

SEPARATION OF POWERS

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by

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TABLE OF CONTENTS

	page
Dedication	(i)
Acknowledgements.....	(ii)
Table of Cases.....	(iii)
Table of Statutes	(iv)
ABBREVIATIONS	(v)
INTRODUCTION	1
CHAPTER ONE: A.Historical Perspective	3
I: Definition of the Doctrine of Separation of powers	3
II: Historical Background of the Doctrine of Separation of Powers	8
III: Importation of the Doctrine of Separation of Powers into Kenya ...	11
CHAPTER TWO: The Separated Powers	19
I: The Executive	19
II; The Legislature	19
III: The Judiciary	30
IV: A Critical Analysis of the Three Organs. Is there a Separation of Powers in Kenya?	42
A. The Executive versus The Legislature	42
B. The Executive versus The Judiciary.....	45
C. The Judiciary versus the Legislature	50
CHAPTER THREE: Separation of Powers in Kenya: Recommendations	52
CHAPTER FOUR: CONCLUSIONS	75
FOOTNOTES	83
BIBLIOGRAPHY.....	88

(1)

DEDICATION

To my mother, for her love.

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TABLE OF STATUTES

Kenyan Statutes

1. Advocates Act, Cap. 16 Laws of eKenya.
2. Constitution of Kenya, 1969.
3. Election Laws (Amendment) Act, 1982.
4. Government Proceedings Act, 1967.
5. Judicature Act, 1957, (Cap. 8).
6. Kenya Military Forces Act, cap. 198.
7. Kenya Military Forces, (Military Council) Act, cap. 198 A.
8. Littleton Constitution, 1954. (Royal Instructions).
9. Magistrates Courts Act, 1967.
10. National Assembly, (Powers and Privileges) Act,

Others

1. Constitution of United States of America, 1789.
2. Criminal Code of Gold Coast Colony.

ABBREVIATIONS

Periodicals

- | | | |
|----------|---|--------------------------|
| E.A.L.J. | - | East African Law Journal |
| E.A.L.R. | - | East African Law Review |
| L.Q.R. | - | Law Quarterly Review. |

Cases;

- | | | |
|-----------|---|----------------------|
| A.C. | - | Appeal Cases. |
| All. E.R. | - | All England Reports. |
| E.A. | - | African Law Reports. |

INTRODUCTION

The purpose of this paper is to examine the doctrine of separation of powers with a view to ascertaining whether there is, or not, a separation of powers in Kenya. The doctrine of separation of powers is one of constitutional law which requires that the three organs of the government namely: the executive, the legislature and the judiciary operate independently and their functions are executed by different people. Nwabweze¹ classifies it as one of the yardsticks for testing a constitutional government.

It is proposed that in the first chapter of this paper a look will be had at the doctrine, its meaning and definition. In this respect the analysis will be based on the English law on the subject and how it was applied in America. This invariably involves a comparison between the concept as understood in English and in America.

In the second chapter, a closer analysis will be had at the three organs of government. It is an examination of each organ and how it developed from the colonial period to the present time. It is also in this chapter that an attempt will be made to critically analyse these organs to ascertain whether there is separation of powers in Kenya.

In the third chapter recommendations and solutions will be advanced in an attempt to solve the issues raised

in the second chapter. It is an assessment of the doctrine of separation of powers and its applicability or desirability in the Kenyan situation.

Chapter four will deal mainly with personal observations of the Kenyan situation and the relevance of the doctrine.

CHAPTER ONE

SECTION ONE: DEFINITION OF THE DOCTRINE OF SEPARATION
OF POWERS

Before any discussion of the doctrine of separation of powers is attempted, it is important to give its definition and meaning. It has been admitted¹ that the phrase separation of powers is one of the most confusing in the vocabulary of political and constitutional thought, and has been used with varying implications indeed, commentations have drawn different conclusions as to whether there is, or there is not, a separation of powers in a given constitution. Such uncertainty is exemplified by the disagreement which exists over the correctness of Montesquieu's assertions about separation of powers in England.

In his book 'The Spirit of Laws',² Montesquieu asserts that when the legislative and executive powers are performed by the same person, there can be no liberty because apprehensions may arise and it is also possible for the same Monarch or Senate to enact tyrannical laws and execute them in a tyrannical manner. He however says that some checks and balances are necessary for the smooth *running of government. He says,*

"The legislative body should not meet of itself... And if it had a right to prorogue itself it might happen never to be prorogued; which would be extremely dangerous, in case it should ever attempt to encroach on the executive power. Besides, there are seasons, some more proper than others for assembling the legislative body: it is fit,

therefore, that the executive power should regulate them time of meeting as well as the duration of those assemblies, according to the circumstances and exigencies of a state known to itself."3

He says, therefore, that where the executive power does not have a right to restrain the encroachments of the legislative body, the latter invariably becomes despotic and would soon destroy the other powers.

The legislature should also, on the other hand, have power, to stay the executive. But the judiciary ought not to be united with any part of the Legislature or the executive. He also says that to prevent the executive power from being able to oppress:

"it is requisite that the armies with which it is entrusted should consist of the people and have the same spirit as the people, ... To obtain this end, there are only two ways; either that the person employed in the army should have sufficient property to answer for their conduct to their fellow subjects, and be enlisted only for a year ... or if there should be a standing army, composed chiefly of the most despicable part of the nation, the legislative power should have a right to disband them as soon as it pleased, the soldiers should live in common with the rest of the people, and no separate camp barracks, or fortress should be suffered."4

The disagreement, referred to above, stems from the understanding that even when Montesquieu wrote there was no separation of powers in England from the point of view that, in so far as ministers are not agents of the legislature or vice versa they can be said to be separate organs. Since the American style of separation of powers had not yet emerged in 1748, Montesquieu may

perhaps be forgiven for applying the phrase 'separation of powers' to the British constitution.

Further disagreements about the doctrine of separation of powers are exemplified by ambiguities between physical or legal separation of powers, or persons, and the separateness or independence of functions. One simple sense in which this is true is that, the constitution makes legislative and executive office-holding incompatible, yet ministers are not separated from, and independent of the legislature. In relation to the separateness of the judicial power from the legislative and executive branches, the doctrine has been used inconsistently both ~~to~~^{to} support and to refute the need for judicial invalidation, or quashing, of legislative or executive action. Here the doctrine is used to imply checks and balances on one organ of government by another. Yet, on the other hand in countries like France, the view maintained is that powers which are separate may not interfere in each others functions. Hence the review of legislation or administrative action by the judiciary is thought impermissible.

Finally, there is confusion about separation of powers when what is under discussion is not the policy of separating persons or organs but the separability of the concepts of 'legislative', 'executive' and 'judicial^y' as ways of characterizing governmental actions. In this context opposition to the 'separation of powers' or declaration that the doctrine is outdated or discredited usually imply the view that the notions of what are

legislative, executive or judicial activities cannot be simply or sharply differentiated from each other.

✓ From the above contradictions, it is now clear that the doctrine of, or the phrase 'separation of powers' is a cluster of overlapping ideas, for example differentiation of concepts; legal incompatibility of office-holding as between members of one branch of government and those of another; isolation, immunity or independence of one branch of government from the actions of interference of another; the checking or balancing of one branch of government by the action of another; or the co-ordinate status and lack of accountability of one branch to another; when talking about separation of powers, therefore it has to be borne in mind that it can be used to mean any of the above things. The doctrine may therefore, be summed up as ¹implying that there are three distinct functions of government, that is, the legislative, executive and judicial functions, which ought to be exercised respectively by three separately manned departments of government. These departments should also be constitutionally equal and mutually independent, ensuring, further, that the legislature does not delegate its powers; ^{such} a definition, it should be noted from the outset, is one that cannot be found, in its entirety, in any of the traditional authorities from whose writings the theory is normally thought to be derived, and neither can it be said to fit the political arrangements either of the United States or of any other working constitution past or

present. Each country has tried to modify the doctrine to meet its requirements, depending on what they understand it to mean.

In my view, the doctrine of separation of power stipulates that the executive, judicial and legislative functions should be kept separate not only in terms of structure but also in terms of the persons who perform these functions. The ministers, as members of the executive should not sit in Parliament as legislators, and should not be appointed from among the members of the legislature, and vice versa; and complete independence of the judiciary should be ensured from any encroachment by either the executive or the legislature. Each organ of the government should be free to perform its assigned duties. However, there should be a mechanism of checks and balances to ensure that each organ does not exceed its authorized limits. This is more preferable in regard to the two organs of the legislature and the executive - because, if the executive was left on its own without any form of accountability, it would become despotic and infringe on the constitutional rights of the individual. Similarly, if Parliament was not controlled in the manner it conducts its business, it would exceed its powers to the detriment of the liberty of the individual. For these reasons, it is submitted that there should be clear separation of powers in terms of who does and performs which function, but there should be some control mechanism to ensure that these powers are exercised within

their desirable boundaries.

SECTION TWO: HISTORICAL BACKGROUND ON THE DOCTRINE
OF SEPARATION OF POWERS

Any discussion of the law of Kenya, whatever branch it may be, necessitates a look at the English background of that law, because of the fact of history. Kenya, having been a British Colony, imported most of its laws from her colonizer. Indeed, towards the end of the colonial era, the proud boast was frequently heard that of all the imperial legacies, Britain had conferred upon her African possessions, British Conception of Justice were the finest and most important. To understand the operation of the doctrine, therefore, it is important to have a look at its historical background in England until the time of its importation into Kenya.

It should be noted that the history of the doctrine goes even beyond English law, having its roots in the Ancient World, where concepts of Governmental functions and theory of mixed and balanced government were evolved by Aristotle. In his works, 'Politics,' Aristotle described the distinct functions of government and it may be taken as the first step towards the evolution of the doctrine. In England, there were theories of mixed government and of checks and balances between the three organs. Here the balance was not so much between specialized governmental functions as between different

total constitutional principles of Monarchy, oligarchy and democracy. The balance is between different elements sharing legislative power rather than a balance of legislative against the other forms of power. This is what Locke had in mind when he discussed his idea of separation of powers. He said:

"It may be too great temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make."⁵

Locke's advocacy of separation is thus a mixture of the natural justice argument and a quite different argument about physical separation. He says laws take only a little time to make, and therefore, there is no need for the legislature to be continuously in session. However, there is a need for constant and lasting force to execute the laws. Thus the legislators, having assembled and made laws, may separate and

"being separated again they are themselves subject to laws they have made."⁶

In this sense, separation means 'dispersal' and it has nothing to do with the 'separating' 'isolating' or 'balancing' senses of the term. It can safely be said therefore, that Locke did not believe in the separation of powers in the sense of 'independence and equality' of executive and legislature, because he was of the view that

"There can be but one supreme power, which is the legislative, to which all the rest are and must be surbordinate."⁷

Montesquieu, on the other hand, emphasized the need to place judicial and executive power in different hands, and also spoke of mutual balancing and restraining of the legislative and executive power. However, through a running together of the checking and balancing theories of mixed government with the doctrine of separation of powers, there seems to be a confusion still as to whether or not 'checking' of one branch by another is a participation in the other's function and a partial violation of the separation of powers doctrine, or whether it is actually an exemplification of the doctrine, which carries out the very purpose of the separating and balancing off against each other of the three branches of government. This notwithstanding, the doctrine of separation of powers was used during Montesquieu's time to overthrow Monarchical rule. This happened not only in France but also in many other countries ^{of} which U.S.A. provides a good example.

