JUDICIAL ACTIVISM: KENYA'S POST - INDEPENDENCE EXPERIENCE.

BY

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A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE BACHELOR OF LAWS DEGREE (LL.B.), UNIVERSITY OF NAIROBI.

NAIROBI. APRIL, 1990.

D E D I C A T I O N

To my dad, the late Patrick Ogola;

Mum, Yuanita;

Brother, Odhiambo.

- Valuable friends, each in a very special way.
- Invaluable sources of inspiration, determination, and encouragement, which no doubt, are instrumental in shaping my life, thus far.

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A B B R E V I A T I O N S

1.	A.B.A.	:	American Bar Association
2.	A.B.A.J.	:	American Bar Associatin Journal
3.	A.C.	:	Appeal Case
4.	Att. Gen.	:	Attorney General
5.	ALL E.R.	:	All England Reports
6.	C.A.P.	:	Chapter
7.	Camb.	:	Cambridge
8.	CH.D.	;	Chancery Division
9.	C.L.J.	:	Columbia Law Journal
10.	D.P.P.	:	Deputy Public Prosecutor
11.	E.A.	:	East Africa
12.	E.A.L.R.	:	Eastern Africa Law Report
13.	E.A.L.J.	:	Eastern Africa Law Journal
14.	Ed.	:	Edition
15.	H.C.	:	High Court
16.	H.L.	:	House of Lord
17.	H.L.R.	:	Havard Law Reports
18.	J.	:	Judge
19.	(K)	:	Kenya
20.	K.B.	:	Kings Bench
21.	LL.B.	:	Bachellor of Laws
22.	LL.M.	:	Masters of Law.
23.	L.J.	:	Lord Justice
24.	L.R.	:	Law Report
25.	Misc Cr. App:		Miscellaneous Criminal Appeal

26.	N.I.L.R.	:	Netherlands International Law Review
27.	Q.B.	:	Queen's Bench
28.	R.	:	Republic
29.	(U)	:	Uganda
30.	Univ.	:	University
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ACKNOWLEDGEMENT

Special thanks are due to my supervisor, Professor J. B. Ojwang of the faculty of law, lecturer, advocate, and director for post graduate studies, University of Nairobi, through whose guidance, criticisms and invaluable suggestions, I am introduced to articulate and responsible scholarship.

I am indebted to you, Professor Ojwang, for your unlimited patience, throughout the arduous exercise, and for the role you played in educating me.

Special thaks are also due to my brother, Samson Odhiambo and his family, who have been my source of encouragement and determination, and through whose financial support, this dissertation has been written and typed.

Special thanks again, to Ochieng' and Dorcas and their households, whose company throughout my stay at the university has been especially nourishing.

I also acknowledge the love and unreserved affection accorded me by the members of my family throughout this arduous exercise; and especially to Dorcas again, for excellent typing of the original manuscript of this dissertation.

Due regards also extended to the librarians in charge of the Parklands Campus library, and those in charge of the Africana section of the Jomo Kenyatta Memorial library through whose relentless services I was able to locate

whichever books I needed for references.

Finally, I am indebted to close comrades who have accorded me unlimited friendship throughout my campus life: Mohammed Orya, Ochillo Sammy, Odando Charles, Ray Aringo, Dan, Walter, Ann, Linette, Helen and many others.

I bear responsibility for all errors in this dissertation.

E. K. O.

PREFACE

This dissertation analyses the nature of, and the scope for judicial activism, in the context of independent Kenya's legal system. It investigates the propriety, on the part of the courts, of assuming activist tendencies, especially against the background of the separation of powers.

Judicial activism tends to strain the confidence of those who dislike the innovation, while judicial caution tends to estrange the confidence of those who regard the law as imprisoning them in the past. This is a dilemma for any legal system, and this dissertation attempts to establish the approach of Kenyan courts, with regard to the same.

To do this, I have divided the discussion in this dissertation into five chapters.

Chapter 1 introduces the topic of study, and attempts a definition of the relevant terminologies and concepts, which have been developed around the notion of judicial activism. Relevant schools of thought are also discussed in this chapter. The positivist and the naturalist schools of legal thought, are specially considered, since the attitude of judges to the role they believe themselves called upon to perform, will depend, to some extent, upon their personal commitments to either the positivist or the naturalist views of legal thought.

Chapter 2 discusses judicial law-making in selected jurisdictions and observes how courts in these jurisdictions have made law, both in civil and criminal matters.

Chapter 3 discusses the democratic character of judicial law-making, and investigates whether, in the Kenyan practice of democracy, judicial creativity would be inconsistent with democratic ideals.

Chapter 4 discusses judicial law-making in independent Kenya. In this chapter, I have traced the origin of the Kenyan judicial structure from its colonial roots, and, using pre-independence caselaw, I have investigated whether the colonial judiciary was creative in its application of the law. Finally, to determine the attitude of the present courts in Kenya, with regard to judicial activism, I have attempted a study of the post-independence caselaw, from which has emerged three categories of judicial approach to the resolution of conflicts: the "restraint and lack-of-competence" approach, the activist approach, and the inconsistent path, which sometimes becomes a restraint approach, and at times becomes an expansive, activist approach.

Chapter 5 is a set of submissions, based on findings emerging from the whole study.

CHAPTER ONE

JUDICIAL ACTIVISM: RELEVANT CONCEPTS AND SCHOOLS OF THOUGHT

INTRODUCTION

PART ONE: TERMINOLOGY AND DEFINITIONS

1:1 THE MEANING OF JUDICIAL ACTIVISM

The fifth edition of Black's Law Dictionary defines judicial activism as,

> "Judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favour of progressive and social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally those decisions represent intrusions into legislative and executive matters."

I would adopt this definition and add that judicial activism entails judicial legislation. It is the active development of law by judicial decisions.

1:2 THE RESEARCH PROBLEM

The central problem in this study is to determine whether law-making is an exclusive domain of the Legislature, or whether the judiciary is, by necessary implication, a partner in the business of law-making. Despite adherence to the common law doctrine of precedent some judicial decisions indicate that Kenyan courts have been active in legislation. The general opinion is

that the judiciary is usurping legislative functions. This has resulted in confusion as to the real function of the judge This study seeks to clarify the issue in light of the Kenyan experience since independence. To do this judicial activism is studied in relation to some concepts which have been developed around it. For instance, how does the notion of judicial activism relate to some of the democratic requirements of our constitution; how does it relate to the concepts of the separation of powers and the rule of law?

This essay attempts to establish whether in the process of interpreting the law, courts do make new law. There are two competing views which have emerged, and both attempt to define the proper function of the judiciary. At one end is the view that the function of the judiciary is to find the intention of Parliament, and of Ministers, and carry them out. This is better done by filling in gaps and making sense of enactments, than by opening them up to destructive analysis.[1] At the other end is the view that the proper function of the judiciary is to interpret the words the Legislature has used. These words maybe ambiguous but even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited.[2]

The first view, unlike the second, favours judicial creativity. I propose to consider which view is the better and preferable in the Kenyan situation.

1:3 ISSUES OF LAW AND THE PROBLEM OF DEFINITION

The problem of definition of law is a perennial one, and one needs only to look at the competing views in the definition of law to agree. In this essay I begin from the premise that law is a functional concept, subject to change by the changes in the condition of society. I would adopt Professor Hart's opinion that to understand law, we must first put it in a context before attempting to define it.[3] Thus, law maybe defined as a rule made by authority for the proper regulation of a community or society, and for the correct conduct in life.[4] If such a rule regulates conduct, and is accepted as being necessary and binding by the people whose conduct it is supposed to regulate, then that rule is law.[5] Clearly this type of law may or may not satisfy the positivist's or naturalists view of what law is or ought to be, but provided the society accepts it and recognises it as having a force of law, and binding upon themselves, then that is the law I am concerned with here.

1:4 SCHOOLS OF LEGAL THOUGHT

a) The natural School of Legal thought

Cicero, in the first Century B.C. defined natural law as ".... right reason in agreement with nature; it is of universal application, unchanging and everlasting ...."[6] According to this view law is that which is in accord with righteousness. The name natural law came about because in attempting to answer the

question what is law the adherents of this view had to resort to nature.[7] They believed that everything natural was an embodiment of beauty and justice, and hence required of the promulgators of law, to reflect that beauty and justice in legislation. To claim a higher status for natural law, it is said to have some peculiar characteristics. Firstly it is universal and immutable.[8] In consequence it is available for those whose office it is, to enact or develop law. It is a conception of justice in the sense in which justice stands for the righting of wrongs and the proper distribution of benefits and burdens within a political community. Secondly, natural law is higher and superior towards law promulgated by the political authorities.[9] Hence natural law provides the standard of validity for ordinary rules. The third quality is that it is discoverable by reason.[10] Herein lies the natural quality of natural law. The Stoics, the school which elaborated the doctrine, veiwed all things, including man, as having natural essenses or ends. It would appear that in modern times, the courts would be the "judge" of the "right reason", and thejudges' natural duty would be to make laws which promote the human and general good. This suggests that a court will not only be guided by objective rules laid down by the authority, but also by its own subjective view of good and bad, just and unjust. Where man-made law is unjust, it is the function of the court to make it just. Natural law necessarily involves moral and value judgements. The idea of morality and value judgement, which is inherent in the naturalist

definition of law, is the main distinguishing feature between positivist and naturalist definitions of law.

b) The Positivist School of Legal thought

Positive law has been described as the law of the state,[11] that is, a law consciously made by the state following laid down procedure. This law is something ascertainable and valid without regard to subjective considerations.[12] According to this view, once a law has been made following a proper procedure, it is valid regardless of whether or not it is just. What it is, is one thing, what it ought ot be is another. Hans Kelsen calls it "Pure Theory of Law,[13] devoid of politics, sociology, morals, and all that is foreign to it.

