THE CONCEPT OF THE RULE OF LAW IN AFRICAN SOCIETIES

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Thesis presented for the internal degree of
Doctor of Philosophy in the Faculty of Laws
University of London
December 1965

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ABSTRACT

This study examines the extent to which the newly independent African countries are adhering to the Rule of Law. The idea that rulers should observe a certain code of behaviour in dealing with their subjects is not new. In the first of the three parts of this study, we trace the evolution of this idea. Two approaches are distinguished. Chapter One deals with the conceptual fundamental human rights approach which is rooted in the theory of natural law and natural rights. The second chapter appraises the British procedural approach, with its emphasis on remedies as distinct from the explicit enactment of individual rights. After a few remarks on the universal conception of the Rule of Law, we conclude this part of the study with a working definition.

African states have borrowed many ideas and institutions of government from Europe. These are being adapted to suit local needs. We pause in Part II to examine African traditional ideas and practices of government, to discover the equivalents (if any) of the features of the concept of the Rule of Law.

Part III opens with Chapter Five, which analyses the new political systems in Africa with particular reference to the one-party regimes. Chapter Six examines the democratic basis of African governments, while Chapter Seven attempts a survey

of individual liberties in modern Africa. In Chapter Eight, the factors making for or against fair and impartial administration of justice are evaluated. The ninth chapter briefly concludes the work.

ABBREVIATIONS

All N.L.R.	All Nigeria Law Report
B.I.C.J.	Bulletin of the International Commission of Jurists
C.A.	Consequential Act
C.L.J.	Cambridge Law Journal
E.A.	East Africa Law Reports
E.R.N.L.R.	Eastern Region of Nigeria Law Report
F.S.C.	Federal Supreme Court (Nigeria)
I.C.J.	International Commission of Jurists
I.C.L.Q.	International and Comparative Law Quarterly
I.L.O.	International Labour Office
J.A.A.	Journal of African Administration
J.A.L.	Journal of African Law
J.Comp.Leg.	Journal of Comparative Legislation
J.I.C.J.	Journal of the International Commission of Jurists
L.Q.R.	Law Quarterly Review
L.N.	Legal Notice
M.L.R.	Modern Law Review
N.N.L.R.	Northern Nigeria Law Report
N.R.N.L.R.	Northern Region of Nigeria Law Report
P.C.	Privy Council
T.H.C.B.	Tanganyika High Court Bulletin
T.L.R.(R.)	Tanganyika Law Report (Revised)
W.A.C.A.	West African Court of Appeal
W.P.	White Paper

ACKNOWLEDGEMENTS

I am much indebted to many for the production of this work. I recall with warm appreciation the help I received from judges, magistrates, court registrars, Ministers of Justice and other Law Officers, legal practitioners, university teachers and others, in each of the ten African countries I visited in the summer of 1964 to undertake field work.

In England I was most privileged to discuss many aspects of my study with Mr. Norman S. Marsh, until recently the Director of the British Institute of International and Comparative Law, and now one of Her Majesty's Law Commissioners. Apart from the series of interviews he gave me, Mr. Marsh also lent me a number of publications and papers relevant to my inquiry.

Professor A. R. Kiralfy of King's College, London, very kindly read the draft of Chapter Two of this study, and made some extremely helpful suggestions.

Especial thanks are due to Professor A. N. Allott of the School of Oriental and African Studies, for his intimate supervision of my work, and for his abundant good will, which was a great asset to me on my African tour.

To the Governments of Nigeria and the United Kingdom I express my indebtedness for their generous awards, which enabled me to undertake this study.

Finally, I must also record my gratitude to the backroom people without whose contributions things would not have gone smoothly: the library staffs of all the libraries I used; the team of typists ably directed by Mrs. E. W. Garland, and Mr. Abiola Ojo who helped in the checking of the typescript.

TABLE OF STATUTES

UNITED KINGDOM LEGISLATION

Act of Settlement, 1701	67, 84
Act of Union, 1706	67
Acquisition of Land (Authorisation Procedure) Act, 1946	135
Administration of Justice Act, 1960	108-9, 127
Air Force Act, 1957	82
Army Act, 1955	82
Bill of Rights, 1689	67, 83
Catholic Emancipation Act, 1829	122
Commonwealth Immigrant Act, 1962	137
Crown Proceedings Act, 1947	102, 103, 104
Ecclesiastical Jurisdiction Act, 1829	122
Habeas Corpus Act, 1640-1816	67
Incitement to Mutiny Act, 1797	126
Judicial Pensions Act, 1959	84
Law Commissions Act, 1965	55
Licensing Act, 1662	131
Magna Carta, 1215	67, 76, 77, 78
Mutiny Act, 1689	82
Naval Discipline Act, 1957	82
Oaths Act, 1888	122

Obscene Publication Act, 1857	130
Obscene Publication Act, 1959	130
Official Secrets Act, 1911, 1920	126
Parliament Acts, 1911, 1949	67
Peerage Act, 1963	67
Petition of Right, 1628	67
Public Health Act, 1936	135
Race Relations Act, 1965	136, 138, 139, 140
Reform Acts, 1832-1928	67
Statute of Westminster, 1931	67
Statutory Instrument Act, 1946	97
Supreme Court of Judicature (Consolidation) Act, 1925	86, 87
Toleration Act, 1689	122
Trades Union Dispute Act, 1906	105
Trade Union Act, 1871	119
Trade Disputes Act, 1965	119
Tribunal of Inquiry Act, 1921	90, 101
Tribunal of Inquiries Act	99, 101
War Damage Act, 1965	103

AFRICAN LEGISLATION

CONGO (BRAZZAVILLE)

Law relating to public order and security, 1960 419

CONGO (LEOPOLDVILLE)

Loi fondamentale, 1960 298

DAHOMEY

Special Court Law, 1961 558

ETHIOPIA

Civil Code, 1960 496

Constitution, 1955 351

GHANA

Avoidance of Discrimination Act, 1957 (No.38) 443

Constitution, 1950 (s. 1 No. 2094) 146

Constitution, 1954 (s. 1 No. 551) 146

Constitution (Amendment) Act, 1964 (Act 224) 520

Constitution (Repeal of Restrictions) Act, 1958 (No. 38) 146

Constitution [Republican] Act, 1960 (Act 1) 146, 308, 309,336,341,345, 355

Constituent Assembly and Plebiscite Act, 1960 (No. 1) 307

Courts Act, 1960 (C.A. 9) 498

Criminal Code Act, 1960 (Act 29) 384,454,475,487

Criminal Procedure (Amendment) Act, 1961 (Act 91) 582

Criminal Procedure (Amendment) Act, 1962 (Act 139)	406
Criminal Procedure (Amendment) Act, (1964) (Act 238)	552,553,557
Criminal Procedure Code, 1960 (Act 30)	392, 404
Deportation (Othman Larden and Amadu Baba)	433
Electoral Provisions Act, 1960 (Act 292)	368, 370
Emergency Power Act, 1961 (Act 52)	411
Habeas Corpus Act, 1964 (Act 244)	405
Industrial Relations Act, 1965 (Act 299)	457, 458
National Assembly Act, 1965 (Act 300)	369
Newspaper Licensing Act, 1963) (Act 189)	484
Newspaper Registration Act, 1961 (Act 71)	484
Presidential Elections Act, 1965) (Act 292)	368, 370
Preventive Detention Act, 1958 (No. 17)	420
Preventive Detention Act, 1963) (Act 199)	420
Preventive Detention Act, 1964 (Act 240)	420, 421
Public Order Act, 1961 (Act 58)	452
State Proceedings Act, 1961 (Act 51)	563
State Secrets Act, 1962 (Act 101)	475
Statutory Instruments Act, 1959 (No. 52)	337
Telecommunications Act, 1962) (Act 112)	491

GUINEA

Constitution, 1958 352

IVORY COAST

Labour Law, 1961 (No. 209) 387

Press Law, 1959 490, 491

KENYA

Agriculture Ordinance (Cap 318) 566

Constitution (Amendment) Act, 1964 (No. 28) 55a

Constitution (Amendment) Act, 1965 (No. 14) 55a, 435, 508

Constitution, Order in Council, 1963 (s. 1 No. 791) 68, 379, 411, 430 462, 522

Criminal Procedure Code (Cap 75) 533

Criminal Procedure Code (Amendment) Act, 1963 (No. 33) 532, 533

Crown Lands Ordinance (Cap 280) 467

Deportation (Aliens) Ordinance (Cap 174) 434

Deportation (Immigrant British Subjects) Ordinance (Cap 175) 434

Immigration Ordinance (Cap 172) 434

Trade Disputes Act, 1965 (No. 15) 456

Vagrancy Ordinance (Cap 58) 388, 389

LIBERIA

Aborigines Law (Code of Laws 1956 Revision) 392, 393

Constitution, 1847 (as amended in 1955)

Public Works Law 393

MADAGASCAR

Constitution, 1962 (Law of 27 December, 1962) 348,349,355

MALAWI

Constitution (Amendment) Act, 1964 (No. 1) 376

Constitution Order in Council, 1964 (s. 1 No. 916) 336, 376, 380 394, 430, 449

Criminal Procedure Code (Cap 24) 406

Legal Aid Ordinance, 1964 (No. 8) 537, 538

Legal Education and Legal Practitioners' Act, 1965 (No. 20) 531

Penal Code (Cap 23) 432, 443, 455, 481

Police Ordinance (Cap 64) 543

Preservation of Public Security Ordinance (Cap 265)

MALI

Constitution, 1959 (Law No. 60) 389

Law of 19 August 1962 constituting the "People's Court" 559

NIGER REPUBLIC

Law relating to the Organisation and Jurisdiction of Courts, (No. 62 - 11 of 16 March, 1962) 516

NIGERIA

Constitution (Amendment No. 3 Order in Council, 1959 (s. 1 No. 1772) 4

Constitution of the Federal Republic, 1963 (Act No. 20) 4, 347,348, 355-7,394,403,405,412-414,429,430,439, 449,456,461,475,476,510,522,540-542,572.

Criminal Code (Cap 42)	476,477
Criminal Procedure Code (Cap 43)	406, 410, 535
Electoral Act, 1962 (as amended in 1964 and 1965)	356, 359, 362, 364
Emergency Powers Act, 1961 (No. 1)	411
Federal Supreme Court Act, 1960 (No. 12)	536
Immigration Act, 1958 (Cap 84)	547
Immigration Act, 1963 (No. 6)	547
Legal Practitioners' Act, 1962 (No. 33)	531
Newspaper (Amendment) Act, 1964 (No.)	482,484,488,489
Newspaper Ordinance (Cap 129)	484
Obscene Publications Act, 1961	475
Official Secrets Act, 1962	475
Lagos (Federal Territory)	
Public Lands Acquisition Act (Cap 167)	461
Public Order Act (Cap 169)	451, 452
Eastern Nigeria	
Newspaper Law, 1955 (No. 24)	489
Northern Nigeria	
Children and Young Persons Act, 1958 (Cap 21)	438,455
Constitution, 1963	344
Court of Resolution Law, 1962 (No.17)	497
Criminal Procedure Code (1960) No.11	396,540,541
High Court Law, 1957 (No. 2)	7

Land Tenure Law, 1962 (No. 25) 466, 470

Native Courts Law, 1956 (No. 6) 497, 502, 523, 548

Penal Code Law, 1959 (No. 18) 442, 498, 548

Western Nigeria

Customary Courts (Amendment) Law, 1963 (No. 28) 510, 523

Customary Courts Law, 1957 (No. 26) 524, 548

RHODESIA

Constitution Order in Council, 1961 (s.l. 2314) 63

Law and Order (Maintenance) Act, 1960 63

SENEGAL

Constitution of 1963 (Law No. 63 - 22) 61,62,337,338, 339,341,345,353,460,508, 509,518,560

SIERRA LEONE

Constitution Order in Council, 1961 (s.l. No. 741) 51,414,430,518

SOMALI

Constitution, 1960 59

Code of Criminal Procedure, 1961 542

SOUTH AFRICA

Promotion of Bantu Self-Government Act, 1959 (No. 46) 353

Representation of Voters Act, 1951 (as amended) 353

SUDAN

Missionary Societies Act, 1963 (No. 10) 441, 446

Penal Code 500

TANZANIA

Act of Union of Tanganyika and Zanzibar, 1964 336

Corporal Punishment Ordinance (Cap 17) 399

Criminal Procedure Code 405

Dar-es-Salaam Club (Dissolution) Act, 1963 (No. 54) 462

Interim Constitution, 1965 (Act No. 43) 336, 341, 367, 508-510

Judicial Service Act, 1962 (C.A. 10)

Magistrates Courts Act, 1963 (No. 17) 405, 406, 498

Minimum Sentences Act, 1963 (No. 29) 396-401

National Assembly (Elections) Amendment Act, 1965 366

Penal Code (Cap 16) 384

Penal Code (Amendment) No. 3 Act, 1962 389

Poor Persons Defence Ordinance (Cap 21) 536

Preventive Detention Act, 1962 (No. 60) 421-423

Societies Ordinance (Amendment) Act, 1965 366

UGANDA

Constitution Order in Council, 1962 (s.l. No. 2175 (as amended in 1963) 56, 380, 394, 412, 413, 430, 461, 509, 549

Control of Aliens (Refugees) Ordinance, 1960 (No. 19) 434

Deportation (Amendment) Ordinance, 1956 434

Foreign Investments (Protection) Act, 1964 464

Judicial Services Act, 1963 (No. 67) 509

Magistrates' Courts Act, 1964 (No. 38) 499

Newspaper Surety Ordinance (Cap 232) 484

Poor Persons Ordinance (Cap 25) 536

Press Censorship and Correction Ordinance (Cap 231) 486, 487

Trade Disputes (Arbitration and Settlement) Act, 1964 (No. 20) 432

BUGANDA

Customary Offences Law, 1964 499

ZAMBIA

Constitution Order in Council, 1964 (s.i. 1652) 60,64,342,412, 394, 461,466,507,509,549

Native Courts Ordinance (Cap 158) 502

Poor Persons Ordinance (Cap 42) 536

Preservation of Public Security Ordinance (Cap 265) 453

Societies Ordinance (Cap 262) 453

OTHER COUNTRIES

Ceylon: Constitution Order in Council, 1947 (Cap 379) 506

France: Criminal Procedure Code 406, 408, 440

India: Penal Code 500

New Zealand: Parliamentary Commissioner (Ombudsman) Act, 1962 100

Russia: Criminal Code, 1960 402

United States of America: Constitution 40

TABLE OF CASES

A

Adegbenro v. Akintola (1963) 3 W.L.R. 63 — 341, 569

Adkins v. Children's Hospital (1923) 261 U.S. 525 — 42

Ahmed Muddei and Others v. Minister of Interior (Somali) Supreme Court Decision 17/3/65 — 564-5

Akintola v. Aderemi (1963)F.S.C. 187 1962 — 460

Re Akoto v. Others (Ghana Civil Appeal No. 42/61 — 421, 422, 424, 425, 566-7

Amadu Tijani v. Secretary of Southern Nigeria [1921] A.C. 399 — 168

Amphitrite Case (1921) 3 K.B. 500 — 104

Anderson v. Gorrie (1895) Q.B. 668 — 88

Aoko v. Fagbemi and Another 1961 All N.L.R. 400 — 541, 575

Arzika v. Governor of Northern Nigeria (1961) N.R., N.L.R. — 430

Ashby v. White (1704) H.L. — 91

Ashford v. Thornton 1 Barn and Ald — 76

Attorney General for Canada v. Cain (1906) A.C. 542 — 435

Awolowo v. Federal Minister of Internal Affairs (1962) L.L.R. 133, 177 — 546-8, 550

B

Bailey v. Drexel Furniture Co. (1922) 259 U.S. 20 — 42

Betty v. Gillbanks (1882) 9 Q.B. 308 120, 587

Dr. Bonham's Case (160') 8 Co.Rep. 107a 72, 90

Bradford Corporation v. Pickles (1895) A.C. 587 135

Bradlaugh v. Gossett (1884) 12 Q.B.D. 271 91

Bradlaugh v. Clark (1883) 8 App. Cas. 91

Brocklebank v. The King (1925) 1 K.B. 52 134

Brown v. Board of Education of Topeka (1945) 347 U.S. 43, 44

Burmah Oil Co. v. The Lord Advocate (1965) A.C. 75 103

Bowman v. Secular Society Ltd. [1917] A.C. 406 122

C

Calvin's Case (1608) 7 Co.Rep. 1a 73

Chandler v. Director of Public Prosecutions (1962) 3 W.L.R. 694 126

Cheranci v. Alkali Cheranci (1960) N.N.L.R.24 377-9

Chimpembere v. R. (1961) R.N. 865 Fed.S.Ct. 481

Christie v. Davey (1893) 1 Ch. 316 135

Christie v. Lenchinsky (1947) A.C. 573 110

Chung Chi Cheung v. The King (1929) A.C. 65

City of London v. Wood 12 Mod. 669, 687 73

Constantine v. Imperial Hotel Ltd. [1949] K.B. 693 138

Cox v. Hakes 15 App. Cas. 506 109

D

Day v. Savidge (1614) Hobart 185 73

Dennis v. United States (1951) 341 U.S. 494 478

Doherty v. Balewa (1961) 1 All N.L.R. 664 347

Re Dominion Trust [1947] Ch. 183 138

Donoghue v. Stevenson [1932] A.C. 56 136

D.P.P. v. Obi (1961) 1 All N.L.R. 186 475-6

Duncan v. Cammel Laird (1942) A.C. 24 10

Duncan v. Jones (1936) 1 K.B. 218 120

E

Egba Native Authority v. Adeyanju (1938) 18 N.L.R. 77 250-1

Elias v. Pasmore (1934) 2 K.B. 164 440

Entiek v. Carrington (1765) 19 St.Tr. 1030 108, 134

Eshugbayi Eleko v. Government of Nigeria [1928] A.C. 109

F

Fajinmi v. Speaker of Western House of Assembly 1962 1 All N.L.R. 604 575

Fray v. Blackburn (1863) 3 B. & S. 88

Foster and Mulholland Cases (1963) 2 W.L.R. 658 132

G

Glasgow Corporation v. Central Land Board (1956) S.C. (H.L. 107

Gokpa v. Police (1961) 1 All N.L.R. 423 546

Gopalam v. State of Madras (1950) S.C.R. 88 424

Re Grosvenor Hotel London (No. 2) (1964) 3 W.L.R. 192 107

Re Gwyon (1930) 1 Ch. 255 138

I

Inspector General of Police v. Armah (1929) F.Ct. 26-29 480

J

N. Jima v. Republic of Tanganyika (1964) E.A.L.R. 107 404

Johnson v. The King (1940) A.C. 231

Jordan v. Burgoyne (1963) 2 Q.B. 744 119, 138

Joshua v. R. (1955) 2 W.L.R. 8 479

L

Land Realisation Co. Ltd. v. P.M.G. (1950) 1 Ch. 434 425

Leach v. Money (1765) 19 St.Tr. 1002 135

Lewis v. Bankole (1908) 1 N.L.R. 82 166, 170

Liversidge v. Anderson and Another (1942) A.C.206 112-3, 147, 424

Local Government Board v. Arlidge (1914) 1 K.B. 98

Lochner v. New York (1905) 198 U.S. 45 42

M

Marbury v. Madison (1803) 1 Cranch 137 41

Marealle v. Kilimanjaro District Council - Arusha High Court (Tanzania) Civil Case No. 44 of 1961 564, 570

Merricks v. Nott-Bower (1965) 1 Q.B. 57 107

Muhidini s/o Asumani v. R. (1962) E.A. 383 384

N

Tinsa Maw Naing v. The Commissioner of Police (Rangoon) (1950) B.L.R. 17 424

Nana Taweiah III v. Kwezi Ewidzi (1936) 3 W.A.C.A. 55 249

Nwali v. Police 1 E.N.L.R. 1 549

O

Ojiegbe and Another v. Ubani and Another 1961 All N.L.R. 277 450

Re Okine (C.A. No. 6/60 425

Olawoyin v. Attorney General of Northern Nigeria 1961 All N.L.R. 269 347

Omagbemi v. Dore Nuna (1925) 5 N.L.R. 17 283

Omodion v. Fastro (1960) W.R.N.L.R. 27 438

Oruche v. Police (1963) F.S.C. 73/1962 549

P

Parmiter v. Coupland (1840) 6 M.E.W. 105 124

Plessey v. Ferguson (1896) 163 U.S. 337 43

Police v. Marke (1957) N.R.N.L.R. 89 480, 549

Prohibition del Roy 12 Co.Rep. 65 71, 79

R

R. v. Aldred (1909) 22 Cox C.C.1 125

R. v. Amalgamated Press of Nigeria Ltd. 1961 All N.L.R. 199 475, 477

R. v. Buddie Eka 11 W.A.C.A. 39 549

R. v. Burns (1886) 2 T.L.R. 510 125

R. v. Busby (1960) 1 A.E.R. 326 116

R. v. Caunt (1947) An editor on trial, Morecambe and Heysham Visitor (1947) 124

R. v. Earl of Banbury, Skinner 517 — 73

R. v. Earl of Crewe ex parte Sekgome (1901 2 K.B. 576 — 108

R. v. Halliday ex parte Zadie (1917) A.C. 260 — 111, 112

R. v. Haske 1961 All N.L.R. 330 — 543

R. v. Leese (1936) The Times September 19 and 26 1936 — 126

R. v. Luima and Others 16 E.A.C.A. — 481

R. v. McCormack (1864) 17 I.R.C.L.R. 411 — 407

R. v. Mackenna (1960) 1 A.E.R. 326 — 116

R. v. Msengi Abdullah [1952] T.L.R. (R) 107 — 404

R. v. Mylius (The Times) February 2 1911 — 124

R. v. Omisade and Others (F.S.C.) (1964) N.M.L.R. 75 — 315

R. v. Penguin Books Ltd. (1961) Crim.L.R. 176 — 130

R. v. Phillips (1947) 32 Cr.App.Rep. 47 — 110

R. v. Ramsey and Foote 12 Cox Cr. Case 231 — 122

R. v. Salima do Salimi and Another (1915) 2 U.L.R. 182 — 437

R. v. Uzorukwu (1958) F.S.C. 14 — 535

R. v. Wallace]Johnson [1940] A.C. 23 — 125, 478-81

Republic v. Chotara s/o Ulumgile T.H.C.B. 1964 Case 196 — 399

Riordan v. War Office (1959) 1 W.L.R. 406 — 105

Robinson v. S. Australia (1931) A.C. 704 — 107

Rookes v. Barnard (1964) 2 W.L.R. 269 — 105, 119

S

Salum s/o Alli v. Republic of Tanganyika T.H.C.B. 1964 Case 224 399

Scala Ballroom (Wolverhampton) Ltd. v. Ratcliffe (1958) 3 A.E.R. 138

Schenck v. United States (1919) 249 U.S. 47 478

Sharington v. Stratton (7 & 8 Eliz), 1 Plowden 303 71

Shaw v. D.P.P. [1962] A.C. 220 130

Shemfe v. Police 1962 N.R.N.L.R. 87 546

Shibban Lal v. State of Uttar Pradesh (1954) S.C.R. 179 424

Shobhuza v. Miller [1936] 518 108

Slaughter House Cases (1873) 16 Wallace 36 42

Somersett's Case (1772) 20 St.Trial 1 137

Southern Rhodesia Case (1919) A.C. 211 108

The State v. Tarka, Daily Times, Lagos 23/3/65 409

Stockdale v. Hansard (1839) 91

T

Taylor's Case (1876) 11 Ventris 293 122

Terrell v. Secretary of State for the Colonies (1953) 2 Q.B. 482 502

Thomas v. Sawkins (1935) 2 K.B. 249

A. Thomas and Others v. Oba Ademola II and Others 1945 N.L.R. 12 252

V

Re Van der Pulie and 4 Others, Noted in an I.C.J. Staff Study G.P.D. Act (1961) 3 J.I.C.J. No. 2 65 425

W

Wednesbury Corporation v. Ministry of Housing and Local Government (1965) 1 W.L.R. 261, 431 107

Wilkes v. Wood (1763) 19 St.Tr. 1153 135

Williams v. Majekodunmi (No. 1) 1962 All N.L.R. 324 431

Williams v. Majekodunmi (No. 2) 1962 All N.L.R. 328 431

Wise v. Dunning (1902) 1 K.B. 167 120

Y

Yates v. United States (1957) 354 U.S. 298 478

TABLE OF CONTENTS

	Page
Abstract	ii
Abbreviations	iv
Acknowledgements	v
Table of Statutes	vii
Table of Cases	xviii
Part I: THE EVOLUTION OF THE CONCEPT OF THE RULE OF LAW	
Chapter One: THE FUNDAMENTAL HUMAN RIGHTS APPROACH	4
The explicit constitutional enactment of fundamental human rights	4
Earliest regimes	15
The Greeks	16
The Romans	25
Christian Europe	29
The American example	37
The international recognition and protection of human rights	44
Theoretical recognition	44
Universal Declaration of Human Rights	46
European system	49

Page

Fundamental rights in Africa 51

Framework of rights guaranteed 59

Efficacy of rights guaranteed 62

Chapter Two: THE BRITISH APPROACH 65

Protection of fundamental rights without explicit constitutional guarantee 65

Historical experience 67

Curb on royal power 74

Independence of the judiciary 83

The sovereignty of Parliament 90

Dicey and the Rule of Law 94

I Absence of arbitrary power 96

II Equality before the law 100

III Fundamental rights as general principles of the constitution 107

Personal freedom 108

Fair trial 113

Freedom of association and assembly 118

Freedom of religion 121

Freedom of expression 123

Freedom to own property 133

Freedom from discrimination 140

Page

The nature of Englishmen's rights 140

The relevance of the British approach to Africa 145

Towards a universal conception of the Rule of Law 149

Part II: THE RULE OF LAW IN TRADITIONAL AFRICA

Chapter Three: INDIVIDUAL FREEDOMS IN TRADITIONAL AFRICA 162

Traditional legal systems 162

Status differentiations 167

Enjoyment of property 172

Religious freedom

Freedom of association 178

Free discussion 181

Equality of treatment 181

Rank 183

Age 185

Sex differentiation: the status of women 186

Aliens 198

Slaves, serfs and others 200

Stratified societies 206

The protection of the rights of the individual 217

Page

Chapter Four: THE MACHINERY OF GOVERNMENT IN TRADITIONAL SOCIETIES 219

The patterns of African governments 219

Democratic equivalents 228

Legislative power 236

Administration of justice 240

Executive power 267

Checks and balances 269

Sanctions against the ruler 277

Part III: THE RULE OF LAW IN MODERN AFRICA

Chapter Five: THE STRUCTURE OF POWER 289

The colonial interlude 290

Towards independence 291

Autochthonous constitutions 301

The popular basis of the new constitutions 306

Party systems 312

Structure of government 335

Chapter Six: POPULAR GOVERNMENT 351

Legitimacy as a source of control 351

Elections in multi-party states 364

Closed leadership and the Rule of Law 372

Page

Chapter Seven: THE FORTUNES OF LIBERTY 375

The protection of human rights as a guarantee of liberty 375

The protection of life and human dignity 383

The right to life 383

Freedom from slavery or forced labour 385

Freedom from torture and inhuman treatment 394

Haadi lashing 395

Tanzania Minimum Sentences Act 1963 396

The protection of personal liberty 403

Arrest 403

Pre-trial detention 405

Detention after conviction 408

Preventive detention 410

Preventive detention in periods of emergency 411

Preventive detention as a permanent feature of the law 413

Preventive detention: a postscript 425

The protection of freedom of movement and residence 428

Citizens 428

Aliens 433

The protection of the right of privacy 436

Family life 436

The inviolability of the home 439

Private life 441

	Page
The protection of freedom of conscience	443
Sudan: Missionary Societies Act 1962	444
The control of educational institutions	448
Right of worship for religious minorities	450
The protection of freedom of peaceful assembly	452
The protection of freedom of association	454
Political parties	454
Unlawful societies	455
Registration requirements	456
The position of trade unions	456(a)
The protection of property	460
Protection from discrimination	466
Unequal road to equality	467
Protection of freedom of expression	474
Problems of dimension	475
Press control	482
The courts as guarantor of liberty	492
Chapter Eight: THE ADMINISTRATION OF JUSTICE	494
Parallel legal systems	495
Independence of the judiciary	501

	Page
Protection from political interference	504
Judicial appointments	505
Conditions of service	516
Security of tenure	517
Tenure of office of inferior judges	521
Protection of judges from intimidation	524
Access to justice	532
Legal aid	534
A public defender in Malawi	537
Fair trial safeguards	539
Speedy trial	539
The nature of the alleged offence	540
Presumption of innocence	542
Right to legal representation	545
Double jeopardy	548
Miscellaneous	556
Special criminal courts	557
Problem of justiciability	563
Supremacy of the law	568
Retroactive legislation	568
Nolle prosequi	571
Prerogative of mercy	573
The content of the law	573

Page

Detention power 574

Emergency powers 574

Democracy and judicial power 575

Non-legal restraints 577

Chapter Nine: CONCLUSION 580

Bibliography

Part I

THE EVOLUTION OF THE CONCEPT OF THE RULE OF LAW

CHAPTER ONE

THE FUNDAMENTAL HUMAN RIGHTS APPROACH

The explicit constitutional enactment of fundamental human rights.

I propose to take the Nigerian constitution[1] as the starting point of my discussion of the explicit constitutional enactment of human rights since its Chapter III, which contains a list of fundamental human rights with provisions for their judicial enforcement has served as a model for nearly all other British territories in Africa on the threshold of their independence.[2] It is a remarkable fact that the idea of an explicit constitutional guarantee does not correspond to the British legal traditions:[3] this at once raises the question of the historical process by which the Nigerian constitution came to include provisions of this kind protecting fundamental rights.

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1. The Nigerian (Constitution) (Amendment No.3) Order in Council, 1959 (S.I.No.1772), but see now Constitution of the Federal Republic of Nigeria, 1963, Act No.20. Unless otherwise stated, further references to the Nigerian Constitution are to the Federal Constitution.
2. With the exception of Ghana and Tanganyika (as it then was), for which see post Chapter 2.
3. For the peculiarly British approach, see ibid.

The generally accepted explanation[1] seems to be that these rights were guaranteed in the first place, by the Nigerian constitution primarily to allay the fears of minority groups. It is true that one of the recommendations made by the Minorities Commission[2] appointed by Her Majesty's Government to enquire into the fears of minorities and the means of allaying them was that certain fundamental rights should be written into the constitution of an independent Nigeria. One cannot, however, conclude from this that but for minority fears these rights would not have been guaranteed. On the contrary, a proposal for justiciable fundamental rights had been accepted in principle by the constitutional conference[3] that endorsed the recommendation for the establishment of the Minorities

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1. T.O.Elias, "The new constitution of Nigeria and the protection of human rights and fundamental freedoms" (1959-60) 2 J.I.C.J.30; K.Ezera, Constitutional development in Nigeria (1964) 252; D.Cowen, The Foundations of freedom (1961) 124; O.I.Odumosu, The Nigerian constitution: history and development (1962) 243; D.Lan Van Grove, "The 'sentinels of liberty'? The Nigerian judiciary and fundamental rights." [1963] J.A.L.152; K.Vasak, "The European Convention of Human Rights beyond the frontiers of Europe." (1963) 12 I.C.L.Q.1216; A.H.Robertson, Human rights in Europe (1963) 173.
2. Under the chairmanship of Sir Henry Willink, see Report (1958) Cmnd. 505.
3. Report (1957) Cmnd. 207.

Commission, a fuller discussion of the proposal being postponed to a later date because of the complexity of the subject.[1]

There is even some evidence from Lord Chandos (then Oliver Lyttleton, the Colonial Secretary) of a more ambitious suggestion before an earlier conference in 1953:

> "....a member representing a not very important group asked that Charter of Human Rights should be incorporated in the constitution. I replied by saying that they could put 'God is Love' in the constitution if they so wished, but not while I was in the chair. I had the prestige of Nigeria too much at heart to wish that general ethical aspirations should be attached to the laws and the constitution."[2]

I have myself had an opportunity to discuss this matter with some of the leading participants in the 1953 Conference. These sources revealed that the Action Group (A.G.) and the National Council of Nigeria and the Cameroons[3] (N.C.N.C.) presented a joint memorandum to the conference which received the enthusiastic support of the Northern Elements' Progressive Union (N.E.P.U.), calling for the incorporation

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1. Ibid, para. 63, p.32.
2. The memoirs of Lord Chandos (1962) 410.
3. As it was then known. Since independence and following the withdrawal of Southern Cameroons from the Federation, it has assumed a new name: National Convention of Nigerian Citizens.

of fundamental rights in the proposed constitution. However, the Colonial Secretary discouraged the conference from a detailed discussion of the proposal which was consequently shelved.

The N.E.P.U. leaders who felt that the Colonial Secretary virtually gagged their delegation in 1953, lost no time in raising the issue once more at the conference of 1957. The time seemed auspicious. In the interval between the preceding conference and the present one, an enactment[1] had been passed in Northern Nigeria to the effect that the Prerogative Writs would no longer run in respect of any proceedings in the native courts.[2] The opposition elements in the Region reacted by tabling a motion in the House of Assembly demanding a constitutional guarantee of fundamental rights before the conferment of

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1. Northern Nigeria High Court Law No.2 of 1957. See now s.27, High Court Law Cap.49. s.27.
2. Save, of course, the habeas corpus writ. The then Attorney-General, Mr.H.H.Marshall, took pains to deny the allegation that the limited abolition of the prerogative writs was motivated by political or party considerations. He recalled that Brooke in his Report on Native Courts had advised the abolition of the writs "because of their abuse and their use by unscrupulous people...and by clever lawyers for the purpose of getting before the High Court cases which would not otherwise be permitted to go there." Northern Region House of Assembly Debates, 1957 Col. 852.

regional self-government which was then imminent.

The motion, as worded, appears to support the view of those who attribute the origins of the Nigerian Constitutional guarantee to minority fears.

> "....the House do resolve that provisions be made in the Constitution to protect the minorities (the members of the opposition parties in particular.)" [1]

But the debates show that the term 'minorities' was used in the sense of political dissenting groups rather than in the sense of social or ethnic groups.[2]

According to the opposition spokesman, the motion had been introduced because it was well nigh impossible for their supporters to obtain justice in the courts.[3] The latter were staffed with politicians who were given to intimidating members of the opposition parties.[4]

The ruling party, the Northern Peoples' Congress (N.P.C.) surprised the opposition by accepting the principles

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1. Ibid. Col. 835.
2. In this wide sense, all the main Nigerian political parties are minority groups since each of them draws its main support from a particular region outside which it becomes a minority party.
3. Reference is presumably to native courts only.
4. Northern Region House of Assembly Debates, 1959 Col.836.

of the motion though not its phrasing,[1] it being "the fundamental aim of the Regional Government to protect human rights." It was wrong, declared one Minister, to emphasise "the protection of a political party";[2] all sections of the community should be protected. Another Minister explained that the motion had been amended "to meet the wishes not only of protecting the opposition party, but to protect every individual."[3]

The motion, as amended, was duly carried. In the South too, the consensus of opinion favoured the idea of a constitutional guarantee. Dr. Nnamdi Azikiwe, in a speech in Lagos on May 25, 1956 recalled that his party, the N.C.N.C. had, as far back as 1948, in its Freedom Charter, pressed for the incorporation of fundamental human rights in the Nigerian constitution.[4] For the Action Group,

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1. The amended motion reads: "This House do request that provision be made at the forthcoming review of the constitution for the protection of fundamental rights subject to the law." The leader of the opposition objected to the limiting phrase, "subject to the law". He would want the incorporated rights to be subject to no reservation. Ibid. Col. 842.
2. Ibid. Col. 840.
3. Ibid. Col. 860.
4. Zik, a selection from the speeches of Nnamdi Azikiwe (1960) 188. The late Alhaji Adegoke Adelabu, then leader of the opposition in Western Nigeria wanted Nigeria to follow the "accepted democratic convention" of writing safeguards into the constitution. Western Region House of Assembly Debates, Omnibus Issue, No. 7, 1957. Cols. 48-49.

its leader, Chief Obafemi Awolowo pledged that on independence, Nigerians would hold fast to the heritage of liberal democracy and the rule of law by which Britain had made Nigeria fit for independence. The first requirement, however, was a popular constitution which, among other things, would guarantee to everyone freedoms of speech, of assembly, of movement, and of association, as well as easy access to the law courts where justice would be dispensed with absolute impartiality.[1]

Faced with this hardly expected "unanimity of the Nigerians"[2] on the issue of fundamental human rights, the 1957 Conference, as noted earlier, accepted in principle the idea of a constitutional guarantee. It was one of the topics disposed of when the Conference resumed in 1958.[3] The latter Conference had before it the Minorities Commission Report recommending the constitutional protection of human rights as a safeguard for minority interests.[4] This is a

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1. Towards independence (1957) 13-15.
2. Alhaji Tafawa Balewa addressing the African Conference on the Rule of Law held in Lagos in 1961. African Conference on the Rule of Law (an I.C.J.publication) (1961) 87. Cf. Alhaji Ahmadu Bello, My life (1962) 222.
3. Report (1958) Cmnd. 569.
4. Only one group, the Christian bodies actually asked the Commission for fundamental rights provisions in the constitution. Ibid, para 37. Awolowo, Awo, the autobiography of Chief Obafemi Awolowo (1961) 185-212.

little strange as none of the political parties representing Nigeria's minority groups saw in fundamental rights an adequate safeguard for protecting minority interests. Rather, the proposal eliciting the widest appeal amongst these groups was the creation of states along ethnic lines with a federal system.[1] The conclusion thus seems unavoidable that the Commission's support for a constitutional guarantee was decisive only in so far as it persuaded a reluctant Whitehall to endorse the overwhelming Nigerian demand for one.[2]

While, therefore, the Nigerian political leaders saw in fundamental rights a bulwark against tyranny of the government towards individuals, the Minorities Commission and perhaps Her Majesty's Government regarded them as a veritable shield for minority groups. The two approaches are not necessarily contradictory. As Professor de Smith

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1. Cf. D.S.Rotschild, "Safeguarding Nigeria's minorities" (1963, Spring) Duquesne Review: a Journal of the Social Sciences. 35.
2. Cf. G.Ezejiofor, Protection of human rights under the law (1964) 183. Other factors might have come to play as well: the trends in post-independence Ghana, for example. Not long before too, Britain had agreed that the Federal Constitution of Malaya should define and guarantee certain fundamental rights. Report (1957) Cmnd. 210, p.18.

observes, constitutional guarantees of individual rights could lend useful support to the protection of minorities,

> "since like-minded individuals tend to group together for the purpose of holding meetings, forming political parties, publishing newspapers, educating their children and worshipping in their own way, to uphold the liberties of the individual is also to uphold the liberties of the group to which he regards himself as belonging."[1]

It is important nevertheless to bear in mind that the primary object of Nigeria's Bill of Rights is to protect individuals from state arbitrariness, any advantages therefrom to social groups - minorities or otherwise - are merely secondary.

A perennial problem about constitutional guarantees is what they should consist in.[2] It is much to the credit of the Minorities Commission that they saved the Nigerian constitution makers[3] much energy and time by borrowing almost in their entirety the fundamental rights contained in the European convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November, 1950.[4]

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1. The new Commonwealth and its constitutions (1964) 179.
2. See generally, UNESCO, Human rights: comments and interpretation (1949) ; W.F.Bowker, "Basic rights and freedoms, what are they?" (1959) 37 Canadian Bar Review, 43; W.R.Lederman, "The nature and problems of a Bill of Rights." ibid,4-15.
3. Though some Nigerian political leaders would have preferred their own draft clauses containing fewer provisos.
4. Except for three provisions: one borrowed from Pakistan, another from Malaya, with the third added by the Commission. Report Cmnd. 505 pp.101-102.

It was no longer a question of seeking to write "God is love" into the Constitution, the Convention having already rendered into legal, though one may hesitate to add, precise language[1] "those beliefs widespread among democratic countries."[2]

The European Convention from which Nigeria derived the text of its fundamental human rights was itself inspired by the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948. Moreover, these rights now accorded universal recognition did not just emerge overnight; on the contrary, they have a long history behind them and are but the culmination of the enduring aspirations of mankind for a higher law binding on the state.[3] We can sense here the relevance of the principle of constitutional guarantees to the concept of the Rule of Law, which following Norman S.Marsh[4] may be briefly rendered as the sum total of principles, procedures and

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1. M.G.de Winton: "Fundamental Human Rights in Nigeria" in Constitutional Problems of Federalism in Nigeria, (ed.L. Brett) (1961) 43-44.
2. Minorities Comm. Rep.op.cit.p.97.
3. H.Lauterpacht: International Law and Human Rights (1950). An international bill of the rights of man (1945).
4. "Working Paper "On the Rule of Law" at the Delhi Congress (International Commission of Jurists) The Rule of Law in a Free Society, p.197.

institutions called forth to check tyranny as well as to promote human dignity and welfare.

The close relationship between the concept of natural rights and the concept of the Rule of Law has been remarked upon.[1] Both are seen as paternal, or perhaps identical twins. We may even go further and describe them as Siamese twins. To sketch the history of the idea of fundamental human rights, therefore is, ex hypothesi, to probe the evolution of the concept of the Rule of Law. But a full account of the development of the idea of a fundamental law would require volumes.[2] In this study, one can do no more than relate, in the briefest outline, some of the events and thoughts that led to the universal recognition of fundamental human rights.

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1. W.H.Jones, "The Rule of Law and the welfare state" (1959) Annales de la Faculte de Droit d'Istanbul, 249. Hereafter referred to as Annales.
2. Reference may be made to numerous standard works on this subject such as E.Barker, Natural law and the theory of society (1950); Bryce, "The Law of Nature" in Studies in history and jurisprudence (1901); C.G.Haines, The revival of Natural Law concepts (1930); A.P.D'Entreves, Natural law (1951); F.A.Hayek, The constitution of liberty (1960); C.H. McIlwain, The growth of political thought in the West, (1932); Constitutionalism: ancient and modern (1947); F.Pollock "The history of the Law of Nature" in Essays in the Law (1922).

A. EARLIEST REGIMES

The earliest known state systems never adopted the practice of listing rights peculiar to individuals[1] though there were other ways of ensuring that rulers governed according to the laws and customs of the land. Seagle cites[2] Diodorus of Sicily to the effect that royal magistrates were obliged to take an oath that they would disregard any ordinance that was contrary to law.

The preamble to the first known Code compiled by King Hammurabi simply enjoined the God-fearing king to establish justice on earth, to destroy the base and to hold back the strong from the feeble.[3] Neither did the laws of Moses provide a distinct machinery for correcting the excesses of a temporal ruler who was accountable only to the Divine Will.[4] Be that as it may, it was neither the so-called pagan Hammurabi Code nor the theology-based

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1. See generally H.J.Muller, Freedom in the ancient world (1961). Professor Muller notes that classical Chinese did not even have a word for rights. ibid at p.112.
2. The quest for law (1941) 222.
3. Cf. The Declaration of Fundamental Principles in Article 13 of the Republican Constitution of Ghana, 1960. But there is evidence that Hammurabi was true to his charge. Dr.H.King refers to Hammurabi's letters which "give independent proof of the king's enthusiasm in the cause of the humbler and more oppressed class of his subjects." History of Babylon p.160 quoted by C.E.Edwards, The Hammurabi Code (1921) 9.
4. Cf. J.C.McRuer, The evolution of judicial process (1957) 7.

Pentateauch that would influence legal thoughts in the coming years. Rather, mankind would turn to Greece where a new and more rational idea about law was gradually emerging as historic Greece transformed the ordinary man from a nomad tribesman into a villager and now to a citizen.[1]

B. THE GREEKS

The foundations of freedom were laid in ancient Greece,[2] thanks to the "essential humanism"[3] of the Greeks. For unlike the earlier societies, the Greeks were not slavishly attached to their gods but were given to seeking practical solutions to their problems. There is no better illustration of this characteristic than the early reforms carried out in the law following the protests of the common people of Athens. They were dissatisfied with the customary law which was being used as an instrument of oppression by the privileged classes from whom magistrates were drawn. These magistrates declared the laws and applied them often

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1. A.E.Zimmern, The Greek Commonwealth (1922) 90.
2. In the limited space available, it is not possible to describe the attitude to law of all the Greek states of antiquity. The Athenian state for reasons of the vast documentation it has attracted and being perhaps the most developed of all has been singled out.
3. Muller, op.cit. p.148.

to the detriment of the masses. The general feeling was that if the customary law were reduced to writing most of the abuses would disappear.[1]

Draco was thus called upon to compile the customary law of Athens in a code. The Athenians were wrong to think that a code would provide a panacea to all their legal problems. For one thing, the certainty of the law does not guarantee the justice of its specific rules. It was little surprising therefore, that before long the Draconian code proved not as self-sufficient as the people had optimistically hoped, the harshness of many of its provisions becoming manifest during the factional strife into which Athens was soon plunged. The famous dictum was now heard everywhere that "The laws of Draco are written not in ink but in blood."[2] To make the code more just, Solon was called upon to revise it. He was made sole legislator with extensive powers for judicial and political re-organization. A strong dose; but to his immortal fame, Solon did not abuse the immense trust reposed in him. He produced a

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1. Cf. Kathleen Freeman, The paths of justice (1954) 16.
2. The death penalty was usual for nearly all crimes.

code which was a vast improvement on Draco's.

The code system did not solve the long-standing riddle of the binding force of law generally to which the Greek thinkers now devoted their time. Thales and his Ionian school sought the answer in physical speculations and concluded that the varying phenomena of the physical world could only be explained by "some uniform natural principle".[1] On the other hand, to Anaxagoras and his disciples, the supposed uniformity of physical nature must be distinguished from the instability and changeableness of the ways of man. Aeschylus took the latter distinction further when he urged that Nature should be differentiated from Convention, human laws deriving from the latter.[2]

From now on, a succession of Greek thinkers would stress this dichotomy of law. With the exception of the Sophists who insisted that each state must set up its own principles of justice based on a variable standard of utility,[3] all were agreed that man-made laws were far from

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1. J.W.Gough, The social contract (2nd edition) 8.
2. A theory described by W.A.Robson as a brilliant version of "the scheme of the world". Civilization and the growth of the law (1935) 188.
3. Cf. Vinogradoff, Outlines of historical jurisprudence (1920) Vol.II, 31.

self-sufficient but must conform, as near as possible to some ideal law. Although Socrates did not say this in so many words, his rejection of state absolutism and his plea that rulers should not merely issue prohibitions but must also pay due regard to the requirements of thought and knowledge indicated a movement in the same direction.

The one great weakness in the Greek system of thought, however, was the failure to prescribe a remedy against rulers who failed to observe the standards of government which those given to learning had formulated.[1] Indeed, when Socrates himself was called upon to pay the supreme penalty for an offence he did not commit, he refused to defy the state, flee the country or appeal to a higher law in his defence.[2]

Plato's writings provide some clue to the seemingly meek submission by Socrates to his persecutors. Once the law-makers had proclaimed a law, he concluded, the argument whether the law was good or bad became irrelevant. Those who wanted good laws must entrust their job of law-making to men of wisdom - 'philosopher-kings' - who would make

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1. Cf. McIlwain, Constitutionalism: ancient and modern p. 38.
2. Cf. Cowen op.cit. p.204.

their "art a law".[1]

At the same time, Plato expressed his belief in a universal norm of political life ascertainable by human reason or "nature" (as he called it) and which would serve as a yardstick for differentiating good from bad states. We can see here the concept of the law of nature in embryo.[2] Plato's pupil, Aristotle soon arrived on the scene to develop the same theme.

Aristotle was never an admirer of the unrestrained development of Athenian democracy.[3] He advocated a limited republic which, according to him, was the only form of polity that could be called a constitutional state. The laws of such a state must satisfy a double test,[4] were the laws good or bad when compared to those of the perfect state and secondly, did a specific enactment comply with the ideal and character to which the lawgiver had set before the citizens?

His first requirement follows closely Plato's comparative approach of setting the prevailing conditions in

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1. Cf. McIlwain, op.cit. p.31.
2. Ibid.
3. Cf. Bryce, Modern democracies (1921) Vol.I. p.207. Plato's reaction was similar, but see the Funeral Oration of Pericles in Thucydides Book III.
4. See generally, C.F.Strong, Modern political institutions (1963)

a state against the background of a universal norm. The second was, however, new; if the analogy is not far-fetched, it would seem to foreshadow the election manifesto in the modern state.

But the firm distinction which Aristotle made between Natural and Conventional Justice is the most notable feature of his thought on this subject. Natural Justice was universal, immutable and in accordance with Nature. Conventional justice, by contrast, derived from man-made laws and was therefore applicable only for a particular time and place. The two, however, need not be opposed because "Nature...is a guiding principle in the universe and Natural Law is its expression. In the ideal state, the law corresponds completely to Nature."[1]

How, it seems opportune to ask, did Greece of Aristotle's time fit into his philosophy of law and his conception of a state under the constitution? Vinogradoff tells us that at that time there were built-in institutions to enforce the legality of the acts of state officials, who

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1. Susemihl and Hicks, The politics of Aristotle (1894) 27.

were by law subject to the superior authority of the community as exercised through the agency of the popular assembly.[1] An aggrieved private citizen could for instance exercise the right of political accusation, which could result in punishment against those who violated a law or exceeded their duty.[2] What is perhaps more remarkable was that the assembly was not credited with infallibility. Thus by a special procedure which Bryce[3] terms "Constitutional Legislation", there took place an annual review of all laws the obnoxious ones being dropped. Further, by the "Indictment of Illegality"[4] any citizen might prosecute a person who proposed illegal laws in the Assembly even after they had been duly passed.

All these elaborate facilities for judicial review[5] of the acts of state organs would have been of little avail to the lowly people most in need of them, had not provision been made for some form of informal legal assistance:[6]

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1. op.cit. Vol.11. p.115.
2. loc.cit.
3. Modern Democracies Vol.1, p.195. Of course the annulment procedure must be commenced within one year of the original law being passed and would succeed only on the ground that the innovation was ill-considered and in conflict with the constitution: Cowen, op.cit. p.205.
4. Bryce, op.cit. p.195: punishment may be a fine or even death.
5. This may not be a happy term since the Assembly was both judicial and legislative.
6. Cf. the institution of the dock brief in English courts.

> "Among the many splendid arrangements that exist in the city, what is better or more popular (democratic) than the fact that whenever a private person standing trial and danger is unable to speak in his own defence, one of his fellow citizens can, if he likes come forward to help him and instruct the jury as to the rights of his case." [1]

Hypereides, speaking for Euxenippos, was here describing legal aid scheme in respect of criminal causes but the same right could be claimed in civil suits including cases of political accusation and of Indictment of Illegality.

Notwithstanding this impressive deference to constitutionalism the Greek democracy was far from being a legal paradise: for the period was also notorious for its corruption, political intolerance, victimisation and tyranny. Nor can we overlook the greatest blot of all, the legal recognition accorded to slavery. Even Aristotle, an otherwise eminently liberal thinker, sought to justify the institution of slavery.[2]

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1. Quoted by Vinogradoff, op.cit. Vol.11, p.116.
2. Susemihl and Hicks, op.cit. p.27.

Zeno and his school of Stoics were attracted to Aristotle's dichotomy of Justice which they gave a fuller interpretation. Nature was identified with reason and to live in accordance with it was at once the highest virtue.[1] It was at this point that the Romans turned to Greece for new ideas in aid of their programme of legal reforms. The Stoics' philosophy fascinated them; but before turning to the use to which the Romans put the imported ideas, let us attempt to sum up the Greek attitude to the notion of a higher law binding on the state. None of the Greek philosophers went so far as to advocate a fundamental law which would invalidate a state law inconsistent with it.[2] They were content to prescribe political ideals leaving the state, if it so wished, to live up to them. Individuals were enjoined to voice out their objections to any bad law but not to resist its enforcement, as Socrates by personal example, demonstrated.[3]

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1. Dias and Hughes, Jurisprudence (1964) 498-499.
2. Cf. Haines, op.cit. p.7.
3. Cf. Sophocles who made Antigone to protest her innocence to a charge that she had wilfully disobeyed the king's orders: "Nor deemed I that thy decrees were of such force, that a mortal could over-ride the unwritten and unfailing statutes of heaven. For their life is not of today or yesterday, but for all time and no man knows when they were first put forth." Antigone; pp.450ff.

Nonetheless, the world is still much indebted to the Greeks for the data on the perfect state which their philosophers formulated and which would provide a basis on which succeeding civilizations would build the notion of a higher law binding on the state.

C. THE ROMANS

It fell to the Romans to carry on from where the Greeks finished off, following the collapse of their civilization. The influence of the Greek Stoics is evident in the writings of Cicero who once declared that "Universal consent is the voice of Nature"[1] and in a memorable passage in De Legibus,[2] he pressed home his point that the law of nature (ius naturale) must be the source and limits of all rights.

> "There is indeed a true law (lex), right reason, agreeing with nature and diffused among all, unchanging, everlasting, which calls to duty by commanding, deters from wrong by forbidding.... It is not allowable to alter this law nor to deviate from it. Nor can it be abrogated. Nor can we be

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1. Tusc. lxx. 35.
2. II, 4, 10; quoted by Haines op.cit. p.9.

> released from this law either by the Senate or by the people. Nor is any person required to explain or to interpret it. Nor is it one law at Rome and another at Athens, one law today and another hereafter; but the same law, everlasting and unchangeable...."

Cicero concluded by noting that though God was "the framer and proposer of this law", it was binding on him as on all people and nations.

But neither Cicero nor any other Roman had anything to say on how a breach of ius naturale could be corrected. Thus as with the Greeks, so with the Romans, the vaguely perceived notion of a higher law was no more than a standard or norm to test the moral validity of positive law.

In practice, however, the Romans invoked the concept more often than the Greeks ever did. Thus because ius gentium, the law common to all nations and applicable only to peregrines justified the institution of slavery, the Roman jurists[1] turned to ius naturale in their campaign for the abolition of slavery, and it readily supplied the philosophical rationalisation for the extension of Roman

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1. e.g. Ulpian had no doubt that the institution of slavery was contrary to nature. Cf. Bryce: Studies in history and jurisprudence. Vol.II,p.144.

citizenship to all the subjects of the Empire.[1] There were other gains indirectly brought about by the recognition of ius naturale.

The Romans gave the impression that they were deeply attached to the principles of ius naturale in their every-day life yet a dictatorship did emerge in Rome.

Paradoxically, it was the need to check the arbitrary powers of a few individuals who had lately perverted the Republican constitution that called forth the Empire.[2] This explains why Octavian, (now Augustus) had to go out of his way to cloak his new imperial office with a constitutional garb. He declined the use of the title of Dictator, bearing in mind that the use of that style had in fact been one of the Senate's grievances against Julius Caesar.[3] He even rejected the censorial powers that would have given him complete control over the Senate. Domitian, who was less wise, assumed these powers, and met his death through assassination.[4] Even Justinian who launched

1. Seagle op.cit.p.201.
2. Jolowicz: Historical introduction to the study of Roman Law (1952) 332.
3. Ibid. Antony was said to have conciliated republican sentiment by securing the enactment which alienated the dictatorship for ever.
4. Ibid, p.336.

the concept of the Emperor's supreme authority had to explain himself in terms compatible with the requirements of ius naturale. He spoke of his authority resting with the people who had delegated it to him and also could recall it whenever they felt like it.[1]

In these matters, however, theory and practice often diverge, and markedly too. The fear that a dictator may deploy his might to crush any challenge to his authority often compels his oppressed subjects to submit meekly to his wanton caprice. It was true to pattern therefore, that each succeeding Roman emperor eroded the limits which the constitution had laid down. Before long, the Roman Senate became powerless, degenerating into a mere registry for the Imperial will; but Roman judicial tradition endured for much longer. The praetorian system afforded ample justice in the field of private law,[2] and even in the realm of public law, (at any rate in the early days of the Empire), the customary plea, "I appeal unto Caesar" was never a forlorn gesture.[3] In due course, however, the political

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1. See his Institutes and Digest.
2. J.C.Declareweil: Rome the Lawgiver (translated by E.A.Parker) (1927) Ch.II; Cf. McIlwain op.cit. pp. 54-5.
3. A.H.M.Jones: Studies in Roman government and law (1960) 53-65.

ills engendered by irresponsible aristocracy engulfed the whole nation.

D. CHRISTIAN EUROPE

The decline and fall of Rome heralded in the new European states founded on the Christian faith. Rulers began to explain their authority in divine terms, claiming to be God's representatives on earth. It was an ingenious answer to St. Augustine's caution that if human law was contrary to the law of God it could be disregarded and the church as the exponent of Divine Law could even interfere with and override the state. How could this be, the princes asked, if the state and the church were one? These divine claims of the princes soon hardened into the theory of divine kings, of which the modern conception of state sovereignty is an off-shoot, as MacIver reminds us.[1]

> "This magic of sovereignty became transferred into legal prerogative, divine origin passing into divine right.".

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1. The Modern State p.9 but Gough doubts this and fixes the emergence of the doctrine to emperors' struggles with the Papacy in the mediaeval period.

The doctrine of divine right demanded automatic submission of the subjects to their rulers; the reasoning being that since God was the embodiment of what was fair and just, His agents on earth could be trusted to reflect His attributes. In practice, however, state absolutism did not result from this doctrine in the Middle Ages because the Pope was acknowledged as the final arbiter in spiritual matters. The "Vatican" was a sort of international 'court of appeal' and the kings and princes ruled mindful of a possible excommunication from the influential Church should they violate the laws of God as interpreted by the Vicar of Christ. It was never easy to distinguish matters which were Caesar's from those which were God's and this lack of precision enhanced the position of Rome which St.Thomas Aquinas, the prince of scholastic philosophers, even sought to reinforce further when he put forward his four categories of law:[1] (1) eternal law, that is the law of God; (2) natural law which is eternal law revealed to man through the exercise of his reason; (3) divine law meaning eternal law revealed in the Scriptures and (4) human laws which should conform to reason and thus to eternal law.

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1. Dias and Hughes, op.cit.pp.506-509.

The theory of Aquinas thus aims at harmonizing the teachings of the Church with the ideas of the Greek philosophers but he failed to foresee the long-term consequences of his preachings. For by re-identifying natural law with human reason, he was unconsciously preparing the ground for the eventual separation of natural law from theology. He popularized St.Augustine's view, that the validity of law depended on its justice or injustice and that if a human law was at variance with natural law, it was no longer law but a corruption of law. He also re-iterated Isidore's contention that law must be formulated not with a view to particular interests but for the benefit of all the citizens.[1]

Perhaps going further than many of his readers expected, he declared, as Cicero had done, that God himself was subject to the law of nature.[2] On the other hand, his submission followed logically from the general thinking of the mediaeval jurists to whom law in its origin ranked equally with the state and did not therefore, depend

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1. Cf. Aquinas, Selected political writings (ed.A.P.D'Entreves) (1948) 121-129.
2. Cf. Lauterpacht, International Bill of Rights p.34.

on the state for its existence.

Martin Luther, moved more by the need for religious reform than by the desire to win greater political powers for the European princes irrevocably committed himself to Protestantism,[1] he appealed to the princes for support in the ensuing struggle with Rome (better known as the Reformation). Luther's subsequent victory meant the destruction of the notion of a single and universal papal authority. But he had baited the princes' support by invoking the doctrine of the divine right of kings. Now the princes, conscious of the immense political gains which the break with Rome had brought in its wake, were determined to keep these gains.

With the inauguration of a system of national churches (spearheaded by Henry VIII) papal jurisdiction in politico-religious matters, the only tangible restraint on the exercise of power hitherto known, disappeared. What should take its place?

Hugo Grotius led a movement for a more secure system of law binding on the sovereign states, natural law

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1. Cf. Laski, Authority in the Modern State (1927) 21.

providing the necessary platform.[1] Grotius reverted to the Roman interpretation of law of nature as being discoverable through human reason without reference to religion. Pufendorf would, at a later date, counter this suggestion and would insist that natural law emanated from divine injunction. But it was the process of secularization of the law of nature inaugurated by Grotius which gained the upper hand.

In addition to his better known campaign for respect for the law of nature by states in their dealings with one another,[2] Grotius proclaimed a theory of natural rights binding on the states:

> "a theory of natural rights not merely natural law as before, not merely principles of eternal validity but certain qualities inherent in persons and demonstrated by reason and recognised by natural law to which, therefore, national law ought to give effect."[3]

There were, however, a few philosophers who exerted a pull in the opposite direction. Jean Bodin, the Frenchman who had been influenced by the writings of the Italian,

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1. Cf. Oppenheimer's International law (8th edition) Vol.1. p.6 et.seq.
2. In his De jure belli ac pacis which first appeared in Paris in 1625.
3. Roscoe Pound, The spirit of the common law (1921) 88.

Machiavelli, put forward a theory of sovereignty tailored to suit his times. He argued that the authority of the sovereign could not be restrained by human laws and although superior laws of morality and religion were binding on them, they were answerable to God alone for any infraction of the latter.[1] Hobbes, in his Leviathan developed the same theme. The subjects had made a prior pact or "concord" among themselves which could only be binding on them but not on the assembly or king who were not parties to it. This theory (to which Spinoza also subscribed) virtually gave carte blanche to the rulers who became hardened in their absolutist claims, some echoing and like Justinian twisting Ulpian's dictum.

Quod principi placint legis habet vigorem[2]

By contrast, Locke in his Social Contract Theory, argued that men formed themselves into an organised society

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1. Cf. Haines, op.cit. pp. 20-21.
2. 'What pleases the king has the force of law.' Ulpian never meant the dictum to be taken literally as is forcefully shown by Andre Tune in "The royal will and the Rule of Law.." in Government under law (ed. A.E.Sutherland) (1956) 401. Professor Tunc quoted from Beaumanoir's Livre de Justice et de Plet, to the effect that the statement meant no more than the king was vested with legislative powers which could not be exercised arbitrarily nor by the king alone. Cf.McIlwain, Constitutionalism etc. p.123ff.

for "convenience and stable living". The sovereign could therefore not be despotic because he was bound by the terms of the social contract and must ensure the peace, safety and public good of the people.[1] Like Grotius, Locke supported the idea of the natural rights of man though he placed the preservation of property very high on the list of duties of any government, describing it as 'the end of government and that for which men entered into society.' He has been much criticized for making too much of the right of property[2] which the rising middle class would seize upon and (with the kindred doctrine of freedom of contract) use to keep down those of the lower classes.

But Locke also had a great deal to say in the liberty of the subject holding that no one could be put out of his estate and subjected to political power without his

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1. See generally, The second treatise of civil government (ed. J.W.Gough) (1956).
2. It would seem unfair though to make too much of Locke's insistence on the protection of the right of property. The conception of property as in the mediaeval period was never precisely formulated. McIlwain observes that the mediaeval law of property embraced nearly everything under the sun: franchises, liberties of personal status, public office, and the king's prerogative. Constitutionalism 'ancient and modern' p.61. Even today the problem of what constitutes the right of property still agitates the Indian courts. See P.P.Pandit: "Constitutional Protection of Property in India." in Some Aspects of Indian Law Today I.C.L.Q. Supplementary Publication No.8. (1964).

consent. Proprietary or personal right was, however, insecure if left to the good faith of one man, the king, hence Locke joined and played an active role in the Glorious Revolution of 1688-9 to establish a sovereign popular legislature, which, he was convinced, could best safeguard the natural rights of man. At the same time, Locke expressed the belief that the sovereign legislature must observe certain standards - 'bonds'[1] as he called them - . Failure to observe these standards would justify the citizens to revolt.[2] This is how he put it:

> "...the legislature being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislature when they find the legislative act contrary to the trust reposed in them ... And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody even if their legislators whenever they shall have been so foolish or so wicked as to carry on designs against the liberties and properties of the subject .... And thus the community may be said in this respect to be always the supreme power." [3]

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1. The principal one and most relevant of the three requirements is that they should "govern by promulgated established laws, not to be denied in particular cases but to have a rule for rich and poor, for the favourite at court and the country-men at plough..." Locke, The Second Treatise of Civil Government, 29.
2. Locke, (Everyman's edition) p.233.
3. Second treatise of civil government, xiii 129.

Here we find the first unequivocal recognition of the right of rebellion against rulers who violate the liberties of their subjects, though these liberties were yet to be precisely formulated. Before long, however, the American colonies would achieve a double feat: the successful assertion of the right of rebellion against Britain's George III and the spelling out of the rights of man in a Constitution.

E. THE AMERICAN EXAMPLE

The events which led to the American War of Independence and the French Revolution are beyond the scope of this work. Of interest to us are the constitutional devices which were created to regulate life in the post-revolutionary era, particularly the explicit setting out for the first time ever, of the inherent rights of man in a formal constitutional document.

The Continental Congress of the American Colonies in its Declaration of Independence in 1774 made these assertions: "We hold these truths as self-evident - that all men are created equal, that they are endowed with certain inalienable rights, that among these are life, liberty and the pursuit of happiness." The Congress,

inspired by these general principles proceeded to draft a Declaration of Rights enumerating these "inalienable rights" in detail; this Declaration also served as a model for each state when they came to adopt a written constitution and to write the rights of the citizen into them.

Two questions may be raised here: Were the principles of equality of men and the "inalienable rights" of men as "self-evident" as the American revolutionary leaders claimed? If they were "self-evident" why bother to spell them out in a constitution?

We have seen that European theorists disputed amongst themselves, firstly as to what natural law itself consists in, and secondly, its place in the legal system. On the other hand, the American statement must be viewed in the context of the Revolution and the prevailing conditions in that country from the time of the settlement of the colonists. As Professor Haines reminds us,[1] although the colonists brought with them many of the prevailing ideas of the common law to provide a basis for their

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1. op.cit. p.52.

legal arrangements, the law was invariably applied by those who were untrained in the English legal system:

> "Statutes applicable to local conditions were frequently lacking. Courts and judges found themselves called upon to make law for the occasion with little else to guide them except the Bible, the precepts of natural law or natural justice, and the community sentiment of what ought to be right and just. Under such circumstances, appeals were frequently made to natural law or to allied concepts."[1]

Thus, to a degree, natural law principles were already part of the law of America though these principles even up to 1791 when the American (Federal) Constitution was amended to include the famous Bill of Rights, were referred to as the common rights of Englishmen.[2] The Revolution itself, it should be remembered, was justified by the revolutionary leaders as the legitimate exercise of the natural right of the people of the American colonies. Nor did these leaders see their Bill of Rights as according new rights to the citizen. They were all agreed that

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1. Ibid.
2. Thus the Americans accused the British Parliament of "a violation of the Law of Nature which is a part of English Law." McIlwain, The American Revolution: a constitutional interpretation (1923) 193.

charters do no more than declare pre-existing rights.[1] However, since a written constitution had been decided upon,[2] it was only proper that the principles which the people held dear should be spelt out in the constitution and given special protection.

Thus the imprecise natural law precepts in ancient and mediaeval times which Grotius and others later gave the status of natural rights were not only accorded legal recognition by the Americans, but were secured by the constitution. Henceforth in America neither an executive act nor an ordinary legislation could override these rights. It is at this point that the inherent rights became fundamental human rights.

Even more unique was the provision made for the judicial enforcement of these rights. Section 2 of Article 3 of the Constitution gives general power to the courts to decide cases arising under the Constitution. But more specifically, the Fifth and Fourteenth Amendments provide that no person may be deprived of life, liberty or

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1. Cf. Haines, op.cit. pp. 54-55.
2. Three reasons are noted by Professor Haines for this decision: (1) a distrust of legislative power: the people detested legislative domination, (2) the protection of the minority and (3) the protection of property rights - "the supreme function of the government to preserve and protect." Ibid. pp. 82-88.

property without due process of law.

If we contrast the procedure adopted by the French republican constitution makers for the recognition of fundamental rights, we find that they contented themselves with proclaiming fundamental rights in the Declaration of Rights of Man and the Citizen of 1789, avoiding the question of judicial enforcement and treating fundamental rights as in the nature of articles in the social contract. Despite this, there is significance in the fact that the French, although in the throes of the Revolution, felt it necessary to give formal recognition to the rights of man in a constitution.[1]

Under the American system, the Supreme Court in fulfilling its role as the arbiter of what the Constitution is,[2] has to strike a balance between the interests of the Federal Government, the claims of the states and the rights of the individual. That this has been a challenging task is clearly shown by the chequered judicial history of the clauses of the Bill of Rights.[3] Thus, until 1868 when

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1. Cf. Seagle op.cit. p.283.
2. Marbury v. Madison (1803) 1 Cranch 137. But some have criticized this decision as "one of the best legal usurpations known to the law" E.M.Byrd Jr., "The role of the lawyer in the economic and social development of his country....." (1965) 5 J.I.C.J. No.1. 148 at 51.
3. Cf. B.Schwartz, American constitutional law (1955) 207-221; also A .T. Mason, The Supreme Court, palladium of justice (1962)

the Fourteenth Amendment was inserted, the Bill of Rights was hardly effective. Even so, up to 1937,[1] the courts were given to leaning heavily towards the laissez-faire view of the function of government.[2] Entrepreneurs and speculators were protected at the expense of the ordinary citizen. The Slaughter House Cases[3] illustrate how the provision of the Fourteenth Amendment was strained to cover the protection of corporations as "persons". These corporations were, it was held, entitled like individuals to unrestricted freedom of contract; statues which sought to regulate working hours and minimum wages for women and children were, therefore, unconstitutional.[4]

President F.D.Roosevelt was quick to recognise the Court's hostility towards the social reforms implicit in his New Deal. Not until he threatened to pack the Court did the Federal Justices abandon their obstructionist tactics.[5]

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1. Schwartz, op.cit.pp. 208-212.
2. Ibid.
3. (1873) 16 Wallace 36.
4. Lochner v. New York (1905) 198 U.S.45. Bailey v. Drexel Furniture Co. (1922) 259 U.S.20: Adkins v. Children's Hospital (1923) 261 U.S. 525.
5. Cf. C.H.Pritchett, The Roosevelt Court (1948) 71-90.

Over the Negro Question, the pattern was the same. At first the Court condoned discrimination on grounds of colour as when the pernicious separate but equal doctrine was upheld in Plessey v. Ferguson.[1] In 1954, however, the Court all but overruled itself in Brown v. Board of Education of Topeka.[2] In the latter case, the separate but equal doctrine was held unconstitutional where it was invoked to justify segregation in public schools.

One or two lessons emerge from this cursory survey of the American Constitutional practice which deserve note. First, no Bill of Rights however carefully drawn can provide for all exigencies. A liberal judicial interpretation may be called for to supply the missing links in the light of experience, an exercise which would however presuppose a disinterested and an impartial Bench. Secondly, judicial review by itself, is not a sufficiently effective safeguard. The Supreme Court of America, as an example, "lacks fiscal or physical power; it relies on the executive branch of the Government to enforce its orders and on Congress for

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1. (1896) 163 U.S. 537. (a decision on private schools).
2. (1945) 347 U.S. 463.

its money and jurisdiction."[1] In short, due observance of the Bill of Rights rests on the three branches of government working in complete harmony. The Executive must be ready and willing to enforce the constitution; and where new laws are called for to give full effect to decided constitutional points, the Legislature must on its part move in quickly.[2] The Civil Rights Act, 1964 belated though, is a step in the right direction and a superb illustration of this harmony at work.[3] But can this harmony be sustained? It should, since there is a strong tradition of law and freedom which militates against abuse of power, even by the most powerful branch of the Government: the Executive.

E. INTERNATIONAL RECOGNITION AND PROTECTION OF FUNDAMENTAL RIGHTS.

1. Theoretical recognition.

It has been said that by the twentieth century, the

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1. Time Magazine, New York (Atlantic Edition) October 9, 1964.
2. A.E.Sutherland,"The Negro and the Law", Span Magazine,May 1964.
3. Contrast the delaying tactics of the past. For instance, the decision in Brown v. Board of Education of Topeka (1954) was not implemented for five years: Byrd Jr.op.cit.p.55. For an account of the progress of the 1960 Civil Rights Bill, see P.G.Kauper: Civil Liberties and the Constitution (1962) 199. See further K.A.Greenwalt, "Legal aspects of Civil Rights in the United States and the Civil Rights Act of 1964" (1964) 5 J.I.C.J. No.2. 247; (1965) 6 I.C.J. No.1.

recognition of fundamental rights had become "a general principle of civilized states."[1] This claim is based on the practice of states formally proclaiming respect for fundamental rights in their constitutions. The fate of the fundamental rights contained in the Weimar Constitution[2] proved conclusively, however, that the rights declared in many of these constitutions were protected on paper only.[3]

Hitler had come to power on 30 January, 1933. Following the fire in the Reichstag on 27 February, he assumed emergency powers, and the Law of 24 March, 1933

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1. Lauterpacht, International law and human rights p.83.
2. So impressive were the sentiments on liberty expressed therein that the Constitution was acclaimed as "the most liberal and egalitarian of all constitutions". S.King-Hall and R.K.Ullmann, German Parliament (1954) 84. Cf.F.Castberg, "The Bonn Constitution and fundamental rights" in Freedom of speech in the West (ed.Castberg) 318.
3. Cf.Islamic experience. According to Islamic law, God is the sole legislator, the ruler's duty being merely to execute the law, the interpretarion of which is entrusted to the ulema (comprising kadis (judges) and muftis (juris consults).) Thus in strict theory, the state is not in a better position than the individual whose rights derive from Allah. These rights cannot be amended or abrogated by the state which suggests that the latter is severely limited in the use of its powers thus enhancing the Rule of Law. On the other hand, as the holy law does not provide for every exigency and is most inadequate in respect of criminal and financial matters, the ruler could legitimately issue discretionary commands. This discretionary power was used so unsparingly by many Muslem rulers that authoritarian government soon became a typical feature of the Islamic world. Cf. J.Schacht, The origins of Muhammadan jurisprudence (1950); Anderson, Islamic law in the modern world (1959); N.J.Coulson, "The state and the individual in Islamic law." (1957) 6 I.C.L.Q.

footnote contd. overleaf....

which gave the Government the right to set aside numerous constitutional provisions including those on fundamental rights set the seal on National Socialist dictatorship. There was at no time a formal repeal of the Weimer Constitution.[1]

2. Universal Declaration of Human Rights.

The Second World War with its attendant Nazi atrocities must have finally convinced mankind that it was unsafe to leave the conception of the protection of human rights to the controlled will of 'sovereign' states. Since the War, therefore, a strong movement for international protection of these rights has made itself felt.

The Charter of the United Nations touches upon many aspects of the problem, though it would be wrong to think that nothing had been done in the direction of internationalizing respect for human rights prior to the Charter. The historical perspective of the current approach is

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footnote continued from previous page.....

49; H.Seigman, "The state and the individual in Suni Islam" (1964) 44 Muslim World, No.1. p.14; B.Lewis, Istanbul and the civilization of the Ottoman Empire (1963) esp. pp. 40-50; 147-151.

1. Castberg, op.cit. p.335.

sketched by Professor Jenks as follows:[1]

> "The international protection of human rights is not new either as a concept or as a policy. Wilberforce, Palmerston and Gladstone all regarded it as cardinal. But apart from the International Labour Organization, the international protection of human rights was thought of prior to the second world war in terms of unusual and probably temporary measures for the protection of the specially oppressed. The concept of a World Organization affirming, promoting and envisaging steps to guarantee human rights on a universal basis was altogether revolutionary."

The framers of the Charter were resolved to take that revolutionary stride and such was the prevailing mood that some even thought that the resulting charter was too cautious on human rights.

The Charter persistently speaks of the promotion of fundamental rights, but it neither defines these rights nor does it contain provisions for securing their protection though some Articles[2] appear to impose mandatory obligations on the Organization and its members in respect of human rights. The legal nature or otherwise of these Articles

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1. Law, freedom and welfare (1963) 7-8; The common law of mankind (1858); also H.Waldock, "Human rights in contemporary international law and the significance of the European Convention" in The European Convention on Human Rights. I.C.L.Q. Supplementary publication No. 11 (1965) 1; Ezejiofor, op.cit.Ch.2.
2. Articles 13, 55 and 56.

has been a subject of acute controversy.[1] The legal position is made no clearer by the far-reaching prohibition placed by Article 2 (7) which forbids the United Nations "to intervene on matters which are essentially within the domestic jurisdiction of any state."[2]

Of immediate importance, however, was the problem of defining the rights vaguely mentioned in the Charter. The U.N. lost no time in setting the machinery in motion for such definition. Under the auspices of the Economic and Social Council, the Commission on Human Rights produced the Universal Declaration of Human Rights but the more ambitious plan for a covenant floundered.[3]

The Declaration's preamble states:

> "Whereas it is essential, if man is not to be compelled to have recourse to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

The classic rights and freedoms are then spelt out in a

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1. For two different views see Lauterpacht, International law and human rights and P.N.Drost, Human rights as legal rights (1951) 31 et seq.
2. As to the problem posed by South Africa's apartheid policy see J.N.Brierly, The law of nations (1963) 293-294; also contributions by Prof. D.H.N.Johnson and Dr.R.Higgins in Sanctions against South Africa (ed.R.Segal) (1964) 62-93.
3. Principally for political reasons. see U.N.Bulletin No.1; These rights and freedoms, p.11 et seq.

clear language and although many regret the fact that it has no binding force, its impact as an educational instrument setting out 'a common standard of achievement' has been striking. Thus when the European states decided to build a "kind of United States of Europe", every member of which "must accept the principle of the rule of law and of the enjoyment of all persons within its jurisdiction of human rights and fundamental freedoms",[1] they turned to the Universal Declaration for a Statement of these rights and freedoms. The Rome Convention was the outcome.[2]

3. EUROPEAN SYSTEM

The like-minded states of Europe have thus succeeded in agreeing a legally-binding Convention where the World Community of States owing to their differing stages of social and economic development and diverse political background have failed. It needs pointing out, however that it was not an easy matter even for the states of Western Europe, for they too could not instantly agree on a comprehensive convention. Civil and political rights were agreed first,

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1. Winston Churchill, speech at Zurich on 19 September 1946 quoted by G. Weil, The European Convention on Human Rights, (1963) 22.
2. For its background, development and prospects, see Weil op.cit.; A.H.Robertson op.cit.

but the more controversial rights of property, education and free elections had to wait until an acceptable Protocol was ready.[1] The Social Charter embodying the economic and social rights was only signed as recently as October 18, 1961, and it does not form part of the legally-binding Convention, though elaborate arrangements have been made for its implementation.[2]

The importance of this new European system in the field of human rights is immense.[3] The Convention represents the highest form of protection ever devised for human rights. Its admirable procedure (which cannot be gone into in any detail here[4]) affords a meaningful remedy to a person whose rights have been infringed by a signatory state. If the full obligations under the Convention have been accepted by the latter, the aggrieved person can exercise the individual right of petition to the Commission on Human

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1. See Weil op.cit. pp. 35-40; Robertson op.cit.pp.31-37.
2. Summarised by Robertson op.cit. pp. 140-150.
3. The list of signatory states is impressive by itself:Austria, Belgium, Cyprus, Federal Republic of Germany, Greece, Iceland Ireland, United Kingdom and France. Though the last mentioned is yet to ratify the Convention. Switzerland recently signed but she has not yet ratified the Convention.
4. But see A.H.Robertson,op.cit., Chapters 3,4, 5 and 7; also H.Golsong, 'The control machinery of the European Convention of Human Rights' in The European Convention of Human Rights. (I.C.L.Q. Supplement) p.38.

Rights, which at its discretion may refer the case to the Court of Human Rights.[1] Even if the Commission does not think that the case merits a judicial hearing, a signatory state may elect to champion the cause of the aggrieved person before the Court.[2]

So attractive a procedure apart, the sheer precision with which the rights are spelt out in the Convention has won the hearts of many a people outside the precincts of Europe.[3] Following the reception by Nigeria, the modified version of the European provisions has been adopted by one African commonwealth country after another.

G. FUNDAMENTAL RIGHTS IN AFRICA

The attitudes of African countries to fundamental rights are far from uniform.[4] Two groups of countries may be distinguished.

(i) Group A countries: These have entrenched and enforceable fundamental rights provisions.

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1. Much conciliatory work is done at this stage and very often erring states would prefer to retract rather than be exposed later on to a court hearing.
2. Cf. the two Cyprus cases taken up by the Greek Government against the United Kingdom Government in 1956 and 1957 respectively.
3. Cf. Vasak op.cit. p.1206.
4. See generally, de Smith, The New Commonwealth and its constitutions, Chapters 5 and 6; Ezejiofor op.cit.

(ii) Group B countries: These consider that it is sufficient to declare mere adherence to fundamental rights in their respective constitutions without making them justiciable.

I. Group A countries.

We have already related the story of how Nigeria came about its fundamental rights provisions.[1] We saw that although the idea of protecting these rights was supported by practically all the Nigerian politicians, the adoption of the European model was prompted by the Minorities Commission's preference for it.

The Indian Constitution of 1950 with its enforceable fundamental rights provisions preceded the Rome Convention by a few months.[2] One might think that the Indian provisions would have attracted the Nigerians since the latter's problems on independence would be more similar to those of the "new" state of India than to those of the older European countries. But the opposition groups in Nigeria would almost certainly have rejected the Indian model as the Indian Constitution

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1. ante, p.4 et seq.
2. Cf. A. Gledhill, Fundamental Rights in India (1955); "Fundamental rights" in Changing law in developing countries (ed. J.N.D.Anderson) (1963) 81, esp. pp.88-90.

while protecting fundamental rights also makes provisions for detention without trial.[1]

It follows that the American Bill of Rights with its widely phrased clauses (thus leaving the judges to delimit their scope) would have been attractive to the opposition elements[2] and possibly to the lawyer politicians in the dominant parties, but not to the heirs presumptive to the imperial power. In any event, the American Bill of Rights was tainted in the eyes of the Africans because of its apparent impotence to deal with the Negro problem.[3]

The Liberian experience with the American model of constitutional guarantees was not reassuring. The 'Little America' on the West Coast which had been founded as "an asylum from the most grinding oppression" perpetrated on the Negroes by the American Whites[4] had a Bill of Rights[5]

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1. Cf. the stiff opposition of many Nigerians to the proposal to enact a law providing for preventive detention: see post Chapters 5 and 7.
2. In Northern Nigeria, the opposition parties did not want fundamental rights "subject to the law". Such qualifications it was felt gave too much latitude to the ruling party to enact any law. N.R.H.A. Deb. 1957, Col. 842.
3. Cf. President Lyndon Johnson's speech made on the occasion of signing the Civil Rights Act, 1964, on July 2, 1964, 188 years after the Declaration of Independence: "We believe that all men are entitled to the blessings of liberty - yet millions are being deprived of those blessings, not because of their own failures but because of the colour of their skins." quoted by K.Greenwalt, op.cit.p.248.
4. As stated in the country's Declaration of Independence.
5. Liberian Constitution, 1847, Article 1.

from its independence in 1847. Yet until recently the aborigines were treated in spite of the Bill of Rights, exactly as the whites had treated the founding fathers of Liberia.

It would thus seem that had the Nigerians been invited by Whitehall in1958 to decide, in a constituent assembly, the form which the rights they were about to accord constitutional protection would take, they would probably have used, as a basis for their discussion, the Universal Declaration and the Rome Convention. The probable outcome would have been provisions as close to the present Chapter III of the Constitution as could be. In the final analysis therefore, the Minorities Commission's prompting was, as we have suggested, a time and energy saver.

