

LAW, MORALS, AND THE INDIVIDUAL IN KENYA

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For Wairimu

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My friend "young" Franc Gitau abhors, like I do, bourgeois individualism in all its manifestations. I have been the awed recipient of his suggestions and criticisms on aspects of law and morals. I would like to record my meagre thanks to a consistent friend and colleague of many days.

Many of my original thoughts, apprehensions and misapprehensions on the subject of law and morals were subjected to thorough and exacting analyses by my supervisor, Mr K. Kibwana. Mr Kibwana is an efficient person - as was evidenced by the dispatch with which he read and delivered back my drafts. I remove my hat both swiftly and humbly to him.

There can be no doubt about it: Njoki is the finest typist in town. She has also often come to my (Secretarial) rescue many a time, and I offer a handshake and a smile.

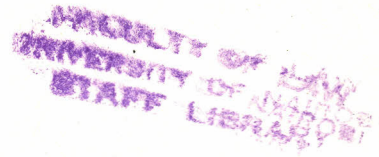
I am not unmindful that my frequent perorations on law and morals must have often bruised Wairimu's ears: dedicating this dissertation to her is probably the ultimate heresy. I do not, however, do that with tongue in cheek.

Throughout sixteen years of formal education, the warfare has been long, and the strife often fierce. The call to do battle was always a strong and spirited one: the triumph song is warm and beautiful. Just like my mother.

All acknowledgements must cease where the salutations end and inelegancies begin. I am solely responsible for any such infelicities.

Makumi Mwangi  
(Nairobi, May 1980)

LIST OF CASES



Gwao bin Kilimo Vs. Kisunda bin Ifuti (1938) T.L.R. (Rev) 403

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Kibuchu Vs. Mbugua (1970) H.C. of Kenya (Unreported)

Kimani Vs. Gikanga (1965) E.A. 735

Lolley's Case (1812) Russ & Ry 237

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R. Vs. Boulter (1908) 72 J.P. 188

R. Vs. King (1963) 3 All E.R. 561

R. Vs. Wheat (1921) 2 K.B. 119

Roe Vs. Wade (1973) U.S. Supreme Court

Samuel Thata Mishek Vs. Priscilla Wambui (1973) H.C. of Kenya (Unreported)

Shaw Vs. D.P.P. (1961) 2 All E.R. 446

LIST OF STATUTES

Constitution of Kenya	Act. No. 9 of 1967
Criminal Procedure Code	Cap. 75, Laws of Kenya
Employment Act	Cap. 226, Laws of Kenya
Judicature Act	Cap. 8, Laws of Kenya
Penal Code	Cap. 63, Laws of Kenya
Vagrancy Act	Cap. 53, Laws of Kenya

BILLS AND ORDERS - IN - COUNCIL

1897 East African Order-in-Council  
(1921) . (Kenya Colony) Order-in-Council  
Abortion (Amendment) Bill 1980 (U.K.)

ABBREVIATIONS

A.C.	.....	Appeal Cases
All E.R.	.....	All England Reports
C.C.	.....	Civil Case
E.A.	.....	East African Law Reports
E.A.L.J.	.....	East African Law Journal
E.A.L.R.	.....	Eastern African Law Reports
E.A.L.Rv.	.....	East African Law Review
H.C. of Kenya	.....	High Court of Kenya
H.L.R.	.....	Harvard Law Review
H.L.	.....	House of Lords
J.E.A.R.D.	.....	Journal of East African Research and Development
K.B.	.....	Kings Bench Reports
T.L.R.	.....	Tanganyika Law Reports
Y.L.J.	.....	Yale Law Journal

"..... and we must, therefore, follow our virus through these phases and endeavour to get the point of view of the fellow creatures that, though regarded with loathing by the superficial, are sufferers even as we are, and quite as innocent of intentional malice. For though we acquire the disease from them, they get it from each other and from us. So there would seem to be as much to be said on one side as on the other."

HANS ZINSSER : Rats, Lice and History

"..... Colonial State generates a colonial posture. This posture automates a series of complexes which remain with the African long after the colonial stimulus has ceased to have direct contact. The continuation of these complexes is seen in a state of mind which permits colonialism as a reflex. During this period the remoteness of the stimulus is often misinterpreted as non-existent, thus generating a false sense of security in the minds of Africans lately out of bondage. The stimulus exists, its virulence undiminished. In fact what happens is that the imperial power at this time, finding itself undisturbed, conserves energy, spreads its contagion, prepares the ground, and concentrates all its efforts towards the achievement of its main objective - that of ..... exploitation....."

ODUMEGWU OJUKWU: BIAFRA - Random Thoughts Vol.II



## INTRODUCTION

0:0

There is a dearth of studies on law and morals in Kenya, and on Jurisprudence generally. Research on morals has tended to be conducted from the viewpoint of criminology or sociology. Three law centered researches are currently being carried out: one on law and morals considered from the perspective of criminal jurisprudence<sup>1</sup> and the other two on selected aspects of law and morals.<sup>2</sup> This state of affairs is reflective of the neglect East African Legal Scholars have shown towards the study of jurisprudence<sup>3</sup> and of law generally.<sup>4</sup>

There are many reasons why a study of law and morals in Kenya should be undertaken. Least of these is its academic attraction - and a study of law and morals is an absorbing intellectual pursuit. More important is the fact that a society's conception of law and morals is the nerve centre from which derives the society's definition of economic, social and political relationships. Ideas on law and morals will invariably reflect the dominant politico-economic themes in society. They reflect the mentality and uncertainties beneath the mantle of exploitation; how the local exploiting elite are answering, by force of economic, social and political need, to the voice of the metropolitan bourgeoisie. In mapping out these relationships, with regard to Kenya, we are essentially attempting to show the quintessential subordination of the original values of a Capitalist African State to the inherent philosophy of imperialist societies.

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- (1) Gakuru's LL.B Dissertation is on law and morals seen generally from the viewpoint of enforcement.
  - (2) R. Njiru's dissertation is on abortion; M. Matemus is on prostitution. Both are LL.B. dissertations.
  - (3) Mihyo's The Development of Legal Philosophy (K.L.B 1970) remains the textbook by East African scholar to delve into /an Jurisprudence.
  - (4) In this respect, Ghai and McAuslan, Public Law and Political Change in Kenya (Oxford 1970) is the only text of enduring value on law in East Africa. Reviewers have not been kind to other attempts at legal textbook writing : see for instance Nowrojee and Rember Quic quid bene Dictum est Ab Ulio Meum Est (1975) II EALJ Vol I; Ojwang, J.B. Constitutional Law and Government in Uganda (1976) 12 EALJ Vol I. Okoth-Ogendo, "Tudor Jackson:

This is not a definitive study; indeed with the very short time available for research, it would be superfluous, vain and foolhardy to present it as such. Rather, we offer it as a modest contribution towards an area of study and research whose current neglect belies the magnitude of its importance towards a better understanding of the totality of the forces at work on the entire Kenyan society.

#### 1:0 - THORETICAL FRAMEWORK

The existing plurality of schools of thought in bourgeois social science - and in law - has meant the existence of widely varying conclusions drawn from the same data. This multiplicity has been attended by debates concerning the proper methods to be applied in interpreting social phenomena.

Two broad methods of the study and interpretation of social phenomena can be identified: the bourgeois theoretical frameworks, which aim at interpreting social phenomena from their superior class position; and the Marxist method, which derives its' inspiration from materialist postulates. In each of these two broad categories, however, there exist many variations. As between the two broad methods there exist many distortions, aiming at establishing the supremacy of one over the other.

In this chapter, we shall briefly discuss some of the main theoretical frameworks that have been employed as tools for deciphering social phenomena. On this map of theoretical frameworks, we shall attempt to locate the thrust towards which East African theoreticians have leaned. Of especial interest to the jurisprudent, however, is the effect that these theoretical frameworks of the social sciences have had in the area of legal analysis.

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The Law of Kenya - A Review Article" (1970) 16 EALJ Vol I  
No.6, Rukwaro G.K, Review of Kiapi's Civil Service Laws in  
East Africa 1975 II EALJ Vol.I

See also Okoth-Ogendo, Teaching of the Law of Immovable Property: A Personal Assessment (Paper presented at the Faculty of Law Seminar, University of Nairobi, September (1978) at page 13.

East African lawyers have displayed a marked dependence on legal positivism as a theoretical analytical tool.<sup>5</sup> There has, however, recently sprang a host of legal scholars who have relied on Marxist conceptions of law and state in their attempts to decipher socio-legal phenomena.<sup>6</sup>

The reliance by East African legal scholars on bourgeois conceptual and methodological tools, and especially on legal positivism, is, we suggest, a mirror of the current underdevelopment of society at large; and this is an underdevelopment wrought by the colonial process, in seeking to understand which we must resort to political economy.

#### 1:1 SOME SOCIO-SCIENTIFIC METHODS

Socio-scientific thought during this century has laboured under the influence of Max Weber, whose starting point in analysing social phenomena was the idealtypus (ideal type). To Weber, the idealtypus was the chief instrument of causal analysis, and the fundamental concept of all social sciences. In giving the rationalization of the idealtypus, Lachmann observes that:

"When we use an ideal type we stand at a distance from reality but for precisely this reason we are able to gain knowledge of it"<sup>7</sup>

But the ideal type, being a theoretical and abstract concept, has no solid, practical base. Ironically, the most pungent criticism of it was levelled by Weber himself, when he asserted in 1913, that logically, there is no difference whether the idealtypus is formed from

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- (5) The point is well-noted by Okoth-Ogendo in Property Theory and Land-Use Analysis: A Theoretical Framework (J.E.A.R.D. Vol.5 No.1, 1975) and by K. Kibwana, Analytical Positivism in Kenya: A Preliminary Enquiry.
  - (6) Eg Miho, The Development of Legal Philosophy op cit, Kibwana Analytical Positivism in Kenya, supra, Mutunga, Commercial Law and Development in East Africa and A Demystification of the Kenya Law of Hire Purchase
  - (7) Lachmann, The Legacy of Max Weber (Heinemann, 1970) pp 26 - 27

meaningful and intelligible or from specifically meaningless relationships. Thus, in essence, the idealtypus does not always have any specific reference to human action. It can at once be applicable to the human sphere as to the plant kingdom.

The Weberian system of thought is, as its roots, very deterministic. Its main premise is that history is neither the conscious realisation of ideas, nor the result of the deliberate efforts of collectives. The idealtypus is designed to fit into a system where the pervading belief is that the end result of ideas is often widely different from what those who postulated the ideas hoped for.<sup>8</sup> My reading of this inelegant trend of thought is this: that in examining relations within society, not much will be gained from adopting historical perspective, since the synthesis so derived will ipso facto be foreign to the thesis. The conclusions so reached may also be so erroneous as to amount to no more than mere conjecture.

In Africa, in the face of decolonisation and in the period thereafter, scholars have been faced with

"issues about the continuity of laws, internal conflicts, 'place' of customary law in the national legal systems and legal 'development' etc."<sup>9</sup>

In an attempt to come to grips with these problems, jurists of the historical school fell back on Weberian generalisations. They perceived law as developing over a period of time as a result of the volkgeist (national spirit). To this school, change is not perceived through history, but through variations in the conceptions in vogue as to what comprises the volkgeist. Historical school jurists however mask the truth that the volkgeist will invariably be defined by the ruling class. The volkgeist, like Weber's idealtypus, is not only arbitrary and unscientific, but is a "mystic essence" essentially designed to mask and mystify the exploitative operations of a class society.

