

HUMAN RIGHTS IN A ONE-PARTY STATE

**International
Commission
of Jurists**

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Human Rights in a One-Party State



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HUMAN RIGHTS IN A ONE-PARTY STATE

INTERNATIONAL SEMINAR
ON HUMAN RIGHTS, THEIR
PROTECTION AND THE RULE
OF LAW IN A ONE-PARTY
STATE

convened by
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Preface

by

The Commonwealth Secretary-General

Our age is one of questioning and anxiety. Seldom in human history have old beliefs and roles been subject to such urgent and critical scrutiny as today. Everywhere the need is felt to adapt and innovate in order to respond to the complex challenges of our time. And in no other area has the search for new ways been more intense than in the realm of political processes, structures and institutions. It could hardly be otherwise; for politics pervades our lives more comprehensively and touches each one of us more intimately, than ever before. Even in the old democracies of the developed world, whose political institutions evolved over many centuries, the quest for greater relevance and responsiveness in political structures is visible and growing. How much more insistent and urgent must this quest be in the developing world, where the clamant demands of fragile nationhood, massive poverty and high popular expectation produce stresses altogether unimaginable in the more stable environments of the industrialized democracies?

Fortunately, there is today much greater awareness in the developing world of the inherent difficulties of transplanting political institutions into a milieu wholly different from the one in which they were originally nurtured and evolved. Yet, the lessons of the last twenty-five years — when one newly independent country after another bravely sought, with varying results, to replicate the Westminster model — have by no means been assimilated into political thinking or public opinion in the developed countries. There is a strong tendency there to be somewhat dismissive, even superior, towards efforts to create new systems of government more attuned to local needs and circumstances and, indeed, to the genius of the people whom they must serve, as well as capable of fostering socio-economic development that is truly endogenous.

Few would now deny that public participation in government is an

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indispensable tool of development. The fulfilment of such fundamental human rights as the right to work, the right to an adequate standard of living, to education, to social security, and to the highest attainable standard of physical and mental health, is wholly what development is all about. And public participation is critical to the achievement and maintenance of that social cohesion which is the underpinning of effective development. Recognizing the need for such cohesion, and for national mobilization to meet the requirements of waging a war on want no less desperate and no less disabling than a conventional war, a number of developing countries have turned away from a winner-take-all type of Westminster democracy rooted in an adversary system to a one-party system. To the casual observer, these new forms may have the appearance of totalitarianism; yet, as the proceedings at Dar es Salaam have shown, a one-party state can afford citizens more genuine opportunities for political choice than the multi-party system it has displaced, and it can also ensure greater popular participation and involvement in public affairs. By exploring the reality that underlies the form, as well as by making suggestions which would be conducive to the healthy evolution of those conventions of constraint on which, in the ultimate analysis, good government depends, the International Commission of Jurists and the distinguished jurists that it brought together have performed a signal service.

And that service goes deeper still. Human rights are the birthright of the people of the developing world no less than of the developed. They do not derive from the institutions and structures of the industrialized democracies and their fulfilment need not depend upon the reproduction of those institutions and structures in the democracies of the 'Third World'. But, by the same token, there must be a consciousness in the developing world of the need and capacity to accommodate these rights — to ensure respect for and protection of them — in the new political structures. If not, it will become all too easy to acquiesce in their denial as an incident of valid structural change. The Dar es Salaam seminar has helped to strengthen that perception and, in doing so, it will help to ensure that that denial does not become a concomitant of the new approaches to democracy. In the end, the true test of these approaches is the measure by which they advance the attainment by men of the birthright of their humanity — not their conformity to orthodoxy, itself always in transition.

Shridath Ramphal

Introduction

It is commonly assumed in the western world that the enjoyment of human rights and fundamental freedoms is to be found only in multi-party parliamentary democracies. It may well be that the enjoyment and protection of civil and political rights has reached its highest point in those stable and prosperous western societies which have evolved or adopted this form of political system. This does not, however, justify the further assumption that there is little to choose between other forms of society in the matter of human rights. In practice there is a great deal of variation in the degree of openness which they enjoy.

During the period of decolonization and independence after the Second World War, many of the newly liberated countries adopted, or had to adopt as a condition of obtaining independence, constitutions modelled upon those of their former imperial powers. At that time there was considerable optimism, particularly among lawyers in these countries, that these constitutions would operate in the same way and with the same legal safeguards as were to be found in the western countries on which they were modelled.

The experience of the last twenty-five years has shown that the western type of parliamentary democracy in its full sense has survived in very few third world countries, and then usually only in countries with a very small population. New forms of society have emerged, many of them very authoritarian. Others are of a more liberal nature. Perhaps the most interesting of these is the one-party democracy as developed by Tanzania and Zambia and more recently adopted by Sudan. All these countries have repeatedly declared their commitment to the principles of the rule of law and the enjoyment of basic human

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rights. They consider, however, that their one-party system is better adapted to their needs and political, social and economic circumstances, and offers them a truer form of democracy than would the western multi-party system.

The International Commission of Jurists, an organization of lawyers based in Geneva, has for twenty-five years been active in the promotion of the Rule of Law and the legal protection of human rights in all parts of the world. In 1955-1968 it organized a series of congresses and conferences, mostly in the third world, in which the principles of the rule of law and the conditions for the enjoyment of human rights were formulated in considerable detail. These congresses and conferences took place against the background of the movement towards independence and the assumption that the multi-party democracy would be the standard form of constitution.

After a seven-year interval, the International Commission of Jurists felt that it might be valuable to try to arrange a series of seminars on human rights on a regional or sub-regional basis in order to discuss relevant human rights questions in the light of the changing circumstances in each area. It was decided to begin the series, if possible, with a seminar in East and Central Africa on human rights and the rule of law in a one-party state, so as to approach the subject afresh in the context of this new political philosophy and system.

Approaches were made to governments, lawyers organizations, universities and others within the region. The response was sufficiently encouraging for the Commission to decide to proceed to organize a seminar in September 1976.

The Tanzanian government kindly consented to allow the seminar to be held in Dar-es-Salaam, and President Nyerere gave his personal encouragement to it, while making clear that the responsibility for the seminar lay entirely with the International Commission of Jurists. The International Commission of Jurists would like to place on record its gratitude to President Nyerere and to the Tanzanian Government for the friendly encouragement and the assistance which they gave.

With the exception of a very few experts who had considerable personal knowledge of the region, all the participants came from within the region. Of the thirty-seven participants, about one third occupied ministerial, official or judicial offices; about three quarters were lawyers and one quarter were churchmen, political scientists, civil servants and other non-lawyers. All had considerable experience of various aspects of government, legal practice and the protection of

human rights. They came from Sudan, Tanzania, Zambia, Botswana, Lesotho and Swaziland.

The seminar was arranged so as to promote as far as possible free and frank discussion of the many sensitive issues involved in the subject. With the exception of the opening session, the meetings were held in private and it was agreed that the report of the discussions would not make personal attributions. Largely due to a very fine keynote speech by Mr Pius Msekwa, Vice-Chancellor of the University of Dar-es-Salaam and a former Secretary of the ruling party TANU, all the most important issues were raised from the beginning and were discussed throughout the seminar in a relaxed and open manner.

The participants were able to agree upon a considerable body of practical conclusions and recommendations, and they asked the International Commission of Jurists to communicate these to the governments of the countries from which the participants came. The seminar also asked that neither the conclusions nor the report of the seminar should be published until these governments had had time to consider and, if they so wished, to comment upon them. This was duly done and explains the delay in publication of this report.

The International Commission of Jurists is very glad to have been able to organize this seminar, and hopes that it has made a useful contribution towards the development and protection of human rights in the one-party and other states of East and Central Africa. It has been gratified by the many expressions of thanks which it has received from the participants. For its part, the Commission wished to acknowledge with gratitude the generous grants it received from the government of Sweden and from the Ford Foundation which made it possible to finance the seminar.

An explanation of the committees and workshops is perhaps needed. It was agreed that six general topics, with the relevant working papers which had been circulated in advance, should be discussed in smaller groups. Three of these were called committees and met in the mornings; the other three, which were called workshops to distinguish them, met in the afternoons. There was no difference in the way in which they operated. As the participants divided differently in the mornings and afternoons some cross-fertilization of ideas between the committees and workshops was achieved.

Geneva, July 1977

Niall MacDermot
Secretary-General
International Commission of Jurists

List of participants

Name	Particulars
1. Leo S. BARON, Zambia	Deputy Chief Justice of Zambia
2. Mohamed Omer BESHIR, Sudan	Senior Research Fellow, Institute of African & Asian Studies and Dean of Graduate College, University of Khartoum; former Ambassador and Head of African Department, Ministry of Foreign Affairs; and former Principal, University of Khartoum
3. Godfrey L. BINAISA, USA (formerly Uganda)	Barrister, Queen's Counsel; former Attorney-General of Uganda
4. Mark D. BOMANI, Tanzania (Chairman of the seminar)	Deputy Director, U.N. Institute for Namibia; former Attorney-General and Member of Parliament of Tanzania, and Member of TANU National Executive Committee, 1965-75
5. O.E.C. CHIRWA, Tanzania	Advocate; Queen's Counsel; Vice-President of Tanzania Law Society; former Minister of Justice, Malawi (1961-64); Asst. Commissioner for Lands, Tanzania

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6. Frederick M. CHOMBA, Investigator-General (Ombudsman) of
Zambia Zambia since 1973; formerly Barrister-
at-Law; Member of the Judiciary 1959-
73, finally as High Court Judge
7. Khalafalla EL-RASH- Chief Justice of Sudan; LL.B. and
EED, Dipl. Int. Law (Cambridge); LL.M.
Sudan (London); formerly District Judge,
Advocate General and President of
Supreme Court
8. Gamaliel Mgongo FIMBO, Law Lecturer, University of Dar es
Tanzania Salaam; LL.B. (University College, Dar
es Salaam), LL.M. (London)
9. Philip Telford GEORGES, Professor of Law, University of the
Barbados West Indies; former Chief Justice,
Tanzania and former High Court
Judge, Trinidad & Tobago
10. K.L. JHAVERI, Advocate; Member Judicial Service
Tanzania Commission; Director, Tanzania Legal
Corporation; former elected Member
Tanzania Legislative Council (1959-
60) and Parliament (1960-65); Pre-
sident Tanzania Law Society (1964,
1967-75)
11. Horace KOLIMBA, Principal Secretary, Ministry of Man-
Tanzania power Development
12. M.H.A. KWIKIMA, Advocate; Administrator-General;
Tanzania former Resident Magistrate (1964-70)
and Acting Judge (1970-73)
13. Daniel M. LISULO, Member of the Central Committee of
Zambia the United National Independence
Party, Vice Chairman of Political,
Constitutional, Legal and Foreign
Affairs Sub-Committee of the Central
Committee; Legal Counsel of the
Party; Advocate, B.A., LL.B.

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|-----|---------------------------------------|--|
| 14. | Damian Z. LUBUVA,
Tanzania | Deputy Attorney-General, Tanzania;
former Chief Corporation Counsel of
Tanzania Legal Corporation |
| 15. | Douglas LUKELE,
Swaziland | Deputy Attorney-General, Swaziland;
Attorney of the Courts of Swaziland
and Botswana since 1957 |
| 16. | Niall MACDERMOT,
Switzerland | Secretary-General, International
Commission of Jurists; Queen's
Counsel. Formerly Recorder of the
Crown Court; Member of UK
Parliament; Financial Secretary to the
Treasury; Minister of State for
Planning and Land |
| 17. | Dr. E. MALIE,
Botswana | Chairman, School of Education |
| 18. | J.P.W.B. McAUSLAN,
England | Professor of Law and Chairman,
School of Law, University of Warwick;
former law lecturer, University of Dar
es Salaam |
| 19. | Mrs Thecla G.
MCHAURU,
Tanzania | Member of Permanent Commission of
Enquiry; formerly Teacher (1938-40);
Staff Nurse (1943-53); Community
Development (1954-68); Secretary-
General of Umoja wa wanawake wa
Tanganyika (U.W.T. Women's
Organization) (1968-76) |
| 20. | Lameck MFALILA,
Tanzania | High Court Judge; former Resident
Magistrate (1965-69); Secretary and
Legal Counsel to Tanzania-Zambia
Railway Authority (1969-70);
Registrar of High Court of Tanzania
(1970-72) |

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21. T.L. MKUDE,
Tanzania
Corporation Counsel, Tanzania Legal Corporation; former Law lecturer, Dar es Salaam University
22. M.P. MOFOKENG,
Lesotho
High Court Judge; former teacher, advocate, Crown Counsel, Senior Crown Counsel, Acting Attorney-General, Director of Public Prosecutions
23. C.D. MOLAPO,
Lesotho
Minister for Foreign Affairs, Lesotho
24. Alexander
MOTANYANE,
Lesotho
Rector of St Augustin's Seminary; Chairman, Christian Council of Lesotho
25. Pius MSEKWA,
Tanzania
First Vice-Chancellor of the University of Dar-es Salaam; Chairman, Vice-Chairman or member of various governmental and para-statal boards and committees; former Executive Secretary of TANU
26. Simbi V. MUBAKO,
Zambia
University Law Lecturer
27. John B. MWENDA,
Tanzania
Member of Permanent Commission of Enquiry; formerly in government service as Labour Officer, Asst. Labour Commissioner, Director of National Provident Fund, Director of Revenue and later Financial Operations Controller at the Treasury.
28. Simon I.M. PHIRI,
Kenya
Secretary for International Affairs, All-Africa Conference of Churches
29. Sketchley D. SACIKA,
Zambia
Labour Commissioner; formerly Workmen's Compensation Commissioner, Chairman of Workmen's Compensation Fund Board, Asst. Secretary Cabinet Office

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|-----|---------------------------------------|---|
| 30 | Ernest L. SAKALA,
Zambia | Director of Public Prosecutions, Zambia |
| 31. | K. SELLO,
Lesotho | Advocate |
| 32. | Nathan M.
SHAMUYARIRA,
Tanzania | Senior Lecturer, Department of
Political Science, University of Dar es
Salaam |
| 33. | Edward J. SHAMWANA,
Zambia | Advocate, Senior Counsel; LL.B.
(London); President of the Law
Association of Zambia |
| 34. | Mahdi SHARIF,
Sudan | Advocate; former District Civil Judge
(1950-56); Senior Legal Counsel,
Ministry of Justice; Acting Attorney-
General (1958-60) |
| 35. | Alan J.F. SIMMANCE,
United Kingdom | Adviser to Zambian Government
1966-76: formerly barrister (UK):
Advocate, Supreme Court of Kenya
(1961); Crown Counsel, Kenya (1960-
62); Principal, Kenya Institute of
Administration (1963-66) |
| 36. | David R. SMOCK,
Kenya | Head of Middle East and African
Programme of Ford Foundation;
former lecturer University of Nigeria
and American University, Beirut |
| 37. | J.S. WARIOBA,
Tanzania | Attorney-General of Tanzania |

Chairman's opening remarks

Mark D. Bomani,
former Attorney-General of Tanzania

The Hon. Chief Justice, the Hon. Minister, distinguished guests, ladies and gentlemen. Before I call upon the Hon. Minister to officially open this seminar allow me to make a few observations. I am sure I shall be speaking on behalf of you all when I thank Hon. Daudi Mwakawago, Minister of Information and Broadcasting, for kindly agreeing to come and open this very unique seminar.

Equally, I would like, on your behalf, to thank the government of Tanzania for agreeing to the holding of this seminar on its soil. The choice of Tanzania as a venue for this unique seminar is not accidental. Tanzania is today operating one of the better known one-party systems, and has been doing so for a reasonably long time, (eleven years now). The one-party state phenomenon is now a reality in many countries in Africa; it is also getting better understood and appreciated outside Africa.

Naturally, there are difficulties in operating a one-party state, just as there are difficulties in operating any other party system. Some of these are inherent, others are artificial. It is important therefore that there should be an opportunity for a gathering of this sort to sit down and compare notes either generally or on selected topics as is the case for this seminar. In any such sit-in, it is absolutely important that the participants should have first-hand or practical knowledge of the subject under consideration. Tanzania's experience in this regard will therefore be of great benefit to the seminar and it is for this that I should like to express our gratitude to the Government for allowing

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this seminar to take place here and also for making it possible for such a large contingent of Tanzanians with varying backgrounds and experience to participate, above all by designating one of its senior Ministers to come and perform the official opening.

I should also like to express gratitude to the International Commission of Jurists and the Ford Foundation for sponsoring the seminar. The International Commission of Jurists is a respected non-governmental organization performing a good job in the field of observance of human rights. Its many publications on the subject are well known. It is therefore fitting that the Commission should sponsor such a seminar. The outcome of this seminar, I am sure, will lead to a better understanding by the Commission, the international community and, above all, by the seminar participants of the efforts that are being and that can be made in the protection of human rights and the rule of law in a one-party state.

The large turn-out, its good quality and wide choice, thanks to the efforts of the sponsors of the seminar, promises that the deliberations will be interesting and enriching.

I now call upon the Hon. Minister to open the seminar.

Speech of welcome

Daudi Mwakawago,

Member of TANU Central Committee and Minister of Information and Broadcasting, Tanzania

Mr Chairman, distinguished guests. Participants, ladies and gentlemen:

It is a great pleasure to me to have this opportunity of making a short speech of welcome at the opening of such an important seminar organized by the International Commission of Jurists here in Dar es Salaam. On behalf of the party, TANU, and the government of Tanzania I welcome you all to our country and I hope you will enjoy your stay here during the seminar.

This seminar, by coincidence, takes place in our country where we have a one-party system. Much has been said about the protection of human rights and the rule of law, or the lack of it, in a one-party state. Thus it would be said, this seminar is yet another forum which will spend time on a much discussed subject. To us in this country, however, the seminar is very important. It is the first time that an international organization has organized such a seminar here. We in Tanzania, constantly try to examine ourselves frankly and we also examine with good sense what other people say about us. The result of this seminar will therefore attract a great deal of our attention.

In Tanzania we do not have a bill of rights in the constitution; but we have embodied the elements of human rights in the party creed and the preamble to the constitution of the country. We have a one-party system, yet we have tried to ensure that there is freedom of conscience, expression and association; and machinery has been established for this purpose in the party, government and for the people as a whole. For

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instance, we have an independent judiciary which is fully charged with the task of administering justice according to the law on the one hand, and on the other, there are elaborate and effective administrative procedures laid down in protecting individuals' rights closely connected with this.

Our laws provide for preventive detention and also leaders are vested with great executive power. This is, however, counterbalanced by established institutions such as the Committee for the Enforcement of the Leadership Code and the Permanent Commission of Enquiry.

I understand all these matters will come under discussion in this seminar and it is my hope that you will examine them critically and constructively. The list of participants clearly shows we have great minds here today. Wherever you come from and whatever you believe, please feel very free in your deliberations. The question is not whether to recognize or accept human rights and the rule of law. These are recognized and accepted the world over. The question is the effective protection of human rights and the rule of law under a given system of government.

Generally, however, in this connexion, the subject of the rule of law and protection of human rights is an involved one covering both political and legal aspects. It is a subject that often raises lively debates on whether the basic human rights or the principles of the rule of law can obtain in a one-party system. In certain quarters it is argued with force that just as in a multi-party system such rights and principles of the rule of law are safeguarded, the same applies in a one-party system. Likewise, however, there are admittedly problems and difficulties which arise in the process of upholding these principles in a one-party system. Such problems call for attention and at appropriate occasions such as seminars of this kind they could be discussed and brought to light. It is my sincere hope that this seminar will provide a useful forum whereby the participants will freely and without any inhibition discuss the problems involved in upholding the highly cherished principles of the rule of law, within the context of the one-party system.

In our country, where we have a one-party system, we do not claim our system is the ultimate in the protection of human rights. Indeed we are constantly preoccupied with improvements to ensure that they are protected. What we have rejected is the claim that a multi-party system is the ultimate protection.

My function here is to welcome you, not to open discussion on the many important matters which will occupy your attention for the next five or six days. I wish you all every success and, again, a pleasant stay.

The doctrine of the one-party state in relation to human rights and the rule of law

Key-note address

Pius Msekwa,

Vice-Chancellor of Dar es Salaam University.

To be invited to give the key-note address to this august gathering of learned professionals is an honour of which I am deeply conscious. I would therefore like to start by expressing my sincere gratitude to the organizers for their invitation to me to participate in the work of this conference.

The subject on which I was invited to speak, namely 'The doctrine of the one-party state in relation to human rights and the rule of law', is far from new, for in the early 1960s there was vigorous discussion of the one-party political systems which began to emerge in the ex-colonial states of Africa at that time, and a good deal of the discussion centred upon the claim that democratic values could be maintained within such systems.

There is therefore no need now of repeating those arguments. Indeed, that is not the purpose of this meeting, for I think all of us here are convinced that one-party systems are compatible with democracy. Our purpose is simply to examine the different methods by which human rights can best be protected and the rule of law effectively maintained in a one-party set up. The rationale for such a discussion is that since we now have some experience of working one-party systems in Africa, we should make an interim assessment of the reality of the problems, and of the various institutional and procedural attempts which have been directed at overcoming them.

But I believe that the need and relevance of such an assessment is not limited to one-party states, for it is not the constitutional arrangements of a political system which constitute the decisive factor in the matter of the rule of law and the protection of human rights. Whether a system is single-party or multi-party, what really matters is how the system in question actually operates, and in particular the norms and values which exist within it.

The phenomenon of one-party political systems began to emerge in the ex-colonial states of Africa in the early 1960s. In much of the discussion which took place then, the point which was put forward most frequently was that it had been wrong in the first instance to assume that the Westminster plan could be successfully transplanted to other areas of the globe. A discussion of whether or not African conditions are inherently inhospitable to multi-party parliamentary institutions is beyond the scope of this paper; but it is certainly true that in at least two cases, the path toward the one-party system sprang from exactly opposite considerations.

In mainland Tanzania, the case for a one-party system was based on the observation that the country was solidly united, because the mainland Tanzanians themselves had massively voted for one-party dominance. Hence it was desirable that the laws of the country should reflect its realities. It was convincingly argued that without a one-party system, Tanganyikans would be denied their right of making a choice in parliamentary and local government elections, since TANU was so overwhelmingly supported that opposition candidates stood no chance whatsoever. Therefore, only a one-party system in which candidates belonging to the same party could compete for election would restore the principle of choice to the Tanganyika electorate.

