CHAPTER 5

THE ORIGINS AND SPREAD OF ONE-PARTY STATES IN COMMONWEALTH AFRICA, THEIR IMPACT ON PERSONAL LIBERTIES: A CASE STUDY OF THE ZAMBIAN MODEL

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A question can be posed here as to how far is the effective protection of fundamental human rights compatible with the adoption of a single-party system of government? Of the twelve Commonwealth African states, five are, or have been, established as *de jure* one-party states—these are Ghana (1964–66), Tanzania (1965), Malawi (1966), Zambia (1972), Sierra Leone (1978). Three of these, that is, Ghana, Tanzania, and Malawi rejected the incorporation of a bill of rights as a substantive part of their single-party constitutions. It is thus notable that Zambia (1973) and more recently Sierra Leone (1978), the two most recently created *de jure* one-party states in Commonwealth Africa, have, on the contrary, opted for the retention of a bill of rights in their single-party constitutions. In September 1976, an international seminar organized by the International Commission of Jurists on Human Rights in One-Party States, urged in its conclusions that national constitutions could include justiciable bills of rights.[1] But can an enforceable bill of rights exist in, and be compatible with, a *de jure* one-party system? If it can, are there areas of the bill of rights which, nevertheless, cannot operate within the single-party constitutional set-up? Since, among the single-party systems, it is in Zambia that individual rights have received formal constitutional protection for the longest period, the question posed for the present investigation will be answered with reference to the Zambian experience although of course some comparisons with the positions obtaining in Tanzania, Malawi and Sierra Leone will be included in appropriate contexts.

The origins and spread of single-party systems in Commonwealth Africa

Although rule by a single-party made one of its first appearances in the communist countries of Russia and China, its origins and spread in Africa seem to have arisen from the constitutional experiences of the Francophone African states. Before the adoption of either presidential rule or single-party systems in Commonwealth Africa, the Francophone states had already experienced governments under these systems. Thus it might be hypothesized that events in the neighbouring Francophone states might have provided a cue for similar events in the neighbouring Commonwealth African states. Ghana, for example, which first adopted the one-party system in Anglophonic Africa was in proximity with Francophone colonies like Guinea, Senegal, Mali and the Ivory Coast—all of which had already established single-party systems of government.

It is relevant to observe that human rights in those constitutions which drew their inspiration from the Gaullist model of France are protected merely by way of a preamble. The constitutions of Francophone African states have indeed implemented the approach

to the protection of the 'Rights of Man and Citizens' with which the mother country—France— is traditionally associated. It is interesting to note that this approach is closely reflected (though in different forms) in at least three of the *de jure* one-party states in Commonwealth Africa—Ghana (1960), Tanzania and Malawi.[2] It is not out of place to conclude, albeit tentatively, that the constitutional practices in the Francophonic Africa had some impact on the constitutional developments in post-independence Commonwealth Africa.

As already stated, Ghana became the first Commonwealth African state to establish a *de jure* one-party state in 1964. The Convention Peoples' Party (the CPP) under President Kwame Nkrumah became the only legally recognized party. A year later, Ghana's example was followed by Tanzania which constitutionally established the Tanganyika African National Union (TANU) on mainland Tanzania, and the Afro-Shirazi Party (ASP) on the island of Zanzibar as the only political parties in the 'Union' of Tanzania. TANU and ASP have now merged into one party, the Chama Cha Mapinduzi since the union between Tanganyika and Zanzibar became complete in 1977. In 1966 Malawi followed suit when Dr. Kamuzu Banda's Malawi Congress Party (MCP) became the only national party. Zambia became legally a one-party state seven years later in 1973. Sierra Leone is the newest single party state, having adopted this system of government in 1978.

Apart from these *de jure* one-party states on the African political scene, another set of *de facto* one-party states has arisen. With the banning of the only remaining opposition party, the Kenya Peoples' Union (KPU), Kenya has been, since 1966, a *de facto* one-party state—the only party remaining being the Kenya African National Union (KANU). Uganda too had in effect become a *de facto* one-party state in 1969 with the disappearance of the Kabaka Yekka (KY) and the Democratic Party (DP). President Obote's Uganda Peoples' Congress (UPC) remained the only party in the national politics of Uganda.

A peculiar situation also arose in 1970 in Lesotho ruled, since independence, by Chief Leabua Jonathan. He executed a coup when it became clear that his party was losing the first general election since independence. He is currently heading a civilian government without parliament; this type of governmental system may be regarded as a 'no-party system'. Also included in this category are military governments which have existed in Africa from time to time.

The final picture that emerges from the Commonwealth Africa political situation is that out of these twelve states only *two*, Botswana and Gambia, have at all times preserved a multi-party system of government, and even these have 'dominant-party' systems. The question is naturally prompted as to the reasons for the increasing predominance of the one-party system in Africa.

Reasons for the adoption of single-party systems in Africa

A number of reasons have been advanced in support of the case for the establishment of a one-party system of government wherever this has occurred in Africa. On this matter the Zambian situation is in marked contrast with that of Tanzania.

In Tanzania the case for a one-party system was largely based on the fact that throughout the political history of that country, the Tanganyika African National Union

(TANU) had received overwhelming support from the people of Tanganyika. Since 1958, when the first elections to the Legislative Council were held in Tanganyika and from then on in all successive electoral contests, both national and local elections, TANU had been winning virtually all the seats.[3] Indeed, there were many unopposed seats in favour of TANU, and opposition in Tanganyika had virtually disappeared at the time of independence in 1961. The Presidential Commission on the Establishment of a One-Party State asserted that the prospects of contested elections had steadily receded and the country was in fact a one-party state.[4] From this the government argued that so long as the law permitted other parties to exist, TANU was bound to fight elections, both national and local, on a party basis. Since candidates put forward by TANU had been overwhelmingly successful, many even being unopposed, the people had in effect abandoned their right to choose representatives to parliament. It was therefore argued that only in a single-party system in which candidates belonging to the same party, TANU, could compete for election, would the principle of choice be restored to the Tanganyika electorate.

Because almost all members of parliament were TANU members, discussions in parliament, even on important issues of policy were inhibited because MPs were required to accept party discipline as to how they ought to behave in parliament. Nyerere himself put this argument in this rather eloquent fashion:

> Given the two-party system ... some limitation of freedom is essential—both at election time and in debate—in order to enforce party discipline and unity. And we have seen that these restrictions are not necessary where you have only one party. It seems at least open to doubt, therefore, that a system which forces political parties to limit the freedom of their members is a democratic system, and that one which can permit no party to leave its members their freedom is undemocratic. Where there is one party, and that party is identified with the *nation as a whole*, the foundations of democracy are firmer than they can ever be where you have two or more parties, each representing only a section of the community.[5]

Thus the Tanganyikan case for the establishment of a one-party state in the political circumstances outlined above, seems to rest on a persuasive ground. The story in Zambia was, however, almost the opposite to the one prevailing in Tanganyika.

Unlike the case of Tanzania, Zambia has been a multi-party state since before independence (1964).[6] The nationalist movement split in 1958 when the present ruling party, the United National Independence Party (UNIP) broke away from the African National Congress (ANC) led by Mr. Harry Nkumbula. There was also a White settler political Party, the United Federal Party (UPFP), which changed its name after independence to 'National Progressive Party' (NPP). Moreover, the opposition in Zambia had a strong base of support in certain provinces of the country. Further, the electoral performance maintained by the opposition parties in Zambia show that its strength had steadily been gathering momentum. In the 1962 elections, which were held with a view to introducing self-government in Northern Rhodesia, UNIP was unable to secure the required number of seats in the Legislative Council in order for it to form the government.[7] UNIP had to form a coalition with ANC in order to prevent the settler United Federal Party from acceding to power. At independence the three parties, UNIP, ANC and NPP, competed for power in the 1964 elections. Out of the contest UNIP had fifty-six elected members in parliament, ANC obtained eight seats, and the NPP came out with ten members elected on the reserved European roll. 1968 also happened to be

an election year. The NPP having been dissolved in 1968, the contest was between UNIP and ANC. The results were that UNIP emerged with eighty-one elected members and ANC with twenty-three members. What was interesting about the results of the 1968 election was that Western Province, formerly a UNIP stronghold, rejected almost all candidates sponsored by UNIP.

The government of Zambia, through the president, had in fact recognized the potency of opposition and so had envisaged the creation of a one-party state, not by 'force', but through 'consensus'. President Kaunda, in March 1964 (i.e. seven months before independence), had assured the nation that a one-party state in Zambia would only be introduced through the election process.[8] Three years later, that is in 1967, the president reiterated the same principle when addressing an Annual Conference of UNIP held at Mulungushi. He summarised the government's stand on this matter through four neat points, *viz.*:

1. that we are in favour of a one-party state;
2. that we do not believe in legislating against the opposition;
3. that by being honest to the cause of the common man we would, through effective party and government organisations, paralyze and wipe out any opposition, thereby bringing about the birth of a one-party state;
4. that we go further and declare that even when it comes about we would still not legislate against the formation of opposition parties, because we might be bottling up the feelings of certain people no matter how few.[9]

One of the obvious effects of the results of the 1968 elections was that it worked against the government's plan for the destruction of the opposition through the ballot box. The government's hope for a voluntary disappearance of the opposition further suffered a set-back with the occurrence of certain political events in 1972. Chief of these developments was the formation of the United Progressive Party (UPP) headed by the former vice-president, Mr. Simon Kapwepwe. The political implications engandered by the formation of UPP were so vast—for example, most of its leaders were eminent figures in Zambian politics who had played an important role in the nationalist struggle, and who were the founders of the nationalist movement. Secondly, the new party's base of support was among the Bembas, a politically dominant and populous tribe.

