

LAW: AN INSTRUMENT IN A SOCIO-ECONOMIC
SETTING, THE KENYA CASE

A Dissertation Submitted in Partial
Fulfilment for the LL.B. Degree,
University of Nairobi.

by

UNIVERSITY OF NAIROBI
LIBRARY

NZUKI MWINZI NZUKI

JULY, 1982

NAIROBI.

(i)

ACKNOWLEDGEMENTS

Special thanks go to Dr. O. Oki Ooko-Ombaka; my supervisor for his guidance; incisive and illuminating comments given during the writing of this dissertation. And all those comrades from whom I drew much - needed inspiration in the said task.

Thanks also go to Rodah Kalekye Mulandi for her efforts to reduce my "freehand" into this neat work.

ABBREVIATIONS

1. Am J. Comp L. American Journal of Comparative Law.
2. Cap. Chapter of the Laws of Kenya.
3. E.A.L. J. East African Law Journal.
4. E.A.C.A. East African Court of Appeal Reports.
5. KANU Kenya African National Union.
6. M.P. Member of Parliament.
7. N.L.J. Nigeria Law Journal.
8. S.L.J. Sudan Law Journal.
9. U.C.L.J. University of California Law Journal.
10. U.L.F. Uganda Law Focus.
11. Wisc. L. R. Wisconsin Law Review.

TABLE OF CONTENTS

	PAGE
Acknowledgements	(i)
Abbreviations	(ii)
INTRODUCTION	1
Definitions	1
Theoretical Framework	4
CHAPTER ONE: THE HISTORICAL CONNECTION ..	5
CHAPTER TWO:	23
Independence and After	23
The Political Economy of the Law of Vagrancy	35
CHAPTER THREE:	42
On Lawyers. The Law and the People.....	42
Law and the People - Ignorance of the Law is no Defence	51
CHAPTER FOUR:	65
CONCLUSIONS AND RECOMMENDATIONS.....	65
FOOTNOTES.....	73
SELECTED BIBLIOGRAPHY.....	79
TABLE OF STATUTES	82

INTRODUCTION

"Everyone talks about law and development but nobody does much about it."

- Robert Seidman.

This paper examines the role that law and institutions allied to it have played in the socio-economic development of Kenya. The approach of the paper is society based. It adopts a historical and materialistic approach to the issues raised. The approach lies midway between an idiographical and nomothetical approach.

The former approach concerns itself with biting off small chunks of the gamut of laws governing various economic institutions, investigates them intensively and then attempts an evaluation of their efficacy and by implication their contribution to socio-economic development.

The latter method, seeks to generalize legal hypotheses and correlations between variables that enter into the study of law and society. It bases itself on a number of concrete case studies. It seeks also to explore general connections between law, society and development with its domain being legal and political philosophy.

DEFINITIONS

Definitions are a common aspect of any piece of scholarly work. We on our part do not intend to leave out this important aspect but before we define some of the concepts to be tackled in this paper, a word of caution is

necessary. This note of caution is necessary where one is called upon to define concepts which are themselves not precise. There is a danger of artificiality in such cases. To quote Justice Wendell Holmes:

"As long as the matter to be considered is debated in artificial terms, there is a danger of being led by a technical definition to apply a certain name; and then to deduce consequences which have no relation to the grounds on which the name was applied."¹

"Law" and "society" are two very imprecise terms hence there is a danger of defining these terms and end up not explaining them. Moreover, the way in which one defines a certain concept will reflect one's general attitude towards the subject-matter of such concept and not merely as a starting point which moulds everything that follows. This is especially discernible where "law" is defined. The term "law" has been defined differently by every jurist who has undertaken the task.

We on our part would not set ourselves the goal of getting into jurisprudential gymnastics in an effort to define what law is. This is because any particular definition of law will ultimately be a manifestation of a certain theory as well as its cause. However, it will suffice for the purpose of this dissertation to take law as meaning legislation. That is the laws that are passed by a body having the capacity to do so. Such a body may be a council, a parliament or National Assembly.

THEORETICAL FRAMEWORK

In this paper, a materialistic conception of history is utilised. This conception holds that there is a dialectical relationship between the socio-economic structure and the legal superstructure that arises out of it. The basis of analysis is that the mode of production prevailing in Kenya during and after colonial rule has to a large extent determined the content of the legal superstructure and that the interaction between the two has resulted in a discernible socio-economic structure.

It is also argued that the capitalist mode of production has maintained the economically and politically dominant classes at the top. These classes oppress and exploit the masses. It is this dominant class that runs the economic structure and hence formulates what legal, political, cultural and social institutions are necessary for the long lease of life and maintenance of the capitalist mode of production.

This dissertation is four-pronged. Chapter one deals with the historical connection between colonialism and modern-day Kenya. It analyses the means and ways in which law was used by the colonialists.

Chapter two picks up on the eve of independence and analyzes the role played by law in the continuation of the colonial economy and the creation of certain socio-economic relations that are evident in the Kenya of today.

In this regard therefore, and corollary to the above definition, we will take such legislation as a totality of all the instruments by which goals are adopted, implemented and reviewed. It will be noted here that goals once adopted by legislation, are implemented by administrative and other agencies given power by the legislating body to do so. It should be noted further that in the context of this paper, the said Law-as-legislation is taken as being a way of attempting to solve the basic problems of human existence. And to do so, the argument is put forward that law becomes an instrument in a socio-economic setting. Law thus becomes a tool which can be used for the good of society or misused for the interests of a minority dominant class.

"Society" is taken here to mean the peoples of Kenya, whatever their race, creed or colour. The development of the peoples of Kenya analysed in this paper, is viewed as the end result of all the attempts that must be made towards betterment of society towards higher standards of life, polity and material contentment. In Kenyan terms therefore, development must mean the emancipation of the Kenya peoples from inter alia, poverty, disease, inequality and ignorance, so as to ensure rapid social, political and economic development.

The issue raised for determination is whether the legal system has played a positive role in achieving the nationalistic and developmental aspirations that were the birth-pangs of the independence struggle. The chapter is underlaid by the examination of the law of vagrancy.

Chapter three is on lawyers, the law and the people. It is a triumviratic analysis of the role played by lawyers in Kenya's socio-economic setting. The lawyer is arraigned against institutional law and the people. This chapter is under-scored by an examination of the maxim; Ignorance of the law is no defence /IGNORANTIA IURIS NON EXCUSAT7.

Chapter four contains the conclusions and recommendations.

All through this paper, we reflect the words of that great Kenyan patriot, Josiah Mwangi Kariuki when he warned that:-

"It takes more than a National flag
however appropriate;
A National Anthem;
however stirring;
A National Flower;
however beautiful;
A National Court of Arms;
however distinctive;
To make a NATION."

CHAPTER ONE

THE HISTORICAL CONNECTION

"The most reliable thing in a question of social science, and one that it is most necessary in order really to acquire the habit of approaching this question correctly and not allowing oneself to get lost in the mass of detail or in the immense variety of conflicting opinion - the most important thing if one is to approach this question scientifically is not to forget the underlying historical connection, to examine every question from the standpoint of how the given phenomena arose in history and what were the principal stages in its development; and, from the standpoint of its development, to examine what it has become today." - LENIN.

It is pertinent in this paper that before discussing law and development, it is necessary to give a historical account of the reception of law and its operation in Kenya. The story starts way back in the period characterised by a flurry of activity among European nations on paper as well as on the soil of the African continent in an attempt to divide Africa amongst themselves. It is a period historians have described as the "Scramble for Africa". The scramble for Africa drove the said European nations to a round-table conference in Berlin in 1885. The gist of the conference was to piece-up Africa among the contending powers without resort to war. So the division of Africa was to be 'peaceful' on paper and in the drawing rooms where diplomacy reigned supreme but violent in the field. While the European leaders wrestled in the conference rooms in Europe, their paid-up agents

trudged all over Africa laying claims to every bit of land they could muster. These they called "spheres of influence" for their respective nation. In the case of East Africa, Karl Peters laid claims for Germany to what is today Tanzania, while British agents laid claim to what is at present, Kenya and Uganda. While doing this, they were always at each other's throats.

Once the furor over the creation of spheres of influence in East Africa by Britain and Germany, had died down, there remained the question of control over these territories. Both powers did not want direct control over these distant areas but it was certain that one way or another, and once in their hands, such territories could not be left to fall into "enemy hands."¹ In order to have their cake and eat it" as well, the British imperialists turned to the legal entity, Imperial British East Africa Company/IBEAC/ to do for them what was not politically, legally and economically possible directly.

The IBEAC was the birthchild of William Mackinnon in 1887. It had its objects the opening up of the "British areas of influence" to Commerce and Civilization. Like the earlier missionaries; and in fact the IBEAC was a "missionary" of its own kind, christianity; commerce and civilization were its tools of subjugating and exploiting the commercial resources of East Africa. The importance of this mission was recognized by the British

Crown when in 1888, the company was granted a royal charter of incorporation hence its name.

Since 1888, the IBEAC, was not just a commercial entity but also an administrative agency of the British government with rights of administration over the mainland excepting the Sultan of Zanzibar's dominions. In order to fully administer the hinterland effectively the IBEAC's agents concluded treaties with unsuspecting African chiefs, ceding their lands and peoples to the British Crown. To the African chiefs, their X-marks on the treaties meant little while to the British government, the treaties so signed were evidence of the company's authenticity in the field of administration. Thus between fiction and truth, present day Kenya's administration was put in the hands of a chartered company. The IBEAC was the British government agent of control in what was British East Africa. The chartered company was thus a mere device, a cloak to hide the various policies and purposes for which European powers scrambled for and partitioned Africa into the nation-states that we see today.

The question that may be posed at this juncture is: what reasons, political or social-economic did Britain have for acquiring all these colonies and in particular why did she acquire territory in East Africa at this particular time?

The answers are to be found in the economic interest of the British. Since the time of the industrial revolution and its resultant doctrine of "Laissez-faire," Britain had no industrial competition from any other powers in the world. The scene at this time in history was changing drastically. She was no longer alone in the industrial field.

Competition for her manufactured goods was becoming stiff. U.S.A., France and Germany were also becoming industrialized nations. These countries' goods were cheaper in the world market. Therefore for Britain to survive, she had to devise ways and means of warding off this imminent cut-throat competition. To stay at number one, Britain needed to be a lot tougher in the world market than her adversaries or if not the much lauded doctrine of Laissez-faire had to be abandoned for monopoly capitalism.

Hence the acquisition of colonies by the powers concerned had its roots from this economic motive. Britain thus looked unto colonies for raw materials for her industries. In turn, the colonies would provide a ready market for her manufactured goods. In these colonies, other nations were barred from trading or acquiring raw materials there. In other words, Britain would exercise monopoly over trade and commerce in these areas. In addition to this economic motive behind the acquisition of colonies in East Africa, Britain needed to 'export' her surplus population to these virgin lands so that they could exploit the natural

resources abounding there and hence be in a position to acquire more and more raw materials for her industries. At the end of all these reasons, she would be a great nation governing all manner of peoples and lands and where her mode of capitalism would be introduced. This would ensure an easier way of exploiting the colonies.

