PARLIAMENTARY PRIVILEGE IN KENYA: THE ROLE OF AN IMPORTED CONSTITUTIONAL CONCEPT

by

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INTRODUCTION

The origin of Parliament as a vital institution of government in western nations is closely interlinked with the whole philosophy of liberal democracy. The liberal democratic state started off with an economic order in which success was seen as dependent on free competition. It was held that individuals must be left free to maximise the returns of their deliberate options, based on personal skill and acumen.[1]

This individualist orientation constituted a major public interest to be advanced and safeguarded for modern generations and for posterity. It was essential, therefore, to transform it into an overriding political dogma superintended by state machinery. The state itself had to be organised in such a way as to ensure the effective preservation of the economic system and the sanctity of the idea of free choice.[2]

The element of competition in the political order took two main forms — the political party and the institution of Parliament. Political life was to be organised on the basis of parties; the party which won the elections would form the executive organ of the state. And Parliament, the state's lawmaking instrument, comprised of representatives who had been successful in competitive elections. Government arose from Parliament; and the latter arose from the popular vote. This tradition, in so far as it alone founded the efficient public ordering of the nation, was, as it were, the mainspring of western civilisation. The early lead of the west in industry, commerce, science and technology can hardly be seen apart from the political progress and governmental stability based on parliamentary democracy in the relevant countries.

The institution of Parliament in western countries has been progressively developed and democratised, becoming, in a sense, the most fundamental organ of government.[3] In Britain, in many ways the classic

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1 See C. B. Macpherson, *The Real World of Democracy* (1966); G. H. Sabine, *A History of Political Theory*, (3rd ed. 1962), Chaps. XXVI, XXIX and XXXI; G. Myrdal, *Economic Theory and Underdeveloped Regions* (1967) at p. 46 *ff.*; F. A. Hayek, *The Road to Serfdom* (1944).

2 Macpherson, *op. cit.*; Sabine, *op. cit.*; Myrdal, *op. cit.*; Hayek, *op. cit.*

3 The most notable exception is the United States where the Presidency as an institution depends to a significantly lesser extent upon the elected body. See C. Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (1963); R. S. Hirschfield, 'The Power of the Contemporary President', (1961) 14, *Parliamentary Affairs*, 353.

example of parliamentary democracy, the government of the day emerges almost automatically from the results of a parliamentary election. The executive organ is accountable to the electorate through Parliament which, by majority vote, is able to bring down the government on an important issue of policy.[4] The floor of Parliament is a forum of debate where the conduct of government is reviewed and the reactions of the electorate ventilated. Parliament makes the laws intended for the governance of the country; it confers specific powers of public control on specified machinery of government; it votes moneys for the running of the processes of government; and it investigates the probity of the executive organ in the use of public powers and public moneys.[5]

The establishment of such a role for Parliament underwent a difficult historical phase. In the nature of things, the executive is always in a much stronger position than any other organ of government. It can easily get out of control and drift into complete authoritarianism by virtue of its command of coercive physical and administrative resources. This reality faced England in the seventeenth century when the Stuart Kings sought to establish a tradition of prerogative government.[6] But Parliament emerged triumphant, consolidating its gains in the *Bill of Rights* of 1688 and the *Act of Settlement* of 1700.

The parliamentary tradition could not, however, be preserved by the two statutes alone. It took vigilance and the evolution of specific safeguards to ensure that parliament remained the spring of governmental authority. One of such safeguards was *parliamentary privilege* — the immunity accorded people involved in parliamentary proceedings in relation to their conduct in pursuance of such proceedings. The privilege concept, as we will see, has taken a fairly precise form and is today one of the main pillars of parliamentary government.

It so happens that in the colonisation process, towards the end of the nineteenth century, the bulk of the African continent fell to the liberal democratic powers of the west. At the dawn of independence the ex-suzerains left for Africa vast heritages of western constitutional philosophy. Britain bequeathed to her former colonies the Westminster model constitution with its provisions for parliamentary government. She was

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4 That this should actually happen is rare, mainly on account of the strict party discipline observed within the individual parties.

5 See K. C. Wheare, *Legislatures*, 2nd ed. (1968); N. H. Brasher, *Studies in British Government* (1965); J. Harvey and L. Bather, *The British Constitution* (1972).

