

PRESIDENTIAL POWERS/DIRECTIVES AND FUNDAMENTAL HUMAN RIGHTS -
A CONFLICT?

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a Bachelor of Laws Degree, University of Nairobi.

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INTRODUCTION

It must be admitted that when writing on Presidential directives case law on the same boils down to nil. In other words, criticism of the exercise of Presidential powers and the incidental directives is almost nil and hence, the difficulty in writing on the subject.

In chapter one, I shall discuss the historical development of fundamental human rights which is now entrenched in chapter five of the constitution of Kenya.

I shall reflect on the ancient philosophy on natural law jurisprudence and how it contributed^{to} and was a basis for the universal recognition of human rights. I will then, in the same chapter highlight arguments advanced in the United Nations Charter for the recognition of such rights as being fundamental and also look briefly at the internationalization of human rights and the consequent entrenchment in our constitution which will necessitate a brief look at the historical (colonial) development in Kenya for their recognition.

I shall outline the constitutional provision only in so far as they will be affected by Presidential directives which is the subject of chapter 3.

In chapter 2, I shall reflect on the powers conferred on the President since independence and the constitutional amendments which have increasingly bestowed power upon him.

In chapter 3, I shall discuss, against the background of Presidential powers, the legal basis of Presidential directives. In the same chapter, I will basically outline directives so far made by the President only in so far as they infiltrate and infringe on the constitutional provisions on fundamental human rights.

The last chapter will be a discussion on the implications of Presidential directives on human rights.

This paper therefore, seeks to bring into light the conflict emerging between Presidential directives and the constitution (chapter 5) which is the supreme law of the land (s. 3 of the constitution of Kenya).

The question to be answered therefore, is how do we resolve this conflict where there appears to be one; which balance can be struck between constitutional provisions and Presidential directives which are both at the "top"?

CHAPTER ONE

HISTORICAL DEVELOPMENT OF FUNDAMENTAL HUMAN RIGHTS

Very distinct terms Human or fundamental rights is the modern name for what have been traditionally known as natural rights, and these may be defined as moral rights, which every human being, everywhere, at all times ought to have, simply because of the fact that in contradistinction to other being, he is rational and moral. No man may be deprived of these rights without grave affront? to justice. *1

Fundamental means 'essential', 'primal' Human could, of necessity, be included rights that are so fundam

In the development of the notion of natural rights, the theory of natural law played a dominant part. But it is remarkable that before the formation of the theory of natural law by the stoic philosophers, *2 citizens of certain Greek States had enjoyed some of the rights which are today laid as fundamental; equal freedom of speech or equality before the law or equal respect for all.

The concept of natural law was just systematically formulated by the stoics after the breakdown of the Greek city states. For them natural law was universal in that it applied not only to the citizens of certain states but rather to everybody everywhere in the cosmopolis. It was superior to any positive law and embodied those elementary principles of justice which were apparent to the "eye of reason" *3

The natural rights conferred by it were "not the particular privileges of citizens of certain states, but something to which every human being, everywhere, was entitled by virtue of the simple fact of being human and rational." *4

Men, they argued, could conquer and obey this law of nature because of their common possession of reason and capacity to develop and attain virtue. They were, by this, able to emphasise the notion of freedom and equality of all men. This conception of natural law was upheld by the Romans especially the stoics. Thus Cicero^{*5} said:

(immutable?)
"It is of universal application, (unchanging and everlasting). It is a sin to try to alter this law, nor is it allowable to attempt to repeat any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligation by senate or people... And there will not be different laws at Rome and at Athens or different laws now and in the future, but one internal and unchanging law will be valid for all nations and for all times."*6

Similarly, during the middle ages, there was even greater rules laid by political philosophers, especially St. Thomas Aquinas⁷ on the concept of natural law as a law higher than our positive laws and one which all rules must conform to.

After a temporary set-back resulting from the popularity of the teaching of Machiavelli⁸ and the absolutism of the nascent national states in the 16th century, the idea of reformation and resulting religious struggles brought about a widespread outcry for the natural rights of freedom of conscience and religious belief. The second factor was the doctrine of social contract which was closely associated with the theory of natural law, since the raw materials for the formulation of the former were the common - places of the latter⁹. The doctrine made its appearance in the 16th century and 17th century when political theories turned to the idea of contract in order to interpret the relationship between the individual and the community.

Initially, it claimed that royal authority derived from a contract of Government whereby the people collectively had undertaken to obey the rule, so long as he governs in the general interest and kept within the terms of the contract. In the 17th century however, it came to be conceived as an act of separate individuals emerging from a state of nature into civil society, whereby, for their common advantage, they undertook with one another to set up a Government to which they would give actual support and submission.¹⁰

The association thus formed would proceed usually by majority decision, to appoint governors whom it empowered either by a contract of government, a deed of trust or by an act of delegation to govern on its behalf, usually, subject to the condition that is acted in the general interest and respected natural rights. Failure in this respect might justify disobedience and even rebellion¹¹.

This was, however, not the invariable teaching of the school of social contract.¹² But it was the one which, by virtue of its great influence on the American and French Revolution, popularised the modern notion of natural rights and gave it a dynamic content.

During the American Revolution, which originated in the colonial revolt of 1763, the colonists backed their claim with the concept of natural law and natural rights, and made use of Locke's doctrine of the social contract to justify their rebellion. When the Government, by levying taxes without their consent, was seen as a violation of these rights.

The same idea was immortalized in the American Declaration of Independence which was the final act demonstrating the determination of the colonists to overthrow the authority of the imperial Government.

"We hold these truths to be self-evident that all men are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights Governments are instituted among men deriving their just powers from the consent of the governed; that whenever any form of Government becomes destructive of these ends, it is the right of the people to alter or abolish it and institute new government." 13

Although the founding fathers thus based their case against the mother country on the rights of man, when they came to draft a constitution in 1787, no attempt was made to enshrine these in a Bill of Rights. It was only in 1791 that ten amendments to the constitution were passed in congress which came to be known as the Bill of Rights and to be regarded as forming part of the constitution.

Also during the 2nd half of the 18th century, the economic and social injustices of the French ^{Ancien Régime} ~~ancient~~ regime had become unbearable and in consequence provoked a stream of brilliant satirical and destructive criticism from the philosophers. These writers in whose arguments the influence of Rousseau was discernible, believed that mankind was on the threshold of a new age in which right reason could triumph, and in which all citizens could enjoy their natural and imprescriptible right to life; liberty and the pursuit of happiness.

It was the duty of Government to preserve these rights because men everywhere had certain inherent spiritual and material needs, and the rights necessary to meet these needs were natural and inalienable.

A Government which failed to safeguard them could not justify its existence.¹⁴

The criticism of the philosophers produced desire reform. By the French Revolution, a constitution was drafted in 1791 which embodied the concept of human rights.

Before the American and French Revolutions it had what was for all practical purposes only a philosophical appeal but after the declaration and the Constitutional Bill of Rights the concept assumed a positive importance.

The American and French examples started off a new trend in the constitutional recognition of individual fundamental rights.

Consequently Bills of Rights have become parts of the constitution of practically all European and Commonwealth states and also Communist states.¹⁵

After the two world wars, natural law, now called Human rights movement was revived. The rule of nazism, communism and fascism necessitated the need for having nationally recognised rights.¹⁶

As a result, a charter was drafted in 1948 which recognized international protection of human rights.¹⁷ This was ^{followed} formed by another charter in Europe which enumerated human rights that cannot be taken away, such as right to life, liberty, freedom of conscience and expression.

A court of appeal for human rights was set for state parties to this charter.¹⁸

The Nigerian constitution, that is the macpherson constitution¹⁹ of which most of the commonwealth Africa are modelled, was modelled on the European convention on Human rights. The constitution lists a number of individual rights which cannot be denied the individual except under certain circumstances. These rights include the right to liberty, life, freedom of conscience, movement, expression and right to a fair trial.²⁰

Similarly, during the American declaration of independence which we have looked at above, it was proclaimed that the nation was founded on natural rights, "a philosophy of human right" as Carl Lotus Becker observed, "which is valid, if at all, not for Americans only but for all men."²¹

Thus before world war II, international law left nation states free, with minor exceptions, to treat their own nationals, as they saw fit. This meant that human rights was not a subject of international concern and was treated as being exclusively within the domestic jurisdiction of individual states.

The situation changed with the adoption of the United Nations Charter, which is, among other things, a human rights instrument. Moreover, the United Nations Charter is the foundation upon which a large body of international human rights instruments directly related to and implementing the charter are found.

These are the universal declarations of human rights,²² the Genocide convention²³ the United Nations Racial Convention,²⁴ the United Nations Convention on Human Rights,²⁵ and the international labour organization,²⁶ and the United Nations Educational science, culture organization (UNESCO)²⁷ Human Rights instruments.

Influenced and inspired by the United Nations Charter, in addition are regional human rights instruments such as the European convention of Human Rights²⁸ and the American declaration and convention on Human Rights.²⁹ *O.A.U.*

The charter is now in force in more than 150 countries.³⁰ When the convention of 1950 came into being, the principle of respect for human rights had been established in the preamble and in article 55 (c) of the charter of the United Nations.

Furthermore, a detailed definition of human rights had been achieved in the General Assembly of the United Nations 10th December, 1948. The European convention of 1950 declares in its preamble that it shall represent "the first steps for the collective enforcement of certain of the rights stated in the universal declaration of 1948."

In drafting the convention, some of the leading figures stressed the ideas of natural law on which the draft convention had been based. It was emphasised that every man by virtue of his origin, his *nature* and his destiny, has indefeasible rights against which no reason of state may prevail.³¹

A Swedish representative, delivered the following declarations of faith "Is not the belief in the existence of human rights the real greatness of the Western civilization of European culture?"

32 This is an individualistic approach that negates the universality of human rights with a potting declaration of the significance of European inclinations, in what is dubbed a "Universal Declaration..." Racial

The preamble of the convention which describes the contracting parties as 'Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world', must also be regarded as expressing natural law concepts.

over tone to be precise

Some of the speakers referred to the spiritual and moral 'common heritage' of a free and democratic Europe, which the convention is meant to safeguard.

33 (Mr. Teitger used the expression 'the common denomination' of our political Institutions. *34* One of the purposes of the convention is to strengthen resistance to attempts in all member states to undermine free 'democratic stability' *35*

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On one hand, the direct purpose of the convention is to safeguard certain minimum rights.

On the other hand, the list of human rights to be protected is not complete.

From the foregoing, it may be observed that the demand for humanity, justice and equality is a very old concept. Some elements of the instinct for decent and humane treatment appear in every religion, but these yearnings have little to do with contemporary concept of human rights that individuals have claims against the state.

As we have observed earlier, the question of the rights of individuals was left to their nation states, but this changed beginning with the charter of the United Nations which proclaimed as a principle purpose:

"To achieve, international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion...."37

In Article 55, United Nations Charter, the principle was repeated in the form of a pledge that the United Nations shall promote:

"Universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language or religion."

