirements for the Bachelor of laws Degree
(LL.B), University of Nairobi.

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By
KIHORO CERERE

Nairobi

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Abbreviations

- A.C. Appeal cases
- All.N.L.R. All New Zealand Law Reports
- C.C., C.A. Constitutional Cases, Court of Appeal (before)
- C.C., S.C. Constitutional Cases, Supreme Court (before)
- C.L.R. Commonwealth Law Reports (Australia)
- C.R. Constitutional Review Cases (India)
- CVL/A Commonwealth Law Reports (Australia)
- E.A.L.R. English and Protectorate Law Reports.
- E.A. English and Overseas Reports.
- H.L. House of Lords decisions.
- K.B. King's Bench Reports.
- L.R. Law Reports.
- P.C. Privy Council decisions.
- S.A. South African Law Reports.
- T.L.R. Times Law Reports.
- U.S. United States Supreme Court decisions.

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I N T R O D U C T I O N

Constitutionalism is Conceptualised as the limiting of the arbitrariness which is inherent in Government. It requires that the powers of Government are to be used for the good of Society and not for the satisfaction of the whims and Caprices of rulers.¹ For as Disrael said,

"... all power is a trust-that we are accountable for its exercise - that from people, and for the people, all springs, and all must exist."²

All unfettered power is by its very nature arbitrary. The powers of a Constitutional Government must therefore be demarcated by enforceable rules. Hence, Constitutionalism involves restraints imposed on Government in the exercise of its power from invoking excesses which derogate its duty as a trustee of people's power.

Restraints on Government may be based on Convention derived from tradition or they can be an act of conscious creation by the people. Conventional restraints are observed as a matter of tradition. Thus, only restraints enacted in a constitution can be legally enforced by the Courts on Governments. Constitutionalism has therefore, come to presuppose a written Constitution. In this sense, Government, being a creature of the Constitution which creates its organs and delimits their powers, any act of it which contravenes the Constitution is void.

Restraints on Government powers can be positive or negative. By positive restraints, is meant those Constitutional provisions which specifically define and limit the power of the various organs of Government. Provisions which confer substantive rights on individuals operate negatively to confine Government power. The Government is precluded from

acting in any way that would prejudice constitutionally guaranteed individual rights.

We have seen that the most important aspect of the notion of Constitutionalism is the enforceability of the restraints imposed on the exercise of Government power. This is where the judiciary comes into the picture in the practice of Constitutionalism. The traditional role of the judiciary has been the arbitration of disputes between individuals and between the individual and society where their rights and interests conflict. Essentially, the restraints on powers of Government are imposed to protect individuals' interests and rights from encroachment through arbitrary exercise of those powers. Hence, the duty of courts to enforce restraints on the exercise of powers of Government co-extend from their ordinary duty of arbitration between the conflicting rights of individuals and the powers of Government. The judiciary has also the advantage of being in an impartial position in as far as the conflict between the rights of individuals and the powers of Government are concerned. It is the exercise of a Government's legislative and executive powers which infringes on individual rights. The judiciary is therefore unaffected by self-interest and consequent bias in its review of legislative and executive action. This objectivity is ensured by the requirement that the judiciary should function separately from, and independently of the other organs of Government.

Professor Nwabueze has rightly emphasized the need to distinguish Constitutionalism with two other concepts with which it is confused, i.e., constitution and democracy.³ The mere fact that a Government is conducted according to the terms of a constitution does not make it constitutional. A constitution as a mere document may consist of mere declarations without an enforceable content. The vital aspect of

constitutionalism is the existence of enforceable restrictions on the power of government. Democracy on the other hand implies the notion of the popular basis of government as secured by free elections and universal franchise. And a popular government is not necessarily constitutional unless its power is also limited by law.

A written constitution embodying limitations on the power of government has been adopted by the United States, Canada, Australia, New Zealand, India, South Africa, and many other countries. The constitution of the United States is the oldest written constitution in the world. It was adopted in 1787 and has since been amended several times. The constitution of the United Kingdom is not written, but it is based on a series of laws and customs that have developed over centuries.

Colonial powers, such as the British, French, and Dutch, did not have any written constitutions. They ruled their colonies as they saw fit, without any limitations on their power. This was because they were not bound by any laws or customs that would restrict their authority. In fact, they often used their power to exploit their colonies for their own benefit. It was not until the late 19th and early 20th centuries that colonial powers began to grant written constitutions to their colonies. This was done in order to gain the support of the colonists and to prepare them for independence. However, these constitutions were often designed to limit the power of the colonists and to give more power to the colonial powers. This was done by giving the colonial powers the right to appoint and dismiss the heads of government and to veto the laws passed by the colonial legislatures. In addition, the colonial powers often gave themselves the right to amend the constitutions without the consent of the colonists.

It is the purpose of this paper to investigate the extent to which colonial powers with written constitutions have accepted the constitutional principle of the separation of powers. This principle is one of the most important principles of constitutionalism. It is based on the idea that the power of government should be divided into three branches: the executive, the legislative, and the judicial. Each branch should have its own distinct powers and should be able to check and balance the powers of the other branches. This is done in order to prevent any one branch from becoming too powerful and to ensure that the government is accountable to the people.

the exercise of their powers was restricted by the constitutions. It is also intended to examine how the courts have adapted themselves in their new position as guardians of constitutionalism. The circumstances which have led to their appointment in their new capacity will also be discussed.

The field embraced in this study is rather wide, covering, as it does, about twelve independent African countries. The countries are formed into two exclusive groups, each of which has a number of similar characteristics. The first group consists of those countries which have specific provisions in their constitutions relating to the powers of the courts generally.

Throughout this paper, it will be found that American and Commonwealth (including Canada) judicial decisions have been freely quoted and are treated as precedents. It is not an apology for this, but a recognition of the fact that the American and Commonwealth courts have been the most influential in constitutional law. The study is not a comparative study of applications of the same principles in different countries, but an attempt to interpret the principles in their own context. This cannot be denied.

Similarly, constitutional decisions from other Commonwealth countries, which have been cited by the High Court of Australia and judicial decisions from other countries, will be referred to in this study.

Finally, it will be noted that many examples regarding constitutional provisions will be drawn from Kenya. Of course the writer is more familiar with the Kenyan constitution than with that of any other African country. This should not be taken as a justification. It is in fact a recognition of the fact that all the constitutions of Commonwealth Africa, with the exception of the independence constitutions of Ghana and

Tanzania, originally had generic homogeneity. All were more or less drawn from the Nigerian draft constitution of 1959.

CHAPTER 1

COLONIAL BACKGROUND

Constitutionalism presupposes the fulfilment of certain requirements. The conduct of Government must be according to the Rule of Law, and respect fundamental human rights.

Government is universally accepted as a necessity, since man cannot fully realise himself, his creativity and his whole personality except within an ordered society.⁴ At the same time man must be allowed some measure of personal freedom and choice if he is to retain that essential characteristic of a rational being; the power to think and act. This would be seriously undermined if man were to become a mere mechanical tool in society, responding to the absolute governance of society. The individual would, in such a situation degenerate into a robot.

A. Colonial objective

Taken in this context, constitutionalism was virtually non-existent in colonial states. The colonial administration denied colonial subjects the minimum of personal rights and freedoms. *Absolute political power was vested in the Government.* This arose out of the objective of colonial administrations. The colonial administration was a tool for imperialist exploitation of the natural resources of the colonies. Its role was therefore, the establishment of optimum conditions for maximum exploitation.⁵ This was euphemistically described as the maintenance of law and order. To allow colonial subjects fundamental rights and freedoms would have interfered with maintenance of law and order and the profit objectives of British imperialism. For it would have meant, allowing natives freedom of association, which would have led to the formation of labour unions. Such

unions would have agitated for higher wages and better working conditions for their members. Such an event would not only disturb the political calm required to develop the colonial economies, but if such claims were granted, they would reduce the profits earned from the employment of cheap native labour. Hence, a form of legalised servitude was instituted, which held African servants to their masters by supporting private contracts with penal sanctions.⁶

The rule of law envisages a Government according to law, administering its subjects by fair laws, which do not discriminate but binding on the generality of the citizens. This was ofcourse impracticable in colonial society, because it was a society based on inequality. It existed for the exploitation of the colonised for the benefit of the colonisers. Lord Lugard, one of the chief architects of British imperialism put it succinctly:

"Let it be admitted at the outset that European brains, Capital and energy have not, and never will be expended in developing the resources of Africa from motives of pure philanthropy, that Europe is in Africa for the benefit of her own industrial class."

B. Structure of colonial administration

The structure of colonial Governments was thus diametrically opposed to the concept of constitutionalism. Administration was carried on through an imposed machinery, rigidly hierarchical and predominantly military in character.⁸ The Governor headed the administrative team. He was followed by his Provincial Commissioners, District Commissioners, District Officers, and at the very bottom, Chiefs and Headmen. The Governor was himself subject to the instructions of the colonial office and to the British Sovereign through Orders-in-Council.

The implications of such a system of administration is readily apparent. Each administrator was responsible to his immediate superior and was not answerable to those over whom he ruled. The whole administration was totally unrepresentative of its subjects, who did not participate in its selection. In the early days of colonial administration, the Governor, as the administrative head in the colony charged with the maintenance of law, order and good Government, epitomized the corporate powers of Government.⁹ By virtue of the Foreign Jurisdiction Acts, applicable to all colonies, the Governor was empowered to hold courts and promulgate regulations by ordinance in order to create a comprehensive framework for administration.¹⁰ In essence therefore, the colonial administrative hierarchy combined in one body the executive, legislative and judicial functions. The Governor made regulations by proclamation, which were executed by administrative officers of whom he was the head. The same administrative officers organised and supervised native courts and staffed subordinate courts as ex-officio judicial officers.