The political climate which resulted from the emergence of UPP on the political scene of Zambia was tense and manifested itself in nationwide appeals not only for the detention of its leaders, but also for the introduction of a one-party state. In the wake of these demands from every part of the country, the government abandoned its original stand, which was that although the one-party state was desirable and perhaps inevitable, no legislative action should be taken to prohibit other parties. President Kaunda now insisted that the government's decision to bring about a one-party state through legislation was in accordance with the wishes of the people, because:

> ... since independence there has been a constant demand for the establishment of a one-party state in Zambia. The demands have increasingly become more and more widespread in all corners of Zambia.[10]

But, as Nwabueze had observed, these demands which the president was referring to "were made by UNIP partisans, and should not be taken as conclusive of the wishes of the Zambian people as a whole".[11]

However, Zambia did not provide an ideal situation, as did Tanzania, for unilateral action on the part of the government to introduce a one-party state. That this nevertheless happened, meant that the opposition parties of UPP and ANC, which enjoyed popular support in some provinces of the country, were forced out of existence.

Probably the most forceful argument in favour of the introduction of a one-party state in Zambia was that Zambia needed a one-party state not because, as in the case of Tanzania, the country was solidly united; but because the country was dangerously divided. Zambia, like many other African states, is a culturally heterogeneous society consisting of a series of ethnic groupings (about 73 such groupings in all). The political order established in Zambia at independence, being a blend of Westminister parliamentary democracy, was devised on the assumption that power to rule was to be the subject of political competition between the various political parties. Now, while the dominant party, UNIP, evidently projected a national outlook and endeavoured to recruit membership and support from every corner of the country, the smaller parties were content to seek support and loyalty from a particular region or tribe from where the top leaders came from.[12]

There is no doubt that the need for national unity is a compelling one in the new nations of Africa, and that any arrangement which would foster its realization must be adhered to. Moreover, it is only when national unity, and therefore stability, is assured that the government can proceed effectively to plan and execute socio-economic projects intended to raise the level of standards of living among the people. The masses were led to believe that once independence was achieved, immediate improvements in their social and economic conditions were to follow—and most of these promises came from the leaders of the dominant party. Hence continued survival of the party, and therefore the government, depended largely on how quickly the impact was made on satisfying the basic needs of the people. Moreover, the opposition would naturally exploit the failures of the government in economic planning and in the implementation of programmes designed to induce the equal redistribution of wealth to the benefit of the people.

Few would dispute the validity of the argument based on national unity in the circumstances of new African states. True, all those forces that operate to draw people apart must be discouraged, and a base conducive to securing national solidarity must be laid down. But this does not prevent one asking the question as to the best means of achieving that solidarity. It can thus be argued that any such method necessary to bring about national unity must not lose sight of the interests of all people and the desire to maintain a democratic society founded on respect for human rights. The question of how best to preserve human rights is, of course, a moot question as experience has shown in Britain, Tanzania and some other countries which have no constitutional bills of rights but where, nevertheless, personal liberty forms part of the whole basis of their democratic practice. The one-party state creates a constitutional system whereby certain individuals or a group of individuals are denied the same basic, fundamental rights and freedoms, notably the freedom of association, the freedom of expression, and the freedom against discrimination, on grounds of political opinion. Thus, in the *Nkumbula* case,[13] counsel for the appellant argued that the setting up of a commission to work out a one-party constitution was *ultra vires* because it cannot in law be for the "public welfare" within

the meaning of the Inquiries Act (under which the commission was set up) to prepare to deprive a citizen of any of the fundamental rights protected by the existing constitution. The Court of Appeal for Zambia, resolved that whether or not a matter is one of "public welfare" is subjectively to be decided by the president, and that that decision cannot be challenged in a court of law unless bad faith or improper motive is alleged.

Apart from the argument based on national unity, there were some other isolated reasons advanced to justify the establishment of a single party in Zambia. Chief of these was the consideration of the geo-political position Zambia occupied in Southern Africa at the time of the moves to introduce the one-party state. Zambia was the only country which shared borders with the minority regimes of Rhodesia and South Africa through Namibia/South-West Africa which it controls and rules, and with the former Portuguese territories of Mozambique and Angola. These two former Portuguese territories have now become independent (1975 and 1976, respectively). Because Zambia offered bases to the liberation movements to carry out their guerilla campaign in these territories, there has constantly been infiltration by Portuguese, Rhodesian and South African troops into Zambia, and they have carried out activities which were obviously intended to, and did in fact result in, sabotage of Zambia's strategic installations.[14] In particular, Zambia depended on her southern neighbours for the importation of her exports and also for the supply of vitally needed manufactured goods, and for the supply of power to feed her industries—especially the copper mining industries.

In order, therefore, for Zambia to organize resistance to these outside, subversive attacks and for her to plan to save the economy from disruption by Rhodesia and South Africa, it was argued that the country needed to secure to itself a united and vigilant population under the guidance of one party and a strong executive. If a multi-party system was allowed to continue operating with its undesirable effects of dividing people politically, the enemy would easily attempt to exploit the situation, and procede to harm Zambia permanently. Thus, although the National Commission on the One-Party State recommended a reduction in the executive powers of the president generally and, more specifically, in his security powers,[15] the governemnt rejected this recommendation on the ground that for security reasons Zambia needs a unified command under an executive president.[16]

The need for an autochthonous constitution was also frequently mentioned as one of the motivating factors in the introduction of a one-party state. This has been the view shared by many of the African states, namely, the desire to see to it that any constitutional order bestowed on them must derive its authority from within these nations, and that the contents of the constitution must bear some relevance to their national sentiments and consciousness. As Professor Wheare has eloquently written of new African states:

> For some members of the Commonwealth, it is not enough to be able to say that they enjoy a system of government which is in no way subordinate to that of the United Kingdom. They wish to be able to say that their constitution has the force of law and if necessary of supreme law within their territory through its own native authority and not because it was enacted or authorized by the parliament of the United Kingdom—that it is, so to speak, 'home-grown', sprung from their own soil, and not imported from the United Kingdom.[17]

It is precisely within this framework of thought that the National Commission on the One-party State in Zambia perceived the need of removing all legal ties between the one-

party constitution and all British legal sources such as the Zambia Independence Order.[18] And when the Constitution of Zambia Bill, 1973, which sought to introduce the one-party system of government was being presented to parliament, the then vice-president, Mr. Chona, called the moment one of "great significance and historic importance", for the same reason.[19] There is therefore no doubt that within the government circles there were those who saw the moment of the introduction of a one-party state as an opportunity to remove from the political system the last vestiges of colonial imprints, and to give the new system a distinct national character and form.

Although not frequently advanced in Zambia at the time of the introduction of a one-party state, there is an argument which asserts that the one-party state is the only system of government fairly corresponding to certain traditional African styles of political system.[20] In traditional African political systems there were no political parties, because, as Nyerere argues, in the African traditional society there were no strong issues nor were there in existence private interests which would have formed the basis upon which parties could emerge to defend one or the other of those interests. Nyerere further argued that:

> The European and American parties came into being as the result of existing social and economic divisions—the second party being formed to challenge the monopoly of political power by some aristocratic or capitalist group. Our own parties had a very different origin. They were not formed to challenge any ruling group of our own people; they were formed to challenge the foreigners who ruled over us. They were not, therefore, political 'parties'—i.e. factions—but nationalist movements. And from the outset they represented the interests and aspirations of the whole nation.[21]

The thrust of the argument is that since there are, as yet, few divisions based on economic or social classes in Africa, there can only be one movement for the entire country; or as is sometimes stated differently:

> Since parties reflect class divisions, the appearance of an opposition party must be prevented in order to avoid the development of a class struggle.[22]

The mode of adopting the one-party system: a comparative summary: Ghana, Malawi, Tanzania

Here we are not concerned with how the one-party state originated in countries like Kenya and Uganda where the system has never been formally established by law. In Kenya, for example, the one-party state came about as a result of a voluntary merger of existing parties and also by proscription of the opposition party, the Kenya Peoples' Union, led by Oginga Odinga. Similarly in Uganda under Milton Obote, the one-party state, though not formally established by law, was a product of a combination of defections to the ruling party and of proscription of the opposition parties.[23]

Ghana

Ghana formally became a one-party state in January 1964. This came about following a referendum organized in terms of the 1960 Republican Constitution. The electorate voted overwhelmingly in favour of the government's proposal to introduce a one-party state.[24] Following the referendum, the constitution was

amended to provide that "there shall be one national party", which "shall be the Convention Peoples' Party".[25]

