

**A PHILOSOPHICAL ANALYSIS OF THE DEMOCRATIC  
PRACTICE IN KENYA.**

By

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**A Dissertation presented to the Department of Philosophy in Partial Fulfilment of the  
Requirements for the Degree of Master of Arts in Philosophy in Egerton University.**

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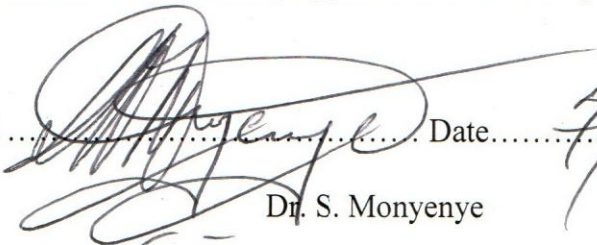
## DECLARATION

I, JOSEPHINE W. NJORGE, declare that, this thesis, is my original work and has not been presented anywhere for any academic purposes. I, also declare that, this study is based on my personal research. All sources used have been fully acknowledged.

Signed 

Date 6/8/1997

This thesis has been submitted with my approval as a University Supervisor.

Signed  Date 7/8/97

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## ABSTRACT

This study aimed at investigating the bottlenecks and problems faced by Kenyans in their pursuit for democracy. It sought to establish the effects of culture, the economy, civic education and colonialism on democracy. It also considered whether there was need to reinterpret democracy so as to make it pertinent to the Kenyan situation.

The hypotheses postulated in this study were: -

- There is need to cultivate and nurture a democratic culture in Kenya.
- Economic, colonial and educational factors have had a negative influence on the practice of democracy in Kenya.

Library research was the main method of data collection. However, 55 key informants were informally talked to, so as to enhance the data.

After the data analysis, the study found out that economic, cultural, and colonial factors influence the practice of democracy in Kenya negatively. That, institutions devised by the colonial government in Kenya for oppressive purposes are still being used for the same purposes by the Kenyan government.

It was observed that, Kenyan leaders have yet to learn that the free and open society is by definition dynamic and incompatible with any static stratification or guarantee for any status quo. Authentic democracy is possible only in a state ruled by law, and on the basis of a correct conception of the human person.

Democracy requires personal dedication of both the governors and the governed. Unless democratic habits of thought and action are a part of the fibre of the Kenyan people, then political democracy in this country is insecure. What the country needs is a culture of selflessness and sacrifice in order to nurture the budding democracy. But not a democracy based on fear, intimidation, self-glory and personal enrichment.

It was, therefore, recommended that the government should be so organised as to enable the maximum individual freedom consistent with equal freedom of others. The government should endeavour to create mechanism to protect democracy rather than destroy it through those provisions in the constitution such as the Public Order Act, Public Security Act and the Chief's Act which are truly inimical to democracy

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## **DEDICATION**

To my Mother, and my late Father; the pillars of my knowledge.

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It would be very presumptuous for me to say that I could have achieved what I did in terms of this thesis without any support. I, therefore, would like to register my sincere gratitude to the following persons (individuals) and institutions who in one way or another enabled me to complete my two years study for a Masters Degree in Philosophy:

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# CHAPTER ONE

## INTRODUCTION

As a subject of philosophical inquiry, democracy has been a concern of a number of distinguished philosophers from antiquity up to the present day. In this century, the collapse of monolithicism in Eastern Europe saw a resurgence in the demand for more democratisation all over the world.

In this regard, Kenya, which adapted a democratic mode of government at independence back in 1963, was suddenly thrown into the limelight; with her practice of democracy being a target for criticism from both local and international quarters. The leaders were accused of not upholding the democratic ideals they embraced at independence.

Curiously enough, the Kenyan leaders categorically re-affirmed their commitment to democracy, something they have taken the trouble to do at any given opportunity ever since the dawn of independence.

However, recognising the fact that a good democrat is not defined by his professions but by his practices, this work set out to critically analyse from a philosophical point of view, the Kenyan practice of democracy.

This thesis, therefore, has tried to uncover the realities of the Kenyan political situation, its structure, nature, and forces acting upon it. The nature of democracy, that is, how it is practised here in Kenya, has been examined.

The meaning attributed to this concept here is similar to that highlighted by Western liberal scholars. The study, therefore, discussed the institutions within which democracy is required to be practised and, its safeguards. In this regard, various concepts as

encompassing democracy - as grounds that have to be there for democracy to be seen to exist in Kenya are looked at.

This thesis is divided into five chapters. Chapter One, which is largely descriptive, highlights the definitions and reasons for carrying out this research. The purpose of this chapter is to basically underscore the scope within which this research was carried out and the methodology used.

Chapter Two is a reflection on what the philosophers of democracy have said about the various concepts encompassing the subject. This was geared towards providing a theoretical framework within which to ground the Kenyan practice.

Chapter Three is a representation of the development of Kenya's political environment from the dawn of independence to the present day. It contains a reflection on how the constitution has evolved over the years and how the government is constituted. It also gives a historical perspective of the political situation in Kenya from the time of independence up to present day.

Chapter Four gives a critique of Kenya's practice of democracy. An attempt has been made to look at the various institutions of democracy and how their practice has evolved over the years. It also deals with the various institutional factors, structural factors and other factors inhibiting democracy. On the whole, it points out the major faults and weaknesses of the Kenyan practice of democracy.

The final chapter (5) contains a reflection on the lessons that need to be learned from Kenya's past practices and how these can help Kenyans improve future practices so as to move towards fuller democratisation. It gives recommendations towards a better future in terms of democracy, and how the corridors of this much-cherished system of government can be opened further.

In a nutshell, all the remarks in this thesis are intentionally ordinary in that they are

based on experience. Whereas that great philosopher of antiquity, Plato argued about democracy from his experience at Athens, in this study, it has been discussed from the experience here in Kenya. This was done because, it is one thing to have democracy, theoretically, in the constitution, but, its practical implementation is quite another!

## **1:1 STATEMENT OF THE PROBLEM**

No other century has seen so much fervour for democracy as this one. There has been a clamour for more democratisation all over the world and Kenya was not left behind. Although at independence Kenya adapted a democratic mode of government, She has constantly come into the limelight of criticism not only by the Western world, but also by her own people led by among others; the clergy, lawyers, journalists, and opposition leaders as not upholding her democratic principles.

The year 1992 will be remembered as the year that saw the Kenyan Government succumb to the pressures of these criticisms by repealing Section 2(A) of her constitution to allow for a Multi-party mode of government.

Ironically, even in the light of these criticisms and changes, the Kenyan leaders continue to strongly maintain that Kenya is a democratic country. These political changes have raised certain fundamental socio-political issues with philosophical dimensions. Of particular interest to this research were: the conditions that needed to be met for democracy to be seen to exist in Kenya and the major draw backs to this process.

The problem that this thesis seeks to address, therefore, is one of a paradox between what ought to be and what there is with respect to democracy in Kenya. The contention is that, there is a discrepancy between the democratic theory and its practice here in Kenya. Are the leaders merely paying lip service to democracy or are the critics wrong in their assessment? Why do Kenyans seem to still be fighting for democracy thirty-four (34) years

after independence? Is Kenya progressing or retrogressing in terms of democracy?

This thesis, therefore, seeks to unveil the reasons for this discrepancy and what can be done to encourage and promote democratic habits of thought and action in Kenya.

## 1:2 OPERATIONAL DEFINITION OF TERMS

### 1:2:1 Democracy: Origins and Definition

Democracy has been a subject of philosophical inquiry through the centuries from antiquity up to present day. The fact that it continues to manifest itself as a global phenomenon underscores its significance as a subject of philosophical discussion. Today, the concept has become so sacred that no one dares say that he is undemocratic.

As a form of government, democracy was first practised in the Greek City-States. The term democracy is, therefore, derived from the Greek word, "Demokratia". A word that comes from two Greek words; *demos*; "people" and *kratos*, "rule". The etymological meaning of democracy is thus, "rule from the people", but this etymological meaning has been interpreted in different ways in the course of history, thus corresponding to different realities<sup>1</sup>.

The most original interpretation of democracy indicates a form of government where the political decisions are directly in the hands of the whole body of citizens acting under majority rule. This form; or direct democracy as it is known was found in many of the primitive societies such as the Greek City-States. As it existed in these states, democracy was the lawful rule of the many in the true interest of the community.

After the disappearance of direct democracy in ancient Greece, democracy was forgotten in Europe. Monarchic regimes prevailed for centuries during the middle ages up to the French Revolution (1789). It was only with the creation and the independence of the United States of America and the French Revolution that the new concept of democracy

started its gradual evolution to the present day.

In the ancient days, the stress was only majority rule as a validating principle of democracy. However, after the French Revolution and the creation of the United States of America, there was an emergence of a theory of human rights, whose explicit development in the writings of Thomas Hobbes and above all, John Locke, paved the way for a conception of democracy in which the principle of majority rule, was a necessary but not a sufficient condition.

At this time, direct democracy was no longer possible due to the complexity and size of nations. What emerged is known as representative democracy.

### **1:2:2 Representative Democracy**

This is the form of government where the citizens exercise their right to political decision-making not directly but through representatives chosen by and accountable to them<sup>2</sup>. The basic institution in this form of government is the representative legislature or parliament.

### **1:2:3 Constitutional Democracy**

This is usually a form of representative democracy where the rights and the power of the majority are exercised within the limits of a constitution in order to guarantee the minority the enjoyment of certain individual or social rights such as the freedoms of expression, movement, association and religion.<sup>3</sup> This form of democracy is also sometimes called liberal democracy. A republic is understood to be a form of representative and constitutional democracy as in the case of Kenya, which became a republic after adapting a democratic mode of government from her British coloniser in 1963.

This means that Kenya had no earlier experience with democracy and one of the arguments advanced by the critics of this system of government and its requirements such as multi-partism in Kenya is that, it is alien to Africa and it is not consistent with our cultural and political backgrounds. It has also been argued that there is need to develop a democracy relevant to our contemporary needs. In Archie Mafeje's words:

African scholars have not been able to generate new concepts to deal with their own reality. What is the substantive meaning of democracy in Africa? African political scientists have not made any sort of headway or breakthrough in devising new political concepts.<sup>4</sup>

Although it is true that in Africa in general and in Kenya in particular, democracy was adapted from her colonisers, it should be pointed out here that those insisting that it is alien to Africa are doing so because they are not willing to change as democracy requires.

Democracy and its meaning do not change with locality or from nation to nation. If each person or nation is going to insist on formulating a democracy consistent with their needs, then we will end up in a situation like we pointed out earlier in this study, where everyone will insist that they are practising democracy; but a different kind of democracy such as a personal democracy or clan democracy.

Thus democracy demands that deliberate efforts be made to create mechanisms for its establishment. However, in Kenya and in Africa, the attempts by governments and by supporters of the status quo involve the attempts to destroy freedom of the individual, to suppress the diversity of life, and to force social and political processes to conform to sets of narrowly chosen tenets.

Democracy is an ideal whose meaning does not change from a people to people or nation to nation. In trying to establish the substantive meaning of democracy in Africa, therefore, we are trying to say that democracy can change meaning depending on where it is practised. This is not true. Kenyans should be working towards developing and cultivating

democratic habits of thought and action.

From the foregoing, it is clear that, despite its popularity today, democracy connotes different things to different people. This is why the defenders of any kind of regime claim it is a democracy and fear that they might have to stop using the word if it were to be tied to any one meaning.

However, there are certain conditions such as freedom, equality, and participation that need to be met for any society to be called democratic irrespective of where it is located – in the West, or in Africa.

Democracy, therefore, is defined in this study as that kind of government that encourages, protects and allows rights of citizenship such as freedom of speech, religion, opinion and association, the assertion of the rule of law accompanied by respect for the right of minorities. A kind of government where the citizens treat each other as equals with absence of class feeling.

In this work, the quest for democracy is treated as a quest for human dignity, equality, freedom and justice, which encompasses the liberation of citizens from tyrants, nations from foreign domination and exploitation, and women from social subjugation. In his Gettysburg address of 1836, Abraham Lincoln characterised democracy in words that seemed to express its very spirit: "a government of the people, by the people, for the people"<sup>5</sup>.



Thus, democracy is treated as that form of government in which the supreme power is vested in the people collectively, and administered by officers appointed by them. It is a society characterised by recognition of equality of rights and privileges: political, social or legal equality. According to this work, therefore, the major elements of a democracy are; participation, delegation of powers, and the assertion of the rule of law, freedom, and equality.

There are other terms that have also been used in this study that are quite well known, widely used and to a large extent, self-explanatory. It may, nevertheless, be useful to provide definitions of principle concepts in order to minimise the possibility of misunderstanding.

Minorities are defined as that group which holds views that are different from those of the ruling party. They were, therefore, treated as the opposition: the party of the smaller numbers.

Culture is treated as the art or practice of cultivating. It generally refers to what a person learns from and in relation to his or her material and social environment. It is through culture that individuals and groups learn to recognise, accept and respect established social institutions and practices; as this is what fashions values, attitudes, habits and social groups.

### **1:3 OBJECTIVES OF THE STUDY**

The main aim of this study was to investigate the bottlenecks and problems experienced by Kenyans in their pursuit for further democratisation.

Specifically, this study sought to:-

1. Establish the effects of culture, colonialism, the economy, and civic education on the democratic practice in Kenya.

2. Find out the major factors that inhibit the practice of democracy in Kenya.
3. Assess the tenability of multi-party democracy in Kenya (our experience just after independence came to bear).
4. Consider whether there is need to re-interpret democracy so as to make it pertinent to the Kenyan situation (bearing in mind that our economic, cultural, social and political situations are different from those of the West).

#### **1:4 JUSTIFICATION FOR THE STUDY**

This study embarks on one of the most topical issues in Kenya and in the African continent today. The aims/objectives of this study could not be more significant or relevant.

At a time when everyone including traditional enemies of democracy wants to wear the label of democracy because it is fashionable to be considered a democrat, it is extremely necessary to re-examine the Kenyan concept of democracy; and to re-define what Kenyans need and recognise as democracy. If this is not done and done well, we could end up in a situation where everyone could claim to be exercising democracy, but a different kind of democracy. So, what is the substantive meaning of democracy in Kenya?

This study recognised that there has been a proliferation in the meanings of the term democracy, and despite its popularity today, it connotes different things to different people and with a little manipulation, it can be made to accommodate almost any collection of social facts we may wish to carry in it. In Carl L. Becker's words:

In it, we can easily pack a dictatorship as any other form of government. We have only to stretch the concept to include any form of government supported by a majority of the people for whatever reasons and whatever means of expressing assent.<sup>6</sup>

It is this realisation that the world is living in an age of democratic pretensions

where theory is easily equated with practice that made this study necessary. It sets out to investigate how widespread the practice of democracy is, in Kenya.

This is because, when pushed too far, qualified democracy can easily turn out to be the very antithesis of democracy, as we know it. Further, to believe that a system is democratic simply because it is called a democracy is a way of destroying democracy by its very name. It is for these reasons that the work that the researcher has embarked on in this thesis is extremely important and timely.

Secondly, Kenya has entered into another phase of democracy multi-party democracy. It is, therefore, important that an investigation of the practice of democracy in the country be made. This study undertakes this task.

## **1:5 LITERATURE REVIEW**

Before the democratic practice in Kenya can be considered in detail, the researcher would first like to turn attention to what the other philosophers have said about the concept of democracy. This is an important task because this is a philosophical inquiry. More so, we are interested in what set of ideas, and what motions of mind, have formed and brought into being the democratic state we now know in the form it is now. This is because, to find a firm basis for a theory of the democratic method of government in the modern day, we must go back to the process of social thought from which the idea issues. This will go a long way in helping put the Kenyan situation into perspective. Further, political democracy in Kenya today requires that we look at the initial ideas on the topic.

Although some of these views would be regarded as old and outmoded, it should be pointed out that they still hold true and that, we have only modified them to suit the changing conditions of the modern world.

## 1:5:1 The Philosophical Foundations of Democracy

John Locke, who is considered as the father of modern democracy, grounds all authority in a covenant. Authority, he says, is conventional and can have no other origin than popular consent for, by nature, every man is his own sovereign lord. By agreement then men give up their natural authority, but the cession is to the society as a whole rather than to an individual or a small group. In effect, therefore, a compact sovereign is created by the covenant. The right to rebel against the sovereign is retained. He says;

There still remains in the people a supreme power to remove or alter the legislature when they find it act contrary to the trust imposed on them<sup>7</sup>

A government is dissolved not only when it is overthrown by an external enemy but also when internally there has been an alteration of the legislature.

Locke maintains that people are unable to protect their rights in the state of nature. This is because in the state of nature, every man is the judge in his own cause, since he must rely upon himself for the defence of his rights. To remedy this situation, people establish a government for the protection of their rights. In so doing, they delegate to government the authority to make and enforce laws, but they stipulate that government must abide by the will of the majority.

Except for the original covenant, which creates the political society, the decisions of the group are taken by a majority vote rather than by unanimous agreement. Locke attributes no special wisdom to the majority, but bases the argument on expediency. Unanimous decisions would be preferable, but human nature does not make them possible.

Property is very prominent in Locke's political philosophy, and is, according to him the chief reason for the institution of civil government. He sees the right to private property as proceeding civil society since it is grounded in the natural moral law. Labour for him, is

the justification of private property since labour is man's own. He says:

. . . the great and chief end of men uniting into commonwealths, and putting themselves under government, is the preservation of their property, to which in a state of nature there are many things wanting.

Locke's doctrine is more or less democratic but the democratic element is limited by the view (implied rather than expressed) that those who have no property are not to be recognised as citizens.

Locke realised that the ruler can easily use his position to further his own interests at the expense of his subjects and the only way of curbing this is to make him party to the contract. He was, therefore, a key source to the doctrine of government by consent, majority rule, natural rights and the separation of powers. He emphasizes that those who administrate or execute the law do not make it. He thus proposes that government should have three separate arms namely; the Executive, Parliament and the Judiciary. This is meant to ensure that it is not the same people who make the law that execute it. This, he opposes, for, he says that they may exempt themselves from the law they make and suit the law both in its making and execution to their advantage.

However, it should be noted that the rule of the majority, democratic though it is, might have its pitfalls. Take the example of a society with a majority of ignorant people and a minority of well-informed individuals that is allowed to practice majority rule. The majority may hold false beliefs. Should they, therefore, suppress the minorities who hold the right opinion?

Locke foresaw this problem and advocated that the legislature should make laws after careful deliberations. The fact that the legislature is answerable to the people who have given them consent to make the laws carries with it the implication that the legislature is easily removable if it fails to carry out its duties.

The separation of powers is meant to ensure that there are checks and balances in

government and that there are no excesses of power by any one arm of government.

The independence of the judiciary enables it to be a watchdog to both the legislature and the executive. It checks the injustice done by both when they abuse the power bestowed on them. Therefore, for Locke the banner is; "the people shall judge."

From the foregoing, Locke made important contributions to political thought. As a matter of fact, the guarantee of freedom since his time certainly has been the so-called separation of powers. This is because it guarantees the rule of law, without which the civil liberties of individuals cannot be safeguarded, thus undermining the very core of democracy.

It should be pointed out that under the institutional framework where there is no separation of powers, the parliament which is supposed to be the institution through which the people rule themselves, does not serve the purpose for which it was originally intended.

The two great political theories of antiquity that have come down to us, Platonic and Aristotelian, were reactions to democracy; the first one altogether hostile and the second more moderate and impartial.

Plato maintains that the best government is that where the ruler is a philosopher king. The king has absolute powers. He divides his society into three classes namely; philosopher kings, soldiers and workers. The only ones allowed to rule are the philosopher kings. He believed that ruling was a skill that was only possessed by philosophers. According to him, justice will be maintained in the state when each individual citizen adheres to his own class and does what this class requires of him or her.

He says that the majority are ignorant of what is best for them and the philosopher kings should determine this for them. It should be pointed out here that Plato disliked democracy for two reasons: firstly, his family background was aristocratic and secondly, it was under a democratic regime that Plato's teacher, Socrates, was unjustly condemned to

death. He argues that democracy leads to extreme freedom, which in turn leads to despotism. His logic is, however, short-sighted because by the same token, it can be argued that the extreme of despotic rule could lead to democracy for he sees one extreme as leading to another.<sup>9</sup>

Further, Plato erred in believing that ruling could be a skill as medicine is a skill for a physician. While a physician can diagnose the same symptoms in a number of patients and prescribe the same drug, a ruler cannot discern the wishes and needs of every individual citizen and meet them equally. Plato's suggestion that there seems to be absolute standards of good is wrong. People differ in their interests. He seems to advocate that those who have the skill to rule have the right to do so. This is not acceptable because power is derived from the consent of those who are to be ruled.

Plato also portrays his philosopher king as infallible and yet, by nature, no man is infallible. It should be remembered that Plato was arguing from his experience in the Greek City-States and not from any modern form of representative government.

Although Plato was opposed to democracy and a defender of despotism he recognised that equality of political opportunity and freedom for the individual to do as he likes are the salient characteristics of democracy. This is what he was opposed to.