C. Role of courts in colonial administration.

There were usually two systems of colonial courts: a supreme court and its subordinate courts and the native courts. Except for the supreme courts which were usually established by an Order-in-Council,¹¹ subordinate and native courts were constituted by local ordinances. Subordinate courts were usually held by administrative officers as District magistrates of the first, second and third class. Native courts, on the other hand, were held by elders appointed by administrative officers in their areas. The administrative officers had extensive powers of supervision and revision over the native courts. Only the judges in the superior courts were professional men, and who were

appointed independently of local political pressure.

The judiciary is, according to liberal-democratic theory of Government, responsible for restraining the Government from abuse of its legislative and executive powers. This is sought to be accomplished through the protection of fundamental human rights by the enforcement of restraints placed on the exercise of Government power. To facilitate the execution of this role, it is necessary that the judiciary be independent of and separate from the other arms of Government.

Most powers of Government are discretionary as to whether they shall be exercised or how they shall be exercised. But that discretion is limited by law. "The King himself ought not to be subject to man but subject to God and the law", wrote Bracton in the 13th century, "because the law makes the king".¹² This superior law governed the kings as well as subjects and set limits to royal prerogatives. This is what has come to be called the rule of law which precludes arbitrary exercise of Government power.

The fullest elaboration of the rule of law as a supra-national concept was made in the Declaration of New Delhi in 1959.¹³ In relation to the executive, the Declaration required that a citizen who is wronged should have a remedy against the state. The Declaration also related the rule of law to the judiciary. It required a separate and independent judiciary with provision for proper grounds and procedure for the removal of judges. For Montesquieu has written:

"There is no liberty yet, if the power to judge is not separated from the legislative and executive power."

The nature of British jurisdiction over her possessions in Africa did not allow for the observance of the rule of law. British administration in East Africa has in fact been called an example of British lawlessness.¹⁴

Early British constitutional law recognised two aspects of foreign jurisdictions. With reference to British settled colonies, it was assumed that:

"An Englishman carried with him English law and liberties into any unoccupied country where he settles. As the law is the birth-right of every subject, so wherever they go, they carry with them, their law and therefore every such new found country is to be governed by the law of England."¹⁵

As regards conquered or ceded territories, since ex hypothesi such countries must be already settled, the British law purported to follow international law. That the new sovereign may at his pleasure alter and change the laws of that territory, but until he makes an alternation of those laws, the ancient laws of the territory remain.¹⁶

Neither of these two aspects of foreign jurisdiction suited the mode of British territorial acquisition in Africa. British claims were mainly based on purported treaties of quasi-cession, in which local rulers petitioned for British protection. The Foreign Jurisdictions Acts therefore placed protectorates under the same jurisdiction as conquered territories. This claimed for the crown every attribute of sovereignty in the protectorates with power to alter the law as it saw fit.

Under the Foreign Jurisdictions Acts, British colonial administrators were absolved from observance of English law. Colonial administration saw Government and law in terms of two simple functions:

Maintenance of law and order and dispute settlement. The function of Government and courts was geared towards the achievement of these two goals. The colonial Governments were not bound by any enforceable restraints on the exercise of their power. Therefore the essential political and judicial protections which give effect to the rule of law were eviscerated by the activities of colonial administrators. In pursuit of law and order, the administrations not only refused to observe the rule of law but in fact legalised its breach.

Administrators were able to deport any person they were satisfied to be dangerous to peace and good order. Such an order was expressly made final.¹⁷

Bills of attainder, forbidden in England since the Bill of rights of 1688, were extensively used against Africans. In The King V. The Earl of Crewe (ex parte Sekgome),¹⁸ the respondent applied for an order of habeas corpus against a proclamation of the British High Commissioner for South Africa authorising his arrest and detention. The King's Bench held that despite the proclamation being an act of attainder, the detention was valid and habeas Corpus would not issue. Vaughan Williams L.J., justified the courts' decision saying:

"The idea that there may be an established system of law to which a man owes obedience, and that at any moment he may be deprived of the protection of that law, is an idea not easily accepted by English lawyers, ... it is made less difficult if one remembers that the protectorate is over a country in which a few dominant civilized men have to control a great multitude of the semi-barbarous."

The defence of Act of state was used to avoid redress even where the liability of the Government to an individual

arising out of arbitrary use of its power was not in question. An act of state has been defined as essentially an exercise of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal courts. The function of the law of state is that of law out of the sovereign power, and the courts of the municipal courts that accept it, as it is, without question. An act of state is a duty pleaded as a defense for a tort taken by foreign sovereign or his agents, the law of the Government, or the law of nations, though exceptions of international law as to the procedure, were held by the House of Lords under English law.

In Ol le Niogo v. Attorney General (East Africa Protectorate),²⁰ the plaintiff brought a writ of habeas corpus for breach of the East Africa Protectorate Act, 1905, for confiscation of his property. The defendant pleaded that the Government had a right to confiscate property under an agreement with the plaintiff, and that the confiscation was in fact made in accordance with the law of the Protectorate, which was not a municipal law, but a law enforceable in a municipal court. The plaintiff succeeded in his successful appeal.

To enable the colonial administrations to override without invoking the equity of the courts, the administration of justice was separated as to the judiciary a fundamental part of the Government.

Lower courts had no separate and independent existence from the other organs of the Government. Administrative officers staffed the subordinate courts as executive and judicial officers. They appointed the staff of the native courts, over whose activities they had a review of management and revision. It is clear that this combination of executive and judicial function was a deliberate and conscious policy designed to maintain law and order at the expense of justice.

and fairness to the individual. Being subordinated to the executive, the judiciary was expected to administer the law to further policy considerations and administrative convenience. Such an approach is found in East Africa Order-in-Council of 1902, which provided:

"In all cases to which natives are parties, every court shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."²¹

The judges in the superior courts were professional lawyers and could therefore be expected to resist local political pressure. However, though they were not subordinated to local administrators like the staff of the lower judiciary, they were still vulnerable to pressure from their home Governments. Colonial judges held their office at the pleasure of the crown.²² They did not enjoy security of tenure. Furthermore, there was a careerist legal structure in the colonial judicial service which supplied legal personnel to the Empire. A judge could be transferred from one colony to another, just like any other civil servant.²³ The judges were therefore open to the pressure of advancement within the Empire.

In any case judicial independence in the superior courts would have meant little to the African. Their cases were mainly decided in the administration-controlled native courts and their appeals rarely went beyond the administration-staffed subordinate courts.

It must not be overlooked that the superior courts, no less than the lower courts were organs of colonialism and in the last analysis were required to support the order of which they were an important part.²⁴ British conceptions of justice included the use of courts to maintain the political and social status quo established by the colonial

mission. The Bushe Commission criticized the colonial administrations in East Africa for the way they used the administration of justice for the overriding objective of maintaining law and order and in so doing often invoking excesses frowned upon by the law. In court the judiciary relied too much on the administrators' knowledge of the accused and not enough on evidence produced at trial. Rough and ready justice too often became rough and ready injustice.²⁵

It is not surprising that the judiciary lacked separate and independent existence from colonial administrations. Since the nature of those Governments did not allow for any form of enforceable rights or any limitations on their powers, the need for a separate and independent judiciary did not arise.

SOURCES OF JUDICIAL REVIEW

The review by ordinary courts of the constitutionality of legislative and executive acts and of the propriety of administrative acts of a quasi-judicial nature is the main bulwark of constitutionalism.²⁶ As Dicey stated, :

"Without an effective machinery for testing the constitutionality of statutes, the limitations placed upon the powers of the legislature are a matter of policy, not law, their sanction is moral not political."²⁷

For Government to be effectively limited, the restraints on its powers must be legally enforceable and courts must have the power to so enforce them. In other words, the judiciary must be accepted as the ultimate arbiter whenever the nature and extent of Government's power is in dispute.

A. Nature of judicial review

Judicial review is not the exercise of a separate substantive power to review acts of the legislature. It is simply a power co-extensive with their ordinary functions to hear and decide concrete cases brought before them in which a conflict between a statute, or the manner of its execution and the constitution is alleged. The functions of the courts do not extend to passing upon abstract questions not presented by actual litigation. The courts' jurisdiction may be invoked only by an aggrieved party before it, provided he can establish a locus standi entitling him to challenge the act in question.²⁸

An attempt to vest a substantive power of constitutional review in the United States failed when a proposition that the courts should be joined with the executive in a council of revision, and empowered to veto congressional legislation was rejected.

Elbridge Gerry, a delegate at the Philadelphia Convention of 1787 warned that such a move would serve "in making statesmen of judges."²⁹ But judicial review as implied from and incidental to the courts judicial power to interpret law and decide cases was admitted. It was stressed that:

"It is the duty of the court to declare all acts contrary to the manifest tenor of the constitution void."³⁰

That courts should have the power of constitutional review has not been accepted without question. That the decisions of the courts should be final and conclusive upon the political organs of Government seems manifestly unfair. It is suggested that such finality would imply superiority of the courts over the legislature. It is asserted that such a situation is intolerable where the views of a handful of men should be imposed on the elected representatives of the people. In reference to the judicial review of the American supreme court, it has been argued that:

"The opinion which gives to the judges the right to decide what laws are constitutional, and what are not, not only for themselves in their own sphere of action, but for the legislature and executive, also in their spheres, would make the judiciary a despotic branch."³¹

To this criticism Nwabueze has replied:

"But once admit that the courts inexorably have to resolve any conflict between a statute and the constitution, should that become necessary in the ordinary course of applying the law in the settlement of disputes, it must equally inexorably follow that their decisions should be final and conclusive upon the political organs of Government."³²

Lawyers in the civil law tradition hold the view that it offends the doctrine of separation to allow the judiciary, through review, to annul the work of the legislature.³³

Thus there is no judicial review in France. But the constitution of the Fifth French Republic established a constitutional council which examines proposed organic laws before they are promulgated to ensure that they do not conflict with the constitution. In Germany and Cyprus, there are special constitutional courts which remove judicial review from the ambit of ordinary courts.