Sierra Leone had no hesitation in adopting the Nigerian model[1] though with some departures.[2]

In Uganda, writing fundamental rights into the constitution proved attractive to policital leaders on the eve of independence because of the acuteness of the rivalry between

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1. Constitutional Conference Report, 1960 Cmnd. 1029 pp.4;16-21.
2. Chapter II Sierra Leone (Constitution) Order in Council, 1961 (S.I. 1961 No. 741).

parties, regions and individuals. The Munster Commission had recommended verbatim reproduction of the Nigerian provisions as well as the establishment of a Council of State on the Kenyan pattern.[1] The latter recommendation was however, rejected since it was felt that a Bill of Rights contained ample safeguards against discrimination.[2]

The paramount intention of Uganda's Bill of Rights[3] (which though modelled after the Nigerian provisions was not a verbatim reproduction of the latter as envisaged by the Munster Commission) was to limit the powers of the government lest it yielded to the temptation as in some other African countries to adopt an increasingly arbitrary or authoritarian approach to its powers and responsibilities. The immigrant communities particularly the Asians, with their important commercial and proprietary interests, found the provision for the protection of property rights especially attractive.

Kenya's inclusion of a Bill of Rights in the Constitution was almost a matter of course, since none of the political

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1. Report published in Entebbe, 1961.
2. Constitutional Conference Report,1961 Cmnd. 1523,pp.29-30; Report of the Independence Conference, 1962 Cmnd.1778 p.4; Y.P.Ghai, "The Kenya Council of State...." (1963) 121.C.L.Q. 1106.
3. Chapter III, Constitution of Uganda, 1963.

parties dissented from it. Mr. Ronald Ngala, who handed the former Kenya African Democratic Union (K.A.D.U.) delegation told the 1962 Constitutional Conference that the proper working of democracy and the Rule of Law demanded such an arrangement.[1] The Kenya African National Union (K.A.N.U.) for its part had always regarded a Bill of Rights as less objectionable than regionalism, as tending to promote national unity rather than disunity. Moreover, KANU leaders were intent on demonstrating to the suspicious elements in the country and to the outside world their dedication to the Rule of Law. As in Uganda, the immigrant communities, more notably the Europeans (with their considerable farming interests) welcomed the protection afforded by the constitutional guarantees. The result was the adoption of the Ugandan provisions adapted where necessary to render them applicable to Kenya. An unusually stiff method of entrenchment was employed but the republican constitutional amendments[2] have since relaxed these entranchment provisions to bring them into line with what obtains in other countries.

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1. (1962) 14 B.I.C.J.p.20.
2. 1964, Act No. 28 ; 1965 Act No. 14 .

In the now defunct Central African Federation, support for a constitutional guarantee was lukewarm though the Monckton Commission had come out clearly in favour of bills of rights for the Federation and its three component territories.[1] A committee of officials was appointed in 1960 to consider possible constitutional changes, but did not appear to take very kindly to the idea of a constitutional guarantee though the committee's thorough examination of the idea of constitutional guarantees helped to clarify the problems involved not least of which was that of definition.[2] Furthermore, the inevitable exceptions to the declared rights might have been misunderstood in the particular circumstances of the Federation.

In the former Nyasaland (now Malawi), attitude to fundamental rights was at first cautious. At the Constitutional Conference of 1960, it was decided that constitutional guarantees of fundamental rights would be premature.[3] The 1962 Conference, however, reversed this decision; there was a general agreement that the proposed constitution should

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1. Report, 1960 Cmnd. 1148.
2. Report of the Advisory Commission on the review of the Constitution of the Federation of Rhodesia and Nyasaland. (1960) Cmnd. 1150 Appendix VII.
3. Report, 1960, Cmnd. 1132 p.8.

contain a Bill of Rights based on the Uganda provisions.[1] It is noteworthy that Dr. Kamuzu Banda who led the Malawi Congress Party at the Constitutional conference did not object to an enforceable Bill of Rights; but he saw it not as a protection for minorities, the true guarantee for whom was the goodwill of the majority and democratic justice.[2]

Yet, not long after independence, voices might be heard in Malawi denying that the people of Malawi ever wanted a Bill of Rights. It was a British idea, a regrettable one at that, bearing in mind that the British Parliament is sovereign; it was indefensible to deny others their right to a Parliament as sovereign as Britain's.[3]

In neighbouring Northern Rhodesia (as Zambia was then known), the politicians as independence approached, expressed a determination to make a real success of a multi-racial society in their country. Indeed, Mr.Kenneth Kaunda (as he then was) frequently mentioned among the things which his country badly needs, "a colour-blind society",

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1. With certain enumerated modificiations. Report of the Nyasaland Constitutional Conference, 1962. Cmnd.1887. pp.8, 21-23.
2. Neither would a Council of State adequately protect them. Ibid, p.8.
3. This point of view appears to have won the day as the proposed changes in the constitution for a republic do not provide for a Bill of Rights. The Times, October,18, 1965.

freedoms of speech and of movement.[1] It is hardly surprising therefore, that the 1963[2] Constitution contained a Bill of Rights whose provisions were returned in the Republican Independence Constitution of 1964.[3]

As in Malawi, however, there are some politicians in Zambia (remarkably, not confined to the African race) who genuinely feel that constitutional guarantees were a "luxury" which "go-ahead" unity-seeking new states of Africa could scarcely afford. It would have been better, so the argument runs, if the British did not saddle them with these guaranteed rights.

How accurate is this idea that Britain has made constitutional guinea-pigs of her former colonies? We have noted how the leaders of other African Commonwealth countries, especially Nigeria, relentlessly pressed for the inclusion of these rights in their constitutions. Another instance of unprompted preference for fundamental rights comes from a country with a non-British background or influence: the Congo (Leopoldville) whose Loi Fondamentale,

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1. Cf. his discussion with Colin Morris in Black Government (1960) Chapters 3 and 4.
2. S.I.No. 2088.
3. 1964 No. 1652.

unratified but partially applied in practice, provided for certain fundamental rights which, in some cases, were more protective of individual freedoms than the corresponding European provisions.[1] This was one of the few points on which there was complete unanimity amongst the delegates (- including the Congolese political leaders) at the now famous Round Table[2] Conference.

The Constitution of the Somali Republic (made up of the former Italian Somalia and the former British Somaliland) also makes provision for enforceable fundamental rights.[3] The decision in favour of constitutional guarantees was not only unanimously reached by the politicians but was also approved in a referendum by the people to whom the Constitution was submitted for popular endorsement.[4]

Framework of the rights guaranteed: The ideas expressed in the various Bills of Rights are broadly similar though in the non-Commonwealth countries, Somali Republic, for instance, social rights are included.

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1. Vasak, op.cit.p.1221.
2. Cf. Five African states (ed.G.Carter) (1964) 90.
3. Cf. N.Noor Mohammad, "The Rule of Law in the Somali Republic" (1964) 5 J.I.C.J.275.
4. 90.6 per cent of those who voted supported the Constitution. Ibid.,pp.278-279.

I now propose to examine more closely the contents of the bills of rights in Commonwealth Africa where the clauses are fairly uniform and such variations as are found have been dictated either by local conditions or by drafting improvements.[1] Zambia's declaratory section is typical.[2]

> "Whereas every person in Zambia is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, [tribe] place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely -
>
> (a) life, liberty, security of the person and the protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and
>
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation."

The section concludes with the usual limitations on declared rights to ensure that their enjoyment by any individual does not prejudice the rights and freedoms of others or the public interest. Subsequent sections amplify

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1. Cf. de Smith, The new Commonwealth and its constitutions, p.193.
2. s.13.

the substantive rights guaranteed,[1] derogation from which is only possibly in two instances:

(i) in normal times, if an impugned law or act apparently contravening a protected right is reasonably justifiable in a democratic society (Nigeria, Sierra Leone) or is "reasonably required in a democratic society" (Uganda, Kenya, etc.)

(ii) in periods of emergency, the rights may, subject to certain exception be suspended.

II. Group B countries.

The most important feature of the rights guaranteed in Group A constitutions is that the remedy of judicial enforcement of the rights is itself a fundamental right. Group B countries by contrast, enumerate these rights without providing a legal remedy for their violation. The francophone states exemplify the latter approach. The preamble to their respective constitutions proclaims the people's attachment to the French Declaration of Rights of Man and the Citizen of 1789 and the Universal Declaration of 1948.[2] A chapter of the constitution[3] then proceeds to enumerate certain

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1. See further Chapter 7, post.
2. Cf. Constitution of the Republic of Senegal, 1963, Law No. 63-22 of 7 March, 1963.
3. e.g., Senegal, Chapter 2.

"public and personal liberties" though in a rather imprecise language. To take just one example, Article 8 of the Senegalese Constitution which deals with freedom of expression and the right to education reads thus:

> "Everyone has the right to express or diffuse freely his opinion through speech, writing or image. Everyone has the right to educate himself without hindrance at sources accessible to everybody. These rights find their limits in legal prescriptions and rules as well as in the respect of another's honour."

There are no standards laid down which the "legal prescriptions and rules" referred to in the article must satisfy. There is, however, a salutary rule, that only an organic law can abridge or suspend the stated liberties.[1]

Ghana and Tanzania belong to the Group B countries but since they both claim to have adopted the British approach, further comments on their attitude to fundamental rights are reserved for Chapter Two.

Efficacy of rights guaranteed.

It is pointless to have a declaration of rights which

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1. Article 56. An organic law requires absolute majority of the members of the National Assembly. It must be submitted by the President to the Supreme Court for a declaration of its constitutionality before its promulgation. Article 67.

is hedged about by fundamental provisos as is Chapter VI of the Constitution of Rhodesia, 1961.[1] Such ineffectual guarantees leave the courts little, if anything, to enforce.[2]

Above all, nothing can stop a determined government from abrogating these rights (unless they are further internationally guaranteed) as we saw in the case of the high sounding fundamental rights written into the Weimar Constitution.[3] South Africa's wanton and deliberate dismantling of the entrenched clauses in its constitution (a prelude to the introduction of the iniquitous apartheid policy) is also illustrative of the doubtful efficacy of entrenched clauses as against a government resolved to destroy them.[4]

The foregoing observations would have shown that the Rule of Law is not necessarily co-terminous with a bill of rights. Moreover, although the bills of rights in the various African countries provide for the expeditious enforcement of the guaranteed rights, and for the fair and

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1. S.I.1 No.2314.
2. See esp. ibid s.65(3); "Southern Rhodesia, human rights and the Constitution" (I.C.J. Study) (1964) 18 B.I.C.J.43.
3. Article 143 of the Basic Law of the Federal Republic of Germany, 1949 provides for criminal sanctions against those who subvert the constitution from within, in an attempt to prevent Hitler-type subversion. Cf.Friedrich op.cit.
4. For a legal discussion of the wrecking process see, Cowen op.cit. p.43 et seq; also B.Bunting, The rise of South Africa Reich (1964).

impartial determination of other causes, they do not deal with conditions necessary to secure an independent judiciary without which, as Dr.O.Odumosu in writing about Nigeria has pointed out, the fundamental right provisions would be a sham.[1]

The key to the whole problem is the independence of the judiciary. A comprehensive account of the Rule of Law must therefore deal separately with the position of the judiciary and the rules of practice and procedure which make for a fair trial. Since the concept of fair trial is undoubtedly Britain's most outstanding contribution to civilization,[2] it is to that country that we turn in the next chapter, for an examination of the practice in countries whose constitutions contain no entrenched fundamental rights.

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1. op.cit. p.251.
2. Cf. Goodhart, "Legal procedure and democracy" [1964]. C.L.J.51.

CHAPTER TWO

THE BRITISH APPROACH

Protection of fundamental rights without explicit constitutional guarantee.

It is a paradox that Britain which has played a leading role[1] in the crusade for an effective international guarantee of human rights had never adopted any general system of constitutional guarantees. Clement Attlee (as he then was), was asked when Prime Minister if the Government would take steps to make the Universal Declaration of Human Rights legally binding in Britain and the Colonies. He replied that no such steps were necessary because Britain and the Commonwealth probably approached more nearly to reaching the ideals enshrined in the Universal Declaration

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1. The United Kingdom initiated the text of the draft International Convention which served as a basis of discussion in the Drafting Committee of the Human Rights Commission, see These Rights and Freedoms, (1950) 87. In the European arena, the United Kingdom was the first to ratify the European Convention, see Robertson, op.cit. p.14. It may be wondered, if these rights are already internationally guaranteed, why bother about state guarantees? However, the dualist theory which prevails in England, requires an Act of Parliament to give an international obligation a binding effect in municipal law: Chung Chi Cheung v. The King, (1929) A.C. See also, N.S.Marsh, "Civil liberties in Europe", (1959) 75 L.Q.R. 535-7; Philippe Comte, "The application of European Convention on Human Rights in municipal law", (1963) 14 J.I.C.J.99.

than any other country in the world.[1] We may recall too, the tirade of Bentham on the French Declaration of the Rights of Man,[2] Dicey's apparent complacency on the generality of the rights of Englishmen;[3] the outright dismissal of a constitutional guarantee for India by the Simon Commission on the Indian Constitution,[4] which received the warm endorsement of the Joint Parliamentary Committee on Indian Constitutional Reform;[5] and the firm, if polite, rejection of the value of a bill of rights by eminent constitutional lawyers like Sir Ivor Jennings[6] and Professor K.C.Wheare.[7]

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1. 460 H.C. Deb. Cols. 16-17. He noted also that the Declaration was not a Covenant.
2. "Look to the letter, you find nonsense --- look beyond the letter, you find nothing --- Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense --- nonsense upon stiles." "Anarchical Fallacies", in Works (ed. Bowring), Vol. 2, pp. 497, 501, see further, de Smith, The New Commonwealth and its constitutions p.164.
3. He rates the Habeas Corpus Acts the equivalent of a hundred constitutional articles guaranteeing individual liberty; Introduction to the study of the law of the Constitution, 10th ed., p. 199.
4. Report (1930) Cmnd. 3569, 22-23.
5. H.L. 6 and H.C. 5, (1933-34), 215-218.
6. The approach to self-government, (1956) 110: Some characteristics of the Indian Constitution, (1953) 3-4, 48, Democracy in Africa, (1963) 79-81.
7. Modern constitutions (1960), 71.

Why have rulers, statesmen, and constitutional lawyers in Britain, down the centuries, frowned at the notion of constitutional guarantees? Are the British subjects any poorer for it? For an answer to the first question, we must delve into English history; the second calls for an appraisal of current constitutional practices.

Historical experience.

The British Constitution will not be found set out in one document. Thomas Paine, a fanatical constitutionalist who sees a constitution as the grammar of liberty,[1] castigates the English Parliament as "merely a form of government without a constitution", and therefore exercising power without right. Paine would seem here to overstate his case. The Septennial Act, 1716, the object of his violent attack, described by him as "a conclusive proof that there is no constitution in England", is but one of many statutes[2] which together with customs and conventions

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1. "Rights of Man" in Complete Works.
2. A few examples would suffice: Magna Carta, 1215; the Habeas Corpus Acts, 1640-1816; Petition of Right, 1628; Bill of Rights, 1689; Act of Settlement, 1701; Act of Union, 1706; Reform Acts 1832-1928; Parliament Acts, 1911 and 1949; Statute of Westminster, 1931; Peerage Act, 1963. See generally, Costin and Watson, The law and working of the constitution (1952) Vols. I and II.

regulate the English system of government.[1] But Paine's grievance against the English practice goes deeper than the absence of one-text constitution. He appears to use the term "written constitution" in the American sense of a superior law to which all other laws, institutions and persons shall be subject. Perhaps the absence of a written constitution in this sense highlighting the flexibility of the British approach, primarily explains the lack of a comprehensive Bill of Rights in Britain.[2]

Lord Denning has said:[3]

> "We have worked out our constitutions on purely practical grounds based on our experience and our needs. We think it would be unwise to put anything down because it would be difficult to adapt to changing needs".

In other words, reasons of historical experience and perhaps a conscious preference for adaptable rules dictated the pragmatic British approach. One might feel sceptical

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1. L.S.Amery, Thoughts on the constitution, (1953) 1. Marshall and Moodie, Some reflections on the constitution, Chaps. I and II.
2. Lauterpacht, op.cit.p.127.
3. The independence of the judges (Presidential address to Holdsworth Club, Birmingham), (1950), 2.

about the suggestion of a deliberate choice[1] in these matters without doing violence to the other and more decisive factor, historical experience. Because the pragmatic approach has adequately served British needs,[2] there has never been cause to pause formally to consider an alternative system.

As far back as 1612, Sir John Davies, then Attorney-General for Ireland, wrote:

> "Neither could any man ever vaunt, that, like Minos, Solon, or Lycurgus, he was the first Lawgiver to our Nation: for neither did the King make his own Prerogative, nor the Judges make the Rules or Maximes of the Law, nor the common subject prescribe and limit the Liberties which he enjoyeth by the Law ..... Long experience and many trials of what was best for the common good, did make the Common Law".[3]

He went on to equate common law with "Customary Law ..... the most perfect and most excellent, and without comparison the best to make and preserve a Commonwealth".[4]

Contrary to Davies's claim, common law has not always been, nor would it long remain self-sufficient.

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1. But Professor de Smith speaks of instinctive preference for "pragmatism to metaphysics", The new Commonwealth and its constitutions, p. 166.
2. Cf. Ezejiofor, op.cit. p.156.
3. Preface to Irish Reports (1612); see further, J.G.A. Pocock, The ancient constitution and the feudal law, (1957) 30-41.
4. Ibid.

At one time, and not infrequently, the Law of Nature was invoked, "as the canonists and the civilians do when a new case comes up concerning which they have no existing law",[1] to fill gaps in common law. Indeed, not until after 1600, spurred on by Coke's vigour, did common-law thought begin to turn its eyes "inward upon the past of its own nation which it saw as making its own laws untouched by foreign influences, in a process without a beginning".[2] We are further reminded that

> ".....a common lawyer who was a mature man at the time of Coke's birth [1552] would not have thought quite as Coke was to do half a century later. He would have been far more aware of the civil law as a part of the English fabric, and far more open to the mediaeval concept of law as a thing universal, more important in its universal characteristics than in its local and municipal manifestations. His mind would probably have been less insular than Coke's, less massively convinced that English law was the common law; and his interpretation of English history would have differed accordingly".[3]

Nevertheless, the cult of the antiquity of the common law triumphed. Common law was proclaimed as having existed since time out of mind. The Law of Nature was not

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1. Per Yelverton C.J., V.B. 8 Edw. IV, 21, and further, H.H.Marshall, Natural Justice, (1959) 7.
2. Pocock, op.cit., p.41.
3. Ibid., p.31.

as such ruled out of court. In as much as it was immemorial, it was held to be part of the timeless common law. The latter's character has somewhat changed too. It was looked upon less in Davies' rendering of it as Custom, tried and approved by passage of time "during which ... there did thereby arise no inconvenience",[1] than in Coke's conception of it as judge-made law. Henceforth, it would be for the judges to find and declare it with precision and, from time to time, to renew it by application to the matter in hand.[2]

How would the judges set about finding this law? Coke insisted, by "artificial reason".[3] Many years before, Christopher St. Germain had emphasised the place of reason in English law.

> "It is not used among them that be learned in the laws of England to reason what thing is commanded or prohibited by the law of nature, and what not, but all the reasoning is under this manner, as when anything is grounded upon the law of nature they say that reason will that such a thing be done, and if it be prohibited by the law of nature they say it is against reason or that reason will suffer it be done".[4]

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1. Preface to Irish Reports.
2. Pocock, op.cit., p.35.
3. Prohibition del Roy, 12 Co. Rep. 65.
4. Doctor and Student (1569), f.8 recto; but see Sharington v. Stratton (7 and 8 Eliz.), 1 Plowden, 303 and further J.W.Gough, Fundamental law in English constitutional history (1955), 17-18.

As would be apparent from this passage, far from denying the validity of the law of nature, St. Germain not only affirmed it but ascribed to it a high authority, though giving it a different name: the law of reason. He put it first even above the law of God in his list of six "grounds" of the law of England."[1] With the eloquence of Cicero, he urged everybody to keep it:

> "...And it is written in the heart of every man teaching him what is to be done, and what is to be fled. And because it is written in the heart therefore it may not be put away .... and therefore against this law, prescription, statute nor custom may not prevail. And if any be brought against it, they be no prescriptions, statutes, nor customs, but things void and against justice".[2]

In a line of cases, Coke proceeded to give judicial blessing to this notion of the Law of Nature as a higher law. It was part of the law of England and Parliament could not take away the protection which it afforded the subject.[3] In the celebrated Dr. Bonham's Case[4] he repeated his contention that an Act of Parliament if "against common right and reason or impossible to be performed, the common law

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1. Gough, op.cit. p.18.
2. Ibid., f.4 recto.
3. Calvin's Case (1608) 7 Co. Rep. 1a.
4. (1610) 8 Co. Rep. 107a.

will controul it." Again in Day v. Savidge,[1] he held that "an Act of Parliament made against natural equity, as to make a man judge in his own cause, is void in itself; for jura naturae sunt immutabilia and they are leges legum." [2]

Now that the supremacy of Parliament has been firmly established, Coke's views sound heretical, but they should be seen in their historical context. Indeed, his opinion was not untypical of his Age.[3] Thus in Calvin's Case, Bacon who appeared for Calvin stressed that the Law of Nature favoured "life, liberty and dower" and since English law was grounded in the Law of Nature, it should do the same: "all national laws whatsoever are to be taken strictly and hardly in any point wherein they abridge and derogate from the law of nature".[4]

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1. (1614) Hobart 85.
2. Ibid, 87.
3. Even James I notwithstanding his absolutist claims subscribed to the idea of a fundamental law and the advantages of government according to law. He was reported to have asked, "if fundamental laws of any kingdom should be altered, who should discern what is meum and tuum, or how should a king govern?" Gough op.cit. pp. 48-65. As late as 1701, Holt C.J. in the City of London v. Wood (12 Mod. 669, 687) affirmed Coke's judgment in Dr. Bonham's Case, which Holt thought "far from extravagancy". See also R.v. Earl of Banbury. For a fuller discussion consult McIlwain, The High Court of Parliament (1934) 42-100.
4. Quoted by Gough op.cit. pp. 45-6.

It seems obvious from Bacon's plea that moral principles or principles of reason in the abstract have been pushed to the background in favour of specifically defined and practically enforceable liberties and rights, in particular, the rights of property and of personal freedom.[1] It was there that Coke sought to defend and uphold rather than protest judicial supremacy vis à vis parliament and king. Gough's observations are apposite. Coke, he says, "undoubtedly believed that the ancient laws, from Magna Carta onwards (whether his history was right or wrong is irrelevant), were the essential and fundamental guarantees of the rights and liberties of Englishmen, but he had no reason to think that parliament wanted arbitrary power and would threaten to subvert them. Indeed it never entered into anybody's head that such a thing could happen. If anybody threatened the liberties of the subject it was certainly not parliament but the king and his supporters."[2]

Curb on royal power.

The Danes had created one nation out of the petty Anglo-Saxon kingdoms. The Norman Conquest brought in

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1. Ibid. pp. 23; 60-65.
2. Ibid. pp. 57.

William the Conqueror who was determined to consolidate that unity[1] by entrenching the king as the undisputed authority in the realm. His successors at no time relaxed efforts in this direction. A useful instrument for the attainment of this objective was found in the centralization of all the branches of government, notably that dealing with the administration of justice.

Under the new system, the king maintained his own panel of judges who travelled all over the country as itinerant justices presiding over Assize Courts. Removed from local prejudices and sentiments, the king's judges were able to dispense justice with fairness. It was perhaps, more because of this apparent impartiality than because of the superior coercive powers possessed by the central government that the royal courts attained an unrivalled stature[2] over the local courts of which there were legion. But the local people were not entirely excluded from the administration of justice even in the royal courts. One of the great reforms of Henry II[3] was

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1. C.K.Allen, The Queen's peace, (1953)23-27.
2. Thus the king was firmly established in mediaeval legal theory as the fountain of Justice. See Allen, ibid, pp.30-33.
3. The procedural aspects of the king's reforms have received the unanimous acclaim of legal historians, see Hanbury's English courts of law (1960), Ch.II. Roscoe Pound would even go so far as to date the Rule of Law definitely from Henry II: The development of guarantee of liberty, (1957).

the inauguration of the jury procedure[1](which later proved a strong safeguard of liberty) by the adaptation of the administrative procedure of "an inquest of the country," which was used by the Norman kings for the ascertainment of their fiscal rights.[2]

No sooner had Henry II's son, John, ascended the throne than he began to undermine the achievements of his father. He used the machinery of the central government to oppress his subjects. It was the barons, with their superior economic power who confronted, with remarkable success, the tyrannous but weak King John. The outcome was the promulgation of Magna Carta at Runnymede in 1215. These charters[3]made important concessions to the barons at the expense of the Crown. The relations of overlords and tenants-in-chief and the reciprocal duties and claims therefrom were precisely and clearly defined.[4]

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1. Though the archaic methods of trial such as ordeal or compurgation intended to be displaced persisted for quite a while. See Plucknett, A Concise History of the Common Law. (1956) pp. 118-119; 425, n.6; Ashford v. Thornton 1 Barn & Ald. 405.
2. But see another view by H.Richardson and G. Seyles, The Governance of Mediaeval England, (1963)
3. There were four in all.
4. Pound, The development of guarantee of liberty, p.21.

Political problems are never solved in isolation,[1] hence the barons' gains later became the people's gains. The very general terms in which the most significant clauses were couched has permitted a rather free interpretation so as to extend their application to the people in general.[2] A reading of the two clauses widely recognised as "giving warranty to some of the Englishmen's mostly deeply held political beliefs"[3] would bear this out:

> "39. No free man shall be seized or imprisoned or stripped of his standing or possessions or outlawed or deprived of his standing in any other way, nor will one proceed with force against him or send others to do so except by the lawful judgment of his equals or by the law of the land."
>
> "40. To no one will we sell, to no one deny or delay right or justice."

While there was implicit in these clauses the recognition and protection of the liberties of Englishmen, yet in addition, they effectively delimited a zone to which the king's powers would no longer extend, and which we now

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1. Even the specific clauses of the charters did not all deal with the barons' grievances; for example, the very first article provided for the redress of the grievances of the Church thus recognizing a fundamental division of power between the spiritual and the temporal.
2. Holdsworth, A history of English law, (1923-56),II,p.196; IX, p.113. See also a recent tribute to the language of Magna Carta, by Lord Denning, "Runnymede, fount of English liberty", The Times, June 9, 1965.
3. G.R.C.Davis, Magna Carta (1963) 13.

know as the judicial sphere. The determination of the citizen's rights and the redress of wrongs to him, were henceforth to be the preserve of the courts of law.[1] As might be expected, the king did not suffer gladly this substantial reduction in his authority and sought to modify the charter provisions by calling on the obliging Pope Innocent III to declare them null and void, on the ground that they had been extorted from him under duress; but the intervention from Rome was of no avail. King John's successors stood by the charters and were wise enough to confirm and re-issue them from time to time. Finally, Edward I, in collaboration with the emergent Parliament, put Magna Carta on the statute book in 1297.[2]

The courts entrusted by Magna Carta with the exclusive duty of determining "the law of the land" were still royal courts presided over by judges who were royal

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1. Here is the foundation of the doctrine of separation of powers, which the French thinker Montesquieu was later to find very attractive. He was, however, mistaken in instancing the English constitution as displaying this doctrine in the sense that three separate legal powers existed in the realm, Legislative, Executive and Judicial. The influence of Montesquieu's interpretation of the English Constitution is evident in the Constitution of the United States of America. But the more realistic separation of powers is the one contemplated by Clause 39 of the Charter, i.e., into strictly governmental (viz. the executive and the legislative treated as one) and judicial matters. See McIlwain, Constitutionalism, etc. p.81 . and Dennis Lloyd, The idea of law (1964) II.
2. Plucknett, op.cit. p.23.

servants. James I underlined this anomaly in the famous Case of Proclamations,[1] when he claimed that, as the Supreme Judge in the realm, he could decide the issue himself. After all, he argued, the law was founded on natural reason which he possessed as much as anyone else. But the tough and resourceful Sir Edward Coke, newly appointed Chief Justice of the Common Pleas, resisted the king's attempted usurpation of the judge's functions.[2] He did not deny that the King was blessed "with excellent science and great endowment of nature," but he firmly reminded the king that the latter was not learned in the laws of his realm, he could not perform judicial functions, and that this specialist function was to be reserved for judges who had been specially trained in and sworn to execute justice according to the laws and customs of England. They alone "by artificial reason" could declare what the law was. The angry king retorted that Coke's view implied that he (the king) should be under the law, which was a treasonable utterance. Coke's shield was a quotation attributed to

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1. Prohibitions del Roy, (1608), 12 Co. Rep. 63-65.
2. See Levy-Ullman, The English Legal tradition (1935), and Holdsworth, H.E.L., V, 420 et seq.

Bracton:[1] Rex non debet esse sub homine sed sub Deo et sub lege.

Coke's judicial boldness did not go unpunished, though his retribution came on another occasion. He was dismissed from his office[2] in 1611, having failed to justify to the king's satisfaction, his practice of encouraging aggrieved claimants to seek common injunctions in Chancery; though the last was not yet heard of him. In later years as a Member of Parliament, he led the movement that secured the adoption in Parliament of the Petition of Right in 1628.

The Petition reaffirmed the validity of Magna Carta according to which, "as also according to the most ancient Customs of this land, every free subject of this realm hath a fundamental propriety in his goods, and a fundamental liberty of his person".[3] An attempt was made

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1. Maitland, Selected Historical Essays (ed. J.M.Cann) (1957) 118. Chancellor Egerton thought Coke's claims were, at that time, extraordinary, see his observations quoted by Holdsworth, H.E.L. V, 430. But William, Earl of Pembroke was reported to have confronted the King in nearly identical circumstances and with very similar arguments. J.M.Zane, "The five Ages of the Bench and Bar in Select Essays in Anglo-American legal thinking (1907) 648.
2. It has been said that he was brought down by the four P's. Prohibitions, Praemunire, Prerogatives and Pride. Levy-Ullman, op.cit., p.228.
3. Lord's Journals III 769, Rushworth, I 546, and further, Gough op.cit. p.63.

by some of the Lords to insert a clause explicitly safeguarding the royal prerogative "Sovereign Power", which provoked Coke's much quoted speech.[1]

> "This is magnum in parvo...and to speak plainly it will overthrow all our petition... I know that Prerogative is part of the law, but sovereign power is no parliamentary word. In my opinion, it weakens Magna Charta and all our statutes; for they are absolute, without any saving of sovereign power...Take we heed what we yield unto, Magna Charta is such a fellow, that he will have no sovereign. I wonder this sovereign was not in Magna Charta or in the confirmations of it. If we grant this, by implication we give a sovereign power above all these laws....What it means here, God only knows: it is repugnant to our Petition".

The next phase in the contest between king and judges proved the fiercest, with very far-reaching consequences, culminating in the Glorious Revolution. The demands that were made by the conflict were perhaps too much for the judges to bear. The stream of able and courageous lawyers available for appointment to judicial office suddenly dried up. Typical of the judges of this era was Jeffreys, who had gone down in history as the author of the "Bloody Assizes", though he seems to have had

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1. Quoted in Gough op.cit., at p.64.

more than his own share of the blame for the lapse in judicial standards during the period.[1] Commentators tend to ignore his advice against the indictment of the seven Bishops which James II flatly rejected. The subsequent acquittal of the Bishops was a singular victory for law and justice,[2] pressed home by Herbert C.J. when he held that the Army could not be governed by martial law.[3]

King James II reacted to each unpleasant judgment by dismissing the judges and reconstituting the Bench in the hope that he would eventually get twelve lawyers for judges who were all of his own way of thinking, especially over his contention that the king could dispense with Acts of Parliament by Proclamation. He was warned by Jones, a Lord Chief Justice, "Your Majesty may find twelve judges all of your own way of thinking, but never twelve lawyers".[4] This was a heart-warming tribute

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1. Zane, op.cit.pp.705-707,see also G.W.Keeton, Lord Chancellor Jeffreys and the Stuart cause (1965).
2. See R.E.Head, Royal supremacy and the trials of bishops, (1962) Ch.6.
3. This meant every soldier was subject to the general law like the civilians, but not for long: in 1689, the Mutiny Act set up Councils to administer military law. The Act was provisional and was renewed from time to time. For the sources of military law today, see the Army Act, 1955; Air Force Act, 1957 and the Naval Discipline Act, 1957. The link with the general law is nevertheless, maintained through the writ of habeas corpus and the prerogative orders. See Dahmel and Smith.
4. Zane, op.cit.

to the uprightness of the English Bar, but it serves also as a useful reminder that the much-sought after judicial independence presupposes a courageous and indepent Bar.

Independence of the Judiciary.

James II, having exhausted the indulgence of the people, had no choice but to flee the realm. His place was taken by William of Orange and his wife Mary, who had been invited by Parliament to the throne. The first act of the joint Sovereign was to endorse the Bill of Rights of 1689 which while settling the issue of the succession to the Crown declared as well the rights and liberties of the subject. It also put one constitutional doubt to rest. We have seen how the judges resisted royal interference with the course of justice. The judges are upheld by the Statute in their view that the royal pretensions to the power to dispense with the law, and in some cases to cancel it altogether, were illegal. However, the more subtle method of interference such as the peremptory dismissal of unpopular judges by the Crown, was not dealt with in the Bill of Rights.

Section 3 of the Act of Settlement 1701 saw to that by making the superior judges dismissible, not at the pleasure of the Crown but while/of not good behaviour and by an address to both houses of Parliament. The exact interpretation of this provision is not free from controversy. Sir Kenneth Roberts-Wray suggests[1] that the judges hold office during good behaviour provided they may nevertheless be removed on a Parliamentary address. They could be removed for misbehaviour by such means as proceedings by scire facias and criminal information,[2] impeachment or the exercise of the inquisitorial and judicial jurisdiction of the House of Lords. Parliament has, however, reserved to itself the overriding power to get rid of a judge who no longer commanded its confidence. This is so because Parliament could present an address for the removal of a judge for any cause. Sir Kenneth finds support for his view in the present law set out in section 12 (1) of the Supreme Court of Judicature (Consolidation)Act 1925.[3]

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1. "The independence of the judiciary in Commonwealth Countries" in Changing law in developing countries (ed.J.N.Anderson) (1963) 70-72.
2. Both processes were abolished by the Crown Proceedings Act, 1947.
3. "All the judges of the High Court and of the Court of Appeal with the exception of the Lord Chancellor shall hold their offices during good behavious subject to a power of removal by His Majesty in an address presented to his Majesty by both Houses of Parliament." But see section 2 (1) of the Judicial Pensions Act, 1959 which imposes a retiring age of seventy-five on judges, though existing judges at the time the Act came into force would not have to retire against their will: s.3.

Lord Denning, on the other hand, is of the opinion that a judge could not be removed except for misconduct and even then there must be a petition from both Houses of Parliament.[1] This interpretation rules out the removal of a judge by means other than parliamentary address, but appears to impose a condition - a proved judicial misbehaviour - before Parliament could proceed on an address.

As only one judge[2] has ever been dismissed since the Act of Settlement, one cannot as yet be categorical as to which of the suggested procedures accurately reflects the law in practice. Lord Denning is probably correct in holding that only Parliament could remove a judge. Should an occasion arise to take disciplinary action against a judge for acts that would have necessitated the use of one of the "other means" listed by Sir Kenneth, Parliament would step in with a substantive motion praying Her Majesty to remove the "unfit" judge. In other words, those acts would amount to a "sufficient" cause either for Parliament to act independently or to confirm proceedings initiated by "other means". But with respect, Lord Denning's condition that

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1. The independence of the judiciary etc., p. 7 Cf. 9. Halsbury's Laws of England (1961) 415.
2. In Ireland in 1830.

Parliament could only act on grounds of the misconduct of a judge does not accord with the doctrine of the sovereignty of Parliament. Admittedly, the view allows for what is permissible in a true democracy, since public opinion would not suffer an irresponsible dismissal of a judge; yet it is necessary to be clear on the rules as theoretically laid down, while also noting the important gloss which conventions have placed upon their application. Thus Sir Kenneth sums up the position:

> "It is said that Judges are independent. Independent of whom? Not of Parliament which can secure their dismissal. Not of the Executive in the shape of the Government of the day which can control the decisions of Parliament. Of course this is theory. The conflicts between the legislative and the judiciary during the eighteenth and nineteenth centuries have established a wealthy tradition of natural respect for each other's rights, and if today an address for the removal of a Judge were to be proposed, one would be confident that there would be no question of putting on the Party Whips."[1]

On the whole, judges have a fairly secure tenure. Their salaries[2] and pensions[3] are charged on, and are paid out of, the Consolidated Fund.[4] Their mode of appointment is usually mentioned as a further method of securing their

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1. op.cit. p.72.
2. Supreme Court of Judicature (Consolidation) Act,1925, s.13.
3. s.14.
4. s.15.

inedpendence. This is arguable having regard to their appointment on the Prime Minister's recommendation though no Prime Minister would readily throw overboard the now settled convention that appointment to the Bench must be the climax of a leading barrister's careers,[1] and in recent years, a strong tradition has developed of ignoring political considerations when filling judicial vacancies.[2] Moreover, unlike the position in France, career judges are unknown in England. This is not to say that a judicial hierarchy does not exist in England, rather that promotion within it does not offer such attractions as would tempt a superior judge to submit to political pressure in order to move up the ladder. For instance, the salaries of the judges of the High Court, the Court of Appeal and of the House of Lords are kept on nearly the same level.[3]

The fear of possible civil and criminal actions against the judges for their judicial acts may impair their

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1. By s.9 only a barrister with no less than ten years' standing could be appointed as a puisue judge. The Prime Minister (Sir Winston Churchill) answering a question in the House of Commons in 1955 said: "It is, has long been, the practice to appoint as judges those who are held to be best fitted for judicial office." 536 4 c. Deb.Col.902.
2. Dennis Lloyd The idea of law, p.257. But the office of Lord Chancellor is clearly political, s.12 (1).
3. Lloyd, ibid., p.258.

impartiality, hence the immunity from such actions conferred on judges of the superior Courts. Crompton J. in Fray v. Blackburn[1], stated the rule and its rationale as follows:

> "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act though it be alleged to have been done maliciously and corruptly .... the public are deeply interested in this rule which indeed exists for their benefit and was established in order to secure the independence of the judges and prevent their being harassed by vexatious actions."

Lord Esher in Anderson v. Gorrie re-affirmed the rule emphasizing that the immunity would still exist even if the acts or words of the judge were not done or spoken in the honest exercise of his office.[2] The rule as it stands today is obviously too wide, nor is the distinction between superior and inferior courts in this respect supportable.[3] Professor Winfield[4] does not wholly dissent from the criticism

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1. (1863) 3 B. & S. at p. 578.
2. (1895) 1 Q.B. 668 at 671.
3. Holdsworth observes that this has not always been the rule. At one time, all judges would be taken up on their decision, the complaint procedure being used. One original reason for the rule was to assert the independence of the superior courts of such rival courst as the Court of Star Chamber.
4. Present Law of Abuse of legal procedure, (1921) 205-6.

made here but he believed that without such an extensive rule, "the administration of justice would lack one of its essentials - the independence of the judges. It is better "to take the chance - happily a rare one now - of judicial incompetence, irritability or irrelevance, than risk getting a bench warped by apprehension of the consequences of judgments which would be given without fear or favour".

The judges are further protected by the law of criminal contempt, (of which we shall hear more later), which punishes speeches or writings tending to obstruct the course of justice. These impressive safeguards notwithstanding, the impartial administration of justice would have been more difficult to achieve without a general acceptance of, and respect for, judicial independence. Sir Winston Churchill, no doubt expressed the feelings of his fellow countrymen when he said,

> "The British Judiciary with its traditions and record is one of the greatest living assets of our race and people and the independence of the judiciary is part of our message to the ever-growing world which is rising so swiftly around us".[1]

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1. 557 H.C.Deb. 1954 Cols. 925-932, quoted by Roberts-Wray op.cit.p.64.

Earlier, in the same speech, Sir Winston had been careful to put judicial independence no higher than "the principle of the complete independence of the Judiciary from the Executive", thus leaving unaffected the doctrine of the sovereignty of Parliament.

The sovereignty of Parliament.

Up to the Glorious Revolution of 1688 there was as yet no clear-cut division between adjudication and legislation, as the seemingly conflicting views of Coke on the powers of the courts and Parliament, respectively, would show.[1] To him, Parliament was a court and the supremacy which it enjoyed sprang from the fact that it was a supreme court, hence its name, "the High and most honourable Court of Parliament". In the crisis that led

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1. Against his statement in Dr.Bonham's Case, that an Act of Parliament if contrary to common right and reason could be adjudged by common law to be legally void, could be placed the following, "of the power and jurisdiction of Parliament for making of Laws in proceeding by Bill, it is transcendent and absolute as it cannot be confined either for causes or persons within any bounds". 4 Inst. 28. Blackstone too once remarked that an Act of Parliament contrary to the Law of Nature would be of no validity, only to admit later the English were never used "to reason what thing was commanded or prohibited by the Law of Nature...what the Parliament doth, no power on earth can undo". 1 Comm. 91. It is therefore, not only Coke who never understood the "antithesis between legislation and adjudication by which we now interpret him". McIlwain, The High Court of Parliament, (1934) 148; also Gough op.cit.pp.42,46.

to the Glorious Revolution, Parliament and the judges acted as allies rather than as rivals. One major outcome of the Revolution, however, was the "unquestioned acknowledgment of the sovereignty of Parliament".

It is significant that the courts did not grudge Parliament its new-won primacy though there were a few cases concerning parliamentary privilege in which the courts resisted Parliament's claim to be sole judge of the law and custom of Parliament. In Ashby v. White,[1] the House of Lords upheld the dissenting opinion of Holt C.J. that the law of England was one and indivisible and if there was a law and custom of Parliament it must be part of the law of England. Again in Stockdale v. Hansard,[2] a Commons resolution extending parliamentary privilege was denied legislative validity. In these cases, however, the courts were merely insisting that only an enactment resulting from proper legislative procedure could override the common law. Although there is no extant decision of the courts with a binding authority on the legal nature of the doctrine of

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1. (1704).
2. (1839) 9 Ad. & El; Bradlaugh v. Clarke (1883) 8 Appp.Cas. 354; Bradlaugh v. Gossett (1884) 12 Q.B.D. 271.

sovereignty,[1] it can be deduced from dicta in an impressive number of cases that an Act of Parliament i.e., one which issues from the Queen-in-Parliament[2] cannot be questioned in a court of law.[3] Moreover, the pronouncements of the "high priests of the sovereignty mystery"[4] have been so persistent that no one would now deny the validity of the doctrine.[5]

According to Dicey, the one fundamental dogma of English constitutional law is "the absolute despotism of the King-in-Parliament".[6] He meant by this that no person or body is recognised as having a right to override or set aside the legislation of Parliament. Yet Locke had argued that no authority, patriarchal or popular could take it away, the rights of the citizen which were prior to it. The absolutist claims, however, fitted very well into Austin's 'command' theory of law.[7] Bentham supported

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1. Heuston, Essays in constitutional law (1961), 5-6.
2. In which following Parliament Act, 1911 and 1949, the House of Commons is dominant.
3. Thus A.B.Keith writes: "It is the characteristic of the Parliament that its legislative power is absolutely sovereign ...The courts have no power whatever to deny the validity of any Imperial Act." An introduction to British constitutional law, (1931) 121.
4. Heuston, op.cit.p.1;see also G.Marshall, Parliamentary sovereignty in the Commonwealth (1957).
5. O.Hood Phillips, Principles of English law and the constitution (1939) 81.
6. The Law of the constitution, (9th ed.) 145).
7. Lectures on jurisprudence especially "The province of jurisprudence determined".

the supremacy of Parliament because it permitted quick changes in the law which would facilitate his utilitarian reforms.[1] But like Locke, he believed that Parliament could not restrict the liberties of the citizen. Parliament could not be infinite: though it might possess indefinite powers, even then it was limited by convention.[2]

Professor Goodhart has endeavoured to identify the nature of this convention. Four general principles are suggested:[3]

(i) That no man is above the law.
(ii) That those who govern do so in a representative capacity, and are subject to change through regular elections.
(iii) The recognition of freedoms of speech, of thought and of assembly by which the subjects criticise those in authority.
(iv) The independence of the judiciary.

To sum up then, in the area of power,[4] the Queen-in-Parliament is sovereign, but is far from Bodin's princeps

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1. Dicey, Law and opinion in England (1962) 306.
2. Goodhart, English law and the moral law (1953) 54.
3. Ibid., pp. 55-62.
4. As distinguished from rules relating to the composition and procedure of the sovereign legislature, breach of which could lead to an "Act" being invalidated, Heuston, op.cit. pp. 6; 9-29. Cf. Dicey's internal and external limits of sovereignty, The Law of the Constitution, 76-79; Bryce's "legal and political sovereignty", Studies in history and jurisprudence, I, p.505. H.W.R.Wade, "The basis of legal sovereignty" 1955 C.L.J., 172.

legibus solutus.[1] To be certain of obedience,[2] its enactments must not overstep the limits imposed by the beliefs and ideals of the people some of which are implicit in the foregoing general principles. Even Austin himself was later to accept that at the General Elections the people were the sovereign. In other words, "the legally omnipotent sovereign, had a line to toe - the overriding supremacy of the people".[3] So interpreted, Dicey not only acknowledged, but also thought it desirable that the doctrine of the sovereignty of Parliament should exist side by side with the concept of the Rule of Law. The two concepts are the twin pillars on which the British Constitution rests.[4]

Dicey and the Rule of Law

In his learned editorial introduction to Dicey's Introduction to the Law of the Constitution, Professor

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1. But see Cowen op.cit. p.231.
2. H.Laski, The problem of sovereignty, (1917) 14-16; also Parliamentary government in England, (1938) 13-70.
3. The gravamen of Daniel Defoe's argument in Legion's Memorial addressed to the House of Commons, Gough op.cit. p. 176. The impact of public opinion on legislative output is so considerable nowadays that it is rare for a statute to emerge which does not bear the imprint of genuine public approval. C.S.Emden, The people and the constitution (1956) 309. See more fully, J.D.Stewart, British pressure groups (1958).
4. Cf. R.M.Jackson, The machinery of justice (1964) 341.

E.C.S. Wade listed no less than five different senses in which the term the Rule of Law is used:[1] the law natural or positive which ought to rule the world; the recognition of certain fundamental obligations as binding upon states in their dealings with one another, equality before the law; the synonym of the maintenance of law and order; and the supremacy of certain fundamental laws. In the final analysis, however, these various conceptions are perhaps not mutually exclusive; thus the last mentioned meaning may be said to possess many features implicit in the others. Dicey, on the other hand, prefers to break the term into "at least three distinct though kindred conceptions":[2]

(i) absence of arbitrary power on the part of the government;

(ii) every man being subject to the ordinary law; and

(iii) the fact that the general principles of the constitution derive from the ordinary law of the land.

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1. pp. XCVI-XCIX, cf. Wade and G.G.Phillips, Constitutional law (1965) 60-76): Jennings: The Law and the Constitution (1959) 43 et.seq.
2. The Law of the Constitution p.188.

We must now take a closer look at each of these three conceptions.

I. Absence of Arbitrary Power

Dicey says that in England, "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner."

What does Dicey here mean by "law established in the ordinary legal manner"? Presumably, he had in mind the common law, statute law and delegated legislation. The possible abuse that might arise in the uncontrolled use of the third species of law - delegated legislation - was probably not apparent at the time Dicey wrote. Since then, however, the sheer volume and detail of statutory regulations has undoubtedly created uncertainty in "the law of the land" contrary to the requirements of the Rule of Law.

But the tempo in the modern state is such that the delegation of power to create offences to government departments, local authorities, public corporations etc., is unavoidable. What has been done in recent years to secure conformity with the Rule of Law, as far as practicable, is to provide that these statutory regulations shall be simple and intelligible, adequately publicised and accessible to

the people.[1] Parliamentary control of delegated legislation has also been strengthened.[2]

Dicey's first meaning of the Rule of Law as it stands, therefore, merely amplifies the settled principle of law, nulla poena sine lege. He adds, however, that issues were determinable only before the ordinary courts, thus ignoring an increasing number of statutory provisions, authorizing direct enforcement.[3] A suggestion has been urged in his favour that he was here more concerned with the superior protection afforded by habeas corpus.[4] Even on such a lenient appraisal he may still be criticised for ignoring the Irish Coercion Acts[5] and for his mild and rather belated criticism of the Habeas Corpus Suspension Acts, which were a prelude to preventive detention by government order extensively used during the two World Wars.[6]

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1. Ibid.,esp. Ch.42.
2. See Statutory Instrument Act, 1946.
3. F.H.Lawson: "Dicey Revisited" 7 Political Studies 1959, p.216; the following examples being given: the recovery of income tax and excise duty by distraining on property without intervention of a court; the Public Health Act, 1936 empowers direct action in certain events, and pest control by the Ministry of Agriculture.
4. Ibid, p.214.
5. Ibid, p.215.
6. Ibid, see

Dicey, still on his first meaning of the Rule of Law, goes on to draw a contrast with those systems of government based on the exercise by persons in authority of wide or discretionary powers. It is, of course, accepted that judges exercise a fair amount of discretion when they pass sentences on convicted prisoners save where the law lays down a fixed sentence. This apart, Dicey's postulate disregards the emergent administrative process[1] whose veins and arteries are administrative tribunals and procedures of inquiries[2] though these had not then proliferated as much as now. However, following the decision in Local Government Board v. Arlidge,[3] Dicey with his characteristic academic open-mindedness later modified his generalisations.[4]

It is widely recognised today that in a welfare state like Britain an increasing use of tribunals and inquiry procedure in the administrative process is inevitable.[5]

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1. See C.K.Allen, Law and Orders (1956) 342 et seq. Griffith and Street: Principles of Administrative Law, Ch.V.
2. Two types of inquiry procedures should be distinguished: one is used for administrative purposes to enable the Minister to make up his mind on particular issues; the other is ad hoc inquiry instituted under the Tribunals of Inquiry Act, 1921 e.g. that set up to look into the Crichel Down Affair as to which see Keeton, Trial by tribunal (1960). Reference in the text is to the former type.
3. (1914) 1 K.B. 160.
4. "The development of administrative law in England" (1915) 31 L.Q.R. 148.
5. See Prof.Sir David Parry's Change and continuity in legal development, 18th Haldane Memorial Lecture Birkbeck College (1951); Cf. Sir Cecil Carr Concerning English Administrative law (1941).

At the same time, there is general agreement with the views expressed by the Franks Committee on Administrative Tribunals and Inquiries[1] that the standards of openness, fairness and impartiality must not be sacrificed to administrative expediency; the underlying object being to approximate, so far as possible, the admihistrative process to the judicial process.[2]

There is, on the other hand, what may be called the sphere of pure discretion of which Dicey would probably disapprove were he to be confronted with it. We have in mind those ministerial acts and decisions which are said to be policy-inspired and cannot, therefore, be inquired into in a court of law. The general opinion today is that these acts and decisions need controlling and a vigorous campaign[3] has been mounted in recent years to create a

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1. Report 1957 Cmnd. 218. Cf. Report of the Committee on Ministers' Powers (1932) Cmd. 4060.
2. The changes introduced by the Tribunals and Inquiries Act 1958 have this in view. Note also the work of the Council on Tribunals set up under the Act which exercises far-reaching supervision over tribunals but vaguely so in respect of inquiry procedures.
3. Spearheaded by "Justice" (the British section of the International Commission of Jurists) see its Report The Citizen and the administration (1961); also T.E.Utley, Occasion for an Ombudsman (1961); Professor Hurwitz, the Danish Ombudsman's broadcast, The Listener, May 12, 1960. S.A. de Smith, "Anglo-Saxon Ombudsman" (1962) Political Quarterly, 9. Contrast J.D.B.Mitchell "The Ombudsman Fallacy" 1962, P.L.24.

Parliamentary Commissioner in the pattern of the Scandinavian Ombudsman to investigate complaints of misuse of administrative powers.[1]

Legislation has now been proposed by Government for the appointment of a Parliamentary Commissioner for Administration[2] with an independent status though answerable to Parliament to whom he would issue an annual report or such ad hoc reports as he thinks necessary. His field of investigation (with a few stated exceptions) will extend to the whole range of relationships between the private person and the central Government.[3]

II Equality before the law.

In his second conception of the Rule of Law, Dicey says that in England not only was it true that no man was above the law, but also (emphatically) that every man whatever

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1. A Commonwealth country, New Zealand adopted the Ombudsman institution in 1962. Parliamentary Commissioner (Ombudsman) Act, 1962. For the background and the role of the Ombudsman system in New Zealand, see Sir Guy Powles (the New Zealand Ombudzman), "The citizen's rights against the modern state" (1964) 13 I.C.L.Q. 761.
2. (1965) Cmnd. 2767.
3. But unlike the Scandinavian Ombudsman, he will not be seized of complaints direct from private persons. It is thought such an arrangement would erode the traditional functions of Members of Parliament to draw the Parliament's attention to the citizen's grievances. Instead a complainant will be required to write his complaints through a member of the House of Commons. Ibid, para. 4; 6.

his rank or condition was subject to the jurisdiction of ordinary courts. The latter point has just been taken and we saw that innumerable administrative tribunals now share with the courts the determination of the citizens' rights and duties. The objective set by Dicey is, however, partially realized by the recent Tribunals and Inquiries Act, 1958 which has, in many cases, restored access to the courts formerly barred by the insertion of judge-proof clauses into statutes.[1]

We would also recall that in the sphere of pure discretion the Minister is virtually outside the reach of the Courts; Dicey did not notice this though admittedly the problem had not reached its present magnitude. Yet he scorned the French droit administratif which was gradually pinning down the Executive to the requirements of the law. Perhaps he was here misled by the composition of the Conseil d'Etat, the chief French administrative courts. He wondered how non-professional judges, administrative experts at that, could fairly and impartially resolve issues in which the

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1. A state of affairs which provoked Lord Hewart's The New Despotism (1929) see also de Smith: Judicial Review of Administrative Law, Chapter 7.

administration itself was a party. But Professor Hamson has made a more intimate study[1] of the French system and his verdict must have since re-assured Englishmen generally[2] concerning the effectiveness of the French Conseil d'Etat. We may observe also that Dicey when better informed about the working of the French administrative system, later retracted some of his earlier conclusions.[3]

It can be argued that Dicey's observations were not accurate in every respect even concerning conditions in England. He did not dwell, for instance, on the enormous privileges and immunities in litigation enjoyed by the Crown and certain public authorities at the expense of the ordinary citizens.[4] Indeed, until the Crown Proceedings Act 1947, the Crown, pursuant to the doctrine

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1. Executive Discretion and Judicial Control; 'Le Conseil d'Etat' 68 L.Q.R. 60.
2. Thus, not long ago, a correspondent of "The Times", described the Conseil d'Etat, "an august and highly respected arbitral institution", as the stabilizer of the French ship of state. The Times, April,1962.
3. In his article, "Droit Administratif in modern French Law" (1901) 17 L.Q.R. 302; also, in a note carried in the seventh edition of his work (Introduction to the study of the law of the Constitution) and significantly captioned "English misconception as to Droit Administratif."
4. Heuston, Essays in constitutional law (1961) 45.

"the king can do no wrong" was not liable for the torts of its servants.[1]

The Act of 1947, it seems, would not relieve an injury sustained by a British subject outside the British jurisdiction if such injury stems from an act of international policy by the Crown[2] e.g. the annexation of a foreign territory or an act of war. However in Burmah Oil Co. v. The Lord Advocate,[3] the House of Lords by a bare majority decided that no defence of act of state would avail to deny the citizen of due compensation for injury suffered during the War at the instance of the Crown. The decision was contrary to what was generally believed to be the law[4] and Parliament stepped in to restore the law to what it was thought to be.[5] In so doing, Parliament also annulled the Burmah decision, an unwholesome gesture by a country which gets the pace for others in constitutional government.

In contracts, the Crown has always been subject to legal proceedings, if by the tedious procedure of petition of right. The Crown Proceedings Act, 1947 has since

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1. See generally Glanville Williams, Crown proceedings (1948).
2. The only sphere where the state is beyond the law. H.W.R. Wade, Administrative law (1961) 332.
3. [1965] A.C. 75.
4. Cf. C.A.Hopkins "Prerogative and compensation" (1964) C.L.J. 180; P.Jackson, "The Royal prerogative" (1964) 27 M.L.R. 709.
5. War Damage (No. 2) Act, 1965.

simplified the procedure, and the Treasury now lists departments which can sue and be sued. To avoid possible hardships, where no appropriate department is indicated, the Attorney-General may sue or be sued.[1] Nevertheless, as in tort, contracts arising from political action are outside the field of law, the oft-quoted authority being the Amphitrite Case,[2] where it was held incompetent of the Crown to fetter, by contract, its executive action which the needs of the community must, from time to time, determine. Granted this, it may well be asked why, if specific performance could not be decreed against the Crown in contracts of this nature, damages could not be paid by it as seems to be the case in France,[3] (to the possible surprise of Dicey). Rather, the non-liability rule has been extended to Civil Service contracts.[4] We were thus reminded, not long ago, by Diplock J. (as he then was) of the rule that

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1. s.17.
2. (1921) 3 K.B. 500. Various interpretations have been put on this intricate case, see H. Street; Governmental Liability etc. (1953), 98-99; also J.D. Mitchell: "Limitations on contractual liability of public authorities" (1950) 13 M.L.R. 318, 455.
3. Street, ibid.
4. Cf. Leo Blair, "The civil servant: political reality and legal myth." (1958) P.L.32.

the sovereign through her officers could terminate at pleasure the employment of any person in the public service except where a statute provides otherwise.[1]

One instance of a derogation from the principle of equality before the law, namely, the Trades Union Dispute Act, 1906,[2] is not specifically discussed by Dicey in his later edition, though elsewhere[3] he argued that the Trade Disputes Bill should not be passed into law because inter alia, it would make trade unions a privileged class. Another example of derogation which he might have mentioned is diplomatic immunity enjoyed by a Sovereign and his accredited representatives abroad.[4]

Lord Wright[5] has recast Dicey's equalitarian doctrine in a rather more accurate form as follows: all are equally subject to the law though the law as to which some persons are subject may be different from the law to which others are subject. The inference is that once they find themselves before the ordinary courts, all persons whether of

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1. Riordan v. War office (1959) 1 W.L.R. 406.
2. But see Rookes v. Barnard (1964) 2 W.L.R. 269.
3. "A protest against privilege" National Review, October 1906.
4. Cf. Heuston op.cit. p.46.
5. "Liberty and the Common Law" [1945] C.L.J.2.

superior or inferior status are entitled to participate in equal terms in proceedings concerning the exercise of powers, rights and duties. Is this assumption justifiable? Consider the extravagant claims by the executive to state privilege for documents and the courts' self-imposed limitations on their power to decide the propriety of these claims.[1]

By preventing the disclosure of vital documents necessary to support the evidence of the citizen when litigating with the latter, the Crown obviously obtains an unfair advantage. Cases are not unknown where justice cannot be done or seen to be done.[2] No doubt public security and at times public interest may, in appropriate cases require non-disclosure, but it should be open to the courts to examine the documents (perhaps in camera) to be sure that the

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1. The leading case is Duncan v. Cammel Laird & Co.(1942) A.C. 24. Documents and other evidence have been withheld in surprising instances, see P.I.Bell, "Crown Privilege" (1957) P.L. 29-34; F.Lawton, "Crown privilege" (1964) 5 J.I.C.J. No.1. 117. But see Lord Chancellor's concessions following protests against executive claims 197 H.L. Deb. 1955-6. Cols. 741-748.
2. Cf. Denning, The changing law (1953) 24.

particular privilege claim is supportable.[1] It is encouraging to note a judicial trend in this direction as reflected in two recent Court of Appeal judgments.[2]

III. Fundamental rights as general principles of the constitution.

Dicey's third sense in which the Rule of Law might be said to be a special attribute of English institutions is that the general principles of the constitution emanate from judicial decisions unlike in other countries where the practice is to have constitutional bills of rights.[3] He admits, however, that the judge-made English Constitution "bears on its face all the features good or bad of judge-made law."

We will now proceed to consider the extent to which some of the individual freedoms which these general principles embody are adequately safeguarded in Britain by this

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1. As in Australia (at least in South Australia): Robinson v. S.Australia (1931) A.C. 704. Also in Scotland, the courts would decide whether the interests of justice are paramount when faced with a Minister's objection to the production of documents or other evidence. Glasgow Corporation v. Central Land Board (1956) S.C. (H.L.)1.
2. I re Grosvenor Hotel, London (No.2) (1964) 3 W.L.R. 992; Wednesbury Corporation v. Ministry of Housing and Local Government (1965) 1 W.L.R. 261; see also Merricks v. Nott-Bower (1965) 1 Q.B. 57.
3. Though he treated the United States of America kindly.

distinctive procedural approach.

I. Personal freedom.

No person may de denied his liberty unless there is a sentence of a competent court to that effect. The writ of habeas corpus ensures the prompt release of one who has been unlawfully detained by another, be the latter an ordinary subject or a Secretary of State.[1] The application for the writ, like bail application, takes precedence over all other matters before the court.[2] When the writ issues, it is a direction by a judge of the High Court to whoever has the detainee in custody to bring him before the judge so as to determine the legality of his detention.[3] If the detention is not justified, the detainee is released. Before the Administration of Justice Act, 1960, such release was immediate. Now, the order of the court to release a

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1. Act of state is not a defence: Entick v. Carrington (1765) 19 St. Tr. 1030; where Lord Camden said: "With respect to the argument of state necessity or distinction that has been made between state offence and others, the common law does not understand that kind of reasoning, nor do our books take note of any such distinction." Contrast the position outside Britain: R. v. Earl of Crewe ex parte Sekgome (1910) 2 K.B. 576; Southern Rhodesia Case [1919] A.C. 211; Sobhuza v. Miller [1926] A.C. 518.
2. Denning, Freedom under the law (1949) 1.
3. H.Street, Freedom, the individual and the law (1963).

detainee is no longer final.[1] The gaoler may appeal to the House of Lords from the decision of the Divisional Court, a change which shakes a leading principle behind the procedure, namely, the instant determination of the applicant's right to freedom.[2] Notwithstanding this incursion, habeas corpus is still probably the most effectual protection of the liberty of the person ever devised by any legal system.[3]

Complementary to the habeas corpus procedure is the application for bail[4] by one who has been unlawfully arrested and detained. This follows logically from the fundamental rule of English law that a prisoner is presumed innocent until proved guilty. Except for serious offences, and unless circumstances dictate otherwise, bail is ideally

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1. Administration of Justice Act, 1960. s.15. It was once thought that an applicant could go from one judge to another until all the judges were exhausted but this doubt has been put to rest by the Act which prohibits more than one application unless supportable by new evidence. s.14; Re Hastings (No.2) is thus confirmed while Eshughayi Eleko v. Government of Nigeria, [1928] A.C. 459 is rejected.
2. Per Lord Halsbury Cox v. Hakes 15 App. Cas. 506.
3. Cf. Holdsworth 10 H.E.L. p. 658; for a useful list of assorted instances when the writ has laid, see Street op.cit. p.33.
4. The two have so much in common that the Habeas Corpus Act also deals with bail. Lord Goddard, (1949) 65 L.Q.R. 30.

readily granted;[1] nor must its amount be excessive.[2]

Although ordinary citizens have powers of arrest (albeit more circumscribed than those of the police) it is the latter who are primarily responsible for bringing offenders to justice. But if a policeman effects a wrongful arrest, the victim could sue and recover damages for wrongful arrest or for false imprisonment.[3] These impressive safeguards are, however, overridden in periods of emergency. We have before referred to the Habeas Corpus Suspension Acts which debarred the courts from issuing a writ of habeas corpus during periods of political excitement. Dicey himself admits[4] that these Acts were

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1. Matters to be taken into consideration are laid down in R v. Phillips (1947) 32 Cr.App.Rep.47. Figures indicate, however, that the accused has barely one chance in two to avoid spending some time in gaol pending trial. F.E.Mostyn, "Bail and the presumption of innocence" (1964) 61 L.S.G.799. For a comparison of English practices with those of other countries see B.Botein and J. Stuiz, "Report on pre-trial release practices in Sweden, Denmark, England and Italy to the National Conference on Bail and Criminal Justice." (1964) 5 J.I.C.J. No.2, p.203.
2. Magna Carta, 1215; Bill of Rights, 1684.
3. If, however, the warrant is issued by a Justice of the Peace authorising the Constable to carry out an arrest, the Constable would be protected unless some serious illegality appears on the face of the written warrant: Hood-Phillips: The Principles of English Law and the Constitution, p.343, for the position of a constable who arrests without a warrant and without communicating the ground of arrest to the prisoner, see Christie v. Lenchinsky (1947) A.C.573.
4. op.cit.p.229.

resorted to because "speedy trial or release of persons charged with crime has been found an inconvenient or dangerous limitation on the authority of the executive government", yet he contends that though the increase in the power of the executive was no trifle, it did not go as far as the total suspension of constitutional guarantees as was often the case in some foreign countries.[1] Moreover, the English Acts applied only to those suspected of treasonable practices were renewable annually.

So much for periods of political excitement; what of periods of war? The regulations made under the Defence of the Realm Act, 1914 and the Emergency Powers Act, 1939 are in point. In R v Halliday ex parte Zadig,[2] a regulation made under the former Act was unsuccessfully challenged. The defence had contended that it was ultra vires the parent Act because Parliament could not have contemplated that the regulations made thereunder would provide for the deprivation of the liberty of the British subjects without trial.

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1. Ibid.,pp.230-1.
2. [1917] A.C. 260.

The decision sparked off public and private discussions on the nature and scope of the liberty of the subject in time of war within the realm. Pollock, astonished at the "portentious opinion" of Lord Shaw, the dissenting judge in the Halliday Case was emphatic that the liberty of the subject was in abeyance in time of war;[1] on the other hand, Harold Laski[2] described Lord Shaw as a really great judge who could put things well.

The drafstmen of the 1939 Act carefully avoided the possible pitfalls dwelt upon by the defence in the Halliday Case. The relevant section[3] conferring power of detention without trial on the Secretary of State was very widely drawn. Regulation 18B of the resulting Defence Regulations had every appearance of being impregnable. Yet in Liversidge v. Anderson and Another,[4] the detention order served under it was assailed though without success, the decision turning on statutory interpretation. But Lord Atkin's dissenting judgment has attained immortality

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1. Pollock-Holmes, Letters, i, 244-245 quoted by Heuston, op.cit.p.161.
2. Holmes-Laski, Letters, i, 107 quoted ibid.
3. s.1 (1) & (2).
4. [1942] A.C. 206.

for the powerful sentiments on personal liberty which it contains; he says,[1]

> "In this country, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive; alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed to the Court of King's Bench in the times of Charles I."

The arguments deplored here by Lord Atkin reverberate today in anglophone Africa.[2] One may add that the ratio decidendi in the Liversidge Case has proved to be common law's worst gift to anglophone Africa.

II. Fair trial

Judicial independence and equality before the law are two aspects of the right to a fair trial; these have been discussed above and will not detain us here. We are concerned here with those substantive and procedural rules

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1. At p. 244.
2. Cf. Ghana's preventive detention cases discussed in Chapters Two and Seven; see also the Nigerian case Awolowo v. Minister of Internal Affairs [1962] L.L.R. 177.

which make for fair determination of causes especially criminal ones since in civil suits, the litigants could by consent relax or modify rules applicable to their case.

Prosecutions are initiated either by ordinary citizens when they are said to be unofficial,[1] or by the police, though prosecutions for certain offences[2] could be brought with the consent of the Attorney-General who also has the power to discontinue any prosecutions.[3] The principle has been long established that the Attorney-General, though a politician would not allow party politics to influence him in his decision on matters affecting criminal prosecutions.[4] Though the latter acts under his general superintendence and direction, he (the Director of Public Prosecutions) enjoys a large measure of independence.[5]

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1. Cf. Devlin, Criminal prosecutions in England (1960) 16-17.
2. e.g. under the Official Secrets Acts; incest etc.
3. By entering a nolle prosequi which answers the indictment and prevents further prosecution of it.
4. For a reaffirmation of the principle see a statement by the Prime Minister in 1959. The Attorney-General must always act in a quasi-judicial capacity, taking no orders from the Prime Minister or the Cabinet or from anybody else. Parl. Deb. 600 H.C. Col.31.
5. Cf. Devlin, op.cit. p.19; Prosecutions of Offences Regulations 1946 S.R. & O. No. 1467/L.17. See further, J.L.Edwards The law officers of the Crown (1964); T. Mathew, The office and duties of the Director of Public Prosecutions (1950).

Once prosecutions have been decided upon, the police would (except in the few unofficial cases handled by private citizens) undertake a two-phased inquiry: (i) the detection of the believed guilty party, and (ii) the proof of his guilt.[1] The police have a freer hand in phase (ii) though "the law which gives freedom to the police to question equally gives freedom to the suspect not to answer." In phase (ii), the suspect has become the accused and the Judges' Rules, (recently revised to provide further safeguards for the accused) would come in to play.

Preliminary investigations follow in a magistrates' court except in the case of summary offences,[2] thus affording an opportunity for a speedy discharge in deserving cases. Some have, however, doubted the usefulness of committal proceedings in view of the overwhelming frequency of committal for trial and because the accused would invariably reserve his defence till the trial stage.

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1. Cf. Devlin, op.cit. p.26.
2. i.e., the less serious non-indictable offences.

The English system of trial being accusatory,[1] the position of the judge is that of an umpire who should be as neutral as is compatible, with the ends of justice, his main preoccupation being to ensure the scrupulous observance of the elaborate rules of evidence that have been formulated with the generous object of protecting the accused: the presumption of innocence, and its buttressing companion, the burden of proof; the prohibition of self-incrimination; the cautious reception given to hearsay evidence, confessions, character, previous convictions and evidence of similar facts.

In a trial by jury (which is the rule for indictable offences),[2] the judge does not determine the guilt of the accused; that is done by twelve of his "peers" acting as jurors. The judge merely sums up the evidence of both sides explaining the applicable law. If he exerts the slightest pressure on the jury, the verdict would be set aside on appeal.[3]

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1. See generally, Glanville Williams, The proof of guilt (1963) esp. Chapter 2.
2. Bill of Rights, 1689.
3. As in R. v. Mackenna; R. v. Busby (1960) 1 All. E.R. 326, for Mr. Justice Stable's impatient advice to dissenting jurors; see more fully Devlin, Trial by jury (1956).

Jury trial is on the decline in civil cases, but in criminal cases, it remains a pillar of liberty. The strength of the system lies in what Sir Patrick Devlin (as he then was) calls the jury's "sovereign power of acquittal."[1] The jury give a general verdict which no one can call on them to explain. Even if their verdict of acquittal is patently contrary to law, it stands as the prosecution has no right of appeal.

> "If his country condemn a man and they exceed the law, he shall go free: if the law condemns him and nevertheless his countrymen acquit, he shall go free."[2]

In this way, popular opinion is continuously brought to bear on the law ensuring that "the Englishmen got the sort of justice they liked and not the sort of justice that the government or the lawyers or any body of experts thought was good for them."[3]

Relevant to a discussion of the right to a fair trial is the Legal Aid Scheme, a valuable device which enables the impecunious litigants to bring or defend

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1. Ibid.,pp. 89-91.
2. Ibid.,pp. 90-91.
3. Ibid.,pp. 159-160. Cf. Denning, Freedom under the law, pp. 36-38.

proceedings, civil or criminal before the courts.[1]

Finally, machinery exists to correct the infrequent lapses which are more evident in the lower courts such as the magistrates' courts which are staffed, in the main, by lay men and women. Where, for example, rules of natural justice - showing bias or ignoring the audi alteram partem principle - are infringed, prerogative orders[2] would lie from the superior courts in exercise of their supervisory jurisdiction over the subordinate courts. A comprehensive appeal system further guarantees fairness.

III. Freedoms of Association and of Assembly

Britain is a parliamentary democracy, part of its democratic creed being that there must be an alternative government. The Opposition party or parties must be given every chance of putting their case across to the people with a view to persuading them to change the existing government for theirs.[3] Liberty to form political groups

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1. Cf. S. Pollock, "Legal aid and advice: the first decade" (1961) 4 Lawyer, No. 3, p.13.
2. i.e., certiorari, prohibition and mandamus; see de Smith, Judicial review of administrative action (1959) 253-322 also H.H.Marshall op.cit. Ch.3.
3. Laski: Parliamentary Government in England (1938) p.71.

is therefore central to the British system of government. Conversely no political party or association could be illegal, per se. The Communists and the National Socialists, extreme as the majority of the people may consider their views to be, are under no legal restrictions whatsoever to canvass for political support,[1] provided that in so doing their conduct is not such as is likely to occasion a breach of the peace.[2]

The existence and status of trade unions also provides a useful determinant of freedom of association. In Britain, trade unions are legally privileged, though this has not always been so; the common law once looking upon them as in the nature of a criminal conspiracy.[3] The Trade Unions Act, 1871, changed all that by treating them as trusts, while subsequent legislation notably the Trade Disputes Act, 1906 strengthened their bargaining position. The latter statute virtually immunes them from liability in tort.[4] Though there is provision for their registration, this merely confers

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1. The Communist Party uhtil recently had two members in the House of Commons. In 1949 the Prime Minister declined to take action against Communist activities: H.C.Purt.Deb. Vol. 461. Col.2019.
2. The legal position has been recently amplified by Lord Parker, C.J. in Jordan v. Burgoyne (1963) 2 Q.B. 744.
3. D.Lloyd, "Industrial law" in The British Commonwealth, the development of its laws and constitutions (ed. G.W.Keeton), Vol.1, The United Kingdom, p.359.
4. But see Rookes v. Barnard [1964] A.C. 1129 since overruled by Trade Disputes Act, 1965.

special privileges on those unions that take the trouble to register and in no way affects the legality of those that choose not to.[1]

Freedom of assembly is not denied to subjects, everybody being at liberty to go where he will. It may well happen, and the law does not discourage this, that several individuals decide to exercise that liberty at one and the same time, provided that in so doing they commit no trespass or any other tort, and when lawfully gathered they refrain from making libellous or seditious speeches.[2] It is well to observe, however, that there is a common law misdemeanour of unlawful assembly, committed when three or more persons assemble to commit a breach of the peace or to give firm and courageous persons cause to fear a breach of the peace in consequence of the assembly.[3] Moreover an important requisite of the exercise of this freedom is the availability of a place where one may assemble. Many of the places normally used for this purpose have owners who are at liberty to regulate the use of their property

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1. D.Lloyd, op.cit., p.360.
2. Dicey, op.cit.p.271.
3. Newark, op.cit. p.65. see Beatty v. Gillbanks (1882) 9 Q.B. 308, O.Kelly v. Harvey (1882) 14 L.R. Ir.105; Wise v. Dunning, (1902) 1 K.B. 167; Duncan v. Jones (1936) 1 K.B. 218.

even to the inconvenience of the public. The highways too are usually owned by the local authorities, and their use by citizens at large is only for passing and re-passing. In order to use them for any other purpose, permits are required. The allied liberty to hold processions or use the streets for demonstrations is subject to the same limitations.[1] In modern times, traffic problems subject the latter freedom to increasing control by the police and the local authorities who regulate traffic. These may withhold permits for processions or grant them subject to (at times onerous) conditions. The Public Order Act, 1936 empowers local authorities on the application of the Chief Constable with the consent of the Home Secretary to prohibit all processions for a period not exceeding three months. Political factors, however, hardly enter into the exercise of these powers.

IV. Freedom of Religion

The religious schism that followed the Reformation generated much intolerance and it took some time to recognise

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1. Professor Street was thus constrained to conclude that Englishmen have no right to hold a public meeting anywhere: Freedom etc. p.41. Cf. Jennings, The law and the constitution p.277.

the right of every citizen to worship in his own way.[1] Taylor's Case[2] endorsed the formula "Christianity is part of the law of England", later to be denied in R v. Ramsey and Foote,[3] where Lord Coleridge told the jury that if the decencies of controversy were duly observed, the fundamentals of religion might be freely attacked. In 1917, in Bowman v. Secular Society Ltd.,[4] the House of Lords refused to hold that the objects of a company were criminal per se because they denied the truth of Christianity. Irreligious words, as such, should not be punished as offences against God unless "their manner, their violence, their ribaldry" tended "to endanger the peace....to deprave public morality generally, to shake the fabric of society and to be a cause of civil strife",[5] and this was an issue for the jury.

Today, it could be safely asserted that the law does not restrict religious freedom though it sanctions an

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1. R.S.Pollard: Conscience and Liberty, pp.35-42.
2. (1876) 11 Ventris 293. In virtue of this decision, the publishers of Thomas Paine's "Age of Reason" Sheeley's Queen Mab were successfully prosecuted. Some statutes were later passed however, to remove one religious disability or other: Ecclesiastical Jurisdiction Act, 1677, The Toleration Act, 1689, the Catholic Emancipation Act, 1829 and the Oaths Act, 1888.
3. 15 Cox's Criminal Cases 231.
4. [1917] A.C. 406.
5. Ibid, at p.466.

himself in the face of the court was the sole judge of the issue, the "offending" subject having no right of appeal against his decision. This was an enormous power, as the subject might be cast in jail indefinitely until he had purged his contempt. The Act of 1960 now allows an appeal, though regrettably the summary nature of the offence persists.[1]

Contempt of Parliament on the other hand, is somewhat inexact,[2] a situation which springs from the insistence by Parliament that it alone is competent to decide when a breach of its undoubted privilege has occurred, while the courts too cling to their historic claim that the law and custom of Parliament is but part of the law of the land.[3] In recent years, however, there is an appreciable evidence[4] that Parliament would be wary of treating every unpleasant

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1. Street: Freedom etc. p.173.
2. R.A.Butler told the House of Commons in 1957 that the dignity and independence of both Houses were better preserved by keeping their privileges indefinite, see Marshall and Moodie op.cit.pp. 96-105.
3. Holdsworth says these privileges were as much subject to the rule of law as the prerogative of the Crown: H.E.L.Vol. VI,p.272; this is doubtful, a correct guidance on the matter, it is submitted, is to be found in Sir Erskine May's reference to the "old dualism" which is still with us. Parliamentary practice (16th Edition) p.172. See also Henston op.cit.pp.82-91.
4. Kilmuir: The Law of parliamentary privilege pp. 20-22.

established Church - the Church of England. Members outside the established Church are still subjected to disadvantages not applying to members of the Church of England. Princes or princesses who aspire to the throne cannot marry non-Anglicans, and it still appears to be the position that a Catholic cannot be appointed Lord Chancellor, the highest judicial office in the land.

VI. Freedom of Expression

Freedoms of speech and of the press are here taken together. Dicey states the relevant rule as follows:[1] any one may "say whatever he likes subject to the risk of, it may be, severe punishment if he publishes any statement (either by word of mouth, in writing or in print) which he is not legally entitled to make." To ascertain what the subject is not legally entitled to say, we must go to the law of crimes and the law of torts where we shall find the following offences among others: defamation, sedition, contempts of court and of Parliament, obscenity and blasphemy.

The elements of defamation (libel and slander) need

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1. op.cit., p.240.

no exposition here[1] though it is worth reminding ourselves that a libel could attract civil as well as criminal liability, the latter arising where the libel is likely to arouse angry feelings causing a breach of the peace. In modern times, recourse is not normally had to criminal libel.[2] A far more important crime touching upon freedom of discussion nowadays is sedition, or seditious libel as it is more precisely termed. Stephen in his Digest of the Criminal Law defines[3] sedition as the publication of any words with a seditious intention which is formed where the words published are likely to bring the person of the Sovereign, the Government, the constitution, the judiciary and Parliament into hatred, or contempt, or to excite disaffection against them or to attempt by unlawful means to alter matters by law established. Promoting ill-feelings and hositility between various classes in the realm also constitutes a seditious intention.

If we took these ingredients of seditious intention at their face value, political criticism would appear to be

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1. See Parke B. in Parminter v. Coupland (1840) 6 MEW 105; Street: The Law of Torts, p.269 et seq.
2. But see R v. Mylius, The Times, February 2, 1911. It is not always easy to distinguish Criminal libel from sedition. See R. v. Caunt, [1947] An editor on trial, Morecambe and Heysham Visitor, (1947).
3. Art. 98.

hazardous in its nature. There are, however, some important qualifications which Stephen himself added to his definition. A statement is not seditious if it is intended to show that the government has been misled or mistaken in their measures; or if it indicates matters which are producing or have a tendency to produce feelings of hatred and ill-will between various classes.

At first, the cases reflected the wider definition but in later years it became settled that for a charge of sedition to succeed the accused must have incited people to violence[1] and the article, book or speech must be calculated to produce that result. Coleridge J. in R. v. Aldred[2] reminded the jury that the word "sedition" "in its ordinary signification denotes tumult, and insurrection, a popular commotion, or an uproar; it implies violence or lawlessness in some form."[3]

The test laid down in R. v. Aldred was not met in

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1. R v. Burns (1886) 2 T.L.R. 510; T.Dawson, The law of the Press (1947) 77-80.
2. (1909) 22 Cox C.C.1.
3. Ibid, p.3. Contrast the West African case R v. Wallace-Johnson [1940] A.C. 23. See post, Chapter 7.

R v. Leese[1] and the accused were found not guilty of sedition though this gain was off-set by their conviction on the ill-defined crime of public mischief.

There are two useful safeguards against frivolous prosecutions for sedition. First, the Director of Public Prosecutions must authorise prosecutions for the offence; the decision to prosecute being taken personally by him.[2] Secondly, there is what Coleridge called "the wholesome corrective .... a jury of Englishmen." The jury are slow to convict a man for his outspoken views.

The Incitement to Mutiny Act, 1797, and the Official Secrets Acts 1911 and 1920 created crimes in the nature of sedition though these are much wider in scope. Thus it has been recently held[3] by the House of Lords that "a peaceable protest against nuclear weapons" in the form of marching on installation stations amounted to interference with the disposition of the Armed forces and therefore constituted an offence under the Official Secrets Acts. This case is

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1. [1936] The Times, September 19 and 26, 1936. See Denning's criticism of this case: Freedom under the law.
2. Evidence of the Director before the Select Committee on Obscene Publications, para 367, quoted by Street, Freedom etc., pp.201, 298.
3. Chandler v. Director of Public Prosecutions (1962) 3 WLR 694.

unique in another respect. The accused sought to call evidence that their acts were likely to benefit rather than prejudice the state, whereupon their lordships propounded the rather dangerous theory that only the Crown was competent to decide what was in the interest of the state.[1]

Freedom of expression is further restrained by the law of contempt either of court or of Parliament. A citizen who critices a judge in such a way as to cast reflections on him personally is guilty of contempt of court, the law being concerned to safeguard judicial independence. The rule prohibiting publications of comments on pending suits aims at preventing trial by newspapers.[2] Experience, however, showed that the law of contempt as it stood before the Administration of Justice Act, 1960 worked some injustices.[3] The judge who alleged contempt against

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1. See further D. Thompson: "The Committee of 100 and the Official Secrets Act, 1911" (1963) P.L. 201-236. It has been suggested that information not prejudicial to the national interest or to legitimate private interests but solely relating to the efficiency or integrity of the Government department or public authority should not be treated as a criminal offence. The law and the press, pp.22-23.
2. But some journalists have wondered whether the courts are not adopting a double standard on this matter. Criticisms of decisions while appeals are pending are ignored if made in learned journals but not if like criticisms appear in widely disseminated non-learned journals.
3. Contempt of Court: A Report by "Justice" (1959).

criticism as constituting a breach of their privilege. The latest observations of the Committee of Privileges of the House of Commons (although,on this occasion, touching upon a speech of a Member of Parliament made outside the House) bear out this point: it was the duty of the House to deal with such reflections upon members as tended to undermine the respect for and confidence in the House itself as an institution.[1] When however, the effect of the impressions was being considered, regard should be had to the importance of preserving freedom of speech in matters of political controversy. It was particularly important that the law of parliamentary privilege should not, except in the clearest case, be invoked to inhibit the formulation and free expression of opinion about the conduct of the affairs of the nation.