Malawi

In Malawi, the question of whether or not the country should become a one-party state was at no point put to the people for approval. True, Malawi has always had only one political party, the Malawi Congress Party (MCP). In July 1975, the government set up a constitutional committee, "to consider and make recommendations with regard to the provisions of the new Constitution required to give effect to the decision that Malawi should become a Republic".[26] It is important to note that the committee was never asked to consider the question of the establishment of a one-party state in Malawi. It would have appeared that the question of a one-party state was just one of those questions which the committee considered in recommending the form the republican constitution was to take.[27] To this question the committee answered in the affirmative. The committee submitted its proposals for the Republican Constitution to the National Convention of the Malawi Congress Party in October 1965, and these were "unanimously" accepted. The proposals were subsequently endorsed by the Malawi government as the basis of the Republican Constitution. The Republican Constitution became operative in 1966, and provided for a one-party state.[28]

Tanzania

Tanzania, followed by Zambia, took a completely different course in the manner of adopting a single-party system, from that adopted by Ghana and Malawi. In Tanzania the decision to introduce a one-party state was made by the national executive of TANU. The people were not consulted upon that decision, either in a referendum or otherwise. The decision having been taken, a presidential commission was appointed to consider "the changes in the constitution of Tanganyika and the constitution of the Tanganyika African National Union, and in the practice of government that might be necessary to bring into effect a democratic one-party state in Tanganyika". In other words, the question of the desirability of a one-party state was not open for discussion either by the commission, or by the people. Thus, although the commission consulted widely on the form of the new constitution, it did not receive submissions for or against the one-party state. The recommendations of the presidential commissions,[29] as approved, after amendment, by the government, formed the basis of the one-party constitution in Tanzania.

The mode of adopting the one-party system in Zambia

The national commission on the one-party participatory democracy

As indicated above, the method by which the one-party system originated in Zambia closely followed the approach in Tanzania. On the 25th of February 1972, President Kaunda announced that the cabinet (not the party central organ, as in Tanzania) had taken a decision that the future Constitution of Zambia should provide for a one-party democracy, and that a commission would be set up with the task of determining the form which that one-party democracy should take. The commission

was duly appointed on 1st March. The general terms of reference were to "consider changes in:

(a) the Constitution of Zambia;

(b) the practices and procedures of the Government of the Republic; and

(c) the Constitution of the United National Independence Party",[30] necessary to bring about and establish a one-party participatory democracy in Zambia.

The commission, like its Tanzanian counterpart, was thus precluded from entertaining submission for or against the principle of a one-party state. However, precisely because Zambia has had a strong base of opposition, it was not surprising that a number of petitioners were unable to confine themselves within the commission's terms of reference regarding the form of the one-party democracy as such and discussed matters relating to the pros and cons of its establishment.[31] It is also relevant to note that the ANC president and his deputy, Mr. Harry Nkumbula and Mr. Nalumino Mundia, were appointed to the commission, but declined to serve because of their opposition to the whole idea of creating a single-party system in Zambia.

The president had also set out a number of principles to be adhered to by the commission in its consideration of the matter. These included the principle that "the fundamental rights and freedom of the individual shall be protected as now provided under Chapter III of the Constitution of the Republic of Zambia".

The commission was required to investigate a number of crucial issues, including the nature of the presidency in a one-party state, the nature and structure of government in general (including the important question of the relationship between cabinet, parliament and the central committee of the party), the nature and structure of parliament in a one-party state and its relationship to party organs, especially to the National Council. The composition of the commission was representive of people from various walks of life. The commission also toured the country widely, collecting evidence from the people as to the form the new constitution should assume. The one-party state was formally established on 13th December, 1972, when the Constitution Amendment Act,[32] implementing the decision, received the presidential assent. The Constitutional Amendment stipulated that:

> There shall be one and only one political party in Zambia, namely, the United National Independence Party.[33]

The government's move to introduce a single-party was challenged — not only through political means, but also through a court action instituted by the opposition leader, Mr. Harry Nkumbula. The case is an important one in the constitutional history of Zambia, and merits an extended discussion in the present context, for the arguments involved pertain to the basic question of the compatibility of a single-party system with the enforceable protection of human rights.

Opposition in the courts: the *Nkumbula* case[34]

In this case, the applicant sought a declaration from the High Court to the effect that the introduction of a one-party state was "likely" to infringe fundamental rights guaranteed to the petitioner by the Constitution as it existed at that time, that is to say, the right

to assemble freely and associate with other persons[35] as a member, and as leader, of the African National Congress, the right to express and receive opinion,[36] and freedom from discrimination on the grounds of political opinion.[37] It was argued that these rights could not exist or be enjoyed unhindered under a single-party system, since such a system is incompatible with such freedoms; alternatively that the introduction of a one-party state is manifestly contrary to the spirit of the Constitution.

On behalf of the petitioner it was argued that the fact that the one-party commission was enjoined to adhere to the principle that "the fundamental rights and freedom of the individual shall be protected *as now* provided under chapter III of the Constitution of Zambia" meant that the freedom of association, including the right to form political parties, would be retained even after the new constitution was established. It therefore implied that following from this, witnesses were allowed to give evidence opposing the creation of a one-party state. (Surprisingly, no argument in reply to this and many others on behalf of the State are stated in the report). With respect to the above contention by the applicant, Doyle, C.J., who handled the case in the High Court, observed that:

> Quite clearly, s 23 in its existing form would be inconsistent with the notion of a one-party state in that at present it guarantees freedom of association, including by implication power to form political parties.[38]

However, his lordship considered that the principle referred to by the president regarding the retention of a bill of rights in the proposed constitution was "merely a guiding factor in considering the approach to the form of a one-party state", and that the reference to the principle did not mean "that s 23 must be rigidly adhered to in its present form". It was the court's view that it would be outside the commission's terms of reference to allow witnesses airing their views either for or against the proposal to create a one-party state. In any case, the court observed, the petitioner was at liberty to put forward his views in public or in private in support of, or against, the one-party state. That he could not put forward particular views before a commission set up to deal with certain matters was no restriction upon his freedom.

The petitioner further argued that his freedom of expression was likely to be infringed because there was an authoritative statement by or on behalf of the Government of Zambia inhibiting any expression of opinion against the introduction of a one-party state. The basis of this claim referred to the statement made by the district governor for Lusaka, Mr. Justin Kabwe, that "UNIP was ready to crush anyone who opposed the formation of a one-party state", and that "whether people liked it or not, the one-party democracy had come to stay in Zambia". Meanwhile, Doyle, C.J., conceded that if the petitioner succeeded in showing that the Government of Zambia did take steps or threatened to take steps in furtherance or pursuance of its decision to introduce a one-party state, and if it could be shown further that such steps would be likely to infringe his rights under the Constitution before its amendment, "that would be contravention of s 22 of the Constitution, and the petitioner would be entitled to redress". But were the utterances or verbal intimidations by Governor Justin Kabwe such a step? While deprecating the "somewhat extravagant language" in which Mr. Kabwe's statement was couched, the High Court held that "an isolated statement by a comparatively junior official" could not be said to be official government policy.

The last declaration asked for by the petitioner was that the introduction of a one-party state was contrary to the spirit of the Constitution. Doyle, C.J., started considering his question with the assertion that:

> I have no doubt that the introduction of a one-party state will prohibit the formation of political parties, and that it will be a restriction on the present rights of assembly contained in s 23. In that sense it is inconsistent with the present constitution.

There is an inherent difficulty in the petitioner's argument on this ground. In the first place there was no evidence that under the then Constitution any action was to be taken to prevent the formation of political parties. The prevention was only to take place after the Constitution was amended—and the amendment would obviously involve alteration of s 23, restricting rights of assembly by different political parties. What the government did was no more than to make a declaration of its intention to introduce legislation in parliament to amend the Constitution, for the purpose of creating a one-party state. By law the government possessed the right and power to amend the Constitution for any purpose—including an amendment to the bill of rights as long as the prescribed majority in parliament was secured. Surely a mere prior announcement of an intention to exercise that right and power cannot be challenged as likely to infringe rights under the Constitution. And when the right and power had been exercised, and a one-party state has been created, the rights alleged to have been infringed would have disappeared with the coming into effect of the amendment. In the event, the petitioner would no longer have those rights.

On appeal to the Court of Appeal for Zambia the arguments took a completely different line. In the first place it was argued that the setting up of the commission could not be "for the public welfare" within the meaning of the Inquiries Act[39] under which the commission was appointed, because "it cannot in law be for the public welfare to prepare to deprive a citizen of any of the fundamental rights protected by the existing Constitution". The Inquiries Act vested in the president a discretionary power to appoint a commission to "inquire into any matter in which an inquiry would, in the opinion of the president, be for the public welfare".[40] This clearly made it a matter for the subjective decision of the president to say which subjects were "for the public welfare", calling for an inquiry by a commission. The exercise of such a power, under the usual administrative law, was beyond challenge in a court of law, unless it was alleged that the president acted "in bad faith or from improper motives or an extraneous consideration or under a view of facts or law which could not reasonably be entertained".