Adherents of positivism maintain that the judiciary is to apply the law the way it is enacted by Parliament. It is not the proper function of the court to inquire into the justness of a particular enactment of Parliament. Lord Simonds reiterated this position in the House of Lords, in the case of Magor and St. Mellons Rural District Council V. Newport Corporation,[14] where he said that the duty of the court is to interpret the words that the Legislature has used, and not to travel outside them on a voyage of discovery". Positive law is complete and ready for application the way it is once it has satisfied the criterion of originating from the sovereign, and the court does not need to alter it in any way. Positivists consider the criterion of justice as superflous and irrelevant for an adequate defination of law.

It should, however, be noted that today the conflict between naturalism and positivism has escalated into enormous dimensions, because everywhere around us states are promulgating statutes which may appear to be unjust, immoral, or degrading to human dignity, in the name of security, and lawyers and judges are called upon to apply them. In my view the attitude of judges to the role they believe themselves called upon to perform, will depend to some extent upon their personal commitments to either the positive or the natural views of legal thought.

c) The Sociological School of Legal thought

This school provides a belief in the non-uniqueness of law: a vision of law as but one method of social control.[15] The purpose of law is to serve and protect human needs, and to reconcile these needs with the needs of the whole society. Thus law is defined here as the "sum of conditions of social life as secured by the power of the state, through the means of external compulsions".[16] A lawyer is seen as a social engineer and he uses law to lubricate the social machine.[17] The Sociological view contains the ideas of purpose and utility, and sees law as a purposive enterprise. We must be sufficiently capable of putting ourselves in the position of those who drafted the rule to know what they thought "ought" to be, and it is in the light of this "ought" that we must decide what the rule is.[18] The function of the court as the interpreter of law is therefore to determine the purpose, and give it effect. The purpose of law does not contain

law itself but the background of law. All law is made with the intention that their social background be known.

As to the theory of utility, Bentham believes that nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do.[19] Man's desire is pleasure and avoidance of pain. Hence utility should be the sole basis of legislation. Where Parliament makes a law which fails the utilitarian test, it is the duty of the court to rectify it.

Like other concepts, the concept of utility fails in reconciling pains and desires of all the members of a society. For instance, how is a judge, in deciding whether to issue an injunction against an alleged nuisance, to reconcile the enjoyment of one who likes late night noisy parties against the discomfit of his neighbours? The argument by utilitarians is that man is motivated by pain and pleasure, and properly drafted legislation, applied by a utilitarian court, can produce a coincidence between the interests of the individual and that of the community.

d) The impact of Public Policy on judicial decisions

Besides other determinants, the jurisprudence of a court may be influenced by policy considerations. The government may have in mind some public policies which it is anxious to implement and, by intimating its intention to the judiciary such policies can be implemented through judicial decisions. This is more so possible in those jurisdictions where there is very little separation of

powers between the three organs of government. In those jurisdictions where the choice of a judge is placed entirely on the Head of State, public policy may, most probably, find its way into judicial decisions since, a judge may feel insecure if in his judicial decisions he does not reflect the current political opinion, and himself being a political appointee.

Judges not only implement government policies but may also, in the process of interpreting law, be policy makers themselves. For instance, most of the law of torts is based on public policy. Donoghne V. Stevenson[20] established a new category of duty - employer liability. Judges had known how difficult it was for a plantiff to establish a duty of care on a manufacturer defendant wish which the plantiff was not in privity of contract. The decision in this case, which was based on public policy, rid the law of the contract fellacy, and provided authority for the proposition that a notional duty is owed independently of contract by a manufacturer to the ultimate consumer of his product. In George Mbuthia V. Jumba Credit Company Ltd,[21] the majority view was that allowing the finance company to exercise its statutory power of sale would be against public policy, for the intention behind the mortgage transaction was not to divest the mortgagor of his land. Arguments based on policy justify a political decision by showing that the decision advances or protects some collective goal of the country as a whole.[22] It is not advisable for judges to base their decisions on public policy because this will bring into such decisions the judges' individual political philosophies.

In Re Miram's[23] case, Cave J. said that judges are to be trusted as interpreters of the law than as expounders of what is called public policy. Sir Charles Newbold is of the opinion that the judiciary is not elected and should not seek to interfere in a sphere which is outside the true function of the judges. It is the function of the executive of a country to be dynamic, and the judiciary to be conservative.[24]

A court which bases its decisions on public policy will obviously be legislating.

PART TWO: CONCEPTS

1:5 STATUTORY INTERPRETATION

What is a Statute?

A statute is an instrument enacted by a legislative body constituted according to some particular constitutional formula,[2] and its words are law. In Kenya a statute is that measure which has gone through the three readings in Parliament and has receive a presidential assent.

The nature of language is such that legislation inevitably demands interpretation. Words are often uncertain or ambiguous, and courts have always been required to determine whether a particular circumstance is comprehended by a particular enactment The Court's Cardinal duty is to interpret statutes. The observat has been that courts make law through statutory interpretation.

This was observed in 1717 by Bishop Benjamin Hoadly, in a sermon delivered before the king, and often quoted by J.C. Gray,[26]

> "Hay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them."

The adoption of this view entails problems: why then does Parliament exist? It suffices here to note that it is because of such confusion over the role of the court that rules have emerged, guiding the court and making it adhere to its proper role.

English law has established three main rules of interpretation: the literal rule, the golden rule and the mischief rule.[27] These are distinct rules and a court can invoke whichever produces a result which satisfies the sense of justice in the case before it. They can also be used in pairs. The rules of interpretation attempt to restrict the judicial creativity by the courts. Where the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound the words in their natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the law giver.[28] The effect of the literal rule is to reduce judicial innovation and to make judges adhere to the intention of Parliament. Other judicial pronouncements, however, indicate that even when words used are clear they should not be given effect if this will produce a result so outrageous that the legislature cannot have intended it. This is called the golden rule of interpretation.

Both these rules emphasize fidelity to the legislature's words, although the golden rule makes some allowance for judicial creativity. The mischief rule requires the court to find out the mischief which the legislature intended to cure, and then make a rule which curses it. This rule affords the judiciary the greatest scope for judicial law-making. The classic formulation of the mischief rule appears in the resolutions of the barons of the Exchequer in Heydon's case[29] where it was said that in interpreting a statute, four things were to be considered.

Firstly, what was the common law before the making of the Act. Secondly, what was the mischief and defect for which the common law did not provide; third, what remedy the Parliament had resolved and appointed to cure the mischief; and finally, the true reason of the remedy; and then the office of the judge is always to make such construction as shall suppress the mischief, and advance the remedy. The remedy should suppress any evasions for continuance of the mischief, according to the true intent of the maker of the Act Probono - publico.

The third rule clothes the judiciary with wide powers for judicial innovation. The court may look at the rest of the law, and take judicial notice of any facts of common knowledge when the statute was enacted. In practice, there are several obvious drafman's errors, and courts have subtituted new words for statutory words. The general rule would appear to be that judges may read in words which they consider to be necessarily implied by words which are already in the statute. The court has limited power to

add to, alter, or ignore statutory words in order to prevent a provision from being unintelligible or absurd. This calls for increased judicial creativity and frowns upon the assertion that courts are to interpret within the four corners of the statute. Two contradictory views have, therefore, arisen. One takes the duty of a judge as being purposive and less mechanical, allowing the judge to interpret a statute in such a manner as to creat the best possible of all the meanings. This view calls for increased judicial creativity. The second view is suspicious of a change which would give judges more freedom for manoeuvre. The disagreement between the two views, is illustrated by the argument about "gap" - filling between Lord Denning and Lord Simonds in Magor and St. Mellons Rural District Council V. Newport Corporation,[30] where Denning, L.J. said,

> "... We sit here to find out the intention of Parliament and of Ministers and carry it out and we do this better by filling in the gaps and making sense of the enactments, than by opening it up for destructive analysis."

This court of Appeal proposition was repudiated by Lord Simonds in the same case in the House of Lords.

> "The duty of the court is to interpret the words ..., those words maybe ambiguous, but ..., the power and duty of the court to travel outside them on a voyage of discovery are strictly limited.[31]

Lord Simonds considers "gap filling" in statute a "naked" usurpation of the legislative function under the guise of interpretation.

The literal rule can lead to injustice becasue it does not allow for any contrary opinion but what is manifested on the face of the statute. The golden and mischief rules are more flexible and would be more useful for us today. Faced with glaring injustice the judges should not be impotent, sterile and incapable. In my view, where a strict construction would lead to absurdity the judges should read words in statute so as to do what Parliament would have done had it been faced with the situation.