Judicial review consists in measuring legislative and executive acts against the nature and scope of the power vested in these organs. If an act of either is not of the nature, or is not within the scope of the power vested in them, such an act is void.

The powers of the various organs of Government are defined in a constitution. Where no constitution exists, or where it is silent as to the powers of Government then no limitation of these powers is possible, because courts would have no standard against which to measure when they have been exceeded. In an unwritten constitution where no precise limit to the legislative power is set, any restraints are observed as a matter of convention not law. Where such a case obtains as in the United Kingdom, Parliament is said to be unlimited and therefore supreme. The courts cannot interfere with its acts because they lack the standard of a superior law by which to compare and impugn such acts as they find to contravene it.

B. Provision for Judicial Review

(1) Express and implied constitutional provisions

The whole of Commonwealth Africa became independent with written constitutions. These constitutions created, defined and empowered the most important organs of Government.

Does the fact that any organ of Government has acted incompatibly with the constitution that created it and gave it power to act, call for an intervention of the judiciary to enforce the constitution?

The duty of the judiciary to intervene in such an event is explicit where the constitution is declared to be supreme.³⁴ The important consequence in such a declaration is that the constitution is hierarchically superior to both the legislature and the executive. The acts of both can therefore be valid only when they conform to the constitution. It is clearly the duty of the court to declare all acts which are incompatible with the constitution to be void.

The duty is not so explicit in constitutions which do not provide for their supremacy. But it can be implied from provisions which only obliquely declare superiority of the constitution over any other law. For example, the Kenya constitution only provides in S.3 that the constitution shall have the force of law throughout Kenya and that subject to S.47 thereof, (which provides for its amendment), if any other law is inconsistent with it, the constitution shall prevail and the other law shall, to the extent of inconsistency, be void. The effect of this section was tested in Okunda and Another v. Republic.³⁵ In that case the issue arose whether S.8(1) of the Official Secrets Act of the East African Community was inconsistent with S.26(8) of the Kenya constitution and therefore void within meaning of S.3 thereof. The Attorney General of Kenya had prosecuted the two appellants under the Community's Official Secrets Act 1968, S.8(1) of which required the consent of the Counsel to the Community to be obtained for prosecutions under the Act. The Attorney General had not obtained such consent. S.26(8) of the Kenya constitution provides that the Attorney General is not subject to the

direction or control of any other person or authority in the exercise of any of his functions. The two sections were clearly in conflict. It was held that the Act of the Community was among "other laws" within the constitution S.3 and was therefore void.

It may be urged that the effect of such a provision as S.3 of the Kenya constitution establishes the supremacy of the constitution not only over all other laws but also over the legislature and executive. In the Kenya constitution, this view is buttressed if S.3 is read together with S.67. The latter section vests the High Court with the power of determining constitutional issues where questions as to its interpretation involving a point of law arise in lower courts. It can be argued that this specific power is co-extensive with an overall duty of the judiciary to police the operation of the Government vis-a-vis the constitution. Questions concerning the interpretation of the constitution call for an authoritative determination, and they are therefore usually referred to the highest court in the land.

The supremacy of the constitution, with its effect of invalidating other laws inconsistent with it, would have little logic if it was not accompanied by judicial review of the constitution. If a law is inconsistent and therefore void, it must be declared so void. It is not to be expected that such a law would void automatically. It is in its application by the courts that the inconsistent law is shown to have no effect.

In some constitutions the courts are vested with exclusive jurisdiction to review all matters affecting individual rights guaranteed in the constitutions.³⁶ It can be argued that in such a case, applying the rule of interpretation

"expressio Unius est exclusio alterius", such a provision confines the courts' judicial review of the constitutions to matters affecting only the fundamental rights provisions.

From the preceding arguments, it may be concluded that judicial review is only explicit where constitutions are expressly declared supreme. In other cases it is not clear whether there is a power of judicial review of matters affecting the whole constitution, except as specifically provided for. But the power of review of the whole constitution can be extended from those specific provisions.

(ii) Inherent duty in written constitutions

The judicial duty of constitutional review can exist without express or even implied provision for it in a constitution. It can be argued that it is inherent in all written constitutions. Theoretically, in all cases of written constitutions, the legislature is a creature of the constitution and is therefore subordinate to it. Its acts can only be valid if they conform to the form, and are within the scope of its power as provided in the constitution. The force of this argument is greatly supported by the United States' supreme court decision in Marbury v. Madison,³⁷ where Chief Justice Marshall stated:

"If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity bind the courts and oblige them to give it effect? or, in other words, though it be not law, does it constitute a rule operative as if it was a law? This would be to overthrow in fact what was established in theory.

"It is emphatically, the province and the duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each

other, the courts must decide on the operation of each. So if a law be in opposition to the constitution, if both law and constitution apply to a particular case, so that the court must either decide the case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these two rules govern the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution and not such an ordinary act must govern the case to which they *both apply.*"

C. Is Review of the Constitution Exerciseable by an organ other than the judiciary?

The limitations on the powers of Government are usually placed on its legislative and executive organs. Both of these organs have self-interest in the enhancement of their powers. Consequently they cannot be trusted to enforce objectively constitutional provisions limiting those powers. Neither can they be expected to invalidate their own acts which they have performed in excess of their powers. The judiciary is thus the only organ of Government which is left to carry out such a function.

The competence of the judiciary in this respect is greatly improved by the fact that in its normal functions, it is concerned with balancing rights between individuals, and between individuals and society. And in fact judicial review of a constitution consists in balancing the rights of an ordered society as embodied in the powers of Government and the rights of individuals. This is why judicial review is said to be Co-extensive to the ordinary duty of courts.

However, except for these rationalisations about the general competence of the judiciary to review constitutions,

do there exist legal rules which require that such a function be performed exclusively by courts?

(1) The Doctrine of Separation of Powers

Commonwealth constitutions do not contain specific declarations concerning separation of Government powers. But this principle can be derived from the arrangement of the chapters of those constitutions. In the Kenya constitution, for example, Chapter II defines executive power and vests it in the president and cabinet; Chapter III creates legislative power and assigns it to parliament while Chapter IV creates the high court and vests in it original jurisdiction in all civil and criminal matters.

If we accept that judicial review is Co-extensive with the ordinary function of the courts, it can be further argued that it is implied in the investment of judicial power in the high court.

From the separation of organs of Government is derived the doctrine that certain functions, because of their peculiar nature, may properly be exercised by only a particular branch of Government; that such functions cannot be delegated to any other branch, and that one organ may not interfere with another by usurping its powers or by supervising their exercise.³⁸ Neither the legislature nor the executive can be restrained in their action by the judiciary, though the acts of both, when performed, are in proper cases, subject to its cognizance.³⁹

The separation of judicial power from other powers of Government and the restriction of its exercise to the judiciary was disputed in the Ceylonese case of Liyanage v. Reginam.⁴⁰ In that case parliament set up

a special court and introduced special penalties to deal with alleged plotters in an attempted coup. The accused argued that the legislature was purporting to set up a body whose function was inherently judicial performable only by the courts. The state argued that judicial power did not exist separately, that it was embraced within the ambit of legislative power to make laws for peace, order and good Government. This would enable the legislature, for example, to enact a law convicting a person of an offence and imposing sentence therefore, without trial in a court of law.

The privy council, in rejecting this argument, referred to the arrangement of the constitution of Ceylon into parts, among which is one headed " the judicature ". This separate provision for the judiciary in the constitution was clearly intended to separate the exercise of judicial power from that of legislative power.

The court further held that the separation of judicial power was concomitant to the doctrine of judicial independence. Where it was provided, as in the Ceylon constitution that judges are to be appointed by a judicial service commission,⁴¹ and they may be dismissed only on proper grounds and by a procedure set out in the constitution, it was intended to separate and insulate the judiciary from legislative and executive powers. These provisions would be inappropriate in a constitution by which it was intended that judicial power should be shared by the executive or the legislature.

This decision found favour in the dissenting judgement of Azu Crabbe J.A in Awoonor-Williams v. Gbedemah.⁴² In the case it was sought to unseat the defendant from the National assembly of Ghana. The ground for removal was

that the defendant had been adjudged by a commission to be guilty of misusing or otherwise abused his office while a public officer. Removal on this ground was provided for under Art. 72(2)(b)(11) of the 1969 Ghana constitution. While the majority held that adjudging can be done by a court or other competent authority, the minority of one dissented from that view. He held that to adjudge was a purely judicial function performable only by the courts. The said commission could not therefore, have competently adjudged the defendant guilty of defrauding the state.

(ii) What is Judicial power?

We have so far argued that the judicial power of Government is vested in the judiciary by virtue of the doctrine of separation. If we are also to argue convincingly that judicial review is a judicial power, and is also thereby vested in the judiciary, a definition of judicial power must first be attempted.

One of the most widely accepted definitions of judicial power was made by the Australian supreme court in the case of Huddart Parker Ltd. v. Moorehead,⁴³ where Griffith C.J., stated:

"The words 'judicial power' mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a *binding* and authoritative decision (whether subject to appeal or not), is called upon to take action."