It is a fact that to maintain a certain state of affairs, the climate of its existence must be just right. So for Britain to realise her economic ambitions in Kenya, she had to introduce her administration here so that her economic goals could be realised in the firm belief that state protection was afforded her companies and citizens operating from the colonies. Thus in June 1895, the British government took over the running of British East Africa from the IBEAC and declared a protectorate over the area.

As students of the law, our main concern is not the political aspects of British imperial policy, though it is not in itself unimportant. Our sole concern is the legal aspects of the process by which it was possible for Britain to rule over foreign lands and peoples. The question is what role law played in this process of territorial acquisition, annexation and eventual colonisation of Kenya. We have seen how the IBEAC's agents obtained concessions and made treaties with chiefs ceding their territories to the company's

administration and commercial exploitation. Essentially these may be looked at as contracts between the chief and the company, which in law is a legal entity. In this case, the IBEAC being a chartered company had the legal backing of the British government. The Royal Charter had authorised the company "to acquire by purchase, cession or other lawful means foreign lands and to set up a system of government therein."²

With the taking over of British East Africa by the British Government the question of the legality of this aspect arises. The truth is, being a colonial power, Acts had been passed since 1843 to cater for such eventualities. These Acts were the Foreign Jurisdiction Acts of 1843 - 78. These had been used in supporting the company as well as dealing with the Sultanate protectorate of Zanzibar. These Acts were later consolidated and amended by the Foreign Jurisdiction Act of 1890. The Act expressly provided for the British government exercise of any jurisdiction over foreign lands, "whether such lands were acquired by treaty, capitulation, grant usage, suffrance or any other lawful means." This jurisdiction was to be exercised through orders-in-council, empowering consuls and colonial officials to hold courts, promulgate legislation and to carry on administration in the areas to which such order-in-council would apply.

Hence under the Foreign Jurisdiction Acts the Africa order-in-council of 1889 was promulgated to legalise

British exercise of power over her protectorate. Thus we can see that the promulgation of this order-in-council laid the legal basis for the assumption of general governmental authority to discharge the obligations that the British government undertook under the Berlin Conference of 1885 and which obligations, she had undertaken through the IBEAC and now through direct administration of the protectorate.

From 1897, an East Africa order-in-council was promulgated to take care of the British East Africa Protectorate. The protectorate was to be treated as a foreign country and the inhabitants not as British subjects. The Africans kept their laws and their customs but subject to the "protection" of the British. According to International Law, therefore, the inhabitants of the protectorate belong to a foreign country and that International Law did not govern its relations with Britain but that the rights and obligations of the inhabitants of the protectorate depended upon the law of Britain. Such an argument lands itself to criticism and demystification. As we shall go on to argue, the legal aspects of a protectorate and those of the colony are basically the same. It is only a question of semantics. The powers exercised over Kenya by the British both during the protectorate and the colony, were the same as will be shown by citing various illustrations.

We have already seen that an East Africa order in council was promulgated in 1897. It dealt with judicial matters but did not apply strictly to the Africans but it did create Native Courts and Non-native Courts. Henceforth a duality of courts was established until their abolition in the latter years on the eve of independence. This ordinance may be said to have effectively introduced English Law into Kenya and hence a legal system modeled on the image of Britain. By Article 52(c) of the ordinance stated that (native) customary law would be applied so long as it was not "devoid of humanity and justice." The stigma of repugnancy had started. Any customary law repugnant to justice and humanity (of course, British standards of justice and humanity) would be null and void.³ Legal colonialism had entered into Kenya.

Britain was not satisfied with hiding under the cloak of protectorate while in actual fact, she exercised all powers as though it were a colony. In 1920, she finally declared the British East Africa protectorate, the Kenya colony. There was to be no mistaking the legal as well politico-economic implications of such a move. It meant outright subjugation of the peoples of Kenya by the British.

But what role did the law play in all this? The answer is doubly clear. It was the tool of subjugation. A weapon in the hands of imperialists. Its use as such was to henceforth be felt. This role can be perfectly perceived if we go back to the methods used by the British to annex African territory. We have seen how the use of force was not uncommon. Conquest was not rare. The "law of the jungle" was sometimes and often used. Treaties were made but flouted by "gangland" tricks and fraud. We have only to refer to the case of OLE NJOGO & OTHER V. A. G. OF E. A. C. PROTECTORATE,⁴ in order to understand that whether a territory was a protectorate or a colony, the powers used were the same. The Masai as a nation had rich Agricultural lands. Under a dubious treaty, the Maasai, Laibon was induced to move away to some other lands to pave way for British settlement.⁵ In 1904 an agreement was made with the proviso that the agreement "shall be enduring so long as the Masai as a race shall exist and that Europe settlers shall not be allowed to take up land in the settlements."⁶ This treaty was flouted even before the ink had dried. Once again in 1911, the Maasai were compelled to move. Due to this, Ole Njogo and others /damages were claimed brought an action for breach of agreement. The government raised the objection that this was a treaty and not a contract and that any annexation of land was an Act of state, breach of which could only be solved by war. The court upheld these arguments and dismissed the case. Sir Charles Eliot, then Governor was more explicit about the implications of

the decision, He said:

"The Maasai as a nation must go under ... it is a prospect that I view with a clear conscience and equanimity..."

The Maasai case was a cause celebre!.. It gives us insight into many aspects of colonialism and the part played by law in this apocalypse. Justice was to be the preserve of the colonialists. They would determine what was just or unfair. The courts were their instruments to control. Law was to be made and interpreted according to the whims of the colonialists. The invocation of the defence of Act of state was an example of arbitrary government which characterised the whole of the colonial period. It was a perfect instrument of executive tyranny.

Together with the cases of NYALI LTD V.A.G.,⁷ BURON V. DENMAN⁸ and R.V. Earl of CREWE ex PARTE SERGOME,⁹ the Maasai case, represent illustrations of the kind of sham legal framework that was introduced into Kenya. What was done in England illegally was been done legally, in Kenya. They, like all other cases during the colonial period, illustrate clearly the immense difference between the law made or sanctioned by Britain and that practiced in Kenya. Yet the introduction of English law into Kenya was aimed at bringing law, order and civilization and the benefits of the Rule of Law!

Lord Denning in the case of Nyali Ltd.¹⁰ had established in obiter that the received law should be applied cautiously, taking into account the circumstances of the country into which it is applied. The practical paradox was that there was now,

law to which a

"... an established system of law to which a man owed obedience and that at any moment he may be deprived of the protection of that law..."¹¹

The reconciliation is difficult to make really.

The colonists propagated intentions were that they had come to bring civilization to Kenya. In so doing, they had introduced a legal system but the laws and regulations which comprised it weighed the balance against those most in need of its protection. A system of law so constructed can only confer very dubious kind of benefits indeed.

This apparent paradox between law and practice, and the need for reconciliation is to be found very much complicated in no other field than colonial land law. This area was not only a sensitive issue then, it still is and will continue to be unless radical reforms are made towards an equitable land policy in Kenya. In as far back as 1894, the colonial authorities had adopted the Indian Land Acquisition Act. This Act allowed the government to acquire land compulsorily for purposes of building the Kenya-Uganda railway and for other government purposes. Further Land Regulations were promulgated in 1897 for the

purpose of providing land for settlers. It will be remembered that the British settlement Act of 1844 was ^{aimed} carried at settling surplus British population in colonies overseas. Under it the colonialists could acquire what the British called "waste and unoccupied lands." The truth is that nothing of this sort existed. What there was is that due to the density of population, some areas of Kenya had low density of population. At least no history - minded person can say that the Maasai lands which were acquired through extra-legal means were "waste and unoccupied" otherwise there would have been no need for the 1904 and 1911 Masai Agreements.

To the colonial officials, land was a very important economic as well, ^{as} socio-political resource. Its importance is underscored by the fact that land was then, and is still, the main stay of the African economy. In a government the control over land means control over the economy. Firstly, because whoever controls the land in Kenya is in a good position to dominate and influence the government of the day. This is precisely what the settlers did with the colonial government. Secondly, because for the colony to be fully British both in the economic as well as the political sense, the British had to have considerable settlement. And that's exactly what a colony is all about. So land had to be controlled and granted to settlers on the field as well as those in Britain who wanted to migrate

to foreign lands in the hope of a bright future.

Legal as well as political manouvers had to be devised in order to have control over land. The East Africa (Lands) order in council of 1901 gave effect to this policy. All lands in Kenya were now vested in the crown,¹² and the commissioner or governor of the day was responsible for its administration. He could grant leases and grants on such conditions and terms as he thought fit. In 1902, the commissioner provided land for outright sale and leases of ninety-nine years duration and European settlement in Kenya was unleashed. The creation of Kenya as a "whiteman's country" had begun.

The point which should be made at this juncture is that the colonial power now had made no distinction between two types of ownership of Kenyan land. Ownership of the country and ownership of the land therein was to them one and the same thing. Colonisation brought an end to any residual rights that remained in the indigenous population of this country. Disposition of Kenya's land was to be the sole preserve of the colonial authorities. Legislation saw to this. The crown lands ordinance of 1915 re-defined crownlands now to include all land occupied by the Kenyan people. But they had residual powers of use over their own land. And even this power of use and occupation was limited. The ordinance provided that "such reservation shall not confer on any tribe or members of any tribe any right to alienate the land

so reserved or any part thereof."¹³

The implication of this proviso is clear. Land henceforth was in the hands of the colonial government even that land under the actual occupation and use of the Africans. The mass of the Kenyans had no right over it. It could be taken at will and alienated to European settlers at the will of the colonial government. In fact, the decision of the court in WAINAINA V. MURITO,¹⁴ effectively declared that all the Africans were "tenants-at-will" of the crown. Henceforth, the disinheritation of the Africans from their own lands was complete. By use of their law, whether general or particular, the British colonialists had wedged their way into the centre of Kenya's economic base.

All through this chapter, we have underscored the central role that law and legal institutions were directed towards the subjugation, disinheritation and eventual exploitation of the Africans by the European administrators and settlers. Legal and extra-legal means were used. Law as understood in Britain was not the law practiced in Kenya during this period. Though the British pride themselves as having brought the Rule of Law into Kenya, the turth is that they themselves never observed what that concept entails. As some constitutional lawyers have pointed out elsewhere,¹⁵ the British law instead of helping the weak, went on its way to uphold the strong and that from the African point of view the English law

that was introduced into Kenya operated as a weapon by which British colonialists used to dominate and exploit the Africans in all fields, be they economic, political, social or cultural. The law was thus "a tool at the disposal of the dominant political and economic group" in the Kenya of that day.

Now, let us move from the general to the particulars of the colonial era. Although in a paper of this size, one cannot look at all aspects of colonialism we will endeavour to give an insight.