6 See W. Holdsworth, *Some Makers of English Law* (1966), Lecture IV; E. C. S. Wade and A. W. Bradley, *Constitutional Law* (8th ed. 1970), Ch. 4.

convinced, apparently, that this was her greatest contribution to civilisation in the third world.[7]

The primary concern of this article is to investigate the significance in Kenya today of Parliamentary privilege. It is proposed to analyse the concept on a theoretical level and to trace the process whereby it became part of Kenya's constitutional heritage. Thereafter the development of the principle in this country will be considered. From the analysis reflections will be made on the idea of constitutional importation and the general applicability of western conceptions of government.

THE CONCEPT OF PARLIAMENTARY PRIVILEGE

(a) *Britain*

As already noted, the concept of parliamentary privilege grew out of the contradiction between power and restraint. The English Kings were loath to accept parliamentary superintendency over their exercise of executive powers. Though the Glorious Revolution of 1688 set at rest such royal inclinations, the King was still able, by indirect methods, to vindicate his distaste for the conduct of individual parliamentarians during parliamentary proceedings. It is basically for this reason that the concept of privilege was evolved and institutionalised.

Parliamentary privilege is often treated as though it had two meanings; the one referring to, '[the] sum of the fundamental rights of the House [of Parliament] and of its individual Members as against the prerogatives of the [Executive] [and] the authority of the ordinary courts of law....'; and the other including the whole constellation of Parliament's functions as part of privilege.[8] In strict technicality only the former sense is correct. For, etymologically, privilege contemplates some immunity from normal consequences and is not concerned with positive, ordinary *functions* as such.[9] The privilege concept, therefore, describes certain peculiar immunities available to Members of Parliament (M.P.s)[10] while they are engaged in parliamentary duties.

Essentially M.P.s conduct parliamentary business through speech and writing, in some cases on the floor of Parliament and in others in committees. It is, therefore, in respect of their parliamentary speeches and

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7 See S. A. de Smith, *The New Commonwealth and its Constitutions* (1964); L. C. B. Gower, *Independent Africa* (1967), at pp. 14-18; 54-67; F. D. Schneider, 'The Study of Parliamentary Government in the Commonwealth', (1960) 14, *Parliamentary Affairs*, 460. The colonial period was not however, characterised by the practice of parliamentary democracy. Instead, politics was discouraged and something close to pure administration typified the running of the state. See R. First, *The Barrel of a Gun* (1970); E. A. Brett, *Colonialism and Underdevelopment in East Africa* (1973); Y. P. Ghai and J. P. W. B. McAuslan, *Public Law and Political Change in Kenya* (1970).

8 *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 18th ed. (1971), at p. 64 *ff*.

9 (Ed.) C. T. Onions, *The Shorter Oxford English Dictionary* (3rd ed., 1944) defines privilege as follows: 'A right, advantage or immunity granted to or enjoyed by a person, or class of persons, beyond the common advantages of others'.

writings that M.P.s need protection against executive power and the courts of law.

In the British Constitution, the privilege of free speech in parliamentary proceedings is well established.[11] Great English lawyers like Coke would have seen such constitutional issues as part of the common law and the rights recognised thereunder.[12] But the matter was given statutory *imprimatur* with the Bill of Rights of 1689. The present state of the law is stated in *Erskine May*:

> Subject to the rules of order in debate... a member may state whatever he thinks fit in debate, however offensive it may be to the feelings, or injurious to the character, of individuals; and he is protected by his privilege from any action for libel, as well as from any other question or molestation.[13]

Broad as it is, the privilege of free speech could lend itself to abuse. On this score it has been subjected to some restrictive interpretation. In the *Strauss* case,[14] the question arose as to whether a letter written by an M.P. to a Minister in relation to a nationalised industry was protected by parliamentary privilege against claims in defamation. The House of Commons rejected the opinion of the Committee of Privileges that the letter was a proceeding in Parliament for the purpose of determining whether or not it was protected. The main reason for this interpretation was that the language used was so pejorative of officials of the nationalised industry as to remove the communication out of the ordinary ambit of parliamentary proceedings.[15]

Further limitations on privilege are to be found in connection with criminal conduct. Although the *words* spoken in parliamentary proceedings are privileged even where a crime is disclosed,[16] the position of criminal *acts* appears to be different.[17] If an M.P. committed a criminal act it is unlikely that the act would be interpreted as part of the parliamentary proceedings.[18]

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10 Some of the privileges also cover officials of Parliament who may be discharging their duties in the course of parliamentary proceedings. In *Bradlaugh* v. *Erskine* (1884) 12 Q.B.D. 276, the Deputy Sergeant at Arms was held justified in committing an assault in Parliament in pursuance of the order of the House. 'The Houses,' observed Lord Coleridge, 'cannot act by themselves as a body; they must act by officers.'