Blasphemy is now virtually an obsolete offence. But, as if to fill the gap so created, the law of obscenity has been actively invoked in recent years, though the intention is not so much to stifle freedom to publish, as to strike a balance between that freedom and public decency.[2] Opinions

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1. Report of the Committee of Privileges on a speech made by the Rt.Hon.Quinton Hogg (former Lord Hailsham) 247 H.C. 1963-64, p.vi.
2. See Alec Samuels "Obscenity and the law" (1964) 61 L.S.G. 729.

inevitably differ, of course, as to what for instance constitutes pornography as distinct from literature.[1] The Obscene Publications Act 1959 (since supplemented in 1964 by a further Act of the same name) reflects the British genius for compromise.[2] Under the Act, expert evidence may be adduced as to the "public good" of the impugned publication, a safeguard which saved Lady Chatterley's Lover[3] "from burning".

Indignation was recently felt at the forfeiture procedure[4] employed to restrain the publication of Fanny Hill. By that procedure a magistrate has powers to order the police to remove any articles believed to be obscene from the owner, who must show cause why they should not be forfeited. It was further feared that the authorities might invoke the ill-defined and highly controversial common law offence of conspiracy to corrupt public morals[5] to by-pass the Obscene Publications Act, but the law officers were

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1. N.MacDermott: "Literature v. Pornography" (1959) Oxford Lawyer, Trinity, 31.
2. Ibid.
3. R v. Penguin Books Ltd. (1961) Crim.L.R.176.
4. Obseene Publications Act 1857.
5. Shaw v. D.P.P. otherwise known as the Ladies' Directory Case: (1962) A.C.220. Prof.Hart regrets this establishment or re-establishment of the courts as custos morum thus sacrificing the principle of legality which demands precise definition of all criminal offences: Law, Liberty and Morality (1962) 12.

quick to give an assurance that such an approach would not be adopted.

Only very brief remarks are called for here on the freedom of the press, for in England[1] the press enjoys the same safeguards as do ordinary subjects and the preceeding remarks mutatis mutandis apply to them. Indeed, such differences there may be, are to the advantage of the Press.[2] Thus the defence of fair comment, which has been aptly described as a bastion of the freedom of the press is broadly interpreted in a libel suit involving the press in recognition of its rôle as a public watchdog. Perhaps the most telling illustration of the freedom of the press is the absence of any form of censorship in England.[3] It is true that the Services, Press and Broadcasting Committee issues "D" Notices in the form of letters to the editors informing them certain news items are regarded by the defence authorities as secrets of importance, publication of which would be contrary to national interest, but these notices need not be obeyed though an editor ignores

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1. See more fully, The law and the press (a Justice Report) (1965).
2. "The Press and the Law" The Lawyer; Hilary 1964, p.33.
3. Though this has not always been so. The Licensing Act 1662 charged the Stationers' Company to license all printing works but the statute was not renewed when it expired in 1695: Street: Freedom etc. p.96.

them at his own risk.[1] So jealously regarded is this freedom to publish without prior restraint that two journalists were recently heard to say[2] that in the news-gathering aspect of their work they were entitled to immunity from disclosure of information even if public interest dictated that they should disclose these sources. No doubt they were moved by the code of conduct of the National Union of Journalists which enjoined members to "keep professional secrets and respect all necessary confidences regarding sources of information". Lord Chief Justice Parker, however, rejected this claim to "super-citizen" status and the "silent journalists" preferred to go to prison.

Of recent years and particularly following the Vassal Tribunal Report,[3] there have been calls for some form of Press control.[4] There already exists machinery for self-control in the shape of the Press Council which investigates complaints against the Press. The Council

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1. See further "The Press and the Law" The Lawyer: Michaelmas 1964, pp. 38-39.
2. Foster and Mulholland Cases (1963) 2 W.L.R. 658.
3. Which revealed that certain sections of the Press had been trafficking in unfounded rumours. Report,1963, Cmnd. 2009: Lloyd: The Idea of Law,p.158.
4. See (1962) Cmnd 1811.,Par.325, (Royal Commission on the Press).

however, is a domestic tribunal made up largely of the members of the profession itself and lacking any statutory authority, though its stature has been lately enhanced by the injection of some lay members into it and the appointment of Lord Devlin an ex-Lord of Appeal in Ordinary, as its first lay Chairman. The first Report[1] since its reconstitution is reassuring and would seem to allay the criticism of white-washing levelled at the Council as it was formerly composed. The Report speaks of the growing impact of the Council on the public and even of an undertaking by the Council to keep a watchful eye on the growing danger that the Press might become a mammoth private power[2] wielded by a few "Pres barons".[3]

VII. Freedom to own property.

If ever there was a freedom beyond dispute in England, it is the freedom to own and hold property; it is more commonly referred to as a right of property, as if to put it higher than the other freedoms we have so far examined.

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1. Summarised in The Times, December 16, 1964.
2. Street, Freedom etc., pp. 243-7.
3. Lloyd: The Idea of Law, p.157.

Locke, as we would recall,[1] sees the preservation of property as the end of all governments. Blackstone was more dogmatic: property was an "absolute right in Englishmen",[2] and the law would never authorise the least violation of it, even for the good of the whole community. Lord Camden's conception would seem to be closer to the truth. In Entick v. Carrington[3] he endorsed Locke's postulate but unlike Blackstone he recognised that the right of property was sacred and incommunicable only in so far as it had not been taken away by some public law for 'the good of the whole'. But he too fell into error when he added that 'the good of the whole' would not be an excuse if compensation was not given in cases of expropriation. Such a proposition is clearly restrictive of the sovereignty of Parliament, for it is common knowledge that the courts cannot inquire into the confiscatory nature of an Act once it is duly passed.[4]

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1. Chapter 1.
2. Commentaries Vol.1 pp. 138-9. Referred to by Newark, op.cit.p.69.
3. (1865) 19 St. Tr. 1030.
4. Refuge cannot be found in the Case of the Ship Money for it resolved no more than that taxation without legislative authority was bad. Executive Departments, for instance, cannot demand money without legislative approval; see Att.Gen. v. Wilts United Dairies (1922) 91 L.J.K.B.897, and Brocklebank v. The King (1925) 1 K.B. 52.

One consequence of the social revolution brought about by the Welfare State is state interference in the user of private property, examples of which can be found in the Rent Restrictions Acts and the Town and Country Planning Acts though elaborate procedures are usually prescribed[1] which must be complied with if the interference is to be legal. On the other hand, in those spheres where the state has not declared a vested interest, the private owner is free to use his property as he lists and here, the implications of the saying that 'the Englishman's home is his castle' come into full play. Not even the police can enter upon private premises to search and seize a person's property in connection with the commission of a crime.[2] Bradford Corporation v. Pickles[3] has long been regarded as an authority for the proposition that if one who owns some property is motivated by ill-will in its lawful user and thereby causes another person damage, the latter has no actionable remedy. It may well be, however, that

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1. Acquisition of Land (Authorisation Procedure) Act, 1946.
2. Leach v. Money (1765) 19 St.Tr.1002; Wilkes v. Wood (1763) 19 St.Tr.1153.
3. [1895] A.C. 587. Contrast Christie v. Davey (1893) 1 Ch. 316.

if in this day and age similar facts arose in a case the decision would be different and would reflect rather the wider principle of liability propounded by Lord Atkin in another context.[1]

VIII. Freedom from discrimination.

In the discussion on religious freedom, one saw that non-members of the Church of England are still subject to some minor disabilities. Two other instances of discrimination may be mentioned here; first, discrimination on grounds of sex has not totally disappeared as is evident in the differential rates of pay which still exist to the disadvantage of the female sex. Secondly, racial discrimination, although not widely practised has lately taken a turn for the worse[2] as to necessitate the law to step in to protect immigrant races[3] especially the "coloured" people.

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1. Donoghue v. Stevenson, [1932] A.C.562.
2. Cf. the Smethwick constituency results in the General Election of 1964, (i.e., the defeat of Mr. Gordon Walker); also the Labour Club Affair in the same town.
3. Race Relations Act, 1965.

The impression should not be created that only "coloured" persons suffer[1] from racial discrimination: Jews, despite their long sojourn[2] in England are not wholly free from it.

English law soes not discriminate between classes of persons or races on irrelevant ground,[3] the celebrated judgment of Lord Mansfield in Somersett's Case[4] having established that in the eyes of the law, all people are equal nor would the status of a slave be recognised. But it is also well-known that the alien lacks some of the legal protection accorded to citizens,[5] though his lot is much better today than it was, say, a hundred years ago.[6]

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1. What seems to aggravate their plight is that unlike other immigrant races they are more readily and permanently identifiable thus making it easier to pick on them for discriminatory treatment, cf. C.Chattaway "Symposium on the Colour Problem," The Spectator, December 4,1964.
2. A very eventful one at that; banished in 1290, they returned only in 1660. They once suffered from a number of discriminations, and in a property-conscious society their denial of property right must have been very agonising: Bracton says: "The Jew can have nothing that is his own, for what he acquires, he requires not for himself but for the king." By 1846, however, all these restrictions have disappeared: Graveson, Status and the Common Law (1953) 17-18 Today Jews are in the fore-front in the financial and business world.
3. Opinions are, however, divided in the objects of the Commonwealth Immigrants Act, 1962. See C.Thornberry, "Law,opinion and the immigrants." 25 M.L.R. 654 at p.661.
4. (1772) 20 St.Tr.1.
5. Glanville Williams calls the alien a nudus juris in a legal no-man's land. The reform of the law (1951) 55; Gardner and Martin, Law reform now (1963) 52 et seq; The citizen and the administration, pp. 32-35.
6. Graveson, op.cit. pp. 25-26.

So much for the position in public law.

In private law however, there was title protection from discrimination on ground of race.[1] The attempts in the last decade to check racial discrimination by legislation (a crusade which Fenner (now Lord) Brockway made his own) have provoked an interesting debate on the usefulness or otherwise of legislation on this matter. Legislation alone, as Fenner Brockway himself very well realised, would not end racial prejudice; the cure lies in gradual education and inter-racial associations in favourable environmental conditions.[2] Nevertheless, the law ought to intervene, as Moore Berger put it, to strike directly at the acts of those who discriminate rather than at their beliefs.[3]

Such legislation has been opposed on two grounds. First, that it would be difficult to enforce, but there is the American example of the Human Relations Council under

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1. See Re Gwyon (1930) 1 Ch.255 where Eve J did not comment on a "colour bar" clause in certain trusts though on another ground, he held the Trusts not charitable. The West Indian cricketer Mr. (now Sir) Learie Constantine, won a pyrrhic victory in an action against the Imperial Hotels Ltd. for the latter's refusal to provide lodgings for him when there was accommodation. He was awarded the rather contemptuous damages of £5. Constantine v. Imperial Hotels Ltd. [1949] K.B.693. Contrast Scala Ballroom (Wolverhampton) Ltd. v. Ratcliffe (1958) 3 A.E.R.; Re Dominion Students' Trusts [1947] Ch.183; also Jordan v. Burgoyne (1963) A.E.R., where the Lord Parker, the Chief Justice, said that the maker of a racial speech must take his audience whether made of reasonable people or not, as he finds them. See now s.6 of Race Relations Act,1965.
2. See his contribution to the "Symposium on the Colour Problem" op.cit.
3. Racial equality and the law (1954) 67.

the Public Accommodation Acts, which has proved useful in the enforcement of civil rights.[1] Secondly, that such legislation would introduce into the law the concept of race. This appears a formidable objection; but if the Common Law which was not born in nor contemplated the existence of a multi-racial society has failed to provide adequate protection of immigrant races, should legislation not be passed to meet this deficiency? It is even arguable that the concept of race was unknown to English law prior to the Race Relations Act, 1965. The Army Act, 1881 expressly refers to a racial class. Subsection (2) of section 95 of the latter Act provides that "any negro" or "man of colour" though an alien might enlist in Her Majesty's Regular forces and when so enlisted, he is deemed entitled to all privileges of a national born British subject.[2]

The Race Relations Act, 1965 is in a number of respects a compromise enactment. In deference to strong protests from some sections of the community, criminal sanctions

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1. B.Rose considers this point in The New Society, November 19, 1964; see more fully J.Jowell, "The administrative enforcement of laws against discrimination" (1965) P.L.119.
2. Cf. Graveson, op.cit. p.25.

contemplated in the original Bill were deleted.[1] Section 1 which prohibits "discrimination on the ground of colour, race, or ethnic or national origins" is applicable only to discrimination suffered "in places of public resort". Thus refusal to grant a tenancy to a person because of the latter's colour or racial origin is not affected by the Act.[2] Similarly, an insurance firm is atill at liberty to refuse to issue policies to "coloured" people or to do so for an extortionate premium on the fantastic excuse that they are more prone to accidents than others.

The nature of Englishmen's rights.

To bring this survey of Englishmen's liberties to an end, one or two observations may be made as to their place in the legal order. The point needs no emphasis that on the whole a healthy climate of liberty pervades Britain. We may here echo again the remakrs[3] of Clement

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1. Instead a Race Relations Board is constituted to be assisted by a number of local conciliation committees. The latter investigate complaints of discrimination using their best endeavours to secure a settlement between the parties. Cases impossible of resolution by the Committees are referred to the Board who may request the Attorney General to institute civil proceedings for the enforcement of section 1. He proceeds by an action for injunction. ss. 2 and 3.
2. But see s.5 which provides a remedy for discriminatory restrictions on disposal of tenancies with certain qualifications.
3. 460 H.C.Deb. cols. 16-17; cf. Arthur Bryant: The Years of Endurance, pp. 17-18.

Attlee (as he then was) that his country approaches more nearly to reaching the ideals enshrined in the Universal Declaration of Human Rights than any other country. It is, however, possible to dissent from the British approach on the ground that unless you litigate you are not likely to know the exact nature of a given freedom. Ascertainment would be facilitated if these freedoms were spelt out in a Bill of Rights. There is the fear, however, that if this were done, the declared rights would stagnate, and the judges, through being constantly invited to pronounce on them, would be likely to develop a mental attitude that the rights were exhaustive of the rights of the citizen.[1] The evergreen common law, never past childbirth, could, on the other hand, still recognise new freedoms; why sterilise it?

One serious apparent limitation of the British approach, however, is that these freedoms survive by the good grace of the parliamentary majority. They may at any moment, and with the least ceremony, be drastically modified.

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1. Cf. the judicial reaction in America to the 9th Amendment, which provides that the enumeration in the constitution of certain rights should not be construed to deny or disparage others retained by the people; indeed only the right to engage in political activity has since been acknowledged.

suspended, or even abolished altogether. Yet Dicey, though alive to this far-reaching incident of parliamentary sovereignty does not lament it; instead, as we have seen he regards the doctrine of parliamentary sovereignty as complementary to the concept of the Rule of Law.

His attitude is not necessarily contradictory. As has been shown above, it is not Parliament but the people that are really sovereign. The latter has bestowed on the former such sovereignty as would enable it, among other things, to secure political liberty and freedom from oppression.[1] In this connection, several opportunities are provided by the rules and practice of Parliament for ventilating individual grievances. Firstly there is Question Time,[2] and then under S.O.No.9, a motion of adjournment of the House of Commons can be moved to raise a definite matter of urgent public importance.[3] Public petition could be used too, for the right of petitioning Parliament in the prescribed manner is acknowledged as a

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1. Cf.C.H.Bartlett, "The sovereignty of the people" (1921) 37 L.Q.R. 498.
2. See Erskine May, op.cit. pp. 353-364.
3. Ibid.,pp.366-374. Cf."Ten Minute Rule" under S.O.No.12.

fundamental principle of the constitution.[1] The Opposition may ask for a full debate on a substantive motion where there has been a serious denial of freedom. The series of debates which took place over the extradition of Chief Anthony Enahoro of Nigeria in 1963 is a vivid illustration of the ready concern which Parliament can show for protecting liberties.

The evidence is indeed overwhelming that Members of Parliament see themselves primarily as the upholders of individual freedoms and therefore of the Rule of Law. Mr.Robert Jackson, a former Justice of the United States of America wrote in 1955:[2]

> "I have been repeatedly impressed with the speed and certainty with which the slightest invasion of British individual freedom or minority rights by officials of the Government is picked up in Parliament not merely by the Opposition but by the party in power, and made the subject of persistent questioning, criticism and sometimes rebuke. There is no waiting on the theory that the judges will take care of it."

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1. Ibid.,pp. 836 et seq.
2. Cited in "America's Supreme Court", The Times, May 5, 1965.

In Britain, therefore, due observance of civil liberties and therefore of the Rule of Law, has come to be regarded as good politics and it is possible that a government which wantonly violates them would be brought down by Parliament. Should the ruling party condone such violation (as would almost certainly happen given the modern rigid party system), the constituents would have their opportunity at the next elections to reject that party. Ultimately, therefore, the Rule of Law in Britain rests on the feeling of every citizen that it must be upheld.[1]

We must, however, guard against taking too smug a view of the British system. Governments rise and fall today more over economic issues than over questions touching on civil and political rights, though this may be because the latter are not outrageously assailed by those in authority.

Some of the blemishes in the British system have been noted in the above analysis. Happily, the British

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1. Cf. Goodhart, The Rule of Law and absolute sovereignty". Annales, p.284. Cf. G. Phillips, "Constitutional Government and the Rule of Law" (1938) 20 J.C.L. 262.

themselves are alive to these deficiencies and as we saw are regularly discussing them with a view to their correction.[1] It is this continuous craving (in which everybody is playing a part: the individual, the press, Parliament and other national institutions) for a blend of idealism and pragmatism,[2] that is the surest guarantor of the Rule of Law in Britain.

The relevance of the British approach to Africa

Amongst the Commonwealth group of African countries the Republics of Ghana and Tanzania[3] stand out in their rejection of the idea of constitutional guarantees; both have, in other words, "adopted" the British approach. Ghana's position is, however, historically comparable to that of South Africa in this regard, for having started on independence with certain protective clauses in its constitution which were later removed.

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1. Special mention may be made of the contributions and achievements of Justice (the British section of the International Commission of Jurists.)
2. Cf. Her Majesty's speech to Parliament on the occasion of the latter's 700th anniversary of its foundation on June 22, 1965. 267 H.L.Deb. Col.455.
3. The name adopted after the union of Tanganyika and Zanzibar.

The 1950 constitution of the old Gold Coast prohibited racial discrimination[1] but this was repealed by the 1954 constitution.[2] It reappeared in the Independence Constitution of 1957[3] which further protected the freedom of conscience, while also regulating the procedure for compulsory acquisition of property for which adequate compensation must be paid. These clauses were specially entrenched though a year later the Constitution (Repeal of Restrictions) Act removed these entrenchment provisions. The explanation was that it was desirable that the Parliament of Ghana should be sovereign. The Prime Minister, Mr. Kwame Nkrumah (as he then was) intervened in the debates to say that the rigid independence constitution had been accepted with the greatest misgivings and only to avoid undue delay in the grant of independence.[4]

The Republican Constitution of 1960,[5] true to design

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1. S.I. 1950, No. 2094 s.50.
2. S.I. 1954, No.551 s.56.
3. Ghana (Constitution) Order in Council, 1957 S.I.1957, No.277, s.31 (2).
4. Parl.Deb.Official Report Vol.12, p.5 cited by Bennion, Constitutional law of Ghana (1962) 69; also Rubin and Murray, The Constitution and Government of Ghana (1961)8.
5. No.1 of 1960.

did not provide for a Bill of Rights though Article 13(1) obliges the President when taking the oath of office to solemnly declare his adherence to certain fundamental principles among which are matters customarily included in a bill of rights.

The precise legal force of this Declaration was in issue in Re Akoto and others.[1] The appellants were detainees under the Preventive Detention Act, 1958 who had unsuccessfully applied for habeas corpus.[2] One of the grounds of their application was that Article 13(1) of the Constitution was contravened by the detention law. The Supreme Court held that the contention that the Preventive Detention Act was invalid because it was repugnant to Article 13(1) of the Constitution was misconceived. The court likened the presidential declaration to the coronation oath taken by the Queen of England during the Coronation Service:

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1. Civil Appeal No. 42/61.
2. The courts having held that the President's satisfaction required by the Preventive Detention Act 1958 (Act No. 17) would not be reviewed by the courts. Liversidge v. Anderson [1942] A.C. 206 applied. Even though the latter case was decided in a period of war.

> "Neither the oath nor the declaration can be said to have a statutory effect on an enactment of Parliament. The suggestion that the declarations made by the President, on assumption of office constitute a 'Bill of Rights' in the sense in which the expression is understood in the Constitution of the United States of America is therefore, untenable."[1]

To remove any lingering doubts on the matter, the court concluded as follows:

> "We are satisfied that the provisions of Article 13(1) do not create legal obligations enforceable in a court of law. The declarations, however, impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate."

Ghana's presidential declaration may be usefully compared to the preamble of the interim Constitution of Tanzania.[2] The latter recites the rights of the individual and the duties of the state, and goes on to claim that:

> "such rights are best maintained and such duties equitably disposed of in a democratic society where the government is responsible to a freely elected Parliament and where the courts of law are free and impartial."

The Government's explanation for this firm rejection of a bill of rights was that constitutional guarantees were likely

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1. Civil Appeal No. 42/61.
2. Act No.43 of 1965.

to invite conflict between the executive and the judiciary.[1]

However, as Britain clearly demonstrates, the absence of a bill of rights in a country is not fatal to the observance of the rights of the individual or of the Rule of Law.

To know to what extent the Rule of Law is being adhered to in a given country, therefore, one ought not to look at its constitution for particular provisions, rather one should examine its entire political and legal systems, and the way of life of the people is no less relevant.

What then are the main features of the concept of the Rule of Law that we shall be looking for in the African

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1. See the Proposals of the Tanganyikan Government for a republic, Government Paper No.1 of 1962, p.6.

countries? The diversity of approach which we have noticed in this and the previous chapter should point to the folly of confining oneself to the boundaries of a particular state to ascertain these main features.

Towards a universal conception of the Rule of Law.

We shall long be indebted to Dicey for highlighting the characteristics of the Rule of Law in England. Unfortunately, his analysis obviously tailored to fit the situation in England was one time regarded in the common law world as the definition of the concept of the Rule of Law. Yet, Dicey himself did not claim to have formulated a comprehensive definition. He spoke of three possible "conceptions" or "meanings", not exhaustive features. For instance, he did not include in his analysis the independence of the judiciary which is widely regarded as an important feature of the concept.[1]

As we saw earlier in this Chapter, Dicey's rather impatient condemnation of other foreign systems of government was not alwyas justified. He failed, for example,

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1. Thus in Tanganyika (now Tanzania) it was mentioned as the main characteristic of the Rule of Law. W/P No.1. 1962, p.6.

to concede that just as the English people were being guided by those ideals implicit in the English term 'Rule of Law' so were other countries, in their own way pursuing a similar end.[1] We find the American insisting on "government under law"; the French speak of "le principe de la legalite" or "la de droit" and the Germans der Rechtsstaat.

Since Dicey wrote, however, the concept of the Rule of Law has assumed international importance but only in the sense of the synonym phrase - "the preponderance of the legal spirit"[2] - almost casually introduced by Dicey himself. Thanks to the International Commission of Jurists for providing the necessary platform,[3] eminent jurists are today advocating the elaboration of a universally applicable restatement of the idea of the Rule of Law.[4]

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1. Cf. Hayek, The political ideal of the Rule of Law (1955); Marsh, "Working Paper on the Rule of Law" p.191.
2. op.cit.p.195.
3. Although probably for reasons of its history, the Commission has no members from Communist countries, the practices of these states are investigated as objectively as possible.
4. See the Act of Athens (1955); the Declaration of Delhi (1959) the Law of Lagos (1961); the Resolution of Rio (1963); generally, The Rule of Law in a free society, where Jean-Flavien Lalive speaks of "za trend towards the acceptance of a common denominator of the Rule of Law in the practice of individual states." p.x.

But the task of creating an ordered theory out of the diverse and, in some cases, seemingly incompatible national practices and institutions is not going to be an easy one. It is interesting to observe that even amongst countries with a similar political and social background and comparable economic structure and problems, agreement has not been possible as to all the essentials of the concept. This was revealed at the 1957 Chicago Colloquium arranged by the International Association of Legal Science for jurists from the Western world on "The Rule of Law as understood in the West".[1] Certain questions which merit attention were resolved. The Rule of Law was not a mere formalistic concept decreeing legality but presupposed certain rules, procedures and institutions. Furthermore, the concept of the Rule of Law was compatible both with a federal constitutional structure combining a power of judicial review, and a unitary structure with a sovereign legislature. Although the separation of powers was not essential to the operation of the principle, yet it was

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1. The transactions are published in the Annales op.cit.

highly desirable that powers should be as diffused as possible. Finally, it was emphasised that the Rule of Law was no longer concerned with the arbitrary use of power, but with the positive purpose of encouraging the responsible use of power,[1] and that in this sense, the welfare state was not opposed to the Rule of Law.[2]

The organisers of the Chicago Colloquium arranged in 1958 a like conference in Warsaw on the Rule of Law as understood in the communist countries.[3] It emerged from the discussions that the one overriding feature of the communist conception of the Rule of Law was "socialist legality", in principle which enjoins strict and persistent application and execution of the law. By this conception it would seem that all laws however iniquitous in their effect, must be obeyed. This construction would, however, be misleading, argued Tchikvadze who told the conference that "socialist legality" was the instrument of socialism by which the interests of the individual were placed above all others.[4] The West was wrong not to see that socialism

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1. See Professor Hamson's general report, ibid.,p.15.
2. Cf. the penetrating analysis of "The Rule of Law in a Welfare State" by Prof. H.W.Jones, ibid.pp.243-258.
3. Proceedings reported in (1961) 21 Zeszyty Problemowe Nanki Polskief (Cahiers de l'Académie Polonaise des Sciences). For a summary and a critical review of the deliberations, see Dr. A.K.Kiralfy, "The Rule of Law in Communist Europe." (1959) 8 I.C.L.Q.465.
4. Zeszyty etc.p.324.

had conferred individual rights on the subjects.

If "socialist legality safeguards the political rights and liberties of citizens" as here claimed, the question arises why it should not be easy to devise an umbrella definition that would apply to the western as well as the communist countries?[1] Some objections would be instantly raised to such rapprochement.[2]

(i) That the constitutional structure of the communist state does not permit periodic change of government through genuine popular elections.

(ii) That the constitution and the law is mainly administrative (e.g. Soviet wives are prevented from joining their husbands in the West and the former have no legal remedy in the courts to uphold their marital rights.)

(iii) The rate of deflections of East Germans to West Germany is seen as a commentary on the degree of liberty in Eastern Europe.

(iv) How could people who openly reject the need for such institutions as the state and the law admit a theory

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1. Cf.Marsh,"The Rule of Law as a supra-national concept" in Oxford essays in jurisprudence (1960) 223; "The Rule of Law: New Delhi - Lagos - Rio de Janeiro" (1963) 4 J.I.C.J.No.2, p.257.
2. Cf.Dr.A.K.Kiralfy who doubts whether a comparison of the two ideas of legality could be justified. op.cit.p.467.

which insists on state subjection to law? Is it not the corner-stone of communism that the state and the law would progressively wither away?

Sight should not, however, be lost of the tremendous shift that has occurred in communist attitudes[1] since Marx, Engels and Lenin. Today, in the communist world theory hardly relates to practice; but in the effort to maintain their dogma as the central organizing principle to which the facts must conform, leaders have to strive "to fit the state and the law into the Procrustean bed of Marxism."[2]

So too has the West relaxed its excessive deference to individualism, the maintenance of the status quo, and the doctrine of the laissez-faire. The acceptance of the Welfare State[3] is an admission that the problem of today is, in the words of an Italian Judge, Armando Cichetti, the securing of the right to work, equal participation in the

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1. These changes do not mean, however, that the law now reigns supreme in the Soviet world. Judges are still told to bear in mind that their judgments must in content be politically correct. K. Grzybowski, Soviet legal institutions.... (1962) 119.
2. I.Lapenna, State and Law: Soviet and Yugoslav theory (1964)1. The Yugoslavs, are, however, now less dogmatic and relatively more liberal than the other communist countries. The Programme of Yugoslav Communists published in 1959 proclaimed "a new quality in law" safeguarding the personal rights of citizens. Henceforth, it was said, the citizens would be protected from arbitrary action. Quoted ibid,p.102.
3. Though not without some protests see F.A.Hayek: The Road to Serfdom. But see Pound: "The Rule of Law" Encyclopaedia of the Social Sciences p.403 et seq.

benefits of welfare and culture.[1]

The advent of a third force in the world community, the Afro-Asian states whose under-development compels them to speak in a language akin to those of socialist countries, makes it more urgent that a new meaning of the Rule of Law should be formulated to take account of their aspirations. The late Jawaharlal Nehru spoke for these nations at the Delhi Congress of the International Commission of Jurists when he urged that the Rule of Law must run closely to the Rule of Life: it could not go off at a tangent from life's problems providing answers to problems which existed yesterday and were not so important today.[2] In other words, no definition of the Rule of Law could be timeless,[3] a view endorsed by the International Commission of Jurists in its Declaration of Delhi, which recognises the dynamic nature[4] of the concept, the essence of which is not only to safeguard and advance the civil and political rights of the individual,

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1. "The Rule of Law as the Basis of a Universal Legal System"; Review of Contemporary Law; 5th year No.2 December,1958,p.12.
2. The Rule of Law in a Free Society: (I.C.J.Publication) p.43.
3. See Freidman: Law in a Changing World p.502; N.Heditz administers this warning: an attempt to set up principles or ideals valid for all time would only produce a minimum of no value: "The Rule of Law in the Northern Countries", Annales, etc. op.cit.,p.242; also The Hon.T.J.Thorson: 'The Rule of Law in a Changing World'; University of British Columbia Law Review, March 1960,p.176.
4. A similar stand has been taken in 1957 significantly by some American lawyers at the Chicago Colloquium, see Hanson, Annales, etc. p.15.

but also to establish the social, economic, and cultural conditions under which his legitimate aspirations and dignity may be realized.[1] In his admirable Working Paper which paved the way for the adoption of this expansive basis for the Rule of Law, Mr.Norman Marsh emphasized that a free society was a pre-condition of the concept.[2] Some may quarrel with this assumption, but the alternative is a highly regimented society[3] in which work and welfare would be glorified without a corresponding regard for the need to use power responsibly.

So appraised, the concept implies a judgment of value. It has been variously described as meta-legal,[4] socio-ethical[5] or ideological in the sense of providing a yardstick by which to measure "good" against "bad" law.[6] Dr. R. M. Jackson has, however, expressed some concern that the concept has lately acquired so many different meanings

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1. The Rule of Law in a free society, p.3.
2. ibid.,pp.192-193; also "The Rule of Law as a supra natural concept" pp.242-245.
3. Cf.Friedman op.cit.
4. Hayek, The political ideal of the Rule of Law,p.38.
5. Stone, The province and function of law (1946) 327-328.
6. Friedman, op.cit.p.491 et seq.

as to have become a meance to clear thinking; and he warns against the danger of reducing it to a fine sonorous phrase or mere slogan to be placed alongside many others with which the word is already plagued.[1]

I shall now attempt a tentative working definition of the Rule of Law conscious of the fact that the concept includes ideas difficult to express in words. Nevertheless the Rule of Law is not (pace Sir Ivor Jennings) "an unruly horse."[2] It prescribes a standard of conduct for rulers by insisting on a free and just society under a constitutional government. Its main features may be said to consist in:

(i) A constitution freely adopted by the people.

(ii) A government representative of and responsible to the people.

(iii) The recognition and effective protection of fundamental human rights (political and social),[3] not necessarily by a formal guarantee but in a way that strikes a proper balance between the needs and interests of the individual on the one hand, and of the security and stability of

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1. The machinery of justice (1964) 327-328, 341.
2. Cf. Jennings, The law and the constitution, p.60.
3. Cf. the European Convention on Human Rights. Supra Chapter 1.

the state on the other.[1]

(iv) Fair and impartial administration of justice: the independence of the judiciary is central to this requirement; certain minimum safeguards for a fair trial are also essential.

(v) Government under law: a residual requirement namely that there must be a continuing readiness on the part of the government to observe the constitution and the ordinary law of the land, whether statutorily laid down or judicially declared.

These features are stated in outline here; but in Part III of this study, we consider them more fully in the African context. The African traditional past however, is so recent that amidst the tremendous changes, technological and cultural, that are taking place in modern Africa, old myths and codes and traditional beliefs and standards continue, with striking tenacity, to claim allegiance.[2]

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1. But see Lord MacDermott's view that the Rule of Law prefers the individual to the state, Protection from power under English law (1957) 8.
2. Cf. D.Forde, African worlds (1954) VII-VIII.

As will be noted later,[1] the imported European systems of government are being adapted by the political leaders purportedly to create institutions of government more in accord with traditional ideas and practices.[2] In Part II which follows, therefore, we shall examine these traditional ideas and practices with a view to discovering the equivalents (if any) of the foregoing features of the Rule of Law.

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1. Chapter 5.
2. Cf. Tanganyika Governments proposals for a republic. G/P.No.1 of 1962. See also L.Senghor, African socialism (trans.M.Cook) (1964); K.Nkrumah, Consciencism (1963). African socialism and its application to planning in Kenya, Sessional White Paper, 1964.

Part II

THE RULE OF LAW IN TRADITIONAL AFRICA

CHAPTER THREE

INDIVIDUAL FREEDOMS IN TRADITIONAL SOCIETIES

Traditional legal systems.

The idea of fundamental human rights became firmly established only at the turn of the eighteenth century.[1] It would be wishful, therefore, to expect that African traditional societies would have accorded recognition and protection to these rights in the modern sense. Indeed, early writers on African ideas and institutions had doubted whether the individual, in traditional societies, had separate interests (let alone rights) apart from the group.[2] Thanks to the more penetrating investigations of these societies by most modern writers,[3] this inaccurate image of the individual in traditional polities as a "robot" whose interests, thoughts and actions were completely submerged in those of the group, is now being discarded. But before we examine, more fully, the place of the individual in traditional societies an attempt will be made to put traditional Africa[4] in its proper legal setting.

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1. Supra, Chapter 1.
2. See for example, Hartland, Primitive law (1924) Chapter III.
3. For a review of current thoughts on this subject, see Gluckman, Politics, law and ritual in tribal societies (1965).
4. I shall in this study refer to traditional Africa in the past tense though some of the ideas and practises analysed here are still being observed in some societies.

It is not intended to engage in the verbal ritual of showing that African law is law.[1] It is sufficient to note that in virtually every African society, great stress was placed on the importance of maintaining social harmony,[2] and the pressures towards conformity with legal and social norms was particularly strong. Though the view of law as a means of maintaining social harmony would not by itself fit Austinian "command" theory of law,[3] one can still conveniently call, even in such African situations, thoe rules of conduct which people recognise as obligatory, 'law'.[4] Every society has law in this sense but this does not mean that legal systems are identical the world over, as

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1. But see T.O.Elias, The nature of African customary law (1956) esp. Chapters 3 and 4.
2. Cf.J.H.Driberg's description of the object of African law as the maintenance of the social equilibrium, "African conception of law" (1934) Journal of Comparative Legislation and International law.
3. See The province of law determined (ed.H.L.A.Hart) (1954) esp Lectures I and V. Austin has been criticised for attempting to invest a personal definition with the authority of a scientific and universal truth. Glanville Williams,'International Law and the controversy concerning the word "law".'
4. Cf. Goodhart's definition of law, English law and the moral law (1955) 19-37. The key word, he says, is 'oughtness', Prof. Axel Haggerstöm's 'law conviction', ibid.p.23; also Sir Frederick Pollock; "Law is enforced by the state because it is law, it is not law merely because the state enforces it." A first book of jurisprudence (1924) 29; Malinowski, Crime and custom in savage society (1926) 30. But see Hoebel; The law of primitive man (1954) 276.

each society is free to adopt a system that fits its social structure.[1]

Thus some African societies with centralised political systems like the Ashanti and the Ganda, the Yoruba and the Zulu, had a political superstructure, and therefore a legal system not unlike modern European systems.[2] On the other hand, there are some small or loosely organised societies like the Bushmen whose political systems, were rudimentary. What distinguished these latter societies from the others was the fact that they lacked elaborate institutions and procedures for changing the norms of conduct and for settling disputes.[3] But, as Lord Hailey reminds us, although the laws of these simpler societies "differ from the codes familiar to us today, they exhibit to the modern world some of the scenes which must have been enacted in a distant past in parts of the Middle East and later eras in Rome, Germany or Britain."[4]

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1. Cf. P.Howell, A manual of Nuer law (1954) 24.
2. Cf. J.G.Prestiany, "Law" in the Institutions of primitive society (1963) 39.
3. Cf. Allott, "African conception of the Rule of Law" in Development for what? (ed.J.Hallowell) (1964) 75. esp.pp. 80-85; H.L.Hart, The concept of law (1961) 84 et seq; and further, Chapter 4 infra.
4. African survey (1957) 590; cf. Maine, Early institutions (1880) 389 et seq; also D.Lloyd, The idea of law (1964) 235.

Is there, therefore, anything unique about traditional African law? This is arguable having regard to the similarities which particular African legal systems might show to the legal systems of other lands, given comparable social and political structures. It also follows that since there were great variations in the political, social and economic organisation of the traditional societies inter se[1] their legal systems must necessarily differ so that one cannot accurately speak of a universal general African law. But, as Professor Allott has demonstrated, it is possible to generalise about these systems and in the process to extract certain, if a rather limited number of features common to all of them.[2] We are, however, conscious of the danger that such generalisations may conceal more than they reveal. Nonetheless, these common features[3] provide a useful basis for a discussion of individual freedoms and of the mode of government in traditional Africa. The former is taken in the present chapter and the latter in the following chapter.

The community principle.

The pervading rôle of the group in legal and political

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1. The variations existed not only as between tribes but also as between ethnic groups within one tribe and even within ethnic groups themselves. The future of law in Africa (ed. A.N.Allott) (1960) 10.
2. "The unity of African law" in Essays in African Law (1960) Chapter 3.
3. For a suggested list, see ibid, pp. 67-71.

matters is possibly the most outstanding feature common to all African legal systems. The explanation for this may be found in the fact that the central factor of social and political organisation was the family. Thus, the basic qualification for membership of a political unit was blood relationship (actual or fictitious); the object being to maintain a closely-knit society. This emphatic bias for an integrated society did not mean, contrary to earlier views, that traditional polities were monolithic.

Kin-solidarity was very strong in smaller communities, and relatively less so in others. (It was at its weakest in a multi-tribal society).[1] Even so, it needs to be remembered that kin-solidarity was appealed to only where inter-group issues were involved. Within the group itself, the individual had recognisable rights and obligations as against other members of the group.[2] He was at liberty to assert or resist these rights and obligations, as the case might be, against other members of the group; though if his interests were threatened by non-members of the group, the group (not the individual) took necessary steps to defend the threatened interests.[3]

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1. Schapera, Government and politics in tribal societies, (1956) 20.
2. See the Nigerian case, Lewis v. Bankole (1908) 1 N.L.R.82.
3. Cf. modern insurance policies against accidents etc.

Status differentiations

Alongside the community principle, one must also reckon with the incidents of status. Status, it has been said, dominated the traditional society:[1] rank, age, sex, ethnic origin, and in later years, wealth as well. Although these differential statuses did not completely dwarf the community principle, they were sufficiently marked as to make some inroads into it.

The problem posed for individual freedoms in traditional Africa was, therefore, two-fold: (i) to ensure that the community principle was not so applied as to stifle initiative (i.e., affording security without freedom;) and (ii) to prevent social differentiation (deriving from status) from hardening into social stratification.

Whether and how far this two-fold problem was resolved will be apparent in the following pages.

I. Enjoyment of property.

(a) Land

A full discussion of the "real character" of ownership of land in African societies is not possible here.[2]

1. Gluckman echoing Maine, The Barotse ideas in jurisprudence (1965) 5.
2. But see Allott, 'Towards a definition of absolute ownership' [1961] J.A.L.99; 148; cf. S.R.Simpson, ibid,145.

Stated in the briefest outline, the position appears to be as follows: The concept of individual ownership of land in the English sense i.e., 'absolute in fee simple' was, in theory, non-existent in the traditional society.[1] There were (and still are) two distinct aspects to African land tenure system (i) control and (ii) occupation and user.

(i) Control: By control is here meant the power to grant portions of land (primarily to the groups making up the community and ultimately to the individuals within that community) as well as the power to rescind grants previously made.[2] The controlling power (remotely) vested in the highest political authority i.e., the state; but the power devolved by delegation on the next political authority downwards, and so on to the family, the lowest unit in the chain.[3]

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1. See generally, Gluckman, Barotse ideas in jurisprudence, Chapter 3; Elias, Nigerian land law and custom (1962) 95 et seq; also Lord Haldane's quotation, with approval, of Rayner L.J.'s dictum that the land belonged to the community, the village or the family but never to the individual. Amadu Tijani v. The Secretary of Southern Nigeria [1921] A.C. 399.
2. Cf. K.Bentsi-Enehil; Ghana land law: an exposition, analysis and critique (1964) Chapter 1.
3. Cf. Allott, "The unity of African law", p.70.

(ii) Occupation and user.

An important qualification to the right to a grant of land was the membership of the group, primarily the family - the immediate grantor of portions to its members. However, once an individual was seised of his own portion, his right to occupy and use the same to the best advantage was secure.[1] He could build or farm on it but he could not sell it to a stranger, without the consent of the family, nor could the latter give such consent if the stranger was not a member of the wider political group say, the clan, without the approval of the political authority in the clan.

Only if the individual died without heir to succeed him would the land revert to the family.[2]

This broad picture of individual rights in land is blurred in two respects. First, the family might prefer to retain large portions of land to be administered as family estates rather than appropriate them to individuals. This notwithstanding, the individual's rights in the family property were still defined. For instance, he had the right of

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1. Cf. Danquah, "There is no claim on the farmer with regard to the fruits of his individual efforts on the land." Akan laws and customs.....(1928) 3; and further E. Bentsi-Enchil, op.cit. pp. 87-123.
2. I have not considered individual ownership of land which was of a much later development in Africa. It could arise by an individual taking possession of an unappropriated land. Cf. Mr. Justice Onyeama, "Some aspects of Nigerian land law" in Nigerian law, some recent developments, I.C.L.Q, Supplementary publication No. 10, (1965) 69 at p.73.

residence, the right to be consulted in any dealings with the property and the right to demand partition of it.[1]

Another source of confusion is the "widespread sharing of produce"[2] that went on in the traditional society. A casual observer might think that the people did not distinguish between individual and group rights or interests.

However, in certain well-defined circumstances, the individual might lose his rights of user and occupation.

(i) Direct extinction: the family could expel an individual from the group. Among the Yoruba, a member, who committed a grave crime might be driven from the town or sold as a slave.[3] The family would consequently re-enter the vacated portion of land. Could the state as distinct from the family confiscate such land? In theory, this was possible but such would have been the opposition from the family or clan that it was hardly attempted by a ruler however despotic.[4]

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1. Lewis v. Bankole supra.
2. Gluckman, Politics, law and ritual in tribal society, p.36.
3. P.C.Lloyd: Yoruba land law (1962) p.86.
4. Rattray, Ashanti (1924) pp. 230-1, K.A.Busia, The position of the chief in the modern political system of Ashanti, p.60.

(ii) Indirect extinction: On a proved act of rebellion the state could legitimately banish a whole family. Portions held by the members of the family would revert to the rest of the community for re-distribution. Land might be compulsorily required, for example, for a new market or to construct a new road. The practice was settled, however, than an alternative land must be found for the group adversely affected by the scheme.

It seems reasonable to conclude that barring rejection by the family of the individual member or by the state of the family, the tenure of each holding was secure. But a security of tenure linked to virtual inalienability might work some injustice. A grantee might for instance, find that the original portion allocated to him was unproductive. Could he demand a new grant? If there was unallocated land, he would probably be given a fresh portion. If, however, all land had been taken up, the general rule appeared to be that there was nothing the community could do about it. Among the Kikuyu, the Kiama would not interfere with the ownership and use of land not even for the purpose of adjusting an inequality of

fortune between kinship groups.[1]

(b) Other property

Next to land, the only property of importance was cattle especially among the pastoral societies to whom cattle, was the most significant source of wealth.[2] Unlike in the case of land, stock were individually owned. However, since inter-relations were expressed in terms of reciprocal rights over domestic stock, a relation might some day claim gifts of animals for certain socially defined requirements such as payment of bride wealth.[3]

Other movable property was everywhere susceptible of individual ownership.[4]

II Religious freedom

Maine's postulate, that every society must pass through that intellectual condition in which civil obligations and duties are inevitably compounded[5] would

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1. Lambert, Kikuyu social and political institutions (1956) 115. Contrast the practice which has been observed in some villages around Ijebu-Ode (Yoruba) of a yearly re-allocation of land to ensure its maximum use. Lloyd, op.cit. p.73.
2. Cf. P.Gulliver, The family herds....(1955).
3. Ibid, p.77.
4. Among the Yoruba, however, gold chains and pendants were owned by the family. G.B.A. Coker, Family property among the Yoruba (1958) 60.
5. Ancient law, p.16.

appear to be especially true of African societies where legal, political and religious matters were inseparable.[1] In these societies, however, religion was more than a psychological phenomenon. As Evans-Pritchard, echoing Durkheim, puts it:

> "religious facts whatever else they may be are social facts and cannot therefore be explained in terms of individual psychology. Religion is not an individual matter. It is a social phenomenon, something general, traditional and obligatory."[2]

To deny religion in a traditional society was to reject most of the social and political obligations of citizenship.[3] It would, for instance, be unthinkable in Ashanti for a person to refuse to join in the performance of the communal rites connected with the Adae and the Odwera ceremonies.[4] The latter ceremony though primarily connected with the first fruits also served as an occasion for the cleansing of the nation from defilement and for individual re-affirmation of political allegiance to the state.

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1. Cf. J.H.Driberg, "The secular aspect of ancestor worship in Africa" (1936) Journal of Royal Africa Society (Supplement).
2. "Religion" in The institutions of primitive society, p.5. Cf. M. Fortes and G.Dieterlen, African Systems of thought (1965) pp. 1-7.
3. All principal events in life must be marked with religious rites: birth, marriage, sickness, death, important travels, etc. Kingship or headship must have religious sanction hence sacred king and the attributed role of ancestors in government. Cf. E.B.Idowu, Olodumare, God in Yoruba belief (1962) 3 et seq; God in the Nigerian belief (October lectures, Lagos, 1962) 22.
4. Busia, The position of the Chief in the modern political system of Ashanti, pp.27-36.

On the other hand, though there was a state religion there was no established "church". Herskovits has remarked on the ubiquitousness of shrines in Dahomey. No compound was complete without a building where the ancestral dead were worshipped.[1] New ancestral gods were designated from time to time as and when the old ones were thought to be too remote to be able to hear distinctly the supplication of their living relatives.[2] The Yoruba too recognised a plurality of orisa (divinities); though the exact census of the pantheon is unknown,[3] figures like 201, 401, 1060, even 1440 being mentioned.[4] Whichever figure one accepts, the range of choice was wide enough to allow some measure of freedom, if not of belief, certainly of worship. Nor was exclusiveness known in these matters for one could join in worshipping as many divinities as one liked.

How did the traditional societies react to religions coming from outside such as Islam and Christianity? In most places, Islam preceded Christianity and on the whole, it was not badly treated. For example, the Islamization

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1. Dahomey: an ancient West African kingdom (1938) Vol.1, p.195.
2. P.Mercer, "The Fon of Dahomey" in African Worlds, pp.210-234; K.Little, "The Mende of Sierra Leone", ibid, p.120.
3. Idowu, Olodumare etc. pp. 67-69.
4. Ibid.

of Nupe (Northern Nigeria) was fairly smoothly carried out.[1]

In contrast, the Egba reaction to Islam was in the initial years less cordial.[2] Angry opponents pulled down the mosques erected by the Moslems; it took some time before the latter could firmly establish themselves. This hostile reception should be contrasted with the "festive welcome" accorded to Henry Townsend, the first Christian missionary, when he arrived in Abeokuta on 4 January 1843, though in 1848-9 a wave of persecution was to break out against the Christians. The immediate cause was the burial of the first Christian convert in a cemetery in accordance with Christian rites and not in the family compound as was the tradition.[3] The Ogboni Society did not like being robbed of their customary rites. It was also suspected that some Christian converts, notably the Sierra Leonian immigrants, who resented the abolition of polygamy, secretly instigated or at least supported the attacks on the missionaries. The leading chiefs, however,

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1. S.F.Nadel, Nupe religion, p.232.
2. It was generally believed that the Moslem converts and their immigrant mallams were subversive of the established order turning "fifth columnists" during the Fulani invasion. S.O.Biobaku, The Egba and their neighbours (1957) 15.
3. Ibid.,p.35.

came down on the side of the latter and the persecution was called off, though in 1866-7 the missionaries suffered a further persecution. This time it was part of a general outburst against all European elements (including the merchants) and their friends in protest against the placing of constables by Commander Glover of the Lagos Government, on the Egha border with Lagos. The missionaries and the African converts were temporarily expelled from Abeokuta.[1]

The Buganda story is more tangled. The first Christian missionaries arrived in Buganda in 1877 but again they had been beaten to the race by the Moslems, who were not only well-received by the Baganda but numbered among their early converts Suna II, the Kabaka at the time.[2] Suna was later to change his mind when political considerations demanded this. It fell to Mutesa II to deal with the competing claims of the Moslems, the Christian missionaries, and the old guard or "the pagan stalwarts" (as Gray terms them) who were determined to conserve the customs and cultures of the people. The king successfully played one group against the other.

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1. Ibid., pp. 83-5.
2. J.M. Gray, "Mutesa of Buganda" (1934) Uganda Journal, 22.

Mwenga who succeeded him was greatly suspicious of the Christian converts, some of whom were openly inciting acts of insubordination against traditional authorities.[1] Customs were violated with impunity. The priest of the tomb of Junju, for instance, was forcibly expelled and a bonfire was made of his armlets and fetishes. The king retaliated and a state of 'civil war' prevailed.

The wanton murders of Bishop Hannington and a few converts to Christianity took place during this strife.[2] However, the concerted opposition of the Christians and the Muslims was too much for the king who was outfought and eventually lost his throne. Kiwewa, a pro-Christian king, was installed but the Muslims soon brought him down, installing their nominee, Kalemu, in his place. The Christians, on regaining the upperhand, brought back Mwenga. By 1902, however, the two new religions were so well-established that the composition of the Lukiko of Buganda followed religious lines reflecting the balance between the various groups.[3]

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1. J.M.Gray, "The year of the three kings of Buganda" (1950) 14 Uganda Journal 15.
2. Ibid., p.16.
3. A.Low, "The composition of the Buganda Lukiko in 1902" 23, Uganda Journal, 64.

The pattern was thus fairly the same everywhere; the new religions were tolerated so long as their followers did not meddle in political affairs or subvert the established customs. By the end of the last century, church, mosque and shrine could be found in close proximity, adherents of each worshipping unmolested according to their beliefs. Nor was it uncommon to find different members of one family subscribing to different faiths.

In some places, the new religions were incorporated into the traditional structure. Thus the Yoruba oba (king), by custom, should be "multi-religionised" when he ascends the throne.[1] During his installation ceremonies, in addition to the customary rites, he has to receive the respective rites of Islam and Christianity. Every oba also takes part in the main festivals of all the religious groups. The Alake of Abeokuta (Yoruba) retains the services of a chaplain, a mallam and an Ifa priest.

III. Freedom of association

The tendency to form associations is very strong in Africans generally. In the old days, people were free to organise themselves into groups to promote and protect

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1. P.C.Lloyd, "Installing Awujale" (1961) Ibadan, 8.

their common interests whether in the field of politics, religion, economics, recreation or pleasure. In some societies, slaves were even allowed to form convival associations.[1] Associations subversive in their objectives or activities would not, however, be tolerated.

Moreover, since the society was an integrated one most associations functioned within the framework of the political system. Thus the age-groups, age-sets and age-regiments in those societies that had them and secret societies like the Ogboni among the Yoruba and the Poro among the Kpelle were also organs of government. It should not be inferred from this that all associations were units of government or that their aims, objectives and interests must be identical with that of the state. We shall see in the next chapter how some organisations (even those which fulfilled governmental roles) provided a check on the power of the ruler.

Two illustrations may be given to show that not infrequently these organisations took courses of action independent of, and at times, opposed to the authorities. As a rule, women took no prominent part in the running of the

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1. Fadipe, The sociology of the Yoruba, Ph.D. Thesis, (London) 1940, p. 743.

state but they were usually organised into powerful associations to safeguard their interests.[1] The Aba riots attest to their fighting spirit and solidarity in any matter affecting them directly. On that occasion, the women suspected the "warrant chiefs" of having supported the taxation of men and probably of women too. They demanded the caps of these "chiefs" assaulted them or destroyed or looted their property.[2]

The other illustration is drawn from Dahomey and concerns the influential organisation dokpwe which was so important and influential that every person joined it be he a chief or a commoner. It was nonetheless a free institution independent of the political authority and should a chief and a common man both require its help it would be given in the order of asking.[3]

Lastly, it follows from the integrated nature of African society that the party-system of government highly

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1. A. Scobie, Women of Africa (1960) 1.
2. Report of the Aba Commission of Inquiry 1929, quoted in Report of the Native Courts (Eastern Region of Nigeria) Commission of Inquiry 1953, para. 90. An Egba women's movement led by Mrs. F. Ransome-Kuti played a major part in the agitation for the abdication of Oba Ademola II, the Alake of Abeokuta in 1948.
3. Herskovits, op. cit, p. 64.

regarded in the Western world had no counterpart in traditional society as no organisation held itself as an alternative government. With very few exceptions such as the Kikuyu,[1] rulers whether chiefs, elders or notables, continued in office for life unless meanwhile they had lost the confidence of the people and had been removed. There were, however, other means of ensuring that the rulers acted in accordance with the wishes of the people.[2]

IV. Free discussion

As freedom of discussion was possibly one of the most tangible features of African democracy, it would seem better to postpone comments on this subject till the next chapter when African conception of government is examined.

V. Equality of treatment

The patriarchal rather than aristocratic structure of the typical African society (leaving aside for the moment the stratified societies) did much to engender respect for the principle of equality of treatment. On the other hand, certain incidents of differential statuses produced opposite results.

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1. With their Ntuiko (the handing over of power by the ruling generation to the next). Cf. Lambert op.cit. pp.136-138.
2. See more fully Chapter 2 infra.

(a) Rank

In some societies, certain privileges attached to kings, princes and chiefs as against the commoners. Thus only the Nupe king and the members of the nobility could grow the more productive lebozi kola nuts.[1] Among the Yoruba the oba alone could wear beaded shoes and (at one time) socks.[2] Some ornamented umbrellas were used as insignia of office by certain designated senior chiefs, therefore no other person could use such colourful umbrellas.

A strange rule was made by Oluyole, the Bashorun of Ibadan (Western Nigeria) in the nineteenth century prohibiting anybody but himself from wearing velvet robes though other chiefs might use velvet caps. He claimed the prohibition was made for the welfare of the people. Silk velvet was very rare at the time. If poor people were allowed to aspire to what they could not afford, they were likely to neglect the more essential things of everyday life to the detriment of their dependants. Worse still, if they could not legitimately obtain these things the spirit of emulation and covetousness might lead them to robbery and

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1. S.F.Nadel, A Black Byzantium (1961) pp.90,122.
2. A.K.Ajisafe; op.cit.p.23.

other evils.[1]

Privileges were by no means confined to kingly personages: the Biru (important persons keeping secret traditions) were accorded a privilege status among the Ruanda. They lived in seclusion and were exempt from tribute payment.[2] It was thought that they needed special protection to enable them to perform their duties without fear or favour.

Where privilege took the form of economic monopoly, class distinction would result. Thus among the Swazi an aristocracy emerged because people could not build and cultivate where they liked. The land belonged to the king and land tenure was therefore determined by the hierarchical political structure.[3] The situation was even worse in Ruanda and other stratified societies and merits separate treatment later.

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1. Cf. S.O.Biobaku, "Oluyole of Ibadan" in Eminent Nigerians of the Nineteenth century (ed. K.O.Dike) (1959) p.46.
2. J.J.Maquet, The premise of inequality in Ruanda (1961) p.103.
3. Hilda Kuper, An African aristocracy; rank among the Swazi (1947) p.44.

We might here contrast the more egalitarian practices of the segmentary societies like the Nuer of whom Evans Pritchard wrote: "That every Nuer considers himself as good as his neighbour is evident in their movement. They strut about like the lords of the earth, which indeed they consider themselves to be. There is no master and no servant in their society but only equals who regard themselves as God's noblest creation."[1]

(b) Age

Perhaps more than in most societies, age differentiation was of considerable importance in an African society going deeper than the customary division into minors and adults for purposes of legal capacity, liability and punishment.[2]

An unusually high degree of respect was expected to be shown by the younger to the older ones, and since to govern was to rule, government was more the affair of the older members of the community. The degree of gerontocracy varied from one society to another but it was fairly

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1. The Nuer (1940) 182. Cf. I.Lewis, A pastoral democracy (1963) at p.1, where similar remarks were made about the pastoral Somali. See also for the Ibo (though surprisingly recognising a caste in the Osu) C.Meek, Law and authority in a Nigerian tribe (1937) pp333-4; M.M.Green, Ibo Village Affairs (1929) pp. 23-4.
2. I.Schapera, Tswana law and custom (1955) 29.

widespread.[1] Among the Arusha, for example, youths had no political rights or duties; at best only unambiguous messages would be entrusted to a junior murran.[2] It did not mean that youth was despised, on the contrary, age and youth were always treated as complementary. Since the older people had riper and richer experience, it was proper that they should take precedence in public life; the younger ones could wait till their own time came but meanwhile should watch the older ones and learn from them.

Often, therefore, the issue turned on what rôles were most suitable to a person's age. We thus find appropriate functions assigned to the members of the community according to their maturity and physique as the division of societies into age-grades, sets and regiments shows. Through these associations the voice of the youth was heard and could even be very effective as demonstrated by the activities of the asafo group among the Akan peoples. It is significant that the asafo companies were the first target of attack in the campaign launched during colonial

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1. A.R.Radcliffe-Brown, Preface to (A)frican (P)olitical (S)ystems (ed.M.Fortes and E.E.Pritchard) (1940) p.xxii.
2. P.H.Gulliver, Social Control in an African Society (1963) 36-37.

days by the chiefs and the British officials to invest the chiefs "with considerable powers exceeding those which the chiefs possessed under Native Custom".[1]

Among the Ibo, the youth were even more prominent in public life.[2] Those with intelligence were singled out for special responsibilities[3] such as being sent out on diplomatic missions and if any of them should display qualities of wisdom and decision, on a vacancy occurring in the leadership of the group, he would be preferred to a senior member lacking in these qualities.

It must be added, however, that the traditional concept of youth was quite different from modern conceptions. A man's age was relative to the ages of others older or younger than he was. Thus, if there were many older men around, a man at 40 might be treated as though he were a youth.

(c) Sex-differentiation: the status of women

The idea of sex equality even in advanced societies is of a comparatively recent origin and nowhere has it been

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1. Burns, Colonial civil servant (1949) 203-204, quoted by D.Austin, Politics in Ghana 1946-1960 (1964) 24.
2. M.M.Green, op.cit.
3. C.K.Meek, op.cit., pp.138 et seq.

fully accomplished yet.[1] In traditional Africa, sex inequalities were evident in private as well as in public life.[2] Some writers have, however, exaggerated these inequalities and have jumped to mistaken conclusions concerning practices which have no counterparts in their own societies, without fully appreciating the social realities behind these practices.[3]

(i) Women in private life

Most of the sex inequalities in traditional society stemmed from the African conception of marriage.[4] The payment of "bride-price" or 'marriage-consideration' is often instanced as illustrative of the status of a wife as a slave. Thus as recently as 1958, C.W.Greenidge dismissed African customary marriage as "a mere sale of a woman into marriage".[5] With the payment of a 'bride-price', "the woman becomes the property of her husband."[6] This explanation of

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1. Cf. A.Phillips, Survey of African marriage and family life (ed.A.Phillips) (1953) XVI; Evans-Pritchard, "The position of women in primitive societies and in our own" in The position of women etc....and other essays. (1965) 37-58; J.S.Read, "Womens' status and law reform in Changing law in developing countries 210-239.
2. Cf.Allott,"The legal status of women in Africa" [1961]J.A.L.125
3. Cf.Evans-Pritchard loc.cit.
4. See more fully, Lucy Mair,"African marriage and social change" in Survey of African marriage and social life,p.5 et seq.
5. Slavery (1958) 95-96.
6. Ibid.,p.97; but see Allott, [1959] J.A.L.142.

the rational behind the payment of "bride-price" is totally inaccurate.[1] A little reflection would show that the payment was but a means of preserving the social equilibrium as between groups. One group acquires a new member, the other group feels itself diminished; in order to restore the equilibrium, the latter demands something which would enable it to reconstitute itself by the acquisition of another woman.[2]

There were, however, other aspects of marriage which in their effect reflected on the dignity and status of a wife: Thus, certain types of marriage (e.g. levirate by which a widow was expected to cohabit with her deceased husband's relative; sororate: the relatives of a deceased or barren wife might be called upon to provide another woman to make good the deficiency or loss) emphasised the subdued position which the woman held in the society.[3] All these peculiar forms of marriage should however be seen in their social context. Usually in the interests of the

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1. Cf.Mair, op.cit.p.7.
2. Cf.H.H.Rawson, in a review of Rev.Junod's The life of a South African tribe in (1913-1914) Journal of African history pp.6-7.
3. Cf.Phillips loc.cit.

children, it was advisable for their mother or her substitute to remain in the matrimonial group. Her own right to inheritance might also depend on her still being associated with the husband's group as wife.

Child betrothal on the other hand was a negation of marriage by consent and did not always work to a woman's advantage, though the consent of a man was not always sought either before a marriage was concluded by his family.

The wife must obey her husband. In some societies she was obliged to show exceptional respect towards him even addressing him as "father". In his family, she would rank as a new-born child, every person in the family, old and young even a child born the day before her marriage, would rank as her senior, though all children born subsequently must address her as "mother", as would all wives junior to her. Yet in other societies, she was never fully integrated into the group and was even looked upon as a suspicious "alien" in times of stress between her own group and that of her husband.[1]

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1. For an example of this persistent ambiguity of wife's status see P.H.Gulliver, Social control in an African society pp. 142-144.

The fact that African marriages actually or potentially are polygamous has been instanced as a factor likely to intensify the inequality between the sexes, since a wife had to share her rights with other co-wives, thus reducing companionship between the spouses.[1] On the other hand, the more wives a man had, the greater freedom each wife would have to go about her business without persistent demand for attention from their husband. In societies where women could hold separate property, this freedom could prove of great economic advantage. Among the Yoruba the wife's economic independence has in some cases reversed the conventional rôles: the husband becoming his wife's dependant.

In many places however, women were not so well-placed. Their rights over land (the men were not usually in a better position as regards ownership of land) and other property,[2] were severely restricted. Among the Arusha, women had no rights of inheritance.[3] Nor could they participate (at

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1. Lucy Mair, ibid,p.7.
2. Allott, "The legal status of women", pp. 128-9.
3. P.H.Gulliver, op.cit.p.141.

least overtly) in contractual obligations concerning property. The happier lot of the women of the Valley Tonga might be contrasted; sex did not determine the right to receive lineage land, men and women being equally eligible.[1] The husband did not exercise control over land acquired independently by the wife. Miss Elizabeth Colson attributes the diminished equality now noticeable between the sexes in Tonga to the Kariba Settlement Programme by which the women have lost their rights without an opportunity of establishing new ones. Under the Programme, land was allocated to men in accordance with the number of wives they had; in consequence, women now "hold land at the pleasure of their husbands."[2]

In a matrilineal society like the Akan, women had rights of property as men had. Bossman wrote in 1700:

> "Married people here have no Community of goods but each has his or her particular property".[3]

He went on to say that as between the woman and her husband,

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1. Elizabeth Colson, "Land rights and land usage among the valley Tonga etc." in African Agrarian systems (ed.D. Biebuyck) (1963) 142.
2. Ibid., p.151.
3. Description of the Gold Coast of Guinea (1900).

the matter was so adjusted that the charge of housekeeping was borne by her while he saw to the clothing of the whole family. To find the funds for the maintenance of the household, the Akan woman had to till the soil. Among the Shona where a type of economic partnership obtained the husband was the dominant partner.[1] All these lend support to the charge often levelled at African traditional society that it was flagrantly discriminatory against women in the way its economy was structured.

The women, it is said, did all the work while the men just stood idly by. The truth seems to be that in most traditional societies there was a sharp division of labour on sex lines.[2] The men, because they had the stronger physique, went to war or guarded the village from external attack. They were also engaged in occupations like hunting which might involve them in making long journeys away from home in search of game.

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1. Allott, "The Legal status of women in Africa" p.128.
2. So much so that it was viewed with distaste if one sex intruded in the sphere of the other. J.H. Driberg, "The status of women etc.,..among the Nilotics and Nilo-Hamitics" (1935) 5 Africa 407 et seq.

The ties and duties of motherhood also meant that women had to undertake duties which were sedentary.[1] The older a woman became and the more children she had, the greater her influence and it was not uncommon for her to become the most powerful figure in the household. Enough has perhaps been said to show that the woman was not the oppressed person in traditional society that she is often made to be. Nor is it accurate to describe the relationship between husband and wife as one of master and slave. Mary Kingsley, who travelled extensively in West Africa and therefore knew better reached the following conclusion:

> "The immediate rule of a husband over his wife may be likened to that of a constitutional monarch, that of a man or woman over a slave to that of an absolute monarch."[2]

(ii) Women in public life

As a rule, public affairs were more the concern of men than of women[3] who were for these purposes treated like minors.[4] Not only were they often excluded from

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1. Ibid.
2. West African Studies (1899) 375.
3. Allott, "The legal status of women in Africa" p.126; see also Schapera, Tswana law and custom pp. 28-29.
4. Cf. Evans-Pritchard, The Nuer, p.178.

tribal councils,[1] they were also forbidden from attending public meetings such as the Basuto pitso for instance. The Arusha permitted them to attend a public assembly but then 'they must observe a markedly subordinate demeanour, speak quietly in a pitched voice with eyes cast down, remain at the edge of the assembly and only speak when requested.'[2]

On the other hand, women were not altogether without some influence in political life. Some fulfilled special constitutional roles as queen-mothers or queen-sisters, while, as a group, women made their feelings felt through their separate movements or associations.

(a) Special roles. The Mende of Sierra Leone had women rulers[3], though the wider practice in Africa was for women to occupy positions of shared power as queen-mothers or queen-sisters. A royal duality once existed among the Fon of Dahomey, the King sharing power with his sister though the practice was soon suppressed except for its brief resuscitation by Gezo.[4] With the Lozi,[5] dual

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1. But see Nadel, A Black Byzantium, p.147.
2. Gulliver op.cit. p.142.
3. Allott, "The legal status of women in Africa." loc.cit.
4. P.Mercier, "The Fon of Dahomey" p.210.
5. "The Lozi of Barotseland etc." pp. 23-24.

monarchy has always been the fulcrum of their constitution. The joint sovereign even kept two separate capitals, the northern occupied by the king as "the great one of the earth" and the southern occupied by the queen-sister as "the earth of the south". The two kept separate councils interlocking into a single council to emphasise the unity of the kingship. As the queen-sister exercised no ritual power over the king, he undoubtedly enjoyed primacy over her.

This order was reversed among the Swazi where the queen-mother with the title of Indlovukati (Lady Elephant) had ritual control over her son the king, Ingwenyama (Lion). The important thing, however, was that both should rule conjointly.

> "In all activities they should assist and advise each other, for he is Inkosi and she is also Inkosi. Together, they are spoken of as twins..."[1]

In Bunyoro, kalgota the official sister of the king was regarded as the female counterpart of the king and therefore, chief lady of the land,[2] though she was not invested with such important powers as the Swazi or Lozi "queens".

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1. Hilda Kuper, op.cit. p.55.
2. J.Beattie, Bunyoro, an African kingdom (1960) 31.

The queen-mother in Bunyoro also had some political power. In Ruanda[1] and Buganda[2] similar positions were reserved for the royal women. Concerning Buganda, Roscoe remarks:

> "There were the Queen (Lubuga) and the king's mother (Namasole) whose offices were superior to those of the chiefs. These ladies ranked below the king, yet their powers over their own people and estates were absolute, and both took the title of Kabaka like the King".[3]

In Ashanti, a queen-mother derived her office from the chief (usually her brother) but she held her own separate stool. She had well defined constitutional functions which included advising and reproaching (if need be) the chief in a way that none of his councillors dared.[4]

The special roles so far mentioned derived from birth and attached more to the family than to the women in their own right. There were, however, a few positions which went to the women concerned on grounds of merit. The Nsukka Ibo for instance, accorded the title of Ogbu-efi to deserving women.[5] In some parts

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1. Maquet op.cit. p.124.
2. E.S. Haydon, Law and justice in Buganda (1960) 55.
3. The Baganda, their customs and beliefs (1911) 236.
4. Busia, "The position of the chief etc." p.20.
5. Meek, op.cit. p. .

of the Yoruba country, an outstanding woman might be appointed Iyalode (First Lady). She sat on the council as the representative of the women. Madame Tinubu (following a successful career in commerce, a very active political life as power behing the throne, first in Lagos, and later in Abeokuta, and for her heroic home-front action in supplying ammunitions to Egba soldiers during the Dahomean invasion of 1863) was made Iyalode of the Egba in 1864.[1]

Women who were past the menopause were admitted to exclusively male societies, (e.g. the Erelu of the Ogboni (secret society); the second highest title, Iya Agan of the Egungun cult, also went to a woman among the Egba). Women were also recruited into the army in some societies.[2]

(b) Women's Movements. Invariably, wherever there were associations with exclusive male membership there were also found their female counterparts. The Poro male

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1. Biobaku, "Madame Tinubu" in Eminent Nigerians of the Nineteenth century, pp. 33-4.
2. Eva Meyerowitz cites the case of the Amoanimaa Ohemmaa of Amakum, an Akan state who accompanied her warriors into battle (c.1660). Even as late as 1900, Yaa Asantewaa of Ejisu led the Ashanti nation in a rebellion against the British. The Akan of Ghana (1958) 31-32.

secret society of Kpelle (Liberia) was matched by Sande, the women's organization.[1] Just as Poro had its Grand Master, the virtual ruler of Kpelle, so Sande had its Headwoman.

Kikuyu women too had institutions on the same lines as the men's Kiama; though the jurisdiction of the former was limited to domestic affairs and matters touching on the interests of the women and children.[2]

(d) Aliens

Those who were considered aliens or strangers by members of a particular group could not partake in the benefits of kin-right such as land-holding. Aside from this major handicap, it would seem that attitudes adopted towards them varied from society to society.

In the kingdom of Ruanda ethical obligations were owed only to members of the in-group. The Nuer, for example, did not consider it objectionable to kill a 'non-adopted' Dinka.[3] This apparent inhumanity was, however, mitigated by the provision for expeditious

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1. Lowie, The origins of the state. pp. 83-4. See also, K.Little, The Mende of Sierra Leone in African Worlds. p.1300
2. Lambert, op.cit.pp.96 et seq.
3. i.e., one was not a naturalized citizen. Cf. Evans-Pritchard,p.221. Both tribes were in perpetual enmity and for all you know a Dinka or any other stranger might be a spy.

acquisition of citizenship. A Dinka boy who had been brought up as a child of his captor's household could by formal adoption become a member of the household with full rights as a natural born Nuer, thus showing that with the Nuer common residence in a community overrides distinctions of descent.[1]

A liberal policy was adopted by the Lozi towards aliens, for whom ignorance of the law was an excuse.[2] The Nupe even went further in according aliens special protection which contrasted remarkably with the ruthless treatment meted to native peasants.[3]

Generally, however, the safest course was for an alien to obtain the patronage of a true member of the host group.[4]

Where aliens belonging to one ethnic or tribal group were so many as to form a small community, the host group usually respected their separate identity and allowed

1. Ibid., p.235.
2. M. Gluckman, The judicial process among the Barotse (19) 119.
3. Nadel, op. cit., p.120.
4. As widely prevalent among the immigrants in the Arusha society, see Gulliver op. cit. p.217. Among the Zulu such an attachment would confer on the stranger the status of a 'quasi-kinsman who was free to marry into his superior's clan though not into his lineage.' M. Gluckman "The kingdom of the Zulu" in A.P.S. p.28.

them to live apart in separate settlements or camps[1] though they might be moved to another site if their host required the land occupied by them for other purposes.

(e) Slaves, serfs and others

Aristotle, in Politics, argued that some people were by nature inferior and ought to be the property of others. Slaves, in effect, should be recruited from particular races designated as inferior, an argument which found favour with Sir John Hawkin and other British seamen who from 1562 supplied the Spanish colonies with slaves from Africa.[2] Britain later moved officially into the lucrative trade finding markets in Virginia and later in her other American and West Indian colonies.

However, it takes two to make a bargain. For, apart from very few Africans actually kidnapped by the European dealers, it was the Africans themselves who sold their less fortunate brethren into slavery. It is said that trafficking in human beings was alien to Africa until the iniquitous practice was introduced into the continent by the Arabs and the Moslem Moors.[3] The trade

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1. Schapera, Tswana law and custom, p.31.
2. Greenidge op.cit. p.18.
3. G.F.Macmunn, Slavery through the ages (1950) 53.

however, quickly took root so much so that African chiefs vigorously resisted early efforts to put an end to it. The king of Bonny (Nigeria) was quoted as saying in 1807:[1]

> 'We [the king and council] think that this trade must go on. That also is the verdict of our Oracle and the priests. They say that your country [Great Britain] however greattcan never stop a trade ordained by God himself.'

Who were the slaves sold to the Europeans? Blood relationship real or fictitious, being the basis of citizenship, citizens could not, at least in theory, sell one another into slavery. Among the Bini, for instance, only foreigners could be slaves.[2] Prisoners of war were the biggest source of slaves, though it would be wrong to suggest that tribal wars were primarily fought to recruit slaves.[3]

Some persons dedicated to the gods for sacrificial purposes were diverted to the slave markets. In this respect, the Aro-Chuku gods were unusually blood-thirsty but the truth was that:

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1. H.Crow, Memoirs (1830) quoted by K.O.Dike, Trade and politics in the Niger (1956) 13.
2. H.L.Roth, The Great Benin (1903) 103.
3. J.F.Ajayi and R.S.Smith, Yoruba warfare in the 19th Century (1964) 117 also K.O.Dike in Foreword, ibid, p.v.

> "Instead of killing the slave brought to them [the priests] to make the oracle talk, they kill a goat or a pig and exhibit its blood in the sacred stream to their dupe who believed it to be that of the slave brought."[1]

At the height of the slave trade, traditional taboos were set aside and in some places, relations were sold for debt and open slave markets were found, human beings being hawked like chattels. Privately organized raids were made on neighbouring states for slave recruits.

Trafficking in human beings is only one form of slavery. There are other forms of economic servitude in the nature of slavery. A few instances of such economic subordination and exploitation were known in traditional societies. The institution of clientage springs to mind. In theory, it was supposed to be a partnership arrangement freely negotiated by the lord and the client, but in reality freedom to enter it was illusory. It is true that the lord protected his client from oppression and in some cases a relationship as intimate as that between father and son might develop. The client was, however, frequently exploited.

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1. F.Hives and G.Lumley, Juju and justice in Nigeria (1930) p.vii.

At best, he had only usufruct rights over cattle as among the Ruanda under the Buhake system,[1] also in the kingdom of Ankole, the Iru serfs could only own barren cows, the Hima lord having exclusive right to productive cows.[2] The logic is clear; any increase in the number of cows handled by an Iru client accrued to his Hima lord.

Among the Tswana, the exploitation took another form. There were hereditary serfs called Sarwa, who had very little if any rights and from among whom were drawn the chiefs' household servants (malata). They were treated like slaves and were inherited with the throne.[3] Among the Lozi, however, a slave was less harshly treated, the only major handicap imposed on him being that he could not leave his master's village.

Moving across to West Africa, we find as among the Yoruba, the Iwofa system, a type of debt-bondage. The debtor or his relation was obliged to devote a percentage of his time to the services of his creditor towards the discharge of the interest of a loan.[4] Abuse later crept

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1. Maquet op.cit.pp. 140-142; Cf. "baba-ship" in Nupe, Nadel, A black Byzantium, pp. 122 et seq.
2. K.Oberg, "The kingdom of Ankole in Uganda" in A.P.S.p.130.
3. Cf.Schapera, Tswana law and custom pp. 251-252.
4. See P.A.Talbot, The peoples of Southern Nigeria (1916) Vol. III pp. 631-636; I.O.Delano, The soul of Nigeria (1937) 73-75.

into this credit system and extortionate interest was charged, making it almost impossible for the labour equivalent of the interest to be performed within a reasonable time. In consequence, the debtor or his blood relation became something like the creditor's permanent slave, with this difference that he (the Iwofa) remained in his own house and not under the creditor's roof.

Generally in West Africa slaves were humanely and considerately treated, the accompanying evils of slavery being less in evidence than in any other part of the world.[1] The slaves were hardly inferior in social standing to other persons, and as a result there was no feeling of castes between them and the free-born. In many cases, slaves were treated as though they were members of their master's family and should the latter's line of descent fail, his slave might be named as his heir.[2] To kill a slave unlawfully amounted to murder.[3] He was thus free to own

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1. Talbot op.cit.p.693.
2. Casley-Hayford, Gold Coast natiore institutions (1903) 82.
3. Rattray, Ashanti law and constitution, p.38.

property and in some places he could himself own slaves. In Fulani Zassau, a slave official was reputed to own personally 1,200 slaves.[1]

If their legal and social standing was so impressive, what was the point of designating them as slaves? Rattray supplies an answer:

> "When the necessity arose or the terrible practice of human sacrifice became the vogue, an otherwise kind and considerate master would turn instructively to the man who had no friend in the world to satisfy the need for money or victim."[2]

A slave was thus liable to be resold at any time into another household and was the first call for sacrificial rites. However, pending either of these painful occasions, the slave was virtually a full member of the community. In some societies in West Africa, slaves were even appointed to key political offices. The Omonu of Onitsha like the Iyasere of Benin was appointed from the king's mother's slaves.[3] Too much should not, however, be made of these exceptional arrangements as more often than not, they were a device to buttress the personal authority of the ruler. By appointing his trusted servants to key positions, it was hoped that they

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1. Smith, op.cit. p.82
2. Ashanti law and constitution, p.42.
3. Meek, Law and authority in a Nigerian tribe, p.194; Talbot op.cit.p.583. Two leading titles in Ijebu Ode (Yoruba) the Ogbeni Oja and the Ogbeni Odi were reserved for slaves. P.Lloyd "Political Systems of the Yoruba", 380.

would they identify "themselves more with his fortunes in upholding his rights and defending his reputation than the free-born."[1]

The Ottoman Empire provides an interesting parallel. The Sultan gradually displaced the aristocratic and feudal families who could prove difficult to control, installing in their places the "Slaves of the Gate" and criminals until the civil service was dominated by these servile persons.[2] Similarly in Northern Nigeria, key administrative posts were filled with "harmless" eunuchs. In Zazzua, for instance, three of the four rukuni (senior order) were eunuchs.[3]

Stratified societies

President Senghor in his essays On African socialism, expresses a longing for a return to the good old classless indigenous society whose splendour, however charred it might have been by the fire of conquest "is now becoming verdant once again in the springtime of a new era."[4] Senghor was however careful to add that his data for African socialism were drawn from "West Africa realities" where the group held priority over the individual: "they are religious countries,

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1. Talbot, op.cit.,p.693.
2. B.Lewis, Istanbul etc.p.61.
3. Smith op.cit.p.53. Cf. Nadel op.cit. pp. 103-105.
4. p.79.

unselfish countries, where money is not King".[1]

How far can we extend this notion to other parts of Africa? President Nyerere on the other side of the continent has been developing the same theme.[2] Ujamaa (familyhood) is the basis of African socialism which is the heritage of African traditional society in which everybody was a worker, there being no other way of earning a living. The elder who appeared to be enjoying himself without any work and for whom everybody else appeared to be working, had had to toil hard in his younger days. His apparent wealth was not "his" but belonged to the people and he was merely its guardian holding it in trust for them. But Nyerere's conclusion that his thesis has validity for all Africa may be open to challenge for he appears to have ignored stratified societies like the Ruanda. He even doubted whether the equivalent of the word "class" existed in any indigenous African language.[3]

Mr. Tom Mboya says that the pivot of the belief in African socialism is that "we are all sons and daughters of the soil", from which "springs the logic and practice of

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1. Ibid.,p.77.
2. Ujamaa, the basis of African socialism (1963)
3. Ibid.

equality and the acceptance of communal ownership of the vital means of life - the land".[1]

It follows that 'African socialism', as defined, could only be found in those societies which granted to all citizens equal rights and where no person or group of persons enjoyed a monopoly of economic power. While, it may be right to posit that most African societies adhered to the belief in "familyhood" as the basis of society, there are one or two stratified societies which subscribed to "the premise of inequality" as the basis of the society.

Various theories have been advanced to explain the occurrence of caste in those societies that have them. How far could these theories be applied to African cases?[2] Oppenheimer sees caste simply as the creation of conquest states.[3] This theory has been much assailed, for example, by R.H.Lowie who considers the problem at some length and since he illustrates his view with African references, it will be used as the basis of the discussion which follows.

He argues that other factors than the simple fact of conquest must come in to play before social classes can arise.

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1. Freedom and after (1963) 163.
2. See I.Schapera. Government and Politics in Tribal Societies, (1956) 130-1; Lucy Mair: Primitive Government (1962) 125-137.
3. Der Staat (1907), quoted by R.H.Lowie: The Origins of the State (1962) 20.

The central phenomenon is the clash of peoples distinct in lineage and occupation.[1] Differences in dietary regulations could even be seized upon to create social barriers between people and people. Thus the Tutsi looked down upon the Hutu despised the Twa for eating poultry and eggs.

A more crucial factor, however, is the possession by the conquering people of a superior political know-how. Again, the Tutsi had this in abundance and used it to great advantage. They reduced the Hutu clan heads to tax-gatherers, and the already down-trodden Twa were made permanent serfs. The rigid system of clientage (buhake) reinforced the caste structure. As Maquet explains "this political system was a means of maintaining a certain social order in which the group of rulers and their caste appropriated to their consumption a considerable part of the country's goods without having to use their labour in the productive process".[2]

The rule of primogeniture where recognised could also produce social stratification. The Bini untypically adhered strictly to the rule[3] in respect of succession to the throne of

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1. Ibid, p.32 et seq.
2. The premise of inequality in Ruanda.
3. This practice of hereditary title is believed to have started only at the beginning of the 18th century. Talbot op.cit.p.576.

the oba and to the seven princely offices making up the order of Nzana Nimion. However, a division of the society into ruling and subject classes was avoided by a constitutional provision which entrusted executive functions to the Eghaerbo n'ore, the order of the commoners headed by the Iyasere, the prime minister.[1] It was thus possible for the lowliest person with the requisite ability and drive to reach the top.