In the constitution of the U.S.A. which came into effect on 4th March, 1789, the first three articles vest federal legislative powers in the congress, the executive power in the President and the judicial power in the Supreme Court of the U.S.A. These powers appear to have been intended for the most part to be mutually exclusive, so that no member of one branch of government may be a member of the others as well. However, because such total separation is not practicable, several checks

and balances were introduced; firstly, the President is empowered to veto legislation of congress,⁸ but such vetoes may be overridden by a two-thirds majority in each house of congress. Secondly, any treaties entered into between the President and other countries to be effective, must be ratified by a two-thirds majority of the Senate.⁹ Thirdly, the President has powers to appoint judges to Supreme Court, the Supreme Court also has power to declare Acts of congress or of any state legislature, or actions of the President illegal if they in any way transgress the provisions of the federal constitution.

In the United Kingdom therefore, the doctrine is not as extreme as it is in the U.S.A. Political developments of the 19th and 20th centuries have provided a framework for a sharp reappraisal of the doctrine especially in England. There is much overlapping of power between the three organs of government. It is, hence, impossible to insist that strict separation of powers exists in the U.K. and such overlap is exemplified in the following ways; firstly, members of the executive branch are also members of the executive branch^{and} are also members of one or other of the Houses of Parliament and this is basically due to the requirement that all the ministers of the crown be held responsible to parliament for their actions in the form of parliamentary questions. Secondly, the monarch, who heads the executive branch also in effect forms the Third House of Parliament in so far

as she has to give consent to the Acts passed by the legislature. She is also referred to as the ^{Fountain} Foundation of Justice because she is technically present in all her courts of law and is also responsible for many judicial appointments and exercises the prerogative of mercy in respect of persons convicted in the courts. She thus participates in the functions of all the three organs of the government. Thirdly, Parliament also adjudicates once in a while; and in particular, the House of Lords is the ultimate Court of Appeal for England. The Lords of Appeal therefore sit in the House both as legislators and as judges.

Further, superior judges are usually appointed by the crown, or by the Lord Chancellor, and are removable by the crown, although independence of the judiciary is jealously guarded. Delegated legislation by administrative bodies also constitute an overlap in the minister, who delegates it to local authorities, and other administrative bodies. All these examples therefore illustrate that there is no total separation of powers in the U.K., however, the doctrine has all the same remained an important one, and was copied by many countries.

SECTION THREE: IMPORTATION OF THE DOCTRINE OF SEPARATION OF POWERS INTO KENYA.

As has been pointed out earlier, most of our laws have been imported from England. It is the writer's view that a brief look into this history is necessary

for the proper understanding of the doctrine under the Kenya law.

Official British rule over Kenya was declared on 15th June 1895,¹⁰ however, attempts to establish colonial rule started as early as 1885 with the Berlin Conference which marked the beginning of a "carefully planned" partition of Africa - carefully planned in the sense that it took into consideration all the interests of the contending western powers and was a result of compromise between them. In all these activities, however, there was no reference to or consideration of African interests, especially as regards the fixing of boundaries.

By the end of 1886, a reasonable and definite portion of the Coast and Mainland of the then East Africa Protectorate had been reserved for British control and occupation by means of various agreements and treaties among the European powers and also with some African rulers, such as, the Sultan of Zanzibar.

Initially, the control of British domains in East Africa was left to the Imperial British East Africa Company (IBEAC Co.) which was trading in the area. It was founded by William Mackinnon for purpose of private trade, but was later granted royal charter. It did its best in carrying out the duty imposed on it, but when it became bankrupt and thus unable to carry on with its businesses,

it became necessary for the British government to take over actual control of those territories.

The motive for having colonies was varied from one power to another, but generally the following can be taken as the most important reasons. Firstly, economic conditions at home with the industrial revolution forced European powers, and Britain in particular, to go out and look for colonies to provide the raw material to feed their industries, to provide plantation labour, and ^{provide} markets for their finished products. In addition they sought to employ their middle class in the colonies as administrators and supervisors while at the same time settling some of their population, to solve their unemployment problem.

Such history is only important for our purposes in so far as it indicates the type of legal institutions that were later inherited by the independent states. It was noticed that as a general trend, colonial rule was more brutal in colonies occupied by the most backward countries at that time," and most of such countries did not bother about the future of their colonies; and were more concerned with maximum exploitation of these colonies than carrying out any meaningful development. It is indeed for this reason that countries like Angola and Mozambique, which got their independence through liberation movements, had no viable systems of

government or legal institutions to inherit.

For the British, they adopted indirect rule system as a policy to help them realise their aims in Kenya. They recognized the fact that to achieve their aims they needed a hureaucracy whose backbone was the Provincial Administration. They had the colonial secretary based in England, who issued orders of the crown to the colonies through the local governor stationed in Kenya. The Governor also had people, like Provincial Commissioners, District Commissioners, District Officers, Chiefs right down to the village headman, under him. The structure was thus a hierarchical one, with power flowing from the top. It was also centralized, and military in form.

This history reveals that there was no separation of powers during the colonial period because administrators were the same people who not only made laws, but also executed them. The same person were also occasionally adjudicators in the event of disputes. For instance, the District Officers also acted as Magistrates in the areas they controlled and this would usually be after the chief and his 'baraza' had heard the case and failed in resolving the dispute. This means that ⁱⁿ ~~its~~ minor cases, it was the Chief who would determine the ^{outcome} ~~outcome~~. The district officers had to assign particular days of the week during which they would devote all their time to hearing disputes. Power, as has been pointed out, emanated from the governor and not the masses; in the same

breath, allegiance was owed not to the people but to the officials directly above; the chief owed his allegiance to the District Officer and finally to the Governor and not the people he was ruling. Neither was there popular participation in the government because the views of the masses were never taken into account in decision-making; in fact, such decisions were made in London only to be implemented in Kenya by the Governor.

It was only as independence was becoming inevitable that there was some poor form of representation of the masses in Parliament. Indirect rule was very much preferred by the British for reasons we have looked at, but they covered it under the guise that Africans should be spared from the technicalities of the law because of their illiteracy and the alien nature of the English law. Such were the reasons they advanced to justify their non-observance of doctrine—such as that of separation of powers in Kenya, that other than the expense involved in employing magistrates to perform duties that could otherwise be performed and were performed by administrative officers, the Africans could better present their cases before a chief's 'baraza; than before a court of law. That even if such doctrines as that of separation of powers were to be observed, the Africans would not appreciate their exact import since they were primitive and uneducated. This view is illustrated by the case of Wallace-Johnson v R.¹² in which it was clearly stated

that certain rules applicable in England for the protection of rights of individuals could not apply in the colonies to protect the natives, Whereas they were made applicable to the British citizens in these colonies. The facts of the case were that, the appellant published in a newspaper, in the Gold Coast Colony, an article attacking legislation and the events in the colony. There was no evidence of any outbreak of violence, or of any manifestation of hostility to the government of the colony as a result of the article. The appellant was however convicted of unlawfully publishing seditious writing of, and concerning, the government of the Gold Coast. He was also convicted of unlawful possession of documents containing seditious writing about the government contrary to the criminal code of the Gold Coast Colony.¹³ He appealed on the ground that the prosecution could not succeed unless the words themselves were of such a nature as to be likely to incite violence and unless there was positive extrinsic evidence of incitement to violence or of seditious intention.

The Privy Council held that the appellant was rightfully convicted, as no extrinsic evidence of incitement of violence or of seditious intention is required under the Criminal Code of the colony; that there was certain rules in England, that protected British subjects but when brought to the colonies they were limited to the settlers and did not have

similar protection for Africans.

The significance of the case is that such doctrines of English law as that of separation of powers could only be applicable in Kenya in so far as they protected the interests of the colonising power, Britain, and her citizens in Kenya and the extent, therefore, that it was irrelevant, such doctrines were inappropriate and inapplicable to the Africans in the country.

As independence approached in Kenya, however, Britain realised that the country would be sovereign, worthy of recognition just as any other sovereign state. They started looking at the African from a different viewpoint namely: that they could also be able to manage their own affairs; and so afforded them some minimal opportunity of managing their own affairs; for instance, Africans were now being allowed to vote and to elect their representatives to parliament.

It is common practice that every state that has moved from colonialism to independence has sought to shape its inherited institutions to the changing circumstances and ideas of that independence seeking to move away from their colonial past, they are concerned with adapting their political system to the needs of the independent society; however, it should also be appreciated that having to work within an inherited framework, makes it more difficult to change than it might appear and it is for this reason, therefore, that we have looked

into the history of the doctrine of separation of powers from a British perspective so as to be able to understand it better.

At independence, there was great need to develop a truly democratic state. However, the Kenya constitution turned out to be a compromise between the various contending parties; namely the Europeans, KADU representatives and KANU interests. The end result was that more emphasis was laid on compromise than on the legal institutions that were supposed to be put into effect.

In conclusion, therefore, the doctrine of separation of powers has been incorporated into the Kenyan law as one of the inherited institutions, but, as will be pointed out later it has been applied with moderation.

In the next chapter, we shall examine in detail how each of the three organs of government has evolved and developed in Kenya from the pre-independence era to the present with a view to ascertaining whether there is, or there is not a separation of power in Kenya.

CHAPTER TWO

THE SEPARATED POWERSSection A: The Executive

During the colonial era, it has been stated¹ that the main aim of the colonial government was to exploit the economic potential of Kenya. The administrative structure adopted was therefore one that would enable the government to realise administration which was centralized and military in form. At its head there was the Governor who was the immediate representative of the Queen in Kenya. The governor had below him a chain of administrators ranking from provincial commissioners down to the village headman, a structure which is still in use even after independence.

What emerged from the colonial administrative structure therefore was an executive - dominated type of government backed with a powerful civil service system. The civil service became even more powerful after the second world war, when Kenya emerged as the major producer of agricultural commodities that were greatly needed to meet the food needs of the Allies.² The Agricultural Department had to recruit more personnel to enhance its output, and this necessitated a strong well-contained administration to assist such programmes. The state of emergency declared in Kenya in the 1950s also invariably meant a strengthening of the public

administration. There was need to enlarge the authority of the government and to further entrench the power of the executive. Armed Forces were thus used for the re-establishment of government control especially in areas like the Central Province, where the situation was critical. The police department was also expanded and its administration further strengthened. It was then that the General Service Unit, popularly known as GSU, was created. Gertzel says it consisted of

"a strong police striking force with military training, capable of moving quickly to any *parts* of the country."³

The responsibility of maintaining law and order in the African areas was also transferred from the Tribal Police to the Kenya Police. These improvements in administration remained basically the same even after independence.⁴ The emergency, therefore, left behind a large, strong and well-organized administrative force, to be inherited by the independent government. All these strengthened the executive branch so much that it ~~is~~ overshadowed the other two branches of the government.