The same mixture of technical and constitutional issues in interpretation appear in Black - Clowson international Ltd. V. PaperWerke Waldhort - Aschaltenburg A.G.[32] where the House of Lords, by a bare majority of 3 to 2, upheld the rule that reports of committees are admissible only as evidence of the mischief prompting an enactment and not as evidence of the meaning Parliament intended to attach to its words. The majority took this view, even though the report contained a draft bill identical in all material respects with the terms of the Act. They saw practical objections to admitting the commentary on the draft bill contained in the Committee's report, since that would mean construing two documents instead of one, and would open doors to the admision of other aspects of Parliamentary history.

These cases indicate the unsettled position on whether, and if so, to what extent judges should assist Parliament in legislation. The East African, and Kenyan, position can be identified from decided cases. In 1955 it was observed that the East African judges were under the duty to make the common law adaptable in

East Africa. Lord Denning, commenting on the transplantation of the common law to the colonial lands, observed in Nyali Ltd. V. Att. Gen.[33] that,

> "... In these far off lands, the people must have a law which they understand and ... respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands".

This opinion incorporates the rules of interpretations we have seen. It embodies the golden and the mischief rules of interpratation and clothes the courts with legislative powers where appropriate.

1:6 THE CONCEPT OF JUDICIAL PRECEDENT

A precedent is a judicial decision which contains in itself a principle. The underlying principle of a case, which forms its authoritative element, is often termed ratio decidendi.[34] Decisions handed out in court in earlier cases play a significant role in the administration and adaptation of law in many legal systems. Sir John Salmond has stated that in England, a judicial precedent speaks with authority. It is not merely evidence of the law but a source of it; and the courts are bound to follow the law that is so established.[35] This doctrine is founded on the theory that it is essential for the law to be certain, and to attain this, it is worthwhile to sacrifice justice occasionally.

Adherence to the doctrine of precedent is, however, weakening. For instance, even the House of Lords has held that it is not bound by its own earlier decisions. The House changed the practice which had prevailed for a long time. The statement released by the House

acknowledged the importance of the doctrine, especially in the orderly development of legal rules, but also observed that rigid adherence to precedent may lead to injustice in particular cases and unduly restrict the proper development of the law. The House modified their practice so that while treating former decisions of the House as binding, it reserved the right to depart from the previous decisions when it appears right to do so.

In Miliango's Case,[37] Lord Wilberforce said that he could not accept the suggestion that because a rule is long established, only legislation can change it. That maybe so, when the rule is so deeply entrenched that it has infected the whole legal system, or the choice of a new law involves more far-reaching research than courts can carry out. In this case a judicial decision abrogated a common law rule said to be 350 years old. Issue was whether this should be allowed to happen. Nevertheless longevity maybe regarded as decisive against change when people have relied on the old rule in entering into transactions. In Re Compton,[38] Lord Green M.R. indicated that he would have held trusts for poor relations non charitable if the issue had come up for the first time, but it was impossible now to overrule cases holding that they are charitable, because people would have relied upon them.

In the United States, Courts of the various states and the U.S. supreme court have never held themselves to be absolutely bound by their own decisions. Today, a feeling of freedom exists in the U.S., which could strike an English judge as revolutionary. Jaffe says he has been disturbed by the bold innovation of the Supreme Court of the United States.[39]

In Adams Export Company V. Blackwith,[40] the supreme court of Ohio, in overruling the doctribe laid down in Ellis V. Bitzer,[41] which had been the law of Ohio since 1825, Wanamaker, J., said that "a decided case is worth as much as it weighs in reason and righteousness, and no more. It is not enough to say "thus saith the court." It must prove its right to control in any given situation by the degree in which it supports the right of a party violated and serves the course of justice as to all parties concerned."[42] This shows that the U.S. approach to the doctrine of precedent is far more liberal than the strict view of the English courts. Only where a departure from earlier cases would interfere with vested rights, do we find marked hesitation in repudiating established rules which are thought to be in conflict with the mores of the present day.

In my view, case law ought not to be wholly bound by the rule of past generations. Although certainty is the very essence of the law, courts should be able to change the law by reversing or modifying a rule which has been demonstrated to be erroneous, either by being obviously harmful or detrimental to society because of the changed conditions, or when it is just a bad law. Lawyers and judges should regard precedent as a mere evidence of the law and not as the law itself.

In Kenya, we apply the doctribe of precedent by virtue of Section 3(2) of the judicature Act, but it is applied in accordance with the principle extracted from the observation of Lord Denning in Nyali Ltd. V. Att. Gen.[43]

> "Just as with an English Oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character it has in England."

This principle establishes that judges in East Africa, and Kenya, have some discretion whether or not to follow a past decision. Our courts are more favoured by the golden and mischief rules of interpretation.

Adherents of precedent believe that if the judges were not bound by prior decisions, there would be no limit to judicial legislation.[44] In my opinion, law is an organic concept, subject to change with the development in society. A judicial decision of several decades back, ought not to be taken as a binding source of law which courts must accept under all circumstances.

1:7 JUSTICIABILITY

In Morgans V. Launehbury[45] it was held that there are certain questions of policy which judges are not empowered to settle. The court observed that such policy or social questions were best suited for resolution by the collective wisdom of Parliament. A justiciable matter is one of a legal character, and not of a social or political or economic nature. A matter is justiciable only where a recognized judicial remedy exists. The concept of justiciability, therefore, considerably reduces judicial innovation, because it operates to restrict the area of judicial creativity.

1:8 JUDICIAL DISCRETION: ACTION OF RESTRAINT

Judicial discretion is the concept which allows or entitles a court, to take into account certain collateral matters, such as the conduct of the parties, in addition to considering their bare legal rights, in deciding whether to grant an equitable remedy.[46] The importance of this doctrine is that it either enhances or restricts the hand of the court in pronouncing rules, thereby directly affecting judicial creativity.

1:9 RETROACTIVITY AND PROSPECTIVE OVERRULING*

One of the problems of judicial law-making is its normally retroactive effect. "Since the law-making power is exercised in the context of a specific controversy, the court's novel ruling normally governs the case before it"[47] This may work considerable hardship not only on the defendant against whom a cause of action will have already accrued, but also on future defendants. These unsettling consequences are proper considerations in deciding whether or not to disturb the status quo, by adhering to the doctrine of precedent. One suggested solution is for the courts to assume a power of prospective overruling. The court would apply the old precedent in the instant case, but would announce that, for the future, a new rule would be followed.[48] This may be unjust to the particular plaintiff, but, as we have seen earlier, to achieve certain ends, justice must be sacrificed occasionally.

1:10 SEPARATION OF POWERS AND THE RULE OF LAW

The institution of government is conceived of as comprising three organs: the Legislature, the Executive and the Judiciary. The Separation of powers doctrine aims at providing checks and balances to government by ensuring that each organ of the government is restricted to specific functions. No organ should perform, or interfere with, the functions of another. The Legislature makes the laws, the Judiciary interprets and adjudicates the law. The persons who comprise these three agencies must also be kept separate and distinct, no individual being at the same time a member of more than one branch, as Locke envisaged when he said,

> "It must be too much temptation to human frailty apt to grasp at power, for the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make."[49]

The doctrine of separation of powers clearly militates against the notion of judicial activism, and gives no room for a possible partnership in law-making business. However, the reader should note that this doctribe has never been rigidly applied in any country.

As to the principle of the Rule of Law, Dicey remarks that it means absolute supremacy of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness or prerogative, or even of wide discretionary authority on the part of the government.[50] An issues arises whether judicial legislation would be an abuse of the discretion. Commenting on the

issue of discretion G.K. Kuria and J.B. Ojwang had this to say:

> "The need for discretion is especially urgent in emergent states where such calamities as floods, epidemic or food shortages do often occur. External aggression from hostile neighbours is also recurrent threat in some countries"[51]

Ojwang and Kuria evidently support judicial legislation in emergency situations. This position is acceptable because it allows law and legal concepts to remain meaningful and functional in the society.

The rule of law also guarantees equality. The judiciary is to apply law in a manner that guarantees equality in society. Judge Tanaka superbly articulates this view when he said, in the South West African Case[52] that the judicial power is also subject to this principle (of equality). The Bill of Right also guarantees the equality principle. It is the duty of the judiciary to protect these rights. "Such rights will be taken care of if the judiciary should recognize in clear terms its role as the chief guardian of the values represented by the Bill of Rights. By considering the spirit of the Bill, the judges should be in a position to pronounce impertially on whether or not some particular power exercised by the executive transgresses the social contract".[53] This view demands the constant use of the golden and mischief rules of interpretation.

Sir Charles Newbuld opposed the view that judges should legislate, and defined the role of a judge in a most humble manner:

> "The judiciary is not elected and should not seek to interfere in a sphere which is outside the true function of judges ... It is the function of the judiciary to be conservative so as to ensure the rights and duties of the individual as determined by the rule of law"[54]

With respect, I submit that the position taken by the learned judge applies more accurately to a static society, with no changes and progress. In the modern societies, where promulgated rules become obsolete within a short period of time, it may not be safe to exclude the judiciary from legislation whenever it appears right to do so. In modern times, when states are promulgating statutes which may appear to be very aggressive the judiciary is called upon to come to the protection of the individual. It can only properly do this by occasionally, varying the content of the existing laws.