The human undertaking of the member states of the nations may have been vague at the inception, and the obligation may have been no more than to "promote" those values, but subsequent documents gave further meaning to the terms.

The universal declaration of Human rights in 1948, to which all member nations subscribe, set forth a 'common standard of achievement for all peoples and all nations' to which all "shall strive by teaching and education to promote respect for these rights and freedoms" and enumerates those rights which we call human.

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Among the most important has been the convention on the prevention and punishment of the crime of Genocide, 1948, the international convention on the elimination of all forms of Racial Discrimination (1965) and the international conventions on economic, racial and cultural Rights, 1966. In addition, there are a number of other instruments that deal with particular rights such as rights of women, children and refugees ; rights of the wounded and the sick in armed conflict; a number of declarations of less formal character, and several regional instruments that define principles and establish machinery for enforcement of the enumerated rights.

No nation can any longer claim not to know what human rights are, nor can any nation now assert that the manner in which it treats its own nationals is free from international scrutiny.

The United States Secretary of the state Cyrus Vance, in April, 1977, stated the basic concept of human rights in these words:-

"First, there is the right to be free from Governmental violation of the integrity of the person. Such violations include torture, cruel, inhuman or degrading treatment or punishment, and arbitrary arrest or imprisonment. And they include denial of fair public trial, and invasion of the home".

To this should be added, as now recognised, freedom from gross discrimination. Secretary Vance identified as 2nd category the right to food, shelter, health care and education.

Presumably, at least the basic human needs essential to maintenance of decent life would be recognised as within the core.

Vance's third category was the right to enjoy civil and political liberties. Although these rights are acknowledged in the universa

declaration of human rights and in later conventions ratified by many nations, they may not yet be part of the core rights to which every nation concedes it is bound.

In 1970, the international covenants on civil and political rights on economic, social and cultural rights came into force with the requisite number of ratifications.

From the foregoing outline on the Human Rights Charter, it can be said that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedoms, justice and peace in the world.³⁸

ADOPTION OF THE BILL OF RIGHTS IN KENYA

The colonial administrators had established and maintained by means of law, a Governmental and social system characterized by authoritarianism and racial discrimination in such vital fields as the administration of justice, the development of representative institutions, and agrarian administration. The repressive system and its hostility are seen by firstly the manner in which legislative powers were exercised.

For instance, by the Native Courts Regulations of 1897, the Commissioner for East African protectorate armed himself with powers of preventive detention and restriction of movement in respect of any persons subject to the regulations if it was shown to the satisfaction of the Commissioner that the person was disaffected to the Government or was about to commit an offence against the regulations or was otherwise conducting himself so as to be dangerous to peace and good order in protectorate.

These provisions provided for special powers which had the effect of depriving a person of the basic rights of freedom of the person and of movement.

The vagrancy regulations³⁹ provided for the arrest and detention of any person found asking for alms or wandering about without any employment or visible means of existence. The Native passes Regulations enabled the control of movement of natives. Curfews and other restrictive orders could be imposed by the administrators.

Laws were exercised in a discriminatory manner - the powers of the Commissioner were discriminatory, for they were used only against those subject to the Native courts regulations - that is Africans. Where laws were not expressly discriminatory administrators were given wide discretion, and in practice could and did exercise it in a discriminatory manner. In this they were generally supported by the courts, which seemed unwilling to extend their conceptions of justice from the administration of justice into other fields.

The attitude of the courts may be illustrated by two decisions, upholding the principle of racial discrimination, where in both cases the court could have opted for different interpretations on the grounds that such discrimination was repugnant to public policy or the common law.⁴¹

he first concerned the power of the Commissioner of Lands to impose restrictions on who would bid at auctions for sales of crown land, and their use thereafter.⁴²

The Commissioner had advertised the auction of town plots at which only Europeans were to be allowed to bid and purchase and had stipulated that during the terms of the grant, the grantee should not permit the dwelling house or out-building thereon to be used for residence of any Asiatic or African who was not a domestic servant employed by him. The Commissioner's powers to dispose of land were derived from the crown lands ordinance of 1915. The ordinance had made a distinction between the disposal of Agricultural and urban land, and the power to impose racial restrictions or covenants was expressly granted only in the case of Agricultural land. It was argued by the appellants that therefore, there was no power to impose these restrictions on the disposal of land in towns. The Judicial Committee, saying they were concerned with law and not policy, found for the Commissioner, holding that Prima Facie the rights of the crown and its servants to dispose of crown property was analogous to those of the private owners.

*Wed
7
Thurs*

They had to observe the express terms of the statute, but apart from that they were free to impose what restrictions they chose.

Their lordships went on to argue that it would be valid to restrict the bidding to industrialists, or the trading community, in appropriate cases, so why not to racial groups!

he second decision concerned the validity of a curfew order whose application was restricted to Africans only.⁴³ It was made under the Public Order Ordinance 1950 (as amended), section 10 of which provided that the curfew orders may be applied to "every member of any class of persons". Specified therein without considering what might have been intended to be proper purposes of this phraseology, the court also stated its opinion that non-conformity with legislative procedures requiring the consent of the Secretary of State for specified kinds of legislation, contained in the Royal instructions, was not an invalidating factor since it was not justiciable.

A final example of denial of human rights is contained in the laws allowing collective punishment to the disregard of individual guilt or responsibility, and the imposition of responsibility for the misconduct of others on one deemed to be in authority over them. Good examples of the first are found in the Special Districts (Administration) ordinance, and in the Stock and Produce Theft ordinance, s.15 of which authorised a magistrate, though not necessarily acting in a judicial capacity, on a complaint of stock theft to order all or some members of a tribe or sub-tribe to pay compensation to the aggrieved member of that tribe or sub-tribe had been implicated in the theft.⁴⁴

An example of the second provision occurred in the village headman ordinance of 1902, under which a headman, appointed by the Commissioner, was required to keep order in areas adjacent to his village or villages, and an order against him in his official capacity was enforceable against all the inhabitants of his village or villages.

If an outrage (not defined) occurred in any area in which a headman was responsible for the preservation of order, and the perpetration of such outrage could not be discovered, the sub-commissioner (later Provincial Commissioner) could in his discretion impose a fine upon such a headman unless he could prove to the satisfaction of the sub-commissioner that the outrage would not have been prevented by reasonable vigilance on his people's part.⁴⁵

These laws were made necessary by a colonial regime established to provide conditions for European settlement, and were made possible by the absence of constitutional barriers; no fundamental and justiciable limitations of power were placed on either the legislature or executive, and there was little check in the legislature to the enhancement of such legislation.

Thus the courts and administrators, paid very little regard to the individual rights during the colonial period.

The original Bill of Rights was introduced into Kenya in 1960 as a result of decisions taken at the 1st Lancaster House Conference.⁴⁶

Human Rights as defined and protected in the universal declarations of Human Rights and the Bill of Rights in the constitutions of many countries, had little place in the colonial regime established in Kenya.

However, with the imminence of independence¹⁹⁶² under an African Government, major reversals of policy were made. Kenya, among other things, was to be a country where individual rights in a context of non-discriminating society, were to be fundamental safeguarded. Legislative and executive powers were to be accordingly circumscribed and the judges were to be established as watchdogs over the new scheme.

The new system was to be brought into being through two kinds of changes. First, the decentralization of Government with its powers divided between a central and regional authorities. Secondly, the establishment, within the constitution of a Bill of Rights⁴⁷ which was to be supreme over the ordinary laws and executive action, and whose amendment was through a complex and difficult process. A Bill of Rights was also considered a particularly appropriate device for the protection of minorities, which is at the same time acceptable to the majority, for it singles out not communities but individuals as possessors of rights.

When Kenya obtained her constitution for internal self-Government, there was a Bill of Rights, which, with minor modifications, was subsequently entrenched in the ~~in the~~ independence constitution.

C H A P T E R T W O

RANGE OF POWERS VESTED IN THE PRESIDENT
SUBSTANTIAL PRESIDENTIAL POWERS.

In chapter one, we examined the historical development of fundamental human rights and their subsequent entrenchment in the Kenya constitution.

We shall now examine the general powers vested in the president by our constitution, which powers form the background and legal basis of presidential directives.

The declaration of republican status in December, 1964, a year after independence established a single executive authority with powers concentrated on its hand. This change was rationalised on the basis of both native and western ideas.¹

"It is proposed that strong national leadership assured by the election of a president who is Head of government and Head of State, ^{Not} in which you have a constitutional president and someone else as Head of government."

It was argued that the latter was just not understood by the Kenyan people and also that the modern constitutional form must be suited to our traditional needs, that is, to say that our people have always governed their affairs by looking to a council of elders elected and headed by their own chosen leader, and that, therefore, that tradition which is African will be preserved in the constitution.²

file retaining many important aspects of the "Export Model" notably the procedures of parliament and the whole idea of parliamentary government, the Republican constitution thus created a new type of regime founded on a synthesis of the classical parliamentary and the American presidential systems. The main concern of African governments at this time was to confer more powers upon the executive.

It is necessary here to say what the ^{"Westminster"} "Export Model" connotes. The "Export Model" constitution provides for a dual executive governor-general, acting on behalf of the Queen while the "efficient" powers fall to a popularly elected prime minister and his cabinet, responsible to the National Assembly.

Kenya's independence constitution was based on the "Export Model" constitution which vested the executive powers of government in the Queen, but these powers were to be exercised on her behalf by the Governor-General either directly or by officers subordinate to him.

The main powers exercised by the Governor-General included the appointment and dismissal of the government, (depending on the results of elections or the expression of parliament's will, as the case may be), prerogation and dissolution of parliament,³ and the prerogative of mercy.⁴ The powers of administration were exercised by the prime minister and his cabinet and by various agencies of the executive authority with ultimate responsibility to parliament. The export model is therefore based on a comprehensive document which defines the powers of government and specifies the mutual relations of the various organs (the executive, judiciary and legisla-

Always avoid repetition 'miss'

ture) often providing also for safeguards to individual liberty.⁵

As we have noted above, many important aspects of the export model constitution were retained by the republican constitution in Kenya.

Suffice to note that in Kenya, as in most African countries the most remarkable aspect of constitutional and political life since independence has been the wide-ranging powers available to the executive authority and specifically the president, as we shall see below.⁶ By a constitutional amendment of 1964,⁷ the republic of Kenya was established. The purpose of the first amendment Act was to "establish the Republic of Kenya, to amend the constitution, and for matters incidental thereto and connected therewith."⁸

In pursuance of that objective the powers of the executive were substantially increased.

By the Act, the presidency was created; its incumbent being also the Head of State, Head Government and commander-in-chief of the Armed Forces of the Republic.⁹

Power was concentrated in the hands of the executive - the president. His right to address parliament at any time enabled him to be a major potential influence on the course of law-making.