During the colonial period, the settler class which had by now become the dominant economic and political class in conjunction with the British colonial administration carried out policies which created an economic society discernible by features reflecting the capitalist mode of production whereby the Europeans were at the apex of the colony while the other races took the back seat. The settlers had appropriated most of the arable land and made it "white highlands". Land, it must be noted is the backbone of an agricultural economy. In short, the European colonisers owned and controlled the existing means of production. The Africans were left with subsistence farming in their 'reserves' (so-called after being bundled into hostile, unproductive land by use of laws to that effect and administrative violence).¹⁶

Since the settler farms required labour, they in conspiracy with the colonial administration used legal as well as extra-legal means to see that cheap African labour was available. Agricultural policies were made in such a way that the African had little alternative; either to work in the settler farms or starve in the reserves. As it were the spirit of preservation is greater than that of extinction. They went to work in the farms. Law, especially labour laws and taxation legislation was central in the unmasked unmaking and exploitation of the African. All in all, the position during this colonial period and after, can be likened to the state of affairs as observed by Karl Marx.¹⁷

"The workers were to be free from the old relation of clientship, villeinage or service but also free from all goods and charters; from every real and objective form of existence; free from all property /land/ such a mass would be reduced either to the sale of labour power or beggary, vagabondage or robbery as its only source of income. History records that is first tried beggary, vagabondage and crime; but it was headed off this road onto the narrow path which led to the labour market by means of gallows; pillory and whip."

Thus the state and settlers used inhuman labour laws and coercive methods to get African labour. They gave low wages not to add, worked under bad working conditions and the "kipande system"¹⁸ - all these were aimed at the incarceration of the African in the urban centres and farms, and to be exploited by the Europeans. The end result: to produce raw materials /coffee, cotton, sisal etc.⁷ for export to the metropolitan industries.

In operation, in this scenario of African exploitation was the notorious Master and Servant Ordinance of 1910, a legislation for forced labour extraction. Taxation laws in the manner of poll tax and hut tax were introduced with a view to forcing the Africans to get integrated into the capitalist or monetised capitalist economy. Under the above ordinance, chiefs (who were mainly Africans) could recruit labour using any methods mentionable.

The main purpose of the kipand system was to enforce the contract of work under the said ordinance.¹⁹ It was used as a tool of employers to force Africans to work for employers that they did not like. It was also used to monopolise African labourers for certain jobs. In other words, the worker had no choice of the place of work nor was there anything like freedom of contract. The squatter system did wonders to the supply of estate labour. The squatters were the newly created "landless-Africans."

Thus with this small historical interlude, one point emerges clearly. And this is that the features of foreign domination that we see today in Kenya have their roots in her colonial history. It is this foreign-featured domination that Kenya entered her formal independence. Her economy was (and is) characterised and marked by multiple dependencies and inequities of colonialism. Internationally, the colony's economy had been dominated

by western capitalism in the form of exploitation by British Multinational Companies and British Nationals (settlers) Kenya's rural areas had been so neglected such that they existed as reservoirs for labour supply.

It must be stated here and now that such foreign domination and dependency is in no way accidental. It was a deliberate and concerted move to tie the colony to the metropolis for purposes of exploitation. It was a consequence of the laws introduced by the colonial state As we shall see later in this paper, at independence Kenya inherited both the British legal regime and the capitalist mode of production subsisting during the colonial period. Marx's words may be prophetic in this regard²⁰ in the sense that, "from the form of the development of productive forces, these relations (had/have) turned into fetters."

CONCLUSION

In conclusion therefore, we may point out that whenever any group of people whether the British colonialists or British settlers, aspire to power, in order to have effective control over a territory, the control may take any dimension. Political, economic etc. its legal ideology is the "law". Law becomes an effective tool in the social relations. It is a weapon in the hands of the dominant group in society. Like in, *the Colonial State, Law may be the tool for* ~~the~~ segregation and apartheid. It may uphold class division and create distinctive socio-economic relations.

The question of how effective the law is used in any one particular state need not detain us. It is answered in each historical period by the effective units of production, exchange and political viability, and the supportive legal superstructure.

Thus this chapter is important to the understanding of the whole paper in that history is important because it points out to us that law was one of the major tools used by the colonialists power to establish its dominance and to create the kind of society that independence found. The law created a continuous legal regime which was more likely than not, overthrown at independence or the post-freedom era. The law at independence therefore becomes the baseline from which independent Kenya started and to ignore ^{that} baseline and its development is to tell less than half the story. It is in this spirit that this paper proceeds to analyse in a nutshell, the role of law in post-independence Kenya and her socio-economic setting.

CHAPTER TWO

INDEPENDENCE AND AFTER: THE POLITICAL ECONOMY OF
THE LAW OF VAGRANCY.

Kenya gained her independence¹ on 12th December, 1963. The importance of this event is clear. It means inter alia, that a new nation had been born. Indeed, the clamour of a peoples destiny had been unleashed. A cry for the creation of a new nation based on a new philosophy was everywhere and ^{on} every patriotic Kenyans' lips. The spectrum for change was unlimited. The future lay bright. For every Kenyan, independence meant one thing, "Uhuru" /freedom/. It is only under freedom that a people can live and develop.

Independence too meant, the creation of new institutions: a Kenyan Executive, a Kenyan Economy, a Kenyan Flag and Anthem, a Kenyan Legal System and a Kenyan legislature. All these and more and a new social and economic organization. All Kenyan patriots were consciously geared to strive for a form of social organization which would free the manacled spirit and energy of the Kenya people so we could build a new country; and sing a new song.² As Mzee Jomo Kenyatta, the Nationalist on whose hands the reins of leading the new nation fell, stated; that the war for independence had been won but ahead of the nation was a greater war; the war against poverty, disease and ignorance.³

It is true that at independence, Kenya was highly under-developed by any standards. She lacked among other things, national unity and a modern legal system. This state of affairs can be traced back to the ravages of the colonial system. A system which had used the law for the effective subjugation and exploitation of the Kenyan people. A regime which had used the legal system to divide and rule the Africans. Colonialism brought the capitalistic mode of production to Kenya. It is this private enterprise system that was inherited by the new nation. As it were colonialism and capitalism were twin brothers whose mission was to exploit the material wealth of the Kenyan masses, and to do so effectively, their proponents captured our minds, our values and our history distorted and reversed. The socio-economic order was disrupted beyond repair and replaced by one that was exploitive, foreign and unjust.

Thus at independence, there was a great need to remedy this situation. To do so, Kenya had to break from the socio-economic system that had been imposed on her. An economic system whose main feature was the wholesale exploitation of our natural resources and the murder of our people. Independence meant the break away from our inherited colonial past - our inherited economic, legal and social institutions. The blackanizing of the personal running these institutions would not suffice. As is going to be stated in this paper, no attempt was made

towards this desirable break. The same system, the same institutions and in many key economic areas, the same men⁴ who used to dominate them before.

Perhaps one of the most important aspects of uhuru is the inheritance of the three, organs of the state: legislature, judiciary and the executive. The legislature may be said to be the most important because it can and if supreme, affect the functions of the other two. The legislature determines what laws will be applied and institutions of the state and the society will be reformed. In a new state, laws must emanate from the legislature in accordance with the citizens' aspirations. The legislators must be the people's representatives since all laws emanate from them and are supposed to affect their everyday life. The reasons for this are obvious and cogent ones. As Muno Ndulo⁵ put it at a law seminar;

"No major social change occurs or is put into effect which is not reflected in or induced by some kind of change in its laws. By the same token, the kind of laws that are written will to some degree or another, determine the sorts of social change that will take place. Law is the instrument through which goals are adopted, implemented and reviewed.

In short, it is proposed that law should be used for social engineering⁶ in a developing country like Kenya. It should be seen as an instrument of social ordering which must derive its essential characteristics from the apparent needs and aspirations of the Kenyan people. This monopoly of socio-economic ordering that

is attributed to law may however be both progressive or retrogressive depending on how the political and legislative actors utilise this aspect of the law. A case in point here is the application of some Acts (laws) carried forward from the colonial period like the Vagrancy Act of 1968.⁷ On the other hand, the said attribute of the law may be used to preserve reactionary policies, social and political institutions. A good illustration of this is the present court system. This system still follows the old-age procedures. It is still manned to a large extent by former colonial judges who were adherents of colonial laws. It is late in the day for such personnel to radicalise their legal thinking and adapt to changing circumstances. The said circumstances are the great need for the utilisation of not only the legal system but all possible organs to achieve rapid social, political and economic development in order to emancipate the Kenyan people from ignorance, disease and poverty. The emphasis is really on the satisfaction of the basic needs of the greater majority of the Kenyan people. Any other deviation from this goal can only be for the worse and not the better for the Kenyan masses.

Therefore, in this process of social engineering law becomes a valuable tool. However, it is not prescribed here that the legal order is a cure for all the country's problems. There are still those of us who believe that law should essentially follow and never

lead. These see law as a passive giant, only active in the law courts and dispute adjudication. As it were the law should be a determined agent in the creation of new norms and new institutions. This is today one of the recurrent themes in the history of legal thought and finds rapport among many a jurist.⁸

Since independence, it should have been an accepted fact that law could serve as a useful instrument for accelerating change in society. Once such a premise is accepted, research would be necessary for discovering what specific areas and institutions of the Kenyan society needed remedial change. Moreover, to do so effectively, the past of what role the law played during the colonial era is of the greatest help. This would be so in order to build a social and autochthonous legal system." It is hence necessary to delve into the past in order to understand the present and what trends are for the future."⁹ In this respect therefore Kenyans customary laws must be removed from the legal doldrums and periphery of the legal system and ^{made} central in the re-making of the said autochthonous legal order.

At this juncture, it is proposed to look at the state of the law at independence and what has been the trends for the past two decades. The constitution is the supreme law¹⁰ and from it the legal hierarchy descends pyramidally. Hence today, Kenya law is a horchpot of:

- (a) The constitution.
- (b) Acts of the Parliament of Kenya.
- (c) Some British Acts of Parliament, the Common Law, Doctrines of equity and statutes of general application in force in England on the 12th of August, 1897, and
- (d) bodies of African customary law.

According to section 3 of the constitution, it is the supreme law of Kenya and any other law inconsistent with its provision is null and void. The constitution creates the three organs of the state: executive, legislature and judiciary. It also defines their functions and powers.

English law too finds great reception in Kenya by virtue of the Judicature Act.¹¹ Customary Law is still on the decline having been relegated ever since the colonial days to the periphery of the legal system. The trend has been its extinction or its anglicization. Where it finds application, it is categorised¹² and subject to the "Repugnancy Clause."¹³ For this reason, any Kenyan concerned with the subject of customary law would be prompted to ask as did F.C. Von Savigny, a leading jurist of the historical school of jurisprudence why our customary laws are treated thus. Savigny had asserted the primacy of customary law over legislation. It is the same idea as regards British Common Law. But in Kenya customary law is treated like foreign law in the courts and must be proved in evidence as a fact.¹⁴

The foregoing state of affairs is quite understandable. It can be traced to the inherited socio-economic system which still prevails in Kenya. Capitalism as the mode of production creates social relations based on individualism. Such a system has its own inexorable logic. It is a system, as has been stated of customary laws, that sides with the rich on a people's most cherished customary institutions and culture. As it were capitalism has created two classes in Kenya. The 'haves' and the 'have-nots.'¹⁵ The war is between these two major tribes. The owners of the means of production and distribution versus the workers and peasants. The exploiters, who also happen to be the Ruling Class, have the legal weapon. They are the businessmen, the members of parliament and the civil servants. To them, the law is a tool in the said war. Any laws, however benevolent they make, reflect this dichotomy. It is as if the words of Nazareth ring brutally true: that "The Law grinds the poor and rich men rule the law."