The expansion of the Provincial Administration as put by Evelyn Baring (the then Governor) was necessary for the good of the colonial government. It was stated:

"Government recognizes that the final responsibility for good government and preservation of order clearly lies with the provincial and district commissioners who represent the governor in their areas. These officers are entitled to give general directions concerning preservation of peace and order..."⁵

The Provincial and District Commissioners were charged with the responsibility of chairing Emergency Committee meetings and running of the day-to-day activities in their areas as concerns maintenance of law and order. In addition, they were also responsible for initiating development activities as this was seen as a good way of combating the Mau Mau menace:

"... Thus before independence, it could be said that the provincial administrators had power, authority and influence. They also had three major functions: control, co-ordination and mobilization of the public for development. In the exercise of all three, they acted in an executive capacity as the agent of the governor."⁶

As nationalist movements took shape, the first thing they questioned was the necessity for such an authoritarian administration. They also questioned the idea of having unofficial members, whether elected or nominated, in the Executive Council, which was later transformed into the Council of ministers. It should be pointed out that even by the time the council of ministers was established in 1954, the executive branch was, by all means, independent. The head of the executive (the Governor) was not responsible to the Council of Ministers. He derived his authority from the colonial office in London.

During the colonial era, therefore, there was no separation of powers. The executive emerged as the dominant organ of government with the legislature and the judiciary subservient to it. Members of the

executive were not only administrators, but also adjudicators when disputes arose within their areas of operation. The district officers and the chiefs had days allocated for judicial functions. The same people were also law makers in so far as they devised regulations for implementation in their areas. This was supported by the argument that these administrators were better placed ~~by~~ and, being in daily contact with the people, knew their problems best and therefore, knew what kind of rules would best help them realise their aims in terms of development or otherwise. There was therefore no separation of powers during this period. However, as time wore on, little improvements started to be effected in the governmental system, though crude at first.

Developments started with the democratization and separation of the two councils, the Execution Council, and the Legislative Council. The executive Council All the powers, as has been said earlier, were vested in the Governor. He did not have ^{to} consult with anybody in his decision-making and in the exercise of his powers, other than the colonial secretary in Britain. It was in reaction to this that the executive Council was created to act as a check on the unfettered powers. It was composed of senior civil servants of the colonial government. Although the executive Council did not help much towards the initial goal of controlling the ^{Powers} ~~powers~~ of the Governor, its formation brought about some awareness that there should be some form of

separation of powers in the performance of government duties. It could not, as it were, force any decisions on the governor, because it was a purely administrative body; and the governor was free to take or reject its advice.

Further developments saw the nomination of unofficial members to ~~sit~~ in the Executive Council. Such nominations were done by the Governor, and those nominated could attend Executive Council meetings at the Governor's discretion or invitation. They did not have voting powers in determining the decisions of the Executive Council. The Council even at this time, only performed advisory functions, and therefore had no meaningful control over the governor's powers. In response to this, it was considered a necessity to eliminate the Governor's powers; by electing unofficial members, ~~instead~~ of having them nominated by the Governor. The first elected unofficial members of the Executive Council formed only a minority, and could not affect the deliberations in the council meetings. However, some of them were later given departmental responsibilities, and thus consequently eroded the concentration of power in the hands of the Governor.

The next stage of development was when the Executive Council was transformed into a Council of Ministers.⁷ This is when we start seeing some form of collective responsibility, where the council of ministers is made responsible to the Legislative Council. The

governor's discretion is also curtailed and he could not act without taking into consideration the deliberations of the Council of Ministers. It is the council of ministers that was later transformed into the cabinet as we know it today. The governor also ceased to preside over the council.

One of the characteristics of the council of ministers was that it was multi-racial and indeed included Africans among other communities. It had thus, gone beyond racial barriers and accepted Africans as capable of making rational decisions. Political parties were, however, not allowed to function until 1960.⁸ With this crude ministerial system came the idea of Parliamentary control over finance (which was formerly under the control of the Executive). A Public Accounts Committee was set up in the Legislative Council and by the Audit Ordinance 1952 and Exchequer and Audit Ordinance of 1955, the accounting system and financial policy were brought under some department.

As Kenya advanced towards independence, certain powers of public administration ~~invested~~ vested in the governor were removed. Independent bodies or commissions were set up in pursuance of this objective. These commissions included Public Service Commission, Judicial Service Commission, Teachers Service Commission, Police Service Commission and Director of Public Prosecutions. They were solely concerned with the recruitment,

dismissal, transfers and discipline of personnel under their department throughout the country and they were supposed to be far removed from Executive influence. One shortcoming was however that their powers were exercisable only in relation to the members of the lower civil service, and not senior officers.

After independence, there have been more clear cut definitions of functions. The Kenya Constitution contains particular provisions as regard each of the three organs of the government. In Chapter II, there are provisions for the Executive branch, which consists of the President, Ministers and Assistant Ministers. The ministries have as their personnel the civil servants whose function is to execute all the laws enacted by parliament. They also take care of the general public administration in the country. Within which formulates government policy and it consists only of the President and the Ministers.

At independence, Kenya inherited a monarchical kind of government which it aimed at transforming into a presidential regime. But what we ended up with is a compromise between two executive regimes, namely: parliamentary executive and presidential executive. Parliamentary executive is one where the Chief Executive is the Prime Minister, who has to have the backing of the majority of the members of Parliament; whereas presidential executive is that which is headed by the

President, and does not depend, for its tenure in office, on Parliament and the President is not required to be on elected members of parliament. The Kenyan system is stronger than either the Presidential or Parliamentary executive system, and the executive power is not vested in the Kenyan Cabinet, but in the president. Cabinet is only to advise the President, who is free to accept or ignore the advice.

The constitution specified the qualifications necessary for one to be elected a president, and the formalities to be followed before and after such election.⁹ There are two methods of electing a President, namely: after the dissolution of Parliament, or when a vacancy arises in the Office of the President, say, as a result of death or resignation. When the President is to be elected at a general election, he must first be nominated by a political party, and such nomination must, of necessity, be done by two party officials - a proposer and a seconder. Where only one candidate is validly nominated, he is automatically elected President, so long as he wins his Parliamentary seat. In most Third World Countries, of which Kenya is one, there are no competitors with the Presidential candidates and they usually go unopposed, not only in their constituencies, but also nationally as the sole ^{peer & president²¹} candidate.

The nomination must also be accompanied by signatures of ^{at least} one thousand people who support him.

This requirement has no particular legal significance. except that it was meant to be a bottleneck for adventurists. Once elected, the President is supposed to stay in office for five years unless disqualified on grounds of incapacity due to mental disorder or any other physical incapacity, or when a vote of no confidence has been passed against him.¹⁰

Once declared elected, the President assumes office as such,¹¹ however, he must take and subscribe to the oath of allegiance for the due execution of his office.¹² His salary and allowances are made out of the consolidated fund and are determined by resolution of the National Assembly. He is also protected in respect of legal proceedings during his tenure of office.¹³

The President, upon entering his office, appoints his Vice-President from among the ministers, who are elected members of Parliament. The major duty of the Vice-President is to assist the President in his functions, but no specific duty is outlined in the Kenya constitution. He assumes presidential functions when the President is out of the country, or when the President is ill. In such cases, the President is required to empower the Vice-President in writing to take over his duties while he is away. Furthermore, whenever the Office of the President falls vacant due to death or resignation or for any other reason, it is the Vice-President that

assumes the functions of the President, pending election of a new President. In these circumstances, the Vice-President is required to hold office for three months.¹⁴

a period not longer than 90 days is allowed for him to complete his public duties

The ministers of the government of Kenya are appointed by the President from among the elected members of the National Assembly. Their offices are established by Parliament or by the President subject to any provisions made by Parliament.¹⁵ The Office of a Minister falls vacant on the directive of the President, or if the holder ceases to be a member of the National Assembly, otherwise than by reason of dissolution of Parliament. There must be fresh appointments of ministers every time a person is elected to the office of the President. Assistant Ministers are also appointed in a similar manner and have, more or less, same terms.¹⁶

S. 16(2) of const.

The cabinet is also established by the constitution¹⁷ and it consists of the president, the Vice-President, and the other ministers. Its function is to aid and advice the President. It is also collectively responsible to the National Assembly for all things done by or under the authority of the President or the Vice-President, or any other minister in the execution of his office.

Once appointed, ministers, and assistant ministers must take and subscribe to the oath of allegiance for the due execution of their offices before they enter upon the duties of such offices. The ministers and assistant ministers also have permanent secretaries under them to

supervise their departments. These permanent secretaries are appointed by the President and their office is one in the public service.¹⁸

Ministerial departments are manned by the civil servants. After independence, attempts have been made to insulate the civil service from politics, and in particular, executive control. It is for this reason that the Public Service Commission was established. Its powers are entrenched in the constitution.¹⁹ It is composed of a Chairman, Deputy Chairman and five other members appointed by the President. These officials are to hold office for a term of three years. They are supposed to have security of tenure during that period and can only be removed for inability or incapacity to perform their duties, or due to misbehaviour. Persons who are, in any way, involved in politics are disqualified from being appointed as members of the Public Service Commission, unless such a person has stayed out of politics for ten years.

The major functions of the Public Service Commission are three: it appoints persons to hold, or act in, office in the public service. Secondly, it disciplines public servants; thirdly, it removes people it has appointed from office as need may arise. It is, however, precluded from dealing with top government officials, like the Attorney-General, Controller and Auditor-General,

Permanent Secretaries, Director of Public Prosecutions, Commissioner of Police, Ambassadors and High Commissioners. These are highly political jobs which fall directly under the President, though they are in the Public Service.

Although the original intention of the government was to remove the civil service from politics, in practice, it has been the reverse. In the 1971 Ndegwa Commission Report, it was remarked:

"The structure and function of the civil service [colonial] were carried over into the post independence period with ^{little} other basic change."

The half-hearted attempts by the government to create an independent civil service, by forming the Public Service Commission, have instead resulted in a more consolidated structure. It is inseparable from the executive, and has not only greatly eroded the powers of the local authorities, but have also turned out to be like some ruling party. They are directly responsible to the President.

SECTION B: The Legislature

The Legislature is the second arm of government. It is composed of the President and members of the National Assembly, the total number of whom should not exceed ²⁰⁰ 170; out of this, ¹⁸⁸ 158 must be elected members and ¹² twelve are nominated by the President. ²⁰

changes in
1987/8

The 1963 independence constitution gave Kenya a Parliamentary form of government. The National Assembly was, then, a bicameral one with two houses, namely; the Lower House (House of Representatives) and the Upper House (the Senate). The Lower House consisted of 117 elected members, twelve nominated members, the Attorney-General, and the Speaker. The Senate on the other hand consisted of 41 Senators, representing the forty-one districts into which the country is divided, and the speaker. This position was however radically altered by the First Constitutional amendment,²¹ which established a Republic with the President as head of both the state and the Government.