In Uganda in 1969, on the other hand, the need for a one-party system, sprang from the conviction that the previous multi-party arrangement had been basically divisive and prone to violent eruptions. Thus, all opposition parties there were banned in December 1969, following an attempt on the life of President Milton Obote. Subsequently, the intention was announced of abolishing the system of rival parties altogether, and creating a *de jure* one-party state. Reading the Common Man's Charter and the subsequent proposals for election to parliament in Uganda, one is left in no doubt about the seriousness with which the Ugandan leadership was bothered by the lack of unity in that country. The proposed requirement that any candidate standing for election to parliament would have to contest in four different

constituencies, one in each region of the country, was clearly aimed at committing future leadership to national rather than parochial interests. Therefore, as Ali Mazrui has put it: 'Uganda needed a one-party system not because, as in the case of Tanzania, the country was solidly united: but because the country was dangerously divided'.¹ I believe the move by Zambia to a one-party system was also motivated by the need for unity, in the face of threatening divisive forces.

Whatever the circumstances may have been under which the systems evolved, the situation in Africa today is that there are one-party states and multi-party states, as well as non-party states. Our task is to discuss the one-party system in relation to the protection of human rights and the rule of law.

Our objective

The main goal of our states is to build a just society of free and equal citizens, who live in healthy conditions, who control their own destiny, and who co-operate together and with other people in a spirit of human brotherhood for mutual benefit. Our aim is justice for all, that is, equal rights and protection from abuse for all members of the society. We want to secure and maintain freedom of speech and freedom of movement and association for our people, provided that these freedoms are not used by individuals to reduce the equal freedom of other members of the society or to threaten the integrity of the state. But at the same time, we must strive to secure for everyone freedom from hunger, ignorance and disease. Hence, in the circumstances of our countries, where gross economic and educational differences exist within society, it becomes unrealistic to talk as if the individual freedoms are the only ones that matter. We have to bear in mind that there are other things which also matter and which may sometimes require priority. President Nyerere made this point several years ago in a speech at the University of Toronto, when he said: 'What freedom has our subsistence farmer? He scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote, and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is reduced will his existing political freedom become properly meaningful and his right to human dignity become a fact of human dignity'.²

So, in a one-party state, how do we ensure that people do have the freedom of expressing differing viewpoints? How do people get

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protected from petty tyrannies by officials, and from inefficiency, corruption and nepotism? How can we make the judicial process more effective in serving the citizens, so that everyone can get genuine protection from the law enforcement agencies of the system? And, in particular, how do we do all these things while safeguarding our struggle to move towards the reality of economic freedom for all?

Rights of the individual in a one-party state

In discussing the whole question of the rule of law and its operation in any political system, it is necessary to take into account the objective conditions of the system in question, as well as its goals and priorities.

Any political system is a goal-seeking entity which is made up of people who constantly place demands on it, recognize its control or authority over them, and support it. It is also a demand-processing entity, and in order to continue to exist, a political system as a whole must satisfy some demands, moderate others, and ignore still others. Above all, it must rally support from within the society which it governs. A political system is therefore the sum total of its institutions, discernible structures, personnel, laws and the way in which it operates. The way in which a system actually operates is the most crucial factor in determining the extent to which the members of its society enjoy human freedom in its widest sense.

One of the functions of a political system, whether single-party or multi-party, is to control the social actions of its population and to influence them to work for the achievement of certain goals. The amount of regulation necessary to preserve the political entity and to achieve its goals naturally differs from system to system, depending upon the nature of its environment, its homogeneity, the choice of goals, and the level of social, economic and political development attained.

For most of the states in independent Africa, the existence of powerful centrifugal forces calls for a strong regulative capacity, particularly in the area of integration. For the achievement of a greater degree of inter-ethnic accommodation and national integration is one of the most critical political problems facing many African states. And democratic government cannot be practised nor individual rights protected in a society which is torn by internal disorder. It is in consideration of these factors that many of these states felt that constructive criticism or opposition *within* a single-party framework is more helpful than organization into opposing parties. The unleashing of

those centrifugal forces tends to threaten even the very basic core value which is shared by all political systems, namely the system's survival, or its endurance as an entity. Although one must carefully distinguish between the survival of a particular political administration and the survival of the political system, survival is a legitimate and universally pursued goal of all political systems.

But the difficulty which normally arises is how to distinguish between opponents of the system, and critics of particular policies, or critics only of methods of implementing agreed policies. This is where the operation of the preventive detention laws becomes important. We certainly do need preventive detention legislation in order to protect the state, even though we know that its existence greatly reduces the freedom of the citizens, as it confers power on the authorities to imprison a person who has not broken any written law. All that preventive detention laws usually require is that the relevant authority should have reason to believe that a person is likely to commit a breach of the peace or to disturb public tranquillity; or the authority should be satisfied that a person is conducting himself so as to be dangerous to peace and good order, or is acting in a manner prejudicial to the security of the country. How can we make sure that preventive detention is not used for example to cover up police inefficiency, or as a threat against rivals, or simply in personal vendettas? How can we, who are concerned with safeguarding and extending peoples' freedom, ensure that the system is safeguarded but is at the same time kept alive by constructive criticism.

I believe that if people who happen to have differing views are willing and are permitted to work constructively within the legal framework of the system, they may well be providing support for that system, for it is essential for a political system to try to avoid the development of a false sense of support. Nation-building may prove impossible if the political centre lacks feedback on the utility of its approaches to social, political and economic development. Such feedback helps the system to function more effectively by ensuring that the leadership does not operate and make its policy decisions in an informational vacuum. In any case, even the idea of 'elders sitting under the big tree and talking until they agree' would be of little functional utility to the system if those who do not agree are not allowed to talk!

But notwithstanding these facts, there is also the vital question of stability, and the need to preserve the existing political structure and its societal and economic underpinnings. With regard to the developing

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countries of Africa in particular, it is necessary to prevent outside influences from upsetting the system's objectives. So how can we effectively promote free expression of ideas without encouraging disunity or being diverted from the pursuit of the social goal we have chosen for ourselves?

One of the fundamental rights of every citizen in a democratic political system is the right to take an equal part in the government, or the right to participate meaningfully in the decision-making process of the system which governs him. Hence, one of the ways of examining the respect for human rights in any particular society is to analyze the extent of participation by the people in its decision-making process. And it is important to stress here that effective participation means much more than the casting of a vote once every five years to elect the president or a member of parliament or a local government councillor.

Meaningful participation means having a decisive influence and control over the political, social and economic institutions which determine the citizen's way of life. Hence it is necessary to give consideration to the following questions: Who makes the policy decisions and how? Are there large and important groups that are political in character, such as workers' unions, women's organizations, or peasants' co-operatives? If they exist, what is their power and influence, and what are their channels of access to the political structure? Do they pursue their goals openly and within the ethos of the existing system, or do they use secret operations outside the institutional structure?

Such questions are important because it is often argued that one functional advantage in the maintenance of an opposition is that having an opposition is an effective way of channelling dissatisfaction through legitimate filters, thus enabling dissenting elements within the body politic to let off steam. In that way, so the argument goes, an organized opposition acts as a safety valve because, by offering a legitimate avenue for criticism and protest, it discourages those who are dissatisfied from seeking redress outside the legal framework.

I personally believe that the willingness or otherwise of the various groups to stay within the norms of the existing system often depends upon the responsiveness of the system itself. For example, some supporters of negro rights in the USA have in recent years taken to extra-legal activities to dramatize the plight of the negro. This is because the political system of the USA has not been responsive enough to prevent mounting frustration caused by the absence of equal rights for some of its citizens, albeit a minority.

However, responsiveness to particular interest groups has to be carefully balanced, otherwise it becomes dysfunctional. For example, certain interest groups such as trade unions and the bureaucracy sometimes make demands for rewards which can only be satisfied at the expense of society as a whole. René Dumont points out that civil servants in Senegal and Cameroun earn in one and a half months what a peasant in the same country earns in a life time.³ The political systems concerned seem to have overreacted to this particular group. That course of action is clearly dysfunctional with regard to the development of the people of the country as a whole.

In multi-party systems, the organs of popular participation are normally limited to parliament at the national level, and the local government councils at the lower levels. In a single-party set up, provided the party is functioning normally and is not an exclusive club of a few members of the élite, the organs of participation are much more numerous. For in addition to parliament and local councils, they include the party committees and conferences at various levels, right down to village level. Through these party organs, information, recommendations and decisions are constantly passed both upward and downward, providing at the same time extensive opportunity for wider participation at the grass roots and the expression of opinions.

But the provision of suitable structural machinery alone is not enough to ensure real participation by the people in decision-making. Tanzania has done a great deal to multiply the organs of participation: in addition to the numerous organs of the party already referred to, formal village councils have been established for each village and given considerable decision-making powers with regard to local affairs. But do these organs of participation give every ordinary Tanzanian man and woman effective protection against oppressive actions by officials of the state?

We already have examples of people in Tanzania who have been made to suffer as a result of the way in which some of the country's accepted policies have been implemented. For example, in pursuance of the policy of socializing the Tanzanian economy, the party Vice-President and Prime Minister recently made a statement in which he appealed to the regional and district party leaders to mobilize and organize the people for the establishment of peoples' cooperative shops, which should replace private capitalist retail shops, especially in the villages. But instead of doing that, in many cases the authorities simply ordered the immediate closure of all existing privately owned

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retail shops, on which the people depend almost entirely for their simple daily requirements, thus depriving them of these essential services. It has not been easy at all for those who were so affected to get remedial action taken to correct these faults. In a multi-party system the opposition parties would no doubt exploit such a situation for their own electoral gains, and in order not to give them such an easy opportunity, the party in power would take prompt corrective action.

So what arrangements should a one-party state make to ensure that people can express their dissatisfaction through the constitutional framework?

Related to this question is the issue of the character of the party itself and the question of democracy within it. In order to achieve mass participation within the party, mass membership of the party is very important. Indeed, one justification for the system of one party is that the one party can be identified with the whole nation. It is true that because there is no actual or potential threat from an opposition group in such a situation, the party's survival does not depend on mass membership or affiliation. Presumably on the basis of that factor, it has sometimes been argued that the party should restructure itself into a vanguard group of ideologically dedicated cadres who can provide from above the leadership necessary to activate the rest of society. But were that to happen, so that the party in fact becomes an elite group, it will effectively have ceased to be a forum for mass participation in its affairs. On the other hand, a political party will cease to be such a party in any serious sense if membership of it involves no ideological commitment at all.

The political faith of the type of parties we are discussing is usually based on a set of principles which carry the support of the vast majority of the people, and therefore if admission into the party is governed only by a person's acceptance of these principles and adherence to them, the basis for mass participation will be secured. Yet there still remains the issue of democracy within the party itself. Party members must be able to speak freely and frankly inside party meetings. In June 1962, proposals for a republican constitution for Tanganyika were introduced for discussion in the national assembly. Many of the members who spoke expressed fears and doubts about the extensive powers which were to be conferred on the executive president and the government. In commenting on the fears expressed, President Nyerere, who was then a back-bencher, said: 'The ultimate safeguard of a peoples' rights, the peoples' freedom, and all those things which they

value . . . is the ethic of the nation . . . The ultimate safeguard is the peoples' ability to say "no" to the official, the ability to say to him: "no you cannot do that, that is un-Tanganyikan and we cannot accept it from anybody".⁴

But unfortunately there often seems in practice to develop an unwillingness to use this right of frank speaking. Even at party meetings some delegates seem to be unwilling to speak their minds. They whisper that they are afraid of losing their job if they displease a more senior party member, or they just want to ingratiate themselves and 'be popular'. These kinds of attitudes are very dangerous. How can their growth be discouraged, so that people use their rights, and fulfill their duties as representatives in speaking the truth as they see it?

I said earlier that a political system must rally support from within the society which it governs. One of the ways to improve responsiveness and to mobilize popular support for a political system is the holding of periodic elections at fixed intervals. Elections which are held honestly, whether within a single or multi-party framework, are excellent mechanisms for ensuring the accountability of the system to its population. The Tanzanian experience of three general elections so far has clearly shown that with our one-party system unless the elected representatives in parliament continue to remember in all their actions that the people are their masters, and constantly go back to them to account for their actions and hear the peoples' views, they will be rejected and replaced. Tanzania has certainly achieved a large measure of free elections to parliament, as well as freedom for the MPs to speak out. This can be seen particularly during the question hour of parliamentary sessions, and during the annual budget debates.

There are of course certain controls and limitations imposed by the election rules, such as the prohibition on candidates' appealing to racial, religious or tribal sentiments. But the rules were also designed to ensure equality of opportunity between the competing candidates. Thus, in order to ensure that no candidate is put at a disadvantage merely because of his poor financial position, the party undertakes the payment of all election expenses, especially in relation to the campaign, for all the candidates who are finally nominated, and no candidate is permitted to spend any personal money for any purpose connected with the elections. Similarly, in order to give the voters an opportunity to see and hear each candidate individually, so as to assist them in making meaningful choices between the candidates, the party organizes and pays for numerous campaign meetings closest to where the voters

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live, at which meetings the candidates physically present themselves and address the voters. After they are elected, members of parliament automatically become voting members of the main party organs at all levels, from the district party conference to the national party conference. This enables them to participate effectively in the formulation of policies at party level, and facilitates their work in parliament when it comes to giving consideration to the enactment of appropriate laws which will give legislative effect to those policies.

This whole question of ensuring peoples' participation in the affairs of government is *indeed* very important, but of equal or even greater importance is the need to raise the level of political consciousness of the people, so that they may be enabled to exercise their right of participation more effectively. The people must be made fully aware of their rights and the machinery which exists for their participation. For if they remain ignorant, they will submissively sit down under the petty tyranny of officials, or they will suffer for long periods as a result of inaction by inefficient or corrupt servants of the state, without even attempting to do anything about it; for they will not be in a position to know what to do and how.

As P.T. Georges correctly observed; 'In the final analysis, the only safeguard is an alert public opinion, quick to show its resentment when restrictive measures are proposed which are not reasonably justifiable in a democratic society'.⁵ Conscious efforts must be made to create this alert public opinion.

As I have just pointed out, Tanzania has already established fairly adequate machinery through which the people can exercise their democratic rights, control their government, and protect themselves against petty tyranny by arrogant public officials. Yet for the majority of the people this machinery exists only on paper, and is not yet a reality in their everyday lives. Peoples' willingness to sit down under petty official tyranny and accept it is a problem which is to a large extent part of the unfortunate colonial heritage, with its accompanying mentality of authoritarianism and subservience. For the colonial administrative style was characterised by authoritarianism and arrogance towards the public, and this heritage of authoritarian administration is one that has bedevilled many ex-colonial countries. It makes people unaware of their rights as free citizens of a free country. And if by chance they know, then they lack the self confidence which comes from a consciousness that in fighting to uphold these rights they will be supported by a community which understands the issues at stake.

Tanzania is trying to deal with this problem by extensive political education campaigns. These are conducted partly through the mass media, but mainly through scheduled political education seminars which are held constantly throughout the country. And, in addition, there is a massive programme of general adult education, which is aimed at liberating the minds of its recipients, so that they may be enabled to throw off the impediments to freedom which tend to restrict their full physical and mental development as human beings.

But we have not yet succeeded, and we are still faced with the problem of a public which is not sufficiently alert and self-assertive in defending its fundamental rights, and which still tends to be excessively fearful of the authority of officials. In such circumstances, how best can we ensure that there are automatic checks on abuse of power?

The nature of the economic problems of our countries and the need for rapid development demand that certain officials of the government or the party be entrusted with great powers over other individuals. In the districts and regions, the commissioners wield direct and effective power in a manner which affects the life of the people there. This is inevitable and necessary, for the leaders will only be able to bring about the desired transformation if they are entrusted with real responsibility. But we have to recognize that these powers can be — and have been — abused, with consequent suffering for those same people on whose behalf the government is conducted. It is in consideration of these dangers that on becoming a one-party state constitutionally, Tanzania immediately established the permanent commission of enquiry on the abuse of power. I believe Zambia introduced the commission of investigations for the same reason. In recommending the proposal to parliament, President Nyerere said: '... The people will have direct access to it. The government believes that the operation of such a commission should help to make a reality of the political equality of our people, and of the individual freedom within the context of our socialist society'.⁶

The working of the Permanent Commission of Enquiry over the years has borne out those expectations of the government. That commission is now generally accepted as an institution which provides to the individual a suitable and reliable machinery for redress against mal-administration or abuse of power by officials, and it is truly within the reach of ordinary citizens. But this latter needs to be qualified, because the commission is stationed in Dar-es-Salaam, so, taking the

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vastness of the country and consequently the expenses involved in getting to Dar es Salaam from up-country districts, relatively few people who live up-country can benefit from the services of the commission. So what more can be done to facilitate the resolution of complaints of maladministration speedily and inexpensively?

In Tanzania, the party itself also endeavours to play the role of supervising and controlling the activities of the government agencies, by summoning administrators to account for their actions.

The concept of the supremacy of the party which has been accepted here implies that it is the party's responsibility to guide and supervise all the activities of the government, the parastatals and other national organizations, all of which are regarded as instruments of implementing the party's policies. It is thus the party's duty to review the results of the implementation which is being undertaken by its agencies. In pursuance of this understanding, party committees, initially at the national level, but also now increasingly at the regional and district levels, have from time to time summoned public functionaries for specific questioning. In February 1973, for example, the TANU Central Committee summoned the Managements of Tanganyika Packers, the Dar-es-Salaam District Development Corporation, and the National Agricultural and Food Corporation, to explain the acute shortage of meat which the capital city was experiencing at that time and which had given rise to serious public complaints. Also summoned were the managements of the National Development Corporation and the National Textile Corporation, to explain why there was a shortage of textile goods. At another meeting, the minister responsible for water supply, together with his principal secretary, were summoned to account for the problems which were being faced at that time by Dar-es-Salaam residents as a result of an inadequate supply of water.

One serious disadvantage against the party becoming an effective instrument of control over the actions of government regional and district officials is its structure. In the regions and districts, the party secretaries are also the chief executives of the government in their respective areas of jurisdiction. If a peasant is abused or otherwise ill-treated by the commissioner of the district acting in his governmental capacity, that peasant may feel inhibited from seeking redress by petitioning the district committee of the party, in which the same commissioner will be sitting as secretary of the committee. However he can — and does — appeal to such a committee against wrongful treatment by any of the other district officials, with a reasonable

amount of confidence that he will be given a positive hearing. He also can — and does — take his complaints against the commissioner, who is at the same time the party secretary, to the higher organs of the party. For access to any party leader of any level is a right which every party member is guaranteed by the party constitution.

The role of the courts

The next question is how we can make the judicial process more effective in serving the people. This I think is an important area which merits close examination, for although it is normally taken for granted that the courts are the guardians of the freedom of the individual and the rule of law in a state, this may be so more in theory than in practice.

Given the low educational level of the vast majority of the people in our societies, the judicial process is too technical for most people to comprehend, and consequently it is not easy for them to approach the courts for a remedy. Moreover, there is the problem created by the colonial heritage. The courts in colonial times were by and large deliberate allies of the administration, and this long-standing attitude has not quite been forgotten. We should therefore ask ourselves some questions and seek answers to them. Is the machinery of justice through the courts as satisfactory as it should be, both in its structure and procedures? How swiftly is justice available, especially in the rural areas? Do the people there have to travel long distances or wait many months before they can get justice? Does justice through the courts resemble a commercial commodity, more available to the rich than the poor? Is the dispensation of justice carried out by the courts without regard to administrative convenience?

These questions are important because there are countries in the world today where the laws and regulations are simply neglected or are regularly twisted to the demands of expediency by officials and citizens alike, so that the gap is notoriously large between the law as it stands on the statute books and actual practice. There are also instances where the judicial process has become dysfunctional, because of the lengthy delays and expenses involved, to the extent that many citizens fail to get protection from the law enforcement agencies of the system.

In situations such as are obtaining in our young countries, the inadequacy of the court systems may to a large extent be due to lack of resources with which the government can provide a more adequate system of courts. But it may also be that we are not making maximum

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use of the resources we have in that area; which means that if we did so, we could at least reduce some of the inadequacies without having to wait for the day when the government will have sufficient funds with which to employ more staff and provide more facilities.

With regard to the structure of the courts, for example, there is the important question of how to associate the people with the judicial process. Among other things, such association of the people with the court system helps to clear some of the misunderstandings regarding the role of the courts, especially with regard to the concept of the independence of the judiciary. The Presidential Commission on the establishment of a democratic one-party state in Tanzania recorded in its report that they had 'formed a strong impression that there is a good deal of misunderstanding about what this important concept really means', and proceeded to define it as follows: 'What is essential for the maintenance of the rule of law is that judges and magistrates should decide the cases that come before them in accordance with the evidence. They should not be influenced by extraneous factors. In criminal cases they should not convict or acquit because they believe that a particular verdict will please the government. In civil cases they should not consider the relative importance of the parties or the political consequences of their decision. Their job is to find the facts and apply the relevant principles of law'.⁷

A clear understanding of the true meaning of the concept of the independence of the judiciary is important. Because if the judges and magistrates are regarded as a special group which is not part of the society, or their work is seen as not being part of the collective effort by the community as a whole, problems will continue to arise.

In an attempt to achieve this desired association of the people with the judicial process, Tanzania has taken action to introduce a system of assessors on the mainland part of the Union, while in Zanzibar a system of peoples' courts has been established. In mainland Tanzania, primary court magistrates sit with at least two assessors in all cases, both civil and criminal, and the decision of the majority of the assessors and the magistrate together is what constitutes the decision of the court. In effect, therefore, in the primary courts there is a three-man bench. One member of this bench is a full-time judicial officer, while the other two are part-time representatives of the community. In the high court, all trials before the court in its criminal jurisdiction are held with the aid of assessors, and at the close of hearing, each of the assessors is required to state his opinion of the case; but the judgement is given

by the judge, who is not bound to conform to the opinion of the assessors. I understand that consideration is now being given to the extension of the assessor system to the intermediate courts, i.e. the district courts.

Certainly these are useful developments, but the judicial process involves much more than the work of the courts. There is also the investigation which is carried out by the police, the prosecution process, the rules of procedure, the services rendered by defence advocates, etc., all of which have an important part to play in the administration of justice and upholding the rule of law. It is important to review the work of these agencies from time to time with a view to removing bottlenecks and generally bringing about improvements. For very many of the justifiable complaints about delay in the administration of justice arise from causes unconnected with court administration, such as the time taken by the police to make proper investigations, and the time taken by defendants to prepare their defence in cases where they engage the services of advocates.