For these who see the Kenyan society as a complex in which politics economics, the legal system and culture are extricably tied up, the system of capitalism that we have inexorably embraced, offers no hope of progress and social justice which is accessible to all. In a post-colonial society like ours, and fixed in such an economic setting which in doctrine and practice runs counter to the aspirations of the

people and operates to the exclusion of their involvement in what is theirs, such a mode of production has nothing to recommend itself.

In a nutshell, then, what colonialism bequeathed to independent Kenya in the field of the law was two parallel, somewhat unintegrated systems of law, in a large measure based on contradictory basic norms. The colonial system made contradictory presumptions about African values and norms. This presumption was at most intentional and at times due to negligence. The colonial economic interest was predominant and all changes were undertaken to enhance that relationship. As a result the pre-independence situation created a technological and mental dependence in Kenya. The laws that were installed were those that encouraged resource extraction by the metropole. Thus the law became an instrument for the creation of new values, and a dangerous mentality - the one of dependence which has had serious implications for Kenya's modern developmental process. The interaction and the competition between these external forces and the indigenous values has created an unstable mix of traditional values and norms on the one hand and the western values on the other.

Since no society can easily adhere to two contradictory systems of basic values and since these basic values sustain basic norms of a legal order, what the pre-independence and independence situation has done is to prolong the process of establishing lasting basic values. Indeed, the process of development in this country must include the process of search and research for lasting socio-economic and legal values. It is only in this way that one can say that Kenya law has grown out of the Kenyan society and that it represents the lessons that a society derives, from its history. It is only when law derives its legitimacy from society that it becomes a product of that society's experiences and creates harmony with the society's other institutions. At this level, the society is stable. The law has then the role of providing a "framework for the citizen within which to live his life and its central purpose is to furnish baselines for human interaction."¹⁶

As it were, the law that governs the Kenyan people is embedded in English law. No great changes have occurred. This makes it evident that freedom was granted to Kenya on the understanding that the existing political and legal institutions would not be dismantled. It is an assumption held on the premise that in most cases the only change that is evident is in respect of personnel manning the said institutions. Lawyers still train in the same way. The common law still remains the most important source of law as far as the ruling class is

concerned. English law is accepted uncritically.¹⁷

It is the authors hope that what follows about the common law will not cause a crisis of confidence in those Kanyans who have a great faith in it. Some writers,¹⁸ have impugned that the success of the common law in former colonies of Britain derives from the fact that wherever it went, it found "legal vacuums" and that in such lands the existing systems of law were "too primitive to compete with the imported product." The truth is, there were no legal vacuums in Africa. Every ethnic group had its own legal system appropriate to its own socioeconomic and political organization. To deny that Africans had developed systems just as the British, is at best to deny their existence as people.

Moreover, the African legal systems were not allowed to compete with the imported laws. Colonial laws, it is a fact were born of violence - white violence aimed at thwarting the course of justice. Chai and McAustan¹⁹ see colonial law as having been second only to weapons of war in the establishment of colonial administration. The Africans humanity and dignity were violated in the name of the British Common Law.²⁰

The point being underscored is that imported laws do not help in the maintenance of law and order as the ruling classes would like the people to believe. The very nature of the imported ^{LAW} underlaid as it were by the common law, cannot face the challenge of faster

development. The inherited legal system cannot therefore be made to achieve lofty goals as demanded by the Kenyan people. The judiciary manned as it were by common law lawyers, and decides the rate and measure at which egalitarianism is to be introduced into the society, cannot be expected to do this. They belong to the privileged class of society.

Law in Kenya today may be said to be faced with a social challenge. The said challenge has origin in the idea of human dignity, freedom and equality. It is based on two fundamental beliefs. First, that men and women are not ^{to} be denied legal opportunities and participation in national life and resources. It is not a gift from benevolent powers. It is a right. Second, the belief that every Kenyan is entitled to state protection against the ills of poverty, ignorance and disease. Fair distribution of wealth features prominently in this spectrum. Fundamental human rights are equally if not more important than the right to property.²¹

Social justice, ^{by which is meant justice} in depth must not only penetrate and destroy these inherent inequalities based on colour, race, sex, tribe and wealth but it must also support the weak, the oppressed and exposed. This, it is contended cannot be achieved by the present laws. An overhaul of the whole lot is needed. The task needs new principles, new laws, new machinery and new men. The prime purpose of the Kenyan laws being the protection of private property

and the distribution of justice in the adversary system, the above measure is necessary. If therefore the law and lawyers in this country are to make a valuable contribution in this regard, old established habits of thought as to the nature of law and the whole gamut of practices must be abandoned. In other words, "legalism" must go -if not we will continue to rigidly adhere to precedent, the substitution of legal rule for policy, the setting of discretion in the adversary system of laws and the contentment with formality.

The modern Kenyan demands not only a safe and healthy existence but a pleasant and economically viable environment. He sees this as a human right independent of the ownership or possession of property. Since this human right is inherent even in those who do not have property, the property and in general the country's resources must be used in a way that will give content to this right. We should not fall prey to the mechanics of the exploiting classes. This class whatever its achievements always finds some way of disguising its real position, both from itself and from the exploited. It makes out to the world that its rule is just and permanent. The class does not recognise its real position and even if it does, it believes in a stable atmosphere where its aims of exploiting the masses will come to fruition without having to offset and upset the system that has created it.

In this process, it clothes itself with laws that protect the property so looted from the masses. An illustration of such a law is the Vagrancy Act.

22

UNIVERSITY OF NAIROBI
LIBRARY

THE POLITICAL ECONOMY OF THE LAW OF VAGRANCY:

We have already elsewhere²³ in this paper alluded to the fact that laws of vagrancy originated from the colonial period. Together with the laws of Trespass and passes, the colonial authorities controlled the supply of labour from the African reserves into settler farms and towns. In other words, despite the introduction of free capitalist economy into Kenya, labour (Africans) was not left to the forces of supply and demand. This was for obvious reasons. The colonial system enterprise of primitive capital accumulation was not ripe enough to allow what was not in the best of the system. And the best to them meant 'infettered' exploitation of the African labour and lands. The kipand system²⁴ should be seen in the context of being a tool of control of native supply of labour. The laws of vagrancy during this period played a class role. Today they play the same class role. The laws maintain and legalise the division of society along property lines - that is to say they stratify society on the basis of economic qualification.

What is its role today? To answer this question one must go back to the re-enactment of the law of vagrancy in 1968 by Kenya's national assembly. The vagrancy Act is cap. 58 of the laws of Kenya now. In its preamble, the Vagrancy Act is stated to be an

"Act of parliament to make provision for the suppression of vagrancy; for the detention of vagrants and for the care and rehabilitation of beggars and for matters incidental thereto and connected therewith."

From the preamble therefore, one conceives the Act to be a welfare piece of legislation aimed at bettering the unfortunate members of this country, especially beggars and the lower class of people. Vagrants are deemed to be undesirable in the society because they are not productive. Moreover, not only are they health-hazards to the "healthy" members of the society, they are "actually" a nuisance to property owners.

The question that we must pose is this, who really in Kenyan context, is a vagrant? If we go back to the definition of the Act, section 2(a) defines a vagrant as:

"Any person having neither lawful employment nor lawful means of subsistence such as to provide him regularly with necessities of his maintenance, and for the purposes of this paragraph prostitution shall not be deemed to be lawful employment and earnings from prostitution shall not be deemed to be lawful means of subsistence."

Who according to this definition is a vagrant if we look at it from the practical point of view? Obviously,

it is first of all the unemployed, the poor, the destitute and prostitute. From the authors experience at the District Magistrate's Court, Machakos,²⁵ the Act has largely been used against the unemployed in towns and prostitutes. This latter group also happens to be unemployed. The other aspect of the implementation of the Act is the fact that now it is also used against the public the people! Police swcops in Machakos like Nairobi are quite common. It nets the people mentioned above. These "swoops" are carried out under s.3 of the Act that empowers the police to arrest any person they suspect of "being a vagrant." A person so arrested without warrant has the onus of proving that he has a fixed abode and a lawful means of subsistence that provides him with the necessities for his maintenance. In other words, a "vagrant" must prove the police "mistaken" - the person is presumed guilty by the wrong people and even before being charged in a court of law! Such action is to say the least, a violation the constitutional rights of Kenyans.

To most Kenyans and especially those that have found themselves charged with vagrancy and yet they are neither beggars nor destitutes nor criminals, feel that the operation of the vagrancy Act in modern day Kenya is unconstitutional and oppressive. To them;

"The position has returned to that of the old days when people had to carry their identification with them at all times. The provisions of the vagrancy Act may be justifiable but the present manner of its enforcement; it is submitted, clearly is not."²⁶

Police have too many powers under it. Not only that, the methods they use amount to assault. Yet they get away with it. Despite the fact that the constitution of Kenya contains a bill of rights/Chapter 5 which entrenches and guarantees certain fundamental rights and freedoms of the individual, the vagrancy Act continues to be implemented in direct contravention of the letter and spirit of these provisions.

A writer²⁷ on the Vagrancy Act has attributed this apparent unconstitutionality of the Acts implementation to "poor draftsmanship" and is therefore its "unforseeable consequence." We cannot condone such a view. It smacks of investigational naivette. First, because the Act is a direct adoption of the colonial vagrancy regulations. Secondly, it was then enacted by the colonialists for certain and particular purposes which purposes are socio-economic and political. Thirdly, that the same socio-economic and political system pertains in Kenya. And that the Act like most property laws in this country, is a handy tool in the quagmire of the protection of private property. This aspect of the matter is largely ideological. Fourthly, the Act is really "bad law, bad intentions" as far as the people of this country are concerned but to the owners of property, it is "good law" and part of the arsenal of

the ruling clansto keep the people pacified and exploited.

The said author continues to "defeatingly" quote Professor Seidman²⁸ out of context despite the fact that he has rightly stated that; "the task of the lawyer concerned with legislaition is to predict that specific legislation will achieve its intended objectives." As a matter of fact, the lawyer in a bourgeois state is not an ignorant person nor does he draft laws without insight. He first and foremost belongs to the ruling clan elite with interests to protect. Whenever he drafts an Act that has adverse effects on the masses, one cannot be heard to say that's "poor draftmanships." It is intentioned not inadvertent and its effects are quite foreseeable. The effect in this case is the protection of private property from inteference by the "haveanots." The cruz of the matter is that the Act plays a clan role. Engels and Marx,²⁹ have put the situation thus:

"The history of all hitherto existing society is a history of class struggle. History is propelled and the fate of men determined by the war of classes..."