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(8) Berger, Invitation to Sociology: A Humanistic Perspective (Penguin, 1963) pp 52

(9) Okoth-Ogendo, Property Theory and Land Use Analysis op cit pp 52

To Mill, the coinage of the word 'utilitarianism' marked a desire to emphasize observation as the only correct basis of any knowledge and human experience as the ultimate test of any idea. The emphasis was on the consequences, rather than on the intention behind any act. Mill believed that our knowledge of the world is a knowledge of experience. He argues that generalizations about the world should be rooted in experience. They must be of an a posteriori rather than of an a priori nature. Fletcher's summary of Mills socio-scientific method is apt:

"Mill's emphasis was by no means restrictive of imagination in the quest for knowledge and critical judgement; it was only insistent upon the giving of adequate grounds for propositions, the clear testing of explanations, the careful provision of evidence for theories and judgements."<sup>12</sup>

To both Bentham and Mill, the greatest number meant no more than the bourgeoisie populace. The greatest happiness principle was a reaction to the dissatisfaction of the bourgeoisie with being "kept outside the parliamentary control of state power."<sup>13</sup> Property, tax and licence laws were acting against bourgeois interests, and this could only be alleviated by the bourgeoisie being well represented in parliament by some of their own. It was therefore argued that utilitarianism would

"mean changing and improving the political and economic institutions, changing laws of property, abolishing privileges, equalizing opportunities, adjusting taxation and other such matters."<sup>14</sup>

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- (12) Fletcher, John Stuart Mill: A Logical Critique of Society (Michael Joseph, London 1971) pp 29. Thus, Mill in his The Logic and Procedures of Scientific inference (pp 51-91 Ibid) defines a hypothesis as:

"Any supposition which we make (either without actual evidence or on evidence avowedly insufficient) in order to endeavour to deduce from it conclusions in accordance with facts which are known to be real: under the idea that if the conclusions to which the hypothesis leads are known truths, the hypothesis itself must be, or at least is likely to be true."

- (13) Mihyo, loc cit pp 83

- (14) Utilitarianism (Grolier Classics, 1956), Introduction

Mill sought to resolve what he considered to be the unsatisfactory methods of the physical sciences. He was principally preoccupied with establishing the procedures of inference by which men established testable knowledge about the world of their experience. Like Comte, however, he believed that the use of hypotheses in science was only valuable if the hypothesis was testable against that experience. The major infelicity of Mill's system, as we see it, is that it does not attach much importance to a thorough socio-economic-historical investigation as a precondition for testing a hypothesis. This, it is posited, serves to hide the shaky internal structure of bourgeois socio-scientific and legal positivist theories, because it is preoccupied with the consequence rather than the intention. This preoccupation is observable in positivist legal theory, and is especially glaring in Kelsen's pure theory of law.<sup>15</sup> It calls for no more than an analysis of the legal rules. This is analytical positivism's main defect.<sup>16</sup> It precludes, or attempts to do so, an investigation of metajuridical factors in any conception of law.

Opposed to these examples of bourgeois theoretical methods is the Marxist-Leninist approach to socio-scientific and legal analysis. Karl Marx, Friedrich Engels and Lenin have left social scientists with a body of immortal works. Their analyses are prompted by the belief that the material conditions of life must be understood before coming to grips with the superstructural features of society. The Marxist materialist approach can therefore be distinguished from the idealist approach which examines human society from the viewpoint of ideas.<sup>17</sup>

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(15) See, Lauterpacht, Kelsen's Pure Science of Law, in Modern Theories of Law (Ed Jennings) But Kelsen, by resorting to to Kant's theory of knowledge as his analytical basis did engage in the metajuridical factors he so abhorred.

(16) That this is the case is evident from Austin's command theory through all positivist theories of law, to Hart's view of law the union of primary and secondary rules.

(17) The idealist approach is best typified by Hegel, The Philosophy of History (Dover Publications, 1956) Indeed, Marx's starting point was a disputation of the verity of Hegelian idealism.

Marx succinctly summarised the method of his approach:

"....neither legal relations nor political forms could be comprehended either by themselves or on the basis of a so-called general development of the human mind, but that on the contrary they originate in the material conditions of life, the totality of which.... has to be sought in political economy."<sup>18</sup>

The materialist view of history differs from the idealist view which proceeds upon the belief in the ascendancy of spirit over nature: it is rooted in observable developments in human history. It is therefore possible to study with accuracy the social conditions of the life of the masses, and the changes in these conditions.<sup>19</sup>

The Marxist method of investigating social phenomena is based on the truism that production relations in society are founded upon the economic base; that from this economic base arises legal, political, religious, intellectual and other superstructures. It is this ordering that breeds conflicts in society. As Marx observes:

"It is not the consciousness of men that determines their being, but on the contrary, their social being that determines their consciousness. At a certain stage of their development, the material productive forces of society come into conflict with the existing relations of production, or - what is but a legal expression of the same thing - with the property relations within which they have been at work hitherto.... Then begins an epoch of social revolution."<sup>20</sup>

It is against this general background that the Marxist theory of law and state has developed. This theory is informed by three cardinal tenets. Firstly, it perceives law as an historically determined social phenomenon, and rejects any subscription to the dictum ubi homo ibi jus,<sup>21</sup>

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- (18) Marx, A Preface to A Contribution to the Critique of Political Economy in Marx-Engels-Lenin, On Dialectical Materialism (Progress Publishers, Moscow, 1977) pp 43
- (19) Lenin, The Materialist Conception of History 1 bid pp 315-377
- (20) Marx, loc cit pp 43 - 44
- (21) Where there are people, there is law

since society aspires towards the stage where the law withers away. Secondly, law is seen as being inseparably linked with the State, and the understanding of the relationship between law and State as being a necessary precondition for unveiling the class nature of law. Thirdly, Marxist legal theory subscribes to the view that each socio-economic formation is attended by its own peculiar form of law and State; thus, as Engels observes, the ideas of justice in currency at any particular period will depend on the nature of the existing socio-economic formation. In the light of this, a Marxist definition of law has been advanced:

"The Marxist-Leninist theory of law regards legal norms as instruments of the class struggle in the hands of the dominant class: as a means of compelling people to carry out the will of such dominant class."<sup>22</sup>

This definition of law is important because it underscores the crucial relationship between the law and the State. It correctly emphasizes the fact that the law is one of the important coercive instruments of the State, and that, therefore, the law cannot be divorced from the existent class struggles in society and the pertaining socio-economic system.<sup>22b</sup> We reject any definition of law - like the multiple bourgeois ones - which perceive law in isolation from society in its socio-economic setting. Such definitions are not seriously founded upon the need to understand the totality of the forces operating upon society and the dynamics of their actual functioning.

This Marxist-Leninist theory has been criticised by jurists and social scientists alike on its theoretical and conceptual assumptions.<sup>23</sup>

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(22) Golunski and Strogorich, Bourgeois Doctorines as to the Essence of Law: Criticism Thereof pp 33

(22b) See Mutunga, Commercial Law and Development in Kenya

(23) Eg Karl Popper, The Poverty of Historicism (Routledge and Kegan Paul, (London 1972); Luijpeg, The Phenomenology of Natural Law (Duquesne University Press, Pittsburg, 1967)



A less emotional but equally pungent criticism has recently come from Okoth-Ogendo.<sup>24</sup> His main criticisms are not only that "condemning" law to wither away with the State is to subject legal regulations to a highly deterministic view,<sup>25</sup> but also that the specific character of law as a normative system is destroyed.<sup>26</sup> We suggest that these fears are based on a refusal to appreciate the essential nature and function of the law, and the relationship between that law and the State that withers away.<sup>27</sup> But nor do we consider Kibwana's riposte<sup>28</sup> to have been based upon a clear perception of the nature of the quintessential point of contention. The problem, as we perceive it,<sup>29</sup> is this: that Marxist dialectics,<sup>30</sup> has itself been shackled by theoretical difficulties - albeit abstract in nature - and has fallen to metaphysics as an aid, in the notion of the withering away of the State. If, as it does, Materialism takes as its starting point inexorable facts, we consider it a weakness of the system that it falls back to abstractions to attain completion. But this is a highly abstract and theoretical issue that does not in any way reduce the truths inherent in the quintessential Marxist approach.

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(24) Property Theory and Land Use Analysis, Supra

(25) Ibid, pp 42

(26) Ibid. See also Okoth-Ogendo, Teaching the Law and Immovable Property: A Personal Assessment, loc cit. But see Mutunga, Notes on Teaching Commercial Law (Faculty of Law Seminar, Nbi University Sept.1978) which provides some refreshing views on the place of law in society. Mutunga effectively answers Okoth-Ogendo's oft - repeated fears about law losing its essential character qua law. He observes that "statutory provisions must be mastered; case law must be analysed, interpreted and explained.... Comments and articles by legal scholars on the relevant legal issues must be recommended and discussed. They must be criticized. Our law students....must know what the law is: they must know where to find it. Any approach which belittles this aspect of teaching must be discouraged."

This, we suggest more effectively dispels Okoth-Ogendo's expressed fears than does Kibwana's terse rhetoric in Analytical Positivism in Kenya (Supra)

(27) A brief summary of this process is given by Mihyo(Supra) pp 84

(28) Analytical Positivism in Kenya loc cit

1:2 CONCLUSION

We suggest, however, that the foregoing is not enough justification for rejecting the Marxist-Leninist theory of law and State in favour of other methods of interpreting social phenomena. The task, as we see it, is to interpret social and legal phenomena in a manner that adequately exposes the exploitation of our society that resulted from colonialism, neo-colonialism and imperialism. To argue that

"We cannot build successfully on the literature we have inherited because much of it reflects utilities and opportunities not in tune with our own..... the key tools of analysis that we have inherited - both conceptual and methodological - conceal biases that are not only intellectual in nature but ideological in origin as well."<sup>31</sup>

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- (29) Even on pain of being labelled deviationists!!
- (30) Engels has observed: "Hegel's method took as its point of departure pure thought, whereas here the starting point was to be inexorable facts. A method which, according to its own avowal, 'came from nothing, through nothing to nothing.' It was the only element in the entire available logical material which could at least serve as a point of origin. It had not been subjected to criticism, not been overthrown; none of the opponents of the great dialectician had been able to make a breach in the proud edifice. It had been forgotten because the Hegelian school did not know how to apply it. Hence, it was first of all essential to carry through a thorough critique of the Hegelian method." On Dialectical Materialism, op cit pp 49. (Emphasis mine)

Marx himself observed: "My dialect method is not any different from the Hegelian, but is its direct opposite. To Hegel, the life-process of the human brain i.e. the process of thinking, which under the name of 'the idea' he even transforms into an independent subject, is the demiurgos of the real world, and the real world is only the external, phenomenal form of "the idea." With me, on the contrary, the ideal is nothing else than the material world reflected by the human mind, and translated into forms of thought." Capital, Vol I (Progress Publishers 1977) pp 29.

For a summary of Hegelian Dialectics, see Mure, The Philosophy of Hegel, (OUP.London, 1965)

- (31) Property Theory and Land Use Analysis op cit pp 42

is to bend to forces of reaction. In any case, any "new" analytical framework, to have any positive effect, must take into account the total colonial and neo-colonial experience. It must consider the class nature of Kenyan Society and methods by which the ruling elite use the law to consolidate their class positions. It must relate the law to the other coercive measures replete in the State machinery, and the reasons why these evolved in Kenya during the later part of the last century, and were consolidated after independence. The Marxist-Leninist theory of law and State lives because by its very nature, it takes these factors into account. Evidently therefore, our stand that the analysis of social and legal phenomenon in Kenya does not need to be contained in any "new" conceptual envelope, is not spurious.

1:3 - HYPOTHESIS<sup>32</sup>

Lord Devlin, in his monograph The Enforcement of Morals<sup>33</sup> makes the trenchant observation that the moral codes in society cannot claim validity except by virtue of the religion on which they are based. He subscribes to the view posited by Lord Phillimore in R. Vs Boutler<sup>34</sup> that

"A man is free to think, to speak, and to teach what he pleases as to religious matters but not as to morals."

Lord Phillimore's views, viz. that moral codes are based on religion, and that a person has freedom of religion (which includes freedom of no religion), are only apparently contradictory. It is necessary however, to demistify Lord Phillimore's dicta in order to put bourgeois conceptions of law and morals in sharp relief.

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(32) See footnote 12, Supra

(33) O.U.P., 1965: also in Dworkin, The Philosophy of Law (O U P 1977) pp 66 - 82

(34) (1908) 72 J.P. 188

Relations in society are founded on the existing - or imposed - economic base. From this economic base derive superstructural features, on law, morals, religion etc. While these exist in a dialectical relationship with the economic structure, it is also true that they exist in dialectical relationship with each other. But since the economic base is in the control of the ruling classes - they derive their exploitative power therefrom - they also control the relationship between the different superstructures.

We posit that Lord Phillimore was no more than engaging himself in "spinning" a fine specimen of English judicial rhetoric in the baroque manner."<sup>35</sup> Since the learned Law Lord cannot have been *departing from his class position, his statement can only be open* to one interpretation: that while the Victorian ruling class would allow self-deception as to freedom of religion, it would not countenance lightly any departure - intended, apparent or otherwise - from its chosen moral path.