11 See *Haxey's Case*, in *Erskine May*, *op. cit.*, at p. 71; *Strode's Case*, in *Erskine May*, at pp. 71-2; *Sir John Eliot's Case* (1629), 3 St. Tr. 294; Wade and Bradley, *op. cit.*, at p. 155 *ff.*; *Erskine May*, Chap. VI.

12 See Sabine, *op. cit.*, pp. 452-53; Holdsworth, *op. cit.*, p. 131.

13 *Op. cit.*

14 House of Commons, *Parliamentary Debates* (Hansard) Vol. 591 (Session 1957-58), cc. 207-344.

15 It would seem that any matter undertaken by MPs but which is not intended *bona fide* for the discharge of parliamentary proceedings, e.g., a casual conversation between them inside the Chamber, is not regarded as a proceeding in Parliament. See *Erskine May*, at p. 86.

16 *Erskine May*, at p. 87.

17 See *Bradlaugh* v. *Gosset* [1884] 12 Q.B.D. 284. But this is subject to the qualification in n. 10, *Supra*. See *Erskine May*, at p. 87.

18 Where an M.P. commits a crime in Parliament it is for the House to decide whether to pass necessary judgment or to send the matter to the court of law.

Yet another important limitation on the scope of privilege is *statutory detention.* After the detention of an M.P. under the *Emergency Powers (Defence) Acts,* of 1939 and 1940, the House of Commons appointed a committee to investigate whether there had been a breach of privilege. The committee reported that the detention was lawful and entailed no breach of parliamentary privilege.[19]

It is to be noted that the scope of privilege is not unlimited. It does not excuse all criminal conduct nor does it render M.P.s immune to statutory detention by the executive. The fact that the use of such statutory powers has been extremely rare is likely to be more a question of the style of rule than of any sacrosanct protective norm for M.P.s.

The greatest source of strength for the concept of parliamentary privilege in Britain has been the sanction available to M.P.s. They have enjoyed the powers of courts of law, of imposing punishment on those violating the privilege.[20]

(b) *Kenya*

(i) *Background*

Through its colonial connection, Kenya drew heavily on Britain's constitutional principles and public organisational styles.[21] The most significant of such imports for our purpose was the British constitutional model. Those who have taken note on this process of importation tend to prefer the view that the Westminster model had all the makings of a perfect device of government, and that on this score it wholly found favour with the nationalist leaders of the emergent states. The best example of such scholars is the late Professor de Smith; according to him,

> [the Westminster model] has been the most sought after of Britain's exports to the Commonwealth.... It has been demanded partly because it is familiar to colonial politicians, partly because they genuinely admire the way in which it works in Britain, partly because they have sometimes been told that they lack the political maturity to operate it effectively, partly because it makes for very strong government...[22]

While this line of thought is not unjustified, it is important to note that it obscures part of the picture. After many decades of close working relationship between the tutelary and colonial states it would have been unlikely for the former to take an indifferent attitude as to future bilateral ties. The colonial connection had helped to forge such economic ties as the outgoing suzerains could not be expected to overlook. And,

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19 *Erskine May,* at p. 103. It may well be that the wartime needs were taken into account.

20 *Erskine May,* Chap. IX.

21 The main colonial legacies were: statehood, indirect rule, the Westminster Constitution, the Whitehall model of civil service, the mode of economic organization, and the common law. See Gower, *op. cit.,* at pp. 1-34.

22 *Op. cit.,* pp. 68. Of similar views are: Gower, *op. cit.,* pp. 14 *ff.;* Schneider, *op. cit.*

at a time of international ideological conflict, it was unlikely that a major western power would be willing to abandon all links with her recent colony.[23]

The important point, however, is that Kenya at independence inherited the fundamentals of the British constitution. Provisions were made for an executive government chosen from the elected House and responsible to the same, and a judiciary organised as far as possible independently of the other organs of government.[24]

We have already seen the fundamental role of Parliament in the British governmental structure. A similar conception of power relations ran through Kenya's Independence Constitution. Under this document the Governor-General took the initial step in the formation of a government by appointing a Prime Minister who would in turn name his Cabinet. But the Governor-General, who was the Queen's personal representative as Head of State, had little discretion in the matter. He could only appoint as Prime Minister, 'a member of the House of Representatives... likely to command the support of a majority of the members of the House....'[25] Similarly, he could only remove the Prime Minister from office, 'if a resolution of no confidence in the Government of Kenya [was] passed by the House of Representatives and [he did] not within three days resign from his office or advise dissolution of Parliament....'[26]

Established under the fourth chapter of the Constitution, Parliament comprised two distinct units — the Queen (represented by the Governor-General) and the National Assembly. The Queen's status in this set-up arose from her position as Head of State. And the National Assembly was conceived as the democratic basis of government consisting of popularly elected representatives.