As to the arguement that the Act is for public order, we counter that, as the said order is maintained ~~at~~ the expense of human rights, It is inimical that since independence~~the~~ the judiciary, legislature and the executive have actively helped in preserving an unfettered administration despite the people's crying

need for equality freedom from exploitation and the preservation of fundamental human rights. As Ainley C.J held in Kioko v. A. G.³⁰ it is very special facts indeed that would be required to lead a court to say that such a law is reasonably required in the interests of our society. It is not reasonably justifiable in a democratic society.

CONCLUSION

When all is said and done, the truth emerges that the law of vagracy in Kenya is not justified. What the state punishes as a "Vagrant" is not really such. The so-called vagrants are victims of the socio-economic system and its inherent class contradictions. It is evidently meant to punish those who have been rendered workerless and propertyless by the capitalist form of private ownership of the means of production and the appropriation of social production. This is clear if one grasps the fact that the ruling classes can never at any one time be found without means of subsistence nor fixed abode. The unemployed and the landless Kenyan is sure to be vagrant.

Moreover, despite the fact that the constitution guarantees equality before the law, the vagrancy Act does not apply to all people equally. It is discriminatory and arbitrary to lower classes. It therefore does not

accord with the concept of the "rule of law" which in this country is on the lips of the rulers yet nobody does anything about it. Reform is needed in this respect.

CHAPTER THREE

ON LAWYERS, THE LAW AND THE PEOPLE

"I contend that instead of them (lawyers) practising law to defend the weaker members of our society from exploitation; instead of conceiving of the law as a bulwark against the rule of the jungle; many of us are using law to enable the rich to get richer; and the corrupt to become more powerful" Hon John Munro, Australian Minister.

In this chapter, we intend to analyse mainly the role of the lawyer in the spectrum of what we have already expressed in the earlier part of this paper. The role of lawyers in this perspective will be viewed against the background of the law and the people. We have already established that during both the colonial and the independence period, law and its consonant institutions have been used as instruments of the entrenchment of the country's dominant interests. That the continuity in the role of the law in society from the colonial days till now, have been hitherto a continuity towards the dominance of the capitalist mode of production. And that both the colonial laws and the post-independence laws still reflect this dichotomy: one; law as a tool in the hands of the ruling class and, two ; law as an instrument of exploitation, coercion and suppression.

Within this forest of contending interests in society, the role of the lawyer is a special one. By lawyer, we mean every person who professes the law, applies it, enforces it or drafts it. In all, all those persons involved with the legal system directly.

We cannot understand nor explain the post-independence role of the Kenyan Lawyer unless we go back into the colonial period. It should be noted that Africans started getting into the legal profession as late as 1961. Before then, it was dominated by Europeans especially of British extraction and some Asians. Each of these served the interests of their own communities.¹ The African was not represented nor worth of it as far as the system was concerned. The reason why there were no African lawyers is that the British colonial government could not allow it. The law suffered under the handicap of political suspicion. The British had learnt a lesson in India where the political "agitators" (nationalists) were mainly lawyers. This was government policy that no Africans were to be allowed to study law. As Sir Philip Mitchell, a colonial governor once said, "...every

"... every lawyer is a politician and every politician is a lawyer - there is no professional pride."

One can see clearly that the British government did not want the Africans to get independence more so education. The latter would inform them of their rights. As long as the majority of the people were ignorant, the better for their exploitation. Lawyers were thus viewed as

"educators" of the people as to what their political and economic interests were, and hence a role conceptualised as being that of the guardians of the peoples' rights. It is no wonder then that legal training for the Africans was forbidden. This leaves us with the European and Asian lawyers in the colony. As a general over-view, the lawyers of this period were part and parcel of the privileged class of colonialists. Thus their role in the colonial situation was, that of being, because of its market orientation, a hand-maiden of the capitalist enterprise. The lawyer was allied to the colonial state. As we know, the colonial ideology was that of civilising and as some writers² have stated in a bourgeois context, such a situation and its attendant rationalisation assumed the form of legal ideology. Colonial lawyers were staunch articulators of such legal ideology.

Since the colonial state needed lawyers in both the public and private sectors in order to implement its policies, especially those of the establishment of "law and order"; mediation between the traditional and modern sectors of the Kenya economy, the role of the lawyer tended to be similar to that of the state. The lawyer was needed to bring a veneer of legitimacy to these oppressive policies. It is a fact that in bringing law and order among the benighted natives, the law was harsh and discriminatory to Africans. Moreover, the lawyer helped to facilitate the operation of the capitalist economy in the sense that they mobilised the emerging superstructure of capitalism and tried to fit

them into the Kenya circumstances. As it were, the
as the lawyers were the
/ confidants of the governors and "legitimators" of
oppression of the governed.

Thus by the time of independence, the legal profession in Kenya had come to be associated, in the eyes of the peoples with the colonial state. It was a part and parcel of the coercive machinery of government. It was largely urban-based, expatriate and generally far-removed from the general population of the country and also insensitive to the people's political and economic problems. The most the legal profession did then, was the important role that it played in the social and economic life of the expatriate communities. It was dependent for its living on the capitalist economy it has helped to establish.

At this juncture, the question we pose is that role does the lawyer play, and has played since the attainment of independence? This question needs to be answered from a view of the totality of the inherited political, and socio-economic system. In the first place, Kenya chose the "politics of continuity" of the existing systems with only a blackening of the major section of the same. The government made a clear choice in favour of capitalist development. The K.A.N.U. government in its manifesto promised to create

"a society in which those who work hard shall enjoy the fruits of their labour."³ It did not state any elaborate plans for so doing. All the same, it further stated; "that development was a matter of personal will and dedicated struggle and not something that can be had for nothing."⁴ The path that KANU government had chosen, for development to occur, has relied heavily on foreign firms. Transnational companies now play an important role in Kenya's economy. Some prominent Kenyans, especially those allied to the ruling elite, have participated in this concerted exploitation of the resources of the country in the name of development. Beset as it was at independence by the problem of political and economic control and legitimacy, the African-led government of this country has pursued the policy of Africanisation and the involvement of the state in promoting "African capitalism" [capitalism has no race]. As in the colonial period, the state has tried to mediate between the foreign and domestic capital, and between the urban and rural sectors. It has fashioned out a partnership between Finance capital and national capital. The former has become dominant over the latter. Sometimes, the two conflict. The international Finance Capital is serviced by the white namely Europeans, Americans etc. and some members of the ruling bourgeoisie. They have links with the international bourgeoisie whose interests are identical to their own. Below this outlay of the international and national bourgeoisie, are the people the workers, farmers and peasants. They are

all tied to the urban bourgeoisie in terms of exploitation, leadership, supply of food, and dependence. In a breath, a dominant, privileged class is matched against an exploited and depressed class.

In such a complex of relationships based on differing modes of life the role of the Kenyan Lawyer stands in aberration. On one hand, the legal profession has maintained the same continuity in structure as the mode of production. On the other hand, the society cries to the lawyer for protection against the dominant groups the governors. But, the truth is that lawyers today are the intermediaries of external capital and at the same time are associated with the local economic interests that have been called into being by the process of capital accumulation by the bourgeoisie. The reason for this is clear if we look at the class of the Kenya lawyer today. He is a representative of the externalization of the class structure. He is closely connected with the socio-economic origins and functions of the emergent national bourgeoisie. This class offers a market for his services. He has organized himself in a way that he has become an instrument for the protection of his economic status and interests but also those of his clients (buyers of his legal services). Hence what we see in Kenya today is the attempt of the lawyers to put external legal traditions to service in pursuing domestic interests and has modified indigenous traditions of customary law to suit the requirements of external exploitation. This may be consciously or unconsciously.

The lawyer has thus used his legal skills as a instrument of legitimising the domination of those controlling the state superstructure over those the state controls the people. They have acted as conducts in the articulation of that superstructure. The lawyers have through alliance and co-operation helped the ruling class to hierarchicize and bureaucratise all government institutions of which the people know nothing about especially the rules of procedure and function. Hence in some cases ~~rules~~ are made to protect the peoples liberties.⁵ but the people are ignorant about them. They are then utilised and limited against the masses. The lawyers have relegated themselves from their professional responsibilities as guardians of individual rights and equality before the law. In the cases where they try to stand up to be counted the pressure is too much⁶ and cries of his bourgeois brother, ^{that} he is a detractor and a subordinator of the system.

Whatever one may conceive as the role of the lawyer in Kenya today, it is most evident that such a lawyer must operate within the society and for the good of the society. The lawyer is to have regard to the operation of law in society, what end it serves and whither it ^{is} intending, He must strive to help build a new legal culture based on the national aspirations of the people. The lawyer should not continue to be seen as a member of a transmitted legal culture that is associated with external economic

domination and political patronage. Moreover, he should be an exponent of the interests of the masses and not minority groups. In this respect, the legal profession must strive to erase the marks of the imposed legal culture, not only in terms of the "received law" but also in terms of the proliferation of obsolete institutions. For instance Kenyan lawyers still wear wigs and gowns in courts primarily because these symbols increase their status in the eyes of the illiterate masses. These and more are symbols of an alien legal culture. The point we are trying to underscore is that the mere fact itself that institutions that are imported are still in operation today does not only mean dependence but that these institutions play the crucial role of reproducing political and economic arrangements that keep the country open to external exploitation.

In order to evolve a Kenyan legal culture therefore, the legal profession must bridge the gap between them and the people. The relationship that exists today of the people as a ready market" for advocates' (lawyers') services should be re-examined and some amends made. These amends, we propose must take the form of first and foremost, the lawyer being a "man of the people". in the sense that he ~~in~~ informs the people of the law, how it affects the people and as to what remedies are available if the rights of the people are intere^{fer}d with. The feeling among most lawyers that the task of educating the people of their rights under the law lies on the government shoulders though well-founded needs re-examination. It is true that if the government "belongs" to the peoples it should operate for their total good. The fact that in cases like this it doesn't

can only be explained through analysing what the nature of a state is.

In Kenya, the state is seen as a power standing over society, although as it were, the state needs to arise out of the society over which it operates. The state is contrary seen as placing itself above the society and increasingly alienating itself from the people. The reason as we see it is that the state is the domain of the dominant classes in society. The state is there to referee the anatagonisms between the governors and the governed arising out of conflicting economic interests. It is a fact the governors are also the economically dominant group. Hence it amnipulates the state so that law and order is maintained 'mystically' for the good of all but in particular for the good of their dominant economic position. Hence, analytically, and from experience, the ignorance of the people as far as the law is concerned serves a useful purpose. A literate society having the knowledge of all their legal rights, are a threat to the rules. One can imagine the situation where the hunted comes to know more about the hunters, especially the hunting methods, the trails they follow and the traps they set for them. In such a situation, every hunter must dread the thought of what would happen if the hunted were ever to unite The same would be true if all the exploited were ever to unite. In such a situation therefore, it is not in the interest of the state to make sure that every citizen knows the law nor that every citizen is educated. Mass education as it were is not in the interests of the present Kenyan situation. The said can only be feasible if the whole

capitalist system is thrown overboard.