But whether in setting up the commission the president had acted on a view of the facts or the law which could not reasonably be entertained would turn on the description of "public welfare". In the view of the petitioner, public welfare meant the welfare of the individuals comprising the public, so that to derogate from individual rights and freedoms cannot be for their welfare. This, the court refused, holding that the meaning of the "public" in the context of the Inquiries Act "is the community in general, as an aggregate, the people as a whole". Thus, in the opinion of the court:

> What is in the public interest or for the public benefit is a question of balance; the interest of the society at large must be balanced against the interests of the particular section of society of or the individual whose rights or interests are in issue, and if the interests of the society are regarded

> as sufficiently important to override the individual interests, then the action in question must be held to be in the public interest or for the public benefit.

Accordingly, the setting up of the Commission was within the powers of the president under the Inquiries Act and therefore lawful.

On the second ground of appeal the petitioner argued that the court below had erred in law in holding that his rights had not yet been infringed upon unless and until the Constitution was amended, and the one-party state established. It was asserted that the petitioner does not have to show that his rights under the bill of rights after the introduction of a one-party state are likely to be contravened in relation to him, but that it is sufficient for him to show that the introduction of a one-party state will infringe his rights under the Constitution in the present form: this approach, the argument further asserted, accords with the words in section 28[41] of the Constitution: "is likely to be". The court, however, noted that under section 28(5), no application can be brought to the High Court under section 28(1) on the grounds that any guaranteed right under the bill of rights was likely to be contravened by reason of proposals contained in a bill which has not, at the time of application, become a law. The existence of this provision makes it clear that if the only step taken by the executive is the introduction of the bill, the enforcement procedure under s 28(1) of the Constitution cannot be invoked. Baron, J.P., then concluded that:

> In my judgment, therefore, section 28(1) has no application to proposed legislation of any kind, far less to a proposal to amend chapter III itself. . .

In holding thus, the Court of Appeal was merely confirming the view of Doyle, C.J,. in the Court below that, for an application to have *locus standi* to seek redress under section 28(1), it is not sufficient to plead a mere declaration of intention by the government to introduce legislation in future, but that the applicant must be able to show actual or threatened action by the executive's violation of his rights. Since in the *Nkumbula* case, the appellant failed to show that the executive or any of his administrative officers had taken some action in relation to him in the sense described above, or that any such action was threatened to be taken, section 28(1) was not successfully invoked.

The decision in the *Nkumbula* case may be compared with the Sierra Leonean case of *Steele and Others v Attorney-General*[42] decided by the Supreme Court for Sierra Leone in 1967. Interestingly, although this was also a case challenging the constitutionality of the government's plan to introduce a one-party state, it was never cited in the *Nkumbula* case. The initial point must be made here that the Constitution of Sierra Leone is, or was, in many respects similar to that of Zambia, with a justiciable bill of rights protecting individual rights and freedoms. In its 1965–66 session, the Parliament of Sierra Leone passed a resolution to the effect that "Government give serious consideration to the introduction of a one-party system of government in the country". Consequently, the government issued a White Paper on the "Proposed Introduction of a Democratic One-Party System in Sierra Leone". In this paper the government set down its views about the subject, and also set out some proposals about what type of the one-party system it wanted to introduce.[43] A one-party committee was then set up by the government with a duty of collecting views on the type of the one-party system to be established in Sierra Leone.[44] As in Zambia, the committee in its consideration of this

matter was to take into account the government's views that fundamental rights and freedoms must be retained in the proposed system, together with other principles, such as the maintenance of the rule of law and the independence of the judiciary.

It was from this background that the dispute in the *Steele* case arose. The plaintiffs in this case brought an action under section 24(1) of the Sierra Leonean Constitution which, like section 28(1) of the Zambian Constitution, sets out the provisions for the enforcement of the guaranteed rights, and reads as follows:

> 24(1) Subject the provisions of subsection (6) of this section, if any person alleges that any of the provisions of sections 12 to 23 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

The claim of the petitioners was that the appointment of a one-party committee by the government constituted and was a threat to, or infringement of, the constitutional provisions contained in sections 12 to 23 (inclusive) of the Constitution, and was specifically in breach of section 22 guaranteeing freedom of assembly and association, including the right to form and belong to any political party. Cole, C.J., viewed the construction of section 24(1) in the same way as did Baron, J.P., in the Zambian case. The Chief Justice observed that:

> What does s 24(1) of the Constitution mean? This question is relevant because it is my view that on a proper reading of s 24(1) of the Constitution, the plaintiffs-respondents must allege material facts on which they rely to show that any of the provisions of Ss 12 to 23 (inclusive) of the Constitution has been, or is being, or is likely to be, contravened in relation to them. In my considered opinion, what the section means is this: To entitle a person to invoke the judicial power of this court, that person must show by allegations of material fact in his pleadings as a result of the legislative or executive acts complained of he has sustained, or is sustaining, or is immediately in danger of sustaining, a direct injury, and this injury is not one of a general nature common to all members of the public.[45]

Unlike in the Zambian case, the petitioners in the Sierra Leonean case did not allege infringement of the freedom of expression since the government, although it had decided to introduce a one-party state, did not prohibit people from expressing their views for or against the decision. In this respect the government had categorically stated that:

> Any changes in our political system which are proposed, will only be brought about if the people agree to them, after being consulted by a method which is both constitutional and popularly acceptable.[46]

But like in the case of Zambia, what the Sierra Leonean government did was merely to set up a committee with the task of considering what form of constitution would be suitable to give effect to the introduction of a one-party state. There was therefore no question of having taken a positive step in the form of introducing legislation to bring about the single-party state. It is therefore interesting to note that the sort of issues which arose in the *Nkumbula* case did not arise in the Sierra Leonean *Steele* case. This may be explained on the ground that in Zambia the government in setting up the one-party commission did so through a statutory instrument made pursuant to an Act of Parlia-

ment—the Inquiries Act. The setting up of the one-party commission was made pursuant to this statutory instrument which the applicant challenged as invalid because of its alleged contravention of certain constitutional provisions guaranteeing the freedom of expression and the freedom of association and assembly in particular. In Sierra Leone, on the other hand, the setting up of a committee for the purposes of introducing a one-party state was done merely through the passage of a parliamentary resolution and no legislation of any kind was ever passed for that purpose.

The decisions in these two cases, but especially in the Zambian case, provide good examples of the nature of problems that courts frequently face when dealing with cases in which the political factor is centrally significant. What the court was asked to do in the *Nkumbula* case was to declare that the government's plan or policy to bring about what it considered to be the best form of political system for the country was unlawful and therefore null and void. It amounted to something like saying that the government did not have power to impose restrictions on individual liberties. Surely if the courts were bold enough to hold just that, this would have aroused a serious uproar of political controversy between those who consider themselves representatives of the people on the one hand, and the courts on the other. But, as Baron, J.P., remarked in the *Nkumbula* case:

> ... it is unthinkable to suggest that the government of a country elected to run an ordered society is not permitted to impose whatever constitutional restrictions on individual liberties it regards as necessary to enable it to govern to the best advantage for the benefit of the society as a whole.

It was in predictions of this kind of possible clash between the executive and the judiciary that the Presidential Commission on the Establishment of a Democratic One-Party State in Tanzania, partly based its argument, it will be recalled, for the omission of a bill of rights in the proposed one-party constitution for Tanzania.

In a situation such as that which arose in Zambia, however justified the applicant's case would have been in law, it is qustionable whether a judge presiding over the case would find against the government. He has no choice except to find some way out of the controversy by presumably putting up some learned arguments and rationalizations to justify his findings in favour of the government. This is what we may term here as "constructive bias" by the judiciary in favour of the government: it is "constructive" because at least it has the merit of avoiding an unnecessary conflict between the court and the executive. This also ensures that the administration of justice would not be adversely affected by the ensuing political controversy.

Provisions made for human rights in the one-party constitution of Ghana, Tanzania and Malawi

It has already been stated at the beginning of this chapter, that the one-party constitutions devised for Ghana (1964), Tanzania (1965) and Malawi (1966) did not incorporate bills of rights: Indeed, in Tanzania and Malawi the issue whether or not to incorporate a bill of rights in their respective one-party constitutions was extensively discussed, and in each state the idea was rejected.