The National Assembly consisted of the Senate and the House of Representatives,[27] to which the Government was responsible.[28] The two Houses made and where necessary, unmade the laws of the land.[29] They controlled public finance[30] and could criticise the Government or even bring it down by the vote of no confidence.

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23 See C. Leys, *Underdevelopment in Kenya* (1975); G. Wasserman, 'The Politics of Consensual Decolonization (1975) 5, *The African Review*, 25, 1, 'The Independence Bargain: Kenya Europeans and the Land Issue 1960-1962' (1973) 9, *Journal of Commonwealth Political Studies*, 99 *f*; 'Continuity and Counter-Insurgency: The Role of Land Reform in Decolonizing Kenya, 1962-70' (1973) 7, *Canadian Journal of African Studies* (1973), 133; G. W. Kanyeihamba, *Constitutional Law and Government in Uganda* (1975), at p. 56.

24 The Independence Constitution, Sched. 2 of the *Kenya Order in Council*, L.N. No. 718 of 1973.

25 Ibid., s. 75 (3).

26 Ibid., s. 75 (4).

27 Ibid., ss. 37, 38, and Sched. 5 Pt. II.

28 Ibid., s. 76 (2).

29 Ibid., s. 66.

30 Ibid., Chap. VIII.

The independence Parliament was clearly conceived, after the British tradition, as the backbone of government. The constitution makers envisaged for Kenya a firm parliamentary tradition in which unimpeded competition would be the determinant of the government of the day.

(ii) *Parliamentary Privilege*

We have already seen the crucial role of parliamentary privilege in the British constitutional structure. In the absence of this principle constant confrontations would, in all probability, have occurred between the executive and the legislature, perhaps resulting in entirely different power relations in which the former might be completely unrestrained. Against this background, it becomes relevant to see what role the privilege concept has played in Kenya, a nation inaugurated by a constitutional framework centred on the institution of Parliament.

For its primacy in Britain's framework of government, privilege is largely a *common law* concept.[31] Its scope is not exhaustively defined in any statute, and has been the subject of empirical demarcation by both Parliament[32] and the courts of law.[33]

Like the whole idea of a written constitution, the legal format of privilege in Kenya was different from the British style. The concept of privilege was a novelty in the same way as the new parliamentary framework provided under the Independence Constitution. The concept did not form part of any long tradition in Kenya. It could not, therefore, preserve the 'common-law' style only; additional normative protection was necessary.

There were two alternative methods of incorporating the privilege concept into Kenya's system of norms — in the constitutional document itself, or in ordinary legislation. The latter was preferred.[34] This was a rather strange preference, considering the importance then attached to

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31 Those countries with written constitutions and laws operating side by side with common law, equity and customary rules, are apt to visualise their norms on the basis of a hierarchy. Such an outlook would rate the various norms in varying priority with the Constitution at the top. Britain does not lend itself to this kind of analysis. She is not in the tradition of documentarily spelling out all the cardinal norms, preferring to leave it to general custom, as may from time to time be interpreted in specific instances. What specific constitutional enactments obtain there are essentially backward-looking and based on the crisis then in hand — e.g. the *Bill of Rights* 1688 and the *Act of Settlement* 1700. The British Constitution, therefore, is largely part of the common law tradition. See Holdsworth, *op. cit.*, at pp. 95, 117, 131; Sabine, *op. cit.*, at pp. 452-53; L. Wolf-Phillips, *Comparative Constitutions* (1972), at pp. 10-12.

32 See the *Strauss* Case, *supra*.

33 See *Bradlaugh* v. *Erskine, supra*; *Bradlaugh* v. *Gosset, supra*; *The King* v. *Wilkes* (1763), 2 Wilson 151; *Eliot's Case* (1629), 3 St. Tr. 294; *Stockdale* v. *Hansard* (1839), 9 A. & E.1; *The Case of the Sheriff of Middlesex* (1840), 11 A. & E. 273; *Stourton* v. *Stourton* [1963] p. 303.

