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

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PREFACE

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Any work dealing with such a controversial subject as the rule of law can not be thoroughly treated within the 8,000 word limit imposed for the Bachelor of laws dissertation. This of necessity means that some points which would have required further enunciation have not been given detailed treatment. Nevertheless, I think I have substantially covered my area of research.

My special thanks goes to my supervisor Professor Kapeller for his constant supervision and assistance throughout the writing of this dissertation which has proved to be of much help. I am also deeply indebted to the one who very kindly took her time and spared no efforts to make sure that she converted my otherwise illegible handwriting into this legible whole. Last though by no means least I cannot forget to thank all those who have aided me in my research particularly through discussions.

It is hoped that this dissertation will be of some assistance to students of constitutional law . No efforts have been spared to eliminate mistakes, but the writer accepts responsibility where any mistake, [redacted] or misinterpretation of works of law may occur.

MWANGI, S.W

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INTRODUCTION

Unless a community lives under a rule of law, it will tend to be lawless to have no rule and that means more or less an anarchical way of subsisting to the detriment of individual freedom and rights. Acknowledged absolute and autocratic rule has at any rate the merit of frankly and openly conceding that it recognizes no individual freedom and rights. Therefore the importance of the concept of rule of law can be seen and it is always discussed in connection with individual freedom under a system of government or political organisation.

Freedom, which helps to attain human dignity is very important The spirit of freedom is a sustaining and irresistable force, for freedom is essential to man's self realisation. Human nature demands it. Freedom convers to man as he has arisen and begun to think. It belongs to those who have won it and it can be lost only by thoughtlessness and neglect. Consistent vigilance is necessary to its maintenance in its full force and power. It is man's greatest treasure and all people must steadfastly and courageously guard it . Freedom of the individual without the limitation of justice may be merely licence and there cannot be justice if the freedom of the inspiration of mankind and the mainsprings of human conduct ever since man began to think and yearn for more than animal comfort and it has been sustaining force to Nations, great and small. This has made the concept of the rule of law to gain more and more force because it is used as the vehicle to the achievement of individual freedom. Law is a pre-condition of freedom and peace.

The rule of law concept therefore is an old phenomenon and can be traced to Aristotle's days when he emphasised the importance of the rule of law. I have traced the ancient emphasis on the concept starting from Aristotle's time in the early part of the first chapter.

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This reinforces the argument that individual freedom is demanded by human nature at any time of the development of society. This freedom can be facilitated by a legal framework because such rule of law can protect individuals from the rulers arbitrariness. This s is the feeling ta that led to Dicey's exposition of the doctrine of rule of law. No discussion about the origins of the concept of the rule of law, irrespective whether it be in the common or civil laws legal systems without reference to this late great bourgeois scholar(Dicey). I have therefore in the first chapter amongst others decided to give a thorough examination of his exposition of this concept i.e principle of legality, equality before the law and the efficacy of judicial legislation over and above legislatively declared laws on individual rights and freedoms, will be examined. The weaknesses that they manifest are also going o to be highlighted.

The rule of law which is so important must run closely to the rule of life. It cannot go off at a tangent from life's problems and be an answer to problems which existed yesterday and are not important today. Therefore the rule of law as propounded by Dicey has undergone so many changes that almost an independent theory has been created. Today's implications of the rule of law i.e law and order better than anarchy, Government according to law and the rule of law as a broad political doctrine will also be analysed in the first chapter. This will be followed by an analysis of international movement to promote the rule of law. The three treatments accorded to the rule of law are out to achieve a common objective i.e attainment of individual freedom and thus human dignity. They all are opposed to the executive arbitrariness.

Writing of the rule of law and the executive, the Hon James Nyamweya[2] stated that,

"The best government is a government under the law and this can be achieved only by upholding the rule of law in all its aspects".

One way of upholding the rule of law in Kenya is by incorporating the doctrine in our constitution . The danger to an individual freedom is normally posed by the executive arbitrariness.

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The Delhi Declaration defined the rule of law as principles, institutions, practices and prodedures which can enhance individual freedom against executive encroachment and thus enabling him to attain the dignity of man. Therefore in my second chapter I have highlighted some of such principles, institutions and procedures as incorporated in our constitution. How the executive has weakened and shown little respect of such safeguards to the detriment of individual freedoms is also considered.

Writing for a conference of the Law Society in 1977, Hilary B. Ngweno stated that,

"If we now turn to the reality in Kenya, it is true that we live in a constitutional democracy that values the rule of law".[3]

If the rule of law is valued in Kenya then this should be reflected in its practice. After dwelling on the importance of the rule of law and Kenya's government's belief, and by constant talk of such by our leaders, it deemed fit to me to denote chapter three to the real practice of the rule of law in Kenya. This will be done by considering the practice of the principle of legality and equality before the law as expounded by Dicey. An overral conclusion of the entire dissertation and recommendations will be considered as the last thing.

Introduction

Footnotes

1. See Dicey - An Introduction To The Study of The Law of The Constitution.
2. When he was a minister of labour in the late President Kenyatta's government.
3. H.B. Ngweno - "Rule of Law and the Press in Kenya". See Nairobi Times 14/5/77

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CHAPTER ONE

THE ORIGIN AND CONCEPTION OF THE RULE OF LAW

The phrase 'Rule of Law' has been and is common in constitutional law. It is in fact an old phenomenon and ancient philosophers like Aristotle alluded to it when he asserted thus

"The rule of law is preferable to that of any individual".[1]

This was during the days of Greek philosophers and Aristotle also wrote that the "rule of law is the best means of preserving respect for the dignity of man".[2] Aristotle argued that government by laws was better than that of man. He did not define the contents of the laws which a lawful government was supposed to apply and this was the main fallacy that he committed. It is therefore submitted that the rule of law concept may as equally thrive in an oppressive regime when the parliamnet enacts discriminatary laws such as the case in South Africa today even though people like Aristotle may not agree that it is that type of government he envisaged. The legal theory in middle ages was that the government was founded on the principles of Natural justice which the Romans assumed were a universal application.

The doctrine of the rule of law can again be traced back to the English Jurisprudem Even as early as 13th Century Bracton could deduce from the theory of the supremacy of law that rulers were subject to the law: "The King shall not be subject to man but God and the law. Since law makes the King".[3]

Justice according to law was due both to ruler and subject. The Magna Carta and its subsequent confirmations exposees this theory in seeking to remedy the grievances of certain classes in the community. Renaissance and reformation in the 16th Century weakened the idea of a universal natural law. Emphasis shifted to the national legal system as an aspect of the sovereignity of the state.[4] In Britain the 17th-Century contest between crown and parliament led to a rejection of the Divine Right of Kings an an alliance between common lawyers and parliament. The abolition in 1940 of the court of Star Chamber ensured that the common law was modified by parliament. The Bill of Rights in 1689 finally affirmed that the monarchy was subject to the law. Not only was the crown thereby forced to govern through parliament, but also the right of the individual to be free of unlawful interference in his private affairs was established.

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II DICEY'S EXPOSITION OF THE ROLE OF LAW.

The late A.V. Dicey has since his lectures been one of the most influential writers on the constitution. Dicey expounded many principles of the constitution and of those principles which Dicey expounded, that which has had most influence and at the same time has received most modern criticism is his fundamental English constitutional tenet that Dicey categorised as components of rule of law are in brief as follows:

"When we say that the supremacy or the rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct though kindred conceptions. We mean, in the first place, that no man is punishable or can be lawfully made to suffer ~~and~~ in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of the law is contrasted with every system of government based on the exercise by people in authority of wide, arbitrary or discretionary powers of constraint.....(for)....~~when~~ whenever there is discretion there is room for arbitrariness, and that in a republic no less than under a monarchy discretion must mean insecurity for legal freedom on the part of the government must mean insecurity for legal freedom on the part of the subjects....we mean in the second place....not only that with us no man is above the law but (what is a different thing) in that here everyman whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. In England the idea of equality or of the universal subjection of all classes to the law administered by the ordinary courts has been pushed to its utmost limits.... we may say that the constitution is pervaded by the rule of law on the ground that general principles of the constitution(as for example the right to personal liberty or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts, whereas under many foreign constitutions thesecurity..... given to the rights of individual results, or appears to result, from the general principles of the constitution.....our constitution.... in short is a judge-made constitution, and it bears on its face all the features, good or bad of judge-made law...(In other words there is)....inseparable connection

between the means of enforcing a right to be enforced which is the strength of judicial legislation.[5]

I. The principle of legality

In Dicey's first meaning, a distinction must be drawn between what Dicey termed as arbitrary power and the well known concept of discretionary power. It is usual in countries that have constitutional governments to give the executive some discretionary powers to arrest and punish. What is important is that the citizen can foresee the consences of his conduct and will not be punished save for breach of some known law. He will moreover be tried by the ordinary courts. At this point a clear distinction must be made between ignorance of the law, which is no excuse, and the fact that at the time of committing an act that act was known to be permissible, and that its legality was only questioned retrospectively.

What Dicey meant by "breach of law" was that one should not be punished unless he had breached an ascertainable common law rule or enacted law. It is important that the citizens should be assured that the law under which he is governed can be ascertained with reasonalbe certainity. In Shaw v. D. p.p[6] the accused was charged and convicted of conspiring to corrupt public morality. No such offence had either been enacted nor known in the common law. This case was criticided for its contravention of the principle of legality. The principle states that

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

Also in The King V Elizabeth Manley[6a], the appellant made a false statement to the effect that he had been robbed by a man of a given description, thereby lending officers of the police to waste their time and exposing individuals f of that description to suspicion. These allegations were not denied but the submission was made that the indictment, no offence known to the law He was convicted on the grounds that he committed the misdemeanor of causing a public mischief.

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The principle of legality dictates that no person may be deemed to be committing an offence who performs an act which at the time of its performance was not an offence. A person who has committeed an offence may not be subjected to a punishment other than that which is provided by law with respect to the offence committed. The principle of legality also implies that any judgement given in accordance with the law must be enforced in the manner provided for by law since the failure to comply with the legal provisions regarding execution of judgement may infact result in creating new penalties. Creation of offences by analogy is forbidden because of the abuses it may give rise to since the courts may be tempted to extend legal provisions to a case quite different from those which are punishable under the said provision. Also in cases of doubt the court shall interpret the law according to its spirit, in accordance with the meaning intended by the legislature so as to achieve the purpose it has in view. This means that the courts may seek the meaning from within or without the particular statute bearing in mind the general purposes of the Zam law as defined since the sole purpose of the law interpretation is to give full effect to every provision of the law and this purpose must be achieved regardless of the fact that the consequences may be hardship upon the accused. When the rules of construction have failed to resove the ambiguity or uncertainity of the law the doubt must be resolved in favour of the accused.

The principle of legality also extends to cover a situation where a person who has been punished for a given offence may not be punished a second time for the same offence. This does not mean that only one punishment may be imposed with regard to any one offence committed. Where the law prescribes that a person who commits a given offence may be punished by a number of punishments, any person who committs the said offence may be sentenced to all or some of them. Any court may pass any lawful sentence combining any of the sentences which it is authorised by law to pass. In these circumstances the accused may not allege that he is being punished more than once despite the fact that more than one penalty is inflicted for the same offence since the law allows various punishments being combined or cumulated in the manner and within the limits provided for by law so as to achieve the various purposes of the law.

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

The principle of legality although it is out to achieve noble goods has some vital inherent weaknesses. The concept implies notwithstanding the content of the law that all power should be derived from law and exercised according to it it. This is the Dicean concept of legality. It assumes that the law itself is based on respect for the supreme value of human dignity. Both this assumptions have been proved wrong in Nazi Germany and the racist regime of South Africa. In both the two cases, not only the contents of laws applied are bad but the legislation have not regard for the dignity of certain classes of persons. A government like the South African one definitely has a legal system which according to the rulers respects the Rule of Law. The racist parliament legislates in the interest of the executive if one looks at the contents of the legislation and representation in parliament, one would in no doubt discover there is no real rule of law in South Africa. Denial of the subjects the freedom of liberty without due course is against the principle of legality, it but this presupposes the existence of an ordinary government. In the narrower sense of law and order, the rule of law may appear to exist even under anarchical regimes because they have a legally established system as abases for all acts of the executive. The principles of legality only requires that the acts of rulers be in accordance with the law which is not practically rational as many such acts may clearly violate the law.

Too much emphasis on the Rule of Law and order as the basic social values may create such a restrictive state of affairs as to be oppressive to the masses. Those who are opposed to the regime which depends on physical force rather than the consent of the governed may readily rise in arms to overthrow it, hence libertarianism necessary in a government. The anger of an oppressed group was the actual downfall

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of colonial states overseas because colonial masters never gave their subjects any rights to liberty.

The requirement that the government must have legitimate power is quite weak beca powers may be legitimate even if they are oppressive. This alone does not ensure by any means the protection of the rights of the individual. An oppressive regime normally has an equally oppressive parliament which legislates according to the wishes of the executive and to the detriment of the governed. One can validly argue that such laws are illegitimate because they have not the principle of legality as to test for the validity of the acts of the executive. The parliamentary representatives in such governments is normally in disfavour of the oppressed class as the case in in South Africa which is an example of the tyrannical regime in Africa. Any institutio which may enforce law in a such a regime may not do so effectively because it is part and parcel of the executive arm.

The rule of law as rule of certainity seeks to establish standards and criteria which would transform unmotivated and unknowable executive discretion into reasonable, ascertainable administrative law. Such a conception of the rule of law is however open to serious criticism. On the one hand it may be said that it is too rigid and all inclusive. The objection is at least as old as Aristotle.

> "It is because" law", he says "cannot cover the whole of the ground and there are subjects which cannot be included in its scope that difficulties arise and the question comes to be debated. Is the rule of law the best law preferable to that of the best man?" 7(5)

In our own times we are all familiar with the argument of the administrator that the ever changing circumstances of economic and social life or the delicate nature of political and diplomatic relations require very flexible government powers. Yet it is worthwhile to follow Aristotle's argument to its conclusion. Whilst admitting that the rule of law in the sense of a fore-ordained regulation, cannot determine certain governmental decision he proceeds to discuss whether such issues should be entrusted to a single individual or to a number of persons with that particular controversy. In his approach, Aristotle comes very near to the administrative problems of our own day.

are much more ready than Dicey for example to recognize the need for wide and
ecretionary powers in the Government. Some loss of certainity may be involved
t uncertainity can be held in check if we pay attention to the methods by which
vernmental decisions are reached.

This emphasis on the methods of decision is seen as far as England is
ncerned in the recent Franks report on administrative tribunals and enquirers,
commendations of which emphasising the importance of openness, fairness and
partiality in the procedure of administrative tribunals and ministrial
quiries have now been translated into law. In another jurisdiction with a
mewhat different legal tradition and by a judicial rather than a legislative
ocess, the French conseltd' Etat has similarly underlined the importance of
thod in administrative procedure as for exemple in the well known decision of 194
which it annulled the withdrawal of a licence for a particular news vendor
cause the requirement of fairness in a semi-penal issue. In this case, an
portunity for the grantee of the licence to present her case had not been
erved.

Thus in its most direct and literal meaning the rule of law implies certainity
human relation. Men should know their rights and duties in society. The Greeks
oke of law or nomoc, as the principle of political associates which assigns
each citizen his position in society and defines its nature and extent. In
10 we find the English House of Commons petitioning King James I in the
llowing terms.