In Awoonor-Williams v. Gbedemah, Azu Crabbe J.A in his dissenting judgement, held that the commission of inquiry

in question did not exercise judicial power because the intervention of the high court was necessary to give effect to its findings.

Since judicial review consists in making binding and authoritative decisions on matters affecting the constitution, which the courts can make orders to enforce, then judicial review is clearly a judicial power. It was also the learned Justice of Appeal's view that a judicial power is only exerciseable by the judiciary. Hence, his contention that the commission of inquiry was incompetent to 'adjudge', a word used to connote the exercise of judicial power.

This definition of judicial power brings into sharp contrast, the power exercised by administrative tribunals and commissions of inquiry. Can the judiciary be said to have a monopoly over the exercise of judicial power when commissions and tribunals exercise very similar powers? They can and do make binding and authoritative orders which they can enforce on matters which are subject to their determination.

Justice Crabbe distinguished the power, exercised by the tribunals and commissions from judicial power. The power of tribunals is not final and conclusive. In many instances, they have to apply to the courts for the enforcement of their decisions. Even where they can enforce their decisions themselves, such decisions are subject to appeal to the courts which can indeed vary them.

Final judicial power then never rests with any other body, except the judiciary.⁴⁴ The tribunals and commissions therefore exercise only quasi-judicial power.

However, the situation is very different where the decisions of tribunals and commissions are final and not subject to appeal. Can they be said to exercise full judicial power?

Since tribunals and commissions are executive organs to help in efficient administration, such a vesting of full judicial power would certainly offend the doctrine of separation of powers. It would also offend the letter of the constitution which either expressly or impliedly vests judicial power only in the courts.

CHAPTER III

PROBLEMS OF JUDICIAL REVIEW.

We have seen that the ordinary and normal function of the courts is vested in them by, or implied from the organisation of, the constitutions. Therefore the justification for the existence and exercise of judicial review is based on the values and notions implicit in the constitutions.

Those values and notions are essentially that, there is need for "some limitation of the powers of the Government and some assurance of the rights of the citizenry."⁴⁵ This need was given effect through specific provisions in the constitutions specifically limiting the power of Governments and conferring rights on their subjects. These provisions enhance the power of the judiciary over the other organs of Government by providing a standard against which the propriety of all legislative and administrative action could be measured.⁴⁶

The most important of these provisions is the bill of rights which confer enforceable rights of the individual and which are found in all the constitutions except those of Ghana and Tanganyika.

A. Structure of Government Powers at Independence.

To ensure the observance of the limitations placed on the powers of Government by the constitutions; and to give efficacy to the individual rights guaranteed under it, the powers of Government were so structured as to operate as inherent checks on each other.

The legislature was given a central and important role in the political process.⁴⁷ This was meant as a check against excessive executive power. Special Parliamentary majorities were needed to alter the constitution and to introduce states of emergency.⁴⁸ And the constitutions legally introduced the political principle of collective responsibility of the executive to the legislature.

The key organs of Government were separated. Their powers were counterbalanced to avoid preponderance of one over the other. This was notably the case in the separation of the office of head of state from that of head of Government. This made it almost impossible for one to act independently of the other.

Many institutions which had been part and parcel of the executive in the colonial Governments were set up under independent commissions.⁴⁹ This was meant to insulate them from the direct control of the executive.

The overall sanctity of these arrangements was ensured by the role of the judiciary as the interpreter of the constitutions in a hierarchy of courts which originally went up to the Judicial Committee of the Privy Council, a basically English court sitting in England.

Again there was in most constitutions, an implicit assumption that there was and would continue to be a recognised opposition in the legislature, which ought or was required to be consulted if any changes in the constitution were contemplated.

(i) Considerations relevant in the Drafting of the constitutions

The British Government had good reason for imposing this type of constitution on her former African colonies.

The scramble for colonies in Africa had resulted in boundaries which often cut across tribes thus distributing tribal fragments to different states. This produced minority groups who feared domination by majority tribes which were likely to dominate national politics on independence.⁵⁰ Britain was compelled to protect these minority groups who otherwise claimed separate independence:

"The constitution was to be the means whereby Britain's historic colonial responsibilities of trusteeship of the under-developed and protection of minorities was to be finally and honourably discharged."⁵¹

Diverse tribes and groups which had been lumped together into states had different and often diametrically conflicting interests. There was not only strife for political dominance but also competition in property acquisition. The colonial mission had largely resulted from the need to extend the areas of investment of British capital. The British entrepreneur left behind had to have his investment protected. Hence, one of the most important and frequent clauses in the Bills of rights is that sanctifying property rights.⁵² Private property can be acquired compulsorily by the state only under very stringent conditions, and even then full and prompt compensation should be paid.

Migrant races who had settled in the colonies under the umbrella of the British Empire, had generally enjoyed political, social and economic privileges under British rule. It was feared that independence would bring retaliatory discrimination from Black Governments. The

constitutions therefore embodied compromises between the interests of all groups, as a condition to granting independence. To ensure these were not overturned overnight after independence, power had to be spread as widely as possible:

"Since most of the important compromises and concessions of the various groups were embodied in the constitutions and since the sanctioning authority of the British Government would disappear at independence, it was necessary to ensure both that there were adequate sanctions behind constitutions and that the compromises would not be unilaterally upset or altered. The achievement of the first objective was attempted through judicial review, while the second was to be through devolution of power among different centres of decision-making."⁵³

The attempt to accommodate so many divergent interests resulted in very complicated constitutions which soon proved unworkable.

The fears of minority tribes in most cases were allayed by the inclusion in the constitutions of a comprehensive bill of rights.⁵⁴ In some cases, however, this aim was achieved through provision for federal or quasi-federal states.⁵⁵ Legislative and executive powers were allocated between regional assemblies and a central legislature. The central legislature was bi-cameral with an upper and lower house. The upper house was comprised of regional representatives. This regional system was usually guaranteed with the extremely high majorities required for constitutional change. In Kenya, it was 75% in the lower house and 90% in the senate.

These arrangements were viewed with disfavour by the first central Governments after independence. The distribution of legislative and executive powers between the regional and central Governments hampered the evolution of national

plans for development. The duplicity of separate civil services in the various regions and separate developments projects demanded more money than would nationally undertaken projects.

Political balkanization into regions, mainly along tribal lines, not only weakened the authority of the central government, but also precluded a sense of national unity and loyalty, which had been positively discouraged in colonial times.

The absolute protection in the bills of rights of such individual rights as property and the right against discrimination meant that the independent Governments would find it difficult to Africanise the economy. This was only possible through acquisition of businesses from colonial entrepreneurs and immigrant settlers.

In countries which had neither dominant tribal majorities nor large immigrant communities, there was found no need for either regionalism or a bill of rights. This was the case in Ghana in 1957 and in Tanzania in 1961.

B. Illegitimacy of independence constitutions

The structure of Government power in the independence constitutions was unsatisfactory to the new African Governments. Not only were they complicated and unwieldy, but the considerations upon which they were based were incompatible with the historical background of the new states, and their future socio-economic aspirations.

(1) Discrepancy with colonial administrative structure.

The colonial administration was autocratic and had no legal limitations on its powers. The implications of such a system was that there was no institutional machinery for checking the exercise of Government power, the legislative and judicial orders operating there being suited to the one central concern of colonial administrations, maintenance of law and order:

"The paternal rule of the District Officer, combining in his office legislative, executive and judicial powers, which were not always clearly separated in practice, was the Government to the African for the greater period of colonial rule."⁵⁶

It was in a such a society, used to autocracy in Government, that the rulers of the new states were brought up and learned in politics. With this kind of background, the new leaders could hardly be expected to be impressed with limitations on the power of independent African Governments which did not exist to control colonial Governments. As Martin points out, :

"One may be forgiven some cynicism as one contemplates the spectacle of colonial officials earnestly impressing on African leaders the necessity to limit executive powers in a manner they themselves would never have tolerated."

This in turn meant that the judiciary as an instrument of control of executive power lacked credibility to the African leaders and therefore enjoyed little respect.

The devolution of Government powers through regional assemblies in cases of quasi-federal Governments, or through independent organs of the executive arm, finds sharp contrast with the colonial administrations. Notwithstanding the division into provinces for administra-

tive efficiency, the colonies were administered as Unitary states. And though various officials would be allowed wide discretion to take appropriate decisions in their area of operation, colonial administration was rigidly centralised and all officers were ultimately responsible to their superiors.

The record of the judiciary itself in the colonial era makes it hardly creditable in the role of limiting the powers of independent Governments. Colonial courts were in the eyes of the African population, an intimate part of the authoritarian administrative structure which was being imposed on them. They were that part of the structure which enforced law and order.⁵⁸ If the judiciary had allowed itself to be manipulated by colonial Governments to achieve their policy considerations, it was now unconscionable for it to turn about and seek to enforce on the independent Governments restraints whose violation by colonial Governments it had condoned.

The position of the judiciary did not change with independence. The independent Governments, realising the importance of a subservient judiciary in the interpretation and enforcement of policy, have not taken steps to legitimise it. We therefore find that the higher courts are still largely staffed by expatriates. Even the magistrates in the subordinate courts are British, Indian or British trained Africans. Their familiarity with native law and custom is minimal and they have therefore little sympathy with the feelings of the people whose litigation they are called upon to try. Their attitude awes the common man as much as it did under colonialism and helps to perpetuate the gap between them.