C H A P T E R T W O

JUDICIAL LAW-MAKING: EXPERIENCES FROM SELECTED JURISDICTIONS

2:1 THE THEORETICAL AND HISTORICAL ROLE OF THE JUDICIAL SYSTEM

a) The Concept of judicial system

In a general sense, a judicial system may be defined as that system which is composed of judges and courts, and which makes determinations primarily with reference to prescribed or perceived norms. These norms may be written, as in the case of a code or statute, or they maybe unwritten, as in the case of common law or other precedential systems. The judges may range from professional adjudicators with permanent tasks, to amateur arbitrators selected for a single case.[1]

The judicial system is part of the general political system. If viewed in a vacuum, it is an independent system.[2] The judicial system, like the general political system, is engaged in the authoritative allocation of values in society.

One way of defining the adjudicating process is by looking at the nature of the decision-making which is taking place. In a most general sense, the judicial process is seen, as one involving the application of fixed and known rules, to specific facts, in order to achieve desired conclusion.

Inherent in this approach is the myth of mechanical jurisprudence. "The law", the rule to be applied in an individual case, is either fixed or ascertainable. "The facts" can be found with unerring certainty. "The result" is then the logical consequence of a classic Syllogism.[3] Thus, the adjudicating process is viewed as one in which decisions are rationalized in terms of the compulsion of pre-existing norms, and the function of the judge is looked upon as limited by the laws which he must administer. Thus, the perceived limitations upon the judge's own authority may acquire signal importance in this study.

b) The Origin of the judicial system

In every society, modern or traditional, quarrels are bound to arise. In other societies, the customs, the mores, the folkways are moderately well established, and the social pressures, such as working conditions, pride, ridicule, sense of decency, and other social determinants of life, will not only reduce the sources of friction, but will also compel men to settle their private disputes amicably. In primitive or archaic societies, most of the disputes which arose between individuals were solved by the aggrieved party resorting to violence against the wrongdoer. Sometimes the violence spread to the whole society. This was bad, for it meant widespread havoc, destruction of things, killings and maiming of persons. The higher societies, therefore, invented devices designed to prevent solving disputes by "self-help".

In traditional societies, self-redress was regulated and one could not act by force in asserting his rights, without first obtaining the approval of some designated person, who represented the society. Thus, socially assisted self-help gradually dissolved into the notion of a socially sanctioned and enforced arbitration of most quarrels, and those wronged were normally compensated by the wrongdoer.[4] At first, the payments were voluntary. Later, they became compulsory: the wrongdoer must pay a fine, and the wronged must accept it. Those who refused to submit to this social arbitration, and to abide by its decision were, in some societies, out-lawed and condemned as guilty of peacelessness, and they became enemies of the whole society.

Modern, organized societies, have developed the notion that disputes must be settled without privately inflicted violence. The modern state asserts a virtually complete monopoly over the right to use physical force, when controversies between individuals arise. Every well organised modern society designates some persons, who will settle disputes, and who will determine the rights of the disputants. The disputants thus look to a social agency, authorised to invoke socially endorsed force to carry out the dispute - decider's decisions.[5] Such an official dispute - decider is what I mean by court. "Going to law", submitting conflicts to a court for decision, is a substitute for private warfare.

In Kenya, Chapter 4 of the Constitution establishes the judicature. Section 60(1) thereoff establishes the High Court, and it states:

> "There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as maybe conferred on it by this constitution or any other law."[6]

Section 64(1) establishes the Court of Appeal:

> "There shall be a Court of Appeal which shall be a superior court of record, and which shall have such jurisdiction and powers in relation to appeals from the High Court as maybe conferred on it by law."[7]

Section 65(1) establishes other courts, and section 66(1) establishes the Kadhi's Courts. Thus, in Kenya, we have long recognised the need to solve our disputes amicably by "going to law," and submitting conflicts to courts.

c) The roles of courts and judges

Judges are those officers of the courts, who preside over cases which come before these courts, and who are entitled to give judicial decisions. The machinery which estbalishes a court's jurisdiction may also provide for the manner in which the judges are to be appointed, and their qualifications. For instance, in Kenya, the same constitution provides that the judges of the

High Court shall be the chief justice and such number, not less than eleven, of other judges as may be prescribed by Parliament,[8] and that the chief justice shall be appointed by the president.[9]

Our legal system is based on substantial sets of legal rules. These rules embody or reflect moral norms, social standards, community ideals or values, or social policies. An example of a legal rule is "that murder is a legal wrong", or that by some writing, land is lawfully transferred. These rules, some made by the legislature, some by the courts, are necessarily general in their scope. The major task of the court is the specific application, in particular law suits, of those general rules.[10] A court's task thus falls into two parts: Firstly, it finds the facts of a case, whether one man killed another, or whether another drove eighty miles an hour, or whether one signed a certain document. Secondly, it determines what legal rules cover those facts.[11] The court's decision follows thereafter. By so doing, the court serves as a peace -preserving device. It stops subversive aggression, keeps the peace, by deciding controversies. It meets crises of maladjustment by peaceable adjustments of conflicts. Just as in the Kenyan political system we have substituted political elections for violent revolutions, so is the courtroom duel substituted for private war.

There are two kinds of courts. One, called trial court (or "lower" or "inferior" court), performs both parts of the

judicial task: they both find the facts and apply the rules. The second kind, called upper courts, appeal courts, usually does little about the facts of cases. They devote most of their time to deciding, on appeals, whether or not the lower courts, in particular cases, made mistakes about the rules.

John Locke, writing at a time when the doctrine of the separation of powers had not yet emerged, believed that the judicial role was the carrying out of laws already enacted.[12] The modern legislative - executive - judicial distinction comes from Montesquieu's perception of the English political system in the early eighteenth century. Montesquieu perceived the institution of government as comprising the three organs, the legislative, the executive and the judiciary. These three organs serve as checks and balances to one another, by ensuring that each organ of the government is restricted to specific functions. So today the judiciary, being one of the three organs of the government, is expected to restrict itself to its traditional function of interpreting enacted laws.

How important a court device is, can best be understood by imagining the conditions which would ensue were we to abolish it. We only need to reflect on what happens in revolutionary situations when there is a brief period of lawlessness.

2:2 A COMPARATIVE ANALYSIS OF JUDICIAL LAW-MAKING

Basically, the role of a judge is simply to decide cases coming before him, applying the law that Parliament has made. The theory of older writers was that judges did not legislate at all. A pre-existing rule was there, imbedded, if concealed, in the body of the customary law. All the judges did was to throw off the wrappings and expose the statute to our view.[13] Since the days of Bentham and Austin, no one, it is believed, has accepted this view without deduction or reserve, though even in modern decisions we find traces of its hanging influence. Ideally, the role of a judge is to apply the law, but for different reasons it cannot be fully realized in practice. Statutes and common law rules are often vague and must be interpreted before they can be applied to novel cases. Through interpretation, judges may alter, add to or restrict the application of a statute, thereby making new law. I would like to suggest, in this essay, that the fact of judicial law-making is not in dispute. Rather, the concern should be whether this is a propriety or an impropriety.

It is said that the process of judicial decision is either deductive or inductive.[14] It is deductive in the sense that the judge applies legal rules which are fixed and certain. Personal views, or even the decisions of other tribunals, do not deter the judge from deciding according to the law. In the application of their civil codes, most continental european countries use this approach. The inductive process is more frequently used in the common law jurisdictions. The judge is expected to decide the

case before him, by reasoning upwards from previous decisions in the particular case, to the general principles of law applicable to the particular case before him. According to C.K. Allen,[15] where the French judge has to find his master principle in formulated proposition of abstract law, the English judge has to search for it in learning and dialectic which have been applied to particular facts. There, he is always reasoning inductively, and is, in the process, said to be bound by the decisions of tribunals higher than his own. In the former case, antecedent decisions are helpful only as illustrations of a general proposition while, in the latter, they are the very soil from which the general proposition must be mined.

The inductive process is expected to make the judge participate more fully in the development of the law. But often, judges in the common law jurisdictions have dissociated themselves from what appears to be an obvious corollary to the inductive process - their established role of law-making. We may no longer be in the era of the creativeness of Lord Coke (who, in James Bagg's case,[16] holding that the cause of disfranchising a citizen ought to be grounded upon an act which is against the duty of a citizen, created out of bits and pieces, the magnificently capacious mandamus jurisdiction of the King's Bench, tricking out his creation, of course, with ribbons, furbelows, and scraps from old books), or in the relatively recent days of Rylands V. Fletcher[17] (in which case the defendant employed independent contractors to

construct a dam or reservour on his land. The land was an old mine field, and due to negligence of the contractors they only dug the hole but did not block the mine shafts. The dam was filled with water, which leaked out through the shafts and affected the neighbour's land. The defendant disclaimed liability, contending that this was an indepedent contractor's work. The House of Lords, however, held that this was a case of strict liability and negligence did not have to be proved. The House went ahead and enunciated a rule, that the person, who for his own purpose brings on his lands and collects and keeps, there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damages which are the natural consequence of its escape), or Donoghue V. Stevenson[18] (the famous case of a snail in the bottle of ginger beer. It had until 1932, been the law of England and Scotland that with certain exceptions a manufacturer of a carelessly made product was not liable for injuries which the product caused to a remote buyer, a buyer to whom he had not sold directly. In this case, a majority of the House either rejected the earlier cases, or extended the exception to the general rule to cover all cases. Lord Atkin rested the result on the rule you are to love your neighbour which became in law that you must not injure your neighbour. A remote buyer of a product therefore, fell within the definition of a neighbour, and hence qualified for protection by law), or, more lately Hadley Byrne Co. Ltd. V. Heller Partners Ltd.