"amongst many other points of happiness and freedom which your Majesty's
subjects of this kingdom have enjoyed under your royal progenitors, there
is one which they have accounted more clear and precious that this, to be
guided and governed by certain rule of law".[9]

It is this interpretation of the rule of law which Dicey in his famous work
e law of the constitution contrasts with "every system of government based on
exercise by persons in authority of wide arbitrary and discretionary laws
government".[10]

2. Equality before the law

Diceys second meaning of the rule of law also requires careful examination Equality before the law" does not mean that the powers of the private citizen re the same as the powers of the public officials. In Christie V Leachinsky it is shown that the powers of arrest possessed by police constables are and always have been somewhat wider than those of private citizens. Did Dicey in end t to mean that every citizen is equal in such a way that a police has not ot any authority to arrest or apprehend a criminal? Should not public officers b iven special powers to enable them to do their duties? What the law requires is hat powers should be defined by law and that any abuse of power or other rongful act by public officers should be subject to control by the courts in he same way as any wrongful act committed by a private citizen. There are ualifications to this second meaning such as diplomatic immunity and judicial ivilege. For the preservation of good reletionship of the countries concerned iplomats have diplomatic immunity as concerns executive action against them. is is borrowed from the international law and its justification can only be preciated by the analysis of international but not municipal law. However diplomatic immunity does not affect the fact that they (diplomats) are legally and to obey the laws of the receiving state in the same manner as the tizens of that state.

It is today as when Dicey wrote that officials are not exempted from the isdiction of the ordinary courts and the law of England knows nothing of eptional offences punished by extra-ordinary tribunals. There are not cial courts for the trial of crimes against the state of civil claims against officials. There are many special courts for the decision of issues ch may affect vitally the proprietory rights of citizens or their entitlements nefit. It is submitted that the rule of law is satisfied provided that the unals are impartial and independent that every man is heard before a decision iven affecting his rights, that reasons are given for decisions and nable regard is paid to precedent.

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e essentiale requirements are, however that decisions should be impartial and
et those who give them should not be liable to pressure from the executive.
e number of tribunals is considerable and so to expect absolute uniformity
f procedure in such circumstances would be unreasonable but there remains
e need for vigilance particularly on the part of parliament lest the grant
statutory powers of adjudication be accompanied by a laxity of procedure
as to defeat the ends of justice under cover of administrative convinience.

This conception of equality before the law has some inherent weakness which
ppells one to raise them. It would be ridiculous for one to talk about
uality before the law where " A man may be punished for a breach of the law
t he can be punished for nothing else".[11] The socio-economic inequality is
pent following this reasoning Bose J in the Indian case of State of West
ngal V Anwar said, "It is impossible to apply rules of abstract equality
conditions which predicate inequality from the start"[12]
e of these problems might be avoided by a more proper formulation of the
inciple of equality, namely the equal situations should be treated in the
me manner, but unequal situations should be treated differently.

The rule of law is basically a juxtaposition of the executive powers
rous the liberty of the individual. This is unfair as it amounts to
ting two inequal as equals. This is the basic assumption of the fundamental
hts clause of the constitution,[13] which prohibates discriminatory treatment
any kind while this provision is central to the Rule of Law. It has one
in weakness that men themselves are unequal in terms of their natural
dowments and factual inequality in the socio-economic order. As the Rule of
w respects right to private property, those people with no property at all
ll be unprotected in that respect and hence unequal to the property owning
ss.

Equal protection of the law can only be effective if we consider the
iety in which it is to operate, otherwise it means only that the law passed
the legislative must not discriminate against people except through discriminati
be justified. Equality before the law is based on legislative justification f
scriminatory laws hence it is the opposite of arbitrary rule.

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he question that arises is how one can enjoy liberties like freedom of wor hip xpression assembly etc... in a developing country like Kenya. This causes ublic concern because most people in Kenya are ignorant of these rights and re illiterate. Freedom of expression is subject to the law of libel and lander. Only informed people can demarcate the limit of their freedoms.

Even with such weaknesses as pinpointed in this section of the dissertati n mphasis on the equality before the law would be a noble objective. Even those ountries in which there is no constitutional declaration of human rights or hich having such declaration have no specific right of equal access to law or qual protection of the laws it may be taken to be the lawyers attitude that ll persons are equal before the law and have equal access to it.

Thus a South African writer and professor of law, professor Wille writes ules of law must be impartial, they must be the same for all persons. partiality is in fact one of the main elements of reasonableness. There is presumption that all the inhabitants of this country enjoy equal civil rights der the law. The Rule of law must consequently provide equality of treatment r all persons irrespective of colour, race religion or any other haracteristics. Thus for the enjoyment of protection of rights it makes difference whether the individual occupies a hut or a palace, whetehr he is a tive or non-native, whether he be white or coloured, European or non-European.

Thus it is common knowledge that it is not always the attitudes of the gislative and is a legislative enjoys parliamentary sovereignity then it may awfully' direct the courts and the lawyers to determine the rights of persons ording to their colour, creed or race. Even in South Africa the basic itude of the lawyer is that justice means equality for all persons in their al and human rights, whether such rights are proclaimed in a constitution not.

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The Constitution is the consequences of the rights of the individual

In the third meaning of the Rule of law Dicey said that the constitution is the consequences of the rights of the individual. The individual rights are therefore not dependent on a constitutional code but on the ordinary law. These rights are therefore not given by a constitution but are inherent in the common law. This might be the justification of the lack of a codified constitution in England. While this concept might have attracted support in England it hasnt happened in Kenya because Kenya has a codified constitution that purports to give and guarantee the individual rights. The citizens whose fundamental rights are infringed may seek remedy in the court and will rely on the constitutional guarantee. Many arguments have been advanced against this method of codified constitution. Enlish lawyers say that where individual rights are granted by the constitution, they can easily be taken away. One of the ways to this is to abrogate these rights during emergency. Another way is by suspending the constitution. Once a constitution is suspended all the rights and guarantees granted by it are also suspended.

An anthology of English writing on constitutional affirmation of fundamental rights might well begin with Jeremy Bentham's comment on the anthology. The anthology would include selected passages from the writings of Sir Ivor Jennings & Dr. K.C. Wheare;

"the English constitutional lawyer has neither tried to express and does not think of expressing the fundamental ideas which are implicit in his unwritten constitution...(A)n English lawyer is apt to shy away from a general proposition like a horse from a ghost...on the whole the politician tomorrow is more likely to be right than the constitutional lawyer of today... the presumption is that the constitutional guarantee of principles of civil and political liberty is unnecessary. The conclusion to be drawn from the experience of India, Pakistan and Ceylon is that one should not attempt to deal with the problems of minorities by constitutional guarantees in the Bill of Rights"[15]

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The Englishmen argue that the ordinary law may prove more effective
otection than constitutional guarantees contained in a written
nstitution of [redacted] consists of a set of legal principles gradually
olved out of the decisions of the courts of justice in individual cases.
cey was of the opinion that what he called general principles of the
nstitution (which we might term civil liberties) and their secure position
England, to the fact that they rested on judicial decisions in the
urts rather than in their entrenchment in a written constitution. But in
arguing Dicey evaded rather than solved the difficulty. What he was
fact saying was that in his opinion civil liberties were in so far safer
de when protected by the judges than when at the mercy of parliament in
ich he reveals his views of prejudices as to the proper function of
rliament. On the other hand he could not and did not argue as a matter of
nstitutional theory that parliament can amend unwritten constitutional rules as
ll as written ones, forcing the courts to adjust to the new situation.

The constitutions of the senior members of the Commonwealth followed
e British pattern in so far as they eschewed any general affirmation or
arantee of the liberties of the subject. Nor indeed were they concerned to
scribe standards of political behaviour, they erected a skeleton as
amework of the machinery of government and had something to say on the interrelationship of
e machinery of government but safeguards against the abuse of authority
re primarily a matter for the ordinary laws of the land the crystallisation of
litical conventions and usages and the ultimate verdict of the electorate.

The most obvious target of criticism is the unqualified constitutional
arantee covering a large area of human conduct e.g. all citizens shall have
eedom of speech. This cannot possibly mean what it appears to say if it
e intended as a statement of an idea which the organs of the state should
rive to attain surely it ought not be expressed as a legal guarantee.[16]

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o Latin Americans, a constitution is a record of what should be done under
deal conditions when those ideal conditions have been achieved, the
onstitution will be respected in its entirety. But until that happy day
rrives, more practical new solutions must be found to pressing problems.
f the qualifications are so framed as to leave a significant area of
onduct outside the competence of the legislature, and it for example the
onstitution gurantees freedom of religion subject only to reasonable restrictions
mposed by the state in the interest of public order and morality, difficulties
ill arise. The vaguer the standards to which legislature encroachments
n the guaranteed freedom must conform the wider will be the field of
ncertainity and the scope for speculative litigation.

The ideal constitution according to the Englishmen would contain few or
o declaration of rights, though the ideal system of law would define and
uarantee many rights. Rights cannot be declared in a s constitution except
n absolute and unqualified terms, unless indeed they are so qualified as to
e meaningless.[17] The English lawyer finds political manifestos out of place
n a legal document particularly when their philosophical foundations are
nsecure. Nor is he in the least impressed by the history of civil liberties
n the majority of countries which have had constitutional declerations or
uarantees of rights.

Many arguments have been advanced against the method of a codified
onstitutions. This does not mean the guarantee of human rights and the protection
f the subjects of the states within unwritten constitution is all that secure.
hen in England, it can't be argued these rights cannot be taken away. The
ountries with codified constitutions argue that unless fundamental rights are
rtain and granted in a written document they will be vulnerable to infringement
the executive. The Habeas Corpus suspension Act of England has the same
ffect the suspension of individual rights granted by unwritten constitutions.
case of a writ of Habeas Corpus, the remedy comes too late but once the
ghts are guaranteed in the constitution both remedies and protection are
anted.

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All the same the limitedness of the British constitutional rights is
ow openly talked about by leading British lawyers and hence the tremendous
ressure now for the adoption of a Bill of Rights in England.[18] Britain now
dheres to the European convention of Human Rights and fundamental freedoms
hich became operative in 1953 in Britain and, on paper, in her colonial
erritories. The high rate of individual petitions against the British
overnment at Strasbourg only goes further to confirm that the British
itizens have been missing the Rule of law in the third category Dicey
lked about.

All in all as I have indicated the rule of law as expounded by
icey manifests some weaknesses. In short as far as Dicey's first principle
concerned he carefully avoided the substence of the law and concentrated on
rmal legality aspects. As far as his second principle of equality is
ncerned, Dicey paid too much and almost exclusive attention to the form of
e law rather than to the mobilisation of the same.

his third principle is concerned the entrenchment and certainity of a judge -
de law is now asking for the past for Britain and for Kenya, a fact which
kes Dicey's conceptualisation even weaker today.

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DCAN CONCEPTION OF THE RULE OF LAW

RULE OF LAW AND ITS IMPLICATIONS TODAY

In this section emphsis will be placed upon three related but seperate ses. First, the rule of law expresses a preference for law and order within community rather than anarchy, warfare and constant strife. In this sense, le of law is a philosophical view of society which in the western tradition linked with basic democratic notions. Second, the rule of law expresses legal doctrine of fundamental importance, namely that government must be nducted according to law, a general principle of law which is declared and plied by judicial decision. Third, the rule of law refers to a body of litical opinion about what the detailed rules of law should promote in matters th of substance(for example, whther the Government should have power to tain citizens without trial) and of procedure(for example the presumption innocence in criminal trials, and the independence of the judiciary) while e second sense is founded on decisions of the courts, and expresses an isting legal doctrine, the third sense is more directly relevant to discussion parliament and ~~mx~~ elsewhere when present law is criticized and proposals for w law examined.

Law and order better than anarchy

In a limited sense law and order, the rule of law may appear to be preserved a dictatorship or a military occupation as well as by a democratic form of vernment. Under a government which is not freely elected, the courts of law continue to function, setting disputes between private citizens and such putes between a citizen and government officials as the regime permits to be so ided. Even in this restricted sense, the rule of law expresses some preference human disputes to be settled by peaceful means without recourse to armed ce, terrorism or other forms of physical might. But undue stress on law and er or social values readily leads to the restriction or suppression of litical liberty. Political groups opposed to regime dependent on physical h might rather than popular consent may readily turn to the adoption of lent means to overthrow it. Constitutional experience in Britain and other tern states as well as Br tain's experience as a colonial power has shown that ntenance of law and order and the existence of political liberty are not ually exclusive, but mutually inter-de endent.

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II

ODERN CONCEPTION OF THE RULE OF LAW

. RULE OF LAW AND ITS IMPLICATIONS TODAY

In this section emphasis will be placed upon three related but separate
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stern states as well as Britain's experience as a colonial power has shown that
intenance of law and order and the existence of political liberty are not
ually exclusive, but mutually inter-dependent.

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s the universal Declaration of Human Rights said,

"It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". 19

a democracy, it must be possible by the exercise of political rights to enge a government without threatening the existence of the state. Unless ie possibility exists, the state becomes identified with the sheer force of ercive right and the role of law within the state is virtually emptied of mo ntent; for the state cannot be conceived in terms of force alone

Government according to law

It is basic rule of constitutional law that the organs of government must themselves operate through law. It is because of this fundamental principle legality that legislation must be passed through parliament. The rule of w thus serves as a buttress for the democratic principle, since new powers of vernment may be conferred only by parliament. The doctrine of government cording to law requires that a person directly affected by government action st be able, if necessary to challenge the legality of that action before a urt, and not merely to register a complaint with the department concerned whet will be in an ordinary court like in Britain or a federal administrative urt as in Germany, both approaches are recognised to be ways of maintaining rule of law. Nor is the existence of specialised tribunals contrary to the e of law, providing there are adequate means of ensuring that the tribunals subject to supervision by superior courts, and are genuinely independent of government departments concerned.

The rule of law does however require that public authorities and officials subject to effective legal sanctions if they depart from the law. Often the ction is that their acts are declared invalid and of no legal effect by the rts. But another sanction is the duty to compensate citizens whose rights have n infringed. Thus in the U.S.A, the president ~~while~~ in office is immune while e liability for his unlawful acts. As the watergate affair showed in 1974, when sident Nixon resigned rather than face impeachment proceedings before a hostile gress.

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s importance of impeachment proceedings before a hostile congress, tx is
et it provides a constitutional means of removing a president, thus enabling
r to be sued or prosecuted for unlawful acts which he may have committed
ile in office.

The rule of law as a broad political doctrine

If the law is not to become merely a means ofachieving whatever ends a
rticular government may favour, the rule of law must go beyond the principle
egality. The inherited experience and values of the legal system are
levant not only to the question, what legal powers ought the government to
ve? If for example the government is proposing to introduce criminal sanctions
r conduct contrary to its economic or social policies, a lawyer will want
e new legislation to respect accepted principles of fair criminal procedure.
But for xxx a number of reasons the opinion of lawyers may not be
animous in invoking the rule of law in a legislative context. What are the
sential values which have emerged from centuries of legal experience? Are
ey absolute values or may there be circumstances in which political x
cessity justifies the legislative in departing from them? For example, the
le of law requires that the power of interpreting statutes is vested in the
urts, but is this power of the courts reduced if the courts look at the report
a government committee as an aid to interpreting a statute passed to give
fect to the report.[20] Again, physical liberty and trial by jury are two
ctims of the assault upon law and order. Moreover the legal system exists
thin a social and political context; a legislator's perception of legal values
likely to be effected by his outlook on other social and political questions.
conservative lawyer in parliament will be more inclined than a labour lawyer
oppose measures which expropriate private property or confer immunities upon
de unions. A labour lawyer is likely to oppose new police powers for dealing
h public demonstrations(except, possibly, if they are meant to be used against
ups with fascist tendencies). A liberal lawyer is likely to support proposals
a Bill of rights and other means of protecting individuals and minorities.

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Is the rule of law in this broad political sense too subjective and uncertain to be of any value? would discussion of new legislation be clearer if the rule of law were excluded from the vocabulary of debate? Even legal philosophers are divided amongst themselves. An attempt to ascertain certain values inherent in the system of law was made by Professor Lon Fuller, who argued for example, that the enactment of secret laws would be contrary to the essential nature of legal system, as would heavy reliance on retrospective legislation or legislation imposing criminal sanctions for conduct which is not defined but may be deemed undesirable by an officiel. But these views have not found universal favour.[22]

INTERNATIONAL MOVEMENT TO PROMOTE THE RULE OF LAW CONCEPT

STOP 2/3/90.