In Kenya at present, executive authority is vested in the president of Kenya.¹⁰ He may, subject to the constitution, exercise his power either directly or through officers.

Subordinate to him. The president has sole responsibility for the appointment, dismissal, of the vice president, the ministers and assistant ministers, the allocation to them of responsibility for a department of government and the granting to them of permission to be absent from the country.¹¹ 520

Where a minister is charged with responsibility for a department of government, he is required to exercise a general direction and control over it. It is clear from these provisions vesting executive power in the president that they are bolstered by the specific provisions dealing with his power over, and relating with his ministers. A person stays in the government only as long as he enjoys the confidence of the president.¹² Very true ✓

The president has similarly unfettered powers to dissolve parliament, the exercise of which power is a matter of his personal discretion,¹³ 596 and not merely at the time of a vote of no confidence and this adds a great deal to his strength? power

He also has power to summon and prorogue parliament,¹⁴ 58(i)-59(i) valuable powers, for he can decide when to call parliament and may want to use that power of prorogation to bring an unruly of critical session to an end, although he cannot postpone indefinitely the ~~the~~ calling of a session of parliament since it is parliament which will approve of his budget and general authorization and levying and collecting of taxes.

The President can waive in relation to any M.P., the rule that he loses his seat if he is absent for eight consecutive days in any session without the permission of the Speaker¹⁵ - a rule which gives him unnecessary powers in connection with the conduct of the M.P.'s; and constitutes a potentially serious interference with the functions and procedure of parliament. *Point!?*

By the Act of 1966,¹⁶ it was provided that any M.P. sentenced by court to a term of imprisonment exceeding six months was automatically to lose his seat.¹⁷ Also any M.P. who defaulted in attending parliamentary sessions on eight consecutive sittings without the Speaker's permission similarly lost his seat, unless excused by the President.¹⁸

The reason given for the first measure was that during the period of imprisonment, the people ... will be denied the opportunity for representation.¹⁹

And, furthermore, "because of the crime committed ... the people in the area may well feel that this person is no longer suitable to represent them with that criminal record."²⁰

The main aim of the section appears to have been to incorporate in the constitution an incentive for loyalty to the President.

As the fountain of mercy²¹ he was able to relieve the imprisoned M.P. And he could waive the law where an M.P. would otherwise lose his seat for absenting himself from parliamentary sittings.

you have a tendency of repeating yourself
Shut up! you fool. Respect yourself! I want your own ideas where you'll be!
Respect yourself f... hole! /23
Why can't you eat with me? if I don't build myself
Please do be have as scholars and observers!!!

At the time of independence, an independent public service commission was established by and entrenched in the constitution.²² Its control was vested in the President. The members were, by the provisions in the constitution isolated from politics. For instance, the law Officer, permanent secretaries etc. The apparent effect of those provisions was that the public service commission was relegated to a mere auxillary position. As the President could abolish offices as he considered necessary, it followed that the idea of protecting public offices by vesting their control in independent bodies was rendered invalid.

The President became "in theory, the employer of the Civil Servants and could dismiss them at will."²³

Since the inauguration of the Republic, there have been several significant changes in the law relating to the public service and all of them designed to bring the service more under the control of the President and close the gap between the public service commission and the service it helps control. ✓ *Correct!*

The rubric "Civil Service" - sometimes referred to as "Public Service" - is nowhere defined in the Kenya constitution. But there seems little doubt, to adopt Ghana's definition of the early sixties, that the phrase "... comprises all servants of the state, other than holders of political or judicial offices, who are employed in a civil capacity and whose remuneration is paid wholly and directly out of moneys voted by parliament."²⁴

The expression would cover " ... all staff of ministers and departments; from permanent secretaries to the daily rated employee ... " ²⁵

On the other hand, the constitution makes provision for the exercise of certain important powers by the President in relation to the civil service; on the other, it provides for the establishment of a public service commission to handle the very same subject matter.

s.24 of the constitution provides:

"Subject to this constitution, and any other law, the powers of constitution and abolishing offices for the Republic of Kenya, of making appointments to any such office, and terminating any such appointment shall vest in the President."

And s.24^s(1) provides:

"Save in so far as may be otherwise provided by this constitution or by any other law, every person who holds office in the service of the Republic of Kenya shall hold such office during the pleasure of the President."

From line
On the face of it, the effect of those provisions is to vest in the President, in relation to the public service, powers so wide as to be somewhat inconsistent with the role of an independent body in respect of the same subject matter.

As the President is empowered to constitute and abolish public offices, ²⁶ the role of the public service commission would then be confined to such offices as he may constitute.

This case would become even stronger considering that all public servants hold office at the pleasure of the President. W.B.

However, s.25(1) of the constitution has a "saving clause": the President only enjoys such superior powers subject to the constitution. In this connection the provision of s.107(1) is to be noted: It states:

"Subject to this constitution, the powers to appoint persons to hold or act in offices in the public service, including the power to confirm appointments, the power to exercise disciplinary control over persons holding or acting in such offices, and the power to remove such persons from offices shall vest in the public service commission..."

As in the case of the President, the powers of the public service commission are subject to the constitution. A plausible explanation perhaps, is that the President enjoys his powers in relation to the public service commission while the public service commission enjoys the same powers. But this explanation has its difficulty. It begs the question:- What are the respective powers of the President and the Public Service Commission?

From the sections (24, 25, & 107), it would appear that the ordinary regulation of the civil service is the function of the Public Service Commission. The President, however, enjoys extraordinary powers in relation to the public service, apparently in the capacity of state custodian.

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This ENESIS is a replica of J. B. Dwarvas/26
LLM Dissertation 1976

He may abolish offices where he considers them not to be in the interest of good Government. And even as the P.S.C. performs its function of regulating public service matters, its overall context of operation must meet with the President's view as to good Government and public interest.²⁷

In his role as the state's custodian, the President is empowered to terminate public appointments already made by the commission. In the same role, he may himself - make appointments which otherwise would fall within the ambit of the commission. In a sense, it appears, the President's role in respect of the public service is ultimate, rather than routine; he only comes into picture when a matter of state interest is involved. Otherwise, public service matters are left to the public service commission.²⁸

Thus, not only does the commission's membership depend upon the President's appointive powers - its function may be delegated to public officers. From the foregoing points, it would appear that the President is in a much stronger position than the Public Service Commission in relation to the public commission establishment.²⁹ The constitution vests certain appointments solely in the President.

These include the Attorney General, Secretary to the cabinet and the Director of Personnel.³⁰

The dissertation has facts which are non-disputable. stop foolish comments.

You sure are irrelevant. better write your relevant poor comment. How sick you seem to be with a.

.../27. stop make practical comments

The whole lot of you are stupid and fucked up why cant you write your own dissertations!

Handwritten scribbles in the top right corner.

~~Handwritten scribbles in the top center.~~

In so far as the President appoints the P.S.C. as well as the leading public servants, he apparently has the main initiative in public service appointments.

In independent Kenya, the tie between the President and the civil service has been a very close one. On a theoretical plane, the civil service is Government's main machinery for implementing the executive's policies and decisions and for regulating the affairs of state.³¹

On that account, it is invariably felt that the civil ^{service} ought to reflect the prevailing tradition and philosophies of Government. The incumbent regime will invariably expect the civil service to execute its policies with singular loyalty and devotion.

In relation to the judiciary, the main power that the President has is the appointment of judges and members of the Judicial service commission. The President appoints the Chief Justice, the puisne Judges and the judge of Appeal, but ^{accept} ~~expect~~ ^{except} in the case of Chief Justice - when exercising the power of appointment in relation to them, he has to act on the advice of the judicial service commission.³²

except

The mode of appointing judges under the constitution is designed to ensure the highest degree of judicial independence. In the first place, definite professional standards are set which a candidate for

appointment to the bench is required to satisfy . For instance, such a person is to be a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from such a court³³ or alternatively, an advocate of Kenya of not less than seven years' standing.³⁴ All appointive discretion is required to be exercised within those professional limits.

Under s.68 of the constitution, a special body, the Judicial Service Commission is set up to play a major role in appointments, termination, discipline etc. The Commission has five members, the Chief Justice (Chairman) the A.G., the Chairman of the Public Service Commission and two Judges of the High Court or of an appeal court.³⁵ It is required to operate independently; it "shall not be subject to the direction or control of any other person or authority".³⁶

The only judicial appointment which is subject to the discretion of the President is that of the Chief Justice³⁷ but of course, on the basis of the professional standards stipulated under the constitution. The puisne judges are required to be appointed by the President acting in accordance with the advice of the Judicial Service Commission.³⁸

The removal process in respect of judges is a complicated process. A judge may be removed from office "only for inability to perform the functions of his office" (whether arising from infirmity of body or mind or from any other cause) or from misbehaviour.³⁹

*This is an obsolete observation.
NO Credibility here, Sir!*

Not after 1998 constl amendment - the new article of the pres. elect. may be with a 2/3 vote.

no-562 (2)

psyco

(this is a historical of process)

But even where the grounds are satisfied, there is yet another safeguard. An independent tribunal has to be set up to investigate the conduct of the judge and to make definite recommendations for removal on the basis that it is warranted.⁴⁰

obscure

Dismissal of Justice O'Connor
Patricia 22
W. Scoville!
Ches...

Where the question of removal relates to the Chief Justice, the initiative for appointing the tribunal falls on the President. Where he considers that the question of removing the Chief Justice should be investigated, he refers the matter to the Chairman of the Public Service Commission, who then appoints the members of the investigatory tribunal.⁴¹

Judicial

The President removes the Chief Justice only if the tribunal recommends that course of action.⁴² Otherwise, the Chief Justice continues in office.

There are certain provisions however, which do not appear to be inconsiderate with the potential influence of the executive in relation to the judiciary, when the office of the Chief Justice falls vacant, or the Chief Justice is somehow unable to discharge the duties of his office, the President is empowered to appoint a puisne judge to act as the Chief Justice.⁴³

An acting Chief Justice ceases to hold that position in one of the three ways: if the substantive holder of the office resumes his duties under that office; if a new Chief Justice is appointed; if ^{his} acting capacity is sooner revoked by the President.⁴⁴

The implication of the last instance is that an acting chief Justice may have his appointment revoked by the President even though there is no substantive holder exercising the duties of that office

This may have the danger that an acting chief justice who aspires to retain that position probably with a view to being made the substantive holder, may be tempted to sacrifice his independence to the executive.

The constitution⁴⁵ empowers the President to take initiative for "Kenyanization" of public offices where the current holders are expatriates. It is possible to discontinue the service of a Judge, notwithstanding the protection accorded the bench under the constitution,⁴⁶ Again, this does not appear to be consonant with the idea of judicial independence which the constitution seeks to uphold.