LAW AND THE PEOPLE: IGNORANCE OF THE LAW IS NO DEFENCE

The area of the law where ignorance is highly illustrated is in the area of criminal law. In this area, the people are presumed to know the law. If not, ignorance is no defence to a criminal charge.⁷ It has already been noted in this paper that whatever else independent Kenya got was the power over legislation.⁸ With this power, the legislature could pass laws as forces to be molded and manipulated to alter human behaviour and achieve development. The substantive rules of law are in this respect/promulgating them. Thus law-as-legislation is seen the as obvious tool of social engineering aimed at meeting Kenyan's pressing problems of nationhood and at the same time, to reach development goals. So pressing are these problems and so contracted the times span for development, that direct and manageable solutions must be found.

If it is agreed then, that legislation plays such a key role towards the execution of a country's development goals, it is of necessity means that laws must be communicated to the people effectively and fairly accurately so as to ensure that they are understood. For clearly a citizen who does not know of the passing or existence of a particular law can only comply with it by accident. In a situation where there is dire need for directed change, accidental compliance with laws through which development programmes are to be implemented is unacceptable. Yet, the truth is that the majority of

the people in this country know very little about the laws that govern them.⁹

What then is the solution to this phenomenon? To answer this question, one must look at the existing machinery for making the people to know their laws. Secondly, one must look at the underlying presumptions as far as these are concerned. Thirdly, proposals should be made as to what methodology is to be used to solve the problem.

Basically, the officials of communicating the law in Kenya seems to be based on two rules. First is that related to the rule that; "IGNORANTIA IURIS NON EXCUSAT" and the second is that of public notice. This latter rule is the presumption that everyone knows the law. The first rule is to be found in the Penal Cod.¹⁰

"Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence."

The rationale of the above rule is to be found in the common law, according to which law is seen as representing the norms of the society in question and the notion that if law is to command the respect of the people, it must reflect the ethos of the said people. The other underlying presumption is that every person in ^{such} which a society will know the norms of his people and it is the norms of his society that in turn constitute the law. For instance, it is assumed that the criminal law of Kenya is

representative and on objective expression of the people's established judgements and values. Under such circumstances to plead ignorance as a defence would be tantamount to admitting that one does not know his people's law."

The following are case-law illustrations of the circumstances under which ignorance of the law has been pleaded. In R.v George Kivungi,^{11a} the accused was charged of the offence of setting fire to vegetation contrary to S.3(1) of the Fire Act, cap. 327. The said vegetation was a government forest reserve. In his defence, he admitted setting fire to his own maize stalks in his shamba and that the fire had spread accidentally to the forest reserve. He also stated that he did not know whether one was expected by law to inform his neighbours when setting fire to any vegetation as provided under the Act. Moreover, he argued, he had no intention of burning the forest reserve. HThe accused even asked the chief to pardon him for the accident. Nevertheless, he was fined 100/= or 21 days imprisonment in default.

The above is a clear case whereby the accused was governed by the Fire Act and yet he had never heard of its provisions nor its existence. Yet he was penalised for it. The case also illustrates that not only ignorance of the law is no defence but also that the court is not willing to understand the circumstances under which the ignorance is pleaded. For instance, the accused was quite elderly, illiterate and attached to the soil as a peasant.

11b

In yet another case, ZABITISI KAWUKA v. ABDUL KARIM, an old man applied for leave to appeal after two year had elapsed since the case was decided. He honestly believed that one could apply any time and so long as he had acquired enough money for the litigation. The grounds that the old man relied on were that

- (i) he was ignorant of the procedures of the law,
- (ii) old age and
- (iii) lack of means to pay for legal serves, in other words, he was poor. The sitting judge dismissed the application holding that ignorance of the law, old age and lack of means were not good grounds for allowing an appeal out of time.

The above case is illustrative of three major handicaps. Ignorance of the Law, poverty, old age and illiteracy. Now, if it is assumed that the majority of Kenyans are poor and illiterate, it will be seen how magnified the problem as experienced by the old man in the above case is. It should be noted here that ignorance goes with illiteracy and poverty and as already stated, since independence the war has been against ignorance, disease and poverty. It is these major problems that this chapter attempts to illustrate by the examination of the rule. Ignorance of the law is no defence.

But what can be said of the pleading of ignorance of the law in the wider context of the Kenyan people.

In Kenya, such pleading is understandable. And such a presumption can be easily rebutted. Most of our laws are imported and not only that no attempts are made to educate the masses as to what laws apply to them except in a negligible way. More so when the notion that law is nothing but an expression of people's mores is inapplicable where law is imported. The law was imposed in disregard to Kenyan mores, this making the rule obsolete in the circumstances. The public have been taught the rule in the court rooms where they plead ignorance but are nevertheless convicted. This shows that despite the wrong assumption that the rule exists, it would not have been the intention of a people's legislature to so legislate. Otherwise a legislature that is committed to social, legal and economic changes cannot afford to convey its message through the court rooms when the culprits have never heard of the law by which he is being punished. Moreover, the fact that cases are reported in the press can hardly be said to qualify as a feasible means of communicating the law to the people. especially in Kenya where the percentage of illiteracy is a matter of national concern.¹² This means is also disqualified on the ground that the newspapers and the laws are written in English, a language different from that used by the peasants and workers of Kenya.

Since the rule that ignorance of the law is no defence imports a duty to know the law, the question is

whether that duty to know the law should not be qualified, because wherever there is a duty, there is a corresponding right. If a legal system requires that every person should know the law on pain of punishment, the people should have a right to be reasonably and accurately informed of such laws as ~~one~~ in application. As has already been noted in this paper, the people's rights are not sufficiently met because the law he is supposed to obey is not only foreign to his culture but also is written and published in equally foreign language.¹³

Besides the conventional methods of communicating law to the people, other methods are proposed. It must be noted right from the onset that in order to show that efficacy of such methods, the degree of literacy of the society is a key factor in determining what devices to apply in order to reach the ^{people.} secondly, it must be noted that the issue whether or not to communicate the law to the people is basically a political decision rather than a legal one. This is so where ~~the~~ government takes upon itself the sole position of guardian of society and leaves no room for any other claim by groups of people to do the same. Any person trying to talk on behalf of the masses may well be branded a "dissident." Thirdly, and consequently, the ~~quantity~~ and quality of what laws are to be communicated and to whom, may often depends on the government's decision as to what change the strategy is to be hatched for. Lastly, the fact ~~that~~ ^{it} is implied ^{the} that the state has/obligation to inform people of the laws promulgated, it is proposed that the private lawyer

has an equally bigger obligation to the people in terms of communicating the law to them. This duty arises from the presumption that the lawyers are members of the society. That the lawyer has been educated through public institutions and public funds hence the society has a corresponding expectation to be served by the lawyer. The obligation also arises out of the fact that lawyers are very few in numbers as compared to the total population, in addition to the fact that they possess special skills in a myriad of illiterate persons in the country. Their weak of knowledge must be inclined to public service not mainly private gain, the latter for which they have been called "sharks."

The following discourse is therefore on what methods may be used to make sure people know what laws govern them. The method perceived and assumed to efficate the rule of ignorance of law is no defence is that it is presumed that the people themselves make the laws. This is based on the concept of democracy and hence representation in the Legislature (National Assembly). Once the people elect their members of parliament, they are assumed to be represented in whatever capacity in that August house. But experience has shown that if anything members of parliament are themselves ignorant of the laws. How then can a blindman lead another blindmen? Moreover, it seems what is important in choosing an M.P. is not his wisdom but how much money he has to distribute around. Through

discussions with villagers, it has been found that they even do not know that the parliament passes law. They see an M.P. as just another arm of the government who "speaks" on their behalf even without having consulted his constituents as to what to ask or speak about! Where M.P.'s draft private members' bills which appear pro-masses, they are branded "dissidents" and "threats to national stability." Some people even go ahead to call their bills representations of "foreign ideologies."¹⁴ Thus one can see that despite the prevalent myth of mass-participation in legislating by the people's representatives, the truth is the laws they enact are English carbon copies transplanted and adapted by the parliament as laws for Kenya.¹⁵ The enactment of the law of succession Act, 1972 and the hullabaloo that followed its coming into effect among the Muslims is a clear indication that the masses do not participate in legislation. Not every one should give his idea of what labour is to be passed but that the laws so enacted must reflect the people's mores and customs. If the laws emanate from the society, that it can claim autochotomy, then in such a case, the rule against ignorance of the law would hold more legal efficacy.

It is proposed therefore that whenever a new law is to be passed some sort of public opinion or referendum be sought. It is this public opinion which is the best guarantee of the people's rights. This is because a country's public opinion is basically shaped by its history and the political and economic arrangements

obtaining in that country. As learned Hand has said, "Liberty lies in the hearts of men and women, when it dies there, no constitution, no law, no court can save it; no zone can even do much to help it."¹⁶

Simply put, the laws that the country continues to adopt can have no more force than the written words in a statute-book. As far as the people are concerned, they do not exist until something happens and one is put behind the dock to answer accusations. It is terrifying to note that even University students do not have an idea as to what laws apply in this country except for the constitution and the vagrancy Act. The latter for which many have come to know about it the hard way through police hands. At least basic knowledge of the most important statutes is necessary.

The other method that may be used to communicate the law to the people is through the Radio, Mass Media eg. Newspapers, Magazines and journals. Among these, the radio, seems to be the most effective in that it reaches all parts of Kenya and can be heard by all owners of radios. But even then due to the prices of the radios, the common man still sees a radio as an item of luxury, As for the newspapers, their circulation and readership is limited¹⁷ to the literate and the urban - based elite who also own radios as well. Magazines are not widespread. Most of them are fashion magazines¹⁸ and are mostly fun magazines aimed at the middle class communities based in town. As for journals, the only two law journals in Kenya were the East African law journal which was

normally published and supported by the three Universities in East Africa, namely Dar-es-Salaam, Nairobi and Makerere. The other is the Nairobi Law Journal published under the auspices of the Faculty of Law and the Kenya Law Students Society. It is regrettable that both journals are monibund not to mention that they were mainly read in University Libraries and corridors.