With this kind of a judiciary, it is easy for the Governments, in case it fails to give effect to their policies, to dismiss its resistance as neo-colonial subversion and proceed to suppress it. Former Tanzanian Chief Justice Georges, has indicated that in the event of conflict between the Government and the judiciary, the latter stands to lose. It should therefore interpret the law so as to accord with Government policy.⁵⁹

Again the fact that the judiciary is largely staffed by British or British-trained lawyers means that their orientation is towards common law tradition. Thus, to them, Parliament is supreme and the constitution alterable according to its will. The African judiciary therefore tends to construe constitutional limitations on the powers of Government very narrowly in the common law tradition and in favour of the state.⁶⁰

(ii) Conflict with African customary values.

The courts have found difficulty in using the individual rights provisions as standards of comparison in judicial review. This is because the bills of rights insist on individual rights, an emphasis which is alien to customary definition of rights. In African societies individual rights were not recognized; nor were they distinguishable from duties. Rights and duties were communally defined, an individual reciprocated the rights he derived from the community by the duties expected of him by that community.

Again the bills of rights in constitutions of Commonwealth Africa mainly confer negative rights. They merely enumerate areas of individual conduct in which the state will

not interfere. On the other hand, African societies recognized only the positive duties which the community owed to each and every member of that community.

No doubt the peasants of Africa, mainly illiterate, do not appreciate the rights guaranteed in the constitution. In fact most of them do not realise they exist, some of them having been vigorously suppressed by colonial Governments.⁶¹

It is also possible that due to the illegitimacy of the judiciary to the majority of the African populations, they still largely use traditional adjudication methods. Most cases concerning violation of individual rights never find their way into courts, but are settled extrajudicially. This means that rights which are not correspondingly recognised by customary societies are not enforced.

Lower courts may themselves be found ignorant of, and infringing the Bill of rights. A customary court in Nigeria continued to convict and sentence persons for the customary offence of adultery, although the constitution stipulated that no one should be punished for an offence unless it were defined by a written law.⁶²

The situation has been summarised by James Read as follows:

"There are several aspects in which the bills of rights may be said to be out of time with the third world context in which they operate. Thus Asian and African religions, cultures and social systems do not necessarily have the same values which have inspired the definition of human rights in Western nations. The community, and the duties imposed by custom, religious law and family ties may rank higher than some aspects of individual freedom."⁶³

(iii) Incompatibility with economic development.

It will be appreciated that independence was achieved after decades of colonial exploitation. The independent Governments were confronted with a host of serious and pressing economic and social problems.⁶⁴ They had few resources at their disposal with which to combat these problems. Indegenous technical skills were very limited and the majority of the people were still engaged in subsistence agriculture. Investment capital and opportunities for such capital as existed were limited. Manufacturing industry was either primitive or non-existent. These were the basic economic realities which had existed in the colonial era. In most countries, constitutional development was rapid, in many cases taking between three and five years. Therefore colonial economies passed into independence unaltered.

If we accept the marxist premise that the superstructure of society, including its political and ideological orientation, are predicated on the economic base of that society, then we can accept that leaders who inherited a neo-colonial economy had no option but to adopt the same ideological and administrative approach as the colonial Governments. They were also forced to accept a new class position for themselves, which was formerly occupied by the colonialists. These are leaders who have come to be called the African native petty Bourgeoisie.⁶⁵ To conform with the constitutions, which were based on liberal democratic theory of Government in the fairly developed Western nations, meant ceasing to exercise powers by the independent Governments, which had hitherto been considered necessary by the colonial administrations to tackle problems, which remained the same notwithstanding independence.

If the economic deprivation suffered by the new states under colonialism was to be alleviated and the economy developed for the benefit of the indigenous people, there was need for a dynamic and revolutionary rehabilitation programme of national resources. Such a programme required strong executive Governments to overcome the resistance of class vested interests, which were already entrenched in the constitutions. This leadership could only be provided by people who were determined to bring change. And it is such leadership which was immediately disenchanted with constitutions which they found to impede the execution of reasonable and necessary policies for the realisation of desirable national goals. As stated by McAuslan:

"The practical operation of Government, carried out by men who have been elected on policies required legislative and executive action to put them into operation and must inevitably stress the primacy of executive power."⁶⁶

The Tanzanian Presidential Commission on the Establishment of a Democratic One Party State addressed itself to the question of the priority of development vis-a-vis, the need to limit the powers of Government by the provision of constitutionally guaranteed individual rights. It concluded that:

"Tanganyika has dynamic plans for economic development. These cannot be implemented without revolutionary changes in the social structure. Decisions concerning the extent to which individual rights must give way to the wider considerations of social progress are not properly judicial decisions. They are political decisions best taken by political leaders responsible to the electorate."⁶⁷

This statement of principle indicates unequivocally that African Governments bent on correcting the inequities

wrought by the colonial experience on their peoples could not stand any limitation on the execution of requisite policies.

The constitutions did not address themselves to the solution of the serious economic problems which plagued the emergent states. Rather, they restricted themselves to declarations of what rights individuals had against Governments. Apparently their framers did not realise that certain rights and freedoms are only valid in certain circumstances. President Nyerere has stated that freedom without development is impossible.⁶⁸ For it is impracticable to declare that a person has the right to life while there is not enough material provision to sustain that life.

The limitations placed on Governments were regarded as impediments to the development of material conditions which would give effect to any rights. Hence, before such conditions were attained, constitutional limitations and interventionist judiciaries have to give way to the priorities of economic development.

C. Imperative Amendments

With these contradistinctions in view, it is clear that the constitutions could not be retained as originally adopted whether a new Government chose to become a puppet neo-colonialist state, performing the role of a colonial state, or whether it chose to pursue radically different economic policies and ideological lines, the limitations on their powers were untenable. They made the basis of the Governments frail and impeded the launching^{of} economic reforms. This would be a bold step because of vested

interests, and it would require a strong executive.

The first reaction of the independent Commonwealth Governments therefore, was to amend the constitutions to provide for a more powerful Government. This of course meant a Government saddled with less limitations on its powers. It would also mean that the position of the judiciary as the enforcement agency of these limitations would be considerably weakened. The result has either been the overthrow, or the fundamental or far-reaching alteration, of the constitutions.

Within short periods after independence most states which had become independent with the British sovereign as a constitutional monarch adopted republican status replacing the Queen with an executive president who combines the office of head of state with that of head of Government.⁶⁹

The move to republicanism has generally signalled the enhancement of executive power which has logically portended the diminution of the powers of the legislature and judiciary. This was accomplished through a series of constitutional amendments.

For example, the central role which parliament had been given in the political process was eroded and superseded by the power and popularity of the executive. This was facilitated by the removal of the means of control originally vested in parliament. Specially entrenched provisions in the constitutions were abolished and the special majorities required for approval of declarations of states of emergency were reduced to simple majorities.⁷⁰

Bicameral legislatures, usually affording double checks were replaced by unicameral national assemblies.⁷¹ The right of appeal to the Privy council was abolished, thus removing from judicial review, the one court which could exercise its functions without local political pressure.⁷²

This reduction in legislative and judicial control on Government was accompanied by an increase of executive discretion in the exercise of special and extra-ordinary powers to deal with crises. The presidents were, in the exercise of those powers, permitted to exercise a wide discretion of detention, deportation and restriction. They can make regulations to apply in areas to which emergency powers are applied, and such regulations supersede individual rights guaranteed in the constitution.⁷³

In legislatures based on the Westminster constitution, organised parliamentary opposition is crucial, and its requirement can be implied in most constitutions of Commonwealth Africa. Yet all these countries are now either de jure or de facto one-party-states.⁷⁴ Their constitutions have been amended to provide for one party state or opposition has been smothered through extra-legal means.⁷⁵ Elsewhere constitutions and legislatures have disappeared in the advent of military coups, beginning with the coup in Ghana in 1966.

The total effect of these changes has been to reduce the restraints on Government to such an extent that the executive has become too strong for the judiciary to contain. To survive the judiciary has had to become compromising to executive abuse of power.

CHAPTER IV

FUNCTIONING OF JUDICIAL REVIEW

It cannot be denied that judicial review, which makes the decisions of courts final and conclusive in declaring legislative and executive acts which conflict with the constitution void, places the courts in a position of supreme power.⁷⁶ It is also true that this is a proposition that the executive finds hard to accept. This is more so where it has become necessary that the executive should have more power than allowed by the exercise of judicial review. Such is the case in the Emergent States of Commonwealth Africa. It is here that emphasis on executive power is imperative if the problems of economic underdevelopment are to be effectively tackled. Hence, strong objection is taken to judicial review, not so much of administrative, but political acts. This is considered an interference in the political direction of the state, a task for which the judiciary is clearly unsuited.⁷⁷

A. Vulnerability of the Judiciary.

Judges cannot avoid being involved in political and social controversy because they do not function in a vacuum. They function within a political and social system and the emphasis of their decisions reflect on the socio-political climate in which they are situated.⁷⁸ Even the appointment to the bench must at one stage involve a political decision. Again if we accept that a Government is a result of class struggle, then it follows that judges are a tool of the dominant class and share its values and ideology.

This socio-political influence is marked both in the judicial interpretation of statutes as well as constitutions. In interpreting constitutional restraints on African Commonwealth Governments, courts have had to take into account prevailing political and social conditions and to dress their decisions to suit them. This approach is in no way peculiar to the African judiciary. British and American courts have had to depart from strict legal interpretation of statutes and constitutional provisions to give effect to social and political values which it was imperative to consider. A few illustrations will be pertinent.

In Roberts v. Hopwood,⁷⁹ the London Borough Council, in exercising discretion conferred by statute on local authorities 'to allow such wages as they may think fit' increased the maximum wage of £4 per week for both male and female workers.