In trying to stratify society into three classes, Plato implies that some people (philosopher kings) are more privileged than others. This is not true because all men are born equal.

Plato's society presupposes that there is no upward mobility and, therefore, no equality of opportunity to do so. This is not practical because in real life, people keep changing their careers and jobs in order to live better and history has proved that where their freedom to do so is denied, the people will demand to have it back. (The pro-democracy movement in Kenya should be a pointer to this).

It is true that "we are not equally endowed with physical and intellectual powers and skills".<sup>10</sup> But, it should be noted that the demand for equality does not deny the existence of natural differences, or shall we say, it loses much of its force and justification when it rejects such principles as, 'the right man in the right place', 'the best man in the highest place'. The claim for equality is a protest against unjust, undeserved, and unjustified inequalities. On its part, the French Declaration of Rights (1789) clearly states: "Men are born and remain free and equal in rights."<sup>11</sup>

From the foregoing, it is clear that liberty and equality are the twin pillars of democracy. This then would presuppose that each person has the right possibility of ascending to the top of the social scale, and thus facilitates the way for the rights of community annulling before the law all privileges of birth (as Plato had advocated) and desiring that in human society struggle for pre-eminence should be solely decided in accordance with individual capacity. Pericles in 431 B.C also echoed this when he said:

While the law saves equal justice to all alike in their private disputes, the claim of excellence is also recognised; and when a citizen is preferred to the public service not as a matter of privilege but as a reward of merit."<sup>12</sup>

J. Stuart Mill a utilitarian philosopher reasoned that a limited government which promoted individual liberties would enable individuals to fulfil their own nature. He tried to draw a line between the proper scope of authority and that of liberty by insisting that the only reason why the state should interfere with an individual's freedom is when in the pursuit of freedom, he interferes with that of others in the society.

Unlike Locke, Mill was very wary of majority rule. He was concerned with the kind of government that would be most useful in promoting the happiness, or pleasure, of the people. To him there was little question that democracy is superior to other political systems for this purpose.



Mill maintains that, democracy must not permit a new form of tyranny in modern society - the "tyranny of the individual's pleasure", rather, it must understand that the best suited person to know what is pleasurable or painful for an individual presuming that he or she is an educated adult, is the individual himself/herself. Mill argues that, government must be as tolerant as possible, interfering with individuals only when they threaten harm to others.<sup>13</sup>

Since Mill rejected Hobbe's pessimistic view of human nature as basically selfish, he did not believe that these intrusions would be frequent. A genuinely democratic government, guarding against the tyranny of the majority, will cultivate individuality by tolerating beliefs and lifestyles, which are eccentric, unorthodox, and even bizarre. Not only would this benefit the individual, by allowing him or her to pursue pleasure and avoid pain with the fewest possible restrictions, but it would also benefit society by encouraging the growth of genius. Mill consistently attempted to show that personal liberties benefit the individual and society in valuable ways. You are entitled to think and to act as you wish, not because it is your right in a Lockean sense, but because such activity is useful to you and to others.<sup>14</sup>

Although no one has done better than Mill in putting forward a suggested criterion for the limits of liberty and authority, it should be noted that this criterion has its weaknesses. This is because; human beings have different tastes and preferences. In pursuing one's interests, one might be offending another individual who does not share the same taste. Take the example of freedom of dress. The youth of today like spotting some hairstyles and clothes such as mini-skirts which are offensive to some sections of the society especially the older generation. In such a case, if we were to stick to Mill's principles, then there would be conflicts in society between people who have contrary tastes.

Furthermore, Mill's criterion is not applicable in a heterogeneous society such as Kenya, which has different ethnic communities each of which, has different customs. This can be seen clearly in situations where the courts of law are forced to fall back on customary law to resolve some conflicts between different communities. A good example is the burial saga of the late criminal lawyer S. M. Otieno where the court had to appeal to Luo Customary Law to reach a verdict. The widow, Wambui Otieno (from the Kikuyu community) felt that the judgement was very unfair as it had interfered with her right to bury her husband.

From the foregoing, it is clear that Mill's major concern was for individual liberty and in examining the nature and limits of the power, which can legitimately be exercised by society over the individual. He also examines the struggle between authority and liberty for he says;

If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power could be justified in silencing mankind.<sup>15</sup>

To him, men may limit the powers of rulers by either evoking the institution of natural rights (basic rights) or by introducing constitutional checks. Therefore, an individual is not accountable to society for his actions in so far as these concern the interest of no person but himself.

Mill was a defender of democracy. He stood firmly on the side of freedom of press, freedom of association, and freedom to think and act as one wishes. It should be recognised that despite its failings, Mill's principle maintains its position as the strongest bastion of liberty that any thinker has given us. But as pointed out earlier, if it was to be applied in its entirety especially in heterogeneous societies, there would be severe conflicts in society. For example the state would not have any right to stop an individual from

cooking and eating pork simply because he lives in a Muslim neighbourhood (Muslims are opposed to the eating of pork as it is against their religion).

Mill's principles however, can be applied to safeguard against uncalled for restrictions and tyrannical tendencies of any government.

The thinker who gives us the most vivid picture of 'Liberty Hall' and its dangers is Thomas Hobbes who characterises life in a state of nature as being "nasty, brutish and short".<sup>16</sup> He preferred despotic rule to unrestrained freedom.

Hobbes however, missed the point because a despotic regime undermines the very freedom it was instituted to safeguard. Eliseo Vivas echoes these sentiments by asserting that, "we should remember always that where enough individuals are deserving of freedom, they will insist that government does not stifle it".<sup>17</sup>

The kind of power that Hobbes wrote about is the concentration of power that deprives the individual citizens of their rights and responsibilities as envisaged in the democratic constitution like the one in Kenya.

Further, Hobbes sees the interests of the sovereign as being identical to those of his subjects. But is it really true that the richer the monarch, the richer are his subjects? In Kenya at present, a few rulers have made themselves millionaires while the rest of the people are poor. The riches of the monarch are never proportional to the riches the subjects. In any case they are inversely proportional. The interests of the monarch cannot be identical with those of his subjects.

Hobbes made the mistake of assuming that the major interests of all citizens are the same. If the ruler is left with unlimited powers as Hobbes proposes, he is likely to yield to his natural desires, since there is nothing to prevent him from doing so. History abounds with instances of rulers abusing their powers when there are no proper checks for such powers.

Karl R. Popper understands an open society as that society which sets free the critical powers of man. On his part, Popper sees open society as a pluralistic society. That is, a society where incompatible views are expressed (that underscores his concern for the freedom of expression), and conflicting aims pursued.<sup>18</sup> A society in which everybody is free to investigate problem situations and to propose solutions of others and most important those of the government whether in prospect or in application and above all, a society in which government policies are changed upon criticism. He sees government as a set of institutions, among them for example, general elections, which permit control of leaders, and which makes it possible for the ruled to attain reforms without resorting to violence.

Popper's political philosophy was a reaction to what he calls utopian social engineering (views of Marx, Hegel and Plato). He sees their arguments as undermining the basic principles of an open society and ends up in both totalitarianism and authoritarianism (refer to Plato's philosophy already discussed earlier in this section).

Karl Marx regards freedom and democracy as necessary for his ideal communistic society. The kind of democracy that Marx wrote about is different from that enshrined in the Kenyan Constitution. Marx gave a specific class content to his. However, democracy as an ideal requires that all citizens be equal before the law. It gives to each one of them the possibility of ascending to the top of the social scale.

For his part, Rousseau argues that the people whether they can augment their right or not, are still the ultimate determinants of their destiny. They are also the final say from which there is no appeal.

He combined the absolute sovereignty of Hobbes and the popular consent of Locke into the philosophical doctrine of popular sovereignty. He says that the legislative power remains supreme while the executive becomes always derivative.

Montesquieu too shares with Locke and Rousseau in expressing with clarity and

vigour the liberal and humanitarian ideals of the eighteenth century. He was an enthusiast for liberty and an enemy of despotism. He divided government into three kinds; republican, monarchical and despotic. He says that a republic is a democracy when the body of the people possesses the supreme power. He admitted immutable laws of justice.<sup>19</sup>

He sees political liberty not as consisting in unrestrained freedom but only in the power of doing what we ought to will and in not being constrained to do what we ought not to will. Liberty consists in the right to do whatever the laws permit. In a free society according to him, no citizen is forced to act in one particular manner when the law allows him to follow his own inclination.

He further says that political liberty involves the separation of powers. He says that the legislative, executive and judicial powers must not be vested in one man or one particular group of men. They must be separated or independent of one another in such a way that they act as checks on one another and constitute a safeguard against despotism and the tyrannical abuse of power. Political liberty exists when independent powers reciprocally limit each other.

Montesquieu's views on concepts of democracy such as justice, liberty and the separation of powers are still relevant up to the present day and could not be more significant.

The philosophers discussed in this section argue that to understand the concept of justice, we have to first start from the concept of equality. The concept of equality is based on the assumption that there is something peculiar to human beings and common to human beings without distinction of class, race and sex which lies far deeper than all differences between them.

To say that all men are equal means that none shall claim to have a better treatment than another does in advance of grounds being produced. Therefore, the only universal

right is the right to equal consideration and equal consideration is implicit with the idea of justice.<sup>20</sup>

Most of the writers discussed in this section do agree on some concepts as being necessary in a democracy. These include the separation of powers, majority rule, freedom, equality, justice and the rule of law. They recognise that the only mode of government that can safeguard the rights of its citizens is a democracy. First in the form of its constitution and the way of its coming into being, and next in its method of government and the way of its operation.

They argue that since unanimity among human beings about matters of great concern is impossible, the majority principle in so far as it truly respects the existence of human rights is the only one that makes democracy a viable alternative to tyranny. This majority principle is exercised via the instrumentalities of elections. In Giovanni Sartori's words:

Unless elections take place in conditions that assure freedom, they cannot produce leaders who are responsive to the will of the voters. The list of the 20<sup>th</sup> century has proved *ad abundantiam* that, just as representation without voters has no meaning, voting without free choice cannot result in representative government, and become more than the people renunciation of their sovereignty. If presume representation is fraudulent, election without choice is equally so.<sup>21</sup>

Democracy exists to the degree that there is an "open society" in which the relation between the governors and the governed is consistent with the principle that the state is at the service of people. In short, what Sartori is saying is that democracy implies that society takes precedence over the state, that *demos* precedes *cracy*.

### **1:5:2 Democracy: Views on the Kenyan Situation**

It is important to now turn attention to the situation in Kenya and what various

writers in Kenya have said about it. At the dawn of independence in Kenya, the founding fathers believed that self-government and democratic government were identical. In Edward Shil's words:

...these elites believed for the most part that democratic self-government entailed the full paraphernalia of the modern polity including a legislative body under the dominance of the majority party.<sup>22</sup>

For example, the goals of African socialism according to Tom Mboya's words were:-

Political equality, social justice, freedom from want, disease and exploitation, equal opposition and a high and growing per capita income equitably distributed.<sup>23</sup>

However, after the initial optimism concerning the democratic aspirations voiced by Kenya's political leaders, a mood of disillusionment set in occasioned by the fact that Westminster model that was adapted at independence was not compatible with our economic, political and cultural background.

The founding fathers left too much to chance for in the years preceding independence, the basic issues were the form of government independent Kenya should assume and the rate of Africanising the economy. In the end, it was simply a question of the Africans taking over the existing system and not that of changing it. Further, they tended to believe that self-government could be equated with democracy.

This is why after independence, the leaders were unable to institute mechanism supportive of the constitution they had adapted at independence. The separation of powers was not effected as the executive, legislative and the judiciary all became rolled into one.

Under single party system of governance, the safeguards of liberty of the subjects have been eroded by the extension of the control of the president over both the legislative and the judiciary. Thus, there has been a concentration of power in the hands of one man over all the organs of the state. The

foundations of democracy have, therefore, been undermined... Manifestly, therefore, single – party rule by its nature degenerates into a sordid instrument of tyranny. It destroys the judiciary. It destroys the freedom of the press and freedom of association...<sup>24</sup>

It should be pointed out here that Macpherson has argued that there could be democracy in a single-party state. He however, asserts that this can only happen if people consider how much intra-party democracy there is, and beyond that, on how open membership in the party is, and how strenuous a degree of activity is required as the price of membership in the party.<sup>25</sup>

So, how has single-party performed in Kenya? Aloo Ochola argues that one party democracy leads to the controlling and limiting of the rights and freedoms of the people who would voluntarily want to participate in the political life of the nation.<sup>26</sup>

It is little wonder then that the pro-democracy movements that have come up during the recent political changes in the country have tended to equate dictatorship with single-party and democracy with multi-party.

From the foregoing discussion, it is clear that there is much more to democracy than political parties and a constitution. This is because a democratic constitution does not automatically guarantee democratic practice. In a heterogeneous society such as Kenya, it is important to consider all the factors that come into play at different times in the life of each individual such as ethnicity, regionalism or ideological factors such as feminism, religion or socialism. This brings to bear John Stuart Mill's gloomy assessment of the chances of representative democracy in plural societies:

Free institutions are next to impossible in a country made of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government cannot exist.<sup>27</sup>

Although tribalism has continued to be one of the factors militating against



democracy in Kenya, Mill's assessment is too final. The researcher would like to treat tribalism as normal teething trouble associated with infancy (in this case the democratisation process).

When reflecting on democracy and analysing struggles around access to power, it is important to define and outline political ideology within the context of the Kenyan experience. This is especially so because the world is living in an age of democratic pretensions where theory is easily equated with practice. But, how widespread is the practice?

There is need for more effort towards the attainment of fuller democratisation. Philosophers of democracy especially Thomas Jefferson<sup>28</sup>, John Stuart Mill<sup>29</sup> and John Dewey<sup>30</sup> have called attention to certain positive conditions, whose presence quickens and strengthens the democratic process. Foremost of these is citizen participation in the running of state affairs. This requires the spread of civic education allowing for an informal and critical awareness of the issues and problems of the times. If the avenues of communication are open, an educated electorate can become aware of the consequences and costs of past policies and the present alternatives of action.

Democratic behaviour as Afrifa Gitonga argues is not something that is genetically conditioned. It is learned. The practice of democracy must, therefore, be taught to its practitioners. This underscores the importance of education as far as the practice of democracy is concerned. As Eboe Hutchful rightly puts it:

There is need for a more conscious effort, new directions of thinking, in an attempt to develop an afro-centric conceptualisation of democracy.<sup>31</sup>

Other things being equal, the amount or degree of democracy in any given society is directly proportional to the degree of acculturation of the people in the democratic values, attitudes and beliefs, and hence this study's insistence on the cultivation of a

democratic culture in Kenya. Amos Wako, Kenya's Attorney General at the time of writing this thesis, realised as much. In his address to the 49<sup>th</sup> Session of the United Nation's Commission on Human Rights in Geneva, Switzerland, on March 2<sup>nd</sup> 1993, he said that Multi-party democracy needs to be nurtured and its culture cultivated.<sup>32</sup>

In the past in Kenya, the technique has been to make life as intolerable as possible for the opposition members by various forms of discrimination and victimisation, ranging from denial of amenities or rights to physical molestation and even lynching and death until, their will broken, they are obliged to join the ruling party.

All forms of harassment to the opposition were devised. Opposition leaders were attacked as they toured different parts of the country. The government ordered security police to shadow opposition leaders, prevented them from organising and addressing public meetings, arrested and harassed them through multiple prosecutions, and sent many to prison.<sup>33</sup>

It is now apparent from existing literature that there is need to develop a democratic culture in Kenya. This is because when colonialism came to Kenya, it did not find democratic traditions and base, but rather, various mixtures of rudimentary democratic institutions. This is why it has been increasingly difficult to conceptualise democracy in Kenya. Marie Louise Otabela has summarised this view thus:

...In view of the difficulty of conceptualising democracy in Africa, a feasible alternative might be an attempt to define the antithesis of democracy, African totalitarianism... Our analyses have to extend to internal factors especially cultural foundations of totalitarianism within African societies themselves... Substantively speaking, when analysing the African reality, there are certain things, which are peculiar to Africa. These factors have to be made apparent in theory because they exist in practice.<sup>34</sup>

It is, therefore, crucial to examine our historical background, the heritage of which provides a social base on which an enduring democratic state can be built. It is not enough to have democratic principles on paper (constitution) or to just profess them,

there is need to create mechanism supportive of these principles such as justice, equality, majority rule, rule of law and freedom. As John Dewey says, a good democrat is defined by his practices, and not his professions!<sup>35</sup>

In a nutshell, this chapter has demonstrated that the contribution of philosophers to democracy cannot be ignored. Their views have only been modified to suit the changing conditions of the modern world. The meaning of democracy, therefore, does not change with locality (be it in the west or in Africa), and to believe that a system is a democracy simply because it is called a democracy, is a way of destroying democracy by its very name.

## **1:6 HYPOTHESES**

There are two main hypotheses in this study namely;

- There is need to cultivate and nurture a democratic culture in Kenya.
- Economic, colonial and educational factors have had a negative influence on the practice of democracy in Kenya.

## NOTES ON CHAPTER ONE

1. Catholic Bishops of Kenya, Pastoral Letter - On the Road to Democracy, Paulines Publication - Africa, Nairobi, 1994, p.3.
2. *Ibid.* p.3.
3. *Ibid.* p.4.
4. Archie Mafeje, "Theory of democracy and the African Discourse: Breaking Bread with my Fellow Travellers", Quoted in Codestria Bulletin, No.1 & 2, Codestria, Dakar, Senegal, 1992, P.12.
5. Giovanni Sartori, Democratic Theory, Frederick A. Praeger Publishers, New York, 1965, p.26.
6. Carl L. Becker, Modern Democracy
7. John Locke, The Second Treatise on Government, Quoted in A.J. Minton & A.T. Shipka, Philosophy: Paradox and Discovery, 3<sup>rd</sup> Ed., McGraw Hill Publishing Co., New York, 1990, p.499.
8. John Locke, *Op. Cit.* p. 498.
9. Carl L. Becker, *Op. Cit.* p. 53.
10. Derek Heater, Contemporary Political Ideas, Longman Group Ltd., London, p. 71.
11. *Ibid.* p. 71.
12. Thucydides, The History of Peloponnesian War, Bk. II, par. 37, Quoted in Giovanni Sartori, *Op. Cit.* p.333.
13. Alburey Castell, (Ed), J.S. Mill, On Liberty, Appleton Century Crofts, New York, 1947, ch. III & IV.
14. *Ibid.* ch. III & IV.
15. *Ibid.* p. 16.
16. W.T. Jones, Masters of Political Thought – Machiavelli to Bentham Vol 2, George G. Harrap & Co. Ltd., London, 1980, p.103.
17. Eliseo Vivas, "Freedom: The Philosophical Problem", Quoted in H.W. Ehrmann (Ed), Democracy in a Changing Society, Frederick A. Praeger Publishers, New York, 1964, p.3.
18. Karl R. Popper, The Open Society and Its Enemies (Plato), Vol. 3, Princeton University Press, 1971, p.69.
19. Charles L. Montesquieu, The Spirit of Laws, Quoted in W.T. Jones, *Op. Cit.* p. 218-247.
20. Giovanni Sartori, *Op. Cit.* p.96.
21. *Op. Cit.* p. 25
22. J.H. Hallowell (Ed), E. Shils, The Fortunes of Constitutional Government in the Political Development of the New States in Development: For What?, Duke University Press, Durham, 1964, p.103.
23. T.J. Mboya, "The Republic of Kenya: African Socialism and its Application to Planning in Kenya", Nairobi Government Printer, Nairobi, 1965, p.1.
24. Aloo Ochola, "Of Democracy, Politicking and the Legal Profession in Independent Kenya", Quoted in The Nairobi Law Monthly, No. 26, Oct., 1990, p. 21.
25. C.B. Macpherson, The Real World of Democracy, Clarendon Press, Oxford, 1966, p. 13.
26. Aloo Ochola, *Op. Cit.* p. 22.
27. J.S. Mill, Considerations on Representative Governments, Quoted in A.Lijphart, Democracy in Plural Societies: A Comparative Exploration, Yale University Press, London, 1977, p. 18..
28. See Thomas Jefferson's Collected Works in, Encyclopedia Americana, Vol. 8,

- American Corporation, Danbury, Connecticut, 1979, p. 684-686.
29. See J.S. Mill, *Op. Cit.* p. 230-245.
  30. John Dewey, Democracy and Education, New York, (1916), in Encyclopedia Americana, Vol. 8, American Corporation, Danbury, Connecticut, 1979, p. 684-691.
  31. Hutchful Eboe, "The International Dimensions of the Democratisation Process in Africa", Quoted in *Op. Cit.* p.20.
  32. Mukalo wa Kwayera, "Hanging on a Cliff", Quoted in Pius Nyamora (Ed), Society, Nyamora Publications Ltd., Nairobi, Jan. 4, 1993, p. 11.
  33. Kiraitu Murungi, "Moi will not Yield", Quoted in, Finance Magazine, Feb. 15, 1992, p. 30.
  34. M.L.E. Otabela, "La Democratie Comme Remouveau de la pense'e Politique: Le Totalitariane Africain", Quoted in *Op. Cit.* p. 13.
  35. See John Dewey, Liberalism and Social Action (1935), in *Ibid.* p. 684-691.