Devlin's major thesis then, is based upon the argument that since society means a community of ideas on politics, morals and ethics, an individual living in society must embrace those ideas. Devlin argues further that every society has a shared morality, and that there is no immorality which is by its nature not capable of threatening the society's existence. His plea for the legal enforcement of morals takes root from this thesis.

Our task here will be to show how the class position posited in Devlin's argument on law and morals has been reflected in legal and moral relationships amongst the various classes of Kenyan people. We shall show that while it is historically true that the ideas of morals in society have always been ruling class ideas, the imposition of British rule in Kenya - with the attendant economic structure and other superstructures, based on English ruling class conceptions -

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(35) This is Professor Hart's expression in discussing Lord Simond's opinion in *Shaw Vs. D.P.P.* (1962) A.C. 268, in *Law, Liberty and Morality* (OUP 1965)

had the effect of beginning the strangulation of the moral personality of the Kenyan people.

We will argue that all this has caused a paradox of lego-moral relations: of how the emergent Kenyan elite, conceived of a colonial mother, may still show respect to a senile, pre-capitalist father. It will be the position taken here that this lego-moral paradox and socio-legal conflict has been the cause of several dead letter laws, best typified by the crime of bigamy, which is punishable under Kenyan criminal law.<sup>36</sup>

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- (36) Under Section 171 of the Penal Code, Cap 63 of the Laws of Kenya. The conflict arises because polygamy is still an accepted way of life in Kenya, provided that the marriage is contracted under customary law. Section 171, it is suggested, is part and parcel of the imposition of English moral, legal and social superstructures in Kenya. Several English decisions exemplify the working and mentality behind these superstructure - eg. Cockburn, C.J. in R. Vs. Allen (1872) L.R. 1 C.C.R. 367 at 374-5 said that:

"Bigamy involves an outrage on public decency and morals, and creates a public scandal by the prostitution of a solemn ceremony which the law allows to be applied only to a legitimate union, to a marriage at best but colourable and fictitious, and which may be made, and too often is made, the means of the most cruel and wicked deception."

See also, Lolley's Case, (1812) Russ & Ry 237;  
R. Vs. King (1963) All E.R. 561; R.Vs. Wheat (1921)  
2 K.B. 119

CHAPTER 1

0:0 - SYNOPSIS

This chapter will map out the general areas within which we shall argue our views on law and morals in Kenya. In order not to seriously truncate the value of, /pre-empt the views posited in /or chapter two, this chapter will only deal with general themes.

The first section will give a brief historical introduction which, we contend, must ex necessitate be at the root of any study of the Kenyan - or any other society. This historical introduction will include a vital discussion of the Repugnancy clause, and its impact on the conceptions of law and morals in Kenya.

We shall then examine pre-capitalist ideas of religion, culture and morals. This excursus into pre-capitalist moral, religious and cultural notions is of useful comparative value, and will sharpen the impact of the erosive effect of the colonial superstructural legacy.

In the final section, we shall trace the lines along which the major bourgeois protagonists of the debate on law and morals have argued. Due regard will be paid in this section to the showing how positivist writers on law and morals have attempted to mask the harshness of positivist theory by ill-fated appeals to natural law.

1:0 - HISTORICAL INTRODUCTION

The declaration of protectorate status on much of what is now Kenya on 15 June 1895 Marks the effective advent of British rule in Kenya. Prior to this, British interests had been largely motivated

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and concerned with economic considerations. In declaring protectorate status, the British government had a keen eye on the coast:

"To the British Government the East African Protectorate.....appeared in itself to be of little economic or strategic significance. But since Zanzibar and the coast formed a necessary base for British operations in East Africa and in the Indian Ocean complex, the Protectorate, a kind of Zanzibar backyard, had to be made safe. In the same way, the security of the East Africa Protectorate was regarded by the British as an essential part of the major strategic consideration for retaining control of Uganda and the Nile Valley."<sup>1</sup>

Further justification for European activities after 1895 derives in large measure from the General Act of the Berlin Conference, concluded by the participant states. This Act purportedly laid down rules

"relating to the acquisition of, and establishment of authority over territory in Africa, and coupling these with moral injunctions to stop the slave trade in Africa and bring 'Civilisation' to Africa...."<sup>2</sup>

Since little was known of the interior, this General Act dealt only with the coast. This ignorance of the interior generated a crop of doctrines of the interior, about which there was no consensus amongst the competing European states. The problem of lack of consensus was resolved by means of bilateral agreement between European powers. These agreements mainly delimited spheres of influence. At the same time, treaties were concluded with chiefs in the interior.

At this stage of the colonial process, the chief exploitative agent of the interior was the Chartered Company. The British East Africa Association (B.E.A.A.) by obtaining Charters and concessions, acted in the interior with an impunity the British Government would not have been able to achieve because of constitutional blocks and international agreements regarding the interior.

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- (1) B.A. Ogot, Kenya Under the British, 1895 - 1963 in Ogot and Kieran (Ed) Zamani (EAPH & Longman 1969)
  - (2) Ghai and McAuslan, Public Law and Political Change in Kenya (Oxford, 1970) pp 4

The granting of a Royal Charter of Incorporation to the B.E.A.A., in 1888 silenced British Constitutional experts who had argued about the answerability of the British Government to acts of the B.E.A.A., which now became the Imperial British East Africa Company, (I.B.E.A.) From 1888, the IBEA was recognised as an arm of British imperial policy. It differed from the BEAA in its source of power. Ghai and McAuslan report that

"In legal terms, this meant that whereas the Association had derived its powers solely from the agreement with the Sultant, the Company derived its powers first and foremost from the British Government, and then from agreements with the Sultant and other rulers."<sup>3</sup>

The declaration of protectorate status marks the beginnings of the decline of the imperialist operations of the I.B.E.A. as an agent of the British government. It marked the beginning of the process of handing over its concessions at the coast and its charter to the British government. From then on, the legal basis for British entrenchment in Kenya was derived from a series of Orders-in-Concil.<sup>4</sup>

While the British Government (and European) adventure in Africa did take force from strategic and social factors,<sup>5</sup> the most important cause was economic. Lenin observes that:

"the economic quintessence of imperialism is monopoly capitalism. This very fact determines its place in history, for monopoly that grew up on the basis of free competition, and precisely out of free competition, is the transition from the capitalist system to a higher socio-economic order"<sup>6</sup>

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(3) Ibid., pp 7

(4) The legal problems encountered in this process are well-traced in Wolff, The Economics of Colonialism: Britain and Kenya 1870 - 1930 (Trans Africa, 1971)

(5) See Wolff, op cit chapter 1; R. Van Zwanenberg, An Economic History of Kenya and Uganda 1800-1970 (MacMillan, 1975) pp 183-188; H. Arendt, The Alliance Between Mob and Capital infra pp 101

(6) Lenin, The Highest Stage of Capitalism in H. Wright (Ed) The New Imperialism: Analysis of Late 19th C. Expansion (D.C. Heath & Co. 1961) pp 37



Lenin views imperialism - and we agree - as an inevitable catastrophe, as one of the crises resulting from the internal contradictions of the Capitalist system, and leading to its final breakdown. On the process of imperialism, Lenin observes that it

"emerged as the development and direct continuation of the fundamental attributes of capitalism in general. But capitalism only became capitalist imperialism at a definite and very high stage of its development, when certain of its fundamental attributes began to be transformed into their opposites, when the features of period of transition from capitalism to a high social and economic system began to take shape and reveal themselves all along the line. Economically, the main thing in this process is the substitution of capitalist monopolies for capitalist free competition. Free competition is the fundamental attribute of capitalism, and of commodity production generally. Monopoly is exactly opposite of free competition."<sup>7</sup>

#### 1:1 - THE MISSIONARIES

As we shall argue later, the ideas of morals that the colonial religious and legal superstructures imposed on Kenya were ideas of the British ruling classes. These ideas had been inculcated in

"the human debris that every crisis, following invariably upon each period of industrial growth, eliminated permanently from producing society. Men who had become permanently idle were as superfluous to the community as the owners of superfluous wealth."<sup>8</sup>

It was these people who took it as their task to teach and impose upon colonial societies, the morals and religious views of the masters who had rejected them. Prominent amongst this group were the missionaries. They were a product of 19th Century British liberalism, which had its roots

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- (7) Lenin, Ibid pp 34. These views by Lenin clearly dispel those views posited by bourgeois and reactionary economists and historians of imperialism eg. Hobson, Imperialism, who argues correctly that imperialism resulted from the financial weakness of the capitalist system: but Hobson was a laissez faire economist and believed in free trade and this distorts his views; also Schumpeter, Imperialism as a Social Atavism where he views capitalism as being anti imperialist by nature!!
- (8) Arendt, The Alliance Between Mob and Capital (Supra) pp 103

in liberal sympathy for the fate of the Industrial poor in Britain, who were the victims of the crisis of Capitalism in its transition from pre-monopoly to monopoly capitalism.

The Church Missionary Society (C.M.S.) founded in 1799 in England was responsible for the first missionary intrusion into East Africa. Its activities in Africa began in 1844 when Johann Krapf began to explore the East African coast: he was joined by Rebmann in 1846. They founded the first mission station at Rabai Mpya near Mombasa. Their missionary operations were based on the belief that education of the native was an agent of evangelization. They *saw education of the native as a first and necessary step towards* the salvation of his soul, and therefore undertook educational activities with that in mind. But schools were responsible for a conflict of interest that developed: while the missionaries encouraged children to attend school, parents opposed this because it interfered with cultivation. In this conflict,

"Livingstone and his adherents put forward the view that evangelization by itself was not enough, and Christianity, civilization and commerce needed to develop together. His arguments were opposed by the rabid evangelicals who were so concerned with the salvation of Africans as individuals that they saw no need to concern themselves with Africans as communities."<sup>9</sup>

For a long time, the evangelical view held sway, and despite the conflict, missionary activity in Kenya intensified after the declaration of protectorate status in 1895. The Protestant East Africa Scotland Mission was formed, supported by Mackinnon, with centres in Kikuyu and Meru tribal areas. The African Inland Mission, a non-denominational American supported group, founded a station at Ukambani and later moved their headquarters to Kijabe where they came into contact with Kikuyu and other Rift Valley peoples such as the Nandi. The American Seventh Day Adventists and Quakers set up missions in Nyanza. Meanwhile, while the Methodists established a mission in Meru, the C.M.S. spread to Kabete, Fort Hall, Embu and Nyanza.

Although the extremists amongst the missionaries did eventually seem to overcome their initial disbelief that "God should need to use such a worldly instrument as the school to spread his religion"<sup>10</sup> the education provided at the schools, apart from being the hopelessly inadequate rote-learning of religious dogma, also attempted to strangle creative indigeneous pursuits such as dance. These schools were also used as forums for denouncing accepted local moral ideas in favour of Christian morality: these two norms were often in conflict. A particularly high point of this conflict occurred in 1929 over the practice of female circumcision which the missionaries considered pagan, crude and cruel, but which the Gikuyu saw as a vital link of their existence. Many Gikuyu broke away from the missionary churches as a result of this conflict.

It is however imperative to put missionary activities in the context of the developments that were taking place in capitalist Europe. In 19th Century Europe, two factors especially affected social, legal, economic and political thinking. The first was the Industrial Revolution, and the other was the development of utilitarian philosophy. Both these were responsible for the exploitation of the working classes.<sup>11</sup> Utilitarianism, having been used by the bourgeoisie to overthrow feudal regimes, was later used as a tool of subjugation in the exploitation of working class labour as the Industrial Revolution advanced. In Africa, the same principle - wielded amongst others, by missionaries - was used at the whim of bourgeois capital in the service of monopoly capitalism. It is our view that the missionaries, in instilling the tenets of christian dogma in the Africans, were essentially attempting to stifle reaction against, and to mystify, the dynamics of this exploitation. Thus the missionary religious and educational superstructure were in an important dialectical relationship with the operations of the imperialist economic base.

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(10) Ibid., pp 16

(11) The effect of this exploitation in Britain are poignantly brought out in Dickens' novel, Hard Times

It is axiomatic that the attainment of total conquest and the subjugation of a people demands that the "conquerors" hit at ~~the very heart of the subject people's institutions~~ end, colonial legislation constantly hit at the local ideas of morality. We shall now examine the most pre-eminent colonial legislation regarding law and morals.