34 The *National Assembly (Powers and Privileges) Act*, Chap. 6, Laws of Kenya. The Constitution merely provided that '...Parliament may, for the purpose of the orderly and effective discharge of the business of the National Assembly, provide for the powers, privileges and immunities of the Assembly and its committee and members' but did not state the content of such immunities.

the institution of Parliament.[35] While ordinary legislation could be amended by simple majority vote, special (in some cases, near-unanimous) majorities were required before the Constitution could be amended.[36] The most appropriate place for privilege, therefore, was in the constitution.

(iii) *Privilege Legislation*

From the fact of adopting a Westminster model constitution *per se*, it might logically be inferred that Kenya was importing its basic concepts. Parliamentary privilege would fall in this category;[37] being such an essential ingredient of parliamentarism it is arguable that it could not be severed from the imported institution unless some express legal provision stated otherwise. It is also arguable that Kenya would have received the concept of privilege as part of the common law.[38] By virtue of the *East African Protectorate Order-in-Council* of 1902, Kenya had received the English common law as part of her legal heritage.[39] As this provision does not appear to have contemplated any specific aspects of common law, it is likely to have encompassed such basic constitutional principles as parliamentary privilege.

Above a level of conjecture, clear statutory provisions have been made for the reception of the privilege principle. As early as 1952, the colonial Legislative Council passed the *Legislative Council (Powers and Privileges) Ordinance.*[40] The aim of the statute was stated as being,

> ... to declare and define certain powers, privileges and immunities of the Legislative Council and of the Members of such council, to secure freedom of speech in the Legislative Council, to regulate admittance to the precincts of the Legislative Council to give protection to persons employed in the publication of the Reports and other papers of the Legislative Council ...

Its scope was more or less the same as the British conception of privilege. Indeed, the House of Commons practices were the Council's main source of inspiration.[41]

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35 The Constitution was the fundamental law of the land and any law inconsistent with it was void.

36 Independence Constitution, s. 71. Some of the provisions were *specially entrenched,* requiring a 90 per cent vote (of all the M.P.s) before they could be amended (Shed. 4 Col. 1) and the rest were *entrenched,* requiring a 75 per cent majority vote (of all the M.P.s).

37 See Wade and Bradley, *op. cit.*

38 See *supra* n. 31.

39 Art. 15 (2). This provision has substantially been provided for in independent Kenya by the *Judicature Act,* 1967, s. 3 (1) (c).

40 Ordinance No. 25 of 1952. The Legislative Council, the precursor of Kenya's National Assembly, was then by no means a representative body. The voters' rolls were racial and the Council was dominated by white settlers and colonial officials. See B. A. Ogot, 'Kenya Under the British, 1895 to 1963' in Ogot and Kieran (eds.), *Zamani: A Survey of East African History* (1968), at pp. 255-89; G. F. Engholm, 'African Elections in Kenya' in W. J. M. Mackenzie and K. Robinson, *Five Elections in Africa: A Group of Electoral Studies* (1960) at pp. 391-461. For all this the Council still considered itself to be a genuine legislature and properly entitled to parliamentary privilege.

41 Legislative Council Debates, *Official Report,* Vol. XLVII, 8 April, 1952, cc. 3-4; 45-55 — debate on the Legislative Council (Powers and Privileges) Bill, 1952.

The Ordinance provided specific safeguards for members of the Legislative Council. No legislator was liable to civil or criminal proceedings '... for words spoken before, or written in a report to, the Council or to a committee, or by reason of any matter or thing brought by him therein by petition, bill, resolution, motion or otherwise'.[42] This was a basic condition for the effective operation of any legislative body.[43] Members of the Council were privileged from arrest for any civil debt during session.[44] Not only did this give rise to the implication that criminal cases were excluded; the Ordinance expressly left out of its protection cases of debt '... the contraction of which constitutes a criminal offence ....'[45] Unlike the British tradition where criminal acts committed in Parliament are cognisable to both Parliament itself and the courts of law,[46] it is apparent that no criminal jurisdiction at all was given to the Legislative Council.[47] The Council was also protected by provision of criminal sanctions (enforceable by the courts of law[48]) in cases of non-compliance with its orders or those of its committees.[49] It was an offence to assault or molest any officer of the Council in the course of its duties,[50] to create a disturbance which interrupts the Council's proceedings,[51] to publish any false or scandalous libel on the Council,[52] and so on.