In some societies, the explanation for the appearance of social differences is to be sought in other types of historical events. Such differences may not be so provisional as to cause rigid stratification. Thus among the Haya, a clan which showed cowardice in battle would be degraded. If a chief's wife committed some grave crime her clan might henceforth be despised, its women were thus looked upon as bazana (female slaves) from which the chief ought not to take a wife again.[2]

Among the Ibo it was an abomination to marry an Osu.[3] A person became an osu in one of two ways:[4] if he was captured in war or bought from his own people and was dedicated to a

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1. Egharevba, A short history of Benin (1960), also Roth, op. cit. pp.92-3.
2. Corry and Hartnoll, Customary law of the Haya tribes (1945) 265.
3. Meek, op.cit. p.
4. S.N.Obi, The Ibo law of property (1963) 80-81.

god as the latter's slave; or if as a fugitive from justice, domestic oppression or a pressing creditor, a person took refuge in the shrine of a god. Although the osu had some measure of legal rights and enjoyed some immunity in their dealings with the property of their deity (since people feared them) their lot was one of utter degradation as they were regarded by the free-born with physical repugnance.[1]

Lowie further suggests that "wanton destruction rather than the hoarding of property" could lead to social stratification. Such ostentatious display might confer a sort of glory on those indulging in it by which they could rise to ascendancy.[2] In Africa, however, such ostentatious dissipation of wealth seems to have had the opposite effect. In the first place, the subsistence economy and lack of machinery for the accumulation of wealth (with the exception of cattle and wives) meant quick consumption of goods produced.[3] A person who had more than he needed had no choice but to give the surplus away but the beneficiaries

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1. Green, op. cit. p. 24.
2. op. cit. p. 39.
3. M. Fortes and E. E. Evans-Pritchard, A.P.S. p. 8.

fully appreciated the nature of such involuntary generosity. Secondly, generosity (where not imposed by force of circumstances) was a tribal virtue which every person was enjoined to display; he who displayed it in lavish measure was at best regarded as an ideal tribesman; though he might thereby gain accelerated promotion to a position of leadership,[1] he was never, as such, thought of as being of a superior breed.

The ruler was generally the richest man in the community but only in a theoretical sense[2] for the wealth which he appeared to have and lavish in entertaining his people or feeding an army of dependants, was not his personally. Thus for the Basuto Ashton states that the main tie between the ruler and his people was the use of his position and wealth for their benefit.[3] The cattle which the Tswana ruler kept belonged to the people.[4] Tributes were gladly paid by the Lozi because they felt certain that what they gave they would receive back in the form of feasts.[4]

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1. See for example among the Ibo where a rich person might be given a title or made a member of the Ozo society. Meek, op. cit. pp. 164; 185.
2. Schapera, Government and politics in tribal societies, 75.
3. The Basuto, 207.
4. Schapera, Iswana law and custom, 118.

Busia suggests that the principle of stool lands was extended to other items of property held by the chief in Ashanti. "Everything he possessed gold-dust, wines, slaves, farms became stool property on his becoming chief."[1] Among the Yoruba, however, only the after-acquired property of the Oba belonged to the throne.[2]

The Swazi king was, in contrast, said to own all the land[3] which he and his mother would deal with as they pleased. They could even take the gardens already allocated to their subjects. It is doubtful however that the royal powers over land were so extensive. He was called the "herder of the people" who "served out" the land but so were other Bantu chiefs described.[4] If his position in respect of cattle was a correct guide, he was only a nominal owner of the land. For the royal cattle belonged to the nation and the king could not sell them for his own benefit. The animals were to be used for prescribed purposes: to feed the people at national gatherings, to obtain wives for

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1. The position of the chief etc. pp. 44 et seq. at p. 51.
2. Lloyd, Yoruba land law, 45.
3. Kuper, op. cit. pp. 44-47; 149-150.
4. Cf. Schapera, Government and politics in tribal societies

royalty and for national sacrifices.[1]

Even if the king could recall land granted to his subjects, he had to be careful in the exercise of this power lest his arbitrariness invoke opposition.[2] Although an aristocracy did emerge from the hierarchical political structure of the state and the uneven distribution of wealth, the vocal leading commoners who served as indunas (councillors) protected the interests of the peasants, any of whom might one day rise to the position of an induna. Popular participation in public affairs thus neutralized the presumed or real monopoly of economic power of the ruling class thus preventing the emergence of a rigid class structure.

The above survey shows that social stratification in its worst form was found only in those societies where economic divergences and racial differences coincided Buganda must be an exception to this rule. The Kabaka was held to be the owner of all the land in pre-European Buganda[3] which had been acquired by right of conquest. Kintu, probably a Hima, was the conqueror and first king of Buganda. He had

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1. Kuper, op. cit. 151.
2. ibid. pp. 45-46.
3. E. S. Haydon, Law and justice in Buganda (1960), 127.

entered Buganda with a host of fellow Hima grouped in clans, possibly fourteen in all.[1] The two factors that should give rise to a class structure[2] are present: immigrant ruling race culturally dissimilar to the conquered and secondly, the vesting of all the land in the leader of that race, i.e. the king. However, a divided society was averted, the comprehensive personal rule of one man taking its place.

The Kabaka used land tenure[3] to strengthen his personal position. Kintu was said to have allocated butaka (clan lands) to his fellow immigrants but none of the portions so allocated was bigger than required primarily for the residence of the clan head and secondly for the burial of clansmen. Butongole were official estates granted by the Kabaka to the chiefs and officials and were revocable by him as were also bwensengeze which were individual grants made or confirmed by the Kabaka to an individual chief or a peasant. To his kinsmen the Kabaka did not even bestow exceptional favour. They formed the Ekirangira (princely

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1. Lord Hailey, Native Administration in the British African territories (1951) Part 1, p. 2 quoted by Haydon, op. cit. p. 3.
2. Cf. M. Fortes and Evans-Pritchard, A.P.S. p. 9.
3. Much of what follows is based on Haydon, op. cit. pp. 127-131. See further A. B. Mukwaya, Land tenure in Buganda.

clan) but they had no clan land, lands being individually conferred on them at the Kabaka's pleasure.

By this arrangement all the "immigrants" were carefully controlled. They lacked independent economic power and were in no better position than the "natives". For favours, everyone looked up to one man, the Kabaka who stood as "the unique despotic pinnacle of Ganda society".[1] The method employed was undoubtedly ruthless but a lasting and remarkable assimilation was achieved[2] which other immigrant rulers in some of the Interlacustrine states never even attempted.[3]

In Bunyoro the idea of superordination and subordination permeated the society, pre-eminence being given to ascribed status over personal achievement.[4] The position was no better in the kingdom of Ankole[5] where assimilation was by law made impossible. There could be no marriage between

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1. L. A. Fallers, "Social stratification in traditional Buganda" in The King's men, 68. The Kabaka's aloofness was further strengthened by the rule which prevented him from being a member of any totemic clan though he was tenuously associated with his mother's clan. See M. Southwold, Bureaucracy and chiefship in Buganda (1961), 5.
2. Cf. J. Roscoe, The Baganda, their customs and beliefs, 269.
3. The Bahinda's humane colonial policy towards the Haya tribes must be excepted. Corry and Martnoll, op. cit. pp. 262 et seq.
4. J. H. Beattie, Bunyoro, and African kingdom (1960), 10. For the myth of how the division of the society into three distinct social categories based on descent came about, see pp. 11-1/.
5. See K. Oberg, op. cit., pp. 128-136.

a Mwiru and a Bahima. Important public posts were barred to the former; their legal rights were also precarious. For example, the right of blood revenge could not be exercised by a Bairu family if a Muhima killed a Mwiru though the Mugabe (king) might exact compensation for the latter's family.[1]

The protection of the rights of the individual.

The worst effects of group attitude and status differentiations are combined in the stratified societies. All those who belonged to the ruling race were entitled to the advantages of membership of the society. In the eyes of the law, all others were outsiders and were only tolerated for economic reasons, namely, to perform jobs which members of the superior race could not or would not condescent to perform.[2] We may, in conclusion, contrast the rights of citizenship enjoyed by all members of the non-stratified societies. This does not mean, however, that the individual rights in the latter societies were guaranteed by the state and would be enforced against the whole world at the instance of the citizen.

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1. ibid, p.131.
2. Cf. South African apartheid.

Rather, as we noted previously, extra-kinship rights and interests were secured by the group support, to which the individual was entitled and received from his kinsmen who, in their turn, manipulated the political and social forces to obtain or protect his rights.[1] The machinery of government in traditional Africa which we next consider, was so devised as best to attain this objective.

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1. Cf. J. Van Velsen, The politics of kinship (1964), 261.

CHAPTER FOUR

THE MACHINERY OF GOVERNMENT IN TRADITIONAL SOCIETIES

The pattern of African governments

In their Introduction to African Political Systems,[1] Drs. M. Fortes and E.E. Evans-Pritchard distinguish three types of African society.[2] First, there are those societies based on kinship system where the individual is linked to other persons and to particular social units through the transient bilateral family. These have no political organization, let alone government. The Bushmen may be given as an example.[3] Secondly, there are those societies with a lineage or segmentary system comprising permanent unilateral descent groups. Here corporate units are found with political functions but without government because there is "no centralized authority, administrative machinery and constituted judicial institutions". Societies of this type are classified as Group B in the work, and the Nuer, the Tallensi and the

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1. (1940), 5-7;
2. For other classificatory suggestions see G.P. Murdoch, Africa and its peoples and their culture history, (1959) pp. 33 et seq; Ottenberg, Cultures and societies of Africa (1961) pp. 46 et seq; Paula Brown, "Patterns of authority in West African societies", (1951) Africa, 261; J.S. Coleman, "The politics of sub-Saharan Africa". in The politics of the developing areas. (1960) 252-258; I. Schapera. Government and politics in tribal societies (1956).
3. J. Middleton and D. Tait, Tribes without rulers (1958) 2.

Logoli are listed as examples. Thirdly, the Group A societies such as the Zulu, the Ngwato, the Bemba, the Banyankole and the Kede have everything the other two types lack because their system is centralized.

It is possible to criticize ~~with~~ these authors for failing to find political structures in societies with kinship system especially in the African context, where all the societies are kin-based, and the largest state is but the prototype of the extended family. Professor Radcliffe-Brown's definition of a political organization seems to provide a clue to the authors' approach. Political organization is "that aspect of the total organization which is concerned with the control and regulation of the use of political force".[1] But why the emphasis on force at all?[2] The suggestion seems to be that an ordering based on anything but force would not be political.

The illogicality of holding that a society which maintains internal and external order has no political structure has led many commentators, in recent years, to urge a theory of the universality of political structures.[3]

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1. Preface to A.P.S. p.xxiii.
2. But see Max Weber who insists on some authority with a monopoly of the use of force in the state. "Politics as a Vocation" in Gerth and Mills, From Max Weber, (1946) p. 78. quoted by G. Almond, The politics of the developing areas, p. 15.
3. Cf. Almond "A functional approach to comparative politics" in The Politics of the developing areas. pp.3. et.seq. Cf. G. Goldschmidt in Foreword to Winans, Shambala, the constitution of a traditional state. (1962) p.xiii.

Are not the same functions performed in all political systems even though the degree of specialisation of these functions or the frequency of their performance may vary from society to society? If the correct functional questions are asked, we shall find that all the types of political structures known to modern systems have their counterparts in the non-Western primitive ones.[1]

It cannot be right either, to prescribe a particular type of political structure which a society is obliged to display before it could be said to have a government. As Almond argues, "the classic distinction between those [systems] in which political structure is quite differentiated and those which are not should be reformulated as a distinction between those in which it is less visible and intermittent. We are dealing with a continuum and not a dichotomous distinction".[2]

What are the objectives of government generally? How were they realised in African communities, whatever the size of these communities and however they are organized.[3] Professor Schapera has employed this functional method of investigation in his study of the diverse societies of southern Africa.[4] He finds that the tasks of leadership and

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1. Almond, op.cit. p. 11.
2. Ibid, pp. 11-12.
3. Even though they may lack any of the organizations we are accustomed to call by the name of government? Lucy Mair, Primitive government (1962) 61; but see M. Fortes, A.P.S. p. 241.
4. See Government and politics in tribal societies, pp. 201 et seq.

organization were common to all these societies. Government was everywhere based on the principle of individual "captaincy" though because of the varying structure and complexity of each society, the quantum of government necessarily differed from one society to another, being either minimal or comprehensive. It would facilitate analysis if we applied a common label, "chieftainship" to all these societies even to the Bushmen and the Bergdama, startling as this might sound.

The Bushmen-type chieftainship would be titular while the centralized Bantu chieftainship might be described as paramount and the Hottentot with their non-centralized system as presidential. This three-type classification is similar to that put forward by Fortes and Evans-Pritchard, but the basis of classification in each case differs. Professor Schapera's reasoning is free from structural bias and, for our purpose, it has the advantage of introducing some order into the seemingly "jumbled-up" pattern of African political systems.[1]

Expressions like "ordered anarchy" to describe societies such as the Nuer[2] are likely to mislead. For by whatever titles we choose to refer to them - "leopard-skin chiefs", "prophets", "mediators", "spokesmen", "emblem-holders", or "holders of roles", - there were office-bearers

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1. R. Oliver, "Democratic institutions in Africa" in One Party States (Commonwealth Challenge), 1964, vol.12. No.3. p.18
2. Evans-Pritchard, The Nuer (1940) 6. The term "diffused government" suggested by Lucy Mair, is with great respect, more apt. op.cit., Ch.3.

in these societies whose recognized duty it was to conduct public affairs.[1] Thus Howell observes that the Nuer were always seeking someone by whom and through whom social harmony could be secured. References to great leaders abound in their traditions. We should not hold it against them that because those aspirations which in some societies "are attached to organized and permanent institutions, among the Nuer..... were focussed on personalities".[2]

Such leaders had little if any executive power, but did they need one? The social structure was ideal for persuasive government. Moral sanction, the direct expression of public sentiment for example, and ritual and supernatural sanction were nearly sufficient to support their decisions. If, on the other hand, these sanctions proved ineffectual as occasionally happened, resort was had to self-help and the feud or even warfare (as between groups). These latter remedies were, however, considered disruptive of the society, as the Tiv would say, "they spoil the tar [country]".[3]

The problem posed by these societies for the Rule of Law is minimal, being related to the quantum of power possessed by the rulers. If any persons needed protection

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1. See further Middleton and Tait, Tribes without rulers (1958). The reader should not be put off by the title of this work. The editors themselves admit that in societies considered, there were "political functionaries, the nature and extent of whose authority and powers of representation vary widely". p. 16.
2. A Manual of Nuer law, p. 33.
3. P.J. Bohannan, Justice and judgment among the Tiv (1957).

at all, it was probably the rulers themselves from a few ungovernable individuals.

Different considerations would obtain in the case of less homogenous and larger politics[1] as were many African paramount chieftainships. Thus a Yoruda oba widely reputed to be a constitutional monarch[2] was spoken of as possessing power to depose any chief or arrest or punish any offender or order the execution or expulsion of any rebel.[3] He could enact or cancel any law, pardon and release any prisoner.[4] Needless to say, Ganda kings were expected not just to reign but to rule actively and powerfully.[5]

Where power was expressed in such absolutist terms, it would be idle to look for separation of powers on the American model. The king or paramount chief was at once the executive head, the legislator, the supreme judge, the commander-in-chief of the army, the chief priest of supreme ritual head. The Basuto, for example, believe that the exercise of political and judicial authority is complementary.[6] All this, however, is theory, and represents the African conception of political sovereignty. In reality, the personal power of

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1. See J. Plamenatz, "In what sense is freedom a Western idea" (1960) 1 Current Law and Social Problems, 3-18.
2. See P.C. Lloyd, "Political system of the Yoruba" (1954) S.W.J.A.366; "Sacred kingship and government among the Yoruba" (1960) 30 Africa, 221; Yoruba land law, pp. 43-47; "Traditional rulers" in Political parties and national integration in Africa (ed. J.S. Coleman and C.G. Rosberg Jr.) (1964) 382-412.
3. A.K. Ajisafe, The Laws and customs of the Yoruba (1924) 21-22.
4. Ibid.
5. L.A. Fallers, The king's men (1964) 4. (contd. overleaf)

the chief was checked and controlled in many ways. Government in the typical African kingdom was well summarised by L.A. Fallers, as being "under a kind of traditional constitutionalism in which authority was diffused and checked and consent was obtained through a hierarchy of corporate groups, theoretically based upon descent acting through their senior members as headmen or chiefs".[1]

There was therefore no concentration or powers,[2] the hierarchical state organization compelled considerable decentralization and distribution of power.[3] The tribal constitution would also invariably reserve certain titles to subordinates; a few examples of such powerful position have been mentioned in our earlier discussion of the roles of women as queen-mothers or "queen-sisters". In most of the societies too, the paramount chief must act on the advice of a tribal council.

We are now in a position to raise the following questions and to attempt answers to them in turn;

(i) How far was the government based on consent?

(ii) Were there any limits on the legislative power

(contd. from previous page).

6. Ashton, The Basuto, p. 222. Cf. Biobaku, "Historical sketch of Eqba traditional authorities" (1952) 22 Africa 35 at p. 39.

1. loc.cit.
2. Cf. Radcliffe Brown, Preface to A.P.S., p.xxi; Elias, Nature of African Customary Law, pp. 188-190.
3. Allott, "African conception of the Rule of Law", pp. 86-7.

(iii) How fair and impartial was the administration of justice?

(iv) Were there any effective checks in the exercise of executive power?

Democratic equivalents.

Viewed in the modern sense of a government based on popular franchise, government in traditional Africa was not representative.[1] Often, the family heads of the kinship group would constitute its government.[2] If the political unit was larger the family heads formed an electoral college to elect from among their number those to conduct public affairs at a higher level and so on to the tribal level. As the issues which faced the government of the time were communal rather than individual, it would seem appropriate that those who managed the affairs of the family should represent its interests in wider groupings.

The pattern just sketched was not always followed especially in a paramount chieftainship where the ruler might be so powerful as to insist on personally selecting the ward, village and district headmen, as well as his councillors of state. Certainly, from the mid-nineteenth

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1. Cf. St. Clair Drake, "Representative government and the traditional cultures etc." pp. 10-12.
2. See K.O. Dike, Trade and politics in the Niger Delta (1956) 34-35; Sarbah, Fanti national constitution, pp. 4 et seq; Meek op.cit., pp. 100-101; Green, op.cit., pp. 14-31.

century the Kabakas of Buganda successfully did this and were thus able to perpetuate an autocratic regime sui generis in Africa.[1]

In some places, however, the tribal constitution would stipulate that important chiefs should be appointed from designated families and clans so as to give every group a voice on the tribal council. The councillors were advisers to the paramount chief or king whose power, however, edged about, was still a considerable figure. The mode and manner of his appointment was therefore important.

Everywhere, kingship was hereditary, though, as pointed out earlier, except in such rare instances as among the Bini, the rule of primogeniture did not obtain. The first son might be named heir as among the Bantu but he never succeeded his father automatically[2] and succession was at times fiercely contested. The qualities required in a candidate were, fairly well-known:[3] intelligence, humility,

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1. Fallers, op.cit., pp. 4-6; further, A.I. Richards, "Authority patterns in traditional Buganda" in The King's men, pp. 270 et seq; East African Chiefs (1960) pp. 45-53; J. Roscoe, The Baganda, their customs and beliefs (1911) pp. 222 et seq; M. Southwold, Bureaucracy and chiefship in Buganda (1961); Haydon, Law and justice in Buganda (1960) 3-17; Mair, Primitive government, esp. Ch. 8.
2. If he anticipated the title, he was disinherited. Schapera cites the case of Sekgoma who was suspended by the Ngwato in 1898. Tswana law and custom, p. 58. Cf. Ashton, The Basuto, pp. 193-194; Nadel, A black Byzantium pp. 50-51; M.G. Smith, Government in Zazzau, (1960) 67.
3. Busia, The position of the chief etc. p. 9; Nadel op.cit. p. 48.

generosity, friendly temper, vocational or professional success, manliness and physical fitness (Seniority also counted).

Ideally, the "election" of a Yoruba oba involved careful weighing of these qualities in the candidates nominated by the appropriate ruling house of the many ruling families that comprised the royal lineage. Each of the ruling houses should hold the title in rotation[1] but the kingmakers (the senior chiefs drawn from the commoner groups in the town) reserved the right to pass over candidates from one ruling house in favour of another.

The election of an Ashanti chief was more elaborate.[2] The queen-mother would hold a meeting with the adult men and senior women of the branches of the royal lineage at which the eligible candidates were considered and the most suitable one chosen. The nomination was forwarded to the elders who would convene a joint meeting with the headmen and "commoners" to ratify or reject the nomination. "On the announcement of the name, demonstrations of approval or disapproval were

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1. Though not always so; in Iwo, Oba Lamuye was followed on the throne successively by five of his sons. Lloyd, "Political system of the Yoruba", p. 383.
2. What follows is based on Dr. Busia's account in The position of the chief etc., pp. 9-13.

unmistakably given by applause, grunts, hisses, laughter or silence".[1] If the nominee was rejected at the meeting, the queen-mother must repeat the nomination processes until an acceptable candidate emerged and should the dead-lock persist, the royal family had to give in:

> "'Odehyee' nsi hene' is the Ashanti maxim on such a situation: 'a royal does not instal the chief!' that is the privilege of the commoners who have to serve him".[2]

It was, however, not in every society that the people had such a dominant voice in deciding succession issues though it was customary generally for the ruler-elect to be presented to the people for formal approval. An individual candidate might be passed over but never the royal family. As the Ngwato reminds us, Kgosi ke kgosi ka a fsetswe (A chief is chief because he is born to it).[3] The hereditary principle was thus central to the system. Moreover, the pre-eminence accorded the ruler primarily belonged to his family (the family of the founding ancestor or of the most senior if the founders came from different families). This explains why in many societies, the ruler must share political authority with his close relatives with such

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1. Ibid, p. 11.
2. Ibid.
3. I. Schapera, "The political organization of the Ngwato etc." in A.P.S. at p. 75.

titles as queen-mothers, queen-sisters and great-uncles.

Power conflicts were not unknown within the royal family, and the ruler, suspicious of his relatives, often sought ways of curbing their influence over him. He felt more secure confiding in his trusted personal servants or slaves and began to invest the latter with important powers hence the emergence of such powerful posts as three of the Katikiro of Buganda, the Lozi Ngambela, and Iyasere of Benin. In Fulani Zazzau, three of the four rukuni (senior order) were eunuchs.[1] With the passage of time, however, these titleholders grew less and less subservient to the ruler, their gains in terms of power being the latter's loss.

The hereditary principle and the consequent disproportionate part played in government by members and servants of the royal household would appear to be offset by another basic African idea of government. This is the belief that government is a partnership between the ruler and his subjects. The Ngwato again have a maxim for it: Kgosi ke kgosikamorafe (The chief is chief by the grace of the tribe).[2] The ruler should always defer to the wishes of his people, otherwise he would be removed from his position.

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1. M.G. Smith, op.cit., p. 53.
2. Schapera, op.cit., A.P.S. p. 79. The Basuto also say morena ke morena ka batho ("the chief is chief by the people".)

'To every man a voice'

Although generally, an ordinary citizen did not have an opportunity to vote for the ruler of his choosing, he was accorded a voice on any matter affecting his interests[1] or those of the community at large. No decision would be taken unless the issues had been thoroughly discussed. The society was so organized that every adult person (or as more often the case, every male adult) could freely express his opinion on any public affair.

Large states were rare because the people preferred small units of government in which their voices would be effective. Societies like the Yoruba despite a common ancestry, a common language and a cultural homogeneity never developed a pan-tribal government. The old Oyo empire did not embrace all the Yoruba country; even those areas within the empire retained their institutions of government and except for states close to Oyo metropolis the component states were to all intents and purposes independent.[2] The Zulu kingdom even during the reign of the warlike Shaka was not a unitary state.[3] Principalities carved out either for

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1. Allott, "African conception of the Rule of Law", p. 90.
2. J.A. Ajayi and R.S. Smith, Yoruba Warfare in the 19th century pp. 1 et.seq. 68. See further, Johnson, The history of the Yorubas (1921) pp. 80 et.seq.
3. See generally, M. Gluckman, "The kingdom of the Zulu' in A.P.S. pp. 36-41; Custom and conflict in Africa (1955) pp. 160-168.

the kings' relatives or for distinguished warriors remained autonomous units as did some colonized tribes whose chiefs were allowed to retain their political functions under a system analogous to the indirect rule made famous by the British.[1]

Nation-states then (with a few exceptions such as Buganda) comprised tiers of authority. The views of the ordinary people were transmitted by their spokesmen through the various intermediate councils to the highest council of all. So rigidly observed was this device of delegation that if later circumstances should warrant the revision of the people's mandate, their spokesman, even if he were the chief's nominee could not review the mandate. He must report back for fresh instructions. Many a headman of a village or division were not infrequently faced with conflicting demands: the pressure from the chief whose agents they were, and the agitation of the people whose spokesmen they were supposed to be.

When therefore, a ruler spoke with a seemingly autocratic voice, one should not be misled to thinking that he was all-powerful or that the decision announced by him was his personal view. For the Ashanti, Rattray observes:

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1. Cf. R.H. Lowie, The origins of the state, p. 19.

> "To all outward appearances and to the superficial observer, the fiction indeed was encouraged that he [the chief] was a despot and an autocrat. In reality, every move, every command which appeared to emanate from his mouth, had been discussed and agreed upon in private by every councillor who had a say in the affairs of the state. These councillors, in turn, would also have taken care to sound their subjects right down to the Asafo. Nominally autocratic, the Akan constitution was in practice democratic to a degree".[1]

Questions of war which one might expect to form part of the ruler's prerogative were in some African societies decided by the people. Among the Egba, for instance, an extra-ordinary meeting of the chiefs, the Ogboni (secret society) and adult males (the women being excluded because invariably the grave nature of the matter would have necessitated the Oro (bull-dozer) being brought out) would be summoned. Captain Jones who in 1861 witnessed one such meeting reported that the people would gather in thousands. Everyone was allowed to express his opinion; the regularity of the proceedings and the decorum which prevailed were impressive.[2]

The Basuto granted their ruler the right to decide minor matters but important issues must first be discussed at the pitso (a public meeting of all adult males). The

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1. R.S. Rattray, Ashanti law and Constitution, p. 406.
2. Captain Jones's Report on the Egba Army in 1861. (Enclosed in Consular Despatch no. 17 of 20 June 1861 from Governor Hill at Sierra Leone to Lord John Russell (P.R.O. F.O. 84/1134) reproduced in Appendix to Ajayi and Smith op.cit. pp. 129-140.

ensuing discussion was keen and free, "and great weight attached to the opinion and attitude of the people".[1]

All over the continent, the rules of procedure adopted at these meetings aimed at enhancing the expression of free and frank opinion. The most junior persons present spoke first[2] so that they might not be put in fear of saying something at variance with the views already expressed by their seniors. Even if they said unpopular things, no offence would be taken against them, as the Sotho would say, "he who trips in an assembly is not to be blamed". The touchiness displayed by the Asogwa (an Ibo bureaucratic society) in Nsukka, when publicly criticized[3] would seem difficult to understand. It was definitely out of step with Ibo attitudes generally on these matters, for the Ibo too held that at public meetings every person was entitled to give free expression to his view.[4]

Free discussion could thus be said to be the most fundamental feature of African system of government.[5] Little wonder, therefore, that the African leaders of today are fairly unanimous that 'Democracy is essentially

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1. Ashton, op.cit. pp. 215-217.
2. Gluckman, "The Lozi of Barotseland" in Seven tribes of British Central Africa (1951) 41.
3. Meek, Law and authority in a Nigerian tribe, p. 149.
4. Ibid, p. 138.
5. Songs were even used as media for expressing political opinion; Nadel, A Black Byzantium, p. 137.

government by discussion'.[1] Thus one commentator claims:

> "The African is democratic almost to the point of inaction. Everyone must have his say; everyone else must agree before a decision is taken by a group; 'a decision that disturbs the heart of another is not a wise one' is a proverb speaking well of the African sense of democracy...."[2]

The people would talk and talk until they agreed and failing agreement the meeting would be adjourned for further consultations. Where various councils or associations were involved, the discussion could pass backwards and forwards between them in search of an agreement.[3] When, after this rather tedious examination of the various shades of opinion on the instant issue, a decision was arrived at which, in the nature of things, was bound to be a compromise one, or "a synthesis cautiously sifted",[4] there should be no further dissent. It would by now be apparent that decisions were not reached by voting. Therefore, the notion of a majority rule did not obtain; consequently a party system of government would not have fitted into the cultural framework.

In sum, the society was essentially consensual, all conflicts being resolved by an emergent consensus which once attained should dissolve all differences leaving no

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1. Tafawa Balewa, Foreword to H.O. Davies' Nigeria, the prospects of Democracy (1960) Julius Nyerere, "One party System" (1963) 2 Spearhead, No. 1; see further Colin Legum, Pan-Africanism (1960).
2. N.Sithole quoted by C.Friend,(1962) 2 Freedomways,436.
3. Gluckman, Judicial process among the Barotse, p. 10.
4. Sithole, loc.cit.

enduring lines of cleavage.[1] Institutionalized dissent, which is what an opposition party is in a Western parliamentary system of government, would have been an admission of a permanent breach in the social equilibrium, the maintenance of which was, as the people belived, the end of society. It is important to note though, that the people were not as such uncritical of the acts of their rulers. The principle 'to every man a voice' which has just been outlined, afforded ample opportunity for criticisms of the government which a ruler could ignore only at his own peril.

II. Legislative power.

In traditional societies, legislative power was an instrument of social and political control though unlike in modern societies generally, this power was so hedged about that some commentators have concluded that it was non-existent. This static image is not quite accurate. It is true that the law basically rested on rules of custom which though not easily susceptible to change, were not unchanging. They were subject to a process of constant adaptation to new situations, either by re-interpretation or by the creation

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1. E. Shils, "The fortunes of constitutional government in political development of the new states" in Development: for what?, pp. 121-122.

of new rules.[1] Because in these societies, the laws were more often found than made,[2] legislation[3] was subordinated to adjudication, but it nonetheless existed. It goes without saying that legislative power was not unlimited, the factors restricting its scope being:

(a) The economic and social structure of the society: In societies with subsistence economy and therefore less complex, the range of legislative power would be necessarily limited.[4] Moreover, since land, the chief means of production was controlled by the people, problems which called for solution would require more judicial or administrative processes than legislative.[5]

(b) Other sources of law: Lex as humanly made law must not contradict or set aside "mos, the custom of the people, jus the idea of justice or right morality, and fas, the divinely ordained or supernatural law".[6] In brief, the traditional legal order vaguely recognised a fundamental law which no enactment should lightly encroach upon.

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1. D.Lloyd, The Idea of Law,p.233.
2. Shils, op.cit.p.122.
3. It took many forms; Dr.Elias lists five: (1) legislation by chief's decree, (2) legislation by chief and in executive council (3) institutional legislation (i.e. by-laws made by associations like age-grades); (4) legislation in public assembly, (5) judicial legislation: Nature of African Customary Law,p.191.
4. Cf.Schapera, Government and politics in tribal societies,p.70
5. In pastoral societies, the judicial and administrative functions of the state would be less preponderant over the legislative. For a helpful note on the interaction of the legislative and judicial processes in tribal...

(contd.overleaf)...

(c) Popular control on the exercise of legislative power: Reference has already been made to the Basuto rule that major matters must be decided at the pitsos. The cry, fe lumile (it has thundered) with which a pitso was brought to an end was more authoritative than the voice of the Paramount Chief. Strictly speaking, however, this essential requirement of public consent was not restrictive of the legislative competence of the state, being only definitive of the composition of the highest legislature of the land. However, the arrangement did give the people the invaluable right to reject unpopular proposals.

Elsewhere in Africa, public assemblies were not so constitutionally important but everywhere the need for popular consent for all measures was emphasized. In some societies, the simple fact of promulgation of a law did not give it automatic force. "One had the impression" writes Miss M.M. Green, "that laws only establish themselves by degrees and then only in so far as they gain general acceptance. A law does not either exist or not exist; rather it goes through a process of establishing itself by common consent".[1]

(contd. from previous page).

5. societies, see I. Schapera, 'The sources of law in Tswana tribal courts: legislation and precedent' (1957) I.J.A.L. 150-161.
6. Allott, "African conception of the Rule of Law" p. 98.

1. Ibo Village Affairs, pp. 132-135.

The Kikuyu too were mindful of this requirement of general acceptance;[1] prior concurrence of the various age grades, would have been sought before any legislative decision was taken by the appropriate authority. Thus the athamaki or agambi of the ruling lodge or rank, though invested with full legislative powers would in particular first make sure of the support of the members of the rank immediately below theirs, lest the latter, on taking over power at the next utuiko might decide to repeal all the laws passed during the previous rule.

This constant search for the widest support for new measures is but another instance of African notion of democracy. We shall find it again presently when we examine the judicial process. The following remarks although intended primarily for an Ashanti are true of every African:

> "To him a democracy implies that the affairs of the Tribe (State) must rest not in the keeping of the few, but in the hands of many.....To him the State is literally a Res Publica; it is everyone's business".[2]

Therefore, because the citizens actively took part in the running of affairs of the state and laws resisted by them would not normally be enacted, the organs of state were

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1. Lambert, op.cit. pp. 136-138.
2. Rattray, Ashanti Law and Constitution, p. 406.

indirectly checked in the exercise of their legislative power.

III. Administration of justice.

Bohannan[1] says of the Tiv of Nigeria that they are a litigious people who enjoy listening and participating in a jir (case).[1] Similar remarks have been made by other commentators about other African societies.[2] The observation was once made of the people of Ikot-Ekpene in Eastern Nigeria that litigation formed a big part of their life; "The week consists of four days. Three days they go to court and one day to the market".[3]

The popular interest shown in dispute settlement is not difficult to explain. As has just been pointed out, in most societies, public affairs were everybody's business. There was a civic duty to attend these hearings whether or not the spectating public were directly affected in the instant case or not. They too were members of the court and the decision of the presiding elders in every individual case was shaped at least partly by their opinion.[4] In an illiterate community, the hearings also afforded a medium

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1. Justice and judgment among the Tiv, p. 13.
2. In respect of the Lozi, see Gluckman, Judicial process among the Barotse, p. 21. For the Basuto generally, see A. Phillips, Report on Native Tribunals in Kenya (1944) at para. 59; for the Kisii para. 122 & 113, the Kikuyu par. 173. Contrast the Masai para. 412.
3. Quoted in the Report of the Native Courts (Eastern Nigeria) Commission of Inquiry (1953) para. 91.
4. Schapera, "Sources of Tswana law in tribal courts", p. 161; also Allott, Essays in African law, p. 69.

for educating the people on the accepted norms of the society. Moreover, as the investigations would range wide over matters on relationships immediately or remotely relevant, a spectator's name might be suddenly dragged into a case and he would probably volunteer or be called upon to comment on the part of the evidence that affected him. In any event, it was in the interest of the members of the public to attend these sessions since, as there was no separation of powers, a case that unobtrusively began as a petty matter between two litigants could end with an important legislative or administrative pronouncement.[1]

As regards African litigiousness, certain distinctive aspects of African judicial process should not be overlooked. To a bystander, a number of disputes might sound trivial, certainly the casual manner in which some of them were disposed of would appear to convey that impression. On the other hand, many of such disputes were brought solely to publicise a wrong-doing. Thus when a person sued knowing that he would lose, it was probably because he felt aggrieved that his neighbour had committed a greater wrong on him as for example by subjecting him to personal ridicule. He knew that the elders would be reluctant to support someone who was right in law but wrong in justice and that

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1. Gluckman, Judicial process among the Barotse, p. 71.

they would seek to achieve justice if need be indirectly as by administrative action.[1] It is important to add too that most of the litigation revolved around duties and not around rights.[2] Very often a rebuke administered to an opponent was more satisfying to a litigant than any compensation ordered in his favour.

The essence of African judicial process was, therefore, to indicate to the parties their right and wrong doings and to reconcile them so that they could, thereafter, live together harmoniously.[3] The mode of trial and the sanctions employed were thus geared to this end. The trial must manifestly be seen to be fair, if the consequent verdict was to command the acceptance of both parties or more important still, of the rest of the community. This was much more so in those societies where the executive organ was very weak.[4] Here there was generally an air of voluntariness about the whole process. Usually, cases could only be initiated with the concurrence of both parties and when judgment was given (restitutive sanctions were more in evidence than primitive measures), execution might again depend on the willingness

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1. Ibid., p. 22.
2. Allott, Essays in African law, p. 68.
3. Cf. Gluckman, op.cit., p. 49.
4. As among the Nuer, see Howell op.cit.

of both parties to co-operate.[1] Tribunals dispensing this type of consensual justice are called arbitral courts to distinguish them from judicial courts[2] which are backed by the arm of a strong Executive. Parties are summoned before these latter courts, and judgments enforced regardless of the attitude of the parties.

Judicial courts were found in those African societies with personnel of government powerful enough to apply force effectively when necessary. Yet even in these societies, judicial process still tended to be conciliatory which would seem to suggest that the availability of force as a sanction was not seen as a substitute for the customary search for social equilibrium. Vox populi was the just law and not the misguided opinion of a few people backed by the might of the state.

The conciliatory method of dispute settlement was probably unavoidable since the issues tried usually transcended the interests of the litigants before the court. Thus for the Lozi Gluckman points out that disputes were

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1. Lambert calls this "judgment by agreement" as distinct from "judgment by decree". Quoted by A. Phillips op.cit., para. 135, 721.
2. Allott, Ibid and in greater detail "Arbitral proceedings in customary law" in Essays in African law, pp. 117-149. Cf. Bohannan, Justice and judgment among the Tiv. pp. 160-61. J.L. Gibbs, Jr., "The Kpelle moot" (1964) 33 Africa, 1.

never investigated as though they arose in ephemeral relationships involving single interests. They were seen as touching upon multiplex relationships the intricate network of which must be preserved.[1] The society would crumble if decisions were given leaving one group of the community permanently at odds with another. For tribal societies generally, Vinogradoff writes,

> "The governing principle upon which the courts proceeded was not the investigation as to fundamental right, but the solution of conflicts as between opposing parties. Its nature and methods are not directed towards analysis of the complex contents of the cases..... For tribal societies, it is impossible to tackle such problems as the dominating influence of kin solidarity prevents the consideration of purely individual motives".[2]

Access to justice and legal assistance.

Not every citizen had direct access to justice qua litigant. Among the Basuto and the Southern Bantu generally, women were not publicly heard and could therefore take no part in judicial proceedings.[3] A woman had therefore to be represented by her father if unmarried or her husband if married or whoever was for the meantime her guardian. Moreover, the doctrine of collective responsibility, might

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1. Op.cit., p. 21.
2. Op.cit., Vol. I. p. 350.
3. Allott, "The legal status of women" p. 126.

foreclose individual suits even if those who would have been individual parties were males. Thus among the Tswana, the head of each family was responsible for all his dependants which included his wife, unmarried children and servants. These must be assisted by him in their legal actions against other people.[1] Nor could they be sued except through him. The arrangement was for the protection of the head of the family who was responsible for the payment of their debts, fines or damages and was not a restraint on access to justice as such.

The system of protection which operated under the military structure of Ruanda society might also at first sight appear to bar a subordinate's access to justice. A subordinate was required to seek the support of his military chief before embarking on litigation. However, the requirement was properly not a rule of law at all though practical wisdom dictated its observance. But Maquet has rightly observed that if the protection of a man of higher standing was considered useful and necessary in such a situation, "We must suppose that judicial decisions were not taken only in the cases' own merits but that the respective power of

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1. Schapera, Tswana law and custom, p. 50.

the two protectors was weighed by the judge".[1] On the other hand, the "power" of the two protectors could be evenly balanced. Maquet, however, says that in such a situation the outcome would be a compromise in which each chief would act as a representative of the litigants rather than a judgment which goes to show that "power relations were emphasized in Ruanda and that the rights and properties of isolated men, that is to say, those not identified in any respect with a powerful one were insecure".[2]

Indeed, as stressed in the last chapter that was generally the position in traditional Africa. It is no exaggeration to add here that it would be disastrous to go to court friendless. Apart from the possible handicaps which might beset an inexperienced litigant who decided to argue his case unassisted, he ran the further risk of his case being prejudged even before he had been heard in court for the elders might say: "there you are, your case is so bad that your own people do not even support you".

The search for support was thus an important pre-trial formality,[3] but such was the social system that a

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1. op.cit., p. 122.
2. Ibid.
3. Cf. the convening of a movt., "the jir at home" among the Tiv, Bohannan, op.cit., p. 165.

genuine case would not go uncontested for want of support. Some societies might even earmark one or two members of the group to give such legal assistance.[1] Driberg cites[2] the practice among the Mangbettu and the Chagga whereby certain men, "champions at law"[3] made it their job to represent litigants generally. Such pleaders wearing masks "to prevent identification by members of the audience" were also found among the Mende and other people of the Hinterland of Sierra Leone.[4] Among the Kikuyu too, some Athamaki were already specialising in advocacy with the laudable aim of serving rather than perverting the ends of justice:

> "A muthamaki chosen by a plaintiff or defendant of his own kin or residence to represent him in a civil suit will often warn his client ndigiguteithia na chira no' guteithirie na kuruta ('I would not help you in the case except to help you in the paying'), implying that he would not twist the argument to suit his client's case if he believes him in the wrong but he will give him some assistance in meeting the judgment debt if the judgment goes against him".[5]

Mode of trial.

(a) Openness: The requirement of openness was observed in African judicial process for, except in a small number

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1. Cf Allott, "African conception of the Rule of Law", p. 96.
2. "African conception of law", p. 232.
3. Elias, "The nature of African customary law", pp. 98, 234, 247.
4. Elias, Government and politics in Africa, pp. 156-157.
5. Lambert, op.cit., p. 117.

of grave cases heard by the secret societies sitting as judicial tribunals; all trials were held in public.

(b) Fairness: The principle of natural justice that both sides shall be heard was widely adhered to. The Lozi kuta as Gluckman testifies observed due process of law. This was in keeping with the ideal held by the Lozi that both litigants should be heard and cross-examined in each other's presence.[1]

There were no restrictive rules of evidence in African judicial process corresponding to those regulating admissibility of evidence under the English system. Thus evidence consisted in a continuous statement by a witness which might extend to relevant and not so relevant issues.[2] The belief was that you could not arrive at the truth without investigating as well all the mediate acts and relationships that were likely to have influenced the dispute currently before the court. This did not mean though, that the parties or their witnesses could in their evidence wander about thus inhibiting the progress of the trial. A witness who told an unconnected story was quickly interrupted by the presiding

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1. Judicial process among the Barotse, p. 102, also The ideas in Barotse Jurisprudence. p. 9.
2. Cf. Allott, "Practice and procedure in native courts" (1961) 5 J.A.L. p. 134.

elders who might subject him to a hostile cross-examination.[1]

A typical African trial has been succintly described as follows:[2]

> "The plaintiff speaks first. He is followed by the defendant. Witnesses are then brought by both sides. The discussion becomes more and more open. Each litigant has not only his witnesses, but his relatives and friends, to speak on his behalf. There is no limit to the time any one may speak, nor to the number of times he speaks..... The evidence is received; and if the case is concluded satisfactorily, the defendant admits his fault, compensation is awarded, the plaintiff agrees, and the case is ended. On the whole, the proceedings are animated but orderly. Everyone has his full say and is satisfied. If the judgment is not satisfactory, the argument is begun over again....."

It would seem difficult to understand how, in the face of this meticulous regard for what everybody had to say, the suggestion could still be made that the Africans were not accustomed to the rules of natural justice.[3] One decision, cited in support of this view is Nana Tawaiah III v Kwezi Ewudzi[4] where Kingdon C.J. held that the proceedings before a Native Tribunal in the former Gold Coast were a nullity

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1. The African system of trial may thus be described as inquisitorical and in this sense akin to the continental system. The positive steps taken by the members of the court to get at the truth was ideal for a civil arbitral procedure but it is arguable whether it does not tilt the scales slightly against the accused in a criminal process. See, Goodhart in Foreword to Gluckman, Judicial process among the Barotse, XVI. But see Gluckman ibid; also The ideas in Barotse Jurisprudence pp. 10-11.
2. Brown and Hutt, Anthropology in action pp. 124-5 quoted by A. Phillips, Report on Native Tribunals etc., para. 721.
3. Lewin, African native law (1947) 99.
4. (1936) 3 W.A.C.A. 55.

because two of the tribunal members who gave judgment did not hear all the evidence. It is true that in pre-European days such a change in the composition of the court would not vitiate a judgment. This is because, unlike the Native Tribunals, the indigenous courts had no fixed membership and members came and went at any stage of the proceedings. The practice was however well-established that whoever was presiding should summarize the evidence so far heard for the benefit of joining members before the verdict was given.[1] Nor was the verdict reached by voting;[2] judicial decisions like any other decision followed the sense of the gathering.

In Egha Native Authority v Adeyanju,[3] Graham Paul J., alluded to the changed circumstances of the indigenous courts, then called native courts, in Nigeria:

> "Native courts as they have for some years been called by the Nigerian legislative draughtsmen are not native institutiins at all. They are creatures of statutes of the Nigerian Government. Under the Native Courts Ordinance, a 'Native Court' need not necessarily even consist of natives. It seems to me obvious that no "native law and custom" dealing with the procedure of an institution which as a creature of what is in this connection I may call foreign statutes of the last thirty years or so and has no place in native law and custom".[4]

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1. As the linguist would do in Akan societies when through disagreement the number of councillors was increased. Sarbah, Fanti national constitution (1906) 33.
2. The presiding judges might not even "have an equal vote or voice in the decision". Allott, "Practice and procedure in native courts" etc., p. 133.
3. (1938) 18 N.L.R. 77.
4. Ibid. at p. 80.

It is possible to criticise Paul J. for appearing to suggest that "native courts" should dispense justice in accordance with notions foreign to the members who sat on them[1] but his point, in another sense, was well taken. Notions of justice which fitted the judicial structure of pre-European days were no longer wholly applicable to the new system of courts. Those elders who sat in the new courts unmindful of the structural transformation that had taken place could be forgiven for still being guided by these odd notions and practices, at any rate those among them who meant well. There were, however, some court members who thought that in the new order, they could do as they pleased and indulged in practices which were wholly foreign to African notions of justice.

In the Adeyanju Case, which drew the foregoing comments from Paul J., the claim of the Egba Native Court judges that the procedure adopted by them was sanctioned by custom was wholly untenable. The Native Courts Ordinance had provided

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1. Thus ignoring a number of injunctions the other way. e.g. when Captain Maclean was appointed "Judicial Assessor" in the former Gold Coast, he was expected not to restrict himself "to the technicalities of British law" in his supervisory duties over the native courts. See Allott, "The history of native courts in Ghana", in Essays in African law, p. 101. Sir Donald Cameron had also warned that the development of native courts "should not be misdirected by administrative interference or permitted to misdirect itself into channels quit foreign to native ideas". Memorandum of Native Courts (1930) para. 5-6, quoted by Phillips, Report on Native Tribunals, para. 723.

that the Ake Native Court should comprise the President and 22 members though without fixing a quorum for each sitting. The accused appeared before the President and two members of the court and after the prosecution had commenced its case, the two court members withdrew from the case and were replaced by another two members who soon withdrew just after the defence had completed their own case. The President and two other members who had heard none of the evidence purported to convict and sentence the accused. The latter's appeal to the Native Court of Appeal was of no avail but he succeeded in the High Court where Paul J., aptly described "the procedure disclosed in this case as a travesty and a mockery of the administration of justice" and therefore repugnant to natural justice, equity and good conscience.[1]

The learned judge indeed needed no "repugnancy clause" to refute the validity of the alleged custom. There was just no custom of the kind. Some nine years later in another case[2] from Abeokuta Pollard Ag. J., categorically remarked "I find as a fact that in Ogboni [secret] societies the sacred principle which is enshrined in the legal maxim - audi alteram partem - operates with full force".[3] It was

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1. op.cit. at p. 80.
2. A. Thomas and others v Oba Ademola II and others. (1945) 18 N.L.R. 12.
3. Ibid. at p. 33.

therefore unconstitutional for the Ogboni to "drum" out Chief Akinwande Thomas, the Base (later Olo) of Iporo, without previously informing him of the charges against him or that he was going to be tried, or inviting him to defend himself.

If the view is held that natural justice "is an indigenous conception",[1] an explanation must be given for "the seemingly unceremonious mode of trying [criminals]"[2] such as the Kikuyu and the Kamba Kingole,[3] and Mwinge, and the injoget of the Kipsigis.[4] For these practices appear to infringe the principle of presumption of innocence which is but a sub-maxim of the maxim audi alteram partem. It would be misleading however, to describe these procedures as "African lynching", a kind of parallel to the lynch-law once unofficially observed in some parts of the United States of America. As Gerhard Lindblom observes,[5] "the expression [African lynching] is faulty. When we talk about lynching, we usually mean the proceedings of an incensed crowd,

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1. Gluckman, Judicial process among the Barotse, p.212-214. See also Schapera, Government and politics in tribal societies, p. 80., Sarbah, Fanti national constitution, loc.cit., Lambert op.cit., p. 118.
2. Elias, Nature of African customary law, pp. 223-228.
3. See G. Lindblom, The Akamba, (1920) 176-180.
4. See. J.G. Prestiany, The social institutions of the Kipsigis (1964), 192.
5. op.cit., p. 179.

generally a mob who in unbridled fury and generally with great cruelty, administer justice on their own account. [However], this is not at all the case with the Kingole, which, on the contrary, acts by the order of the leading men of the community, the elders, and can thus be looked upon as the reaction of the protective instinct of the community against a threatening danger.

Among the Akamba, therefore, the kingole would not convene except in respect of grave crimes like witchcraft which were considered dangerous to the public safety and against habitual offenders, incorrigible thieves for example. Even then, there would have been a thorough investigation to ascertain whether the suspected person was really guilty, the medicinemen being employed for this purpose.[1] It is noteworthy that these medicinemen must be drawn from many districts and should be separately consulted. The execution of the guilty man even after he had been identified by divination, could not proceed without the consent of the elders.

The Kikuyu also used the special procedure against those suspected of witchcraft and notorious thieves. The

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1. Ibid. pp. 176-177.

accused was led to a forest for execution by the kingole but the latter could not proceed unless two requirements[1] were met. First the consent of the family of the accused must be expressly given by a person competent to give the same. Secondly, there must be a formal trial in the forest to which the elders from the remoter parts were invited as observers. Two objections may be raised to this procedure notwithstanding these two safeguards: the secrecy and the fact that it could proceed even in the absence of the accused.[2] On the other hand the active consent of the family of the accused as further brought home by the rule that the actual execution must be commenced by a relative (usually the accused's father or brother), is suggestive of the probable guilt of the accused, otherwise his family would not have cast him off so ignominously.[3]

The group action taken spontaneously against an habitual offender by the Bantu of Kavirondo supposedly "without a hearing of the case and often on the spur of the moment"[4] must therefore have been preceded by a decision of the elders to the effect that the culprit

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1. Dundas, "The organization and laws of some Bantu tribes", (1915) 45 J.R.A.I. 234-306; also "History of Kitui" (1913) 43 J.R.A.I. 514; Cf. Lambert op.cit. p. 79.
2. Allott, "African conception of the Rule of Law", p. 97.
3. Cf. Elias, Nature of African customary Law, p. 224.
4. G. Wagner, op.cit. Peat see, Radcliffe-Brown, A.P.S. p.xu.

should be "placed outside legal protection of the clan". A person thus outlawed was virtually condemned to death and it would be lawful for any citizen to put him to death unceremoniously. This is because in the majority of traditional societies there was neither a standing army[1] nor a permanent police force, the citizens at large were thus law enforcement officers, but they must act pursuant to a judgment of recognised authorities.

The extra-ordinary procedures just outlined should not be confused with the summary punishment of a person caught in the act of flagrantly committing a crime.[2] This form of self-help is generally recognised in every legal system provided the avenger acted only in response to provocation or in self-defence. It is often said though that in some African societies it was legitimate to kill an adulterer caught in the act by the husband but this is doubtful[3] because such homicide would still attract the paument of blood-money to the family of the victim.

Some instances of summary justice should however not escape attention. Thus among the Bantu, a chief

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1. For the Yoruba see, Johnson, The history of the Yorubas etc., (1937) pp. 131-137; Ajisafe op.cit., pp. 18-20. Ajayi and Smith op.cit., pp. 13-28; 129-140.
2. See Schapera, Tswana law and custom, p. 48.
3. But the seducer could be severely thrashed. Schapera ibid. Cf. Dundas "The organization and laws of some Bantu tribes, p. 274; Elies op.cit., p. 227.

occasionally dispensed with formal trial if he was openly disobeyed or where he suspected a plot against his authority.[1] We are told that he would send people to kill those planning his overthrow, "'or to eat them up' i.e. destroy their homes and confiscate their property".[2] The chief who ordered such actions against his suspected subjects must be very sure of h his facts for if the allegation proved unfounded in the end, he was not likely to retain his position for long as his people would unite against him. Some chiefs have been known, however, to act on mere whim but such instances "are generally acknowledged to represent an abuse of power and not its legitimate exercise".[3]

Among the Nguni, people who were accused of sorcery were not tried in the usual way but were "smelt out" at a public séance held on the chief's order.[4] This was no summary justice as such but a special trial conducted by those supposed to be experts in supernatural matters. Their findings were conclusive, the "identified" sorcerers being punished forthwith.

(c) Impartiality.

It is not enough to grant both sides to a dispute,

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1. Schapera, Government and politics in tribal societies p. 103.
2. Ibid.
3. Ibid.
4. Ibid.

an opportunity to state their case; the consequent decision must be taken in accordance with the evidence. One who is himself personally interested in the outcome of a case is likely to put an interpretation favourable to himself on the evidence adduced by both sides. The second rule to the principle of natural justice anticipates situations like this when it provides that a man cannot be a judge in his own cause. This is the foundation of the doctrine of judicial independence and impartiality.

In traditional societies, as remarked above, there was no institutional device for insulating the judicial functions of the rulers from the political. However, the administration of justice was far from perverse. The people had clear notions of impartial adjudication. Dr. J.G. Peristiany writes concerning the Kipsigis:

> "If a wise elder is asked what council would hear a dispute between members of a spatially and politically distinct territorial units he will answer: 'The four retired provincial leaders of the four regiments who belong to the most senior age-set'. But the most senior age-set has only few living representatives, and it is highly unlikely that the retired leaders of the four regiments would be found amongst them. In reality the elder's answer specifies the kind of wisdom and the kind of balance necessary to a just solution. This is a judgment of value <u>not</u> an existential judgment. If a territorial unit could be found inclusive in relation to the communities of the conflicting parties and also representing all regimental units and the most senior age-sets, then clearly the constitution of the council would transcend most sectional interests. If no such council can be formed then the values of unity have to be affirmed and enforced by a number

of other constraints".[1]

One such restraint was the use of a joint tribunal consisting of kinsmen of both parties but presided over by a neutral elder. The latter could be a professional mediator as was a leopard skin chief among the Nuer.[2] Since the mediator knew that the frequency with which he was approached depended on his skill and impartiality, he was always careful to bring about a just verdict. Nor would the Nuer confine themselves to the professional mediators but would go as well to other persons with a reputation for fairness.[3] It may be added here too that the nature of most of the disputes heard in these societies was to a large extent conducive to impartial adjudication. They were usually a balance of wrongs,[4] damage being hardly denied by the defendant whose entire defence might even consist in seeking to justify the wrong complained of. Settlement meant an adjustment between rival claims.

The African judicial process would thus appear to put very little strains on the judges. This would however be wholly true only in respect of civil wrongs. When we

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1. "Law" op.cit., pp. 45-46.
2. See Evans-Pritchard op.cit., pp. 163-165, Howell op.cit., pp. 27-29.
3. Howell, op.cit., p. 211.
4. Evans-Pritchard op.cit., p. 172.

come to the realm of pure criminal or public wrongs,[1] a different situation would arise. The judges would not now be searching for a group responsible or answerable for the wrong committed by one of its members but would suddenly transform themselves into a quasi-political body mobilizing public opinion against the offender with a view to ridding the community of him, hence such special procedure as the Kikuyu king'ole.

Could the ordinary man obtain justice in a suit in which the ruler (especially in centralized societies) was personally interested? This problem was very real because there were frequent prosecutions for disobeying or insulting the chief.[2] The chief would appear to be in an impregnable position. The cases came before his court probably presided over by him. However, he was not a sole judge as multiple benches were the rule in traditional societies. The bench must also defer to the contributions of members of the audience. The latter would quickly react to any unjust decisions by murmurs of disapproval or even wild demonstrations. Some societies recognised the danger

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1. The distinction between civil and criminal wrongs does not really correspond with the distinction made in the English system. Indeed most wrongs were civil as the parties proceeded on the ground that they or their group had suffered especial damage. The epithet "pure" used here is intended to distinguish the very limited number of offences such as witchcraft which were clearly regarded as a menace to the community at large. It is noteworthy that this class of offences were always punished capitally or by expulsion from the community. Dr. Elias discusses

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inherent in the active role played by the ruler in judicial matters. So that he might not be in a position to exercise dictatorial power over the bench, a rule was developed that he was to be a mouthpiece of the bench pronouncing, in open court, the latter's verdict and not his own personal view of the case. The Akan even went further by creating a special legal post - the Okyeame, who was the official spokesman of the court, variously called the linguist, or prosecutor, or "talking chief". He must be eloquent in speech, virtuous in morals and learned in the laws not only of his state but of other lands.[1] He would summarise the case of both sides and remind the judges of the relevant rules of law before they retired with him to consider their verdict.

It was the Okyeame too who delivered the judgment in open court. The chief would be present throughout the proceedings but only as a formal president intervening very occasionally and even then merely to correct some irregularity. Rattray says "An Ohene Okyeame i.e. chief who takes upon himself the duties of his Okyeane (spokesman and prosecutor

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1. the distinction between civil and criminal law more fully in The nature of African Customary law, Ch. 7. also Lord Hailey op.cit., pp. 388-9.
2. Depending on the status of the chief, such offence might be regarded in the nature of sedition.

1. K. Antubam, Ghana's heritage of culture (1963) pp. 94-97; Sarbah op.cit., pp. 32-38; Rattray, Ashanti law and constitution, pp. 81 et seq; Danquah, Akan laws and customs (1928), 41-43.

was and is a term of opprobrium all over Ashanti".[1] We also have it from Sarbah that a Fanti ruler who set aside the findings of his councillors or improperly influenced causes before him would lay in store for himself a serious task whenever charges were brought to remove him for misconduct.[2]

Was the ruler amenable to legal proceedings? The concept 'the king can do no wrong' was generally accepted. It would derogate from the dignity of the ruler to arraign him before his court. However, someone, usually a leading councillor, would be held answerable for the ruler's wrong on the fiction that it was the councillor who advised the wrongful act. Thus the Akan again made the Okyeame "the direct recipient of the praises and abuses of his royal master".[3]

Although, in strict theory, the Lozi believed that the ruler should be bound by the law and could be tried by the court, they also agreed that the "owner" of the court should not be tried in it.[4] It would appear the Tswana

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1. Ibid.
2. op.cit., p. 38.
3. Antubam, op.cit., p. 98.
4. Otherwise he would be a judge in his own cause. Gluckman, Judicial process among the Barotse, p. 27.

too recognised this difficulty though they did not extend the exemption to a ward headman who could be tried in his court, his next of kin presiding or, probably out of courtesy, the case would be taken to the chief's court.[1]

In most cases, however, there were other and more efficacious political remedies against a ruler who had committed a wrong that would have required a formal trial.[2] The problem is well summarised by a commentator: "That which the chief did, the will of the community sanctioned; when the chief did that which the will and power of the community did not sanction, he was no longer chief. Everything which a chief did was right as long as he could do it".[3]

Some powerful elements in the community other than the ruler could obstruct the course of justice. J. Kizell, an American negro who visited some villages around Sherbro River in Sierra Leone in 1810 wrote: "he who has the most people in the family may do as he pleases; the king can do nothing with him. Sometimes however had a man's conduct may be if he has many people to back him, they are afraid to raise a palaver [Court] against him and if they call

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1. Schapera, Tswana law and custom, p. 282.
2. Cf. Allott, "African conception of the Rule of Law", p. 97.
3. See Corry and Hartnoll op.cit., p. 264.

him to account his plan will be to go with as many people as he can muster, well armed and thus make the judge afraid of him".[1] Where these "over mighty subjects" voluntarily submitted to the court's jurisdiction, the judges "when they see that the party who is wrong is the strongest, they will give no justice being afraid of the consequences".[2]

These were serious lapses and clearly infringed the principle of equal protection under the law. Dr. N.A. Fadipe writing of the Yoruba reported similar abuses: "the powerful and often their near relatives as well had only their conscience to stay their hands in the commission of acts of injustice. They were not always subject to the regular operation of the law. If they chose to defy the law there was no immediate machinery for bringing them to work by the customary process".[3] As Dr. Fadipe himself hastened to add, however, these powerful elements were checked if their action fell foul of some person of their own rank. This was likely to be so in most cases for litigation was a matter between fairly balanced groups representing both parties.[4] Further, the force of public opinion, should not be overlooked. If

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1. Letter to Governor Columbine concerning the chiefs in the Sherbro River published in African Institutions Reports, (1812) vol. 6. pp. 123 et.seq., at p. 131.
2. Ibid., p. 132.
3. op.cit.
4. Cf. Allott, "African conception of the Rule of Law", p. 98.

the people were reunited against the obstructionists, the latter could be forced to submit to legal process. Among the Yoruba further resistance might be met by bringing out the Oro cult to enable the Ogboni officials to arrest the recalcitrant elements.

But where the executive authority was weak or colluded or acquiesced in the act of defiance, justice would be defeated. The problem of execution of judgment is relevant here too. Even when one did not resort to self-right enforcement (in which one took direct action, such as retrieving goods wrongfully detained) or to reprisal i.e. revenge, but used jural institutions,[1] one invariably still had to enforce the court's decision by self-help[2] with all the handicaps involved. If a powerful opponent refused to abide by the court's decision, enforcement might prove difficult. On the other hand, a litigant who resisted lawful execution of a judgment risked public resentment which might take any form including public ridicule and even ostracism.

In another sense, such public reaction indirectly served as a guarantee of judicial impartiality. Judges who would not like the public to acquiesce in a defiance of their

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1. Bohannan, op.cit., pp. 137-142.
2. As was generally the case in early societies, see Vinogradoff op.cit., vol. I. pp. 355-359. Cf. Allott, "Practice and procedure in Native Courts", p. 134.

decision would refrain from perverse verdicts.[1] Moreover, a litigant who suspected foul play might publicly challenge the judges to swear on oath[2] that their verdict was free from bias. As has been observed[3] among the Ibos, members of the audience might hoot and jeer at an incompetent judge despite the latter's position. If there was a higher political authority, the disatisfied party could appeal, judicial bias being a permissible ground of appeal. The case would be heard de novo[4] and it would thus be open to the appellate court to override the lower court on the latter's finding on facts. If the final court was still suspected of bias, resort might be had to the ordeal, the disatisfied party hoping in this way that the gods would uphold his innocence. His vindication would be interpreted by the people as a supernatural condemnation of the "prejudiced" judges and these might lose their position or at least their self-respect.

After all is said and done, the surest safeguard of judicial independence in these societies was undoubtedly the participation by the people in judicial proceedings. Arguments about uncertainty of customary law later to be

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1. For the same reason, bribery and corruption which later became widespread in the customary courts was rarely practised. In the old days, both parties gave "presents" which were in the nature of court fees to the members of the court and not as often represented, "in order to induce a court to give a wrong decision" see Report on the Native Courts (Eastern Region of Nigeria) para. 93-94.

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heard in colonial and independent Africa did not arise. The law and procedure were intelligible and acceptable to the people.[1] Their voice was heard in the actual interpretation of the law or its application to a given case. It would have required exceptional boldness on the part of the elders to disregard the fairly unanimous opinion of the people on any point whether of law or of fact.

IV Executive power.

Popular participation in public affairs meant that decisions would invariably reflect current public opinion. It was however not everywhere, nor always, that the people were in full control. In the small societies, it was possible to get all the people together at short notice, reach a fairly unanimous decision and proceed to act on it regardless of the opposition of the elders who, lacking effective power, were quickly isolated. In the larger

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2. Cf. Meek op.cit., p. 236. The Kikuyu required that the elders of the Kiama should be sworn in before being allowed to try a case, Kenyatta op.cit., p. 223. For the more comprehensive Akan use of the oath see Danquah, op.cit., 69-83.
3. Green op.cit., p. 199.
4. A person could also secure a re-trial by seeking refuge in a sanctuary. Among the Lozi it was enough if a convicted man could seize the leg of Natamoyo, a prince; see Gluckman, Judicial process among the Barotse, p. 10.

1. Allott, "The unity of African law". p. 69.

societies, nation-states for example, such isolation of the paramount chief would not have been so easy to bring about.

There were, moreover, some societies in which the ordinary people lacked political power where the nobility were also politically neutralized to the considerable advantage of the ruler. This was generally the case among the Interlacustrine Bantu,[1] of which the Buganda kingdom was an extreme example. We have seen how the Kiganda system of comprehensive personal rule was established. Such councillors of state as were found were the king's favourites. The king's relatives played no conspicuous part in government and public assembly widely used in other Bantu states was never encouraged.[2] The reports of the early travellers and missionaries (after making allowance for possible bias) speak of sordid acts of tyranny by one Kabaka after the other.[3]

There are limits to despotism. When the Baganda could no longer put up with a Kabaka's arbitrariness, they would revolt against him,[4] violently removing him, if need

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1. Cf. Audrey Richards: East African chiefs, (1960) esp. 344-354.
2. Ibid, p. 351.
3. See Haydon op.cit., pp. 4-5. Richards op.cit., p. 45. See further Roscoe op.cit., ; H. Mukasa, "Some notes on the reign of Mutesa", (1934), Luganda Journal 129.
4. Roscoe gives a number of instances of such revolt pp. 223-229.

be, for they adjudged it their right to discipline an "uncontrollable" Kabaka.[1] In their philosophy of kingship they saw him as "the father of the people, but he is also their child".[2] It was proper to deal sternly with a delinquent child. Here, therefore, as in all African societies there were recognised methods of checking the excesses of power. However, the defect in the Buganda methods lay in their corrective rather than preventive nature.

Checks and balances.

We will now proceed to look briefly at the checks and balances employed in traditional societies to control the exercise of power, some of these have already been met in one connection or the other.

1. Delegation of powers: The keynote of the traditional political system was decentralization,[3] except in the Interlacustrine Bantu states just noted. The political structure was pyramidal with the paramount chief standing

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1. See Southwold op.cit., pp. 11-12.
2. Audrey Richards "Authority patterns in traditional Buganda" in The king's men.
3. Cf. W. Tordoff, "The Ashanti Confederacy" (1962) 3 Journal of African History, p. 416. See further Rattray, op.cit., pp. 405-406.

at the apex.[1] Power was said to radiate from him but its actual exercise was shared. Thus we might find lesser chiefs in the district sharing power with the ruler in the tribal capital. Such a territorial division of power was of the nature of a federal arrangement and as a rule the ruler would not interfere with his territorial subordinates in matters exclusively affecting their respective units. This recognition of regional antonomy was an important limit on the power of the ruler.[2]

2. Co-ordinate powers: The idea of having a dual monarchy is that one ruler should act as a check on the other. The Lozi and the Swazi joint sovereigns are the best known. In the Swazi kingdom, the balance of power was evenly held by the king and the queen-mother. The rhythm of the exercise of their several authority has been well described by Mrs. Hildea Kuper.[3]

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1. Cf. G.I. Jones, Report of the position status and influence of chiefs and natural rulers in the Eastern Region of Nigeria (1957) 6.
2. M. Fortes and Evans-Pritchard op.cit., pp. 11-12. Among the Barotse the same end was achieved through duplication of offices. Each public official had his own Ngambela so that Ngambelaship had become "a generic concept for the Barotse" denoting "assistant, deputy and also protector". An Ngambela held his powers in opposition to his superior and as a check up on him. Gluckman, The ideas in Barotse jurisprudence, p. 42.
3. op.cit., p. 55.

> "Between the Ingwenyama and Indlovukati there is a delicate balance of powers, legal economic and ritual. He presides over the highest court, and formerly he alone could pronounce the death sentence. But she is in charge of the second highest court, her councillors may take part in discussions at her son's court and her hut is sanctuary even for men sentenced to death. He controls the entire army but the commander in chief may reside at the queen's village. He has his own chosen regiments at the capital under the leadership of princes. He has power to distribute land, together they work the rain that fruitifies the soil. He may take the cattle from the royal herds, she may rebuke him if he wastes national wealth".

Their mutual co-operation was thus vital to the stability of the nation. The subjects knew this and would not hesitate to play one against the other so as to neutralize both of them but the family bond was so strong that mother and son rarely disagreed fundamentally.

3. Senior kins' role: In some societies, as we have seen,[1] the ruler had to share some of his powers with his close relatives.[2] These might even have individual jurisdiction as leaders of regiments or as headmen of districts or wards. The ruler's position was considerably strengthened if these close relatives were behind him but if he was tyrannous, they would intrigue against him. No chief would like his kinsmen to become centres of disaffection against him.[3] The people

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1. Chapter 1.
2. See Schapera, Government and politics in tribal societies, pp. 151-2.
3. Gluckman, "The Kingdom of the Zulu" in A.P.S. p. 42. It is noteworthy that Shaka was assassinated by his brother Dingane who became king but was himself brought down by another brother, Mpande, ibid, pp. 26; 42.

might even threaten to transfer their allegiance to another kinsman if the ruler did not mend his ways.

4. Conciliar control: Invariably the ruler would have a council of advisers. Among the Southern Bantu rarely would a chief disregard the wishes of his indunas who are his principal assistants.[1] In West African societies, the ruler was in many cases just the mouthpiece of the councillors.[2]

In nearly all the African paramount chiefdoms, one councillor usually stood above the others. It was he who shouldered most of the responsibilities of state. His primacy among his other councillors was acknowledged by his distinctive name which varied from one society to another; "Great Councillor", Chief Councillor", Leading Councillor" or "Favourite Councillor". Examples are[3] the Lozi Ngambela,[4] the Tswana Ntana ya kgotla,[5] the Oyo (Yoruba) Bashorun[6] and

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1. Schapera, Tswana law and custom, p. 77.
2. Cf. Rattray op.cit., p. 407. P.C. Lloyd "Political system of the Yoruba" p. 383.
3. The mankrado or osomanyana in the Akan societies has not attracted much attention but Dr. J.B. Danquah writes of him, "In any town he is the first person after the chief of the town. He is the first advisor to the chief and takes charge of the town during the chief's absence. He is always Regent during any vacancy..... no act of imposture can be rightly done without his knowledge". Akan laws and customs, p. 38.
4. He is the great induna with the weightiest voice: Gluckman "The Lozi of Barotseland" p. 33. Cf. P. Mason, The Birth of a dilemma, (1959) 47. See supra p.
5. See Schapera, op.cit., Cf. The induna lenkulu among the Swazi, Kuper op.cit., pp. 60-61.
6. He was the powerful "Prime Minister and Chancellor of the kingdom". Johnson op.cit., p. 72; Cf. Margary Perham, Native Administration in Nigeria (1937) 169.

the Bini Iyasere.[1] Buganda even had a Katikiro[2] though he could be dismissed at will by the Kabaka. The position of these officials was vaguely analogous to that of a modern Prime Minister though unlike the latter, they did not have much say in the appointment of their co-councillors neither could they dispense with the services of these as they pleased. Nonetheless, their position would appear to cast doubts on the argument that a dichotomy of power between a constitutional or formal head of state is alien to African ideas of government.[3] Again, such was the ritual surrounding the person of the king in some societies that he was successfully precluded from exercising any but formal functions. He could not leave his hut lest he be seen in public. Where he was allowed to appear in public, he might not do so without wearing a mask. If he had to speak, he must do so through intermediaries.[4] Could such a chief do without a leading executive councillor?

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1. Egharerba op.cit., pp. 81-82; Roth op.cit., pp. 92-93. Cf. similar arrangement among the Onitsha Ibo. Meek op.cit., pp. 185-189.
2. Cf. the favourite Counsellor to the mwami (king) of Ruanda. Maquet, op.cit., p.
3. Nor were the people confused by the concept of a dual executive. The Barotse saw the Ngambela and the king as "two different kings". Gluckman cites this Barotse song of praise: the king is owner of Loziland and its trees and his [own] servants and its cattle [game, fish, birds]; the Ngambela is the owner of the people". The ideas in Barotse jurisprudence, p. 37.
4. Cf. I. Wallerstein, Africa, the politics of independence (1961) 26.

5. Associational control: In many of the societies, there were various organizations wielding considerable political power: age-grades and age-sets; titled societies, and secret societies. Associational control over the ruler was particularly strong in West Africa where, as Lowie observes, the relationship between royal and associational influence belies the notion that African societies were uniformly given over to autocratic politics.[1] Among the Kpelle, for instance, the Poro Society virtually ran the state; its leader, the Grand Master could summon public meetings to take far-reaching decisions with or without the king's approval.[2]

The Yoruba Ogboni were similarly powerful though in theory they were supposed to stand between the oba and his subjects "preventing the one from becoming despotic and ensuring the proper subordination of the other".[3] Leo Frobenins has described how the Ogboni pulled the strings and made the oba "dance like a marionette at their behest".[4]

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1. op.cit., p.289
2. Ibid.
3. Biobaku, "Historical sketch of Egba traditional societies" p. 38: "Egba Senate" in the Proceedings of the 3rd. International West African Conference (International West African Conference) (1956) 257-263.
4. The voice of Africa (19B) 56-57. R. Burton remarks that the Ogboni were even more powerful than the barons of King John's day. The Egba law and Constitution produced "a hundred tyrants instead of one". Abeokuta and the Cameroons (1863) Vol. I. pp. 275-278. See also J. Hodgkin, Nigerian perspectives (1960) 278-279; Johnson op.cit., pp. 77-78.

We shall presently see the important role played by the asafo groups in the destoolment of an Akan chief.

6. Supernatural control: Ancestor worship, in a number of these societies, served as a restraint in the exercise or power. Just as the people accepted that the king was entitled to their obedience because of the somewhat divine nature of his authority[1] so they would hold the king himself accountable to the departed ancestors. As M. Fortes puts it: "he who holds authority is himself bound to superior authority and is both entitled and obliged to invoke this superior authority as the sanction of his status".[2]

The Ashanti saw the stool on which the chief sat as a sacred symbol of the presence of the ancestors and of his authority.[3] Ideally, all laws and decisions made by the ruler should be in accord with Nature's laws. It was for the priests to tell him if he was not achieving this blend and if he did not heed the caution, his destoolment would almost certainly follow.[4] To enact laws contrary to "Nature" was an act of defiance to the superior authority of the

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1. See more fulle, Meek, A Sudanese kingdom (1931).
2. "Some reflections on Ancestor worship in Africa", p. 136. Why is it, the author goes on to ask, that we do not find ancestor worship and the equivalent of kingship in genealogically based social systems like those of the Tiv and the Nuer? Could it be that "jurisdiction in these societies is so diffused as to rule out specific attribution and representation of authority"? Ibid, p. 138.
3. Cf. Fortes, ibid, p. 138.
4. Hoebel, "The Ashanti constitutional monarchy and the triumph of public law", in The law of primitive man, p. 225.

ancestors.[1]

The Ifa (oracle) priests were consulted from time to time by the Yoruba oba. The priests would have sensed the feelings of the people and if they found that an oba was becoming unpopular, they would tactfully convey the news to him. The oracle, they would say, had warned the oba that he should mend his ways lest a terrible tragedy befall the nation, of which he might be a victim.

In Ruanda, the body of dignititaries called Biru were charged with the preservation of ritual knowledge and the accomplishment of ceremonies essential to the existence of the Ruanda society.[2] These sacerdotal functions necessarily served as a check upon the considerable powers of the mwami (king), for the latter would not treat lightly the biru's objection to his decisions.

7. Special tribunals: A remarkable attempt was made in Fulani Zazzau to suppress zalunci (maladministration).[3] Special courts were created called wali with jurisdiction to investigate complaints of administrative abuses. The system proved ineffective because the highest political

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1. For the departed continued to take a lively interest in the affairs of their living relatives. Rattray, op.cit., p. 400. It was indeed a three dimensional society comprising the living, the dead and the yet unborn. W.E. Abraham op.cit., p. 63.
2. Maquet op.cit., p. 126.
3. M.G. Smith op.cit., pp. 95-107.

and administrative posts were occupied by members of the royal lineages who were in a position to suppress adverse criticisms of their conduct or even to victimise the criticising members of the administrative courts.

8. Public assembly: The democratic right of public discussion with its restraining influence on the exercise of power has been amply dwelt upon in the preceding pages. It remains for us to stress again that with the possible exception of the Interlacustrine Bantu states, there was never such a thing as government apart from the people in traditional Africa.[1]

Sanctions against the ruler.

We have so far been discussing the restraints placed in the way of a ruler who might want to indulge in arbitrary acts. If, notwithstanding these obstacles, a ruler still lapsed into arbitrariness, what remedies did the people have against him? There were several remedies, though these did not uniformly apply in all the societies;

(a) Fine: Among Swazi, Tswana, and Venda, a chief could be fined by his councillors for his misconduct.[2] Such fine was secretly imposed and would only be publicly mentioned if, on a future occasion, the chief's conduct came up for

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1. Cf. Rattray, op.cit., p. 407.
2. Schapera, Government and politics in tribal societies, p. 150.

scrutiny say in a public assembly.

(b) Withholding tribute: An unpopular chief might be boycotted by his people, who would refuse to visit him in his palace or pay tribute to him.

(c) Secession: Those disatisfied with their ruler but could not compel him to comply with their wishes or to bring him down, would "vote with their feet" by seceding from their state either to join another or to start a new settlement of their own. The numerical strength of a chief's following was of especial importance. An act of secession was therefore a cruel blow to a chief which could have a far-reaching effect on the balance of power in the neighbourhood. Commenting on this "most important sanction", Stayt says,

> "This power of achieving retribution by desertion possibly to join the ranks of a rival forms a natural check on the absolute power of the rulers and prevents them from indulging too often in arbitrary acts of cruelty and injustice".[1]

(d) Collective resistance: A ruler would be constrained to retract his arbitrary commands in the face of the united opposition of his people. Such resistance could take many forms including tumultuous public demonstrations with the demonstrators rioting and looting and singing vituperative

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1. The Ba Venda (1931) 217 cited by Schapera ibid p. 154.

songs.[1] This was, however, less of a positive remedy than a signal warning that unless the ruler met the people's demands he would be removed if need be violently.

(e) Removing the ruler: This was perhaps the most efficacious remedy of all. With the exception of the Kikuyu with their ntuiko system providing for a periodic changeover of government,[2] in African societies generally the ruler held his position for life,[3] but this did not mean that he could hold on to his position if he became despotic and unpopular. African conception of government as a partnership between the governor and the governed can be seen here at work. The Lozi would tell one about to be initiated into a position of authority: "you do not rule alone but by the power of those behind you [the followers sitting behind him]. Wisdom does not come from one man, but from many men". Turning to the people, the officiating elder would say, "You will be weak and lost without a leader. Strengthen him and you strengthen yourselves".[4]

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1. e.g. The Yoruba kirikiri, cf. Ajisafe op.cit., p. 36; see also the "anti-tsav uprisings" among the Tiv, Bohannan op.cit., p. 163. An important instance of such resistance was the disinheritance of Prince Ginuwa and his expulsion from Benin following the "unanimous opposition" of the people against him for instigating "many acts of cruelty". Dike, Trade and politics in the Niger Delta pp. 21-22.
2. See Lambert op.cit., pp. 136-138. Kenyatta describes it as a peaceful and constitutional revolution: Facing Mount Kenya (1938) 196.
3. Frobenius wrote of a not too destant age when "every Bale (ruler, presumably of Ibadan] who had served his statutory two years of office was murdered in conformity with the laws of a very ancient ritual". Ibadan had a shift promotional system of government in which the ruler would have started as a junior chief (Mogaji) (contd. overleaf).

A mutuality was thus established between the ruler and his followers which should never be disturbed. As long as the ruler continued to observe his own obligations under the "social contract", he was assured of loyalty, respect and obedience from his people. If however, he violated these obligations, his people were within their right to withdraw their loyalty, remove him and put someone else in his position. Such a removal in very ancient times was explained in religious terms: the deposed ruler was adjudged unfit to mediate between the ancestors and their living children.[1] In later years, however, the justification for removing an unwanted ruler was couched in political terms: he who made could unmake, the people (i.e. the elders of the community) who conferred authority on the ruler could take it away from him.[2]

The procedures adopted for the "constitutional" removal of a ruler varied from society to society. Among

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3. ascending the promotional ladder on a vacancy occuring at the top. It might well be that aspirants to the top position in their impatience would kill the incumbent to accelerate their own succession. In the alternative, as recent history proves, many who became Olubadan were so old that they rarely reigned for long. Between 1946 and 1965, there have been nine Olubadans. See generally, I.B. Akinyele, Iwe itan Ibadan (1930); C.G. Elgee, The Evolution of Ibadan. (1914).
4. Gluckman, "The Lozi of Barotseland" pp. 20-21.

1. Cf. Tordoff op.cit., p. 416.
2. Cf. Abraham op.cit., pp. 75-76; D. Austin op.cit., p. 19.

the Akan, definite charges would be preferred against him based on the accepted grounds for removing a ruler.[1] At the latter's installation he would have been "admonished" by the elders as to what was permissible for a ruler and what was not.[2] In reply he would pledge to rule in accordance with tradition; at the same time, he would swear the great "oath of Thursday" to "listen to the advice of my elders".

Any commoner, it would appear, could initiate proceedings against the ruler[3] for violating the elders' "admonition" and his "coronation oath". Though the symbolic ceremony of destooling a chief was carried out by the asafo groups (the militant youth), these alone could not independently of the elders carry out the destoolment.[4] On the other hand, as the upholders of the people's interests, (it would seem) they could step in and act alone if the elders condoned or were parties to the chief's "unconstitutional behaviour". But then the prescribed procedure[5] would have

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1. D. Austin ibid.
2. Rattray op.cit., pp. 81-82; Canquah points out that by this solemn ceremony the chief was endowed with the right and correlative duty to rule and govern his dominions with the advice of his councillors, op.cit., p. 114; see also Busia, The position of the chief etc. p. 12.
3. As by conducting an insiduous campaign among the populace so as to arouse public opinion which would compel the elders to act. Rattray op.cit., p. 146. Cf. The Tiv practice of "drumming the scandal" to compel a judicial hearing of a complaint. See Bohannan op.cit., p. 144.
4. Danquah op.cit., pp. 119-121.

(contd. overleaf).

been breached, paradoxically to defend the constitution itself.

Among the Yoruba, the elders were vested with disciplinary powers over the oba, including his removal from the throne if need be. The leading Ogboni the Iwaefa (Council)[1] would exercise these powers in a town that had an Ogboni society. The procedure adopted at Oyo was fairly typical.[2] If the Alafin (ruler) was "ultra-tyrannical and withal unconstitutional and unacceptable to the nation",[3] the Bashorun as the spokesman of the Oyo Mesi (Council) would ask him to die, a request which was invariably obeyed,[4] he would be murdered if he refused.

In African societies as elsewhere, resort was had to the extra-constitutional remedy of assassinating a ruler who had become intolerable. Thus the Tswana chief, Motswasele II

(contd. from previous page).

5. See Abraham pp. 77-78; and generally Danquah's illuminating discussion of the whole question op.cit., pp. 115-124, also Cassley Hayford op.cit., pp. 34-36 where the case of Hima Diki v Agima touching the constitutional procedure for destroling a chief decided in 1901 is reviewed. Tordoff cites the following instances of destoolment in Ashanti. Asanti Osei Kwame (1771-c.1801) Kofi Karikar; (1874) and Mensa Bonsu who succeeded him, op.cit., pp. 415-416; D. Austin op.cit., p. 20.