Since the creation of the United nations in 1945 and the forum it provided for the articulation of a multiplicity of cultural experiences and exchange, the rule of law concept has undergone tremendous changes. The early formalistic approach to the rule of law concept as posited by Dicey, which even Hitlers nazi regime could claim some adherence to, was to change speedily from 1945 by the emergence and spread of the principles of human rights as basis minimum normative standards of behaviour required of all states members of the world body. No state henceforth could clearly boast of the rule of law without incorporating basic human rights in the substantive body of its constitutional practice and laws. These so-called basic rights were further elaborated upon at the United Nations level in the 1948 Universal Declaration for Human Rights. Two further important definitional instruments were passed by the United Nations General Assembly in 1966, the International Covenant on Civil and Political Rights[23] and its optional protocol for individual petitions[24] and the International Covenant on Economic, Social and Cultural Rights.[24(a)] All these come into force in 1976 and, Kenya is a party to all,[26] except the optional protocol.

There are numerous other international instruments of legal and quasi-legal nature which define in detail some of the aspects of human rights standards and methods for their achievements.

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will mention only a few more. In May 1974 the General Assembly responded to the demands of the non-aligned bloc of countries and passed the Declaration on the establishment of a New International Economic Order[26] together with the Programme of Action on the implementation of A New International Economic Order.[27] In the same year the controversial charter of Economic Rights and Duties of states[28] was also passed.

What these International standards setting instruments have done is to move the ideological veil of laisser fare role of states in the socio-economic activities within their territorial jurisdiction and internationally to extend of them more and open participation so as to redress ~~xxxxxxx~~ internal inequalities in the distribution of social wealth. Whether by free consent or coercion states are required to adopt the stipulated standards of behaviour which greatly add to those contained within the earlier limited conceptualisation of the rule of law in political and constitutional spheres. The extent to which states adthere to these new ~~xxxxxxxxxx~~ socio-legal standards depend to a great extent on the historical backgrounds and the type and magnitude of internal and external pressures particular states are exposed to. What is clear is that the expanded scope of state duties and powers carry with it equal dangers of abuse which may erode most of the traditional rights without necessarily adding to them or replacing them with better, more meaningful alternatives.

It is not only at the United Nations level that the rule of law concept received expansion. At regional levels, such as the (western) European arrangements for human rights which we have seen, the incorporation of human rights standards have meant substancial changes in the substance of the rule of law which states concerned are expected to adthere to within their respective borders.

PERCEPTION OF PRIVATE INTERNATIONAL BODIES

The International Commission of Jurists an international organization with consultative status under the United Nations has undertaken a series of studies which has been discussed at successive congresses in various parts of the world.

the summer of 1952 a few prominent lawyers from different parts of the
rld met in West Berlin to discuss reported violations of fundamental rights
some parts of Europe. The outcome was the formation of an organization
wn as the International Commission of Jurists which is a non-political
sociation whose object is the mobilization of the legal profession for the
tection of human rights and the expansion and fulfilment of the rule of
. The International Commission of Jurists regards the rule of law as a
ing concept permeating several branches of the law and having great
tical importance in life of every human being. The doctrine as expounded
icey has undergone so much changes that almost an independant theory
been created. The rule has come to be identified with the rights of man.
ll examine the opinions of modern jurists beginning, from the Act of Athens
55 to the resolutions of the Lagos congress in 1961.

Athens Declaration of 1955

The 1955 International commission of Jurists conference that came out with
ct of Athens approached the doctrine of rule of law not only as a legal
t but also as an important concept for the attainment of social equality
ical stability. One of the main emphasis was that an independent judiciary
profession are essential for the maintenance of the Rule of law and proper
stration of justice. Though modern Jurists show respect to some of Dicey's
tion, they do not advocate strict adherance to 3 of Dicey's expositions
anized legal systems capable of administering justice. These organized
systems do not have to adthere to Dicey's meaning of law . Modification
ring out these meaning of law will not mean that there's no Rule of law
stice is administered to the citizens the objective of the Rule of law
ng to these jurists will have been attained.

a free society, whether it has a written constitution or not and whether
this constitution is subject to the review of judicial body, the position
judiciary and of the individual judges is of special importance. It is
teristic of a free society that those to whom the power of governing is
d can only act under and within the authority of the law. The power of
slative to make law whether or not subject to formal constitutional limit

e in a free society exercised on the assumption that the fundamental liberties
f the people as a whole will not be violated. The inevitability of human
rror, especially when self-interest(which included the exercise of power as
n and in itself) comes into conflict with the claims of others requires that the
w and the assumptions which underlie it should be interpreted by a judiciary
hich is as far as possible independent of the Executive and the legislature.
e conception of independence does not mean that independence ~~xR~~ should be
solute, entitling a judge to act an entirely arbitrary manner. The judges
ty is to observe the law and the assumptions which underlie it, in the
ght of his own conscience, to the best of his abilities.[29]

To assert the independence of the judiciary within the restricted connotation
dependence is even in free societies to state an ideal rather than a fully
olized condition of fact. The individual judge, the judicial collegium or
heat court are not exempt from human imperfection or impervious to the
fluence of sectional interest. It is therefore important to have regard to the
dependence not only of the judge but also of the judiciary as an institution.
latter may provide tradition and a sense of corporate responsibility which are
tronger guarantee of independence than the private conscience of the individual
ge. There must be machinery for the selection, promotion and, in case of
reme necessity, removal of judges. This may involve the participation of
executive, the legislature, the judiciary itself, other institutions(such
the Bar), the people through the electorate and the combination of two or
e of these bodies what is essential to a free society under the Rule of
is that such machinery and perhaps more important, the tradition which
ern its exercise should themselves express the spirit of the law and its
rlying assumptions.[30]

It is through such independence of the judiciary that effective and efficient
nistration of justice can occur. The ~~as~~ usefulness of the 3 expositions of
y as concerning the Rule of law can be minimal if such independence is non-
tent because the arbitrary acts of the Executive would go unchecked. The
tion of the judiciary in a society under the Rule of law is closely associated
the function of the legal profession. In the same way as the judiciary is not
pendent in the sense that it is able to exercise arbitrary power so the legal

ofession in not 'free' if by freedom is meant liberty to pursue its own ends
those of its clients without regard to the law or to its underlying assumptions.
t in the same way as the judiciary the legal profession must be free from
interference from the executive, from legislature and indeed from
om the judiciary within the proper sphere of discretion(when properly
ercised) which the law allows it. The legal profession can be a restraining
rce on the arbitrariness of other centres of power within society and from
ore positive aspect it can exercise an educational influence on the general
blic. The lawyer by virtue of his technical knowledge has a special
ponsibility to translate into effective action the legitimate aspirations
the individuals, who make up society upon whose fundamental rights and
nity a society under the Rule of law is here assumed to be based.[31]
h an independent legal profession coupled with an independant judiciary is
ential for the maintenance of the Rule of law and proper administration of
tice and this was the view or the recommendation at the 1955 International
mission of justice conference held in Athens. Putting all our faith in the
ey's expositions and having no effective judiciary and legal profession will
n very little. Thus having an efficient judiciary and legal profession would
ult in the achievement of what Dicey had in mind and therefore the struggle
the objective is to achieve a standard within our judiciary that would make it
charge its duties effectively, still at Athens the international commission
jurists said that the Rule of law,"

"Springs from the rights of the individual developed through history
he age-old struggle for freedom which rights include freedom of speech, worship,
mbly and association and the right to free elections to the end that laws
enacted by the duly elected representatives of the people and afford
ection of all."[32]

The core of this definition is that the Rule of law is more than a formal
gnition by a government of the natural rights as free election
use it is through this exercise that people are able to choose their leaders
ny form of government.

..../25

is conforms to the social contract theory of Hobbes.

Declaration of Delhi 1959

The declaration of Delhi 1959 closely followed and re-affirmed the finding the Act of Athens. Its finding can be summarised as follows:

The Rule of law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only the safeguard and advance the civil and political rights of the individual in a free society but also to establish social educational and cultural condition, under which his legitimate aspirations and dignity may be realised."[33]

The opinion of the jurists in these conferences about the Rule of Law and ay's are at great variance. Dicays expositions did not include any political economic concept. The jurists in the working paper of Delhi included both these. One of the requests of the international commission of jurists that in Delhi was that there should be full employment of the resources to give tical effect throuhg out the world to the conclusion of the Rule of Law.[34] connection between the Rule of Law and economic development was not mpleted by Dicey.

function of the Rule of Law at the time of Dicay was directed at individaul from the arbitrary power of the executives. The modern concept he Rule of Law concerns itself more with the values that are essential to a society. It aims at creating a society that provides an ordered frame- within which all the members find fullest expression. A free society will s recognize the supreme value of human personality.[35] It conceives the state servant and not the master of the individual . It must therefore premarily rn itself with the rights of the individaul.

The Delhi declaration of 1959 in its finding that man's legitimate aspirations ignity must be realized was emphasizing the individuals natural rights.

include his right to assert his personal freedom from state interference spiritual fr political activities i.e. worship, speech and assembly.

..../26

t has been recognized that such rights without some education and economic
bility would not be of any use. It is this realisation that has led to the 2nd
ind of individual rights, whichever concerned with the claim of all individuals to
ave some access to the minimum material means to help them utilize these rights.
his is particularly so in developing countries what would for example be the
alue of a right that, any person charged with a criminal offence.

"Shall be permitted to defend hemself before the court in person or by a legal representative of his own choice" 36 when the majority of the people lack the economic power to execise this right?

is is what the Delhi Declaration meant when it demand the establishment of .....
cial economic and educational conditions" to enable the citizens to realize
eir rights. It is well known that in modern circumstances the declaration of
man Rights in a constitution or their theoretical recognition in law may be
ndered worth-less if the litigant is not able to enforce the right. His ability
enforce or protect these rights before the courts often depend on his ability
serve adequate legal representation. His common knowledge that everywhere the
rvices of competent lawyers are costly and difficult to obtain. The congress
Delhi said:

"Equal access to law for the rich and poor alike is essential to the maintenance of the Rule of law. It is therefore, essential to provide adequate legal advice and representation to all those threatened as to their life, liberty, property or reputation, who are not able to pay for it. This may be carried out in diffrent ways and is on the whole at present more comprehensively observed in regard to criminal as opposed to civil cases. It is necessary, however to assert the full implication of the principle, in particular in so far as adequate means, legal advice or representation by lawyers for the requisite standing and experience. This is a question which cannot be altogether dissociated from the question of adequate remuneration for the services rendered. The primary obligation rests on the legal profession to sponsor and use its best efforts to ensure that adequate legal advice and representation are provided. An obligation also rests upon the state and community to assist the legal profession in carrying out this responsibility. 37

he Delhi Declaration views about what the citizens should be guaranteed , can be quated with the socialist views. In an article called 'Justice in Tanzania' the ttorney General pointed out the distinction between the meaning of freedom in iberal democratic theory and that which is accepted in other political theories . his comment fits in this section of the dissertation because it puts more light n what the Delhi Declaration was out to achieve. The Attorney General stated that n English Constitutional theory freedom is conceptualized in an essentially egative way. Its totality is determined by adding up those areas of individual onduct with which the state is not permitted to interfere. This freedom is efined with reference to the individual and means that the state may not limit reedom of expression movement etc. Socialist political theory looks at freedom n a more positive sense. Under this approach, it becomes the duty of the state o guarentee economic political and cultural rights of the mass of the people. In he sense the distinction may be said to be between a theory of freedom from the tate and one of freedom within the state. In another sense, socialists would y that it is absurd to talk about the political freedom of liberal democracy, hen gross economic and cultural differences exist within society.

As a concluding comment as far as the Delhi Declaration is concerned its portant to note that the participants in the congress worked alot for an cceptable definition of the rule of law. The rule of law was defined as,

> "The principles, institutions and procedures not always identical but broadly similar which the experience and traditions of lawyers in different countries of the world often having themselves varying political structures and economic backgrounds have shown to be important to protect the individual from abitrary government and to enable him to enjoy the dignity of man." [39]

is definition associates legal principles, institutions and procedures with the lues they are designed to protect. That is the thought underlying the title given this congress "the rule of law in a free society", on the one hand we speak a free society, on the other of a freedom from abitrary government and cognition of the dignity of man, but the underlying ideas is the same.

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It is not proper to be dogmatic about the appropriatness of different legal institutions and procedures because the differing political and social conditions in which the various legal systems of the world operate must be born in mind. The ambitious concluding words of the definition i.e. protection from abitrary government and enjoyment of the dignity of man should be taken into consideration. They are not intended to be a mere rhetorical repetition of similar ideas. Supremary and certainty of law do not supply all the elements of the rule of law, indeed certainty of law is a relative conception to be weighed against discretion by reference to extraneous values. Those values we find in the conception of the dignity of man. It includes the political and civil liberties, the right to responsible government, freedom of speech and association by which in the historical development of many countries, men have asserted that they are matters and not the servants of the state, but it is much more.

The values found in the conception of dignity of man recognises that, without a minimun standard of education and economic security, political and civil freedom may be more formal then real. This does not mean that the lawyer as such is competent to lay down the economic and social programme of his society but it does imply that in many spheres, particularly in administrative law he will be called upon to strike a just balance between measures designed to enhance man's political and civil rights. This wide interpretation of the dignity of man has been emphasized because too often in the past the protagonists of the rules of law have interpreted their cause or allowed it to be interpreted in way unsympathetic to the broad stream of social and economic progress.

(d) Law of Lagos -1961

The initiative of the International Commission of Jurists in calling an African conference and inviting to it in their Personal capacities lawyers from the different countries South of the Sahara , Sprang from a realisation of the deep - rooted love of justice inherit in African tradition.

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The intention was to measure against the tradition the legal systems which are the legacy of the colonial powers and to asses the political situation in the newly independent states in the light of the guiding principles of the rule of law. As is known, the principle objective of the international commission of of jurists is to act as the guardian of human rights and fundamental freedom in order to protect the individual against arbitrary acts of government and to enable him to enjoy fundemental human diginity. The main conclusion that emerged from the Lagos conference was that the dignity of human person is a universal concept, regardless of the different forms it may assume in one or anothe cultural enviroment. African lawyers emphatically rejected any notion of a purely African judicial system, as distinct from other systems, constructed sorely on the basis of Native custom. Africans have eleborated a concept of human dignity during the crucial years leading to their emancipation which recognises no limitations whatsoever.

At Lagos African lawyers showed that the Rule of Law is infact a concept shared by countries " having varying political structures and economic background and that it is not bound up with any [redacted] ideology. Observers at the lagos conference from other continents were deeply impressed by the African Lawyers determination to aviod sacrificing fundemental freedoms to economic and technological development. It is quite evident that the new African states must simultaneously cope with establishing thier political institutions developing their economy and setting thier social structure, without abandoning if at all possible, the most vaulable elements of thier traditional institutions, such as the solidarity of the community and the family. The law of Lagos stated that the rules of law" cannot be fully realised unless legislative bodies have been established inaccordance with the will of the people who have occupied thier constitution freely"

This vital priciple adopted unanimously by the conference derives from the concept of the Rule of law as defined by the Athens and New Delhi congresses. When read together with the declaration that the principle embodied in the conclusions (of the Lagos conference) should apply to any Society, free or otherwise.

This expresses a conviction shared by the participants in the conference and by the international commission of jurists namely, that whole government still responsible for the administration of colonial territories should respect the Rule of Law in exercising those responsibilities, the Rule of law will not trully prevail in such territories until they have achieved political independence A new element has therefore been incorporated in the concept of the Rule of law expressed in the law of Lagos as follows.