## CHAPTER TWO

### **METHODOLOGY**

#### **2:1 METHODS OF DATA COLLECTION**

In carrying out this research, most of the data was mainly theoretical in the sense that it took the form of library research. Books, journals and magazines dealing with various aspects of democracy were read to enhance this study's data. Topics covered in this area include justice, participation, rule of law, equality, separation of powers, majority rule and the freedoms enshrined in a democracy such as that of the press, worship, movement, speech and association.

Books dealing with the impact of culture, colonialism, civic education and the economy on democracy were also read.

This was done so as to provide the researcher with thorough understanding and insight into the problem as it relates to previous works, and emerging trends and ideas on democracy.

Also, to find a firm basis for a theory of the democratic method of government in the modern day, we must go back to the process of social thought from which the idea issues.

Further, the attempt to understand the problem of political democracy in Kenya today required that the initial ideas on the topic be looked into.

This was also important so as to enable the researcher to delimit the problem and define it better. It also led to the gaining of more insights into methods, measures, subjects and approaches used by others in order to improve the research designs.

The researcher was also interested in what set of ideas, and what motions of mind, have formed and brought into being the democratic state in the form it has now.

This was important so as to put the Kenyan situation into perspective.

Finally, these books, journals and magazines made it possible to sample current opinion of various people about the topic or the problem.

Although library research was the main method of data collection, this research also drew heavily from personal opinions of some members of the Kenyan community who included lawyers, clergy, opposition leader, scholars, government officials and journalists. This was done through unstructured and basically informal interviews.

This was done to test contentious issues with regard to democracy. It was necessary at certain stages to conduct these interviews so as to verify the informant's opinions on matters relevant to the study's objectives.

These key informant interviews were unstructured and were geared towards gaining more information not attained through the library research to enrich the study's data.

The unstructured questions helped to make the interviews more conversational and allowed for greater insights into the unique differences between respondents.

The unstructured interviews also allowed the researcher to probe into those areas that seemed to merit further investigation. These interviews also combined enough structure to facilitate the exchange of factual information with adequate freedom to develop insights.

The advantage of using the key informants was that they were very co-operative and were willing to give detailed answers.

## **2:2 DATA ANALYSIS**

In this study, the philosophical analysis method was adopted in the analysis of data. This method entails critical and logical analysis of terms, theories, concepts and

statements to determine their meanings and contextual definitions.

It falls under the analytical tradition of the twentieth century and has its proponents in scholars such Wittgenstein, B. Russell, Rudolf Carnap, G. E. Moore, A. J. Ayer and Ryle. This critical analysis of terms and concepts is used to determine their proper meaning so as to rid them of border-line vagueness and ambiguity, hence make them more clear and well understood.

This does not only result in clarification, but also helps to expose the philosophical absurdities that rest on inadequate conceptions of concepts.

It consists in the critical analysis of various components of the problem and in explaining the inter-relations between them so that one can draw the proper conclusions about the problem at hand.

The philosophical analysis method, therefore, was employed for both the literature collected through library research and the key informants. This was possible because the informants were talked to regarding the meanings of terms, statements, and concepts and how they understood these.

### **2:3 PROBLEMS ENCOUNTERED IN THE FIELD**

A number of logistical problems were encountered in the course of this study.

Apart from the usual constraints of time and money, the researcher encountered a lot of distrust and suspicion from some informants, who thought that the researcher was an official government spy out to use their views to have them arrested later. A lot of patience and convincing had to be employed with respondents who sometimes threatened to walk away on grounds that, "you do not go discussing sensitive issues with strangers".

The researcher also encountered a lot of hostility from some informants who were land-clashes victims who demanded to know whether by giving their opinions they were



assured of getting their land back. If not, why waste their time? A lot of time was, therefore, spent in convincing such informants to co-operate.

Although most of these key informants were very co-operative, most of them had very busy schedules which led to the canceling and rescheduling of appointments as they had to be elsewhere to attend to emergencies, official or private duties. This led to delays in the research timetable.

Finally, the Egerton University Library was ill-equipped in terms of relevant data. Since this was basically a library research, the researcher had to do a lot of travelling to other libraries such as the University of Nairobi Library, Kenyatta University Library, Macmillam Library, Moi University Library and the British Council Library.

## CHAPTER THREE

### HISTORICAL PERSPECTIVE

After years of colonial rule under the British, Kenya did finally attain her independence in 1963. At the dawn of this independence, she adopted a western type of constitution with multi-party democracy forming the cradle of the institution.

Before delving into the practice of democracy, therefore, we want at this early stage to look at the events preceding and events just after independence so as to see the circumstances that led to the adoption of a multi-party mode of government by our Founding Fathers.

This is very important because the events preceding independence (colonial governance) had great influence on what was to follow after independence.

When Kenyatta took over from the British as Kenya's first president, he was already so mesmerised by the colonial orientation that it solely shaped his perception of leadership. For example, the colonial response to what they saw as Mau Mau menace influenced Kenyatta's regime to act tough in the event of dissent. This is how detention laws were introduced. The subsequent constitutional changes such as the introduction of Section 2(A) in the constitution were a way of consolidating the executive's powers and trying to curb any form of dissent, a lesson learnt from the colonial government.

On 8<sup>th</sup> April 1953, after being convicted of managing Mau Mau – which was considered a 'terrorist' organisation – Mzee Jomo Kenyatta had the following to say:

I wish to say that we are not guilty and we do not accept your findings and that during the hearing of this trial which has been so arranged as to place us in difficulties and in inconvenience in preparing our cases, we do not feel that we have received the justice or the hearing which we would have liked... No doubt we have grievances and everybody in this country high or low, knows perfectly well that there

are such grievances. We will not ask to be excused for asking for those grievances to be righted.<sup>1</sup>

Twenty five years later, on 24<sup>th</sup> September 1988, another patriotic Kenyan Okongo Arara addressed a Nairobi Court after being convicted of sedition, and echoed the words of Kenyatta thus:

I do not ask for leniency from this court for to do so is to recognise its right to judge me. I expect no mercy and ask for none, for if there is no mercy for millions of Kenyans, what will mercy to one individual serve?<sup>2</sup>

Kenyatta's speech was made in colonial court packed with colonial magistrates and lawyers. Arara's address was made in a packed independent Kenyan court presided over by Mary Ang'awa and, assisted by a Kenyan Black State Counsel.<sup>3</sup>

The above case is just one of the many examples of how the colonial legacy has continued to influence the practice of democracy in Kenya. Its influence will be discussed in greater depth in a later chapter of this work which will show how during the decolonisation process, very scanty attention was given to the kind of society that Kenya could become after independence. In the end, it became a question of simply taking over a system from the British and not that of changing it.

### **3.1 DEMOCRACY: THE EARLY YEARS**

In early 1960, the formation of purely African political organisations on a national scale were authorized.<sup>4</sup> The new "disunity", as well as the aspirations of individual African political leaders, became evident in the formation of two major parties in March of that year, in which ethnic factors also played a part. The two parties formed at this stage were the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU).

In the later years (after 1961), the principle task faced by Kenya's political leaders of all races became the drafting of a constitution in order that a transfer of power from the colonial government could be effected.

When independence was finally attained on December 12, 1963, Kenya faced its new freedom with multi-party forming the cradle of her constitution.

However, her stint at multi-party was to be short-lived because, in late 1964, the two parties amalgamated to one party and this meant a return to the one-party system. Moi dissolved KADU and joined KANU when the late president Jomo Kenyatta offered him a cabinet position in his government.

The one party system had been established by the voluntary amalgamation of the two existing parties (KANU and KADU), into the Kenya African National Union (KANU).<sup>5</sup>

Kenya, therefore, became a *de facto* one party system, since no law prevented the formation of opposition parties and in fact a few were formed in the following years, most notably the Kenya People's Union (KPU) which was active from 1965 until 1969 when it was outlawed.

Again, the attempt to have multi-party was short-lived because the Kenya People's Union (KPU) was banned in 1969 on charges that it had planned to overthrow the government. Consequently, this proscription brought a return to the single party state.

It is important to note here that the return to one party was not voluntary this time round. Law banned KPU and, therefore, Kenya became a *de facto* one party system.

It is safe to point out at this early stage that this remained the situation until pressure from both internal and external quarters forced the government to return to multi-party democracy by repealing Section 2(A) from the constitution, the clause that prohibited the formation of other political parties. We will, however, not go into the details now as this will be looked at in detail in the later chapters of this work.

Having looked at how political parties came about, it is also important to look at how the constitution developed. This then leads us to the next discussion – Constitutional Development.

### 3.2 CONSTITUTIONAL DEVELOPMENT

The independence Constitution of Kenya was a result of various meetings and processes:

Successive constitutions of Kenya had their origins in a constitutional conference held in London in early 1962. At this time, Kenya was still administered as a colony by a Governor - General. Legislative and Executive Councils, chosen to represent Africans, Europeans and Asians separately, had only advisory powers.<sup>6</sup>

The purpose of the 1962 conference, therefore, was to secure agreement on the principles of a new constitution under which Kenya would be granted its independence.

In the days preceding the Conference, federalism was the major issue.

Forces advocating federalism were grouped in the Kenya African Democratic Union (KADU), a minority party whose major strength was among the coastal peoples, the Kalenjin, part of the Luhya, and the Kamba. Fearful of domination by the larger ethnic groups, they and their European and Asian allies pushed for a federal form of government.<sup>7</sup>

On the other hand, the Kenya African National Union (KANU) majority, which was composed of Kikuyu, Luo, many Kamba and other ethnic groups, advocated a centralised form of government. This idea of a centralised government was more acceptable to the British and this is why the Lancaster Conference came out with the kind of changes it recommended.

This controversy resulted in a document entitled "Frame work (of the Kenya) Constitution", which provided the skeleton of the later constitution of Kenya of 1963 known as the independence constitution).<sup>8</sup>

The independence constitution called for the relation of the monarchy, a parliamentary system, and strong powers for regional governments. The Queen of England was the head of State, represented in Kenya by the Governor General. The Prime Minister headed a cabinet that was collectively responsible to the National Assembly, which was composed of two chambers: the House of Representatives, where real legislative power lay; and the Senate, which could delay legislation. A bill of rights provided strong protection for human and property rights, and an independent judiciary was created. A difficult amendment process was intended to provide some guarantee of permanence to the system.

The Republican constitution, which came into effect on December 1, 1964, was the name given to the amended Independence constitution. Later changes made the constitution more flexible and consistent with the new republican system. For example, an amendment act adopted in May 1965<sup>9</sup> eliminated the distinction between specially entrenched provisions and other provisions and, permitted the amendment of the constitution by an Act of Parliament that received sixty-five percent of the votes in both houses.

December 1966 saw a major amendment which combined the Senate and the House of Representatives in a unicameral national Assembly.<sup>10</sup> The former members of the two houses assumed seats in the new Assembly. In April 1969 the Assembly adopted a revised constitution. That version was still fully in force in 1975.

However, in the subsequent years after 1975, there followed other amendments to the constitution. Worth of mention at this early stage of our discussion is an amendment in 1982 that introduced a clause in the constitution (the notorious section 2a) which prohibited by law the formation of other political parties thus making Kenya a *de jure* one party state. This was done to curd all forms of opposition. Other amendments will be mentioned in the

subsequent chapters of this work.

The constitution contains thirteen sections known as the Bill of Rights. These were drafted by a Committee at the 1962 constitutional conference in London. The Bill of Rights provided strong and detailed protection of the fundamental rights and freedoms of the individual. Both substantive and procedural rights were affirmed, as were traditional, political and civil liberties. Inhumane treatment of prisoners and arbitrary search and entry of premises were forbidden.<sup>11</sup>

Freedom of conscience, including freedom of thought, and freedom of religion were affirmed. Freedom of expression and freedom of assembly including the right to form labour unions or other special interest associations was also guaranteed.

Strong protection for property rights were also created.<sup>12</sup> In 1975 the special status that the Bill of Rights enjoyed in the Kenyan constitutional system had still not been challenged. However, this situation changed with a constitutional change in 1966 providing for a preventive detention law.

Political freedom was hindered, however, by a constitutional change in 1966 providing for a preventive detention law. The law, passed the same year, allowed the government, specifically the Minister for Home Affairs, to detain persons or restrict their movements if he is satisfied that it is necessary for the preservation of public security.<sup>13</sup>

Public security was undefined, and no limitations were put on the minister's power to make such a decision. The substance of the charges against the persons need not be revealed; all communications with them can be restricted; there is no recourse to the courts; and there is no limit to the length of detention.

In some other chapter of this work, we will show in detail how this law has continued to affect political freedom of individuals in the country.

As concerns citizenship, the constitution bestows automatic citizenship upon

anyone born in the country after independence as well as anyone born before independence if either parent had also been born in Kenya. Any woman married to a Kenyan may also become a citizen by a simple registration process. Finally, anyone over the age of twenty-one who has resided in the country for five years may apply for naturalization.<sup>14</sup>

We would now like to turn our attention to the structure of government as provided for in the constitution.

### **3:3 THE STRUCTURE OF NATIONAL GOVERNMENT**

#### **3:3:1 Executive Branch**

The original constitution in 1963 provided that the first President of Kenya would be the person who immediately before the Republican constitution went into effect held the office of Prime Minister.<sup>15</sup> Subsequent presidents were to be elected in accordance with the new constitutional provisions. The President is the head of State, head of Government and Commander-in-Chief of the Armed Forces. If he loses a vote of confidence, he must either resign or dissolve parliament and call for new elections. He also must be an elected member of The National Assembly.

#### **3:3:2 Legislative Branch**

On the powers of Parliament, the Constitution clearly defines them thus:

The legal principle of parliamentary supremacy is modified by the constitution, which grants power to the courts to enforce the provisions of the Bill of Rights against any infringement and to judge the constitutionality of laws.<sup>16</sup>

Parliament is empowered by the constitution to legislate on any matter. It can and does delegate authority to the heads of ministries, who may enact subsidiary legislation in the form of ministerial orders, rules, and regulations. Members of parliament are seen as



representatives of the people since they are elected to the national assembly by their respective constituents.

### **3:3:3 The Legal system**

The country's legal system and court structure are clearly defined by the Judicature Act of 1967.

The Judicature Act of 1967 provides the basic definition of the country's legal system and court structure. It enumerates the sources of Kenyan law as: the constitution; legislative acts of the national assembly; specific acts of the British parliament before the establishment of the Republic of Kenya; and English common law and doctrines of Equity in force at the beginning of colonial rule.<sup>17</sup>

African customary law, varying according to ethnic traditions, is required to be used as the guide in civil matters affecting persons of the same ethnic background as long as such custom is not in conflict with statutory law or modern morality. Islamic law has a role in some matters of personal law affecting Muslims. Finally, judicial precedent also has the force of law.

Having looked at the various aspects of the Kenyan constitution, we would now like to move on and analyse the practice of democracy and see whether it has been in-keeping with the constitution. But as already mentioned in the preceding pages, the independence constitution is not the same one that we have today as it has undergone amendments that will come to light in the course of this discussion.

### NOTES ON CHAPTER THREE

1. Bernard Alali & Wanambisi Simiyu, "After Multi-Parties, What next for Kenya", Quoted in Finance Magazine, Feb. 15, 1992, p. 26.
2. *Ibid.* p. 26.
3. *Ibid.* p. 26.
4. Irving Kaplan, Dobert M.K. & Marvin B.J. (*Et al*), Area Handbook for Kenya, United States Government Printing Office, New York, 1979, p. 182.
5. *Ibid.* P. 182.
6. *Op. Cit* P. 188.
7. *Ibid.* p. 188.
8. *Ibid.* p. 188.
9. See constitution of Kenya, Act No. 14 of 1965 - published on 8th June 1965.
10. See Constitution of Kenya, Act. No. 40 of 1966 - Published on 31st March 1967.
11. *Op. Cit.* p. 189.
12. See Constitution of Kenya, Ch. 5.
13. *Op. Cit.* P. 191.
14. *Ibid.* p. 191.
15. *Op. Cit.* p. 192.
16. *Op. Cit.* p. 195.
17. *Op. Cit.* p. 199.

## CHAPTER FOUR

### THE PRACTICE OF DEMOCRACY

#### IN KENYA: A CRITIQUE

In the course of this research, various points of view regarding areas and factors that need redressing in the Kenyan practice of democracy came up. This chapter focuses on them.

In the following remarks, therefore, we would like to identify some of the encumbrances, some of the occasions that must be removed in terms of the daily life in Kenya - if we want life here to be more agreeable, and more fruitful in terms of democracy.

#### **4:1 Democracy and The Representation of People In Kenya**

The essential feature of a democratic polity, as already noted elsewhere in this work, is, its concern for the participation of the member in the process by which the community is governed. It goes beyond the insistence that politics or government be included among the careers open to talent. It gives to each citizen a public office, a place in the sovereign tribunal and unless it is a sham, it places its destiny in the hands of that tribunal.

In a democracy, therefore, the people are the ultimate decision-makers. They are:

...the court of last appeal, the guardian of the guardians,  
government by the people.<sup>1</sup>

The significance of democracy, therefore, rests on the significance of participation in the sovereign tribunal.

However, it is important to note here that the size and complexity of present states renders direct democracy in which every individual citizen participates in major decision-

making impossible. Thus, the key to mass-participation in a democracy today remains the electoral process.

This is especially so because democracy in its practical moment, as Afrifa Gitonga argues, demands that the people be the rulers of themselves and that they should have their destiny and that of their society in their hands. But, since they cannot rule themselves directly, the people appoint representatives through elections<sup>2</sup>, to which attention should now be turned.

#### **4:1:1 Elections.**

If a belief that the principles of democracy are desirable and attainable is founded on any true conviction it is not sufficient for every citizen to have the vote; he should also be assured of the greatest possible freedom and effectiveness, in its use. Voting is central to democracy.

Fairness in the electoral process is therefore critical; it requires, at a minimum, respect for certain procedural rights.

These include: the right to run for office, the right to campaign freely for one or for another, the right of all to register to vote, the right to cast one's vote free of all coercion, and the right to join with others to form parties, caucuses, movements, and in general the right to do whatever fair competition for election may require.<sup>3</sup>

The critical question addressed by this thesis was whether the members of the community have in practice, the protected right to participate in making directive decisions for the community.

#### **4:1:1:1 Elections in Single-Party Kenya**

At independence, the constitution protected the conduct of elections by ensuring impartiality and honesty in elections, by setting up an independent Electoral Commission,

which was to be responsible for drawing up constituency boundaries and the actual conduct of elections.

However, the 10th Amendment to the constitution made it compulsory that *All candidates* for a general election be nominated by a political party (Our Emphasis). This requirement violated the rights and freedom of participation for those who did not obtain party clearance to contest elections. Those citizens wishing to participate as independent candidates were also denied their right to do so, and the electorate their right to be represented by a candidate of their choice.

The basic assumption for holding elections is that there exists alternative preferences and values. However, the Kenyan one-party system did not permit the existence of alternative forms of political organisations. Elections under these circumstances were reduced to a choice between individuals and not competing political policies, thus making elections democratically meaningless as measures of popularity and legitimacy of those in power. In such cases, the government imposed itself on the electorate.

The party became a weapon for fighting those that held dissenting views from those of the government. These were either not cleared for the elections or were expelled from the sole political party. For example, in 1979 the leaders of the Kenya People's Union (KPU) - a party banned back in 1969 - were denied their right to participate by not<sup>4</sup> being cleared to contest the elections by the then ruling party KANU.

Again, the implications of this on democracy were serious. This is because democracy is a safeguard of individual liberty and when such a safeguard remains a dead letter, democracy dies with it.

Looking at the incident of the Ex-KPU members who were banned from contesting the general elections in 1979, we can draw the conclusion that during the one-party regime,

the price of participation in the party was beyond that which an average person could be expected to contribute.

Further, within the one-party framework, the electorate were denied their democratic rights to change governments by electing and choosing them on the basis of competing political values and policies. Under these circumstances, elections just served as a way of confirming the government in power.<sup>5</sup>

Monopoly of power by the one party did not leave the people who should be the custodians of the power in a democratic society with the choice to examine its performance, and to replace it even when it was found guilty of misrepresentation.

By definition, one-party system<sup>6</sup> excludes itself from freedom of choice. You either chose party J or party J; either you voted for Didi or you voted for Didi. In such a situation, the people had no choice. Consequently, the people were denied one of their fundamental freedoms; freedom of choice.

On the other hand, expulsions from the sole party implied that one was expelled from parliament as well, denying the electorate the right to be represented by a person of their choice. This was unconstitutional because the electorate still desired his or her services.