We have examples in the proceedings of the resident magistrates courts of Tanzania which demonstrate the seriousness of this matter of delays. Not so long ago there were the two cases which came to the courts, involving the theft of public money by employees. In each case more than Shs.200,000/- was involved. In both cases, over twenty adjournments were requested, nearly all of them by the prosecutor, because either the investigation was not complete, or the prosecutor had no police case file, or merely with a request for a mention date. Finally, the magistrates in both cases decided to refuse further adjournments and acquitted the accused, on the grounds that justice delayed is justice denied.⁸ What can we do to eliminate such delays?

However, the most important consideration in discussing improvements to the judicial process in our societies is how to strike a just balance between the interests of an accused person and those of the community as a whole. We have often heard it said that justice must not only be done, but it must also appear to be done. Where a person who is accused of stealing large sums of public money escapes punishment in the courts purely on technical grounds, whereby procedural defects are exploited to obtain acquittals, or is convicted but gets away with a very light sentence, this may lead to the whole concept of the rule of law being held in contempt by the people.

Again, there is the apparent conflict between a lawyer's duty to his client and his duty to the cause of justice. Laymen have often posed the

question: How can an advocate consistently urge a court to find a man not guilty when the advocate himself knows that the man is guilty? The lawyer's answer is of course that the advocate cannot set himself up as a judge of his client's case, that the advocate is only the mouth-piece of the client in putting the case before the court for it to judge, and he has to do so no matter how improbable or even impossible it may seem for his client's case to succeed. Is this entirely satisfactory, or are there alternative courses of action which could instill greater confidence in the general public regarding this aspect of the administration of justice?

There is also the point that the law as it stands at the moment can be justifiably criticized for leaning too heavily in favour of the accused person. For example, subject to certain exceptions, bad character of the accused is inadmissible, while his good character is always relevant. Also, the court has power to exclude admissible evidence which might be unfairly prejudicial to the accused. Moreover the accused, unlike the prosecution witness, has a right to avoid cross-examination. I think that some of these rights of the accused person could be reviewed without bringing about maladministration of justice. The effectiveness of the legal system should be determined not only in the protection it affords to those who are innocent, but also in the comparative certainty with which those who are guilty of anti-social behaviour are discovered and punished.

Conclusion

Mr Chairman, the question of the protection of human rights and the rule of law in a one-party state is undoubtedly a very important one. We know that there are many people who readily associate the idea of one-party rule with authoritarianism and restrictions on human liberty. I have based my presentation on the premise that the one-party state is a valid expression of democracy, but that there are nonetheless problems which do exist and which should be faced. I have posed some of these problems in the form of questions, and drawn on the Tanzanian experience of the various attempts which have been made to overcome them. I hope the discussions which will follow now and in the course of the week will contribute significantly to the general effort which is being made to find better ways of improving the protection of human rights and the maintenance of rule of law in our one-party democracies.

I wish to express my gratitude once again to the organizers of this seminar for having made it possible for me to participate in its work.

NOTES

1. Ali A. Mazrui, *Cultural Engineering and Nation-Building in East Africa*. (Northwestern University Press, 1972), p. 287.
2. Julius K. Nyerere, 'Stability and Change in Africa', (Government Printer, Dar es Salaam, 1969), p. 3.
3. Rene Dumont, *False Start in Africa*, (André Deutsch, London, 1966). p. 81.
4. Parliamentary Debates (Hansard) 28 June 1962.
5. P.T. Georges, 'The Rule of Law: Definition and Safeguards' in *Law and Its Administration in a One-Party State - Selected Speeches of Telford Georges*, (Mimeo, Faculty of Law, University of Dar es Salaam), p. 39.
6. Parliamentary Debates (Hansard) 8 June 1965.
7. *Report of the Presidential Commission on the Establishment of a Democratic One-Party State* (Government Printer, Dar es Salaam, 1968), p.33.
8. Dar es Salaam District Court Criminal Case No. K290/74 (990/73) and Dar es Salaam District Court Criminal Case No. K364/74 (2327/73).

Opening plenary session: summary of discussion

The first plenary session of the seminar took the form of a general discussion on the issues raised in Mr Pius Msekwa's keynote address on 'The Doctrine of the One-Party State in relation to Human Rights and the Rule of Law'.

At the conclusion of his address, Mr Msekwa remarked: 'I have based my presentation on the premise that the one-party state is a valid expression of democracy but that there are nonetheless problems which do exist and which should be faced'.

Comment at the plenary session was centred on an amplification by participants of this premise and the qualifications to it. There was free and frank discussion on the origins of one-party government in modern Africa, on the meaning of one-party democracy and on the special difficulties of enforcing the rule of law and of preserving human rights in the absence of an organized political opposition.

While participants were often critical of one-party government in practice, there was general consensus that democratic principles were as consistent with single party as with multi-party rule. It was not the desire to abandon democracy which had prompted the transition to a one-party system but rather a sense that the political and economic aspirations of the people were being frustrated through adherence to inherited multi-party forms. It was pointed out that, in some situations, the opposition had declined so far in terms of popular support that it had ceased to represent a viable alternative to the party in power. Multi-party politics had become divisive and destructive at a time when the compelling national requirement was for stability, development and peace. Opposition had degenerated into mere obstruction or had

become an irritant so that even valid criticism from opposition representatives had been disregarded. Scarce manpower resources had been split between conflicting political groups and the path to national unity had been unnecessarily impeded.

Electoral choice had, in fact, become more meaningful and constructive, criticism more rather than less acceptable since the inception of the one-party state. Human rights and freedoms, save only the right of political association, had not been abrogated in the one-party environment and the independence of the judiciary, which was the fundamental safeguard of the rule of law, had been preserved.

This was one side of the picture. The reverse was that, as participants frankly admitted, there had been lapses and elements of tension, even fear, introduced which did not exist before. The distinction between constructive criticism within the party and opposition from outside the party was not an easy one to draw. The prohibition on political association could react adversely on the formation and the activities of other groups which, though non-political, came under surveillance out of suspicion that they might develop along political lines. The all-embracing nature of the party created pressures to conform and people became apathetic or reluctant to speak their minds. As one participant observed 'who will appeal against the party to the party' with any confidence of redress? Furthermore, one-party states tended towards a collectivist rather than an individualist philosophy and this could create an attitude of mind in which the interests of society were paramount and those of the individual took second place. Security became the prime consideration to a political leadership which reacted nervously and suspiciously to real or imagined threats. For all these reasons, constant vigilance was necessary if the rule of law was to be maintained and if individual human rights were not to be relegated to the periphery of national concern.

Some criticism was voiced of the statement in Mr Msekwa's paper that 'it is not the constitutional arrangements of a political system which constitute the decisive factor in the matter of the rule of law and the protection of human rights'. In a one-party system, ultimate control over industry, commerce, the bureaucratic machine and virtually every other important sphere of national activity was vested in the state. Constitutional restraints and safeguards were therefore vital to ensure that the exercise of such wide discretionary power was not abused. Nevertheless, there was universal agreement with Mr Msekwa's point that, in the last analysis, it was the norms and values of society which

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would determine the extent to which human rights were actually preserved. The seminar was emphatic that these norms and values must emanate from the party and that, without a total commitment by the party to the protection of human rights and the maintenance of the rule of law, even the most stringent constitutional framework would not avail. An ethos must be created in which the individual can challenge authority without being labelled as a dissident or maltreated by party functionaries at local level. Examples were only too common where party officers had behaved like petty tyrants and a case was even cited in which party executives who had been summoned before the high court to answer for an illegal detention had failed to appear.

The seminar was agreed that the creation and perpetuation of the correct *ethos* must be the party's continual concern. The task was one which required education and re-education at every level in the party hierarchy and a constant emphasis that the party's objective was service to the people and not the unbridled exercise of power. The seminar fully endorsed Mr Msekwa's conclusion that the party must be an organ of mass participation if this realization was to be achieved. Every adult citizen should have the basic right to be a member of the party and to participate fully in the conduct of its affairs. The alternative of an elitist party was rejected by the seminar on the grounds that it would open the door to government by and in the interests of a ruling clique. Indeed, some participants already viewed with apprehension the self-perpetuating tendencies to which even parties of mass participation had been prone. The distribution of *portfolios* had become a game of musical chairs with the same faces in different jobs not all of which they were competent to fill. New blood should be constantly infused into the body politic and voluntary resignations or retirements at every level become more common than was presently the case. It could even be argued that the concept of 'the party' was out of date and that what was required was now a movement or, as in one country, 'an alliance of productive forces' acting in the interests of society as a whole.

A major concern of the plenary session was the institution of preventive detention which Mr Msekwa had rightly characterized as a derogation of the freedom of the individual and as conferring the power to imprison a person who had not broken any written law. Preventive detention was, however, a feature of multi-party as well as one of one-party system. While a few participants questioned the justification or need for preventive detention, most accepted that it

was necessary at the present stage of development in the countries under discussion in order to preserve the security of the state. As Mr Msekwa had noted, however, the institution was inherently liable to abuse and could become a cover for police inefficiency, a vehicle for threats or a weapon in personal vendettas. There was also, as several participants noted, a disturbing tendency to use it as a convenient alternative to the normal processes of the criminal law. The seminar was unanimous that abuses of this kind must be strenuously resisted. The right not to be detained without trial was a fundamental human right which should be protected in any political system. Inroads into the rule of law must never be allowed to become associated with the political exigencies of the one-party state. Nor should preventive detention ever be used to obstruct the course of justice or as a means of interference with the due process of the law. As its very name implied, it was never intended as a punishment but simply as a means of combating a genuine threat to the security of the state.

Mention was also made of the need to reinforce the constitutional machinery for the protection of human rights with adequate provision for the redress of individual grievances against the abuse of authority by those in power. As Mr Msekwa had pointed out, the structure of government should provide for meaningful participation in the decision-making process both by individuals and by groups representing organized labour, the professions and other interests such as the co-operative movement. Ombudsman-like institutions had a vital role to play in providing redress against arbitrary or unfair administrative action, although these institutions were still often too remote from the ordinary villager or lacked the power to initiate action and follow up the recommendations which they had made. The seminar felt that these institutions must be strengthened, supported and encouraged in every way. A vocal and active press should also be encouraged, but even this suffered from the liability that many of the people were illiterate and could not use the press as a means of voicing criticism or expressing discontent.

In the last analysis, therefore, responsibility for the protection of human rights and the maintenance of the rule of law lay squarely on the shoulders of the party. Nothing in the one-party approach was inconsistent with the full and liberal exercise of this responsibility provided that the party was totally committed to it and prepared to educate its officials and its entire membership accordingly. Institutional safeguards without any underlying commitment were not enough.

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Two participants felt that this analysis paid insufficient regard to the socio-economic context. They took the view that human rights were essentially class rights to be fought for, and rejected the notion of natural rights as a western capitalist inheritance. They regarded the law and institutions of society as ultimately the expression of the interests of the ruling class and suggested that any analysis of the role of the party must first consider what class interests did it represent. Human rights were essentially class rights which the state could extend or limit according to its ideological base.

There was considerable discussion about the merits or demerits of this approach but nothing tangible emerged. The majority of participants clearly regarded the discussion of fundamental human rights as a matter of legitimate concern and did not wish to pursue the matter along dialectical lines.

Committee I – Constitutional Aspects

Summary of Constitutional aspects of the rule of law in a one-party state

Leo Baron,
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The purpose of this paper is to pose questions rather than to suggest answers. Its subject concerns a very specialized aspect of law and legal institutions and is political as well as legal in character. While human rights is a term generally understood, the rule of law is not. By it is meant not only strict adherence to legality, but the existence of a body of substantive and procedural law adequate to 'protect the individual from arbitrary government and to enable him to enjoy the dignity of man'.

All limitations on individual freedoms involve questions of balance, of fixing a point at which restrictions become unacceptable judged by universal standards. This point must vary according to circumstances; in times of war or of national emergency the limits of acceptable derogation will be higher. However, to spend too much time on establishing these limits would divert us from our primary purpose. Our inquiry should proceed within the framework of broad and generally recognized concepts of what are acceptable derogations.

We should be concerned not simply with an examination of the political structure of a one-party state, the relationship of the party with government, parliament and judiciary, and its compatibility with individual freedom, but we should go further. Politics is concerned with power, and the rule of law with protection against abuse of power. Whatever the theory, the question is whether in practice one-party states have been able to avoid an abuse of power and, if not, how much of that failure is attributable to the one-party system and how much to reasons unconnected with the political structure. I suggest, therefore,

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we should consider (1) the legal and institutional structure designed for the protection of individual freedoms; (2) the ways in which this structure may be rendered less able to protect those freedoms under any political system; and (3) whether any such vulnerability is greater in a one-party state than in a multi-party state.

(1) It matters little whether individual freedoms are protected in a written constitution or in unwritten common law or some other way; what matters is the actual content of the substantive and procedural law designed to protect those freedoms and the willingness of the executive to ensure that their protection by the courts is effective.

One aspect of substantive law deserves special mention in the context of a one-party state. Freedom of association in such a state must be limited to the extent that one cannot associate in or form another political party. Does this limitation go further in practice, and if so, does this depend on the special character of freedom of association or on considerations which apply to all traditional freedoms?

By the institutional structure I mean the legislature, executive, judiciary and governing party. The governing party is included in the institutional structure because ultimately the protection of individual freedoms depends on its commitment in this regard.

(2) The vulnerability of the institutional structure lies in the power of the governing party, which may seek to govern from the top instead of being an expression of the will of the people. The party, through its machinery and public opinion is able to control its members in the legislature and the executive, and exert weighty pressure on the judiciary as well.

(3) Is this vulnerability greater under a one-party system? My experience is limited to Zambia, but I would expect considerable difference in different countries.

The party

Interference with individual freedoms is clearly likely in a dictatorship — but is the one-party system in Africa a form of dictatorship or a reflection of the history, traditions and way of life of her people? On the one side it is argued that the multi-party system is foreign to African government in which problems traditionally are solved by discussion among all concerned until a consensus is reached. There have never been groups competing for the right to govern, that right was vested in traditional rulers. Where there are no ideological differences, a multi-party system is inappropriate in such a society.

On the other side it is argued that traditional government by monarchs and feudal chiefs is unsuitable in the modern world and is no basis for a modern form of government. It is healthy to have an alternative, even lacking differing ideology, to act as a government in waiting and to highlight the inadequacies of the present one. The people should have more than a choice of candidates committed to implement the party policy; they should have the right to criticize that policy outside the party structure.

The question is whether a one-party state can be democratic. Is there any reason to assume that only multi-party representative governments can be democratic? If democracy is a form of government in which sovereign power rests in the people as a whole and is exercised by them directly or through their elected representatives, cannot a one-party system be democratic? The answer lies in the internal constitution of the party. Of special relevance are the right to join the party and not to be expelled save on prescribed grounds, and whether these rights are written into the constitution, particularly if participation in government depends on party membership. Other questions are whether and to what extent inability of the people as a whole to exercise their sovereign rights means that individual rights cannot be protected; does the protection of these rights depend on the ability of the people to replace the government; and does the government here mean the individual representatives or the party? It is also relevant to consider the legal supremacy of the party and the implications of this supremacy to the legal authority of other institutions. Whatever the theoretical objections, the ultimate test of a democratic one-party state is practice. It would be useful to consider whether there has been a trend towards authoritarianism in one-party states, and if so whether that is the result of the introduction of the one-party system or simply a continuation of that trend in the previous government.

The executive and legislature

The relationship between the governing party and the executive and legislature must be close. In multi-party systems the policy making power usually rests with the cabinet, the ministers being answerable to parliament. In one-party states the supreme policy body is usually the central committee of the party, whose members are not in parliament. To what extent does this widen the role of the legislature as a check on the executive? Also relevant is the nature of the party's control over its members, whether Ministers or back-benchers. What is the method of

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selection of candidates and of election? What screening and veto powers has the party? What protection is there from disqualification by expulsion from the party?

The judiciary

The independence of the judiciary does not necessitate their independence from society. In the multi-party state judges are expected to remain aloof from party politics. Does the momentum of the single party make this attitude unrealistic, and if so does this weaken the independence and impartiality of the judiciary?

In the final analysis, their independence, like the rule of law itself, depends not on legal provisions (e.g. appointment, removal, security of tenure, etc.), but on the commitment of the government and the party to these goals.

Summary

1. Essentially, the protection of human rights and adherence to the rule of law in any society depend on the commitment of the governing party to those principles.

2. The extent to which a society adheres to the rule of law will depend on the extent to which the governing party is able to exert pressure on the executive, the legislature and the judiciary.

3. This ability depends *inter alia* on the relationships between the governing party and these institutions.

4. The real enquiry is to compare these relationships under a multi-party system and a one-party system, and to examine whether the ability to influence these institutions is greater under the latter system.

5. The enquiry must proceed also to examine whether, whatever may be the theory, it has proved possible in practice for the one-party state to avoid the abuse of power, and if not, whether that failure is attributable to the one-party structure or is equally consistent with a continuation of former trends.

Summary of Zambia's single party constitution – a search for unity and development

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The constitutions of states are reflections of political and social forces. This is as true now in Zambia as it was in colonial times. The colonial constitution was a flexible instrument designed to preserve the ruling power with the cooperation of the white settlers and the acquiescence of the Africans. If this balance was threatened, the Governor, as representative of the Colonial Office, could exercise his executive and constituent powers and simply decree a new constitution.

At independence, the governor's powers passed to the president, largely unaltered in character and extent. The president could, in reality, amend the constitution as easily as the former colonial governor. The constitution has since been amended to permit economic reform and to introduce a one-party state without a popular referendum.

The decision to introduce the one-party state through constitutional amendment was largely influenced by political developments within the ruling United National Independence Party and by the election to parliament of Simon Kapwepwe of the United Progressive Party, thereby confirming a trend towards multi-party rather than a single-party system. Although the single-party system had been the ultimate aim of the government for some time, the official policy rested, now rather forlornly, on the hope of achieving it through the polls.

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The biggest split yet to have occurred within the majority party, and the possibility that for the first time since independence UNIP might lose power to the combined forces of Nkumbula's ANC and Kapwepwe's UPP, transformed official policy, and led to the decision that the one-party system would be enforced before the next election without a referendum. The detentions of opposition leaders and the banning of all other parties than UNIP may be seen as a pre-emptive coup, an adroit tactic to buy time for a government beset by many problems.

The National Commission

A National Commission was appointed to consider the necessary changes in the Constitutions of the Republic and of the party. The commission was empowered to consult with the people, not on whether or not they wanted the change, but on the form it should take within the context of participatory democracy and the philosophy of humanism.

Although the commissioners were allowed to examine a wide range of matters, they were instructed to pay due regard to and adhere to certain inviolable principles, among which were: the supremacy of the rule of law and the independence of the judiciary, the protection of the fundamental rights and freedom of the individual, the vesting of supreme power in the people and the exercise of the power directly and indirectly through representative institutions, the necessity for a strong government to achieve its revolution, and the participation of the nation in the elimination of imperialism, colonialism, racism, and foreign exploitation.

The National Commission, reflecting a wide cross section of the community, toured the country taking oral and written evidence and attempting to involve the people generally in the implementation of this decision made by party and government. The outcome was an original and sophisticated series of recommendations including some which would have recast the nature and quantum of presidential power. These in particular were rejected by the government in favour of the status quo.

The one-party constitution

The One-Party State Act of 1972 makes it unlawful to form or participate in any other party than UNIP, and provides that several constitutional posts shall be held only by party members. Whether by accident or design, chiefs, judges, the director of public prosecutions and the auditor general are exempt from this requirement. The Act is a

constitutional amendment and thus not subject to judicial review.

The act gives UNIP a central position in the constitution, a major departure from the Westminster tradition which regards political parties as extra-legal associations. Another major departure from the independence constitution is the preamble, containing the guiding principles of the one-party participatory democracy under the philosophy of humanism, which include recognition of the fundamental rights and freedoms of the individual.

Except for one other major change, the constitution remains the same in essentials. Instead of a vice-president, there is a prime minister who is the head of administrative functions, but who has no appointive powers. The major change concerns the relationship between party and government. Although the government is now officially divorced from the party central committee, in the event of a policy disagreement, it is the decision of the central committee which shall prevail. As a result, the cabinet has lost its power as principal advisor to the president on policy issues.

On the election of the president, the government's position has changed several times. While the first constitutional bill proposed a free, contested election at large of the president, the second provided for the election of the president within the party, with a plebiscitary endorsement by the general populace. The president is elected by the party's general conference held every five years, with up to 600 delegates. A recommendation by the National Commission to limit the number of presidential terms was rejected on the grounds that 'there should be no limitation on how often a man or woman can serve his or her country'.

The national assembly remains basically the same, with members elected competitively as in Tanzania. (Several candidates nominated by the local party and approved by the central committee are offered to the electorate in each constituency). While it has been officially agreed that all members who are not ministers are free to criticize the government, freedom of speech in parliament is likely to depend more on the party's attitude than on constitutional provisions.

The National Commission also proposed the extension of the functions of the supreme court to enable it to give advisory opinions on constitutional matters without the need for litigation. This proposal has, however, been left out of the draft constitution.

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The leadership code

Two new institutions for the control of executive power are to be included in the new constitution — the leadership code and the ombudsman. The leadership code is aimed at divorcing power from wealth and tackling the problem of corruption. It is one of the most discussed innovations, and a reflection of the general feeling among the 'have nots' that something must be done to stop corruption, and even the accumulation of personal fortunes by perfectly legal means, by the 'haves' who are invariably also holders of public office. The code's general effect is to prohibit the receipt of more than one income while in public office. The date of implementation was postponed.

The enthusiasm with which the code was greeted tended to obscure the difficulties of its enforcement, or its possible discouragement to able young men and women without family fortunes from engaging in political activity and public service until such time as they have accumulated sufficient wealth to live comfortably in town. Indeed, a rigorous enforcement might lead to an exodus of the scarce manpower resources of the country into the private sector. A strict enforcement of the code could result in a decrease in internal investment and an increase in foreign savings and investment.

The formulation and enforcement of the code is entrusted to a five member committee appointed by the president. The code does not apply to the president, judges of superior courts, the director of public prosecution, the investigator general and the auditor general. Any disputed breach of the code is referred to a tribunal composed of two presidential appointees and a chairman appointed by the chief justice.