"in order to maintain adequately the Rule of law all governments should adhere to the principle of democratic representation in their legislatives". 41

To conclude this chapter it deems fit to state that, it is not possible formulate a simple and clear cut statement of the rule of law as a broad political doctrine. As society develops and as the tasks of government change, lawyers, political adapt the received values of law to meet changing needs. Therefore, even Dicey's exposition cannot be termed as outdated. Both Dicey's exposition of the rule of law and the modern concept of the rule of law emphasize different things but are out toachieve a common object i.e. human dignity. Therefore in the succeding chapters as I have indicated in the introduction I will utilise both the Dicay's exposition of the doctrine and modern exposition.

CHAPTER 1

Footnotes

1. Kanyechembe G. - Constitutional Law And Govenment in Uganda, East African Literature Bureau 1973 at page 13/
2. Wade and Phillips - Constitutional And Administrative Law 9th Edition at page 86.
3. d' Entrèves page 86; maitland, pp 100-4, C.H Mcllwan - Constitionalism Ancient And Modern, chapter 4.
4. For the rule of law in 16th century England, see G.R. Elton, Studies In Tudor Stuart Politics And Government Vol 1, page 260

E.CG. Wade., "preface to the Tenth Edition", 1x -x111, of A.V. Dicay - An Interduction To The Study Of The law Of The Constitution (London, Macmillan, 1959, a 1973 reprint) pp. 195, 198-9

6. 1932 A.C. 662

7. 1933 I K.B 629 [illegible] cox lox

7b) Norman North rule of law in free state

8. Norman S. Marsh - Rule of Law in a free society page 53

9. 1 bid page 53 paragraph 1

10. Ibid " " " 2

11. 1932 AC 662

12. 1953 All Indian Report S.C. 75

13. Section 52 of the Kenya constitution Act No. 5 of 1969

14. African Conference on the Rule of Law - A report on the proceedings of the conference page 78

15. Jenninga - Some Charateristics Of The India Constitution 1953 pp 3-4

16. S.A de Smith - The New Common wealth And Its Constitutions at page 167

17. Dr. K.C. Wheare - Modern Constitutions 1951 page 75

18. See for instance the strong arguments that countries with written constitutional bills of rights and constitutional courts have for better protection of citizens rights than the English system - H.W.R. Wade, Constitutional Fundamentals (London, Stevens and Sons, 1980) at pp8 and 24-40, see also Lord Scarman's appeal where he recently said that judges need it, parliament needs it, the Government needs it ...." The Times , April 19, 1980.

19. d' Entries, The Notion Of The State, page 69

20. Black - Clawson International Ltdv papierwerke AG (1975) AC 591

21. CF. Jennings Law And Constitution, p 317. 'the "Principles" of Constitional lawyers are always a dangerous foundation for the formation of policy.

22. See H . L.A. Hart (1958) 1 Hart. L. R. 593

23. Gen. Ass. Res. 2200A, 214.N G ADR, Supp. (No16) 52, U.N. Doc A/6316 (1966)

24. Gen. Ass. Res. 2200A (xx1) of Dec. 16, 1966. U.N. Gen Ass. off. Rec. 21 sess, supp. No. 16 (A/ 6316), p. 59.

25. Gen Ass. Res. 2200A (xx1) of Dec. 16, 1966, U.N. Gen/ Ass. off. Rec., 21st sess, supp No 16 (A/6316).

26. The International covenant on civil and political Rights, 23/3/1976; and International covenant on civil and political Rights, 23/3/1976; and International covenant on Economic, Social and cultural Rights, 3/1/1976 -

U.N. Human Rights International Instruments, Signatures Ratifications, Accession, e.t.c. 1st January 1978 ST/HR/4 at page 2.

Kenya retified the conventions in 1972, [illegible]

U.N. Gen. Ass. Res No. 3201 (S-V1) of 1st May 1974, 22, 29th plennery meeting.

U.N. Gen. Ass. Res. 3281 (xx1x) of 12 Dec, 1974, see a detailed study of this in Meagher, R.F. An International Redistribution of Wealth and Power: A study of the Charter of Economic Rights and Duties of States (New York, Pergamon Press, 1979)

Norman S. Marsh - Rule of Law in a free Society page 279

Ibid page 280

Ibid " 281

Ibid " 300

see Declaration of Delhi 1955 - In Rule of Law in a free state by Norman S. Marsh page 3

Ibid

The Delhi Declaration seem to have laid more emphasis on Human dignity than anything alse.

legality
Equality before the law

Kenya Constitution section 77(2)d

Congress of international jurists at Delhi in 1959

Robert martin - Personal Freedom And The Law In Tanzania (an article by Mr. O.C.O. Chirwaes)

Norman S. Marsh - Rule of law in a free state page 56

African conference on the rule of law - Forward by Jean flavan Lalive (the African conference on the rule of law head at Lagos)

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Supra

CHAPTER TWO

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

The main purpose of the concept of the rule of law in modern states is the preservation of the rights of the individual against unwarranted executive interference. For the rule of law to be a reality, a legal concept with practical application, there are some constitutional practices that must attained.

The Delhi Declaration clearly stated that the rule of law would only be practicable in a free society. It is this freedom that the Kenya constitution seeks to guarantee and protect. This is done by the incorporation of the rule of law concept in the constitution. As I have stated in the first chapter the main purpose of the concept of the rule of law is the protection of the rights of individual against excessive executive interference which would result to arbitrariness. one of the ways the Kenyan constitution has ensured this protection is the constitutional embodiment and entrenchment of the fundamental rights chapter in the constitution.

THE FUNDAMENTAL RIGHTS

Some fundamental rights are indeed expressions of the rule of law but others are not. The protection of the rights of the individual against excessive executive interference which would result to abitrariness means that the fundamental rights should be respected. The rule of law is one of ensuring proper respect for fundamental rights. In this section I will restrict myself to only some fundamental rights which are indeed expressions of the rule law. Chapter five of the Kenya constitution sets out the bill of rights clauses. These clauses are contained in sections ~~70-85~~. The fundamental rights I am going to deal with are, protection of rights to life, protection of right to personal liberty, Protection from slavery and forced labour, protection from inhuman treatment, protection of freedom of expression, protection from discrimination of grounds of the race, etc.

(a) Substance rights

Section 70 of the constitution provides that every person in Kenya is entitled to the fundamental rights and freedom of the individual regardless of race, tribe, place of origin or residence ..... These rights are however, subject to the rights and freedoms of others and the public interest. The effectiveness of a section like this one is therefore very little in the light of paragraphs (a) to (c) of section 70 which set out the provision to the enjoyment of rights listed down in this section. If the effect of such provision is to render negative what appears to be positive to the individual upon first meaning then we should dispense with such a section altogether as it would make little or no difference in practice. If such a section remains only for judicial reference upon sentencing an accused person, thenit is of no use to the

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ractising lawyer as he cannot comfortably rely on it to advice his client.

Section 71 [2] protects the rights to life. Such a right can be deprived ufully. This is protective in so far as deprivation of the right to life y be exercised unlawfully as the case in most dictatorship military regimes early 1980 the Attorney general in a reply to a parliamentary question stated nly that the police have got my authority to shoot to kill(suspected robbers). was not until a new Attorney general was appointed that the goverment through e new Attorney general responded in paliament and denounced the order by ex- laining correctly that it is illegal under the law for policeman to shoot or oot to kill suspects unless extreme circumstances made this necessary. It's lear that when the government reacted through the Attorney general had in mind protection in our constitution of the right to life. The order was unconstitional

Section 72 (1) [3] has one of the longest provisions it protect the right to rsonal liberty but the provisions which follow in sub-section (1 render the ole section uneffective and useless. Constitution maker wanted to guard inst a posible abuse of the law by the hard cores in the community. De Smith arts that effective consititutional in a gurentees rigidly entrenched are consititutional in so far as they obstruct the verment from executing its plans.[4] The subjects must sacrifice this rights r the benefit of the nation hood. According to this view this may be a good idea in veloping countries because in these states unnecessary critism of vernment policy under the pretext of rights to personal liberty and freedom expression may destroy the spirit of National development. Another argument that since the rule of law must conform to social-economic circumstances n Desmiths view needs support. But the rights of individuals shouldn't be tricted unfairly under the pretext that such rights shouldn't be exalted cause they will militate against socio-economic development Freedom of movement erty of expression and association must be made subject to the interest of the tion in the development plans but the subjection must be reasonable to avoid element of arbitrariness.

Section 73[5] protects against slavery and forced labour. This right is ardly protected.

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This is because servitude which the section I believe is out to protect go slightly beyond forced labour. However there are of course some exceptions to this section, exceptions which are reasonably justifiable in a democratic society eg. section 73(3) d which deals with compulsory national service and compulsory participation in effort to prevent Natural disasters. Protection against forced labour is very relevant in Kenyan economic situation where there is much unemployment. This is because the government might resort into forcing people to engage themselves in providing labour where they don't want e.g. the unemployed youth has always been urged to find employment in the farms. This contradicts the type of education they have. With a protective proviso against forced labour an individual is left to make his own choice without dictation from any quarter.

Section 74[7] gives the protection from inhuman treatment and it also contains some exceptions which make some treatment lawful although inhuman. Torture, inhuman or degrading treatment which is unlawful would be very much forthcoming from the government security forces were it not for such a proviso.

There is also the protection of freedom of conscience under section 78[8]. It therefore gives cognizance to freedom of worship although it has provisos, under paragraphs (a) to (b) which limit the enjoyment of such freedom if such enjoyment may go against the public interest or if not reasonably justifiable in a democratic society. On 15th May 1964 Dini ya Msambwa was granted official registration as a lawful society within the meaning of the societies Act. It enjoyed the same rights as any other religion in Kenya under section 78 of the consitution. On october 1968 the Attorney General declared Dini ya Msambwa as a prescribed Society and thus doing away with the religion.[9(a)] The religion had become a political organisation with a distinct element of Trade Union politics. Judging by the political activities it had indulged itself in, the 1968 order banning Dini ya Msambwa sect was a restriction of freedom of conscience but a a justifiable restriction.

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Freedom of expression is protected by section 79 but it also has some limitations. On 22nd of February 1981 the Kenya government in a special Kenya Gazette notice signed by the Minister of state in the office of the President banned the Libyan owned weekly newspaper, the VOICE OF AFRICA. No specific reason was given for the ban other than that it was not in the public's interest to allow the newspaper to continue operating. Just before the banning order, the newspaper had become very controversial i.e it claimed that the New year's Eve bomb incident at the Norfolk Hotel in Nairobi was the work of Israel intelligence rather than that of an Arab terrorist as the government had claimed and the paper was thereafter highly critised by several government ministers. The banning of the newspaper together with being an infringment of the freedom of the press also was an infringement of the freedom of expression. But according to the limitation proviso to section 79 the banning was justifiable and its that proviso that the government relied on in doing away with the editors freedom of expression.

Section 82 of the constitution deals with protection against discrimination on any ground at all except where the dictates of public interest and interests of other people are at stake. Such circumstances allow for positive discrimination e.g. the discrimination that a non-muslim cannot inherit the property of a Moslem under islamic customary law. Should Streaming

Procedural rights

These can fall under two categories i.e. criminal safeguards and civil safeguards. In both cases the provisions provide minimum safeguards for trial. The application of the right to trial is only possible in a framework that has genuine desire to uphold the rule of law and human rights. Section 77(1) provides that on being apprehended an accused shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law unless the charge is withdrawn. Among the criminal safeguards granted to one charged with a criminal offence in sub section 2 is included the presumption of innocence until one is proved guilty or pleads guilty, right of accused to be informed as soon as is reasonably practicable in a language that he understands and in

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...detail of the nature of the offence charged, right to adequate time and
cilities to prepare his defence and the right to plead his case either in per
by a legal representative of his own choice. Also the principle of non-
troactivity is protected together with the principle of legality. How some
these safeguards are practised by the Kenyan courts is what I will dwell on
iefly. They constitute in the area of administrative law what is referred to
Natural Justice whose most stressed element is the provision of a fair heari
Section 77 (1) presupposes amongst others an independent court established
law. How independent the Kenya judiciary is tackled substantially in the
cond part of this chapter. Also in the case of Republic v Sandstrom [10] which
have criticised in chapter three. It turns our clearly that our judiciary is
t all that independent.

The presumption of innocence is provided for by section 77 (2) (a).[11] The
rinciple of the law is that when one is arrested he is presumed not guilty
til proven guilty or pleads guilty. When the cases come up before the courts
Kenya this presumption is upheld when a policeman turns himself into an
vestigator, prosecutor, judge and executor in the cases of suspected criminal
is presumption is not upheld. In the case of Mwithaga VR it can beeasily
ferred that the provision granted to an accused for reasonable time to prepare
defence can be ignored if and when deemed necessary. In this case the accu
s a very controversial politician who was charged with the assault of his
parated wife. The offence charged had been committed twenty months before th
ial. The accused was also alleged to have done damage to property. The defe
unsel argued that he had not been given time to prepare his defence since the
se was mentioned in the morning and called up for hearing in the afternoon.
e trial court convicted the accused and the defence counsel appealed to the H
urt on the ground that he had not been given adequate time to prepare the
fence. The appeal was rejected. Apprently the rights of the accused had bee
olated.

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Even the rights for an interpreter as provided for in section 77(2)(f) has been violated in Kenya. In Andrea VR, the accused was a portuguese citizen who was found in possession of prohibited literature. He was tried in Swahili and English neither of which he could understand. The accused was not granted the services of an interpreter and he appealed on that ground and the High Court retried him. As concerns the right of the accused to either defend himself or to appeal by a legal representative of ones choice. I have substantially dealt with this in the second part of chapter three. The right of an accused to be informed as soon as is reasonably possible and in detail the nature of his offence is covered under section 72. In Shimchetto VR the accused was prosecuted for corruption in office. He was detained for five weeks without either being told of the reasons for his detention or his arrest. On appeal against conviction the appellant argued that his constitutional rights had been violated. The High Court was reluctant to quash the conviction despite the blatent violation of the rights of the accused as provided for. The court contented itself with critic of such practice by the prosecution. It is clear therefore that redress may not be so readily forthcoming.

The rights to trial is merely a constituent of Human rights and thats why analysed it within that context. The right to trial has suffered from excessive qualification as the case with other rights guaranteed by the constitution. The phrase used throughout the provisions of the fundamental rights chapter is public interest. This is one of the fundamental principles of public law, reflecting the fact that all individuals are part of a community and that their individual interests must be balanced against those of the collectivity which is made up mainly of theworkers, peasants and unemployed. There does not seem to be a single country where there are no social classes. What characterises Kenya is class system combining pre-capitalistic and capitalistic traits. Therefore the misuse of the term public interest plays an ideological role in distorting the nature of class antagonism and struggles in Kenya by making it possible for the ruling social classes, which include the state.

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The State bureacratic stratum tries to continue and perpetuate its exploitation and suppression of the workers peasants and the unemployed all in the name of public good and public security, by equating public interest with the interests of a small sovereign elite which is the ruling class. This has helped in eroding where the ruling class's guaranteed by our constitution.

Also by invoking say, the Preservation of Public Security Act which the president can bring into operation at his discretion (some parts of cap 57 can't be invoked without approval by parliament e.g. part III) the fundamental rights are put in great threat. This explains why the Human rights body, Amnesty International has condemned detentions without trial affected under Kenya's prevention of public security Act. Despite its constitutionality the measurers taken under the Act do not accord with the standards set by International law as suggested by the universal declaration and the international covenant which are a development and authoratative interpretation of the united Nations Charter which binds all member states. As the Act now stands the executive can use it to intrude usurpingly on virtually every field of human conduct.