1. As it was called in some places e.g. Abeokuta.
2. See P.C. Lloyd, Yoruba land law p. 46.
3. Johnson op.cit., p. 70.
4. Cf. Perham op.cit., p. 169. An oba who gallantly poisened himself was given a decent burial and was even acclaimed for "playing the man". Cf. Ajisage op.cit., p. 36. Opinions are however divided on why Sango, an Alafin of Oyo and a despicable tyrant was elevated to the status of a divinity (of thunder) after hanging himself following his rejection by his people. One view was that such was his grip on the people that they could not believe he had really hanged himself: oba koso. Idowu, Olodumare, God in Yoruba belief pp. 90-91; Cf. Johnson op.cit., p. 43.

was murdered (c. 1821) for taking cattle from his subjects, abducting their wives and ruthlessly enforcing the death penalty.[1] Reference has already been made to the Buganda practice of killing the Kabakas who had become uncontrollable.

But when a ruler was removed, another kinsman succeeded him. Thus it has been said that African societies never had revolutions leading to a change in the system of government.[2] It would not be safe to be dogmatic on this point. Thus in a Nigerian case,[3] evidence was adduced to show that the Jekri changed from a monarchical to a republican form of government. The people had become dissatisfied with the ruling house which they thought was too powerful and too wealthy. They revolted and a civil war ensued which resulted in the overthrow of the monarchy. The people insisted on henceforth electing their ruler whom they styled "Governor", a title obviously borrowed from the British which suggests that the "revolution" occurred about the second half of the last century.

Some societies had had their own "glorious revolutions", a common instance being the influential position later achieved by the commoner officials in the kings' courts of councillors.

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1. Schapera, Government and politics in tribal societies, p. 152. Gluckman has even submitted that insurrection "can be connected with the total [Barotse] political process". The ideas in Barotse jurisprudence. p. 51.
2. Schapera loc.cit; also Gluckman The ideas in Barotse jurisprudence p. 30.
3. Omaghemi v Dore Nuna (1925) 5 N.L.R. 17.

The curb placed on the Aremo (Crown Prince) at Oyo may be mentioned here too. The Aremo reigned with his father and at one time, the rule was that he must die with him too. That rule was repealed in 1858 when he was allowed to put himself forward with others as a candidate for the throne.[1] But he was in a powerful position as Crown Prince and could easily secure his own nomination on the death of his father. The people did not like the idea of one man holding on to the reins of power (albeit in different capacities) for so long without a break. Hence the rule was laid down that an Aremo of a reigning king could not succeed that king; an ex-Aremo (i.e. of the previous king) succeeding.

In the foregoing analysis we have sought to show that with few exceptions, indigenous government was democratic though noting too that permanent dissent groups did not exist, the majority persuading rather than alienating the opposing elements.[2] We also saw that rulers who appeared to possess limitless powers were subject to many checks and balances. The people who approached their king falling on their knees, sprinkling their heads with dust to show respect,[3] would

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1. Johnson op.cit., pp. 41-42.
2. Cf. Allott, "African conception of the Rule of Law", p.
3. As observed by the Moorish geographer A.I. Bakri of Cordoba who visited the Sudanic kingdom of Ghana in the eleventh century A.D. See R. Oliver and J.D. Fage, A short history of Africa (1962) 46.

readily and loudly abuse him once he had lost their confidence.

In Western societies, the concept of the Rule of Law is accorded peculiar sanctity precisely because it embodies ideals which are held dear and which all governments ought to observe.[1] Similarly in indigenous societies, there were requirements of "good rule" which the ruler would ignore at his own peril. The Lozi put it very well when they say "even the king is the slave of mulao [law]".[2] Law here refers not just to decrees and judicial decisions but to something wider, what M. Fortes calls "a general faculty" pervading all social relations.[3] In these societies, we cannot talk of religion, conventions, modes of livelihood, family and social structure and legal systems as though they were separate entities,[4] for these were inter-linked and a decision, judicial or political, which disturbed one of them would almost certainly disturb all. Therefore those who made decisions were mindful of their possible far-reaching repercussions, hence their craving always for s social harmony. One might say that the concern for harmonious relationships between kin groups and again between interests was the African version of the concept of the Rule of Law.

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1. Cf. T.D. Weldon, States and morals (1946).
2. See Gluckman, Judicial process among the Barotse, p. 164.
3. "Some aspects of ancestor worship in Africa", pp. 137-138.
4. Cf. Allott, "Towards unification of laws in Africa" (1965) 14 I.C.L.Q. 366 at p. 389.

Thus the structure of government and the limited rape of individual rights reflect the extent to which integration was carried in these societies. Colonial rule, was however, to shatter this structure.[1] The European ideas, activities and institutions it brought with it, created or facilitated an individually - oriented society. Perhaps the most grievous change of all, in the context of this study, was the introduction by the British Administration[2] of the idea of a "sole native authority" whereby a paramount chief was virtually proclaimed an "absolute" ruler restrained only by the fear that the Administration might remove him. Traditional checks and balances were thus swept away.[3] It is this latter type of chief that has been mistaken for a true indigenous chief by some commentators who suggest that most of Africa was given to despotism.[4]

By the time the colonial masters began to take leave of Africa, new habits had set in, thus making it impossible for the Africans, even if so minded, to return to the older order. The new leaders of Africa are, however, determined

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1. Ibid.
2. The French did not make much use of the indigenous institutions though some effort (which was not sustained) was made to stay the growing disruption of indigenous institutions: Lord Hailey in Foreward to Anderson, Islamic Law in Africa, p. vi. Cf. Lucy Mair, Native policies in Africa (1936) 189.
3. Cf. Hailey, African survey, pp. 540-541.
4. African states (with the possible exception of Ruanda and to some extent the Fulani emirates) were not even feudal. Cf. Oliver and Fage, op.cit., p. 45. See more fully, Mrs. E.M. Chilver, "Feudalism" in the Interlaenstrine kingdoms in East African Chiefs, pp. 378-393.

to reconstruct their societies.[1] The question we shall endeavour to answer in the final part of this study is: are methods compatible with the Rule of Law being used to carry out this reconstruction?

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1. With the avowed aim of blending the old and the new.

Part III

THE RULE OF LAW IN MODERN AFRICA

CHAPTER FIVE

THE STRUCTURE OF POWER

In this chapter, I shall be discussing the following:-

(I) The impact of colonial rule on the traditional system of government.

(II) The struggle for independence in so far as this dictated the form the independence constitutions later took.

(III) The autochthonizing process - the steps taken to adapt the independence constitutions to suit the people and their environment.

(IV) The extent to which the "autocthonous" constitutions are based on or accorded with genuine popular sentiment.

(V) The nature of party-systems in Africa, with emphasis on the emergence of one-party regimes: the argument for and against the latter are put. The methods employed to establish the regimes are also examined with a view to finding out how far they are compatible with the Rule of Law.

(VI) The structure of government - the problems of separation of powers and the distribution of functions between the various organs of government. The supremacy of the executive is emphasized, a situation which may spell danger for the Rule of Law.

A. THE COLONIAL INTERLUDE.

One immediate consequence of the colonization of virtually all Africa was the lumping together, in one territory or the other, of tribes which once existed as separate political units. In the process a tribe might even be split into two, though in nearly every case a bigger state replaced the existing smaller units of government. The heterogeneity of colonial territories was, however, to be one of the factors that would hasten the demise of the traditional systems of government at any rate, in the form we saw in the preceding chapter. For, in the new nulti-tribal society (which might comprise peoples who once regarded themselves as traditional enemies), common leadership based on blood relationship which sustained traditional politics, was non-existent. Secondly, Colonial rule introduced new ideas and values so that the indegenous people had to undergo some form of education and training in order to get on in the new order. In this way, new elites emerged none of whom became nationalists and were destined to challenge and eventually displace the colonial rulers with whom the traditional rulers (no longer directly responsible to their people) had sided.[1]

The third, and perhaps the most decisive, factor was the superimposition of an alien bureaucracy on the indigenous

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1. Cf. H.L. Bretton, Power and Stability in Nigeria (1962) 13-14.

system of government so that the latter was relegated to the sphere of local administration[1]. Thus although the British under their system of indirect rule, made more use of the existing traditional framework and personnel than the other European colonial powers to maintain law and order in the remotest parts of each territory, the new rules accorded to the traditional rulers were manifestly different from those performed by them in pre-European days.[2]

This lack of continuity in the system of government in Africa would not be an advantage to the people if and when independence came. The enthusiastic adoption of the European ideas and institutions of government proved, in many cases, ill-advised and changes would be sought shortly after independence to cast the constitutions in national forms. Where the constitution is subjected to repeated changes, there is bound to be some instability which hardly enhances the Rule of Law.

B TOWARDS INDEPENDENCE.

The European colonial powers: France, Portugal, Belgium and Spain all regarded their colonial territories as

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1. Cf. Busia, The challenge of Africa (1962) 69.
2. See more fully, Hailey Native Administration in the British African territories (1950) Parts I-V esp. Part IV; for a comparative study of other colonial territories, see his African survey also R. Delavignette, Freedom and authority in French West Africa (1950) 49-84.

an extension of the metropolitan country. Up till the present day, the Portuguese have designated their colonies as provinces of Portugal; and in the beginning, the Congo Free State was the personal possession of King Leopold II, who voluntarily transferred it to the Belgian Government. Although the French were not so extreme, they too envisaged a union between their country and the colonies. It was not to be expected, therefore that these colonial powers would withdraw easily from their possessions in Africa.

For their part, the British have always recognised "that Africa must inevitably be ruled by Africans".[1] Each colony would be carefully prepared for self-rule within the Commonwealth, the outstanding problem was thus one of timing. From the end of the last War, however, African nationalists were resolved to force the pace, with their demand for accelerated independence. They were prepared to create disturbances if their point was not taken, just as the authorities were equally ready to employ all the majesty of the law to deal with "trouble-makers".

As all colonial powers are necessarily authoritarian, some of the laws called into being in the ensuing confrontation

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1. K. Nkrumah, Africa must unite (1963) 16.

were repressive.[1] It is significant to note in passing, that many of these repressive laws have not only survived independence but in a few cases they have been made more stringent.

By and large, early independence became the rule especially in non-settler areas. The British have been criticised by many African leaders for imposing rigid constitutions on them at independence. Yet one would have thought that the intensive consultations and numerous conferences held in the years preceding independence ought to have ensured that the resulting constitutions were acceptable to all concerned.[2] It is also said that the British did not take those who commanded the overwhelming support of the people into confidence;[3] rather they sided with minority groups and traditionalist elements. In the end, a constitution limiting rather than strengthening democratic government would emerge.[4]

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1. Busia, The challenge of Africa, p. 65.
2. Cf. Roberts-Wray, "The legal machinery for the transition from dependence to independence" in Changing law in developing countries p. 61. Thus on the case of Nigeria, between 1950 and 1958, four constitutional conferences were held on the future of the country. Ezera op.cit., p. 253.
3. J.M. Kariuki, 'Mau Mau' detainee (1963) 166. Cf. Margary Perham, The colonial reckoning (1961) 116.
4. But the British stood firm against regionalists in Sierra Leone and the Gambia where the coastal people demanded constitutional advantages over and above the people of the hinterland. Cf. D. Williams Commonwealth West Africa in African independence (ed. P. Judd) (1963)140.

It is true that the British placed unduly great emphasis on the ethnic and cultural diversities of the African tribes thus exacerbating instead of reducing internal disunity.[1] But it would be wrong to pin the blame for the form the independence constitutions took entirely on the British. Indeed, the intransigence of the minority groups in the bargaining pre-independence period was immediately responsible for such constitutions; for those who knew that power would pass to their numerically superior opponents usually exacted a high price for their support for self-rule.[2]

Thus in the "model colony" of the Gold Coast, the opposition parties based principally in Ashanti but not without some support elsewhere, drawn from ethnic and religious minorities, discontented farmers and a few intellectuals demanded a federal form of government and a second chamber,[3] proposals which were unacceptable to the ruling party, the Convention Peoples' Party(C.P.P.) founded and led by Mr. Kwame Nkrumah. It was realized, however, that

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1. Cf. Hansard Society's observations in Problems of parliamentary government in the colonies (1953) 41; also Perham, The colonial reckoning pp. 116-117.
2. Cf. de Smith, The new Commonwealth and its constitutions p.111.
3. See Bennion, op.cit., pp. 51-54; 58-59.

some concessions were necessary to placate the vocal opposition if independence was to come as scheduled. In the event the Independence Constitution provided for a form of regionalism and the entrenchment of certain fundamental rights. Within a year, however, these "dirisive" provisions were, as we saw, removed to emphasize the oneness of Ghana and to vest full sovereign powers in the Parliament of Ghana.

Nigeria's size both in area and population and its numerous ethnic groups each with its own language, customs and culture necessitated some sort of devolution of powers on territorial basis. A fully-fledged federation was thus unavoidable.[1] The 1951 unitary constitution was replaced by the 1954 federal constitution which laid down the foundations for the present pattern of government. Nigeria's federation is, however, unusual, the Northern Region being bigger than the two (now three) southern regions put together. Before independence, which came in 1960, demands were made to split the country into more evenly-sized regions or states, which proposal, the North naturally resisted.

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1. Cf. Awolowo, Awo, etc. p. 300; J.S. Coleman, Nigeria, background to nationalism (1958); E. Awa, Federal government in Nigeria (1964) esp. chapter III.

If the federal arrangement in Nigeria conceded too much to the North, Buganda, in Uganda, would even appear to be more favoured than the rest of Uganda. Buganda had threatened to secede from the rest of Uganda if its special position guaranteed by the 1900 Agreement with the United Kingdom Government was not protected under any future constitutional arrangement for Uganda.[1] The Agreement was renewed in 1955 but the Ganda would leave nothing to chance and on December 31, 1960 their Great Lukiko (legislature) purported to terminate the 1955 Agreement. This pretended "unilateral declaration of independence" was no more, in strict law, than an empty gesture,[2] though it brought home to all concerned that the price of including Buganda in an endependent Uganda was a federal constitution.

The Uganda Independence Constitution 1962 guaranteed the federal status of Buganda[3] as was done for the other kingdoms, Bunyoro, Toro, Ankole and the district of Busuga, except that the powers reserved to the Buganda government were more extensive. What is perhaps most remarkable is the provision which enables the Great Lukiko to decide whether

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1. See more fully Apter, The political kingdom in Uganda esp. Chapter 16.
2. Cf. de Smith op.cit., p. 160.
3. 1962 S.I. No. 2175 second schedule.

the Buganda seats to the Uganda National Assembly shall be filled by direct or indirect elections. In the latter case, the Great Lukiko itself forms the electoral college.

In Kenya, prior to the republican constitution, the ruling party alleged that "the British forced majimbo [regionalism] down our throat". The exceptionally rigid level of entrenchment prescribed for the provisions relating to the regional arrangements appeared to lend support to this charge.[1] Yet it should be noted that it was neither Whitehall nor the European settlers but the Kenya African Democratic Union (KADU) (then in opposition to the Kenya African National Union (KANU) who insisted that the Westminster model was unsuitable for Kenya because it gave too much power to the majority.[2]

The Congo (Leopoldville) might be cited as an example of a non-British Colony which attained independence under a constitution with which many of the leaders who were to work it were not satisfied. The Congolese, lacking any training in responsible government but anxious to move with "the wind of change" demanded immediate freedom in

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1. See Constitution Order in Council 1963 S.I. No. 791, ss. 83-95 (since amended). The Constitution has been described as "the most complicated constitution ever devised for a colonial territory". G. Bennett, Kenya, a political history (1963) 139. But see Cyprus Constitution 1962, described by Prof. de Smith as sui generis op.cit., pp. 282-296.
2. Bennett, op.cit., p. 156.

1959.[1] At the hastily convened Table Ronde held in Brussels between 20 January and 20 February, 1960, the date of 30 June 1960 was fixed for independence.

Certain resolutions were passed which were to provide a framework for the constitution to be later drawn up by Belgian experts. The outcome was the loi fondamentale,[2] promulgated by the Belgian legislature on 19 May, 1960. The Congo Republic was to be a unitary state with some degree of decentralization of power to the six provinces into which it was divided, The powers of the latter were expressly set out in the loi and touched, in the main, on local matters;[3] but they significantly included the granting of mineing concessions within the framework of the general regulations provided by the constitution.[4] Until 30 June 1960, the partition of authority between the central and provincial governments was not operative. Meanwhile, effective powers were vested in the provinces "within the framework of a wide measure of autonomy". The indecisiveness of the constitutional provisions might have contributed to the subsequent upheaval

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1. See generally, A.P. Merriam, Congo, background of conflict (1961).
2. Loi fondamentale sur le structures de Congo. Official Belgian Gazette (the Moniteur Belge) of 27-28 May, 1960, for an unofficial translation see Catherine Hoskyns, The Congo, a chronology of events (1962) Appendix XXI.
3. Articles 208-220.
4. Article 220 (VII) read with Article 219 (26).

into which the country was soon plunged. Independence was achieved on the promised date but Katanga held firmly to its "wide measure of autonomy" and declared its secession from the Congo Republic on 11 July 1960.[1] The rest of the story is well-known; armed conflict resulted and order was gradually restored by the U.N. presence.

All the independence constitutions we have so far surveyed failed to meet with the approval of substantial sections of the people for whom they were made. This, however, was not always the case. In countries where internal divisions were less acute,[2] Tanganyika (now Tanzania), Malawi, and Zambia, for examples, the political leaders received, in essence, the type of constitution they demanded. The Zambian experience has been unique. The Independence Constitution[3] transformed Northern Rhodesia from a dependency to an independent republic (with a monocephalous executive) within the Commonwealth. In other words, the country skipped the dominion status.

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1. Catherine Hoskyns, The Congo since independence (1965) 140 et.seq; C.C. O'Brien, To Katanga and back (1962) 83-99.
2. i.e., among the Africans whose resistance to White domination afforded a common platform which later proved a cohesive factor.
3. 1964 S.I. No. 1652.

The position in French Africa was quite different from what obtained in the British territories. Rights of citizenship were based on the adoption of French culture and civilization. The Africans had therefore to abandon their tribal way of life in order to secure political rights. Such political training as the Africans had was to prepare them for fuller participation in French politics.[1] African leaders sat in the legislature in Paris, and some of them at one time or the other even held office in the French Government. Until the eleventh hour, therefore, the French African "nationalists" did not appear to want independence from the metropolitan overlord. Guinea, led by M. Sekou Toure[2] was the solitary dissenter in the referendum held in 1958 at the instance of President de Gaulle to enable the overseas territories to signify whether they wanted to associate with France in a Community or to be Independent.

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1. The loi cadre of 1956 which accorded a measure of autonomy to the territories did not envisage eventual complete independence from France. See generally, T. Hodgkin and Ruth Schachter, "French-speaking West Africa" (1960) International conciliation ; P. Neres, French-speaking West Africa from colonial status to independence. (1962); K. Robinson, "Constitutional reform in French tropical Africa". (1958) 6. Political Studies 45.
2. Echoing Nkrumah, he told his people, "We prefer to be poor and free to being prosperous in slavery". Quoted by D. Stibbe,"French-speaking Africa"in African independence (ed. P. Judd) (1963) 254.

Two years later, the other eleven territories followed Guinean example and opted for independence.

What should be noted in the francophone African progress towards independence is the almost total absence of discussions between the French and the African leaders as to the form the independence constitutions would take. The African leaders were themselves so French that it was expected that they would adopt the French constitutional model. Prior to independence all these states favoured the parliamentary constitution of the Fourth Republic but with independence came the need to change the constitution and adapt it to African needs.

C. AUTHOCHTONOUS CONSTITUTIONS.[1]

The need was also felt in the anglophone states to recast the independence constitutions avowedly to suit the local needs and circumstances but in reality to produce a more efficient machinery of government which would be able to cope with the urgent problems of national consolidation and accelerated economic development. As would be recalled also, the leaders of many anglophone states were not quite happy

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1. I am using the term in its more practical sense i.e. casting a constitution in a "national form". Cf. K. Robinson, "Autochthony and the transfer of power", in Essays in imperial government (ed. K. Robinson and F. Madden (1963). But see K.C. Wheare, Constitutional Structure of the Commonwealth (1960).

with their independence constitutions so that the earliest available opportunity was naturally seized to recast these constitutions.

The resulting changes, in most cases, have however, been very comprehensive, in effect substituting an entirely new political system. An apt example is the constitutional review which took place in Ghana on the occasion of the transformation of the country from the status of a monarchy to that of a republic. Dr. Nkrumah, then Prime Minister said that after three years of Ghana's independence he became convinced that a brand new constitution was needed which would take account of "the mood of the time, the temper of the people, the historical and cultural patterns of the country, the urgent need to develop our land...."[1] An ingenious constitution[2] resulted which has since served

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1. Nkrumah, Africa must unite, p. 79. It may be asked why this "more suitable form" was not adopted earlier, for example, to coincide with independence? A variety of answers have been given. First, the nationalists believed that a mastery of parliamentary system was a condition for the attainment of independence. See Azikiwe, Zik etc., p. 85. Secondly, the nationalists themselves were too psychologically committed to the European systems to think of any other. H.O. Davies, "The legal and constitutional problems of independence" in African independence. Thus it was considered an affront and perhaps racialist for commentators in the West to suggest that parliamentary democracy could not function smoothly in new Africa. Cf. Awolowo, Awo etc., pp. 304-305, Tafawa Balewa, foreword to H.O. Davies, Prospects for democracy, (1960). Thirdly, suggestions for the Africanization of the political system usually came from the opposition elements whose motives were

(contd. overleaf).

as a model for Tanganyika (now Tanzania) and Zambia though neither of these countries has gone all the way with Ghana in conferring exhorbitant powers on the first President.[1] Dr. Nkrumah's own explanation is that "There are some jobs in the world that can best be done by a committee, others by a managing director".[2] As he "is impatient when it comes to building Ghana", he needs these special powers "to get on with the job resolutely.

On this point, most francophone leaders are in full accord with him. Following the accession of their countries to independence, and the need to substitute an indigenous head of state for the President of the Community, the Fourth Republic parliamentary-type constitutions were replaced with [the] Gaullist-oriented constitutions.[3] In many respects, these constitutions differ one from the other,[4] but they

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1. suspected by the ruling party e.g. in Kenya as already seen and in Ghana where the National Liberation Movement in 1955 called for an original constitution, "on the African pattern" based "on our way of life and manners, tradition and culture". Liberator, December, 20, 1955 quoted by D. Austin, op.cit., p. 280.
2. Government proposals for a Republican Constitution, (White Paper No. 1/60). See more fully Bennion op.cit., Ch. 2; Rubin and Murray op.cit., Ch. 2.
1. Ghana Constitution, 1960, Apt. 55.
2. Africa must unite, p. 83.
3. See generally, G. Lavroff and G. Peiser, Les Constitutions Africaines l'Afrique noi francophone et Madagascar (1961) 23-33.
4. J. Juergensmeyer, "African presidentialism: a comparison" etc., [1964] J.A.L. 157, at p. 167.

all have one feature in common, the excessive strengthening of the executive, which, in a presidential régime, means one man, the President.[1] There is no doubt, however, that these constitutions are designed to reflect political realities in each of these countries where there is a single or dominant party with a predominant figure as its leader. For the Ivory Coast, A.P. Yace, president of the National assembly observes:[2]

> "The political situation of the Ivory Coast where there exists a nearly nation-wide unanimity around one man, his ideas, his programme, around the party whose leader ensures the rule of the state and from whom the entire Assembly owes its existence, naturally calls forth, after independence, for a regime which gives to the chief of state who draws support from the national will pre-eminence over all other institutions".

In Senegal, although President Senghor's pre-eminence was hardly in doubt, that country retained a parliamentary system with a twin-executive until the leadership crisis of

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1. See M. Buchmann "La tendence au presidentialisme dans les nouvelles constitutions negro-Africaines" (1962) 12 Civilizations 46.
2. Fraternile, February 12, 1960, quoted by A. Zolberg, One-party government in the Ivory Coast, (1964), 267.

1962. According to President Senghor, one of the causes of that crisis was the existing constitutional arrangement which split executive powers between himself and the then Premier, M. Dia.[1] With the latter's fall, the 1963 Constitution introduced a presidential regime with a strong monocephalous executive.

All francophone states and an increasing number of anglophone states now have "one-party strong leader governments",[2] Nigeria being a conspicuous exception. In 1963 when the country was adopting a republican constitution its leaders had an opportunity to rethink their parliamentary attachment, but they firmly declined to change the existing constitutional framework.[3] This was predictable in view of the country's strong tribal divisions around which the main political parties are organised. A few changes were nevertheless made to the Independence Constitution, the overall effect of which has been slightly to strengthen the executive, thus

(i) the Judicial Service Commission has been abolished;[4]

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1. Keesings Contemporary archives, March 9-16, 1963, 1293B.
2. H.O. Davies, "The legal and constitutional problems of independence", p. 339.
3. Proposals for the constitution of the Federal Republic of Nigeria (Sessional Paper No. 3. of 1963, Lagos).
4. Judges are now appointed by the President (or Governor) on the advice of the Prime Minister (or Premier). For Supreme Court judges see Nigeria (Federal) Constitution, 1963, S. 112.

(ii) now, on a vote of no confidence, the Prime Minister, or Premier in the regions, can elect to resign or insist on dissolution of Parliament;[1] whereas previously dissolution would follow only if an alternative government could not be formed;[2]

(iii) chieftaincy matters are no longer justiciable, which means that the executive has the final say on questions of restriction,[3] appointment, or removal of chiefs.[4]

D. The popular basis of the new constitutions.

Did these new constitutions meet the requirement of the Rule of Law that they shall be freely adopted by the people? Bearing in mind that "the people" does not mean just the majority,[5] African leaders have been especially concerned to secure legitimacy for the constitutions by canvassing the widest popular support for them. One or moreo of the following methods have been used:

(i) A referendum of the entire electorate.

(ii) Legislative approval usually by a special majority.

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1. S. 68 (5).
2. Nigeria Constitution 1960. S. 63 (4) (a).
3. Nigeria Constitution 1963. S. 27 (4) .
4. S. 161 (3).
5. K. Roberts-Wray, "The legal machinery for the transition from independence to independence", in Changing law in developing countries, p. 61. See further, Cowen, op.cit., pp. 188-193.

(iii) A national convention representing all groups, interests or shades of opinion might be summoned to consider the proposed changes.

A few examples may be given of these methods in operation.

(a) Ghana. Methods (i) and (ii) were combined. A preliminary draft of the constitution was, pursuant to the Constituent Assembly and Plebiscite Act, 1960,[1] submitted to the people, who were to vote "Yes" or "No" to the question whether they accepted the draft constitution as set out in the White Paper[2] earlier issued by the Government. The Government warned that it "will not consider itself bound to introduce into the Constitutional Assembly a Constitution which follows word for word the attached draft".[3] Changes of detail, arrangement and emphasis might be found desirable when the stage was reached for the enactment of the Constitution.

In the event, the subsequent plebiscite was of academic[4] interest, for when the National Assembly sat as a Constituent Assembly to consider the Constitution Bill there were important omissions and alterations in the draft

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1. No. 1. of 1960.
2. Government proposals for a Republican Constitution, White Paper No. 1. of 1960.
3. Ibid.
4. The mandate was, however, impressive. 1,008,740 votes were cast in favour of the projected constitution, with only 131,425 against. Rubin and Murray op.cit., p. 9.

proposals as submitted to the people.[1] The most far-reaching of them all was the future Article 55 which confers special powers on the first President and was introduced as an amendment on the final day of the debate. It reads:

"(1) Notwithstanding anything in Article Twenty[2] of the Constitution, the person appointed as first President of Ghana shall have, during his initial period of Office the powers conferred on him by this Article.

(2) The first President may whenever he considers it to be in the national interest to do so, give directions by legislative instrument.

(3) An instrument made under this Article may alter (whether expressly or by implication) any enactment other than the Constitution.

(4) Section (2) of Article Forty-two of the Constitution[3] shall apply in relation to the powers conferred by this Article as it applies in relation to the powers conferred on Parliament.

(5) For the purpose of this Article the first President's initial period of office shall be taken to continue until some other person assumes office as President.

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1. For a catalogue of these omissions and alterations see Rubin and Murray op.cit., pp. 15-27.
2. Which provides that Parliament consists of the President and the National Assembly and vests legislature power in Parliament.
3. Conferring power of review on the Supreme Court.

Section (6) goes on to reserve the power to repeal or alter the Article to the people.

Doubts have been raised whether the whole constitution is not vitiated in view of the substantial alterations made after the people had accepted the draft constitution in a plebiscite.[1] However, since the Government made it abundantly clear that it would not be bound by its own draft, in effect it received a carte blanche to substitute any fresh provisions as it deemed fit. It was of course open to the Constituent Assembly to withhold support for any extravagant alterations. However, since the latter were ratified by the Assembly by the appropriate majority, the Constitution could not be impugned. It is noteworthy that there were opposition protests especially against Article 55 before the Constitution was enacted.[2] Mr. Abayifaa Karbo regretted that the insertion of the Article ran counter to the "national effort" that had been put into the making of the Constitution; but the amendment was carried by 63 to 7 votes.[3]

(b) Senegal. The procedure adopted by the Senegalese for their Constitution of 1963 would seem preferable to

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1. Rubin and Murray op.cit., pp. 27-29; Article 55 is separately impugned at p. 109 but see Bennion op.cit., p. 136.
2. See further Bennion op.cit., pp. 96-97.
3. Ibid, p. 97.

Ghana's. The National Assembly had agreed to a final text which was submitted to the people for endorsement in a referendum.[1]

(c) Ivory Coast. The Ivorian leaders were apparently reluctant to put too much trust in the people,[2] hence their Constitution was promulgated in 1960 was an act of the legislature. A draft was submitted by the Government to the National Assembly who returned it without any amendment. On resubmission, it was unanimously adopted.[3]

(d) Tanganyika. As in Ghana, the National Assembly constituted itself into a Constituent Assembly to enact the Republican Constitution, which was passed by more than the requisite two-thirds majority on November 23, 1962. There was no plebscite.[4]

(e) Nigeria. The Prime Minister of the Federation and the Regional Premiers met to consider what changes should be made in the existing Constitution. Their proposals were put before an All-Party constitutional Conference which sat for two days.[5] Two major proposals drew

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1. The results were as follows: Of 1,232,479 eligible to vote, 1,555,077 were in favour of the new Constitution and 6,349 against: Keesing's Contemporary archives, March 9-16, 1963. 1293B.
2. Zolberg, op.cit., p.
3. A.S. Alexander; "The Ivory Coast Constitution" (1963) 1 J.M.A.S., 293 at p. 296.
4. But ample time had been given to the people to ponder on the proposed changes. A Government Paper, "Proposals of the Tanganyika Government for a Republic" op.cit., had been published on May 31, 1962 and agreed to by the National Assembly on June 28. See generally, McAuslan,

(contd. overleaf).

sharp protests from the opposition groups, the Press and the Bar: (1) an enactment which would authorise preventive detention; and (11) the abolition of the Judicial Service Commission.[1] The projected "Preventive Detention Act" was dropped but, as noted above, the proposal to abolish the Judicial Service Commission was pushed through, though not without further strong protests in the Federal Parliament when the latter net to endorse the proposed constitutional changes agreed by the all-party conference.[2] The Constitution of the Federal Republic of Nigeria was passed by the necessary two-thirds majority on September 19, 1963.

Trend towards personal rule.

That Nigeria has retained a cabinet system of government does not as such mean that, in practice, power is exercised in a way markedly different from what obtains in a presidential regime. A prime minister[3] backed by a docile parliamentary majority is as much an elected monarch as an executive president.

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4. op.cit., pp. 505-507; Cole and Denison op.cit., p. 25.
5. See Proposals for the Constitution of the Federal Republic of Nigeria.
1. Ezera op.cit., pp.284-287.
2. Par Deb. (House of Representatives) vol. 12, 1963-1964, esp. cols. 2679-2683.
3. President Azikiwe describes him as a "power-loaded head of government". "Some essentials for Nigerian survival" (1965) 43 Foreign Affairs. 447.

In Ghana, power is personalised and the constitution expressly says so. President Nkrumah heads the government, the state and the only political party allowed by law to operate. Malawi provides an interesting parallel. In spite of its constitution which prescribes a cabinet form of government, the Prime Minister Dr.Banda, exercises a personal authority nearly as pervasive as that of President Nkrumah's in Ghana.

It has been suggested that this personal ascendancy of the head of government in most African countries indicates "a resurgency of African chieftaincy."[1] It is not difficult to see, however, that the new "paramount chiefs", if they may be so called, are far more powerful than the chiefs of old[2] given the armed forces at their command, the national economy which they can deploy as they wish, the patronage at their disposal and the apparent absence of effective sanctions against their misrule.

Since these leaders owe their primacy to their dominant position within the ruling party, we must next consider the nature of party systems in Africa.

E. PARTY SYSTEMS

Political parties serve as a network of control but opinions diverge as to the number of parties that could usefully

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1. Juergensmerer, op.cit.p.176.
2. Chapter 2.

exist in each state. Two answers have been urged:[1] (i) a multi-party system with more than one party vying for popular mandate and (ii) one-party system with only one single national party embracing all groups and interests.

The relative merits of either system would be apparent as this study progresses. Here only an introductory appraisal would be attempted.

(a) Multi-party system.

The notion that the ruling party shall be faced by a contending opposition is implicit in parliamentary democracy, therefore one should expect to find opposition parties in countries with a parliamentary system of government: Nigeria, Sierra Leone, Uganda, Kenya, Malawi and Zambia.

However, Kenya's opposition has disbanded itself,[2] and that of Malawi is as good as non-existent. The strength of the opposition groups in Sierra Leone is dwindling fast,[3] while in Uganda the ruling party is committed to declaring a one-party state as soon as practicable. The Zambian leaders are not opposed to the one-party system and would

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1. There is a possible third answer: no party at all, as in Egypt and Ethiopia. St.Clare Drake, "Democracy on trial in Africa" in Africa in motion (The Annals, July 1964) 118.
2. East African Reporter November, 20, 1964.
3. Cf.M.Kilson, "Sierra Leone" in Political parties and national integration in tropical Africa (ed.J.S.Coleman and C.C. Rosberg) (1964) 90-131.

gladly welcome a popular decision to that effect.[1]

Only in Nigeria, therefore is there a virile opposition, at any rate at the federal level, where things are delicately balanced to accommodate the conflicting claims of the component regions.[2] Moreover, some Nigerian leaders, if their utterances are an adequate guide to their true opinions, appear deeply committed to parliamentary democracy,[3] yet they do not seem perturbed that their regions are virtually one-party establishments.[4] It should be remembered that regional governments make a greater impact on the common people than the federal government since most subjects within regional competence touch the daily life of the people.

Numerous complaints are heard of victimization of supporters of the opposition party in each region. Amenities are withheld from their areas. They are over

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1. See statement by President Kaunda at a Press Conference held the day after independence: Republic of Zambia Information Services. Background No.27. November, 18, 1964.
2. Cf. Ahmadu Bellos, My life, p.231.
3. Dr.Nuamdi Azekiwe said in 1954 that democracy would be a sham without an opposition. Zik etc. p.98. In 1964, now President, he described as inhuman the idea of one-party system, the denial of human rights and preventive detention measures. The Daily Times, Lagos, November 17, 1964. Chief Obafemi Awolowo, then leader of opposition in Federal Parliament, argued that democracy and one-party system are mutually exclusive. In the latter, free elections are impossible and the ruling party arrogates to itself the right to rule for ever. Awo, etc., pp. 301-305.

(Footnote 4 overleaf...)

assessed for tax purposes and in the customary (including Moslem) courts, they cannot be sure of a fair hearing. When conditions become intolerable they have no choice but to join the ruling party.

The evidence suggests, therefore, that the attachment to a multi-party system in Lagos is due to the unresolved power struggle going on. As soon as one party is assured of an overall majority in Parliament, the other parties are likely to be eliminated.

Indeed members of the Action Group who formed the opposition in the Federal House regarded the controversial use to which the Emergency in Western Nigeria in the second half of 1962 was put as a pre-meditated attempt by the Federal Government (then made up of a coalition of the NPC and the NCNC) to eliminate their party (AG) from the ensuing power struggle.[1] The "coincidence" of the "treason trial" (in which the Action Group leader, Chief Obafemi Awolowo and some of his close lieutenants were tried for treasonable felony) with the state of emergency further

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4. See more fully, J. Mackintosh, "Electoral trends and the tendency to a one-party system in Nigeria" (1962) 1. J.C.P.S. 144. Only one region, the Mid-West, has officially endorsed a one-party system. The Mid-west premier is a firm believer in the system which he describes as natural, African and efficient. West Africa, April 17, 1965.

1. See Chapter Eight p.

intensified the disquiet of the opposition. The courts found, however, that the charges were not trumped-up.[1] Of the 31 accused originally charged, 16 were acquitted at various stages of the case, the rest, including Chief Awolowo, the AG leader, were convicted and sentenced to varying terms of imprisonment. Chief Anthony Enahoro, Chief Awolowo's deputy who had been deported from Britain as a fugitive offender to stand his separate trial, was also convicted and sentenced to 15 years' imprisonment later reduced to seven years on appeal.

Following Chief Awolowo's imprisonment, the federal office of the leader of opposition became vacant. The Prime Minister declined to recognise a successor. In his view, the idea of opposition was only suitable in a two-party system and as there were more than two opposition parties in the House at that time, he did not feel obliged to recognise any.[2] He would be prepared at any time to do so if there was an 'effective' opposition but he did not see how a handful of twenty people could provide an alternative government.

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1. The Queen v. Omisade and others (FSC) 1964 NMLR 75. Some other aspects of the case are considered later.
2. Statement in Parliament, December 11, 1962, quoted in Mr. Prime Minister (a selection of speeches made by Alhaji A. Tafawa Balewa), (1964). 151.

The test here enunciated by Nigeria's Prime Minister might be thought too subjective, but since the constitution imposes no obligation on him to recognise the opposition or its leader, he is perfectly within his rights to lay down conditions which would guide him in exercising his discretion. It is a little surprising that the opposition so central to the 'Westminster model' is not accorded official recognition by the constitution.[1]

From the Report[2] of the pre-independence constitutional conference for Uganda, it appears that agreement was reached to provide for the designation of the leader of opposition in the same way as laid down for the designation of the leader of the opposition in the United Kingdom in the Ministers of the Crown Act, 1937. Curiously, this provision was not separately inserted in the subsequent Independence Constitution but was tied to the provisions relating to the appointment and removal of members of the Electoral Commission by the Prime Minister, who must consult the leader of the opposition before exercising the power.[3]

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1. Contrast Jamaica (and to a lesser extent Trinidad) where the leader of opposition is expressly given certain important constitutional functions. See de Smith, op.cit., pp. 103-105.
2. (1962) Cmnd. 1778. p.
3. The Constitution of Uganda, 1962, S.45.

Is this a mandatory duty on the Prime Minister to recognise a leader of opposition, or would it suffice if, when necessary, he consulted the person he considered to be a 'leader of opposition' subject to the Speaker's ruling? This question assumed constitutional importance when Mr. Basil Bataringaya, the then leader of opposition, crossed the floor of the House. The opposition demanded a successor but, as in Nigeria, the Prime Minister did not feel able to recognise either of the two parties in opposition as the official opposition.[1] He recognised what the constitution granted the opposition but no more. He further recalled the pledge he had given at the constitutional conference in London that all those holding office prior to independence would continue to do so. Mr. Batringaya had not been removed but had, of his own accord, vacated the post. As regards the obligation cast upon him (the Prime Minister) to consult the leader of opposition in connection with the Electoral Commission, he promised that he would consult the leader of the most numerous non-government party when he wanted to make changes in the Electoral Commission.[2]

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1. Africa Digest, April, 1965, p. 129.
2. Ibid.

He saw fit, however, to warn that it would 'be wrong for the Press or anyone else in the country to regard anyone as the leader of the opposition'.[1] Shortly afterwards, the Government, through Mr. Ibingira, the Minister of State, announced[2] that legislation was being prepared which would declare the Kabaka Yekka,[3] the Buganda "separatist" opposition group, an unlawful organization. The reason given was that there was a need to unify the nation in the building of a single government. It would not be right that people comprising one-third of the state should be excluded from the proposed government principally because they happened to be living in one particular area.[4]

Absence of official recognition of the opposition or of his leader is not crucial to the successful discharge of his functions provided they are not looked upon as obstructionists who "oppose for the sake of opposition". Unfortunately, the tactics employed by some opposition groups lend support to this charge in that they behave as though they are an enemy of the ruling party rather than a contender for power.[5] Out of frustration, they resort to unconstitutional methods in a bid to unseat the government

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1. Ibid.
2. Africa Digest June, 1965, p.
3. For a useful study of the origins see (1964) Africa Report 9-13.
4. Ibingira op.cit.

(contd. overleaf).

of the day. In the circumstance, it would be over-indulgent to expect the government to sit back and watch their "treasonous" rivals carry out their designs. On the other hand, instances are known of governments raking up cases of subversion to rid themselves of formidable political opponents.

It should not be thought that the eclipse of the opposition in the African states is traceable only to the repressive acts of those in power. Career opportunities and the concern to have a share in the "national cake"[1] might attract members of the opposition to supporting the government. The constituents might even call on their representatives to change allegiance if that would mean more amenities for their area.

Since the special grievance of oppositions in Africa is the fact that they are kept out of power,[2] it has been suggested that a national government might be a better alternative to a straightforward cabinet system of government.[3]

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5. Cf. Apter, "Role of political opposition" in Africa: the dynamics of change, '56 at p. 67. The writer goes on to advise that although an opposition must have as its first purpose the attainment of power, it should in the initial period after independence "go slow, should assist government, and should provide for itself a firm footing, so that everybody recognises how valuable it is". p. 71. Cf. Abdul Razah, ibid, p. 74.

1. Cf. S.L. Akintola, A new deal for Western Nigeria (1964, Ibadan).

2. Cf. D.K. Chisiza, Africa, what lies ahead? (1962) 8, "Constitutional experiments in Africa" (1964) The Round Table, 242-249.

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This is arguable as, at best, a national government does no more than provide a political moratorium in between elections. The parties retain their identities, and when elections come, old wounds are re-opened. The Nigerian election crisis of 1964/65 is illustrative of the strain that could be generated by adopting a system based on "coalition now, opposition later".

Furthermore, a national government is cumbersome and inevitably weak. The government would always find itself in a state of indecision as it is not easy to reconcile the divergent views of component members.[1] This leads us to a wider question: has the one-party system anything better to offer?

The case for one-party system.

1. Need for national unity. The new states are artificial creations by colonial rulers. Tribal and family loyalties are still very strong among the people. If political parties are allowed to multiply, they are almost certain to be organized around tribes as in Nigeria[2] or more extremely

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3. Chief S.L. Akintola calls national government a "commonwealth in which everyone would have a sense of belonging and which, therefore, no one would wish to subvert. (It is known, however, that there have been more cases of subversion in one-party "commonwealths" than in multi-party states.) Drum Magazine, May, 1965.

1. Cf. H.O. Davies, Nigeria: the prospects for democracy, pp. 54-55.

2. See more fully, R. Skbar, Nigerian political parties (1961).

in the Congo (Leopoldville) where 230-odd parties contested the recent elections for a 166-seat National Assembly and 21 provincial legislatures.[1] An all-embracing national party would, by contrast, arrest the growth of factionalism and unify the people into a common nationality in which there is a sense of citizenship.[2] The party leader is seen as a symbol for the new order whose only legitimacy is the constitution about which the illiterate masses know nothing.[3]

2. Absence of strong issues dividing the parties: This is possibly the most persuasive objection to the multi-party system in Africa,[4] as is well brought out by the relative ease with which political parties in some multi-party states enter into alliances either to fight elections or to govern in coalition. In Nigeria, for instance, the NCNC with its professedly 'radical' outlook has for some years been working in collaboration with the more "conservative" NPC at the federal level. The NCNC also joined the former United Peoples' Party 'UPP', a breakaway section of the AG

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1. "Elections in the Congo", West Africa, March 20, 1965. p. 307.
2. G. Rosberg Jr., "Democracy and the New African States". St. Anthony's papers. Number 15, African Affairs ( )23.
3. Wallerstein, The politics of independence, pp. 85-101.
4. President Nyerere once likened the two-party system to a game of football where artificial rivalry is encouraged. He further observed that "the Anglo-Saxon tradition of a two-party system is reflection of the society in which it is evolved. Once the foreign power - 'the other party' - has been expelled, there is no ready made division". 'One party system' (1963) 2 Spearhead.

to form the government of Western Nigeria when the 1962 Emergency terminated. Following the census crisis of 1964 and after leading members of the NCNC in the Western House had joined the UPP to form a new party, the Nigerian National Democracy Party (NNDP), the NCNC entered into an alliance with the AG to fight the Federal election of 1964.[1]

3. Avoidance of waste: In multi-party states, because there are no fundamental issues dividing the parties, politicians, as in Nigeria, have to spend huge sums of money to buy party support.[2] The party in power has to go out of its way to provide sinecures for influential supporters. Boards and corporation posts are filled with loyal supporters who may not always be adequately qualified for the job, while the "winner takes all" conception of parliamentary democracy bars many able people from these jobs just because they support the opposition party. In a one-party system this waste is avoided.

4. Present stage of development in new countries not conducive to parliamentary democracy. It has been asked

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1. Many have remarked on "this interest in power for its own sake". Post, The Nigerian federal election of 1959, p. 442.
2. It is believed that the Nigerian parties particularly the AG, spent considerable sums of money during the 1959 election. See Post op.cit., pp. 151-156. The Coker Commission, found that the AG received sums totalling some £4 million from the National Investment Properties Co., (a company believed to have been floated to provide funds for the AG), between 1958 and 1962. Report of Inquiry into the affair of certain statutory Corporations in Western Nigeria.

whether parliamentary democracy is not in itself a part of a developed economy, advanced science and technology. Would it be right to separate parliamentary democracy from other related aspects of development and apply it out of context to developing states?[1] In the new states, not many special interest groups have formed yet which would require protection from government. Indeed, the early period of independence is a "time of crisis" when everything else must be sacrificed to bring out an accelerated economic growth[2] which, paradoxically, may help to create conditions suitable for a proper working of parliamentary democracy, In the meantime, there should be a disciplined national political party whose leadership can give the necessary direction.

5. Prevailing conditions at independence: Most African political parties were nationalist movements and therefore mass-organized.[3] At independence, therefore, there was

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1. Davies, The prospects for democracy, pp. 62-63. M. Lipset lists mass literacy, relatively high living standards, a sizable and stable middle class, a sense of social equality and a tradition of tolerance and of individual self-reliance as the prerequisites for democracy. "Some special prerequisites for democracy: economic development and political legitimacy" (1954) 43. American Political Science Review, 69-105. Cf. Barbara Ward, The rich nations and the poor nations, (1962) 145-148.
2. For an answer to these economic arguments, see W.A. Lewis, op.cit., pp. 38-44.
3. Cf. T. Hodgkin, Nationalism in Colonial Africa (1956) 139-168. See more fully African political parties, Chapter 4, esp. pp. 68-74.

a very dominant party. Declaring a one-party state was merely a legal recognition of the existing facts of the country as in Tanganyika for example.[1] On the other hand, the antithesis of unity could also warrant the formation of a one-party state as Ghana, "dangerously divided", claims.

6. Harnessing the traditional outlook of the people: We have seen consensual democracy at work in traditional societies.[2] The new leaders believe that without external stimuli such as offers of bribe or appeal to tribal differences, the traditional inclination of the people to reach decisions by conscensus would attract them to one-party system.[3] But the analogy with the past practices as drawn here is likely to mislead. The traditional sanctions against the ruler are not carried forward into the new one-party regimes.[4] Secondly, the latter make a virtue of the centralization of power, whereas, decentralization was a central feature of the traditional systems of government. Thirdly, with a few

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1. Dr. Nyerere poignantly asks, should the new government "halt in midstream and voluntarily divide itself into opposing groups just for the sake of conforming to... the Anglo-Saxon form of democracy". op.cit, p. 10
2. Chapter 4.
3. Rosberg Jr., op.cit., p. 30. Cf. Shils, op.cit., p.126.
4. Ayo Ogunseye, Africa, the dynamics of change, p. 85.

exceptions, subordinate chiefs in traditional Africa held their office as of right and for life. Ministers are today dismissible at will by the President who is also party leader.

Some reservations about the one-party system.

The factors just considered prove a prima facie case for one-party systems in Africa, at any rate in the early years of nationhood.[1] There are, however, certain disturbing aspects in the system which should not be overlooked:

(a) Would it not be considered seditious to try to unseat the government if the people think it is not doing well?[2]

(b) Even if the government had lasted its statutory term, is it really possible to replace it if the people are convinced that it has not fulfilled their expectation? This is the problem of free elections and would be considered in greater detail later.

(c) Is free discussion possible in a one-party state? Might not those who differ in any way from official policy or who choose to voice disagreement with any

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1. But see W.A. Lewis, Politics in West Africa, (1965) 63.
2. P. Whitaker, Political theory and East African problems, (1964) 73.

government action be branded traitors as the opposition parties in a multi-party system are wont to be called?[1] It is pertinent here to note that in Ghana after a formal opposition has disappeared, "dissident and disgruntled elements within" the CPP were the next to be ruthlessly dealt with.[2]

On the other hand, if the leadership is so minded a more congenial atmosphere for discussion and self-criticism could be created. As there is no permanent division into opposing groups, speech would not be inhibited "for fear of giving it ammunition".[3] Nor could the single party afford to ignore criticism coming from its own members whereas the criticisms of a rival party are easily "dismissed as automatic prejudice".[4]

Moreover, the single party in African states is far from monolithic, indeed Senghor's term, "unified party" might be a better nomenclature.[5] It is usually a coalition of interests and groups (like America's Democratic and

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1. F.M. Giwala, "No party-state: a reply to J. Nyerere", Spearhead, February, 1963.
2. See further Chapter 7.
3. A. Diallo, Africa, the dynamics of change, p. 50.
4. W. Kleruu, One-party system of government (1964) On African socialism, p. 82.
5. Cf. M. Keita, Single-Party democracy, Spearhead, November, 1962, p. 19.

Republican parties); some of them as diverse as individual parties in multi-party states. The following observations in an American study bear this out though specifically made in respect of Senegal:

> "The problem of successful party building is one of making a grand coalition out of several interests, for a man may be a member not only of his ethnic group, his generation, perhaps a caste, and a Moslem brotherhood, but also of a trade union, if he is employed by a commercial enterprise or the government, and he may also be a veteran. Membership in any one of these groups may be far more important to the person in question than membership in a political party".[1]

It is, however, important that these associations and connections should provide the individual with genuine avenues or channel in which to express his feelings.[2] The nature of party structure or organization is therefore crucial. Where there is over-centralization as appears to be the case in Ghana, the leadership which may be one man, becomes the conscience of the party and therefore of the state. This does not mean that the tight CPP structure does not afford discussion of alternatives within the party. On the contrary, there appears to be an intra-party division into the right-wing and the "militant

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1. U.S. Army Area Handbook for Senegal, (1963), 259.
2. Cf. Giwala, op.cit.

socialist puritans". These two groups do not always see eye to eye though the final decision on all issues rests with President Nkrumah.

Guinea's PDG[1] and Senegal's Union Progressite Senegalaise (UPS)[2] by contrast, permit a very thorough discussion of issues at the local level where party officials are elected by the people themselves. In Tanzania plans are afoot to democratize Tanu from the lowest to the highest level.[3] Mali's Parti du Regroupment Africain (PDA) is unique in that the leadership is subordinated to it[4] so that here intra-party discussion is freer.

Further, it might be noted that excessive ideological indoctrination could stifle discussion as all opinions would be conditioned to party dogma as laid down by the party leadership.[5] Thus, in Ghana, the youth, party officials and

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1. See Sekou Toure, "The democratic decentralization and the nature of authority". In The International policy of the Democratic party of Guinea (undated) Vol. VII. See further L.G. Cowan, Guinea in African one-party states, pp. 178 et. seq.
2. In 1963, there were 2,500 village or neighbourhood committees, organised in occupational as well as geographical groups. There are other intermediate groups up to the National Council. U.S. Army Handbook etc., pp. 262-266.
3. See generally Report of the Presidential Commission on the establishment of a democratic one party state. (Hereafter referred to as Presidential One-Party Commission) (1965, Dar-es-Salaam).
4. Cf. Carter, African one-party states, p. 7. A.R. Zolberg, The political revival of Mali (1965) 21 World Today, 151.
5. President Nkrumah said in 1962 that the party ideology must be all-pervading. Its theories would be developed in and around the Party leadership and would influence

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now Cabinet Ministers are obliged to undertake a formal study[1] in and must be always guided by the principles of Nkrumaism as defined by Nkrumah himself.[2]

The establishment of one-party states.

A characteristic of one-party systems is the tendency to equate the state, the government and the party. It is thus important to ask (as was done in respect of the constitutions) whether the people in one-party states freely elected to have one-party systems.

One-party states could arise in any of the following ways:[3]

1. Formalizing the situation as at independence:

As already noted, many nationalist parties are mass parties and pre-independence elections usually confirm their dominance. Thus in Tanganyika, TANU won all but one of the 71 seats to the Legislative Council (now National Assembly) in 1960. Similarly the UPS in Senegal won 79 out of 80 seats to the

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5. all education, thinking and action. "The shole nation from the President downwards will form one regiment of disciplined citizens". Guide to Party action (1962).

1. At the Kwame Nkrumah ideological Institute at Wineba, President Nkrumah himself announced that the new Ministers were to undertake a three-week residential course to avail them of "an opportunity of self-examination and study, to consolidate their understanding of Nkrumarism and thereby attain a better grasp of the true interests of the African people and the most effective way of serving those interests". The Times, June 14, 1965.

2. The key textbook is Nkrumah's. Consciencism (1964)

3. See generally, I. Wallerstein "What happened to the opposition?" West Africa, November 25, 1961. Cf. The

(contd. overleaf).

National Assembly in the 1959 elections. The PDG in Guinea lost three out of 60 seats in the elections of 1958, but shortly afterwards the opposition groups were persuaded to join the ruling party. In the Ivory Coast, the Parti Democratique de la Cote d'Ivoire (PDCI) scored 100 per cent success at the polls in 1959.

There was, therefore, in all these countries, a de facto one-party situation. Some, but not all, would seek in due course to declare a de jure one party state.[1] One useful method of maintaining the status quo is by the authorities refusing to register new parties.[2]

2. Absorbing the existing parties.

The opposition may find their role too irksome and decide voluntarily to merge with the government as we saw in the case of KADU in Kenya. Individual leaders of opposition groups might also be lured to the government camp by offers of public posts. Once their leaders succumb, their supporters disintegrate to the advantage of the ruling party.

(contd. from previous page).

3. opposition in tropical Africa" (I.C.J. Report), (1962) 14 B.I.C.J. 1-7.

1. For Tanganyika, see Report of the Presidential Commission on the establishment of a democratic one-Party state (1964).

2. A fuller discussion on freedom of association may be found in Chapter 7 post.

3. Electoral devices:

Outright rigging of elections is a quick way to one-party state. The 1959 elections in Togoland gave the ruling party 33 seats with the opposition parties claiming 13 seats. In 1961, elections were held again, this time for 51 seats, but the government refused to accept the nominations of the opposition and in the event the ruling party won all the seats.[1]

The "single list candidates" system gives the winning party (i.e. one able to win just over 50 per cent of the votes cast), all the seats. Examples of states that have adopted this system are Dahomey, Togoland, Gabon and the Ivory Coast.

4. Statutory ban on existing parties.

In the Niger Republic as in Upper Volta opposition parties have been dissolved by the government.[2]

5. Repressive measures.

The threat to apply or the actual application of the Preventive Detention Act, by most of these new states has had an unwholesome effect on the opposition. Hundreds of the latter are in jail without trial while about as many

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1. "The opposition in tropical Africa", op.cit., p. 5.
2. Ibid, pp. 3 and 5. On October 13, 1964 President Senghor announced the dissolution of Senegal's opposition parties, the Senegalese National Front (FNS). The other opposition party, the African Regroupment Party, whose leader Abdoulaje Ly was imprisoned in 1963 on charges of incitement to armed revolt: West Africa October 24, 1964, p. 1191.

have fled to neighbouring states Some were deported from places they believe to be their native countries.

The eclipse of the opposition in Ghana.

It could be said that most of the countries just instanced have never had a substantial opposition. Ghana is however, in a different class. In the 1956 elections,[1] the opposition won 32 out of 104 seats to the Legislature. The votes cast for them were even more impressive. In the 99 contested constituencies 299,000 votes were cast for them compared to CPP's 398,000. The presidential elections of 1960 showed a marked fall in opposition support but still some 10 per cent of the votes cast went to the defeated Dr. J.B. Danquah who challenged Dr. Nkrumah for the Presidency, though only 54 per cent of the electorate voted.[2] The 1964 poll to approve a one-party state was reported to be as high as 93 per cent with only 2,452 voters saying 'No' in the plebiscite.[3]

In the intervening years between 1956 and 1964 the opposition has been effectively crushed or driven underground. It is not possible here to relate in full Ghana's

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1. Cf. D. Austin, op.cit., pp. 316-362.
2. Ibid., pp. 390-395.
3. Ghana Today, February 12, 1964.

drift to one-party rule.[1] It would be enough to note the heavy pressure under which the opposition had had to labour before the law finally abolished their existence. The Avoidance of Discrimination Act, 1957[2] which was first introduced as the Political Parties Restriction Bill prohibited parties on a regional, tribal or religious basis, thus striking at the very source of support for the opposition. In parliament, the latter were to be called "Minority group" and the seating arrangement was altered from separate government and opposition benches to a horse-shoe formation.

CPP members were appointed regional and later district commissioners thus emphasizing the fusion of party and government.[3] The regional assemblies which the opposition had hoped would provide a forum for them to express their minority views and to exercise some measure of power were abolished by a constitutional amendment.[4] A Commission of Inquiry (a very useful weapon for embarrassing opponents in Africa) was appointed to enquire into the affairs of the opposition-controlled Akim Abuakwa State Council in

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1. But see Apter, Ghana in transition, Chapter 15: Austin loc.cit.
2. Act No. 38.
3. Austin, op.cit., p. 378.
4. Constitution (Repeal of Restrictions) Act, 1958.

1957.[1]

All national organizations: the Trade Union Congress,[2] the United Ghana Farmers Council, the Council of Ghana Women,[3] the Cooperative movement and the Youth movements, were declared auxiliaries of the CPP.

Members of the opposition were thus effectively isolated. The reaction of a few of them to their plight was deplorable. They resorted to acts of violence; notably, attempts were made at Dr. Nkrumah's life.[4] The Government counteracted with a rather harsh application of the Preventive Detention Act. Many leading opposition members were locked up without trial. Those who could escape fled the country to continue their opposition to Dr. Nkrumah's rule from abroad.[5]

Therefore, by September 1962 when the motion for a one-party state was passed in Parliament, the opposition was too enfeebled to resist the move. The constitutional amendment declaring a de jure one-party state after the 1964 plebiscite was also a foregone conclusion.

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1. Austin, loc.cit.
2. Art. 2 of the Rights and Duties of Members states: "To stand united with the Convention Peoples' Party of which the T.U.C. is an integral part, and share all the rights and duties of all the Party Members".
3. The Council pledges to maintain close and paternal relationship with the other national organizations in the building of a socialist state in Ghana under the leadership of the Convention Peoples' Party". National Council of Ghana Women (First Anniversary Brochure) (1961) 6.

(contd. overleaf).

THE STRUCTURE OF GOVERNMENT.

The exercise of power.

We have already argued that there might be a justification for a one-party system in the initial years of independence, though the dangers inherent in the system were also noted. There is, however, a world of difference between a *de facto* one-party state and a *de jure* one-party state. In the latter, a statutory ban is placed on future spontaneous development of organised dissent. The former type is to be preferred and has been adopted in Kenya where President Kenyatta once pledged that

> "should relevant grounds for a multi-party state evolve in the future, it is not the intention of my Government to block such a trend through prohibitory legislation".[1]

Whatever party system a state adopts, political power, to be regular, has to be exercised through institutions established by or under the constitution. This requirement of legality has, to some extent, a limiting effect on the rulers and their parties.

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4. The Cranville Sharp Commission which inquired into the alleged plot to assassinate Dr. Nkrumah and to stage a *coup d'etat* found that the opposition were not officially connected with the plot. See Report, Accra 1959.
5. Their case is stated in a pamphlet by Dr. Busia entitled *Ghana will be truly free and happy* (1964)

1. *Harambee* (the Prime Minister of Kenya's speeches 1963-1964) (1965) 25. cf. President Kaunda who says the people must decide; they "are always changing; their thinking is not static". First Presidential Press Conference *op.cit.* See further. "Constitutional experiments in Africa" (1964) 55 *Round Table* 241.

Separation of powers.

African constitutions, more or less, follow the conventional division of power into the executive, legislative and judicial, though a neat separation of powers is not necessarily produced by the division.[1] In some cases, it may be necessary to add yet two more "estates of power": the party in those states, which have written one-party system into their constitutions; and the people, in countries where legislative power is conferred on the prople acting in a referendum.

A Executive power: The executive formulates policy, conducts the general administration of the state and maintains internal and external order. In parliamentary regimes, these functions are exercised at the pleasure of the legislature. The position differs in presidential regimes: Ghana's first President, it would be recalled, has special legislative powers which, save in two or three instances[2] not even Parliament can override. Similarly in Tanzania, under the Interim Constitution,[3] the President can legislate by decree.

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1. Except possibly in Liberia where the Constitution ordains a tripartite government. Art. 1. s.4. Coleman v. Beyslow 12 LLR. 234.
2. The composition of taxation, the raising of public loans and the raising of armed forces. Constitution Arts. 26, 36 and 53.
3. Decree of 1964, s.19; also Act of Union of Tanganyika and Zanzibar, 1964 ss.5 and 10. But see now Constitution of 1965, Act 46.

These wide powers do not augur well for the Rule of Law in the two countries in that individual liberty could be restricted by presidential fiat; but this has not yet happened.

Although the francophone states follow the French practice of apportioning legislative power between the legislature and the executive,[1] they have been careful to place individual liberty and related matters in the legislature's exclusive list.[2]

B Legislative power: The essential function of Parliament is to make laws. In parliamentary systems, with the possible exception of judicial legislation, all laws originate from Parliament.[3] However, parliament may delegate power to make regulations to the executive; such delegation is made by individual Acts and, as a rule, to particular Ministers.[4] The consequential instruments, orders, or regulations, as they are variously called, would be ultra vires and therefore void, if they exceed the power under which they are purportedly made.[5] Still more important is the power of

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1. Senegalese Constitution 1963, Law No. 63-22 of 7 March 1963 Art.56; Ivory Coast Constitution 1960 Art 41.
2. See post.
3. Art.45 of Malawi Constitution, for example, provides, "Subject to the provision of this Constitution, Parliament may make laws for the peace, order and good government of Malawi.
4. As a rule they are subject to parliamentary confirmation or amendment procedure.
5. Cf. Ghana's Statutory Instruments Act, 1959 (No.52); s.7; Bennion op.cit., p. 6. pp. 262-269; 381-388, esp. p. 85.

Parliament to recall the enabling Act amd so put an end to the delegated power.

By contrast, the division of legislative power in francophone states is permanent. The domain of the law belongs to the legislature and the subjects which fall into the domain are listed. All other subjects not listed fall within the executive's domaine reglementaire. The executive thus has the residual legislative power.[1] Nor is this the whole story, for the domain of the law is further split into two categories. In respect of the subjects in the first category, the legislature enjoys exclusive competence to establish rules. These include:[2]

(a) Civil rights and the fundamental guarantees granted to the citizens for the exercise of their public liberties; the obligations imposed by the national defense upon the persons and property of citizens;

(b) National, status and legal capacity of persons, marriage contracts, inheritance and gifts;

(c) Determination of crimes and misdemeanours as well as the penalties imposed therefore, criminal

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1. Senegalese Constitution Art.65.
2. Art.56.

procedure; amnesty; the creation of new judicial systems and the status of magistrates;

(d) The electoral system of the National Assembly (and the local assemblies);

(e) The fundamental guarantees granted to civil and military personnel employed by the state;

(f) Nationalization and denationalization.

As for the subjects in the second category, the legislature merely lays down "fundamental principles" leaving the details to be worked out by the executive. To this category belong the following:

(a) The general organization of national defense;

(b) The free administration of local communities;

(c) Education.

(d) Property rights, civil and commercial obligations;

(e) Labour matters.

What is to be stressed here is that most matters which touch upon the Rule of Law are placed in the domain of the law, but this gain is almost completely offset by a provision which authorizes the legislature to delegate to the executive power to take over matters normally within the domain of law though a special procedure is laid down for such delegation.[1] Matters regulated by organic laws, the

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1. Art.66.

organization and functions of the judiciary, for example are often excluded.[1] Parliament must later ratify measures taken consequent upon the delegation and the opportunity could be seized to amend the measures.[2]

One other function of the legislature is to control the executive. Financial control is especially important in countries with 'Westminster model'.constitutions where supply must be voted annually. In francophone states such control is neatly avoided by a common provision that if the budget was not passed by a given date, it could be executed by a presidential decree.[3]

Government accountability varies from place to place as political systems differ. Again, ideally, it is most potent in parliamentary regimes where a Government that no longer enjoys the confidence of the majority is obliged to resign.[4] Except in one inconclusive instance,[5] however, it is believed this power has never been invoked in any African country.

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1. Art 67. Organic laws are designated by the Constitution and must be voted by the absolute majority of members of the Nation at Assembly. Their constitutionality must be declared by the Supreme Court before they can be promulgated.
2. Art.66.
3. Togo prescribes 50 days Constitution of 11 May 1963, Art.50; Madagascar, 45 Days Constitution of 27 December 1962 Art.40.
4. But note the recent Nigerian modification to the advantage of the executive. Constitution s.68(5).
5. Western Nigeria where the Privy Council upheld the dismissal of the Premier by the Governor because the former had lost the confidence of the legislature: (contd. overleaf).

The quest for a stable executive has led to a growing preference for the American model of an irresponsible executive. The Republic of Congo (Brazzaville), the Federal Republic of Cameroun and the Entente republics which comprise the Ivory Coast, Upper Volta, Daborney and Niger have, with important modifications, adopted the American pattern of government.[1]

In a separate class of their own are Ghana, Tanzania, and Zambia. Here Parliament cannot oust the President; on the contrary, the President has the power of dissolution[2] though if he exercises it, he automatically brings his own presidency to an end. Although cabinet ministers are drawn from Parliament, they are agents of the President by whom they are appointed and are dismissible.

The foregoing would have shown that with the in-built resistance to parliamentary sanction against the executive, the possibility of a Government falling during its statutory term because of a violation of the Rule of Law is most remote. But there are other means of parliamentary control which do not have the defeat of the Government as

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5. Akintola v Adegbenro, (1963) 3 A.E.R. 544. But the Constitution was amended to nullify the decision. See post Chapter Eight.

1. Cf. Juergensmeyer who aptly describes the African versions as "reinforced presidencies" op.cit., p. 175.

2. Constitutions: Ghana, s.23(1); Tanzania, (Interim) s.44(2); Zambia, s.83(1).

their immediate aim: written and oral questions with or without debate; in francophone states, the committee of inquiry, and correspondingly in the anglophone states, the select committees of Parliament. Debates on measures do provide an opportunity for calling the Government to account.

The evidence, however, is overwhelming that legislators do not make the best of the opportunities which the Constitution and the parliamentary procedures avail them.[1] Private members seldom sponsor bills of their own and there is a universal tendency to "rubber-stamp" Government legislative proposals.[2] The inflexible and relentless use of party whips has been partly blamed for this.

In the very few cases where some parliamentarians want to debate measures thoroughly, they are up against executive obstruction in the form of certificate of urgency frequently entered by the executive demanding accelerated passage of bills. Some constitutions blatantly condone parliamentary inaction by restricting the frequency

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1. Cf. Bennion, op.cit., p. 263. With a few exceptions, Kenya M.P's. for example.
2. Cf. Observations of a Nigerian M.P. Mr. Ikeetuonye quoted by Nwabueze op.cit., p. 198; also N. Azikiwe, "Essentials for Nigerian survival" pp. 449-480; T. Mackintosh, The Nigerian Federal Parliament (1963) P.L. 333; W. Tordoff, "Parliament in Tanzania" (1965) J.C.P.S. by the Party organs. 85 A practice more evident in one-party states where Parliament is outrivalled.

of the occasions when the legislature can meet.[1] Even where no such constitutional restriction exists, parliamentary sitting days are disappointingly few.[2]

The expectation that Second Chambers (in those countries that have them) would provide a platform for a calm and mature scrutiny of government measure is yet to be realized.[3] One explanation is that the composition of these chambers is not conducive to an assertive role against the elected representatives of the people.[4] It has been suggested that their performances might improve if they held concurrent powers with the elected Houses.[5] There is much in this but the experience of Northern Nigeria, where, the House of chiefs, save with regard to financial measures, enjoy co-ordinate powers with the House of Assembly,[6] does not bear this out.

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1. As is the case in Francophone states. In Togo, for example, two ordinary sessions each of which shall last not more than 2 months is prescribed. Constitution Art.43.
2. Nigeria's House of Representatives sat for 44 days in 1960, 54 days in 1961 and 42 days in 1962. Mackintosh op.cit., p. 339. In Tanganyika (Tanzania), the National Assembly sat for 29 days in 1963 and 26 days in 1964 Tordoff op.cit., p. 88. Cf. the average number of sitting days for the House of Commons which is 160. Britain an official Handbook (1964) 34.
3. This is by no means peculiar to Africa. New Zealand abolished its Upper House in 1951 which as far back as 1914 was described as a "council for the automatic registration of laws". Andre Siegfield, Democracy in New Zealand (1914) 73. cf. G.W. Keeton, Democracy and the Second Chamber" The Times, May 26, 1965.

(contd. overleaf.)

Finally, the legislatures the world over are enfeebled vis a vis the executive. They appear much weaker in Africa probably because of their relatively young age. Given time, they would perhaps develop their own tradition and with it a kind of resistance to executive pressure. Such a change is more likely to occur in multi-party systems than in the one-party systems, though the practice in some multi-party states of packing the Government benches with placemen as ministers, parliamentary secretaries or paid officials of the Legislature, is not likely to assist in this direction.[1]

C Judicial power: Judicial power is, in all the states, vested in the courts. Article 41(2) of the Constitution of Ghana provides as follows:

> "Subject to the provisions of this constitution, the judicial power of the state is conferred on the Supreme Court and The High Court and on the inferior courts as may be provided for by law".

(contd. from previous page).

4. President Azikiwe of Nigeria once called the Nigerian Senate "a haven for mercenary elder statesmen" "Essentials for a Nigerian survival", p. 451. Contrast the Senate in Kenya which is elected. Constitution, ss.40-42 and Sched. 5. Part I.
5. Ibid.
6. Constitution of Northern Nigeria, 1963 ss.26 and 27. In the event of a disagreement between the two Houses, a joint meeting of both Houses with equal representation resolves the dispute. s.28.

1. In Western Nigeria, of 94 members in the House of Assembly before October 1965, 54 sat on the Government benches, 49 of whom were Ministers. Four held the offices of Speaker, Deputy Speaker, Chief Whip and Party Whip respectively. The unplaced Government supporter resigned from the ruling

(contd. overleaf).

The term "judicial power" is not defined though power of review is expressly conferred on the Supreme Court. To ascertain the nature and the extent of the other powers vested in the courts, reference must be made to the laws of Ghana that is

> "(b) enactments made by or under the authority of the Parliament established under the constitution;
>
> (c) enactments other than the Constitution made by or under the authority of the Constituent Assembly;
>
> (d) enactments in force immediately before the coming into operation of the Constitution;
>
> (e) customary law".[1]

Similarly, francophone constitutions do not define judicial power.[2] The constitutional functions of the court are enumerated[3] but it is left to an organic law to determine the competencies, organization and the procedure of the

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1. party. Azikiwe loc.cit. cf. The Ministers of the Crown Act 1965. See The Times' editorial headed "Placemen, New Style", issue of November 11, 1964. Surprisingly, except in Zambia, none of the countries with 'Westminster model' constitutions places a limit on the number of ministers that can be appointed. The maximum number in Zambia is 14. Constitution s.44(1).
1. Art.40 of the Constitution.
2. See Senegalese Constitution Art.82.
3. See post.

Supreme Court and by implication of the lower courts too.

The Nigerian Constitution (as with those modelled on it) deals more fully with the exercise of judicial power. In the first place, recourse to courts is guaranteed to every person charged with a criminal offence.[1] But the courts have no corresponding exclusive jurisdiction to determine civil rights and obligations.[2] Its jurisdiction in this respect may be shared by other tribunals (if and when set up) whose independence and impartiality must be manifest. A further restriction lies in the provision for administrative justice which may be entrusted to "a person of authority" whose independence or impartiality is not assured.[3]

The practical effect of the latter provision is somewhat mitigated by another provision guaranteeing protection from deprivation of property.[4] The High Court has a jurisdiction to determine the extent and nature of the interest of a person whose property is compulsorily acquired and to fix the amount of compensation due to him.[5] A general jurisdiction is further conferred on the High Court to give redress to any one alleging a contravention

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1. Nigerian Constitution s.22(2).
2. s.2(1).
3. s.2(1)(a).
4. s.31.
5. s.31.(1).

of the provisions contained in the Human Rights Chapter.[1] Thus in Doherty v. Balewa,[2] it was held that a Tribunal of Inquiry could not be invested with powers to impose a fine for a contravention of its orders.

The occasions when appeals would lie to the higher judiciary from the subordinate courts in criminal and civil causes are broadly laid down.[3] One advantage of this is that a special court could not be established which would deny the Supreme Court, for instance, of its appellate jurisdiction.

Questions as to the interpretation of the Constitution are referable to the High Court in the first instance and, if points of law are raised therein ultimately to the Supreme Court.[4] The latter also has original jurisdiction in any dispute between the federation and a Region or between Regions but only

> "if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends".[5]

The common lawyers' aversion to advisory opinion could hardly be made more explicit. Courts of law should only pronounce on the instant case.[6] The courts should not

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1. s.32.
2. (1961) 1 All N.L.R.604.
3. ss.117-120.
4. s.115.
5. s.114.
6. Olawoyin v. Att-Gen.for Northern Nigeria (1960) N.N.L.R.59.

be dragged into political controversy with any of the other branches of government. In the best tradition of the law, the courts' function is to hold the scales between two adversaries. In any event, the state can always draw on its panel of law officers some of whom are of a judicial calibre to advise it on the constitutionality of proposed legislation.

However, in Nigeria, the common law tradition in this matter has been slightly compromised, albeit on a non-contentious subject. Parliament may be empowered to confer advisory jurisdiction on the Supreme Court, to consider and advise, when requested, on the desirability of exercising any of the prerogative powers of mercy vested in the executive.[1]

While in the anglophone states, judicial intervention in constitutional matters is basically remedial, in the francophone states, it is mainly advisory and in a few cases, arbitral. This is borne out by the following functions customarily conferred on the Supreme Court by the francophone constitutions:[2]

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1. s.116.
2. The list follows closely Arts.46-51 of the Constitution of Madagascar where, it should be noted the High Council of State replaces the Supreme Court in exercising jurisdiction over most of the subjects mentioned in the list.

(i) the rendering of an opinion on the constitutionality of a proposed bill or decree;

(ii) the consideration, at the request of the President of the constitutionality of a law already promulgated; if held unconstitutional, that law automatically becomes void;

(iii) the interpretation to be given to a specific law if so requested by the President;

(iv) the courts opinion must be sought in the ordinances issued pursuant on the general delegation of legislative power to the executive;

(v) the examination of all organic laws before promulgation.

(vi) the court pronounces on the regularity of the rules of procedure of the National Assembly;

(vii) its ruling is obligatory in the case of a disagreement between the Government and the Assembly.

(ix) as the guardian of personal freedom, the court ensures respect for the rights of citizens as prescribed by law.

Except in the last-mentioned instance and only in a rather vague way is the citizen brought into the realm of

judicial review.[1] In certain cases, the nature of the advisory opinion given by the Court is never made public. In Senegal, however, all opinions whether constitutionally required to be published or not are made public.[2]

Be that as it may, judicial power in these countries is still considerable. Whether the judges are put in a position freely to discharge their onerous burdens in the francophone as well as in the anglophone states is another matter which will later engage our attention.[3] In the chapter that follows we shall consider the democratic basis of the new African states.

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1. But see Chapter Eight for judicial review of administrative decisions.
2. Contrast the Ivory Coast.
3. Chapter 8. post.

CHAPTER SIX

POPULAR GOVERNMENT

Legitimacy as a source of control

The principle is now universally accepted that sovereign power derives from the people;[1] but such is the size of the modern state that all the people cannot possibly meet together to exercise sovereignty, representative government thus becomes inevitable. With the possible exception of Ethiopia where sovereignty resides in the Emperor[2] to whom Parliament, both in law and in fact, is subordinate, every African constitution proclaims the democratic foundation of the state. Ghana's Constitution, for instance, recognises the people as the source of power and the guardians of the State.[3] They have delegated certain powers to the institutions established under the Constitution, but the residuary power remains in them

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1. See Article 21 of the Universal Declaration of Human Rights which provides "the will of the people shall be the basis of government; this will shall be expressed in periodic elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent voting procedures".
2. He is known as the "Conquering Lion of the Tribe of Judah, Elect of God, Emperor of Ethiopia". The 1955 Constitution explains his position as follows:
"By virtue of His Imperial Blood, as well as by the anointing which He has received, the person of the Emperor is sacred, His dignity is inviolable and His power is indisputable".
3. Art. 1.

including the right to choose their representatives in Parliament. Similarly, the Liberian Constitution declares that all power is inherent in the people by whose authority and for whose benefit every government is instituted; and when the safety and happiness of the people so require, they are free to reform or alter their government.[1]

Francophone states claim in their respective constitutions to have established a "secular, democratic and social republic" whose principle is "government of the people and for the people".[2] Sovereignty is exercised by the people alone either through their representatives or by referendum.[3] Westminster model constitutions avoid exuberant language but are no less emphatic that legislative powers (subject to judicial review) vest in Parliament.[4]

Free elections held at reasonable intervals and based on popular suffrage are of the essence of representative government. The relevance of representative government to the Rule of Law has been stressed.[5] Thus Sir Ivor Jennings

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1. Art. 1. sect. 2.
2. For Senegal see Art. 1 of the Constitution of 1963; cf. the Preamble to the Constitution of Guinea, 1958.
3. The Constitution of Senegal, Art. 2; the Constitution of Guinea Art. 3.
4. Nigerian Federal Constitution 1963; s.69; Uganda Constitution 1962, s.73; Zambian Constitution 1964 s.57.
5. Cf. the Working Paper on the Rule of Law in a free society op.cit. p.214; the "Law of Lagos" in African conference on the Rule of Law, op.cit. p.11; Basic requirements of representative government under the Rule of Law' in The Rule of Law in the modern age (IJC) (1965).

observes,

> "A people that is free to change the direction of public policy by turning out a Government that does not accord with popular ideas will usually (though not always in respect of each) insist that among citizens engaged in the same kind of activity the laws shall apply equally irrespective of race, religion, colour, social importance or wealth and should be administered impartially against all citizens".[1]

We shall next discuss some important aspects of representative government.

1. Periodic elections.

Opportunity to change the existing government should avail fairly regularly. This is why the life of every legislature is limited by law usually to five years which period could not be prolonged except in stated circumstances. Even so, some constitutions[2] provide that each extension shall not last longer than one year nor could the total extended period exceed five years.

2. Suffrage.

The principle of 'one man, one vote' is adhered to everywhere,[3] except in Northern Nigeria, where for

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1. The law and the Constitution, p.60.
2. e.g. Nigeria's s.68(3).
3. South Africa may be contrasted; here the practice of apartheid deprives non-whites of their voting rights in any election to the country's supreme legislature. See the controversial Separate Representation of Voters Act, 1951 as amended in 1956. Political apartheid has since been carried to its logical conclusion by the Promotion of Bantu Self-government Act, No.46 of 1959. See further The Rule of Law in South Africa (JCJ.Report 1960), 46-49.

religious and social reasons, women do not have the vote,[1] Rhodesia's current political crisis is centred around the franchise.[2]

3. Secret ballot.

Voting is by secret ballot though this does not necessarily guarantee free elections. It is important to know as well to what extent the people are allowed a genuine choice among candidates who are free to campaign for support. Furthermore, the administration of the elections must be seen to be fair.

4. Free and fair elections.

It is of course possible to rig the elections long before they are held as by 'gerrymandering' the constituencies such that the party in power is allocated more seats than its size warrants. This is why constituency delimitation[3] is nowadays entrusted to independent bodies. In most Commonwealth African states non-partisan electoral commissions are established by the constitutions[4] and are charged with

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1. Nigerian Electoral Act, 1962 s.1(3): Ahmadu Bello, My Life, pp.
2. Which is subject to property, income or educational qualifications which the vast majority of the Africans cannot attain in the forseeable future. Southern Rhodesian Constitution 1961, s.3.
3. A condition is invariably laid down that the inhabitants of each constituency should as is reasonably practicable, and after allowing for means of communication, geographical features, district boundaries, be close to the population quota, that is the overall population divided by the number of constituencies. Nigerian Constitution s.51.
4. For Nigeria, s.50; Uganda s.45; Malawi s.40; Zambia s.67.

this task. But, in the main their function is to supervise elections.[1] As the ruling party would itself be seeking to renew its mandate, it would be unsafe to trust that in the conduct of the elections it would be fair to those challenging its right to rule.

In places where electoral commissions are not found, it is usual to designate the Supreme Court or as in Ghana, the Chief Justice to administer elections.[2] Disputed returns are as a rule determined by the courts.[3]

The foregoing precautions are obviously meaningful only where there is more than one political party seeking popular support. A distinction has thus to be made between multi-party and one-party elections.

(a) Elections in multi-party states: the Nigerian example.

How efficacious are the electoral safeguards that have been written into the constitutions of the new African states? The Nigerian federal elections of 1964, the first

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1. Ibid.
2. Constitution Act. 11 (2) (6).
3. Cf. The Nigerian Constitution s.53 which accords the High Court in each Region the original jurisdiction to hear and determine election petitions with appeal to the Supreme Court where such petitions have priority over all other civil proceedings other than those which are part heard. Electoral Act, 1962 s.162 and generally Part IV. In the Republic of Togo, all disputes arising out of presidential, or parliamentary elections are resolved by the Supreme Court. The Constitution of 1963. Arts. 71, 72. Cf. The Constitution of Madagascar, 1962, Art. 51.

to be held since independence, promised to provide a clue.

On December 8, 1964, the Nigerian Federal Parliament was dissolved and allowing for the 21 days which must expire between dissolution and the holding of fresh elections,[1] December 30, 1964 was duly fixed for the General Election. The Nigerian party system is most complicated but the numerous political parties, in anticipation of the elections, had grouped together in two rival alliances: the Nigerian National Alliance (NNA) and the United Progressive Grand Alliance (UPGA).

The electioneering campaigns were, however, marred by many acts of political intolerance.[2] In each Region, there were complaints that the ruling party was placing every conceivable obstacle in the way of the opposition groups. In blatant disregard of the law which requires that adequate facilities shall be granted to each candidate to enable him to canvass the support of the electorate,[3] meeting permits were withheld from those candidates not seeking election on the platform of the party in power. The Premier of

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1. Electoral Act, 1962. s.17 (1).
2. Parties retain hired thugs and lawyers to defend them if the former are apprehended.
3. Quite apart from the Fundamental Human Rights Chapter which guarantee such political freedoms as, the right of expression, assembly, association, etc., s.158 Electoral Act, 1962 expressly enjoins access to school premises or public buildings for the benefit of candidates subject to certain necessary conditions.