1:2 - THE REPUGNANCY CLAUSE ✓

The importation into Kenya of English ideas of law, morals, justice and society is heavily sanctioned by the law and can be traced to 1897.<sup>12</sup> The Judicature Act of Kenya<sup>13</sup> has its roots in that Order-in-Council. This Act contains a proviso stating that this received English law shall apply only so far as the circumstances of Kenya and her inhabitants permit.<sup>14</sup> Courts, and especially colonial courts, were notorious for ignoring this provision.<sup>15</sup> R. Vs. Amkeyo<sup>16</sup> where it was held that in African societies, the institution of marriage as it is understood in the West is non-existent, is an especially notorious example.

Of greater import to the debate of law and morals, is Section 3(2) of the Judicature Act. This sub-section is styled as the Repugnancy clause in legal parlance. It provides that

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(12) By the 1897 Order-in-Council. The provisions of this Order-in-Council were restated in the 1921 Kenya Colony Order-in-Council Section 4(2) of which stated that civil and criminal jurisdiction of the supreme court in Kenya

"shall so far as circumstances permit, be exercised in conformity with the Civil procedure and Penal Codes of India and other Indian Acts which are in force in the Colony at the date of commencement of this Order and subject thereto and so far as the same shall not extend or apply shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general

It is axiomatic that the attainment of total conquest and the subjugation of a people demands that the "conquerors" hit at the very heart of the subject people's pulsation. Towards this end, colonial legislation constantly hit at the local ideas of morality. We shall now examine the most pre-eminent colonial legislation regarding law and morals.

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"The High Court and all subordinate courts shall be guided by African customary law in Civil cases in which one or more of the parties is subject to it or affected by it, So far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice and without undue regard to technicalities of procedure and without undue delay."<sup>17</sup>

Two main issues arise from this section. Firstly, it makes no attempt to define whose justice and whose morality it refers to.<sup>18</sup> Colonial judges, however, did not seem to have encountered any undue problems with this. Wilson J. had a simple answer: in Gwao bin Kilimo Vs Kisunda bin Ifuti<sup>19</sup> he observed:

"Morality and justice are abstract conceptions and every community probably has an absolute standard of its own by which to decide what is justice and what is morality. But unfortunately, the standards of different communities are by no means the same....I have no doubt whatever that the only standard of justice

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application in force in England on the eighth day of August 1897 and the practice and procedures observed in the courts of Justice in England at that date."

- (13) Act No.16 of 1967.
- (14) Judicature Act, Section 3(1)
- (15) See M.L. Marasinghe, Policies, Purposes and Aims of Reception in British Colonial Africa (12 EALJ 1976 Vol I) pp 24. But this tendency of judges to interpret justice and morality in the same way English Courts do still persists in neo-colonial Kenya, since the judges are by and large Englishmen, shackled by English judicial tradition.
- (16) (1917) 9 E.A.L.R. 14
- (17) Emphasis mine.
- (18) Allot, New Essays in African Law (Butterworths, 1970) p 159-60 explains this by reference to British conceptions of natural justice. But Allot's general tenor is sympathetic towards colonial judges. He says of the Repugnancy Clause that it  
"gives flexibility to the administration of justice since it puts the extent of the operation of Customary law ultimately in the hands of the judges. It is within the discretion of a judge....whether to allow a certain rule of Customary law to operate or not;

and morality which a British Court in Africa can apply is its own British standard."<sup>20</sup>

The "British Standard" alluded to by Wilson J in this case is, we submit, the standard and morality of the British ruling classes, which they dispatched their superfluous human debris, born of superfluous capitalist production, to spread and preach in the colonies.

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but this discretion is a judicial one which should be exercised as far as possible, on clear and satisfactory principles." pp 162 (emphasis mine)

Denning L.J. (as he then was) observed in Nyali Ltd Vs. Attorney General (1957) I All E.R. 646 "...in these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task which calls for all their wisdom."

But as Harvey, Introduction to the Legal System in East Africa (EALB.1975) observes, the good sense shown by Denning seems to have been beyond the wisdom or the competence or the willingness of the colonial judges and their superiors in the appellate benches in England. (p 553) . As a cursory survey of colonial decisions shows, there were no clear-cut principles adopted in determining what constituted "good conscience" and "morality". It is submitted that the ideas of good conscience and morality adopted, when according to English standards was according to the subjective conscience of the particular colonial judge.

Neither do we agree with Allot's contention that the fact that a judge is a native Kenyan in neo-colonial Kenya is of little moment. (p164) The lie is adequately given to Allot's contention for example by the decisions of Mulli, J on the law of real property in Samuel Thata Mishek Vs. Priscilla Wambui (H.C. of Kenya C.C.No.1400 of 1973 unreported): Mani Vs Mani (H.C. of Kenya C.C. No.34 of 1977 unreported) and Kibuchu Vs Mbugua (H.C. of Kenya c.c. No.1090 of 1970 unreported) A brief discussion of the importance of a judge's background to the kind of decisions he gives is given in G.K. Kamau's Notes on

The second issue raised by Section 3(2) is that by providing that customary law shall apply so long as it is not inconsistent with any written law, it has been used to outlaw the application of customary law - and thus customary ideas of justice and morality - in the courts.<sup>21</sup> A separate discussion of this is otiose, since it will cover the same ground as that of the first issue.

The point that reception clauses in East Africa should be viewed against the background of British paternalism has been well made.<sup>22</sup> This paternalism extended not only to administrative

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Justice Mullis' Problematic Aspects of Land Law" Justice Mulli's paper was presented at the 1978 Law Society of Kenya Conference.

- (19) (1938) 1 T.L.R. (Rev.) 403
- (20) Emphasis mine. This was the typical view of colonial judges, and as a result, colonial courts became powerful vehicles for the miscarriage of justice: See R. Vs. Amkeyo (Supra). Where the courts did not read repugnance to morality and justice they arrived at the same conclusions by arguing that they were guardians of British Colonial policy - See Ole Oloso Vs Nalulus Ole Kidoki (1915) E.A.L.R. 10
- (21) See Kimani Vs. Gikanga (1965) E.A. 735 especially the judgement of Crabbe, J.A. It has also been argued that Section 3(2) is unconstitutional - See G. Kamau Kuria, Christianity and Family Law in Kenya (1976) 12 EALJ No.1 pp 66
- (22) Marasinghe, Reception Statutes in British Colonial Africa op cit. Kamau also reads racism in these clauses and I agree with this view.



affairs but also to legal ones. Obsessive use of common law precedents was the order of the day in the courts<sup>23</sup> and the chief characteristic of the bench was the tenacity with which it clung to the ideas therein of British ruling class morality. With this development went a constant and incisive erosion of local ideas of morals and justice, which even the statutes could not arrest: the statutes were, after all, a major tool of that erosion.

The concepts of justice and morality as affected by the advent of colonialism may be looked at in their dialectic relationship, with the thesis being provided by the pre-capitalist concepts, their anti-thesis by the colonial concepts, and the synthesis by the resultant two - pronged conception of justice and morality.<sup>24</sup> Our concern with customary law, however, derives from the fact that customary law embodies the original repository of the concepts of justice, law and morality of the Kenyan people.<sup>25</sup>

### 1:3 - RELIGION, CULTURE, LAW AND MORALS

Morals, as a reflection of a people's way of life were derived in the pre-capitalist era from, inter alia, the people's culture and religion. Religion in this section will be understood to mean more than just the western concept of religion. Neither will

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(23) Then, as now. This has been explained by the fact that lawyers in Kenya have largely been trained in the common law tradition, which they have been unable to break away from.

(24) Statutory and Customary.

(25) The issue whether or not customary law is dead does not belong here. We are concerned only with its postulates - if vestiges of it are existent - or with its postulates as they were if it is dead. The validity of our arguments doesn't depend on its life or death. While we subscribe to the view that customary law belongs to the pre-capitalist

it be taken as embracing the tenets of Islam. Colonial authorities catered for Islam by providing for the existence of Kadhi's courts, which dealt with pertinent aspects of Islam.

We shall understand religion as including not only spiritual tenets, but also the whole way of life which in pre-capitalist Kenya linked the unborn, the living and the dead inextricably. It will cover a way of life that was largely devoid of bourgeois individualism where on death, an individual waits for judgement day alone, with no link with the living society. Colonialism, which ushered in capitalism in Kenya, had a disruptive effect of the people's conception of morals and justice; it also sounded the death knell for a large selection of traditional systems of the enforcement of Morals. Kenyatta's observation with regard to the Gikuyu was also true of other ethnic groups in Kenya:

"Religious rites and hallowed traditions are no longer observed by the whole community. Moral rules are broken with impunity, for in place of unified tribal morality, there is now.....a welter of disturbing influences, rules and sanctions whose net result is not only that a Gikuyu does not know what he may or may not, ought or ought not to do or believe, but which leaves him in no doubt at all about having broken the original morality of his people."<sup>26</sup>

Kenyatta has, in this passage, highlighted the conflicts caused by the imposition of different legal and religious superstructures in place of the original pre-capitalist ones. In legal terms, it may be argued that the pre-capitalist notions of the rule of law were being replaced by alien, capitalist ideas of the rule of

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mode of production - as expressed by Kibwana, Analytical Positivism in Kenya op cit, we do not agree that it is outmoded on the ground. We submit that observation of Kenyan society renders customary law outmoded on the theoretical frontiers of Marxist political economy.

(26) Kenyatta, Facing Mount Kenya, (Heinemann, Nairobi 1978 reprint) pp 251

law. We posit that the gradual erosion of the Kenyan people's ideas on religion, culture, law and morals contributed to a large extent to their disavowal of the colonial political superstructure, culminating in the 1952 War of Liberation. That the colonial overlordship was replaced by a neo-colonial one after independence is, however, not surprising: that is a law of the imperialist process.

We have argued that all superstructures exist in a dialectical relationship with each other.<sup>27</sup> Thus, even after 1963, Kenyan leaders and theorists still looked to the religious and cultural superstructures to bolster up the political superstructure. Traditional cultural superstructures were perceived as a permanent feature of African Socialism.<sup>28</sup> In the same vein Okot p'Bitek remarked that

"Another fundamental force in African traditional life was religion which provided a strict moral code for the Community. This will be a permanent feature of African Socialism."<sup>29</sup>

The argument here seems not to be that religion would bring about Socialism, but that the "new" doctrine of African Socialism would necessarily embrace the religious superstructure. The failure of African Socialism as an economic and political philosophy lay in the fact that it derived its inspiration in no small measure from a host of vague concepts like "African traditional life," and in total disregard of history and of the economic forces that ushered in imperialism and colonialism.<sup>30</sup>

Pre-Capitalist systems of the enforcement of morality were also sharply affected by the advent of imperialism, which replaced these with those of the imperial nation. Professor Mbiti observes that in pre-capitalist systems in Kenya,

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(27) See Introduction supra Section 1:3

(28) African Socialism and its Application to Planning in Kenya (Sessional Paper No.10 of 1965)

(29) Okot p'Bitek, African Religions in Western Philosophy (E.A.L.B.) pp 111 - 2

(30) See Lenin, The Highest Stage of Capitalism op cit

"There exists.....many laws, customs, set forms of behaviour, rules, observances and taboos, constituting the moral code and ethics of a given community or society. Some of them are held sacred.....They originate in the Zamani where the forefathers are.... Any breach of this code of behaviour is considered evil, wrong or bad, for it is an injury or destruction to the accepted social order and peace. It must be punished by the corporate community of both the living and the departed, and God may also inflict punishment and bring about justice."<sup>31</sup>

An offence, moral or natural evil suffered by a person was believed to be caused by members of his community.<sup>32</sup> The belief amongst the majority of African people was that God punishes in this life, and is therefore concerned with the moral life of mankind and the upholding of moral laws.<sup>33</sup> Mbiti further observes that each community had its own form of restitution and punishment for both legal and moral offences, ranging from death for offences such as murder, to fines for lesser offences against the person or property.<sup>34</sup>

Scholars on pre-capitalist Kenyan religions and culture and philosophy are agreed that the stability of the community depended to a large extent on the observance and enforcement of its moral codes. The dynamics of this enforcement were however vastly different from those of Western Christian theology. In pre-capitalist societies, sanctions were constant and foretellable. In Western religious mythology sanctions were in the form of a hell-fire in the hereafter. Where it is politically expedient to mete out earthly punishments, such sanctions will, in Capitalist societies, depend on the Degree of the threat to the ruling class, of the infringement being punished. A mythical "reasonable man" has been invented to

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(31) Mbiti, African Religions and Philosophy  
(Heinemann 1971) pp 205

(32) Ibid., pp 208

(33) Ibid., pp 210

(34) Ibid., pp 211

mask this reality. The "reasonable man" of Capitalist society is, we suggest, a product of the vicissitudes of bourgeois politico-economic necessity, and sanctions can therefore be neither constant nor predictable.