Ghana

In 1957 when Ghana became independent, bills of rights in the Commonwealth were not generally accepted as the best constitutional techniques for limiting governmental powers—the Anglo-Saxon sceptism towards constitutional affirmations of human rights, it was explained, had first to be overcome. Thus, Ghana's Independence Constitution of 1957 did not incorporate a bill of rights, and this continued when Ghana's Republican Constitution again omitted a bill of rights. The only reference to human rights to be found in the Republican Constitution of 1960 was in connection with a "declaration" which the president was required to make on his assumption of the office of presidency. In that declaration the president was called upon to declare adherence to a number of "fundamental principles", which included the principles that:

> . . . freedom and justice should be honoured; that no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief; that chieftaincy should be guaranteed and that every citizen of Ghana should receive his fair share of the produce yielded by the development of the country; that subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the the right to move and assemble without hindrance or of the right of access to courts of law; that no person should be deprived of his property save where the public interest so required and the law so provides . . .[47]

The Constitution then purported to entrench this article by providing that "the power to repeal this Article, or to alter its provisions otherwise than by the addition of further paragraphs to the declaration, is reserved to the people".[48] Thus when the single-party form of government was introduced in Ghana in 1964, this declaration remained in the Constitution, which was merely amended to provide for the one-party state. No debate whatsoever ensued on the crucial issue of whether or not it was desirable to incorporate a bill of rights in the one-party constitution of Ghana—in contrast to Tanzania and Malawi. Thus it was that Ghana's one-party constitution did not include justiciable guarantees of individual rights and freedoms.

As regards the presidential declaration itself, the question of its justiciability was decided by the Supreme Court of Ghana in the case of *Re. Akoto and 7 Others*.[49] This case was important in that it decided whether, by reciting the "fundamental principles" embodied in the presidential declaration and enjoining the president to declare his adherence to them, the Constitution had conferred upon them the character of legally enforceable rights operating to limit the powers of parliament. In this case, the appellants were arrested and placed under detention pursuant to an order made by the governor-general and signed on his behalf by the minister of the interior under section 2 of the Preventive Detention Act, 1958. It was argued on behalf of the appellants that the Preventive Detention Act, 1958, by virtue of which the detention orders were executed, was contrary to the solemn declaration of fundamental principles made by the President on assumption of office. The court dismissed as "untenable" the suggestion that the declarations made by the president on assumption of office constitute a "Bill of Rights" in the sense in which the expression is understood under the Constitution of the United States of America.[50] The court then went on to explain the legal nature of the declaration thus (per Korsah, C.J.):

> It will be observed that Article 13(1) i.e. the Article providing for the 'declaration' is in the form of a personal declaration by the President and is in no way part of the general law of Ghana.

> In the parts of the Constitution where a duty is imposed the word "shall" is used, but throughout the declaration the word used is "should". In our view the declaration merely represents the goal which every president must pledge himself to attempt to achieve. It does not represent a legal requirement which can be enforced by the courts.
>
> On examination of the said declarations with a view to finding out how any could be enforced we are satisfied that the provisions of Article 13(1) do not create legal obligations enforceable by a court of law. The declarations however impose on every president a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy for any departure from the principles of declaration is through the use of the ballot box, and not through courts.[51]

Clearly this decision confirmed the assertion that the president in Ghana was free to assent to any bill, even if this derogated from any of the principles embodied in the "declaration". This was rather surprising in the context of the Ghanaian constitutional arrangement since, apart from this Article on the "declaration", there was no other incidence in the Constitution, or indeed in any ordinary legislation, expressly protecting individual rights and freedoms and providing for some machinery to deal with executive encroachment of these rights. In other words, under the Republican/One-Party Constitution of Ghana, there was no formal arrangement whereby an individual whose rights had been violated by the executive could challenge the latter's action either before the courts, or before some form of a tribunal, or any sort of body—in order to obtain a remedy. The executive was left to run the affairs of the government almost uncontrolled. It is partly due to the absence of adequate constitutional and other safeguards on the resultant power structure under the Ghanaian Presidential/One-Party Constitution of 1960–6 that accounted for the rule of tyranny and oppression in Ghana under President Kwame Nkrumah.[52]

"The executive president in Ghana, 1960–66", comments Nwabueze, "had progressively gathered to himself the supreme power in the state, erecting himself above the legislature and the party, and had then proceeded to use this absolute power to tyrannize and oppress people by a systematic desecration of their civil liberties".[53] Not surprising, it was in the area of personal liberty that these powers had the greatest impact, and the main instrument through which personal liberty in Ghana was under constant erosion was the Preventive Detention Act, 1958. Under this Act the president could detain persons in both normal and emergency times. When the Act was enacted, it was announced as a temporary measure—to expire after five years. However, the Act had been re-enacted and established on a permanent basis until it was repealed after the army coup in February 1966.

Since its introduction in 1958, the Act had been extensively used and many opposition leaders and dissidents were detained, including some former cabinet ministers who were allegedly implicated in a plan to assassinate President Kwame Nkrumah. It has been estimated that since 1961, over 1,000 Ghanaians were detained under the Preventive Detention Act for periods ranging up to ten years in conditions of severity worse than those laid down by law for convicted prisoners.[54] Unlike the detention legislation of some other African countries, the Ghanaian legislation never prescribed any rules which could be described as "minimum safeguards" to protect detained persons. The requirement to publish detentions in the official gazette, though it existed initially,

was discontinued; the executive was under no duty to communicate grounds for detention to a detained person, and no review of detention by any person or body was ever instituted. The late Dr. Busia, an ardent opponent of Nkrumah's rule, and later on prime minister of Ghana, singled out five objectionable features of the Preventive Detention Act, namely that:

a) the ... Act empowers the president, solely in his discretion, to deprive any subject of his liberty, virtually for life;
b) the Ghana courts have held that the discretion is absolute;
c) the president in the exercise of this absolute discretion is not answerable to parliament, or any court or tribunal;
d) the person detained is denied the elementary natural justice of facing his accusers or putting his case;
e) there is no provision or protection whatsoever against the indiscriminate abuse of the powers conferred by the Act.[55]

The use made of the Preventive Detention Act was so drastic in extent that it attracted the attention of the International Commission of Jurists which undertook a study of that Act. The findings of the commission confirmed the validity of Dr. Busia's criticisms. The commission concluded:

... there are certain factors in connection with the Ghana Act which, from a legal point of view, are not satisfactory.
i) The maximum duration of the preventive detention seems long especially when it is taken into acount that there is no indication that the term of detention comes up for regular review by the executive ....
ii) On account of the inability of the detainee to face his accusers and put his case there appears to be an infringement of a rule of natural justice ....
iii) There is no independent tribunal before whom the detainee can make his objection.
iv) Because of the narrow subjective interpretation of the words "if satisfied", the courts have precluded themselves from investigating the grounds of the president's satisfaction. Judicial review, therefore, does not seem to have provided in Ghana a strong safeguard for the liberty of the subject.[56]

From these accounts, it will be seen that the re-enactment and further use of the Act in the one-party state after 1964 even worsened the position in Ghana, for it meant that the personal liberty of the subjects of Ghana was further eroded, since now the president had control over both parliament and the judiciary;[57] for one of the proposals that had been submitted at the referendum which sought a mandate to introduce a one-party state in Ghana, was that the president should be empowered to dismiss judges of the superior courts "for reasons which appear to him sufficient". In March 1964, barely three months after the introduction of a one-party state, three judges from the Supreme Court and one from the High Court were dismissed.[58] In Ghana, no serious attempt was ever made to subject the one-party government to some form of legal or even political control mechanisms specifically devised to project individual grievances in respect of alleged violations of personal liberties by public officers or agents. These legal control mechanisms need not be in the form of a constitutional bill of rights, but some form of institution specifically charged to act as a watchdog against infractions of individual rights and freedoms by the various arms of the executive and the legislature was surely needed. In this respect, the Ghanaian constitutional arrangements, especially in relation

to the provision made for the protection of human rights, stand in increasing contrast to those of Malawi and Tanzania, although Malawi perhaps comes next in terms of the deficiency of provisions for the protection of human rights.

Malawi

When Malawi, formerly the British Protectorate of Nyasaland, was granted internal self-government in 1963, a bill of rights was included in the Constitution.[59] This bill of rights was also carried over into the Independence Constitution of 1964.[60] This document was, however, discarded when the Republican/One-Party Constitution was finally enacted in 1966. This was indeed expected, since even the original inclusion in the Constitution of 1963 was accepted by the Malawi Government "with considerable reserve".[61]

The rejection of a bill of rights as part of the Republican Constitution was actually recommended by the constitutional committee set up by the government to consider and recommend what type of constitution would be suitable for Malawi as a republic. The committee in its report observed that:

> ... the inclusion in the Constitution of a written declaration of the natural rights and liberties to be enjoyed by any portion of the community is worthless unless the preservation of these rights is reflected in the genuine wishes of the people as a whole. In a democratic state laws depend for their ultimate authority upon the desire of the people to see them enforced, and it was felt that it was the duty of a responsible government to guide and tutor the people in the the appreciation of the benefits of fair and impartial laws, rather than arbitrarily to impose constitutional protection for minorities which are valueless unless they enjoy popular understanding and acceptance.[62]

This argument seems not to take into account the fact that bills of rights are not only devices for the protection of minorities, but, more important, they are intended to ensure that the rights and liberties of *the people as a whole* are sheltered against arbitrariness by the agents of the state. However, the government based its objection for the inclusion of a bill of rights in the new constitution on three grounds. Firstly, it was argued that the laws of the country already provided an elaborate code for the protection of individual rights against either private or public interference. Secondly, it was also said that since Malawi was a full member of the United Nations, it will be committed to the observance of the United Nations' Declaration of Human Rights.[63] The final objection advanced was that the presence of a bill of rights in the constitution, coupled with a provision for the enforcement of these rights in the courts, would only invite unnecessary and harmful conflicts between the executive and the judiciary.