Another and perhaps more valuable innovation is that of the ombudsman.²

The issue of democracy

There are three prevailing views on democracy in Africa today. The first is that western representative democracy is universally desirable. The second holds that this is a luxury in countries where economic development based on strong government is the greatest need. Authority on communist lines is what Africans require. The third view is that democracy and authority are both desirable in developing countries, but in Africa they must take an African form. It is the last view that most African states including Zambia, professes to follow.

When a country opts for the one-party system the question is inevitably asked, 'How can you have democracy in a one-party system?' Zambia cannot escape this question. President Nyerere argues that democracy is not synonymous with the multi-party system, and that under certain conditions the one-party state may be more democratic than the multi-party state, in which a member's freedom to contest elections or to speak in parliament is limited by party rivalry. However, the argument that a one-party system encourages free debate in parliament is not so manifestly supported by experience.

Democracy is a much abused word, but for the purposes of the argument, President Nyerere's definition may be accepted: democracy is a form of government in which the people, directly or through their representatives, settle their affairs through free discussion and free elections. President Nyerere does not deny the existence of undemocratic one-party states, but states this is because the one-party is not identified with the nation as a whole.

Even in Tanzania it is not possible to state unqualifiedly that the one-party system has resulted in freer elections and freer debate. There are still restrictions and controls by the party on who may stand for election. Free debate in parliament has not significantly expanded the frontiers of democracy. While Tanzania has demonstrated that representative government is possible in the one-party system, the failure to extend the element of free choice to the presidency is an important qualification on democracy in that country. The members of parliament elected competitively do not really govern, but the president does.

The serious arguments against the one-party system are that by its nature it unduly restricts policy choice to one, and it unduly restricts the freedom to associate for political purposes. However, even in multi-party systems political parties are effectively limited to two or three, whose policies are rarely distinguishable from one another. The best that can be said for multi-party systems is that they are an efficient means of selecting alternative styles of government, but a one-party system that allows several candidates to stand for election may achieve this advantage. The supposed advantages claimed for either system are illusory. Democracy is perfectly possible under two or more parties as under one.

Theoretically, Zambia's choice of a one-party system need not be a lurch towards dictatorship. There is some evidence to indicate that calls for a participatory democracy are not mere political rhetoric. Competitive elections and freedom of debate have been included in the

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new constitution. The government record indicates a steady commitment by the President and higher echelons of the party to the democratic process, though there have been periodic aberrations. The extent to which the one-party system promotes democracy depends largely on the democratization of the party. Greater authoritarianism could result if party leaders were to manipulate the party to maximum advantage. However, under present leadership this has not been the case, and there is no reason to predict a lessening of the measure of free choice and free debate.

Stability and development

The objective of the one-party system in Zambia is stability and development. Multiple parties have been blamed for the tribalism and occasional subversion that have plagued Zambia since independence. Party leaders drew support largely from their own tribes. However, it is questionable whether the multi-party system is the sole or major cause of ethnic sectionalism, especially since tribal or subversive activities have occurred both between and within the parties. Indeed, it has been argued that the major threat to national unity is the division within UNIP itself, the root of which is the disruptive struggle for power and its economic benefits, as well as the personalities involved. A rival leader within the single party could appeal to his tribal group for support and his methods might be even more dangerous. The experience of Ghana and Uganda show that the one-party system is not synonymous with national unity, stability, or security.

The one-party system in itself is no prescription for national integration and political stability, but it will probably bring some political unity, at least in the short run. One avenue of political activity has been closed and it may be some time before dissidents regroup. The difficulties of underground organization may frighten many into compliance with the government. The authority of the president has been successfully asserted and is not likely to be soon challenged. However, any brief breathing space must not be taken for national integration which takes much more time and effort to achieve under any system.

Those who argue that the one-party state will bring development assume it will do so through political unity and national integration. However, there is no evidence that the multi-party system militates against development or that Zambian opposition parties impeded development. The ANC was limited to one or two provinces, leaving the rest of the country largely under a *de facto* one-party system.

No failures of government programmes could justifiably be attributed to opposition parties. Nor has the government had any plan to improve industrial production through party mobilization; if they had, the opposition would not have been able to stop them. UNIP has a well oiled machine for political mobilization but no credible programme of party involvement in economic development, and there is hardly any project of technique of mobilization which could not also be done under the multi-party system. However, one-partyism is expected to bring political tranquillity from which development is supposed to follow. To the extent that there will be less political competition and strife, it can perhaps be expected that people will channel their energies into developmental projects.

Conclusion

The new constitution was not intended to be radically different from the former, and the relationship between the executive, legislative and judiciary has been little altered. Of the new institutions, the Commission of Investigation is expected to prove more significant constitutionally than the leadership code. The latter might prove more suitable in the party constitution than in the constitution of the republic. While the foundations of democracy are not significantly improved under the new system, neither are they likely under present leadership to be significantly undermined. The goal of economic mobilization is in reality not affected by the change, except in so far as some political stability may be achieved.

Notes

¹ Mr Mubako's paper was originally published as an article in the *Zambia Law Journal*, vol. 5, 1973.

² The *Zambian ombudsman system* is described in the paper by the Investigator-General, the Hon. F.M. Chomba

Summary of

The role of judges and magistrates in a one-party state

An address by

Professor Telford Georges,

then Chief Justice of Tanzania, to the first Conference of Judges and Magistrates in Dar-es-Salaam, December 1965

The rôle of the judiciary in all newly independent developing countries requires careful examination. Our training is largely based on the English common law which intrudes even in areas of customary law. There can be no doubt that the attitude of the average lawyer to the one-party state is one of guarded reserve. The tendency of the legal profession to conservatism and caution is understandable and should be recognized.

First of all, the one-party state here is very different from that in the communist or fascist setting — the difference lies not only in the constitution but in the philosophical basis of the single party. Communism or fascism as political doctrines deal with the entirety of human behaviour, including the field of legal theory and, while there may not be an absence of legality, quite often legal processes are inverted to serve other ends. This is clearly not the case here. There has been no explicit founding of the one-party state on any identifiable political theory. This means that there is no pattern of legal thinking to which the judicial officer is obliged to conform — no party line on jurisprudence.

The change to a one-party state does not mean a system of repression and authoritarianism; the party principles are broad, including such fundamental rights and freedoms as the right of participation in government at all levels, freedom of expression, of movement, religious belief and association within the context of the law, and the right to the

protection of life, dignity and respect. The system of elections ensures that a candidate must not only please the party to secure nomination, but the public, party and non-party, to win the election. The incorporation of the administrative courts into the ranks and under the control of the judiciary ensures the independence of the entire judiciary from administration control in the sense understood by all systems based on the English common law.

However, the new constitution demands some rethinking of the rôle of the judiciary. Although in a western multi-party system the judicial officer traditionally takes up a position of neutrality, in many cases this is the ideal rather than the reality. The American judge who is elected through the political efforts of his party or the English judge who obtains appointment partly in recognition of his services to his party does not regard active participation in politics as incompatible with an attitude of neutrality in the performance of judicial functions. The objectivity of a judge derives from his professional integrity and competence. The fact of political commitment in a one-party state need in no way interfere with his impartiality.

The judiciary should also be aware of its own position. While not entirely accepting the concept of law as a device by which the ruling power seeks to perpetuate itself, there is no doubt that law was in the minds of the people the repressive arm of the colonial administration. The badge of leadership was imprisonment and courts were seen as centres of reaction. This attitude has carried over and must be understood to be dispelled.

Law seeks the greatest freedom of the individual compatible with his place in a society in which everyone shares the same freedom. The means by which this is achieved vary from time to time and society to society. Judges often say they do not make law, but merely seek it and expound it, but this is not wholly true. The choice of alternatives in any case depends not only on legal and logical exposition but on the attractiveness of different social values and patterns of thought developed over a life time. While the rôle of judge as law maker is more obvious in some cases than others, it is still there in the root of all law — the consideration of what is expedient for the community concerned.

It is important, therefore, that the judiciary be aware of the lines of development and sensitive to the scale of priorities in the balancing of various interests. The task of leadership requires great caution; where leadership moves too far ahead of public opinion the result may be delay of a useful innovation because of public misunderstanding.

While the judge may through a conscious choice of alternatives based on motives of public policy be creating new law, perhaps generally the doctrine of public policy ought to protect the inalienable requirements of the individual rather than the supposed requirements of the public.

In a wide area, of course, there is no choice of alternatives. It is especially necessary in a new society that forms be insistently observed to ensure the foundation of a tradition of observance. If a need for relaxation of form should ever be felt, particularly in the field of criminal procedure, the matter rests with the legislature and not with the courts. The courts must generally limit themselves to aligning legal decisions with common sense not foster the illusion that courts are less concerned with justice than technicalities.

There is no settled theory of law inherent in the one-party state other than that of traditional western democracies. In certain cases, the judiciary can clearly influence the development of the law. It is vital, therefore, that the judge expand at length his reasons for his conclusions. The judge's role as an educator is particularly important where the reasons justifying a rule are not part of the tradition of a people who have grown to accept them, even though they may not be understood. It is the task of the judiciary to explain and justify the law, so that it will be understood more clearly, and in time appreciated and respected.

The process of education is not confined to the general public, but extends to the administration as well. The rôle of the judiciary is dependent on the existence of the administration from which it also needs to be independent. Failure to recognize this may lead to an overplayed dignity which resents any request for clarification as an unwarranted interference and incursion on the independence of the judiciary. It is no longer feasible to base any sort of power on the unquestioning acceptance of the authority of any institution. In the aftermath of the challenge to colonialism no institution can hope to remain free of criticism. While naturally resenting any attempt at interference or dictation, the judiciary should always be ready to explain its actions, for the strength of law lies not in authoritarianism but in reasonableness that commands respect.

The educative rôle of the judiciary concerns also the numerous administrative officials who look at it with much suspicion. It is in that context that political commitment to the aims of society is vital, for it is always easier to accept criticism and counsel from one of known political commitment than from one whose position is doubtful and may be hostile. This can be a serious problem to members of the lower

level of the judiciary, and difficult to avoid. Useful help must come in two ways: through the establishment of solidarity throughout every level of the judiciary, and through explanation at every opportunity of the limits and possibilities of the rôle of the judiciary in this new society.

Political commitment through party membership can be of tremendous advantage in the explanation and propagation of party principles relevant to the work of the judiciary. The function of the party as a medium of mass education cannot be ignored, and there can be no harm in assisting in the extension of knowledge and appreciation of party beliefs and principles.

One further aspect of judicial work deserves reference; the rôle of the judicial officer in a particular case. It is very difficult for him to adopt the position of umpire or referee, for he is often the only person in court with any specialized legal knowledge. For this reason, far more active participation by the judge in the trial is unhesitatingly recommended. A trial here is not a contest of skills between equally matched contestants, for the defendant very often is unable to express himself clearly or create a coherent defence. It is a necessary interference, a duty to assist, to discover what he means and to see it reaches the record. Such activity also helps to educate public prosecutors and investigators in the basic essentials of evidence and proof.

In sum, the judiciary has a significant rôle to play at this time in this society, a rôle with lasting effects on the future development of the country. While there is as yet only a narrow base for public opinion in legal matters, it is the task of the judiciary to establish confidence in itself and its ideals. It must create the feeling that its independence does not mean non-commitment to the mammoth endeavour of creating a new society; it must be part of this endeavour so that its cherished ideals will become part of the thinking of the new society.

Summary of committee I discussion

The committee considered that, in the one-party context, the crucial issue was to preserve the independence of the judiciary and to protect it in every way possible from executive pressures to interpret the law in a manner favourable to party interests. This did not mean that judges should not be free to join the party if they wished to do so and they ought certainly to identify themselves with its general aims and aspirations. But, in the opinion of the majority of the committee, a suggestion that they should participate in the policy-making organs of the party went too far. It was pointed out that justice must not only be done but be seen to be done; a judge who was privy to the decision-making process within the party would be regarded as compromised whenever a party decision was queried in the courts.

The committee also felt that the party itself ought to be a true party of the masses, rather than an elitist group, and unless it was, it would be undesirable for members of the judiciary to join. Indeed, a party of the masses was essential to the maintenance of democracy in the one-party environment. Where such a party existed, there was no reason why democracy should not flourish and the rule of law be successfully preserved.

The committee rejected a minority view that, until government was fully in the hands of the workers and peasants via a revolutionary process, the independence of the judiciary was a myth. The majority of members did not accept the contention by two participants that the rule of law was no more than an instrument of class domination designed to protect the interests of the ruling class. On the contrary, they believed that judges could, and should, be genuinely neutral as between

the subject and the state. Their neutrality should be jealously guarded by providing security of tenure, removal only on serious grounds of misconduct and proven incapacity, and by maintaining high standards of qualification and calibre for appointment to the bench. This was already the practice in the democratic one-party environment and ought not to be relaxed in any way.

The committee also rejected the concept of an elected judiciary but agreed that public participation in its functions through, for example, the appointment of assessors, should be encouraged.

Discussion next turned to relations between the party, the executive and the legislature. It had to be accepted that, in a one-party state, the party was supreme. Its supremacy must be exercised, however, through the framework of the national constitution and by strict adherence to due process of law and the prescribed procedures which the party had itself laid down. The notion of party supremacy must never mean that the party or its agents could act outside the legal framework, ignore the proper channels or issue arbitrary directions. The tendency among some party officials to develop, as one committee member put it, 'a morbid aversion to legality and lawyers' was a serious threat to constitutionality and must be deplored. Indeed, the committee felt that executive pressures against the rule of law and human rights ought to be countered, not only by education and example, but by the inclusion in the constitution of a justiciable bill of rights. Where such a bill of rights did not have constitutional force, there should nevertheless be a written commitment by the party to respect the fundamental rights and freedoms of the individual and the committee did not feel that this commitment was incompatible with effective government in any way.

The committee noted that parliament had continued to prove itself a useful and necessary institution in the one-party context. Parliamentary debate had often become freer and less inhibited than in the multi-party system and no fundamental conflict between the legislature and the party had emerged. Parliament should not, however, become the only forum for the public discussion of issues. The general participatory process should involve the entire society and extend to non-party members and party members alike.

Committee II – Legal protection of human rights

The principles of administrative (or preventive) detention

K.L. Jhaveri,

former Member of Parliament and President Tanzania Law Society

Legislation permitting executive authorities, usually the head of state, to detain persons without trial now obtains in many countries of the free world. In view of the very nature of the detention, it continues to evoke at the highest abhorrence and at the lowest discomfort in the minds of a lawyer. Much has been said yet little appears to have been achieved to minimize the scope and use of this administrative or preventive detention. A continued study of this practice and possible ways of balancing its need with appropriate controls, therefore, demands closest attention.

Firstly, the right to make a detention order is generally restricted in the legislation of most countries to cases in which persons are believed to be conducting themselves so as to be dangerous to peace and good order, or to be acting in a manner prejudicial to the defence or security of the state. It has, however, been observed in a number of countries that the power of detention has been exercised in cases not covered by the scope of the legislation. Also, in some countries the power of detention has been exercised over persons already convicted and in some cases even acquitted. In the former case the power is resorted to on his release if the sentence imposed is considered by the executive to be inadequate, and in the latter case if the executive is dissatisfied with the decision. This penetration into the role of the judiciary is, it is suggested, a grave erosion of the independence of the judiciary. Indeed, it enables a head of state, or more truly those acting in his name, to circumvent orders of the court and to impose penalties without having

considered the evidence adduced at the trial or without regard to the defence of the accused either at all or with impartiality. It inevitably appears as an abuse of the powers granted by the legislature to make a detention order.

The powers of the executive are sometimes strengthened by a provision in the legislation that any order or detention made in exercise of the powers conferred by the legislation will not in any way be open to question in any tribunal or court, and a court cannot order disclosure even of the grounds leading to reasonable belief that the person is conducting himself in a manner envisaged by the legislation. The power therefore to act arbitrarily is made absolute. Lawyers in countries with such legislation are rendered totally helpless. It appears that the legislators who allow such legislation to be passed are not able sufficiently to resist the government's demand for provisions of this kind. More vocal and vivid criticism centred on this point may perhaps awaken more resilient resistance from parliamentarians.

In some countries the legislation does contain provisions giving a right to the person detained to be informed within a certain period of the grounds on which he is being held, and to be granted an opportunity of making representation in writing to the head of state in respect of them. There is sometimes a general complaint that this provision of the law is seldom complied with, and detainees eventually emerge from detention without the slightest concept of the reasons for which they were detained. In law, the breach of a statutory condition for the making of a detention order will normally have the effect of nullifying the order of detention. As will be discussed later, in the absence of procedures for enforcement, the rights of the detainee remain purely theoretical. It is known that on occasions detainees have, on their own insistence, managed to prepare a petition and hand it to the officer in whose custody they are held. It can almost never be verified whether such a petition is transmitted to the head of state and complaints are well known that in practice no reply is received to such a petition. Such safeguards in the legislation in practice only provide window dressing, giving no protection in reality.

In other cases preventive detention legislation, in order to strengthen the powers of the executive still further, precludes any access to the detained person by his lawyer or legal adviser. This is contrary to any sense of justice. If any effect is to be given to the provision permitting a detained person to know the grounds of his detention and enabling him to petition to the detaining authority for his release, it is only fair that

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he should be granted access to a legal adviser. Refusing him this facility will in most cases nullify the provision enabling him to make a defence on his own behalf. It is suggested that a provision in the legislation permitting access to the detained person by a legal adviser, followed by a provision enabling him to petition on behalf of his client, would help to ensure that the defence of the detained person does reach the detaining authority and that its mind is directed to the various matters raised in it. This would, it is believed, greatly minimize the risk of prolonged detention of innocent persons.

Any legislation which in words or in effect permits the detention of a person without his being informed of the grounds for his detention, and without his being heard at any stage, and without the person making the order even being informed of the defence of the detained person, must be abhorrent in any civilized society. A better balance can also be secured if the legislation also makes provision for an advisory committee to sit mandatorily within a certain period of the arrest of the detained person. The committee can then ensure that the grounds of detention have been made known to the detained person and that sufficient opportunity has been given to him to make out his defence in consultation with a legal adviser. The committee can then undertake an investigation into the allegation made against the detained person and of the various defences raised by him and make out a report which it could ensure reaches the head of state for his ultimate consideration. It is recommended that a committee of this kind should be chaired by a high court judge to ensure fairness, compliance with the provisions of the legislation and confidence by the public in the tribunal.

For the safeguards suggested in this paper to have effect, the right must be given to the detained person to invoke processes of the courts to issue mandamus against the committee, or a writ of certiorari in an appropriate case, to redress any legitimate grievance he may have. Indeed, the detained person must be permitted as a matter of express legislation to apply to the high court for a writ of habeas corpus so that the high court itself could ensure the smooth and fair functioning of the legislation. Nothing can be more sacrosanct than the liberty of the person in a democratic society. In contrast nothing is a greater violation of this liberty than the complete ouster of the jurisdiction of the courts to entertain a matter pertaining to the liberty of the individual.

In many countries, complaints are commonplace that persons are taken away secretly and detained without their relatives even being informed of the fact of their detention or where they are being held.

Indeed, in certain cases even upon relatives reporting to the police that the detained person is missing, they are still not informed that they are being held in custody. This can have no basis or justification. It savours of vindictiveness. The legislation should, therefore, it is suggested, provide that every order of detention upon being made should be published either in the official gazette or in a daily paper giving particulars of persons detained. Similarly on his release an official statement should be published. In any event the relatives of the detained person should be informed of his detention within 24 hours so as at least to allay any anxiety as to the whereabouts of the detained person.

As matters related to detention legislation inevitably arouse strong national feelings, this is perhaps a matter that could with advantage be dealt with on an international level. It is suggested that even an international convention, perhaps of a regional nature, should be drawn up to define the various safeguards that would be required to comply with internationally respected norms. Freedom demands vigorous action in this field.

Summary of The role and organization of the legal profession

E.J. Shamwana,
President of the Law Association of Zambia

Without a strong professional body it is impossible to develop a worthwhile body of legal practitioners capable of contributing to the public interest and the development of the law for the public good. This presupposes that lawyers have a role to play in society, but do they? It is sometimes alleged that lawyers are social parasites making profit out of the miseries and difficulties of others. While it is true that some fit this description, there are many who spend their time and money in trying to improve the society they live in. At the least it is true to say that lawyers do not create the conditions of social misery, and as with doctors, will for a fee endeavour to alleviate the suffering of their clients.

Until recently, the legal profession of Zambia was dominated by non-citizens. After independence, it found itself unable, because of non-citizen predominance, to play its part in national life. The profession, identified with the colonial administration, found cooperation with the new political set-up difficult. Some of the citizen lawyers considered that the profession as a whole was unmindful of the needs of the nation. Under these internal and external pressures, the profession became inward-looking. It was in these circumstances, and in recognition of the fact that lawyers had a special place in society and a duty beyond just giving legal advice, that Parliament in 1973 passed the 'Law Association of Zambia Act' abolishing the old Law Society and replacing it with a new organization. Under this Act the new Law Association includes in its membership all lawyers in Zambia, judges, government lawyers, commercial lawyers and academic lawyers, as well as private practitioners.

The association is committed to broad objectives. Among these are:

- (a) to further the development of law as an instrument of social order and social justice and as an essential element in the growth of society;
- (b) to provide a means by which all lawyers, whatever their particular field of activity, can participate together fully and effectively in the development of society and its institutions;
- (c) to maintain and improve the standards of conduct of all members of the legal profession;
- (d) to consider the legislation relating to legal aid and other ways of securing representation for persons who for any reason are unable to secure it, and to make recommendations to the government thereon; and to establish machinery for the provision of legal aid in addition to that provided by the government;
- (e) to promote research in the development of the law in general and particularly in relation to:
 - (i) the applicability and suitability of received law;
 - (ii) the character and content of customary law;
 - (iii) the influence of industrial, commercial and technological development on society and social institutions;
- (f) to promote the reform of the law, both by the amendment of and the removal of imperfections in existing law, and by the reformulation, codification or restatement of particular branches of the law;
- (g) to participate when called upon in draft legislation, and to strengthen the machinery for the critical examination of its legal quality;
- (h) to seek the advancement of the Rule of Law and of the rights and liberties of the individual;
- (i) to protect and assist the public in all matters touching, ancillary or incidental to the legal profession.