In circumstances where it became impossible to either expel a person from the party, or to refuse to clear him, rigging him/her out became the order of the day. Elections were blatantly rigged to ensure that the KANU sycophants stayed in power even when they were unpopular with the electorate. For example, during the 1989 Kiharu by-election, there was a serious case of rigging; and Rev. Gitari, the then Bishop of the Mount Kenya Diocese was quoted in a section of the press as asking how 780 votes cast during the by-election could be better than 9,566 cast in the same election for another candidate. The contestants were Dr. Gikonyo Kiano, and Jidraf Kamau Mweru.<sup>7</sup>

It can, therefore, be safely asserted here that during the one-party era leaders were not elected but "selected". They were leaders imposed on the people either through party or government machinations. The party was, therefore, reduced to a tool for determining the candidature and tenure of a Member of Parliament.

This led to a growing sense of frustration amongst the electorate and most of them chose to stay away from the polling stations during election time as their leaders had already been "selected" for them and hence, casting of their votes was rendered meaningless.

Political analysts tell us that what happens in such a situation is just what is happening in Kenya voters become disinterested and express their disinterest by not turning out to vote. Recent by-elections with a scanty voter turnout in most areas are an excellent indication. As one political commentator put it thus: Nobody goes to the ball game when the score is 100 to 0.<sup>8</sup>

One of the most glaring weaknesses of the one-party system was that those who entered the corridors of power invariably and gradually perpetuated their stay. Note that only those favoured or were in good books with the ruling party could see these corridors. Once a politician fell out with the party bosses, his political career automatically came to an end because either he would be expelled from the only party or he would not be cleared by the party to contest any seat. Some examples are Waruru Kanja, Isaiah Mathenge and Simeon Nyachae.

This, then, meant that such a person was denied his right of participation, and the people their freedom of choice. These limitations and restrictions on individual rights and freedom posed some of the greatest threats to the democratic politics in Kenya during the one-party era.

As if this was not enough, it is this study's submission here that the voters were not protected from coercion either. For example, during the 1988 queue voting system, (a

system that required that, the voters queue behind candidates of their choice), the voters were intimidated to queue behind candidates that were not of their choice. By introducing the controversial voting by queuing which enabled elections to be blatantly rigged, Moi ensured that only his supporters could be “selected” to his rubber stamp parliament.<sup>9</sup> Bribery was also used as a campaign strategy to buy the support of voters whose intention was to vote for other candidates. Thus, the voter was not protected from coercion and bribery and the election results from fraud and manipulation. This helps to further explain the growing voter frustration during this period.

A voting system known to be just to all sections of the community, as free as possible from the element of chance, and offering the electors a more direct share in the choice of representatives would remove the existing sense of frustration and would promote this sound health by making the citizen a responsible and conscious partner in government<sup>10</sup>

Partisan change of Law was also employed as a campaign strategy in the electoral contest to aid those that were in the good books of the government. A case in point is the 1974 fifteenth (15th) amendment to the constitution, which extended the prerogative of mercy enjoyed by the President under section 27 of the constitution. Paul Joseph Ngei, a friend of President Jomo Kenyatta and a co-accused at the Kapenguria trial, had, less than a month prior to the amendment, been found guilty of an election offence by an election court and had been banned from contesting any elections for five years. President Kenyatta decided to intervene to save Ngei from political oblivion. The result, was this amendment to the constitution. This was a gross interference with election laws. Despite having intimidated another candidate, Ngei got off scott-free.<sup>11</sup>

From the foregoing, it is clear that the electoral process is a means to an end, namely: "government of opinion". Therefore, if the nation is to exercise to the full its democratic right of choosing the rulers, the instrument (Electoral System) by which this



choice is made is of immense importance and should remain free and fair to all. However, in our case it has been used as a bait by the party to win the support of those who would have been more comfortable expressing divergent views than being "Yes" politicians.

As Carl Cohen argues, democratic governments alone are based upon participation and derive their just powers from the consent to be governed.<sup>12</sup> Therefore, when we impose leaders upon the very people whose consent we should seek, it means that our democracy is lacking in practice.

Therefore, it should be noted that elections in the one-party era were not free and fair and did not lead to the end they were intended for; "government by consent", because as has been shown in the foregoing discussion, more often than not, the leaders were imposed on the people. This serves to explain the poor voter turn out during voting because casting of one's vote had been rendered meaningless by the continuous manipulation of votes through government machinery. Equally frustrated were those who would have wished to contest a parliamentary or civic seat but were denied their right to do so. Those who have been in the political cold; the likes of Simeon Nyachae, Isaiah Mathenge and Kenneth Matiba can attest to this fact.

It is important to have other political parties so that one can choose which one to belong to if he is dissatisfied with the principles or policies of one. This is especially so because, due to the diversity of human nature, unanimity among human beings about matters of great and topical concern is impossible. Thus, the majority principle in so far as it truly respects the existence of human rights is the only one that makes democracy a viable alternative to tyranny, which is what the one-party Kenyan regime was degenerating into.

#### **4:1:1:2 Elections in Multi-Party Kenya**

It will suffice here to say that Kenyans have not had a long experience with multi-

partism. However, the short stint they have had, has significant implications for democracy in Kenya.

On the eve of independence, Kenya had three main political parties namely: The Kenya African National Union (KANU). The Kenya African Democratic Union (KADU), and the African People's Party (APP). These had 64, 32 and 8 members respectively in the House of Representatives. In September 1963, APP dissolved itself and its members rejoined KANU. In November 1964, Ngala dissolved KADU, thus leaving KANU as the sole party.<sup>13</sup>

In the later years, Odinga formed the Kenya People's Union (KPU), which was proscribed in 1969. A re-introduction of multi-partism came just recently in 1992 after the repeal of section 2(A) of the constitution. This was only after the government had been subjected to a lot of pressure both from within and from without the country. It was only after the donor countries threatened to withhold their aid that the government succumbed.

It is within this background that Kenyans had their multi-party elections in 1992 - a first experience for most of them. Already there is a clear indication that the ruling party did not quite appreciate the idea of rival parties.

Multi-party advocates are tribalists surviving on borrowed ideas, incapable of helping in the development of Kenya.<sup>14</sup>

In an effort to prove the fact that more parties were going to divide rather than unite Kenyans, the president is quoted as saying:

If we allow more parties, tribal feelings and not public opinion will be the guide.<sup>15</sup>

The government has not spared any efforts to persuade public opinion that the opposition leaders caused the so-called ethnic clashes in some parts of the country. But as the Catholic Bishops have pointed out, it is difficult to believe that the government has

made every effort to put a stop to the violence:

Should Kenyans believe that our numerous, well-trained and well-equipped army and police can be defeated by a small group of village warriors armed with pangas and rungas? Should we believe that the police and the army did their best but unfortunately always arrived late?...<sup>16</sup>

However, as already indicated elsewhere in this work, the very existence of several political parties implies freedom of choice.

A pluralist society must possess an authentically democratic state, which means that its governing organs receive their powers from free elections, held at regular intervals. It means also that there is a freely formed opposition, expressing itself without check and able to canvass votes with the same rights as the majority party, so long as it respects the laws binding on the country's institutions.<sup>17</sup>

Looking at the main political parties that were formed after the re-introduction of multi-partism, their composition shows that they were formed along tribal lines. The parties received their support according to the ethnic background of the leaders. For example, Ford-Kenya has most of its support from Nyanza, whereas Ford-Asili and Democratic Party of Kenya have most of their support from Central Province. Already, this is a clear indication of the misconception of multi-partism. When the people have political affiliations according to their ethnic backgrounds, it shows that there is a misunderstanding of the concept and that, ethnicity remains a basic facet of the politics of independent Kenya and this should not happen in a democracy.

It will be remembered that at independence, the minority party KADU insisted on a federal system of government, not for anything else, but for the fear of domination by the larger tribes that formed the majority party, KANU.

To say the least, there are still tribal and political divisions that continue to stand in the way of an overriding sense of a national political community. The government in power still has to learn the notion that a system of competing national parties is the sensible

and most beneficial way of choosing and authorising government.

The repeal of section 2(A) of the Constitution, led to the formation of opposition political parties, and then followed the period that Kenyans all over the country welcomed with so much enthusiasm: multi-party elections. As most Kenyans went to the polls in 1992, they had a single aim at heart; to remove the government of the day from power.

It should be noted here that this was a mistake, as people did not base their voting on programmes for national reconstruction but rather, on their political affiliations. During this time, what mattered were not the policies a candidate stood for, but the party he belonged to and this basically meant voting for parties.

Come the campaigning period and most of the opposition candidates were more often than not denied licences to address campaign rallies or had these cancelled at the last minute without proper explanations from the government. Further, the campaigns were marred by violence in the name of party rivalry. Rivalry between the parties was totally misconstrued.

It should be noted that rivalry should not be war but competition. We must resist the attempt to make political rivalry a sort of civil war (Ethnic clashes) fought with new kinds of weapon. By emphasising that what divides Kenya is stronger than what unites it, the regime in power seeks to justify the excesses and the injustice of their attacks. Conversely, any attempt to stress that Kenyans must learn to live together and respect one another's opinions prepares people's minds for democratic pluralism. But does the ruling regime allow the existence of an effective opposition genuinely able to take its place as a majority party? In the Kenyan experience, the answer has been in the negative. The government continues to behave as if the opposition is its enemy and as if it belongs to the criminal arm of the society. It is yet to learn that:

...Only the existence of an opposition, the criticisms it makes and the alternative it embodies, give real power to the

sovereignty of the citizen. He becomes the arbiter, the person who has the casting vote and to whom the final appeal is made.<sup>18</sup>

It is undoubtedly an important responsibility of the governing party-even though it may not be a virtue that comes easily-not to drive the opposition into helpless apathy but to grant the political opposition an appropriate position.

Unfortunately, during the election period, the ruling-party KANU tried all avenues open to it to make life as unbearable as possible for members of the opposition. There were many tactics employed including the burning of their houses, assault, arbitrary arrest and confinement in police cells; and the stealing of their ballot papers. Some of the opposition leaders had to be hospitalised after they were attacked in government instigated campaign violence. A case in point is John Keen (D.P) and Wambui Otieno (Ford Kenya), who were attacked by a group of people disguised as Maasai Morans when they had gone to open a branch office in Ngong. No one was ever arrested.

It is, therefore, the researcher's submission here that during the elections, life was not very pleasant for the members of the opposition. They were denied their right to freely seek for votes from the electorate by being denied licences to hold political rallies.

The KANU government continued to violate the freedom of association with impunity. Not only were the registered political parties denied licences to hold public rallies but also, some were denied registration altogether...<sup>19</sup>

The ruling party in Kenya has yet to learn that the problem of democratic consensus is not to get rid of agreed fundamentals which includes the principle of toleration of political, social and ethnic pluralism, and which will have a compelling appeal to free men.

It is difficult to achieve and maintain a stable democratic government in a plural society. This is a well established proposition in political science-with a history reading back to Aristotle's adage that; "a state aims at being as far as it can be, a society composed

of equals and peers".<sup>20</sup>

However, change can be brought about through the clash of opinions. Therefore, the opposition cannot afford to be complacent now.

The ruling party here in Kenya has tried to deepen divisions and political differences ( as evidenced by the so-called tribal clashes ) among the people and wants to use this as an excuse for the instability and weaknesses in her practice of democracy.

Kenya, under Kenyatta enjoyed an extended period of peace and prosperity. Although not all Kenyans shared in the nation's good fortune and not all were politically satisfied, there was little opposition; both because the population generally supported the government and because opposition groups were broken up by official harassment before they could become a threat.

Many tactics were employed in rigging the 1992 multi-party elections.<sup>21</sup> Voters were wooed with money in exchange for their voters cards. In this way, it meant that such voters did not vote. There were also cases of names missing from voter registers, and when this happens in a democracy, we can conclude that there is something wrong somewhere. There were even cases of minors who were allowed to vote to ensure that certain candidates won.

In areas that were viewed as opposition strongholds, there were frequent outcries that some people were being denied identity cards even when they had attained the required age to ensure that the opposition did not have many supporters.

As has already been stated, elections in a democracy are the key to "freely given consent". However, during this period there were occurrences that raised the question of whether the people willingly gave their consent. Such events include the government's control over the instruments or facilities of communication. The ruling party had a monopoly over the radio and television stations. Further, there was arbitrary restriction

placed on the freedom of assembly, and that of speech of the opposition groups. For example, in October 1991 president Moi deployed security police to prevent the Forum for restoration of democracy (FORD) from holding a pro-democracy rally in Nairobi on October, 5<sup>th</sup> 1991.<sup>22</sup>

Thus, it is clear that in the years preceding the re-introduction of multi-partism, the KANU government out-manoeuvred all opposition within its ranks, and without by means of legal and extra-legal means. At times (as has already been shown), the law was misused in this endeavour. Today, there still is harassment of the opposition.

The government has yet to create a level playing ground for the opposition and itself.

Finally, although the voting system in Kenya may have been faulty, it is the only means that gives Kenyans the right to change governments when they are dissatisfied with public policy, but only if it is operated as intended..

## **4:2 SEPARATION OF POWERS**

The 19th century political philosopher Walter Bagehot once wrote:

A free state - a state with liberty - means a state in which the sovereign power is divided between many persons, and in which there is a discussion among those persons.<sup>23</sup>

In the same spirit, John Locke saw the classic guarantee of freedom as lying in the separation of powers. However, looking at how the separation of power has evolved between the Legislature, Executive and the Judiciary in Kenya since independence, we noted some anomalies - These will become clear in the course of this discussion.

### **4:2:1 Parliament, Executive and the Judiciary: A Comparative Perspective**

In the single-party Kenyan parliament, policy was proposed by the cabinet and

challenged by the backbenchers who in this case served as the opposition. They too were aspiring to get cabinet posts. This resulted into two camps of backbenchers. In one camp, we had those who thought that the only way to be elevated to a cabinet post was by always being critical of proposed policies. In this way, one became such a nuisance that to silence him, he was given a cabinet post.

Secondly, in the other camp, there were those who supported all policies and tried to activate the friendship of both the President and the key party leaders. Belonging to either of these camps had its own setbacks.

Whereas belonging to the first camp led to the making of more enemies than friends, belonging to the second camp made one a political sycophant - a tool to be used politically by other people. It is this second camp that most parliamentarians chose to belong to.

The implications of this are that in Kenya during the one party era, there was an exaggerated growth in the strength of the powers of the President and party leaders. Due to the scenario explained above, the president and cabinet expected tacit support from parliament. Those who failed to give it were isolated and persecuted especially during election time.

Thus in Kenya's one-party political situation, and by virtue of certain constitutional provisions which formally elevated party dictates to the status of constitutional norm, the national executive - which was also the party executive- was so placed as to be able to demand and rely on receiving the loyalty of parliament.

It is submitted here that, under such an institutional framework, the parliament, which is supposed to be the institution through which people rule themselves, does not serve the purpose for which it was originally intended.

Interestingly, the pre-independence parliament can be considered to have been most



dynamic for it took the colonial government to task over its repressive conduct over the natives. However, after independence, the most blatant corruption and illegality passed through our parliament without any comment from the parliamentarians for fear of reprisals. For example, the report on the murder of J. M. Kariuki was never tabled in parliament even though a parliamentary select committee had been appointed to investigate the death of this popular politician. Those who dared to speak out against the government had to contend with the repercussions. Cases in point are Martin Shikuku and the late Jean Marie Seroney who were detained back in 1975 for claiming during a debate in parliament that KANU was dead. Their parliamentary immunity did not save them.

Such experiences show that in Kenya, the members of parliament had very little protection from the executive, and the only real power that parliament had in relation to the executive was that of the resolution of no confidence.

This explains the growing apathy and chronic lack of quorum in parliament during debates. The quick successions of the amendments of the constitution on considerations of political expediency further explains the status of parliament during this time. Most of the parliamentary bills were quickly passed without any objection because the backbenchers had to safeguard their position in parliament. With regard to controversial issues, most of the Parliamentarians chose to be very cautious:

As Kenya's parliamentarians went back to business last week after five weeks of recess, the mood among many backbenchers seemed to be one of caution with respect to controversial issues<sup>24</sup>

With the shadow of the Preservation of Public Security Act hovering all over, and the fact that the executive had the power to make appointments and dismissals to lucrative jobs and ministries, the role of control was curtailed and criticisms by the parliamentarians was at best lukewarm. The parliamentary power had been hijacked by the executive. This

was despite the fact that parliament had the right and indeed the duty to seek an explanation from the government and to criticise and advise it in the exercise of its executive authority.

The concept of parliamentary supremacy became widely replaced by party supremacy. In this case, the President behaved as if other institutions and the government derive authority from him and not vice versa. This in essence rendered the parliament ineffective and almost irrelevant as a source of authority.

Separation of power as Montesquieu said was to prevent the government from making laws and executing them; which would lead to arbitrariness.<sup>25</sup> However, in our case, Montesquieu's fears were confirmed.

It should be noted here that the concentration of powers in the hands of one man (presidency) was a departure from the Westminster model of independence constitution. The requirement that the executive must be responsible to a freely elected assembly was also abused. This is because the party rigged in candidates that were supportive of all of its policies. It is no wonder that most of the proposed amendments to the constitution were passed without so much of an opposition.

Since 1963, the Kenya constitution has been tampered with (in the name of amendments), so much, so that, it can no longer be classified as rigid. Most of the amendments it has been subjected to have not been for the better. Indeed, most were intended to legitimise undemocratic and authoritarian administration. Why were these changes effected?

The amendments to the constitution in these early years were occasioned partly by the desire to grapple effectively with the challenges of governance in an emergent nation and partly by the attempt by the political elite to shake - off opposition by strengthening themselves via the instrumentalities of the law. The second theme was however to achieve dominance in the years that lay ahead and was indeed to become almost exclusively the basis of all future constitutional changes.<sup>26</sup>

For example, the 19th amendment was to go down into our history as the most far-reaching and controversial amendment to our constitution. This is the amendment that introduced the in-famous section 2A into our constitution and converted Kenya into a *de jure* one party state. The amendment outlawed all opposition whatsoever and gave the ruling party KANU the monopoly of political power in the country. None could hold elected political office, from the president downwards unless one was a member and nominee of KANU. In fact, one ceased to hold elected political office when one ceased to be a member of KANU. KANU was henceforth to enjoy a monopoly of political power in the country.

The background against which this amendment was made is very interesting. Oginga Odinga, George Anyona and others had allegedly intended to form a new political party and called a press conference to launch a new party: the Kenya Socialist Party to challenge KANU. Subsequently Oginga was expelled from KANU and Anyona was detained.

A KANU Governing Council meeting ordered the Attorney General immediately thereafter to prepare legislation making Kenya a one party state. This was in itself an interference with the sovereignty of parliament and the independence and integrity of the office of the Attorney General. More significant was the fact that, in strict constitutional theory, the amendment was outside the scope of the Article 47 of the constitution. This was intended as a constitutional *coup de tat*. A legal way of the ruling party legislating itself in power in perpetuity.

The effect was to rewrite the constitution and especially the bill of rights in a fundamental and unconstitutional way.<sup>27</sup>

The disregard for procedure and other legalities which, had now been established over the years was similarly present in the amending process. "indeed it has been argued

that section 2A was unconstitutional *abinitio*".<sup>28</sup>

This is a clear indication that whereas the constitution declares itself the fundamental law of the land and politicians give lip service to this principle, the amendments to the constitution show that the constitution has never been perceived as such. At best, the constitution has been perceived as a weapon in power politics to be manipulated to subdue or eliminate opposition.

Looking at the short stint at multi-party when we had KPU as an opposition party, we would like to note here that KPU cannot be underestimated. It played its role in parliament. It was active and critical, and it gave full contribution to debates regardless of its size. The only problem is that it lacked influence on government policy. This is the same problem that we are facing today.

Although Section 3 of the National Assembly Powers and privileges Act provides that no civil or criminal proceedings should be instituted against any member for words spoken before or written in a report to the Assembly, this has not always been observed as the detention of Martin Shikuku and the Late Jean Marie Seroney proves. The party and the executive had become more powerful than the parliament, and the immunity of parliamentarians seemed to be a privilege rather than a right as entrenched in the Independence constitution. The situation in the single party era was such that this immunity was granted only to those that were favoured by KANU. We cannot overemphasize the supremacy of the ruling party at this time.

The ruling party KANU is supreme and no one should challenge it in a court of Law.<sup>29</sup>

It would appear here like the high courts' ruling would not have made any difference. The independence of the judiciary was losing its meaning. This is because the courts were reluctant to protect an individual who conflicted with the state. There was a

deliberate attempt by the executive to interfere with the independence of the judiciary.

The 22nd amendment of 1986<sup>30</sup> was as far-reaching in its implications as the 1982<sup>31</sup> amendment and may very well have been a watershed amendment. The amendment was a clear case of a situation where government was no longer receiving legal advice and that the Attorney-General was bending over backwards to accommodate every political whim! In short, it removed the security of tenure of the offices of the Attorney General and the controller and Auditor General. Two very key offices that are meant to be the watchdogs of the public good. Why their independence was deemed a threat or what mischief was being redressed never became clear. However, the 25th amendment of 1990<sup>32</sup> undid the harm by restoring the security of tenure of judges of the high court and the court of appeal, the Attorney General, the controller and Auditor general and members of the public service commission.