In place of a bill of rights, the constitutional committee recommended that there be incorporated in a preamble to the constitution, a declaration of the fundamental principles of government. The recommendation of the committee was duly implemented.

When the Republican Constitution of Malawi finally came into operation in 1966, it incorporated six "fundamental principles of government",[64] of which three are relevant to the present investigation. The first of these state that: "No person should be deprived of his property without payment of fair compensation, and only where the public interest so required", the second asserts that it is "the paramount duty of the government to safeguard and advance the interests and welfare of the Malawian people", and finally, the third principle states that "the Government of Malawi and

people" recognize "the sanctity of the personal liberties set out in the United Nations' Charter of Human Rights". In 1968, the government passed a constitutional amendment,[65] which added to these provisions by enacting that, "nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of (the declaration of principles) to the extent that the law in question is reasonably required in the interests of defence, public safety, public order or the national economy".[66]

As to the question of the justiciability of the basic principles of government enshrined in the Malawian Republic Constitution, it has been held by eminent constitutional lawyers that the principles cannot form the basis upon which a legal action can be founded. In other words, under the Malawi Constitution there is nothing in the nature of a scheme specifically devised to ensure the protection of the rights and freedoms of the citizens. In this respect the Malawian Constitution is akin to the Ghanaian one; in fact it has been claimed that the Republican One-Party Constitution of Malawi drew heavily for its inspiration upon the Ghana Constitution of 1960.[67] On the other hand, the Tanzanian scheme, though also lacking a formal bill of rights, differs markedly form those of Malawi and Ghana in the way the scheme places emphasis on individual rights and freedoms.

Tanzania

Tanzania, alongside Ghana and Malawi, as indicated already above, rejected incorporation of a bill of rights in its One-Party Constitution of 1965. (Tanganyika had also rejected bill of rights in its Independence Constitution of 1961.)

The Presidential Commission on the Establishment of a Democratic One-Party State, which was appointed by the Government of Tanzania and which was charged with the task of recommending an appropriate constitution necessary to bring into effect a one-party state in Tanzania, considered at length the issue of whether or not a bill of rights was an effective means to protect the rights of the individuals in the circumstances of Tanzania—particularly in the context of a one-party administration: "In making our recommendations to the institution of government appropriate to a one-party state", the presidential commission avowed, "we have had constantly in mind the need to ensure that any new arrangements we propose will not unnecessarily encroach on the freedom of the individual".[68] However, the commission felt that this cannot be realized through the mere incorporation of a bill of rights in the Constitution which, "in the circumstances of Tanganyika today" would be "neither prudent nor effective".[69] A number of plausible arguments were adduced by the commission to justify its verdict. The following arguments were advanced:

a) In the first place it was argued that Tanganyika was still a young nation which lacked a "long tradition of nationhood" and also lacked a strong basis of internal national security. As such it was exposed to disruption by a handful of disgruntled individuals. In these circumstances, a bill of rights would be disadvantageous because "it limits in advance of events the reasons which government may take to protect the nation from the threat of subversion and disorder."[70]

b) In the second place it was argued that a bill of rights once included in the constitution would invite conflict between the judiciary and the executive and legislature. This is self-evident since the presence of a bill of rights in the constitution would naturally be coupled with a provision requiring the courts to declare

invalid any law passed by parliament or any executive action if it were inconsistent with a provision contained in a bill of rights. "By requiring the courts to stand in judgment legislature", the commission argued, "the judiciary would be drawn into the arena of political controversy",[71] and this could have damaging effects on the administration of justice by the courts.

c) In the third place, the commission raised the objection that Tanganyika intended to initiate "dynamic plans for economic development" along socialist lines, and that the implementations of these plans would require relaxation of some of the inhibitive provisions in the bill of rights on the power of the state.[72] As the commission put it:

> Decisions concerning the extent to which individual rights must give way to the wider considerations of social progress are not properly judicial decisions. They are political decisions best taken by political leaders responsible to the electorate.[73]

The commission further stressed that the rights of an individual in any society depend more on the ethical sense of the people than on the formal guarantees in the law—as the British constitutional tradition has always demonstrated.

There is no doubt that the aforegoing reasons advanced by Tanzania in rejecting incorporation of a bill of rights in its one-party constitution were indeed powerful and convincing. In the first place, it must be remembered that the paternity of human rights is the European Convention "which is replete with liberal and *laissez-faire* philosophy and may be appropriate for the advanced economies and more stable political conditions of Western Europe".[74] But can the same code of human rights be suitable for a developing fragile polity, avowedly committed to the implementation of economic development plans? In a newly emergent state there are far more points or areas of conflict among the people themselves or among a section of the population against the government. Thus the need to invest sufficient power in the state to deal with any possible danger which would threaten the security of the country. This is the thrust of the first argument adduced by the presidential commission, as recounted above. However, this argument falls short of persuasion, since almost all of the rights and freedoms guaranteed under the bill of rights can be qualified in the interests of defence, public order, public safety, etc., as is the case under the Zambian Constitution. In the Zambian case of *Kachasu v Attorney-General*, the High Court of Zambia upheld the argument of the state that a law or measure taken under it derogating from a guaranteed right under the constitution in the interests of national security, was "reasonably justifiable in a democratic society".[75]

As regards the argument that a bill of rights in fact has the effect of imposing restrictions on the power of the state in the implementation of the needed socialist development programmes. This assertion may have some validity. In Zambia for instance, the Independence Constitution handed over to Zambia left the nationalist government legally powerless to nationalize certain privately owned assets which were vital to the economic survival of Zambia. The Government of Zambia had therefore to revise the colonially-inherited provisions relating to the protection of property rights in order to permit implementation of its economic development plans. Thus, a bill of rights can prove inhibitive on the ambitions of a new nation anxious to push through development projects to induce social and economic progress.

The interesting point, however, about the rejection of a bill of rights in Tanzania is that this seems to be the exclusive idea of the Presidential Commission which was, no doubt, influenced by the previous precedents of omission of a bill of rights after the independence and republican constitutions of 1961 and 1962 respectively. This is confirmed by the fact that, within Tanganyika during the time when the commission was taking evidence from people about the new constitution, there was a certain section of the population in favour of the inclusion of a bill of rights as an integral part of the new constitution. The memoranda submitted to the commission by the Tanganyika Law Society,[76] through its president, urged for a constitutional incorporation of human rights.[77] The rights and freedoms which the society considered should have been incorporated in the constitution were those which in the first place, are found in other Commonwealth African constitutions—that is, "the right of life; freedom from inhuman treatment; freedom from slavery; the right to liberty; the right to property; freedom of expression; freedom of peaceful assembly and association; freedom of worship; and freedom from discriminatory legislation".[78] In addition, "cultural and educational rights" were also included in the list of the traditional civil liberties. It will be difficult to see how cultural and educational rights, if incorporated as part of the bill of rights, would have been enforced through the courts, which, the memoranda said:

> ... must have unfettered power to safeguard and enforce the rights guaranteed under the Constitution; and to this end, the ... remedies such as the writs of habeas corpus, *certiorari* and mandamus, etc., available under all democratic legal systems, should also be available here i.e. in Tanganyika.[79]

There was nothing in the presidential directives to the commission which suggested that a bill of rights was not the appropriate device to protect the rights of citizens in one-party Tanzania. If anything, President Nyerere, in his document entitled "National Ethic", circulated to members of the commission to assist them in their task, enumerated all the known traditional civil liberties—freedom of expression, of movement, of religious belief, of association, equality before the law, property rights, freedom from arbitrary arrest, etc.," upon which he said lie the basis of the Tanganyika nation, and the whole political economic and social organization of the state must be directed towards their rapid implementation".[80] Here it is not claimed that the Tanganyikan leadership was necessarily thinking of the inclusion of a bill of rights in the Constitution as the best method to guarantee those rights, but rather that there was scope for the commission to recommend the adoption of a bill of rights, and there was no reason why such a recommendation could not have been accepted by the government.