In pre-capitalist society, an individual was at once an inextricable part of society, and a mirror of it. In Mbiti's terminology, he is a corporate, or social man. His calamities, hopes and fears are those of his society. The individual is, therefore, of central importance. Existing studies on law and morals view the individual, by and large, against the background of general Western bourgeois individualism. We intend here to look at the individual not qua individual pure and simple, but in the context of his role in society. This discussion will bear in mind that colonialism and neo-colonialism necessitated choice-making viz-a-vis law and morals; we shall view the individual from the point of view of this necessity. The juridical rationalisation for the making of these choices is enshrined in Section 3(2) of the Judicature Act of Kenya. The dynamics of this necessity are, however, the province of Chapter II.

#### 1:4 - THE DEBATE ON LAW AND MORALS

The debate on law and morals is not a recent one. To attempt to trace the debate from its origin, even if such a task were possible in a study this short, would be otiose. We shall therefore look only into the debate as it has developed since the 19th Century.

In its modern aspect, the debate takes root from the publication of John Stuart Mill's Essay On Liberty in mid-nineteenth century. That essay attempted to define the limits of permissible social interference in the individual's affairs. On Liberty has its logical complement in Mill's other influential essay, Utilitarianism, which examined the extent the individual may go <sup>in</sup> the pursuit of his <sup>to</sup> own happiness; its main theme is that the main end of society is to provide for the greatest happiness for the greatest number. These essays represent probably the most eloquent defence of individual freedom as it is conceived of in the West. In these essays, Mill

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argues that the only time when society may justifiably interfere with the individual is when the individual's actions represent a threat to society. In his oft-quoted justifying passage, Mill observes that;

".....The only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others. His own good, whether physical or moral, is not a sufficient warrant. He cannot rightly be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise or even right."<sup>35</sup>

Mill further asserts - and this is the crux of his doctrine - that

"The only part of the conduct of anyone for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."<sup>36</sup>

Mill's postulations must however be read with one caveat: that Mill excludes slaves and minors from the ambit of his theorising. What Mill considers to be the general morality of society is, in fact, a function of the class interests of the bourgeois. The Wolfenden Committee's Report was later to take Mill's view on the enforcement of morality.<sup>37</sup>

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(35) Mill, On Liberty (Grolier Classics, 1956) pp 375

(36) Ibid

(37) Mill argues that "Those who are still in a state to require/taken care of by others.....must be protected /being against their own actions as well as against external injury." On Liberty pp 375

In the same vein, the Wolfenden Committee argued that, as they saw it, the function of the criminal law is "to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable...." quoted in Smith and Hogan, Criminal Law (Butterworths, 1973, 3rd Edition) pp 19

Fourteen years after the publication of On Liberty, Mill was to be taken to task by James Fitzjames Stephen who is often regarded as Mill's most unbending critic. In Liberty, Equality and Fraternity, which is primarily a riposte to On Liberty, Stephen delivers a most biting critique of Millian ideas. He launches his critique by berating Mill for taking as axiomatic general principles which Mill did not endeavour to give proof of, and which Mill expected to be accepted ipso dixit. Stephen argues against the Millian idea of liberty - that no one should try to affect another's conduct by exciting his fears, except for the sake of self-protection. Stephen argues strongly that all morality, and all existing religions, in so far as they aim at affecting existing conduct, appeal to hope and fear, and to fear more emphatically than to hope.<sup>38</sup> It is on the strength of this argument that Stephen justified his assertion that it is part of the law's function to enforce morality.<sup>39</sup>

To Mill, any moral system that aims at more than allowing people to please themselves without hurting their neighbours, is contrary to his principle of liberty. But, as Stephen argues, to subscribe fully to this Millian limitation of the application and working of moral systems would be to do away with, and condemn every system of morals.

The Mill - Stephen debate of the Nineteenth Century was the precursor of this century's Hart - Devlin debate. The terrain covered remains the same, with Hart subscribing to Mill's ideas as

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(38) Stephen, Liberty, Equality and Fraternity (Cambridge University Press 1967)

(39) Denning stated this position more tersely when he stated that ever since the time of Henry I, "in order that an act should be punishable it must be morally blameworthy. It must be a sin." See Denning, The Changing Law pp 112 quoted in Smith & Hogan, op cit p 5

to the sanctioning of morals<sup>40</sup> and Devlin taking the hard line adopted by Stephen.<sup>41</sup> We shall discuss the ~~Hart~~ - Devlin controversy against the general background of the development of legal philosophy during this century. This will enable the lie to be given to their disagreements, which, we argue, are more apparent than real.

Hart's major premise is that law and morals should be perceived of as distinct phenomena, save for a certain existent minimum whereat legal and moral principles overlap.<sup>42</sup> Devlin, on the other hand, argues that because (English) society is founded on Christian moral values, the law must protect and enforce these moral and ethical principles if society is not to disintegrate. Hart argues that enforcement should not exist beyond the minimum he postulates, for, to go beyond it would be paternalistic.

Both Hart and Devlin, beyond their disagreement - which as we see it is a mere solecism - are undoubtedly legal positivists. They have no concern for the law as it ought to be, and their understanding of what the law is smacks of the dogmatism of the Austinian command theory. The classical positivist stand, shorn of all its mystifications, states that law and morals are distinct phenomena, and that this dichotomy should not be interefered with. The crisis in bourgeois legalism, caused by the fascist atrocities during the second world war, marks a slight altering/their theoretical stand with regard /of to law and morals; liberal postivists argued that the law should accommodate elements of morality in its ambit. This was a move marked by the revival of natural law at that time. Thus also, Fuller, a positivist garbed in natural law garments, has argued that

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(40) Hart, Law, Liberty and Morality (O.U.P. 1965)

(41) Devlin, The Enforcement of Morals (O.U.P. 1965)

(42) Hart, Positivism and the Separation of Law and Morals 71 H.L.R. (1958) Such principles include those vetoing murder, violence, theft, etc.



morality comprises the double conception of morality of duty and morality of aspiration. Morality of duty lays down the basic rules without which society cannot function. Morality of aspiration is the morality of the good life, excellence, and the full realisation of ones human powers.<sup>43</sup>

We are convinced, however, that such modifications and alterations of positivist doctrine are more persuasive in theory than in practice. There is no fundamental difference between Hart's minimum above which the law should not interfere with morals,<sup>44</sup> and Fuller's ideas of the morality of duty (which extends as far as the minimum), and the morality of excellence, (which goes beyond Hart's minimum). We suggest further, that Devlin's "limits of tolerance"<sup>45</sup> are merely different words for the same proposition.

The idea of private and public morality is also an offshoot of the same principles. Private morality will reside beyond Hart's minimum; inside Fuller's morality of excellence; and, if pushed, we do not doubt that Devlin would define it properly as those actions of the individual which do not go beyond the limits of tolerance. Public morality will be found below Hart's minimum, within Fuller's morality of duty, and those acts which will cause intolerance a la Devlin, and which Denning classifies as sin.<sup>46</sup>

Positivist legal philosophers, by and large, hide behind the cloak of libertarianism. They purportedly argue from a concern for the liberty of the individual. This positivist preoccupation is quaintly summarised by Smith, who argues that

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(43) Fuller, The Morality of Law (Yale University Press) Chap. 1

(44) Hart, Positivism and the Separation of Law and Morals

(45) Devlin has argued that "Nothing should be punished by the law that does not go beyond the limits of tolerance."  
See Enforcement of Morals op cit

(46) Denning, op cit; also his On Crime, Sin and Morality  
(Address to the 1957 Conference of the U.K. Law Society)  
in Blom-Cooper & Drewry (Ed) Law and Morality (Duckworth 1976)

"Any imposing, through the machinery of the law, of ideals or standards which cannot be justified in terms of social interests is a gross infringement of individual liberty. The result will be an arbitrary imposition of the values of some people on others, who do not share them. The law should arbitrate only between conflicts of interests, not conflicts of ideals. Any moral norm which cannot be accounted for in terms of a morality of interests ought to be a matter of private conscience and not a subject for legislation."<sup>47</sup>

In one stroke, Smith has hit at the heart of the positivists rationalisation of the separation of law and morals viz seeing law as it is, and not being concerned with law as it ought to be. The absurd argument advanced by Smith - and all positivists - is that resort should be had to law where the interests of the minority conflict with those of the majority. Where the morality of excellence is concerned; where the area beyond the minimum as postulated by Hart is concerned, the law ought not to interfere. This trend of thinking caters for the exploitation of the masses; and, where the morality of the ruling classes is threatened by a conflict between it and the morality of the masses, the morality of the ruling classes should prevail. This is not a surprising phenomenon: in class society, the ruling class determines the province of both morality and law.<sup>48</sup>

In positivist theory therefore, the law should not enter into the domain of morality except in so far as such entrance is motivated by the need to protect compound social interests - as defined by

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(47) J.C. Smith, Legal Obligation (University of London 1976) pp 34-5

(48) Thus Smith observes, in language couched in mysticism, that "A morality of interests will include any moral judgement, norm or ideal, justifiable either directly or indirectly in terms of the interests of others according to a scale in which no one person's set of interests is given priority over anyone else's. Any moral judgement, norm or ideal, which in the final analysis is not so justifiable but.....is justified in terms of standards of intrinsic goodness, personal inclinations, tastes and choices, one's existential

the ruling class. This positivist position does not countenance or encourage rule breaking for reason only that a law is immoral. This hard-line position was responsible, as we have argued, for the revival of natural law after the second world war. The reasons for the revival of natural law are succinctly summarised by Shkler, who reports that:

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"There is, indeed, every reason to believe that the several revivals of natural law thinking in the twentieth century have all been part of more general ideological movements in favour of unity, and of wider searches for political values transcending those of competing groups. The first revival in Europe before the First World War was at least partially a defensive reaction to the socialist doctrine of inevitable class war as well as to inevitable Parliamentary party fragmentation. The present revival in Europe seems to represent a search for some set of values in a situation of more or less complete political apathy, where people are haunted nevertheless by memories of fascism and prospects of soviet penetration."<sup>49</sup>

Natural law's major ideological role has therefore been its existence as an alternative to the fears generated by positivism, and as a mask to the atrocities and inconsistencies attendant to constant crises in bourgeois legalism. For these reasons, and also because natural law seemingly appeals to a common higher good, it has found a place in western legal thought. Natural law is, essentially, a doctrine that has historically found disposition in times of crisis.

We posit, however, that in an age where capitalism and individualism are the watchwords, natural law postulates cannot mask, as Fuller has attempted to do, capitalist and imperialist attractions to positivism. Neither is its exploitative and class nature masked by appeal to christian moral values as Devlin has

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commitments and religious convictions will not fall within a morality of interests." Legal obligation  
op cit pp 132-3

(49) J.N. Shkler, Legalism (Harvard University Press, 1964)  
pp 88

tried to do, or by Hart's libertarian stance. Law and morals will only be effectively married if the merger is along the lines we have posited in our Introduction.<sup>50</sup>

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(50) Supra

## CHAPTER 2

### 0:0 - SYNOPSIS

This chapter will briefly examine the composition of Kenyan society in terms of its class nature. This is necessary in order to expose the fallacy inherent in the utterances of eminent political philosophers and leaders to the effect that classes are not only irrelevant but are also non-existent in Kenya.<sup>1</sup> An appreciation of the class nature of Kenyan society is of vital importance in the study of law and morals: as we have argued, in colonial and neo-colonial Kenya, law and morals are concepts that are defined and determined by the ruling class.