The House of Lords found that this was an unreasonable exercise of the discretion and voided the council's decision, calling it 'a misguided conception of socialist philanthropy.' It is to be noted that the language of the statute conferred a subjective discretion and did not require its exercise to be reasonable. The Law Lords put that construction upon it deliberately to restrict that discretion. It is clear that the Lords did not like the council's socialist philosophy, especially on the equality of sexes.

On the other hand in Liversidge v. Anderson,⁸⁰ the House of Lords was concerned with the interpretation of Defence Regulations 18B, which gave the Home secretary certain powers of detention where he had 'reasonable cause to believe' certain persons to be of hostile associations. Though this formulation had been adopted to qualify the exercise of the Home secretary's discretion, the majority

anxious to aid the executive in a time of great emergency, when Britain was in very real danger of invasion, refused to determine whether the Home Secretary had in fact had reasonable cause to believe that the appellant was of hostile associations. In fact, the Law Lords substituted 'has reasonable cause to believe' for 'has cause to believe' thereby widening the Home secretary's decision and giving effect to his action. In a dissenting minority judgement, Lord Atkin pointed out that the majority had broken with precedent and the usual Canons of interpretation. The court here had converted an objective discretion into a subjective one.

The decision was tantamount to the courts' denial of its own power to review executive decisions which it had asserted in the Hopwood Case. It is clear however that courts' action was dictated by political expediency of the time. Indeed this action has been variously described as the House of Lords' contribution to the war effort.

When the political necessity for the abdication of principle had receded, the Privy council was able in Nakkuda Ali v. Jayarante,⁸¹ to restate and affirm the right of judicial scrutiny as to whether an administrative authority had in fact acted reasonably, a principle which had been seriously shaken by the decision in the Anderson Case.

The attitude of the American supreme court towards race relations has also shown a flexible adaptation to changing social attitudes.

The Fourteenth Amendment to the American Constitution granted equal protection in the law for all citizens. In Plessy v. Ferguson,⁸² a negro was punished for resisting segregation on a train. He appealed to the supreme court on a writ of error. Bowing to the racist pressure of the southern states, the supreme court postulated the doctrine

of separate but equal facilities for Whites and Blacks. Fifty-seven Years after this decision, and when racial prejudice had subsided considerably, the same court was able in Brown v. Board of Education,⁸³ to overrule the separate but equal doctrine. Passing on the segregation of educational facilities, Chief Justice Warren declared that 'separate educational facilities were inherently unequal'. This remarkable turn-about reflected the changed tempo of race relations and not any new technical discoveries in the construction of the Fourteenth Amendment.

This spirit of interpretation was reiterated by Wientraub C.J., Chief Justice of New Jersey in a speech delivered at the conference of Chief Justices in August 1958, where he said:

"The constitution does not offer a literal definitive answer to the awesome problems which confront the court. One may read the due process clause, or the equal protection clause for a thousand times and still not detect the slightest clue to the proper decision. The answer must be found elsewhere. The constitutional framework as we all know is a mere skeleton expression of Governmental power and individual rights. The actual contours of those powers and rights must be determined in the context of changing conditions, by a process which is more than a mere mechanical application of a constitutional phrase to a set of facts."⁸⁴

It is clear therefore that the constitutional restraints on African Commonwealth Governments, which were based on liberal-democratic experience in a fairly advanced Western Europe, could not operate in reference to African circumstances without considerable qualification and modification. If such qualification amounted to partial or total neglect of such restraints, this was purely a result of the demands of the circumstances in which those restraints were called

to be applied. Those circumstances, which have been outlined in the second chapter include, past colonial history, backward economies, African social outlooks and the development aspirations of those states. The solution of these problems is always more urgent than the need to observe restraints on Government power or the respect of individual rights.

Can courts, notwithstanding militating circumstances, insist on enforcing restraints on Governments and give effect to rights guaranteed by constitutions?

This question is best answered by an examination of decided cases. These decisions and the reactions they precipitate from Governments, will indicate whether or not this is a likely proposition.

The South Africa Act 1909 (as amended), now the Republic of South Africa constitution Act 1961, provided that certain entrenched sections cannot be amended or repealed except by a bill passed by a two-thirds majority of the two houses of Parliament in joint session at the third reading.

In 1951, a measure was passed by ordinary legislative procedure to repeal one of the entrenched sections which gave voting rights on the same roll as whites to coloured persons in the Cape Province. The legal validity of this measure, which clearly contravened the constitution was challenged by a coloured voter in the case of Harris v. Minister of the Interior.⁸⁵ The Appellate Division of the supreme court held that the measure was not an Act of Parliament at all since it had not been passed by Parliament within the meaning of the constitution.

The Southern African Parliament answered this decision by the passage of an Act, again by ordinary procedure, constituting the two houses as a body called the High Court of

Parliament, with power to reverse by a simple majority any decision by the Appellate Division pronouncing invalid a measure purporting to be an Act of Parliament. The Appellate Division again held this measure to be invalid. 'High Court of Parliament' was simply the two houses attempting to do indirectly what they could not do directly, purporting to abrogate the protection accorded by the entrenched sections.⁸⁶

In retaliation, the South African Government secured the passage of new legislation to enlarge the size of the senate and alter the method of its election. Having increased its majority in both houses of Parliament, the Government was able to remove the Cape coloured voters from the common roll by the two-thirds majority procedure required by the constitution. Having also appointed some additional judges to the Appellate Division who were thought to be politically "sound", the newly constituted court was able to validate the new legislation.⁸⁷

These decisions of the Appellate Division represent the South African judiciary's determination to retain its jurisdiction to test the validity of measures purporting to be Acts of Parliament, than the protection of the constitutional rights those measures sought to abrogate. This explains why the Government was so patient and respectful of this principle of judicial review. It was confident that it would win in the end. The method it finally chose to circumvent the entrenched sections was subtle enough to satisfy the criteria formulated by the court in its earlier decisions. But in the process, the standards of the bench were lowered by the appointment of indoctrinated party hags. One would hesitate to imagine how the Government would have reacted had the court purported to challenge the substantive

aim of the impugned measures, the promotion of Apartheid.

This may well be compared with the reaction of the Government of Swaziland to the decision of the High Court in the case of Ngwenya v. The Deputy Prime Minister.⁸⁸ The appellant in this case was nominated and elected as an opposition candidate, to the ruling party. The respondent challenged his citizenship, claiming that he was a prohibited immigrant and caused him to be served with a deportation order. The appellant applied to the High Court which set aside the order and ruled that the appellant was a Swazi citizen by birth. Thereafter, Parliament purported to amend the constitution, creating a tribunal to be appointed by the minister with powers to entertain all cases concerning citizenship. Appeal from the tribunal lay with the minister whose decision was not subject to appeal to any court and which would supersede and render null any previous judgement. The appellant challenged the validity of this amendment which he argued had not complied with the procedure laid down for constitutional amendment. The court ruled that the amendment was void for failure to comply with procedure.

King Soblinza II replied by overthrowing the constitution and abolishing the legislature.⁸⁹ One of his charges against the constitution was that it had introduced undesirable political practices in the country which were the cause of instability and deterioration in observance of law and order. This reaction is an apt illustration of what might be expected of a Government against which the judiciary insists on limiting by rigid application of constitutional restraints. The constitution becomes a casualty of such a conflict and with it, all institutions created under it.

Adverse court judgements which tend to contradict Government policy can easily be overruled by legislative action. In the case of Marealle v. Chagga council,⁹⁰ a Chagga chief who had apparently been installed for life was dismissed from office in 1959. He sued the Kilimanjaro District Council claiming damages for loss of office. By the time the issue was tried, the Tanganyika Government had abolished all hereditary chieftainships. The High Court, disregarding the possible effects of this change on the action awarded the plaintiff as damages Shs. 919,900.00. This sum would have been sufficient to bankrupt the District Council and more seriously, the success of the action would have encouraged other dispossessed chiefs to attempt similar actions. The Government therefore promptly introduced a bill in the national assembly retrospectively overruling the court's ruling and blocking any such similar suits. Mr. Kawawa, who introduced the bill made its purpose clear: 'Government must have the power to stop a few people who who want to suck the blood of many others'.⁹¹

In reference to the attitudes of East African Governments, McAuslan has concluded that:

"While the courts are free to decide for or against the Government in constitutional matters, if they do the latter, and the matter is judged by the Government concerned to be important, it is more than likely that it will pass legislation to nullify the decision, and the courts will have little option but to acquiesce in this."⁹²

In Kenya particularly he found that:

"Those human rights cases that were decided against the Government were on relatively minor matters, but the Government showed a different approach in 1966 when a challenge was mounted in the High Court to the validity of some of the by-elections which took place following the ousting of K.A.N.U. defectors from the National Assembly... the by-election results were invalid as the constitutional amendment which had introduced automatic loss

approval of certain restraints on its powers, or the enforcement of certain individual rights, the courts tend to restrict their enforcement.

To achieve this, courts tend to shy away from political issues and where such issues are subject to their determination, to base their judgements on the narrowest technical grounds possible.

(1) Interpretation of substantive rights.

Most Commonwealth African constitutions contain bills of rights which define individual rights, with provision that the respective High Courts will have jurisdiction to hear and determine questions where breach of any right is alleged, and to make such appropriate orders as necessary to cure the breach.⁹⁵

Courts are often confronted with arguments by opposing counsel that constitutional rights should be interpreted either liberally or literally. A liberal interpretation seeks to discover the spirit of the constitution and to enforce not only the rights gathered from the ordinary meaning attachable to words used, but also collateral rights which would give effect to such other rights.