The Law Association of Zambia has created several experimental committees to deal with various problems, some entirely professional, others regarding the lawyer's responsibility to society. Among the most important is the Law Development Committee, which examines existing law, considers new law in conjunction with the attorney-general's chambers, and promotes new law where considered necessary. Should this experiment succeed, it will enable the Law Association to discuss

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meaningfully with the government any proposed law which will affect public liberties. Essential to this process is the creation of a strong professional organization aware of its position, its responsibilities to its members, and its role in society, and therefore able to win a degree of respectability and a measure of acceptance from government. The lawyers' organization must convince the government that its interests are not different or apart from those which are considered to be national aspirations. The country should realize that we lawyers are citizens first and lawyers second.

Although there are many aspects of a lawyer's work, the lawyer's most important obligation is to seek the advancement of the rule of law and the rights and liberties of the individual. In relation to this aspect lawyers must be prepared to accept that governments will regard lawyers either individually or collectively as interfering busy-bodies. In Zambia, the lawyer's oath is to uphold the constitution as by law established. With the exception of the investigator-general there is no body or collection of persons charged specifically with the duty of ensuring that the rule of law is adhered to by government.

It is often argued that in a one-party state lawyers cannot defend individuals or causes politically unpopular. At times there is truth in this statement, but its application extends to any form of government. The test is not whether it is a one-party state, but whether state policy allows such a defence. And even where allowed, the defence lawyer will need the support of a strong legal body upon whom he can rely for moral support, so that he feels he is not a solitary individual fighting against the state. Even in those circumstances courage and conviction are essential.

Summary of The Tanzania legal corporation

T.L. Mkude,
Corporation Counsel

To further the goals of socialism and self-reliance contained in the 1967 Arusha Declaration, the Tanzanian Government nationalized a number of key industries, thereby introducing more and more state participation in what was traditionally regarded as the sphere of private business. To manage these enterprises, and promote the development of particular sectors of the national economy, parastatal organizations were created, which may be state corporations, companies with at least a 50% government shareholding, or groups of individuals responsible to the state.

As these institutions grew in number, their legal needs exceeded the capacity of the attorney-general's chambers. The bulk of the work was done by private practitioners, but with the departure of many of these from the country, they were no longer able to provide the services required. The need was felt for a public or quasi-public legal corporation, a new cadre of lawyers, committed to the public interest. The private lawyer has tended to associate himself with the owners of property, who are his regular clients, thereby regarding nationalization as hostile to their interests, and in the final analysis, to his own interests too. The Tanzania Legal Corporation was thus created in 1970 to provide the needed lawyers and services.

The initial mandate of the Corporation included the provision of legal services to parastatal organizations and such legal services to the Government as the attorney-general might direct. Parastatals were directed to obtain all legal services from the Corporation, and today it is their sole legal advisor. Through amendments to its charter beginning

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in 1972, the Corporation's mandate has been extended, entitling it to provide legal services to all legal persons. When requested by the judiciary, it also defends persons accused of murder or manslaughter, as well as arguing murder cases on appeal. In carrying out these diverse functions, the Corporation undertakes the activities of any law firm ranging from legal advice and drafting to litigation.

Administratively, the Corporation is divided into a main office, concerned with commercial and advisory work, a conveyancing department, and a litigation department. However, the present number of lawyers (24) does not allow strict specialization and a lawyer in conveyancing, for example, while concentrating in this area, will appear in court when necessary. The management is vested in a board of directors, whose chairman is appointed by the president, and whose members are appointed by the minister of justice. The day to day affairs of the Corporation are under the supervision of the chief corporation counsel, also appointed by the minister.

The Corporation is self-supporting, generating its income from legal fees. Each parastatal pays an annual retainer fee varying with its size and type. This fee is negotiated, and the parastatal then pays 60% of the normal scale for any legal services rendered. Members of the public are charged the normal scale fees that they would pay to private practitioners. The professional staff of the Corporation are salaried employees, unlike for example, advocates in the German Democratic Republic who receive, pro rata, a percentage of fees obtained in addition to a basic salary.

Issues are raised by the existence of a non-traditional, wholly state owned legal corporation. How well does it function in defending the individual? And what degree of 'professional independence' do lawyers of the Corporation enjoy? In answer to the first question, although the Corporation lawyer spends most of his time advising parastatals, he encounters no difficulty in providing legal services to the general public in most situations. However, where an individual wishes to sue a parastatal, the Corporation would decline to take the case as a conflict of interest would arise. The Corporation also works as a mediator in any dispute between parastatals. In the unlikely event that a parastatal refuses to accept the decision reached by the Corporation, the parastatal may seek the services of a private practitioner. In practice, however, no such case has arisen, and should it occur, it would be advisable that both parties seek private counsel, as the Corporation might otherwise find itself in the position of having to cross-examine and criticize, in public, people with whom it is in a fiduciary relationship.

The second question of 'professional independence' requires a definition of that term. For our purposes it means that a lawyer should know what the rights of his client are and pursue those rights to the best of his ability without any fear that the state may look at the role he plays with disfavour and possibly punish him for it. Since there is little constitutional litigation in Tanzania, the principal area of potential conflict with the state lies in criminal cases. The question implies that the state is interested in securing convictions and will not let lawyers in its own institution pursue the interests of their clients to the extent of getting acquittals. This suggestion is wrong for two reasons. First, the sole interest of the state in any criminal proceeding is justice which simply means that the guilty be punished and the innocent be set free. Secondly, if the state were truly interested in securing convictions, the better target would be the judiciary, since courts are known to have acquitted even poorly defended individuals. Judges, after all, have the last word. In the years since the Corporation was established there has not been a single instance in which a lawyer of the Corporation has felt his independence threatened because he is defending a member of the public.

The Corporation has been able to live up to the expectations of its founding members and those it serves. As the number of parastatals keeps growing, the Corporation will grow with its increasing responsibilities. It has not yet been able to establish branches up-country, but in time this will be done.

Summary of committee II discussion

The organization of the legal profession

The committee first considered the availability of legal services to the citizen and the independence of the legal profession in the exercise of its functions and responsibilities. Some apprehension was voiced about the impact of public legal corporations in certain countries and the tendency, where such corporations had been established, for private practice to dwindle to the extent that it might eventually cease to exist. While appreciating that an exodus of private lawyers did not stem exclusively from the establishment of a public legal corporation, committee members doubted whether the ordinary citizen could expect the same standard of representation against the state from a semi-official body as from a private lawyer. Some felt that in order to safeguard the defence of individual rights, the citizen should always have the opportunity to select a lawyer of his own choice to represent him, but the general view was that this feeling should not be interpreted simply as a defence of private practice as such. The vital point was that the legal profession, however organized, should be able to perform its duties independently of the state. This could be secured by maintaining an element of private practice or, if this was inconsistent with the social and economic policies of the nation, by creating a variety of public legal corporations with different purposes, one of which should certainly be devoted to the provision of impartial legal aid. It was noted that some countries already operated legal aid schemes under the aegis of a separate government department and this represented another equally viable approach. Whatever the formula adopted, the committee felt that the individual must be able to secure the services of a lawyer who

was professionally independent both of the government and the para-statal sector and fully competent to represent his interests against the state or any of its organs. It had to be remembered also that private practice tended to operate for the benefit of the rich; the legal profession had a duty to provide for the representation of those who could not afford to pay a heavy client's fee. Private practitioners must be prepared to devote some of their time on a rota basis to providing free legal services for individuals who could not afford to pay for these in a normal way.

The committee also agreed, however, that the contribution of the legal profession to human rights should not be limited to *pro deo* legal work. Members of the profession should assist in the protection of human rights through their willingness to serve on committees dealing with law reform and, indeed, to participate in any other activity aimed at promoting individual freedom and human rights. The committee believed that a strong and active professional association of lawyers could assist enormously in promoting the profession's social and humanitarian rôle. The association should be active in law reform, human rights education, the defence of individual liberties and legal aid.

Preventive detention

The concept of preventive detention was basically abhorrent to the committee as a denial of the right to fair judicial process, through the operation of a legally authorized but arbitrary power to confine an individual without the benefit of trial. At the same time, committee members acknowledged that the practice was not associated exclusively or even mainly with one-party states but existed under both multi-party and one-party systems. The ideal society was obviously one in which preventive detention did not exist at all and in which every real or imagined threat to state security was dealt with under the substantive law and by invoking the regular jurisdiction of the courts. It was, indeed, possible to argue that, were the criminal law relating to attempts and conspiracies less inadequate, recourse to preventive detention could be abolished. Nevertheless, the view of the committee was that a situation of genuine national emergency did sometimes arise in which the power of preventive detention could be justifiably invoked. What must be emphasized, however, was that it should only be used where public security was seriously threatened and where the threat could not effectively be encountered through the normal processes of the law.

The great problem therefore was the misuse of preventive detention and the abuse of the arbitrary authority which it conferred on the executive and its agents. The committee was agreed, for example, that preventive detention should never be used to punish the individual for the alleged commission of an offence which could not be proved against him in a court of law. The very word 'preventive' implied that there must be an apprehension of future conduct that might endanger state security and that the object of detention must be solely to restrain the individual until that apprehension had passed away. Unfortunately, however, it was only too easy to cite examples where preventive detention had been used in situations involving neither national security nor any fear of future action which could threaten the stability of the state.

It was also felt that inadequate protection existed in most states to safeguard the rights of the individual detainee. While procedures varied from one country to another, the detainee was sometimes denied access to a lawyer and deprived of the right even to challenge the illegality of his detention. He was not always informed of the grounds for his detention even when the law provided that this be done. He could petition against his detention but might never know whether the petition had reached its proper destination. The order for his detention was published in some systems but not in others and access to him by relatives might be denied. A lack of proper visiting arrangements or adequate administrative supervision could increase the likelihood of ill-treatment or even torture. His family might be rendered destitute while he was detained.

The committee discussed these and other problems at considerable length. It concluded by preparing for submission to the Seminar in plenary session a series of concrete proposals designed to prevent the misuse and abuse of preventive detention powers. As amended in the closing plenary session these were embodied in the seminar conclusions.

Committee III – Promotion and legal protection of human rights

Summary of

Office of the investigator-general (ombudsman) in Zambia

The Hon. F.M. Chomba,
Investigator-General

This paper describes the functions of the Office of the Investigator-General in Zambia. The ombudsman, as an institution, originated in Scandinavia and has since spread around the world. Basically, he is an independent officer or member of the government who receives and investigates complaints and, should they prove justified, seeks remedies or makes recommendations.

The Zambian ombudsman was proposed shortly after the government announced the intention to form a one-party participatory democracy, partly in response to the fears which had been expressed by some political dissidents that a one-party state would not respect the rights of the citizen.

The National Commission recommended in October 1972 the establishment of an ombudsman (termed 'investigator-general') to investigate 'any matter of individual injustice or administrative abuse of power or authority'. Such an office could be an impartial and independent means by which complaints could be raised informally and at little cost, and with greater range and flexibility than the courts. In addition the investigator-general could assist the administration with informed advice and reproof, by soothing public feeling over outrageous abuses by the fact of his investigation, and by screening and rejecting unjustified complaints. The Zambian Constitution incorporates the recommendations of the National Commission in articles 117-119.

After the general elections of December 1973, the president appointed the first Investigator-General, who, after a study trip to India,

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New Zealand and Tanzania, opened his office in September 1974. In the same year the national assembly passed the Commission for Investigations Act, No. 23 of 1974. This obliges the Commission to carry out any investigation ordered by the president while leaving to its discretion whether to make investigations pursuant to allegations or complaints lodged by citizens. The Commission's jurisdiction extends to the conduct of any person in the service of the republic or a local authority, any person holding office in the party or of any institution or organization in which the government holds a majority of shares or exercises financial or administrative control, or members and servants of any commission established by the constitution or Act of parliament. The Commission may not question or review any decision of a judicial officer or tribunal, or any matter *sub judice*, or any matter relating to the exercise of the prerogative of mercy, or, of course, the President.

Anyone may file a complaint, orally or written, if it arises out of facts within two years of the date of filing. The Commission may decline consideration of the complaint on the grounds of non-exhaustion of remedies or if satisfied that it is vexatious, in bad faith, improper, unnecessary or fruitless, or may discontinue an investigation for the above reasons. The Commission may make an investigation irrespective of any statutory provisions prohibiting the challenge of the administrative decision in question.

The Commission has a wide range of powers. Its writs, orders and directions have the same force as those of the high court. It has wide powers of inspection and subpoena, restricted only by the president's certification that the yielding of the information sought might prejudice national security or international relations or disclose the deliberations of the cabinet or central committee of the party or any of its sub-committees related to secret or confidential matters. While no one has a right of audience or of legal representation before the Commission, it cannot make recommendations against some one who has not had the right to comment on the complaint. The Act also covers such points as notice, in camera proceedings, and contempt.

The Commission cannot make enforceable decisions. Its reports, findings, conclusions and recommendations are made to the President, who decides the nature of any further action. The commission may direct, on behalf of the President, appropriate authorities to implement his decisions and may receive the reports of compliance.

Since its institution, the Commission has received a steadily rising number of complaints against all sectors of officialdom, including

party officials and government ministers. Where the Commission has found abuses of power the President has not hesitated to punish the offender and grant such redress as the facts warrant. Despite the wide acclaim greeting this institution, the numbers of complaints remain relatively low. In part this is due to the lack of awareness by the high proportion of illiterates, and in part to the location of the offices of the commission in Lusaka, thus not readily available to much of the population. Consequently, the Commission has undertaken tours of the rural areas to explain the Commission's functions and receive complaints. The response to those tours has been overwhelming. It is hoped that as money and manpower become available regional offices may be opened to serve rural districts.

Though they may have no actual experience of it, some fear the one-party system is synonymous with autocracy and totalitarianism. The Zambian experience dispels these fears. The Zambian humanist ideology aims at an egalitarian society wherein the full rights of the citizen are respected. The one-party system is a participatory democracy in which all citizens are afforded the opportunity of having a hand in running the country. The Office of the Investigator-General is but one of the ways in which they may do so. By exposing and penalizing improper practices, the standard of public administration is improved. The Investigator-General and his broad powers and jurisdiction further represent the commitment of the government to the respect of the human rights of the individual.

Summary of Procedures for investigating complaints in the permanent commission of enquiry

J.B. Mwenda,
Member of Permanent Commission of Enquiry, Tanzania

Ten years ago the Permanent Commission of Enquiry (PCE) was instituted following the recommendation of the 1964 presidential commission. The commission considered that an ombudsman institution of this kind would provide better safeguards for the individual than a bill of rights. It also advised that the institution should not limit the actions of the government or party in a way which would interfere with the task of national building. Consequently the 1965 interim constitution provided for a PCE without any executive powers. The 1966 PCE Act prescribed its powers, immunities and procedures. While ten years is a short time as a national institution, it is long enough to enable some appraisal to be made of its success as well as a description of its powers and procedures.

Membership and staff

The PCE consists of a chairman and four commissioners appointed by the president for a term of two years. Members may not serve more than two terms without a lapse of two years, nor may they hold any office in the party, civil service or parastatal organizations, though they may be members of the national assembly. The members of the PCE are not required to have any legal training, but past appointments show they tend to be mature persons with considerable experience in public affairs. The PCE staff is seconded from the civil service and the secretary is appointed by the president.

Powers and procedures

The PCE is empowered by the Constitution to enquire into the conduct of virtually all party, government and parastatal organizations in the exercise of their office or authority or in the abuse of that authority. The PCE has no power to enquire into the conduct of the President, the head of the executive for Zanzibar, the East African community, private companies, diplomatic missions, religious organizations or the people's defence forces. The PCE also may not question any judicial decision, but at the same time the proceedings and decisions of the PCE are not subject to judicial appeal or review. The PCE can, however, and does, review the conduct of judicial officers in the performance of their duties, e.g. complaints of court delays. Lastly the jurisdiction of the PCE is limited to persons in the service of the united republic and union matters only, thus excluding all matters under the executive powers of the head of the executive for Zanzibar.

An enquiry may be commenced in one of three ways: by the direction of the President, on complaint of an individual, or on the PCE's own initiative. The PCE has wide powers of discretion in its acceptance of or approach to any investigation. It is also vested with extensive powers of subpoena of witnesses and documents, and powers of entry and inspection, restricted only by the president's direction that such action might prejudice the security, defence or international relations of Tanzania or involve disclosure of cabinet deliberations. All enquiries of the PCE are conducted in private, without confrontation of witnesses. The Commission is not bound to hold any hearing. However, all persons complained against are accorded the opportunity to be heard by the PCE, but without representation by an advocate.

Remedies

The PCE has no enforcement powers. At the close of each enquiry, a full report is made to the President who has complete discretion whether to act upon it. In practice, only those cases of gross injustice which the appropriate authority has not remedied are reported to the President, giving the PCE considerable latitude in negotiating remedies. The PCE is also compelled to submit a report of its activities to the national assembly, including case summaries which do not reveal the identity of the persons under investigation.

Appraisal

The achievements of the PCE are best appreciated by those whose

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complaints it has dealt with. It is difficult for others to do so as its work is conducted in private and the anonymity of its yearly report makes it difficult to correlate its activities with disciplinary actions of the President. Nevertheless, its mere existence is of great psychological value to those who know they may, with a minimum of formality and no cost, file a complaint against the violation of their rights. In addition the President takes great interest in the reports of the PCE, which alert him to weaknesses in the bureaucracy.

Some have argued that the PCE is superfluous, duplicating the work of other institutions; the courts, parliament, and the press. But each of these institutions have their drawbacks; the courts are formal, unwieldy, slow and expensive, the press unsuited to the protection of the individual, and members of parliament lack the time and resources for extensive investigation. The PCE fills the gap left by these institutions. Its success is due firstly to the keen interest of the President and his determination that it should fulfill its mandate, secondly to the confidentiality of the enquiries, and lastly, to the lack of technical, formal and financial obstacles to quick redress of complaints.

Although the PCE has enjoyed great success, it has some way to go to full effectiveness. The statistics of the last ten years reveal that it is mostly used by the small minority of urban dwellers, while a smaller number of complaints originate among the peasants who comprise almost ninety-five per cent of the population. This must be corrected. However, a foundation has been laid. It is up to the workers and peasants to build upon it.

Summary of committee III discussion

The committee first discussed the ombudsman-type institutions which had been created in Tanzania and Zambia under the respective titles of permanent commission of inquiry and commission for investigations. Institutions of this kind were not, of course, unique to one-party states. Nevertheless, the committee felt that they had an especially significant role to play in the one-party environment, where the greatest danger to human rights probably lay in abuse of authority and the increasingly heavy hand of the bureaucratic machine.

The committee noted that, in both Tanzania and Zambia, the members of the commission were appointed by the president and that there were no prescribed criteria for selection. In Zambia but not in Tanzania, however, the chairman of the commission had to hold the qualifications of a high court judge. In both countries, the commissioners needed to be committed party members and the scope of their investigations was so wide that it became important to have a variety of backgrounds and experience represented. Tenure arrangements differed between the two countries and, in Zambia, all the members except the chairman were appointed on a rotational basis.

The committee considered that, provided the institution had ready access to legal expertise and advice, there was no necessity for its members to be legally qualified as such. The committee felt, however, that some element of security of tenure must be provided for by law since many of the commissioners' reports would inevitably reflect adversely on the executive organs of the state.

Three general limitations on the work of the commissions were noted, two of a legal and one of a non-legal kind. They had no power

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to investigate the president himself, no authority (in Zambia) to institute their own inquiries, and problems of a distance and communication make it difficult for them to be speedy and comprehensive in their work. Paradoxically, they are also uncertain judges of their own effectiveness. Once a commission has reported to the president, its formal involvement is at an end and it may never know the ultimate outcome of its intervention.

Although some committee members felt that even the president's own actions should be susceptible to investigation, the majority view was that the lack of power to do so was an unavoidable and logical constraint. The committee strongly urged, however, that the commission should have full authority to initiate investigations on its own account. It had to be recognized that parties often felt coerced or reluctant to make complaints themselves and a flagrant violation of a human right could remain unredressed while the commission waited vainly for a complaint. The committee also felt that the commission should have authority to follow up each presidential decision on its recommendation, so as to ensure that the executive complied with whatever remedial action was laid down.

On the practical side, the committee discussed the possibility of establishing branch offices for the commission and even of decentralising its membership to regional level. On the whole, the consensus was that the membership could not be geographically dispersed but that offices for the local reception of complaints ought to be established so that complainants did not have to travel long distances to lodge their grievance.

In summary, the committee was unanimous that ombudsman-type institutions were of critical importance, should be strengthened and supported, and established where they did not at present exist. The committee rejected the notion that these institutions constituted an interference with the normal traditional process and regarded them as an invaluable machinery for the prevention of abuse and the protection of human rights.

The committee next considered the propagation of human rights through the educational process. The point was strongly made that this demanded education of the party as well as by the party, and that without the former the latter would not effectively take place. Committee members felt that the problem was not one exclusively or even primarily of knowledge. Much had been done to express and promulgate the basic human rights but not always enough to see that party leaders at every level were fully committed to their observance. There was too much repetition of rhetoric without an underlying belief

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that human rights must be protected and maintained. Furthermore, there was always a danger that education through party channels would degenerate into a process of brain-washing or crude political indoctrination. It was therefore necessary to involve as many agencies as possible, non-governmental as well as governmental, in the propagation of human rights. The press, radio and television, the legal profession and other means should all be used to awaken public consciousness to the issues involved. Some members felt that certain rights, such as women's rights, might require greater prominence than others and should be emphasized accordingly. These were problems of balance, however, which might vary from state to state. The fundamental need was to reach beyond lip-service and platitude to a genuine commitment by party leaders who were prepared to practise what they preached.

Workshop I – Freedom of expression and association

Summary of Trade union rights in a one-party state

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A number of general observations should be made at the outset regarding the issue of trade-union rights. First, different one-party states are not homogeneous in character, and their policies regarding trade union rights vary considerably. Second, trade union rights cannot be treated in isolation from other internationally recognized human rights and it is rare for workers and employers to be accorded the right to associate freely with each other where other human rights are not respected. Third, the participation of unions in the industrial and social process involves the very essence of democracy, and the extent to which people are allowed free expression through trade unions provides quite a reliable yardstick for determining the democratic nature of any given society. Fourth, Zambia, a one-party state, although not bound by the international standards regarding union rights found in ILO Convention No. 87 on Freedom of Association and Protection of the Right to organize, adopts a national policy and practices standards closely aligned to those found in the Convention.