From the foregoing instances, one would imagine a situation in which the proportion of acting Judges on the High Court bench is kept fairly high, thus enabling the Government to exercise considerable influence, facilitated by contractual provisions and by its ability to initiate the process of terminating individual appointments.

SPECIAL PRESIDENTIAL POWERS

The Government has inherited all the prerogative powers that the Queen could exercise in relation to Kenya in 1964.⁴⁷ It has been held that since the prerogative is part of common law, the prerogative powers were in some respects as extensive as in Britain - with minor exceptions, though in other respects they were even wider.⁴⁸

But the prerogative that the President can exercise on behalf of the Government are those that belonged to the Queen in relation to an independent Kenya, which were not as extensive. It is, for instance, clear that the Queen could no longer have claimed to legislate by Order-in-council. Again, the prerogative, being part of the common law, is liable to be displaced or repealed by written law. Thus, many of the former prerogatives are either regulated by law, or have been repealed. An example of the former is the exercise of the prerogative of mercy.⁴⁹ *But are you sure?*

The President may remit or reduce the punishment, including a term of imprisonment, or a forfeiture, on conviction of any offence. Hence, the breaches of the law are by no means absolute. Under s.27 of the constitution, the President is empowered to pardon convicted persons, to substitute

lesser punishment for a court sentence etc. *What then do need by? prerogative mercy? It seems not for criticism. If you know your identity, know if meaning. Heck they read this work!*

Under s.27(e) of the constitution, the President may remove any disability placed upon an election candidate by an election court on the ground that the candidate has committed an election offence. *(Nigeria Election 1975). "Nigeria clause"*

Under s. 28 of the constitution, an Advisory Committee on the prerogative of mercy is established whose duty is to advise the President on the exercise of his powers of reprieve.

This Committee consists of the Attorney-General, and at least three (and at most five) other members appointed by the President. The advice of the committee is not binding on the President.⁵⁰ *What is the need then?*

Thus the exercise of the prerogative is ultimately the responsibility of the President; furthermore its exercise is a matter for his personal discretion and is not subject to collective responsibility.

There is no definition of emergency and what constitutes it is left to the discretion of the President. Such discretionary powers on the part of the President has a somewhat clear definition.

repeated

Other Presidential powers relate to emergency. The Government has wide and unfettered powers in the North-Eastern province, which were subsequently extended to the contiguous districts of Marsabit, Isiolo, Tana River and Lamu. ⁵²

Sec 5

These powers enable the Government to administer these parts, without any constitutional constraints - the President can make any law by regulations, his legislative competence in this respect not being subject to any constitutional or other legal restrictions; he can thus authorize any administrative action that he feels necessary or expedient for the purpose of ensuring effective Government.

Powers relating to the above mentioned area are used extensively. Realistically, therefore, one should regard them as an important adjunct to the Presidential powers.

Closely related to the emergency powers are the extraordinary powers of the President which are provided for in the preservation of Public Security Act, ⁵³

By the third amendment, ⁵⁴ all provisions in the constitution which were specially entrenched were abolished and instead provided for less stringent procedures for amending those particular sections of the constitution.

The most important power affected was that of emergency. The period within which parliament was required to approve a declaration of emergency by the President was extended from one to three weeks and the period of the emergency, once approved could last was extended from two to three months.

Malawi's was worst. → No whose motion do you say so?

The sixth amendment⁵⁵ came in 1966, its effect being to relax emergency powers even more than was achieved in the third amendment. The section⁵⁶ now read:⁵⁷

"Subject to provisions of this section, the President may at any time; by order published in the Kenya Gazette bring into operation generally or in any part of Kenya, part 3 of the preservation of public security Act, or any provision of that Act!"

Part three of the Act contains the most stringent provisions under the title "Special Public Security Measures" under which the President may make special public security regulations for certain matters, for example, detention of persons,⁵⁸ restriction of movement,⁵⁹ imposition of curfews⁶⁰ etc.

The Act was to be read simultaneously with s.29 of the constitution as it (the Act) operates within it. Parliament by this amendment, ceded more powers of control over emergencies to the President. Further, the emergency provisions were no longer in the constitution but in an ordinary Act, therefore, it could be altered with the ease of a simple majority unlike if it was a constitutional provision.

The preservation of Public Security Act came into force on July.20, 1966, and has not been revoked since then.⁶¹

*1982 in few after
abolish coup*

While it is in force, the President has wide powers of derogation from the protected rights.⁶²

While the executive exercises wide powers conferred under emergency law, the court has the difficult task of entertaining individual's redress claims arising from the exercise of those powers.

Judicial powers in relation to the fundamental rights of the individual appear to be considerably limited during the operation of the preservation of Public Security Act.

Whilst part three of the Act operates, s.83 of the constitution empowers the President to exercise wide powers, including the detention of individuals.

By that section of the constitution, the exercise of such powers is not to be regarded as being inconsistent. With the protections of personal liberty etc.⁶³ The effect of such a provision, it would seem, is to oust the ordinary review jurisdiction of the High Court in relation to the matters specified. Normally, in the exercise of such jurisdiction the court would be entitled to test executives acts against statute law, or the constitution to see if the acts have been lawful.⁶⁴

The section appears to oust the High Court's function of superintending fundamental rights as regards the particular rights specified.⁶⁵

However, s.83 of the constitution seems to give the High Court a new basis of jurisdiction, albeit only limited. Inter alia, it provides that where a person is detained under the preservation of public security Act, "he shall, as soon as reasonably practicable and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained."⁶⁶

Secondly, it is required that whenever the power of detention under the Act, is exercised, this should be published in the Kenya Gazette together with the reasons for the action and the law warranting it.⁶⁷

It is further required that not more than one month after the commencement of detention and thereafter at intervals of not more than six months, the case should be reviewed by "an independent and impartial tribunal established by law and president over by the President from among persons qualified to be appointed as a Judge of the High Court."⁶⁸

These provisions may be said to be mandatory because of the fact that they are enumerated in the constitutional document and because they confer important rights upon the person detained, suggesting that they seek to assure him of fair procedure in his detention.

Holding that this interpretation is correct, the person detained should therefore, challenge the legality of his detention on the ground that those provisions have not been complied with.

Thus it might be argued that under s.83, the High Court is impliedly given new powers of Judicial review. *←* The High Court's powers are however, reduced by Cap. 57 and hence, the importance of the tribunals as a device for checking executive arbitrariness is reduced - considerably - detained persons are not protected.

We shall see in the next chapter ^{how} this Presidential power and the incidental directives made by the President has conflicted with fundamental rights - some of which we have mentioned ^{en passe} in passing - as far as they relate to detentions.

The above expose exhibits powers reposing in the President albeit not all.

~~#####~~

CHAPTER THREEPRESIDENTIAL DIRECTIVES

Presidential directives are rule-like pronouncements, proclamations or promulgations issued or made by the President, based on authority which he has or thinks he has. *Such authority is not real, it is a facade on quick sand.* This authority is derived wholly or partly from the constitution and the Acts of parliament, which we looked at in the preceding chapter. For instance, s.23 (3) of the constitution vests executive power in the President; and under s.83, the President has the power of detention. S.83 is to be read with the Preservation of Public Security Act, chapter 57, laws of Kenya, which enables the President to exercise powers of detention and thus derogate from the protected rights.

In this light, and bearing in mind that the President wields unrivalled political power, these directives can be legal or extra-legal. *extra-judicial, para-judicial, meta-judicial*

They are extra-legal when the President acts, as it were, more by virtue of political authority than by virtue of legal right and duty, or has an illusion that he has the power to issue a directive which he goes ahead and issues. The inevitable consequence of such directive is that it is acted upon by the subject, a parastatal organization or a Government body.

When the President makes such directives they may become, as one may guess, legally binding, and hence acquire a form of law.

Sometimes they are just politically and morally binding.

*Sheave Ke
Ombudsman*

A breach of the former category will be backed by a legal sanction, while a breach of the latter category will be backed by a political, moral or administrative sanction. Thus, the legal validity of Presidential directives is at least in theory, capable of being tested in a court of law.¹

PRESIDENTIAL DIRECTIVES AND THE DOCTRINE OF SEPARATION OF POWERS.

Governmental power ought to be divided into three components, each being exercised independently.

The functions of the executive has come to be understood to include, and in particular, the function of implementing the law enacted by the legislature. How comes then that the executive is taking the role of the legislature by making directives which may be and often are accorded the force of law?

There would be an end to everything were the same man or the same body to exercise those three powers - that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

*Plagiarism - an academic offence (Theft of academic material without giving credit where due?)
John Locke
Montesquieu*

It is considered by legal writers that the significance of the doctrine lies not in the rigid demarcation of the three functions, but in the emphasis placed upon the checks and balances, so that the three different organs can act in mutual restraint inter se, to prevent concentration of power in a single organ with the likelihood of tyranny as the upshot.

The President in Kenya has his feet in two organs; one foot in the legislature whilst the other is in the executive.² When he issues directives, the President, even as his directive sometimes has legal effects, operates within the aura of the 'executive authority' and relies on powers derived from the constitution and Acts of parliament. This, therefore, is one instance where the executive, of which the President is a subset, has, bestowed upon it legislative powers which, in traditional categorization of Government powers, vest in the legislature. This is a departure from the strict application of the doctrine of separation of powers. *point!*

JUSTIFICATION FOR THE PRESIDENT'S EXERCISE OF LEGISLATIVE POWERS

The executive authority, in the Government of Kenya, constitutionally vests in the President,³ and he may exercise it either directly or through officers subordinate to him. Thus any power granted to the executive generally can be exercised by the President.

The executive is sometimes invested with legislative power, which traditionally reposes in the legislature. When a specific legislative power is bestowed upon the executive, such grant is deemed a necessity in the modern state and is justified on the reasons following.

Firstly, because of pressure on parliamentary time, parliament *cannot* possibly deliberate on all issues pertaining to legislation.

May?
they are always sleeping in it
/40 HFE

Secondly, the subject matter may involve a high level of speciality, the expertises for handling which parliament generally lacks. Such technical issues of national importance are better handled by experts supplied by the executive.

And thirdly, there is need for flexibility, and the argument runs thus: an Act of parliament or the constitution when enacted cannot possibly be suitable for all contingencies foreseen or unforeseen. Therefore, parliament should enact in general terms, outlining the policy framework only but leaving the executive to legislate in accordance with the exigencies of any particular moment.

The executive; where it has been allocated legislative or judicial powers, must submit, in case of the former, to parliamentary control, and in both cases, unless otherwise stated, to judicial review. These are the checks and balances which are supposedly the cornerstone of the doctrine of separation of powers.

Presidential directives, therefore, are issued upon powers which the President thinks repose in the presidency. These powers in some instances have to be subject to certain procedure and are sometimes subject to powers of other Governmental organizations like the legislature and the judiciary. (4) 3

In order for them to be legally valid, Presidential directives are supposed to be issued pursuant to powers bestowed upon the President (see chapter two on Presidential powers).