Some of these threatening factors to the rights of the individual show that the rights as enshrined in our constitution are merely instruments in the political battle. The powers that they will use the rights to justify themselves and legitimise the political system. Buts should the same rights stand in their way they will be brushed aside. It is the practice of these rights which justfies the place of the individuals rights in our legal system and its only when such rights are respected that the rule of law can exist because the rule of law can only thrive in a free state.

Separation of Powers

The other doctrine that helps in realising the practice of the doctrine of the rule of law is the doctrine of seperation of powers and the Kenya constitution has incorporated the institutions within its constitutional framework to safeguard individuals against executive arbitrariness.

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here is a belief to this doctrine that true justice and fidelity to accepted
nd publicised laws are best served whenever there is a clear distinction in
heory and practice between the judicial executive and legislative arms of the
overnment. This also was the view of the jurist called Montesquiv[18] who first
rmulated the doctrine. The constitution provides for this three organs of the
overnment. The executive power is vested in the president by virtue of section
(1) of the constitution. The law making is vested in the legislative by sectior
while the judicial power is vested in the judiciary. But is there really
eration of powers in Kenya?

As far as the judiciary is concerned section (60)(1),[19] establishes the High
urt with unlimited jurisdiction in civil and criminal matters. Section 61(1)[20]
ovides that the chief justice shall be appointed by the president while sub-
ction (2) provides that the Puisne judges shall be appointed by the president in
nsultation with the judicial service commission. Kenya's president is an
ecutive president as stated by our constitution.[21] This means that if he is
signed with the undoubtedly important task of appointing the chief justice
will appoint a judge he knows will be
vulnerable, to the executive wishes if necessary. Also as concerns
consultation with the judicial service commission[22] while appointing the
suc judges it will result with appointment of judges who are loyal to the
sident. This provision reduces the tenure of judges to a temporary situation
ending on what the president wishes which is a clear interference by the
ecutive with the independence of the judiciary. As matters stand now the
blem of removal is more amplified where the chief justice is the one affected
the tribural appointed by the president.[23]

Section 68(1) 9-c[24] strengthens the executive position in so far as the justice.
rney General and the puisne judges are basically appointed of the president.
The subordination of the Attorney Genral to the chief justice only tends to
ure that the chief justice in his function as chairman of the judicial service
ission does not digress from the main policies of the executive and this....

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nsequently affects the independence of the judiciary, subsection 3 of section 68 rovides that the judicial service commission may make regulations providing r its own procedure and with the consent of the president may confer powers impose duties on any public officer or authority for the purpose of the scharge of its functions. I believe the commission could easily do such things ithout presidential assent.

An independent judiciary is an indispensable requisite of a free society nder the rule of law. It is implicit in the concept of independence that rovision should be made for the adequate remuneration of the judiciary and that udges rights to the remuneration settled for his office should not during his rm of office be altered to his disadvantage. The Kenya consituttion has ndeavoured to provide for such matters.

It is a characteristic of a free society that those to whom the power of overning is entrusted can only act under and within the authority of the law. .e can be ensured by an independent judiciary which in most cases can't be l that independent. In the case of Mwithaga Republic[26]. It is clear that the overnment to silence Mwithaga (who was a great critic of the government) olitically had to make sure that he goes to jail and thus it had to interfere with ejudiciary. This is proved by the glorious decision reached by the High court fter an appeal. When it comes to constitutional review by the courts in most ountries the court show much unwillingness[27] to confront the executive. In the se of British Coal Corporation VR Lord Sanky said that although constitutional view is like statutory review its somewhat different. The constitution is perior to the statutes, Therefore constitutional review should be reviewed with more ideas attitudes etc should be looked to before you interprete a consitution and I believe Kenyan court would adopt same approach.

The Rule of law to be made more practical requires an independent judiciary as I have tried to show in this chapter although the constitution endeavour guarantee for separation of power and therefore independence of the

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judiciary it hasn't achieved much. Some provisions of the constitution act against sepration of powers and other factors as I have indicated affect such independence.

The Kenya legislature is also expected to play its role without encroachment from other bod[illegible] under the West Minister model[28] constitutions with much allowing for some degree of National valuation, In all the states of commonwealth Africa become independent, a central political role was assigned to the legislative. The drafters of these conetitutions evidently assumed or at least hoped that the legislativewould become the pivot for the entire machinery of government. This has not turned out to be the case. In many of these states, there is now no independent legislative body In other where a legislative still exists its role in the processes of government is largely formal.

In kenya the Executive and the legislative are almost one if not seperate bodies. The cabinet ministers also sit in the legislative body.[29] The president who is the head of the executive has been vested with powers that give him powers in the legislative. A bill must have the assent of the president before it becomes law.[30] The legislature can effectively curb executive arbitrariness if it can perform the task of publicly criticising and controlling the performance of government without any encroachment. I will show how it has failed in performing this role thus minimising its impact on the practice of the rule of law in Kenya. The basic reason for the decline of parliamentary criticism is simply that governments have not been willing to tolerate public questioning of their conduct.[31] At the somewhat legislative level, corruption, mismanagement, administrative arrogance and unlawfulness are all too common. At broader level, there are the unchanging realities of poverty and exploitation where MPs have attempted to draw public attention to such matters. Various devices have been used to silence them.[32] At the lower end of the scale government patronage has been used to purchase support. The threat that critical members will not be nominated by this party at a subsequent election has been employed to the advantage of the executive.[33]

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Technically legal means have been found to unseat members where all else failed 34
preventive detention laws have been pressed in to service not forgetting the 35
application of intimidation.

The result has been that what was at independence often a lively legislative body has been turned into docile moribund appendage of the executive. The quasi-military hierarchical form of administration established by the colonialists, remains largely unchanged. 36 This system is run by bureaucrats responsible to the executive. It has never since its inception been susceptible to any type of effective popular control either locally or from the centre. And yet it is this structure which directly effects the lives of the great mass of the people. The non-effective control of the executive by the legislature by itself militates against the Rule of law because the arbitrary acts of the executive might go unquestioned.

Probably the central feature of the West minister model is the responsibility of the executive to the legislative. The executive stays in office because the confidence goes to the legislative, 37 So agrees. Once the executive loses the support of the legislature it can be turned our of office. This is the essence of parliament control function. Unfortunately it is also the major institutional reason for the demise of legislature in Kenya and the introduction of a defacto one party state thus posing certain rather obvious difficulties with regard to the operational liability of a parliamentary system. Only candidates supported by the ruling party will always be able to exercise some degree of control over its members. The Kenya constitution provides that a member who wishes to cross the floor and join an opposition party must resign his seat and seek re-election, thus applying extra-legal means to prevent the formation of a parliamentary opposition. Kenya's constitution provides for a multi-party system yet only candidates sponsored by the ruling party are permitted to stand for elections. 38 Thus with the political basis for their control removed it is not surprising that legislatures are incapable of exerting any real influence over the executive machinery of the government.

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he legislature has failed in all its traditional function ie. law-making, ublicly criticising and controlling the performance of government and as a rvice for involving the people generally in the political process due to the roachment of the legislature by the executive.

I can readily at this stage submit that there is no actual seperation of wers in Kenya. This is less the fault of the constitution itself than of the litical system as I have clearly pointed out. Though complete seperation of is almost impossible
wers is untenable Kenya is far from even national seperation of powers. Both gislature and the judicairy suffer from encroachment from the executive and ch the rule of law is endangered. None of these two bodies encroaches itself the executive and the reason is obvious. A president in Kenya possesses vastly ater national prestige than a prime minister and the mystique which surr unds. ican president is certainly for greater than that of parliament. In any case the vement to republican status has generally signalled on enhancement of the er of the executive which is accompanied by a weakening of the other branches the government and certainly having its effect on the practice of the rule of .

Constitutionalism

To ensure that the governmental powers are used for the good of society m whom the government has got the mandate to govern the concept of nstitutionalism has to be respected. The mere fact that a government is fully cted and that it has the support of the majority is not itself necessary sistent with constitutionalism since as it is argued . Adolf Hitler came to er through overhelming majority support. The determining factor of a stitutional government is the extent which it is limited by some predetermined es.

Kenya has a codfied constitution which is the supreme law of the land. graph 3 of chapterIof Kenya constitution states that

"The constitution will have the force of law. If any other law is in- consistent with this conatituion, this constitution shall prevail and the other law shall to the extent of the inconsistency be void".

e a country has a written constitution, it must act according to that

nstitution because any power exercised that is either inconsiste

n some instances the Kenya ~~constitutional~~ government has shown no respect to his constitutional provision.

During the 1974 KANU - GUM - National assembly general elections, Mr. aul Ngei, then a ~~senior~~ Senior cabinet minister, threatened to kill his aspiring opponent unless the latter withdrew from seeking nomination.[39] Mr. Ngei did this ith the full knowledge and co-operation of the administration, including the olice. H e succeeded in his criminal and unconstitutional scheme and was eclered together with a few others in different constituencies, "unopposed", mplying that he was without rivals. He was therefore 'duly elected' and as re-appointed as a senior cabinet minister. This fraudulent election was later hallenged. The court nullified the sham election and found him with an election ffence of using undue influence to deny his prospective opponent of the onstitutional civil rights to offer himself for Nomination.[40] According to the ational Assembly and presidential Elections Act, the finding of an election ffence would have disqualified the respondent from presenting himself for a eriod of five years, among other punishments. But Ngei was not to be ncumbered by these established laws. Section 27 of the constitution was amended o give the president the powers to pardon those who are disqualified as Mr. Ngei as accordingly pardoned. This shows that the consitution can't block the xecutive move because when need arises it can always be amended to serve the need making non sense of rule of law in the public eyes.

To escape the concept of constitutionalism the executive has coerced the leg legislative to enact laws which erode the constitutional provisions. An example is the preservation of public security Act[41] which gives the president powers even to detain a person without trial thus militating against the human rights enshrined in our constitution. (The Act must be viewed from a colonial perspective. The Governor during colonial period was legally empowered through the passing of emergency regulations to deal with specific areas. At independance the president inherited these powers i.e. having the preservation of public security Act enacted).

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The minimum standards of a constitutional government are set down by
fessor Smith in his work on constitutional law. These standards cannot
said to be exhaustive but they have formed the foundation of most
stitutional governments. The draughtsmen of the Kenya constitution seem
have been guided by these standards. These standards are:

a) The government must be accountable to an entity that is distinct from
itself.

b) The elections must be freely held at frequent intervals.

c) The political groups are free to organise opposition and civil liberties
must be protected. 4(b)

As far as the government being accountable to an entity that is distinct
itself I have indicated already that this as far as Kenya is concerned
utopian idea. As concerns there being free elections held at frequent
rvals, this also is not adhered to in Kenya in total. The presidential and
eral elections have always been held on schedule. But these does not mean
have been free and fair. Before the presidential elections are held the
mbent president usually makes sure that he has crushed all possible opposition.
for this reason that K.P.U was banned [42] because the government feared
rty would become very populer because it was opposed to many government
sses which were not to the interest of the common man. The reflection
nfair elections exists in Kenya :- the non-existence of an oppositional party
h as I have indicated elsewhere cannot be allowed to operate in Kenya freely.

The concept of constitutionalism and a freely elected government are based on
assumption that governments are to be democratic. The government that is
to enforce the law must be a creation of the people. As Abraham Licoln
it must be

"A government of the people by the people for the people".

vernment that has not come to power by the peoples mandate owes them no
gation. A government that has however come to power through the electorate
ld not act consistently with their mandate.

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As far as political groups being free to organise opposition and civil liberties being protected, I have already talked this as far as fares Kenya is ncerned in different places. Organised or unorganised opposition in Kenya is emed as a threat to the government and the government always determined to sh it. The civil liberties provided for in our constitution on the other hand e highly eroded by our government this becoming less protective.

is not possible for there to be constitutionalism without there being a rule of w. For there to be some rule of law there should be constitutionalism nce without it, the executive will not limit its exercise of power and bitrary power is inconsistent with the practice of the Rule of law.

In conclusion of this chapter it deemd fit to state that the Kenya nstitution has tried to incorporate the doctrine of the rule of law. It has ovided for ways and means by which the doctrine can be reaused. But fortunately this has been done mostly in a half hearted manner. Where the nstitution has provided effectively for such the executive has either been ing round such safeguards or disregarding such in total. Therefore the human ghts, the seperation of powers doctrine and the concept of constitutionalism ve not been protective means as they have been enshrined in our constitution and t s has given the doctrine of Rule of law a heavy blow to the detriment of ividual rights.

PTER 2

tnotes

Kenya constitution Act no.5 of 1969

Ibid

Kenya news and Africa report July 1980

Ibid

For the general discussions of the constitutional guarantees, see de Smith The New Common Wealth And Its Constitutions, London 1964

Kenya constitution Act No. 5 of 1969

Ibid Section 73(3)

Kenya constitution Act No 5 of 1969

Ibid

Ibid

Daily Nation October 9, 1968

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High Court criminal case No 45 of 1980

Criminal Appeal case No. 185 of 1975

Kenya constitution Act No. 5 of 1969

(1978) E.A. 46

Section 77(d) of Act No 5 of 1969 (Kenya constitution)

Court of Appeal criminal Appeal No 119 of 1974

Cap 57 laws of Kenya

1689 - 1755

Kenya Constitutional Act No. 5 of 1969

Ibid

Ibid Section 23(1)

Ibid " 61(2)

Ibid " Section 5

Ibid

Ibid

Supra

(1935) A.C 500

For general discussions of the westminister model, see de smith, The New Commonwealth And Its Consitutions, London, 1964, and Roberts Wray, Common Wealth and colonial Law, London, 1966.

Kenya constitution Act No. 5 of 1969 section 16(1)

Ibid section 46(2)

Many MP's have been detained due to criticism of the government.

For example president Kenyatta invoking cap 57 detained outspoken parliamentarians like Martin Shikuku, Maria Ferony and George Anyona.

Kanu National executive committee refused to clear George Anyona to contest for Kitutu East parliamentary seat.

Imprisonment of Muithaga in 1975 infairly

Infra

The colonial Kenya civil service structure has been retained by independent Kenya.

(b) Ibid section 40(1)a

Ibid Section 34(c

MbondoV Galgalo and Ngei, Election petition, 1975 judgement reported in full in the weekly review December 1, 1975 pp 18-24

Elections offences Act cap 66, laws of Kenya section 9(c)

Infra

. Kenya peoples union banned in 1969

APTER 3

E PRACTICE OF SOME ASPECTS OF THE RULE OF LAW DOCTRINE IN THE 'NYAYO' ERA

President Moi was elected as the second president of the Republic of Kenya n the 14th October 1978 after complying with the consitutional provision of the lection of the president after the death of a president. President Moi got his gime nicknamed as the 'Nyayo Regime' after his repeated remarks that he will llow the late president's footsteps.(18) This was no more than a stressing of the ct that the new administration was not going to have a break with the Kenyatta adition, thus stressing continuity.

The doctrine of Rule of law was first expanded by Dicey and he gave three tributes given to it were the two principle of legality and the principle equality before the law. I intend in this chapter to dwell on the practice these 2 principles in the Nyayo era. In doing so I will tackle the instances lated to the practice of these principles, which to me have attracted much blic debate not forgetting that the Nyayo regime is to date approximately and a half years old. Much of the criticism levelled against the practice the Rule of Law in the Nyayo era will have to be done having in mind that ch has been inherited from the Kenyatta Regime and the blame of such on the yo Regime will only arise in investigating on what the Regime has done to try d curb such weaknesses within the limited time the government has been in wer.

THE PRINCIPLE OF LEGALITY This principle means that the absolute supremacy predominance of regular law as opposed to the influence of arbitrary power d excluded theexistence of arbitrariness of prerogative or even of wide scretionary authority on the part of the government. It states

"a man may be punished for a breach of law but he can be punished for nothing else".