The background to the amendments gives an interesting insight into the workings of the constitutional process in Kenya and in, particular the disharmony between formal constitutional provisions and constitutional practice.

Whereas the constitution provides that the Attorney-General is to act completely independently in the exercise of the functions of his office and that parliament is the supreme law making body in the Land, the Attorney-General nonetheless did receive "a directive" in November of 1990 to draft a bill effecting the changes! The irony of it all is that the same parliament that had waxed eloquence on the insignificance of judicial tenure and the need of a strong presidency, now fell over itself exalting the independence of the judiciary!

From the foregoing, it is clear that the separation of powers in Kenya gradually became meaningless as the Executive, Judiciary and Parliament, all became rolled up into one, under the executive arm of government.

It is, therefore, our submission here that in one-party Kenya, the President was becoming a personal ruler. He was indeed the government, and as such was identified with the state. National security was also given a personal dimension too. It involved not only the security of the state and its institutions but also the security of (his continuance in office) the presidents' tenure of office.

As a result, the substance of most amendment was to create an edifice of almost unaccountable power in the executive, and to undermine the other arms of government, viz, the judiciary and the legislature.

J. S. Mill argues that political institutions are made by man and can be shaped deliberately by man; success or failure depends partly on circumstances and the people's willingness to play their part<sup>33</sup>. However, in our case, deliberate effort was made to destroy the fabric of democracy in Kenya. Thus in practice, the President had usurped the powers of the Legislature and the Judiciary thus rendering them meaningless.

A good democrat is not defined by his professions, but, by his practices. However in our case, all that the politicians have been doing is to pay lip service to the doctrines of democracy while in practice have been working hard to destroy the very institutions that guarantee it.

It is a crazy demo against democracy when politicians suppress the prime elements like multi-party politics, while at the same time allege the government's respect for democracy and Human Rights. It is an act equivalent to throwing a baby away with the bath water.<sup>34</sup>

Despite these democratic professions from our leaders, the first ten amendments of the constitution ensured that power was centralised much more in the executive, and particularly the presidency, and parliament's authority diminished as more discretion was granted to the former.

However, following the December 29th, 1992 general elections, the Kenyan

political scene has drastically changed. In parliament for example, there is now an opposition that will keep the government on its toes. The only disquieting development is that the government continues to behave as though the opposition does not exist. The opposition also is undoing itself by continuous infighting and struggles for power within the party ranks. The existence of multi-party is a better safeguard for the separation of powers. At least, there is an opposition in parliament.

During the one-party era, the parliament's record was dismal. This was because any sort of criticism of government policy was treated as a direct insult to the president, and as lack of patriotism. Thus, the parliamentarians in fear of losing their seats chose to become complacent. They sang each other hoarse in an attempt to win the favour of the president! Thus, parliamentary supremacy remained more of an illusion; a dead letter. Constitutional amendments were employed as a political ploy to frustrate any opposition in parliament. The ruling party KANU imposed political unanimity by force. Its rule was perpetuated by suppression of any form of criticism that was deemed as opposition. Thus, the culture has been that our leaders are reluctant to subject themselves to the democratic principles they profess.

It is noted here that the government having emerged out of the first multi-party general elections, though it is to a large extent experimental and mediocre, will most probably be democratic in so far as it will be questioned, and kept in check by a deeply radical, intelligent and perhaps, unfriendly legislature. And to that extent, the government might be compelled to budge to certain fundamental demands of the reformist opposition members of parliament - at least to save its face and prolong its life into the next general elections.

In conclusion, it should be pointed out that the balancing function of the separation of power between the government, parliament and the judiciary - misunderstood and beset

with tensions as this legacy of John Locke may be in its Kenyan reality - is an impressive institution against the ever-present danger of the usurpation of power by the ruling elite. In a democratic state, power is broadly decentralised among many institutions and organisations; in an undemocratic state, power is concentrated in the hands of a tightly centralized elite.

This is what Kenya was degenerating into. She had adopted a constitution with elaborate but empty promises of freedom and rights. The leaders were only interested in sustaining themselves in power.

There is more to life than politics, even for the 'political animal'. But there is more, also than the private pursuit of happiness; and nothing is more central to the spirit of democracy than this conviction. Kenyan leaders are yet to learn this! History has taught us that the concentration of too much power in a few hands always provides the potential for tyranny. Freedom and democracy require political pluralism. This is why the re-introduction of multi-partism has shed some light onto our political scene. Already, there are some positive advances. Now, even members of parliament who were elected on a KANU ticket can express their dissatisfaction with party or government policies. At least they have the confidence that even if they are suspended from KANU, they can seek "Political asylum" in the other parties.

#### **4:3 ON HUMAN RIGHTS: THE KENYAN EXPERIENCE**

It is not enough to be called a citizen. One must also be assured of the greatest freedom possible to enjoy the rights that go with citizenship.

Citizenship is not simply an attribute of constitutional declaration, but the empowerment of individuals to exercise civil, political, legal and religious rights. These include: freedom of speech, assembly and association; full political participation including not only the right to vote and be voted for, but also the right to participate in defining policies



and platforms, freedom from arbitrary arrest and the right to a fair trial; and the right to education, health services and the means of making a decent livelihood.<sup>35</sup>

To make these rights secure, the nation's founding fathers established a government of limited powers that were defined by a written constitution. However, after the initial optimism concerning the democratic aspiration voiced by these political leaders; over the years, a mood of disillusionment set in among the Kenyan people.

This compelled the researcher to face up to three specific questions: a) Were the founding fathers wrong in their thinking about the political conditions necessary to safeguard freedom? or b) Is popular opinion now wrong, in its conclusions on the subject? or c) have changing conditions changed our conception of what freedom is?

The answers to these questions will become clear as we discuss the "freedoms" individually. Despite the fact that the founding fathers intended that the basic functions of government would be to safeguard the freedoms that flow from man's inherent rights such as that of speech, worship and assembly, it is important to note here that, even political institutions designed to maintain freedom will fail in that objective unless they are operated as intended. It is the aim of this study to find out if this is what has happened over the years in Kenya.

Democracy attaches great importance to human personality and this makes it most attractive and politically most suitable. However, over the years, Kenya's record on Human rights has remained mixed.

#### **4:3:1 Freedom of Expression.**

The assertion that there are natural rights seems to be the assertion that there are certain rights which belong to everyone, which are not created or established by the state, and which the state cannot legitimately abolish or ignore. In Thomas Jefferson's words in

his declaration of independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable Rights, that among these are life, liberty and pursuit of Happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed - that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new Government.<sup>36</sup>

In the Kenyan case, the government has over the years steadily interfered with these rights instead of protecting them. One of the freedoms that has grossly been interfered with in Kenya is that of speech.

Although discussion is at the heart of the democratic process and although free societies depend on those who ask questions, form their own judgements and follow the dictates of their consciences, the government in Kenya has constantly prohibited and suppressed free speech using the machinery at its disposal such as the police force.

In its effort to consolidate its powers in the years after independence, the Kenyan government became increasingly hostile to any form of criticism as this was regarded as opposition and it was suppressed using various means.

During Kenyatta's reign, those sons of Kenya who were courageous enough to use their critical faculty became very unpopular with the government, and were subjected to various forms of oppression, intimidation and harassment. For example, back in 1975 when Martin Shikuku dared to express his opinion on the then ruling party KANU by saying that it was dead, he, together with the then speaker of the national assembly, the late Jean Marie Seroney, were immediately arrested within the precincts of Parliament and detained without trial. While in detention they were subjected to various forms of torture, and Shikuku had to seek treatment abroad for the injuries he had sustained while in detention. This same fate befell George Anyona back in 1977 when he expressed his desire

to form another political party to compete with KANU

This was not only a contravention of chapter five (sections 81-85) of the Constitution of Kenya, but also an interference with the parliamentary immunity of the said persons. It was indeed a sad day for democracy in Kenya.

The culture of intolerance to any dissenting views took root and grew to great lengths over the years. It culminated in the introduction of section 2(A) into the Constitution<sup>37</sup>, thus making Kenya a *de jure* one-party system. This in itself was a gross interference with the peoples' freedom of choice, and did not make matters better for freedom of speech.

The trend that had now taken root was that every sort of criticism from any quarter was regarded as opposition that had to be quashed. The situation degenerated so much that even in our public universities, the lecturers could not teach freely as government spies had been posted among the students. It is no wonder then that a number of university dons such as Dr. Katama Mkangi were detained during this period. The others such as Ngugi Wa Thion'go and Maina Wa Kinyatti sought refuge in other countries for fear of repercussions.

It will be remembered that back in 1975, on the second day of March, the Late J.M. Kariuki, who was the then outspoken member of parliament for Nyandarua North, was brutally murdered in what appeared to have been a politically instigated murder. His murderers were never apprehended and despite the fact that the parliamentary select committee that was constituted to investigate his murder named some high-ranking officers as murder suspects, these were never arrested. His death remains a mystery up to the present day. He lost his life because he was unflinching in his support for social justice - something that did not augur well with the government of the day. Others who also lost their lives in mysterious circumstances include the late Hon. Pio Gama Pinto the late Hon. Tom Mboya, and the late Hon. Ronald Ngala.

In Kenya, therefore, it will be noted that both legal and extra-legal means have been employed over the years to silence any form of criticism. A culture of eliminating those who were rising to prominence had been born. Our leaders have quite forgotten that the values embodied in the democratic ethic include tolerance, co-operation, respect for dissenting opinions, and the willingness to make compromises.

Kenya has suffered from a profound lack of respect for human rights over the years. The years after the introduction of section 2(A) into the constitution were the worst. It became increasingly impossible to freely express one's opinion without first looking furtively over one's shoulder to see if a government spy was in the offing. Any comment on any aspect of the practices of the government was misconstrued to mean opposition and direct insult on the person of the President. This had to be crushed at all costs.

As a result, numerous economic, political, legal, cultural, and psychological barriers were created or used to make the enjoyment of human rights especially, the freedom of expression extremely difficult. Those outspoken clerics who were courageous enough to speak against any form of social injustice - the likes of the late Bishop Alexander Muge, Rev. Timothy Njoya, and Bishop David Gitari of the Mount Kenya Diocese had to pay for their outspokenness. For example, Bishop Gitari had his sermons interrupted on several occasions by youth wingers (KANU). As if this was not enough, he was attacked in the middle of the night in his residence by robbers in what appears to have been a politically instigated robbery. As usual, the perpetrators of this crime have never been apprehended. Bishop Muge had to contend with threats of arrest on several occasions and was finally killed in a very suspicious road accident after defying orders from the then minister for labour, the late Mr. Peter Okondo, not to visit Busia town, otherwise he would not leave alive. Indeed, he died on his way back to Eldoret from Busia.

From the foregoing, it is clear that freedom of speech had become a privilege of

those in power and not a fundamental right for everybody. The trend of thought that assumes its crudest and least defensible form in the dictum of Thrasymachus that "might makes right, justice is in the interest of the stronger" - had slowly insidiously, not altogether unashamedly warped itself into the fabric of democratic thought and practice and had become exalted to the level of complete philosophy of life in Kenya, which had frankly abandoned true democratic practices.

Over the years, the government chose to take the claim of infallibility which to say the least amounts to an act of fanaticism. In the evolution of history and modern science, dissenters have often led the way to major changes. Tolerance for dissent is, therefore, one of the cardinal virtues of a free society. However, this has been illusory in Kenya.

To curb any form of criticism and to ensure the government's continuance in power, various repressive laws such as the Preservation of Public Security Act, the Public Order Act, the Chief's Authority Act, and certain provisions of the penal code have been used in Kenya to suppress those considered as dissenters and deny them their basic rights and freedoms. Most of those arrested or harassed for expressing their opinions were told that it was done in the interest of public security. Note that at this period in the history of Kenya (in the late eighties), public security was synonymous with the security of those in power and their continuance in office.

This is the period that saw the greatest number of political prisoners or prisoners of "dissent" languishing in our Kenyan prisons. Terms such as "disgruntled elements" were commonly used to refer to those with dissenting views.

Although to some extent restrictions on individual freedom in a democratic society flow not from the theory and practice but from the complexity of social relations in a growing community, in Kenya, there have been deliberate attempts by those in power to silence the voice of democracy by either intimidating, harassing, detaining or even killing

the protagonists of this much cherished system of government.

The trappings of democracy have been paraded and lauded by our leaders, but, the real will of the people has been ignored and those who have dared to express it have had to face up to the reprisals. Wives and children of the protagonists of democracy know what it means for they have had to pay for the outspokenness of their husbands. In 1989, Mumbi Wa Kinyatti lost her job to pay for her husband's outspokenness<sup>38</sup>. Another case in point is Mrs. Edith Matiba who was injured in a night raid in her home by armed robbers in what was widely believed to have been another government instigated attack.

When such acts as the foregoing take place in a country whose leaders have always emphasised their support for democracy, then it means that something is terribly wrong. These acts are not only in conflict with the Kenyan Bill of Rights<sup>39</sup>, but are also inconsistent with various international human rights instruments. Ironically, Kenya is a signatory to the Universal Declaration of Human Rights and has ratified amongst others, the convention on the prevention and punishment of the crime of Genocide and the international covenant on civil and political rights.

To say the least, Kenya has used various institutional, structural and other factors to inhibit the enjoyment of certain freedoms, such as that of speech, by her citizens.

#### **4:3:2 Freedom of Press.**

Karl Marx once wrote;

.... without freedom of the press all other freedoms are illusory. One form of freedom is the condition of another, just as one part of the body is dependent on the rest. When any aspect of freedom is called into question, freedom, itself is thereby repudiated ....and doomed to a phantom existence .... unfreedom becomes the rule, and freedom the exception, a matter of chance and arbitrary circumstance.<sup>40</sup>

At this early point, it should be noted that, there have been serious cases of press

harassment in Kenya. Despite the fact that in a democratic society any man may publish a book or newspaper without first submitting it to an official censor, this has not always been the case. The press has been muzzled to the point where printing machines have been dismantled by the police.

Over the years, any form of criticism has changed name to sedition. Indeed, the many editors of magazines who have stood in various courts of this country to answer sedition charges will attest to this fact. Mr. Kareithi, former editor of the *Financial Review*, was not only charged with sedition for publishing a story on how the government had taken over and nationalised Miller's investments, but, the magazine was also banned. To say the least, the ban was a tragedy for press freedom in Kenya. All this was done in the name of public security.<sup>41</sup>

The harassment of the press has raised the need for press legislation to protect the press. This has yet to be achieved in Kenya.

In order that the people be fully informed, they must have access to different views, and they must be free to express their own views. This was not possible in the one-party Kenya because the avenues of communication, viz the radio, the television, and the newspapers could not freely express criticism, debates, and full discussion of public issues. Whereas the government had, and still has, a monopoly over the radio and television stations as avenues for propaganda, the magazines that dared publish any form of criticism were banned. For example, the *Beyond Magazine* was banned for daring to publish the evidence of election rigging in the Tinderet and Kirinyaga constituencies. This was back in 1989, and the reasons for the ban were given as "sedition".<sup>42</sup>

Where it has not been possible to ban a magazine, we have had cases of police raids that end up in the impounding of some issues of magazines even before they come off the printing press! This is a clear demonstration of how sensitive the Kenyan government has

been to any form of criticism. The result has been that they have made life as intolerable as possible for the journalists who end up working in fear and rather than clashing head on with the authorities, most of them choose to report what the government wants to hear, and not, what the people should know!

Therefore, we can safely assert here that there has been arbitrary restriction placed on the freedom of press and the government has had institutional control over the instruments of communication such as the radio and televisions. There has been coercion, and threat of coercion employed against the journalists. A District Officer in Gatundu decided to lock up seven journalists in the course of their duty (covering a farmers' demonstration in the area). Despite the public outcry that this action caused, no action was ever taken<sup>43</sup>. This was as recent as after the re-introduction of multi-partism. This is a clear indication that there is something terribly wrong with the Kenyan practice of democracy.

The government has consistently ignored the fact that there has to be independent journalists to maintain the free flow of information to the public. It has instead used the radio as a vehicle of political propaganda for its own convenience.

In defence of press freedom in Kenya, Rev. Timothy Njoya once said:

Freedom of press and worship go together and if one is removed, the other goes. If the state wishes to kill the opinions of the people, association and habits, it should provide alternatives. Detention without trial in the name of nationalism and state security is a tool used by minorities not to mobilise people but as a tool of oppression.<sup>44</sup>

The trend has been to make life as intolerable as possible for the journalists either through police brutalities, arrests, sedition charges, destruction of the instruments of their trade such as cameras, and notebooks, and threats, until, their will broken, most of them decide to turn pro-government and report in favour of the government, even when they



know that it is wrong. Others choose to deal with subjects that are not sensitive to the government.

Once again the restrictive laws such as the Public Security Act, and the Public Order Act have been used as an excuse to muzzle and suppress the freedom of press so as to keep the people uninformed. This has been in an effort by the government to perpetrate its stay in power at the expense of the ignorant masses. The policy has been, "let the people be told what the government wants them told, and not what they should know".

Despite the fact that the re-introduction of multi-party has seen some genuine advances in terms of freedom in all spheres of life, press harassment still continues. The journalists must learn to live with the threats and insults, ranging from being called fools to bastards in an attempt to intimidate them! "Journalists were labelled, 'bastards conceived by the roadsides and riverbeds'. The editor of *Finance Magazine* was labelled stupid".<sup>45</sup> Being banned from covering some government functions is something journalists in Kenya have had to contend with over the years. Kenyan leaders have yet to learn that those who do not agree with our opinions are not necessarily fools or scoundrels, and that, human beings who are affected by decisions taken should have some say in influencing these decisions, and should get to know about them. As John Dewey once wrote, "democracy should be the name for a free and enriching communion".<sup>46</sup>

The press has not been given a chance to be responsible to distinguish between report of fact and the statement of editorial opinion, because the government always equated the two.

From the foregoing, it is the submission of the researcher that the government has used its institutional and structural instruments to frustrate the journalists, and to make the occupation of journalism as hazardous as possible, so as to make them report in the government's favour. The government should not barricade the avenues of communication

so as to thrive on the ignorance of the masses. It is indeed a sad time for democracy when books are taken down from shelves of bookshops on grounds that they contain subversive materials, and that they jeopardise state security. The question is, whose security?

#### **4:3:3 On the freedom of Worship, movement and Assembly.**

Going by the number of religious sects that have sprang up over the years in Kenya, we can conclude that Kenyans have not had much complaining to do about freedom of Worship, except for a few cases such as Ngonya wa Gakonya whose efforts to register a religious sect (The tent of the living God) were turned down by the Government.

However, the clerics whose sermons have been interrupted by youth wingers, or those who have had government spies sit in on their sermons can say that things have not been quite smooth sailing.

Over the years the government has called on the church on several occasions to keep off politics. Therefore, it is the clergy that has not had it easy over sermons delivered or in the case of the Catholic Church, for a pastoral letter addressed to the faithful. Despite the fact that the government allows the existence of several churches and sects, it is sad to note here that the clergy has not been given as much freedom to preach. Outspoken clergymen such as; Bishop Henry Okullu, Bishop Ndingi Mwana'aNzeki, Fr. Ndikaru Wa Teresia and Dr. David Gitari have on more than one occasion come under fire from the political leaders for speaking up against social injustices. These have been asked to leave the Church and join politics if they want to preach politics.

Thus, the clergy has something to complain about in terms of freedom of worship. Most of those who have risen beyond the threats of the government and spoken against the evils in society have had to contend with insults from our political leaders.

Looking at the way freedom of worship has evolved over the years, therefore, we

can draw the conclusion that, whereas the government has allowed the people to worship in churches of their choice, the clergy has not been that free. This is because, whenever they have spoken against any form of social or political injustice, they have had to contend with insults and threats from the government. Life has equally been made uncomfortable for them as they have had to do with being followed around by government spies.

It should, however, be acknowledged that with the re-introduction of multi-partism in late 1991, things have improved to some extent in terms of freedom of speech. At least one can air his views today without the fear of a government spy overhearing him. However, such sentiments or opinions are still not received well by the ruling party and more often than not, one is bombarded with insults, always being referred to as serving the interests of his foreign masters. Kenyan leaders are yet to develop the right attitude towards free speech.

#### **4:3:4 On Equality and the Rule of Law.**

Liberty and equality are the twin pillars of democracy. This is clearly enunciated by the French Declaration of 1789:

Men are born and remain free and equal in rights<sup>47</sup>

Equality before the Law is a fundamental democratic right. It gives the citizen the confidence that he will be able to change even undesirable legislation either through representation or by more direct action. It offers each individual the opportunity to ascend socially and economically according to his development of talents, skills, and moral statues, and in accordance with his contribution to the advancement of society to which he belongs.

The claim for equality, therefore, is a protest against unjust, undeserved and unjustified inequalities as have been subjected to Kenyans through among other things, official corruption, nepotism and tribalism.