(where the House of Lords, not content with the dismissal of an action for damages because the defendant had excluded legal responsibility, established a new legal principle of great financial importance, the responsibility of those who negligently make statements on financial soundness expected to be used by third parties). In all these cases, and many more, courts were obviously seen as legislators of law. Yet, many judges in England, closely followed by those in commonwealth countries, continue to say they see their role as no more than merely applying the law as it is, and that they have no legislative role. Although Lord Radcliffe accepts that judges are in some sense law makers, he adds that we cannot run the risk of finding the archetypal image of the judge confused in men's minds with the very different image of the legislator.[20] Radcliffe wishes to preserve the image of the judge which is objective, impartial, erudite and experienced declares of the law that it. It is his argument, I take it, that the judge upholds the deep, matured wisdom of our civilization against the treacherous claims of the transient; and that, if he seeks to do the job of the "legislator", whose task it is to mediate the clashing claims of the moment, his authority to do justice in the terms of the long-run standards of the society will be impaired. While this is true, I think the formulation is too absolute. The tendency of his argument is to reinforce the doctrine of judicial passivity.

Gray[21] is of the view that law is what the judges declare: that statutes, precedents, the opinions of learned experts,

customs and morality are only the sources of law. Arguing on the same line is Jethro Brown,[22] who says a statute, till construed, is not real law, but only ostensible law. Real law, according to him, is only found in the decision of the court. In this view, even past decisions are not law and the courts may overrule them. For the same reasons, present decisions are not law, except for the parties litigant. Men go about their business from day to day. The rules to which they yield obedience are in truth not law at all. Law never is, but is always about to be. It is realised only when embodied in a judgement, and in being realised, expires. There are no such things as rules of principles: there are only isolated doom.[23]

Formulations of Mr. Gray, I would like to suggest, is too absolute and self limiting. It fails to take into account a situation in which litigation is only a rare occurrence in the life of the ordinary person, as in Kenya for instance. We know the law, we feel it and it governs our conduct. We do not wait for a court to pronounce a statute to be law. It is law as soon as it successfully passes the necessary Parliamentary procedures. Law and obedience to law are facts confirmed everyday to us all in our experience of life. Statutes do not cease to be law because the power to fix their meaning in case of doubt or ambiguity has been confided to courts. Obscurity of statutes or of precedents, customs or morals, or collision between some, or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function. The power of interpretation has,

constitutionally, been lodged in the judges. Their conclusions must, indeed, be subject to constant testing and retesting, revision and re-adjustment, but if they act within their conscience and intelligence, they ought to attain in their conclusions a fair average of truth and wisdom. Insignificant is the power of interpretation of any judge, when compared with the bulk and pressure of the rules that hedge him on all sides. Innovate, however, to some extent, he must, for with new conditions, there must be new rules. Within these pressures the judge must search for social justice.‡

Judge Cardozo has suggested that the judge has used, and should use the method of sociology in applying the law. He needs not interpret contracts with meticulous adherence to the letter when in conflict with the spirit. Instead, a judge should read covenants into them by implication, when he finds them "instinct with an obligation imperfectly expressed." The law, he adds, has outgrown its primitive stage of formalism, when the precise word was fatal.[24]

The tendency of the world today is in the direction of a growing liberalism. We should identify, first, the end the law serves, and then fit the rules to the task of service.

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‡Without attempting to define the content of social justice, in my view, social justice entails the realization of the value of justice, or the quality of granting what is right and fair, to enhance good relations between persons and communities, with an aim of moving society, through peaceful changes, to a system of sociolism.

This conception of the end of the law as determing the direction of its growth, which was Ihering's great contribution[25] to the theory of jurisprudence, finds its organism, its instinct in the method of sociology. There can be no wisdom in the choice of a particular law unless we know where it will lead. The teleological[26] conception of his function must be clear in the judge's mind. Cardozo argues that we do not pick our rules of law full-blossomed from trees. Every judge, consulting his own experience, must be conscious of times when a free exercise of will, directed at the furtherance of the common good, determined the form and tendency of a rule.

Law is, indeed, an historical growth; an expression of customary morality which develops silently and unconsciously from one age to another. Nothing less than conscious effort will be adequate, if the end of the law is to prevail. Most learned writers and jurists, including Lord Denning,[27] agree that a jurisprudence that is not constantly brought into relation to objective or external standards, incurs the risk of degenerating into a jurisprudence of mere sentiment or feeling. The great judges of England were great because when the occasion cried out for a new law they dared to make it. They were aware that the law is a living organism, its vitality dependent upon renewal. They made law serve life.

Clearly, law, resorted to for the solution of social problems, offers the opportunity for creative manipulation or resigned impotence

Judges who regard themselves as mere servants of Parliament and its government, will perform routinely the law in question, and this would be to misunderstand the nature of their job. It would be a disaster if law came to be regarded as a set of self-contained principles, which stand valid in their own right.

The authority of the judges, and their power to do justice, is not a commodity in short supply to be hoarded and husbanded. Judicial legislation is relevant where it is progressive, and concerned for the ordinary man. In such cases, legislation may enhance public faith in the administration of justice. Where it is conservative or reactionary, it may lead the ordinary man to believe that the law is an instrument of the powerful, and belief in judicial honesty maybe impaired. During my clinical programme[28] (in the second year of my studies for an LL.B. degree) I had an opportunity to perceive an accused person's view on the source and definition of law. I had the impression that an accused person, waiting in the dock, is not concerned with the statutory law. Rather, he looks to the judge to pronounce the law. Evidently, he regards the judge as the law-maker, upon whom his liberty, apparently, depends. There is, to him, no justice according to the law, but justice according to the court. Thus, it would be good sense to maintain public confidence in our courts, by allowing creative manipulation, where appropriate, rather than nourishing a spiritual pride in the sanctity of the law. Through this creative manipulation of the law, the ordinary

person may have a fair view of the law, and stop regarding it as an instrument of the powerful. Jaffe[29] suggests that the public loses faith in the administration of justice if the judges are seen to be the tools of power. But if judicial law-making is kept within limits, and is responsive to the totality of social claims, it will not jeopardize the prestige of the judiciary. But the truth, adds Jaffe, is that a judiciary, whether reactionary or radical, can do more to work its way by ad hoc manipulation. Such activity is difficult and eludes the criticism and confrontation made possible by overt law-making.[30]

The law-making role of the judiciary, at any one time, may depend on many factors. The government maybe burdened with great issues of state, or a large amount of routine business; the legislature maybe understaffed, lacking competent lawyers, clerks and research workers to advise or draft proposals. The pace of change may be great, bringing with it new social and economic conditions, and demands for recognition of moral claims. In such circumstances, there is a peculiar opportunity and need for judicial activity. But the occasion alone is not enough to compel the judicial response. The response will depend on the outlook of the legal profession, judges, practitioners and the Law Society.[31] This implies that if we, in Kenya, are to develop a consistently active judiciary, the pressure must come from the lawyers, professors of law at the University or School of Law,

the Law society and the Council of legal education. Our judges, aware of such pressures, may be confident with their role of, occasionally, fitting rules to the end required. As the Evershed Committee has observed,[32] legislation is a slow and cumbersome process. Parliamentary time[33] is in modern conditions notoriously limited and may well become more so in the future. Clarification of the law by judicial decision is a swifter and surer process, which can go forward at all time and quite independently of political consideration (this assertion is very general in its application. It may not necessarily be consistent with the pace of judicial law-making, in Kenya for instance). A judiciary which constantly reminds itself that its power is limited by the dogmans of Parliamentary omnicompetence, Parliamentary supremacy and Parliamentary responsibility, may lose the will to exercise this great historical function. Because the individual citizen may be dwarfed by the state, and because the legislature may be relatively subservient to the executive, the judiciary is the most immediately available resource against the abuse of executive power.[34] We must continue to look to the judiciary as one of the important instrumer for maintaining the rule of law. Novel and unforeseen situations arise as conditions change. And, especially in the older and more developed nations where it is reported a higher frequency of litigation (as opposed to the position in newer and less developed

nations, where litigation is only a rare occurrence in the life of the ordinary person), it is inefficient, distressing and unnecessary to postpone the needed law-making until the accumulation of unfortunate decisions compels legislative reform. The judge should have a sense of moral freedom and independence, in the service of justice. We cannot look to him to resist abuse of power if he is made to feel impotent. In Liversidge V Sir John Anderson,[35] the House of Lords had before it a case of indefinite imprisonment by the Home Secretary under a war defence regulation authorizing imprisonment on "reasonable cause to believe a person to be of hostile ... associations." It was held that the reasonableness of the Home Secretary's belief could not be questioned by a court. Dissenting Lord Atkin, in his minority opinion, observed that:

> "I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive... It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive..."[36]

In the U.S. the courts are actively innovating. The State courts have been sweeping away common law doctrines which, in their opinion, are obsolete. Much of their activity, reports Jaffe,[37] has been connected with suits to recover damages for personal injury. In the past the courts of the United States

have held that certain kinds of persons (e.g. non-profit making corporation, charitable organization, father, son, wife - who negligently cause injury to each other) are not liable for the torts committed by them or by their agents. They have immunity from liability. Many lawyers, judges and laymen believe that these immunities whether or not sound in the days when the courts reated them, are obsolete in the mechnized, risk-heavy conditions of today. The state legislatures could abolish these immunities. Some have done so, and some have not. But where the legislature has failed to act many judges have been ready to do the job themselves.