The question of morals and society will then be considered. This will include a definition not only of what is considered

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- (1) The most eminent being Jomo Kenyatta, Suffering Without Bitterness (EAPH 1968) who, in arguing that the theory of class struggle has no relevance for the Kenyan situation, used the same arguments postulated in African Socialism and Its Application to Planning in Kenya op cit where it was posited that the conditions that gave rise to class divisions in Marx's Europe viz a concentration of economic power, treatment of private ownership as an absolute, unrestricted right, and the close relationship between economic power and political influence, do not exist in Kenya. Research reveals the fallacy of the view that there is no concentration of economic power in Kenya. - see Colin Leys, Underdevelopment in Kenya (Heinemann, 1975); Kaplinsky, Readings on the Multinational Corporation in Kenya (OUP 1978). On ownership of private property Section 75 of the Kenya Constitution is explicit. This provision, guaranteeing the sanctity of private

immoral in Kenyan society, but also who decides what is immoral and whose interests are essentially served by that decision.

We shall then engage in a discussion of how law, as we have defined it,<sup>2</sup> has played upon Kenyan class society in shaping the ideas of currently immoral acts. While we shall discuss particular immoral acts, no attempt will be made to discuss all immoralities. Indeed, such a task is uncalled for, since our aim here will be to show the philosophy and mentality behind some acts being declared immoral, and not others.

We shall conclude our discussions in this chapter by defining the place of the individual in this entire set-up. In

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property is more jealously guarded than are the other constitutional provisions guaranteeing other fundamental rights and freedoms. That a close relationship exists between economic power and political influence cannot seriously be disputed. Okoth-Ogendo in African Land Tenure Reform notes at pp 130: "The survival of constitutional guarantees relating to property where all other fundamental rights and freedoms effectively disappeared, all indicate the consolidation of a new kind of ethic in society. A clear preference for capitalism had emerged by the end of the first decade of independence. The front-runners in this development were quite clearly an urban based salariat, the Civil Service elite, local and national politicians and businessmen.... This link between control of political institutions and acquisition of property established a self-perpetuating system in which a stable property base is considered essential to success in politics and business enterprises."

in Judith Heyer, (Ed), Agricultural Development in Kenya (OUP 1976) Chapter 5.

(2) Introduction, Supra Section 1:1

doing this, we will briefly discuss certain notions such as reciprocity and obligation, which bourgeois theorists have resorted to in attempting to define the extent of the individual's role in society.

1:0 - KENYAN CLASS SOCIETY

No serious observer or student of Kenyan society can contend with any merit that class struggle is a phenomenon unknown to Kenyan society. A penetrating analysis of the formation and development of class struggle in Kenya is on record.<sup>3</sup> The definition of class posited there, though inelegant in construction, is comprehensive:

"A class can be generally conceived of/ā group /as of people in a community who belong to the same socio-economic level, high or low, according to the degree in which they possess the characteristic which constitutes the criteria of placement into such a position eg. income level, property or land-ownership. This means that, within a given community, a superior-inferior relationship is created or exists between groups in various classes which are differentiated according to the amount of land owned or controlled, or according to productive position occupied by each of these groups in the economic system of the society. (sic). In this respect, class is a form of stratification, or inequality by groups of people in a given society more related to economic distribution and control. Economic aspects of society do not exist in isolation and must keep 'rubbing shoulders' with social factors of any social system. (sic) Hence, class is primarily a socio-economic phenomenon."<sup>4</sup>

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(3) N.A.G. Wanjohi, Classes in Kenya (unpublished B.A. Dissertation, Dept. of Government, Nairobi University, 1973/74). See also Mutunga, Commercial Law & Development in Kenya: Who Will Bell the Cat? etc

(4) Ibid, pp 1.

In Marxist analysis, the emergence of classes is postulated as a result of disturbances in the natural order of production, where only tools were owned individually. Capitalists expropriated these tools, necessitating individuals to sell their labour power. Industrialization and alienation from the land caused the emergence of a bourgeois class who owned the means of production, and a proletariat class, selling its labour for meagre wages. Kenya's development from colonial to neo-colonial status provides an excellent practical example of this theoretical position at work. The specialised economics of this process has been elegantly traced by Marx.<sup>5</sup>

An understanding of the classes existing in Kenya presupposes the acceptance of the truism that Kenyans are an exploited people. Kenyans are at the mercy - and under the thumb - of the international bourgeoisie, whose dominance is assured by their capital. The International bourgeoisie since they also own the means of production can therefore be conceived of as the ruling class in Kenya. Oppression moves from them downwards.

There exists a disagreement amongst students of Kenyan Society as to whether the class directly below the international bourgeoisie is the national bourgeoisie (who play a localised exploitative role in the country) or the comprador bourgeoisie who although undoubtedly playing an exploitative role themselves, are also exploited. Whatever the view taken, the composition of this class is not in doubt: they comprise the minorities, ie. the Europeans, Asians and Arabs and also a segment of indigenous petty-capitalists. This class of people act as agents of the international bourgeoisie.

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(5) Marx, Capital op cit



We adopt here the point of view/by Mutunga in his paper, /taken  
Commercial Law and Development in Kenya. He makes a telling point  
in that paper: that these petty capitalists are oppressed as the workers  
and peasants are. They are exploited at the hands of the international  
capitalists. Their share of the surplus value, for instance, is  
reduced; their markets are dominated by the international bourgeoisie.  
To the extent that these petty-capitalists are oppressed by finance  
capital, they should be grouped together with the Kenyan workers  
and peasants, whose stand is invariably anti-imperialist. Salvation  
from oppression by international finance capital must therefore begin  
with these oppressed petty capitalists aligning themselves with the  
nationalistic, anti-capitalist and anti-imperialist aspirations of the  
Kenyan workers and peasants.

Imperialism, as Lenin has argued, is a corollary of capitalism.<sup>6</sup>  
At this stage/imperialism, the essential feature is the export of /of  
capital rather than commodities, to the colonies and neo-colonies;  
and international monopoly capitalists share the world amongst  
themselves.<sup>7</sup>

It is obvious that the Kenyan economy has been integrated into  
the international capitalist economic system. The Kenyan neo-colonial  
state mirrors the hopes and aspirations of the international bourgeoisie.  
The interests of the monopoly bourgeoisie are served by their agents  
in Kenya, viz the local bourgeoisie. Not only the Kenyan economic  
structure but also the entire superstructures serve and reflect the  
needs of the metropolitan bourgeoisie first, and only then those of  
the local bourgeoisie. The needs of the Kenyan proletariat - and  
the peasant - when and if they are reflected, are reflected subject  
to these conditions.

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(6) Lenin, The Highest Stage of Capitalism op cit

(7) Ibid

The law - and the morality that the law seeks to uphold - is a superstructure that serves the institutions and ideology of the bourgeoisie. All religious, political, legal and other superstructures are geared towards the service of the international capitalist system. The Kenyan class society reflects that relationship.

1:1 - MORALS AND SOCIETY

The issue of what is considered immoral in Kenyan society will be considered from the view points of both the pre-capitalist<sup>8</sup> and the capitalist era.

i) The Pre-Capitalist Era<sup>9</sup>

The pre-capitalist era in the development of Kenya is the era so romantically remarked upon by Kenyatta, Mbiti, Okot p'Bitek, et al. It is the era, in legal analysis, that customary law romantics<sup>10</sup> have, in present day Kenya, and in total disregard of history, urged as the most suitable system for Kenya. This view is unhistorical because the dawn of imperialism in Africa marked a step further into the development of capitalism; a development that Kenya, by opting for a capitalist economic system, has embraced. To urge for the maintenance of customary law is to urge for an anachronism.<sup>11</sup> Pre-capitalist

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(8) See Chapter 1, Section 1:3 Supra

(9) This is the era during which customary law was the type of law exclusively obtaining in Kenya.

(10) See eg. G. Kamau Kuria's analyses of family law in Kenya. eg. Christianity and Family Law in Kenya op cit

(11) See Kibwana, Analytical Positivism in Kenya op cit

superstructures were replaced by capitalist superstructures that would best serve the interests of monopoly capital. Our consideration of the pre-capitalist superstructures is purely for comparative purposes.

In the pre-capitalist era, what was immoral was what had been established by taboos, observances and customs, whose origin was in the zamani where the forefathers resided.<sup>12</sup> Breach of these moral codes was punished, it was believed, by the corporate community of the living and the departed.

It is our view, however, that even pre-capitalist society was class society. Both in societies which had kings and in those which did not, there existed social and economic stratification along the lines our definition has taken.<sup>13</sup> Customary law, which was the existing legal superstructure, served the interests of these ruling classes.

ii) The Capitalist Era

With the advent of colonialism, as we have argued, there came the beginning of an erosion of the ideas of morals and law that had been revered and upheld in pre-capitalist society. These new ideas were basically alien and were geared towards the service of the new economic structure. It is our view that the legal and the moral (and other) superstructures are in a dynamic relationship whether law and morals must be separated as positivists have argued, or whether, as natural lawyers have argued, law and morals should not be dichotomized.<sup>14</sup>

The Capitalist mode of production invariably gives rise to class struggle, which is the dominant feature of capitalist society.

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(12) Mbiti, op cit pp 205; See also Chapter I (Supra) Section 1:3

(13) Supra Section 1:0

(14) See Chapter 1 Supra Section 1:4

The class struggle takes place on all fronts - both economic and superstructural. It is axiomatic that the dominant class in the struggle decides not only what the law is going to be,<sup>15</sup> but also the morals that will be upheld. Our task in the following sections will be to examine what the ruling class has considered to be immoral, and how the law has been used to consolidate that decision through the enforcement of that morality.

## 1:2 - LAW AND MORALS<sup>16</sup>

It is our contention that the law in Kenya does enforce morality up to Hart's minimum, and beyond it depending on whether the act declared immoral by its nature, threatens the existence of the ruling class.<sup>17</sup> We shall contend that, in considering the enforcement of morals, it is necessary to consider not just the black letter of the sanction, but also its effectiveness or non-effectiveness. What is immoral and the harshness of the sanction attached to that immorality will depend on the state of security of the ruling class.

All the offences against morality in Kenya are arrestable without warrant.<sup>18</sup> These offences, which also reflect the morality of the ten commandments,<sup>19</sup> were also offences against morality in pre-capitalist society. Other offences against morality have developed with the development of the capitalist system in Kenya.

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(15) See, Golunskii and Strogovich, Bourgeois Doctrines as to the Essence of Law op cit and also, Kibwana, Analytical Positivism in Kenya op cit

(16) See Chapter 1 (Supra) Section 1:4

(17) Hence, eg. the dead letter law against bigamy see Introduction, (Supra) Section 1:3

(18) Criminal Procedure Code, Cap 75, Laws of Kenya

(19) Exodus : 2

1:3 - PARTICULAR OFFENCES AGAINST MORALITY

While drunkenness is an offence unknown to the Penal Code of Kenya, political and legal measures have been taken to curb excessive drinking. Under the criminal law, drunkards are normally fined at token sum.<sup>20</sup> Most of such people are very lowly paid workers, whose contribution to the profits of the employer is negligible, or unemployed persons who contribute no labour to the capitalist. On a political level, measures taken to curb drinking have been through the closure of beer halls. Most of these beerhalls were in rural areas. Their closure was agitated for by reference to an "ought" and not to an "is". The argument advanced was that people ought not to drink excessively if they expect to make progress. We suggest that the rationale behind this appeal to an "ought" is neither altruistic, nor concerned with a sober nation. For, if workers aspire towards that "ought" they will be soberer and stronger, and the capitalist will gain more efficient man-hours of work.

That the capitalist stands to gain from sober employees is not only self-evident, but has been taken cognizance of by legislation. Thus Section 4(3) of the Employment Act<sup>21</sup> prohibits the payment of wages to an employee in any place where intoxicating liquor is sold, or is readily available for supply, except for employees employed therein. Contravention of this section is an offence. Neither may an employer, where the contract of employment provides for payment in kind, make such payments either in part or in whole, of any intoxicating spirit or noxious drug.<sup>22</sup> Also, if an employee becomes intoxicated during working hours and by so doing renders himself

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- (20) Attendance of any Third Class Magistrates Courts on Monday mornings confirms this. The offence is normally dubbed "drunk and disorderly." Fines rarely exceed twenty Kenya shillings. Chang'aa brewers are, as a rule, fined more, maybe because their brewing is feared to affect the market of beer brewers.
- (21) Cap 226, Laws of Kenya
- (22) Employment Act, Section 5(1) (b)

unwilling or incapable of properly performing his work, this may amount to gross misconduct, and justify the summary dismissal of such employee. <sup>23</sup>

The rationale for these provisions seems clear: that the law will encroach onto areas of private morality if the effect of non-encroachment will be to threaten the existence of the capitalist. And no capitalist society will stand aside and watch the very fabric of its existence pulled asunder.