However, a peculiar problem in Kenya is that these directives are at most times issued at public gatherings. Immediate enthusiastic enforcement follows even before their legal validity is scrutinized.

By legal validity we mean: - does the President have express or implied constitutional or statutory authority for the promulgation? And if yes, have the appropriate procedures translating that directive into law been adhered to? This is a question we shall answer subsequently.

As we shall see below, Presidential directives have sometimes been in conflict with express provisions of the constitution, i.e., the supreme law of the land.⁵ The constitution provides:

"This constitution is the constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to s.47, if any other law is inconsistent with the constitution, this constitution shall prevail and the other law shall to the extent of the inconsistency, be void."⁶

In the constitution are entrenched fundamental rights and freedoms of the individual.⁷ S.34 of the constitution provides for the protection and enforcement of these rights whenever there is an infringement of them. If s.3 of the constitution is properly interpreted, no law is to override these rights, save for express exceptions in certain circumstances which the constitution itself specifies. S.47 of the constitution provides for the procedure by which the provisions of the constitution may be altered. Only under this section will the alteration of the constitution be deemed to have been legally and validly made.

We shall now embark on an analysis of how the President has exercised his directive powers.

DIRECTIVES SO FAR MADE

As we mentioned earlier in this chapter, Presidential directives are, in practice, treated as enforceable before their validity is determined. This may be said to be an attribute of extra-legal dimension of some Presidential directives.

An area where the supreme law of the land has been infringed, by way of directives, is that relating to freedom of assembly and association.⁸ The constitution provides:

"Except with his own consent no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests..."

The constitution then goes further to list the exceptions to the general rule. The constitution provides that no law shall be held to be inconsistent with or in contravention of the above section if the law in question makes provision that is reasonably required in the interests of defence, public morality or public health,¹⁰ or for protecting the rights or freedoms of other persons,¹¹ or if it is to impose restrictions upon public officers, members of disciplined force, or person in the service of a local Government ~~or~~ authority,¹² and also if it is for the purpose of imposing reasonable conditions for the registration of trade unions and associations of trade uniona.¹³

If any law is made for the above reasons, then it will be held to be valid unless the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.¹⁴

The President, well aware of the above section of the constitution, forbade betting at the International Casino by means of Presidential directive.¹⁵

The betting, lotteries and Gaming Act¹⁶ provides for the control and licensing of betting and Gaming premises, the imposition and recovery of a tax on betting and gaming, and for the authorizing of public lotteries and for purposes incidental thereto.

S. 14 provides for the manner of controlling and licensing betting. Under this section, any owner or occupier who keeps or uses any unlicensed betting premises will be guilty of an offence.

S. 29 makes it an offence to bet in public places and s.45 provides also that gaming premises should be licenced otherwise the owner or occupier shall be guilty of an offence.

It appears from the above sections on the Betting, lotteries and Gaming Act that betting is lawful so long as the premises in which it is carried on are licensed and so long as the rules laid down by the Act are adhered to.

When the International Casino in Nairobi was first opened, it was reported that only two classes of Kenyans were barred from its gambling tables - (prostitutes and journalists.

Almost two decades later, new categories of people barred from gambling at Kenya's Casino was added - Members of Parliament and civil servants. This ban was slapped by the President.

By way of announcement, the President banned the two groups from gambling saying that "gambling was an evil which could lead to misery among families."¹⁷ His Excellency did not, however, give any indication whether other Kenyans would be barred from gambling at casinos, or whether other forms of gambling such as at horse races would also be affected.

This directive of course left doubt and uncertainty in the minds of "wananchi" who would have liked to exercise their constitutional right of freedom of association and assembly.

This directive certainly had negative consequences. The "wananchi" were left in a dilemma as to whether to continue gambling or not. Nowhere is it mentioned in the Betting, lotteries and Gaming Act, which class of people should bet or gamble.

The enthusiastic enforcement of this directive was manifest when the British High Commissioner,¹⁹ who was scheduled to host a large and distinguished gathering including many invited government ministers, M.P's and senior civil servants at the International Casino in Nairobi, at a function to promote tourism in Kenya expressed disappointment when only very few politicians and government officials turned up.²⁰

It is apparent from the poor turnout that the directive had, in point of fact acquired the force of law and was automatically being enforced as if it were legal or valid. The people (hopefully) knowing their right to assemble, had foregone that lawful right in favour of the presidential directive. The two groups barred from gambling considered themselves to be under a moral and political obligation to comply with the directive.

Looking at the above provisions pertaining to protection of freedom of assembly and association, we can rightly say that the directive did not fall under the main rule (s.80) or under the exceptions to the general rule. In strict legal terms, therefore, it may be asserted that the directive was unconstitutional. It is difficult to see how the President could be said to have been exercising his powers under any of the exceptions to s.80 - which we have enumerated above. The reasons given for the ban did not fall under any of the sections on the Betting, lotteries and Gaming Act. We may, perhaps, say that, in this regard, the directive was extra-legal and, strictly, did appear to be inconsistent with the letter and spirit of the law. Furthermore, the reason given for the ban was unjustifiable under the circumstances.

A further inconsistency with s.80 of the constitution was manifest, too, when the President, exercising his powers, directed that the University Academic Staff Union be de-registered.²¹

The societies Act²² provides for the manner in which a society, once registered, may be de-registered.

Under s.4(i) of the societies Act, every society which is not a registered society or exempted society is an unlawful society.

S.12(i) of the Act provides that where in respect of any registered society, the Registrar is of the opinion that the registration of a society should be cancelled or suspended on the ground that the society has, in his opinion, among its objects, or is, in his opinion, likely to pursue or to be used for, any unlawful purpose or any purpose prejudicial to or incompatible with peace, welfare or good order in Kenya,²³ or the interests of peace, welfare or good order in Kenya would (in his opinion) be likely to be prejudiced by the continued registration of the society,²⁴ or that the terms of the constitution or of the rules of the society are, in his opinion, in any respect repugnant to or inconsistent with any law etc.²⁵

The registrar may, in his discretion, give written notice in the prescribed form to the society calling upon the society to show cause, within such period as is specified in the notice, why its registration should not be, suspended; and, if the society fails to show cause to the satisfaction of the registrar within the time specified, the registrar may cancel or suspend the registration of the society.

S.12(3) of the Act gives the Registrar power to cancel the registration of any registered society, which has ceased to be a society within the meaning of the Societies Act, or which the minister has under paragraph II of the proviso to s.4(i) of the Act, declared to be a society dangerous to the good government of the Republic. S.4(1)(ii) provides that a society is unlawful if the minister has declared it, by order, to be a society dangerous to the good government of the Republic. X

Under s.15 of the societies Act, any society which is aggrieved by the Registrar's refusal to register it by his cancelling or suspending its registration under s.12 of this Act may within a period of 21 days, or such extended period as the minister may allow, from the date of the cancellation appeal to the minister against the cancellation and, where the society does so, it shall not, pending the decision on the appeal, be an unlawful society notwithstanding the said s.4(1) of the Act.

The Academic Staff Union was registered in 1972. It represented workers of the University, but it was mainly formed to represent "those members of staff who are employed on academic terms." It was also formed to regulate and improve relations between members of the University Council and students, as well as to negotiate for salaries and conditions of service for its members.

If we look at the provisions of the Societies Act, the logical inference is that the society was legitimately formed - its existence and purpose were therefore lawful and had satisfied the Registrar on the same.

And as we have seen above, s.80 of the constitution provides that

"... no person shall be hindered in the enjoyment of his freedom of assembly and association ... and in particular to form or belong to a trade union or other association for the protection of his interests."

While the University of Nairobi was still involved in one of its frequent crises (unrest which led to closure on February 27, 1980), the University Academic Staff Union had issued an ultimatum to the new University Council on issues including salaries, academic freedom and the reinstatement of one of the professors²⁶ who lost his job when he was detained. The Union handed the demands to the vice-chancellor, but before they received the reply, the President had ordered its de-registration.

After the University closed, the President said that he was aware of a group in the campus calling itself "the magnificent five." He said the group was being used as puppets to disrupt peace in the University and that he was aware of collusion between lecturers and students.²⁷

The crisis point for the Union was reached when the Union organized a demonstration against apartheid in South Africa and the murder of Guyanese politician and academic, Dr. Walter Rodney,

It was soon after the demonstration that the President told a passing out parade at the Administration Police Training College, Embakasi that the University was being used by a neighbouring country to plot political assassinations in Kenya.

Further, the President said: "I have sufficient information about this manoeuvre by a neighbouring country which wants to use the University of Nairobi for subversive activities including killings". - That he shall be careful with the University of Nairobi.²⁸

Later, a Senior Lecturer²⁹ who had defended the University Academic Staff union against charges by the President was arrested - and released after a day in custody.

Soon thereafter, the President ordered the de-registration of the Academic Staff Union, a ban which also applied to the Union Civil Servants. The President made the order at Machakos during a wedding ceremony.³⁰

*Lack of seriousness!
Ignorance of procedure.*

He said, the Government was taking care of its employees by improving their wages and welfare, and there was no need for the two unions to continue politicking! When contacted, a union spokesman told The Weekly Review that "we are shocked by the cancellation of our union. There is apparently nothing we can do about it."³¹

It is clear from the foregoing that the reasons given for the de-registration of the union were based mainly on suspicion.

The union was formed basically to protect its members' welfare - a right which is firmly entrenched in the constitution, s.80. To take away that right is to act contrary to very fundamental principles. The President was exercising powers which were rightly the powers of the Minister and therefore, the Registrar. As we saw earlier the societies Act provides, expressly, the circumstances which may lead to the de-registration of any registered society and the remedies lying in case the Registrar breaches any of his duties as regards de-registration.

It is to be noted under what circumstances the order for de-registration was made, and, inspite of that, there was immediate compliance, leaving no room for legal redress by the individuals affected. S.84 of the constitution, and the societies Act, seem, in this regard, to be to^{NO} avail.

The same fate befell the union of Kenya Civil Servants. The President ordered its de-registration for reasons that the union had over-indulged in politics.³²

The trade unions Act³³ is an Act of parliament to provide for Staff Associations, employees' associations and employees' organisations, and for the registration and control of trade unions and other matters connected with the foregoing purposes.³⁴

Under s.17(1) of the Trade Unions Act, the certificate of registration of a registered union may be cancelled by the Registrar at the request of the Trade Union upon its

.....7

dissolution.³⁵ This request is to be verified in such manner as the Registrar may require or if he is satisfied that the Trade Union has ceased to exist.³⁶

The registration of a Trade Union may be cancelled or suspended by the Registrar if he is satisfied that the registration was obtained by fraud, misrepresentation or mistake,³⁷ or that any of the objects of the Trade Union is unlawful,³⁸ or that the constitution of the Trade Union is being used for any unlawful purpose,³⁹ or that the Trade Union has wilfully, and after notice from the Registrar, contravened any provision of this Act, or any regulations or any rules,⁴⁰ or that the funds of the Trade Union are expended in an unlawful manner.⁴¹

A trade union served with a notice of cancellation of registration, may, within a period of two months, show cause in writing against the proposal to cancel or suspend its registration, as the case may be, and if such cause is shown, the Registrar may hold such inquiry as he may consider necessary in the circumstances.⁴²

The Registrar may then, after/ 52

the expiration of the period of 2 months, cancel or suspend as the case may be.⁴³

It is clear from the foregoing provisions of the Trade Union Act that the power to deregister a trade union is vested in the Registrar. The Act also provides the procedure which may be followed before a trade unions registration is cancelled.