The U.S. practice, in my view, supports Professor Dugard's[38] view that a judge is not an automation whose task is limited to applying clear rules of law to clear findings of facts in a purely logical manner. He is called to a higher duty, of choosing between factual situations, and in exercising this choice he should be guided by accepted legal rules. It is not suggested that these values should prevent the judge from discharging his duty of applying the law in accordance with his judicial oath. But it is suggested that where there is doubt as to the law or to the facts of a particular case, it is proper to be guided by traditional legal rules. A better court is that which recognizes that rules of law, which grew up in a remote generation, may be found to serve another generation badly. It descends the older rule in favour of one which represents the established and

settled judgements of society, more so, where no considerable rights have been vested in reliance upon the older rule.

Apparently, this is the position in the U.S. In his message of December 8, 1908, to the Congress of the U.S., President Roosevelt recognised the existence and the need for judicial activism:

> "The chief law-makers in our country... are the judges, because they are the final seal of authority. Every time they interpret contract, property vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy, and as such interpretation is fundamental. It gives direction to all law-making. The decisions of the court on economic and social questions depend upon their economic and social philosophy, and for the peaceful process of our people during the twentieth century. We shall owe most to those judges who hold to the twentieth century economic and social philosophy, which was itself the product of primitive economic condition."[39]

Thus, the duty of a judge is to objectify in law, not his own aspirations, convictions and philosophies but aspirations, convictions and philosophies of men and women of his time. Hardly shall he do this well, if his own symphathies, beliefs and passionate devotions, are with a time that is past. The judicial function is a dynamic concept. It differs from country to country, and even from judge to judge. The court is called upon to realise this dynamism and reflect the times in their judicial decisions. For instance, in the nineteenth century, the judges decided that the plea of self-defence, which had been introduced into the law of murder in an earlier day, did not permit three hungrymen on a boat a drift at sea, to kill and eat a fourth. The judges held that the plea was inconsistent

christian principles. The crown thereafter, in its exercise of the prerogative, reduced the death sentence to six months imprisonment.

In view of the dynamic nature of the judicial role, I would like to suggest that the Blackstonian[40] doctrine of the "declaratory" function of the courts, holding that the role of the court is not to pronounce new law, but to maintain and expound the old one, has long been little more than a ghost. Caselaw suggests that from Holmes and Geny (who strongly asserted that judges, because they necessarily enact into law parts of a system of social philosophy, are the chief law-makers[41]), to Pound and Cardozo (both of whom believed that the judge should use the method of sociology in applying the law[42]), contemporary English judges have increasingly recognized, and articulated, the law making functions of the courts. The radical transformations which, for instance, contracts, tort or family law have undergone at the hands of the courts, have made it increasingly difficult to maintain the time - honoured fiction of the declaratory role of the judge. The House of Lords has now buried the remnants of the declaratory view. In Shaw's Case,[43] the House of Lords asserted its power to supplement and, by implication, to depart from the statutory regulation of criminal law, through the revival of a common law offence called conspiracy to corrupt public morals. This assertion has opened one of the most stirring controversies of recent times on the function of the law in general, and the courts in particular, as the guardians of the public morality.

Following the present trend[44] of the English case law, such sweeping modifications of both common and statutory law (as, for example, found in the Donoghue, Shaw or Hedley Byrne cases above) cannot, appropriately, be said to be merely declaratory statements, or refinements of the existing law.

The decision by the House of Lords not to be completely bound by their earlier decisions, is a recognition that judges are to apply the law in a way which allows for its growth. In so doing, the judge is, in a sense, regarded as a law-maker, not in competition with the legislature, but in a supplementary role. The legislature, can hardly be expected to foresee all the circumstances which would arise in future, at the time of enacting a statute. It is the judicial role to interpret statutes enacted in a gone era in such a way as to sustain the mode of living and the philosophy of the people of the current era. In some cases, he can do so only by what can properly be regarded as a law-making judicial process. Radcliffe[45] has suggested that iflaw is to stand for the future, as it has stood for the past, as a sustaining pillar of society, it must find some point of reference more universal than its own internal logic. In my opinion, such point(s) of reference should include logic, history, customs, utility and accepted standards of right conduct. Which of these forces shall dominate to shape the law in any direction, depends largely upon the comparative importance of value of the social interests that will thereby be promoted or impaired. This should be judged by the court.

Finally, I think, the tone and temper in which the modern judge should set about his task are well expressed in the first article of the Swiss Civil Code of 1907, an article around which has grown up a large body of juristic commentary. "The Statute," says the code, "governs all matters within the letter or the spirit of any of its mandates. In default of an applicable statute, the judge is to pronounce according to the customary rules which he would establish if he were to assume the part of legislator. He is to draw his inspiration, however, from the solutions consecrated by the doctrine of the learned, and the jurisprudence of the particular court."[46]

If such a tone and temper is adopted, judicial activism should not be seen as a usurpation of the legislative function.

2:3 COURTS AND THE CREATION OF NEW CRIMINAL OFFENCES

In criminal law the general rule is that a person can not be convicted of an offence, unless that offence, and the procedure for punishing it is provided for by some written law or precedent. This common law principle is embodied in the latin maxim - Nullum Crimen Sine lege, nulla poena sine lege[47]. In some countries this maxim has been incorporated in their constitutions. The constitution of Kenya in relation to this matter has stated:

> "No person shall be convicted of a criminal offence unless that offence is defined, and the penalty thereof is prescribed, in a written law.[48]"

However in Kenya, exception is given in case of contempt of court. Contempt of court can be criminally punished even though the offence may not be provided for by any law.

What this maxim stipulates, Prima Facie, is that judicial creativeness in criminal law is a myth. The question which arises is what will a judge do, faced with a case where there is no statute or precedent to guide him? Illustrating with a single case, I want to show that, sensibly speaking a judge who finds himself in such a situation may not acquit an alleged offender merely because of an absense of a legal authority on which to convict him. If the alleged offence is so serious that it attracts public attention, then the judge must be guided by policy or "educated" common sense, and fashion a law that will appropriately serve the sense of justice in the case before him. A precedent so laid down for the first time, undoubtedly becomes a new precedent for future cases.[49]

Despite the nullum crimen principle, common law courts have played legislative roles in developing or creating new criminal offences. Thus in Shaw V. D.P.P.,[50] the House of Lords has asserted its power to depart from statutory regulations of criminal law, and made a new precedent. During the trial, the appellant pleaded not guilty to an indictment charging him with conspiracy to corrupt public morals; Shaw had published a booklet (ladies dictionary) which contained 28 pages of obscene language and scenes of prostitutes. The book was intended to encourage prostitution. As a directory it was only to be a source of information for the addresses of mentioned individuals.

Appellant contended that his book was intended to assist prostitutes get customers without appearing in the streets. Shaw was convicted and he appealed on the grounds, inter alia, that there was no such offence at common law as conspiracy to corrupt public morals. In their judgement, the majority of their lordships were of the opinion that, although there was no common law under which the appellant could be found guilty, yet the courts, being the custodian of justice, their lordships considered themselves duty bound to apply established principles to new combinations of circumstances, and though the act committed did not constitute a punishable offence within the written law, yet the act itself constituted aviolation of public morality for which the appellant could be punished.

What is clear in this case is that the statute only prohibited street soliciting, but it did not foresee that prostitutes could still successfully continue with their trade, through other medium of communication. Because Parliament had not foreseen such a situaion, a gap was left in the law. The court successfully filled the gap. In Shaw's case, the House of Lords took into account the social values which that society would like to see preserved, and determined that a violation of public morality ought to be punished criminally. This case clearly illustrates a departure from the positivist School of jurisprudence that there is a distinct separation between law and morality. it is interesting to note that in this case, even one of the most outspoken opponents of judicial law making, came to accept that in criminal law, courts can create new offences.

Said Lord Simonds:

> "In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fumdamental purposes of the law to conserve not only the safety and order, but the moral welfare of the state, and that it is their duty to guard against attack which may be more insidious because they are novel and unprepared for"[51]

Lord Simonds should not restrict this reasoning only to criminal cases. Novel and unprepared for situations arise also in civil cases.