The first National Assembly was elected in May, 1963 when KANU won an overwhelming victory against KADU. The Kenya legislature remained two-party until 1964 when KADU voluntarily dissolved itself. Another opposition party, the KPU however, was formed in 1966^{only} to be crashed four years later extra-legally by the Executive. The bicameral National Assembly was finally brought to an end in December, 1966, and the Senate was amalgamated with the House of Representatives to form a Uni-cameral Legislature. This was done by the Constitutional Amendment of 1966.²²

There are three categories of members of the National Assembly, namely: elected, nominated and 'ex officio' members. The elected members are elected in constituencies, which should be not less than 150 and not more than 168 in number, and represent

electoral commission thinks fit. The Kenya Constitution lays down²³ the qualifications necessary for one to be elected a member of Parliament. He must be nominated by Ruling Party (KANU). He must be a Kenyan citizen who has attained the age of 21 years. He must also be registered in some constituency as a voter. He must be able to speak read Kiswahili and English languages well enough to take an active part in the debates of the National Assembly. Any person who owes allegiance, obedience or adherence to any foreign state, or is under death sentence, or a sentence of imprisonment for a term exceeding six months, or is adjudged insane or bankrupt, or holds an office in the public service, is disqualified from being elected a member of Parliament.

As regards voters s.32(2) of the constitution provides that every person registered in a constituency, unless in lawful custody, or has been convicted of an election offence, is entitled to vote in that constituency. A person is also disqualified to be registered as a voter in elections to the National Assembly and in Presidential elections if he has been adjudged or otherwise declared to be of unsound mind or bankrupt. Otherwise, any Kenyan citizen who has attained the age of 18 years and has been ordinarily resident in Kenya, either for a period of not less than one year immediately preceding that date, or, for a period of, or periods amounting in the aggregate to not less than four years in the eight years immediately preceding that date, is qualified to be registered as a

voter.²⁴

Voting is done on a common roll, as opposed to communal roll of the colonial days, and the franchise is based on universal adult suffrage; in other words, it is based on one-man-one-vote for every adult Kenyan. The Kenya constitution, until its forthcoming amendment, contemplates the existence of more than one political party, although Kenya is a ^{JUR} 'de facto' one party state at present. It therefore makes provisions that only the party that gets the majority of seats in the National Assembly will form the government. The elections are gauged on the single majority ^{test,} that whoever gets the majority or greatest number of the votes cast, qualifies as elected representative of that constituency.

There are two types of elections, the General Election and the By-election. Under the constitutions, general elections are normally held when Parliament is dissolved, and when such a dissolution is ordered, the next parliament must meet within three months of the dissolution. There are three ways of dissolving Parliament.²⁵ The President is empowered to dissolve or prorogue Parliament any time. The significance of this provision is no clear, but perhaps it can be assumed to be a source of power to the government, and can be utilized by it to call elections when it thinks opportune, especially when, in the case of a multi-party system, the opposition is making undue pressure on it. The second way of dissolving Parliament is by passing a vote of no

confidence in the government by the National Assembly. Such a vote must be passed or supported by a majority of all the members of the Assembly (excluding the 'ex Officio' members) and a seven-days' notice has to be given prior to its passing. If the President does not resign from his office or dissolve Parliament forthwith, it stands dissolved after three days of the passing of the no confidence vote. The final way is after the expiry of five year from the time the Parliament first met. The life of Parliament is five years, and once this duration lapses, Parliament stands dissolved for fresh elections; but its life can be extended if Kenya is at war or other emergency. Such extension can however only be for twelve months at a time and the total should not exceed five years.

Once elected, a member can only vacate his seat, before the lapse of five years, if he has ceased to be a Kenyan citizen, or if any circumstances arise that if he were not a member of the Assembly, would cause him to be disqualified by s.35(1) or by any law made in pursuance of s.35 (3) or (4) of the constitution to be elected as a member, or if he fails to attend the proceedings of the Assembly on eight consecutive days on which the Assembly was sitting in any session. A member can also vacate his seat in the National Assembly if he resigns from the party which nominated him for the elections.

The second category of members, the nominated members, should not exceed twelve in number.²⁶ They are appointed by the President from amongst persons who, if duly nominated, would be qualified to be elected as members of the Assembly. The constitutional amendment of 1968²⁷ endowed the President with discretion in his choice of whom to nominate, but this discretion has to be exercised reasonably, with due regard to s.33 of the constitution. Once nominated, a member cannot be dismissed at the pleasure of the President, and has the same protection as that enjoyed by the other members. It follows therefore that even nominated members can only lose their seats if they resign or cross the floor (in the case of a multi-party situation). *can't crossing*

The 'Ex-Officio' members of the National Assembly Comprise the Attorney-General and the Speaker.. As an ex-officio member, the Attorney-General is not entitled to vote at all on any question before the Assembly, meaning, he has neither a deliberative nor a casting vote. His office is one in the public service, but sits in Parliament as the Principal Legal Adviser of the government, for which same reason, he is preserved a seat in the cabinet and is thus accorded a Ministerial status.²⁸ The speaker on the other hand though an ex-officio member, has a casting vote to exercise if there is a tie. He is elected by ~~the~~ *the* Assembly in

accordance with the standing orders, from among persons who are members of the Assembly, or are qualified to be elected as such members. The President, the Vice-President, Ministers, Assistant Ministers and the Attorney-General cannot be elected the speaker. When the office of the Speaker is vacant, there can be no business transacted in the National Assembly, other than election of the Speaker. Once elected a speaker will vacate his seat only when the National Assembly first meets after a dissolution of parliament; or if any circumstances arise that, if he were not a speaker, would disqualify him to be elected as such; or if the National Assembly so resolves, and such a resolution must be supported by the votes of not less than 75% of all its members, excluding the ex-officio members. Once elected, the speaker, if an M.P. loses his parliamentary post. This is to ensure neutrality in the process of debates.

The constitution also provides for the office of the Deputy Speaker,²⁹ He is also elected by the National Assembly from members of the Assembly other than the President, his Vice-President, Ministers, Assistant Ministers, the Speaker and the Attorney-General.

All legislative power is vested in the National Assembly by s.30 of the constitution. This power is exercisable by Bills passed by the House. Details of passing a bill are, however, contained in the standing orders. Other than the law-making function, Parliament has a duty to control and finance government expenditure.

With the help of the Public Accounts and Estimates Committees, Parliament is able to scrutinize government expenditure and to ensure that government funds are not misused. Parliament has an additional duty of criticizing the government and putting a check on its powers. This is actually the role of an opposition party in Parliament in a mutiparty system, and is carried out in the form of questions directed to the government ministers during question time, or in discussions on the presidential address when opening a session, or by moving an adjournment motion usually about the last minutes th
the
at/end of every sitting. Any member of the National Assembly has the right to ask questions to Ministers regarding the administration of their departments. When asked a question a minister is under an obligation to provide an answer. Budget days also provide parliament with an opportunity to criticize the government.

For the due execution of their functions members of the National Assembly are given privileges and protection by the constitution. S.57 of the constitution provides, thus:

"... Parliament may, for the purpose of the orderly and effective discharge of the business of the National Assembly, provide for the powers and privileges and immunities of the Assembly and its committees and members."

These immunities and privileges include freedom of speech, freedom from arrest for civil debt,³⁰ the right of the National Assembly to regulate its own procedure, the right to punish members or strangers for contempt,³¹ and others.

SECTION C: The Judiciary

The judiciary is the third, and final, arm of government. It is composed of the bench and the bar, plus other members of the legal profession. Its major function is to adjudicate "on disputes which arise out of the laws made by the legislature and administered by the executive."³² In this respect, the judiciary's main functions are to determine disputes which arise between individuals amongst themselves and between the individual and the state. It is also charged with the responsibility of protecting the individual against the excesses of the government and arbitrary actions of government officials. The judiciary, above all, is the upholder of the constitution. It has a duty to correctly interpret the constitution and ensure its supremacy as the fundamental law of the country.

The court system in Kenya is one other of the inherited institutions from colonial era. The idea of independence of the judiciary from encroachment by either the executive or the Legislature, according to Winston Churchill was "a part of our message to the world,"³³ and, in fact, the colonial officials took it upon themselves to ensure that that message was emitted in Kenya. They established a British type of court system in Kenya although they did not impose it on the Africans right away; so the African Courts were allowed to co-exist with the 'civilised' courts. The ultimate aim however, was to anglicize these native courts as the history of legislations regulating

the court structure reveals, starting from the 1902 East African order in council.

It would be a ^sminor_^ to say, therefore, that there was separation of powers during the colonial era, because judicial independence, an important pointer to separation of powers, was non-existent. The courts were part and parcel of the executive, and the judicial functions were performed by administrators or vice versa. The judges lacked security of tenure, and promotions depended on faithfulness in carrying out government policy, rather than on strict administration of justice in accordance with the law.

With the advent of independence, however, attempts were made to separate the judiciary from the other organs of government. The duties and functions of the judiciary have henceforth been laid down in chapter IV of the constitution. It establishes the court of Appeal of Kenya and gives it jurisdiction and powers to hear appeals from the lower courts. The judges of Appeal are the Chief Justice and such a number of other judges not being less than two, as Parliament may prescribe.³⁴

The High Court is also an establishment of constitution, as a superior court of record with unlimited jurisdiction in civil and criminal matters. The High Court judges comprise of the Chief Justice and not less than eleven other judges as Parliament may prescribe. The Chief Justice is appointed by the President. To be appointed a judge of the High Court,

one must have been a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the commonwealth, or in the Republic of Ireland, or a court having jurisdiction in appeals from such a court, or he is an advocate of Kenya of not less than seven years standing or he holds, and has held, ~~for~~ for a period of, or for periods amounting in the aggregate to, not less than seven years, one or other of the qualifications specified in the Advocates Act;³⁵ that is, he could be a barrister at law, a legal practitioner, or holds a ~~degree in law.~~ *BUP?*

Appointments to the office of High Court Judge is done by the President. If the office of the Chief Justice falls vacant for any of the reasons specified in section 61(4) of the constitution, a High Court Judge can be appointed to exercise his functions until a chief justice is appointed. Once appointed, a judge holds office until retirement age, which is 74 years,³⁶ and can only be removed for misbehaviour or inability to perform functions. In such cases, before dismissal the question has to be referred to an independent tribunal for investigations. *amended - by who??*

Judges cannot enter upon their duties unless they take and subscribe the oath of allegiance,³⁷ and the purpose for granting them security of tenure is to ensure that the judiciary is kept independent of the Executive or the Legislature.

Under s. 65 of the Constitution, Courts subordinate to the High Court, and a courts martial are established. Their powers and jurisdiction are conferred by the relevant legislations.³⁸ They are under the supervision of the High Court. Kadhi's Courts, for those professing the Islamic faith, are also established under s. 66 of the constitution. There is, to crown it all, the judicial service commission, a body entrusted with the appointment, dismissal, discipline and transfer of the members of the lower bench.

In performing its functions certain safeguards have been devised to ensure that the judiciary is not put under any undue influence and to ensure that it remains independent. This is why the judicial service commission was established. The commission consists of the Chief Justice, as its Chairman, the Attorney-General and two other High Court Judges or Justices of appeal, appointed by the President and the Chairman of the Public ^{Service} Commission.

The second way of ensuring judicial independence is by granting the judges security of tenure, in that once they have been appointed, they can only be removed for misbehaviour or inability to perform their functions. Otherwise, they will stay in office until their retirement. The judges cannot be forced to retire or resign by altering their terms of service and salary to their detriment. They also enjoy some privileges and the **Judicature Act, 1967**, outlines these privileges as freedom from **civil** suit

This is now part of our constitution history - see art 198
Remember again in 1990.

for any act done or ordered by a judge in the discharge of his judicial duty; they also have power to punish people for contempt of court.³⁹

SECTION FOUR: A Critical Analysis of the Three
Organs: Is there separation of Powers
in Kenya.