Eastern Nigeria was unable to address a meeting in Bauchi, Northern Nigeria because "all available space had been booked".[1] He had therefore to go outside the town to address his supporters. The Federal Prime Minister who comes from Bauchi blamed such disappointment on inadequate preparation by Southern politicians who hurriedly travel north and expect to find everything laid on for them within hours.

Prior to the election, an all-party agreement had been reached that the Local Authority Police would be placed under the control of the Inspector-General of the Nigeria Police[2] but the decision was not effectively implemented. The result was that the Regional authorities were still able to use the local police as well as the customary courts to intimidate voters to return candidates standing on their platform. Known political opponents were rounded up and conveniently imprisoned on such charges as unlawful assembly or conduct likely to cause a breach of the peace (perhaps for singing party songs).

The Nigerian President in an outspoken broadcast speech[3] was constrained to doubt whether the impending

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1. West Africa, November, 14, 1964, p. 1291.
2. Who is answerable to the Federal Prime Minister. see Constitution s.106.
3. Reproduced in Supplement to Federal Nigeria vol.7. No.8. 1964.

elections would be free and fair in view of

> "the frequent complaints of intimidation and wholesale arrests of opposing candidates and mass imprisonment of political opponents in order to prevent them from telling their side of the story in the effort to win the sympathies of voters".

Eleven days to polling day no less than thirteen Western Nigerian towns were under curfew.[1] (But repressive measures could boomerang against the authorities as was shown in the Lagos municipal elections of 1962 which the opposition party, A.G. won against all expectations and despite the ban placed on public meetings in the months preceding the elections.[2])

In the end, the election crisis to which the country was subsequently plunged and which shook it to its very foundations arose, less from denial of elementary liberties during the campaigns than "from the higgledy-piggledy manner the Electoral Commission handled the nomination of candidates and the nomination returns in particular".[3]

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1. West Africa, January 2, 1965, p.3. One commentator wrote that the prisons in the Region were filled to capacity so that hundreds of people had to be given "suspended sentences" allegedly to coerce them to supporting the party in power. Y Babatunde, 'Campaign of terror in Nigerian election'. The Guardian, December, 23, 1964. See also two earlier articles by the same author on December 21 and 22, 1964.
2. Cf. the electoral practice in Burma where public meetings are prohibited during the election campaigns. Only person-to-person publicity methods may be used. Interparliamentary union: Parliaments; a comparative study of the structure and functions of representative

(contd. overleaf).

Any Nigerian not less than 21 and not otherwise disqualified can seek to become an M.P.[1] He requires two nominators and has to deposit the sum of £100 which he forfeits if he obtains less than one-fifth of the total number of votes cast in his constituency.[2] He, or his nominators, must personally present the nomination papers to the electoral officer at the place appointed by the latter.[3]

There were allegations that in the current elections, in some parts of Northern Nigeria, the electoral officers did not make themselves available. One intending candidate was reported to have been arrested as he was about to file his nomination papers.[4] Similar complaints were received by the Federal Electoral Commission. In the event, the closing date for nomination was extended by 24 hours.

If after the expiration of the time for the delivery of nomination papers, there is only one person whose name has been validly nominated in a constituency, that person is declared duly elected.[5] Nine days before

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(contd. from previous page).
2. institutions in forty-one states (1962) 47.
3. The Daily Times, Lagos, December 29, 1964.
1. The Nigerian Constitution s.45.
2. Electoral Act, 1964.
3. Electoral Act, 1962 s.18 (3).
4. Daily Express, Lagos, December, 1964.
5. Electoral Act, 1962. s.25 (1).

the election, there were reports that over 60 candidates had been so returned in the North, 15 in the East and 2 in the West.[1]

The Chief Electoral Commissioner appeared, at first, as puzzled as some politicians that such a large number of candidates were being returned unopposed. In a national broadcast, he admitted there had been cases where more than one candidate had been validly nominated 'and yet names of candidates had been announced as returned unopposed'.[2] He stressed that it was the duty of the electoral officer to accept or reject nominations. However, the announcement that a candidate had been elected after the close of the nomination was the duty of the electoral commission and he and his colleagues would look into the complaints of nomination and other irregularities.

As the public waited in vain for the Commission's findings, confidence in their impartiality began to recede.[3] One of the contending alliances, UPGA, demanded the postponement of the elections so that alleged irregularities might be properly attended to, failing which its supporters

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1. The two Western seats were at Ife but were subsequently contested.
2. Daily Times, Lagos December 23, 1964.
3. The columnist Peter Pan wrote 'Half the confusion today would not have arisen if Mr. Esna's (the Chief Electoral Commissioner) Commission made itself trustworthy. It has been evasive; and when they might have been accounted as the authority to speak out the old man and his crew have been silent'. Daily Times, Lagos, December, 30, 1964.

would boycott the elections. The President of the Republic appeared to favour postponement while the Prime Minister felt that the elections should proceed as scheduled but that alleged irregularities could subsequently be challenged in the courts as the constitution and the electoral law prescribe.[1]

A meeting of Regional Governors and Premiers called by the President and the Prime Minister for December 29 to resolve the deadlock between the Head of State and the Head of Government proved abortive.[2] The Electoral Commission announced that polling would take place as planned on December 30. It was not a unanimous decision as three members of the six-man Commission dissociated themselves from the announcement and tendered their resignation.[3] These were the Eastern and Mid-Western representatives: the first two, echoing their Governments, wanted the elections postponed. The Lagos member, on the other hand, preferred partial postponement only in areas where irregularities have been alleged.

The Commission is required to act by a majority so that technically their decision to press on with the elections

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1. See the text of his cancelled broadcast Sunday Times, Lagos, January 4, 1965. The text of the President's cancelled broadcast is also published, ibid.
2. See Sixteen days of political crisis from the State House Diary (Federal Ministery of Information, Lagos) (1964).
3. West African Pilot, Lagos, December 30, 1964.

is valid.[1] On the other hand such were the irregularities complained of and later admitted (if belatedly) by the resigning Commissioners[2] as to strengthen the case for postponement.

s.156(1) of the Electoral Act, 1962 provides

> "If the Electoral Commission is satisfied that there has been a substantial failure to comply with the requirements of this Act before the date fixed for holding the election in respect of nomination papers or otherwise however, the Electoral Commission may postpone the election until such time as such requirements are satisfied".

Apart from the nomination controversy, the Eastern and Mid-Western Commissioners in their letters of resignation[3] listed the following irregularities which they found during their coutry-wide tours.

(a) The sitting of polling booths in people's private houses;

(b) The construction of polling booths with mats and local materials as against aluminium sheets;

(c) No polling booths were erected at all in some places;

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1. But see Dr. O. Onwumaegbu who argues that from the moment the Eastern and Mid-Western representatives withdrew from the Commission the latter was no longer properly constituted as required by s.4 of the Electoral Act, 1962 which vests the conduct of the elections in the Commission. 'It's now of never', West African Pilot, January 6, 1964.
2. See below.
3. Extract in West African Pilot, December 30, 1964.

(d) Contrary to section 13 of the Electoral Act, 1962, the register of electors for some constituencies were not available, and where available were incomplete;

(e) In Lagos in particular, polling booths constructed for the election had been destroyed.

(f) The resignation en masse of many presiding officers in some constituencies in circumstances of fear and intimidation.

These were grave departures from the requirements of the electoral law though the two Commissioners did not explain why they waited till the eleventh hour to satisfy themselves that things were not as they should be.

UPGA's decision not to participate in the elections in protest against the Electoral Commission's inept management of the same was, to say the least, rather astonishing. With the boycott, NNA's victory was assured.[1] The extra-constitutional remedy preferred by UPGA did not pay off and after a needless post-election crisis, the President summoned Alhaji A. Tafawa Balewa whose Alliance won the

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1. They swept the North winning 162 out of 167 seats though they did not do so well in the West (considering the boycott) where they won 36 out of 57 seats. UPGA won the rest and the 14 Mid-west seats.

most seats to form a new government.

The two Alliances after what seemed, at one stage, a mortal battle agreed to collaborate in a broad-based government.[1] Elections would be held later in the East and Lagos where the boycott was effective.[2] It was further agreed that arrangements would be made to review the constitution and the machinery of election.

To sum up, the Nigerian federal elections of 1964 bear out rather vividly Professor W.J.M. Mackenzie's warning that in any election where those concerned ignored "certain rules of the game which limit the struggle for power...the game itself would disappear in the wreckage of the whole system".[3] The way and manner the elections were fought, administered and sabotaged, in places, reflected somewhat on Nigeria's reputation as a 'showcase of parliamentary democracy in West Africa if not in the whole of African continent.'[4]

(b) Elections in one-party states.

The crucial question is whether one could really talk of elections where there are not at least two political parties sufficiently well-organised to canvass their policies

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1. See The State House Diary.
2. A new law (Electoral Act, 1965) had to be passed before the Little Election could take place. UPGA won all the seats contested save two which went to independents in the East.
3. Free elections (1958) 14. Cf. W. Mackenzie and K. Robinson Five elections in Africa (1960). 5.
4. K. Ezera, 'The role of a constitution in a developing political system. The Nigerian example'. in New nations in a divided world. (ed. K. London) (1963) 137.

and candidates so as to enable the electors to exercise some choice of alternatives.[1] There is however, the view to which President Nyerere subscribes that elections need not centre around parties but may be simply a choice of personalities. The President recently set up a Commission to consider, among other things, how to achieve in a one-party state 'complete freedom for the people to choose their own representatives on all representative and legislative bodies within the context of the law'.[2]

The Commission in its report[3] recommended contested elections to the National Assembly[4] though all candidates must be members of TANU whose National Executive Committee shall select two candidates for each constituency.[5] Electioneering campaigns would be sponsored by the local party organization other than that in which the poll is to be held.[6]

The Commission's recommendations have been substantially embodied in the Interim Constitution of 1965 and in the National

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1. Mackenzie, Free elections, loc. cit.
2. Government Notice No. 300, Tanganyika Gazette, February 7, 1964.
3. Report of the Presidential Commission on the establishment of a democratic one party state (Dar-es-Salaam; 1965).
4. As well as to the local councils. Ibid. pp. 18-21, 24-26.
5. The Commission had recommended three candidates but the party amended this to two. See Presidential Address to the National Assembly on June 8, 1965, reported in Africa Digest, August, 1965.
6. Ibid.

Assembly (Elections) (Amendment) Act, 1965.[1]

Under the latter Act, a prospective candidate for a parliamentary seat must be sponsored by not less than 25 registered voters in the electoral district he is seeking election.[2] A primary election is first held with the Annual District Conference of TANU forming the electoral college. The names of two candidates who receive most preferences go forward for the general election but not before they have been approved by the National Executive Committee of the party.[3] A common electioneering platform is provided under the supervision of neutral officials.

The new electoral system was put to the test on 21 and 25 September, 1965 in a keenly-fought general election[4] in which two cabinet ministers, several

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1. Act No. 46 of 1965.
2. ibid., ss. 26-30.
3. s. 32.
4. There are 107 constituencies; in the instant election 106 were contested. No parliamentary elections took place in Zanzibar though the Zanzibaris participated in the presidential election.

junior ministers and a substantial number of former members of the National Assembly failed to be elected.

For the election of the president, a primary election is first held within the party for which the Electoral Conference of TANU (comprising all those entitled to attend the National Conference of the party and delegates from the Afro-Shirazi Party of Zanzibar) constitutes an electoral college. A sole presidential candidate is nominated at this party caucus for the general election proper;[1] he must poll not less than the majority of the votes cast in order to win the election.[2]

In the 1965 elections, the outgoing President, Dr. Nyerere, was unopposed at the nomination stage, and went on to win the general election with 2,519,000 votes to his credit and 92,300 votes against him.[3]

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1. Interim Constitution s. 7 (3) read together with Constitution of TANU, ibid., Article IV (E) (3).
2. Interim Constitution s. 7 (4) (b).
3. Commonwealth Survey, October 22, 1965, p. 1021.

Tanzania's innovation is a considerable advance on the practice, hitherto, of using in a one-party state an electoral system designed for a multi-party state with the result that the candidates of the single party are always returned unopposed, thus giving the electorate no opportunity to exercise their franchise.[1] It would have been more reassuring, however, if contested popular elections, as provided for in the case of parliamentary seats, had been extended to the presidential elections.

In Ghana, by contrast, the President is not directly elected; instead the National Assembly is required to endorse the party candidate.[2] The National Assembly itself is elected under a system designed for a multi-party state. There are even provisions for payment of deposits by candidates, election symbols, polling agents etc.[3] It is to be remembered, however, that in Ghana, unlike in Tanzania, membership of the

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1. Cf. Presidential Commission Report, p. 19.
2. Presidential Elections Act, 1965, Act 292.
3. Electoral Provisions Act, 1965, Act 291.

National Assembly is not restricted to members of the party.[1]

The provision that where there is only one candidate in any electoral district, such a candidate is deemed elected,[2] proved most important in the general election of June 1965. Party directives had gone out to the effect that all nominations for the imminent elections would be made by the central committee of the CPP which would allocate candidates to stand in any district whether they were domiciled there or not.[3] People were urged to demonstrate their belief in the nation, one party and one leader, by not coming forward to stand against party candidates.[4] In the event, all the 198 candidates nominated by the central committee were returned unopposed so that no polls were necessary on the election day.

Though Parliament was in effect selected by the party chiefs, the electorate could, in theory, terminate

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1. National Assembly Act, 1965, Act 300, s. 1.
2. Electoral Provisions Act, 1965, s. 41.1
3. Daily Graphic, Accra, May 26, 1965.
4. ibid., June 1, 1965; Evening News, Accra, of the same date.

the tenure of membership of their representative. A majority of the voters in the particular district addresses a petition to the Speaker indicating that the member concerned no longer enjoys their confidence. However, this petition of recall must be passed to the Speaker through the General Secretary of the Party.[1]

In view of the considerable powers with which the President is invested, the manner of his election is more important than that of Parliament, which merely assists him in running the state.

The National Assembly is required to approve the single nomination of a presidential candidate laid before it by the Chief Justice who acts as returning officer for the presidential elections.[2] Only a member of the party may be nominated by at least three nominators. The General Secretary of the party must endorse the nomination which the National Assembly must approve, failing which it stands dissolved.[3]

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1. National Assembly Act s. 2 (d).
2. Presidential Elections Act, 1965, Act 292, ss. 4,5.
3. s. 5.

One-candidate elections.- francophonic style.

This system is usually adopted for the election of a President. There is only one candidate but he cannot be declared unopposed. The election is of interest more for the number of absent voters and spoilt ballot papers. Thus during the Cameroon Republic's presidential elections in 1965, of a total of 546, 926 registered voters in West Cameroons, 430,075 cast their votes. There were 116,851 abstentions and 460 invalid votes.[1] The elections confirmed the popularity of Messrs. Ahidjo and Foncha for the presidency and vice-presidency respectively. It is, however, significant that over 20 per cent of the electorate were either indifferent or would have preferred some other candidates were they given a choice.

The single list system:

Here the electorate are still permitted to choose between rival parties though in the final analysis their choice is not given full effect. In Gabon, Chad, Dahomey and Togo, the state is converted to a single constituency.[2] Each voter would vote for a list which would include the President of the republic, and all the members of parliament.

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1. West Africa, April, 17, 1965, p. 423.
2. G. Rosberg, 'Democracy and the new African states' in African Affairs, St. Anthony's Papers No. 15 (1961), Cf. Wallerstein, Africa, etc. p. 157.

The Ivory Coast and Senegal do operate the single list system too but the list elects only parliament, the President being separately and directly elected.

As already noted, the idea of a single list system is to create a monolithic parliament so that the opposition even if strong in certain areas and could have obtained some seats, would be totally unrepresented.[1]

Under the system, the individual counts for little. It is the party or more accurately the leader who earns the necessary votes.

Closed leadership and the Rule of Law

It would have been apparent from the foregoing brief survey of electoral systems that African leaders are not as yet prepared to surrender political power willingly to their rivals even in countries such as Nigeria where opposition parties are allowed to organise freely. This confirms the impression already noted that these leaders see themselves in the image of traditional chiefs who hold their position for life.

The masses probably see them likewise and would tolerate them as long as they are not excessively despotic.[2] Periodic elections have, in the circumstance, become a sort of grand ritual to confirm in power, but not to change

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1. Zolberg, op.cit. p. 265.
2. D. Nicol, Africa, a subjective view (1964), 6.

the existing rulers.[1] Nevertheless, it has been found necessary in some places to adopt electoral procedures that make a genuine expression of the will of the people virtually impossible. In yet other countries, the conventional electoral system is so manipulated as to frustrate the wishes of the opposition elements.

We have in the preceding chapter discussed at some length the reasons for the reluctance of African leaders to encourage competitive leadership. They believe that if their rivals are allowed to canvass freely for support, they would abuse that freedom by appealing to sectional sentiments or blaming the government for unavoidable errors or promising the impossible such as the abolition of all taxes if voted into power.

In self-defence too, the leaders have to consider what becomes of them if they are dethroned. Most of them are professional politicians with no worthwhile independent means of livelihood. Defeat at the polls would spell disaster to many of them for it would mean descending from a position of power and relative wealth to obscurity with nothing to fall back upon.

Whatever may be said in mitigation of African leaders' tight grip on the power which was bequeathed to them at

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1. Who have been aptly called 'national fixtures'. K.Young,Jr., "New politics in new states" p.499.

independence, critics might still wonder, perhaps, with some justification, whether the label "democratic" can be attached to the governments "elected" subsequent to independence.[1]

Is the political picture sketched here fatal to the Rule of Law? Not necessarily so. One must distinguish between political democracy and a liberal society: the former, in its modern meaning, insists on the virtues of the 'rule of numbers',[2] the latter has a close affinity with the Rule of Law and demands the observance of certain ideals by all governments whatever their form.

This distinction could be overdrawn for, in the final analysis, democracy and liberalism are interdependent[3] though the dividing line between the two concepts provides a starting point from which to consider how truly liberal modern African societies are.

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1. The point is of course hypothetical. There is no reason to conclude firmly that if elections were free and fair the present rulers would not be confirmed in office. What raises the presumption of undemocratic regimes is the reluctance of the leaders to risk open competition for political leadership.
2. Thus Erik von Kuehnelt-Leddin, says democracy "is concerned with the question of <u>who</u> should be vested with ruling power: while liberalism deals with <u>the freedom of the individual regardless</u> of who carries on the government. A democracy can be highly illiberal while, on the other hand, an absolute ruler could be a thorough liberal without being for this reason the least bit democratic". <u>Liberty or equality, the challenge of our time</u> (1952), 87.
3. Hence the expression liberal democracy.

CHAPTER SEVEN

THE FORTUNES OF LIBERTY

The protection of human rights as a guarantee of liberty.

As has been stressed, the Rule of Law presupposes a free society in which the rights of the individual are given the fullest effect. We saw in Part I of this study that a few African states (Group A countries) have not only spelt out these rights in their respective constitutions but have gone further to make them justiciable. The others (Group B countries) are content merely to affirm their adherence to the notion of respect for human rights. However, for a variety of reasons, these two approaches are not as divergent as it might seem.

1. To guarantee individual rights is one thing, to ensure actual observance another. Liberia's Bill of Rights which is nearly 120 years old, outlaws slavery in all its forms.[1]

> "Nor shall any citizen of this Republic or any person resident therein deal in slaves, either within or without this Republic, directly or indirectly."

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1. Constitution, Art.1. S.4.

Yet as we shall see shortly, up to 1962, the Liberian laws were replete with provisions sanctioning forced labour.

2. In any event the guaranteed rights are usually declaratory of the existing laws,[1] so that they are provided for too in the ordinary laws of Group B countries.

3. However, because these rights (as in Britain) form part of the ordinary laws of Group B countries, their scope can be restricted by ordinary legislative process. Ghana's and Tanganyika's Preventive Detention Acts are a case in point. But India too has a Bill of Rights as well as a Preventive Detention Act. It would be recalled too that Nigeria nearly enacted a "detention law" in 1963. The Constitution of Malawi has since been amended to authorise the detention of a person in the interests of defence, public safety and public order.[2]

Furthermore, the legislatures of Group A countries can, in a period of emergency, approve measures

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1. cf.6. the rights relating to protection of life, personal liberty and criminal justice are already adequately provided for in the Criminal Codes and Criminal Procedure Codes of the various countries. cf. Nwabueze, Constitutional law of the Nigerian Republic. pp.348 et seq.
2. The Constituion of Malawi (Amendment) Act, 1964 Act, No.1 of 1964.s.3

derogatory of the rights guaranteed[1] though such measures must be reasonably justifiable to deal with the emergency situation. Even so, this gives a considerable latitude when it is remembered that a parliamentary resolution (supported by a simple majority) whose constitutionality cannot be inquired into in any court of law, would suffice to delcare a state of emergency.[2]

Also in peacetime, provisions[3] safeguarding due process of law, freedoms of conscience, of expression, of assembly and association, of movement, and the prohibition of discrimination can be derogated from by a law "reasonably justifiable in a democratic society".

The meaning of the phrase "reasonably justifiable in a democratic society" is obscure, though a few Nigerian decisions[5] are already indicative of judicial attitude to it. In Cheranci v. Alhali Cheranci,[6] for instance, Mr. Justice Bates suggested that Nigerian courts should,

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1. Except in three instances, namely, provisions relating (i) inhuman or degrading punishment, (ii) slavery and forced labour, and (iii) retroactive penal legislation. For Nigeria, see Constitution ss. 19, 20, and 22(7).
2. See the Nigerian case Williams v. Majekodunmi. 1962 All N.L. R 328.
3. Nigerian Constitution ss.23-28.
4. cf. D. la Van Grove, "The 'Sentinels' of liberty? The Nigerian judiciary and fundamental Rights." (1963) J.A.L. 152.
5. See a useful summary of the important cases by L. Brett, "Digest of the Nigerian Constitution" (1964) 8 J.A.L. 185-194.
6. 1960 N.R.N.L.R. 24

in construing the phrase, be guided by the experience of India and the United States of America, where the courts proceed on "a presumption that the legislature has acted constitutionally and that the laws which they have passed are necessary and reasonably justifiable."[1] Therefore, the burden of proving that a particular law is not reasonably justifiable is on the citizen who asserts the contrary.

With respect, this approach would have an unduly hindering effect on the rights guaranteed[2] as it seeks to prescribe a uniform test irrespective of the nature of the right allegedly infringed. As Professor Alan Gledhill has observed,[3] it is impossible to lay down an abstract standard or pattern applicable to all cases. The court should consider each infringed law separately, regard being had to "the underlying purpose of the restriction, the extent and urgency of the evil sought to be remedied and the prevailing conditions of the time; it must consider whether the restriction is disproportionate to the evil whether the remedy is worse than the disease."

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1. Ibid., p.29.
2. The Indians are themselves restricting "attempts to fit American terminology into the Indian Constitution." P. Pandit op.cit., p.19.
3. Fundamental Rights in India p.59.

If the principle enunciated in the Cheranci Case is correct, then it would seem Group A countries are no less prepared than Group B ones to exalt majority rule even though the primary objective of constitutional guarantee is to restrain that rule. If follows too that one cannot really criticize Group B countries that with them alone, national independence connotes group rather than individual freedom.[1]

4. In practical terms, the entrenchment of rights may not mean much in the African context. In de jure or de facto one-party states, the requirement of a special majority (usually two-thirds) for constitutional amendment is not an adequate protection. It is not surprising therefore that of the one-party states only Kenya[2] has a Bill of Rights. Malawi's Bill of Rights, as already noted, is likely to be short-lived as the proposed constitutional changes for a republic do not provide for a Bill of Rights.[3] Meanwhile, the constitutional amendment procedure requiring the support of at least two-thirds of the members of Parliament during the second and third readings of any Bill

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1. Ghana, for example. cf. Pedler, "West Africa, crucible of freedom" p.35.
2. Kenya (Republican) Constitution, 1964. Ch.2.
3. It has also been noted above that a serious inroad has been made to the right relating to personal liberty with an amendment permitting detention without trial.

proposing an amendment to the Constituion[1] has been altered. The Constituion like any piece of legislation can now be changed by a simple majority.[2]

5. Nor should it be thought that once these rights have been spelt out and made constitutionally secure, a clean break is necessarily made with the past. On the contrary, it is customary, expressly, to save some stringent laws[3] and practices which would otherwise be inconsistent with the rights guaranteed. A few of these exceptions are so widely phrased that some purists have doubted if much was gained in enumerating the rights in the first place.

6. Far-reaching exceptions apart, it has been suggested that those African countries with guaranteed rights have been holding out a false prospectus since they know fully well that the overriding problems facing

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1. The Constitution, S.46. See now S.4A.
2. cf. S. Roberts, "The Constituion of Malawi." [1964] J.A.L. 178.
3. S.21(2) of the Constitution of Uganda 1962 is typical: "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section (dealing with protection from inhuman treatment) to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Uganda immediately before 9th October 1962 (because the Constitution became operative on that date). See furhter, Holland, "Human rights in Nigeria" pp.147-148.

new states - consolidating national independence, integrating the disparate communities making up the new nation, and the irrepressible desire to achieve rapid economic growth - are such that state policy could not be founded on the primacy of individual liberty.

The supposed antithesis between liberty and economic progress has dominated this interesting debate. Harold Laski has argued that freedom (of speech, for example,) could hardly be said to exist in a political society which lacks economic security.[1] None but the exceptional citizen would speak out his mind for fear of losing his job. The Indian philosopher Humuyum Kabir too, though conceding that liberty and security are not incompatible, pleads:

> "The demands of security must take precedence over the demands of liberty in respect of the minimum human needs."[2]

This accords with the views of most African leaders. President Nyerere has said,

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1. UNESCO Symposium on Human Rights pp.86 et.seq. also J. Somerville ibid., pp.152-153. C. Bay wrote: "if people starve, it is nonsence to expect them to care for free speech.....starvation can confine the freedom of expression more effectively than political tyranny." The Structure of freedom (1958).
2. UNESCO Symposium on Human Rights p.192.

> "There is never a single 'correct' answer when a conflict of principles is concerned. For it is comparatively easy to build a nation of well-fed robots who have no ideas of their own, or have a society where everyone can talk while they are starving. But we are aiming at achieving all the freedoms, and that means thinking at every stage of the progress both about the principles and about the techniques of advance."[1]

Circumstances would change as would the emphasis given to the social, economic and political freedoms.

> "At present, however, we have to face the fact that in general terms the freedom for all to live a decent life must take priority. Development must be considered first and other matters examined in relation to it."[1A]

Some of these contentions have been challenged by Professor D. V. Cowen, who emphatically repudiates "the notion that the provision of social and economic security should be given pride of place above all the other freedoms."[2] Individual liberty and social and economic

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1. Address at the opening of Da-es-Salaam University College Campus, August 21, 1964. PRO/21. p.12.

1A. Ibid., cf. Kwame Nkrumah, "True freedom for all, speech at the Fourth Afro-Asian Solidarity Conference, May 10, 1965. p.6.

2. The foundations of freedom. p.121.

security, he says, are not mutually exclusive. The traditional freedoms would be small comfort without amenities; but equally, amenities are worthless without freedom. The problem is one of striking a wise balance between both. He concludes as follows:

> "I have.... yet to learn how the right to personal freedom and a fair trial, freedom of speech and the press, and freedom of worship, stand in the way of economic and social security in a given state. And if it is felt in a particular state that they do, then the state in question I would say, is not worth living in."[1A]

Which African states are worth living in? The survey of liberty in Africa which follows may assist in answering this question. The Human Rights Chapter of the Nigerian Constitution would provide a frame of reference.

A. PROTECTION OF LIFE AND HUMAN DIGNITY.

I. The right to life.

The sanctity of life is safeguarded by the

1A. Ibid., p.122. Also "African legal studies etc." in African Law, New law for new nations (ed. H.W. Baade) (1963) 25-32.

constitution[1] as well as by the criminal laws[2] of every country. Intentionally to take the life of a person is an offence usually capitally punished. However, the state, pursuant to a lawful sentence to that affect, may authorise the taking of life. Death caused in certain circumstances is also excused. Thus, provided no more force than is reasonably required is inflicted, no offence is committed if death occurs when

(i) acting in defence of persons or in certain cases of property too,

(ii) preventing the commission of a serious crime,

(iii) preventing a detained person from escaping lawful custody, and

(iv) when effecting an arrest.

It is for the court to decide the reasonableness of the amount of force used. In the last case mentioned, the court would have regard to the grave nature of the offence for which the arrest was being made as well as the circumstances of its commission.[3]

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1. Nigeria, s.18.
2. cf. Ghana Criminal Code 1960 (Act 29) ss. 46-52. Tanzania, Penal Code Cap 16, ss. 196-200.
3. Muhidini S/O Asumani v. R (1962) E.A.383; also Cole and Denison on.cit., pp.240, 248.

II. Freedom from slavery or forced labour.

Slavery or servitude is everywhere prohibited by law. So is forced labour which term is defined as

> "work or service which is exacted from every person under the menace of any penalty and for which the said person has not offered himself voluntarily."[1]

Inevitably, certain types of involuntary labour are excepted from this general rule:[2]

(i) Work or service executed in virtue of compulsory military service provided it is of a purely military character.

(ii) Any work or service which forms part of the usual civic obligations of the citizens of a fully self governing country.

(iii) Work or service required in cases of emergency i.e., in the event of war or of a calamity e.g., fire, flood, famine etc.,

(iv) Minor communal services of a kind which being performed by the members of the community in the direct interest of that community may be considered a normal civic obligation.

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1. Art. 2, Forced Labour Convention, 1930 No.29.K.O. Series.
2. Ibid.,

Many African states have ratified the 1930 Convention and the Convention on the Abolition of Forced Labour, 1957.[1] Nonetheless, labour practices in some of the states still fall short of the standards laid down in both conventions,[2] though only very few of the discrepancies are fundamental. Indeed most of the alleged abuses may be traceable to the difficulties posed by the vagueness of the provisions of the convention. For instance, it is not clear whether it is legitimate for the state to compel conscientious objectors who refuse to serve in the armed forces to carry out civil work in lieu of their compulsory military service as the Nigerian Constitution[3] and those modelled on it provide. Or converseley, could the state in peacetime substitute public services of a civil nature for compulsory military service for all young men liable to a call-up? The French adopted the latter

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1. No.105.
2. See especially, Report of the Committee appointed under Article 26 of the Constitutition of the International Labour Organization to examine the complaint filed by the Government of Portugal concerning the observance by the Government of Liberia of the Forced Labour Convention, 1930. (1963). Official Bulletin, ILO (Supplement II); also Report of the ILO Committee of experts on the application of Conventions and Recommendation (1962).
3. S.20. (3) (b).

practice in their African colonies and the resulting economic advantages were so attractive that most francophone states have carried it into independence.[1]

Other variations of this practice are also known. Thus in the Congo (Brazzaville), a compulsory service is imposed on any person between the ages of 18 and 23 who have been in residence for more than six months in mission centres and cannot give proof of regular employment.[2] In 1963, Upper Volta passed a law authorising the requisition of any male or female above the age of 18 "for certain tasks of national interests."[3]

These practices have been held to infringe Article I(b) of the 1957 Convention forbidding compulsory labour "as a method of mobilizing and using labour for purposes of economic development."[4] As would be expected,

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1. Chad, Ordinance No. 2 of May 1961. ss.4 and 7. Gabon, Legislative decree of 6 December 1960, S.7 and Act No. 19/61 of 12 May 1961 S.4; Senegal, Ordinance No. 60/54 of 14 November 1960 ss.21 and 26. Ivory Coast, Act 61-209 of 12 June 1961, S.18 and Act No.61-210 of the same date, S.2. The Ivory Coast scheme has, however, been scrapped. See M.Bell Army and Nation, in sub-Saharan Africa (1965). A civilian work force like Ghana's Workers Priyade has been substituted. West Africa, August,21, 1965 p.933.
2. Act No. 44/59 of October 1959 ss.2 and 5.
3. West Africa, February 16, 1963, p.175.
4. Reports of the I.L.O. Committee of experts (1962) pp.214-217.

many African states anxious to mobilize their manpower to the best advantage are finding this clause irksome.

A visitor to Nairobi cannot fail to notice the thousands of loiterers who have left their villages for the town in search of "soft jobs." Such people may be arrested and charged before the courts for contravening the Vagrancy Ordinance.[1] On conviction, they are either sent back to their districts[2] or detained in places of detention[3] for not longer than three months. If at the expiration of that period "no suitable employment has been obtained and accepted" by a detainee, he is sent back to the district where he normally lives.[4]

It is felt that the government should, in these cases, be able to compel a vagrant, who refuses every job offered to him, to serve on a public project for his own and the national benefit. He should be paid such remuneration as is payable for similar work in an open market.

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1. Cap. 58.
2. A repatriated vagrant must not leave his district within three years unless he has been issued with a permit so to do. S.4(1)(b).
3. S.4.(1)(a).
4. i.e., if he is a Kenyan S.10(2)(a); otherwise, the Minister has a discretion to discharge him or order him to leave Kenya. S.10(2)(b).

The francophone states have met the above difficulty by proceeding on the principle that the right and duty to work are correlative. A person may not be forced to do specific work "except for the performance of an exceptional public service in the general interest on a basis of equality and under the conditions determined by law."[1]

It seems at first that the latter qualification is covered by communal services or self-help which Article 19 of the 1930 Convention protects. But self-help is given a somewhat restricted meaning in the Convention. The services must be minor and of a local nature. Examples given are: maintenance work, and in exceptional circumstances, the erection of small school, and medical and treatment room. In Africa however, self-help has a wider connotation.[2]

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1. The Constitution of Mali, 1959 as amended by Act No.60-1. As noted above the practice is frowned upon by the I.L.O.
2. In Tanganyika (Tanzania) self-help is, for instance, statutorily protected. It is an offence to dissuade persons from assisting with self-help "approved by Regional or Area Commissioners". Penal Code (Amendment) (No.3) Act 1962, s.87C. In Zambia, the President and his entire cabinet recently joined the Zambian Regiment in a "communal work" namely, the building of a 160-mile road from Sevanje to Luapula. See the Republic of Zambia Press Releases No. 1258 and 1296 of August 1965.

A re-definition of the term "forced labour" may be called for to take sufficient account of African situation and economic problems,[1A] though not to condone such blatant cases of forced labour as were rampant in Liberia[2] and were, up to 1961, protected by the laws of that country.[3] Some examples were:

(i) The exaction from every male citizen within Tribal Jurisdiction of unpaid labour for the construction or repair of public works.[4]

(ii) A system of compulsory paid porterage requiring the prompt supply of porters by chiefs upon request from any private person or official.[5]

(iii) The supply by chiefs of compulsory labour to persons engaged in prospecting, mining and farming.[6]

(iv) Compulsory female labour in "rubbing" houses in civil or military camps.[7]

(v) The requirement that every able-bodied aborigine in the Tribal Jurisdiction should plant crops and take them to market when ready.[8]

1A. cf. the well-known economist E.F.Schimacher who has suggested the creation of "workplaces" in rural areas to ease mass unemployment and mass migration into a few metropolitan areas in developing states. "How to help them to help themselves". The Observer, London, August 29, 1965.

2. Report of the I.L.O. Commission, op.cit.,

3. The Code of Laws (as revised) 1956.

4. Aborigines Law ss. 221 to 224.

5. ss.240 to 248.

/cont'd.overleaf...

(vi) The summoning of male inhabitants of townships and adjacent aboriginal settlements for maintenance of local roads.[1]

The Government of Liberia told the investigating Commission of the International Labour Office that none of the foregoing laws had been enforced.[2] In any event, all "antiquated statutes which did not represent present-day practice would be repealed shortly. This was hardly a convincing defence, but the Government true to its undertaking, had by May 1962 eliminated all the major discrepancies between its laws and the requirements of the Conventions.[3] It would be wishful to expect that these statutory reforms would bring about instant change in the long-established labour practices of Liberia but it is encouraging that the Government who had defaulted several times before in forwarding obligatory reports under the Convention, also undertook henceforth to issue the reports as and when due.[4]

/cont'd. from previous page.
6. ss. 249, 250.
7. s. 257.
8. s. 423.

1. Public Works Law, S.30.
2. Report p.105.
3. Ibid., p.110.
4. Ibid., p.112.

III. Freedom from torture and inhuman treatment.

The use of torture in the criminal process to elicit information or to extract confession from an accused is everywhere regarded as unlawful. Ghana expressly prohibits the rough handling of a person about to be arrested; he may not be subjected to more restraint than is necessary to prevent his escape.[1] What about those in lawful custody? A letter purportedly written in Ghana and smuggled out of prison read in part:[2]

> "Many of us have completed close on seven, six, five, four or three years of imprisonment, as the case may be, in conditions of severity worse than those laid down by law and accorded to convict prisoners."

The letter went on to allege that Dr. J.B. Danquah, the former Opposition leader who died in detention aged 69, was tortured for 13 months and kept in chains until his death.

A London newspaper[3] a few days later, followed up this story with the publication of a photograph allegedly taken in a Ghana prison depicting "Members of the Opposition"

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1. Ghana Criminal Procedure Code 1960, Act. 30 s.6.
2. The Times, March 12, 1965.
3. Daily Express, March 17, 1965.

shackled and sitting on the ground. The authenticity of the photograph was denied by President Nkrumah in an address to Parliament.[1] As was later shown by a Ghana Government spokesman, the said photograph was in fact of Togolese prisoners in a Togo prison and had been taken shortly after the 1963 coup d'etat at the request of the new rulers "to show how political prisoners were treated in detention under the Olympic regime."[2]

The punishments which obtain in African states are death, imprisonment, fine, flogging and deportation. Preventive detention or restriction should be reckoned a punitive measure where its duration is prolonged (e.g., it exceeds three months). None of these punishments is degrading per se, but the circumstances which attract them[3] and how they are administered could drastically affect their nature.

A person sentenced to death may be totally pardoned or his capital sentence may be commuted to a term of imprisonment

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1. West Africa, April 3, 1965, p.363.
2. What the British Press would not print about Ghana. (Text of a Press statement by Mr.N.A.Welbeck, Ghana's Minister of Information and Party Propaganda Secretary on April 15,1965).3
3. Cf. s.31A(1) of the Law and Order (Maintenance) Act 1960 as inserted by the Amendment Act, 1963 of Southern Rhodesia which provides for the death penalty for throwing petrol or other inflammable liquid on a dwelling house with the intent of setting it on fire or attempting to do the same in respect of any building in which a person is present. It is immaterial whether the accused knew such person's presence or not.

by the Executive in the exercise of its power (or prerogative) of mercy. In some countries, an admirable system has been devised to ensure that the executive is properly advised as to the merits of each application before it. An advisory committee variously constituted in different countries is established[1] whose duty is to consider the report of the case as given by the trial judge and any other relevant information as could be derived from the case. The committee's observations and recommendations (if any) are then transmitted to the appropriate minister for the latter's personal decision.

With a few exceptions, the death sentence is humanely carried out. One such exception was the public hanging of five political offenders in Burundi before a crowd of 10,000 people on January 15, 1963.[2]

The distinction between ordinary prison sentence and one with hard labour is still observed in nearly all the countries though not much should be made of this.[3] In any

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1. The Zambain committee comprises such persons as may be appointed by the President and they hold their position at his pleasure. Constitution s.55. In Malawi, the committee is entirely ministerial. Constitution s.73. While in Uganda and Nigeria no more than two ministers may sit on the committee which has from five to seven other members, one of whom (in Nigeria) must be a medical practitioner: Nigeria constitution ss. 102,103. The Supreme Court may also be vested with advisory jurisdiction in respect of the prerogative of mercy, ibid., s.116.
2. (1962) BICJ.14. A law has just been passed in Malawi to permit public hanging of condemned criminals.
3. France (But not the United Kingdom) still makes the distinction.

case, steps are being taken in some of the countries[1] to reduce the number of offences which are liable to imprisonment with hard labour. Prison terms are subject to remission for good conduct in appropriate cases.

Two penal measures which have earned much criticism call for brief comments. They are haddi lashing practised in Islamic communities and still retained in Northern Nigeria despite the Human Rights provisions, and the Minimum Sentences Act in Tanzania.

(a) Haddi lashing: Hadd is an unalterable punishment expressly provided for by the sacred texts,[2] but the offences which carry the punishment are limited and an almost impossible burden of proof has to be discharged to establish them. Thus, illicit sexual intercourse (zina) (for which 100 lashes are prescribed (plus a term of imprisonment in certain cases)) must be proved either by a sustained confession of the accused or by the testimony of four trustworthy Muslim witnessess to the very act.[3] An accuser who fails to make out his case in this regard may himself be guilty of qadhf that is, imputing incontinence to a chaste Muslim without just cause. The

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1. Nigeria for example, see T.O.Elias, "Some considerations on the administration of criminal justice in Nigeria" (1962) International Review of Criminal Policy, (No.20) 3.
2. Anderson, Islamic law in Africa, (1953)195-197.
3. Ibid., p.380. But the Malikis hold that the offence is sufficiently proved unless the contrary is shown, when an unmarried woman becomes pregnant.

punishment for qadhf is 80 lashes. Alcohol-drinking (shurb) is similarly punished. The latter offence is more easily proved in that the smell of alcohol or unruly behaviour as a sign of intoxication are regarded as sufficient testimony.[1]

However, it must be emphasized that haddi lashing is not a form of corporal punishment and therefore does not have as its aim the infliction of physical pain.[2] Elaborate rules are indeed laid down as to its administration.[3] Only a cowhide whip may be used which the inflicter must hold with just three fingers. An object usually a book, is placed under his arm to prevent him from raising his arm above his shoulder. The punishment is administered in public all of which goes to show that it "is to be regarded as a disgrace and sometimes even as a sort of religious penance rather than a very severe physical ordeal."[4]

(b) Tanzania's Minimum Sentences Act, 1963.[5] The objection that has been voiced against this measure is two-fold:[6] first for the severity of the penalties it prescribes for certain scheduled offences and secondly for the strict limitation it places on the discretion of the Courts in sentencing.

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1. Ibid., p.375.
2. Cf. Nwabueze, Machinery of Justice in Nigeria (1963) 236-7; Constitutional Law of the Republic of Nigeria, p.350.
3. See The Criminal Procedure (Haddi Lashing) Order in Council 1960. Further, S.S.Richardson and T.H.Williams. The Criminal Procedure Code of Northern Nigeria (1963) 182.
4. Anderson, Islamic Law in Africa, p.197.
5. Act. No. 29.
6. See Cole and Denison, op.cit., p.313. For a critique of the Act, see J.S. Read, "Minimum Sentences in Tansania" (1965) JAL 20.

Three classes of offences were dealt with in the Act according as the prescribed punishment varies.

(a) Part I offences attract a minimum term of two years' imprisonment and at least 24 strokes of corporal punishment.[1] They include:[2]

(i) stealing by a person in the public service;

(ii) stealing by a servant where the offender is an employee of a local authority, a registered trade union, or registered co-operative society, a political party, a missionary or a charity;

(iii) theft where the offender knew or should have known that the property stolen belongs to the Government or any of the bodies mentioned in (ii);

(iv) robbery;

(v) housebreaking or burglary;

(vi) taking part in corrupt transactions or obtaining an advantage without consideration;

(vii) attempting to commit the above offences.

(b) Part II offences are punishable by a minimum term of three years' imprisonment and at least 24 strokes of caning.[3] The offences listed here are stealing, or attempting to steal cattle.

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1. s.4(2).
2. Schedule to the Act.
3. s.4(2) and schedule.

(c) Part III offences also attract at least 24 strokes of corporal punishment but the terms of imprisonment for each offence are specified.[1] For example, a person "who is in possession of stock suspected of having been stolen" is liable for three years' imprisonment but if he only trespasses with intent to steal stock, he gets one year.

The Act does not apply to a 'juvenile', that is a person under the age of 16 years;[2] nor to female persons.[3] Male persons over the age of 45 years are also exempted from the provisions relating to corporal punishment.[4]

The Courts are not completely denuded of their discretionary power. A person convicted of a Part I offence, if a first offender (defined under the Act as one who has not been previously convicted of a scheduled offence or of any offence relating to property),[5] and the value of property stolen etc., does not exceed 100/- and there are special circumstances, may be sentenced to either 10 strokes of corporal punishment or any term of imprisonment that would meet the requirements of his case.[6]

It is to be regretted that this useful discretionary

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1. Ibid.,
2. s.2(1).
3. s.2(2)(a).
4. s.2(2)(b).
5. s.5(5).
6. s.5(2).

power does not extend to Parts II and III offences. In one rather sad case,[1] a youth aged 19, with no previous convictions was, on his own confession, convicted of stealing a pig worth 40/- and was sentenced to nine months' imprisonment by a magistrate who mistook the case for one in which he could exercise a discretion as to sentence. The High Court had no choice but to enhance the sentence to the prescribed minimum of three years and 24 strokes.

As the Act lays down a minimum and not a maximum punishment the Courts are at liberty to impose a heavier sentence in appropriate cases. But such is the distaste many High Court Judges have shown for the Act that it is doubtful if any extra strokes (which could be as many as yet another 24 strokes)[2] ordered by a magistrate would be allowed to stand. Indeed, the Act has generally been very narrowly construed.[3] Thus, where an accused admitted in answer to a question from the Bench after his conviction that he knew the shop he stole from was a co-operative shop, his appeal to the High Court against the minimum sentence imposed, was upheld.[4] Law J's explanation was that it

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1. Republic v. Chotara S/O Ulumgile, Tanganyika High Court Bulletin 1964 Case 196.
2. Corporal Punishment Ordinance, Cap.17,s.8(2).
3. Some of the decisions arising from the Act are reviewed by Read, op.cit.,
4. Salum S/O Alli v. Republic Tang.H.Cf.Bulletin 196 Case 224.

was improper for the magistrate's Court to fill gaps in the prosecution evidence. The prosecution must prove that the said shop belonged to a registered co-operative society even though in the instant case the shop was Cosata's, the leading national co-operative retail society.[1]

One other unpopular feature of the Act is the manner prescribed for administering the corporal punishment.[2] The 24 strokes are to be administered in two instalments, the first soon after the offender is admitted into prison and the second on the day immediately prior to the day of his release or if the latter is not practicable, then on such earlier day as is practicable. Additional strokes, if any, are to be administered at any time between the two instalments.

What is the justification for this "Draconian measure"?[3] The Vice-President of Tanzania, the Hon.Mr.R.M.Kawawa has this to say,[4]

> "They are not policies which we like and I am convinced that the Prison Officers do not like them either; to administer corporal punishment is an unpleasant thing for any civilized person to do. But we have to make people recognize that to commit

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1. Read op.cit., p.37.
2. s.5(3).
3. Cole and Deninson op.cit., p.313.
4. Speech at a seminar for prison officers at the University College, Dar-es-Salaam, November 21, 1963 quoted by Read, op.cit., p.23.

> an offence against the nation, or any of its citizens, is an evil thing, which is a disgrace to a man who does it."

The Act, therefore, aims at arresting the rising rate of crimes.[1] Imprisonment alone has failed to achieve this desired result. Because, during the colonial rule, political leaders were sent to prison, the people have come to regard the latter as an abode for martyrs:

> "all prisoners tended to get the sympathy of the public. There was not any feeling of disgrace in going to prison or having a member of your family in prison.[2]

Moreover, some criminals look upon the prison as a sort of hotel which they gladly frequent as non-paying guests.

At first, it seems odd to prescribe such a heavy penalty for stock and cattle thefts,[3] but one should bear in mind that these thefts often lead to inter-clan unrests, even violent disturbances.[4]

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1. Especially in cases of fraud of Government funds. Cf. Read, ibid., pp.24-25.
2. Kawawa, ibid., p.22; further, National Assembly Debates (Hansard) June 11 and 12, 1963.
3. i.e., Part II offence carrying 3 years and 24 strokes.
4. Moreover, according to figures published in 1961, stock theft and arson totalled 43,986 an increase of 8,486 reported cases over the 1959 figures. The number of herds of cattle stolen was given as 10,455 (with 5,080 recovered) in 1,783 reported cases, an increase of 177 cases over the 1959 cases. Tanganyika Data Book (Information Services)(1961).

Every society takes measures which it considers appropriate to cure itself of certain chronic evils. In the Soviet Union, a person guilty of embezzlement of State funds on a particularly large scale is liable to be sentenced to death.[1] Judges in Britain have been constrained to impose as long as 46 years' term of imprisonment on spies, and up to 30 years on some of the "Great Train" robbers. Relevant as these harsh penal measures are to the present discussion, they cannot excuse any treatment of offenders that appears to degrade the human person.

It was envisaged that the Minimum Sentences Act sould be temporary. But as Mr.J.S. Read prophesies, "it has come to stay, and ..... may well serve as a prototype of similar measures in other African countries."[2] In view of the utterances of some African leaders, he is likely to be proved right. To cite just one example, President Sekou Toure of Guinea has said that his Government would deal with thieves with the utmost severity:

"In future, no pity shall be shown to thieves.
We shall impose extreme penalites on them...."

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1. A similar punishment is prescribed for counterfeiting. Decree of the Presidium of the Supreme Soviet of the U.S.S.R. extending the death penalty laid down in the Criminal Code of 1961. See generally, I.Lapenna, "The new Russian Criminal Code and Code of Criminal Procedure".(1961) 10 ICLQ,421; 437-438.
2. Op.cit., p.39.

"In our eyes, the thief is an evil being whether he steals millions or only a pin, his behaviour comes from mentality which we intend to destroy".[1]

In Nigeria, on the other hand, even though crimes are on the increase, the trend is towards making the object of criminal practice more reformative than retributive.[2] In this direction, a committee has been set up by the Federal Ministry of Justice to revise the criminal law.

B. THE PROTECTION OF PERSONAL LIBERTY.

All African legal systems acknowledge the right of the individual to the liberty and security of his person but usually, cases are specified when it shall be legitimate to deprive him of this liberty.[3] The extent of such deprivation is important for it could easily become arbitrary. Even where the deprivation is within bounds, the established procedure must be scrupulously followed.

I. Arrest

A criminal has to be apprehended and brought to justice. Therefore, a person who is seen committing or is suspected of having committed a crime may be arrested. In

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1. Toward full re-Africanization (1959) 46 quoted by Read ibid., p.20.
2. Elias, "Some considerations on the administration of criminal justice in Nigeria", p.6.
3. Cf. Nigerian Constitution s.21.

exceptional cases, arrest may also be made if that is the only way of preventing the commission of a criminal offence.

The power of arrest is carefully regulated. Private persons can make arrests in restricted cases; the police powers are wider but, even so, these are hedged about.[1] With listed exceptions, every arrest must be supported by a warrant duly signed by a judicial person, i.e., a magistrate or (very rarely) a judge. The warrant contains a concise description of the offence charged and names or otherwise describes the person to be arrested. He must be told the cause of his arrest. This rule is relaxed if the arrest occurs during the course of the commission of a crime or when after committing the crime the criminal is pursued and caught, or if the person is arrested while escaping from lawful custody. Another recognised exception is where the arrested person does not make it possible for the person arresting him to give the necessary information as when he assults the police officer making the arrest.[2]

As the writ of Habeas Corpus still runs in most

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1. For Ghana see Part I of the Criminal Procedure Code, 1960. Act 30.
2. N.Juma v. Republic of Tanganyika (1964) EALR 107 following R. v. Msengi Abdullah (1952) ITLR (R) 107 where the dictum of Viscount Simon in Christie v. Leachinsky (1947) 1 AER at pp. 572-573, was quoted with approval.

anglophone states,[1] it would secure the immediate release of a person wrongfully arrested. Unlawful arrest is a criminal offence in every country which is heavily punished in francophone states.[2] It is also a tort in anglophone states for which the victim may claim compensation.[3]

II. Pre-trial detention

A person under arrest must be taken without delay to a police station or to any lawful place of detention.[3] If he is not formally charged, he must be relased forthwith. If a charge is preferred against him, he is nevertheless to be taken before a magistrate (an examining magistrate or a prosecuting attorney in francophone states) within 24 hours.[4] In Tanzania, a "justice of the peace"[5] (who has full powers of arrest)[6] is enjoined to take persons arrested by him or on his orders before a magistrate "without unnecessary delay".[6] If, however, no magistrate is available, he could remand

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1. Thus s.348 of Tanganyika's Criminal Procedure Code empowers the High Court 'to issue directions in the nature of Habeas Corpus' Cf. Ghana's Habeas Corpus Act 1964 (Act 244).
2. In Central African Republic, imprisonment for 5 to 10 years is prescribed. Act. No. 61, s.239.
3. Nigeria Constitution s.21(4).
4. Nigeria's Criminal Procedure Act, 1945. s.9.
5. This is usually a rule of practice in the case of arrest on a warrant, but is mandatory in the case of arrest without a warrant. See the Criminal Procedure Law (Northern Nigeria) 1960.s.42.
6. Every executive officer of a local council is so appointed as are other fit and proper persons. Magistrates' Courts Act 1963 s.43.
7. s.47.
8. s.49.

persons arrested in a prison, lockup, or other place of security for a reasonable time up to a maximum of seven days.[1]

Until an accused has been proved guilty his innocence is presumed. It would not be fair, therefore, to confine him pending the determination of his case, unless there are strong reasons why he should be so restrained. Bail has been instituted to cover this situation. A person admitted to bail[2] executes a bond, with or without sureties conditioned for his appearance for his trial as and when required. Most francophone states have adopted the French practice of providing for offences (of a minor nature) which are subject to bail as of right.[3] In the anglophone states as in Britain, bail is discretionary for all offences.[4] A Judge of the High Court alone grants bail for an offence punishable with death. For a felony, a magistrate may admit the accused to bail if he thinks fit; for any other offence, bail must be granted unless the Court sees good reason to the contrary.

The law appears to contemplate ready admission to bail for less serious crimes. In practice, however, police

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1. s.50(b). Cf. Ghana where in 1962, for security reasons, the Criminal Procedure Code was amended to give the authorities power to detain a person in custody for 28 days. Act.139.
2. And the amount which must never be excessive should be fixed with regard to circumstances. Cf. Malawi Criminal Procedure Code Cap. S.127 (2).
3. French Criminal Procedure Code, Act. 137; 140, 145.
4. Cf. Nigeria's Criminal Procedure Act s.118.

convenience is often placed above personal liberty. Some Nigerian magistrates are known to instruct their registrars to require the police to endorse their satisfaction of any person standing surety for an accused person even where the surety is recommended by counsel to the accused.[1] This curious practice virtually places bail at the mercy of the police.

Bail should normally issue[2] unless the accused is likely to interfere with the course of justice as by influencing and corrupting prosecution witnesses[3] or if he is not likely to appear for his trial. If bail is refused, the prosecution must produce the accused before the Court at periodic intervals not exceeding seven days for a renewal of the authority to hold him in detention. The francophone states have retained the useful rule laid down in the French Code of Criminal Procedure that in correctional matters when the maximum penalty provided by law is less than 2 years' imprisonment, an accused may not be detained for more than 5 days after his first appearance before an examining magistrate unless he has been previously convicted

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1. A.Ekineh, "The problems of bail" 1 N.B.J.14.
2. Save for grievous crimes e.g., murder.
3. R. v. McCormuck, (1864) 17 I.R.C.,L.R.411.

of a felony or of a misdemeanour for which he was sentenced to more than 3 months' imprisonment.[1] In all other cases, detention pending trial cannot last more than 4 months, though in exceptional circumstances, the examining magistrate may prolong that period by another 4 months.[2] In any event, the period spent in such detention is deductable from the term of imprisonment to be served following conviction.

In anglophone states, the law merely requires a trial within a reasonable time,[3] but there is a consolation for the victim of unlawful detention in that he is entitled to a compensation.[4]

III. Detention after conviction.

Imprisonment following conviction for an offence known to the law has been dealt with. But a person convicted at his trial may protest his innocence by appealing to a higher court to set aside his conviction. Ought he to be admitted to bail pending the determination of the appeal? Bail pending trial or at any stage of the trial is, as we saw, founded upon the principle of presumption of innocence. When the accused has been found guilty of the offence by a competent court and sentenced to a period of confinement

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1. Art. 138.
2. Art. 139.
3. Nigerian Constitution s. 22(2).
4. s.21(4).

different considerations must obtain. The courts have to be convinced that he would prosecute his appeal or that he would not disappear, thus rendering the punishment imposed on him ineffective.[1] There must also be a reasonable possibility that his appeal would succeed, or and that the application for bail is not just a way of staying off the evil day.

In theory, it is possible to secure bail where the appeal is not likely to be heard before the appellant's sentence expires.[2] In practice, however, the appellant is usually advised to apply for an accelerated hearing of his appeal.[3] If social circumstances justify the granting of bail following conviction, the court would oblige "but these [circumstances] must be strong and cogent".[4]

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1. Ekineh, op.cit., p.16.
2. Ekineh, op.cit., p.16.
3. R. v. Tarrant, The Times, December 16, 1947. In this respect, the Roman-Dutch law in force in Rhodesia and South Africa, is more favourable than the common law for the principles that apply to admission to bail before conviction hold for bail after conviction pending appeal. Cf. P.Charles' contribution to the discussion on the right to bail in African conference on the Rule of Law pp.115-116.
4. Per. Mr. Justice P.G.Smith in The State v. Tarka Daily Times, Lagos, March, 23, 1965. Mr. Tarka, an opposition leader in Northern Nigeria had been sentenced to 4 months' imprisonment. His application for bail was not granted.

IV. Preventive detention.

A person may not have committed an offence at all, but may nevertheless be detained to prevent him from misbehaving. Two types of such detention may be distinguished.

(a) Failure to give security for good behaviour.

The following classes of persons may be required to give cause why they should not be ordered to enter into a recognisance with sureties for good behaviour for such period (up to one year) as a magistrate may think fit:[1]

(a) one who is likely to commit a breach of the peace or disturb the public tranquility;

(b) one who is suspected of clandestinely taking precautions with a view to committing an offence;

(c) a habitual offender.

If any of these persons fails to furnish the security asked for he may be detained in prison for a s long as two years depending on the amount of security demanded[2]

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1. Cf. Nigeria, Criminal Procedure Act, ss.35-37.
2. s.49 read in conjunction with s. 390.

though he has a right of appeal to the High Court whose decision is final.[1]

(b) Conduct prejudicial to the safety of the state.

This is by far the more important type of preventive detention as it is not usually preceded by a judicial inquiry, and in many cases, as we shall see, the courts are precluded from reviewing the executive order imposing the detention.

(i) Preventive detention in periods of emergency.

The state would go to any lengths to safeguard itself whenever its safety is endangered, preventive detention being but one of the many extreme measures[2] that may be taken to meet the exigency.

In Group A countries, as already mentioned, the fundamental rights guaranteed may be derogated from during this period. Thus in Nigeria, during the Western Nigerian emergency of 1962, the Administrator appointed by the Federal Government of Nigeria to run the Region[3] was invested with unprecedented powers which included the

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1. s.44(2).
2. See e.g., the far-reaching powers conferred on the Government in Ghana by s.4 of the Emergency Powers Act, 1961 (Act 52). Cf. Nigeria, Emergency Powers Act, 1961, Act No.1 of 1961, s.3.
3. Emergency Powers (General) Regulations, 1962, Reg.2.

authority to detain persons who, to the Administrator's satisfaction, had been concerned in acts prejudicial to the public safety, or in the instigation of such acts.[1] But a detainee could move the courts to rule that his detention was not reasonably justifiable for the purpose of dealing with the situation created by the emergency.[2] The detainee may also request that his case be referred to an advisory tribunal, with a legally qualified chairman, and so constituted as to ensure its independence and impartiality.[3] Such reference must be made within one month of the commencement of the detention and thereafter, at intervals of not more than six months.

Most Bills of Rights, subsequent to Nigeria's, contain fuller safeguards for detained persons. In Uganda,[4] Kenya,[5] Malawi[6] and Zambia,[7] the detainee must, as soon as reasonably practicable, but not longer than five days from the beginning of the detention, be furnished with written statement, in a language that he understands, specifying in detail the grounds of his detention. The

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1. Emergency Powers (Detention of Persons) Regulations, 1962, Reg.2.
2. Nigeria, Constitution s. 29(1).
3. s.30.
4. Constitution s.31.
5. Constitution s. 15.
6. Constitution s. 24.
7. Constitution s. 26.

detainee is further entitled to reasonable facilities to consult a counsel of his choice. The latter must be permitted to make representations to the advisory tribunal on behalf of his client who may appear either in person or by his counsel before the tribunal when it meets to hear his case.

It is further required that every detention must be published in the Gazette within a fortnight of the detention order. The notice states the particulars of the relevant law under which the detention has been imposed. In Uganda but nowhere else, there is a useful provision obliging the detaining authority to lay before Parliament a monthly report specifying the number of persons detained as well as those cases which the authority has not found it possible to act in accordance with the recommendations of the advisory tribunal.[1]

(ii) Preventive detention as a permanent feature of the law.

Most countries leave it to the Executive to declare a state of emergency in the first instance; but, within a stated period, usually not longer than three months, the Executive must obtain parliamentary confirmation of its decision.[2] Except in the obvious case of war, Nigeria[3]

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1. s.31(3).
2. See African Conference on the Rule of Law, pp.96-113.
3. Constituion s.70(3).

and Sierra Leone,[1] on the other hand, entrust the declaration of a state of emergency to Parliament alone. In the former, a simple parliamentary resolution would suffice while a two-thirds majority is required for a similar resoltuion in the latter. No cause need be shown in both countries for the emergency delcaration.

The Nigerian Constitution further provides, somewhat superfluously, that Parliament may, by the votes of at least two-thirds of all its members, declare a state of emergency on the ground that "democratic institutions in Nigeria are threatened by subversion".[2]

It is to deal with the latter type of emergency of subversion[3] that many African countries have enacted a standing detention law rather than wait till a public emergency has been formally declared. The Nigerian Prime Minister has regretted the rigidity of the Nigerian Constitution in this respect. He feels

> "the government of any country has a need of a certain power in order to curb subversive activities, in order to protect itself and the citizens from being destroyed".[4]

There are dissident elements here and there who would not hesitate to employ violent methods to effect

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1. Constitution s.25(4).
2. Constitution s.70(3)(C).
3. See H.E.Groves, "Emergency powers" (1961) 3 J.I.C.J. No.2. 1 at p.7.
4. Federal Part Del. August 7,1963,Col.2683.

a change of government in their respective countries. There have been no less than six "criminal attempts and conspiracies", as President Nkrumah reminds us "against my life and against the security of the state since 1953".[1]

The new rulers have also to cope with communal demands for separate autonomous states on ethnic lines. Violence invariably results where these demands are resisted by the Government. The unrest in Northern Nigeria's Tiv Division culminating in the terrible distrubances of 1964[2] in which several lives were lost, is but one example of the problems of integration facing the new states. The Somali question in Kenya is a more serious

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1. Extracts from an Address to Parliament, Ghana Today, April 20,1965. Hardly in any African country has one plot or the other not been uncovered since independence. For Ivory Coast, see West Africa, February 16,1963,p.157; September 14,1963; for Nigeria Republic, West Africa,31, 1964,p.1.323. Leading politicians were tried in Senegal and Nigeria respectively in 1962-3 for allegedly planning the overthrow of the Government. To this record of violence must be added the murder of the Premier of Burundi M.Louis Rwagasoe in 1961. A wave of Army mutinies also swept across East Africa in 1964. But for the view that there has been less violence in Africa compared to other developing areas, see J.Spiro,"Political stability in the new African states", in Africa in motion, p.99.
2. A commission of inquiry was appointed by the Northern Nigerian Government to examine the Tiv problem but the commission's report was not published. The Government's White Paper "summarises the Commission's Report as accepted by the Government". Certain reforms have been decided upon in the political and judicial spheres to take account of the Tiv grievances. White Paper on the Government's Policy for the rehabilitation of the Tiv Native Authority, Kaduna (1965).

specie of the same problem. The Somali tribesmen of the Northern Frontier District of Kenya want the Kenya Government to recognize their right of self-determination. A great majority of them would rather join their fellow Somalians in the Somali Republic than be integrated with Kenya.[1] But if the Kenya Government let them, it is feared the multi-ethnic state of Kenya would crumble as other minority tribes might also seek to secede.

Inevitably, unpopular measures have to be taken in the new countries. People whose interests are thereby affected may create difficulties for the Government. In 1962, the Government of Mali, anxious to improve the national econom y which (even till now) was heavily dependent on France[2] decided to reform the currency replacing the CFA franc with the Mali franc. The former would cease to be legal tender as soon as the latter was introduced. It was a hasty measure and, perhaps, as events later proved, of doubtful economic wisdom but these are no sufficent reasons for the opponents of the

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1. Report of the Northern Frontier District Commission (1962), Cmnd. 1900.
2. A.R.Zolberg, "The political revival of Mali". pp.155-156.

Government to organise wild anti-Government demonstrations at which pro-French slogans were shouted.[1]

In the older and more stable states the threats to public disorder here considered might not pose unusual problems so as to require extreme measures being taken to deal with the situation. This is far from being the case in the new but fragile states of Africa. As President Nyerere frankly admits:

> "Our Union (of Tanganyika and Zanzibar) has neither the long tradition of nationhood nor the physical means of national security which older countries take for granted. While the vast mass of the people give full and active support to their country and its government, a handful of individuals can put our nation into jeopardy and reduce to ashes the effort of millions".[2]

Other excuses[3] have been given for the enactment

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1. "The people's Court in the Republic of Mali" (1963) 16 B.I.C.J.
2. Speech at the University College, Dar-es-Salaam, August 21,1964. Indeed, Tanzania has one of the poorest security forces in the world. With a population of about 9.5 million, spread over an area of approximately 362,440 sq.miles, there are only 1,350 policemen', Even if the Army, as in most new states, is used to maintain internal law and order, there are only 1,400 troops to call upon. For these and other figures showing the security strengths of African states, see N.Brown and W.F.Gutteridge, The African military balance (1964) 5-12.
3. e.g. the law's delay; it is said that it takes far too long to institute criminal proceedings and the trial might drag on for even longer a period; and there is the possibility of an appeal with a further delay. Ghana, Statement by the Government on the Report of the Granville Sharp Commission White Paper No. 10 of 1959. But the Nigerian Prime Ministers's reason for seeking an amendment to the Constitution to permit a law "to curtail the liberty of the Nigerian citizen" was to earn more time for the Executive in the conduct of investigations before the trial.

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of a detention law and its use in times other than emergency periods, but none is as convincing as the above explanation based on the inadequacy of the security machinery of the new states. The belief expressed by the Ghana Government that preventive detention could be a humane alternative to prosecutions[1] could not have been intended to be taken seriously. The suggestion is that the full rigours of the law are not exacted when a person is detained, whereas had he been tried and found guilty he was likely to face a maximum penalty which could be capital punishment. The assumption here is that all detainees are undoubtedly guilty of crimes known to the law.[2] One would have thought in a great majority of cases the objective of detention law is to nip subversive designs in the bud. Even if preventive justice is regarded as a punitive measure and therefore an alternative to criminal prosecutions, it would have logically followed that the citizen would be granted an option in the matter, that is, to be detained for possibly ten years, or to stand his trial. This

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1. Houses of Representatives. Debs. August 7, 1963, Col.2681, Mr.L.J.Dosunnu from the Opposition Benches thought the law as it stood was adequate to deal with the situation the Prime Minister had in mind. Ibid., Col.2684-5.
2. Statement by the Government on the recent conspiracy. White Paper No.7 of 1961 p.34; West Africa, December 16, 1961. p.1377.

submission need not be stretched so far, for the Ghana Government does not appear, in practice, to treat preventive detention and criminal prosecutions as interchangeable. Some detainees have not only been prosecuted, but also when one such trial ended in a verdict not expected by the Government, a re-trial was ordered.[1]

The scope of preventive detention law.[2]

Virtually all Group B countries provide for one form of detention law or the other. One of the widest of these laws is the Congo (Brazzaville) Republic's law of 11 May, 1960,[3] which provides that persons whose activities are dangerous to order, public security, or the prestige of the state, or which tend to compromise the building-up

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1. M.K.Boateng, Minister of the Interior said following the verdict of acquittals in the fresh trial, said: "These three matters (on which detention orders are issued) cover a very wide field and bear no relation to the specific charges of conspiracy to commit treason and treason which were the subject matter of the court's decision". He concluded that the decision of the court would not affect the detention orders made against the accused who were to continue in detention until the detention orders made against them had expired. Ghana Today, December 18,1963.
2. For a world survey of detention laws see "Preventive detention under different legal systems". (1961) JICJ, Nos. 1 and 2.
3. Summarised by J.Pouabou in a background paper to the African Conference of the Rule of Law, Lagos, 1961.

of the Congo Republic may be detained in a special establihsment if the Government so decrees. Such detention is not reviewable in a court of law and cannot prejudice any subsequent prosecutions that may later be instituted against the detainees.

However, in many francophone states, preventive detention does not last long, because there are special criminal or security courts which dispense justice expeditiously if rather crudely.

For the anglophone states, it is proposed to compare Ghana and Tanzania's Preventive Detention Acts.

The Ghana Act first came into force in 1958.[1] As preventive detention was never intended to be "part of the permanent system of government,"[2] the Act was to be temporary; five years' duration was stipulated though this could be extended by a resolution of Parliament for a further period of three years. In 1963, however, the Act was given a fresh five-year term.[3] The present law (which amends and consolidates the existing law), is to be found in the 1964 Act[4] which now permits restriction orders to issue in lieu of detention orders in appropriate cases, e.g., for reasons of old age.[5]

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1. Act.No.17.
2. W.P. No.7/61. p.34.
3. Act.199.
4. Act.240.
5. s.2(1).

Tanzania's Preventive Detention Act[1] is a permanent statute. A detainee thereunder may be detained indefinitely. In Ghana, except in the case of a detainee attempting to evade a detention order whose original term is thereby doubled,[2] no detention may, in the first place, last longer than five years.[3] But a detention order may, at any time, be extended for a further period not exceeding five years.

Ghana's Preventive Detention Act pertains to acts committed or suspected which are prejudicial to (i) the defence of Ghana, (ii) the relations of Ghana with other countries or (iii) the security of the State.[4] The Tanzanian provisions[5] appear wider in that they cover not only acts which are prejudicial to the defence or the security of the State but also conduct dangerous to peace and good order.

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1. Act. No. 60 of 1962.
2. Act 240, s.6.
3. s.3.
4. s.1.
5. Act. No. 17, s.1(1). But the Supreme Court of Ghana has contended that the term "security of the state is generic and must be widely interpreted to cover all offences listed in Part IV, Chapter 1 of the Criminal Code, 1960 (Act 29) Re Akoto, Civil Appeal, No.42/61.

In another important respect, the Tanzanian Act is much wider in that it applies to any person whether a citizen or not.[1] Indeed, of the first dozen or so detainees, only three were said to be nationals of Tanzania.[2]

In both countries, the President issues the detention orders.[3] In Ghana, within five days of his detention, the detainee must be furnished with the grounds of his detention,[4] the corresponding period in Tanzania is 15 days.[5] The detainee must be afforded an opportunity to make representations to the President, but in neither country is he in a position to confront his accusers on whose sworn testimony the detention was based.

In Tanzania, but not in Ghana, there is, (as in Group A countries), an Advisory Committee whose Chairman and two members are appointed by the President while the other two members are appointed by the Chief Justice. The

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1. s.2(1)
2. Personal information, Dar-es-Salaam.
3. Ghana, Act 240, s.1.
4. But the grounds are often too brief, perhaps vague. Here is a typical example: Acting in a manner prejudicial to the security of the State, in that you have encouraged the commission of acts of violence in the Ashanti or Brong-Ahafo Regions and have associated with persons who have adopted a policy of violence as a means of achieving political aims in these Regions. Taken from the affidavit in support of application for habeas corpus by Mr.B.O.Akoto op.cit.,
5. s.6.

Committee advises the President whether, in their opinion, an order made should be continued or rescinded or suspended, though the President need not act on the advise tendered.[1] The Committee is expected to act soon after the President has received the detainee's representations or where no such representation has been made, within a year of the detention order being made and thereafter, at intervals not exceeding one year.[2] The Committee must be informed by the detaining authority of the grounds on which the order has been made and of such other matters relating to the person detained as may be relevant to his continued detention. A copy of the representations made by the detainee is also lodged with the Committee who may interview him if necessary.

There is, however, no way of ensuring that these provisions are scrupulously observed.[3] It is expressly provided that detention orders cannot be questioned in any court of law.[4] Although no such blatant bar is placed on judicial review in Ghana, the courts have all but declined jurisdiction in every detention case that came before them.

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1. s.7(6).
2. s.7(4).
3. There was some delay, for example, in appointing the Advisory Committee stipulated by the Act. It was, in fact, not constituted until nearly two years after the Act came into force although some people have been detained earlier. See Tanzania, Parl.Deb.(Hansard) May 12, 1964. Col.53.
4. Act.No. 17, s.3.

Mention has previously been made of the futile attempt made in the Akoto Case[1] to get the courts to declare the 1958 Act ultra vires Article 13(1) of the Constitution requiring the President in his assumption of office to make a solemn declaration of certain fundamental principles. The courts have further held that the writ of habeas corpus would not lie in respect of any detention order made pursuant to the Preventive Detention Act. The submission that by the Habeas Corpus Act, 1816 which was then in force in Ghana, the courts must inquire into the grounds given by the President was rejected. The subjective test adopted in Britain by the majority in Liversidge v. Anderson,[2] and in India[3] was thus favoured in determining whether the President was in fact satisfied.[4]

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1. Chapter Two.
2. (1942) A.C. 206.
3. Gopalan v. State of Madras (1950) S.C.R.88. But in India vague grounds of detention would render the detention invalid. Shibban Lal v. State of Uttar Pradesh, (1954) S.C.R. 179. See further V.Bose, "Preventive detention in India" (1961) 3 J.I.C.J. No.1, 87, Gledhill, Fundamental Rights in India, 89-94.
4. Contrast the practice in Burma where the Supreme Court has held that it would review the grounds held out by the Executive as justifying any detention. Tinsa Maw Naing v. The Commissioner of Police, Rangoon (1950) B.L.R.17, esp. at p.35. See more fully, U Hla Aung, "Preventive detention in Burma" (1961) 3 J.I.C.J. No.1; 47.

In re Okine,[1] Mr.Justice Smith found the words of Lord Romer in Land Realisation Co.Ltd., v. P.M.G.,[2] particularly apt,

> "It is well settled that where a statutory provision empowers a Minister to do something if he is satisfied, with regard to a certain state of affairs, then a statement by him that he is so satisfied will be accepted by these Courts".

In another case,[3] Mr.Justice Ollennu listed "the main essentials" of a valid detention order as follows:

> "(1) the person against whom the order is made must be a citizen of Ghana, in other words question of nationality;
> (ii) the identity of the person;
> (iii) satisfaction by the President that the order is necessary to prevent i.e., good faith of the President".

There is no indication of how the President's bona fides could be determined other than by his own assertion, and the Supreme Court has said that it would:

> "presume in principle that the high officials of state have acted in good faith in the discharge of their duties. It will be wrong in principle to inquire into the bona fides of Minister of State on a mere allegation of bad faith by a Minister (not to say the President)".[4]

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1. Civil Appeal No. 6/60.
2. (1950) 1 Ch. 434 at p.445.
3. Re van der Puije and 4 others noted in an I.C.J. Staff Study "Ghana's Preventive Detention Act" (1961) 3 J.I.C.J. No.2. 65 at p.68.
4. Re Akoto,

Neither in Ghana nor in Tanzania are provisions made for parliamentary control of detention power in lieu of judicial control. Nor is there an obligation to publish the names of those in detention though, by practice, Ghana announces the names of detainees in the Gazette while in Tanzania, questions on preventive detention are admissible in Parliament. It is from the latter source that we gather that following the Army Mutiny of January 1964, some 555 persons were detained, 305 of whom were released shortly afterwards.[1]

Preventive detention: a postscript.

That preventive detention law is inimical to the Rule of Law needs no emphasis:

> "it means that you are imprisoning a man when he has not broken any law, or when you cannot be sure of proving beyond reasonable doubt that he has done so. You are restricting his liberty and making him suffer materially and spiritually for what you believe he has done. Few things are more dangerous than that.... To suspend the Rule of Law is to leave open the responsibility of the greatest injustices being perpetrated".[2]

One can hardly improve upon the evils of preventive detention as here described by President Nyerere of Tanzania. Yet in the same speech the President insisted

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1. Parliamentary Deabtes (Hansard) May 12, 1964 Col.53.
2. Speech at the University College, Dar-es-Salaam, August 21, 1964.

that he would rather let 99 innocent people suffer temporary detention than allow one possible traitor to wreck the nation.

This is an arguable point of view. While it may be necessary to forestall those planning evil and nip their plots in the bud by temporarily putting them away, such detention should be of short duration and the detainee ought to be afforded access to an impartial body which would pronounce on the propriety of his detention. In short, preventive detention ought to be a brief prelude to a normal trial.

Ghana has now had some eight years of detention law but on every occasion that the measure has come for review prior to one amendment or the other, members of Parliament without party distinction, have spoken up on its evils.[1] One member felt it would in the long run have an adverse effect on the national economy, since detainees in their hundreds are fed by the state.

It should be noted too that the victims of detention power are usually some of the best brains in the country who cannot easily be made to forgo the principles they cherish even if these run counter to the dictates of

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1. Parl.Deb. October 5,1962,Cols. November 4,1963, Col.538 et.seq. May 12,1964, Cols. 2 et.seq; May 14,1964, Cols. 87-89.

the ruling mass party.[1] Yet economic experts have repeatedly warned the developing countries that the economic goals they have set for themselves may be unattainable if they did not husband their intellectual resources most effectively.[2]

The whole cannot be truly happy when a part is dejected. Preventive detention has brought poverty to many a home with children going wayward and wives becoming prostitutes.[3]

The fears that what was conceived as a preventive measure might in the end become an instrument of coercion[4] are being confirmed by some instances of abuse of detention

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1. Cf.C.Legum, "Africa's intellectuals" New Society, December 31,1964: Wallerstein, "What happened to the opposition?" op.cit.,
2. E.Shils, "Intellectuals, public opinion, and economic development". in Independent Black Africa (ed. W.J.Hanna) (1964) 490; But elsewhere the same author advised African intellectuals "to overcome their tendency towards an 'oppositional mentality'." Intellectuals and democratic development' in Africa the dynamics of change, op.cit., p.189.
3. C.J.Nimo, Ghana, Parl.Deb. November 4,1963,Col.539.
4. The Nigerian Prime Minister agreed that preventive detention power could be easily abused. Therefore, he 'as the Prime Minister today, can give no guarantee that such power cannot be misused'. Federal Parl. Deb. August 7, 1963, Col.2683.

power.[1] Mr.J.A.Braimah (C.P.P.) sums it up thus:

> "we know how Preventive Detention Act has been used in many cases. There are occasions when we go into our rooms and ask ourselves is it right? Was that how we thought the Act would be applied? Is there any justification for Mr.X or Mr.Y being detained?

C. PROTECTION OF FREEDOM OF MOVEMENT AND RESIDENCE.

In Africa, as elsewhere, the law discriminates in favour of citizens as against aliens with regard to the right to freedom of movement.

A. Citizens.

As a general rule, a citizen may move freely

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1. Two specific cases of detention 'for no just cause' were cited by Mr.E.W.Dowuona (CCP). Ghana Parl.Deb. No.4,1963 Cols. 542-543. Mr.B.F.Kusi drew attention to another abuse which,thanks to the vigilance of the Commissioner of Police,was averted. There had been a complaint from Effiduase Asokore alleging that four former United Party members were plotting to kill the President. In fact, one of the complainants was in love with one of the suspects' wife. The complainants alleged that the police were siding with the opposition and demanded that the conduct of the investigations he left to the complainants' hands. The Commissioner of Police did not accede to their request. Parl.Deb.May 14, 1964, Col.89. It is thought the Government went too far in detaining several market women who fed the Sekondi-Takoradi Railway strikers in 1961. L.Blom-Cooper, 'Freedom from Justice' (1962) 1 Amnesty 8-9. For the Government's explanation, see W.P. No.7/61. Finally a rather damning criticism of the working of detention system was uttered in 1962 by Mr.Krobo Edusei, then Minister of Agriculture. He accused his colleague, the Minister of Interior of locking up 'a lot of innocent people'. Parl.Deb. Oct.5 1962, Col.131.

throughout his country, and reside anywhere therein though this right is subject to certain restrictions:

1. The law of trespass restricts him to the use of his property or to the property of others with their consent expressly given or implied by law.[1]

2. He may be prohibited by law from acquiring property in particular areas for any purpose including the building of a place of residence for himself.

3. He may be lawfully detained, pursuant on a court sentence or as a preventive measure.[2]

4. If he has committed an offence abroad, he may be extradited to answer his offence.

5. If he is a public officer or a member of the forces, he may be under legal disabilities as to his movement and residence.[3]

6. The Nigerian Constitution expressly provides that a law may be enacted to provide for the removal of a chief or an ex-chief from one part of a region to another or the exclusion of the same from a specified area.[4]

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1. Cf. Nigerian Constitution, s.27(3).
2. s.27(2), e.g., Northern Nigeria, Ex-Native Office Holder's Removal Ordinance cap;68. Arzika v. Governor, Northern Region (1961) N.R.N.L.R. 65.
3. see supra.
4. s.27(4) Cf. Bshugbayi Eleko v. The Government of Nigeria (1931) A.C. 662.

7. In a period of emergency, a citizen's movement may be restricted as happened in Western Nigeria in 1962 when the Administrator detained prominent party leaders to specified places in the interests of public order.[1] The restrictees' constitutional right to refer their cases to an independent tribunal was not, however, tampered with.[2]

8. It may be necessary, in the interests of defence, order, morality or health to restrict freedom of movement in normal times, though Group A countries require that the law sanctioning such restriction must pass the usual test of being reasonably justifiable in a democratic society.[3] In these countries too, with the surprising exception of Nigeria, a person whose movement is restricted under this head is entitled, six months after the detention order has been made, and at six-monthly periods thereafter, to request that his case be referred to an impartial tribunal. Uganda goes further than the others in providing that such reference would still lie even where the restriction

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1. Emergency Powers (Restriction Orders) Regulations, 1962.
2. Nigerian Constitution, s.30. The restriction must be reasonably justifiable for the purpose of dealing with the situation. s.29. Williams v. Majekodunmi. 1962. 1 All N.L.R. 324.
3. The Constitutions of Sierra Leone s.14. Uganda s.28, Kenya, s.25; Malawi s.22: Zambia, s.24.

has been imposed by a court of law.

In Sierra Leone, Uganda and Kenya, where the restriction is imposed on persons generally or on general classes of persons, reference to a tribunal is precluded. Although in Malawi and Zambia, the reference in similar circumstances is preserved, the consent of a High Court must first be obtained before the reference could be made.

The tribunal's decision has varying effects. In Uganda as in Kenya, the restricting authority must, unless there is a law to the contrary, act on the order for the continuation or termination of the restriction. In Sierra Leone, Malawi and Zambia, on the other hand, subject to a law providing otherwise, the tribunal's decision is merely advisory.

9. The "deportation" of a citizen from one part of his country to another is another form of restriction on freedom of movement. Tanzania's Deportation Ordinance enables the President to issue a deportation order against a person who to the President's satisfaction, is endeavouring to excite enmity between the people of Tanzania or is intriguing against the state.[1] The deportee has no right

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1. Cap.38,s.2.

of appeal against such an order. The Ordinance is less invoked today because a more potent measure, the Preventive Detention Act, which we have considered, is at hand. Uganda's "deportation" procedure is to be preferred. By the Deportation (Amendment) Ordinance, 1956 a judicial inquiry must precede any deportation order issued against a Ugandan though the Judge's recommendation need not be acted upon by the Minister making the deportation order.[1] In Malawi, a removal order may be made on certain undesirable persons requiring them to leave a particular area and not to return there for a stated period; but such an order can only be made by a magistrate after due opportunity has been given to the person concerned to show cause why the order should not be made against him.[2] He has a right of appeal to the High Court against the order.[3]

Right of entry: Freedom of movement includes the right of a citizen to enter his country[4] and immunity from expulsion thereof. An apparent exception to this universal principle

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1. See Deportation Ordinance, cap.46,s.
2. Penal Code, Cap.23 ss.185-190.
3. Ibid., s.186(4). also Removal Orders (Appeals) Rules.
4. It seems also that even if he does not hold a valid passport he cannot be refused entry if he can otherwise establish his identity as a national of that country.

was made in Ghana in 1957 when a special law was passed[1] to enable the Government to deport two persons who claimed that they were Ghanains. The deportees were allegedly engaged in acts prejudicial to the safety of the newly independent Ghana.