Apparently a bill of rights was feared because the commission felt that it would "have the effect of limiting actions of the government and party", not necessarily in relation to individuals, but to "the task of nation-building". Thus, in recommending an alternative mode for the protection of individual rights, the commission looked to a safeguard which would not have a restrictive effect on the actions of the government and party.[81]

What the commission recommended as an alternative to a bill of rights was that the one-party constitution should provide for the establishment of an institution to be known as the "Permanent Commission of Enquiries", whose members should be appointed by the president. The commission was to have a wide jurisdiction to enquire

into allegations of abuse of power by officials of both government and party alike. However, suffice it here to make the point that the device does not, to a considerable degree, serve the same purpose and function as a bill of rights. Institutions like the "PCE" or "CI" are devised with the purpose of providing some means of sheltering individuals from administrative abuse of power or arbitarriness. They are not instituted to check the actions of the government in the sense that if it found an executive or legislative action violative of any of the stated individual rights and freedoms, it could declare those actions unlawful and therefore null and void, as does a court of law. The clear dichotomy that exists between the functions of an "ombudsman" and that of a bill of rights is confirmed by the fact that both institutions are provided for in the Zambian One-Party Constitution of 1972. It is therefore paradoxical to speak, in the context of Tanzania, of the "PCE" as an *alternative* to a bill of rights. In fact, what the Tanzanian scheme for the protection of individual rights was intended to achieve, as indicated above, was the result that the government must be left free from the inhibitive or restrictive effects of a legally enforceable bill of rights. This fact is further confirmed by the fact that the new Constitution of 1965, which formally established a one-party state in Tanzania, confined *all* reference to human rights to a preamble. The preamble to the "interim constitution" of Tanzania recites as "inalienable" and as "the foundation of freedom, justice and peace; life, liberty, security of person, property, the protection of person, freedom of conscience, expression, assembly, association and privacy of family. But a preamble forms no part of a statute, and so can create no legal rights or obligations, though admittedly its spirit may be a guide in the interpretation of the substantive provisions.[82] From this it follows that the recital in the Tanzanian preamble embodying human rights can only play "a moral and an educative role"—a way of trying to "entrench the national ethic in the moral imagination of the people", as the framers of the constitution viewed it: or again, that the "national ethic" enshrined in the preamble represents ". . . a consensus between the people and their leaders about how the process of government should be carried on".[83]

However, the framers of the Tanzanian Constitution recognized that mere recital in a preamble is not enough, and that in addition "everything possible should be done to win for these principles a strong commitment from the citizens".[84] Thomas Franck summarizes the issue well when he concludes that:

> The broad declaration of principle in the preamble to the Tanzanian Constitution perhaps conveys a more meaningful description of a democracy to the average citizen than the rather legalistic Nigerian provisions. . .[85]

In the circumstances of African states, perhaps this assertion conveys a lot of truth. There is a very low educational level in the vast majority of the African societies, with the result that a large number of the citizens are often ignorant about the whole idea of individual rights enshrined in the constitution and when and how to assert them in the courts, even if they have been infringed in relation to the ordinary peasants. Secondly, the judicial process itself is too technical for a vast number of people to understand, and in any case, many people live far away in the rural areas, and hence have to travel long distances to come to the courts in the urban areas. Thirdly, in any case, many people are poor, and even in getting the basic requirements of life like food, clothes or shelter they will have to struggle for them: hence, they cannot possibly be expected

to meet the huge expenses and costs involved in court litigation. There are thus structural and procedural problems inherent in the machinery of justice through the ordinary courts.

From what is stated above, it could be argued that unlike the ideal conditions present in the advanced countries of the West where people understand their rights; know how to go about enforcing them when violated in relation to them; and are economically in a far better position to meet litigation expenses, in less-developed countries it is a case of looking to a different set of institutions and methods in the enforcement of the rights of people which would be understood by the people and would be utilized and appreciated by them. Provided the government and party is serious enough to see the ideals stated in the preamble to the constitution to be translated into practice, there is no reason why this new approach to the attainment of respect for individual rights should not deliver the goods.

Retention of a bill of rights in the Zambia one-party constitution, 1972

Zambia presents the only case in Commonwealth Africa where a bill of rights exists as a substantive component of the one-party constitution.[86]

It will have been noted from the preceding paragraphs that in Tanzania and Malawi —but not in Ghana—the introduction of a one-party state was accompanied by the promulgation of new constitutions which were fundamentally different from their predecessors. The position was, however, different in Zambia where the introduction of a one-party state was originally effected through an amendment to the Republican Constitution, while the latter preserved its structure and its formal contents. Hence the Zambian conception of establishing the one-party state did not incorporate the desire to do away with the Republican Constitution completely. On the contrary, it was the wish of the government to retain, wherever possible, the institutions already existing under the Republican Constitution. The terms of reference to the national commission confirmed this when it stipulated that its assignment was "to consider the changes in (a) the Constitution of the Republic of Zambia, . . . " necessary to bring about and establish the one-party participatory democracy in Zambia. A bill of rights had been a fundamental feature of the Zambian constitution since 1965 and had probably won more acceptance and appreciation by the people of Zambia and of some of its progressive leaders than was the case in Malawi or Tanzania. In Ghana the fact that the one-party state was not followed by promulgation of a new constitution, but was effected through an amendment to the Republican Constitution of 1960, which did not have a bill of rights, meant that no issue of the suitability of a code of human rights in a one-party state could, in fact, ever arise.

In the second place, unlike again the circumstances in Tanzania and Malawi, in Zambia, the national commission was expressly directed by the president to "pay due regard and adhere to" some nine principles "as cardinal, inviolable and built-in safeguards of one-party participatory democracy". Two of these principles are relevant to the present discussion, namely (i) "that the supremacy of the rule of law and independence of the judiciary shall continue to be maintained"; and (ii) that "the fundamental rights and freedoms of the individual shall be protected as now provided under chapter

III of the Constitution".[87] In other words, the national commission was precluded from considering whether or not a bill of rights should be included in the new constitution—this decision had already been taken by the government.

Probably of all bodies appointed to recommend the best forms of constitutions suitable for one-party systems of government in Commonwealth Africa (notably Tanzania, Malawi, Sierra Leone), Zambia's national commission displayed characteristic courage and independence in its recommendations of the principles underlying the one-party state, especially those that related to the place of fundamental rights and freedoms in the proposed single-party system. The commission's recommendations on personal liberty and the rights to freedom, for example, were characteristically liberal in favour of detainees or restrictees, and were intended to enhance the value of those rights by suggesting some curtailment to the powers of the executive over those detained or restricted. In recommending this, the commission was merely projecting the general revulsion which many petitioners displayed in condemning certain features of the provisions in the Republican constitution which related to personal liberties.[88] However, the commission felt that:

> ... in the interest of security, provisions for detention without trial should be retained in the Constitution *provided the powers of the executive were curtailed,* the detention period before the grounds of detention were served in a shorter period and that detainees were free to communicate with their lawyers and relatives.[89]

It is interesting to note that the safeguard for detainees or restrictees which the commission proposed to be written into the one-party constitution would, if they were implemented by the government, have reserved the position regarding those provisions to that obtaining under the independence constitution before it was amended in 1969. First it is important to note what the safeguards recommended by the One-Party Commission were:

1) that there be no detention without trial except during a state of emergency;
2) that a detainee or restrictee be furnished with a written statement specifying the grounds for his detention or restriction within ten days;
3) that the notification of detention or restriction be published in the government gazette within fourteen days of such detention or restriction;
4) that a tribunal be established to review the detention or restriction within three months and that its decision be binding on the authority;
5) that the composition of the tribunal which may sit in public or in camera be as follows: the chairman and two other persons (one lawyer and one other person) to be appointed by the chief justice in consultation with the president of the republic.
6) that detainees be free to communicate with their lawyers and relatives and not be held incommunicado;
7) that whenever a state of emergency is declared while parliament is not in session or after its dissolution, the national assembly be summoned within twenty-eight days of the date of the proclamation for approval; and
8) that a declaration of a state of emergency ceases to have effect after a period of six months from the date of the proclamation unless the national assembly approves its continuation.

The government, however, rejected the suggested safeguards, arguing that ". . . at this stage in the nation's development and in view of Zambia's geo-political position in Southern Africa these recommendations could not be implemented without detriment to Zambia's security and sovereignty".[90] The provisions of Chapter III under the Republican Constitution, under which detentions and restrictions were declared, were therefore to remain. In any case, there seemed to be a paradox in the commission's recommendations in one of the vital areas of a bill of rights, in view of the presidential directive that "the fundamental rights and freedoms of the individual shall be protected as now provided under chapter III of the Constitution of the Republic of Zambia". In other words, by virtue of this directive it was arguably outside the commission's terms of reference for it to suggest any changes with regard to the form or content of the bill of rights.[91] But this directive was in itself contradictory, in that certain sections of the bill of rights, like the freedoms of assembly and association which gives peoples the right to form rival political parties, could not be retained in the One-Party Constitution. The Commission noticed this and then commented that:

> Notwithstanding the directive in our terms of reference that the fundamental rights and freedoms of the individual shall be protected as now provided for under chapter III of Constitution of the Republic of Zambia, we considered that by implication those sections which gave people the freedom to form more than one political party could not be retained in the constitution.[92]

Apart from this change, the bill of rights as it existed in the Republican Constitution—both in form and substance—was reproduced in the One-Party Constitution which came into force on 13th December, 1973.