From the foregoing account of the functions and nature of the three organs of government, one would immediately conclude that there is no separation of powers in Kenya. However, it is safer to arrive at such a conclusion after the critical analysis of the functions of the three organs, which follows:

A. The Executive v. The Legislature:

It has been noted that the executive, from the colonial times occupied a more privileged and dominant position in the politics of Kenya, and has been the focal point of all government activities.

In relation to the legislature, the overlap of functions has left a lot to be desired. Firstly, by virtue of our government being at the cross roads of Presidential Executive and Parliamentary Executive, we end up with a situation where the President is both head of state and head of government. He sits in the National Assembly as head of the Executive and as a Legislator in so far as he has to give his assent to the bills passed, and in so far as he represents the electorate in his constituency. He also addresses Parliament as the

head of state at the beginning of each session. This invariably means that his duties as an ordinary member of Parliament are greatly influenced by his executive position. In fact the dilemma has been such that the President rarely sits in the National Assembly as an ordinary member, but assumes that he is above the national assembly debates.

Secondly, it is the President that appoints Ministers. This he does as head of the executive. However, what is of interest is that these ministers are appointed from among the elected members of Parliament and therefore will almost always tilt the balance in favour of the government during parliamentary debates. The practice has been to appoint such a number of ministers and Assistant Ministers as will always outnumber the backbenchers. Bearing in mind that ours is a one-party system, this practice discourages and in fact outflanks any meaningful criticisms of the executive by the legislature. In fact there was a public outcry recently by the backbench, which occasionally performs the role of an opposition party, that their motions are deliberately being defeated by the Front Bench with the Assistance of the nominated members, some of whom go to Parliament only on days when a vote has to be taken on any controversial motions. In so far, therefore, as the ministers are also the legislators, we cannot say that there is separation of powers, because even the vote of no confidence

mechanism by which the government is kept alert, becomes illusionary, since you cannot get the ministers and assistant ministeres to support such a vote.

The theory of separation of powers also stripulates that the executive depends on the legislature for its tenure in office. This is hard to see in a situation where there is only one party. Furthermore, the Public Administration, which is supposed to maintain neutrality and in fact assist Parliament in controlling the executive is, on the contrary, under the direct control of the latter. It operates as a branch of the executive, and has been politicized to such an extent that it is as if it is a political party. In addition the administration has also greatly eroded the law-making function of Parliament, in the form of delegated legislation. Most of the everyday lives of the majority are governed by delegated legislations and by-laws made by administrative bodies.

One of the consequences of a one-party system is that instead of the Public Accounts Committee being headed by the leader of the opposition party, it is headed by and composed of members of the executive. This, in effect, means that the function of controlling government finance by Parliament is of little significance, because it cannot be effectively carried out. Furthermore, very little time is allocated to the committee such that even if there could be constructive scrutiny of the government accounts, it cannot be done in time for all

the ministries. It can only investigate the accounts of one ministry at a time. It is also important to note that the committee has no proper sanction other than of exposure. This means that once misuse of funds has been unearthed, it is left to those involved to either resign, on moral grounds or do something positive about it. This is of no use in a country like Kenya, because a minister cannot possibly resign on such grounds. It is doubtful if they would feel the moral blameworthiness to force them into resignation.

The Executive v. Judiciary

The concept of an independent judiciary has been taken as a pointer to separation of powers. We would not strictly speaking, say that there is independence of the judiciary in Kenya, although this is what is being assumed to be the case. Firstly, the President appoints the Chief Justice and the other judges. He exercises his total discretion in the appointment of the Chief Justice, although in the case of the other judges he has to confer with the judicial service commission.⁴¹ It has been pointed out, that the power of the Judicial Service Commission has been so eroded by the executive, as to leave it as a purely advisory body, whose advice has never been binding on the President. He has power to suspend the Chief Justice or any other judge pending investigations. Such investigations are carried out if a judge is alleged to be unable to perform his duties, either due to infirmity

of mind or body; or if he has misbehaved. The tribunal to conduct these investigations is appointed by the President.⁴² In the case of a Chief Justice, the constitution requires the tribunal to be appointed by the Chairman of the Public Service Commission, but this does not rule out the influence of the President in the whole exercise.

Security of tenure of judges has on occasions acted as a bottleneck to the executive as regards its relationship with the judiciary. It has therefore found it more appropriate to avoid this complication, by enlisting the services of expatriate judges, who are employed under specified contractual terms, that are renewable. The government thereby makes itself free to prematurely retire such judges, or refuse to renew their contracts, if their functions turn out to be ^{to} _^ the detriment of the government, or are against government policy. Such expatriate judges clearly lack security of tenure and can be dismissed at the pleasure of the President. For this reason, they have to respect government policy and to keep their jobs or appointments.

There are even few occasions when expatriate judges, who are either unaware of government policy or just decide to decide cases on merit regardless of government policy have declared their stand and reflected

it in their decisions. The effect is inevitable, and was the case when at one time it was revealed in Parliament that the Judicial Service Commission was reviewing the contracts of some Asian Magistrates. The disclosure came during criticism of some Asian magistrates for allegedly failing to discharge their duties properly. The discussion included calls to speed up ^A africanization of the Kenya Judiciary. This implied that non citizens are only interested in exercising the demands of their offices and have little or no regard for government policy, especially when it infringes the individuals' rights, or is unconstitutional. Any apparent move by the judiciary towards greater independence has been viewed with suspicion.

The executive has even employed extra-legal devices to curb such moves, such as detention of people acquitted by the courts. In deed the state of emergency of the 1950s was declared as a means of controlling Mau Mau insurgents, and same Mechanism has been used even at present when such need arises.

The judges themselves have personal restraints and would not like to be involved in controversial decisions that bring them into direct confrontation with the government. Usually, they are appointed from among the class in power. They therefore, share the same ideals and views with the executive. The English case of Robert v. Hopewood⁴³ is a good illustration. In that case a particular country in England elected a very

radical body of councillors. The council decided to pay workers a living wage of about £4 (which was double the usual wage paid) and ordered that men and women be paid equally. The House of Lords Cancelled those resolutions and held that this kind of decision by the council was based on misguided conceptions of Socialists Philanthropy. This case is a clear example of the ruling class trying to protect itself.

A further example is the case of Namwandu v A.G. of Uganda,⁴⁴ in which the court refused to address itself to the question as to whether emergency can warrant exemption of government from liability for a tortious act committed by its agent.

These cases show that judges, being members of the ruling class, have avoided direct confrontation with the executive. It is only in Uganda that a judge openly declared that his duty is to uphold the constitution and the rule of law, no matter what it costs him. He said:

"I will not allow myself to be intimidated into sending innocent persons to jail. Even if it means losing my job, I am still sure of leading a decent life. The only thing we have in this country [Uganda] is the judiciary. We have politicians changing from one policy to another, and one party to another, but the only protection ordinary people have against all these inconsistencies is a fearless and upright judiciary."⁴⁵

It should also be noted that due to the fact that judicial independence was never there during the

colonial rule, it has proved rather hard for the independent government to put it into practice although they think and accept it as desirable. The executive and the judiciary have been seen as serving each other and more so, the latter as subservient to the former. This is how the ordinary layman looks at it. Courts are seen as part and parcel of the executive. The courts on their part, have never tried to assert their independence to alert the majority of Kenyans that their main duty is to protect their constitutional rights from infringement by the executive. The courts have not only remained inaccessible, due to the costs involved and the idea of 'locus-standi,' that only an aggrieved person has the right to complain, but have remained unconcerned about the plight of individuals.

Another recent constitutional development of interest is the appointment in 1980 of the former Attorney-General Mr. Charles Njonjo as Acting Minister for Commerce and Industry. The Attorney General is supposed to be the Administrative head of the judiciary, and therefore should, as much as possible be removed from the influence of the Legislature and Executive. His office is one in the public service, and for him to act as a minister is an infringement of the doctrine of separation of powers. In addition, he is also a member of the Judicial Service Commission and should, more than anybody else, ensure the independence of the judiciary; other than the functions specified in the constitution, it is stated nowhere that he should or can perform ministerial

functions. Ministers should be appointed from among those elected to Parliament. Since the Attorney-General is not an elected member of Parliament, but an 'ex officio one, he is not eligible for appointment as a minister.⁴⁶

Legislature v. Judiciary

Judges, it has been said not only interpret the legislations passed by Parliament but also make the law. They have in this sense therefore undertaken a legislative role and add their own interpretations to Acts of Parliament under the cover of "Legislature would not have intended..." This is an indicator that there is no separation of powers. One of the arguments advanced against this overlap of functions is that to allow the judiciary to make law is, in effect, to usurp the legislative function of law-making and yet Parliament is the body that has the people's mandate to perform that function, not judges. To the extent therefore, that the judiciary is composed of non-elected representatives of the masses, they are not responsible to them and are not responsive to their needs.

On the other hand, Parliament can, and indeed has often ousted the courts jurisdiction or has created other courts or tribunals subservient to its needs, by providing in Acts who shall constitute the tribunal to try certain offences. It has also

overruled the ordinary courts in attempt to avoid judicial review. It has often minimized judicial discretion by stipulating the imposition of mandatory minimum or maximum sentences. The penal code, for example, specifies the kind of sentences that the offences should carry. The judges cannot exceed these provisions that are specified by Parliament. This is, in a way, an undue interference by the Legislature on the functions of the judiciary.

CHAPTER THREE

SEPARATION OF POWERS: RECOMMENDATIONS

In the preceding chapter, we outlined the problems that hinder the ~~speration~~ of the doctrine of separation of powers. In this chapter suggestions are going to be made as to how to solve these problems, if the doctrine has to operate in Kenya.

Immediately after independence, the trend was to increasingly assert the central government control over the whole country. The powers of the executive were further consolidated through the civil service machinery. However, when Kenya became independent, the system of government adopted was more decentralised than that of the colonial period, though it soon reverted to the same structure soon after independence.

The independence constitution provided for a considerable decentralization of powers from the Central government to the regions. This was the system established with the introduction of self-government in June, 1963. The Ruling Party, KANU, however, constantly expressed its disapproval for such a system, arguing that regionalism was a great political mistake. It is no wonder, therefore, when the system did not actually come into operation, that KANU deliberately delayed the implementation of the programme, especially by delaying funds allocation to these regions.

In the final analysis, the government reverted to the colonial system of institutions. It maintained a much closer control over the civil service at the regional level than the constitution allowed. Provincial Commissioners were used for this purpose, and thus maintained a much more direct line of communication between the centre and the regions. The government also ignored the proposals for ensuring that by June 1964 the regions were in control of their finances, and thus assuming full responsibility over their finances. This was not the only delay; the transfer of services from the Central government to the regions was also delayed.

In the meantime, the government was campaigning to seek public support for its proposed amendment to the constitution to abolish regionalism. When their proposed change was finally announced in Parliament on 14th August, 1964, it was unanimously¹ passed and the government was particularly lucky because KADU which had greatly advocated for regionalism had been disbanded soon before the passing of the Amendment Act. Kenya became a Republic in 1964 as a 'de facto' one party state.