However, in Kenya, the constitution is clear on this matter, and the courts cannot create criminal offences. Thus, Kenyan courts cannot benefit from the House of Lords decision in Shaw's case.

2:4 JUDGES AND HARD CASES

For the purposes of this essay, I would like to suggest that "hard cases" are those cases in which the result is not clearly dictated by statute or precedent. Philosophers and legal scholars have long debated the means by which decisions of an independent judiciary can be reconciled with democratic ideals. The problem of justifying judicial decisions is particularly acute in these so-called hard cases. Because there is no clearly applicable

rule, the court may be invited to solve the dispute even by stretching or re-interpreting the existing rules. This allows the court to make law, covertly or explicitly. The positivists have suggested that judges do not make law, even in these hard cases. Instead the positivists have advanced the theory of adjudication[52] - that judges use their discretion to decide hard cases. This theory fails to resolve this dilemma of judicial decision-making. I think, in the mere acknowledgement of judicial discretion, we should accept that some judicial law making (which, strictly speaking, is not part of that discretion), is also acknowledged.

Professor Dworkin,[53] not satisfied with the positivist position, has provided an alternative theory of adjudication which, he believes, is more consistent with democratic ideals. He first posits a distinction between arguments of policy and arguments of principle and suggests that decisions in hard cases should be, and are, based on arguments of principle. Dworkin suggests that in these hard cases the judges have the discretion to decide the case on two grounds of arguments: the arguments of principle on the one hand, and arguments of policy on the other.

My understanding of Dworkin's position is like this: neither policy nor principle grounds of arguments are law. This means that if the judge decides a case on any of these grounds, he would be ignoring the existing law, and would be, in effect creating a new law altogether, albeit in the name of policy or principle.

momentarily accepting the Dworkinian position that hard cases are decided on the grounds of policy and principle, and bearing in mind my assertion that neither policy nor principle arguments are law, I would like to suggest that in all hard cases judges make new law.

But that does not take us far. Not all judges base their judicial decisions (even in the so called hard-cases) on the arguments of policy or principle. In Chapter 1, I explained that arguments of policy justify a political decision (or any decision for that matter) by showing that the decision advances or protects some collective goal of the community as a whole.[54] For instance, the argument in favour of a subsidy for grain growers in Kenya, that the subsidy will ensure the nation's grain sufficiency, is an argument of policy. Arguments of principle justify a decision by showing that the decision respects or secures some individual or group right.[55] For instance, the argument in favour of anti discrimination statutes, that a woman has a right to equal respect and concern, is an argument of principle. These two sorts of arguments (of policy and principle) do not exhaust the forms of arguments that can be brought forward in a given case. For instance, the decision to allow extra income tax exemptions for the blind, may be defended as an act of public generosity, or virtue, rather than on the grounds of either policy or principle. But Dworkin suggests that in these so-called hard cases, without clear precedents to dictate their solution, principle and policy are the major grounds for justifying their decisions.

As I have suggested earlier, decisions should not be based on arguments of policy. Judges are not elected, and not responsible to the electorate. They cannot claim to be the custodians of what is called public policy. This area, properly speaking, is the province of Politicians. My argument is that hard cases offer ideal situations for judicial creativity. When judges make new law, their decisions are constrained by legal traditions but are nevertheless personal and original.

Without going into detailed arguments on policy and principle, I submit that hard cases, on whichever ground they are decided, offer appropriate opportunity for judicial legislation.

2:5 THE ROLE OF JUDGES IN EMERGENT STATES

The judicial function varies from country to country, and even from time to time. Thus, the role of the judiciary in a newly emergent state may well be different from that of a judiciary in an older state. For instance, the Kenyan judiciary, while it may consider itself bound by some English common law principles and doctrines, may still feel a stronger sense of responsibility to its people, and observe the duty of making law responsive to the local expectations, even if it means occasional deviations from the established doctrines of the English law.

Generally, judges must have a greater, and slightly different role, in the newer nations than would be expected of the judges in an older nation. This difference in judicial role may reveal

itself either in the negative, or the positive forms. It reveals itself in the negative form when, as normally is the case, litigation is an infrequent occurrence in the life of the ordinary person. In this case the judiciary may not be expected to initiate judicial reforms since, there is clearly enough time for the legislature to do this (unlike in the more developed nations where the pace of change is so great and rules of law become absolete within a short time, and Parliamentary time so limited. This calls for judicial intervention in the initiation of necessary judicial reforms). The judiciary, therefore, would have little cause to interfere into the matters purely executive in nature. This is why in most of our African countries, legislative reforms are initiated, mostly, by the legislatures. The difference may also reveal itself in the positive form, when there is an increased requirement on the part of the judiciary to enact new law, or to modify the existing rules of law. Such an occasion may arise, for instance, when peculiar circumstances, not anticipated at the time of enacting the statute arose, and, at the particular time the legislature may be over burdened by more pressing issues. Clearly, the judiciary cannot keep silent and say "well, but I don't have the powers." This would be contrary to its traditional role of maintaining the rule of law.

So, within these negative and positive extremes, the judiciary must operate to satisfy the legitimate expectations of the bulk of the citizens. Any emerging state, or those states which emerged sometime back, both in Africa and elsewhere, have or had entrenched

provisions in their constitutions guaranteeing civil rights. In some cases, for instance Uganda, these constitutions have been overthrown through violent revolutions, and new constitutions substituted for them. Where the constitution does not provide for these civil rights, they are part of the basic law which a judge must uphold, guided by the principle of reasonableness. This means that if Parliament enacts a statute which violates the private property of an individual, the judge must look upon such a statute as one designed to violate the civil rights of the citizen. Should the Parliamentary enactment violate any such fundamental rights, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such object. Otherwise the judge has to uphold the citizen's civil rights.[56] This means that in these newer nations, the judges duty is even more onerous. He has the greater duty of making law conform to the democratic ideals (even in a country frequented by political revolutions, and where no democracy exists), even where those ideals are evidently hard to achieve. He cannot say that because democracy does not exist in his country, he is under no obligation to strive for the imagined democratic ideals. This is why I suggest that judges in the new states (where constitutions change now and then because of political rivalry), have got a greater role to play. The "difference" here reveals itself in the positive sense.

Where the civil rights are guaranteed under the constitution the role of a judge is clearer. He is to uphold those rights and

to refuse to apply statutes or judicial decisions which are inconsistent with the guaranteed rights. The judges in these new nations must make sure that laws and statutes made applicable to the state in its pre-independence era, be subjected, as occasion arises, to rigorous tests and meticulous scrutiny to see if they are in consonance with the declared basic norm of the constitution. Any pre-independence law or statute which fails that test must be overruled by the courts unhesistatingly, as being contrary to the basic norm.[57] Parliament itself cannot do this because it may require more time which may not be immediately available.

I suggest to the judges in newer nations, that theirs' is a greater call to duty (not merely to satisfy the dictates of law unilaterally made by a political dictator, as for instance, in dictatorial regimes), and which requires that they make law serve life, in whichever situations they find themselves in. Akinola Aguda, C.J.,[58] submits that in the final analysis the only course open to a judge, if he is to satisfy his conscience and keep within the ambit of his oath of office, is to surrender his own appointment in a country ruled by a tyrannical government. A judge can only feel happy to do this as part of his normal role as judge, if he is satisfied that he has the absolute support, not only of his other colleaques on the bench, but also of all members of the profession from which the governemtn can make further appointments.

I conclude this chapter, by suggesting that issues of justice, and of the duty to obey cannot be separated from legal science in the way positivists suggest. When we describe the law on many questions, we have to refer to moral considerations, and this is not just a matter of filling in gaps. It is part of the function of lawyers, and especially of judges, to answer two questions in one: What is the law; and what does justice require? The law is then applied according to the dictates of justice (problem here is that the most appropriate definition of the content of justice may be hard to come by. But the judges, being reasonable persons, I think it should be within their discretion to decide on the appropriate definition of the content of justice). Certainly, one distinguished English judge, Lord Denning, appears to believe that "justice" is the judge's prime concern, and that admission that law conflicts with it is a confession of defeat.

CHAPTER THREE

JUDICIAL LAW-MAKING AND DEMOCRATIC IDEALS

This chapter enquires into whether judicial law-making is inconsistent with "democratic ideals," whether, if the courts do what popular assemblies should do, the responsibility and vigour of democracy would be sapped. This chapter sets out to establish by what warrant, and in what sense, the judiciary is authorised to make law. It is hoped that at the end of the chapter, there will be found indicators as to whether constitutional democracies like Kenya, should opt for an activist judiciary.

At the outset, I attempt a definition of such vague terms as "democratic ideals." The aim is to establish whether Kenya falls within the general description of a democratic country, and if so, whether this would be consistent with judicial law-making.

I also discuss the limits within which judicial law-making should be entertained in a country which cherishes "democratic ideals.

3:1 ATTEMPTED DEFINITION OF "DEMOCRATIC IDEALS"

In a most basic sense, the term democracy can be defined as rule by the people, or as a government constituted by the will of the people and governing in accordance with that will. The underlying idea of democracy appears to be, that government rests upon the consent of the governed, and therefore, government enjoys a popular base. The idea of popular representation, further, implies

that the government is responsible and answerable to the governed.