Underlying all these methods of communicating the law to the people is the nagging problem of illiteracy among the rural populace. To an illiterate society, the law can only be communicated verbally and in the language that the people understand. ~~Assigned~~ against such method is the cost and the manpower. But as concerns the manpower, the government can utilise the existing administrative machinery to reach the people through public barazas, zalties and during harambee meetings. More so, the legal education of the fundamental laws can be inaugurated in primary and secondary school curriculums. The only fear as far as using the public administration is that the people can interpret the law to suit their own purposes. This is characterised in the case of KASELLA BANTU and others v.R.¹⁹ where a member of parliament had in a baraza explained and suggested ways of eradicating stock theft. One of his suggestions was that once caught the thieves should be punished. Whereupon some villages late caught some stock-thieves and punished them by killing. During the trial and subsequent conviction, one of the accused

gave his defence thus:

"In this area of the country(rural) we do not follow the law in the books. We just do what we are told. Whatever the leaders say we take to be the law."²⁰

Though this unfortunate case was decided in Tanzania this situation is right among our midst one may imagine what a selfish leader would do if given the duty to interpret as to what law is to be communicated to the people. Cases have been known where Kenyan leaders of no small repute have given illegal orders to shoot inspected thieves in disregard of the criminal law applicable.²¹

Another limited method of communicating the law is to have the laws enacted distributed to the people free of charge. As it is, Acts of parliament are sold at very high prices despite the fact that some are important to the everyday life of the people.²² Besides such free distribution, they should be in the National languages or ethnic-languages if they are to reach the people. It is submitted that this method is quite expensive and time consuming - a submission for which one may counter that freedom comes through the knowledge of one's rights. Accountability of the governors to the governed can only be meaningful if the people know what the rulers "social contract"²³ with them contains. The leaders can thus accept under such pressure that each person possesses an inviolability founded on justice that even the so-called welfare of the society as a whole cannot

override. It is on this aspect that in Africa today. Individual rights are stamped on the excuse of national security, stability, peace, unity and the welfare of the people. This is the dilemma of uhuru. The dilemma is that uhuru (freedom) has come without freedoms. The said dilemma does not just exist on the level of values in the quagmire surrounding normative prescription, but that the new nations of Africa have generally failed in a moral sense to meet the challenge of human rights and the dignity of man held to be especially dear to the Africans after the experience of colonialism.²⁴ To continue to keep them in ignorance of the state of affairs of how their countries are being run is to say the least ~~denying~~ denying them the right to knowledge.

CONCLUSION

The methods proposed are not exhaustible nor are they conclusive of other ~~avenues~~ avenues of communicating the law to those who should know it in order to act accordingly. But it must be said that these methods can help towards maintaining the "rule of law" and the tempo of development. The duty to so communicate the law lies primarily on the state but correpondingly, the lawyers have an obligation towards this end. In the whole, the lawyers should not see themselves as legal technicians, a legalistic role that lawyers have confined themselves strictly to

legal issues, a role that ~~mask~~es the masses just a market for the lawyers' services. The lawyer should have a professional urge towards instrumental, social engineering or the use of his investive skills to get things done, not just in the adversary system of administration of justice but also in any kind of field that the society requires his services. This is so in policy making and drafting of development plans. The lawyer should ~~per~~ceive of his share in running the country and the preservation and equitable distribution of its resources among the people. The lawyer to accomplish such tasks, will need not only his legal education but of equal importance and propriety, he must develop his legal skills for these will determine how he is deployed and used, for whom he works and what he is asked to do. The lawyer should not view development from the standpoint of an elitist top-to-bottom, professionally guided transformation of society in accordance with prevailing ~~paradigms~~ of development which seeks to produce human resources for the challenge but should view the modernization of the legal structures as well the socio-economic ones, from the standpoint of the people the rural masses, farmers, peasants and squatters living in a changing and most times an increasingly class-structured, ruthlessly exploitive and competitive socio-economic milieu.

The lawyer should see the problems of the masses as being a problem of priorities and resource allocation whether in food, health, education, literacy etc, it is

not scarcity of resources that haunts Kenya today and the prevailing poverty ridden rural communities but simply their distribution. There is no property of having prestigious international conference centres when people like the Turkanas, the Dorobos etc. in the semi-desert areas of the country do not have the basics. Food, shelter and clothing. In short, poverty, disease and ignorance are still major evils in Kenya despite the 19 years of independence. The lawyer must be a concerned party in all this.

It has been pointed out that law as an institution was used during the colonial period for various purposes. It was primarily used to annex Kenya as a colony. And the law was used in importance to bring in the establishment of the colonial rule. It was also the tool used to discipline the capitalist mode of production. The legal system of the colonial era facilitated the exploitation of Kenya's natural resources and labour. The latter exploitation of labour, it has been shown was possible by the use of coercive means. These means included laws forcing the Africans to offer themselves for work in the settler farms and industries. Hence it can be stated here that African cheap labour was a cornerstone in the building of the colonial economy and its attendant process of primitive capital accumulation. The Master and Servant Ordinances were cited as reliefs in this scenario. Although

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

The issue for determination in this final chapter is whether the task of analysing and showing that law is an instrument in a socio-economic setting has been accomplished. It was stated right from the beginning that this paper has used a historical and materialistic approach in trying to determine the aforesaid task. The author has perceived of law as an instrument which can be used to influence in any given direction, the Kenyan socio-economic circumstances.

It has been pointed out that law as an institution was used during the colonial period for various purposes. It was primarily used to annex Kenya as a colony. And that law was second in importance to arms in the establishment of the colonial rule. It was also the tool used to establish the capitalist mode of production. The legal system of the colonial era facilitated the exploitation of Kenya's natural resources and labour. The latter exploitation of labour, it has been shown was possible by the use of coercive means. These means included laws forcing the Africans to offer themselves for work in the settler farms and industries. Hence it can be stated here that African cheap labour was a cornerstone in the building of the colonial economy and its attendant process of primitive capital accumulation. The Master and Servants Ordinances¹ were cited as relics in this scenario. Attempts

to put land in the market like any other commodity by use of foreign laws of tenure has also been underscored. Especially, the resultant creation of a landed and landless African classes. The aspect resulted in what is commonly called urban drift.

The The sum total of the outcome of the colonial economic policies has been that at the time of independence, Kenya was characterised by multiple dependencies of foreign capital and the inequities of colonialism. The features of today's foreign domination are the hallmarks of yesterdays subjugation. A phenomenon that the legal superstructure nursed and bred. The economic structure is today neo-colonial and still umbilically attached to former metropolitan countries. The only significant change after independence has so far been the change of actors. More so in the political arena. This factor has been shown by the dialectical relationship that is perceived between the economic structure and the legal superstructure.

It has been the thesis of this paper that the state has played a great role in keeping at check the contradictions that have arisen because of the class struggle of the Kenyan society. The law has been the instrument by which this class struggle has been kept in check. The economically dominant class has through the use of the law triumphed over the propertyless classes. The vagrancy Act and its application has been examined within ~~at~~ this context. It was contended that the Act is a class statute

and is unconsciously aimed at protecting ~~public~~ *private* property. Its enforcement is unconstitutional.

The law relating to the rule:

IGNORANTIA IURIS NON EXCUSAT² has been analysed as an illustration of the operation of a rule of law in a social-economic setting. This setting is the class character of the Kenyan society. It is shown that the rule affects mostly the lower classes (poor) in Kenya. This has been underscored by the fact that more than 60% of all Kenyans are in one way or another illiterate. Illiteracy is disadvantageous to the development of a nation since it limits the number of active actors in this area. Hence it has been proposed in this paper that there should be mass education. It must be compulsory so that as many people are literate. In legal terms this means that the people will participate fully in ~~legislation~~ by electing representatives whom they are sure will represent their interests. It also means that it would be hard for the government to introduce retrogressive socio-economic policies which the people do not ascribe to. Laws are also in this category.

The other aspect of this paper is the role of lawyers in the Kenyan socio-economic setting both during the colonial and post-independence period. The paper has accused lawyers of being the hand-maidens of capital. They have played the role of facilitating the continuation of an economic system that is heavily weighted against the masses. Moreover, in this respect, lawyers as members

of the privileged classes, have joined hands with the owners of property to protect the said property. In simple terms, the lawyer, offers his services to those most able to pay. This is not to say that lawyers have always played the devil's Advocate. There exists a free legal aid scheme and other legal services for the poor. There are too radio and mass media forums where some lawyers have tried to educate the masses as to their rights. These the paper wholeheartedly comments. What the paper is saying is that lawyers could do more and this it is submitted cannot be done within the existing economic system.

The paper has also further observed that lawyers in the judicial process have adhered to the legal rules as they are in the statute books. The law is the very estoric business of lawyers, which is neither accessible nor easy to be understood by the people if found.³ In such a situation, the law then becomes resistant to change being so encapsulated in the forensic process. Judges and Magistrates jealously guard the strict legal rules, the tireless workers that they are in the legal process. The law has no greater sensibility to the winds, let alone breezes of change than have the judges and other professionals who administer it. It is hence no criticism of the legal profession to comment that faced with choice between certainty and flexibility of the law, most of them would choose certainty, upholding the established rule even if it be established, as in the examination of the vagrancy Act, that a law operates harshly or even unjustly over the people.

It is submitted that law is not a mystery. It only uses long words. But in applying the law it is not proposed that one should not learn its technical structure. This is important in understanding its development. But technical law by itself is useless, at best an arid game played by keen minds in court rooms and academic ivory towers. To understand the significance of the law, one must look at its historical and social setting, one must question what are the value and policy judgements enshrined within the propositions of law, and one must ask what is done in other progressive countries about the problems of the law as revealed.⁴

In the above regard, legal education and training must be changed dramatically. The present method of training lawyers cannot permit them to introduce great changes being only appliers of legal rules instead of applying the law according to the social situation. As it were if the judiciary is to set the pace, it would be slow. The heritage of the common law does not permit law to lead but only follow. Moreover, the common laws being the revered heritage of the British people and not Kenyans despite what is called its equitable gloss, did not develop by its own process to meet all the challenges of change in society. Hence the remedy is legislation to change society.⁵

It is proposed that the Kenyan lawyer should see himself not just as a utilitarian in search of the greatest happiness of the greatest number. Nor an

analytic jurist primarily concerned with concepts, or as only a social engineer pre-occupied with how law affects man's social interests or as a functionalist anxious to ascertain the functioning of legal rules. He should not perceive himself as just a realist sold on the idea that psychology is of the essence in the judicial process or a perciles engaged as a policy maker wisely dispensing laws nor a plumber skilled only as a technocrat whose main interest is the "lawyers".^{LAW} A Kenyan lawyer of today and tomorrow would require to be more than that. He must be "educated" to appreciate the value of a liberal training which inculcates a spirit of enquiring and analysis; and a sense of obligation to his country. This is because law in Kenya is faced with the challenge of the ~~previ~~ding socio-economic structure that needs complete overhaul. He therefore needs to be at once a socio engineer and analyst, a perciles and a plumber; capable of understanding the country's history, its inherited socio-economic and political systems and hence be in a position to throw overboard the delevict and thereto make a dynamic contribution to the maintenance of a proper balance between the need for stability and the need for revolutionary change; between the claims of the state and the individual. And above all, the extinction of a class society.

The Kenyan Lawyer should make sure that law is engaged in a continuous dialogue both as to the choice of means and the ends in view. If the Kenyan lawyer can

fulfil the role of stimulating economic growth and development and social well-being; elevate the moral fabric of the Kenyan people and foster a spirit of unity among the diverse peoples of Kenya and create a "common law" for the country. A common law where no man is oppressed. Where there is equality before the law. The lawyer and the legal profession would have made a great contribution to the emancipation of this country from the ravages of neo-colonialism foreign domination and chronic problems of disease, poverty and ignorance.

In order to achieve this desired goal, a process of law reform is necessary. A step towards this direction has already been taken by established ~~head~~ of the Law Reform Commission, given the task of reforming obsolete laws in Kenya. As we go to press, the commission has not been appointed nor its task started. What it will do remains to be seen. But one thing is clear. Any law reform in this country will depend on the members appointed to this commission and to what ends the reform is tending. But within the socio-economic setting the best that can be expected is a moderate piece-meal reform in order to fit in the existing order. It is submitted that such piece-meal reform is not enough. What is needed is a complete over-haul of all Kenya's laws including the constitution. The control of the means of production distribution, exchange and consumption must be put in the hands of Kenyans. How this can be done is the

challenge that law - reforms^{er} must face. This paper is clear on one point: that the past and present system of law reform which just seeks to "Anglicise" law while on the other hand extinguishing customary law must go.