The constitution of Zambia, in article 23, expressly recognizes the right to join trade unions, highlighting the importance the state attaches to those institutions. This right may be subjected only to such restriction as are necessary for the viability of the state and government, but such limitations must be compatible with a democratic society.

The Industrial Relations Acts of 1971 amplifies the right contained in the constitution. In particular, it affirms the right to form, join, and participate in trade unions. It also provides that employers may not

deter participation or penalize employees for exercising their rights, nor in any way discriminate against an employee who has been a complainant or witness against an employer, been the recipient of an award or absented himself from work without leave for union activity when such leave is unreasonably denied by the employer. The offer of financial or other assistance to trade unions by employers or employer associations with the intent of exercising influence or control is strictly forbidden.

Within six months of its formation, every trade union must register with the labour commissioner. Failure to do so renders any activity by the union illegal. Trade union constitutions, to qualify for registration, must contain certain provisions designed to strengthen their administration and eliminate abuse. These include descriptions of the organizational structure of the union, the method of election of officers, provision for secret ballot, the persons qualified to handle union funds, the purpose for which the funds will be used, and their collection, banking and investment.

The commissioner has a number of other duties and powers in this area. He cannot register a trade union purporting to organize employees already represented by or eligible for membership of another trade union. In certain circumstances, he may dissolve a union, with this decision subject to appeal before an industrial relations court. He may also prevent individuals from seeking union office who have been within the relevant trade for less than a year, who have been responsible for the dissolution of another union, or who have been convicted of an offence involving dishonesty.

Unions registered under the Act automatically become affiliated with the Zambian Congress of Trade Unions, the only central trade union organization in Zambia. Trade union dues are deducted from wages and paid by the employer direct to the union. The unions are free to apply their funds to purposes designed to further their interests and those of their members in conformity with law. While the provisions of the law apply *mutatis mutandis* to employers' associations with minor modifications, the Act does not apply to defence and security forces who are debarred from union activity due to the nature of their work.

The law and practice regarding trade union rights of one-party states in Africa bear a remarkable degree of similarity, reflecting the British colonial heritage combined with modern ILO standards. Yet modifications have taken place to suit the political outlook of different countries. In Zambia important additions and changes have been made

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in trade union law since independence. For example, all undertaking employing more than 100 individuals must form works councils to promote and maintain the effective participation of workers in the affairs of the undertaking, and to secure the mutual co-operation of workers, management, and trade unions in the development of industrial peace, improved working conditions, and greater productivity. The works councils are the vehicle by which party and government seek to introduce fully the concept of participatory democracy, an aspect of the philosophy of *Zambian humanism*, in industrial undertakings. Under the Act, works councils have powers to veto management decisions in the field of industrial relations and personnel management, and the right to be informed of managerial decisions regarding investment policy, financial control, distribution of profits, economic planning, and the appointment of senior management executives.

The Act compels employers to recognize unions to which their workers belong, and employer associations to join joint industrial councils for the purpose of collective bargaining. Procedures for settling collective disputes follow the basic patterns common to virtually all East African countries, beginning with mediation and going up to adjudication in the industrial court. The right to strike or lock-out is guaranteed, and peaceful picketing aimed at persuading other workers to join the strike is permissible. However, some restrictions are imposed on the right to strike, such as those upon workers employed in essential services. In situations where strikes are permissible, trade unions as a general rule are insulated from court actions.

Democracy is not unique to multi-party states. An examination of the political situation in East Africa will reveal that the one-party system of government assures to the people as much democracy as can be found anywhere in the world. In Zambia, interest groups such as trade unions have a free hand in how they run their affairs, subject to the law of the land. Further, union officials are appointed to statutory boards and directorships of state corporations, an arrangement which enhances the participation of workers in national affairs.

Summary of workshop I discussion

The range of freedom of expression and freedom of association was necessarily limited in a one-party environment by the exclusion — implicit in the case of a 'de facto' one-party state and express in the case of a legally constituted one — of the right to associate in alternative political parties or openly to advocate a reversion to multi-party forms. This limitation did not mean, however, that the exercise of these freedoms need be restricted in other ways. Members of the workshop were agreed that it was vital to keep the one-party system alive through constructive criticism and comment and to preserve the right to associate in all groups other than those with an overtly political base.

Continued *freedom of the press* was probably the most important element of freedom of expression and workshop participants were fully agreed on the need for its protection. It was admittedly difficult, if not impossible, for the press to question the fundamental philosophies and policies of the party, but there remained a wide area over which it could still usefully contribute divergent views. Indeed, some participants felt that its real freedom was often greater than in the multi-party context since the government no longer felt that a free press could be used to jeopardize its very existence by acting as the tool of an organized opposition. Instead, the press could work constructively as a check on abuse, a means of airing grievances and misgivings and a focus for legitimate criticism of the ways in which policies and programmes were being carried out. It had also a powerful and a valuable role to play as an educator of the public in the important issues of the day, in helping to form public opinion and in popularizing the significance of the rule of law and fundamental human rights.

A number of participants pointed out that, in the African socialist or humanist environment, criticism has not been stifled and the existence is accepted of a right to differ from the position taken on particular issues by those in power. Examples were given of instances where the press had exercised its right to criticize and had even succeeded in getting decisions reversed. It had encouraged debate and influenced the outcome of policy at the formulating stage. It had exposed the improper actions of ministers and officials and castigated public bodies for the inept management of their affairs. All these examples illustrated that the press had continued to act as a powerful check within the political system and that the party had often encouraged it to perform this role. In some instances, it was likely that the party had itself initiated or prompted the discussion in the press of issues which it felt appropriate for public debate. The correspondence columns were critical and lively and only on matters of security was it probable that any element of precensorship occurred. Foreign publications, some of them containing material severely critical of the government, were freely admitted; where imported matter had been banned this was on pornographic rather than political grounds.

Nevertheless, the attitude of the party was a critical factor and, since the ownership and management of the press had become predominantly (in some states, exclusively) vested in governmental hands, the party had undoubtedly the power to suppress its freedom if it wished to do so.

Some participants queried whether the press could ever be considered wholly free in these circumstances, although it was noted that the reasons for public ownership were often more financial than political, with rising costs and limited circulation potential a serious obstacle to the perpetuation of independent journals. The workshop considered, however, that privately-owned papers should be encouraged to exist wherever it was economically viable for them to do so. The press should not be seen to be exclusively the mouthpiece of the party and accountable only to the party for the attitudes it takes. In the last analysis, it was the party which had to draw the line between opposition and criticism, and it should seek to do so in ways which did not stifle the right to comment or inhibit the freedom of constructive debate.

The workshop observed that, in many cases, low standards of journalism had led to complaints from the party of mis-reporting or distortion and the press could be in danger of repression as a consequence of its own defects. Everything possible should be done to

improve the accuracy of press reporting through the better training of journalists in the ethics and standards of their profession.

The role of the radio, other mass information media and the adult education movement were also briefly discussed. The workshop felt that these had an essential part to play in promoting human rights through their educational and 'social engineering' functions.

On the issue of *freedom of association*, the workshop noted with satisfaction that the advent of one-party rule had involved no curtailment of the right to associate save on political grounds. Religious, cultural and social freedoms had not been interfered with and were, in most cases, enshrined in national constitutions. A few instances where religious sects had been prescribed on security grounds, or ethnic groupings as racialistic, could not be considered as exceptions to this rule.

The right of employees to join a trade union and of the labour movement to negotiate the wages and conditions of service of its members had similarly not been interfered with, although different forms of union organization had evolved, and their relationship with the party by affiliation or otherwise varied from state to state.

Except in political terms, therefore, freedom of association was a feature of the one-party no less than of the multi-party democratic state. The workshop wished, however, to draw particular attention to the need to preserve a right *not* to associate if the individual wished not to do so. The right not to belong was as much a human right as the right to belong and states should resist the temptation to force membership, particularly of the party or party-sponsored bodies, on persons who did not wish to join. Equally, membership should not be denied to any person who was qualified to join and who subscribed to the objectives of the association concerned.

Workshop II – Public participation, administrative procedures and law

Summary of

Administrative procedure, administrative law and public participation in a one-party state

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Introduction

The administrative process in a one-party state presents a challenge to lawyers, namely how the legal profession can help people to question and try to control the activities of the state when the whole society is being required to take part in far-reaching social change. A great deal has been written on development administration in Africa, but the contribution of lawyers and lawyers' issues, such as due process, natural justice, discretionary powers and their control, has been conspicuously absent.

In approaching this subject lawyers need to be aware of the social and political context, and realize that for many people, no less concerned with the welfare of the people, fundamental rights and freedoms are associated first and foremost with non-justiciable rights, such as health, education and employment, rather than with legally protected freedoms such as speech, association, movement and due process. Governments have to decide which rights are to have scarce resources of money and manpower allotted to them and how much.

The term 'rule of law' has not much meaning for non-lawyers, but other terms can be found to express our concern. At bottom we all, lawyers, politicians, administrators and social scientists, are concerned with the legitimacy of government, the acceptability to the governed of the state organs and their powers. The one-party state is one response to the problem of legitimacy. Two other concepts are basic to this relationship between government and governed, social justice, or fair

policies fairly administered, and efficiency, or the ability of government to respond to the demands of ordinary people and get things done.

The overriding central issue is the tremendous disparity in wealth, power and ability to understand and use the bureaucratic structure, the disparity of class. Lawyers must be aware of this when arguing for the inclusion of legal ideals into social justice. How can the meagre legal resources available in the countries under consideration be reorganized so that they are directed not to a small elite but to the majority of the people? Social justice requires that awkward questions be asked of lawyers about the law and legal system, as well as awkward questions by lawyers about the rule of law in the administrative process.

In East and Central Africa, as elsewhere, the legal profession is overwhelmingly concentrated in the major business district of the major cities, largely inaccessible to the urban let alone the rural majority. The trial process is mystifying even to the educated layman, and it is almost impossible for ordinary people to find out unaided what are their rights and duties under the law.

From the point of view of justice and efficiency the problems posed by the powerful new government institutions in these states — ministries, boards, corporations, commissions, banks, etc. — go beyond fair trial procedures and embrace corruption, favouritism and maladministration amounting to fraud and peculation. No amount of fair administration, in the sense of openness, fairness and impartiality, is going to correct the imbalance between the urban minority who know how to obtain loans from government appointed finance institutions, e.g. to build houses for letting, while the poor are breaking the law in putting up a huddle of miserable shacks on a piece of vacant land. It may even be that what is required is, from the western legal perspective, grossly unfair administration. Lawyers must realize that in developing countries their skills, disciplines and heritage are one of the obstacles to social justice and efficiency as well as a possible means to achieving them. Lawyers must find the solution to this dilemma.

Policy-making and public participation

The process of administration may be divided between the formulation of policy and its implementation. The first is concerned with the broad plans and policies, the second with individual decisions such as granting of particular licences, loans, or embarking on particular housing or agricultural projects. Policy formulation gets little attention from lawyers and much from those concerned with development administration;

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the converse is true of implementation.

Public participation can be applied more easily and is discussed more often in relation to policy formulation. It involves, *inter alia*, the dissemination of full information and discussion with those affected by the proposals, be they ethnic groups or more modern interest associations, before decisions are reached. As everywhere, governments tend to be uneasy lest public participation will provide people to demand something else, or more than the state can afford. Should procedures for public participation be enshrined in the law, or left to the good administrative practice?

In the countries under review parliaments meet less and less frequently and there is an increasing reluctance to allow frank and fundamental criticism of government policies to be voiced. In the absence of a well-organized party machine through which grievances and ideas can come up from the grass roots (which probably exists only in Tanzania), this weakening of the role of parliament seems rather short-sighted. The bureaucracy, as everywhere, is the most powerful part of government and needs to be penetrated by public participation.

There is an uneven willingness to tolerate interest groups within the region, and a tendency for those which offer a challenge to the elite to disappear while those that bolster it survive. This is neither public participation nor social justice. Another aspect is the extent to which policies under consideration (e.g. slum and squatter clearance policies) reach and are discussed with those affected by them. What, for example, were the public participation inputs into the collectivization of agriculture in Tanzania? President Nyerere has insisted that *ujamaa* villages must be established with the active co-operation of the peasants, but he also insisted on strong pressures, which some regarded as coercion, to get peasants to live in villages. The truth is that a government will not abdicate its responsibility to formulate and implement policies it thinks best for the country. In Tanzania's commitment to social justice the stress on egalitarianism is of greater importance than public participation and fair administration, and reconciliation of them is not really possible.

In these circumstances it is doubtful if there would be much advantage in enshrining public participation in law. To give a legal right to be consulted to peasants who cannot consult lawyers would be pointless, as would a requirement for more public hearings. Law can be used to create a climate of public opinion but enacting laws which cannot be enforced brings the law into disrepute. Lawyers should

press for continued dissemination of information, and make themselves available as advocates to those who want to urge their views upon the government, but in doing so should realize two things. First, governments will not be deflected from policies they think best, especially when those policies are likely to be widely unpopular; and secondly, the bureaucracies have such a monopoly of power that they can pick who they will listen to, and even who they will permit to speak. The remedy to this is political not legal.

Discretion and its control

The second part of the administrative process is implementation, the making of individual decisions by the exercise of a discretion which will result in giving benefits to some and not to others. The tendency in recent years has been to increase the power of the bureaucracy to make these decisions and a decrease in the effective controls over them, whether political, legal, or administrative of the ombudsman type. Is not the possibility of unfair and even corrupt procedure in arriving at decisions the area where the lawyer's concept of social justice — fair procedures and adequate controls to see they are followed — has a definite role to play?

Studies that have been made of administration in the countries under review indicate, however, that inefficiency, inflexibility and lack of initiative, rather than corruption or abuse of power, are the predominant failings of the civil service. In developing countries the problems are such that the administration has a much more creative role to play. These facts suggest two important considerations. More checking on discretionary power, to be effective, would need more administrators and controlling institutions; is this a desirable way to allocate scarce resources? Secondly, might not more controls increase the inefficiency and inflexibility without significantly decreasing the injustice? Might not what is needed be a more general recasting of and rethinking about development administration in which questions of injustice and control would be as important as those of initiative, creativity and efficiency.

The reports of parliamentary debates, and of the Tanzanian and Zambian ombudsman commissions and of numerous commissions of inquiry, provide convincing reasons for giving a high priority to procedures for confining, structuring and checking administrative discretion. It is not practicable to introduce legal procedures of the kind existent in the US and UK into countries where the relevant professional

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advice and assistance is not available. While there is place for controls based on complaints procedures, particularly of the ombudsman variety, other less haphazard kinds of control, not dependent on individual initiative and expense, should be considered.

Two suggestions are put forward. First, training for administrators, including party officials, should include a substantial element of relevant legal education, including such matters as fair procedures, natural justice, relevance in decision-making, and the importance of openness in development administration so that it becomes second nature to act both fairly and decisively. Legal training should concentrate more on principles and their relevance in daily work than on particular legislative enactments. Lawyers must convince governments and institutes of public administration of the need for this and produce the necessary course materials and books, practical exercises and training, which at present do not exist.

The second proposal is that there should be a legal and fair procedure equivalent to the comptroller and auditor-general, empowered to keep a constant check on the processes of administration through 'fair procedure' audits. This could be done either by the existing ombudsman commissions or by a new body to be established. It would be concerned with the manner of implementation of policy, not with the policy itself. It would look at past decisions and sit in on current ones, look at the national and local level of government and party administration. Like the body proposed by the Ndegwa Commission in Kenya in 1971 it would be charged with a continuing inspection, review and evaluation of the work of the public service as a whole, and its annual report would have an important educative effect. This inspectorate should be responsible to the President, and its reports could with advantage be considered by committees of parliament and/or of the party. Its effectiveness will depend upon a political commitment to a fair and efficient system of administrative justice strong enough to overcome bureaucratic inertia and hostility, and sharp enough to see through formal acceptance combined with substantive rejection.

Conclusions

If there is some inconsistency in the suggestions made in this paper it is in part due to a genuine ambivalence about where the line should be drawn between vigorous government action and effective control of its abuses. Equally, while lawyers have an important role to play in furthering social justice and efficiency in government, the record of lawyers in

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making these ideals meaningful for the majority of the population is not impressive. At the end of the day administrative justice may be a good deal less important than the substantive policies; if these are or are thought to be unfair, no amount of administrative procedures or institutions will prevent increasing alienation of people from government. When discussing administration in a one-party state it must not be forgotten that substance and procedure are inextricably entwined.

Summary of The public service in a one-party state

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The former British colonies in Africa inherited on independence not only the Westminster constitutional model but the Whitehall conception of the civil servant and his role. Civil servants were not allowed to take any active part in politics, including membership or office in a political party, speaking in public on political matters, asking questions or voting at public meetings, writing letters to the press or books or articles on political matters, or canvassing support for political parties.

The traditional view prevailed that the civil service was politically neutral, equally well able to execute policies of one party as another. The advantage of this system lay in helping to preserve continuity and stability in management in a multi-party system with alternating governments. A party newly in power might be suspicious of the 'mandarins' who served its predecessor, but deliberate obstruction was seldom proved and a tactful re-adjustment usually took place.

Since the adoption of the one-party system in Tanzania and Zambia, the doctrine of political neutrality has been discarded. Civil servants are permitted and encouraged to join the party. In Zambia few if any civil servants have in practice aspired to party office nor has any compulsion on them to join the party been applied. The proper limit to their political involvement remains undefined and may, indeed, present a constitutional dilemma. The party constitution, which is now annexed to the national constitution, prescribes the rights, duties and obligations of party members in the widest terms. The extent to which these rights, duties and obligations can be fulfilled without interference with the

exercise of civil service responsibilities is a matter of some delicacy which has not yet been resolved.

Nevertheless, if the experience of other African countries is a guide, there are definite practical limits to the freedom of civil servants to enter the political arena. The Ghana Civil Service Act of 1960 — one of the earliest examples of an attempt to delineate the role of the civil servant in a one-party environment — defined it as misconduct for a civil servant 'to engage in any activity outside his official duties which is likely to involve him in political controversy'.

In an address on the 'Role of the civil service in a one-party state' delivered in 1966, the principal secretary to the President of Tanzania remarked that a civil servant could obviously not reveal confidential information at party meetings, nor campaign within the party for a viewpoint which was contrary to that of the ministry he served. He continued: 'Civil servants are employed by the people to carry out the decisions of the people's government. They are not employed to be the government. And it is essential that those who are the government should be able to have confidence in the full and active support of the government servants; this confidence cannot exist if the man responsible for executing a particular plan is publicly identified with an entirely different plan. That is common-sense, not a restriction on a citizen's liberty. It remains true to say that civil servants can participate in the political life of the country; it is the manner of doing it which is, at times, affected by the requirements of his duty'.

The key word here is 'common-sense'. A balance has to be struck between political identification on the one hand and personal involvement on the other.

The fusion of government and party cannot alter the fact that civil servants are employed to carry out the decisions of the government, not to be the government. Personal political rivalry or ambition cannot be allowed to cut across the absolute requirements of confidentiality, loyalty, objectivity and impartiality which represent the best of the inherited tradition and which no-one would wish to see impaired in the one-party context.

Some political figures have been appointed to civil service posts and more commonly civil servants have been elevated to political office, but political interference in the civil service has been strongly resisted and party enthusiasm has not become a widespread substitute for professional capacity as a determinant of merit for promotion. The civil servant also remains protected from public criticism in parliament by the

doctrine of ministerial responsibility.

In Kenya, where there is not a 'de jure' one-party system, the ban on civil service participation in party politics remains, save for the subordinate staff engaged for the most part in manual work who are permitted to become members of the ruling Kenya African National Union (but of no other party). Nevertheless, a government memorandum on 'Civil service attitudes' published in 1964 stated that 'it is the duty of civil servants to commit themselves enthusiastically to the support and energetic pursuit of the government's declared policy'.

There was no need in the colonial era to stress the importance of national commitment, for there was no nation to which the civil servant should feel committed. Indeed, commitment to the national ideal was suspect. The inherited attitudes of suspicion and hostility on the part of civil servants towards politicians contributed to and may have hastened the change to the one-party system. Under the colonial system the official was ultimately the master and the politician, even the settler politician, the servant. On independence the roles were reversed, and a more enthusiastic and informed support of party policy was required of civil servants. Technical expertise in various fields was not enough. Those in the public service were expected to participate in the vocation of nation building.

It is, therefore, small wonder that the new political leadership felt it had a gordian knot to cut. It could cut it, as perhaps in Kenya, by enhancing the status of the civil servant above that of the party office-bearer and by stressing allegiance to the President as a father-figure transcending party and bureaucracy alike. But in Zambia and Tanzania, where the 'cult of personality' was less encouraged and the supremacy of the ruling party over the executive an article of political faith, the only solution lay in rejecting the doctrine of neutrality in favour of a whole-hearted emotional commitment to the party, its ideals and its aims.

The rejection of political neutrality on the part of the civil service could clearly not be accomplished without danger of disunity while a formal opposition party or parties remained alive. The Kenyan compromise of allowing every junior employee to join only the ruling party could hardly be extended to the senior ranks and, in any event, the existence of a formal opposition implied both the possibility and the constitutional legality of a change of government, so that a generalized restriction of this kind would be absurd. The obvious answer lay in the abandonment of political neutrality in the process of transition to a one-party state.

The final question remains whether the achieved solution has been one of substance as well as of form. There is a deep-rooted reserve in the official temperament, which recoils from slogans and rallying-cries and continues to cherish the anonymity and security of the public service. Few civil servants, in Zambia at any rate, have been willing to exchange these for the hazards of the ballot-box and few, however dedicated to their professional duties, could be called party activists of the conventional kind. Yet party and government have certainly come closer together and, with the introduction of one-party government, an easier relationship between politician and bureaucrat has emerged. Perhaps the politician still expects too much overt enthusiasm of the civil servant but the civil servant is less wary of the politician than he was when party politics held sway.

In Zambia, one possible future development may be the emergence of a 'Party Service' as an integral branch of the public service as a whole. Already, there are a number of senior civil servants on secondment as the nucleus of a secretariat for the party's central committee and these include the administrative secretary to the party, who is a former secretary to the cabinet and who now holds what is technically the highest civil service post. In the immediate post-independence era, there were many complaints within the civil service about the encroachment of 'political appointments'. The bulk of the traffic is now the other way and, if the trend continues, the policy-making levels of the party will soon be staffed by civil servants to an extent which would have been inconceivable in the old multi-party days.