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executive in the Nyayo era seems to have had lit tle respect for the above
nciple which militates against the individual freedom that the doctrine
Rule of law is out to protect.

) The executive abuse and disregard of established law

There are areas and instances out of the numerous others where the executive
se and disregard of established law is manifestly clear. One area in which
ring and continuos abuse of power is highlighted is in the so called "harambee
nd-raisig programmes". It is an open secret in Kenya's independence history
t Harambee fund raising efforts which are based on sound principles otherwise
mainly exercised either through outright intimidation of donors, abuse of
perty influence buying or to put it crudely corruption. Parents are forced
pay harambee funds to schools, chiefs are ordered and carry out orders to
tract locational contributions usually by threats to harambee fund-raising
tings. Employees are issued with letters demanding contribution so that their
ses may contribute generously from their friends and themselves.

The whole movement of harambee buttressed aided and abetted by a formalised
systematic coercive collection has turned in to what, Mutiso Gideon and
llip M. Mbithi rightly call regressive taxation for financing local
velopment efforts. We have laws governing theft and related offences,
ruption and constitutional provision for the protection from deprivation
or interference with property or property interests but none is mobilised
redress such reign of lawlessness and exercise of unlawful authority. It is
fortunate that a vital concept and institution like that of harambee does not
e any legal framework. The public collections Act does not apply to harambee
llections. It is this lack of legality that has led to the abuse of the spirit
harambee itself a peoples unmolested willingness to ~~voluntary~~ voluntary embark on the
le task of Nation building. Yet licenses authorising public harambee fund
sing meetings are issued under the Act. The method of collecting the money
property is essentially the same as that for collection authorised by the
. Harambee fund raisng meetings are so prevalent in the 'Nyayo' era and its
sad to note the lack of legality the whole exercise is based on.

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ther area in which the administration has distinguished itself as a consistent
itrary misuser of state power to deprive individuals of their rights in
perty is in the cancellation of trade licences and forced closure of beer
ls that cater for the lower classes. In 1980 different cadres of the
inistration made numerous such prohibition declarations in public barazas with
pretence that the same is done in the interest and with popular approval
the public. If the public and the apparently bigoted leaders really wanted
beer-halls to close because drunkardness retards participation in development
n all consumption of alcoholic drinks ought to have been banned. The Coast
vincial Commissioner Mr. Galagalo decreed the ban of such beer halls[6]. All this
done without due regard to the law. If they are claimed to be justified in
interests of public safety, order, health and morality[7] then proper legal
cedures for such interferences with property or property rights including
requirement for prompt payment of full compensation[8] ought to be complied with.
is quite settled law[9] that a holder of a business licence such as one for
rating a beer-hall acquires interests in such beer-hall and the business itself
ch must be protected. Licences for business are normally issued for specified
icile and an interference either with the business
lf or the domicile interferes with some pecuniary interest in the licence. Such
rference shows dictatorship by the executive.

Two members of the executive, the Minister of Higher Education[10] and the
rict Commissioner[11] for Murang'a District found themselves in a controversy or
lision which manifested a clear disregard of established law. The Minister was
ed by armed policeman from addressing a harambee fund-raising meeting[12]
use the meeting had not been licensed[13] by the District Commissioner. Two days
r, the District Commissioner who maintained that the meeting had not been
nced was dismissed from his job by the President when the President personally
to conduct the supposed harambee function. The District Commissioner had
ained to the Minister that the application for a licence for the meeting had been
cted because it had not met the necessary notice required by the law. According
the District Commissioner the application had reached the DC's office two days
re the meeting was to be held instead of the fourteen days as stipulated
the law.

otho felt that such a function was simply an extension of his role as
ister for Education. Looking it from this light Kemotho even ~~xxiXt~~ felt
t it was ridiculous of the District Commissioner to demand that he should
a licence to raise funds for a school that falls under his Ministry. He
d,
"to stop a Minister from conducting a funciton related to his area of
operation in tantamount to opposing the government and hence the President's
decision.

continued by saying that,

"It was discourteous for the D.C. to hide behind a flimsy legal requirement
to embarass and inconvinience all those people who attended the meeting"[14]

The Minister's arguments does not sound convincing because if he knew
did not need a licence why did he bother to get one. Also as far as the public
r Act is concerned it does not cater for the exception the Minister seemed
be talking of. The D.C was acting in accordance with the law and even if the
ister was refused the licence he would have invoked section 9 of the public order
and appeal to the Minister concerned who in his discretion would have reversed th
stand.

The powers of a Minister of basic education in the appointment and posting of
chers have been questioned following a decision by the Minister of basic educatio
emote the headmaster of [illegible] of a primary school in Mericho
trict together with his deputy, because as the Minister alleged, the headmaster
allowed the pupils to go for their lunch instead of keeping them waiting for
because he was scheduled to visit the school. The Secretary General of the
a National Teachers said the Minister had no power to demote or transfer
chers and maintained that the two teachers reported to have been demoted will
main
in these posts until the matter was referred to the Teachers' Service
ission[16]. The ministry of basic education was opposed to this view and even
Permanent Secretary to the Ministry insisted that the Minister had implied
rs to this effect. The Teachers Service Commission Act[16(b)] was clear about
permission and according to section 4 of the Act its only the Teachers Service
ission which can do what the Minister wanted to do i.e. demote and transfer
chers.

I have already stated the powers bestowed on the Attorney Gneral in his apacity as the principle public prosecutor. In discharging his duties the ttorney General ought not to interfere unduly or pre-empt the judicial rocess. While on this latter point, I may divert a little and say that the roper interpretation of Article 26 of the constitution does not and ought ot allow for blanket condoning of large scale 'white collar' economic crimes. he then Attorney General is reported to have said in his London interview when quet loned on issues relating to material advantages acquired through corruption uring Kenyatta's regime that,

"It will be difficult to get people to pay money in certain cases we shall have to count our losses and look foward we do not think of seizing people's assets".[18]

herese it is true that some cases depending on the merits of the particular ases the public may count its losses and look ahead, the assertion regarding he policy of non-seizure of property ought not to apply to property acquired through criminal malfeasance. Neither positive general principles in statutes of limitation nor rules of African customary laws forbid or foreclose estitution of public property acquired illegally.

The institutionelisation of inequities have negative influence over the udicial process and one hopes that it is not the Kenyan government policy to im le ent this blanket pardon. At least such a policy ought not to come from the Attorn eneral. It would be incorrect not to mention here that upon the determination of the judicial process a President may through the exercise of the constitutional power of prerogative of mercy intervene and either pardon a convicted criminal or commute a sentence.[19] As such, it is the Presidency as the ultimate seat of formal justice that ought to decide whether or not the 'white cover' criminals who have so far taken the masses for a ride ought to be pardoned. But this can be done legally only after the judicial process has taken its impartial course and the status of these suspected criminals formally established laws. It is then that claims of adherance to the rule of law and justice may be seen to be legitimate.

I have cited many instances where cabinet ministers have shown abuse and in other cases disregard of established law.

her members of the administration have also found themselves caught in the
se problem. During Kenyatta's regime Provincial Commissioners used to be very
rogant and they found themselves in controversies with varying politicians. The
nd seemed not to have stopped and PC's like cabinet Ministers have been
ctating matters as if [illegible] established law is nothing to them. I will cite
e instance where a PC has acted ultra-vires. On the Madaraka day eve[20] the
ft Valley provincial commissioner[21] found himself at loggerheads with an
sistant minister for Tourism.[22] In an unprecedented incident the Assistant
nister[23] was publicly threatened with jail by the Provincial Commissioner at a
ate function at Nakuru after the Assistant Minister had accused the PC of
rcising tribalism and nepotism in sending out invitations for a madaraka eve
rty. According to the Assistant Minister the PC said,

"I am the PC of Rift Valley Province even if people like Mwithaga like it or
not and you Mwithaga K should from now on grow up. I can order you to be
jailed."[24]

ording to established law[25] only an officer of the rank of Assistant Commissioner
Police could arrest an Assistant Minister and then only with the authority of
Attorney General. Therefore the PC's threat was unlawful.

The President also has in some instances shown tendency of making orders which
itute against established law. One such instance is on 10th July 1980. On that
[26] the President ordered the civil servants union and the university staff union
be de-registered because they had become political. The Trade unions are
erned by the Trade unions Act[27]. Section 17 of the Trade Union's Act states that
Registrar of Trade Unions can cancell a trade union if any of the objects of
Trade Union is unlawful. Section 17 provides for the Registrar to give reasons
y the Trade Union should be cancelled. The Trade Union is to be given notice
two months[28] to give reasons why it should not be cancelled. As for as the
trade unions were concerned the procedure supposed to be followed was not
llowed. According to the secretary general of the university staff union, the
istrar did not give the Trade Union the two months notice as specified in the
de Union Act to give reasons whey it should not be cancelled. According to him
university staff union was "politically cancelled but not legally.

ublic disregard of established law

Kenya's commitment to the adherence of Rule of law is always emphasied by
leaders. The KANU elections Manifesto[29] even emphasised the fact that Kenya is
be bound by the Rule of law. Its unfortunate that members of the executive
e disrespected what they preach. The cited incidents indicate that the Rule
law principle is neglected to the detriment of the good governing of the country.
weakness the executive has manifested seemed to have been inherited by the
mon men. The so termed peace loving citizens of Kenya by the President have
and again chosen to take the law into their own hands in what is termed as mob
tice.

The spectre of a mob ruthlessly hammering a defenceless suspect to death or
mortal injuries while amused members of the public gaze on is slowly becoming
rutal social system that best explains a society in turmoil and anger rather then
ation of laws. The tragedy of mob justice is that it has no limits or values and
be infinitely unjust, deliberately barbaric and too often irreversable justice
victims too often innocent of the suspected crimes.

The incidence of what is generally termed as mob justice is a very frequent
urence particularly in the urban areas.[30] Invariably a person or persons are
pected of pick-pocketing or otherwise trying or actually stealing from either
person or from some premises. The mere shout of 'muizi'(thief) is enough
ove the immediate populace on the heels of the suspect. Whenever one is caught
the multitude 'justice' is always meted swiftly and without any regard to
micalities of procedure. The mere fact of suspicion to a mob is sufficient
f of guilt and it is not even necessary that the culprit be got away with any
perty that he allegedly stole. If the police do not reach the scene within
ry short time, the suspects would never stand before a court of law. The public
ld not take in their own hands the roles of investigators, judges, prosecutors and
cutors at the same time.[31] One shrinks to think of the very possibility of an
cent man being beaten to death by the public.

The inceidence of mob justice is very real menace to the right of one for a
trial[32]. As observed before, once one has been caught by the public on
icion, it then becomes largely superflous to speak in terms of his right
e tried unless we speak of the right we had to trial. However difficult

ight appear to prevent such incidences of mob justice no efforts should be
red to re-educate the public that one is innocent until proven guilty.[33] The
lic has got at least to observe the maxim for only then can justice be attained.
e suspicion is no conclusive evidence to convict.

In his maiden speech[34] in parliament soon after he was appointed the
orney General[35] a said that those who choose to take the law in their own hands
kill or injure a person or persons whom they have taken into custody would be
secuted and made fully answerable for their actions. This was a response to
t the Attorney General thought was arising from disregard of established law. A
ilar warning should be given to the members of the executive who show similar
regard to law because it is by the way they conduct themselves as regards
blished law, that the common men can learn. Adherence to established law
ld do serivce to the Rule of law with all its resultant benefits to the public
a whole. How the principle of equality before the law is adhered to or not is
t I will investigate on.

QUALITY BEFORE THE LAW

Dicey's second principle regarding "equality before the law or the equal
jection of all classes to the ordinary laws of the land needs a very tactful
ination. To examine how his second principle has been put into practice it
s it fit to define the state. This is because the state through its
ntially non-armed organs, the legislative, the executive and the judiciary
st monopolise the formulation and enforcement of law wheter this
one through a justifying constitution or nakedly by force. My analysis will
lve around the formulation and enforcement of law. Its through defining law
e from a social point of view and examining the formulation and enforcement
aw in the light of such a definition that I can clearly manifest to whose
best the concept of equality before the law is out to serve.

It is now about a century since Engels[36] made the following historically accurate
ement on the state.

The state is...by no means a power imposed on society from without... It is
oduct of

'society at a

'Society at a particular stage in development, it is the admission that... society has involved itself in insoluble self-contradiction and is cleft into irreconciliable antagonisms which it is powerless to exercise. But in order that these antagonism, classes with conflicting economic interests, shall not consume themselves and society in fruitless struggle, a power, apparently standing above society has become necessary to moderate the conflict and keep it within the bounds of 'order' and this power, arisen out of society but placing itself above it and increasingly alienating itself from it is the state.

went on to elaborate that,

As the state arose from the need to keep class antagonism in check, but also arose in the thick of the fight between the classes it is normally the state of the most powerful economically dorminent class, which by its means becomes also the politically dominat class and so acquires new means of holding down and exploiting the oppressed class. The ancient state was... ...the state of slave owners for holding down the slaves, just as the feudal state was the organ of the nobility for holding down the peasant serfs and bondsman, and the modern representative state in an instrument for exploiting wage labour and capital.[37]

Engels observations are true for the modern state both in industrial itelist societies[38] as well as those in emergent ex-colonial states that have herited their structural from imperialist designs of the new western industrial tes amd this is where Kenya falls in Because of the class nature of state it is portant to identify the dorminant economic classes in each country in order ascertain the substance of laws that a particuelr state will make and defend. rule of law must therefore be examined within the objective social conditions order to know in whose interest the laws are made and the possible extent of ir enforcement. Such an approach of course makes it possible to unveil the ud of the dorminat bourgeois intellectualism that over emphasise the otherwise dable principle of equality before the law, at the expense of the content of h a law as cardinal principle of the rule of law.

is they do knowing only too well that the law in a capitalist economy is
de by the state essentially for the protection of the ruling social classes that
ey represent. The judiciary also contribute to inequality before the law. Its
ear that most of the people who man it belong to the ruling class e.g. The
dges of the high court and court of appeal both white and black belong to the
rminat social class in Kenya. I will also touch on some aspects of this when
set myself to criticise the case of Republic V Sandstrom.

a) promulgation of laws that militate against equality before the law.

An area in which the concept of equality before the law is heavily weighted
n favour of the dorminat class is the promulgation of laws in the Nyayo era,
ws that appear to be of general application but in reality (they) are meant
affect only the lower classes adversely. The immediate and common place
xample in Kenya include first, the recent legislation passed to eradicate the
rewing and/or consumption of the local spirit "changaa" [39] while in the same year [40]
he monopoly corporation, Kenya Breweries was busy expanding its operations.
and Production of equality before laws.
The second example in the same industry is the
erations of the Traditional Liquor Act as amended, which has elaborate [41]
discretionally powers given to given to the local administration in licencing
r refusing to license trade in traditional liquors while the big capitalists
not have similar legislation affecting their operation in big 'modern'
estaurants, bars and toilets.

The Kenya constitution also creates much room for abuse because some parts of it
t as I will show can be invoked to result in inequality before the law even if the
ctions are on the face of it a supposed reflection of equality before the law.
ese sections were even applicable before the Nyayo era but its continued
plication in the Nyayo era demands comment. Criminal proceedings are
stituted by the Attorney General on behalf of the state.[42] He is the legal
dvisor to the executive and is appointed by the President.. If the criminal
roceedings are instituted by him then practically he can be ordered by the
esident to stop any prosecution if the President does not want the person
be prosecuted to go to a court of law.

e Attorney General can also stop the prosecution of any person as he likes
ich can be subject to abuse. He can also stop criminal proceedings from continuing
entering Nolle Prosequi[43] anytime either before or after the trial. Once entered,
e accused is discharged from his criminal liability. The court cannot enquire the
son for closing this. The reason may range from a genuine reason of lack of
dence to one of favouring or corruption. The control of the criminal
ceedings by the executive do not augur well for the rule of law concept. The
ers that vested with the Attorney General may be delegated to the deputy Public
secutor or a State Counsel. There is no effective way of ensuring that these
ficials will not withdraw criminal cases for purely personal reasons. Therefore
cannot say that such a law is a true reflection of the equality before the law.
h a law which depicts formal equality can be composed to the constitutional
ht for one if he wants to be legally represented in criminal cases.