Courts have often argued that the correct interpretation of constitutional rights is literal; that only rights deducible from the ordinary meaning of words used should be enforced.

This issue was argued before the High Court of Kenya in the case of Republic v. El Mann.⁹⁶ The accused was charged with contravention of exchange control regulations. The prosecution sought to give in evidence the answers which

had earlier been given to an official who had administered a mandatory questionnaire authorised by the Exchange control laws, and which provided that such evidence should be admitted. Defence counsel invoked the constitutional protection that: 'No person who is tried for a criminal offence shall be compelled to give evidence at his trial.' He argued for a liberal interpretation of this provision to exclude this evidence. The state counsel argued for a literal construction of the provision to mean that an accused was only protected from giving evidence at his trial before the court.

The court favoured the state counsel's argument, finding for it supporting dicta in the view of Das, J., in Keshava Menon v. State of Bombay:⁹⁷

"An argument founded on what is claimed to be the spirit of the constitution is always attractive for it has a powerful appeal to sentiment and emotion: but a court of law has to gather the spirit of the constitution from the language of the constitution. What one may believe to be the spirit of the constitution cannot prevail if the language of the constitution does not support that view."

The Kenya court therefore concluded that in certain circumstances a liberal interpretation may be called for, but that where words are precise and unambiguous, they are to be construed in their ordinary and natural sense. This is a rule of interpretation which also applies in the construction of ordinary legislative enactments.

I do not find merit in the reasoning of the court in this case. The equation of the constitution to ordinary legislative enactments for the purposes of interpretation hardly does justice to an act that is both a fundamental and supreme law from which all other laws derive. Whereas

in construing other acts recourse might be had to the constitution or the institutions it creates, i.e. to discover the intention of the legislature, a constitution being an original act can only be construed with reference to the values it embodies. Only then can the rights it confers be given their full effect.

Words are very imprecise tools to operate and can hardly be relied on to convey the exact intention of their users. Words carry various meanings depending on the contexts in which they are used. The real meaning of words is to be construed within the particular context in which they are used. It is this reference to the context in which words are used and giving them the connotation it allows, that is called discovering the spirit of the laws so expressed. This makes the vital difference between liberal and literal interpretation. Literal interpretation means merely that words are given their popular meaning.

The spirit of the constitution is to be found in the values from which it derives, and it is inevitable in its interpretation that reference to those values must be made. Neglect of them tends to constrict rights conferred by the constitution to those gleaned from the technical use of words.

The Judicial Committee of the Privy Council realised the dangers in restricting constitutional rights to literal interpretation when it argued, :

"Freedom of association must be construed in such a way that it confers rights of substance and not merely an empty phrase. So far as trade Unions are concerned the freedom means more than mere rights of individuals to form them: it embraces the

right to pursue that object which is the main raison d'etre of trade unions, namely, collective bargaining on behalf of its members over wages and conditions of employment. Collective bargaining in turn is ineffective unless backed by the right to strike in the last resort.

The argument of the state is that 'Freedom of association' means no more than it says, that persons are free to associate. It does not mean that the purposes for which they associate and the objects which in association they pursue are sacrosanct under the constitution
... "98

Realising that the constitutional framework is a mere skeleton expression of rights and Governmental power, it is unrealistic to expect the rights deducible from the ordinary meaning of words used to describe them in the constitutions to be exhaustive. The spirit embodied in the protection of those rights must be discovered if their full consequence is to be grasped.

It is therefore evident that when courts choose the literal construction of constitutional protections, they are deliberately curtailing the consequences of such rights. As the Government is in most cases, the culprit when the encroachment upon those rights is litigated, the courts by restricting those rights hope to shield the Government from liability. This is especially so in cases in which a decision against the Government would have serious political consequences.

It is the judges' fear that such adverse decisions would alienate the Government and provoke reaction against them.

In Kachasu v. Attorney General⁹⁹ (Zambia) the High court of Zambia found that forced salute of the national flag by school children against the teaching of their religious denomination did not traverse on their freedom of worship,

belief and conscience. The contention of the children's parents was that their denomination taught them that they owed allegiance only to God and not to any earthly power. A decision in their favour would have certainly had serious political implications. The country, which had been living under a state of emergency since 1964, and which was surrounded by hostile Governments needed patriotic and committed citizens. The Government would therefore have been very perturbed if the court had found for the plaintiffs. It is certain that such a decision would have encouraged an erosion of national discipline which was vital in the circumstances.

(ii) Enforcement of Procedural Safeguards

Procedural safeguards are laid down to be followed where an individual is to be denied a right guaranteed under the constitution by the operation of some law. Such safeguards are found in the constitutions themselves, and procedural laws like the criminal procedure code and the Evidence Act.

The important issue is whether courts will validate an executive action depriving an individual of his rights where the laid down procedure for carrying out such an action is not followed.

The United States' Supreme court has indicated that it would not validate executive action which deprives individual rights unless the requisite procedure for such deprivation is complied with. In Mapp v. Ohio,¹⁰⁰ police confiscated phonographic materials during an illegal search of the appellants' house. They later charged the appellant for possession of the phonographic material. The supreme court refused to entertain the charge, holding that it would not validate an executive act violating the guarantee against

illegal search unless such action was perpetrated following the laid down procedure.

Following the decision in Mapp v. Ohio, the Zambia High court in Chipango v. Attorney General¹⁰¹ held that, in cases where the liberty of the citizen was involved, the procedural requirements for the deprivation of the same must be complied with. It took the view that observance of formalities was a condition precedent for the validity of a detention order.

The Zambia decision is however, only an isolated act of judicial forthrightness in Africa. Elsewhere courts have held that so long as executive action has been taken by a duly authorised person, they will not look behind it to see if it was taken in the prescribed manner.

The precedent was set in this respect by the Judicial Committee of the Privy council in Kuruma v. Republic.¹⁰² The appellant had been convicted for illegal possession of ammunition which had been found on him in the course of an illegal search. On appeal to the privy council, it refused to disturb the conviction, holding that the court is not concerned with how evidence is obtained so long as it is relevant. Following itself, the privy council upheld a conviction in King v. Republic¹⁰³ (Jamaica) which again had resulted from an illegal search on the person of the appellant in which he had been found with dangerous drugs.

Although courts have gone so far as to find that an executive action that has been perpetrated in disregard of procedure is illegal, they have nonetheless stopped short of annulling such an act. Again this may be attributed to

judges' fear that they may be accused of opposing the executive, thus inviting retaliatory action.

In S.V. Sekoni¹⁰⁴ (Botswana), the High Court of Botswana found that the appellant's detention was illegal because it had been executed without regard to procedure. But the court refused to annul the detention order, saying that there was no remedy for contravention of constitutional rights of the individual. This was of course, false escapism, because like S.84 of the Kenya constitution, the Botswana constitution, provides that the High Court may make such an order as it may deem fit to remedy an individual whose constitutional right has been infringed.

Similarly, the High Court of Kenya in Ooko v. Republic,¹⁰⁵ refused to revoke a detention order which had been executed in disregard of procedure. It held that, where a detention order has been made by a relevant authority, the court will not question non-compliance with procedure.

(iii) Control of special and extra-ordinary powers.

The executive is armed with extensive special and extra-ordinary powers to deal with emergencies.¹⁰⁶ The application of these powers derogate from some or all of the individual's rights guaranteed by the constitutions. They also confer on the executive regulation-making powers which again violate the doctrine of separation of powers. The application of these powers is only warranted by the existence of an emergency. Hence, the question arises what would happen if these powers were applied in normal situations or to deal with ordinary problems of administration.

Admittedly, the executive has a discretion to decide when a state of emergency exists. But like all discretionary powers of Government, this power is limited by law. The Government in the exercise of this power is required to act reasonably, and objectively. And since it is the duty of the judiciary to enforce the law, it has the duty to see that this requirement is met. In fact, such a duty is co-extensive with the courts' duty to enforce individual rights.

Therefore, where an individual's rights have been infringed as a result of the application of emergency powers, the court has the duty to inquire whether there has been an objective basis for the application of such powers. Hence, if an individual were to challenge any action taken against him in exercise of emergency powers, and the court finds that such exercise has not been reasonable, then it has a duty to invalidate such an action.

A review of decided cases however, show that the judiciary in Commonwealth Africa has been indifferent to executive abuse of emergency powers.

In Namwadu v. Attorney-General ¹⁰⁷ (Uganda), a lorry carrying uniformed and armed soldiers of the Uganda army was in collision with a civilian driven lorry. Some soldiers died in the accident. Soldiers in a second lorry murdered the civilian driver and a school-girl bystander. In an action for damages by relatives of the two deceased, the Government as a master vicariously liable for the acts of its servants, purported to pleaded immunity as the tort was committed during a period of emergency. The court in dismissing this defence held that it was necessary to distinguish between the existence of a real and fictitious state of emergency. It further held that no real emergency existed at this time.

This case involved the abuse of powers under a purported emergency situation. And the issue was whether emergency powers conferring immunity on the Government during their operation could be used as a defence in an action which was prima facie tortious. The judge's dismissal of the defence on the ground that there did not exist a real emergency suggests that he would have allowed the defence had there existed a real emergency. And this in turn shows that courts are not willing to demand an objective application of emergency powers. A tortious action cannot logically be defended by the invocation of immunity under emergency powers. However, this case is important in that judge suggested that the court would be willing to look into whether an emergency existed objectively. But where an objective state of emergency existed, he did not indicate whether the court would require the objective application of powers invoked to deal with it.

However, a previous judgement of the same court indicates that even if a court finds the application of emergency powers is not objectively justified, it will not remedy the victim of such an action.