The trend that has been created is that unless one comes from a particular tribe (the ruling tribe) or has a relative working in a high-ranking position (popularly known as "tall uncle"), then it becomes almost impossible to get a job in Kenya. Some fields are flooded with members of the same community, some without qualifications. A culture of tribalism, nepotism and corruption has developed and it has even vested itself in the highest office in the land! Thus, in terms of employment, Kenyans have not been treated equally.

A government that awards jobs along ethnic lines cannot be said to be interested in equality. However, with the advent of multi-partism in Kenya, it can be acknowledged here that there have been some genuine advances in terms of democracy although there are some serious setbacks.

Further, tribalism has deliberately been used by those in power to create animosity between some communities. This is a monster that has been created to instil fear among the people that the major tribes are going to crash the minor ones. It is little wonder that some parts of the country are experiencing the so-called "Land clashes"!

From the foregoing, it is clear that in Kenya today, one's social or economic ascend depends on one's ethnic background and on political affiliations. There is unequal distribution of the national cake. In this great funeral oration, Pericles said:

...Our government is called a democracy because its administration is in the hands not of the few but of the many,... as regards the law, all men are equal; each is preferred for public honours as he is distinguished, and not because he belongs to a particular class but rather because of his personal merits; nor is a man barred from public career on grounds of poverty".<sup>48</sup>

As a result, there has not been equality of opportunity to realize one's human capacities. Barriers have been deliberately created in this regard. We have had sad cases of legitimate title-deed holders being violently driven-off their land, simply because they belong to a certain community. Residents of Molo, Olenguruoni and Enosupukia, know

what it means to be homeless after having been driven off from their land/homes.

We have cases where those in power have grabbed property belonging to some Kenyans. It is in the light of these that we can understand J.M Kariuki's sentiments thus;

A small but powerful group of greedy, self-seeking elite in the form of politicians, civil servants, and businessmen, has steadily but very surely monopolized the fruits of independence to the exclusion of the majority of the people. we do not want a Kenya of ten millionaires and ten million beggars.<sup>49</sup>

The rule of law always attempts to maintain a balance between the opposing notions of individual liberty and public order, that is, reconciling human rights with the requirements of public interests. In Kenya, this balance has tilted to a great extent in favour of the government. We have had a one-man rule under the guise of democracy!

To say the least, the judiciary has not been impartial. For example, if the political atmosphere has been hostile to what the government dubs "dissidents", so, too have been the courts. A case in point is Rev. Ndege Imunde's "sedition" trial in March, 1990. He was convicted and the magistrate in his judgement noted that the case had come at a time when the government was disturbed with malicious publication of subversive rumours!

The offence is serious and comes at a time when the government is doing all it can to curb malicious and unfounded rumours which can only lead to chaos with all the good and exemplary foundation that the government had laid... the remaining duty of this court is to insure that the stability, peace and tranquility that we enjoy under the umbrella of the government is not abused by any individual or group of individuals irrespective of status in society. As a warning to others who may still be in the dreamland of the accused's thinking of destabilising the solid, just and fair government of the land, a custodial sentence commensurate with the times is called for.<sup>50</sup>

Thus in Kenya, the law has not been applied through persuasion, but through oppression! The constitutional amendments, between 1964 and 1992 clearly reflect the political elite's conceptualization of the law and their endeavour to manipulate the law in

a parochial and right-handed manner so as to secure their survival in power. After the mysterious murder of the then minister for foreign affairs, the late Dr. Robert John Ouko in 1990, those named as suspects in the Troon Report have never been brought to book. The commission of inquiry that had been constituted to investigate the murder was ordered to submit its report before it could conclude its investigations!

This was one amongst the many occasions in which the executive has infringed on judicial discretion. This continuous infringement has meant that the judiciary has not been as free, impartial and fair as it should be. Equal access to justice is a fundamental right of equal persons. Kenya's criminal justice history abounds with instances of executive perversion of the judicial process.

Election time has in the past provided the surest occasion for perversion of the criminal process for political expedience. Candidates unpopular with the government and who it, therefore, wants to keep out of parliament and local government positions, have been criminally prosecuted to discourage them from contesting or to stagger their electoral campaign. The 1988 General Election offers the best illustrations in this regard. Having fallen out of favour with the government, the then Vice President Mr. Mwai Kibaki had Dr. James Muriuki propped up by the government to oust him from Othaya constituency. Mr. Munene Kairu and two other politicians were charged with inciting violence for allegedly uttering words implying that it might not be desirable for Dr. Muriuki to oppose Kibaki. These politicians were jailed for an aggregate of sixteen months but were later released on appeal.

A most bizarre case is in June 1988 trial of one Peter Kiratu Makau who declined to grant the Rift Valley Provincial Commissioner, Mr. Mohammed Yusuf Haji a lift in his car after the P.C.'s government vehicle had broken down. On the charge of undermining the authority of a public officer contrary to section 132 of the penal code

Makau was jailed for three months without the option of a fine. Clearly, as his advocate

Mr. AGN Kamau stated in an application for bail pending appeal:

The learned magistrate erred in law and in fact in failing to appreciate that in the circumstances of the case before him, Mr Mohammed Yusuf Haji could only have made a request for assistance, but could not issue a lawful order which could be defied or disobeyed.<sup>51</sup>

The above cases are an indication that the government has utilised the criminal process to intimidate and attempt to annihilate any form of opposition.

To be fair on the judiciary, it may be argued that the decline of judicial strength in the face of executive incursions is linked to the withdrawal of the constitutional security of tenure in 1988 and the fact that the magistrates who deal with nearly all offences at first instance have no tenurial security. The uncertainty of tenure keeps these judicial officers apprehensive about their livelihood so that they may be influenced in cases with which the government is interested.

The most hotly contested case during the single party era was the treason charge facing Koigi wa Wamwere and co-accused. These are some of the "political prisoners" that the starving mothers who started their hunger strike on the 28th day of February, 1992, at Uhuru park (now popularly called "Freedom Corner") wanted released. These were later released after being subjected to various forms of torture while in jail.

On the fourth day of their hunger strike, the women were invaded by a horde of ruthless anti-riot policemen who brutalised and dispersed the sympathisers of the strikers before clobbering the women. The exasperated women, most of them aged over sixty years, stripped naked in front of the charging policemen, throwing the entire country into confusion and disbelief. Prof. Wangari Maathai, Kenya's world famous environmentalist who sat at "freedom corner" with the mothers was teargassed into unconsciousness and was hospitalised after the raid.

It is important to point out here that the brutal force with which the government met the mothers' peaceful hunger strike was by no means justifiable - legally at least. The picture of armed trigger-happy anti-riot police squads raining countless truncheon blows on the bodies of elderly women shocked many Kenyans and elicited sharp international response. And, while the women broke no law - for they would otherwise have been charged in a court of law-the police brutality was meted out to them without due regard to the law of the land. And the government itself appeared an accomplice to the police in this contemptuous disregard of the law.

Commenting about the brutalisation of unarmed and defenseless women, Mbithi praised the police for their so-called remarkable restraint. Further, the President's description of the mothers as "mad women" particularly incensed Kenyans.

A week before this wave of officially sanctioned violence the women had called on the Attorney General, and appraised him of their intention... After a friendly chat and an exchange of promises to keep in touch, the mothers left for Uhuru Park to begin their strike. Wako must therefore stand accused of the violence later unleashed on the women. He had not warned them that there would be an offence in the staging of a hunger strike nor warned them of any danger lurking in their "provocative action".<sup>52</sup>

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights which were endorsed on 23rd March, 1976 and chapter 5 of the Kenya constitution should be a reality for all. One is reminded of the unforgettable phrase by Lord Deming - "justice should not only be done, but should also be seen to be done".<sup>53</sup>

If the state can be regarded as mediating social thought about justice to its members, and as expressing in its law the product of such thought, we may draw from that premise the conclusion that the state should itself correspond, in its own nature and operation, to the process of social thought which it mediates, and should thus be a broad open channel for the flow of the product which it expresses.



It should be noted that the process of social thought is a process in which all the members of society can freely share, and which they can all contribute freely. Despite the fact that this demand can only be satisfied by a democratic society, it has not been a reality in our case.

Thus, the government should recognise that this demand can be satisfied first; in the form of its constitution and the way of its coming into being, and next in its method of government and the way of its operation!

In terms of equality and the rule of law, Kenya's record has been quite dismal<sup>54</sup>. The judiciary which should be the law-enforcing arm of government has grossly been interfered with by the executive. It should be noted here first that a sound independent judiciary would go along way in enhancing democratic change in Kenya. Secondly, human rights are universal and not the preserve of those in power. The leaders should stop interfering with the peoples' rights in an attempt to hold on to power. The people, as James Madison observed at the U.S.A. constitutional convention, are the "fountain of power".<sup>55</sup>

1982 must be seen as the acceleration point for the increased perversion of the judicial process. With the abortive coup of August 1, the government's existence and its complacent feeling of security were threatened. The government's insecurity was to be reflected in the vigour and viciousness with which it prosecuted people suspected of managing the *coup de tat*. Most telling, though technically not a trial, were the proceedings of the commission of inquiry set up to probe into the affairs of the by then disgraced Charles Njonjo relating to charges of abuse of office and possible involvement in the August 1 coup.

The other issue arising out of these political trials is the Human Rights issue: many an accused complain of torture and inhuman and degrading treatment, denial of right to counsel and violation of the right to a fair hearing by one or other means. The antidotes of

an independent judiciary and a Human Rights Commission ought to be given serious thought in Kenya!

On the whole, Kenya cannot be rated amongst those governments that have practiced the rule of law. The rulers have been more concerned with preserving their own interests at the expense of the people's rights. In this endeavour, they have misused and misinterpreted the law making civil liberties a dead letter.

In a nutshell, there have been abuses of human rights such as freedom of expression and of the press, freedom of assembly and association. There have also been numerous cases of arbitrary arrests of citizens, detention without trial, use of state violence against citizens in peaceful processions and in certain cases, disruption of the transition process to democratic rule.

## NOTES ON CHAPTER FOUR

1. Joseph Tussman, Obligation and the Body Politic, Oxford University Press, New York, 1960, P. 106.
2. Afrifa K. Gitonga, "The meaning and Foundations of Democracy", quoted in Walter O. Oyugi & Afrifa K. Gitonga (Ed), Democratic Theory and Practice in Africa Heinmann, Kenya Ltd., Nairobi 1987, P.7.
3. Carl Cohen, "Four Systems" as quoted in A. J. Minton & T. A. Shipka, Philosophy: Paradox and Discovery 3rd Ed., McGraw Hill Publishing Company New York, 1990, p. 472.
4. Oginga A. Odinga, Not Yet Uhuru, Heinemann Ltd., London, 1968, Pp. 242-244.
5. See Constitution of Kenya, Act No. 7 of 1982.
6. *Ibid.* Act number 7 of 1982.
7. "Sunday Nation", Nairobi, April 23, 1989, P. 5.
8. Muli wa Kyendo, "Freeing Radio Means KANU Suicide", Quoted in The People, Mar. 21<sup>st</sup> – 27<sup>th</sup>, 1997, p.7.
9. Kiraitu Murungi, "Moi will not Yield", Finance Magazine, Feb. 15, 1992, p.29.
10. Enid Lakeman & D.J. Lambert, Voting in Democracies: A Study of Majority and Proportional Electoral Systems, Faber & Faber Ltd., 24 Russell Square, London, 1946, p.232.
11. See Constitution of Kenya, Act No. 1 of 1975.
12. Carl Cohen, "Autonomy and Authority: The Solution of Democracy", Quoted in *Op. Cit.* p. 469-473.
13. Irving Kaplan, M.K. Dobert & B.J. Marvin (*et al*), Area Handbook for Kenya, United States Government Printing Office, 1976, p. 181.
14. Gitobu Imanyara (Ed), "Historical Perspective: From Moi's Speech", Quoted in The Nairobi Law Monthly, No. 23, 1990, p.45.
15. *Ibid.* p.45.
16. Catholic Bishops of Kenya, Pastoral Letter – On the Road to Democracy, Paulines Publication – Africa, Nairobi, 1994, p.12.
17. G.V. D'Estaing, Towards a New Democracy, William Collins Sons & Co. Ltd., London, 1977, p.31.
18. *Ibid* p. 32
19. Mwangi Chege, "A dismal Record", Quoted in Society Magazine, Jan. 4, 1993, p.28.
20. E. Barker, (Trans), Politics, Oxford University Press, New York, 1958, p. 181
21. See P. L. O. Lumbumba (Ed.) The Advocate, Law Society of Kenya, Nairobi, Feb. 1993, p. 25 - 29
22. Njehu Gatabaki (Ed), Finance Magazine, Feb. 15, 1992, p.31.
23. Diane Ravitch, "Education and Culture in a Free Society", Quoted in *Op. Cit.* No. 34, July 1991, p. 42.
24. "The Weekly Review", Nairobi, 20<sup>th</sup> June, 1977, p. 4.
25. Charles Louis Montesquieu, The Spirit of Laws, Quoted in W. T. Jones, Masters of Political Thought – Machiavelli to Bentham Vol. 2, George G. Harrap & Company Ltd., London, 1980, p. 218 – 247.
26. P. L. O. Lumumba (Ed), The Advocate, Law Society of Kenya, Feb. 1993, P.9.
27. In Gitobu Imanyara Vs Attorney General Miscellaneous Civil Application No. 7 of 1991, in The Advocate, Feb. 1993, P. 9.
28. Githu Muigai, "Constitutional Government and Human Rights in Kenya", in Lesotho Law Journal, 1990, P. 134.
29. "The Sunday Nation", Nairobi, Oct. 20th, 1979, p.3

30. See Constitution of Kenya, Act No. 14 of 1986.
31. *Ibid.* Act No. 7 of 1982.
32. *Ibid.* Act No. 2 of 1990.
33. Enid Lakeman & James D. Lambert, Voting In Democracies: A Study of Majority And Proportional Electoral Systems, Faber and Faber Ltd., 24 Russell Square, London WC1, 1946. P. 19.
34. Aloo Ochola, "Of Democracy, Politicking and the Legal Profession in Independent Kenya", quoted in the Nairobi Law Monthly, No. 26, October, 1990, p. 22.
35. Imam Ayesha, "Democratization Process in Africa: Problems and Perspectives", In Codestria Bulletin, No. 2, Codestria, Dakar, Senegal, P. 5.
36. Michael Margolis, Viable Democracy, Appleton Century Crofts, New York, 1968, P. 59.
37. See Constitution of Kenya, Act Number 7 of 1982.
38. "Daily Nation", Nairobi, April 3, 1989, P. 2.
39. Constitution of Kenya, Chapter 5.
40. Marx-Engels, Sochivenia 1, P. 83.
41. Daily Nation, "Government Bans Financial Review", Nation Centre Nairobi, Saturday, April, 22, 1989, P. 1.
42. *Ibid.* March, 20th, 1989 P. 1.
43. *Ibid.* November, 5th, 1994, P. 1.
44. *Ibid.* 29th April, 1989, P. 5.
45. J. Maina, "Nyayo: An Era of Labels", Finance Op. Cit. p. 23.
46. John Dewey, Liberalism And Social Action, quoted in Encyclopedia Americana Vol. 8, Americana Corporation, Danbury, Connecticut, 1979, P. 686.
47. Catholic Bishops of Kenya Op. Cit., P. 14.
48. H. Wheeler, Democracy in a Revolutionary Era, Frederick A. Praeger Publishers, New York, 1965, p. 67.
49. "Weekly Review", Nairobi, March 17, 1976 P. 6.
50. Omondi Tunya, Chief Magistrate in Republic Vs Lawford Imunde, Criminal Case No. 1550 of 1990, quoted in the Nairobi Law Monthly, No. 41, Feb/March, 1992, P. 18.
51. Gitobu Imanyara (Ed)," The Political Trial in Kenya", quoted in *Ibid*, P. 19.
52. *Ibid.* P. 14.
53. Gitobu Imanyara, Op. Cit. P. 21.
54. William Tordoff, Government and Politics In Africa 2nd Edition, The Macmillan Press Ltd., 1993, P. 15.
55. Michael Margolis, Op. Cit. p. 85.

## CHAPTER FIVE

### **DEMOCRACY: DRAWBACKS AND LESSONS FOR THE FUTURE**

The first lesson that ought to be learned from our experience is that it is one thing to write constitutions that promise respect of democracy and human rights but another to observe them. Kenya adapted a constitution with elaborate but empty promises of freedom and rights.

If democracy as a way of life is to survive, therefore, we must distinguish the kinds of individual freedoms that are essential to it from those that are unessential or disastrous.

The proponents of monolithicism have argued that there is need to re-interpret democracy to suit our Kenyan situation. This, they say, is due to the fact that our cultural, economic, social and political situations are different from those of the West.

...Copying foreign systems, whether Eastern or Western won't do since these are alien to our cultural backgrounds. The importance of the "consumer" type of indigenous African governments should not be dismissed out of hand by critics of single party systems ... Kenyans should stick to African Socialism which is rooted in our cultural traditions and is closest to our past indigenous government<sup>1</sup>

However, it is this study's submission here that the meaning of democracy does not change with locality. Democracy in the Lincolnian sense `government of the people, by the people, for the people'<sup>2</sup> requires that the Kenyan leaders create mechanism that can enhance it rather than looking back to the traditional past to justify their undemocratic practices. After all, the procedures and functions of modern state have no parallel in the African traditional communities. Tradition, therefore, cannot be reasonable justification for undemocratic practices.

Even if a leaf is borrowed from governments in traditional societies, nowhere

would it be found that the 'executive' usurped the powers of the 'judiciary'. A despot had no place in traditional governments. Every human activity in traditional society was directed by elders who arrived at decisions by collective agreement and no one could go hungry when a neighbour had food to spare. Social sanctions controlled the behaviour of the rulers and the ruled and those who went against them were visited by the wrath of ancestral spirits!

## 5.1. THE COLONIAL LEGACY.

Colonialism and its attitudes die hard. This is why to understand the politics of Kenya it is important to look into the role played by colonialism in shaping the Kenyan political institutions. In Colin Leys' words:

In a neo-colony, politics must be primarily understood in terms of the interplay of economic and social forces originally generated by colonialism<sup>3</sup>

The advent of colonialism, first in the guise of the Imperial British East African Company, and subsequently direct British control caused a great deal of disruption; demoralisation and discontent amidst the Kenyan people.<sup>4</sup>

Colonialism is an evil that uprooted people from their homes, incapacitated others, colonised our minds, created classes and status.<sup>5</sup> The colonialists were determined to stay and used various repressive methods to try and perpetrate their stay. Sections of the law such as the Public Security Act were used to curb any form of opposition. The colonialists used the so called institutions of control to suppress the indigenous people in order to justify and maintain their own existence.

The British occupation created tribalism, racism and regional imbalances.<sup>6</sup> Matters were made more complicated by the presence of collaborations.

It should be asserted here that the hangover of colonialism still dominates the practice

of democracy in Kenya. For example, the Public Order Act had been enacted by the British for oppressive purposes. Yet, we have adopted it and continue to use it to suppress our own people. The Act remains essentially the same as the colonialist promulgated it on June 3, 1950.<sup>7</sup> It is laden with provisions which are truly inimical to the notions of democracy and the due process of law.

At independence, the founding fathers were only interested in the question of the Africans taking over the existing system and not that of changing it. They had watched the colonialists suppress them using many methods. On coming to power, they adopted the same laws that had been used to suppress them to suppress and crash opposition from their own people! Over the years, the leaders have isolated themselves from the people just like the colonialists had done. They have, therefore, enhanced the culture of "*mbwa kali*"; that was created by the colonialists.

In essence, therefore, the Kenyan Founding Fathers just took over from where the British had left. The majority were only interested in promoting their economic standing. The ignorant masses simply took sides with whoever satisfied their immediate needs. The leaders, therefore, inherited laws that were brought by colonial masters to criminalise political activity to be able to silence opposition, and have over the years used them to perpetuate their stay in power.

A new thing has a flattering and infatuating appeal, and inheritance of power from the White colonialists with all its glory must have been more than infatuating. It has indeed been intoxicating! One hopes that time will come in Kenya when a leader, after two terms of office will retire to make way for a new man with a fresh idea and a new approach. The Kenyan leaders are yet to overcome that colonial legacy of wanting to hold onto power by any means and especially by suppressing any form of opposition. It is a new form of colonialism, under fellow Africans.

Whereas the British policy of "divide and rule" ensured their continued stay in power, it was devastating for the Kenyan people in that it only helped to arouse ethnic animosities. The colonialists thrived on these animosities to perpetrate their stay. With independence, it is very disquieting to note that the Kenyan leaders too borrowed from the British and have continued to manipulate tribal/ethnic feelings to their advantage.

Since the colonial days, successive leaders have manipulated ethnic loyalties for their own political expediency/survival. The British strategy of "divide and rule" through fanning tribal rivalries, and playing different groups against each other has been used by both Kenyatta, but more spectacularly by Moi...<sup>8</sup>

As has already been mentioned, the presence of collaborators during the colonial period did not make matters easy. By surrounding themselves with collaborators, the British were able to control the Kenyan people.