Murder has, from antiquity, been considered as the supreme immorality. In Kenya, once the offence is proved, it is punishable by the death sentence. <sup>24</sup> Considered simpliciter, murder is one of the few immoralities whose enforcement has transcended the boundaries of historical development. <sup>25</sup> In 1973, the legislature in Kenya equated murder with robbery <sup>26</sup> in terms of enforcement. Section 296(2) of the Penal Code <sup>27</sup> lays down the death sentence for the offence of robbery.

While we do subscribe to the conception of simple theft and robbery as acts of public morality, we contend that the extremely harsh sentences meted out for these offences are generated and inspired by more than purely a concern for ridding society of immorality. These

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(23) Employment Act, Section 17(c)

(24) Penal Code, Cap 63, Law of Kenya Sections 202-204

(25) Although now more countries are scrapping the death sentence off their statute books. Beyond the life that is "saved" however, the mentality is the same, since the offence is not considered to be any less serious.

(26) This offence is popularly styled "Robbery with violence" - but this is based on ignorance of the theory of criminal jurisprudence, since the term "robbery" itself connotes the existence of violence.

(27) As amended by Act No.1 of 1973

treatment except abortion. There is little doubt that, following Roe Vs Wade, the Supreme Court will uphold that decision.

Thus, in the metropolises, the trend has been towards removing abortion from the realm of public morality; Kenya is set to faithfully reflect that trend. While we do not welcome such a move,<sup>32</sup> we note that the liberalisation of abortion laws is an example of the religious superstructure being influenced and affected by the socio-political superstructures.<sup>33</sup> The balance between the two superstructures is, however not upset, because other acts such as incest and bestiality, while rarely prosecuted,<sup>34</sup> are still held to be highly immoral, and within the area of public morality. The general trend with regard to abortion, is towards individualism, and this explains the unlodging of abortion from public morality and embedding it in the area of private morality.

The libertarian view with regard to the enforcement of morals has gained a firm place in bourgeois legal discourse. This view has been succinctly restated by Sartorius:

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the House of Commons on February 8, 1980. The trend in Britain is towards not making abortion laws harsher.

- (31) In Roe Vs. Wade (1973) the U.S. Supreme Court held that women have an unqualified right to abortion during the first 3 months of pregnancy, and a qualified right during the next three months.
- (32) We consider abortion not only to be highly immoral, but also to be firmly and inextricably within the area of public morality.
- (33) See Introduction, Supra, Section 1:3
- (34) Although bestiality is prosecuted more often in Kenya. Sentences are harsh, presumably because animals are part of private property and are thus interfered with: this would be in keeping with the very hard penal sanctions against stock theft.

"Respect for the distress that may be caused to those who hold deep moral convictions that one is in disagreement with can be a rationalisation for opposing change, but seldom a good reason. It can, though, and should be, a reason for dealing with those with whom one differs in certain ways. Any moral view which ignored this under the banner of the slogan that 'error has no rights' would surely be objectionable. Utilitarianism.... seems... to give the proper moral perspective on this score. Indeed.....it provided an adequate ground for dealing with the enforcement of morality."<sup>35</sup>

This view found warm and salutary support in the 1954 Wolfenden Committee Report which recommended that homosexuality in private between consenting adults should no longer be a crime. The recommendation also passed that while prostitution per se should not be made a crime, legislation should be passed to drive it off the streets, since public soliciting constituted a nuisance to ordinary citizens. The Committee argued in the libertarian vein: that there exists an area of private morality which is not the law's concern. Provisions against prostitution in Kenya are reflective of the Wolfenden Committee's thinking. In Kenya, prostitution is catered for in the penal code. Any male person who knowingly lives wholly or in part on the earnings of prostitution<sup>36</sup> or persistently solicits or importunes for immoral purposes<sup>37</sup> is guilty of a misdemeanour. He is also guilty if he lives with or is

"habitually in the company of a prostitute or is proved to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting or compelling her prostitution with any other person."<sup>38</sup>

A woman who knowingly lives wholly or in part on the earnings of prostitution, or aids or abets the prostitution of others by exercising control, direction, or influence of their movements is guilty of a misdemeanour.<sup>39</sup> A person who manages or assists in the management of a brothel, is a tenant, lessee, occupier or person in charge of such premises, or, being the lessor or

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(35) R.E. Sartorius, The Enforcement of Morality (Yale Law Journal, Vol.81)

(36) Penal Code, Section 153(1) (a)

(37) Ibid, Section 153(1) (b)

(38) Ibid Section 153(2)

(39) Section 154 Ibid



landlord of any premises, or being the agent of such lessor or landlord lets the same or any part thereof with the knowledge that such premises or part thereof are, or is to be used as a brothel, or is wilfully party to such continued use, is also guilty of a misdemeanour.<sup>40</sup>

Our interpretation of these provisions on prostitution is that in Kenya, the demarcation between licit and illicit sex is not sharp enough. By these provisions, illicit and licit sex are tenuously distinguished by technicalities. Sex for sale, if engaged in only sporadically seems to be legal. Soliciting has to be persistent to amount to an offence, and even then, it is only a misdemeanour.

We suggest that the following conclusions can be drawn about prostitution in Kenya: firstly, that the law is prepared to turn a blind eye on prostitution as long as it is intermittent, and on a purely cost-benefit level. Secondly, the law recognises the dialectic of the capitalist's necessity for survival in any conditions, and has therefore catered for the subsidising of low wages by implicitly allowing membership into the "oldest profession."<sup>41</sup> Thirdly, as long as the inherent decadent effects of capitalism are not glaringly open, the law will be prepared to let prostitution in effect become a matter of private morality. But where the decadence becomes so open as to threaten the ruling classes' professed moral values; where decadence is so profuse as to make it impossible for

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(40) Ibid Section 156

(41) In the Encyclopaedia Britannica it is observed that: "In Babylon, in Cyprus, among the Phoenicians and in many parts of Western Asia, it is recorded that women prostituted themselves as a religious duty at the sanctuary of a goddess, whose name varied with the locality.....The Babylonian custom, as recorded by Herodotus, required every woman, rich or poor, to sit in the temple of Ishtar, and have intercourse with a stranger, who specified his choice by throwing a silver coin of no matter how small value, into her lap. The woman then had to accept the coin and have intercourse with the stranger. Unfavoured women under

the law to justify or turn a blind eye on prostitution the law will unleash its residual force, in the style of Shaw Vs. D.P.P. to restore the balance. Such residual force in Kenya has included the bringing into force the operation of the Vagrancy Act.<sup>42</sup>

The Kenyan criminal law implicitly countenances homosexuality. While Section 165 of the Penal Code makes homosexuality either in private or in public a felony punishable by five years imprisonment, with or without corporal punishment, the stringency of the medical evidence required militates against policing this section and obtaining convictions under it. In four weeks at the Senior Resident and Resident Magistrates courts in Nairobi, and on perusing back records of court proceedings for the period of a month, only one charge of homosexuality was revealed, and a conviction wasn't obtained. In that case, although the first accused's semen was found on the anus of the second accused, the magistrate argued, in his judgement, that to obtain a conviction the forensic evidence had to be not only of a very high standard, but also conclusive and flawless.<sup>43</sup> The suggestion here seems to be that the law will leave homosexuals well alone as long as their acts do not explicitly

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this system might wait a long time, even years, before they had performed their service. Once the rite had been observed, the woman was absolved from her obligations to the goddess....."

St. Thomas Aquinas argues in his Summa Theologicae that prostitution is a necessary evil: "Prostitution in the towns is like the cesspool in the palace. Do away with the cesspool, and the palace will become an unclean and stinking place"

- (42) Cap 58, Laws of Kenya. Normally, people rounded up and charged under this Act are fined only small sums or detained for a while. With regard to prostitution, this Act is a weapon of last resort in the ruling class's arsenal of laws for self protection.
- (43) This is to impose a very difficult task on doctors giving evidence for the prosecution. But the law will change its views to suit itself: the science of medico-legal jurisprudence is after all a tool in the hands of the court. In this case medical evidence was that homosexuals have funnel shaped anuses, although

threaten bourgeois existence. Section 165 seems to exist in the Penal Code as a silent weapon, to be used in the style of Shaw Vs. D.P.P. should bourgeois existence be threatened by it, and when the immorality threatens to openly reveal the permissiveness and decadence of capitalist society.

The much discussed case of Shaw Vs. D.P.P.<sup>44</sup> seems to hit at the very heart of the reasoning of the Wolfenden Committee Report. In Shaw Vs. D.P.P., the House of Lords held that the offence of conspiring to corrupt/morals was existent under English common /publ law. The major issue in that case, with regard to law and morals, was whether it is the Court's duty to curb public immorality where the legislature has failed to do so.

In Shaw Vs. D.P.P. it was argued that it was the courts duty to step in where the legislature failed to tread, and in the interests of public welfare declare certain acts immoral. In coming to this decision, their Lordships were inspired by Lord Mansfield's dictum of 1774, that

"whatever is contra bonos mores et decorum, the principles of our laws prohibit, and the King's Court as the general censor and guardian of the public morals is bound to restrain and punish."<sup>45</sup>

Shaw Vs. D.P.P. caught a complacent public by surprise. The offence of corrupting public morals did exist under the common law, but had not often been invoked. The same kind of surprise and shock, would, we suggest, greet a Kenyan courts enforcement of the penal sanctions against bigamy.

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this defect also occurs in normal people. Despite the fact that in this case the accused had this defect and semen on his anus, the Magistrate was reluctant to convict. We do not doubt, however that under conditions that would threaten bourgeois existence, a conviction would easily have ensued.

(44) (1961) 2 All E.R. 446; (1962) A.C. 223 (H.L.)

(45) Jones Vs Randall (1774) Lofft. p 385 quoted in Hart, Law, Liberty and Morality op cit pp 7

But the seeming conflict between the Wolfenden Committee and the ruling of Shaw Vs. D.P.P. is merely a legal squabble between two of a kind. We have argued that the law enforces morality in pursuit of class interests. The legal, religious and social superstructures are, as we have also argued, in dialectic relationship. The relationship between two of a kind. We have argued that the law enforces morality in pursuit of class interests. The legal, religious and social superstructures are, as we have also argued, in dialectic relationship. The relationship between the superstructures is one of give and take, maintaining a balance between them. Thus, in Shaw Vs. D.P.P., the superstructures were balanced between them. Thus in Shaw Vs D.P.P., the superstructures were balanced against each other, and a conflict between them averted by bringing into play the legal superstructure, in the service of the ruling class.

We contend, however, that any enforcement of morality based on the needs of the ruling class; any law that bolsters up the articulation of moral class interests, is both paternalistic and oppressive. Paternalism will exist wherever class society exists, because, paternalism being a characteristic of the bourgeois, moves from a minority to the majority and not vice versa. Arguments advanced by bourgeois theorists such as Hart, Mill et al only serve to mask this fact.

1:4 LAW, MORALS AND THE INDIVIDUAL

The individual in Kenya is guaranteed all the fundamental rights and freedom of the individual, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, subject to the respect for the rights and freedoms of others and for the public interest.<sup>46</sup> These rights include, inter alia, freedom of conscience, expression, assembly and association,<sup>47</sup> and protection for the privacy of his home.<sup>48</sup> Kenya, being a signatory of the U.N. Charter on Human Rights has undertaken responsibility for ensuring these fundamental rights in Kenya.<sup>49</sup> But these constitutional freedoms operate only provided that they do not infringe on public interests.<sup>50</sup>

The Constitution is the supreme source of law in Kenya and any other law that is inconsistent with it is void to the extent of that inconsistency.<sup>51</sup> The individual is, in his relations with other members of society, constrained by the law.<sup>52</sup> While the individual may overstep unlegislated moral laws with no attaching legal sanction, he may not act against those moral precepts which the law protects and enforces.