Section 77(2) d[44] states that,

"Every person who is charged with a criminal offence shall be permitted to
defend himself before the court of his own choice".

a right on the face of it shows equality before the law. But however such a
ht is hardly of any use to most poeple in Kenya because few poeple can afford
al representation in Kenya. The injustice that can result due to lack of
al representation can be gross. This is usally due to small technicalities
can be resolved by minimum legal help. In R V Ndegwa[45] a case that came up
rural area where legal representation is rarely afforded, the accused was
ged of stealing and had an elternative charge of handling stolen goods. He
ded not guilty to the first count but guilty to the alternative charge. While t
t charge carries a macimum sentence of 3 years the alternative charge carries
ndatory sentance of 7 years minimum.[46] He was convicted on his own plea of
y. Legal representation could in this case have saved the accused from this
ry. There cannot be said to be any rule of law where it is being controlled
he economic might.

hus becomes undeniably evident that in Kenya the very principle of equality
re and equal protection of the law is nothing more than an illusion.

one writer has ably put it,

"The well being of all citizens can be promoted by the timely advice of lawyers. A society in which such legal counselling and assistance is available only to wealthy persons and business corporations may thus be contributing to the perversion of the legal system in favour of the wealthy and to the disadvantage of the poor who cannot afford to use it."[47]

The government only provides such legal representation only in extraordinary rious criminal offences. This leaves a big room for the need of legal presentation for those who cannot afford it. Having this in mind the legal vice centre was established in 1973 under the auspices of the Kenya law society. e aim of the society was to,

"...establishing and maintaining(sic) a centre in Nairobi and other centres elsewhere in Kenya where needy persons may obtain legal advice free of charge and where they may be introduced to practicing advocates who will undertake work on their behalf either free of charge or (if and so far as lawful) at a reduced charge".[48]

s unfortunate that the centre has got no active government backing mainly by way of finance d t has administrative, financial and manpower problems.[49] Its the high time e government takes it upon itself to provide legal representation in criminal fences fpr those who cannot afford it.

I hope to have demonstrated some aspects of bourgeoisie legal designs whereby ws are made with pretentious generality that they are meant to perpetuate equality fore the law but practically they are out to serve the politically and nomically dominating class. I will continue to examine another stategy used by e ruling class in neglecting or out-rightly refusing to mobilise the judicial chinery whenever the interests of members of the ruling social classes are kely to be adversley affected by the law.

Non-enforcement of breaches of the law by the ruling class

On Thursday July 3, 1980 at approximately 5 p.m two ferocious and apparently y poorly trained dogs belonging to and xxx in the service of Kenya canners limited ka, were released on young village girls who were innocently forming their social role of collecting firewood.

atever the motives of the four guards who were handling the dogs were, the portant fact is that they were at the meterial time protecting the property the corporation against theft and the innocent girls were not even suspected nor were they about to steal the pineapples. The dogs mauled and of the girls death and fed on her flesh and seriously injured another.

There was public outcry in this indident and on this particular occasion, the ate reacted to the public mood and protected the four guards together with the rporations security.

incident and supervisor for negligence. At the face of it the state wanted demonstrate to the public that justice was not only to be done but was to be nifestly seen to being done. This is fraud. Firstly, the Kenya Canners Limited the local branch of Delmonte, a United States of America transnational corporation the food and agricultural industry in many undeveloped countries. The indictment the side workers and not the corpaoration or at least the corporation workers careful design by the ruling classes and the state which must be seen in its per perspective for what it is. The very essence if incorporation in geois jusrisprudence is to enable the corporate entity to sue and be sued wrongful acts and ommissions of its dervants - vicarious liability. This rue for civil wrongs as well as criminal wrongs. Our penal code does cipate criminal liability of companies quite clearly and this cannot be inued to include only offences dealing with statutory duties. Even without ling the corporate veil to indentify the actual capitalists forming Kenya ers Ltd it seems more proper that the company should have been prosecuted.

In a case which involved Kenya Reinsurance Co. and Nyumba enterprises. Nyumba criminal investigations department prises is a private Co. in which C.I.D. director Mr. Ignatius Ndefi and derative commissioner Mr. Alaya Mucemi were directors. It brought a piece of for less than 220,000/= and later sold it for more than Sh 14million to the Reinsurance. The 31.808 hectare site had belonged to the Railways ation since 1928 under a 99 year lease. Early 1978 the Railways approached

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ba enterprises and several other developpers with a view to developing land for houses which could be sold to its own staff. This was because legally corporation could not build houses for sale even to its own staff. The lways selected Nyumba enterprises to develop the site which is opposite Belle cinema. They surrendered the land to the commissioner of lands recommending t he allocate the land to Nyumba enterprises. Immediately the tranfer was e. Nyumba enterprises sold the property to Kenya Reinsurance for 14 million llings. The whole transaction left alot to be desired. There was a clear e of consipiracy to defraud between Nyumba enterprises and the Kenya Rail- s alternatively between Nyumba and Kenya Reinsurance. But as normally would the case the state desisted from prosecuting the parties involved and all that said was that the government was trying to investigate the matter.

Since 1971, there has been five councils which have been dissolved. nty of them were dissolved in early 1979 for maladministration, inefficiency ruption, disunity and many more failings. Many more were left to totter along ough over a dozen extra-ordinary audit inspections by the mihistry of local rnment among the councils revealed clear cases of financial mismanagement corruption involving councillors and senior council officers.[56]

The local government workers union in a letter dated December 14 1978, ed several examples of maladministration in the public Heallth department. ngst the cases cited concerned the issue of the Shs 2 million (over) for the chases of drugs which had not been accounted for properly. But as the union writing the issue of drugs has been brought up within the council through report of the council internal auditor and the issue was taken to the finacial mittee which deferred it twice and the committee's discussion leaked to the ss. Press repo rters indicated that two nursing sisters who had been incharge drug stores during the period but resigned between February and December 7 might have quit in connection with the anomalies in the drug stores. identally the two former sisters involved are connected with two of the ncils officials almost directly involved in the running of the department.

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he was the wife of the former Town clerk and the other one was a wife of one
f the director of one of Mugo's two Marmaceutical companies. Later the city m
edical officer of health Dr. Mugo was sent on leave pending investigation
nto certain irregularities levelled against the department including the
rug scandal.

The minsiter for local government and urban planning Intervened and nothing h
appened to the officer. Later on when the minister was replaced with another
inister thus making the former minister loose control over the local
uthorities administration the medic l officer of health retired. So far no
riminal proceedings have been instituted on the former city medical officer of
ealth although there was convincing evidence. This is if we go by the local
overnments workers union letter sent to the then mayor of Nairobi and also the
uditors report to charge him on a criminal offence. such non-enforcement
f breaches of law militates against the principle of the Rule of law.

Several cases have arisen within Nairobi city council revealing criminal
fences done by top city council leaders. Investigation by the press revealed
at Ngumba bought a house from the council at Shs,320,000 just about ¼ of its
[redacted]hs 1.2 million. Besides the low price at which the house was sold
him the approval of the minister for local government was not sought before
e deal was clinched as required by the law. Later on when the then mayor
igned from the city council he returned the house to the city council and he
refunded the money he had paid for the house. A clear offence is of fraud
manifested by the available evidence and no criminal proceedings were
tituted against him. If all of us have to return the property we have
rauded somebody after we have been discovered, then most of us will involve
selves in several fraud deals because we want fear court prceedings.

The r cent numerous disclosures of gross mismanagement of co-operative unions
over the country and the seemingly lack of concern of the government through
legal machinery, to take urgent and stern measures to redress the situation
eaten to destroy the basic foundation of co-operative movement, mutual trust
confidence among the co-operative members. In the last few months Kenyans
been expsoed to alot of well documented evidence from the press, co-operative

embers, probe committee trams etc concerning misappropriation, mismanagement
heft etc of co-operative members money by a few top co-operative officials.
hese top co-operative officials usually politicians have strong political
acking from influential politicians and mostly the parliamentarians of the res-
ective areas. The most disheartening aspect of the whole affair to the
rdinary members is that with all given evidence, few, if any of the culprits are
ver brought to a court of law to answer the levelled charges and where possible
reimburse the misappropraited or stolen money.

The above state of affairs with the co-operative societies can be strengthened
y the Mukurweine Co-operative Society affair. In October 1979 the government
ppointed a team of four co-operative officials from the ministry of co-operative
evelopment. It was supposed to probe the affairs of Mukurweine co-operative
ociety after the members of the society had petitiined to the president for
nvestigations to be conducted to investigate alleged mismanagement and
isappropriation of funds by some committee members but the results the probe
ren't ever-disclosed. The same members had to petition again to the president
ccusing the same committee of gross mismanagement and misappropriation of over
million shillings of the society.[63] The seriousness of the lack of prosecution
f such co-operative society leaders made the Vice president while opening
he Sh 3.5 million Nyeri District co-operative building state that,

"The government is not going to playdown the issue by assisting in covering up irregularities in the country's co-operative societies but will instead exercise vigillance over union officials of the ministry of co-operatives." [64]

Smuggling of food commodities outside Kenya and hoarding of such essential
mmodities has been international house old knowledge e.g. The leading
pitalist mouth-piece. The Economist in its issue of November 1980 had this to
y of us:

"Kenya's economy showpiece of capitalism in Africa is sliding downhill. Its boasting of feeding its own people for hollow when last year cereals with seventy five million dollars had to be imported some from south Africa. This shortfall in food stammed from drought, poor agricultural planning and distribution, hoarding and smuggling to Uganda."

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Smuggling and hoarding in the Nyayo era had in the recent past gone to an
tent whereby the peace of this country was threatened and the above comment of
e Economist magazine can't be dismissed as propaganda. The irony of the
e whole affair is and was that the leaders who blasted those involved in such
bious activities were out to sabotage the economy of Kenya and thus cause
litical unrest. Such leaders who kept on talking of smuggling and hoarding
so talked of in terms of those involved in these criminal unpatriotic acts
as being known to the government. The question I pose to myself is that,
these criminals were known to the government and if they were engaging
hemselves in smuggling and hoarding in order to create political unrest why
ren't they brought to book? Its the public feeling that those involved in
hese practices were and are prominent personalities in Kenya. During an
nterview with the Weekly Review magazine Editors Mr. Shikuku had the contention that
here were some leaders who were involved in illegal practices such as smuggling.
e insisted that a declaration of wealth and the means by which it was acquired
ould assist president Moi to combat corruption and smuggling in the country.

Shikuku's contention seems also to be supported by other members of the
uling class i.e. a cabinet minister challenged the 'authorities' to tell the public
the truth on where last years harvest had disappeared to since he was sure
hat enough had been stored by the state monopoly board that is in charge of
arketting food products.[66] The minister was a few days thereafter pressured
o retract what he had said in a cabinet meeting and he did exactly that.
e had infact challenged the other members of the ruling class. No reasonable
enyan citizen would expect the common man to smuggle such products as maize
ut of the stores of such a leading marketting board. It demands a reasonable
egree of influence to do such. Such influential unpatriotic and get rich
uickly characters were the ones the minister was directing his accusation to but
for reasons best known to some quarters they couldn't be disclosed so as to be
rosecuted.

The available evidence which remains uncontroverted although not judicially
etermined indicates that a special commando or paramilitary unit of the Kenya
olice force, while ostensibly entrusted with the task of combating cattle
ustling (stock theft) in the Rift Valley,

tling (stock theft) in the ~~R~~ Rift Valley Province was actually engaged in
ilance exercise with the full knowledge of the former administration. They
e trained to carry out among other things political assassinations. The then
rney den ral who revealed this after the change of administration in fact
ged that the present President, Vice President and himself were made the
get of the group. He told parliament[67] that the politicians behind the formation a
financing of the Ngoroko squad were known to the government and he promised
ans that they would be exposed and prosecuted.

The alleged leader of the Ngoroko squad was a former assistant commissioner
charge of the Rift Valley Province Mr. Joseph Mungai. He ran away from
ya in November 1978 at the height of what had become popularly known as
Ngoroko issue. The government immediately issued an arrest warrant for
gai ostensibly for an alleged fizzle of public funds and it began to make
rtures to Sudan later Switzerland to have Mungai extradicted because he was
lieved to have gone to those two countries at different times.[68] The International
lice were called in to track down the man. It is after he fled that he was
closed to have been the leader of the Ngoroko sued and the then Attorney
eral[69] promised he would be prosecuted if arrested.

Its surprising that after the then Attorney General had promised to prosecute
h the politicians behind the Ngoroko affair and Mungai, he later on changed
mind even after Mungai had come back. As concerns Mungai, Mr. Ngo[illegible]
Njonjo made the following statement,

"Everyone in Kenya is aware of the disappearance of Mr. James Mungai, a
mer assistant commissioner of police(Rift Valley). Mr. Mungai returned
luntariry to Kenya from Switzerland - December 20, 1979. I ~~am~~ have considered
whole matter of Mr. Mungai's disappearance and the Ngoroko affair and I have
ided that it would bot be in the public interest to prosecute Mr. Mungai. I
refore wish to ~~stand~~ reiterate the statement made by our President recently
Nakuru that the Ngoroko affair is a closed chapter in our country's history".[70]

It's no doubt when the then Attorney General disclosed the ~~a~~ existance of the
cial commando whose aim was to eliminate some of the Kenya respected leaders,
t most people took the matter very sei

at most people took the matter very seriously and they thought that those volved i.e the politicians behind it and Mungai would be prosecuted. The then rinciple Public Prosecutor had made it convincingly clear that would happen Mr. jonjo's above statement reversed the whole situation. When he said the goroko affair should be fdrgotten he in essence saved both Mr. Mungai and the lleged politicians behind the whole affair. The President's statement that Njonjo id he was reiterating was made after the public had waited for a long time see the prosecution starting. It seems by necessary implication that Njonjo de his statement after the Presidents statement so that his defence is that it uld not be in the public's interest to prosecute them would have an impact. e President's statement went thus,

"We have nothing to gain by reminding ourselves of dead issues when we have the gigantic task of moulding a peaceful Nation".[71]

d so he urged all Kenyans to bury the Ngoroko issue once and for all.

If the Public interest, Mr. Njonjo was talking about is the genuine blic interest then it was in the public interest to prosecute the said. This because the Kenyan public lives in a country that is said to adhere to the le of law. Herefor the public would have liked the alleged suspected inal to be prosecuted to comply with our written laws. Also the public would ways be against any individual or group that would create chaos in the country d this is what those involved in the Ngoroko affair were out to do. If the ople of this country and in particular the common men will be expected to respect law, then they must be shown that everyone disregarding his position, bound to be punished if he breaches any law. This I believe should be the case stead of trying to justify reluctance to prosecute a certain class of people saying that it wont be in the public interest to prosecute.

) Judicial disregard of the concept

's clear that our judiciary (particularly the higher courts) is manned by dges who certainly belong to the ruling class. It is no wonder t a an erroneous gements like the one given by Justice Harris in the case of Republic V Sandstrom[72] nifests inequality before the law.

this case a Kenyan woman by the name of Monica Njeri was killed by a White erican Navy apprentice by the name of Frank Joseph Sandstrom. After admitting e charge of manslaughter Sandstrom was almost set free because the sentence he ceived required him only to sign a bond of Shs. 500 promising to be of good haviour for a period of two years. The sting of criticism regarding this ntence could have been of less intensity if the learned judge had not asserted tha was imperative that justice was not only done but was to be seen to be nifestly done. Compound with this avowed sentence was the reported exclamation Sundstrom's mother at the end of the court proceedings "... I just can't lieve it. God is great and justice has been done." The immediate reaction nd quite natural is the question, if justice was done for whose benefit? The untry's legal system or Sundstrom? Whatever premise one takes justice connotes represents the quality of being or doing what is just, that is, right in law nd equity. The right sentence is not one which accords with any specific principle r one designed to achieve any particular aim, but rather it is right in that it ith established precedent.