After the announcement by the President that the union of Kenya Civil servants be de-registered, later, the organization of African Trade Union Unity (OATUU) appealed to the President not to cancel the union of Kenya Civil Servants and the Academic Staff Union. In a statement, Accra-based OATUU, Mr. Denis Akumu said:

"I wish to confirm that OATUU and the world trade unions movement, while supporting fully the President as a great African Leader whose tolerance has been demonstrated both in Kenya and In Africa wish to appeal to him, once again to extend his generosity and kindness to the Kenya Civil Servants Union and the University staff union".⁴⁴

Mr. Akumu said the union supported the President's statement that trade unions should concentrate on worker and employer relations and leave politics to parties. He said:-

"We do, however, feel that barring of these trade unions would mar Kenya's good name before the International Labour Organization and the United Nations Human Rights section and before the world Human Rights Movements".⁴⁵

It can be discerned from the above how fundamental human rights protection are regarded. Any attempt to contravene them is met with much disapproval even on the International scene. Kenya being a signatory to the treaties embodying these rights should safeguard them by desisting from making orders which may be in contravention

of them.

These directives, as we noted earlier in this chapter should be scrutinized before they are enforced.

Handwritten scribble

~~X~~In the case of the trade unions, it did not take time before the two unions were de-registered. The de-registration of the union was not done through the normal procedure. Provisions of the Trade Unions Act were not complied with. The union had not been allowed to call a delegates conference to formally wind up its operations.⁴⁶

Thus we can rightly say that the directive was inconsistent with the strict letter of the constitution.

Similarly, the President ordered for the winding up of 'tribal organizations' in Kenya.⁴⁷ while some of them such as GEMA, Akamba Unions and the Luo Union had become political, others such as the Abaluhya Association, the Kalenjin Association, and the Mij Kenda Association have been much less cohesive. These organizations of necessity stress social welfare rather than political functions. They each represent a group of several small tribes with common ethnicity and are further fragmented into small clan, tribes, or even locational organizations which provide social services⁴ at crucial times such as weddings and funerals.

While these organizations were covered in the resolution passed by the leaders conference for these unions to wind up, there was criticism aimed at the disbandment of such associations whose functions were to provide services that KANU as a national political movement cannot provide, both by its very nature and

organisation.

Similarly, there exists among non-African Kenyans, particularly among the Asian communities small organizations which cater mainly for social activities, mostly on an exclusively ethnic basis, such as the Sikh Union. There have been questions raised about whether it is desirable to do away with such organizations which do not engage in any political activity, at least on the national level.

We considered earlier the procedure and reasons in relation to which societies registered under the societies Act may be wound up. We noted that it is clear from the Act that power to de-register societies vests in the Registrar. Further that an appeal may lie or rather that the Registrar's decision may be challenged by showing cause why a societies activities should not cease.

With the winding up of the above unions, it is certain that the traditional and cultural matters which these unions once catered for, will be adversely affected. (All tribal unions had been disbanded.⁴⁸) It is my contention that since Kenya is not a homogenous community, these tribal organizations should be allowed to exist until such time that a homogenous community is created.

It is also my contention that the purposes for which the above societies are formed cannot be performed by the Nation - otherwise many people would be left without any support or protection in cases of emergencies, or other crucial circumstances as for instance where there is a wedding, or funeral.

Rubbish. Let the dead bury themselves? It is always in order if not our own relatives shall report for funerals... they don't need a whole Ass.

Tribal hot like Moi & B. West

*interests of the Kenyan national interest
Eg. the Kenyan National Community
and Union. Mandi! Thank Twice!
- No. My sister!*

Again, it is evident that s. 80 of the constitution has not been strictly adhered to. Similarly, the societies Act, a statute of parliament has not been used as a guide in ^{such} matters of de-registration of societies.

Another area where a Presidential directive has apparently been in conflict with fundamental rights and freedom of the individual, is that relating to protection of a right to life.⁴⁹

The constitutional provides:

"No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted."⁵⁰

However, a person shall not be regarded as having been deprived of his life in contravention of the result of the above section if he dies as the result of the use of force, to such extent as is reasonably justifiable in the circumstances of the case,⁵¹ that is, for the defence of any person from violence or for the defence of property,⁵² in order to effect a lawful arrest or to prevent the escape of a person lawfully detained,⁵³ or for the purpose of suppressing a riot,⁵⁴ or in order to prevent the Commission by that person of a criminal offence.⁵⁵

Knowing very well the provisions of the above section, the Government had given orders to the police to shoot to kill any suspects of violent crime.⁵⁶ For several years, the Kenya Police officers have been shooting suspects of crimes, usually, pleading self-defence. As the exercise continued, there had been considerable public opposition to this. The then Attorney-General Mr. Njonjo, told parliament that he had given the order to the police to shoot suspects of armed robberies.⁵⁷

*Selfish self-seeking
of the Century*

*I don't think he
cherished some good*

The order by the Attorney - General was further strengthened by the President when he ordered that no mercy should be shown to armed robbers. Speaking at the Jomo Kenyatta International Airport on his way to the Middle East, the President said:-

"Some people are of the opinion that armed robbers should not be killed, but I am saying they should be killed"58

But the President did not specify whether he was ordering that suspects armed criminals or be hanged after being convicted by the courts.

*
The consequences of the President's statement or order was that several innocent people were shot by the police on mere suspicion.

Parliament has not empowered the office of the Attorney - General to either contravene provisions of s.71 of chapter five of the constitution of Kenya or part 3, s.3 of the criminal procedure code in ordering the police to shoot suspects to kill. It is my contention that the President would not be justified either, to contravene these most fundamental human rights of a right to life.

A number of citizens died as a result of the order made by the Attorney - General to the police to shoot to kill suspects, which order was reiterated by the President's statement made at the Airport. To get compensation to the families of the deceased persons was and is a complicated procedure. More often than not, the police pleaded self-defence hence, the next of kin, could not under certain circumstances invoke s.84 of the constitution, considering the financial position of most Kenyans - they are of low financial status. It is expensive to get legal representation.

S.84 of the constitution provides for the enforcement of the protective provisions in chapter Five of the constitution should there be a contravention of them. Under the section, an aggrieved party may apply to the High Court for redress - a right which is also fundamental.

But under the Kenyan circumstances, citizens, more often than not are unwilling to challenge a Presidential order by way of litigation or otherwise. The majority would rather sit on their rights in fear of the consequences - whatever such consequences may be. *apathy.*

However, the President realised only too late that his pronouncement, made at the Airport, was causing misery amongst the electorate. He also realised that the constitution and the rule of law should prevail and that after all it was unconstitutional for the police to prosecute, try and execute suspects.

By a parliamentary group meeting chaired by the President himself, the order given earlier authorizing police to shoot suspected criminals was revoked.⁶⁰

The directive to shoot was also an infringement of s.77 of the constitution, which provides inter alia that any person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.⁶¹

The suspects, instead of being tried were getting shot thus contravening the above section.

S.83 of the constitution has been infringed the most. This section should be read together with S.84 of the constitution. S.83 provides for instances where fundamental rights and freedoms may be derogated from under the Preservation of Public Security Act, Cap. 57. S.83 (2) provides that where a person is detained,

"by virtue of the exercise of part III of the preservation of Public Security Act, he shall be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained."⁶²

There shall, in not more than fourteen days after the commencement of his detention be published in the Kenya Gazette a notification stating that he has been detained and giving particulars of the provisions of law under which his detention is authorized.⁶³ And also that in not more than one month after the commencement of his detention, and thereafter, during his detention, at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person from among persons qualified to be appointed as a Judge of the High Court.⁶⁴

⁷⁷
Under S.83 (d), the detained person shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representation to the review of the appointed for the review of the case of the detained person - by a legal representative of his own choice:

".....if any person alleges that any of the provisions of ss 70-83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained if any other person alleges such contravention in relation to the detained person), then without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."

It would seem that the powers of detention under the Act have not always been employed with due regard to the strict letter of the law.

The President in a speech during Madaraka Day disclosed that some politicians had recently planned to incite workers and students to go on strike - he declared that such elements would "before they had a chance to carry out their plan."⁶⁶

The President further said:

"a group of disgruntled elements have been articulating issues from a negative stance and they have even gone so far as to ask trade unions and secondary schools to stage a one-day strike."⁶⁷

He then turned to the the Police Commissioner, Mr. Ben Gethi; who quickly stood at attention and told him "Do your duty!"⁶⁸

His excellency also hinted that some tough measures would be taken against university lecturers and students who talked about academic freedom. This gave an indication that some of the troublesome elements in the community on the campus might also be detained.⁶⁹

The President further said: "violence breeds violence" and that he intended to take action against the lecturers whom he claimed taught nothing but "politics of subversion through text books majoring in violence".⁷⁰

Soon after this utterance by the President, three lecturers were put into custody.⁷¹

The tribulations of the lecturers were compounded by the fact that lawyers in Nairobi seemed to be shunning requests to represent them in court. A relative of one of the Lecturers claimed that he had approached four legal firms, but they had all turned him down.

It seemed the lawyers were wary of representing people in the wrong books - or so they thought - but their main fear⁷² of ^{as a result} the ^{deten} a member of the legal profession⁷² who was at the time representing people who were later detained.⁷³

Thus the detainees could not exercise their rights under s.84 of the constitution. Their attempt to seek legal redress was clogged by fear in the lawyers should the same action be taken against them, that is, lest they were detained.

The cleaning-up process continued when the President was on a tour to Pokot and Turkana Districts. In connection with dissidents, the President warned that detentions would not necessarily be restricted to politicians.⁷⁴ "This war will now continue until we clear our homestead,"⁷⁵ he told a gathering at Eldoret on his way to Pokot and Turkana Districts. "Some of the elements went around like rats poisoning the minds of the people and I had no alternative but to detain them," he added.

In the same week⁷⁷ the President made it quite clear that the Government would continue detaining those it considers to be

Eldoret , two University Lecturers were remanded in custody pending hearing of their cases on charges of possessing seditious publications. In Nakuru, police arrested two more people for allegedly being in possession of a seditious publication.⁷⁸

Already, a Journalist and an unsuccessful candidate for Nyeri Constituency⁷⁹ was in custody pending prosecution on a charge of possessing similar publications.