The powers of the regions were abolished and an executive presidential system introduced. This gave the President very wide powers as he was not only head of state but also head of the government. As

head of the government, he remained head of the Cabinet, which he appointed himself from among the members of Parliament. In the same capacity, therefore, he would be, and in fact is, responsible to the Legislature and can, theoretically, be removed from office on a vote of no confidence, and further, that his ministers are also supposed to be collectively responsible to the Legislature. Thus the executive and the Legislature continued to be closely linked together in a system of government based essentially on Parliamentary Supremacy as an essential check upon the executive. This system was one designed to prevent the Executive from assuming dictatorial powers and ignoring the country's elected representatives,

In practice, however, this has hardly been the case. Despite their clear conceptions of separation of powers and of Parliamentary supremacy as a check on the executive, the 1965 and 1966 constitutional amendments undoubtedly enhanced the Executive's powers vis-a-vis the Legislature. In particular, the Third Amendment abolished the special provisions for amendment of those entrenched provisions of the constitution relating to regions and fundamental rights. The amendment requirement as contained in 1969 edition of the constitution is only a two third majority of all the members of the National Assembly. The Executive is given further, if unstated, disciplinary measures or powers

over members of the National Assembly, namely, that any member who resigns from the party that had supported him at his election is required to resign his seat in Parliament.² The conclusion one invariably draws from these constitutional amendments is that, although Kenya started off from independence as a country whose organs of government were clearly defined, this has been eroded in the process of the Executive reasserting its influence. It has sought to be dominant over the Legislature and the Judiciary to such an extent that we cannot talk of separation of powers in Kenya. The idea of a vote of no confidence being passed against the government is not only an impossibility, but is also not foreseeable in the near future. Its unreality is exemplified especially by the requirement of seven days notice before it is passed. It is of interest to note that the independence constitution never had any special provisions for the passing of such a vote, it would be passed just as any other vote. Further, the amendments require a majority of all members of the National Assembly to vote on such a motion. This seven days notice is given so as to enable the President to either resign or dissolve Parliament. His chances of resigning are very remote even if such a vote could be passed. Chances therefore are that he would dissolve Parliament in such a situation. There is no requirement that if he so dissolves Parliament he disqualifies himself from being elected again

for another term. If he so contests in the elections and succeeds, the purpose of the vote of no confidence would thus be defeated. Such a situation has not arisen in Kenya and is not envisaged in the near future, because the seven day is even long enough for him to take any extra-legal precautions to safeguard his position.

Kenya is at present a de ^{Jure} factor one party state, although in pursuance of the resolutions of KANU, Executive Committee that this system be legalized, two bills have been published, namely, the constitution of Kenya (Amendment) Bill, 1982 and the Election Laws (Amendment) Bill, 1982.³ Such a situation makes the passing of a vote of no confidence even more difficult because there will be no opposition party to assume powers of the defeated government if it so resigns.

My recommendations on this would be that, although the government cannot be forced into resignation by Parliament, there should be an encouragement of fair criticism by Parliament of unpopular government policies. It would be impossible to think of such a situation especially when all the members of Parliament are members of one party, KANU.

The function of fair criticism, although being performed by the backbench in our one-party structure was perhaps best performed during the period 1966-1969,

the four years that saw the beginning and end of Kenya Peoples Union as an opposition party. It was KPU that was able to point out the shortcomings of the capitalistic system propagated by KANU. They thought this was a great departure from KANU manifesto and therefore maintained the view that what Kenya got was no more than just flag independence. The KPU leader, Mr. Oginga Odinga stated:

"Not only are many European settlers still sitting on big farms, but we are getting a new class of Blundells, Delameres and Briggs deliberately created."4

By this he was alluding to the KANU pledge of being committed to African Socialism, and therefore, in failing to ensure equitable distribution of property among Kenyans, it had failed in one of its major aims.

KPU also contributed much to the debates in the National Assembly, despite their number Gartzel observes:

"In the House of Representatives they formed a small band of seven seated on the speaker's left. They did not have sufficient numbers to be recognized under standing orders as the official opposition; and this meant that they lost special privileges, including a salary for Mr. Odinga as Leader of the Opposition..."5

Though few in number, they made it a point of ensuring that there was a speaker on each motion. KANU government, realising that its position was threatened resorted

to extra-legal measures to contain KPU. A number of its officials were detained in 1966 under the Preservation of Public Security Act. Others were held for holding illegal meetings. Constitutional amendments not only affected members of Parliament but also local councillors who changed their parties, and requires them to resign in the circumstances. Those who openly supported KPU were subject to physical attacks especially by K.A.N.U. youthwingers. All these were intended to obstruct the activities of KPU. The conclusion one draws from the above account is that although KPU was quite effective as an opposition party, and indeed performed that role even better than KADU, the Executive has never allowed any legitimate opposition, and infact the executive has looked at it as undermining 'democracy.' Gertzel observes⁶

"KANU leaders had given ample hints during the little general election of the attitude that the party might adopt towards any KPU candidates returned to Parliament. At a major rally the President [Mzee Kenyatta] had employed a traditional Kikuyu curse to consign the opposition to oblivion. A KANU statement released immediately before the election results were known declared that Kenya would remain a 'de facto' one-party state even though a 'handful of political rejects' had run away from KANU to set a splinter group."

In the new two party state, both the government and KANU challenged the very legitimacy of the opposition itself. KPU was portrayed as having betrayed Kenyan unity. They not only questioned the party's loyalty to the state, on the grounds that it represented only one tribe, but also claimed that its intentions were subversive.

Since the outlawing of KFU in 1969 Kenya has remained a one-party state, and will soon be a ^{is already} 'de jure' one once the Amendment Act has been passed. The effect of this structure has been that the role of an opposition has since 1965 been undertaken by some vocal backbenchers, albeit within the KANU umbrella. The most vigorous element of the Kenya policy debate was from the outset, a group of KANU's own backbenchers. They challenged their own government's policies as radical departures from the original intention of the party. KANU discipline within the Assembly, thus, became strained on numerous occasions. Their criticism was a clear indication of their frustration at the cabinet's ability to ignore Parliament and in fact feared the possibility of a Cabinet oligarchy.

Out of this vigorous debate between the govt. and its backbenchers in the one-party House emerged a pattern of consultation. If the criticism on the floor of the House indicated that the government was unlikely to get the measure through, then the discussion would be withdrawn to the privacy of the Parliamentary Group, where argument was usually resolved by the personal intervention of the President. If the issue was thus resolved, it did not mean that there was a compromise by the cabinet on the points at issue, it was purely because of the late President's charisma.

Members of Parliament were in effect seeking to control their party executive from within Parliament rather than through party institutions. The result was that members became the most critical group within the party, and indeed the only group which had a definite forum and opportunity for debate. They, therefore, as a group, assumed a more influential role within the party than was provided for in the party constitution.

It is therefore submitted that in so far as fair criticism of government policies is concerned, the backbenchers and indeed all members of Parliament should be free to participate. In this way, the Executive will be put under check so as not to abuse its powers. This is particularly important in a 'de jure' system with no opposition party at all. The members should be free to debate on the functions of the executive with a view to improving its services. The good intentions of the backbenchers should not be defeated just for the sake of it, if done, it should all be in good faith and in all fairness. If they are defeated on a motion, it should be because it lacks merit.

The members are the representatives of the people and therefore, should be allowed as much as possible to express their wishes. Although it is not consistent for members elected on KANU tickets to turn round and criticize their party, it is only fair to allow them, in the circumstances, to instil some sense of responsibility

in the executive and to confine it within its rightful limits in its functions. Improvements are, therefore, necessary to ensure that this is done, and that the legislature's function of controlling the government be realised. The idea of ministerial responsibility should be made to have some sense. In particular there should be total freedom of the members to criticize the government. One of the functions of an opposition party is to offer itself as an alternative government, should the government in power be defeated on a major bill, or should a vote of no confidence be passed against it. Now that Kenya is, in law, a one party state the only way to realise this aim, is to have an executive that is conscious of the constitution as the fundamental law of the land, and which is prepared to abide by its provisions. We expect such a government to resign if it, in any way, does not measure up to the required standards.

It should also be noted that, in law, any member of parliament is free to initiate a bill. In practice however, it is the government that has been left to do this. Members have not been willing to utilize this right, and this could be attributed to either ignorance of the right or deliberate laziness, or lack of initiative. Often, members tend to fear anything that would bring them into direct confrontation with the government because, in the few cases they have

initiated private member bills, they have been on less controversial issues, except perhaps the Hire-Purchase Act of J.M. Kariuki. Most of them are however discouraged by the costs incurred in drafting the bills, which they have to meet themselves and not by the government. Most of them, naturally, have been unwilling to incur costs in such areas. It has also been noticed that when a private member initiates a bill, the ministers responsible have opposed them on grounds that the government is contemplating the introduction of a more comprehensive bill on the same subject matter, thus persuading the member to drop his bill. In the alternative, such bills are outrightly rejected in the process of debates as unpatriotic.

It is therefore suggested that members should be made free to initiate bills whenever they want to, and the costs be met by the government. If possible such private bills should also be drafted by the Government's Legal Draftsman in the Attorney-General's Chambers. To avoid any misuse of this privilege, some restrictions and disciplinary control, in the form of screening the contents of such bills to ensure seriousness and thorough thinking, should be set up. This will also ensure that the bills are in the national interest, and for the benefit of the majority of the people.

As regards the second function of Parliament, namely, to control government expenditure, it has been noted that this has not been performed satisfactorily. This is a function that was intended to be performed by the opposition party, whose leader also had to be the chairman of the Public Accounts Committee in the Legislature. It therefore meant that an uninterested party was entrusted with this job and was expected to do it without any partiality. When it is given to a civil servant or any other appointee of the government, one cannot completely rule out the likelihood of bias, and consequent misuse of funds that is then covered up in the process. Further, the Auditor and Controller-General who is entrusted with the duty of supervising the accounts of all government departments is himself a civil servant and therefore under the executive. The implication here is that he cannot report adversely against the government. But even if he could do this, the government can easily ignore his reports. Furthermore, he has been unable to go through all the accounts of the various ministries, because he can only deal with one ministry at a time.

It is therefore recommended that the role of checking on government expenditure be supervised by an independent and impartial body not interested in the matter.

The Auditor and Controller-General should be appointed by an independent body, like the Public Service Commission. He should also be granted security of tenure to avoid any intimidation by the Executive. He should also be given an increased number of staff to ensure that an increased number of ministries' accounts are audited in any given period.

Security of tenure of Controller & Auditor General to be removed by a constitutional amendment in 1986

Other than the above, the President and thus the executive has also increased his powers as regards the civil service, which has been looked at as a service not independent of, but subservient to the Executive. At independence, power was supposed to devolve to the provinces as entitled and in particular, provincial administration was under the Ministry of Home Affairs. It was soon after however, transferred to the office of the President. The Provincial Administration was restored its dominant role as agent of the Executive, and a major organ of control. Provincial and District Commissioners resumed their former position at provincial and district levels, respectively. They were once more the senior executive officers and co-ordinators of all government activities. They also resumed most of those responsibilities that they had lost in June, 1963, to the Regional Assemblies or the County Councils, for example, the collection of Graduated Personal Tax on behalf of the local authorities, Chairmanship of the

Provincial and District Agriculture Committees,
Chairmanship of Divisional Land Boards and District
Development Committees.