Right of exit: With the exception of Kenya where the Constitution very liberally guarantees to all citizens "the right to leave Kenya",[2] the issuing of passport to persons intending to travel outside their country is in the prerogative of the state. Passports have been known to be refused or withdrawn from some politicians or trade unionists so as to prevent them from attending international conferences sponsored by bodies not approved by the Government.[3]

B. Aliens

The treatment of aliens the world over has been

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1. Deportation (Othman Larden and Amadu Baba) Act, 1957. (Act, No.19) Bennion op.cit., pp.202-203.
2. s.25.
3. Cf.the practice in the Congo (Brazzaville) J.Pouabou, Background paper to the African conference on the Rule of Law, op.cit., In Nigeria, the following have had their passports withdrawn or their applications for leave to travel abroad refused at various times: Dr.Chike Obi, leader of the Dynamic Party. Mr.Gogo Nzeribe, a trade unionist, Dr.Tunji Otegbeye, leader of Youth Organisation and Mrs.F.Ransome-Kuti, leader of a women's movement.
4. (1906) A.C.542 at p.546.

succinctly summarised by Lord Atkinson in Att.-Gen. for Canada v. Cain:[1]

> "one of the rights possessed by the supreme power in any state is the right to refuse to permit an alien to enter that state, to annex conditions it pleased to the permission to enter it, and to expel or deport from the state at pleasure even a friendly alien, especially if it considers his presence in the state opposed to its peace, order and good government, or its social or material interests".

For Africa, the control exercised over immigrants in Kenya[2] may be instanced.[3] To enter Kenya, an alien, if he is not a diplomat, must be a holder of a resident's certificate, an entry permit, or a pass.[4] Any person who enters the country illegally or whose lawful entry has expired and has not been extended may be removed by the authorities.[5] Certain classes of people are deemed prohibited immigrants:[6] (a) persons not submitting to medical examination when entering the country; (b) those suffering from a contagious disease; (c) convicts; (d) prostitutes etc., By the Immigrant and Deportation

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1. (1906) A.C. 542 at p.546.
2. See Immigrant Ordinance, Cap.172; Deportation (Aliens) Ordinance, Cap.174 and Deportation (Immigrant British Subjects) Ordinance, Cap.175.
3. Because Uganda, on the other hand, shares borders with trouble-ridden states like the Congo, Ruanda and Burundi as well as the Sudan, a special Law: Control of Alien Refugees Ordinance (Act No.19 of 1960) has been enacted to deal with the influx of refugees from the neighbouring countries.
4. Emigrants Ordinance, s.9.
5. Ibid., s.11.
6. Ibid., s.7.

(Miscellaneous Amendment) Act 1964, the Minister of Home Affairs may declare any person not a citizen of Kenya or a holder of a resident's certificate, a prohibited immigrant if the Minister considers his presence contrary to the interests of national security.

Prohibited immigrants are undesirable aliens and are liable to be summarily deported. It is becoming an established practice to give a deportee just 24 hours' notice to quit, even though he has lived in the country most of his life and intends to make it his permanent home.[1]

The time would seem overdue for a wider international convention on the lines of the Convention entered into by member countries of the Council of Europe on Establishment[2]

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1. Cf.Mr.Ian Henderson, a former Assistant Commissioner of Police in Kenya who with three others was ordered to leave Kenya within 24 hours on August 5,1964. He has served the Kenya Police for several years and although his contract of service had expired, he had been recalled a year before to help extend the Special Branch. He intended to settle in Kenya and was entitled to be registered on application as a citizen of Kenya before December 12,1965. The legality of his deportation has been doubted; in any event, it seems strange that a settler should be in a worse position than a mere holder of a resident's certificate, who may not be declared a phohibited immigrant. But see now Constitution of Kenya (Amendment) Act,1965. First Schedule.
2. Misc.No.1.1957. For the implementation of this obligation by the U.K.Government see Written Parliamentary Answer August 2,1956, 557 H.C.Deb.174-175. The Citizen and the Administration (Justice Report). Pars.32-33; C.H.Thornberry, Dr.Soblen and the Alien law of the United Kingdom. (1963) 12 I.C.L.Q. 414, 431-432.

which lays it down that an alien belonging to one of the contracting states who had been residing in the territory of another for two or more years should not be expelled without being previously granted facilities to make representations against his projected expulsion. He should also be given a right of appeal to a competent authority and to be legally represented before that authority if he so desires. However, these procedural safeguards are not available to a deportee whose case involves national security. Admittedly, deportation for reasons of security poses a special problem but it is thought a tribunal could be enpaneled with a senior Judge presiding and comprising a member each from the armed and Police forces to receive representations from deportees who are adjudged security risks. A provision on these lines should go a long way to dispel wild rumours which often follow in the trail of many African deportation orders ostensibly made on security grounds.

D. PROTECTION OF THE RIGHT OF PRIVACY.

A corollary of freedom of movement and residence is the right to respect for the private and family life of the individual; his home and correspondence.

(a) Family life: Article 14 of the Senegalese Constitution proclaims marriage and the family as the natural and moral

basis of the human community; they are places, therefore, under the state's protection. One manifestation of this protection is the regulation of marriage by law. In Africa, three types of marriage are known,[1] (i) marriage by customary law, (ii) Islamic marriage or (iii) statutory marriage, which in some places is also called Christian marriage. The latter is a monogamous union: the other two are by contrast, polygamous. At one time, the superior courts appeared reluctant to accord recognition, let alone protection, to customary law marriage. Thus, Mr.Justice Barrett-Lennard deciding a criminal case in Uganda remarked as follows:[2]

> "The union usual between heathen natives of tropical Africa, although generally described as marriages are not according to English or International law. They are polygamous in character and create only a casual relation which either party can terminate at pleasure subject to the obligations of making money payments".

The learned judge was however, prepared to accord recognition to a customary law union if a question of status arose.

One relic of this religion-inspired prejudice against customary law marriage came to light in a recent

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1. See more fully, Survey of African Marriage and family life (ed.A.Phillips).
2. R. v. Salima do Salimu and another, (1915) 2 U.L.R. 182. Haydon, op.cit., p.102.

Western Nigeria case.[1] It is unlawful to detain a child without the parents' consent; but how is a child so detained to be recovered? An application for a writ of habeas corpus suggests itself but the Western Nigeria High Court refused to entertain such an application on the strange excuse that as the child was the issue of a customary marriage, any question relating to his control was not justiciable before the High Court.

Parents decide the form the education or training of their children shall take and their consent is required if the children are to receive religious instruction, take part in or attend any religious ceremony other than their own.[2] But the interests and welfare of the children remain paramount and the state would intervene to protect them even against their parents.[3]

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1. Omodion v. Fasoro (1960) W.R.N.L.R.27. W.Ekon Daniels 'Towards the integration of the laws relating to husband and wife in Ghana'. (1965)2 U.G.L.J.20 esp.pp.40-43.
2. Nigerian Constituion s.24(2).
3. Cf.Part VIII of Nothern Nigeria's Children and Young Persons Act,1958,Cap.21 which prohibits juveniles i.e., persons under the age of 16 from engaging in political activities. Mr.S.O.Oluwoyin unsuccessully challenged the constitutionality of this law. His plea was that the law encroached upon his right as a father of some children whom he wished to educate politically. The Federal Supreme Court held that he had no status quo as his right had not yet been infringed. He was calling on the court to make a declaration in vacuo. The appellant should have waited till he was in imminent danger of coming into conflict with the impugned law. Olawouin v. Attorney General, Northern Region.(1961) 1 All N.L.R. 269.

The Nigerian Constitution permits a law which may deprive a minor of his personal liberty for the purpose of his education or welfare,[1] a provision which may be attacked as being unduly wide.[2] Similar provisions in some later constitutions[3] are more satisfactory. The deprivation can only proceed from a Court order or with the consent of the parents or guardian; and, secondly, the age is lower being limited to young persons who have not yet attained the age of eighteen years.

(b) The inviolability of the home: No one, unless authorised by law, can enter the premises of another without that other's consent. Such entry may be permitted by law for two purposes.

(i) Entry by representatives of public bodies: The officers or agents of the Government, or local authority or statutory corporations may enter on the premises of any person with the object of inspecting those premises or anything thereon for the purpose of any tax, rate or due. They may also carry out work on any property that is lawfully on the premises and belonging to the bodies they represent.[4]

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1. 21(1)(d).
2. Cf.Holland, "Human Rights in Nigeria", pp.155-156.
3. Malawi, s.13.1(f) Zambia, s.15(1)(f).
4. Cf. The Constitution of Uganda, s.23,1935.

(ii) Entry for purposes of investigation: The police may enter upon private premises to carry out an arrest, prevent a crime or search for the evidence of a crime. As a general rule, they must be armed with a search warrant signed by a magistrate. In the anglophone states where the common law still runs, this branch of the law is not in a happy state. In Thomas v. Sawkins,[1] the Divisional Court in England held that the police could legitimately enter and remain on private premises without the occupier's consent even though no breach of the peace has or is being committed, if they reasonably apprehend the likelihood of its being committed. The Court was divided as to whether such entry may also be excused in respect of offences other than that relating to a breach of the peace. In yet another case,[2] it was decided that an unlawful seizure of objects might be excused if the objects disclosed evidence of the commission of an offence. The francophonic practice may be contrasted.[3] The prosecuting attorney or the officer of the judicial police can only seize objects and documents

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1. (1935) 2 K.B.249.
2. Elias v. Pasmore (1934) 2 K.B. 164.
3. French Criminal Procedure Code Arts. 56-60, 92-100. It should be mentioned that the power of searches is necessarily wider in cases of flagrant felonies and misdemeanours.

useful to the manifestation of the truth of the particular offence being investigated. An accused whose home is being searched or his representative must be in attendance unless he is not willing to co-operate. If he is not the accused, the house can only be searched in his presence or in the presence of two of his relatives or any other two witnesses. The search in all cases must be conducted in such a way as to protect professional secrets and the rights of the defence.

(c) Private life: It is everywhere a crime to tamper with the correspondence of another person or to intercept telephone conversations though in the interests of the state the Government could authorise such interference, but only in very exceptional cases.

The laws of libel, slander, blackmail, intimidation or conspiracy afford protection from unreasonable attack on the reputation or private life of any person. The common law rather restrictively confines the protection of privacy to property interests and reputation.[1] No action would seem

1. Cf.Marsh 'Civil liberties in Europe',pp.531-532; also Sim v. H.J.Heinz & Co.(1959) 1 W.L.R. 313. The Right of Privacy Bill introduced in the House of Lords in 1961 did not pass the second reading. But Lord Denning is of the opinion that an Act was not needed to change the law as the courts could themselves develop the right of privacy. The Committee on Law of Defamation was also of the opinion that the law of defamation should not be extended to include a remedy for invasion of privacy. Report,(1948) pp.10-49.See further H.Street,Law of Tort (1963) 441; also Winfield, Tort (1963) 728-730.

to lie if a person's picture was taken and exhibited without his consent. An invasion of privacy of this type, on the other hand, is le dommage moral (moral damage) in the francophonic states for which compensation may be claimed. There is however, the difficulty of the assessment of moral damage in terms of money hence the refusal of the French Conseil d'Etat to provide for a remedy for moral damage in administrative matters though the Court of Cassation takes a different view.[1]

Le dommage moral also covers damage caused by insults. But the failure of common law to provide for reparation for insults not amounting to libel or slander, or to punish insults which do not threaten a breach of the peace need not worry the citizens of some of the anglophonic states as insult is an offence in most African tribes.[2]

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1. F.H.Lawson, A.E.Anton, and L.Neville Brown (eds.) Amos and Walton's Introduction to French Law (1963) 209.
2. The exact scope of insult as a customary offence is, however, not free from controversy. It is not disputed that insult to a chief or an elder is punishable. See Elias, "Insult as an offence in African Customary law" (1954) 53 African affairs, 66. In other cases, it is said, there must be a likelihood of a breach of the peace before the offence could arise. It is submitted that the offence is not so restricted. The better view is that an insult is a crime if it is likely to cause fighting. Cf.E.Cotran, Report on Criminal Customary offences in Kenya (1963) paras.115-116. s.399 of Northern Nigeria Penal Code expresses the offence well. "Whoever intentionally insults and thereby gives provocation to any person intending or knowing it to be likely that such provacation will cause him to break the public peace or to commit any other offence shall be punished..."(italics supplied).

E. THE PROTECTION OF FREEDOM OF CONSCIENCE.

Article 18 of the Universal Declaration of Human Rights has been adopted almost word for word in most African constitutions:

> "Every one has the right of freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom either alone or in community with others and in public or in private to manifest his religion or belief in teaching, practice, worship and observance".

Most African states south of the Sahara, are secular.[1] To underline this fact there are laws protecting all religions except those which are subversive of the state or public morality. Thus various Criminal Codes punish insult to religion of any class, disturbance of religious gatherings, trespasses on burial places, and writings and utterances calculated to wound religious feelings.[2]

At the same time, the state demands that religious organisations shall confine themselves to matters religious hence such legislation as Ghana's Avoidance of Discrimination Act, 1957. Religious organizations are forbidden to lend their name or symbol for a political purpose nor may they

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1. But in the Suda, Mauritania, and Somali, Republic Islam is the official religion.
2. Malawi, Penal Code. Cap.23. Chapter XIV.

organise or operate for the purposes of parliamentary or local elections.[1] The Act is primarily aimed at those who might attempt to form political parties on communal or religious lines or provoke communal or religious strife.[2]

Sudan's Missionary Societies Act, 1962.[3]

As is obvious from its title, this Act is directed at the missionaries. The preamble denies interference with, or derogation from, the right of any religious denomination or sect but so stringent is the control the Act imposes on the missionaries that the latter, before their expulsion from Sudan in February 1964, found it almost impossible to carry out their religious mission effectively. However, the genesis of the Act should not be overlooked; but first, some of its provisions.

Missionary societies before they can perform any missionary act must obtain an annual licence which (would) specify the conditions and terms under which they may operate and where.[4] The licence will, for example, state to which persons the missionaries may minister.[5]

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1. ss.5,6.
2. Ghana, White Paper, No. 10/59. p.26; Bennion op.cit., p.235.
3. 1962 Act No. 10.
4. Ibid., s.3.
5. s.7.

Official permission is required for almost every act relevant to the fulfilment of the purposes of a missionary society.[1] The penalty for a contravention of any of the provisions of the Act is a fine of not more than £100 or three months' imprisonment or both.

The Sudanese Government claimed that this stifling piece of legislation was intended to limit the missionaries to religious functions.[2] The missionaries were accused of working against the country's stability and internal security and of using the name of religion to incite the southerners against their fellow-countrymen in the North with a view to bringing about the secession of the Southern Provinces.

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1. e.g., To engage in social activities including the formation of clubs or societies; to appeal for or collect money; to hold or develop land or do any repairs or improvements to buildings and significantly, to undertake work relating to education, health, agriculture, trade and industry, publication and distribution of any form of literature. Moreover, they must first obtain the consent of the guardian of a young person under the age of 18 before they can bring him up in their religion or admit him to any religious order. The consent which must be in writing has to be given in the presence of an app ropriate official. ss.8,10. Regulations 1962 1962 L.R.O. No.33.
2. Memorandum on reasons that led to the expulsion of foreign missionaries and priests from the Southern Provinces of the Sudan, Khartoum, 1964. Cf. Max Warren, 'Christian minorities in Muslim countries'. (1964) 6 Race 41.

All these allegations were denied by the missionaries in the strongest terms.[1] The North-dominated Sudanese Government were simply finding a way to counteract Christianity. The chief crime of the missionaries appeared to be 'the absorption of the Christian faith by the Southern Sudanese'.[2] Islamization and national integration, it is argued, had become interchangeable. Evidence of this could be found in the abolition of Sunday as the day of rest, introduction of the Koran as an Arabic textbook, the taking over of Christian schools, the refusal of permission to open new missionaries and the restriction on the baptism of children.[3]

The Government was, however, convinced that only a final showdown with the missionaries could ease the prevailing tension and so in February 1964, it ordered the expulsion of all missionaries. Shortly after the latter's departure, the Government proposed to the Sudanese priests that they should sever connection with Rome as a first step towards a national Church.

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1. See The Black Book of the Sudan (1964); also a leaflet The Savannah Grass Curtain, religious persecution in the Sudan published by the Africa Centre Ltd. (1963).
2. The black book of the Sudan, p.131. Contrast Northern Nigeria where the Muslims predominate but the churches have encountered no form of state interference. It would even seem the churches are much freer to operate in the Region now than they were in the colonial days when the authorities shielded the northerners from too much exposure to European culture and ideas. Cf. Warren, op.cit., p.45.
3. The black book of the Sudan, p.125.

There have been expulsions of clergymen in both Guinea and Ghana too but only the head of the Church in each of these two countries was involved. The Apostolic Delegate in Conakry was expelled in 1961 because he appeared to criticize a Government decision to take over all private schools most of which belonged to the Catholic Church.[1] But President Sekou Touré also made it plain that 'no prelate except an African would be accredited to Guinea'.[2] The threat awakened the Church to the need to Africanise rapidly. An African was appointed Archbishop of Conakry at once and the government gladly sent representatives to join in his consecration ceremony.

The expulsion of the Bishop of Accra in August 1962, following his somewhat ill-timed criticism of the "Godlessness" of the Ghana Youth Movement, was not an anti-Church outburst.[3] The Bishop was allowed to return to Accra in November, 1962.

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1. See J.O'Connel "The possibility of pluralism: Church and State in West Africa". in Development for What? p.144 esp. pp.156-160.
2. Quoted, ibid., p.157. The Church has been a target of African criticism nearly everywhere for being too slow to Africanise its establishment. The nationalists have also resented the icy attitude shown by some leaders of the Church towards their self-rule aspirations. These Church leaders "were initially bewildered and frightened by the emergence of African nationalism, and to say the least - did not take kindly to it". ibid., p.155.
3. The Bishop's charge was delivered three days after a bomb had been thrown at President Nkrumah. ibid., p.162; also West Africa, August 18, 1962, p.898.

The control of educational institutions.

The expulsions of Church leaders just referred to indicate that African governments would not countenance a discordant note sounded by any section of the community, the Church not excepted. This is why it is in the latter's interest to avoid, as far as possible, the areas of conflict with the state. The control of educational institutions is one possible source of such conflict today.[1]

Swift steps have been taken in Guinea and the Sudan to terminate Church management of educational institutions. In Uganda, plans are in hand to carry out the 'open school policy' recommended by a Commission set up to consider the problem.[2] It is not intended to abolish denominational schools but they must be open to children of other faiths. Religion would continue to be taught in schools though religious knowledge would no longer be accepted as a primary school leaving examination subject, "because of the variety of religions in Uganda".[3] The control and management of schools must, of course, rest

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1. Hence the call for "a new pattern of church work in Africa...showing far less concern with the control of institutions" Adrian Hastings, the pattern of African misson work". (An Africa Centre publication).
2. Institute of Race Relations Newsletter, September, 1964, p.36.
3. Minister of Education, Uganda, ibid.,January 1964,p.27.

with the central government and (by delegation) local authorities. A similar debate is going on in Eastern Nigeria, where the Cabinet is openly divided on the issue.[1]

The view of the Church, especially of the Catholic Church which attaches great importance to the education of its children in its own schools staffed mainly by members of the religious orders, is that state control of all schools "may involve a violation of the rights of the Church".[2] The suggestion that the Church should confine its activities to the vestry is not well-received.

If, however, we look at Group A constitutions, we shall find that religious communities are guaranteed no more than the right to provide religious instructions for their adherents in their own schools.[3] Some constitutions guarantee the same right only if the schools are wholly maintained by these communities.[4]

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1. Daily Express, Lagos, August 12, 1965. Letters exchanged between the Eastern Nigeria Minister of Education and the Catholic bishops are published in West African Pilot, Lagos, August 7, 1965.
2. Problems of our people (Pastoral instruction of the Catholic Bishops of S.Rhodesia) (1963). 8.
3. e.g., Malawi Constitution s. 19(3).
4. Nigerian Constitution s.24(3).

Right of worship for religious minorities.

If religious bodies confine their activities strictly to matters of worship, they have nothing to fear from the state and this is so even if they constitute a minority in the state.[1] There has, however, been an interesting allegation of a denial of the right of worship by some Seventh Day Adventists in Eastern Nigeria. Their case[2] was that by fixing the Federal elections of 1959 to take place on a Saturday, their Sabbath Day, the authorities infringed the right to freedom of conscience guaranteed them by the Constitution. They refused to participate in the elections lest their Church excommunicated them. Therefore, they sought to declare the elections in their constituency void in that the arrangements infringed the Human Rights Chapter. The Regional High Court and the Supreme Court rejected the petition on the ground that had all Adventists in the constituency voted one way, the results of the election would not have been affected. It was thus not necessary to determine whether holding the elections on Saturday ipso facto infringed the petitioners' right of worship.

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1. The exceptional situation in the Sudan has been noted, supra.
2. Ojiegbe and Another v. Ubani and Another, 1961 All N.L.R. 277.

This case seems to suggest that the courts would make minority groups bend to the wishes of the majority on less fundamental issues. If so, a preliminary question ought to have been considered: whether the Adventists were reasonable to interpret the exercise of franchise as a "manner of work", and therefore prohibited on a holy day. The issue involved here is important and may have wide implications for Africa where there are innumerable ~~religions~~ indigenous and modern religions each of which may claim respect for its peculiarities.

Indeed, the Lumpa Church troubles in Zambia in 1964 raise precisely this same problem.[1] Alice Lenshina, the founder of the Lumpa Church and her fanatical supporters demanded an exclusive community in which they would have nothing to do with an earthly government, political party and all that. First, the nationalist party, and, later, the independence government were resolved, and took steps to end the separateness of the Lumpa Church. Violent and fatal clashes resulted. A state of emergency was declared[2]

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1. See Report of the Commission of Inquiry into the former Lumpa Church, Lusaka.1965; "Postscript on the Lumpa Movement". Institute of Race Relations Newsletter, September 1964 pp.25-28.
2. Preservation of Public Security Ordinance, cap.265 s.3. G.N.No. 374 of 1964.

in the Church's strongholds and the Church itself was declared an unlawful society[1] and its leaders were arrested and detained.[2] Were these steps reasonably justifiable in a democratic society? The answer should not be in doubt.

F. PROTECTION OF FREEDOM OF PEACEFUL ASSEMBLY.

The right of persons to assemble freely is guaranteed or recognized by every African constitution but tempers tend to rise quickly when people are gathered in crowds. Therefore, to safeguard public order, restrictions on freedom of assembly are unavoidable.

Notice of public meetings or processions is usually required[3] and permits, which may stipulate conditions,[4] must be obtained before such meetings or processions can be held. If the authorities feel that

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1. Societies Ordinance, cap.262. s.12(1). G.N.No.390 of 1964.
2. Preservation of Public Security Regulations, 1964 (as amended) G.N. Nos. 375 and 376 of 1964.
3. Cf. Public Order (Lagos) Act, Cap.169. s.4.
4. See Ghana's Public Order Act, 1961, Act. 58. Part II. Sections 6(1) of Northern Nigeria's 'Public Order Law' 1957 as amended by Law No.1 of 1964 vaguely provides that the Minister may issue orders for the purpose of "directing the conduct of public meetings". If he issues a general licence, he may specify "the conditions under which and by whom and the place where any particular kind or description of public meeting or procession may be convened, collected or formed". Do these general powers (which he may delegate) enable him to specify what subjects may not be discussed at the meeting? Nwabueze op.cit., p.384.

no matter what conditions are imposed, disorder would still occur, they may ban public meetings for a stated period.[1]

At the Lagos Conference on the Rule of Law, several speakers criticized these powers of the Executive to control public meetings. Some would want the Judiciary to pronounce on the propriety of executive restrictions.[2] But, as Mr. Justice Lionel Brett, warned, "to say that the member of the Executive responsible for law and order may do nothing until the courts have approved in advance the proposed measures would be too restrictive."[3] The Executive should, however, be able to justify, before the courts, 'the reasonableness of the measures taken by them.[3]

The police may intervene to disperse a lawfully convened meeting if any of the stipulated conditions in the permit is contravened, or if a breach of the peace has taken place or is likely to take place.[4]

People may of course gather, without prior authorisation, for purposes other than to discuss or express views on matters of public interest. However, under the various Criminal Codes, if, as in Ghana, such a gathering comprises three or more persons, it becomes

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1. Three months is the maximum period in Nigeria. see e.g., Public Order (Lagos) Act, 5(2).
2. As the law stands everywhere now, the ministerial order imposing the control is conclusive. ibid., s.5(3).
3. African Conference on the Rule of Law p.126.
4. Ibid.,
5. For Ghana, see Bennion, op.cit., p.238.

an unlawful assembly where the said persons

> "conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled, or will by such assembly needlessly or without any reasonable occasion provoke other persons to commit a breach of the peace....."[1]

Riot is a more serious offence and is committed if an unlawful assembly becomes violent or threatens violence. In Ghana, it does not matter that the persons concerned are assembled in a private rather than a public place.[2]

PROTECTION OF FREEDOM OF ASSOCIATION.

The right of persons to associate freely for the protection of their interests is basic to democracy though not all interests are deserving of protection. Thus, the law would not recognise a society formed pursuant on a conspiracy to commit an offence. There are other prohibitions:

(i) Political parties: The omission to mention freedom of association in the Declaration of Fundamental Principles made by the President of Ghana on assuming office, has become meaningful since Ghana formed itself into a one-party state in 1964. For freedom of association could not be said to exist in the political sphere in one-party regimes where people cannot organise to provide for an

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1. Criminal Code, 1960. 201.
2. Ibid., s.196.

alternative government.[1]

The Northern Nigeria Children and Young Persons Law[2] which makes it an offence to induce persons under the age of 16 to take part in politics is clearly restirctive of freedom of association. But in Cheranci v. Alkali Cheranci,[3] the courts did not agree that these restrictions were not reasonably justifiable in a democratic society.

(ii) Unlawful societies: Certain societies which are subversive of public order etc., are, by the various Criminal Codes,[4] classified as unlawful societies. In colonial times, the expedient of an executive order declaring a society unlawful, without more, was frequently resorted to.[5] Although the latter provision still remains

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1. This does not mean, however, that voluntary associations, though declared auxiliaries of the single national Party, are completely denied a positive role in public affairs. Party leadership is sensitive to their feelings. Cf. Wallerstein: The road to independence, Ghana and the Ivory Coast, pp.83-134. For a fuller discussion of the nature of one-party states, see supra, Chapter 5.
2. Part VIII.
3. 1960 N.N.L.R. 24.
4. Cf. Malawi, Penal Code, s.70.
5. Ibid., s.70(2)(ii). Thus the order banning the Nyasaland African Congress simply expressed the pleasure of the Governor "that the Nyasaland African Congress and any branch thereof are societies dangerous to the good Government of the Protectorate". G.N.24 of 1959. The property of a society declared unlawful vests in an officer appointed by the Government and would be disposed of as directed; ibid., s.75.

on the Statute Books of many countries, a Group A country which invokes it must be prepared to show the reasonableness of any order made thereunder.

(iii) Registration requirements: The law may prescribe, as does the Societies' Ordinance[1] in Tanzania, that certain formalities must be fulfilled before a society can lawfully function. For the purpose of the Ordinance (as amended by the Societies Ordinance (Amendment) Act, 1962),[2] a society includes a club, a company, partnership co-operative society or any association of not less than ten persons. The Registrar of Societies may refuse registration or cancel one already made if he is satisfied that the society concerned is associated with a political group or association outside the country or that the society is likely to be used or is being used for unlawful purposes.

If a company or partnership registered to conduct trade or business, engages in activities other than for the purpose of carrying on lawful trade or business, it may be called upon to register as a society. If such registration is refused, or the request when made is not

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1. Cap.337.T.A.N.U. was severly hit by this enactment when it was first made in 1954 in place of certain provisions then contained in the Penal Code. Cf.Cole and Denison, op.cit., pp.256-259.
2. Act.No. 76 of 1962.

complied with by the company, or the registration is cancelled after it has been made, the company or partnership may be compulsorily wound up.

(iv) The position of trade unions: The right of every person to form or belong to trade unions is specifically referred to in the provision guaranteeing freedom of association in Group A countries.[1] What form should these trade unions take? What limits should be placed on their power to strike? Have employers the corresponding right to order a lockout? Answers to these questions are to be found in the ordinary laws of each country. Some countires like Nigeria and Sierra Leone follow the British practice[2] which "eschews force" and is founded upon "the belief that those directly concerned in the productive process are best placed to find their answers to their problems".[3]

Other anglophone states: Ghana,[4] Tanzania,[5] Uganda[6] and Kenya,[7] as well as virtually all francophone

1. e.g., Nigerian Constitution. s.26(1).
2. The British attitudes to industrial disputes are currently under scrutiny in Britain itself. Some are looking towards Europe and particularly Sweden for new ideas with a view to reforms.
3. T.M.Yesufu, An introduction to industrial relations in Nigeria (1962) 21; "Labour relations in Nigeria(2)" in Nigerian law etc.94; also Report of the Morgan Commission on the Review of Wages, salaries, etc., 1963-64.
4. Industiral Relations Act, 1965 Act 299;
5. Trade Disputes (Settlement) Act, 1962,No.43 of 1962.
6. Trade Disputes (Arbitration and Settlement)Act, 1964 Act.No.20.
7. Trade Disputes Act, 1965 No.15 of 1965.

states have, on the other hand, rejected the latter approach in favour of Government intervention if negotiations between both sides fail.[1]

Ghana's Industrial Relations Act, 1965 is typical. It requires every worker to join a trade union, and every trade union to take out a certificate to act as the representative of its members in industrial matters.[2] A certified union must join the Trade Union Congress which alone speaks for the trade union movement in the country.[3] Employers too are obliged to have only one representative body.

Each trade has a negotiating committee representing employers and emplyees. This body concludes all collective agreements which are binding on all for the agreed period which in any case, must never be less than one year.[4] Very elaborate dispute settlement procedures are laid down. If negotiation fails, conciliation is tried, and if that fails too, there is compulsory arbitration.[5] In the latter case, the Minister

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1. 'The evolution of labour disputes settlement procedures in certain African countries'. (I.L.O.Study)(1965) International Labour Review 102.
2. s.3.
3. s.1.
4. ss.5-12.
5. ss.16-18.

serves a notice of arbitration on the parties. Either party may indicate its objection to arbitration and that, if within 4 weeks the other party does not consent and the Minister fails to refer the case to arbitration, a strike or a lockout, as the case may be, would be declared.[1]

In effect, strike action is suspended and may not even take place unless the Minister is indifferent. Frequent wild-cat strikes, it is argued, are harmful to all economies, especially to a developing one.[2]

The procedure outlined here is admirable if the trade disputes to be resolved thereunder arise between employees and private employers when the Minister would be able to hold the scales evenly between the disputants. Greater difficulties would arise where a public enterprise is involved in a dispute. Might not intransigent trade union leaders in the latter situation be branded saboteurs?[3]

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1. s.21.
2. Cf. Britain's proposed early warning system which would oblige trade unions to submit their pay claims etc., to the Trade Union Congress for the latter's consideration before the union members embark on strike action.
3. Cf. the statement of the Ministers of East Africa in August 1962 to the effect that their countries "are in a hurry to develop and the countries' interests cannot be jeopardised by irresponsible attitudes or actions on the part of trade unions or employers'. Quoted in the I.L.O. Study op.cit., p.114.

Critics would point to the reaction of the Government of Ghana to the Sekondi-Takoradi railwaymen's strike of 1961 which was seen as a conspriacy against the Government.[1] But the Government feel that as they have taken several measures to protect the interests of workers generally,[2] and since the latter's leaders are well-represented in Government (thus emphasizing the alliance between Government and labour movement), precipitate strikes ought never to occur.

Central to the disputes settlement machinery outlined above is the belief that the African tradition of consensual democracy is best applied to industrial relations. People must go on talking and talking until they agree. If mutual accord is not forthcoming arbitration courts[3] would produce a just formula.

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1. W.P.No.7/61. The comparison with Nigeria's nationwide strike of 1964 is interesting. The prosecutions of Dr.V.L.Allen, a British lecturer from Leeds University, and three Nigerians for allegedly plotting to overthrow the Nigerian Government were a sequel to the 1964 strike.
2. Thus under the Labour (Amendment) Act 1960 (Act 6), the Minister may, be executing instrument, fix minimum remuneration after consulting with representative interests. Unfair labour practices such as discriminatory treatment against members of a trade union or interference in their affairs are to be referred to a special tribunal which investigates the complaints and punishes any abuses. Industrial Relations Act, 1965, ss.26-33.
3. Such courts are normally constituted ad hoc but in Ethiopa Decree No.99 of 1962 established a permanent court called Labour Relations Board. see further ILO Study op.cit., pp.117 et seq.

PROTECTION OF PROPERTY

Article 12 of the Senegalese Constituion protects property rights as follows:

> "Le droit de propriété est gazanti par la présente Constitution. Il ne peut y être porte, atteinte que dans le cas de nécessité publique légalement constatée, sous réserve d'une juste et préalable indeminité.

This provision concisely sums up the prevailing rules relating to property rights in virtually all Africa.[1] None of the constitutions defines "property" but the breadth of meaning usually given to the term may be illustrated by the Nigerian case of Akintola v. Aderemi and another[2]; the Supreme Court held that a plaintiff's right to costs is of the nature of "property" within the provisions of the Constitution protecting improper deprivation of property.

But the state may legitimately interfere with property rights in various ways: tax, rate and due impositions; judicial penalties; seizure of enemy property etc., It may ne necessary too to take possession of

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1. The presidential Declaration of Principles in Ghana, however, pledges only non-deprivation of property "save where the public interest so requires and the law so provides". As to the necessity of compensation, the Declaration is silent.
2. (1963) F.S.C.187/1962; also Nwakeneze op.cit., p.388, where Adegbenro v. Akintola (1964) was also cited. See further supra.,p.

property compulsorily, or to acquire compulsorily interest or right thereof, if the two conditions, quoted above are satisfied namely, public necessity and due indemnity or compensation.

(a) Public necessity: As Section 18(1) of the Zambian Constitution puts it,[1] every compulsory acquisition must be necessary or expedient

> "(i) in the interests of defence, public order, public morality, public health, town and country planning, or land settlement.
> (ii) in order to secure the development or utilisation of that or other property for a purpose benficial to the community".

(b) Adequate Compensation: The Group A constitutions insist that the compensation paid for requisitioning or acquiring any property must be adequate. Some even require, the prompt payment of such compensation;[2] others

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1. The Nigerian Constitution does not mention public interest specifically. Rather, it incorporates by reference the Public Lands Acquisition Acts of the various territories; (for Lagos, see Cap.167). To ensure that these laws "in force on the thirty-first day of March,1958" are not adversely amended to derogate from safeguards contained therein, s.30(2) of the Constituion stipulates certain limits on "any law made after that date (31 March,1958) that amends or replaces" these laws. The method adopted to save these existing laws is,to say the least, not distinguished for its clarity.
2. Cf.Uganda, Constitution s.22(1)(C) (i); Zambia, Constitution 18(1)(b)(i);

(presumably for the benefit of the immigrant communities) guarantee the full remission of the compensation free from all deductions to any country desired by the owner of the property concerned.[1]

Several issues are raised here which we cannot go into in any detail. First, what is adequate compensation?[2] In most of the countries, the Constitution entrusts to the Courts, the power (a) to pronounce on the interest of the owner of the property and (b) to determine the amount of any compensation to which he is entitled. In the latter case, the courts would presumably uphold only such compensation as is fair, just and reasonable.[3] This does not necessarily mean the equivalent of the market price. Rather, regard would be had to all the circumstances of the case and where appropriate, the compensation may even fall below the market price.[4]

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1. Kenya, Constitution, s.19(5) and (b); Zambia, Constitution s.18(2).
2. The question may arise in many guises. Thus the Government of Tanganyika (as it then was) passed a Dar-es-Salaam Club (Dissolution) Act,1963 No.54 of 1963 which dissolved The Dar-es-Salaam Club abd compulsorily vested its assets in the Government. Members of the Club relying on the Common Law rules that on its dissolution, members of a Club share all the assets. But the Government refunded the entrance fee paid by each member and no more. See further, Macauslan, op.cit., p.566.
3. Quaere, Kenya's provision for "full compensation" and not "adequate compensation" as in other countries. Constitution s.19.
4. I.C.J. The dynamic aspects of the Rule of Law, etc.p.136.

Secondly, the requirement in some countries just referred to, that the compensation due shall be paid promptly poses a thorny economic problem for these developing states. Domestic capital is not enough to expand the economy let alone to buy out, "cash down" the owners of the nationalized assets. For this painful reason, nationalization has not occurred on a scale predicted by some. The African realities in this regard are summed up in Kenya's Sessional Paper entitled "African Socialism":[1]

> "It should be recognized that if the nation's limited domestic capital is used to buy existing land, livestock, buildings, machinery and equipment, the nation has not more productive assets than before - only their onwership has changed. What may be lost are the new resources thay may have been purchased instead - the new schools, hospitals, roads, water supplies, irrigation schemes (etc.,)."

Other losses would include employment opportunities for Kenyans as well as the additional opportunities the new developments would have brought.[2] Skilled employees of the nationalized resources would leave the country as would the compensation paid following nationalization, thus increasing manpower and foreign exchange problems of the country.[3] Above all,

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1. No. 1965, Nairobi; Par.74.
2. Ibid.,
3. Ibid.,

> "There is also the firm likelihood that nationalization would discourage additional private investment thus reducing further the rate of growth of the economy.[1]

The Government of Kenya, therefore, like others in Africa, have persistently reaffirmed their faith in the provisions of section 19 of the Constitution guaranteesing rights or property.[2]

What have been said so far should not be taken to mean that nationalization would not be undertaken in Kenya, in all events. The Sessional Paper gives ample notice that nationalization would be considered

> "if the need is urgent, if other less costly controls are ineffective and if it is understood that most industries nationalized will not be run at a loss".[3]

But regardless of costs, services vital to the people and best provided by Government would be nationalized.[4]

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1. Ibid.,
2. Ibid., paras. 50-51; 74, 142. No stronger evidence can be found for the respect accorded to s.19 than in the Foreign Investment & Protection Act, 1961. Cf. similar statutes in Uganda, Foreign Investments (Protection) Act, 1964, s.22, and in Ghana, Capital Investments Act. The Government of Ghana recently undertook to make more manifest the liberal attitude towards foreign investment implicit in the latter statute. The Times, September, 13,1965.
3. African socialism, par. 76.
4. Ibid.,

African governments would find it difficult to resist the pressures of their people to bring about (fairly rapidly) some sort of social equalisation through a redistribution of wealth. Calls for actions of this nature have been loudest in those countries where

> "Historical forces have created [as] in Kenya a society in which property is by and large owned by sections of the population with a foreign origin".[1]

The general problem of social and economic imbalance will be considered in the next section dealing with freedom from discrimination. But another aspect of equality is also relevant here. This is the possible step that may be taken to place a ceiling on individual ownership of property.

Ghana, following President Nkrumah's "Dawn Broadcast" of 1961, imposed such ceilings[2] though it is not certain how effectively these have been observed, but as Kenya is giving some thoughts to similar measures,[3] it may be necessary to consider how far they are restrictive of rights of property. As the control relates to property

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1. Chanan Singh, "The Republican Constituion of Kenya" etc., (1965) 14 I.C.L.Q.878,944.
2. In respect of Ministers of State.
3. African socialism, paragraph, 106.

not yet acquired, it may be said, the individual's rights are not affected. Yet the government would bar such property and confiscate it at the point of time when it reaches the owner.

Related to the topic under consideration too, but the implications of which we cannot go into here, is the theory which already was the force of law in Tanzania[1] and in Northern Nigeria,[2] that the state does not recognize individual ownership of land.

PROTECTION FROM DISCRIMINATION.

Group A constitutions make some attempt to protect citizens from discriminatory treatment which is defined as

> "affording treatment to different persons attributable wholly or in part to their respective descriptions by race, tribe, place or origin, political opinions, colour, or creed whereby persons of such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges which are not accorded to persons of another such description".[3]

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1. Proposals of the Tanganyikan Government for land tenure reform, Government Paper No. 2 of 1962.
2. Land Tenure Law, 1962. See supra, p.
3. Zambia, Constitution, s.25(3).

But given the prevailing conditions in most of the countries under review, a prohibition of this nature without some qualification[1], is premature. If, on the other hand, as in nearly all the cases, this general prohibition is subject to widely worded exceptions, then the result produced would be nearly as good as having no guarantee of non-discrimination at all.

Unequal road to equality: In settler areas, colonial rule had encouraged the compartmentalisation of the society on racial lines and had conferred, in the process, special political, economic and social privileges on minority immigrant sections of the community.[2] The African rulers are currently engaged in correcting these imbalances. Constitutional provisions which stand in their way are unlikely to be observed in practice.

It is not, of course, in settler areas alone that problems of this nature arise. In places where

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1. Cf. de Smith, The new Commonwealth and its constitutions, p.135.
2. Instances are too numerous to list here, but none stands out more prominently than Kenya's Crown Lands Ordinance (cap.) which validated the administrative practice of permanently reserving land in the Highlands for Europeans. The Government could veto any subsequent transfer from Europeans to non-Europeans. A big slice of the country thus became a European "reserve". Ironically land taken by Europeans from Africans generally without any compensation" was capable of individual European ownership whereas "land, which had always been owned by Africans became Crown Land". C.Singh, on.cit., p.918.

tribal differences are acute (Ruanda, Burundi and Nigeria, for example,) the concept of majority rule may have swept the comparatively less advanced tribes to power. Unless special privileges are conferred on the latter to enable them to catch up with the other sections of the community, social harmony, which is the end sought by these non-discriminatory provisions may be unattainable.

Thus section 28 of the Nigerian Constitution, after guaranteeing freedom from discrimination to all Nigerians, proceeds to exempt a law which

> "imposes any disability or restriction or accords any privilege or advantage that having regard to the nature and circumstances pertaining to the persons to whom it applies, is reasonably justifiable in a democratic society".

Another exemption clause deals with qualifications which may be prescribed for employment in the services of the state: civil and military. But even if a person is duly qualified for a particular post, restrictions may be imposed such that he might lose the appointment to someone less-qualified for it.

It is believed the last-mentioned exemption was inserted to protect the Northern Nigerian public services from being flooded by southerners, whose higher

level of education would give them an unfair advantage over northerners.[1] It would also seem that the same principle is being applied in the federal services where, it is understood, a system of job quotas based on population ratio is now operating.[2]

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1. The Government of Northern Nigeria pursues a Northernization policy which 'gives preferential treatment to Pakistanis, Sudanese, Egyptians and Europeans over Southern Nigerians in Civil Service and commercial employment as well as in the award of contracts'. Ezera, op.cit., pp.296-297. The policy has been likened to South African apartheid. West African Pilot, November 9, 1963. quoted ibid.,
2. Complaints of ethnic domination in the Nigerian Police Force have been heard. In 1962, the three main ethnic groups were represented as follows: Ibo, 44 percent, Yoruba, 16 per cent and Hausa 2.8 per cent. If the North was taken as entity, the latter figure would stand at 16.9 per cent. A possible explanation for this is that although by population the North is siad to be twice the size of the rest of the country, it has, like the West, its own local police force, whereas the Eastern Region does not keep one. P.W.White, 'Police Force in Nigeria', Nigerian Opinion, Ibadan, June, 1965, p.8. Little wonder, therefore, that a directive was reported to have gone out of the office of the Inspector-General of Police seeking to correct such imbalance in the Police Force. West African Pilot, Lagos, July 21,1965. This 'ethnic balancing and arithmetic' process has, it is alleged, been extended to the Universities. Nigerian Opinion, May, 1965. It has been alleged too that the change in the Vice-Chancellorship in Lagos March 1965 was inspired by triabal considerations. The truth about the change in the Vice-Chancellorship (G.K.Berrie and five other authors) (1965). But see the official explanation by the Provisional Council of the Univeristy in Change in Vice-Chancellorship (1965).

Another exemption permits any enactment which may impose restrictions with respect to the acquisition or use by any person, of land or other property. This provision thus saves Northern Nigeria's Land Tenure Law 1962,[1] which imposes some restrictions not applicable to Northerners on the other Nigerians who for the purposes of the Act are 'non-natives'.[2]

Again without the last-mentioned restriction, the richer southerners would buy out the indigenous northerners from their land. Already, concern has been expressed at the rate large portions of land are passing to southerners in such big towns as Kano, Kaduna, Jos and Zaria.

All these provisions have been attacked mainly by southerners[3] who argue, perfectly rightly, that it is

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1. No. 25 of 1962.
2. s.2 of the Act defines a 'native' as 'a person whose father was a member of any tribe indigenous to Northern Nigeria'. A non-native is 'a person other than a native'. s.5 prohibits any grant in respect of native lands (defined in s.4) without the consent of the Minister charged with responsibility for land matters.
3. President Azikiwe remarks, 'These provisos which encourage discrimination against Nigerians in their own country are scandalous. It is not a good advertisement for a nation which revels in liberal democracy and the rule of law to insert in the constitution provisions which would vest its constituent units with power to foster discrimination against its citizens who happen to originate from other regions'. "Essentials for Nigerian Survival" p.456. Dr.M.I.Okpara, Premier of Eastern Nigeria has also condemed 'this section (25-) which makes Nigerians strangers in their own country', Presidential Address, NCNC Convention (1964) 12.

precisely those areas where discrimination would have occurred without constitutional prohibition on discrimination, that have been exempted from the said provisions.

One would like to hope with Dr.T.O.Elias, that all these discriminatory laws would 'be eliminated eventually when the balance has been fairly and safely redressed as between the constituents of the Nigerian Federation'.[1] 'The Rule of Law', he added, 'has perforce to suffer this temporary setback in order to realise itself in the fulness of time'. It is respectfully submitted, however, that it would have been more reassuring to place an express time limit on those constitutional provisions which permit discrimination.

In East Africa, administrative rather than legislative measures are being taken to correct racial imbalances though the Kenya Government has indicated that if foreign enterprises do not co-operate with the Government in realizing its policy of Africanization of the economy 'suitable legislation to enforce the policy will be considered'.[2] Furthermore, in promoting Africanization citizenship guarantees entrenched in the

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1. 'The new Constitution of Nigeria and the protection of Human Rights and Fundamental Freedoms'. p.39.
2. African socializm (Sessional Paper) Paragraph 142.

constitution would be reconized and maintained 'but without prejudice to correction of existing racial imbalances in various sectors of economy'.[1]

The Asians who dominate commerce in this area see in all these emphases on Africanization a threat to their position.[2] Already in Uganda, Government has struck against Asian monopoly in the cotton trade, where Asians once owned something like 90 per cent of the cotton ginneries, by encouraging African co-operative ownership.[3] The pattern is the same in Kenya and Tanzania.

There have been Asian complaints that the respective Governments have tended to favour expatriates in preference to suitably qualified Asians.[4] The judicial

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1. Ibid.,
2. Cf. Y.P.Ghai, 'The Asian dilemma in East Africa' (1965) 1 E.A.J. no.10, 6.
   Nor are they encouraged by yet another declaration of policy which runs thus: "A system of traders licensing will be considered to restrict certain types of trade and business to citizens with a deliberate bias, in the case of new licences in favour of African applicants". African socialism (Sessional Paper) Para. 142.
3. G. Delf, Asians in East Africa, (1963) 56.
4. One Asian M.P. told me in an interview in Kampala that a Cabinet Minister once said that for any job opportunity, a Uganda African would be considered first, then an African from other East African territories, then an African from any other part of the continent and lastly an Asian who might still not get the position if a Briton was willing to serve on contract basis. I received no official confirmation of this alleged practice.

and legal departments come for special mention. Asian lawyers with considerable practical experience in local laws have been by-passed in Tanzania, for example, where Nigerians have been recruited as magistrates, state counsel and legal advisers.[1] But the Government probably feel that the ordinary Africans want to see some evidence of uhuru. An African of whatever nationality would therefore be more acceptable to them than an Asian.[2]

Yet these countries have independent Public and Judicial Service Commissions whose functions are to ensure fairness in the recruitment and promotion of civil and judicial servants. It is common knowledge, however, that these Commissions cannot always dissociate themselves from fundamental policies laid down by Government. Experience has further shown that institutional

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1. In August 1964, an Asian who had been acting as Registrar of the High Court, Tanganyika (as it then was), was suddenly removed from his position to make way for a Nigerian magistrate. The Asian was not even told what his new situation would be. Two days previously he had confirmed an interview appointment with me but as the new changes were to take effect forthwith, he was not able to fulfil the engagement.
2. And to some extent in European judge too. A British judge sent out from the High Court at Dar-es-salaam in 1964 to assume the office of Chief Justice in Zanzibar had to return because the revolutionary leaders who claimed to be echoing the feelings of the common people would not welcome a European for the post. A Nigerian was translated from Tanganyika (as it then was) to fill the post without Zanzibari objection.

safeguards in whatever form would work only if the Government so wish.[1]

When the existing unfair imbalances have been removed, and if social intercourse is maintained between the races or tribes, as the case may be, the temptation to discriminate would decrease.[2] Only then would it be possible to enact laws prohibiting discrimination with any reasonably hope of success.[3]

PROTECTION OF FREEDOM OF EXPRESSION

Freedom of expression is the most sensitive of all freedoms, and for that reason, the least secure

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1. Cf. the position taken by Dr.Banda on this matter; see supra p. . The ineffectiveness and subsequent abolition of the Northern Rhodesian's African Affairs Board and Kenya's Council of State confirm this view. On the other hand, the multi-racial Rhodesian Constitutional Council has recorded some success limited though this is. See generally, de Smith, the New Commonwealth, etc., pp.128-136; Ezejiofor, op.cit., pp.240-244. Y.P.Ghai "The Kenya Council of State and the African Affairs Board". etc.,
2. Senegal attests to this. M. Crowder observes, "Senegal not only has an excellent record of race relation as between Europeans and Africans but also between the various indigenous ethbic groups". He goes on to say that the President, Leopold S. Senghor epitomizes "the homogeneous character of Senegalesesociety". He does not belong to the dominant Islamic religion nor to the majority tribe and he has a French wife: Senegal, a Study of French assimilation, (1962).
3. Only one aspect of equality namely, equality of opportunity has been considered in this section. The other aspect, equal access to the courts is touched upon in the next chapter.

in Africa. All the countries proceed from the rather pliable principle that people are free to write or say what they like, provided their words neither defame or offend against the law. This latter restriction is crucial for much depends on the content of the laws in force.

Problems of dimension: In every country there are laws punishing seditious statements,[1] false news or reports,[2] disclosure of state secrets,[3] and obscene publications.[4] In some places, newspapers and even every form of literature are severely controlled. How far must these restrictions go before they could be said to have eaten up the freedom of expression itself? This raises the whole question of the real dimensions of this important freedom.

Tow Nigerian cases: D.P.P. v. Obi,[5] and R. v Amalgamated Press of Nigeria Ltd.,[6] afforded the Nigerian courts an opportunity to pronounce on the scope of the freedom of expression guaranteed by the former section 24

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1. Infra. p.
2. See especially s. 183 of Ghana Criminal Code, 1960.
3. Ghana, State Secrets Act, 1962, (Act 101); Nigeria, Offical Secrets Act, 1962.
4. Cf. Nigeria, Obscene Publications Act, 1961 which re-enacts Britain's Obscene Publications Act, 1959 and applies to the Federal Territory.
5. (1961) 1 All.N.L.R. 186.
6. (1961) 1 All N.L.R. 199.

(now section 25) of the Nigerian Constitution. The latter provides that every person is entitled to freedom of expression which includes freedom to hold opinions and to receive and impart ideas and information without interference. But a law reasonably justifiable in a democratic society and made in the interest of defence, public safety, public order, public morality or public health shall not be invalid merely because it is restrictive of the guaranteed freedom.

In Obi's Case, the defendant, Dr. Chike Obi, (a Univeristy lecturer and leader of a political party - the Dynamic Party - which had a small following in the country) had written a pamphlet entitled "The people: the facts you must know" which was[1] intemperately condemnatory of the Government. He was charged with sedition contrary to sections 50 and 51 of the Criminal Code which had been taken almost verbatim from Stephen's Digest.[2] The defence contended that these sections infringed section 24 of the constitution guaranteeing freedom of expression, for "any law which punishes a

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1. It read in parts: "Down with the enemies of the people, the exploiters of the Weak, and oppressors of the poor! The days of those who have enriched themselves at the expense of the poor are numbered".
2. Summarised supra, Chapter 2.

person for making a statement which brings a government into discredit or ridicule irrespective of any repercussions on public order or security is not a law which is reasonably justifiable in a democratic society".[1]

The Supreme Court thought differently. Those qualifications to the admittedly wide definition of sedition which are contained in the second part of section 50(2) of the Code afford sufficient protection to the citizen in the enjoyment of his freedom. To reach any other conclusion, said Ademola, F.C.J., would be to take an unduly narrow view of the provisions of the constituion.

> "for it must be 'reasonably justifiable in a democratic society to take reasonably precautions to preserve public order, and this may involve the prohibition of acts which, if unchecked and unrestrained, might lead to disorder even though those acts would not themselves do so directly".[2]

In the other case, R. v. Amalgamated Press Ltd., the defendants were charged with sedition, and with publishing false news likely to cause fear and alarm contrary to section 59(1) of the Code. The Supreme Court again rejected the argument that the latter section

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1. 1961 1 All N.L.R. at p.
2. Ibid., p.196.

was invalid as infringing the constitution.[1]

These two decisions have been much critized by commentators who seem to feel that the absence, in the provisions of the code, of the need to prove an intention to excite violence in order to establish the crime of sedition impedes free speech.[2] While one may regret that the Supreme Court did not go far enough to adopt a more liberal test,[3] the significant shift made from the position taken by the Privy Council in Wallace-Johnson v. The King[4] should not be overlooked.

First, a publication or statement to be seditious must be such as would likely give rise to a disorder or breach of the peace. As the court puts it,

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1. "...section 24 of the Constitution of the Federation guaranteed nothing but ordered freedom and...cannot be used a licence to spread false news likely to cause fear and alarm to the public". Ademola, F.C.J., ibid., p.203.
2. Okonkwo and M.Naish, Criminal law in Nigeria (1964) 332; Holland, "Human Rights in Nigeria" pp. 154; La Van Grove, op.cit., pp.157-159,168-171; But see Nwabueze, Constitutional law of the Nigerian Republic pp.396-399; de Smith, The new commonwealth and its constitutions, p.190.
3. The American test of "clear and present danger" propounded by Mr.Justice Holmes may be contrasted Schenck v. United States (1919) 249 U.S.47; also Dennis v. United States (1951) 341 U.S.494; and Yates v. United States (1957) 354 U.S.298. See generally, Marsh, Civil liberties in Europe" pp.542 et seq. For a useful comparison between American law of sedition and common law sedition, see B.Schwartz, American constitutional law (1955) 242-245.
4. (1940) A.C. 231.

> "It is legitimate and constitutional by means of fair argument to discuss any grievance or to criticize the Government and their policy, what is not permitted is to criticize the Government in a malignant manner for such attacks tend to affect the public peace".[1]

Secondly, the Supreme Court adopted the approach, urged in vain by the defence counsel in Wallace-Johnson's case, that the courts should not merely presume a seditious intention from the surrounding facts of the case and that it should be open to the accused "to show cause that his defence comes within the exception".[2]

The decision of the Privy Council in Wallace-Johnson's case, which has been followed in a number of African countries, arose in the old Gold Coast over the construction to be put on section 330 of the Criminal Code of that Colony, which, as elsewhere, reproduced Stephen's definition of sedition; the defence argued that the section should be read in the light of English

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1. 1961 N.L.R. p.194. Cf. the controversial offence of public mischief In Joshua v. R. (1955) 2 W.L.R. (P.C.), the appellant although found not guilty of sedition was convicted of public mischief on the same facts.
2. 1961 All N.L.R. p.196. Quaere whether this does not place the burden of proof on the accused.

case-law on the subject which regards incitement to violence as an ingredient of the crime of sedition. Their Lordships took a different view and held that the law of sedition of the Gold Coast was quite different from the law of England. No "glosses or interpolations derived from any expositions however authoritative of the law of England or Scotland"[1] should be grafted on to the Criminal Code of the Gold Coast, which was made to measure for the peculiar circumstances of that Colony.

While this decision might be unimpeachable in respect of the Gold Coast[2] where section 7(3) of the Criminal Code expressly precluded reference to English law in construing the Code,[3] the ready extension to other

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1. Ibid., p.240.
2. Even so, one would have liked to know their Lordships' opinions on how the wide definition of seditions intention in the first arm of the section could be linked to the liberal defences stated in the second arm. As the connecting link (it is suggested) seems to be missing, is the section not rendered ambiguous? Should the ambiguity not have been resolved in favour of the accused., so that some overt act or likelihood of such act (violence, disorder or disturbance of peace) would be an ingredient of the offence?
3. A point not considered by the Privy Council, Allott, "Authority of English decisions" in Essays in African Law. (Dr.Allott further cited Inspector-General of Police v. Armah (1929) F.Ct.'26-'29, 513. which was a clear authority that English decisions on criminal law had a persuasive authority in construing the Criminal Code. op.cit., also p.50).

countries of the defintion of sedition favoured by their Lordships has, in some cases, been misguided.

The general rule of construction of the respective Penal Codes of Uganda, Kenya, Tanzania, Zambia and Malawi enjoins reference to English law.[1] Yet in the Uganda case of R. v. Luima and others,[2] the courts considered themselves bound by the Board's decision in Wallace-Johnson's case. They held that mens rea was not required to prove seditions intention as set out in section 41 of the Penal Code, This was a pre-independence case; it is therefore to be hoped that the Uganda courts and those of other countries which have uncritically accepted the reasoning in Wallace-Johnson's case would feel themselves free to move away from that position as the Nigerian courts have done, but perhpas more decisively.

There are, however, many countries in Africa where the courts do not even have an opportunity to take one position or the other. Under the preventive detention laws, those whose speeches or writings are presumed prejudicial to public order are simply locked up.

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1. See s.3 of Malawi Penal Code. The corresponding sections in the other countries are identically worded.
2. 16 EACA 128; Chipembere v. R. (1961)R.N.865. (Fed. S. Ct).

Press control: Africa is notorious for the extent it has gone towards gagging its press.[1] Even, Nigeria, widely extolled as one of the very few countries on the continent with a free and robust press, took some steps in 1964 to provide for further control of newspapers circulating in its capital. In response, however, to a sustained public outcry spearheaded by the journalists themselves (in self-defence) the severe measures first proposed were watered down. The law that eventually emerged[2] preserves the country's image even though its actual working might slightly hamper the press. But as the Federal Minister of Information who introduced the Newspaper (Amedrment) Bill to Parliament observed:

> "...the freedom of the press is not absolute. The freedom of any other section of our society is not absolute. In order to relate one to another and to ensure equity, laws are enacted to regulate the freedom of individuals and sections of the community".[3]

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1. Cf. The (London) Daily Mail's 'Newsight' on the tragedy of Africa's censorship: "Continent that gags its press", Issue of August 27, 1964. Contrast Lord Thompson of Fleet's call for "some compromise" on the concept of press freedom, in the new states. Some government restrictions on the press may be necessary because the general public is not well-educated enough to be able to examine criticisms of government actions objectively. Speech at Press Institute assembly in London. The Times, May 27, 1965.
2. Newspaper's (Amedrment) Act 1964. No. of 1964.
3. Parl.Deb. (House of Representatives) September 26, 1964. Col.2433. The Minister of Finance, reminded the House that section23 of the Constitution enjoins respect for privacy. "..Government, therefore has a duty not only to protect freedom of the Press but also to preserve the rights and privacy of the individual".

He pleaded for the Press to show responsibility and not to assert just privilege all the time. Freedom of the press should not degenerate into licence. It was particularly bad that "bad news tends to make good news from the point of view of sensational headlines and circulation figures". It should be the duty of newspaper men to bear in mind, at all times, the national interest and should indulge only in "headlines and stories (which) make for the national unity and favourable international image".[1]

Many of the members who spoke against the proposed amendment felt that the Government were only seeking to protect themselves as individuals and that the Bill was uncalled for.[2]

These views for and against the Nigerian measures neatly summarise the reasons and counter-reasons that have been given for the various laws restricting free press in Africa,[3] an outline of which now follows:

(1) Registration requirements: In most countries no

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1. Ibid., col.2439.
2. One member though "there are ample provisions in our law of defamation; there are ample provisions in the civil law for the protection of individuals". Part. Deb. September 26, 1964 Wt. 2470-2471.
3. Cf. Report on the Press in West Africa: International Seminar on Press and Progress in West Africa (1960), organised by the Committee in Inter-African Relations.

newspaper can operate without prior registration.[1] The proprietor is usually required to fill an affidavit stating his name, and the name of the porposed newspaper, and the address of the publishing premises. He may have to deposit a small sum[2] or in the alternative execute a bond in that sum with surety or sureties to guarantee the payment of any penalty or damages which may arise in the future. The new Nigerian law discussed above requires every newspaper circulating in Lagos to open offices there to facilitate service of process.[3]

(2) Licensing: Some countries, Ghana, for example, oblige newspapers to take out an annual licence which may be suspended or revoked at any time if conditions specified therein are not complied with.[4] It is not difficult to see that, in one-party states, it would be a condition that no newspaper shall express opinions unduly critical

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1. Ghana, Newspaper Registration Act, 1961(Act 73). Nigeria Newspaper Ordinance 1917 cap.129. Uganda, Newspaper Surety Ordinance 1910 cap.232.
2. The sum required in Nigeria is £250. Some even think this figure is rather excessive. Constitutional problems of federalism in Nigeria (a Seminar Report) 65.A
3. Newspaper (Amendment) Act, 1964 S.1.(2).
4. Newspaper Licensing Act, 1963. (Act 189). SS.1-3 also Regulations made under section 2 (Legislature in 296) put the burden of proof on the person charged for infringing the provisions of the Act.

of the policies and measures of the single party.[1] This explains why in most francophone states only one newspaper, the party's official organ is allowed to operate.[2] As for Ghana, its newspapers are no longer the lively things there were in pre-independence days.[3]

(3) Government ownership: To ensure complete control of a newspaper, the Government may take it over completely. This was done in Ghana in respect of the former opposition paper, the Ashanti Pioneer.

Government-owned newspapers are also becoming fashionable in multi-party states.[4] The National Press Ltd., a Nigerian Government enterprise, publishes the Morning Post. This may not be bad as the Government may need a medium to explain its policies to the people. But it is not always easy to draw a recognizable line

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1. "In the one-party states, it (the press) is merely a loudspeaker. It mouths only what the hierarchy want the people to know". Peter Enahoro, address to IPI International Assembly, London, The Times, May 27, 1965. Cf. Busia, Ghana will be truly free and happy pp.3-4.
2. 'La liberte in Guinea, L'essor in Mali, see generally, J.de Benoist, "The position of the press in French speaking West Africa", Report of the Press in West Africa.
3. Cf. K.Jones - Quartey "Institutions public opinion in a rapidly changing West of Africa". in Africa, the dynamics of change.pp.146, 154. But against this must be set the privilege of unrestrained speech (save that the President cannot be critized) which Members of Parliament enjoy in the National Assembly. Such speeches are freely reported in the press and comments on them are relatively free to.
4. See more fully, Report on the Press in West Africa where it is suggested that the Government should also assist financially privately-owned newspaper enterprise.p.VIII.

between party propaganda and minesterial policies. If other party papers are allowed to operate freely, however, the possible abuses that may result from the system would not be too great.

(4) Sources of news: It is an important feature of freedom of the press that newspapers should be able to collect their news from any source. In Africa, national news agencies have been set up by various governments. In some cases, these are the sole distributors of news both in respect of news coming in and going out of the country. The Kenya News Agency has been criticized for withholding the news of the Stanleville paratroop landing in March 1965.[1] However, until the Africans can themselves play an active role in the international gathering of news, it is considered unsafe to rely solely on what others distribute.

(5) Censorship: Press censorship, in time of emergency is generally accepted. The Press censorship and Correction Ordinance[2] in Uganda may be invoked on the occurrence of any public emergency or in the interests of public safety or tranquility.[3] Thereupon, all

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1. East African Standard, March 6, 1965.
2. Cap. 231.
3. S. 2(2). The executive order imposing the censorship is conclusive. s.3.

newspapers, magazines, pamphlets and books or any other publication may not carry information, statement, comment or suggestion with respect to troops, ships, aircraft etc., No reference may be made to any measures taken for or connected with the defence of the state except with the permission of the Government.[1] The latter may establish a press censorship revocable at will. No publications may proceed until their contents have been passed by the censors.[2]

The Ordinance was invoked in 1964 during the Army mutiny. Censors were appointed but journalists complained that the censors did not give directions as to waht could be published or not.[3] It later transpired, however, that the censors would not permit publication of any news that the British troops were in the country to help resotre order.[4]

Peacetime censorship of the press is more difficult to excuse. Since the colonial era, it has been in the power of the government of most of the countries to ban the importation of any publication if public interest demanded such prohibition.[5] Far wider

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1. S. 3.
2. SS. 5, 6.
3. Personal information, Kampala.
4. Ibid.,
5. In Ghana, see now S.183(1) of the Criminal Code, 1960. Bennion op.cit., p.230.

powers of censorship have been conferred on the Executive in Ghana by section 183(2) of the Criminal Code 1960 which provides that the President may, by an executive instrument, require that any publication which contains or is likely to contain matter calculated to prejudice public order or safety or the maintenance of the public services or economy of Ghana, shall not proceed unless the objectionable matter has been cleared by the authorities.

In the Republic of Niger, by the Law of 21 July, 1959, two signed copies of every issue of a newspaper must be deposited with the Minister of the Interior or with the legal authorities "12 hours before publication". This presumably would enable the authorities to decide whether to expunge certain items from the particular issue.[1]

6. Process and penalties: Section 4(1) of Nigeria's Newspaper (Amendment) Act, 1964 provides as follows:

> "Any person who authorized for publication, publishes, reproduces or circulates for sale in a newspaper, any statement, rumour, or report, knowing or having reason to believe that such statement, rumour or report is false should be guilty of annoffence and liable on conviction to a fine or two hundred pounds or to imprisonment for a term of one year".

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1. Cf. Benoist op.cit.,

No one should quarrel with the above provision for it merely requires a high sense of responsibility to be shown by those who wield press power. But the sub-section that follows may evoke less sympathy as it places the burden of proof on persons charged under the section:

> "(2) It shall be no defence under this section that he did now know or did not have reason to believe that the statement, rumour, or report was false unless he proves that prior to publication, he took reasonable measures to verify the accuracy of such statement, rumour or support".

It was suggested, that the safeguard, contained in section 15 of Eastern Nigeria Newspaper Law, 1955 which provides that no criminal prosecutions may be commenced under section 14 (setting out an offence similar to the Amendment Act under consideration) without the order of a Judge in Chambers being first had and obtained, should be adopted.[1] This safeguard is, however, not as secure as it appears, for if the "examining judge" approved prosecutions, his brother Judge who eventually sits on the case would naturally defer to his opinions.[2]

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1. Part. Deb. (House of Representatives), September 26 and 28, 1964. per various speakers Cols. 2435 et seq.
2. Cf. Dr. T.O.Elias, Ibid., cols. 2472, 2518. He thought also that such a provision might infringe the Constitution (section 100), which vests in the Attorneys-General of the Federation ultimate right to initiate or discontinue prosecutions. ibid.,

How do the francophone states deal with this problem of false news and reports? Their press laws are largely based on the French legislation of 1881.[1] There have of course been many modifications of the latter as we saw in the case of Niger. Probably the most thorough of such modifications is the Ivory Coast's Law of 27th August, 1959 which claims to aim at" strengthening the protection of public order".[2] Its sting is to be found in Article 4:

> "The publication, the distribution, the disclosure or the reproduction by any means whatever of false news of items invented, falsified or untruthfully attributed to third parties will be punished by a term of imprisonment of one to three years and by a fine of 500,000 to 2,5000,000 fr. of the publication the disclosure in the reproduction whether done with mischievous intent or not brings about a disregard of the laws of the country or injuries of the morals of the population or casts discredit on the political institution or their working".

The offence is committed even if the consequences forbidden are merely likely. If the offence has been carried out by means of the press, the chief editors, associate chief editors and the publishers are primarily liable. But in default, the following are answerable

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1. Benoist, op.cit.,
2. Ibid.,

in turn: the authors of the offensive matter,[1] the distributors of the billposters. Lastly, the procedural safeguards to be found in the law of 29th July, 1881 do not apply nor is any statute of limitation applicable.

Broadcasting monopoly: In a vastly illiterate community, the influence of broadcasting is considerable. Television is just spreading and only very few can afford to buy transmission sets in the handful of countries where transmission has commenced. The radio, on the other hand, is a well-established medium of communication; rediffusion services having made extensive and relatively cheap relay possible.

Since its inception, however, the radio in all the African countries have been "a government monopoly as well as its instrument [and] it has remained resolutely so".[2] Where it is not run directly as a government department, a statutory corporation is set up but the latter is usually answerable to the Minister and in many

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1. Article 4 further provides, "In any case, the authors may be expelled from the cojntry for a maximum of five years". Quaere if this penalty may attach to a citizen as well.
2. Jones - Quartey, op.cit., pp.155; 158. Ghana's Telecommunications Act, 1962 (Act 112) gives the President "the exclusive privilege of constructing and telecommunications throughout Ghana".

cases, its proclaimed independence is illusory.[1]

Under these arrangements, political broadcasts are necessarily controlled[2] and there have been instances of news vetting too.[3]

The courts as guarantor of liberty

Although most of the rights we have just outlined are subject to a number of restrictions, it is still within the power of the judges to enlarge them through liberal interpretation of the Constitution and other laws. Judges have their own predilections but it is essential that these should not reflect in their judgment to the detriment of those who appear before them. Equally important is their independence from the other branches of government. We shall devote the

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1. In Nigeria, for example, the Nigerian Broadcasting Corporation has been chided at times for taking its independence too literally. During the controversy over the proposed enactment of a detention law, the Corporation was publicly rebuked by the Government for allowing a young Nigerian lawyer to deliver "a venom" through the air. Daily Express Lagos, July 30th 1963. Cf. The British Prime Minister's recent complaints about the BBC's handling of the Labour Party's 1965 Congress.
2. The opposition parties in Senegal refused to make use of the broadcasting facilities afforded them during the 1963 elections because they considered the meagre 30 minutes allocated to them inadequate.
3. There were complaints in Northern Nigeria that the Government-owned radio did not relay news of the 1964/1965 election crisis. The few who had wireless sets had therefore to tune to the BBC to keep abreast of events. Similar complaints where made regarding the handling of the 1964 nation-wide strike.

next chapter to a discussion of these and other matters that make for a fair and impartial administration of justice.

CHAPTER EIGHT

THE ADMINISTRATION OF JUSTICE

We took the position earlier in this study[1] that the concept of the Rule of Law, stripped of all the verbiage that has gone into defining it simply means a standard of good government: the feeling of every citizen that he is receiving due justice from the state. Even if the notion of justice is constant and universal, its administration may raise different problems in different places due to socio-political factors. It is proposed in this chapter to spotlight some of these problems as have arisen in Africa.

1. In nearly all african states there is a legal dualism, in some cases even a pluralism. Does this enhance or impede the Rule of Law?
2. How does the principle of judicial independence and impartiality fit into a continent where, at least for the moment, politics permeates and dominates all aspects of life?
3. Is justice accessible and available to all the people irrespective of race, tribe, colour, sex or situation in life?

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1. Chapter 2.

4. What procedural safeguards are there for parties to an action, especially in criminal causes?
5. Are there special conditions which dictate a relaxation of the requirements in (4) in the interests of state security or other considerations?
6. What are the frontiers of justice? (That is, the problem of justiciability).
7. Is justice allowed to run its cause? Are judgements binding on all parties including the state when it is a party to an action, civil or criminal.

These are large issues and with the space available, it is not possible to go deeply into all of them, but it is hoped that the more important of them would receive an attention commensurate with their importance.

A. PARALLEL LEGAL SYSTEMS

In most African states, there are found side by side two or more legal systems; the received European system, the indigenous (variously called traditional, customary, or African) system; and, in some places, a religious system based on Islamic law as well. Further complicatins may arise, as in a country like the Somali Republic where the received general system is dual: Italian and English. Steps are, however, being taken here,

as in other places, to create a single national legal system, both through the integration of the courts and the unification of the laws.[1]

Uniform justice. Does this pluralism make for uniform justice? The answer must be in the negative, though this should not matter so long as the lack of uniformity is founded on rational factors. The Rule of Law itself requires that the administration of justice no less than the formulation of laws should accord with the wishes of the people. There does not appear to be the slightest doubt that the vast majority of African peoples still want to be subject to their customary law, administered in a manner intelligible to them. Premature attempts to foist uniformity on the people in these matters are bound to be ill-fated.[2]

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1. Various aspects of this problem have been extensively discussed at many conferences held in Africa and in Europe since 1953. For a review of these conferences and a summary of the practical achievements so far recorded, see Allot, "Towards the Unification of laws in Africa". (1965) 14 I.C.L.Q. 366; also African Conference on local courts and customary law (1963).
2. Ghana's abortive Marriage, Divorce and Inheritance Bill, 1961 (see W.P.No.3/61) may be instanced. An even more telling illustration is provided by the Ethiopian Civil Code passed in 1960, which attempts to harmonise the French, English, and customary laws of civil wrongs. This Code has been coldly received as, at best, a programmatic enactment. Cf. Allott, "Towards the unification of laws in Africa". pp.378-374; 387-388.

Speedy and Cheap justice. On the other hand, parallel legal systems tend to create unnecessary areas of conflict[1] causing delay in justice or increase in costs of litigation. Such conflicts may arise between the general law or between different systems of customary law. In addition, it is not always clear which court may properly exercise jurisdiction in a given case. In Liberia, the extent to which a party to a suit follows tribal customs decides whether he is subject to tribal law and jurisdiction; this vague test has persistently been a source of conflict.[2] In Northern Nigeria, on the other hand, a person who, prior to the commencement of the trial of an action in which he is a party, alleges that he is not subject to the jurisdiction of the native court may apply to the High Court to determine the truth of his allegation. The High Court would then direct that the case be heard in any court "as in all the circumstances of the case may seem just".[3] Suppose an action which is "properly

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1. See W.C.E. Ekow Daniels, "The interaction of English Law with customary law in West Africa" (1964) 13 I.C.L.Q. 574; also Anderson, "Islamic law in Africa; problems of today and tomorrow", in Changing law in developing countries, p.164.
2. Cf. M.R.Konvitz, "Liberia" in Judicial and legal systems in Africa (ed.A.N.Allott) (1962) 82.
3. Native Courts Law, 1956, No.6 of 1956. s. 16. A specially constituted Court of Resolution resolved any conflict of jurisdiction between the High Court and the Sharia Court of Appeal. Court of Resolution Law, 1960, No.17 of 1960.

cognisable" by a local court is inadvertenly before the High Court. Section 132 of Ghana's Courts Act provides that the case shall be referred forthwith to the appropriate local court.

A further unsatisfactory incident of parallelism is that it duplicates appeal opportunities. The litigent first exhausts all the remedies available in the customary court system (which may mean that in some cases four courts would have heard his case) before moving the High Court and ultimately the Supreme Court. This poses a real problem in Africa where litigants are hardly content until the final court in the chain has pronounced on their case.

These problems are however, being urgently tackled in various parts of Africa. The courts are already integrated in Tanzania,[1] Somali Republic[2] and in a number of francophone states;[3] Senegal, Ivory Coast and the Niger Republic, for example. The necessary Act to this end was

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1. Magistrates' Courts Act, 1963.
2. Where a Consultative Commission for Integration was established. For what has been so far achieved in integration generally, see the background paper prepared for the Conference on Integration of Customary and Modern Legal Systems, held at the University of Ife, Ibadan, Nigeria, in 1964, by Dr. Paolo Contini (Chairman of the aforementioned Commission), entitled "Integration of legal systems in the Somali Republic".
3. Cf. Background statement on Law No. 62-11 of 16 August, 1962 submitted to the President of the Niger Republic and reproduced in African Conference on local courts and customary law, pp. 118-119; also ibid., pp. 116-117 for a summary of the transitional arrangements in the Ivory Coast.

passed in Uganda too and is being rapidly applied to the various districts.[1]

But choice of law problems will still remain after the courts have been integrated unless the laws are also unified. Thanks to the adoption of criminal codes, this problem is virtually non-existent in the criminal sphere.[2] Even in those societies (Buganda,[3] for example) where criminal offences are being retained, the constitutional requirement that all offences must be written has hastened the codification of the customary offences. The recent adoption by Northern Nigeria of its own Penal Code[4] was an unfortunate movement the other wa in that it reintroduced parallelism in criminal law in Nigeria which the extension of the Criminal Code (then in force in Northern Nigeira) to the Southern Nigeria in 1916 had sought to end.[5] In another sense,

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1. Magistrates' Courts Act, 1964, Act.38.
2. For the position in the anglophone states, see J.S.Read, "Criminal law in Africa of today and tomorrow". [1963] J.A.L.5. The history of the present position in the francophone states is told by Mangin, "Problems of the Judiciary in the 'Communaté' in Africa" (1959-1960)2. J.I.C.J. No.2.pl.5. Following the recommendation of the Brazzaville Conference of 1944, an indigenous Penal Code was promulgated by the Decree of July 27,1944. Somewhat surprisingly this Code was repealed by the Decree of 30 April 1946 to be replaced by the French Penal Code, The same Decree vested the French courts with the exclusive jurisdiction over all crimes committed by natives. ibid., p.81-83.
3. Customary Offences Law, 1964.
4. Penal Code Law, 1959, No. 18 of 1959.
5. Cf. R.Y.Hedges, Introduction to the Criminal Law of Nigeria (1962) 5.

however, the Penal Code represents a step forward in that by its enactment the ill-defined Islamic offences and the uncharted customary offences disappeared ecept in so far as they are recognised by the Code. Even so it would have been preferable for either the North to adopt the Criminal Code to its requirements, or for the rest of Nigeria to go along with the North in adopting the Penal Code which, although patterned closely on the Sudanese Penal Code, has its ancestry in the Indian Penal Code.[1] It is a much simpler Document and therefore better suited to African countries where lay men decide an overwhelming majority of criminal cases.

In the civil sphere, unification is not going to be easy as there are many variations within one ethnic group and between ethnic groups (let alone between a given customary legal system and the European system.) Time is required to restate the diverse laws as accurately as possible, strike an accord where possible and finally

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1. The one major departure from the Indian Penal Code is the addition of s.403 which makes it an offence for a person "of the Moslem faith" to drink "anything containing alcohol other than for a medicinal purpose".

codify them.[1] This procedure does not appear to appeal to politicians who are over-eager to achieve uniformity in all aspects of life in aid of national integration. It is, however, difficult to see how diversity in personal laws seriously affects national political unity. Nor should the law-makers place the people in a position where they may be tempted to disregard the laws because these are far from popular.

B. INDEPENDENCE OF THE JUDICIARY.

Those who are called upon to administer the law under any system - however homogeneous - must do so fearlessly. A general objection to the customary court system was that the courts and their personnel were everywhere conttrolled by the executive branch of government. In some places officials not only heard appeals, and were empowered to review and revise decisions from these courts, but were even empowered to sit with the customary court judges thus virtually taking over the

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1. Attention may be drawn here to the Restatement of African Law Project under the direction of Professor A.N.Allott at the School of Oriental and African Studies, where the method advocated here is being practically applied. It is hoped that after the laws have been restated, a synthetic exercise would follow and the finished products would be ready for legislative endorsement as codes. See generally Allott and Cotran's "Restatement of laws in Africa etc.," a background paper presented to the Ife Conference.

conduct of the case.[1] In other plaves, Northern Nigeria for example,[2] the position has not changed much up till the present day.

There were good reasons for executive involvement in the administration of native justice in the early days of colonial rule. First, the judges of the superior courts themselves were part of the Judicial Department which was a branch of the colonial service. (The implications of this are brought out in the case of Terrell v. Secretary of State for the Colonies[3] where it was held that in the absence of legislation the security of tenure enjoyed by English judges did not extend to colonial judges.) There was therefore, nothing exceptional at the time in placing the local courts under the Administration. Secondly, the superior court judges

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1. Cf. Zambia, Native Courts Ordinance Cap. 158, s.24. Cf. Judicial and legal systems in Africa (ed.A.N.Allott) (1962) 157.
2. Part II of the Native Courts Law, 1959 places all matters relating to the establishment, constitution (including appointment and dismissal of the personnel of the native courts in the Executive in the shape of either the Native Authority or Provincial Commissioner as the case may be subject to the authority of the Minister. Part VIII of the same Law requires "law officers" to be appointed as inspectors of Native Courts. They will exercise general supervisory powers over these courts including the power to transfer and review cases. In the latter case, however, the inspectors where they find a prima facie evidence of miscarriage of justice can only refer the case to the court which would have been competent to receive the case on appeal. s.58.
3. (1953) 2 Q.B. 482. See more fully, Elias, British Colonial law (1962) 57-78.

were too few and their already heavy commitments under the general system would have suffered considerably had they endeavoured to take on the control of the customary courts as well. Lastly, the arrangement was seen as a protective device for the customary legal system which needed to be sheltered from the technicalities of a developed European system.

Tribute is due to the devotion with which these early administrative officials went about their difficult tasks, but the reasons which actuated their supervisory role over those who administered the indigenous law are not really applicable today. Moreover the party system has introduced a new element in to the issue. In many multi-party states, the customary courts are firmly controlled by the ruling party, and have become an instrument of oppression, thus underlining the need to keep the judiciary - from the lowest to the highest courts - free of political control.[1]

It is easy to see why the judiciary should be shielded from political influence in multi-party states. Does it follow that the one-party states have no need of a special machinery for the protection of the

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1. Cf. African Conference on the Rule of Law, pp.133 et seq; also African Conference on the Local Courts and Customary Law.

judiciary? Here partisan politics is virtually absent. Even judges (one or two have done so in Tanzania) may be members of the national party. Such a narrow view of the principle of judical independence would, however, be wrong.

Constitutions create organs of governement with defined functions allocated to each. The underlying belief is that each organ shall be able to fulfil its functions without hindrance and would, in its turn, let others fulfil theirs with the same degree of freedom. The executive controls the use of force; members of the legislature are invested with privileges that they may be better able to discharge their duties. To the same end, the judicial branch of government - under whatever political system - is in need of a special protection from possible interference by the other branches of government as well as from intimidation by ordinary citizens. It is most gratifying to note, as we shall see more fully later, that one-party Tanzania has better provisions for safeguarding judicial independence than a multi-party state like Nigeria.

I. Protection from political interference.

The extent to which judges are free from political control may be examined under three conventional

heads: (a) mode of appointment; (b) conditions of judicial service; and (c) security of judicial tenure.