It is important to note here that after independence, the Kenyan leaders have borrowed the same technique from the British. By surrounding themselves with a number of sycophants, they fight any form of dissent. It is a new form of "divide and rule". Ironically, it is being applied by the very leaders who went out of their way to fight and oppose it when it was being practiced by the British.

From the foregoing, it should be noted that laws enacted by the British to suppress any form of political activity should not be resting in the constitution. Kenyans seem to have just moved from one form of colonialism/suppression to another.

The challenge at independence was to create unity out of the chaos caused by colonialism. However, the elites who demanded independence erred in believing that self-government and democratic government were identical. They believed for the most part that democratic self-government entailed the full paraphernalia of the modern polity, including a legislative body under the dominance of the majority party. Therefore, instead



of abolishing what the British had created, they just took over.

Our challenge to Kenyans today and especially to the leaders is to secure the safeguards of democracy by rising above the colonial attitudes. It is time we did away with those colonial legacies such as tribalism, oppression and regional imbalances, which continue to make glaring dents to our practice of democracy.

In conclusion, this research has unveiled the fact that the colonial legacy continues to affect the practice of democracy in Kenya. Repressive laws such as the Public Order Act and the Public Security Act are legacies we inherited from the days of British occupation in this country and it is a shame that they are still in our statute books.

One of the greatest critics of the Public Order Act (Cap. 56), the late Jean Marie Seroney (Member of Parliament for Tinderet), moved a procedural motion on April 17, 1973, begging the National Assembly to introduce under Standing Order 95(2), an Act of Parliament to amend the Public Order Act. Although the motion was passed, nothing materialised thereafter. This is because the Act served and still serves the leaders better as it stands today.

It can, therefore, be submitted here that the Kenyan leaders are yet to overcome the colonial legacies and these continue to be detrimental to the practice of democracy here in Kenya.

## **5:2 OF DEMOCRACY AND CULTURE.**

At the beginning of this work, we sought to underscore the role of culture in the democratisation process and argued that it is culture that fashions values, attitudes, habits and beliefs of individuals and social groups. In essence, therefore, it is at the root of behaviour and conduct in society.

It is through culture that individuals and groups learn to recognise, accept and

respect established social institutions and practices. It is in line with this that Afrifa

Gitonga correctly argues that:

...the superstructural foundations of democracy are therefore to be found in values, beliefs, and attitudes of the people ...<sup>9</sup>

In the course of this research, it was revealed that culture has been used to a great extent to hinder and abuse Human Rights in Kenya.

One of the reasons advanced by the Kenyan leaders against multi-partism for example is that it cannot take root and survive in Kenya because the African culture does not have fundamental values such as radical individualism, which form the basis of democracy and Human Rights in the West.

They have failed to recognise that culture is dynamic and we cannot keep looking back to the traditional past of culture to justify the present undemocratic practices.

In Kenya, culture has always emphasised fidelity to predetermined roles and encouraged an environment of uncritical subservience to those in authority. These elaborate rituals of deference to authority have made it impossible for the Kenyan leaders to accept any form of criticism.

At independence, therefore, we had the awkward position of having a Constitution with democratic principles but cultures unschooled in the democratic tradition. Although the Founding Fathers based their demands for freedom on lofty democratic ideals it is doubtful that they ever imagined that they would have to subject themselves to the self-same principles they professed. Neither did we expect them to.

Soon we were singing the old songs, only this time we substituted 'President' for 'Chief'. The new President became the Father of the Nation, the wise elder, the brave warrior. The ancient symbols of power and authority were wielded with benign benevolence (e.g the flywhisk, the walking staff etc.), or worn with an air of ostentatious

majesty (the leopard skins, the flowing robes). And the Kenyans in an effort to endear themselves to these leaders have sang each other hoarse, betrayed or killed one another just as our ancestors had done at the courts of their chiefs.

It is not enough to have a democratic constitution as this does not necessarily guarantee democratic practice. Democracy must go beyond constitutional stipulations to embrace a whole tradition and culture. This is because a democratic mentality must act co-operatively with statutory democratic stipulations in a relationship of mutual strengthening and inspiration. There is need to cultivate a democratic culture. It should, therefore, be recognised that democracy is both an attitude and a value;

...it is an attitude because it is a way of doing things that is dependent upon how we regard ourselves, our abilities and those of others. As an attitude, no doubt democracy can be taught and people educated about the limitations of men as opposed to the *tout puissant* attitudes that underlie most undemocratic systems.<sup>10</sup>

For a culture to be a foundation for democracy, it must be one whose teachings promote the democratic ideal. Among other things, education must preach the gospel of equality, freedom and human dignity. We cannot profess democracy when we also allow a culture that has always dehumanised women and denied the young a say. We cannot hope to run a democratic system of government when our personal and cultural interactions are informed by unfairness, intolerance and intransigence.

Deliberate efforts must be made to develop a democratic culture. This is because democracy is not an inborn faculty.

Democratic behaviour is not a genetically conditioned, inborn or inherited faculty - it is learned. The practice of democracy must therefore be taught to its practitioners. It belongs to the cultural patrimony of a people.<sup>11</sup>

However, rather than develop a culture conversant with democratic ideals, the Kenyan leaders prefer to subscribe to the form, not the substance of democracy. This is

why, for example, when faced with multi-partism, we have faltered. This is because we have no lasting experience with pluralism. 1963 and 1964 as well as the tumultuous 1968 - 1969 periods did not provide us with much needed experience in running a multi-party democracy. Therefore, in the past we have had no opportunity to develop a democratic culture.

Tribalism, intolerance and eliminating those people rising to prominence (Refer to the murders of J. M. Kariuki, Robert J. Ouko, Tom Mboya, Pio Gama Pinto e.t.c) are all pointers to a culture unschooled in democratic ideals. It is yet to be learnt that democracy requires meaningful and extensive competition among individuals and organised groups for all effective positions of government power, at regular intervals and excluding the use of force. However, our traditional culture on which the leaders greatly rely is not generally attuned to competition. This then explains the political murders.

The repeal of section 2(a) of the constitution of Kenya should not have been an end in itself. It should have served as a step towards the strengthening of a democratic constitutional framework within which we would all debate and seek to change the oppressive, non-democratic aspects of our culture.

However, if the squabbling and in-fighting in the opposition parties is anything to go by, then Kenyans still have a long way to go in terms of developing and nurturing a democratic culture.

For example, the schism in FORD was not based on matters of ideology or philosophy but on simple procedural matters - where to locate the party headquarters and how to choose their Presidential nominee, both of which should have been put to the vote. But these are ostensible reasons. The acrimonious intra-FORD exchanges elated a sad oppressive feeling of *deja vu*. The expulsions, the blatant lying, opportunistic posturing, threats, or violence, and the willingness to use people literally as clubs to fight for

personalised agendas are clear indications that the people have not learnt from the past.

Kenyans anointed those heading their factions even before they had subjected themselves to any kind of democratic process. Around each leader, sprouted people, singing their praises and cautioning those that would deign to oppose them. Once again, they were ready to betray, to even kill to attract favourable attention from our "Anointed Princes". The leaders, encouraged by this show of deference, demanded that they be given positions of leadership as a reward for their suffering. They forgot that in a democracy, all effective governing positions are elective.

For example, when Kenneth Matiba was freed from detention, he demanded to be made the chairman of Forum for the Restoration of Democracy (FORD) on grounds that he had suffered while in detention. Odinga too expected to receive the same favour simply because had been a victim of house arrest and detention while fighting for more democratisation.

From the foregoing, it can be argued that to get out of the prevalent culture of violence, intolerance, corruption, greed and injustice, deliberate efforts must be made in changing our attitudes. This should start at a personal level and go all the way to the institutional and national levels. We cannot keep looking back to our traditional culture to justify our malpractices. This is because Kenyans have to realise that culture cannot be static. And as Mahmood Mamdani observes;

Every culture is characterized by a process of continuity, discontinuity, and change; and it varies not only from one geographical location and/or historical period to another, but also from one social group to another<sup>12</sup>

The vitality of an institution can be measured by its ability to adapt to the changing times and to incorporate its dynamic forces into the living community. Kenya has failed this test. This is because, She wants to retain Her traditional culture within a modern

democratic constitution. This is detrimental to democracy.

The great challenge to the government, therefore, is to enlighten Kenyans to have the values, skills, attitudes and knowledge embodied in a democratic culture. In Afrifa Gitonga's words:

... other things being equal, the amount or degree of democracy in any given society is directly proportional to the degree of acculturation of the people in democratic values, attitudes and beliefs. For democracy to exist, survive and prosper, it requires that the people be bathed in and drenched with the democratic ethos. It is in this manner that education and culture constitute one of the most fundamental foundations of democracy...<sup>13</sup>

One of the lessons that have come out as a result of this study is that intellectuals, politicians and the people have to give democratisation a content by not only subscribing to the form, but its substance, too. Democracy requires culture and institutions. That way, it becomes irreversible. When people develop and practice a democratic culture, there is profusion of independent or autonomous associations in society, which form the basis of citizens' power.

Kenyan leaders have to face up to the fact that it is anachronistic to keep referring to our traditional past every time they are faced with the task of changing their attitudes towards democracy. After all, the workings of the modern democratic polity have no equivalent in our traditional past. In B. O. Nwabueze's words:

The functions and procedures of modern state have no parallel in African traditional communities. Tradition has no relationship to modern states and it is not reasonable justification.<sup>14</sup>

From the foregoing, it is clear that culture has crucial contributions to make to democratic practice which can either be negative or positive depending upon those who shape policy (the Kenyan experience has been in the negative). The Kenyan leaders should take cognisance of this fact.

### 5:3 DEMOCRACY AND THE MONEY FACTOR

In Kenya, politics seem to be all about national unity and personal economic development. It can, therefore, be pointed out here that democracy has had no more persistent or insidious foe than the money power.<sup>15</sup>

Our history has shown that money has been used as a bait to win the support of those with votes. One is reminded here of the saying that, "money is the root of all evil".<sup>16</sup> Indeed it has been; and most of the crimes perpetrated against Kenyans by the government have been due to the money factor. Those in power want to hold onto power, not just for the sake of power but because of the economic power that it gives them. They are scared that if they step down, they will be asked to account for how they acquired their property although there is a possibility of not being required to do so.

In the eighties when the government was suffering from a profound sense of insecurity, those who spoke out against any social evils lost their jobs hence breaking their resistance. This was the same technique applied against those lecturers and medical doctors who went on strike to demand for better terms of service.<sup>17</sup> The governments' policy has been to make them go hungry so as to break their resistance.

Most Kenyans have been so crushed by need and poverty that they have no time for politics or democracy for that matter. As a result, the government has made most of them sycophants by showering them with material benefits. Personal benefits and safeguards have, therefore, risen above public interests. Democracy has suffered in Kenya because freedom has been equated with material benefits that the government can speciously promise to distribute to all with votes.

The state has monopolised the monetary process for many years. In its "omniscience" and "omnipotence", it has subordinated the operations of the monetary

system to the whims and caprices of political expediency. It has, therefore, destroyed, altered and has determined the socio-political, and economic system. This has been carried to the extreme to deny the individual his means of independence; the control of his purse, thus, being used as the basis for a demand for the control of his person.<sup>18</sup>

It is common knowledge that for any person to freely advocate any cause, he must have a means of livelihood independent from the state. However, since colonial times, Kenyan political authorities have exercised great control on means of livelihood of many as a provider of land, jobs, education, foreign exchange, trade licences, and even as a distributor of famine relief. Those that fall out with the government lose their jobs, are denied promotions, trade licences and loans from government banks. Further, national resources are used to divide, frustrate and confound the opposition and to buy support of the electorate by threatening that those areas that do not support the ruling party during the elections will not benefit from the national resources.

The government should, therefore, desist from using its economic power to frustrate people and win their support by illegal means. Much of our political and economic experience relates to the efforts of individuals to prevent the grasping hand of government from emptying both their pocket books and their bank accounts.

If Kenya is to survive as a free society, it must seek to increase rather than destroy independence from political influence in monetary affairs; it must aim at the reduction of monetary desertion, at its minimisation and ultimately at its elimination. It must adopt an economic policy that governs all economic affairs. There should be creation of the institutional framework of law and order for the economy and its protection by supervision and law enforcement.

However, our leaders have been more concerned with grabbing whatever resources they can lay their hands on and investing those outside the country. Therefore, in Kenya,



the material conditions have been vitally relevant to the kind of democracy that we have. Those who have aided the government in their endeavours to frustrate those with dissenting views have consequently been rewarded materially. Thus, the economy has been used to undermine democracy in Kenya. Personal aggrandisement has been put above public interests.

The greatest support that the government can give a free economy is to conduct its own household in a fashion that keeps the currency strong and its purchasing power stable to refrain from depreciating, by its own deficit financing and borrowing, the supply of investment capital for private economy; and to use its power of adjusting reverse requirements and changing the discount rates to prevent excessive expansion or contraction of the flow of credit, and of money supply.

As a result, when faced with a situation where the money-game has become the order of the day, democracy in Kenya requires intelligence, self-control and conscience. We require leaders that can rise above personal ambitions. This is because, the relation between democracy and forms of property is extremely tangled.

In this multi-partism era, the government is using discriminatory policy of development against regions of the country where the KANU party was not a winner in the last (1992) elections. In order to have their areas developed, some people have been forced to defect to KANU. Ideally, the search for democracy is always said to have a common object of public good. But juxtaposed with private interests, 'public good' concept has always been overridden. Money has always tended to derail peoples' common purpose- this is what happened to the original Forum for the Restoration of Democracy (FORD).

KANU has been accused of buying out members of the opposition. Thus in Kenya, politics have been turned into an economic power game. Those holding high positions in government stay there because they can defend any evil that the government does in

exchange for personal material benefits.

As Thucydides - that great Athenian historian (455-400 B.C.) reports, the Peloponnesian war which shattered the Great Athenian democracy, was a result of naked ambition for power-leaders grappling for power partly for notoriety's sake, and partly for its material benefits. So, it ruined Athenian democracy.<sup>19</sup> Self-same ambition has no doubt destroyed Kenya's hope for democracy.

From the foregoing, it is clear that what has helped destroy democratic institutions in Kenya is the greed for personal aggrandisement. Most government officials in charge of administration have crushed any form of dissenting opinion in the hope of being rewarded materially. Thus, we need to go beyond personal interests and be more concerned with public interest. Democracy is served by the existence of a healthy and prosperous economy, which is intertwined with full bellies and peaceful minds. It is this latter aspect that the government has used to undermine the foundations of democracy.

The questions of self-satisfaction and nature have become a constitutional affair - hence the partisan change of law to secure those interests. This manipulation has developed dictatorship tendencies in the executive, which have been associated with the reign of President Moi.

Greed and lust for personal enrichment has been used to entice even high ranking academics to publish lies in the hope of personal rewards from the government.

People like Prof. Henry Mwanzi and Philip Ochieng' have presented so contradictory a face in the course of their writing that they can no longer be said to represent any progressive ideals. For example, while schooling and working in Tanzania in the early 70s Philip Ochieng' referred to the Kenyatta regime as a 'man eat man society'. But immediately after this, on coming to Kenya, he exploited the breadth and length of his mastery of the English language to defend the Moi administration and pour scorn on progressive forces like former American Ambassador to Kenya, Smith Hempstone.<sup>20</sup>

Thus, money has played a very significant role in undermining human rights and the safeguards of law in this country. People have been concerned with personal satisfaction, than with public interests. The high rate of corruption which has eaten deep into the Kenyan moral fibre can be traced back to the money factor. The political elite pursue their own personal political and economic agenda pretending to act on behalf of Kenyans.

Constructive criticism is the hallmark of progress in every line of human endeavour, certainly so in government and, therefore, also in the political parties that have become agencies of government. Even political institutions designed to maintain freedom will fail in that objective unless they are operated as intended. This is particularly the case when freedom is equated with material benefits that the government can speciously promise to distribute to all those with votes. In such a situation, only the critical faculty of the conscientious citizens can be relied upon to maintain the now insecure blessings of liberty. This underscores the importance of the economy in the democratisation process. In short, money continues to be one of the greatest and insidious foes of democracy in Kenya.

#### **5.4 THE ROLE OF EDUCATION IN A DEMOCRACY: THE CASE OF ENYA.**

In the course of this research, one factor that we established is the fact that there is a lot of ignorance in the understanding of democracy and its operations. This underscores the need for the spread of civic education; allowing for an informed and critical awareness of the issues and problems of the times. This quickens and strengthens democracy.

Civic education, therefore, plays a central role in shaping a free society. If the avenues of communication are open, an educated electorate can become aware of the consequences and costs of past policies. The more informed and better educated the electorate, the healthier the democracy. We are reminded of Spinoza's declaration that men may become enslaved by their ignorance.<sup>21</sup> Uninformed freedom of choice may take the

road of disaster.

Although constitutional reform is a step towards more democratization, it will not solve all the problems that the Kenyans are facing. As the Catholic Bishops of Kenya have pointed out:

...people can make new laws but laws cannot make new people. It is our personal responsibility to achieve a change of heart... democracy is indeed a good form of government, but it requires education in those who govern and in those who are governed...<sup>22</sup>

In order that the people be able to choose their leaders wisely, they must be fully informed and literate. Therefore, civic education cannot just be of an elite - whether of blood, money, or brains. Not all can be chosen but all must be called; therefore, equality of an educational opportunity must be provided.

For the people to be fully informed, they must have access to different views, and they must be free to express their own views. Therefore, a long process of moral and civic education is required in order to understand and to implement a real participatory democracy. The education given to the people must preach equality, human dignity, and freedom among other things.

The great challenge to the government, therefore, is to educate Kenyans to have the values, skills, attitudes and knowledge that is needed in a democratic society. This same education they should apply to themselves because they are yet to develop the right attitudes as far as democracy is concerned. The object of this education should be to educate free minds in a free society.

The government should stop thriving on the ignorance of the masses. In order that Kenyans become responsible members of the society, they need to be educated on their rights and responsibilities as citizens.

The composition of the political parties that were formed after the re-introduction of

multi-partism is a clear pointer of the misconception of multi-partism. The parties received their support according to the ethnic background of the leaders. For example, Ford Kenya has most of its support from Nyanza, whereas Ford-Asili and Democratic Party have most of their support from Central Province. Civic Education would go a long way in teaching Kenyans that political pluralism is not synonymous with having political affiliations according to one's ethnic background. Ethnicity should, therefore, not be the guiding principle in a democracy.

The electorate needs to be educated on the principles of elections and multi-partism. This is because, if we look at how they voted during the 1992 elections, they did not vote for principles or programmes that a candidate stood for, but rather, for the party on whose ticket he/she was vying for the elections. Lack of knowledge (civic education), led to the voting out of candidates, not because of their lack of political leadership, but because they had "vied on the wrong ticket" as the electorate viewed it. Kenyans have to be taught that when a few people, or elements in a party have done wrong, it does not necessarily mean that the party is bad.

Further, campaign rivalry should not be misconstrued to mean violence. Kenyans should resist the attempt to turn the would be peaceful campaigning into violence "even when others would provoke them to violence".<sup>23</sup>

The political parties and pressure groups should educate the electorate so that they vote wisely. This is because, it is not enough to have the vote, one also needs knowledge on how to use it. In the words of the Catholic Bishops:

...The act of voting is simple, but the decision to vote for a particular candidate requires civic and political maturity...<sup>24</sup>

Some of the messages that need to be sent home to the voters are that they should not sell their voting card or vote. Also that those candidates that give the electorate money

so that they can be voted in are bribing, they cannot be the best. The electorate should know that these candidates cannot give money for five years. Therefore, let the electorate take their money and gifts, but vote wisely.

Further, a voter need not vote for Presidential, Parliamentary, and civic candidates of one party. Vote for the right person despite your party allegiance.

To vote for a candidate, the procedure is that one places an X after their name and party symbol. The voters should not be cheated that when they put an X after someone's name it is because they do not want them.

A voter should be educated to know that he/she has the right to campaign for any party or person either in the public or through the "Whisper Campaign". If one is being assisted to vote, they should make sure that the agent of the party whose candidates they are voting for is present and that the X mark is placed against the symbol of the party of the candidate of their choice. The political parties must, therefore, mobilise the people to resist electoral malpractice. They should also teach Kenyans that at the time of campaigning, emotionalism, exaggeration and character assassination arouses negative feelings towards its target by stirring up emotions rather than by presenting facts. The voters should, therefore, not be led by emotions in making a choice.

Citizens need to be taught that their vote cannot be determined by sympathy for a candidate as a person because of tribal affinity, or because he or she excels in political propaganda presented by political parties and candidates ...  
A well-educated citizen should know that the vote of the political opposition is not just to oppose but also to propose better social, political and economic programmes...<sup>25</sup>

On the other hand, the government should learn that to claim infallibility is to take the path of fanaticism; to impose our own values on others makes us zealots and tyrants. Those who disagree with us about what we believe in or cherish most deeply are not necessarily fools or scoundrels but mortals caught up, as we are, in the inevitable

partialities and limitations of the human animal.