Notes

1. International Commission of Jurists, Search Press, London, 1976, p. 112.
2. This is discussed at a later stage in this chapter.
3. For a statistical account of TANU's electoral programme see Report of the Presidential Commission of the Establishment of a Democratic One-Party state, Paragraphs, 25–32.
4. *Ibid.*, Para. 31.
5. Quoted in *The Executive in African Governments* by B. H. Selassie, Heinemann, London 1974, chapter 5 generally.
6. For a somewhat extended discussion about political parties in Zambia, see William Tordoff and Ian Scott, "Political Parties: Structure and Policies", in *Politics in Zambia* by William Tordoff (ed.), Manchester University Press, Manchester 1974, p. 107.
7. See David Mulford, *The Northern Rhodesia General Elections*, Oxford, University Press, Nairobi, 1962, especially chapter VI.
8. Legislative Assembly Debates, March 20, 1964, Col. 420. Also speech at Chifubu on January 17, 1965, quoted in Colin Legum (ed.), *Zambia: Independence and Beyond.*

9. Proceeding of the Annual General Conference of the United National Independence Party, held at Mulungushi, August 14–20, 1967, ZIS, Government Printer, Lusaka, pp. 10–11.
10. Press Conference on February 25, 1972. Quoted in the Report of the One-Party State Commission, Para. 2, 1975.
11. Nwabueze, *Presidentialism in Commonwealth Africa*, C. Hurst & Co. London, 1974, p. 225.
12. On this subject see Robert Molteno, "Cleavage and Conflict in Zambian Politics: a Study in Sectionalism", in *Politics in Zambia* by William Tordoff (ed.), *op. cit*, p. 62.
13. *Nkumbula v Attorney-General for Zambia*, HP/CONST/Ref./1/1972, of April 1972, unreported.
14. For an excellent exposition on this subject, see Jan Pettman, *Zambia Security and Conflict*, Lewes, Sussex, 1974, in particular chapter V. See also Robert Molteno, "Zambia and the One-Party State", *East Africa Journal*, February 1972, pp. 14–16.
15. See Report of the One-Party Commission, Paragraphs, 33, 41, 42 and 57.
16. Government White Paper on Summary of Recommendations Accepted by the Government, *op. cit.*, p. 4. Author's own emphasis.
17. Wheare, *The Constitutional Structure of the Commonwealth*, Oxford, Clarendon Press, 1960, p. 89.
18. Report of the One-Party State Commission, Para. 16.
19. National Assembly Debates, *Hansard* No. 33, of July 4–August 30, 1973, Col. 87.
20. See Kenneth Robinson, *Autochthony and the Transfer of Power*, Oxford, University Press, 1968, for an extended account of this proposition as it happened in other parts of Africa.
21. Julius Nyerere, quoted in B. Selassie, *The Executive in African Governments*, *op. cit.*, p. 149.
22. *Ibid.*, p. 150. But there are contrary and completely different views about the justification of the one-party system on tradition. e.g. see Nwabueze, *Presidentialism in Commonwealth Africa, op cit.*, p. 217–222.
23. *Ibid.* For an extended discussion of how the one-party state in Kenya originated, see Nwabueze, *Presidentialism in Commonwealth Africa, op. cit.*, pp. 217–20. For further details, see, Nwabueze, *ibid.*, pp. 220–21. All opposition parties in Uganda were banned in 1969, following an attempt on the life of President Milton Obote.
24. As to whether the results of the referendum reflected the genuine expression of the people's choice, see William Harvey, *Law and Social Change in Ghana*, Princeton, Princeton Press, 1966, p. 323, who thinks that the election was rigged.
25. Article 1A.
26. See Malawi Government White Paper (No. 002 of 1965) Introduction.
27. Question No. 7, see Government White Paper (No. 002 of 1965).
28. Section 4(1)(2) of the 1966 Malawi Constitution.
29. See Report of the Presidential Commission on the Establishment of a Democratic One-Party State, Dar-es-Salaam, 1964, Government Printer.
30. Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia, Lusaka, 1972, Government Printer, see, Appendix 1.

31. See Report of the National Commission, *ibid.*, Para. 13.
32. Constitution (Amendment) (No. 5), Act. No. 29 of 1972.
33. Section 12A(1), *ibid.*
34. (1972) Z. L. R. III.
35. Section 23 of the 1964 Constitution.
36. Section 22 of the 1964 Constitution.
37. Section 25, *ibid.*
38. Per Cole, C. J., at p. 114, *ibid.*
39. Cap. 181 of the Laws of Zambia, 1972 edition.
40. Section 2 of the Act, *ibid.*
41. "28(1) Subject to the provisions of subsection (6) of this section, if any person alleges that any of the provisions of Sections 13 to 26 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.
    (2) The High Court shall have original jurisdiction
        (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section;
        (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section;

    and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 13 to 26 (inclusive) of this Constitution.

    ....

    (5) No application shall be brought under subsection (1) of this Constitution are likely to be contravened by reason of proposals contained in any bill which, at the date of the application, has not become a law".
42. *African Law Report*, SLI (1967), p. 1.
43. Quoted in the judgement at p. 8.
44. *Ibid.*, p. 10.
45. Per Cole, C. J., at p. 13.
46. Quoted by Cole, C. J. at p. 7 in *Steele's* case, *ibid.*
47. Article 13(1) of the Republican Constitution of Ghana (1960).
48. Article 13(2), *ibid.*
49. (1961) GLR 523.
50. Per Korsah, C. J., *ibid.*, p. 534.
51. *Ibid.*, p. 535.
52. See K. A. Busia, *Africa in Search of Democracy*, Routledge & Kegan Paul, London, 1967, Chapter 8; also Nwabueze, *Presidentialism in Commonwealth Africa, supra*, pp. 92–98.
53. Nwabueze, *ibid.*, p. 92.
54. See Nwabueze, *ibid.*, p. 336.
55. Quoted in Busia, *Africa in Search of Democracy, supra*, p. 131–32.
56. *Journal of the International Commission of Jurists*, No. 18, March 1964, p. 10.
57. K. A. Busia, *Africa in Search of Democracy, supra*, p. 133.

58. K. A. Busia, *ibid.*, p. 127. For comments on the circumstances leading to these events, see T. M. Franck, *Comparative Constitutional Process*, Sweet & Maxwell, London, 1968, pp. 151–152.
59. Section 1, 1963, No. 883, Schedule 1, Ss. 1–16.
60. Section 1, 1964, No. 916, Schedule 2, Ss. 11–17.
61. See Malawi Government White Paper (No. 002 of 1965), upon the Republican Constitution (Para. 24).
62. *Ibid.* This view presumably was a response to the Minorities' Commission in Nigeria, *supra.*
63. For the contents of the UN Declaration of Human Rights, refer to chapter 1.
64. These are contained in chapter 1, section 2 of the 1966 Malawi Republican Constitution.
65. Section 2(2).
66. For a discussion of some laws passed in apparent inconsistency with the basic principles of government, see Simon Roberts, *Public Law*, 1966, pp. 321–22. Also by the same author in *Journal of African Law*, Vol. 10, No. 2, at p. 131.
67. See Simon Roberts, *Public Law*, Sweet & Maxwell, London 1966, p. 304.
68. Report of the Presidential Commission on the Establishment of a Democratic One-Party State in Tanzania, *supra*, at p. 30.
69. *Ibid.*, p. 31.
70. *Ibid.*, p. 3. For a detailed account of the relationship between the need to secure public order and security on the one hand, and civil liberties on the other, see, Y. P. Ghai and J. P. W. B. McAuslan, *Public Law and Political Change in Kenya*, East African Literature Bureau, Nairobi, 1970, pp. 407–56.
71. Report of the Presidential Commission, *op. cit.*, Para. 102.
72. As to the extent to which this problem manifests itself in a new emergent state, see B. O. Nwabueze, *Presidentialism* in Commonwealth Africa, *op. cit.*, chapter XII. Also D. V. Cowen, *The Foundations of Freedom*, Oxford University Press, Cape Town, 1961, Chapter 6.
73. Report of the Presidential Commission, *supra*, Para. 103.
74. Ghai and McAuslan, *Public Law and Political Change in Kenya*, Oxford University Press, Nairobi, 1970, *supra*, p. 429.
75. *Supra.*
76. The excerpts of the memorandum are quoted in K. A. Busia, *Africa in Search of Democracy*, *supra*, at pp. 136–37.
77. *Ibid.*, at p. 137.
78. *Ibid.*
79. *Ibid.*
80. See Report of the Presidential Commission, *supra*, Para. 131
81. *Ibid.*, p. 32.
82. See Nwabueze, *Presidentialism in Commonwealth Africa*, *supra*, at ppl 30–34.
83. See Report of the Presidential Commission, *supra*, p. 32.
84. *Ibid.*
85. In T. M. Franck, *Comparative Constitutional Process*, *supra*, p. 8.
86. Sierra Leone (1978) has also retained a bill of rights in its One-Party Constitution.

87. Report of the National Commission, *supra*, at p. ix.
88. National Commission, *ibid.*, Para. 32.
89. *Ibid.*
90. Government White Paper on "Summary of Recommendations Accepted by Government", p. 3, *supra.*
91. These 'presidential directives' to the national commission were clearly part of the terms of reference since the commission were "in their considerations and recommendations", to "pay due regard *and adhere* . . . " to them.
92. Report of the national commission, *supra*, Paras. 30 and 31.