Sundstrom's sentence shows discrepancy with even recent sentences dealing ith similar offences. On May 30, 1980 in a Nyeri court, a man was sentenced o seven years imprisonment for manslaughter even after the judge had established hat the accused had for a long time been provoked by the victim,[73] and on May , 1980, a man was sentenced to six and a half years imprisonment after pleading uilty to a lesser charge of manslaughter and he had been in custody for twenty ive months.[74]

According to our legal system, taking somebody's life in an injustifiable or nexcusable manner is a serious offence.[74] And as a matter of fact, Mr. Justice arris was mindful of this when he said that the offence by Sandstrom was very ious, carrying a possible sentence of life imprisonment. But the hard truth s that our existing legal system is actually pregnant with the seed of retribution. nd so the argument goes on like this; if Wananchi suffer punishment one way or othe hen they commit the offence of manslaughter why not sundstrom? While commenting n the judgement Kenya's Attorney General said in parliament[75] that he was not atisfied with the judgement.

e was answering a question put forward by Mr. Kimani wa Nyoike[76] whose question

ge,

"Is the Attorney General satisfied that justice was not only done but also seen to be done in the case of an American sailor, Frank Joseph Sundstrom, who killed a Kenyan girl and then walked out of the court free%"

he Attorney [illegible] General's answer to this question was:

"The answer to the question is that I am not satisfied that justice was done and I am not satisfied that justice was seen to be done. Mr. Speaker, this is, perhaps, the price that we have to pay for independence of the judiciary and I would like to mention to the honourable members that the alternative of that could possibly be disastrous".[77]

It's clear from the Attorney General's answer that he was not satisfied with the dgement. But the fact remains that although we don't expect the executive to terfere with the judiciary neither legislature interfering I can't do away with e fact that there was interference form some quarters. At the same time of the dgement there was the Kenya-United -States of America issue involving military liances and food aid[78] to have given the Kenya government an opportunity to arm the Kenya government into letting young Sundstrom off Scot-free thus ving the Kenya executive interfering with the independence of the judiciary. procedure for ending the tenure of justice was applied in the first time in ya's history and justice Harris was removed from the bench. This was again the interest of the ruling elite to woe the public, which was reasonably angered justice. Harris decision and thus make the public feel that the ruling elite there for its benefit.

HAPTER 3

ootnotes

. Swahili name for footsteps

). -Mzee Jomo Kenyatta

. See a general study of the dynamic of Harambee by J.N. Ngethe, Harambee and development in Kenya. The political of peasants and elites interaction with particular reference to Harambee projects in Kiambu Districts -phD Thesis, carlation 1979.

. The penal code, cap 63 laws of Kenya chapters 26-28, 30-32

. Phillip M. Maithi, rural sociology and rural Development. Its application in Kenya (E.A.I8 1 74)

. Cap 106, laws of Kenya revised in 1972

. Daily Nation 26th May 1980

. See protection from deprivation of property section 75 of the constitution

. Ibid Section 75 (2)

. See singh V municipal council of Nairobi (1946)22 IK.L.R8

. Hon. J. Kamotho

. Mr. Hudson Miaiko

. At Igikiro Harambee secondary School in Makuyu constituency of Murang'a District

. In accordance with the public order Act c p

. see weekly review April 11-1980

. Hon. N'geno

. Weekly Review February 6/1981

). Cap 212, laws of Kenya

. Supra

. Daily Nation December 20- 1978 page

. Article 27 of the constitution

. June 30 1980

. Mr. Njuguna Ndoto

. Hon. Mark Mwithaga

. Ibid.

4. see Weekly Review June 6/1980

5. See public order Act

6. 19-7-80

7. Cap 233, laws of Kenya

8. Section 17 of Trade Union Act

9. Kanu Manyatta 1963& 1979

10. My personal observation

11. It even goes against the principle of Natural justice

12. See section 77 of Kenya constitution Acts No. 5 of 1969

13. Ibid section 77(2)a

14. See Kenya News and Africa Report July 1988 page 5

15. Mr. James B. Karugu

16. In his book edited by C.B. Leacock - called the origin of the family private property and the state (New York International publishers 1972) page 229

17. Ibid page 231

18. R. Miliband, The State In A Capitalist Society. An analysis of the western systems of power (New York Basic Books 1969)

19. Changaa prohibition Act, No. 39 1980 which became effective on 15th August 1980 sections of the Act gives administrative and police officers extremely wide powers of search and arrest that reduce the constitutional protection against arbitrary arrestor entry

1979

Cap 122 - laws of Kenya

Section 26 (3) of Kenya constitution Act No. 5 of 1969

Section 26(3) c

Kenya Constitution Act No 5 of 1969

Criminal case No. 881/78 in Resident Magistrate court at Muranga

Section 322(2) pf Kenya penal code

Economic commission for Africa conference working paper No -16 1971

Legal advisory centre constitution Article 2

.../72

. Interviewed one voluntary legal advisor who sought his name to remain unanimous

. Weekly Review July 8, 1980 at page 11

. Ibid July 25 1980 at page 14

. LCB Go wer - The Principles Of Modern Company Law, (3rd Edition) London stevens & sons. 1969, 1978) chapter 8 and particularly at pp 146-148, Smith ad Hogan, criminal laq (London Butt rworths 1969, 1978) 2nd Edition chapter 8, part 2 at pp 98-109, C.A. Cross, Principles Of local Government Laws, 4th Edition (london sweet and maxwell 1971 pp 106-167

. Chapter 63, law of Kenya, section 23

. See Daily Nation March 7, 1980

. See weekly Review January 18, 1980

. Ibid

. 06 Nairobi city Council

. See Weekly Review January 5 1979

. Ibid February 1 1980

. Hon. Charles Rubia

. See Weekly Review February 20-1980

. Kenya News and Afrisa Reports July 1980 at page 8

. See Weekly Review August 8 - 1980

. Ibid

. Ibid Januaary 11-1980

. Daily Nation March 19-1980 at page 1

. In late October 1978

. James Mungai ran away in November 1978

. Mr. Charles Njonjo

. See Weekly Review January 25 - 1980

. Ibid

. High Court criminal case No. 45 of 1980

. See Weekly Review October 17, 1980 at apge 4

. Ibid

. Ibid at page 6

. Member of Parliament for Nyandarua North

7. See weekly Review October 17, 1988 at page

8. Ibid at page 4

ONCLUSION AND RECOMMENDATIONS

The concept of the rule of law as expounded by Dicey shows alot of eaknesses. In brief, as far as Dicey's first principle is concerned he carefully voided the substance of the law and concentrated on the formal legality aspects. icey himself noted that the substance of the English law contained alot of injustices such as those, that required debtors to languish in prison but he regarded these as not important in his concept. This failure of Dicays first principle is so remarkable that it has been observed that to a great extent if it were applied in its modern form it would mean that the rule of law was observed in Kenya during the colonial period. In his second muociple of equality before the law he paid much attention to the form of the law rather than to the motivation of the same. This is a wall known strategy of bourgeois legalism which expresses legal rights and obligation in very general terms with full knowledge that the ruling powerful with outlawed advantages over the exploited classes when it comes to law enforcement. This was recently unveiled by the European court of Human Rights in Johanna Airey V Ireland[2] where it was held that availability if legal remedy implies and includes accessibility to such available and one cannot then the remedy becomes fiction.

Dicey's third principle regarding the efficacy of judicial legislation over nd above legislatively declared laws on individual rights and freedoms is hard o quarrel with. This is precisely so because the individual rights and reedoms that were recognized internationally in 1988 were very limited indeed and ven more so in England where the Piece-meal legislation by judges could ot be comprehensive. Due to the existing weaknesses in Dicey's conception of the octrine of rule of law I recommend that the first two principles in particular hould not be used by states to legitimise oppresion in the pretext that they are dhering to the rule of law as expounded by Dicey States should use the inciples as a guideline as to how the individual freedom and rights can be otected and they promulgate laws that will lead to real attainment of human gnity.

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

In the second chapter I have started by observing some fundamental rights substantive and procedure) which are expressions of the rule of law as incor- rated in our constitution. As concerns the bill of rights its not the existence which is important but rather it is the practice of these rights which stifies its existence. The rule of law in Kenya has come to be identified th the rights of the individual. The socio-political implication of the ncepts of rule of law and bill of rights have been put in issue . Our law sets finite safeguards for human rights. It has been contended that there are some hts which are inalienable i.e man's right to life is inalienable except due process of law. So are his right to liberty and other analogours rights. en therefore such rights are violated and yet our constitutional lawyers and iminologist turn a deaf ear in complete importance one naturally fears for such hts. An independent judiciary should guard totully against such individual right olations.

I have made it clear that the fundamental rights are essential if man is to tain human dignity and realise human equality. Human dignity and equality essential if man is to give meaning to his life during the period he or she is lve. These fundamental rights assume that men in the ordering of human affairs the 'end' in itself to use Immanuel Kant's own words. The fundamental weakness the other hand of the whole constitution as Professor Yash Ghai and N Mc tkan[3] have pointed out is that it sought to put all people with different socio an nomic privileges at per. Given however the disparities between the races in all ects of life at the time of independence a formal equality under the law would

the effects of preserving the status quo and thus to some extent
petuating the unfairness and injustice of the colonial system. Therefore,
fundamental rights as incorporated in our constitution[4] can serve little to the
ainment of human dignity. As another situation I have recommended that Kenya
ds a political theory that will enable the majority of Kenyans to attain
an dignity and enable them to make their lives meaningful and thus making
rule of law concept more meaningful. The political theory must be based on the
ality of all men. Its only by having such theory being put in actual Practice that the recommendations
the declaration of Delhi such as the establishing economic, social
cational cultural conditions under which mans legitimate aspiration and human dignity c
be achieved. The socialist political theory would mean every Kenyan is
itled to respect and concern whenever political and social arrangements are
ng made.

As far as the doctrine of separation of Powers is concerned I have already indicated
t this is non-existent in Kenya. It has failed because in a way the executive
ts it to be as such. Some provisions exist in our constitution for example
makes the executive encroach itself on the functions of the judiciary i.e
justification is given by any section of the constitution why the President
ld be involved in appointing the Chief justice. If there exists the Judicial
vice commission which employs and disciplines its members. To ensure the
pendence of the judiciary the Chief Justice and puisne judges should be
intees of the judicial service commission. Thus when judges become appointees
n independent judicial service commission their unjustified loyalty to the
utive will be minimised therefore safeguarding the doctrine of separation
owers and doing service to the doctrine of the rule of law. Such an independent
ciary should be capable of strongly resisting against executive arbitrariness.
ndependent legislature together with an educated citizenry to the advantages of
ndependent judiciary can join hands with such a judiciary and exert pressure
nst any move by the executive to misuse powers.

As I have indicated in my second chapter Kenya's legislative is not independent
the executive. Some provisions exist which makes the executive and the
slature almost one thing.

.e Cabinet Ministers and the President are members of the legislative. An
ndependent legisletive should be capable of criticising the executive and
mending any act or constitutional provisions to ensure both its independence
nd the judiciary. Is such a legislature should be in a position of making sure that t
tate serves the interest of the majority to achieve human dignity. Most of the
nstances that the government encroaches on the legislatives independence is when
he executive's interest as opposed to the public interest is
hreatened. This argument can still go for the judiciary. I hold the view
hat the present Kenyan state is based on a capitalist mode of production and
herefore there are several social classes and of course the dominant economic
lass is the ruling class. Therefore there are conflicting interests and in a
d to sustain itself (state) it has to turn into arbitrariness. The legislative
self is a superstructure of this capitalistic mode of production dominated state
d therefore it usually abides with the executive wishes. Where it deviates the
ecutive exerts unjustified pressure on it to bring it in line with its(executive)
pirations. I therefore recommend that to have a successful independent
gislature(and the same argument goes for an independent judiciary) we should turn
nya's capitalist state into a socialist state. Such a state will have a
cialist mode of production and the state would be out to serve the interests of the
jority. One of the interests of the majority is human dignity which is what
e rule of law concept is out to achieve. The legislature as a superstructure
uch a mode production would serve the interests that such a socialist state
ld envisage and therefore it would not encounter any problems in fighting for
an dignity. Such a genuine socialist state will give the judiciary a change
of ensuring human dignity is attained and its then also that the theory of
stitutionalism will make sense because an independent legislature would protect

As concerns the practice of the principle of legality and equality before the
in the Nyayo era, I have come to the conclusion that those two principles have
subjected to much abuse. Executive-cum-administrative abuse and disregard
tablished law is clearly manifested in my third chapter and this strictly goes

gainst the principle of legality unlawful or arbitrary 'orders' by cabinet minister
nd administrative officials also stand out in our legal system. The public also
hrough some instances e.g mob justice has also shown much abuse for established law
ut generally the public is not very much to blame because most of the abuse
mes from the ruling class. I therefore recommend that as far as the executive
mbers are concerned, the legislative should come out with more criticism of
eir acts. Such a legislature should be an independent one as I have already
ntioned elsewhere so that it can be effective in publicly criticing such acts and
us having a check on the executive. The judiciary should also help in this
tter by sticking to the law and punishing such officials if the law allows. Such
judiciary as also I have explained elsewhere ought to be independent. As far as
e public is concerned, its abuse of established law as in the area of mob
stice should not be taken easily. The parliamentatians, the government
the members of the law society should educate the masses on the importance
respecting the law. This will help because most of the people result
o mob justice because of the ignorance of the law. The security forces
uld also be more tough and interfere in a reasonable manner to save mob
tice victims.

As far as the principle of equality is concerned, I have through my
mination on it managed to unveil the fraud of the dominant
minant bourgeois intellectualism that over emphasise the otherwise laudable
nciple of equality before the law at the expense of the content of such
w as the cardinal principle of the rule of law. I have also shown
lect or out-right refusal by the members of the executive to mobilise the
icial machinery in most cases where the interests of members of the
ling class are likely to be adversely affected by the law. All these I
e done by adoption Engels[5] definition of a state so that after showing that
state through its essentially non-armed organs is out to protect and
nce the interest of the dorminant class (socially,politicelly and
nomically). It becomes clear that the present Kenyan state would
nitely show little respect for this principle.

therefore recommend that the Kenyan capitalist state which serves the interes
a few should be changed to a socialist state. This would ensure that
promulgated
e laws promulgated would truly reflect equality before the law. This
uld be possible because the legislature of such a state would be out to
rve the interests of the majority and thus would be reflected in the law
passes. The ruling class of such a state would comprise the majority and
so the risk of favour in mobilising the judicial process to affect a
rtain small class of people who comprise the ruling class will go.

As concerns the judiciary itself showing disrespect for the principle
ile administering justice as shown in Republic V Sandstromm's case I feel
et after achieving a socialist state even the judges themselves will be
t to serve the interest of a socialist state and so the danger of the judges
ving a bias to the members of the ruling class to which they belong will
longer be in existent. Its by having serious respect for the noble
inciple of the rule of law that the Kenyan state would prosper. The
nyans fought for independence because their dignity was practically
reatened by the British colonialists. Its only fair that the
man dignity they fought for should be maintained under any cost. Its only
guaranteeing individual freedom and all other elements associated to such
eedom to achieve human dignity that independence would make sense to the
jority of the Kenyans.

CONCLUSION AND RECOMMENDATIONS

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