Political parties must go beyond being instruments of representation to be instruments for addressing the economic, social, political and cultural aspirations and requirements of the people. A party which is to foster the democratisation process in Kenya must establish a programme that will address the just aspirations of all sectors of society irrespective of gender, race, ethnic origin, religious or philosophical position.

Kenyans must be taught that democracy is much more than a system of delivering material goods. They should, therefore, not give their votes to a particular party because it promises to award them national resources. Let Kenyans be told that national resources such as education, public health and communications are a common right and not a gift from the government. The KANU government should, therefore, desist from treating people unequally by maintaining that only those areas that supported KANU during the election will benefit from the national resources.

Through the public media, the citizens should be educated that it is wrong to just complain about injustices without any action. It is murderous fatalism that leads to accepting anything (no matter what) and to lowering one's resistance, even when it might be possible in the end to improve the quality of life and to remind each other that human rights are universal and not the preserve of any one individual, or class of people.

It is this study's submission here that questions about the strengths and weaknesses of the society's basic institutions must rest on knowledge. By learning what the systems strengths are, Kenyans can keep from changing what works; by dissecting its weaknesses, they can see how to correct them. However, none of this is possible without the knowledge, which will enable the citizens to make honest and unbiased scrutiny of issues. This knowledge can only be achieved through civic education.

In summary, we would like to categorically state that the role of civic education in a

democracy is central and cannot be ignored. There is need for civic education, not only, to help Kenyans to introduce changes, but, also to accept and implement them. It should be an ongoing process of awareness of rights and duties, and a new vision of the common good.<sup>26</sup>

## **5:5 RECAPITULATION**

This research has revealed that the problems and challenges of democracy are many. Some flow from the tension between the emphasis on equality in the democratic ethic and the desire to preserve individual variation and freedom. But despite all the drawbacks and limitations to democracy, there is considerable point to Winston Churchill's declaration: "Democracy is the worst possible form of government except - all the others have been tried!"<sup>27</sup>

The basic premise of democracy is participation which should start with "freely given consent". For, as Mill observed, "the food of feeling is action".<sup>28</sup> Let a man have nothing to do for his country, and he will not care for it. Kenyans should, therefore, be allowed to participate in the political decision making of their country through free and fair elections.

The freedoms of speech, press, worship, movement, assembly and equality before the law as enshrined in the Kenyan Bill of Rights (Constitution of Kenya, Chapter 5), should be a reality for all, and not, a preserve of those in power. Ethnic backgrounds, racism, and social status should never be used as grounds for treating Kenyans unequally.

The demand for equality is not so much concerned with matters of fact, as with value principles and rules of behaviour such as we must recognise ourselves in the other or it is our duty to treat others as our equals, and not as our inferiors or enemies on grounds of ethnic origins. The government should be so organised as to enable the maximum



individual freedom consistent with equal freedom of others.

It should be noted that the pro-democracy forces in Kenya are not robots implementing a western political agenda. They are fighting for their own freedom using tools and techniques developed and tested in the west.

The government should, therefore, create a level playing ground for itself and the opposition. This is because, the right to political participation can only be realised through the political framework and procedures of a multi-party democracy, which have in-built mechanisms for ensuring political diversity and handling political conflicts in free and open encounters, in a " market place of ideas".

Democracy is not possible without respect for diversity and the acceptance of pluralism in authentic dialogue and collaboration between the ruling authority and the political parties. These parties are not to be called "opposition parties", as if their sole vocation was just to oppose the decisions of the government. The role of opposition parties is rather to positively co-operate with the government for the common good, to ensure that the contribution is respected and to be informed and inform about the way public funds are employed. Their political manifestos should contribute, with constructive criticism, to the progress and good governance of the country<sup>29</sup>

On the other hand, political parties must go beyond being instruments of representation to be instruments for addressing the economic, social, political and cultural aspirations and requirements of the people. A party which is to foster the democratisation process in Kenya must establish a programme that will address the just aspirations of all sectors of society irrespective of gender, race, ethnic origin, religious or philosophical position.

The opposition parties should be able to rise above internal divisions and struggles for personal power and prestige as we are experiencing today, only two years after the re-introduction of multi-partism.

The government and the opposition should, therefore, move beyond the rhetoric of confrontation to embrace dialogue, thus ensuring a successful, substantive transition to democracy. Our analysis should serve to show, that bad policies in government though slow are sure in their operation, and will gradually destroy it. Our leaders need to learn that there is nothing like finality in political development and stop interfering with the democratisation process.

Kenyan leaders have yet to learn that the free and open society is by definition dynamic and incompatible with any static stratification or guarantees for any status quo. The people must be allowed to think and to air their views. Democracy should be thought of not as rule in the interest of a class, but as rule in the interests of the whole people transcending classes.

Democracy exists to the degree that there is an "open society" in which the relation between the governors and the governed is consistent with the principle that the state is at the service of the citizens and not the citizens, of the state; that the government exists for the people, not vice versa. The legitimate object of government, therefore, is to do for a community of people whatever they need to have done, but cannot do at all, or cannot do so well, in their separate and individual capacities.

Being a unique and almost utopian system of government, democracy requires personal dedication of all people involved in its installation. This in essence is what the Lincolnian theory of democracy (as government of the people, by the people and for the people) entails. It requires that all forms of sectarian biases and prejudices - which Kenyans in large numbers do not appreciate - should be eliminated.

Authentic democracy is possible only in a state ruled by law, and on the basis of a correct conception of the human person. As the Catholic Bishops have observed, a fundamental condition for the establishment of democracy is the recognition of the rights of

the person and social groups, be it children or adults, men or women, rich or poor without any racial or social discrimination<sup>30</sup>. The government has to do away with its discriminatory laws such as the Public Order Act, Public Security Act and The Chief's Authority Act.

Freedom can be successfully promoted if the task is faced with patience and unflinching courage, and if we remember always that where enough individuals are deserving of freedom, they will themselves insist that government does not stifle it (The struggle for multi-partism should be a pointer to this).

However, the final victory of democracy will not be achieved until Kenyans have conquered their greed and lust for power and have learned to obey the laws of man and its teachings.

Note that democracy is a rare and desirable political form, vulnerable in theory and practice and always incomplete in certain respects. Further, democracies do make mistakes but as Cohen argues, if the mistakes of the people are not to be borne, whose mistakes are to be preferred?<sup>31</sup>

There should be a review of the constitution, which over the years has been dismantled in the name of amendments. Our constitution was composed when there was a *de facto* one party system and it was suitable to the situation of that time. We now need a constitution fitting to the multi-party situation.

However, Kenyans need to be educated on their rights and social responsibilities as citizens of this country. This is because, a review of the constitution will not create new people. Civic education is, therefore, necessary to not only create awareness but, also enable Kenyans to accept and implement these changes. As the Catholic Bishops have correctly argued:

The road to democracy is not an easy road. Let it be clear that democracy is far more than just a multi-party system. It

requires respect and protection of the human rights of each individual and of all groups, especially minority groups... A country in which the authorities cannot be accountable to the citizens in case of public financial scandals and political murders is certainly not on the road to democracy. A country in which the government is still spending billions on luxury projects whilst the education, health and social service system has become a scandal to the tax payer and a burden to Wananchi, is far from the road to democracy...<sup>32</sup>

As can be seen from our experience, a government can only oppress her people upto a certain point, beyond which, the conscientious citizens will decide that a little sacrifice is needed if they are to liberate themselves. Democracy is a gain borne of great sacrifices and loses and it requires people who can rise beyond their personal ambition for power or material gains.

With the re-introduction of multi-partism, Kenya started her walk on the road to democracy. A question one is tempted to ask here is; how far can we take the struggle bearing in mind that the opposition is almost crumbling due to leadership wrangles? Time will tell. Do we still need the donors to make our government rescind some of her oppressive decisions and laws?

The struggle is not yet lost. Now that it has started, there is no telling where it will end, but as history has proved, when the people decide that they want their freedom back, they will demand and fight to regain it. All we need are people and leaders who can rise above their own personal interests; those that can overcome their lust and greed for power and think about the welfare of everyone, not just themselves; leaders who will ensure that the law is applied through persuasion and not oppression as has been the case previously. Further, leaders who will not amend the Constitution in an endeavour to manipulate the law in a parochial and right-handed manner so as to secure their survival in power. Leaders whose response to people's claims to social amenities will not be repression and limitations of Civil and Human Rights as has been the case before. In the words of J.G Holland:

God give us men! A time like this demands strong minds,  
great heights, true faith, and ready hands, men whom the lust  
of office does not kill; whom the spoils of office cannot buy;  
Men who possess opinions and a will; men who have honour,  
men who will not lie; men who can stand before a  
demagogue; And damn his treacherous flatteries without  
winking, Tall men, sun-crowned, who live above the fog in  
public duty and in private thinking; For while the rabble,  
with their thumb worn creeds; Their large profession and  
their little deeds; mingle in selfish strife, lo! Freedom  
weeps; Wrong rules the land, and waiting justice sleeps<sup>33</sup>

Despite the advances that have been made in terms of freedom of speech over the years, the legacy of the fear of reprisals lingers on as was evidenced in the course of this research. Some people who were interviewed were scared that the researcher was a government spy and that their views would be used to have them arrested. Something needs to be done about freedom of speech so that the people are assured that they need not be scared of anything they say, as it is their fundamental right to do so!

In conclusion, it is evident from this research that, to believe that a political system is a democracy simply because it is called a democracy, is a way of destroying democracy by its own name. Democracy requires personal dedication of both the governors and the governed. Unless democratic habits of thought and action are a part of the fibre of the Kenyan people, then political democracy in this country is insecure. What the country needs is a culture of selflessness and sacrifice in order to nurture the budding democracy. But not a "democracy" based on fear, intimidation, self-glory and personal enrichment.

## NOTES ON CHAPTER FIVE

1. Kirugi L. M'Mukindia, "In Support of a One-Party System", quoted in The Nairobi Law Monthly, No.23, Kaibi Ltd., Nairobi, April/May, 1990, p.50.
2. Giovanni Sartori, Democratic Theory, Frederick A. Praeger, Publishers, New York, 1965, p.26.
3. Colin Leys, Underdevelopment in Kenya: The Political Economy of Neo-Colonialism, E.A.E.P, Nairobi, 1994, p.209.
4. *Ibid.* pp.207-247.
5. *Ibid.* pp.207-247.
6. *Ibid.* pp.207-247.
7. See Constitution of Kenya, (Cap.56).
8. Njehu Gatabaki, (Ed.), Kiraitu Murungi, "Political Analysis", quoted in Finance Magazine, Finance Institute Ltd., Nairobi, Feb.15, 1992, p.32.
9. Afrifa Gitonga, "The Meaning and Foundations of Democracy", quoted in Walter O. Oyugi & Afrifa K. Gitonga, (Ed.), Democratic Theory and Practice in Africa, Heinemann Kenya Ltd., Nairobi, 1987, p.21.
10. D. A Masolo, "Ideological Dogmatism and the Values of Democracy", in *Ibid.* p.24.
11. Afrifa Gitonga, *Op.Cit.* p.21.
12. Mahmood Mamdani, "The Social Basis of Constitutionalism in Africa", in Journal of Modern African Studies, Vol.23, No.3, 1990, p.360.
13. Afrifa Gitonga, *Op.Cit.* p.22.
14. B. O. Nwabueze, Constitutionalism in Emergent States, Associated University Press, 1970, p.221.
15. Refer to the defections and counter defections in independent Kenya.
16. "The Sunday Nation", Jan. 28<sup>th</sup>, 1996, p. 13.
17. See Nation Newspapers, 3rd. Jan. 1994, p.1, 7th.Jan., 1994, p.4, 10th. Jan.,1994, p.7.
18. Those that fall out with the government usually have their bank loans recalled or are sacked from employment. Examples include Cyrus Jirongo (Former Chairman of Youth for KANU'92), Oloo Aringo (A Former Minister for Education), Waruru Kanja (A Former Minister for National Heritage), e.t.c.
19. Thucydides, The History of the Peloponnesian War BK.II, quoted in Giovanni Sartori, *Ibid.*, p.334.
20. The People, Apr. 11<sup>th</sup>-17<sup>th</sup>, Nairobi, 1997, p.9.
21. A. G Wernham, (Ed), Benedict De Spinoza, The Political Works, Oxford University Press, London, E.C.4, 1958, p.46.
22. Catholic Bishops of Kenya, Pastoral Letter - Our Social Responsibility, Paulines Publications Africa, Nairobi, July, 1996, pp.5-6.
23. *Ibid.* p.17.
24. *Ibid.* p.6.
25. *Ibid.* p.8.
26. *Ibid.* p.6.
27. Encyclopedia Americana, Americana Corporation, Danbury, Connecticut, 1979, p.685.
28. A. Lijphart, Democracy in Plural Societies: A Comparative Exploration, Yale University Press, London, 1977, p.18.
29. Catholic Bishops of Kenya, Pastoral Letter - On The Road to Democracy, Paulines Publication Africa, Nairobi, 1994, p.15.
30. Catholic Bishops of Kenya, *Op. Cit.* P. 7

31. Carl Cohen, "Autonomy and Authority: The Solution of Democracy", in A.J Minton & T. A Shipka, Philosophy: Paradox and Discovery, Mc Graw Hill Publishing Company, New York, 1990, p.471.
32. *Op.Cit.* p.15.
33. J. G. Holland, "Reflections", in P.L.O Lumumba, (Ed), The Advocate, Vol.2, No.3, Feb., 1993, p.1.

## CITED BIBLIOGRAPHY

- Barker, E. (Translator). Aristotle. Politics. New York: Oxford University Press. 1958.
- Becker, C. L. Modern Democracy. London: New Haven Yale University Press. 1947.
- Berlin, I. Four Essays On Liberty. London: Oxford University Press. 1969.
- Bluhm, W. T. Theories of the Political System. New Jersey: Prentice-Hall. Inc. Englewood Cliffs. 1968.
- Bryce, J. Modern Democracies Vol.1. St. Martin's Street. London: Macmillan and Co. Ltd. 1921.
- Bryce, J. Modern Democracies Vol.II. Macmillan and Co. Ltd. 1921.
- Busia, K. Africa In Search Of Democracy. Routledge and K. Paul. 1967.
- Castel, A. (Ed.) J.S Mill. On Liberty. New York: Appleton Century Crofts. Inc. 1947.
- Catholic Bishops of Kenya On the Road To Democracy. Nairobi: Paulines Publications - Africa. 1994.
- Catholic Bishops of Kenya Our Social Responsibility. Nairobi: Paulines Publications - Africa. 1996.
- Cnudde, C. F. & Neubaue,r D.(Ed) Empirical Democratic Theory. Chicago: Markham Publishing Co. 1969.
- Dahl, A. R. A Preface To Democratic Theory. University of Chicago Press. 1966.
- D'Estaing, G. V. Towards A New Democracy. London: William Collins Sons and Co. Ltd. 1977.
- Ehrmann,H. W. (Ed). Democracy In A Changing Society. New York:Frederick A. Praeger Publishers. 1964.
- Gertzel, F. Politics Of Independent Kenya. Nairobi: E.A.P.H. 1970.
- Graeme, D. Democratic Theory And Practice. Cambridge University Press. 1983.
- Griffiths, A. P. (Ed) Of Liberty. Cambridge University Press. 1983.



- Heater, D. Contemporary Political Ideas. London: Longman Group Ltd. 1974.
- Herbert, A. Marxism And Democracy. New York: Humanitarian Press. 1965.
- Humphrey, S. The Parliament Of Kenya. Nairobi: E.A.P.H Ltd. 1975.
- Jones, W.T Masters of Political Thought - Machiavelli - Bentham (Vol. 2). London:  
George G. Harrap and Company Ltd. 1980.
- Kaplan, I, Dobert, M. K. Marvin, B.J (Et al), Area Handbook For Kenya. U.S.  
Government Printing Office. 1976.
- Lakeman, E. & Lambert, D. J. Voting In Democracies: A Study Of Majority And  
Proportional Electoral Systems. 24 Russell Square London: Faber and Faber  
Ltd. 1946.
- Lenin, V. I. State And Revolution. Moscow: Progress publishers. 1976.
- Lijphart, A. Democracy In Plural Societies; A Comparative Exploration. London: Yale  
University Press. 1977.
- Locke, J. The Second Treatise of Government. Bobbs-Merril Company. 1952.
- Macpherson, C. B. The Real World Of Democracy. Oxford: Clarendon Press. 1966
- Margolis, M. Viable Democracy. New York: Appleton Century Crofts. 1968.
- Medvedev, A. R. On Socialist Democracy. London: Macmillan Ltd. 1975.
- Minton, A. J. & Shipka, A. T. Philosophy: Paradox and Discovery 3rd Ed. McGraw Hill  
Publishing Co. 1990.
- Moi, D. T. Kenya African Nationalism: Nyayo Philosophy and Principles. Nairobi:  
Macmillan Publishers. 1987.
- Morley, F. The Necessary Conditions For A Free Society. Princeton. New Jersey: D. Van  
Nostrand Co. Inc. 1963.
- Nkurumah, K. Africa Must Unite. New York: International Publishers. 1972.
- Nwabueze, B. O. Constitutionalism In Emergent States. Associated University Press.

- Nyasani, J.M (Ed) Philosophical Focus on Culture and Traditional Thought Systems in Development. Evans Brothers (K) Ltd. 1989
- Nyerere, J. K. Freedom And Unity/Uhuru Na Umoja. Dare-Salaam:OUP. 1966.
- Odinga, A. O. Not Yet Uhuru. London: Heinemann. 1968.
- Ogot, B.A (Ed.) Politics and Nationalism in Colonial Kenya. Nairobi: East African Publishing House. 1972.
- Oyugi, W. O. & Gitonga, A.(Ed) Democratic Theory And Practice In Africa. Nairobi: Heinemann Kenya Ltd. 1987.
- Plamenatz, J. Democracy And Illusion: An Examination Of Certain Aspects Of Modern Democratic Theory. London: Longman Group Ltd. 1977.
- Plato. The Republic. Harmondsworth Middlesex. England: Penguin Books Ltd. 1985.
- Popper, K. R. The Open Society And Its Enemies, (Plato). New Jersey: Princeton University Press. 1971.
- Rodney, W. How Europe Underdeveloped Africa. Nairobi: Heinemann Kenya Ltd. 1989.
- Sartori, G. Democratic Theory. New York: Frederick A. Praeger Publishers. 1965.
- Schumpeter, J. Capitalism ,Socialism And Democracy 4th Ed. Macmillan and Co. Ltd. 1952.
- Shils, E. The Fortunes Of Constitutional Government In The Political Development Of The New States In Development:For What?. Hallowell J.H (Ed). Duke University Press. 1964.
- Strong, C. F. Modern Political Constitutions. London: Sidgwick and Sons. London. 1966.
- Tussman, J. Obligation and the Body Politic. New York: Oxford University Press. 1960.
- Wheeler, H. Democracy In A Revolutionary Era. New York: Frederick A. Praeger Publishers. 1965.

- Gathaara, N. Z. "The KANU Government: Consolidation Of Powers: Legal And Extra-Legal Means Since Independence(1963-1978)." (Dissertation). March. 1982.
- Kang'atta, L. M. "Democracy and the Representation of People in Kenya" (Dissertation). July. 1980.
- Kanyi, E. K. T. "Democracy In A One Party State-The Case Of Kenya". July. 1980.
- Mboya, J. T. "Kenya National Assembly: African Socialism And Its Application To Planning In Kenya." Nairobi Government Printer. 1965.
- Muchemi, F. N. "Democracy In Commonwealth Africa With Special Reference To Kenya" (M.A. Dissertation). July. 1980.
- Ojwang, B. J. "Executive Power In Independent Kenya's Constitutional Context"(Thesis). 1976.
- Orwenyo, J. N. "Problems of Ideology in Independent Kenya, Soviet Background and Repercussions in some aspects of Nation Building." Quoted in Historical Association of Kenya Annual Conference, August 1977.

## JOURNALS AND MAGAZINES

Codestria Bulletin. No.1&2. 1992. Dakar. Senegal.

Finance. 16-31 October. 1991

Journal of Modern African Studies. Vol. 23. No. 3. 1990.

Lesotho Law Journal. 1990.

Nairobi Law Monthly. No. 13. 1990.

Nairobi Law Monthly. No. 26. October. 1990.

Nairobi Law Monthly. No. 34. July. 1991.

Nairobi Law Monthly. No. 41. February/March 1992.

Nation Newspaper. Friday March 12. 1993.

New African. No. 272. May. 1990.

Society. January 4. 1993.

Standard Newspaper. Saturday. March 6. 1993.

The Advocate. February. 1993.

The People. April 11<sup>th</sup> – 17<sup>th</sup>, 1997.

Weekly Review. March 22. 1976.