The 1952 Ordinance forms the substance of Kenya's privilege legislation today. Though it has been amended several times, this has been largely as to form only. The *Legislative Council (Powers and Privileges) (Amendment) Ordinance*[53] of 1961 merely tidied up the semantic format of the law. In 1963 the Ordinance was renamed *The National Assembly (Powers and Privileges) Ordinance.*[54] It was revised soon after independ-

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42 S. 3.

43 The fact that such a provision was made only after about half a century of the Council's life is evidence of the relatively insignificant role the legislature played in the total governmental process. She Engholm, *op. cit.*

44 S. 4.

45 Ibid.

46 *Erskine May, op. cit.*, p. 87 *ff.*

47 No reason was given for this departure from the contemporary tradition of the British Parliament. But as the 1950s were years of test on the morality of colonialism, with nationalist agitation against the authorities, it might be expected that the greatest reliance would be placed on the court process as a means for strict enforcement of the criminal laws, on definite policies in the interest of law and order. See C. Gertzel, *The Politics of Independent Kenya* (1970), Chap. 1; C. Rosberg and J. Nottingham, *The Myth of Mau Mau* (1966); G. Bennet, *Kenya: A Political History — The Colonial Period* (1963).

48 S. 18.

49 Ibid.

50 S. 18 (e).

51 S. 18 (f).

52 S. 18 (h).

53 No. 36 of 1961.

54 The *Kenya (Amendment of Laws) (National Assembly Powers and Privileges) Regulations*, L.N. No. 602 of 1963, made under the *Kenya Order in Council*, L.N. No. 245 of 1963, *op. cit.*

ence and is today entitled *The National Assembly (Powers and Priviliges) Act.*[55]

One amendment to the original statute, however, deserves note — the *National Assembly (Powers and Privileges) (Amendment) Act*[56] of 1966. It was provided by this statute[57] that there should be a parliamentary committee in charge of privilege.[58] The committee was '... either of its own motion of as a result of a complaint made by any person' to inquire into any alleged breach of parliamentary privilege.[59] After such enquiry the Committee was to report its findings to the Assembly with any necessary recommendations.[60] It was for the House to take appropriate disciplinary action against the offending person.[61] The constitutional significance of such provisions is that they provided a practical apparatus by which the legislature could vindicate its authority. The provisions ostensibly recognize the important role of the legislature within the power structure and underscore the desirability of sanctions for the preservation of its integrity. But it is important to note that either because of political realities (in particular the singularly dominant role of the Presidency within the power structure)[62] or because of unenlightenment and lethargy on the part of M.P.s, the various legal provisions have not so far been employed in such a manner as to vindicate the authority of Parliament as a crucial organ of government.

(iv) *Privilege and the Constitutional Right of Free Expression*

At one point there appears to be an overlap in the law of privilege and the constitutional provision for freedom of expression. The Constitution provides:

> Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to

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55 Cap. 6, *Laws of Kenya* (Rev. 1964). By L.N. No. 2 of 1963 all statutes were renamed 'Acts'. The continuation of privilege legislation was, perhaps, natural, considering that even the colonial authorities had found it necessary. But, more than that, there was a constitutional provision (see n. 34 *supra*) for this kind of legislation at independence.

56 No. 14 of 1966.

57 In Britain frequent use is made of the Committee of Privileges whenever there is a claim that there has been a breach of privilege. The procedure, however, is purely conventional and is part of a long tradition harking back to the seventeenth century. See *Erskine May, op. cit.*, at p. 652.

58 S. 7B.

59 S. 7B (4).

60 S. 7B (5)

61 S. 7B (6). It deserves note that the whole tenor of the Act suggests a hypothesis that such an offender would be one of the M.P.s, in which case he might be disciplined by exclusion from sessions for some time. The Assembly is given no clear powers of sanction against outsiders, as is the case in Britain.

62 The reality is that the President has acquired firm control of the governmental powers. See J. J. Okumu, 'Chrisma and Politics in Kenya: Notes and Comments on the Problems of Kenya's Party Leadership', *East Africa Journal*, Vol. 5 No. 2 (February, 1968), pp. 9 *ff*. H. W. O. Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya Since Independence, 1963-69', *African Affairs*, Vol. 71 No. 282 (1972).