Lastly, it is recommended in view of all the foregoing discourse that a purely Kenyan legal system is a priority. Mass participation in law-making is a must. The socio-economic structures must be changed to conform to a truly people's nation. In short: the masses of Kenya must control their own destiny by being their own masters. The means of production should be controlled by the workers and peasants and not left to domination by international finance capital in concert with the national bourgeoisie. Law should play the instrumental role in this inescapable goal.

FOOTNOTES

INTRODUCTION

1. ^{1.} Guy v. Donald 203 U.S. 399, 406 (1906).
2. P. M. Kareithi, J. M. In Parliament, EAPH.

CHAPTER ONE

1. At this time Germany, Portugal and France were also competing for acquisition of territories in Africa.
2. Ghai and McAuslan; Public Law and Political Change in Kenya - Nairobi (OUP) 1970 p. 15.
3. Article 20, East Africa Order-in-Council, 1897.
4. (1914) 5 E.A.L.R. 70.
5. The settlement was under the British Settlement Act, 1844.
6. (1914) 5 E.A.L.R. 70 at p. 92.
7. (1956) K.B. 1.
8. (1848) 2 exch. 167.
9. (1910) 2 K.B. 576.
10. Nyali Ltd. v. A.G. (1956) 2 ALL E.R. 689 (H.C.).
11. R.v. Earl of Crewe ex parte Sekgome (1910) 2 K.B. 576 at pp. 609 - 610/
12. See definition of Crownlands in Section 1 of the E.A. Order-in-Council, 1901.
"... All public lands within the East African Protectorate which for the time being are subject to the control of her majesty by virtue of any treaty; convention, Agreement, or of her majesty's protectorate, and all lands, which have been hereafter acquired by her majesty under the land Acquisition Act, 1894 or

UNIVERSITY OF NAIR obi
LIBRARY

otherwise howsoever."

13. Crown Lands Ordinance, Act No.12, ss. 54, 56 and 5.
14. Wainaina v. Murito wa Indangava.
15. Ghai, opp. cit. p. 34.
16. Most colonial laws were like this.
17. Marx, K., Preface, Contribution to the Critique of Political economy.
18. Refers to Native Registration Ordinance.
19. R. van Zwanberg: Colonial Capitalism and Labour in Kenya (OUP) 1975.
20. Marx, K. Supra.

CHAPTER TWO

1. Some people call it "flag independence."
2. Ngugi wa Thiong'o: Home-coming, essays on African and Carribean Literature; Culture and Politics, Heinemann, p. xiv.
3. Forward to the KANU Manifesto.
4. Paraphrasing Ngugi wa Thiong'o: I cannot, on the contrary, forget what the former colonial system and colonialists did and permitted to be done when they had things all their way. I mistrust a change of heart that conflicts with our people's strongest interests, cherished and dearest ambitious.
5. Dean, Faculty of Law, Lusaka.
6. This is a term attributed to Dean Roscoe Pound, a proponent of the sociological (functional) school of jurisprudence.

7. Cap. 58, Laws of Kenya.
8. Friedman, Law in a changing society (1959)p.3.
9. Walter Rodney, How Europe under-developed Africa.
See also Edmund Burke (English Statesman 1729 - 1797)
who once said: "People will not look forward to
posterity who never look backward to their ancestors."
10. Act No. 5 of 1969, s. 3.
11. Cap. 8.
12. S. 2 M.C.A. cap. 10.
13. S. 3 (2).
14. S. ~~30~~ Evidence Act, Cap. 80.
15. Ngugi wa Thiong'o Supra - says there are only two
tribes left in Africa, the haves and the have-nots.
16. Friedmann, 4 law and society review (1969), p. 29.
17. See. The Contraversial Law of Succession Act, 1972,
a Wholesale English Import to Kenya.
18. Scarman; English Law - the New Dimension.
19. Hart's Concept of Law, Ch. 6. makes it clear that
English jurisprudence regards African law as
primitive law.
20. Ghai & McAuslan, p. 506.
21. Scarman, supra, p. 28.
22. In this category are: Laws of Trespass, Protection
of Foreign Investments ACT and Nuisance.
23. P. 4. (Dissertation).
24. Registration of Natives Ordinance, 1900; refers to
the apartheid Laws of the Colonial period.

25. I had my clinical programme at Machakos District Magistrate's Court from October to November, 1981.
26. Le Pelley, Vagrancy and the Law in Kenya, 5 E.A.L.J. (1969) p. 195.
27. Akuthe, P. (1977) LL.B. Dissertation.
28. R. B. Seidman, Paper No. 3, (1967) U.C.L.A.
29. Marx and Engels - The Open Society and Its Enemies, Vol. 2, p. 112.
30. Criminal Appeal No. 633 of 1967.
31. S. 77, (1969), Chapter 5 read as a whole.

CHAPTER THREE

1. The Colonial Situation was based on Apartheid.
2. Pushkani's Law and Marxism.
3. K.A.N.U Manifesto.
4. Supra - Foreword by H.E. Mzee Jomo Kenyatta.
5. Bill of Rights Contained in Chapter 5, Kenya Constitution.
6. Lee Muthoga, Chairman of the Law Society of Kenya was recently blasted for his views on the propriety of detentions.
7. S. 7 Penal Code, Cap, 63.
8. Allot, The Unification of Laws in Africa, 16 Am. J. Comp. Law 51, (1968).
9. 60% of University students interviewed knew very little of what laws and rights they have under the law.
10. S. 7 Penal Code, Cap. 63.

11. R.B. Seidman, The Communication of the Law and the Process of Development. Wisc. L. Review, 3, (1972), 686, 689.
- 11a. Unreported, Resident Magistrate Court at Machakos G.C. 2542/81.
- 11b. (1938) 5 E.A.C.A., 37.
12. 65% Kenyans are semi-literate or altogether illiterate.
13. Mutungi, O. K., Paraphrasing, The Works of Bentham in (1973) E.A.L.J. Volume, 9 p. 16.
14. Abuya Abuya's and Koigi's frequent motions on corruption, land and employment.
15. A good example is the law of contract, cap. 23, a carbon copy of the English Act based on the common law, applied by S.3 of the Judicature Act, Cap. 8, 1967.
16. Leanned Hand, The Spirit of Liberty.
17. Circulation of papers: both the Standard and Daily Nation papers reach approximately 500,000 readers per day.
18. Viva, Drum, Fun, True Love, etc.
19. (1969) Tanzania High Court Digest No. 170, 145.
20. Ibid. pp. 147 - 8.
21. See "Shoot -to-kill" orders by a former A.G. and now Minister.

22. Example: Companies Act Costs 168/= at the Government Printer.
23. A term borrowed from John Locke.
24. Rupert Emerson; The Fate of Human Rights in the third world, world politics Volume xxviii No. 2. (January, 1975) pp. 221-226.

CHAPTER FOUR

1. Master and Servant Ordinance, 1910.
2. S. 7 Penal Code, Cap. 63 Laws of Kenya.
3. Sir Thomas More; A Man of all Seasons:
"They feel they'd rather have no lawyers among them; for they consider them as a sort or people whose profession is to disguise matters."
4. Wedderburn, K. W. The Worker and the Law, (Penguin Books) pp. 7 - 8.
5. Scarman, p. 2.

SELECTED BIBLIOGRAPHY

(A) BOOKS:

1. Conforth, M.: - Materialism and the Dialectical Method.
2. Emerson, R.: The Fate of Human Rights in the Third World, Volume 28 No. 2.
3. Engels and Marx: The Open Society and Its Enemies, Volume 2.
4. Ghai and McAuslan: Public Law and Political Change in Kenya (OUP, 1970).
5. Hand L.: The Spirit of Liberty.(New York, Vintage Books, 1959)
6. Hart, L.: The Concept of Law (1961). (London) O.U.P. 1961).
7. Harvey, W. B.: Law and Social Change in Ghana (1966). /Princeton. N. J. University Press, 1966/
8. IDS: Reflections of Law and Development, Occasional Paper No. 29, (1978).
9. K.A.N.U. : Manifesto.
10. Kaeithi, P.M.: J.M. in Parliament, EAPH.
11. Marx, K.: Preface to the Critique of Political Economy.
12. McGregor, O. R. Social History and Law Reform, The Hamlyn lectures
13. Ngugi wa Thiong'o : Homecoming : Essays on African and Caribbean Literature, Culture and Politics; Heinemann. /London, Heinemann, 1972-/

14. Nikin, P.: ^{ti} Fundamentals of Political Economy.
/ Moscow, Progress Publishers, 1966 /
15. Ocran, T.M.: Law in Aid of Development. / Issues in
Legal Theory, Ghana, Publishing Corp. 1978
16. Pashukani's : Law and Marxism.
/ Ed. B. Einhorn, London, 1978 /
17. P'Bitek, O. Song of Lawino and Ocol.
18. Podvolotsky: The Marxist theory of Law.
(Moscow - 1926), 2nd Edition.
19. Pound, R.: Jurisprudence, (1959).
/ Yale U.P. 1959 /
20. Rawls, J.: A Theory of Justice (HUP, 1971).
/ London, Oxford U.P. 1973 /.
21. Rodney, W.: How Europe Underdeveloped Africa.
/ Dar-es-Salaam, Tanzania, Publishing House, 1972 /
22. Scarman, English Law - The New Dimension.
/ London, Stevens, 1974 /
23. Seidman, R. B: Law and Development: A General
Model (1972). Nairobi.
24. Tigar, : Law and the Rise of Capitalism.
25. Tumanov: Contemporary Bourgeois Legal Thought.
Moscow - Progressive Writers.
26. Wedderburn, K. W.: The Worker and the Law.
(Penguin - 1965)
27. Yashi Ghai: Reflections on Law and Economic
Integration in East Africa; SIAS -
Uppsala (1976).
28. Zwanberg, R. van.: Colonial Capitalism and Labour
in Kenya (1975).

(B) ARTICLES

1. Allott : The Unification of Laws in Africa
16 Am. Comp. L. J. (1958).
2. Burg, E. M.: Law and Development: A Review on
Literature 25 Am. Comp. L.J. (1977).
3. Elias, T. O.: Volume 4 N.L.J. (1970).
4. Friedmann: 4 Law and Society Review, (1969).
5. Kitumba, C.: The Role of Law in Economic Development
U.L.F. (1974).
6. Majaju, A.: Law, the Political Setting and Dilemma
of Development (1974) U.L.F.
7. Mutungi, O. K.: (1973) E.A.L.J. 16.
8. Nyhart, J. D.: The Role of Law in Economic
Development, (1962) S.L.J. 394.
9. Seidman, R. B.: The Communication of the Law
and the Process of Development
(1972) Wisc. L. R. 3,