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(46) Constitution of Kenya Chapter 5 Section 78

(47) Ibid Section 78 (b)

(48) Ibid Section 78 (c)

(49) But see, Okoth-Ogendo, National Implementation of International Responsibility: Some Thoughts on Human Rights in Africa (1974) 10 EALJ No.1

(50) All the provisos in Chapter 5 of the Constitution are geared towards some protection of Public interest.

(51) Constitution, Section 3

(52) There need not be an agreement to be constrained. Eg. the criminal law & law of torts operate regardless of the wishes of the individual.

The relationship between law, morals and the individual is a complex one. The individual is at the centre of a very unpredictable balance of superstructural forces. He is catered for by the Constitution, which at the same time protects the economic interests of the emergent elite, who took power through economic superiority.<sup>53</sup> But the Constitution is itself a class document, and although it contains provisions for the protection of the "individual", the issue arises as to what individual is in question.

We suggest that the "individual" guaranteed these rights is the individual who is in the economically stronger class in society. And protection to any other individual who does not belong to such class, is incidental. In the area of morals, following the general mood of the Constitution, the morality enforced and protected is ruling class morality. Peasant and proletariat morality is not, except incidentally, catered for.

Bourgeois legal theorists and philosophers, prompted by abject individualism, have sought to cloud the issue. They have argued that in legal enforcement, there must, of necessity, exist a principle of reciprocity. By such a principle, no person is forced to act to his own detriment and against his own interest as against those of others.<sup>54</sup> But in saying this, these theorists fail to acknowledge the fact that reciprocity connotes a large degree of equality. It is suggested here that bourgeois reciprocity is a reciprocity whose operation is fettered by class limits. It is further posited that in the area of law and morals, the principle of reciprocity is merely one of the lego-philosophical smokescreens in the hands of the ruling class.

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(53) The Constitution when it was drafted was meant to - and did - protect the property of the colonial remnants in Kenya.

(54) See Smith, Legal Obligation op cit Chapter 8

Thus, in the relationship we have mapped out, the role of the individual in deciding what is moral and what is not, as well as what morality is to be enforced, is non-existent. The ruling class publicists and apologists link the individual and society by an abstract concept of obligation. Abstract because, defining obligation is the prerogative of the class in power; and such definition cannot be consistent because the interests being served by the ruling class are subject to the vicissitudes of the class struggle. Contrary to Smith's postulations,<sup>55</sup> the concept of obligation is neither enriched by the individual nor reinforced by his existence.

We posit that obligations operate to compel the individual to observe and be bound by certain class ideas of morality; and obligation as a concept is beyond the individual's power to shape or to control. The individual must, therefore, aspire towards the moral obligations imposed and defined by the ruling class. He fails to do this on pain of legal sanctions against him.

It is important to note the role that the individual has been made to play, by bourgeois legal scholars - as a measure of moral standards. To Devlin, the test of morality is the intolerance, disgust and indignation felt by the man on the Clapham bus. Hart<sup>56</sup> has offered a pungent criticism of this test; he argues that once the man on the Clapham bus ceases to be indignant, intolerant and disgusted, the law is left without the full moral backing that it needs. In rejecting Devlin's test, Hart suggests that we

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(55) Ibid.

(56) Hart, Immorality and Treason in Dworkin,  
The Philosophy of Law pp 83 - 88

"Summon all the resources of our reason, sympathetic understanding as well as critical intelligence, and insist that before general moral feeling is turned into criminal law it is submitted to scrutiny of a different kind."<sup>57</sup>

But it is our view that Hart's humane sounding rhetoric goes no further than Devlins does. In the final analysis, the difference between the two points of view is merely academic. For, when Devlin's common man feels intolerant, indignant and disgusted, the level of his feelings will be subject to a tribunal's scrutiny. The same tribunal will probably be the source of Harts sympathetic understanding and critical intelligence. They are tribunal's comprising men whose class interests are at stake. As Shaw Vs. D.P.P.<sup>58</sup> has so eloquently illustrated, when class interests are at stake, the common man ceases to figure in the equation. His interests and his morality cease to be of any moment.

We are also constrained to strongly reject any attempts to link the role of the individual to ideas about democracy that are now in currency. In bourgeois terms "democracy" is a term understood in the Lincolnian context of government of the people, by the people, and for the people. This idea of democracy is strongly rooted to the fundamental freedoms guaranteed in most constitutions. The pervasive presupposition in the existence of such guarantees is that freedoms will be enforced equally for every member of society: a notion we have rejected as an attempt to deny the existent and pervasive class content in the Constitution. Our stand is one that cannot

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(57) Hart, Immorality and Treason p 87

(58) (1961) 2 All E.R. 446



be open to discussion: if the morality of the worker and the peasant in Kenya is to be enforced by the law, then that law must, in no uncertain terms, reflect peasant and worker morality, both in theory and in practice. Current attempts at romanticising worker and peasant role in the formation and enforcement of morals are an exercise in futility. It will not entirely be the fault of the peasants and proletariat if the ruling class in Kenya continues to fish in troubled waters - and catches nothing.

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1:0 - SUMMARY

We have concerned ourselves in this discussion with, firstly, deriving an analytical framework on which socio-scientific studies in Kenya should be based. This derivation has been considered necessary to avoid the erroneous conclusions on Kenyan society that attend the reliance on bourgeois frameworks that gained currency in Kenya during and after colonialism. We have argued that the use of such analytical frameworks in present day Kenya is an outgrowth of colonial mentality. The salient point that has emerged from our discussion is that the borrowed theoretical frameworks have been used as an intellectual tool for perpetrating imperialism: our rejection of these bourgeois frameworks stems from an abhorrence for all imperialist phenomena, of which, undoubtedly, these frameworks are a part.

Our hypothesis was chosen with a view to showing how an attempt has been made to impose on Kenyan society British ideas on law, morals and justice. We have taken as our starting point the truism that the imposition of a capitalist economic base in Kenya meant also the dialectic corollary of the imposition of capitalist superstructures. We have posed the problem of the existence of dead letter laws such as those against bigamy, which have resulted from a conflict between colonial and pre-capitalist Kenyan superstructures.

The historical introduction, which we have argued is a necessary background to any study of Kenyan Society, has denystified the real reasons for British advent in Kenya, viz imperialism. We have contended that the economic need, caused by a capitalist crisis in Europe, necessitated the division of Africa by European powers, in an attempt to deal with these economic chaos; and that, this phase of the beginning of colonialism marked the transition from pre-monopoly to monopoly

Capitalism. The missionary presence, far from being the gesture of altruism that bourgeois scholars have argued it to be, was, in our view, an offshoot of the social economic and political need to reduce the surplus of human debris from the metropolises, and thus avoid widespread discontent caused by the economic crisis. In Kenya - as elsewhere - the missionaries played the role of preaching what was perceived to be the virtues of European social, religious and moral superstructures.

The thrust of the historical introduction was towards a discussion of the Repugnancy Clause, on which the juridical rationale for the imposition of British class ideas on law, morals and justice in Kenya is pegged. Colonial judges used the Repugnancy Clause to impose British class ideas of justice and morality, and also to outlaw the effective application of customary law in Kenyan Courts. We have observed that judges in neo-colonial Kenya have not, by and large, shield away from colonial interpretations of justice and morality. These judges have evidently not applied the practical wisdom which Lord Denning in Nyali Ltd. Vs. Attorney General saw it as their task to apply.

Pre-capitalist superstructural conceptions of law, culture, religion and morals have been outlined. By doing this we have been able to clearly view the pre-capitalist and the capitalist superstructural conflict that attended this dialectic transition in Kenya. We have observed that the transition of the superstructural features has lagged behind the economic transition. This has resulted in a paradox of legal enforcement of morals which, in our view, is best evidenced by the criminal offence of bigamy in Kenya.

A summary of the western debate on law and morals since the time of John Stuart Mill has been given. In showing the pervasive positivist thrust of this debate, we have outlined how this trend has been in keeping with the development of legal philosophy in the 19th and 20th Centuries. We have argued that although elements

of natural law theories have been injected into the debate on law and morals from time to time, this has not removed the debate from the firm positivist grip that has characterized it. It has been, rather, an attempt to steer the debate away from the stalemate caused by crises in bourgeois legalism. Kenyan scholars, dependent as they have been on bourgeois intellectual traditions, have been slow to question the professed merits of a positivist theoretical framework. Consequently, positivist mysticism has firmly embedded itself in the psyche of legal scholars, not least in the area of law and morals. This discussion has attempted to dilute some of this mysticism.

The class nature of Kenyan society has facilitated the firm rooting of positivist doctrine in Kenyan legal thinking. Positivism is itself essentially a class doctrine. The ruling classes have used it to give expression to their class interests, and to protect them. We have argued that although attempts have been made by the ruling class in Kenya to deny the existence of class struggle, such attempts have not masked the reality of classes in Kenya. The emergence of classes has been traced to the pertaining economic system.

We have argued that the ruling class in Kenya reflects the values of the ruling classes in the metropolises. This reflection has been pervasive in the legal and the moral superstructures. This is explained by the fact that the existence of the ruling classes is closely allied to the enforcement of the moral values that they uphold. A realisation of the class nature of Kenyan society has been seen as being especially important in understanding the rationale for upholding certain morals, and enforcing them.

Particular acts defined and punished as immoral in Kenya have been examined. These include drunkenness, whose enforcement, we have argued, facilitates efficient labour for the capitalist and hence his continued production of surpluses; smuggling and corruption, whose enforcement is aimed at giving

credibility to the ruling elite; prostitution and homosexuality, whose definition as being immoral plays a similar role with the offence of corrupting public morals as defined in Shaw Vs D.P.P., and which, we have suggested, will be enforced with laxity until they constitute a real threat to the existence of the ruling class; abortion, which, while declared an act of public morality in Kenya and enforced as such by the law, may, following the example of the trend in the metropolises, be declared an act of private morality; and murder, which we have argued has found an equation with robbery, both being punishable by death.

The centre-piece of any discussion of law and morals is the individual. In most cases, it is the individual's rights which are pitted against those of society when an act is declared immoral, and made legally enforceable. We have argued that the constitutional guarantees of fundamental rights in Kenya guarantees these freedom more effectively to the individual who belongs to the ruling class. We have further posited that any theorising on the concepts of reciprocity and obligation and democracy serve only to mask the disadvantage to which the peasant or proletariat individual is put when certain acts are declared immoral. We have noted that using the notion of the "common man" as a measure of morality is fallacious, since the final analysis, the "common man's" feelings will be subject to the scrutiny of a tribunal composed of the ruling classes, whose morality the law seeks to enforce, and who cannot be expected to depart from their established class positions.

#### 1:1 - CONCLUSIONS

The following conclusions can be drawn from the foregoing discussion: firstly, in any class society, the idea of morals, and the morals that will be enforced will be defined by reference to the interests of the ruling class. This phenomenon is a necessary aspect of the development and perpetration of the class struggle.

Secondly, the ruling classes, even while declaring certain acts to be immoral, will be lax in enforcing them as long as such acts do not threaten the existence of the ruling class.

Thirdly, what is eventually defined as immoral in Kenya - and in other neo-colonial states - will invariably have some relationship with the continued existence of imperialism and neo-colonialism. The trend in defining immorality will follow the development in the metropolises. The values that are ultimately upheld will be the same values upheld by the metropolitan bourgeoisie.

Fourthly, the existence of a public and private dichotomy in the understanding of morality has facilitated an easy avenue for the shift from one to the other to meet any crises in society which militate against ruling class interests. A recent example of the operation of this shift was the banning of Western music from Radio Iran. The Ayatollah Khomeini, speaking ex cathedra damned western music as "no different from opium" and banned it from Iran radio. He declared it decadent and corruptive of public morals.<sup>1</sup> Thus in Iran enjoying Western music was shifted from an act of private morality to one of public morality.

It is our view, finally, that in any class society, the interests of the majority of the people cannot be well-served. The current mystification of the class nature of the definition of morality and its enforcement helps in serving neither the interests of the majority, nor of democracy. An ideologically honest proposition would, we suggest, be to enforce the morality of the Kenyan peasants and proletariat. We realise, however, that in present day Kenya, imperialist interests render this proposition untenable - just yet anyway.

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(1) See Newsweek, August 6, 1979

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