> hold opinions without interference, freedom to receive ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) . . .[63]

But there are a number of limitations to this right. The main one is that it may be limited by ordinary statute '. . . in the interests of defence, public safety, public order, public morality or public health . . . .'[64] These grounds are so wide and imprecise that they could easily give legality to unwarranted derogations. Yet the main premise of the section is that freedom of expression is a right, breach of which can be redressed in a court of law.[65]

The freedom of expression applies to all persons. By inference this would include M.P.s. Thus, it could be argued that parliamentary speeches are protected both by the law of privilege and by the constitutional right of free expression. This could place the M.P.s in a strong position. Where the constitutional right was not abridged by statute they might, at least in theory, redress it by the ordinary process of litigation. And where the right was lawfully restricted they could fall back on the ordinary law of parliamentary privilege.

It is necessary to see how far actual practice has been consistent with legal theory.

(v) *Practice*

Kenya in the immediate post-independence years was characterised by a vigorous Parliament, which apparently never doubted for once that it was the supreme institution. This Parliament seems to have taken it for granted that the *National Assembly (Powers and Privileges) Act* gave complete immunity to its members in respect of their parliamentary speeches. But while the Act gave them privilege as against criminal and civil proceedings, it was silent as to the effect of the executives powers of detention. If (as is rather unlikely) the M.P.s did know that in common law tradition detention powers are an exception to parliamentary privilege, the very rare and exceptional use of such powers must have deluded them to overrate their immunities.

Detention by the executive is provided for by the Constitution and the *Preservation of Public Security Act*.[66] Under s. 83 of the constitution, nothing done under the authority of Part III of the said Act[67] is to be held inconsistent with the constitutional guarantees of personal liberty

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63 Act No. 5 of 1969, s. 79.

64 Ibid., s. 79 (2) (a). There are two crucial limiting statutes at the moment, one dealing with 'public safety' (The *Preservation of Public Security Act*, Cap. 57) and the other with 'public order' (the *Public Order Act*, Cap. 56).

65 Act No. 5 of 1969, s. 84.

66 Cap. 57. Though this Act is in nature an emergency law, it has been kept in constant operation.

67 This Part gives the executive very wide discretion in matters of state security, including the detention of persons without a trial. But it is important to note that Part II, which does not have the safeguards of Part III, gives the executive more or less the same powers. No part of the Act has ever been challenged in court as inconsistent with the Constitution.

and freedoms of expression and movement. Under this Act, the executive may abridge various fundamental rights supposed to be justiciable under the constitution.

Kenya's two-party system at independence was soon replaced by a one-party state, at the exhortation of the Government. But this unity was shortlived and in 1966 an opposition party was formed by the malcontents of the ruling Kenya African National Union (KANU). During the three years that the opposition party, the Kenya People's Union (KPU), lasted it became evident that the Government was set to use the state machinery to stop all opposition and to create a relatively monolithic system with only one party, with the state President at its head.[68]

This political development had immediate impact on the role of Parliament in general, and on parliamentary privilege in particular. By 1969, all active KPU supporters including its members in Parliament had been detained and the party banned, allegedly for subversive activities.[69] What could not at once be established was whether the KPU members had been detained for any particular thing they had said in Parliament or on undisclosed considerations of public safety. The executive was not required under the *Preservation of Public Security Act* to publicly give any reasons for detaining a particular person.

The question, therefore, continued as to whether or not an M.P. might be detained for his parliamentary speeches. It rose even more emphatically in 1967 when the President detained a loyal KANU member after he criticised the Government at the Central Legislative Assembly, a regional 'parliament' of East Africa. The immediate concern of the Kenya legislature was expressed by one M.P. in the following terms:

> Mr. Speaker . . . if it is true that [the detained person] was detained after making a statement in the Central Legislative Assembly would it not cause some embarrassment for the Members of this National Assembly if they were to speak freely . . . ?[70]

In libertarian spirit, the then Speaker of the National Assembly, Mr. H. Slade, considered that parliamentary privilege was in danger. He called on the Government to issue a statement making clear its position with regard to privilege.[71] In his own view the *National Assembly (Powers and Privileges) Act* should have been interpreted as giving immunity

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68 Okumu, *op. cit.*; Okoth-Ogendo, *op. cit.*

69 See the National Assembly, *Official Report*, Vol. XII, 26 May, 1967, c. 261.

70 National Assembly, *Official Report*, Vol. XII, 26 May, 1967, c. 261. In strict law there was a stronger reason for the M.P.s to be so concerned. Members of the Central Legislative Assembly were then nominated from the National Assembly, and were therefore M.P.s like any others.