Summary of workshop II discussion

Public participation

Members of the workshop agreed first to examine the issue of public participation, since it was felt that the application of administrative laws and procedures could only meaningfully be considered within the context of public participation in policy formulation and implementation.

It was generally considered that the machinery for participation was adequate in one-party democracies in Africa. The workshop noted the genuine and sincere emphasis which party leaders had placed on public participation in the affairs of government and the pains they had been to in order to ensure that an institutional framework for participation was provided. There was a common feeling, however, that party functionaries at local level had kept too much power in their own hands and had failed conspicuously to relay the views of the people to their leaders. Party 'bosses' had become domineering, extravagant and obstructive. The party organizations which had once been so well geared to fight colonialism must now equip themselves, by education and example, to fight the dangers of corruption in their midst.

While many techniques of participation — notably the institutions of administrative decentralization, commissions of inquiry, seminars and workers' councils — had been used, others had perhaps been overhastily abandoned. An example was the traditional forms of local government which had been abolished in some countries but which participants now wished had been retained. There was also a recurring conflict between the demands of participation and efficiency, with too much emphasis on speedy action leading to organs of participation

being brushed aside. Participation should not be a matter of lip-service only but a genuine requirement at all levels. Equally, much remained to be done to ensure that participation was not abused by unscrupulous so-called 'workers' who resented discipline and interpreted the right to participate as the right to shirk.

All in all, the workshop was agreed that the actual processes of participation were still defective in many ways and had to be improved. There remained a vital need for adequate machinery for the redress of grievances to be preserved and for ombudsman-type institutions to be created or strengthened as safeguards against the abuse of power.

Administrative procedures and administrative law

The workshop could think of no significant changes in these since the inception of one-party rule. The overriding need was for open administration, the proper observance of defined procedures and continuing provision for the judicial review of administrative action. A sustained effort was needed to make the individual fully aware of his rights under the law. The party and the legal profession should co-operate in the educational initiatives which were necessary to ensure that this was done.

There was universal acceptance that the concept of a politically neutral civil service was irrelevant in a one-party state. This did not mean, however, that the ideal of an objective, impartial and incorruptible public service should be compromised in any way. The discussion emphasized the need for loyalty and commitment to the party to be accompanied by absolute integrity in rendering advice to the political leadership and a firm rejection of any partisan temptations to nepotism and intrigue. It was noted that, in some countries, able civil servants had already been absorbed into the service of the party; one participant was dubious about the wisdom of too strong an infusion into the party of civil service expertise but all were agreed on the necessity of access by the party to the most reliable data that informed sources could provide.

Workshop III – Individual and collective rights

Summary of

Individual and group rights in a one-party state: some reflections on the Tanzanian experience

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Two problems are posed by this subject. The first involves the translation of the Euro-centric concept of 'human rights' and their protection into the African context. Twentieth-century Africa has struggled to establish certain basic and fundamental human rights rather than protect them. This process continues, as the granting of flag independence in the 1960s was only the beginning of the struggle for economic independence and genuinely free national states. The main thrust of our effort continues to be to provide and extend basic human rights to our people. The second problem involves relating this concept to the socio-economic context of post-colonial Africa. Human rights are not doled out like manna from heaven: their character is determined by a long process of struggle and political evolution. Workers in Europe for example, have struggled for union rights since the industrial revolution, and even the liberal European two-party states are themselves the product of struggles for power between the landed aristocracy and a rising commercial bourgeoisie, occurring within the context of Renaissance and Reformation individualism. The African struggle involved attempts to eliminate external domination, in which all social groups more or less coalesced to fight the external enemy. When this enemy was removed, however, no clear cut social formations had developed, except those left by departing colonial powers. Power continued to reside with an elite, while the masses remained largely outside the political system.

More importantly, colonialism brought capitalism to Africa while integrating Africa in the global capitalist system. For the purposes of our discussion, the system itself becomes an issue. To what extent can a product of capitalism, which is what basically a post-colonial African state is, extend fundamental human rights to its citizens, especially the peasants who form the bulk of society and the increasingly important workers in factories and cities? Do the dynamics which make the capitalist system work exist in African states? Lawyers and political scientists may question whether human rights can be protected in a post-colonial African state, or whether it is better to change the system to socialism before seeking to protect the rights of individuals and groups. There is no easy answer to these questions. Four areas may shed some light on these issues:

- (a) the class basis of political power;
- (b) the de-participation of the African masses (peasants and workers);
- (c) the liberation of the African man as an individual and a member of particular social groups;
- (d) the institutionalization and decentralization of political and economic power.

In capitalist systems today a distinctive ruling class owns the major means of production, dominates the professions and exercises effective political power. While there may be in Britain or France two or more parties, when all is said and done, there is no systematic change as a result of the defeat or victory of one party. They instal members of the same ruling class. This applies even to communist parties in western Europe. This is even more the case in African states. While in Europe at least élites change seats and rôles as a result of elections, in Africa the same élites remain in power irrespective of election results or the number of parties competing. The ruling petty bourgeoisie accumulated so much power during the anti-colonial struggle that it will remain in office almost for life, rendering irrelevant the number of parties in the state. The important question is: what class has power. If it is a petty bourgeoisie linked to international imperialism, it is likely to serve the interests of international and merchant capitalism. Such groups take no real interest in the welfare of toiling peasants and alienated workers.

Probably the most successful experiment in one-party democracy in Africa has been Tanzania. The basis for this modest success lies with the ruling petty bourgeoisie committed to an anti-imperialist ideology and

deeply concerned with the plight of workers and peasants. The Arusha Declaration of 1967 and the 'Mwongozo' (TANU guidelines) of 1971 directed the party and government's attention to the rights and needs of peasantry and workers respectively and put the whole nation to the task of interpretation, teaching and implementation of these rights. While several mistakes have been made, Tanzania unquestionably improved the performance of its single party system when it adopted a proletarian stand in these declarations. In improving one-party systems, the critical factor is the ideology of the ruling élites and not necessarily the formal legal structures.

The ideal situation would be a state governed by the direct representatives of workers and peasants. But the creation of a worker-peasant state would require a higher degree of consciousness and a higher level of appropriate education than is available at present. At least for a start, Africa's greatest problem is how to put in power those petty bourgeoisie who have a proletarian and anti-imperialist outlook. The class in power must be committed to this ideology if the essential prerequisite to development — disengagement from a deeply embedded colonial economic structure — is to be realized.

Studies in East and West Africa indicate that since independence a process of 'de-participation' has occurred in which the ordinary people, who through the anti-colonial struggle attended meetings, participated in demonstrations and suffered imprisonment, no longer play a comparable role in development. Ruling élites, afraid of the masses, have scaled down the number of meetings and restricted mass activity to ceremonial gatherings to praise the leadership rather than discuss real issues. Consequently, participation of the masses in the political process has declined.

The idea of participation calls for amplification. It is wrong to view mass participation only in terms of voting. Participation should be defined broadly to include the citizen's role in guiding the socio-economic institutions that affect his or her daily life. Decision-making committees inside the factory or on the farm, involving issues connected with their life or work, provide greater representation where it matters than the ballot box once every five years. The importance of real participation at this material level cannot be over-emphasized.

To achieve this participation, the government should nationalize the major means of production. In African circumstances at present there is probably no alternative to foreign control except modified state

capitalism. Secondly, the state should set up social and economic institutions such as cooperatives, management committees and parastatal bodies controlled by those who work and produce in them. Tanzania has had an interesting, and at times difficult experience with its workers in this process. The Mwongozo guidelines placed emphasis upon the development of people rather than things, and stated that 'if development is to benefit the people, the people must participate in considering, planning and implementing their development plans'. It also placed emphasis upon equality, an idea which seemed to prompt unrest and wildcat strikes. In a number of factories managers were locked out or removed at the request of workers, and in 1972/1973 strikes occurred over the behaviour and attitude of the management. The government, alarmed at the spate of strikes, in the majority of cases sided with employers, and the cases where workers won their demands were fewer than those in which they lost. However, these incidents were reported extensively in government-controlled newspapers, and by 1975 the Mwongozo itself was being de-emphasized as a charter of workers' rights.

Since 1964, when NUTA, Tanzania's single trade-union body, was drawn into the party and government, it has not been able to take an independent stand for the rights of workers. While it may be working effectively for workers within the party, the government and the party receive the credit for these efforts. As long as its general secretary is appointed by the president of the state and not elected by the affiliated unions, he cannot be seen by the workers as their representative. The case of NUTA raises an important question about the one-party state: that is, the penetration of the ruling party into all aspects of the national life. While a strong party is necessary to direct national policy and to mobilize the national resources for development, it is equally necessary and important that there be other autonomous institutions in the national life. Sub-national institutions led by citizens who understand and support the general direction of national policy would receive a new lease of life if free from the strangulation of the party at every turn. In many instances, an understaffed ruling party must leave to fairly junior and inexperienced officials control over vital organs of the state, resulting in considerable frustration for professional or skilled men working in their respective fields or organizations. However, a number of Tanzanian institutions, such as NUTA, the university, the Tanzania African Parents' Association and major co-operatives, are represented in parliament, and on the whole this has generated considerable political

activity in these institutions, especially at election time.

Colonialism cannot be considered as a thing of the past until African men and women reach a level where they own their own labour and what it produces. They cannot be 'liberated' until they control their own environment. If the African labourer continues to work for foreign companies and farmers for a salary far below the value of his production, *and continues to live in conditions of squalor and poverty in unauthorized shanty towns in our cities*, then for him there has been no 'Uhuru' or independence.

Furthermore, the African worker and peasant should have access to the property of their motherland — land in particular, but also housing and even factories and industries through their own cooperatives. An end to the exploitation of labour and land is an important part of liberation which cannot be achieved until African men and women have individual and joint access to the means of production. While a right to utilize land as private property has evolved as a fundamental human right in western European experience, in actual practice the mass of workers and peasants in western Europe and North America cannot enjoy these rights because they cannot afford them. Most live in council or government owned housing and work for private companies every day.

Other human rights of a more traditional character deserve attention. While the life and liberty of ordinary citizens has been threatened and endangered more by military regimes and fascist dictatorships than by one-party states, a growing feature of one-party states is the detention of citizens without trial. This aspect is covered in K.L. Jhaveri's paper. The draft statement of principles submitted to the UN Commission on Human Rights by the International Commission of Jurists, if adopted by one-party states, would go a long way to reduce abuses by police and bureaucrats and reassure members of the public.

The family is a bastion of political life in all societies, and it is no wonder Aristotle viewed the state as merely an aggregation of families from which it took its character and existence. The extended African family in particular was a social institution that provided social security for all individual members in traditional society. The law in the one-party state should strengthen this social institution whenever possible, while raising the status of women in the family, who for too long have suffered a disproportionate burden of labour. Historically, an unfettered freedom of conscience and expression of political belief has been associated with the notion of liberty. Such a notion could not be countenanced by the rulers of most one-party states today, but perhaps

some measure of liberty could and should be given to these autonomous sub-national institutions.

A basic issue is the kind of institution wielding the power needed to mobilize men and resources with a goal of liberation. Single parties headed by life presidents who brook no criticism are not parties at all. A party must be a genuine forum for the discussion of the nation's problems. It must have a clearly stated ideology, with clearly stated objectives aimed at the betterment of the mass of people. There must be genuine equality among the members, making possible the criticism and self-criticism so necessary to internal democracy and external success. Ideas from the bottom must reach the top. In most cases, both single and multiple parties are vehicles for ideas from leadership to the masses, dictating their course. However, given the colonial experience, there is need for everyone to feel a sense of genuine participation through mass membership. However, the mass party needs committed cadres, who know the system's goals, its ideological objectives, and know the people they serve. Party leadership is probably the most important factor in the organization of the political party. A dedicated and committed leadership that is not corrupt can spur the masses to make great sacrifices for their own development.

An organizational problem is created by one-party states which lack machinery for a constitutional and peaceful transfer of power. Those in power would not permit a campaign to be mounted supporting or promoting another candidate. Even a 'no' vote at a single party election for the head of state must be exercised surreptitiously. Unless a president resigns voluntarily there is no constitutional way to remove him from office. The suggestion by the commission which investigated the establishment of a one-party state in Zambia, that a president's tenure in office should be limited to two terms like the American president, should be carefully studied.

Experience has shown that, despite the banning of all opposition parties, opposition persists in a single-party state. Man is a political animal, and when politics are discussed there will be differences of opinion and approach. There is some wisdom in going back to what Edmund Burke called 'the open conspiracy' even in a single party state, for men do conspire to seize power. One way of institutionalizing competition for power would be to permit more than one candidate to run in the presidential election, as is done in parliamentary elections.

Whatever system is devised, it is its ideology which guides decision makers in the day to day work, and provides a perspective for a

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consistent approach to state problems. Its importance cannot be overestimated. The successful liberation of citizens from exploitation and domination, as well as promotion of their participation in the political system, depends on the ideology of the party and the rulers. Equality, effective participation, and genuine liberation of man should be the main objectives of a real socialist state. If these objectives were achieved in a society, not only would the human rights of individuals and groups be protected but they would be enhanced and extended.

Summary of workshop III discussion

There was considerable discussion in the workshop about the concept of group as opposed to individual rights. One view was that group rights existed only as the sum of individual rights and that the real problem was that of conflict between individual rights and the interests of the state. The opposing view was that group rights were clearly identifiable, particularly in relation to the processes of production, and that where group and individual rights were in conflict group rights must prevail. Each viewpoint also represented a division between those who thought that human rights were inborn and inalienable and those who saw them as the product of a political struggle which could be won or lost according to the interests of the class in power.

In an attempt to find some common ground between these two approaches, a list of suggested individual and group rights was prepared and distributed for discussion. Some participants felt, however, that many of the rights enumerated were of too political or economic a nature to be usefully considered in the legal context of the seminar, for example, the right 'to a proper return for one's labour', the right 'to resist systems and measures of exploitation' or the right 'of access to the means of production'. Others argued that most fundamental rights were political and that perhaps the test to be applied was whether a particular right was legally enforceable or not. In the outcome, the only group right which was generally agreed on was the right to organize freely in trade unions, cooperatives and other non-political associations with a legally incorporated form. The right of a group to exist in legal form generally constituted authority for it to perform the functions for which it was established, either by its charter of incorporation or under

the statute conferring rights and obligations on associations of a particular kind. Thus, the right of a group of workers to form a trade union subsumed the operational or functional rights of trade union activity thereafter.

While recognizing the existence of collective rights, therefore, the workshop was unable to enumerate these in any comprehensive list. Nevertheless, there was full agreement on the validity of the International Bill of Human Rights which, comprising as it did both the Universal Declaration of Human Rights and two international covenants, asserted the fundamental rights of individuals and peoples alike. The workshop recognized that there were circumstances in which a conflict might arise between the maintenance of individual rights and the common good of society. The general feeling was that the equitable resolution of such conflict was of more importance than the bare enumeration of rights as such. Members agreed that in all states, multi-party and one-party alike, individual rights had sometimes to be overridden in the public interest. Equally significant, however, were the occasions when the public interest was properly subordinated to the rights of the individual, the payment of compensation on the compulsory acquisition of property being cited as a case in point. Only one person felt that when societal interests and individual rights conflicted, the interests of society must invariably prevail. The remainder of the workshop believed that every case should be considered on its merits, that individual rights should be as far as possible protected and that safeguards must be provided against abuse. The imposition of preventive detention, for example, should be subject to stringent legal and procedural controls and there were, indeed, those who felt that its use could be dispensed with as inherently more damaging to society than the ills it sought to avoid.

In the final analysis, the workshop was unanimous that the commitment of the party to the concept of human rights was the paramount factor in determining the extent to which both individual and collective rights were adequately protected.

Closing plenary session

Conclusions

In the closing plenary session the reports and draft conclusions of the committees and workshops were received and discussed. With certain amendments these were approved and adopted as the conclusions of the seminar.

The following conclusions were reached by the participants and agreed by consensus.

I. General conclusions

1. The protection of fundamental human rights and basic freedoms under the rule of law should be among the primary objectives of a one-party state, as much as of a multi-party state. Some limitations of freedom are necessary in all states, multi- as well as one-party. In a one-party state the fact that political activity is limited to one party of course implies a limitation of the rights of association and expression. A one-party state can, however, be a truly democratic form of government where the party is freely open to all citizens who support its objectives.

2. There can and should be a high degree of openness, free discussion and public participation within a one-party state during the stage when policies are being formulated and, after policy decisions have been reached, in relation to their effective implementation. Constructive criticism should always be permitted and encouraged.

3. Constitutional provisions and legal remedies to safeguard human rights are no less important in a one-party state than in a multi-party

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state. In the last resort, however, the extent of the freedom within a one-party state will depend upon the commitment of the party to human rights and the rule of law. If the single party and its leaders at all levels are imbued with a spirit of tolerance and concern for the protection of fundamental rights, this attitude will permeate the whole society and the violations of human rights which are found in some one-party states, as well as in some multi-party states, will be avoided. Even greater vigilance is perhaps required in a one-party state to prevent infringement of basic rights owing to the absence of any organized opposition. Furthermore, party cadres at local level commonly enjoy greater power and exercise more responsibility than would be the case in a multi-party society. It is of paramount importance that local party officials be educated to understand the limits of their authority, to respect human rights under the law and to avoid abuse of power in any form.

4. Some of the limitations on individual rights and freedoms to be found in developing countries are common to both one-party and multi-party states and result from the needs of essential policies such as national integration, economic development, and the elimination of racial, ethnic, religious, class, sex or other forms of discrimination. It is wrong to attribute these limitations to the existence of a one-party state. Rather, that form of political organization is often chosen as being the most effective way of realizing those objectives which are themselves a pre-condition of a fuller achievement of human rights.

II. Constitutional aspects of the rule of law and human rights in a one-party state.

Introduction

5. The seminar considered that the one-party system was fully consistent with the preservation of fundamental human rights and the maintenance of the rule of law, provided that its political form was a truly democratic one. To achieve this, the ideal of government by and for the people should be realized by the provision through the electoral process of a genuine choice between alternative candidates to the legislatures. Where such a choice existed, democracy could flourish to as great or even greater an extent than in a multi-party system where choice was, in practice, confined to the nominees of rivaling parties in whose selection the people as a whole had little, if any, say. Moreover, the inception of a one-party system had sometimes been prompted by a political situation in which a ruling party with massive

popular support was opposed by a party or parties with only a small minority backing. In such a situation, choice had become meaningless since the ruling party candidate was almost invariably returned. The introduction of one-party government in those circumstances had meant the restitution of choice to an electorate which had effectively been denied it in the multi-party context.

6 The seminar also envisaged a state in which the single party was genuinely a party of the masses which all citizens of mature age had generally the right to join, subject only to the necessary exclusion of convicted felons and the like. The party should not become a narrow, élitist group representative not of the people but of the partisan interests of a ruling clique.

7. If these pre-conditions were fulfilled, the seminar was unanimous that there was no inherent reason why fundamental human rights should not be preserved and the rule of law maintained successfully in a one-party environment.

The role of the judiciary

8. The seminar agreed that the independence of the judiciary in the exercise of its judicial functions must be maintained. The cornerstone of the independence of the judiciary lay in its power to dispense justice without fear or favour and with total impartiality and respect for the principles of the rule of law. This should be ensured by the embodiment within the Constitution of clear rules governing the qualifications and calibre of persons appointed to the bench, objective methods of appointment, security of tenure of office and protection from removal from office save on the grounds of gross mis-conduct or physical or mental incapacity as determined by an independent tribunal or similar means. These safeguards were vital to the independent and impartial exercise of judicial authority.

9. It was further considered that members of the judiciary should be at liberty to join the party provided that the party was a party of the masses with no unreasonable restrictions of membership, but should not be members of the policy making organs of the party.

10. It was also agreed that public participation in the administration of justice as, for instance, through having assessors to assist the judges in the trial process, was desirable and should be encouraged.

11. The seminar felt that election of judges was undesirable but approved the practice of associating lay-men with the making of appointments through the medium of a judicial service commission or similar bodies.

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The executive and the legislature

12. The seminar noted that the supremacy of the party was inherent in a one-party state. However, the supremacy of the party should be exercised in accordance with and under the law and following the prescribed procedures, rules and regulations which the party has itself provided. The views of non-party as well as of party members should be taken into account in determining policies for society as a whole. Parliament is a necessary institution for the detailed discussion of the legislative measures presented to it by the executive in order to translate policy into law. It was important to note that a suggested conflict between the party and the legislature was more apparent than real and was resolved by the co-operation rather than the separation of the powers of the party, the executive and the legislature. Experience has shown that the power of the legislature to amend or even to reject bills submitted to it by the executive can be exercised without any violation of the principle of party supremacy and should be preserved.

Human rights

13. The seminar recommended that national constitutions should include justiciable bills of rights. A national judiciary committed to the aspirations of the party should be entrusted with the task of deciding whether or not there has been a breach of individual rights. Where there is no bill of rights there should at least be incorporated in the charter of the party a commitment to respect the fundamental human rights.

14. The seminar recognized that the very nature of a one-party state imposed restrictions on the freedom of association in respect of political organizations. This does not mean that other human rights should not be safeguarded to the full.

III. Legal protection of human rights

The organization of the legal profession

15. Experience even in developed countries shows that a profession composed exclusively of private practitioners does not provide an adequate legal service for the poor. This is all the more the case in developing countries where the shortage of lawyers and their concentration in urban centres restricts the availability of their services to the upper income groups.

16. The seminar, therefore, identified a clear need to establish public legal bodies to provide legal services for the individual citizen. These organizations, although publicly financed, should be completely in-

dependent of government in their operations and should be free to deal with claims against the state in the same way as private practitioners do. Whether they took the form of a department of legal aid within government or of a public legal aid corporation was for individual nations to decide.

17. Meanwhile, wherever circumstances permit, the seminar recommended that private practitioners of whatever seniority in the profession should devote a proportion of their time to providing free legal services to those unable to pay for them, preferably on a rota system. Public legal corporations whose main purpose was to provide legal services to publicly-owned institutions could also assist by offering legal aid services to individuals, save in respect of claims against the institutions which they served.

18. The seminar was unanimous that, to whatever extent publicly financed legal services were established, a system of private practitioners should exist so that those who consider that their rights have been infringed by government or parastatal organizations may be assured that some lawyers who are in no way connected with the government or the parastatal sector are available to handle their cases. It may well be that some countries will find it desirable to reorganize the profession so as to ensure that it is consistent with the social policies of the society. However, in any such reorganization the independence of this sector of the profession from the government or parastatal organizations should be preserved.