They were later detained within a week, nine persons had been detained.

It would appear from the foregoing that the President imagined there were disgruntled elements in the country - lecturers and students included.

The utterances made by him at several rallies and to small gatherings were quickly followed by a number of people being put into custody for allegedly possessing seditious publications. The President's utterances caused fear and apprehension so that everyone - even primary school teachers, were afraid of being picked up "for possessing seditious literature."

The case with which the power under the Public Security Act was employed raises the question as to whether this power was exercised for the proper purposes outlined in the preservation of Public Security Act, Again, the issue is whether this power conferred on the President by the constitution is used for proper purposes.

Looking at s.83 of the constitution, we cannot say that there was, for instance, a war situation to warrant this kind of action - its exercise was over stretched.

Those whose rights had been infringed could not get redress by invoking s.84 of the constitution. Neither was s.77 nor s.72 adhered to. Provisions of s.83 which we have outlined above are rarely complied with - with regard to the procedure to be followed when a person is detained.

It would seem that provisions of s.83 of the constitution are mandatory by the mere fact that they are enumerated in the constitutional document, and that therefore, they confer important rights upon the person detained. This suggests that they seek to assure him of fair procedure in his detention. If the person detained wishes to challenge the legality of his detention, he may do so on grounds that the provisions of s.83 have not been complied with. Thus it might be argued that under s.83 of the High Court is impliedly given new powers of judicial review.

Detention in Kenya has more often than not, been done without giving the detainee any opportunity of representing his case before an impartial panel.⁸⁰ In this case, it must be remarked that the power to detain has been used without due regard to fundamental rights. *John*

That there can be no charge and that the "verdict" is necessarily based on an individual's future conduct, are considerations that should dictate care, before a label is hung around the neck of any person as a "security risk".

A proper balance between national security and individual rights is essential and the fact that, in detention cases, national security must be emphasised more than in other cases, does not mean that such security must ride roughshod over the rights of the individual.

The gravest aspect these detentions, without trial, is that a man is detained when he has not just yet, broken any written law, and his liberty is restricted, he suffers materially and spiritually for what it is thought he intends to do, or is trying to do, or what is believed to have done (in absence of proof).

To suspend the rule of law under any circumstances, is to open the possibility of the greatest injustices being perpetuated.

The preservation of Public Security Act is an Act of parliament to make provision for the preservation of public security.

S.2 which is the interpretation section provides inter alia, that in this Act, "the preservation of Public Security" includes the security of the fundamental rights and freedoms of the individual,⁸¹ and the securing of the safety of persons and property.⁸²

Under part II, s. 3(2), it shall be lawful for the President, to the extent to which this Act is brought into operation and subject to the constitution, to make regulations for the preservation of public safety.

Subject to s. 3(4), such regulations shall not make any provision which is inconsistent with or ⁶⁰contravention of s.72 of the

constitution (which protects the right to personal liberty) or s. 82 of the constitution (which provides for protection from discrimination),⁸³ or purports to amend, modify, or suspend the operation of any written law other than regulations made under this Act.⁸⁴

S. 3(4); the proviso of s. 3(3) of this section shall not apply during any period when Kenya is at war or to any regulations in so far as they apply to the parts of Kenya to which s.127 of the constitution applies.

Under part III, s.4(2), regulations for the preservation of public security may be made for inter alia, the detention, of persons.⁸⁵

Reflecting on observations made earlier on this point i.e. detention, it cannot be said that the proper procedure was adopted for the Presidential exercise of this power.

The manner and place in which the intention to detain people was declared by the President raises the question once more on the purpose for which this power was exercised.

We submit that detention has been used as a way of implementing Presidential directives. This is so where the court process, as a way of implementing the same, has failed. The judges act on written law in the statutes and can only implement what is laid down as law. Since Presidential directives are by and large not law, their implementation can be done in a suitable case, by detaining the person who is in breach.

Administrative process is another way of enforcing directives. Administrators, for instance, chiefs, may enforce punishing those who disregard it. In this case, the individual has no way of redress to the courts - an action will not lie against the President. The person so punished will be hesitant to enforce his rights against such administrator because the argument will be that he was enforcing a Presidential directive.

*What of the
Chief's authority
Act 3 Cap 58
128 777*

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CHAPTER FOURCONCLUSION

Fundamental human rights developed out of natural law concepts which were universally recognised. Natural law embodies those elementary principles of justice which are apparent to the "eye of reason". Human rights include such rights as the right to life, personal liberty, freedom of conscience and expression, and they are considered to be inalienable.

These rights were adopted and embodied in the Kenya constitution after independence, and are safeguarded by constitutional provisions.

Executive power is vested in the President by s.25³ of the constitution. The executive (the President) exercises substantial power in relation to the Public Service, and even in relation to the Judiciary as far as appointments, and dismissal of Judges and Public Officers are concerned. He also exercises power under the preservation of Public Security Act when law and order are threatened.

A person may be detained, among other things, if it is shown that he is a threat to public peace and security.

As we saw in chapter three, the President may make directives derived from powers expressly conferred on him by the constitution and the Acts of parliament. These directives may be legal in so far as they conform to the laid down law, or extra-legal if they appear to be inconsistent with the letter of the law. They may also be constitutional or unconstitutional the latter being inconsistent with the strict letter of the constitution.

The president has in some instances made directives which have appeared to be in conflict with fundamental human rights. These rights as we noted earlier are inalienable, and may be derogated from only in certain specified circumstances. An infringement of them is met with disapproval from the international scene if the country in breach is a signatory to the treaties embodying these rights.

The question therefore is: what balance can be struck between Presidential directives and fundamental human rights?; what solution may resolve the conflict when the President exercises his incidental Presidential directives in circumstances which reveal a conflict with the strict letter of the constitution?

In the preceding chapter, we attempted to set out certain instances where Presidential directives have apparently been in conflict with individual liberties and freedoms.

We can rightly conclude, therefore, that a conflict has been revealed.

To resolve the conflict, it is recommended that the judiciary perform its adjudicatory role when an individual's right is interfered with, be it as a result of a Presidential directive, order or any other cause. If the President issues a directive which conflicts with the individual liberties and freedoms, the court should be willing to take an impartial attitude in the matter so long as the individual bringing the claim has the Locus Standi and as long as he is able to indicate that a particular right conferred upon him by the constitution or other statute has been infringed.

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For the above end to be achieved, judicial independence should be upheld and the doctrine of separation of powers adhered to.

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Thus, the remedy lies not in restraining the President from making pronouncements but on the judiciary which should adjudicate on matters brought by individuals as a result of such pronouncements or directives.

Alternatively, powers to make directives should be provided for in the constitution. The constitution should state in what circumstances and instances the President can issue directives.

— They would logically lose the extra-legal dimension

The const. provides discretionary powers to the President who are judge to challenge him — remember she is the one who appoints them.

stepped!
Nugger head
foot-leaker

This way, the validity of Presidential directives may be determined with certainty, and a party whose rights are considered infringed by the directive may be able to decide on which cause of action to take - that is, whether the directive was made within the ambit of the constitution or whether it was made unconstitutionally and thus conflicted with individual rights.

It is our contention that these recommendations will go a long way in resolving the conflict that emerges between Presidential directives and fundamental human rights.

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CHAPTER ONE

FOOT NOTES

1. Ezejiofor Gaius: Protection of Human Rights Under the Law (Butterworths, London, 1964). Pg.I.
2. Paschal B. Mihyo: The Development of Legal Philosophy (Kenya Literature Bureau, 1977). Pg. 24.
3. Ibid, Pg. 24.
4. Cranston M.,: Human Rights Today (1962). Pg.9
5. Paschal B. Mihyo (supra).
6. De Republica II, XXII, 33, quoted in d'entreves, Natural Law (1960). pp 20-21.
7. See Aquinas selected Political Writings, by Basil Blackwell (Ed.) Oxford, 1959, (trans. by J.D. Dawson) p. 123.
8. THE PRINCE (translated by George Bull) in which Machiavelli (1496-1527) taught the princes how to acquire and retain principalities.
9. d'entreves, NATURAL LAW (1960) p.56.
10. This is the proper social contract, for while the former presupposes a society already formed and is concerned only with defining the terms on which it is to be governed, this deals with the origin of society itself. See Gough, J. THE SOCIAL CONTRACT, (1936) p.3.
11. See e.g. John Locke, CIVIL GOVERNMENT, Book II: (Everyman's Edition) p.71.
12. See Thomas Hobbes: THE LEVIATHAN: (Everyman's Edition) pp 89-90.

13. Frederick & McCloskey: FROM THE DECLARATION OF INDEPENDENCE TO THE CONSTITUTION (1954) p.3.
14. Ezejiolor: PROTECTION OF HUMAN RIGHTS UNDER THE LAW (Butterworths, London, 1964) pg.9.
15. See generally Lauterpacht: INTERNATIONAL LAW AND HUMAN RIGHTS, pp. 89-91; UNITED NATIONS' year book on human rights (1946); Peaslee, Constitution of Nations, 3 vols. 2nd Edition (1956).
16. Ezejiolor: PROTECTION OF HUMAN RIGHTS UNDER LAW (Supra) p.5.
17. United Nations Charter and Declaration of Human Rights, 1948.
18. The European Convention on Human Rights, 1950.
19. Ezejiolor: (Supra).
20. Ibid, chapter 7, pg. 178.
21. Becker C.: THE DECLARATION OF INDEPENDENCE.
22. Article I.
23. Ezejiolor: (Supra).
24. Ibid.
25. Ibid.
26. B.G. Ramcharan: Human Rights; Thirty years after the Universal Declaration (Martinus Nijhoff, 1979) chapter 10.
27. Ibid, chapter II.
28. Articles 1-65.
29. 1969 Nov., 22. Chapter 2 lists the rights which are protected.

30. Thomas Buergenthal: Human Dignity (Aspen Institute, Oceana, Sijthoff, 1979) pg. 15.
31. Mr. Teitgen, consultative Assembly, sitting of 5th Sept., 1949, collected Edition of the "travaux preparatoires I, p.102.
32. Consultative Assembly sitting of 19th Aug., 1949, Ibid, p.41.
33. Ibid, p.41.
34. Ibid, 5th Sept., p.102.
35. Ibid, 16th Aug., p.20.
36. Ibid, p.56, Lord Layton.
37. Robert McKay: Human Dignity (Aspen Institute, Oceana, Sijthoff, 1979) what next? p.66.
38. See the Universal Declaration of Human Rights Articles 1 - 30 which is a reflection of chapter 5 of the constitution of Kenya.
39. Regulations No. 2 of 1898, repealed by No. 3 of 1900.
40. Preservation of Order by night regulation No. 15 of 1901.
41. See e.g. Constantine V. Imperial Hotels (1944) 2 All E.R. 171. But see Koinange Mbiyu V. R. (1951) 24 K.L.R. 130. Where the High Court struck down discriminatory regulations as being ultra vires a statute.
42. The Commissioner for local Government, Land & Settlement V. Kaderbhai (1930) 12 K.L.R. 12.