71 National Assembly, *Official Report*, Vol. XII, 26 May 1967, c. 261.

against statutory detention, *inter alia*.[72] The Government's position was that the immunity of M.P.s as against the powers of detention was not a rule of law but a matter of principle. In the words of the Vice-President (Mr. Moi):

> [*The National Assembly (Powers and Privileges) Act*] . . . covers only civil and criminal proceedings and I agree[73] that it does not cover detention under the *Preservation of Public Security Act* . . . Therefore . . . [I give] assurance to the [MPs] that the Government recognizes the principle that no [MP] may be detained on account of anything said by him in the House.[74]

But he qualified this principle: 'The Government, however, expects that [M.P.s] will behave responsibly: in other words, the statements or speeches made by [M.P.s] in this House must not be careless and irresponsible.'[75]

If the detention of KPU M.P.s might have been explained otherwise than as arising from parliamentary speeches, it now seems clear that the Government is not reluctant to use the *lacuna* in the privilege legislation to detain M.P.s for their parliamentary speeches under the *Preservation of Public Security Act*. The last two years have witnessed the detention of three M.P.s; and the circumstances of their detention suggest strongly that the reason could not but be their parliamentary speeches.

In October 1975, the Deputy Speaker of the National Assembly and another M.P. were placed in detention. This followed a controversial parliamentary session in the course of which the Government took unmistakable exception to the words of the two M.P.s said in the course of the proceedings.[76] After the detention the Government rose to reiterate the 'responsibility' facet of the 1967 assurance. The Attorney-General had the following to say: '. . . sometimes it is good to realize that immunity and responsibility go hand in hand. For a long time Members have been using this House as a place of abuse . . .'.[77] This statement directly suggests that the two M.P.s were detained for abusing (which they could only have done by their parliamentary speeches) the immunity conferred by parliamentary privilege. The last detention to date took

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72 Ibid. At this time one British scholar, Patrick McAuslan, who was then in the country wrote a letter to the *East African Standard* (Nairobi) 2 June, 1967, in which he took issue with the Speaker's interpretation of privilege. McAuslan's view was that 'neither generally, via the Bill of Rights, nor specifically via parliamentary privilege are M.P.s exempted from preventive detention'; '. . . as matters stand at present freedom of speech and the person for MPs rests upon the goodwill of the Government and not upon the law.' This view was taken seriously by many M.P.s who then pressed for an official statement on privilege.

73 Apparently with McAuslan, ibid.

74 National Assembly, *Official Report*, Vol XIII, Pt. 2, 20 November 1967, c. 2159.

75 Ibid. The Vice-President claimed, however, that this was not a condition placed on the immunity of M.P.s against detention.

76 *Target* (Nairobi), 19-26 October, 1975; *The Weekly Review* (Nairobi), 5 January, 1976.

77 *The Weekly Review*, 27 October, 1975.

place in May 1977, after one M.P. had criticised the Government on the award of railway and air contracts, backing up his assertions with rather damaging papers.[78]

The three incidents occurring within but a short span of time seem to indicate the Kenya Government's conception of the sanctity of parliamentary privilege. They set a precedent and increased use of detention against critical M.P.s can be expected in the future; in any case the potential threat of detention will constantly hang over them like the sword of Damocles. The M.P.s are only privileged against detention so long as they speak *responsibly*, a word the adjudication of which the executive has arrogated to itself.

CONCLUSION

The general expectation at independence was that Kenya would adopt and sustain the former suzerain's domestic record of constitutional principles and practices. She was expected to forge a strong tradition of parliamentary government and provisions were made for such safeguards as parliamentary privilege.

Post-independence realities have shown such expectations to have been misplaced. While the content of the enacted laws of privilege has remained fairly constant, the frequency with which the executive organ has undermined their rationale due to political needs has underscored the fact that constitutional principles are a dynamic phenomenon which cannot be preserved by mere legal provisions. And this raises a fundamental question as to the propriety of importing constitutional principles. To what extent can such principles be preserved merely by incorporating them into the corpus of laws of the importing state?

The Government's attitude towards parliamentary privilege in Kenya is an instructive commentary on the banality of constitutional enactments *per se*. Such statutes must form part of a cherished tradition and their *spirit* must be respected if they are to have meaning. The rationale of privilege laws is that lawmakers should not be inhibited in their parliamentary duties. This objective will be imperilled whether the lawmakers are interned through ordinary court process or through statutory detention. The increased use of the detention power against parliamentarians not only falsifies the pre-independence hopes, but further bespeaks the jeopardy facing parliamentary government in Kenya.

78 *The Weekly Review*, 16 May, 1977.