In Re Ibrahim and Others,¹⁰⁸ the applicants for an order of habeas corpus were detained under emergency regulations for what was clearly a criminal violation. They argued that they should have been dealt with according to the criminal Procedure Code. The judge agreed, but refused to give a ruling, restricting himself to general observations on the impropriety of using emergency powers of detention for dealing with ordinary cases of crime.

In Uganda v. Commissioner of Prisons ex parte Matovu,¹⁰⁹ the court justified its reluctance to interfere where there has been an abuse of emergency powers. It argued that a statement by the minister that one had been detained by the minister under emergency powers was a conclusive and

and the courts will not look behind the order to determine its propriety.

Though the court in Nanwadu v. A.G. suggested it was necessary to determine whether a state of emergency is declared objectively, this in itself would not aid in the enforcement of individual rights.

The decisions in Re Ibrahim and Ex parte Matovu indicate that where an objective state of emergency is found not to exist, the courts will not correct the injustices done in the name of powers exercisable under it. Neither will the courts give redress where emergency powers are used for purposes other than dealing with emergencies.

Again, it is the courts' sense of self-preservation which restrains them from enforcing on the Governments limitations provided for by the law. While it is their duty to enforce such observance, it may be reasonable for them to refrain where such an attempt may provoke their own destruction. Worse still it may lead to the overthrow of the constitution and the whole legal order it creates.

C O N C L U S I O N

It has been emphasized before that the values embodied in the constitutions of Commonwealth African states have been transplanted from the fairly highly developed capitalist states of Western Europe and North America. These notions being that there is need to limit the powers of Government and to give specific protection to certain fundamental human rights. It has also been argued that these notions are inappropriate in the under-developed African countries. This is not the case only because these notions are incompatible with the immediate pre-independence history of Commonwealth Africa. But also because the condition of underdevelopment in the countries does not allow for the practice of these values.

The countries of Commonwealth Africa are engaged in a project of reconstruction after years of colonial deprivation. This can only be achieved by the initiation and execution of a programme of rapid economic development. Such an exercise requires strong leadership based on an emphasis of executive power. It also calls for a disciplined national effort. This means vesting wide discretionary powers in the executive and their coercive use to mobilise all available resources for development. This is the only way to create political stability necessary in dealing with the crisis of underdevelopment.

Seen from this perspective, it is clear that a Government in these circumstances cannot tolerate any restraints on the exercise of the very powers the situation demands to be emphasized. Nor can individual rights, which operate negatively to confine the exercise of such powers, be respected.

Judicial review, which exists primarily to limit Government power and give effect to individual rights, is therefore clearly untenable in this context. It is not therefore surprising that the judiciary in these countries has not pursued it with any vigour. If it attempts to do so in disregard of these compelling reasons for its abandonment, then it stands to be defeated. Such a defeat might spell not only the diminution of judicial respectability as an institution, but probably also the destruction of the whole machinery of justice. The judiciary has therefore tended to restrict its functions to those which subscribe to the overall political direction of the state.

Perhaps, judicial permissiveness, an involuntary state of self-preservation has tended to make the judiciary to ignore even the enforcement of such rights as do not involve political issues.

The institution of ombudsman has been mooted as the most ideal in the control of executive excesses in the absence of effective judicial control of the same. Being an arm of the executive, it has less to fear of the consequences of conflict with the executive. This is especially so if it is responsible only to very high authority in the executive hierarchy, i.e. the President. For then it would be very effective in controlling the lower echelons of the executive where abuse of power is often more rife. The officers running such an institution would be fully conversant with the Government's political policies and would not be likely to contradict them. It has the additional advantage of being essentially investigatorial. While the judiciary acts only when claims are brought before it, the ombudsman seeks for complaints from the people. The value of such an approach cannot be over-emphasized in countries where a

high proportion of populations is illiterate and ignorant of its rights.

The popularity of this institution has been established by the very effective operation of Tanzania's Permanent Commission of Enquiry, in a country that does not have a bill of rights. Though providing no compensation where one has suffered through abuse of power, it is able to correct situations where power is being abused and to prevent its continued abuse. Its very existence also discourages potential abuse.

Zambia launched its own body called the Commission For Investigations with the adoption of the One Party constitution in 1973. Also the 1969 Ghana constitution had provided for the appointment of an ombudsman which was never effected.

It is suggested that this means of controlling abuse of Government power should be tried in more African countries. It is the best alternative to judicial review which has dismally failed in this role.

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20. (1914), 5 E.A.L.R. 70.
21. S.20.
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25. See Report, The Commission on the Administration of Criminal Justice in Kenya, Uganda and Tanganyika, 1934.
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28. Olawoyin v. Attorney-General (Northern Nigeria)
(1961) ALL N.L.R. 269.
29. Philadelphia Debates 1787.
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34. e.g. Uganda Constitution, 1962.
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36. e.g. Kenya constitution 1969 (as amended) S.84.

37. I Cranch 137 2 L.Ed. 60(1803).
38. For a fuller exposition on the judicial review under the American constitution, see Mason and Beany, op.cit., pp. 51-104.
39. See the judgement of the US Supreme Court in Mississippi v. Johnson, 4 Wall, 475, 18 L.Ed. 437(1867).
40. (1966) I ALL ER 650.
41. e.g. Kenya constitution, section 69.
42. (1970) C.C. 18 S.C (Ghana)
43. (1908) 8 C.L.R. 330, at p. 357 (Australia)
44. See judgement of Azu Crabbe, J.A., in the Gbedemah case citing Nkumsah v. The State (1968) C.C 55 C.A. (Ghana).
45. McAuslan, J.P.W.B., "The Evolution of Public Law in East Africa in the 1960's (Part I)" p. 6.
46. McAuslan J.P.W.B., op.cit., p. 14
47. See generally, Martin R. "Legislatures..."op.cit.
48. Ibid.
49. Some of the more notable services which were part of the executive under colonialism and which were established under independent commissions were, the Judicial service (especially the lower judiciary), and the civil service.

50. In Kenya the fear of the two majority tribes i.e. Kikuyu and Luo under K.A.N.U. led to the emergence of K.A.D.U. in independence politics as a party of the minority tribes.
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52. e.g. Kenya constitution, section 75.
53. See generally, Ghai and McAuslan, op.cit.
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55. e.g. The Uganda constitution 1962, gave a special position to Buganda in a quasi-federal organisation. Also Kenya constitution 1963, Majimbo provisions.
56. McAuslan J.P.W.B., op.cit., p. 14
57. Martin, Personal Freedom..., op.cit., p. 8
58. McAuslan J.P.W.B., "The Evolution of Public Law in East Africa in the 1960's (Part II)" p.
59. Speech at the conference on East Africa Law and Social change, Dar-es-Salaam, 1968.
60. But cf; Republic v. El Mann (1969) E A 357. A discussion of the case by Adesanya S.A., "The constitutional privilege of an accused to refuse to give evidence: Republic v. El Mann Examined"
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61. e.g. Freedom of association was one of the most vigourously suppressed freedoms by colonial Governments. Giving such freedom would have formented labour and political unrest. Such a situation would have been inimical to British economic imperialism. Hence, Deportation and Restriction ordinances were rife in British colonies to deal with political activists.
62. Aoko v. Fagbemi (1961) ALL N.L.R. 400
63. James S.R., "Bills of Rights in The Third World: Some Commonwealth Experiences" From Verfassung Und Retch in Ubersee, 1973, Vol. I no. I
64. See generally, Martin R, op.cit.
65. See generally, Rodney, op.cit.
66. McAuslan, op.cit., p. 15
67. Report (Government Printer, Dar-es-Salaam 1965) pp. 30-33.
68. See generally, Nyerere, "Freedom and Development".
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Republican Status.
70. Kenya constitution - 3rd amendment, by Act no. 14 of 1965.
71. Kenya constitution - 7th amendment, by Act no. 40 of 1966.
72. Kenya cons titution - 3rd amendment, by Act no. 28 of 1964.
73. Kenya constitution - 6th amendment, by Act no. 18 of 1966.

74. e.g. The Zambian One Party constitution of 1973.
75. e.g. The Method used by the Kenya Government to kill the K.P.U. in 1966, is an example of a party in power which uses the extra-ordinary powers of the Government to outlaw the opposition. Parliamentary members who crossed the floor to join the opposition were forced to vacate their seats in Parliament.
76. But cf. Nwabueze, constitutionalism in Emergent States op.cit p. 18.
77. See Tanzania Presidential Commission on the Establishment of one Party State, Report, loc.cit. pp. 30-33
78. See generally, Friedmann, Law in a Changing Society. (London, Stevens & Son Ltd. 1959).
79. (1925) A.C. 578, H.L.
80. (1942) A.C. 206, H.L.
81. (1950) 66 T.L.R. (pt.2) 214.
82. 163 U.S. 537 (1897)
83. 347 U.S. 438 (1954)
84. Friedmann, op.cit.
85. (2) S.A. 428 (1952)
86. Minister of the interior v. Harris (4) S.A. 760 (1952)

87. Collins v. Minister of interior
(1) S.A. 552 (1957).
88. CVL.A.1/1973, in the Appeal Court of Swaziland.
89. King Sobhuza II of Swaziland, Proclamation on 13th April 1973.
90. (1963) E.A. 131.
91. See The Ast African Standard, 5.Dec.1963.
92. McAuslan, "Evolution of...(Part II) op.cit"
93. Ibid.
94. See Daily Nation, 11.March 1976, p. 2
Indian Judge gets the sack.
95. See Kenya constitution 1969, Ss.84(1) and 84(2)(b).
96. (1969) E.A. 357.
97. (1951) 3 C.R. 228 (India)
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