The most significant reassertion of the Administration's authority concerned the enforcement of Law and order. Provincial Commissioners and District Commissioners again became the Chairmen of the Security and Intelligence Committees and thereby became ultimately responsible for law and order. By the beginning of 1965, the Provincial Administration had dominated the countryside. Its officers were directly responsible to the President and not the party. The Executive regarded it as a major line of communication with the masses.

Along-side the Provincial Administration, is the civil service; the authoritarian system inherited at independence, though supposed to be after the Westminster Model. However, great differences exist between our type of civil service and that of Britain which we were supposed to emulate. The latter is impartial in the true sense of the word and ready to serve any party that comes to power. In Kenya however, the civil service has got extensive powers. Ghai & McAuslan observe⁷ that although the independence constitution incorporated the British idea of an independent civil service changes that have taken place since the inauguration of the Republic- Constitution in 1964 have been geared

towards bringing the civil service more under the control of the President, and thus close the gap between the supposedly independent Public Service Commission, the service it helps control, and the Executive. Firstly, in 1964, the President, rather than the judges, was empowered to appoint the members of the Public Service Commission. Earlier strong provisions had been incorporated in the constitution to ensure that neither serving nor ex-politicians nor public officers could be members of the Commission; nor could members of the Commission hold Public Office before the lapse of three years on leaving the commission. These were part^{of} the many attempts to keep the Public Service Commission, and thus the Civil Service, away from politics, and its members had to be appointed on the advice of the Judicial Service Commission. The officers of the Public Service Commission theoretically have security of tenure and are only removable for inability to perform functions as a result of infirmity of mind or body; or for misbehaviour. Even then, the matter has to be referred to an independent tribunal for inquiring and confirmed before such a person can be dismissed.

In 1964, however, it is the President that was empowered to appoint the members of the Public Service Commission, and not the judges. Further, that the functions of the Commission as regards the imposition of duties and discipline on the civil servants are made only with the consent of the President.⁸

There were further amendments of requirement that no public officer can be a member of the Public Service Commission and that members of the Public Service Commission cannot be public officers before the lapse of three years on leaving the commission - these conditions were removed by the second constitutional amendment Act.⁹ Even greater difficulties exist as regards the powers of the President and the duties of public service commission, especially as regards appointed dismissal of public officers.

The constitution expressly provides¹⁰ that the powers of constituting and abolishing offices in the Republic of Kenya, of making appointments to any such office, and terminating any such appointment shall vest in the President, and that every person who holds office in the service of the Republic of Kenya does so during the pleasure of the President.¹¹ On the other hand, the Public Service Commission also has power to appoint and dismiss public servants. The question at issue is; who has more power than the other? In fact, the President definitely has more power, and these wide powers of the President have, eventually had the effect of making the civil service subservient to the executive, and actually made it part of it. It would therefore be preferable to revert to the independence constitution situation, thus giving the Public Service Commission more power as an independent body to deal with the civil servants.

The situation, as it is at present, is that, the President has power to appoint and dismiss all public officers, not only those of the lower civil service, but also senior civil servants. These senior civil servants include the Attorney-General, controller and Auditor-General Commissioner of Police, Permanent Secretaries, Director of Public Prosecutions, Director of Personnel and Senior diplomatic envoys. They are all appointed by the President, and he is at liberty to dismiss them at will. Of particular interest are the offices of Attorney-General and the Permanent Secretaries. The Attorney-General's is one in the civil service. He is also the head of the judiciary. This overlap of functions makes it even more difficult to talk about independence of the judiciary.

Ghai and McAuslan remark:

"It is doubtful if any Attorney-General can satisfy this requirement [of impartiality] in the Kenyan constitutional system. The fallacy of these provisions is that they are based on the colonial assumption that the Attorney-General is merely a super government draftsman called in to advise the policy-makers on the legal implications of what they are doing. It is doubtful whether this assumption was correct in the colonial period but in a popular government inspired by political principles, policy and law cannot be so easily divorced, and it is no criticism of the present Attorney-General [the A.G. then was Mr. Charles Njonjo] to say that he takes as active a part in the government as does any minister..."¹²

The idea of permanent secretary as understood in English Civil Service System is to have officers that are actually permanent once appointed, and are not transferred from one ministry to another. It is therefore a misnomer to talk

of 'permanent Secretaries' in Kenya. Other than the fact that they can be transferred from one ministry to another, they rarely acquire any technical skills as appertains to their offices. In fact no special qualifications have been laid down to regulate those who are eligible to be appointed permanent secretaries. It is submitted that, a means of ensuring independence and impartiality of government ministries, and therefore the civil service, from executive influence, is to device a system whereby these permanent secretaries, and indeed all the senior civil servants, are appointed by an independent body, though they are assisting the executive in implementing government policies. They should also be granted security of tenure to make them completely independent. In the light of recent developments however, it would not be so necessary for the civil service to be so removed from executive control, as everybody is supposed to be a member of the ruling party, which is in any case the only party. The situation will presumably be like in Tanzania where the civil servants are also ex officio members of the National Assembly. President Nyerere expresses the view that where there is only one party, that party is identified with the Nation as a whole, and the Civil Servants are also required to know the policies of the government if they are to execute them well, and therefore they should also be present at parliamentary debates.

The civil service in Kenya will also be politicized not only in practice, but also in law ~~for~~ be able to serve KANU. In fact, the civil service has been particularly responsive to the governments' needs and wishes. There has been a large amount of delegation of PSC's function to other bodies or individuals.

Another important area in which the power of the executive has been greatly enhanced is as regards the President's emergency powers. He has been endowed with special powers that are not subject to any question by either the courts or Parliament. An aspect of these powers is the prerogative powers of the President. Some of those powers were inherited as powers formerly performed by the Queen of England. As head of State the power automatically vested in the President. In addition there have been particular legislations conferring prerogative powers on the President. Firstly, the constitution provides that the President has power to exercise prerogative of mercy,¹¹ by which he can pardon a convict, grant respite of the execution of any punishment imposed on any person for any offence, or substitute a less severe form of punishment for any punishment imposed on any person for any offence. In exercising this prerogative of mercy, he is assisted by an advisory committee, which consists of the Attorney-General and not less than three, nor more than three, not more than five other members - who include at least two ministers and at least one medical practitioner. All of them are

however appointed by the President, who can in a similar manner, dismiss them at will, except the Attorney-General. Further, the President is not bound to accept the advice they offer, and he is free to decide whether or not to consult the committee. He can exercise his prerogative without any reference at all, of the Matter to the Committee.

There are also other aspects of the President's special powers; these however are the 'subject of specific Acts of Parliament, and broadly, they cover: legislative, judicial and governmental immunities,¹³ Tenure of holders of public office, dissolution of Parliament and the formation of government, Escheat, right to take property during emergencies,¹⁴ and control of the Armed Forces.¹⁵

Other special powers of the President are granted with regard to North-Eastern Province, these were authorized at independence by the Kenya (Independence) order in Council.¹⁶ These powers enable the government to administer the North-Eastern Province without any constitutional constraints and empowers it to make any laws by regulations, especially to contain the 'shifita' problem.

These special powers clearly override important provisions of the constitution and infringe a great deal on the constitutional rights and liberties of the individual. They have popularly been known as

the "Public Security Powers," a phrase used merely to replace "emergency powers" known during the colonial era. They have not been subject to parliamentary control and have been assumed indefinitely by the Executive, without any obligatory public accountability. In particular, the preservation of Public Security Act contains most of those provisions:

These powers have not been subject to judicial review and cannot be questioned in Parliament. It is only hoped that they shall be exercised with due care and rationally.

The Executive and the Judiciary

The executive has, in a similar manner, interfered greatly with the independence of the Judiciary. The problems arise basically from the fact that independence of the judiciary was not known to Kenyans, as it did not exist during the colonial era. The courts therefore are not being looked at as the legitimate upholders of the constitution, and this is not only by those in power, but also by the people generally, although the constitution provides for it. Those in power often consider themselves as the holders of constitutionalism and are therefore not that prepared to accept criticisms from the judiciary. Indeed, they seek to use the constitution as a means of achieving their political ambitions. The people, in general on the other hand are

not only cynical of the judiciary as a guardian of the constitution, but also do not understand how a court of law can overrule what the President has said.

It is therefore suggested that the powers of the Judicial Service Commission as regards control of the officers of the Judiciary should be ~~widened~~ to lessen executive influence over the judiciary. Its powers should not only be limited to the lower judiciary, but it should be empowered to appoint the judges as well. If necessary, the composition of the commission should be changed to accomodate this, so that really responsible people are entrusted with this important function. The security of tenure of the judges should be put into practice. This means not only that the bench should be Africanized, but also that the executive should refrain from intimidating the judiciary. As few expatriates as possible should be enlisted for judicial service in the country. In any case, most of them are far-removed from the aspirations of the country.

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However, to ensure that the judiciary does not overstep its powers, a system should also be established for control over it. This therefore means that some measure of executive or parliamentary control over it only to the extent of containing it within the constitutional provisions, is necessary. This type of control however, should not be to the extent of making the judiciary subservient to the executive. The executive must respect the constitution - as the

fundamental law of the land.

Particular problems arise when the emergency powers are used for purposes other than emergency in a country, for instance, if they are used instead of the criminal procedure laid down. In the case of Re-Ebrahim,¹⁷ Ebrahim was detained under Emergency powers. He tried to apply for 'habeas corpus' to secure his release. The Court while agreeing with him, declined to make an order to that effect and thus invalidate his detention. Courts are particularly cautious because even if they order that released, the executive could easily re-detain them. such people be forthwith/ This problem could be solved by limiting these wide unfettered powers of the executive by Parliament to ensure that it is given only that power as is necessary for the maintenance of order during periods of emergency but such powers should not be permanent, and therefore should only be used in a country when it is actually under emergency.

"...whatever the justification for them [public security powers] there is little ^{doubt} that they strengthen the hands of the government enormously, and since the checks on their exercise are minimal one cannot be sure of the bona fides of the government in their use. The very existence of the powers has an unhealthy and inhibiting effect on the assertion of democratic rights, and their prolonged use is clearly inimical to the growth of democratic institutions."18

Those powers clearly derogate the principle of separation of powers; the President emerges as the sole authority and source of authority in the country.

CHAPTER FOUR

CONCLUSIONS

In the preceding chapters, we have noticed that there is not what can strictly be called separation of powers in Kenya. Indeed, even the British type of institutions we copied cannot, strictly speaking, be said to have separation of powers. In Britain, however, we can undoubtedly say that though the doctrine of separation of powers does not apply in its entirety, the level of separation of powers is much higher than it is in Kenya. Firstly, in Britain, it is Parliament that is supreme and not the executive, as is the case in Kenya. Secondly, they practise multi-party system and thus have the necessary checks and balances that it needs. This means that the executive and judiciary work hand in hand to realise their conception of good representative government. Their separation of powers was even more expressed when the leader of government in power had to resign when his government was defeated on an important bill.¹ This would not be the case in Kenya.