43. A.G. V. Kathenge (1961) E.A. 348.
44. Ordinance No. 18 of 1933, now Cap. 355, Laws of Kenya.
45. Ordinance No. 22.
46. Kenya constitution (Amendment) (No. 2) Order-in-council 2201/1960.
47. See chapter 5 of the Kenya constitution. The words 'Bill of Rights' are not used in the constitution, the title of the chapter being 'Protection of Fundamental Rights and Freedoms of the individual'. See generally on Bill of Rights within the Commonwealth chapter 5, in S.A. de Smith: The New Commonwealth and its constitutions (London, Stevens, & Sons Ltd. 1966) and relevant chapters in the Annual Survey of Commonwealth Law, 1966 - 8, edited by H.W.R. Wade (London, Stevens & Sons Ltd.).
48. Constitution of Kenya, s.70.
49. See S.A. de Smith: The New Commonwealth and its Constitutions (London, Stevens & Sons Ltd., 1966) p.194.

CHAPTER TWO

FOOT-NOTES

1. Minister for justice and constitutional affairs, House of Representatives, Official Report, Vol. 3, (Oct. 7, 1964), cc. 3881 et seq.
2. Ibid.
3. Independence constitution (Sched. 2 to the Kenya Independence Order-in-council, (s.1, 1961, No. 1968) s.65.
4. Ibid; ss. 88 - 89.
5. See chapter 5 of the constitution of Kenya.
6. J.B. Ojwang 'legislative control of executive power in English and French-speaking Africa: a comparative perspective' Public Law (1982).
7. The constitution of Kenya (Amendment) Act No. 28 of 1964, (1st Amendment Act 1964).
8. Ibid, preamble.
9. Ibid, New s.33 of the constitution introduced by the Act.
10. s. 23 of the constitution.
11. ss. 77; 81 (2) (a); 82; 16(3) (a); 18; 19(2) (a); 20 of the constitution of Kenya.
12. Y.P. Ghai & J.P.W.B. McAuslan: Public Law and Political change in Kenya (Oxford University Press, 1970).
13. s. 59 (2), Constitution of Kenya.
14. ss. 58(1) & 59(1), Ibid,

- 15. s. 39 (1) (c), Ibid.
- 16. The constitution of Kenya (Amendment) Act No. 16 of 1966.
- 17. s.41 (1) (b) of the constitution - see 1st Sched. to the Act of 1966.
- 18. New s.42 (1A) inserted in the constitution.
- 19. The Minister for economic planing and development, Mr. Tom Mboya, Kenya House of Representatives, Official Report, vol. 8, Feb., col. 1363.
- 20. Ibid.
- 21. s.88 of the constitution as amended.
- 22. Independence constitution, s.1 1968/63, ss. 186 -188.
- 23. Abraham Kiapi: Civil Service Laws in East Africa (Nairobi, E.A.B.L., 1974), p.16.
- 24. Quoted in A.L. Adu, The Civil Service in New African Sta (London; Allen & Unwin, 1965) p:24. See also Abraham Kia Civil Service Laws in East Africa (Nairobi, E.A.L.B., 19 p.1.
- 25. Ibid.
- 26. See s.107 of the constitution of Kenya.
- 27. See Mwangi Stephen Muriithi V. A.G., High Court of Kenya at Nairobi, Civil case No. 1170 of 1981. The judgement of Hancox J:

It was stated that the President is entitled under the constitution to exercise his prerogative absolutely, as the crown formerly did. That there is no restriction or fet imposed by the constitution or by any other law on his prerogative. Also that no reason for the exercise of the Presidential power under s. 25 of the constitution need be given.

28. Ibid.
29. Y.P. Ghai & J.P.W.B. McAuslan: Public Law and Political Change in Kenya (Oxford University Press, 1970).
30. s. 107 of the constitution of Kenya.
31. Brereket H. Selassie: The Executive in Africa Governments (London: Heineman, 1974) Chap. 6.
32. s.61, constitution of Kenya.
33. s.61(3)(a), Ibid.
34. s.61(3)(b), Ibid.
35. s.68(1), Ibid.
36. s.68(2), Ibid.
37. s.61, Ibid.
38. s.61(2), Ibid.
39. s.62(3), Ibid.
40. s.63(5), Ibid.
41. s.62(b), Ibid.
42. s.62(5)(b), Ibid.
43. s.61(4), Ibid.
44. s.61(4), Ibid.
45. s.126, Ibid.
46. s.126(8), Ibid, also see Ghai and McAuslan (Supra).

47. Constitution of Kenya (Amendment) Act No. 28 of 1964, s.16.
The constitution Act of 1969 make no mention of prerogative of mercy.
48. Nvali Ltd. V. A.G. (1956) I.Q.B. (C.A.), reversed on another ground in (1957) A.C. 253.
49. ss. 27, 28 & 29 of the constitution of Kenya. The President also inherited the Queen's prerogative of Mercy which prerogative was expanded in 1975. When he was given power to pardon those guilty of election offences (Act No. 14 of 1975, s.2).
50. s.29(2) of the constitution of Kenya.
51. Kenya (Independence) Order-in-council, s.19, now constitution s. 127.
52. Act No. of 1966.
53. Cap. 57. Extensively amended by constitution of Kenya (Amendment No. 3) Act No. 18 of 1966. That part providing for preventive detention inter alia was brought into force throughout Kenya by the constitution (Public Security) Order, Legal Notice 211/1966.
54. Kenya constitution (Amendment) Act No. 44 of 1965.
55. Kenya constitution (Amendment) (No. 3) Act No. 18 of 1966.
56. s. 29(1) of the constitution of Kenya.
57. s. 29(1) of the above Act No. 18 of 1966 is presently couched in s.85(1) of the 1969 constitution.
58. s.4(2)(a).
59. s.4(2)(b).
60. s.4(2)(b).
61. See J.P.W.B. McAuslan, letter to the East African standard, June 2, 1967.
62. s.84 of the constitution of Kenya.

63. Chapter 5, Ibid

64. e.g. ^MWadhwa V. City Council of Nairobi (1968) E.A. 406;
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Fernandes V. Kericho Licour (1968) E.A. 640

65. s.84 of the constitution of Kenya

66. s.83(2)(a), Ibid.

67. s.83(2)(b), Ibid

68. s.83(2)(c), Ibid.

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CHAPTER THREE

FOOT-NOTES

1. See generally Colin Leys; Underdevelopment in Kenya (Heinemann, London, 1975); Oginga Odinga; Not Yet Uhuru (Heinemann, 1967) pp. 250 et seq.
2. ss. 23, 27, 30, 52, 53, 59 of the constitution of Kenya.
3. s.23 of the Kenya constitution
4. See chapter 3 - Presidential powers.
5. s.3 of the constitution of Kenya.
6. Ibid.
7. Chapter 5, Ibid.
8. s.30, Ibid.
9. s.30(1), Ibid.
10. s.30(2)(a), Ibid.
11. s.30(2)(b), Ibid.
12. s.30(2)(c), Ibid.
13. s.30(2)(d), Ibid.
14. Nwabueze, B.D: Judicialism in Commonwealth Africa (C.Hurt & Co. London, 1977) p.216
15. The Weekly Review, April 2, 1982, p.7, col. 3
16. Cap. 131, Laws of Kenya.
17. The Weekly Review, April 2, 1982, p.7, col.3
18. s.30, constitution of Kenya.
19. Mr. J.R. Williams
20. The Weekly Review, April 2, 1982, p.7

21. The Weekly Review, July 25, 1980, p.26
22. Cap. 108, Laws of Kenya
23. s.12(1)(a) cap 108, Laws of Kenya
24. s.12(1)(b), Ibid.
25. s.12(1)(c), Ibid
26. Professor Ngugi wa Thiong'o who was detained in 1977.
27. The Weekly Review, July 25, 1980, p.26
28. Ibid
29. Dr. Peter Anyang' Nyongo
30. The Weekly Review, July 25, 1980
31. Ibid, p.26
32. The Weekly Review, Aug 1, 1980, p.33
33. Cap. 233, Laws of Kenya
34. The preamble to cap. 233, Laws of Kenya
35. s.17(1)(a) Trade Unions Act
36. s.17(1)(b), Ibid
37. s.17(2)(a), Ibid
38. s.17(2)(b), Ibid
39. s.17(2)(c), Ibid
40. s.17(2)(e), Ibid
41. s.17(2)(f), Ibid
42. s.17(4), Ibid
43. s.17(5), Ibid
44. The Weekly Review, Aug 1, 1980, p.33
45. Ibid
46. The Weekly Review, Aug. 22, 1980, pp.26-27

47. The Weekly Review, Aug. 8, 1980, p.4 on "Winding up of tribal unions": Pressure on tribal unions to wind up. At a leaders conference in Kabete Institute of Administration
48. All tribal Unions had been disbanded by October 17, 1980 (The Weekly Review, Oct. 17, 1980, p.10)
49. s.71, constitution of Kenya
50. s.77(1), Ibid
51. s.71(2), Ibid
52. s.71(2)(a), Ibid
53. s.71(2)(b), Ibid
54. s.71(2)(c), Ibid
55. s.71(2)(d), Ibid
56. The Weekly Review, May 30, 1980 p.16
57. Ibid
58. Ibid
59. For instance, Mr. Alfred Bengo ongeta among many others, a computer programmer with caltex (Kenya) Ltd. was shot and killed by the police along Langata Road for no apparent reason - see The Weekly Review, May 30, 1980.
60. The Weekly Review, June 20, 1980, p.5
61. s.77(1), The constitution of Kenya
62. s.83(2)(a), Ibid
63. s.83(2)(b), Ibid
64. s.83(2)(c), Ibid
65. s.83(2)(e), Ibid
66. The Weekly Review June 4, 1982 p.5
67. Ibid
68. Ibid
69. Ibid
70. The Weekly Review, June 4, 1982 pp.6-8

71. Mr. Maina wa Kinyatti picked on a charges of possessing seditious publications, Mr. Kamoji K. Wachira, Mr. Amin Mazrui.
72. Mr. John Khaminwa of Khaminwa & Khaminwa Advocates.
73. Anyona and Muriithi
74. The Weekly Review, June 25, 1982, p.6
75. Ibid
76. Ibid
77. The Weekly Review, June 25, 1982, p.8
78. "Pambana Organ of December 12 movement."
79. Mr. Wangodu Kariuki.
80. s.83 of the constitution of Kenya
81. s.2(b) cap. 57, Laws of Kenya
82. s.2(c), Ibid
83. s.3(3)(i), Ibid
84. s.3(3)(ii), Ibid
85. s.4(2)(a), Ibid.