(a) Judicial appointments

Who should have the power to appoint? Opinions are sharply divided as to whether the manner by which a judge is appointed could afterwards influence him in the discharge of his duties.[1] The Stuart kings, as we saw,[2] picked their supporters as judges but were subsequently disappointed that some of the latter took an independent line in time of political crisis. Up till now, judges in Britain, who by all accounts, are among the most independent in the world, are appointed by the executive though the covention is fairly settled that the appointing Prime Minister and the Lord Chancellor would ignore political considerations when making an appointment.

But Britain (first in Nigeria) has impressed on every African colony about to be independent, the usefulness of a Judicial Service Commission (with a

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1. For a survey of the methods adopted in the leading countries of the world, see Marsh 'Working paper on the Rule of Law in a free society'. pp.281-288.
2. Chapter 2.

predominant judicial membership) as an appointing body for all judicial posts except that of the Chief Justice, whose political appointment is conceded. The Judicial Service Commission was first introduced in 1947 into the Constitution of Ceylon but whereas in that country its functions were confined to judicial personnel other than the judges of the Supreme Court and the High Court,[1] the Judicial Service Commission as the institution was framed in the ex-British territories in Africa were to have powers of appointment of superior court judges as well. African political leaders have never pretended to like this arrangement, and Nigeria in 1963 seized the opportunity of the Constitutional review for a republic to abolish its own Judicial Service Commission.[2] If the British system worked satisfactorily, there was no reason to suggest that it would not do so in Nigeria. But there were many who felt that it would be unreasonable to imitate Britain in this regard. Those who want to abolish the Commission ought to show that the

1. Ceylon (Constitution) Order-in-Council Cap.379.ss.52-55.
2. Proposals for the constitution of the Federal Republic of Nigeria (Sessional Paper No.3 of 1963).

existing system has not worked satisfactorily.[1]

Sierra Leone, Uganda, Kenya, Malawi, Zambia and the Gambia still retain the Judicial Service Commission with powers to give a binding advice on judicial appointments, though the opinion of the leaders in most of these countires is against the system.[2] One common objection to the Commission is its composition. The composition of the Zambian Commission is typical. It comprises the Chief Justice as Chairman, the Chairman of the Public Service Commission, a superior judge designated in that behalf by the Chief Justice and one other member appointed by the President.[3] It was possibly erroneous not to include the Attorney-General to sit as of right on the Commission. As the principal legal adviser of the Government, he would have been a useful link between the Commission and the Government.[4]

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1. Parl.Deb. (House of Representatives) August 7-9, 1963, Cols. 26 & 7 et.seq; Senate, August 7, 1963, Cols.628 et.seq; Following a renewed appeal in 1965 by the Federal Chief Justice and the Bar (West African Pilot, Lagos, August 17, 1965), the Federal Prime Minister said that he saw nothing wrong with the abolition of the Commission and that he had received no complaints regarding the appointment of superior judges since its abolition. (ibid., August 23, 1965). The Permier of Northern Nigeria was also reported as having said: "If the judges went to appoint themselves, please let them pay their salaries themselves". Daily Express, Lagos, September 1965.
2. The position of the Uganda Government was made clear in an open letter written by the then Minister of Justice to the President of the Law Society. Uganda Argus, September 15, 1963.
3. Constitution s.104(1).

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to five years' duration.

One would have expected that when Nigeria abolished its own Commission, it would adopt the Tanzanian solution which requires the President to appoint High Court Judges after consultation with the Chief Justice.[1] Although I understand that this practice has been followed in respect of the appointments that have been made in Nigeria since the new procedure there is everything to gain and nothing to lose by explicitly writing this "conventional" practice into the constitution.[2]

The francophone states, following the French example, have struck an admirable compromise in this matter. Judicial appointments are made by the Superior Council of the Judiciary.[3] The Council is, in effect, made up of members of the Supreme Court, except that it

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4. The recent amendment to the Kenya Constitution has rectified this omission. Kenya Constitution (Amendment) Act, 1965, Act. No. 14.

1. Constitution of the Republic of Tanzania, 1965, s.56(2).
2. Two "regional" appointments have been made to the Federal Supreme Court without consulting the Chief Justice of the Federation. See the Nigerian Constitution S. 112 (1).
3. Cf. Senegalese Constitution Act. 80.

is presided over by the President of the State with the Minister of Justice acting invariably as Vice-Chairman. All categories of the judiciary comewithin the jurisdiction of the Council.[1]

The machinery of appointment(s) of the personnel of subordinate courts in the anglophone states are far from uniform. Although in Tanzania disciplinary powers over these inferior judges and other judicial officers are vested in a Judicial Service Commission, the appointing power is firmly retained by the President.[2] Elsewhere, the Judicial Service Commission makes such appointments[3] though with the abolition of the Commission in Nigeria, the Public Service Commission (an independent body too but with no requirement that the majority of its members should be

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1. Ibid.,
2. Constitution s.61. But he has since delegated much of this power to the Judical Service Commission in respect of the appointments of judicial officers except the primary court magistrates. Judicial Service Act, 1962 (Consequential Act 10)s.15. In respect of the appointment of primary court magistrates, a special commission is constituted. Magistrates Courts Act, 1963 Schedule 6, Part IV.
3. The Commission's functions in this respect may be simply advisory. See for Uganda, Judicial Service Act, 1963. Act No. 67. In Zambia, The President may give general directions to the Commission to which the latter must comply. Constitution s.104.(3)

judges or even have legal qualifications) controls the appointments etc., of magistrates.[1] In the North as pointed out earlier, appointments to the native courts are ultimately controlled by the Minister of Justice.[2] In Western Nigeria the Local Service Board shares responsibility for appointments to the Customary Courts with the Minister of Justice.[3]

Qualifications required for appointment: Minimum qualifications are normally prescribed for appointment to the higher judiciary to keep out inexperienced lawyers.

In the anglophone states, a candidate must hold or have held a high judicial office or be entitled to practice and has so practised as a lawyer before a superior court in some part of the Commonwealth for periods ranging from 10 to 5 years according to how each country is placed as regards legal manpower.[4] Up

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1. Constitution, s.147.
2. ante. p.
3. Customary Court Amendment Law, 1962, No.28 of 1963.
4. Cf. Constitution of Tanzania, 1965, s.56. The personnel position is most depressing in most of these countries. Cf. Report of the Denning Committee on Legal Education for students from Africa (1961) Cmnd.1255; M.Hunter "Emergent Africa and the Rule of Law" (1963) 6 Lawyer (No.2) 1; S.Littlewood, The legal profession in African territories" in Changing law in developing countries. pp.154-163.

to the time of independence it was the rule to promote magistrates to the High Court Bench but nowadays in countries like Nigeria[1] and Ghana where there are many able practising indigenous barristers, the tradition is being established of appointing judges straight from the Bar. In countries not quite as fortunate it may be advisable to encourage a period of apprenticeship as magistrates for would-be judges.

The impression that career judges[2] such as are found in the francophone states are necessarily pro-executive may be exaggerated. At any rate since the recent years when the Council of the Higher Judiciary has been handling judicial promotions, the evidence seems to suggest that every promotion is treated as a fresh appointment[3] and is decided both on grounds of

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1. Excluding the North though here crash programmes are in hand to remedy the situation. See Statement made by the Government of Northern Nigeria on additional adjustments to the legal and judicial systems of Northern Nigeria (undated) paras.10-11;34-35. Even the rest of Nigeria with its over 1,000 lawyers is still faced with "personnel problems in the administration of justice (which) have become more and more complex" Sir Adetrobinbo Ademola, "Personnel problems in the administration of Justice in Nigeria". in African law etc., p.41.
2. i.e., judges start from the bottom of the ladder and climb up on promotional basis.
3. Cf.Marsh, "Working Paper on the Rule of Law in a free Society". p.291.

seniority and merit. Candidates for the bench must normally hold a law degree, sit an examination which would earn them an entry into the National Centre for Judicial Studies to train for three years.[1] These requirements may be relaxed to assist in solving the present problem of acute shortage of judges. But the francophone states are reluctant to settle for half-baked judges. Instead, they have availed themselves of technical assistance offered by France to provide judges as required.[2]

Both in the law faculties and at the Centre for Judicial Studies, the training provided for francophone students is very thorough. Subjects taught are not confined to law but include political economy, political science, and fiscal science and techniques. Even if allowance is made for the fact that francophone courts have wider jurisdiction than their anglophonic counterparts[3] and would therefore require judges with a wide educational background, the form of legal education and training in anglophone states, by comparison

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1. Mangin op.cit., pp.85-87.
2. Ibid., pp.88-91. Cf. the limited but invaluable assistance offered by Nigeria and Ghana to the East and Central African countries.
3. e.g. powers of review in administrative and audit matters.

with this, is far from adequate, certainly not for a developing society.[1] The education and training of a lawyer must be so devised as to enable him to understand "the basic principles upon which the state is directed".[2]

It may be added too that a lawyer in Africa of today - and this is even truer of the judges especially those in Group A countries called upon to determine whether certain laws are "reasonably justifiable (or required) in a democratic society" - should acquaint himself with the fundamentals of the laws of other legal systems,(civil or common law). He has to be a comparative lawyer of a sort which means he must acquire the requisite training which would enable him to understand

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1. Some educationists have stressed this problem. For a review of current thinking on this subject, see A.Milner "Legal education and training in Nigeria" in Nigerian law etc., pp. 110-131; further, Allott, "Legal development and economic growth in Africa" in Changing law in developing countries, p.194 F.J.Pedler, "The problems of East and West Africa" in The encouragement and protection of investment in developing countries. I.C.L.Q.Supplementary publication No.3. (1962) 63. For some changes that are taking place see a survey of "Legal education in Africa" (1962) J.A.L.75.
2. President Nkrumah's speech at the formal opening of the Accra Conference on Legal Education and the Ghana Law School on January 14, 1962, reproduced in [1962] J.A.L. pp. 103-104.

legal system other than his own. Comparative law may be offered as a separate subject or each law subject may be taught on a comparative basis.

The point being laboured here is that judges ought to possess the requisite ability for their work and that this is possible only through the right kind of legal education and training. An independent but able judge is much more likely to be impartial.

What do we mean by "impartial" in this connection? It means that the judge:-[1]

(a) is not influenced by personal relations or other prejudices;

(b) is consistent in his judgements.(The rule of stare decisis safeguards this quality in common law countries but it should not be allowed to stifle creative judicial development of the law.)

(c) gives reasoned decisions.

With the foregoing emphasis on legal expertise, it is fair to ask what place is there for laymen in the

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1. I have borrowed and adapted the six norms of impartiality formulated by Professor Harald Ofstad in his article "Impartiality" in Legal essays: A tribute to Frede Castberg (1963) 135-152. Cf. The Hon.Charles D.Breitel "The judicial choice" (1965) 8 Lawyer (Nos.2 and 3) 7; Sir Adetokunbo Ademola, Chief Justice of Nigeria's five qualities of a good judge. "Personnel problems in the administration of justice in Nigeria". pp.42-43.Goodhart,"Legal procedure and democracy". p.56.

administration of justice? It has been urged that the ultimate objective of all African legal systems should be a fully professionalized magistracy.[1] With due respect we would not go as far as this. Laymen must continue to play an active role in the administration of justice. It is the illiteracy of these judges and not their lack of learning in the law which gives the impression that they are not up to the task at the moment. Moreover, those of them who can read and write and who preside over customary courts find statutes and by-laws they are called upon to apply unintelligible. (But so do professional lawyers at times). The answer is to make the law simpler, and to rid the existing statutes of archaic language.[2] The lay magistrates in England are doing useful work and the African lay judges would surely give similar account of themselves when, through education, the common man would have begun to understand the new society of which he is a part and when the law has become less of a lawyer's law. Meanwhile,

1. African conference on local courts and customary law. p.
2. Cf. England, where the recently appointed law commissioners intend to investigate the means of simplifying the statute law. 'It is desirable', they observe 'that the law should be simpler, more readily accessible, more easily understandable than it is today'. Law Commissioners Act 1965 (First programme of the Law Commission) (1965), para. 3.

it may be useful to adopt the German Schoffen system under which laymen sit as judges with and under the chairmanship of a professional judge.[1] This is to be preferred to the present use of non-decision-making assessors in that it approximates more to the traditional idea and practice of a multiple bench.

(b) Conditions of service. Superior judges throughout Africa are paid reasonably attractive salaries which are also specially protected.[2] In Commonwealth Africa, for example, judicial salaries are made by the various constitutions[3] a charge on the Consolidated Fund and are, not therefore, subject to an annual parliamentary vote. Nor can they be reduced to the detriment of any judge subsequent to his appointment. A prohibition is also placed on the abolition of a judicial post while it has a substantive holder.

Francophone states safeguard every judicial post,[4] with like results, though by the means of an organic law dealing with the structure and organization of the judiciary. These states even go further to provide

1. Cf. Marsh op.cit., p.290.
2. Cf. H.Chitepo, 'The responsibility of the Judiciary and of the Bar for the protection of the rights of the individual in society'. In African Conference on the Rule of Law p.69 at p.73.
3. e.g., Nigerian Constitution, s.133.
4. Cf. Niger Republic, Law No. 62 - 11 of 16 March, 1962.

that a judge cannot be transferred from his station without his prior consent.

A distinction made between superior and inferior courts in the anglphone states means that the latter enjoy less elaborate safeguards as regards conditions of service. The implications of this are brought out more clearly in the discussion on security of tenure which follows.

(c) Security of tenure: A judge who is in fear of a possible summary dismissal, on account of his considered decision which happens to displease the powers that be, is not likely always to decide cases according to law. It is essential, therefore, that neither the executive nor the legislature should be entrusted with disciplinary powers over the judiciary. This policy as we shall see shortly, has been adopted by a number of African countries though some have rejected it, but in all countries a judge normally holds office until his retirement at a fixed age.

1. The francophone states lead the field in this matter, at any rate in theory. The Superior Council of the Judiciary (which, as pointed out, is made up of members of the Supreme Court except for the addition of the

President and the Minister of Justice) is charged with the function of removing or otherwise disciplining judges.[1] In some states,[2] it is customary to refer the disciplinary matter first to the Court of Appeal (Cour d'Appel) which sits in general assembly, makes its findings and transmits them to the Superior Council for its decision which is final.

2. In a number of anglpphone states, for instance, Sierra Leone, Tanzania, Uganda, Kenya, Malawi and Zambia,[3] an ad hoc tribunal appointed by the President or Prime Minister, as the case may be, and consisting of a Chairman and at least two other members who must themselves be superior Judges or ex-judges, decides whether a superior judge should be removed from office. The retention of this procedure by Tanzania despite its de jure one-party system is noteworthy.[4] Some countries, Sierre Leone,[5] for example, provide for a further reference to the Privy Council in London of the 'local'

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1. Senegalese Constitution. Art. 60.
2. Niger Republic, for instance. Law 62-11 of 16 March, 1962. Art. 43.
3. The Zambian provision is typical. Constitution s.100.
4. Constitution of 1965, s.58.
5. Constitution s.77 ; also Malawi Constitution s.77.

tribunal's verdict if it favours removal. This machinery can be set in motion only by the head of government and at his discretion though there must be a cause for his decision, namely, that the judge has been unable or unfit to perform his functions due to infirmity of mind or body or for misbehaviour.[1]

3. Nigeria, ill-advisedly, replaced the foregoing admirable procedure for the less satisfactory British practice. Sub-section (2) of section 124 of the Nigerian Constitution now provides that a judge may be dismissed pursuant to a parliamentary address to that effect, provided the motion for the address was passed by the vote of no less than two-thirds of all members of the respective Houses of Parliament. The protests of the judges, members of the Bar, the Press and some prominent back-benchers in Parliament[2] were brushed aside. The

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1. Quaere if the head of government was a party to the misbehaviour. A political remedy would probably be sought against him first before proceeding against the judge under a new head of government.
2. One member, Mr.K.Obi regretted that the judges were being placed on very slippery ground. It was not right that a judge's livelihood 'should depend on the decision of us politicians'. By the new provision a labourer enjoys better security of tenure. You could 'not sack a labourer without giving him notice of a week or two'. Parl.Deb.(House of Representatives) August 7,1963 Col. 2722. On the explanation that the new arrangement was being brought in line with British practice, Chief Ubani replied: 'Let this way of thinking be eradicated and let Nigeria go ahead with a policy which meets with the wishes of the people and let others come and borrow from us. Nigeria must make her own contribution to civilized government'. Ibid.,Col.2847. In the Senate, Chief (Mrs.) M.A.Esan considered it strange that Nigerians did noot want the Queen as their sovereign, but

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suggestion, supported by the Chief Justice of the Federation, that a Council of Chief Justices be entrusted with the powers to prnounce on judicial dismissals did not impress the legislators.

It is not stated if ajudge about to be removed would be given an opportunity to be heard in his own defence. Presumably a Committee of the two Houses would investigate the complaints against the judge and report to each House before a vote is taken on the address.

4. Ghana, while retaining the provision for the judges' removal by parliamentary address, has gone further by placing the fate of the judiciary in the hands of one man, the President. By an amendment to the Constitution in 1964[1] (a sequel to the verdict of the Special Criminal Division of the High Court in the treason case involving T. Adamfio and others), the President's existing power to dismiss the Chief Justice was extended to all other Judges of the Supreme Court and the High Court. The reason given for this remarkable departure from the practice in other African countries was that

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still they 'want what the Queen stands for'. Parl. Deb. (Senate) August 7, 1963. Vol. XII Col. 628.

1. Act 224, inserting a proviso to Article 45(3) of the Constitution.

socialist Ghana could not tolerate a judiciary which 'is far above the people and becomes an independent power'.[1]

The precipitate manner by which the then Chief Justice, Sir Arku Korsah was relieved of his post[2] for his part in the conduct of the Adamafio case confirms the worst fears of those who doubt the wisdom of vesting disciplinary powers over judges in the executive.

(d) Tenure of office of inferior judges: Francophone states protect all categories of the judiciary alike. Indeed, one reason for seeking the integration of courts in these countries was to extend the principle of judicial independence to all Courts.[3] This imaginative objective is just taking roots in the anglophone states where the belief has prevailed far too long that in as much as appeals lie from subordinate or inferior courts to the superior courts, the principle of judicial independence

1. Text of a broadcast on Radio Ghana cited in 'Ghana towards dictatorship', an ICJ Staff Study (1964) 18 BICJ 9 at p.13. Cf. Our charge against the judges, an article published in the Ghanian Times of December 20, 1963.
2. As Chief Justice. He and his two brother Judges who heard the case elected to retire their judicial posts soon afterwards.
3. Cf. Background statement on Niger's Law No.62-11 of 16 March 1962, reproduced in African Conference on local courts and customary law, pp.118-119.

should be vigorously applied only in the latter. Yet very few litigants can afford to reach the superior courts with the result that the lowly members of the community are possibly condemned to having (a) second rate justice.

In Nigeria, with the abolition of the Judicial Service Commission, disciplinary control over magistrates became vested in the Public Service Commission, which keeps the civil service under surveillance.[1] However, inasmuch as the members of the Public Service Commission are not required to be legally qualified, the arrangement leaves much to be desired and the Tanzanian solution seems preferable. There the Judicial Service Commission is given the power to dismiss and exercise disciplinary control over civil servants and persons holding or acting in an office of a judicial nature other than the office of a High Court Judge.[2]

If magistrates[3] should, regrettably, be accorded a civil service status, it seems that customary court judges ought to have been treated in the same way. However, that has not happened; instead these judges are regarded primarily as employees of the local authority

1. Constitution s. 147.
2. Constitution s. 61. Cf. Kenya, Constitution s. 184.
3. In Nigeria.

and are therefore ultimately controlled by the Minister of Justice. It does not appear to matter that in the North some of these judges preside over courts with unlimited jurisdiction[1] in criminal and civil suits, save that constitutional issues arising before them are referred to the High Court and subsequently to the Supreme Court. But it is fair to add that much is being done to remove or minimise local pressures on judges. Any disciplinary action over them by the Native Authority or Provincial Commissioner must be confirmed or approved by the Ministry of Justice. The latter has appointed a Commissioner for Native Courts assisted by a team of inspectors, with general supervisory jurisdiction over native courts. He has been able to check some abuses committed by native court judges where these do not apparently affect the political interests of the ruling party.

In Western Nigeria, the Local Government Service Board responsible to the executive is by a recent amendment to the Customary Courts Law[2] empowered to

1. They are classified as Grade A Courts and have powers to pass the death sentence but such sentence may not be carried out until it has been confimed by the Minister. Native Courts Law ss.17-19. and First Schedule thereto.
2. Customary Courts (Amendment) Law 1963 No. 28 of 1963. s.2(2).

> "dismiss or suspend any member of a customary court who appears to the Board to have abused his power or to be unworthy or incapable of exercising the same justly or who is disqualified or whom the Board considers for other or sufficient reason ought to be suspended or dismissed".

The effect of this amendment is to remove the distinction once made[1] between legally qualified presidents of customary courts and laymen presidents, the former having in effect been treated as magistrates.

II. Protection of judges from intimidation

Judges must be able to carry out their functions without undue embarrassment. This is why, as a rule, judicial affairs may not be raised or debated in parliament in any anglophone state unless there is a substantive motion to that effect.[2] In addition, superior judges enjoy immunity from civil and criminal suits in respect of utterances made in the course of their judicial duties. Where a judge is accused of a crime committed extra-judicially, he would be suspended from his office pending the conclusion of his trial. But in states where the concept of public order or state security is rather wide, a judge would find himself detained indefinitely

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1. Customary Courts Law, 1957, s.5.
2. April 11, 1963. Col. 1126.

without trial.[1] Does such an indefinite detention preclude the disciplinary tribunal for judges (where there is one) from concurrently investigating the alleged misbehaviour of the judge concerned to ensure that an indirect method is not being used to assail the independence of the judiciary?

The law relating to contempt affords judges a further measure of protection. Any action or inaction which amounts to interference with due administration of justice or which tends to have these effects is everywhere treated as contempt of court. The anglophone states distinguish between contempt committed in the face of the court itself (which may be dealt with summarily by the very judge affected) and contempt involving disobedience of instructions given by the court. The latter type needs no further elaboration; the nature of the former is best illustrated by a recent Western Nigerian case.[2]

Mr. Justice M.O. Oyemade was presiding over a

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1. Cf. the arrest of M.Ernest Boka, then President of the Ivory Coast Supreme Court on April 2, 1964, for allegedly being involved in a plot against the Ivoirien Government in September 1963. A fortnight later announced that the arrested judge had committed suicide. West Africa, July 3 1965, p.733.
2. Ogere Murder Trial, Daily Times, Lagos, July28-30,1965.

murder trial in the Ijebu-Ode High Court in which some local political leaders were charged with the murder of a politician belonging to a rival party. Two members of the latter party, actively aided by their counsel, filed an affidavit in the High Court to the effect that they had reason to believe that the trial judge would not decide the case before him impartially. They were apparently led to this belief because his lordship had discharged some accused persons in two previous cases. The applicants further moved that the case be transferred to another court. The judge said that he would not be intimidated and held that the affidavit and the motion constituted a contempt of his court. He convicted the accused accordingly, sentencing the applicants to six months' imprisonment and their counsel to a fine of twenty-five pounds or in default two months' imprisonment.

The judge refused to accept the counsel's apology for his action which he (the counsel) put down to inexperience, because he felt that the apology could not efface the evil which had been done. Copies of the

affidavit were distributed to the Press and the radio before the motion papers were filed in court showing that everything "had been geared up for a sensational crucifixion of a judge (the counsel now) 'esteems so well' ".[1]

The Regional Director of Public Prosecutions, in his address, regretted this most unfortunate incident but urged the judge to temper justice with mercy "since your lordship's integrity and that of the Judiciary has been vindicated by everyone of us".[2]

However, a few days after the contempt case, the state, through the Director of Public Prosecutions, entered a nolle prosequi in respect of the murder trial. But the accused were immediately re-arrested and charged, again for the same offence, but this time in a magistrate's court in Ibadan (the regional capital), for a preliminary investigation.

A unique head of contempt? To what extent is the informed criticism of the judiciary allowed? Would it matter that the criticism was made in an international non-political

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1. ibid., July 30, 1965.
2. ibid.

gathering for instance? These were the issues raised in the now celebrated Cassell Case.[1] Mr. C. A. Cassell, a prominent Liberian attorney, and one-time Attorney-General of his native Liberia had presented a background paper at the African Conference on the Rule of Law in Lagos, 1961. In the paper which was entitled " The responsibility of the Judiciary for the protection of the rights of the individual in Liberian Society", Mr. Cassell was critical of some minor defects in the Liberian Judiciary which if added together might constitute "a menace to the rights of the individual in any society." On his return to Liberia, he was arraigned before the Supreme Court on charges of gross constructive contempt. The Court found him guilty, holding that his remarks concerning the weakness of the Liberian Judiciary were irrelevant to discussions scheduled for the Rule of Law Conference. Mr. Cassell's only reason for irrelevantly volunteering this particular discussion was to hold up the Liberian Judiciary to international ridicule.

The Supreme Court's Judgment led in part:[2]

"The Court will not condone licence to be

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1. The Cassell Case: Contempt of Court in Liberia (an ICJ publication) 1961.
2. ibid., p. 12.

> insubordinate or subversive, we deprecate and denounce the improper habit of concealing our alleged faults from ourselves, where a proper reference to them might do the country the greatest good; and we question the patriotism and the professional good intentions of any Liberian lawyer who prefers to take our alleged faults into foreign countries and before international forums, and there paints the country and its institutions in the blackest hues and attempts to drag her good name and honour through the filthiest slime of prejudiced and stilted half-truths."

Mr. Cassell's plea that his remarks were moderate and that the paper read as a whole was objective did not prevent the court from finding his behaviour unworthy of the legal profession in Liberia. In consequence, he was disbarred.

The role of the lawyer.

In the above case, the Supreme Court of Liberia made this salutary point:

> "Unless the lawyers of our country can enjoy the right to constructively criticise flagrant

> violations of law, and wilful infringements of the rights of the people we would have fallen short of what is expected of the profession in our political society.'[1]

But just as a critic must be constructive so must those in authority not be unnecessarily touchy when criticized. The two cases of contempt we have selected bring out these requirements well.

A lawyer who recognises and is willing to fulfil his obligation to uphold and advance the Rule of Law[2] would naturally wish to know what was likely to happen to him if his line of action should fall foul of the authority. As in Liberia so in all African states, the Supreme Court exercises disciplinary jurisdiction over members of the legal profession.[3] In some other states a disciplinary tribunal may be constituted comprising a judge, the Attorney-General and a number of senior legal practitioners such that the latter is in the majority.[4] Any practitioner disciplined by the tribunal has a right of appeal to the Supreme Court. In effect, no lawyer may lose the right to practise his profession except on the judgment of his senior colleagues.

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1. ibid.
2. Cf. The dynamic aspects of the Rule of Law in the modern age. p.186.
3. Cf. Nigeria, Legal Practitioners' Act, 1962 Act. No.33. of 1962. s.8.
4. For Nigeria, ibid, ss.6-7. For Uganda, see R.W.Cameron, 'Law, Bench and Bar in the Protectorate of Uganda.' (1961) 10 I.C.L.Q. 877, pp. 889-890.

The collective stand of the legal profession on any issue is sure to carry greater weight than the individual views of members of the profession, which argues the case for a strong professional association in each country. Unfortunately, the Bar Associations or Law Societies, as they are variously called in Africa, are not as active or effective as they should be. It is disheartening that in many of the countries members of the profession (are not prepared to) subscribe voluntarily to their associations so that the state has to come to the rescue of the latter by statutorily guaranteeing individual subscriptions. Thus in Nigeria, a licensing fee is payable by every lawyer annually out of which a sum equal to three-quarters is deductable by the Chief Registrar of the Supreme Court for the benefit of the Bar Association.[1]

The moral to be drawn from all this is that legal profession is not yet ready to organise to uphold the dignity of its own profession, let alone to safeguard the Rule of Law. The public image of a lawyer in Nigeria could hardly be worse.[2] The Bar Association in that

1. Legal Practitioners Act 1962 s.4(2). Cf. Malawi, Legal Education and Legal Practitioners' Act, 1965, Act 20, ss.26-30.
2. Though compared with the politicians, the lawyers are better regarded.

country has recently been awakened to the need to salvage this lost esteem but it is not enough for the Association to be active only at times of crisis or during the annual conferences. Major legislation is being passed now and then which affects every sphere of life touching on the political and property rights of the individual. The legal profession must be continuously involved in all these legal reforms and innovations.[1]

In the countries with settler populations, the Bar is dominated by immigrant lawyers. Understandably, the latter are wary of dabbling in legal controversies with a political flavour.[2]

C. ACCESS TO JUSTICE

The courts of law should be accessible to all; and once before the court, litigants ought to be treated alike. A discriminatory procedure which was once a feature of criminal justice in Kenya has since been abolished by the Criminal Procedure Code (Amendment) Act,

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1. There are national sections of the International Commission of Jurists. These have been known to take strong stands on public issues but such efforts are sporadic.
2. Thus in Kenya they felt unable to protest over the somewhat irregular deportations of July 1964.

1963.[1] Before this enactment,[2] magistrates' courts could only try a European if the maximum sentence for the offence for which he was charged would not exceed six months' imprisonment. Otherwise, the magistrates' courts must proceed to inquire into the offence "as if it were one triable exclusively by the Supreme Court". On committal, the European would be tried by a jury.

A non-European was never tried by a jury.[3] Even in the few cases where he was tried by a Supreme Court Judge the latter was assisted by assessors whose opinion the judge need not act upon. When a European and a non-European were jointly accused of a crime the European mode of trial obtained. It was however, always open to a European to waive his right to a jury trial.[4]

This European privilege appeared to be analogous to the concession given to Africans to retain their customary system of justice but the analogy does

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1. Act. No. 33 of 1963.
2. The old provisions are contained in Part VII of the Criminal Procedure Code, Cap. 75.
3. Act. No. 33 *supra*, First Schedule has abolished jury trial entirely.
4. See R. v. Tansley [1960]. E.A. 868.

not quite fit. For, whereas the European could voluntarily submit to the jurisdiction of customary courts, an African could not elect to be tried by a jury if he was so minded.

The foregoing discriminatory procedure was bitterly resented by non-Europeans, but it does not follow that the quality of justice dispensed in the courts was necessarily adversely affected. In any case, the Court of Appeal for Eastern Africa provided a meeting point for all accused persons even though they might have got there by different routes. But how many persons could afford to reach the appeal courts? Inequality of wealth, therefore, produced in Kenya (as it still does) a far greater possibility of differential justice than did the obnoxious racial provisions then written into the Criminal Procedure Code.

Legal Aid.

To ensure that both the rich and the poor receive due justice at law the Rule of Law requires that the state should make provision for adequate legal aid for any person whose life or interest is endangered if, for economic reasons, such person cannot afford legal advice and representation.[1]

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1. Clause X, Conclusions of the 1959 Delhi Congress, The Rule of Law in a free society p.14: also Marsh 'Legal Aid and the Rule of Law: acomparative outline of the problem' (1959-1960) 2 J.I.C.J.No.2.p95. S.M.Huang-Thio,'Legal aid - a facet of equality' (1963) 12 I.C.L.Q.1133.

The present position in Africa in respect of legal aid is far from satisfactory.[1] Only in Malawi is a comprehensive legal aid scheme found. In the other states, the state does not feel obliged to provide legal assistance in civil matters.[2] Even in criminal cases, there are in some states a number of limitations either as to the type of offences for which the aid would be granted or as to the stages of the proceedings when the aid would avail.

In anglophone West Africa, where an accused in capital cases is not defended by a legal practitioner, the court is required, if practicable, to assign a legal practitioner for his defence.[3] Although the Nigerian Federal Supreme Court has ruled that under no circumstances may a brief for the defence in a murder trial be devilled,[4] the practice in that country has been to retain counsel for assisted accused who are not of the requisite standing and experience.[5] This is because the state does not provide adequate funds for the legal aid scheme, though one would have expected some leading lawyers to accept occasionally some of these uneconomic briefs in the interests of justice.

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1. See generally, African Conference on the Rule of Law, pp. 146-149.
2. In the anglophone states, however, a litigant could plead in forma pauperis and so secure a counsel, but the system has never proved efficacious.
3. Nigeria, Criminal Procedure Code s.537.
4. R. v. Uzorukwu (1958) 3 F.S.C.14.
5. African Conference on the Rule of Law, pp.147-148.

In addition to the provision for legal aid for capital offences, the Nigerian Supreme Court is empowered at its discretion to grant legal aid to needy appellants if the interests of justice so require.[1]

In East Africa, there is an under-used power vested in the courts by the various Poor Persons Defence Ordinances,[2] to grant legal aid to a poor prisoner if, in the interests of justice, he should be legally represented at his trial. By practice, such aid is automatic in murder cases. But what is remarkable about these provisions is that they do not extend to proceedings in the Court of Appeal where the accused would be in most need of legal assistance and representation.[3]

In Zambia, legal aid in criminal cases is not limited to any stage of the proceedings and is expressly made available for preliminary investigation.[4] The courts are to certify

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1. Federal Supreme Courts Act, 1960, Act.No.12 of 1960,s.32.
2. For Tanzania, Cap. 21; Uganda, Cap. 25.
3. When Sir Samuel Qu'ashie-Idun took office as President of the East African Court of Appeal, he pleaded with the Ministries of Justice of the three territories to consider extending legal aid in capital cases to appellants. The Legal Secretary of the East African Common Services Organization backed the suggestion. Personal interview (Nairobi).
4. Poor Persons Defence Ordinance. Cap. 42. ss.3-5.

that the applicants are eligible for the aid. The High Court readily recommends assistance in deserving cases but the subordinate courts are less generous in this regard.[1]

In the francophone states, legal aid is invariably granted in all cases before the criminal courts. For civil suits, however, as in France, the legal profession runs a gratuitous scheme in aid of needy litigants.[2]

A 'public defender' in Malawi

In Malawi, the Legal Aid Ordinance, 1964[3] establishes a comprehensive legal aid scheme covering both criminal and civil causes. A chief legal aid counsel who may be called a public defender administers the scheme assisted by a team of counsel.[4] If the chief legal aid counsel or any counsel under him is unable to appear for an aided person, a private legal practitioner may be instructed.[5]

Legal aid is granted in every case if the interests of justice demand and the applicant's means are insufficient to enable him to obtain legal representation. For criminal

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1. Cf. A.O.Mitchley, "The responsibility of the Judiciary and of the Bar for the protection of the rights of the individual in society". Background paper for the African Conference on the Rule of Law.
2. African Conference on the Rule of Law, p.148.
3. No. 8 of 1964.
4. s.3.
5. s.12.

causes, there are three channels of application.[1] First, if the offences are triable in the High Court the Registrar's certificate must be obtained before the chief legal aid counsel can provide a counsel to represent the applicant. Secondly, for certain offences specified by the Minister, a Resident Magistrate may recommend legal aid. Thirdly, a general power is conferred on the chief legal aid Counsel to undertake the defence of a needy person "if for special reasons" such a person should have legal aid.

As for civil cases, the chief legal aid counsel may grant legal aid if the applicant has reasonable grounds for instituting or for defending the proceedings to which his application relates.[2] At present, assistance will be granted only in respect of suits before the High Court and the Magistrates' courts, but it is envisaged that the Minister will extend such assistance to other courts from time to time.

The scheme is handicapped by personnel problems in the office of the chief legal aid counsel. Moreover, the enormous costs of retaining private practitioners are already

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1. ss.4-6. Provisions are made for appeal to the Minister in case of a refusal of any application. The Minister has power not only to order that legal representation shall be undertaken, but also that it should not be undertaken where the chief legal aid counsel intends to undertake one.
2. s.7.

beginning to tell. Nevertheless, its relative success so far, has proved that developing countries need not wait till there is economic abundance before they can provide legal aid for all deserving cases without distinction between criminal and civil causes.[1] The fear that if legal aid is provided for civil causes the courts might be flooded with actions may not be justified, for proper advice obtained from counsel at an early stage, may lead to a reduction rather than an increase in the number of legal disputes contested in courts.

D. FAIR TRIAL SAFEGUARDS

We have already considered the rights of an arrested person and the various forms of detention to which a person may be subjected in different countries.[2] We will now look at the minimum safeguards which all countries adhering to the Rule of Law ought to afford those standing trial before their courts.

1. A prompt and speedy trial: This is a first condition of

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1. Cf. Marsh, "Legal aid and the Rule of Law" etc.pp.110; 114.
2. Chapter 7.

a fair trial and the Group A constitutions recognise this by providing that any person charged with a criminal offence is entitled to a fair hearing within a reasonable time by a court.[1] Does this mean that only the trial has to be promptly initiated or does it also require an expeditious disposition of the trial? If the latter, then it is irregular to reserve judgments indefinitely as happen too often in some states. Also joint trials which may unduly prolong a hearing ought to be avoided. Is there a corresponding urgency where the accused on conviction lodges an appeal?

On the other hand, an unduly hasty trial is likely to produce unjust results. This is why the "short trial" procedure in Northern Nigeria[2] (about which we shall hear more presently) ought to be carefully watched by appellate courts lest abuses creep in.

2. The nature of the alleged offence must be clearly stated. In this connection, Group A countries have prohibited unwritten

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1. Nigerian Constitution s. 22(2).
2. Northern Nigeria Criminal Procedure Code, 1960, No.11 of 1960. Chapter XVI. See generally, Richardson and Williams Criminal procedure in Northern Nigeria (1963), 115-116.

offences.[1] It is also required that the accused shall be informed as soon as reasonably practicable in a language that he understands and in sufficient detail, the nature of the offence which he has been called upon to answer. Native Courts in Northern Nigeria are to be guided by the Region's Criminal Procedure Code.[2] In keeping with the spirit of this provision, the Code itself makes it clear that a formal charge need not be prepared against the accused in these courts, instead a statement of the offence complained of with the date and place of its commission would suffice.[3] This provision and others in the Code have been criticized,[4] but in a vastly illiterate community a simplified version of the imported procedure may not be out of place; and when one remembers that a bill of indictment before other courts could run to a score or more pages as the prosecution assemble together all related offences, including attempts and conspiracies to commit the same, brevity may aid rather than thwart justice.

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1. Nigerian Constitution, s.22(10). An offence arising from contempt of court is excepted. In Aoko v. Fagbemi & another, a woman's conviction for adultery under unwritten customary law was held to be in violation of this provision. 1961. All N.L.R 400. Quaere if 'unwritten' common law offence in Sierra Leone, where there is no comprehensive criminal code, would be contrary to the corresponding provisions in that country's constitution. The ill-defined common law crime of public mischief may be instanced.
2. Criminal Procedure Code, s.386.
3. s.387.
4. J.Price, 'Criminal Legislation in Northern Nigeria...' (1961) 24 M.L.R. 604. But see Odumosu ibid, pp. 612 et seq. Anderson ibid, pp. 616 et seq.

3. Presumption of innocence: Every anglophone state[1] subscribes to the principle that any person who is charged with a criminal offence is, unless he has pleaded guilty, presumed innocent until his guilt has been established.[2] But a proviso is always made that the principle is not thereby infringed to the extent that a law imposes upon any person charged with a criminal offence the burden of proving the particular facts. It is arguable if this proviso has not virtually swallowed the principle it qualifies. A number of recent statues in Africa would appear to exemplify the proviso rather than the principle.

Although the English criminal procedure has served as a model for all liberty-loving countries,[3] it is possible to question some of its assumptions. In view of the growing rate of crime and the decreasing chances of prosecution to conviction, people are beginning to wonder whether the dice are not too heavily loaded in favour of suspects or the accused.[4]

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1. Contrast the francophonic inquisitorial mode of trial.
2. Nigerian Constitution s.22(4).
3. The latest example is the Somali Republic, whose Code of Criminal Procedure is heavily influenced by English (or Indian) law with the writ of habeas corpus, previously unknown in former Italian Somalia written into the Code. Contini, op.cit.
4. Cf. Mr.Norman Skelhorn, Director of Public Prosecutions in England, who raised this point at the 1965 Commonwealth and Empire Law Conference in Sydney. The Times, August 28,1965).

The "Judges' Rules" which originate in England are applied in the anglophone states.[1] These Rules are intended to discourage unconscionable methods of police interrogation; but somewhat artificially they apply only to questions put to "persons in custody" so that the police appear to have a freer hand until they decide to charge the prisoner. The latter practice may not result in much injustice since the suspect need not answer any question put to him. Moreover, statements made during police interrogation may be excluded at the trial if the judge thinks that this is desirable.

Judges are wary of admitting in evidence confessions credited to prisoners. It is proper that a confession induced by physical or mental violence should not be admissible.[2] However, why should one obtained by gentle moral persuasion (even though the prisoner is invited to consider the advantages which he would derive from making the confessionary statement) not be admissible? In a Nigerian case[3] following the commission of a crime, a ~~village~~

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1. With modification, in some places. Cf.s.29 of the Police Ordinance in Malawi which gives an officer in charge of a police station wider powers of interrogation.
2. See generally, Preliminary investigation of criminal offences, Justice Report (1960) esp.paras. 1930.
3. R. v. Haske (1961) 1 All. N.R.330.

chief told his subjects, "all of you will be in the case and will be gaoled if you do not tell me the truth." A confession volunteered in response to the chief's invitation was held inadmissible because the chief's statement, coming from a man in authority, amounted to a threat.

A confession irregularly obtained may disclose valuable real evidence. As the law stands in the anglophone states (following the English practice), the latter is admissible but not the confession itself. The distinction is tenuous, and it would seem better to provide that, once a confession can be verified by other evidence, it should be admissible.[1]

The francophone states have inherited the French aversion to strict rules of proof and evidence. The judge must be thoroughly convinced of the probative value of any evidence introduced and such evidence must not have been irregularly obtained.[2] As the judiciary, the juge d'instruction is brought into the preliminary investigations of a crime at an early stage, there are less chances of abuse of process before the actual trial.

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1. Cf. Preliminary investigation of criminal offences, para.21.
2. Cf. Marsh, "Working paper on the Rule of Law" p.274.

In India, confessionary statements made to the police are not admissible at all. Northern Nigeria takes the extreme opposite position in respect of confessions to certain minor offences[1] which are subject to the 'short trial' procedure (or summary trial as the Criminal Procedure Code terms it). Section 157 of the Code provides that where the accused has admitted that he has committed the offence of which he is accused, "if he shows no sufficient cause why he should not be convicted, the court may convict him accordingly." In other words, the confessionary statement credited to him shifts the burden of proof to him. But this provision should be read together with section 158 which prevents summary conviction if the accused "states that he intends to show cause why he should not be convicted." It would seem, however, that the cause contemplated here would be any other defence but a denial of the truth of the confession.

4. Right to legal representation. In the previous discussion on legal aid, we noted that in some countries where legal aid was offered for the defence of indigent prisoners, inexperienced counsel were instructed, a practice which was deplored. Here we are faced with a different aspect of

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1. Infringements of traffic regulations, railway bylaws, township bylaws; minor assaults or breaches of the peace. None of these offences carries imprisonment exceeding 3 months and the maximum fine prescribed is £25. Criminal Procedure Code (Punishment on Summary Conviction) Order in Council, 1960, Legal Notice 86 of 1960.

problem of legal representation. How far should an accused person be able to insist on a particular legal practitioner (who is willing to be instructed)[1] to defend him at his expense? In theory, all African states regard the right of an accused person to be defended by a counsel of his choice as fundamental, though the right is subject to the overriding interests of the state. Thus in Nigeria, it has been held that a trial is vitiated where an accused person is not afforded sufficient time to secure the attendance of his counsel.[2] On the other hand, in Awolowo v. Federal Minister of Internal Affairs,[3] the Lagos High Court decided that the right to the legal practitioner of one's choice protected by the constitution contemplates the instruction of a legal practitioner "not under a disability of any kind". If outside Nigeria, he must be one who can enter the country as of right and (needless to add) he must be someone who is enrolled to

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1. In the Ghana treason trial involving Adamafio and others, no lawyer came forward to Defend the accused. Perhaps had one volunteered to do so, he would have been thought to sympathise with the alleged designs of the accused. On the other hand, could not the Bar have officially nominated a counsel for the defence? Adamafio himself and Ako Adjei are lawyers and both made the best of the situation. The Chief Justice who presided over the special court was scrupulously fair to all concerned. (Personal observation, Accra.)
2. Gokpa v. Police 1961 1 All N.L.R. 423. Contrast Shemfe v. Police 1962 N.R.N.L.R.87 where the accused did not volunteer any reasons for the absence at his trial of his counsel and had actively participated in the trial by cross-examining the prosecution witnesses.
3. 1962 L.L.R. 177.

practise in the country.

The first of these two conditons raises an important issue for the Rule of Law: ought the executive to be free to impede the course of justice without satisfying the courts of the bona fides of its action and that the prevailing conditions require the steps being taken? In the Awolowo case, the plaintiff, then leader of opposition in the Federal Parliament was accused of treasonable felony and conspiracy. He had instructed Mr.Gratiaen, Q.C., from England for his defence. The latter on arrival at Lagos Airport was denied entry into Nigeria by the immigration officials on the orders of the Minister of Internal Affairs pursuant to the power conferred on him by s.13 of the Immigration Act,1958.[1] Chief Awolowo contested the validity of the Minister's action and moved the High Court to declare it ultra vires the Constitution. The court held inter alia that the Minister's action was lawful and its validity could not be impugned on the grounds of malice. The court, with due respect, ought to have asked whether there were good grounds for the Minister to use the powers conferred on him by a statute to stultify the Constitution. However, the court was of the opinion that

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1. Cap. 84, see now Immigration Act, 1963.

"the relevant provision of the Constitution is limited and in my view limited to legal representatives in Nigeria not outside it".[1] The Supreme Court has yet to pronounce on this apparent limitation placed on the accused's guaranteed right to a counsel of his choosing.

The Group A constitutions expressly exclude the application of the clause relating to legal representation to the customary courts.[2] In Western Nigeria, however, counsel have a right of audience in all Grade A Customary Courts and in such of the Grade B Courts as have legally qualified presidents.[3] Any one who witnesses the proceedings in these courts will quickly appreciate why customary courts, as a rule, are protected from tedious technical and procedural arguments in which lawyers indulge.

5. Double jeopardy: It is one of the first principles of justice that no one who has been prosecuted to a final conviction or acquittal should be tried once more on the same

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1. per Udoma J, 1962 L.L.R. 177 at p. 185.
2. Nigerian Constitution s.22(5) .Cf.Ghana,Local Court Procedure Regulations, 1962 (L.I.208) reg.2. In Tanzania s.29 of the Magistrates' Courts Act, 1963, forbids an advocate or public prosecutor from appearing or acting for any party in a primary court. But provision is normally made for a relative guardian, servant, master, inmate of the household of any party to an action showing proof of authority to appear for him before a customary court. Cf.Northern Nigeria,Native Courts Law. s.28.
3. Customary Courts Law, s.28 (1).

facts whether or not for the same offence. This rule against double jeopardy has been written into most constitutions, though one qualification is usually made: a superior court may order a retrial "in the course of appeal or review proceedings relating to the conviction or appeal."[1]

A good illustration of this principle is provided by the case of Nwali v. Police,[2] decided by the Eastern Nigerian High Court on appeal from a magistrate's court. The appellant had been charged before the latter with a certain offence but the prosecutor failed to prove the facts necessary to establish the offence. The magistrate then discharged the appellant, according to him "not on the merits of the case." Three days later exactly the same charges were preferred against the appellant before the same court. The magistrate rejected his plea of autrefois acquit and proceeded to try him. This time, the prosecution proved the facts they were previously unable to prove and the appellant was convicted. On appeal,

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1. Uganda Constitution. s.24(5); Zambia, s.20(5). These provisions are to be preferred to Nigeria's, for the latter's proviso refers simply to the order of a superior court Constitution s.22(8). It would seem therefore that in Nigeria, where a law does not confer the right of appeal [illegible] on the prosecution, a higher court may be able to re-open the case by ordering a retrial. The subsection is explained in Oruche v. Police (1963) F.S.C.73/1962.
2. 1 E.N.L.R.1; also Police v. Marke 1957 N.R. N.L.R.89; R v. Buddie Eka 11 W.A.C.A.39.

the High Court ruled that the plea of autrefois should have succeeded. The Court admitted that as in England, so in Nigeria, a distinction must be made between dismissal of a complainant on purely formal grounds (e.g. want of jurisdiction,), and dismissal of a complaint after a full hearing. In the latter case, a new trial cannot be commenced on the same ingredients; otherwise the state would be able to claim a second, third chance and so on until a court could be found ready to convict.

Two instances of retrials which violate this principle and are therefore contrary to the Rule of Law may be briefly noted.

(a) Burundi. On October 13, 1961, Prince Louis Rwagasore, the Prime Minister of Burundi, was fatally shot in Bujunbura, the country's capital. A Greek national and some six opposition leaders were accused of his murder.[1] They were tried before the Court of First Instance which on April 2, 1962 convicted them sentencing the Greek to death and the others to varying terms of imprisonment. The Court of Appeal on May 7, 1962 rejected the appeal of the

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1. "A political trial in Burundi" (I.C.J.Study) 16 I.C.J.5.

accused though the prison terms were reduced. The Greek was still to hang, and on June 30 1962, he was duly executed.

The Burundi authorities disliked the verdict in respect of the prison sentences which they thought too lenient. They openly accused the all-Belgian judges who heard the case in the two courts, of having perverted justice. After independence which came on July, 1 1962, the Government proceeded to re-open the case. A special law was passed setting up a new court, styled "Supreme Court" and vested with powers to grant requests for appeals in any cause where no such appeal was previously recognized. The newly constituted Supreme Court[1] on application quashed the judgments of April 2 and May 7 1962, on the ground that a jury ought to have sat with the judges. A retrial was ordered in the Court of First Instance which predictably resulted in the conviction of the accused and in the imposition of severe sentences. Four of the accused were to hang, and the other two were imprisoned for life and ten years respectively. The Court of Appeal upheld this verdict. An attempt to appeal to the Supreme Court was thwarted and the

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1. None of the appointed judges on it had legal qualifications. The judges of the Court of Appeal were also laymen. Ibid, p.12.

condemned men were executed.

(b) Ghana; Like Burundi's, the Ghana treason trial of 1963 was political. Five men, including Tawia Adamafio, a former Minister of Information, Ako Adjei, one-time Foreign Minister, and H.Coffie-Crabbe, an ex-Executive Secretary of CPP, were accused of treason and were charged before the Special Criminal Division of the High Court comprising Sir Arku Korsah; the Chief Justice, Mr.Justice Van Laye and Mr. Justice Akufo Addo. It was provided that the decision of the court was to be final, though sentences passed were subject to the President's confirmation.[1]

After a long trial, the Court on December 9, 1963, announced their verdict: the three prominent accused were acquitted because the evidence adduced against them was insufficient to secure conviction; the other two accused, on the other hand, were found guilty and were condemned to death. The Government reaction was sharp. The Attorney-General described the verdict as "highly discriminatory in nature."[2] He would have understood the judgment had it ended in the acquittal of all the accused persons. He

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1. Criminal Procedure (Amendment) Act, 1961 (Act 91); but see now Criminal Procedure (Amendment) Act, 1964 (Act 238).
2. Press Release, Accra, December 10, 1963, Ghana Today, January,1, 1964.

added that it was unsound in law to split the evidence of a witness and decide that "the witness is truthful in regard to one portion and untruthful in regard to another."

The Ghanaian Times came out with a strong editorial denunciatory of the "anti-socialist" judges who conducted an important case, "in an atmosphere of political frivolity where the issues were narrowed to specific acts of criminality divorced from their social consequences and political aims." In conclusion, it asserted "[our] right to regard these judges with suspicion - to deplore their verdict and to reject their judgment."[1]

That call was duly answered. President Nkrumah's request for special powers to set aside any verdict of the Special Court was given by Parliament.[2] Armed with this power inaptly likened to a nolle prosequi which an Attorney-General or Director of Public Prosecutions enters to discontinue criminal proceedings before judgment,[3] President Nkrumah set aside the verdict of December 9,1963.[4] The new Act reconstitutes the Special Court which now comprises the Chief Justice or a superior Judge appointed by him after

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1. Our charge against the judges (1963) 5-6.
2. Parl. Deb. December 23, 1963.
3. Criminal Procedure (Amendment) Act 1964 s.4; but see "Ghana - towards dictatorship" p.1. For a reply to the latter criticism see Ekow Daniels (1964) 1 U.G.L.J. 147.
4. Rather unhappily, the President accused the judges of corruption. In a broadcast he said, "The nation cannot tolerate a dishonest and corrupt judiciary." Ghana Today, January, 1964.

consultation with the President and a jury of 12 persons drawn from a special list of jurors. The verdict is the jury's and may be reached by a simple majority. The President's action was subsequently approved by the people in a referendum.

The retrial of the five accused was ordered, which resulted this time in the conviction of all the accused persons. They were accordingly condemned to death. However, the President, "because of our respect for life", commuted the death sentences to 20 years for each convict.[1]

The Ghana trial thus had a less tragic ending than the retrial in Burundi where as we saw, pointless ritual killings of the accused were carried out. To pursue political vengeance, as these two countries have done, in spite of the law and regardless of the considerations of justice, is an abject violation of the Rule of Law. It is appreciated in Ghana's case, that the verdict in the original trial was tantamount to an indictment of a regime that could lock people up for years without trial, and as the court showed in this case, without their having committed an offence known to the law. But such a superficial view of the meaning of the

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1. Ghana Today, April 20,1965.

Court's decision would be wide of the mark. The accused might indeed have hatched a plan to overthrow the Government but the prosecution must establish this and it is not for the court to supply missing gaps in their evidence. Furthermore, the executive could and should take quick steps to prevent a breach of security. The quicker they act the better for the nation, but the more difficult it is for the courts to be convinced that the unlawful designs have truly formed as to justify the conviction of alleged plotters. Unless African Governments appreciate this problem of the time-lag between executive thinking and action on the one hand, and judicial reasoning and decision on the other, there will continue to be tensions in the relations between the executive and the judiciary to the detriment of all.

The reaction of the Government of Tanganyika (as it then was) to the verdict of the court-martial[1] which tried 19 soldiers for their part in the mutiny of January 1964 may be contrasted with the events that followed in the wake of the unacceptable trials in Burundi and Ghana.

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1. Comprising a Judge of the High Court and two soldiers.

14 of the soldiers were convicted receiving terms of imprisonment varying from five to fifteen years, while five were acquitted. The Government put out a statement[1] critical of the sentences imposed which it described as too lenient and out of proportion to the seriousness of the offences and the damage done to the country. There was, however, no intention to vary the sentences imposed:

> "To interfere with the Court's decision would be to do exactly that thing for which the nation condemns the soldiers - it would be to abrogate the Rule of Law."

The Rule of Law must remain the foundation of the state and it would not be right to "allow even our disgust with the mutineers to overcome our principles."

6. Miscellaneous: There are other straightforward procedural safeguards which require no elaboration. Examples are: public hearing, the right to an interpreter where there is a problem of language, adequate facilities for the preparation of one's defence and the right of appeal. However, some of these safeguards commonplace as they are, are among the first to be compromised when special courts

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1. The Nationalist, Dar-es-Salaam, May 14, 1964.

are established.

D. SPECIAL CRIMINAL COURTS

One feature of Ghana's Special Criminal Division of the High Court is that its verdict is final.[1] We also saw that the deciding jurors are to be drawn from a special list. Thus the remarkable youthfulness of those selected for the Adamafio trial was commented upon by the presiding Chief Justice, who wondered if they were undergraduates or drawn from some institution. Although many criticised the old court as previously constituted,[2] it afforded a better guarantee of impartiality than the present court, since it was the Supreme Court in all but name exercising original criminal jurisdiction.

Why has Ghana found it necessary to adopt a special court and procedure for certain offences? The state has to be safeguarded from terrorism, plots, disturbances of public order and so on. Stringent deterrent measures are thus called for to deal with these anti-state offences. But a look at the specified offences to which

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1. Criminal Procedure (Amendment) Act,1964. s.2(2).
2. e.g. because it did not provide for a jury. "The growth of executive power in Ghana" (I.C.J.Study) p.26.

the special procedure shall apply shows that offences other than those touching on the security of the state are included: "an offence against the person....or against the peace".[1] The President also has powers to specify further offences by legislative instrument.[2] Since the President need not accept the verdict of the court,[3] the liberty of any person in Ghana is in the President's hands; and as the President is also personally given the powers to detain people, his hold is complete.[4]

Special Criminal Courts are also found in many francophone countries. In Dahomey, for example, such a Court was set up on August 14, 1961 for a period of six months[5] and thereafter as and when needed. As in Ghana, there is no appeal against the sentence of the Court though a sentence of death must be forwarded to the President of the Republic for clemency.[6] In Mali, the state reserves the right to set up any type of court as and when the occasion

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1. Criminal Procedure (Amendment) Act, s.6 (81).
2. s.6(b).
3. s.2(3).
4. See Chapter 7.
5. Law No.61-40.
6. For the use to which the Court has been put, see "The Special Court of Dahomey" (1962) 63 B.I.C.J.15.

demands. On August 19, 1962 a People's Court was established with 39 members, representing all the local divisions in the state.[1] The Court's first task was to try some opposition members who had become a menace to the ruling party, thus by-passing the normal courts.

The foregoing special tribunals are designed to deal with anti-establishment elements. But the francophone states also prescribe a special procedure for dealing with any member of the government who falls foul of the law or acts contrary to public interests or in contempt of any of the organs of state.

It may be thought that it savours of discrimination to subject members of the government to a special court for offences committed in the course of their duties when the ordinary court of the land would have served equally well. On the other hand, as these offences have a political flavour, it is supposed that politicians will be better judges of them than professional judges. But is the impartiality of such a court assured?

The court - called the High Court of Justice - as constituted by nearly every constitution, comprises members

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1. There are doubts as to the legality of the procedure adopted in setting up the Court, see "The People's Court in the Republic of Mali." (1963) 16 B.I.C.J.20.

of the National Assembly appointed for the life of that legislature.[1] (Provision is invariably made that a senior magistrate shall preside over the Court). Its jurisdiction covers the trial of the president of the state but only where he is accused of high treason and there must have been a formal vote by the National Assembly supported by at least two-thirds majority, authorising the initiation of proceedings against him. In the case of ordinary ministers, there is no formality for initiating the proceedings, though some constitutions require prior concurrence of the president. The Court's jurisdiction extends to the minister's accomplices, if any.

The efficacy of this system of justice was put to test in the trial of M.Mamadu Dia, former Prime Minister of Senegal in May,1963.

The Dia Trial.

An intense power struggle between the Senegalese Government then headed by M.Dia and the UPS leadership on the one hand, and the members of the National Assembly on

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1. Senegalese Constitution Art. 86. Cf. the original jurisdiction of the House of Lords to impeach leading figures in the state at the instance of the House of Commons. But since Viscount Melville was last impeached in 1806, this jurisdiction has never been exercised. Erskine May, op.cit.p.38.

the other culminated, in December 1962, in Dia (who was also Minister of Defence) taking security measures against the leaders of the members of the National Assembly opposed to him.[1] Four of these deputies were arrested and a scheduled meeting of the National Assembly to debate a censure motion on Dia and his Government was prevented. Dia thought the party executive (loyal to him) should rule on the propriety of his actions or in the alternative, as Article 48 of the former Constitution provided the disagreement between the Government and the Assembly, referable to the Supreme Court at the request of either, should be resolved by the Supreme Court. Neither of these proposals was agreeable to the other side. The security forces were divided but most of these were loyal to President Senghor who had taken sides with the National Assembly. Dia, who was now isolated, and a few ministers supporting him were arrested and arraigned before the special High Court on May 7, 1963 for treason.

The High Court comprised seven judges with a magistrate as president, all the other members being deputees previously elected by the National Assembly. The foregoing background to this case revealed that the major issue in the

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1. See V.D. du Bois, The trial of Mamadou Dia (American Universities Field Staff Reports Service) (1963) Vol.VI. Nos. 6-8.

political crisis of December 1962 centred around which institution in the state; the party or the legislature was supreme. Now a court which was but a committee of the legislature sat in judgment over those who challenged its authority. All the deputies on the Court had voted in the motion to depose Dia's government one of them having, indeed, moved the motion. Not one of the 39 deputies who refused to participate in the censure vote had been elected a judge of the High Court.[1] It is difficult to see how justice could have been impartially dispensed in a case like this. Dia and others were allowed legal representation by lawyers from Paris. However, despite the public prosecutor's closing plea that the charges against one of the accused be withdrawn and that the Court should consider extenuating circumstances towards the other accused, the Court found all the accused guilty sentencing Dia to life imprisonment (the death sentence has been abolished in Senegal), three others to 20 years' imprisonment and the fifth to 5 years' imprisonment plus the loss of civil rights for ten years.

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1. Du Bois op.cit., (No.7.).

F. PROBLEM OF JUSTICIABILITY

A comparison between the francophone and anglophone constitutions would reveal that whereas the former assume that the courts are best equipped to resolve as many disputes as are capable of rational solution, the latter prefer to entrust to the courts only matters that do not impinge on policy. The test employed to determine the last mentioned restriction has never been clear.

Administrative courts in the francophone states thus avail to check abuses of administrative power and maladministration. By contrast in anglophone states, all too often administrative injustice is perpetrated on the nebulous ground that ministerial responsibility to Parliament[1] is a sufficient safeguard against ministers. It is true that the anglophone states have adopted the provisions of the Crown Proceedings Act in England, so that the government could now be sued in a variety of cases where the individual has been wronged either in tort or for injury arising from breach of contract.[2] But state privilege may bar him from receiving due justice if the state claims protection from disclosure of vital documents.

1. We have seen that ministerial irresponsibility in law or in fact is the rule in Africa. Chapter 5.
2. Cf. Ghana, State Proceedings Act, 1961 (Act 51); Bennion op.cit., pp. 249-253.

More significant is the concept of executive discretion in administrative matters. Liversidge v. Anderson[1] which has re-introduced the doctrine of act of state by the back door, makes the exercise of executive discretion unchallengeable.[2] The effect has been disastrous for the Rule of Law in Africa: licences are withdrawn with impunity, citizens are thus prevented from following their vocation; chiefs are deposed, their salaries cut or stopped in the name of the state[3](in Nigeria all matters relating to chieftancy are no longer justiciable); local councils democratically elected may be dissolved by the fiat of the executive. This list may be continued ad infinitum. Common law system thus gives the impression of being more lawless than civil law systems. The following case[4] from Somali illustrates the contrast very well.

Towards the end of 1963, a new local council was

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1. [1942] A.C. 206.
2. Where the phrase 'if the Minister is satisfied...' is used as most African statutes conferring discretionary powers on the executive do. There is, however, the possibility in Group A countries that the law conferring such wide discretionary powers may be unconstitutional. Thus in Doherty v. Balewa (1961) 1 All N.L.R. 604, the Nigerian Supreme Court held that a statute which provided that the fact of the exercise of certain powers thereunder was sufficient proof of the exercise of such powers contravened the provisions relating to the fundamental rights and to the jurisdiction of the courts.
3. But see the Tanganyikan case Marealle v. Kilimanjaro District Council, Arusha High Court, Civil Case No.44 of 1961.
4. Ahmed Muddei and others v. Minister of Interior, (Supreme Court decision of 17 March, 1964).

elected in Mogadiscio following local council elections held throughout the country. The Mogadiscio Council met on January 2, 1964 at which meeting its Mayor was elected. With the support of the Somali Council of Ministers, the Minister of Interior by decree dissolved the Council replacing it with a sole commissioner. His explanation for this high-handed action was that the new Mayor was the Mayor in the old Council which had been dissolved for "serious administrative deficiencies and irregularities". The Minister, it should be noted, is empowered by law to dissolve a local council which cannot perform its functions. On an application to the Supreme Court (Administrative Chamber) by the Mayor and some councillors to annul the ministerial decree, the Supreme Court held that the Council's inability to perform its functions could only be evaluated a posteriori and not a priori. The submission of the State Attorney that the power of dissolution vested in the Minister was a wide power of discretion and that he need not give reasons for its exercise, was emphatically rejected by the Supreme Court. The ministerial decree was annulled by the latter and the Somali Executive in compliance with the judgment reinstated the Council and its Mayor.[1]

1. Cf. Noor Muhammad op.cit., pp.286-288.

The ordinary Africans are everywhere being called upon to tighten their belts in aid of rapid economic development. It is only fair that they should also get their just share of the fruits of development.[1] But all over Africa, irrespective of party systems, one hears stories of corruption, nepotism and other injustices.[2] Some of these are confirmed when some ministers fall out of favour and post-mortem commissions of inquiry are established or when the central government chooses to embarrass a provincial or regional government and establishes a commission of inquiry to probe its affairs. It is widely believed, however, that if a standing commission were appointed to check abuse of power, maladministration and official incompetence, these injustices would be greatly minimised. The Ombudsman idea has been canvassed because it does not involve "public denigration" of the authorities and would help in reconciling "dynamic and purposeful government

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1. See, however, Kenya's useful arrangement for the settlement and resettlement of agricultural land for persons of all races. Special boards are constituted; these function under the supervisory authority of the Land and Settlement Board. The latter has wide powers to prepare or vary schemes of agricultural settlement or resettlement and land utilization generally. Appeals from its decisions lie to an appeals tribunal with a legally qualified chairman appointed by the Chief Justice. The appeals tribunal may be requested to state a case for the opinion of the High Court on a point of law. Agriculture Ordinance, cap.318, esp. ss. 167, 193-196. The arrangement seems to be working well.
2. Some have suggested that a new class - a political class - is emerging. Cf. Ghana, where Mr. S.I. Idirissu, M.P. spoke in Parliament of 'a new aristocracy, a new class which absorbs an enormous part of the national income' "Back to the 'Dawn Broadcast'," West Africa, September 18, 1965, p. 1039.

with respect for administrative justice and the rights of the individual".[1] A far more comprehensive machinery has, however, been devised in Tanzania to check abuse of power in an effort to make a reality of the political equality of the people and to provide more efficacious protection for their individual freedoms.[2]

Chapter VI[3] of the Constitution establishes a Permanent Commission of Enquiry with jurisdiction over every person in the service of the state except the President or the head of the executive of Zanzibar, or those holding judicial posts.

The commission is to consist of a chairman and two other members all appointed by the President for a term of 2 years. No commissioner may be re-appointed within 2 years of last ceasing to hold office. To guarantee the independence of the commission, its members are precluded from holding any other public office and they are irremovable save for inability to discharge their functions or for misbehaviour. A statute will regulate the functions, procedure, powers and immunities of the

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1. Tom Sargant, "The Ombusdman and one-party states", [1964] J.A.L. 195. Cf. Executive action and the Rule of Law, pp. 115-117.
2. President Nyerere, Africa Digest, August, 1965.
3. ss. 67-69.

commission but the President has already told Parliament that the citizen would have direct access to the commission which will make regular reports to him.[1]

G. SUPREMACY OF THE LAW

In the preceding pages, passing references were made to the methods, open or subtle, that have been employed to restrain justice from following its course. Here some of these methods are brought together as we consider the factors making for or against the supremacy of the law.

1. Retroactive legislation: Certainty of the law is fundamental to justice. The citizen should be able to regulate his affairs well in advance, and the prevailing law is his compass. This is why many constitutions prohibit penal retroactive legislation prescribing new offences or new punishments.[2] It is similarly reprehensible to annul judgments lawfully entered by competent courts of law. We saw that this was precisely the method used by Burundi and Ghana to procure the judgments the authorities thought right. Similarly in Nigeria, a

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1. Africa Digest, August 1965.
2. Nigerian Constitution s. 22 (7), Senegalese Constitution Article 6.

Privy Council decision, Adegbenro v. Akintola and Aderemi[1] (relating to the Western Nigeria premiership dispute) was overruled by an amendment to the constitution because, as the Prime Minister of the Federation of Nigeria put it, that step was politically expedient.[2] The chaos which the Prime Minister hoped would be averted by the expedient violation of the Rule of Law was, as events later proved, merely postponed.[3] The better solution would have been to re-instate Alhaji Adegbenro as Premier of Western Nigeria and immediately afterwards to re-impose a state of emergency to enable the Federal Government to conduct free and fair elections in the Region.

What has been said above should not, however, be taken as advocating a complete prohibition on retroactive legislation. A retrospective law may confer advantage on the citizen and is therefore, unobjectionable. But a surprise judgement may be given which might have the

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1. (1963) 3 WLR 63.
2. Parl. Debates (House of Representatives) June 3, 1963, Col.2234.
3. Widespread riots followed in the wake of the elections held in Western Nigeria on October 11, 1965. The two contestants for the premiership in the 1962 crisis were again the chief actors with both sides claiming victory after the elections.

effect of disturbing fixed relations or could involve the state in incalculable loss if it were to honour the new obligations imposed.

It was the latter consideration that led the Government of Tanganyike (as it then was) to pass the Chiefs (Abolition of Office Consequential Provision) Act, 1963,[1] to set aside the judgment of the High Court in Marealle v. Kilimanjaro District Council.[2] Chief T.L.N.Marealle had given up a civil service career to become, in 1952, the Mangi Mkuu of Chagga at the invitation of the Chagga Council by whom he was elected as a life chairman of the Council. In 1959, however, the people of Chagga, invited by the Council, decided in a referendum to have a periodically elected president rather than a life chairman. The Central Government in Dar-es-Salaam approved the new arrangement and the office of Mangi Mkuu was thus abolished. Marealle sued the local council for breach of contract claiming £4,750. Mr. Justice R.H.Murphy gave judgment for Chief Marealle, awarding him £4,600. The judge did not deny that the

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1. No. 53 of 1963.
2. Arusha High Court, Civil Case No. 44 of 1961. Cf. Burmah Oil Co. case supra.

Central Government confirmed the new arrangement resulting in the abolition of the chief's post but he concluded that it was the Chagga Council that put the Government in a position to act the way it did. The decision would probably have gone the other way, had a statute expressly authorised the abolition of the office. Even so, unless there is an express provision to the contrary, the statute would be construed as not intended to deprive a person of his proprietary right.

But the Government felt that as so many posts had been similarly abolished, a flood of actions must result and the public revenue would be unable to support all the claims, hence the annulment of the case.

2. Nolle prosequi: The Attorney-General or the Director of Public Prosecutions has powers to enter a nolle prosequi which would have the effect of discontinuing the instant criminal proceedings. The power covers all prosecutions whether sponsored by the state or by private persons. The arbitrary nature of this procedure[1] is well-recognised; hence in some constitutions, the office of the Director of Public Prosecutions is made independent to ensure that

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1. Cf. J.L. Edwards, The law officers of the Crown (1964) 228. Contrast the principle of irretractibility of a criminal trial in Italy. Criminal Procedure Code, Art. 75. The Rule of Law in Italy, (ICJ. Study) 15.

he does not use this or his other powers for political considerations. But the politicians do not like this fetter and steps have been taken in some countries, notably Nigeria, to abolish the independent position of the Director of Public Prosecutions and place him under the Attorney-General, the Government's Chief Law Officer.[1] The latter arrangement is probably the more convenient in spite of the political dangers involved. There may be important reasons of state why certain prosecutions should not be initiated. The Attorney-General who sits in the cabinet is better equipped to decide such matters,[2] prosecutions of foreign persons may be taken as an example.

Whoever exercises the power, what is important is that it should be exercised properly in the interests of justice and not otherwise. There have, however, been cases of misuse of the power to enter a nolle prosequi in some countries. The Nigerian Daily Times,[3] was constrained to observe, in an editorial, that the withdrawal of criminal cases against certain political supporters

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1. Nigerian Constitution s.88.
2. This is not to say that the cabinet gives instructions to the Attorney-General in these matters. Thus s.10(5) of the Nigerian Constitution provides that the powers of the Attorney-General to institute, undertake, take over or discontinue criminal proceedings is vested in him to the exclusion of any other person or authority.
3. Lagos, August 31, 1964.

of the ruling party in Western Nigeria "is a negation of unfettered justice".

3. Prerogative of mercy: This power vested in the executive could be used to damage the morale of the judiciary. When politicians feel that the 'correct' decision has not been given in a particular case or in order to relieve a supporter from the consequences of his crime, the prerogative of mercy may be handy. However, the practice is to consult the Chief Justice before exercising the prerogative.

4. The content of the law: It is fair to note that when the new states were born they inherited laws from their respective colonial rulers, some of which were very repressive. Not only have many of these laws been retained, but the new laws that are being made are in many cases more stringent than those the colonial powers imposed on the people and which earned the condemnation of the nationalists at the time.

The law officers in most of these countries would seem to have become expert at giving the politicians the type of drastic laws they ask for while still maintaining the semblance of conformity with the Rule of Law and the spirit of the Constitution.[1] There is very little the

1. Cf. Some of the trade union laws which protect the right to form association but withhold freedom of action. e.g., to strike except with the Minister's approval; further, Chapter 7.

judges can do when faced with laws that have left them with no discretion.

5. Detention power: We have discussed this at length in Chapter Seven where we saw that detention power is used more to substitute executive presumption of guilt for justice ordinarily administered by the courts of law, than to prevent the commission of grave crimes affecting the security of the state.

6. Emergency powers: These are needed when the safety of the state is threatened. The requirement of legislative approval for the declaration of a state of emergency which most African states provide for is not potent enough in the African situation where there is either a single or one dominant party. The use to which the emergency powers are put is therefore crucial. The Group A countries are in a better position in this regard because the courts have powers to determine whether the measures taken during the emergency are reasonably required to deal with the situation.[1] By contrast, the courts of Group B countries have no corresponding powers; here the executive literally rules by decrees which it interprets and applies as it thinks fit.

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1. See Chapter Seven supra.

7. Democracy and judicial power: Judges are generally looked upon as conservative members of the community whose decisions ought to be watched carefully lest they stultify the democratic will.[1] This feeling has resulted in a reaction from the judges who are over-cautious to use their power effectively.[2] The principle of judicial restraint is the dignified term in which this reaction is cloaked. The expatriate judges in East and Central Africa are more sensitive in this regard though this is not unexpected.

But such is the nature of the jurisdiction conferred on the judges as the guardians of the constitution that those who sit in the Supreme Court cannot on occasions, avoid a confrontation with the elected government. Constitutional disputes necessarily intrude into the field of politics for, as has been remarked, there stands in the background of every constitutional controversy a

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1. Cf. de Smith, 'Federalism, human rights and the protection of minorities', p.29.
2. There are exceptions as a line of Nigerian cases shows: the failure of Parliament to make provisions with respect to practice and procedure would not bar the judges from exercising the jurisdiction conferred in them by the constitution. Aoko v. Fagbemi 1961 1 All.N.L.R.400; Fajinmi v. Speaker of Western House of Assembly 1962 1 All.N.L.R. 205 ; see also Doherty v. Balewa 1961 1 All.N.L.R.604, where the Supreme Court refused to uphold a power given to a tribunal of inquiry to impose a fine for disregard of its orders.

political question which is capable of developing into a question of power.[1] It is not suggested that judges should exercise this power recklessly, oblivious of the political order in which their decisions are to operate. However, self-restraint judiciously resorted to is distinguishable from an abdication of responsibility.

At the same time, it is important to stress that the notion of "a government by the noblesse de robe" as an explanation of the nature of judicial power is clearly mistaken.[2] There is only one supreme power in the state, namely, the legislative, the executive and the judiciary acting in a partnership in which each organ undertakes to accord due respect to one another.

Some African states, as would have become evident in this study, give the impression that this ideal partnership is unpractical. The executive predominates, instructing a docile legislature on what to do and overruling the judiciary at will. Democratic government founded upon a genuine exercise of the franchise becomes

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1. The opinion of a German Court quoted by G.Leibholz, "The Federal Constitutional Court in the constitutional system of the Federal Republic of Germany." in Legal Essays, op.cit, p.491 at p.497.
2. Cf. ibid.,pp.504-505.

impossible and all channels of criticism are blocked. Absolutism, the very antithesis of the Rule of Law, thus appears to be entrenched; but even so there are some restraints on the exercise of power though their effectiveness lies outside the law.

Non-legal restraints.

The very condition of underdevelopment serves as a restraint on power. In most African states, there are not enough qualified people to carry out the drastic measures decided upon by the executive. In this way, inefficiency tempers absolutism. Secondly, the power struggle within the ruling party may provide a sort of internal check on the exercise of power. Thirdly, there is the ever-present fear of popular revolt, such as has taken place with remarkable success in Congo (Brazzaville) in 1963, and in the Sudan in 1964. Fourthly, the relationship between the state and the army although defined on paper by the constitution is rather shaky and at the slightest friction the Army may force out the politicians as happened in Togo in 1963 and also in Dahomey in the same year. Fifthly, inter-state rivalry may also serve as a

check on absolutist tendencies:[1] one state championing the cause of the opponents of another state and vice versa: e.g. Ghana and Nigeria, Mali and Senegal, Malawi and Tanzania, Guinea and the Ivory Coast.

However, one possible effect of the present movement towards African unity may be to reduce the efficacy of the last-mentioned restraint. One can only hope that the void thus created would be filled by the states taking positive steps to agree an African Convention of Human Rights.[2] The Charter of the Organization of African Unity makes no specific mention of the continental protection of human rights[3] though it affirms adherence to the principles of the Universal Declaration of Human Rights. Neither did the newly-formed African Commission of Jurists

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1. Cf. the exchange of publications between the Governments of the former Central African Federation (The erosion of the Rule of Law in Nyasaland (1963)), and of the former Nyasaland (Rule of Law in Nyasaland (1963)).
2. See also Resolution 4 of the Law of Lagos passed by the African Conference on the Rule of Law held in Lagos, Nigeria in 1961.
3. Contrast Dr. Nnamdi Azikiwe's call for a binding continental convention on human rights in an address delivered in London on August 12, 1961 and published in a pamphlet, The future of Pan-Africanism (1961). Cf. his inaugural address as Governor-General of Nigeria on 16 November 1960, entitled Respect for human dignity (1960).

insert a pledge in their Convention or Statute to work towards the protection of essential liberties on the continent. However, Article 1(c) of the Statute states that the Commission shall as one of its objectives "promote the development of the concept of justice."

Unless the lawyers themselves actively sell the idea of the Rule of Law and strive ceaselessly for its effective observance, it would be wishful to expect the present political leaders who, as freedom winners and economic providers, are conscious of their dominant position, to readily uphold the Rule of Law. In this connection, our last word must be a tribute to the International Commission of Jurists for their constant world-wide vigilance and concern for the Rule of Law.

CHAPTER NINE

CONCLUSION

The apparent ineffectiveness of legal restraints on many African governments might tempt one to conclude that the Rule of Law has no place in the Africa of today. On the other hand, one should remember that the concept does not rest on legal remedies alone, but envisages political solutions to supplement these where appropriate. We illustrated this fully with our discussion of practices in Britain.

The years immediately following independence are bound to be difficult as the African successors to the colonial rulers try to establish themselves while their rivals, often using questionable means, stake a claim to the position held by them. As there are no fundamental issues dividing the contestants, the ensuing struggle never rises above personalities. The outstanding problem in the present phase of African history, therefore, is to find an appropriate political system, which would reconcile the existing differences, at the same time ensuring rapid economic progress.

These differences are mainly ethnic, with the various groups seeking to protect and safeguard their interests to ensure a fair share of the national cake for all. Many

African leaders seem to believe that these differences are disruptive of the new order and should therefore be extirpated. All the communities should be integrated into one entity in which a man's ethnic origin would be irrelevant. The one-party system, it is argued, ensures this national integration. An analogy is drawn with the integrated traditional society. But as we saw, although the traditional society was integrated, it was not monolithic, neither was power concentrated in the highest political unit. On the contrary, there was considerable decentralisation on territorial and personal bases. This contrast between the diffusion of power in the traditional order and the concentration of power in the president in the one-party states of present-day Africa is too glaring to escape attention. The counterparts of the new African political regimes must therefore be sought not in traditional Africa, but in the Latin American countries.

We do not, however, seek to argue that the European multi-party system of government is best suited to the

newly independent African states. We would suggest, instead, a federal system of government in which each ethnic group would constitute a political unit, but with the federal cabinet as a 'senate' made up of equal numbers of ministers from the component units. This arrangement was provided for in Nigeria by the Macpherson Constitution of 1951. Strangely, however, this equilibrium constitution was discarded in favour of one based on a pure parliamentary system in which the majority party or coalition parties supply all ministers. Such an arrangement is clearly un-African. Decision-making organs as well as the legislative organs should be prepresentative.

Where unity is enforced by glossing over differences, political stability is not likely to thrive. The thesis that one-party regimes ensure stability has not been borne out by events. For although open dissent is outlawed, opposition elements operate underground, so that more plots, counter-plots and other unrests have taken place in the one-party states than in the two-party states.

Whatever political system a state adopts, there will still be the problem of change of government. Thus, in traditional societies, although hereditary leadership

was the rule, the people always found one pretext or another to get rid of a ruler they did not like in favour of one of his relatives. In some societies there was a recognisable procedure for dismissing unpopular rulers, but in a majority, insurrections were the most potent remedy against such rulers.

It is to ensure peaceful and orderly change of government that the Rule of Law requires periodic and fair elections. Election presupposes a genuine choice of alternatives. Where, however, there are no fundamental issues dividing the parties, elections are more likely to centre around personalities. In Tanzania the people are given the chance to decide who their representatives shall be, but as we noted, similar arrangements are not made for the election of a president, the most powerful man in the state. Although the sole presidential candidate could lose an election, it is difficult to see this happening where no alternative person has been ear-marked for the post in the event of the people deciding against the sole candidate.

The Kikuyu ntuiko, by which an entire generation of leaders retires to make way for new rulers, has not received the consideration it deserves in modern Africa. The ntuiko approximates to the American system of a maximum

two four-year terms for any one president. Given the relative youth of the present African leaders, a maximum term of, say, twelve years may be prescribed. An elected government would retire at the expiration of that period with a statutory ban on all its members (who have served for the maximum period) seeking re-election.

Between elections, a government must still observe a code of behaviour. The concept of the Rule of Law sees to this by insisting on the recognition and protection of fundamental human rights, and on the government being run in accordance with the law. Unfortunately, the adversary notion of government and politics which the new African states inherited from their colonial rulers, and in which the latter did not give them sustained practice before withdrawing, has not helped to create the right atmosphere for the due observance of the Rule of Law. Once an appropriate political system can be devised, it is hoped that the present position will change radically.

We should remind ourselves too, that the Rule of Law in its modern conception has two aspects, the restraining and the dynamic. African leaders, because of the underdevelopment of their countries, and their own grim determination to improve the situation at the earliest

possible moment, appear to be placing greater stress on the dynamic aspect of the concept. Perhaps in the fulness of time the conditions generated by the economic achievements: higher rate of literacy, better standard of living, and the emergence of new interest groups transcending ethnic differences will assist in correcting the extreme departures now taking place as regards the restraining aspect of the Rule of Law.

The foregoing optimism rests on the assumption that the political experiments currently being undertaken in some states will not have been carried too far, so that what started as a one-party democracies will by then have been converted into totalitarian regimes; for freedom, once lost, is difficult to regain.

Herein lies the weakness of drawing too firm a distinction between the two aspects of the concept of the Rule of Law. The older states, until recently, dwelt too much on the restraining aspect, and the result was a class-ridden society. The new states run the risk of over-emphasising the dynamic aspect, and the result might well be that the individual would enjoy much social security but would lack self-awareness and the initiative, qualities that make for the dignity and worth of man.

We have suggested that the prospects for the Rule of Law are likely to be brighter in Africa if the states adopt a more appropriate political system which recognises and seeks to harmonise existing differences, and in which every individual would enjoy a good measure of political, social and economic freedom. However, constitutions are no more than "forms for action".[1] The attitude of those who operate them is crucial. Africa's greatest requirement, therefore, is good leadership by leaders who believe in the dignity of man and in constitutional government. The right education may produce such leadership, but no law or constitution can decree it.

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1. J. A. Corry, "The future of public law" in Changing Legal Objectives (ed. R. S. J. Macdonald).

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