The first conclusion, therefore, is that, Kenya as any other Third World Country of the Commonwealth, has only been too eager to accept the benefits conferred by the reception of English law, yet this acceptance cannot be taken beyond mere lip-service to the doctrines and beliefs that appertain to the English law. The

doctrines have only been accepted in theory but far from being practiced. Indeed law and its doctrines are used by the government and those in power to maintain their positions. The basic source of this problem is clearly the issue of legitimacy.

The institutions were, before independence unknown to Kenyans, notwithstanding the fact that they were reasonably developed in Britain. The colonial government was authoritarian and never practised any rule of law in Kenya. The result was that the majority of Kenyans saw ^{law} no more than as a coercive apparatus of the state to command obedience. They never had a chance to see some of the English doctrines of law in operation. So, even at the time of independence there were very few of them who could take over from the officials of the colonial government and one thing that is in practice even now is the hiring of expatriates to man our judicial system, the argument being that the Africans are not qualified for the jobs.

The second conclusion is that a misunderstanding still reigns as regards the personnel of the Executive and the Judiciary. During the colonial era, judicial functions were performed by the District Commissioners, District Officers and Chiefs, who were at the same time the administrators; this has made it difficult for the ordinary person to understand that the judiciary and the the executive are two different institutions, and further, that the judiciary is there to protect the individual

against the excesses of the state. The government therefore has to undertake the responsibility of educating the general public on those issues, and no type of education can be better than putting the beliefs into practice.

The people have a fear of courts and the inaccessibility of the latter means that courts would be useless as the guardians of the people's constitutional rights. The government could perhaps organize a series of lectures or introduce "an awareness of the law" programme in the literacy classes and in addition reduce the adult fees to be paid in civil suits. So that people can be encouraged to use the courts more often. There are people who perhaps due to lack of money or ignorance of their legal rights, decide not to enforce them, or do not know they could enforce the rights, respectively. If there could be mass education of most of the people as to their legal rights, it would go a long way towards legitimizing the inherited institutions, and indeed make them appreciate such doctrines as that of separation of powers.

It should not be overlooked that attempts have been made by the Law Society of Kenya and the Legal Aid Centre to reach the people through radio programmes and the press. But until every Kenyan is literate, and the poverty problem alleviated, it cannot quite be said that such programmes help the rural masses. They definitely help the urban elite but, not a majority of the illiterate folks in the rural areas.

It is the task of the government to ensure that the majority of Kenyans are able to distinguish between the three organs of government and the individual holders of offices under those organs. It has been the practice in Kenya to have politics of personalities rather than policies. Most people associate posts with personalities so that the type of 'democracy' in practice in Kenya is not as a result of institutional legitimacy, but charismatic legitimacy. The Constitutional System is accepted as valid and proper merely because certain political leaders occupy key positions, and not because it is the right system.

It is the institutional legitimacy that we require in Kenya and not charismatic legitimacy and this can only be achieved if a generation of politicians voluntarily retire in favour of another within the framework of the constitution. This is still very far off in Kenya politics where leaders, once they come to power, would like to rule for life. They are not prepared to accept loss of office in favour of some other people. This is why the law and in particular the constitution has often been used as an instrument in the struggle for power rather than as an ^uempire above the struggle.

We have seen that it is the constitution that sets out the three organs of government and the mechanisms by which they are kept independent. It is, also, a

document that was drafted with the imminence of independence, and thus was non-existent during the colonial rule. Ghai & McAuslan observe:

"... until very late in the colonial era, Kenya had no constitution, and political activity took place without regard to the constitutional framework. The ultimate arbiter of power was the colonial secretary in London, and he was not bound by legal rules..."²

Although the existence of the three organs was recognized, the executive emerged as the dominant wielder of power. The idea of representative legislature was in existence quite early in Kenya, but it was not until the late 1950s that the colonial constitution addressed itself to the problems of limiting executive power, and these culminated in the 1958 Kenya (constitution) order in Council, and the independence constitution, 1963.

The independence constitution was henceforth to be regarded as permanent and an umpire above the political struggle. This was seen to be the case during the first two and half years after independence. Since then, however, the constitution has been amended with utmost ease on numerous occasions that as it is now, it has completely lost its original nature. It is now no more than a means to an end, those in power quote it to support their actions and gain temporary and passing advantages over their political opponents; whereas those aspiring for the political posts also quote it to give legitimacy to their aspirations.

In particular, the constitutional amendments have been designed to increase the powers of the executive and conversely decrease the powers of those institutions whose function it is to try and control the executive, and in particular the courts. In the final analysis, executive authority is exercised through powers and procedures contemplated as exceptional by the constitution. The amendments constitute a negative measure towards the problem of legitimacy, and suggests a return to the colonial era. They leave the document unpredictable and dependent on those in power, namely the executive.

Many of the safeguards against abuse of power have been dismantled. The emergency powers, first applied with the approval of parliament to the North-Eastern Province, now extend in an amplified fashion throughout the country. There is no requirement of Parliamentary check over them. The significance of the constitution, as a set of checks and balances on executive power, has been reduced. Even parliament's function of control has been whittled down. Not only are elections rigged, as the election petitions reveal, but the technical disqualification of certain "disgruntled" candidates show that the government does not have the support of the majority of the people that it claims.

On the legalising of the one-party state, Ghai and McAuslan observe:³

"...To introduce a one-party state by law, to ban all opposition parties and proclaim KANU the one lawful party, would be to alter drastically Kenya's image as an evolutionary mature state..."

A legal ban on opposition is a rather crude use of law to maintain oneself in power, ..., a more sophisticated approach is so to exercise powers under the law that an opposition party finds itself virtually unable to carry on because it cannot reach its supporters.."

Be it as it may, that opposition parties have been banned in Kenya,⁴ and that KANU is the only political party. The government has found it more appropriate to use the Bureaucracy, rather than KANU as a political party, to mobilize the people for development. This has had a negative impact on nation-building because the people are more aware of their tribal, racial or local identity as opposed to having a national outlook.

In the final analysis, we have seen that Kenya has not been practising the doctrine of separation of powers in its strict sense. The constitutional provisions in this respect establish a system of checks and balances and not a complete separation of powers. This if put into practice would be quite ideal for a country like Kenya, where, in fact we do not need a complete separation of powers, (which is in any case impracticable); we need the checks and balances system as the constitution envisaged in 1963 before the amendments that followed. The executive has however reduced these checks and balance to the extent that it is still the executive that is supreme. We acknowledge the fact that these doctrines have not

evolved out of our society, as was the case in England, but this should not in any way prevent the operation of the constitution as the ~~s~~upreme law of our country worthy of respect. The government should respect the spirit of the constitution, and not merely use it as a means of ^rpepetuating itself in power.

The foregoing observations notwithstanding, the future of constitutionalism and thus separation of powers does not depend on the constitution, but on the actions of politicians who have used as their cushion, the argument that certain constitutional provisions must of necessity be suspended if Kenya has to achieve a faster rate of economic development.

FOOTNOTESINTRODUCTION

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CHAPTER ONE

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5. Locke, Second Treatise of Civil Govt. Ch. XII,
para. 143.
6. Ibid.
7. Ibid at para. 149.
8. Article 1.
9. Article 2(2).
10. Ghai & MacAuslan, supra.
11. Like Spain and Portugal.
12. [1940] ALIER 241.
13. Criminal Code S. 330 (2) (b) (c).

CHAPTER TWO

1. Ghai & MacAuslan, supra Ch. 1.
2. Britain, U.S.A. v. Germany.
3. Gertzel: The Politics of Independent Kenya 1963 - 8.
E.A.P.H., 1970, Nairobi.
4. District Officers, Provincial Commissioners et.c still
wear uniforms, helmets etc.

5. Government of Kenya Sessional Paper, No. 24 of 1954, para. 6.
6. Gertzel, supra at. p. 26.
7. Lyttleton Constitution: Additional Royal Instructions 13th April, 1954. It was a product of consultation with the political leaders by the labour and conservative parties' colonial secretaries, after the latter of whom the constitution was named. (Govt. Notice 582 of 1954).
8. Gertzel, supra, pp. 20 - 21.
9. Constitution, ss. 4 - 8.
10. Ibid., s. 9, s.12.
11. S. 7.
12. S. 8.
13. S. 13, s. 14.
14. SS. 15, 11, 6.
15. S. 16.
16. SS, 16, 19.
17. S. 17.
18. S. 22.
19. S. 106.
20. S. 42.
21. Act No. 28 of 1964.
22. Act No. 40 of 1966.
23. S. 34 of the Constitution.
24. S. 43.
25. S. 59.
26. S. 33.

27. 10th Constitutional Amendment.
28. S. 33.
29. S. 38.
30. National Assembly (Powers and Privileges) Act, 54.
31. Ibid. s. 6.
32. Jackson, T. The Laws of Kenya.
33. H.C. Debates, Vol. 525, Cols 1061 of 23rd March, 1954.
34. S. 64 of constitution.
35. Cap. 16, Laws of Kenya, S. 12.
36. Judicature Act, Cap. 8, Laws of Kenya, S. 9.
37. S. 63 constitution.
38. e.g Magistrates Courts Act, 1967.
39. Cap. 8, s. 6.
40. Employment Bill, 1982.
41. S. 61, 64: Kenya Constitution.
42. Ibid, S. 62.
43. [1925] A.C. 578.
44. [1972] E.A. 137.
45. Judge Oyemade as quoted by Nwabweze: Constitutionalism in the Emergent States, p. 146.
46. Gutto: Notes on the Rule of Law & Constitutional Propriety of some developments in the Kenya Government. IDS Working Paper No. 348 (Mimeo).

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1. Official Report, House of Representatives, Second Session, First Parliament, Vol. III (Part II) 14th August, 1964, Cols 1707 - 1910.
2. 1966, 5th Amendment Act No. 17 of 1966.
3. Kenya Gazette, 4th June, 1982.
4. Odinga: Not Yet Uhuru, supra, p. 303.
5. Gertzel, supra, p. 146.
6. Ibid. at p. 145.
7. Ghai & McAuslan, supra, p. 246 - 7.
8. Constitutional Amendment Act No. 28 of 1964 as it amended sections 186 (2) and 188 (1)
9. Act No. 45 of 1964.
10. Constitution s. 24, and 25.
11. As was rule in Mureithi's case.
12. Ghai & McAuslan, supra, p. 250.
13. Govt. proceedings Act cap. 40, Laws of Kenya.
14. Preservation of Public Security Act 57 S. 4 (2) (g).
15. Kenya Constitution s. 4; Kenya Military Forces Act Cap. 198, S. 116 - 7, Kenya Military Forces (Military Council) Act Cap. 198A, Ss. 3 - 5.
16. S. 19, now it is S. 127 of Kenya Constitution.
17. [1970] E.A. 162.
18. Supra.

CHAPTER FOUR

1. Callaghan and his Labour Party - defeated by Mrs. M. Thatcher's Conservative Party, 1978.
2. Supra, p. 509.
3. Ibid, at p. 512 - 513.
4. Constitution of Kenya (Amendment) Bill, 1982, and Election Laws (Amendment) Bill, 1982.

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