19. Whether legal services were rendered through a system of private practitioners or publicly financed bodies or, preferably, by both, the seminar considered it desirable to have a strong and efficient professional association of lawyers, through which members of the profession could play an effective rôle in representing and safeguarding the rights of individuals and in promoting an understanding among the people of the protection which the law affords.

Preventive detention

20. The seminar noted that the issue of preventive detention was in no way confined to one-party states. Preventive detention exists in many multi-party states and the need for safeguards is just as great in multi-party states as in one-party states. It is a universal question of human rights.

21. Preventive detention is a denial of the rights of the individual detainee. It also acts as a brake on the freedom of others, particularly

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their freedom of expression. The seminar urged that preventive detention should, therefore, be used as sparingly as possible and made subject to effective safeguards against misuse. The following safeguards were specifically recommended.

22. The power to make a detention order should be confined to the head of state or to a committee or council appointed by the head of state at ministerial or higher level.

23. While the use of preventive detention cannot be restricted to situations of war or civil strife and may be necessary in order to prevent serious disturbances arising, the law providing for powers of preventive detention should, however, confine its use to situations where national security is genuinely threatened.

24. Preventive detention should be used only as a means of preventing future action which it is feared may occur and not as a means of punishment.

25. Preventive detention procedures should be laid down in the law and strictly followed. They should include the following safeguards of the rights of the individual detainee.

26. The detainee should as soon as practicable, preferably within forty-eight hours, be served with a statement of the grounds of his detention in sufficient detail to enable him to answer the allegation against him in representations to the detaining authority.

27. The detainee should have access to a lawyer to advise and, if necessary, represent him. The detainee should have the right to nominate his own lawyer. Where the security authorities consider it essential on security grounds, their representative may be present at the detainee's interview with the lawyer.

28. The detainee should have the right to have his case reviewed by a review tribunal within one month or such longer period as the detainee requires in order to prepare his case. Thereafter he should be entitled to have his case reviewed at intervals not greater than six months.

29. The review tribunal should include a judge of a superior court.

30. The review tribunal should have power to sit in camera. It should consider both the facts upon which the detention is based and whether on those facts the detention appears to be necessary, and recommend accordingly to the detaining authority.

31. The detainee should also have the right to have determined by a superior court the issue whether his detention is within the powers conferred by the Act and whether the prescribed procedures have

been followed. In the event of the detention being held ultra vires, or of the prescribed procedures not having been fulfilled, the court determining the issue should have power to order his release.

32. Notification of the detention order should be given to the detainee's family or other person designated by him within forty-eight hours of his arrest.

33. Orders for detention and release from detention should be published in the official gazette and in a national newspaper.

34. The state should support the immediate dependants of a detainee where he is the breadwinner and they are left destitute by his detention.

35. As preventive detention is not a punishment, the conditions of detention should be as humane as possible within the requirements of security, with access to reasonable social amenities.

36. The detainee should be entitled to receive regular visits from his relatives or friends and to be visited at least quarterly by an inspecting magistrate.

IV. Promotion and non-legal protection of human rights

37. The seminar concentrated on the non-legal protection of human rights through ombudsman-type institutions, and on education in and the propagation of human rights through the mass media and the legal profession.

Ombudsman-type investigatory institutions

38. The seminar wished to stress at the outset that these institutions are not only or especially applicable to one-party states. They have been established in many political environments in order to increase the citizen's opportunity for redress against the government in all its forms. The seminar was nevertheless convinced of the particular importance of including the establishment of such an institution in the constitution of a one-party state. This would provide the clearest possible evidence of the commitment of the party to redressing individual grievances and to asserting the rights of the individual to protection from abuse of authority by any organ of the state.

39. Set criteria for appointment to membership of the institution should be provided for by law, preferably in the constitution, and as a minimum should include an element of security of tenure.

40. While it was not necessary for lawyers to be members of the institution, as such, it was most desirable that lawyers be on the staff to

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advise both on the law and on more general questions of administrative justice.

41. It was essential that these institutions should publicize themselves as widely as possible so that everyone should know of their existence, and how to use them. To this end they should

(a) endeavour to ensure that their reports were given wide publicity in the press and on the radio;

(b) tour the country as extensively and as frequently as possible.

42. The financial authorities within government should provide sufficient funds for this self-promoting work of the institutions to take place, otherwise the intentions of the constitution would be defeated in practical terms.

43. There should be a clear provision in the law establishing and providing for the powers and duties of these institutions to enable them to initiate investigations of abuse of power rather than be required to wait for a complaint to be made.

44. In Tanzania and Zambia it was felt that the strength of these institutions lay in their corporate collective nature. Each case was discussed and decided by the whole body of members and was a decision of the institution as a whole. While, therefore, consideration should be given to the establishment of regional complaint-receiving offices, the members of the institution should not be dispersed all over the country to act as individual regional commissioners or investigators. Should any permanent office additional to the main office be established where members of the institution are located, it should be adequately staffed so as to ensure that it is seen by government, party and the public as powerful and important. There should be frequent liaison between members of the institution located in different centres.

45. An annual report giving a full account of the work of the institution over the preceding year including, where relevant, action taken on its recommendations should be published expeditiously.

46. The enabling law should provide for these institutions to be informed of the decisions reached and the action required as a result of their recommendations and to enable them to follow these up so as to ensure that the directions given have been properly complied with.

Education and the propagation of human rights

47. The seminar considered these topics to be vital, for without a wide-spread understanding of the importance of human rights in a

society both by the government and governed, laws and institutions protecting human rights are virtually powerless. To this end, the seminar made the following specific recommendations.

48. Education in human rights must be directed both to the public at large, so that they can learn what rights they have and how to assert them, and to the officials of party and government at all levels, so that they can appreciate the general limits on the exercise of power which derive from the recognition of fundamental human rights and the rule of law.

49. Education in human rights should be undertaken by a variety of institutions and should take a variety of forms. It should be aimed at all educational levels. In particular, a more imaginative and positive use should be made of radio, television and the press for this purpose. Important judicial decisions and recommendations from ombudsman-type institutions bearing on human rights should be given wide prominence in the mass media.

50. The legal profession has a particular responsibility in this matter. In addition to its daily professional work of appearing for clients in court, advising government officials, giving judgments, in all of which the opportunity to advance human rights should be freely taken, the profession, however small, had a duty to set an example by

- (a) offering its services to the party and educational institutions and programmes for education in human rights,
- (b) publicising its role as an important agent for the protection of human rights, and
- (c) preparing reports and submissions on law reform in the area of human rights for the government and general discussion.

V. Freedom of expression and of association

Freedom of the press

51. Probably the most important element of freedom of expression is freedom of the press. The seminar was unanimous that a high degree of freedom of the press is consistent with a one-party state. Its importance is even greater than in a multi-party state owing to the absence of any institutionalized opposition, so that the press constitutes the main vehicle through which views and grievances can be aired. A free and enlightened press is a powerful instrument for the protection of fundamental human rights.

52. Freedom of the press under any system depends to a large degree upon the attitude of its owners. The owners of the main newspapers in

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a one-party state are usually the government and the party. For the press to be effective, it will need their understanding and support in carrying out its tasks of accurate and objective reporting, constructive criticism, fostering public discussion on important issues, and airing grievances. It must also be provided with the material and professional means to perform its role as a focus of comment and debate.

53. The press has an important educational and creative role in a one-party state. It should educate people to know their rights, and help to create an informed public opinion on the obligations of government officials towards the community they serve.

54. There is a world-wide crisis in the economics of privately-owned newspapers. In a one-party state, those privately-owned papers which are able to survive economically should be permitted to do so, provided they keep within the law.

55. The need for better training of journalists is common to all developing countries. The need is enhanced in a one-party state since low standards of journalism, such as misreporting of events, may lead to restrictions on the freedom of the press. Journalists must be educated politically and provided with the skills and techniques to do their job properly.

56. It must be accepted that, in a one-party state, challenge in the press to the fundamental philosophy and policies of the state will not be tolerated. The journalist must understand and respect the difference between constructive criticism, which will be allowed and encouraged, and destructive criticism which will not be permitted.

57. The distribution of foreign newspapers in both one-party and multi-party states is desirable. It can supplement the information contained in the national and local press and inform the people of the views expressed about them in other countries. Foreign journalists should be allowed to collect information freely within the country, subject to considerations of national security.

Freedom of association

58. The seminar observed that the only right of association which is, or need be, prohibited in a one-party democratic state is the right to form political associations other than the ruling party. In all other respects, the right of association has been preserved and is recognized in constitutional or other statutory form. In particular, the seminar noted with satisfaction that the rights of workers to associate in a trade union have not been interfered with, even though the structure of the union

movement and its relationship with the party may vary from state to state. Nor have religious freedoms been interfered with in the transition to single party rule. Where religious sects have been proscribed, this has been done in the interests of public safety and good order as might equally well have been the case within a multi-party system.

59. The seminar considered that the right of free association, other than in terms of political affiliation, is as important in a one-party as in a multi-party state. Associations such as trade unions, employers' organizations, professional bodies, co-operatives, women's and youth organizations, welfare groups, service or recreational clubs and charitable foundations all have a vital role to play in nation-building and should be encouraged to perform it to the full. Their independence should be assured. They should be free to affiliate to the party, but should not be required to do so.

60. In the opinion of the seminar, the right to associate necessarily implies the right *not* to associate at the individual's own choice. The citizen should be free not to join the party, a trade union or other association and should not be deprived of his civil rights or otherwise penalized, save by exclusion from the normal facilities of membership or from a particular position or office, appointment to which was reasonably conditional on membership of the organization concerned.

61. Where only one association existed in a particular field, such as a trade union or professional body or, indeed, the party itself, the seminar considered that any person who was qualified to be a member and who genuinely subscribed to the objectives of the association should have the right to join and, subject to its rules, to remain a member for as long as he wished to do so.

VI. Public participation, administrative procedures and administrative law in a one-party state

Public participation

62. The seminar agreed that full participation by the public in the decision making process was desirable and necessary, as was the effective communication to the people of decisions once they had been made. An adequate machinery for participation generally existed, principally through the structure and institutions of the party, the process of decentralization, commissions of enquiry, seminars and conferences, workers' councils, the media and other channels of communication.

63. It was not considered practicable or necessary for the right of participation to be conferred on the individual citizen in a legally-

enforceable form. The political rather than the legal environment was the ultimate determinant of the extent of effective participation and, in establishing this environment, the crucial institution was the party, its functionaries and its members.

64. While the desirability of public participation was almost universally acknowledged, its realization was often frustrated by the party executive at local level which had failed to communicate policy to the people or to relay the views of the people to the centre. This was the major stumbling block to full public participation and the remedy lay in more attention within the party to the education of its members and, in particular, its officials at all levels. Consultation within the party was not incompatible with, and should not preclude, consultation with citizens at large. The local party leadership must be encouraged, through education and training, to reach out to the people and involve them fully in the participatory process. In this context, there was a continuing need for the further decentralization of decision-making powers.

65. *Effective local government institutions were valuable as instruments for participation.* This was so even where decentralization had provided people in the regions with a greater voice in the wider area of development planning. There was still a place for the local authority with executive powers over specified matters and with a budget under its control.

66. It was agreed that the proliferation of party and governmental structures, often along parallel lines, was not an impediment to participation but frequently encouraged it by the provision of alternative channels through which views and grievances could be passed. The co-existence of parallel organizations and officials often provided a new range of checks and balances against the arbitrary exercise or abuse of power to replace those which had depended on the existence of an opposition in a multi-party environment. Nevertheless, it was essential to provide a clear machinery for individual redress against administrative decision and the seminar reiterated its view that ombudsman-type institutions should be supported and strengthened wherever they existed or created where they did not exist. One major defect of such institutions which had been already noted was that they did not appear to have the power to initiate investigations on their own account and the recommendation that this should be remedied by an appropriate amendment to the law was supported in this context.

Administrative procedures and administrative law

67. These had been little, if at all, changed with the transition to one-party forms of government and there was no need for the multiplication of rules for the control of the bureaucracy. The greatest need was for open administration and the proper observance of prescribed procedures. It was perhaps even more important than in a multi-party system that questions of administrative justice and correct adherence to procedures should be subject to scrutiny and redress. To this end, the seminar recommended that the jurisdiction of 'ombudsman-type' institutions should be extended and that they be empowered to keep a continuing check on the processes of administration through 'fair procedures' audits. They should look at past decisions and at current ones, examine and comment on internal departmental rules and have equivalent access to local governmental and party administrative decisions. They should be concerned with the manner of implementation of government policy not with the policy itself. In this way they would have an educative effect in highlighting the problems of development administration and the rule of law, meaning substantive and procedural social justice.

68. Even if this were done, the seminar agreed that existing provisions for the judicial review of administrative action must be retained. The party, within the scope of its general educational campaign, should also develop a simplified course syllabus in legal rights and responsibilities which could be taught through seminars and meetings as well as in schools and other educational institutions as a part of the overall civics curriculum. Relevant legal education in the principles of administrative justice, rather than merely law training in random collections of rules, was an essential element in the professional equipment of the public servant and should be provided at institutes of administration to a much greater extent than was presently the case. In addition, the deployment of government legal officers to provinces and regions would be a valuable aid to the party and the administration in ensuring adherence by the executive to prescribed legal forms.

69. Allegations of corruption, tribalism and nepotism, particularly in the areas of appointments, promotions, disciplines, the awarding of contracts, the granting of loans and the issue of permits and licences were prevalent in the one-party as well as in the multi-party environment. The seminar recommended that institutions such as public service commissions, central tender boards and others designed to ensure impartiality and the observance of authorized procedures should be

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retained. There was no evidence that malpractice in these matters is more common in a one-party environment but it was particularly important in that environment to ensure that justice was not only done but seen to be done. Wherever possible, decisions in these and kindred matters should be made by boards or committees rather than by individuals. This would not only assist the process of administrative justice but serve to protect the individual official against false accusations of abuse of authority.

70. On the question of the politicization of the civil service, it was agreed that civil servants could not be politically neutral in a one-party environment for they would be expected to identify themselves fully with the aims and aspirations of the party. This did not mean, however, that they should be compelled to join the party or that non-membership should be allowed to react adversely on their careers. Party membership should remain a matter for voluntary decision save in those few cases where it was an essential adjunct to the performance of the duties of a particular post. In any event, the abandonment of any general principle of political neutrality should not affect the freedom and, indeed, the duty of the civil servant to tender advice honestly and objectively in the performance of his work.

71. The party should ensure that, in deciding on policy, it had all the necessary data without which sound decisions could not be reached. This could be done either by making use of the governmental civil service or by setting up a civil service-type structure within the party, though this should by no means become an impediment to free consultation within the party itself.

VII. Individual rights and collective rights

The international bill of rights

72. The seminar noted that the model for human rights is the series of documents known as the International Bill of Human Rights. This comprises the Universal Declaration of Human Rights and the two International Covenants, the International Covenant on Civil and Political Rights with its Optional Protocol and the International Covenant on Economic, Social and Cultural Rights.

73. As the two international covenants have now received sufficient ratifications to bring them into force, the seminar strongly urged that those countries which have not already done so should give serious consideration to ratifying the two covenants.

74. The International Bill of Human Rights should be translated into local languages and widely circulated.

Relations between civil and political rights and economic, social and cultural rights

75. Lawyers usually tend to be more concerned with civil and political rights as these are more easily defined in legal terms and are capable of more direct legal enforcement and protection. The two classes of human rights are, however, interdependent and the establishment and maintenance of civil and political rights must go hand in hand with the promotion of economic, social and cultural rights. Lawyers in developing countries should, therefore, devote their skills to helping to achieve economic, social and cultural rights, as by assisting in working out and framing relevant legislative proposals for furthering these rights.

Individual and collective rights

76. Human rights include both individual rights and collective rights. Collective rights may be the rights of society as a whole, or rights attaching to particular groups, or rights which the individual can enjoy only as a member of a group such as a local community, trade union, cooperative, professional or other association. Associations of this kind have legitimate interests to promote and defend, and have an important contribution to make.

77. While the rights of the individual in a one-party state are affirmed, the seminar recognized that, as in other states, there are occasions when they can and do conflict with collective rights. Where this happens, the rights of the individual must often be subordinated to the greater good of furthering the rights of the community or group to which the individual belongs. Whether or not this should happen in any particular case must depend upon all the circumstances and the merits of the situation.

78. When it does happen, the fullest possible safeguards should be provided to avoid undue hardship to the individual, and to ensure that interference with the individual's rights is no more than is necessary for the achievement or preservation of the greater good and that the dangers of abuse are minimized.

The role of the party

79. The commitment of the party to human rights is of crucial importance in a one-party state. The party should seek to the greatest possible degree to give effect in its policies to fundamental human rights and basic freedoms. Party leaders at all levels should be helped to understand the nature of these rights and freedoms and the need for effective safeguards under the rule of law to protect them.

Comments by His Excellency President Kaunda of Zambia on the Conclusions

The International Commission of Jurists received from the Ministry of Foreign Affairs, Zambia, the following comments made by His Excellency, President Kaunda, after reading the Conclusions of the seminar:

I am of the view that the report reflects fairly objectively and without misrepresentation the protection in practice of human rights in the one-party participatory democracy of Zambia. I find the need however to refer you to the last two sentences in paragraph 1 of the Conclusions and to state that in the one-party participatory democracy of Zambia there is no limitation of the right of expression in consequence of the constitutional establishment of the one-party system in 1973. In Zambia, the fundamental rights provisions in regard to the protection of freedom of expression remain exactly the same under both the multi-party and one-party constitutions. I would in this respect refer you to section 22 of the independence constitution contained as schedule 2 to the Zambia Independence Order, 1964 and to article 23 of the present constitution of Zambia which established a one-party democracy.

It is also not correct to assume, as stated in the last sentence of paragraph 1, that the one-party is open only to those who support its objectives. The objectives of the Party are not a static and unalterable quantum but a dynamic and everchanging programme kept constantly in review for necessary changes, and there will be support and opposition for the changes within the Party itself and also in the country. It is perfectly proper and possible for even those in opposition to the

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objectives of the United National Independence Party (UNIP) in Zambia to join the Party and seek to change the objectives, provided they accept the constitutional provision that there be only one political party in Zambia. The objectives of the Party are not immutable; they are subject to change if the majority in the Party so desire.

I shall be obliged if you could give consideration to the foregoing comments and to suitably amend the contents of paragraph 2¹.

As the Conclusions were agreed by the participants, the International Commission of Jurists does not feel at liberty to alter the wording but welcomes this opportunity to place on record President Kaunda's comments and corrections.

Postscript

This seminar and its conclusions were the subject of a lively discussion at the twenty-fifth anniversary meeting of the International Commission of Jurists held in Vienna in April, 1977. The meeting was attended by 58 members and honorary members of the commission and representatives of national sections. The participants came from 29 countries in all regions of the world.

The conclusions reached by the Commission on this occasion were expressed as follows:

'The rule of law in one-party states

The Commission discussed the problems of the rule of law in the one-party state with particular reference to the seminar on that theme held in Dar-es-Salaam in September 1976, which was attended by participants from six countries of East and Central Africa. The Commission welcomed the initiative taken by the secretariat and the executive committee in providing for the discussion of the complex and important issues involved, and urged that future meetings of this kind should be arranged.

The Commission was of the view that there were dangers of abuse of power inherent in one-party systems which were less likely to arise if there existed an effective multi-party system. Human rights could, however, be endangered by ineffective attempts to duplicate multi-party systems without due regard to cultural traditions and the historical development of particular countries.

The Commission was pleased to note the real concern shown by all delegates at the seminar that the rule of law and human rights should

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be preserved in the countries from which they had come and agreed that the achievement of this goal would be facilitated if the following principles propounded at the seminar were actually observed:

1. Electoral freedom of choice is essential to any democratic form of society. The party should guarantee genuine popular choice among alternative candidates.
2. Everyone should be free to join the party or to abstain from party membership or membership in any other organization without penalty or deprivation of his or her civil rights.
3. The party must maintain effective channels of popular criticism, review, and consultation. The party must be responsive to the people and make it clear to them that this is party policy.
4. In a one-party state it is particularly important that
 - (a) the policy-forming bodies of the party utilize all sources of information and advice, and
 - (b) that within the party members should be completely free to discuss all aspects of party policy.
5. The independence of the judiciary in the exercise of its judicial functions and its security of tenure is essential to any society which has a respect for the rule of law. Members of the judiciary at all levels should be free to dispense impartial justice, without fear, in conformity with the rule of law.
6. The independence of the legal profession being essential to the administration of justice, the duty of lawyers to be ready to represent fearlessly any client, however unpopular, should be understood and guaranteed. They should enjoy complete immunity for actions taken within the law in defence of their clients.
7. Facilities for speedy legal redress of grievances against administrative action in both party and government should be readily available to the individual.
8. The absence of an opposition makes it essential to provide mechanisms for continuous, impartial, and independent review and investigation of administrative activities and procedures. In this respect such institutions as the ombudsman and *médiateur* with powers to initiate action can be usefully adopted.
9. In a one-party state, criticism and freedom of access to information should be permitted and encouraged.
10. The right to organize special interest associations such as trade unions, professional, social, religious or other organizations, should be encouraged and protected. Such organizations should be free to

affiliate or not with established political parties.

11. All members of the society must be made aware of their human rights to ensure their effective exercise, and for that reason education in human rights at all levels should be a matter of high priority. In particular, officials of the party and government should be made to understand the limits on the exercise of power which derive from the recognition of fundamental human rights and the rule of law'.

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HUMAN RIGHTS IN A ONE-PARTY STATE

This important book is a record of a major seminar organized by the International Commission of Jurists in Dar-es-Salaam. It is the first work of any kind on the problems of moral responsibility and the preservation of human rights and the rule of law in one-party states. This is a book of enormous relevance to lawyers, statesmen and ordinary citizens, and experts in all walks of life who are concerned with the maintenance of social and individual rights under patterns of government that diverge from colonial and western European models. Specific subjects treated here include procedures for investigating complaints, party dominance, trade union rights, the rôle of public service, administrative law, the exercise of individual rights through the judiciary, presidential decree, one-party state theory and international law. Participants include experts from countries such as Sudan, Tanzania, Zambia, Botswana, Lesotho and Swaziland as well as the United Kingdom. The intensive discussions and comments of committees and workshops examining the various papers are responsibly summarized. This is an exciting and wholly original contribution to a problem of universal significance.

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