Democracy, in its very nature, therefore, seeks to establish the rule of law. It seeks to restrain power, and to make it accountable to the people. It seeks to base social policy on the wishes of the people; to create equality for men and women, when all around them inequalities in liberty, opportunity, income, health and the basics of self-respect abound. Democracy is therefore a challenge to deep-seated sectoral interests.

In sum, democracy entails all that can be found in a good government. the fundamental principles of the Rule of Law, the Separation of Powers, the Human Rights, and Political responsibility, can only be fully realised in a democracy. Otherwise, without democracy, even the principle of the Rule of Law would be inadequate, for, Nazi Germany and apartheid South Africa, would qualify as systems operating under the Rule of Law, which denotes respect for the law and the attendant obligation to obey it.

A modern democracy is characterized by the election of the organs which exercise the general law-making function. Participating in elections, criticism and the resulting awareness created, stimulate and channel the energies and interests of the people. Election allows constant interchange between the electorate and its representatives, and this forms the primary communications circuit of democracy.[1] The current flows in both directions. The electorate provides information, and signals its desires, and hence consent is maximised.[2] Through this satisfactory mode of communication, the society channels its needs and desires, which then form the basis of legislation.

If law made in such a manner, reflects the unconflicting interests of the whole society, then that society can be said to be democratic. Within this definition, Kenya qualifies as a democratic country. A constitutional democracy (like Kenya), is of course the ideal, but a government does not have to be popularly elected to be constitutional. There can be a constitutional monarchy.

As an aspect of democratic ideals, political responsibility requires that public opinion be one of the factors informing the actions of government. This presupposes that government is accountable, that people are free at all times, either directly or through their elected representatives, to question the government to explain and justify its conduct and, lastly, that there be available sanctions for unsatisfactory or unjustifiable conduct.[3] This requires participation of every organ of the government, including the judiciary, in order to preserve our democratic institutions.

3:2 IS JUDICIAL LEGISLATION UNDEMOCRATIC?

Some scholars have argued that the judiciary is not elected and should not therefore concern itself with law making, but should strictly apply that law which has been made by Parliament.[4] This appears to suggest that, if the judiciary does what Parliament should do, the responsibility and vigour of democracy would be sapped. While accepting that popular elections are a significant aspect of democracy, I would like to suggest that

every organ of the government, including the executive and the judiciary, has the responsibility of promoting democratic ideals in a democratic country. In its very nature, democracy entails justice, and for this purpose, justice includes upholding of rights and punishing of wrongs by the law. Every person is a potential seeker of justice. Since the courts are integral to democracy, as are the legislature and the executive, it is imperative that the three organs work together, in ensuring democratic requirements of our consitution. The Legislature can do more to the individual, for example, by way of social security. But at certain crucial moments, when his life, his liberty or his property, are in jeopardy, the judiciary is the most immediately available resource. For this function to be effectively done, the judiciary may be, occasionally, called upon to fashion a law. Even in a relatively young nation like Kenya, the life styles are changing so rapidly. The legitimate expectations of the individual change, as wealth and technique increase or decrease, as social cohesion becomes greater or less, and as man's spiritual needs are redefined. For instance, in Kenya, because of a redefinition on man's spiritual needs, several denominations have sprung up (e.g. the Tent of Living God), and the individual members of such denominations, may need special protection hitherto not found in our constitution. The judiciary cannot protect the interests of the individual common man, unless it can redefine the protection of the constitution, and the statute law. If the court then legislates in order to afford justice for an individual

or a group thereof, such legislation, in my opinion. would not be undemocratic. In any case, the judge who makes the law, is even in the very act of law-making bound by the law. He can only legislate within prescribed authority. In deciding a case, the judge must look to the vast mass of principles and rules found or implied in consitutions, codes and statutes, and in precedents. But, in a small but significant group of cases, these sources of law will not give a clear answer (No doubt, the Kenyan judiciary can attest to this fact, for it is only in 1987 that it had to choose a law, among conflicting laws, in the S.M. Otieno Case[5]) The judge must then develop logical extensions of the potentially applicable rules, and make a choice. This body of substantive propositions, provide a great reservoir of principles available for the making of new law, and at the same time, sets limit to the judge's power of choice. Accordingly, therefore, judicial legislatior is done pursuant to law. The judge may adopt the attiude that the statute embodies principles sufficiently general to allow for growth as occasions present themselves.

But, if the law is to function as a control, and to set the limits within which innovcation is to take place, it is suggested that the judge should reationalize his decisions.[6] Where discretion is exercised, the requirement of rationalization is crutial. In submitting himself to this discipline, the judge alerts himself to the limits of his power, lays the basis for objective criticism and enables the citizenry to participate and to conform its conduct to the potentialities of the decision.[7] Such a process would seem

to require that the newly made law be based upon a principle already found in the existing law, be it the constitution, statute or a principle derived by the judges from common law rulings. Further, the judge must sincerely believe the reasons upon which he purpots to rest his decision, at least in the sense that he is prepared to apply them to a later case, which he cannot honestly distinguish. Where the reasons given for a decision are a mere facade, or are devised solely for the case at hand, or are based on unstated reasons, which are unsupportable in law, the decision is lawless, and lacks the democratic quality. The requirements that decisions be grounded in a stated principle, is a safeguard against judicial usurpation and caprice. Courts can fulfil their responsibility in a democratic society only to the extent that, they succeed in shaping their judgement by rational standards.

Lastly, as I have earlier suggested, the three organs of the government must work together, to ensure democratic requirements of our constitution. In the light of this fact, the judiciary cannot overstep its bounds within a democratic country, since the other two organs will provide the necessary check on the judiciary. Instead, the judiciary can provoke, or command legislative co-operation and thus greatly extend its technical capacity to deal with problems requiring complex solution. In all its processes of law-making, the courts will be guided by equitable principles. Its sole intent will be to promote justice. In my view, therefore, judicial legislation, well guided by recognised rules and principles of law, pressure from Parliament and the social desires, does not go against the "democratic ideals".

3:3 LIMITS OF JUDICIAL LAW-MAKING

In the light of the discussions in the preceding chapters, it is no longer fashionable for anyone to assert that judges do not play a vital part in the evolution of law. On the contrary, judges, at least implicitly, do indeed evolve the law in their bid to make it reflect the modern demands of our ever changing society. By and large, legislatures must be responsible for the formulation of general principles of conduct, and the courts must apply the prescriptions of legislatures, in the general principles, to individual disputes, and in the process enlarge or restrict the scope of an enactment. However, it should be noted that courts do not really enjoy unfettered freedom to judicial innovations, and so, it is necessary, at this stage, to examine factors limiting judicial creativeness.

a) JUDICIAL LAW-MAKING AND THE SUPREMACY OF PARLIAMENT

The doctrine of supremacy of Parliament provides one of the limits for judicial law-making. Supremacy of Parliament, means that Parliament has the right to make, or un-make any law, and no person or body has a right to override it, or set aside such a law.[8] Accordingly, therefore, for those countries which have accepted the supremacy of Parliament, the courts only have inferior legislative capacity. This means that whenever a court makes, or considers making judicial innovations, it is always sensitive to how Parliament may react. When judges make law, they will make it in response to evidence and arguments of the same

character, as would move the superior institution, if it were acting on its own. This is a deeper level of subordination, because it makes any understanding of what judges do, especially in hard cases, parasitic on a prior understanding of what legislatures do all the time.

Again, being an inferior institution, the nature of the judicial function imposes certain limits upon judicial reform. As Friedman has observed, to arrive at a consensus, the legislature follows an elaborate procedure eventuating in the approval of a particular form of words as law.[9] But, because courts develop the law on a case to case basis, they cannot, as can the legislature, undertake the establishment of a new legal institution, "an elaborate procedure of investigation and consideration eventuating in the approval of a particular form of law."[10]

The case of National Provincial Bank V. Ainsworth,[11] is illustrative of the operation of the doctrine of Parliamentary supremacy. In this case, the House of Lords, the highest judicial authority in England, rendered a decision only to find it overruled by Parliament later. The House of Lords had earlier held that a "diserted wife's equity" never existed under English Law. However, two years later Parliament said that the decision did not reflect the wishes of the people, and passed the Matrimonial Home Act, 1967, which provided, inter alia, that a deserted wife has an equitable right to continue occupation of the marital home. The justification for the legislature overriding a judicial decision, is that it is composed of the representatives of the people, and so it is the relevant institution to decide which law is good for the people.

The judiciary is not elected, and is therefore not answerable to public opinion.

It should be observed, however, that the doctrine of the supremacy of Parliament, has not altogether, barred the courts from giving very creative judgements.

b) THE BINDING NATURE OF PRECEDENT

Despite the relaxation to the strict adherence to the doctrine of precedent, the doctrine still serves as a source of restraint in judicial creativeness. When judges pass judgements, they necessarily reflect their own political morality in these decisions. But there is also a further morality, which controls judges: the morality embedded in the traditions of the common law. Precedent doctrine is part of the traditions of the common law. This tradition of the common law, emboddied in the doctrine of precedent, contracts the area of a judges' discretion to rely upon his personal morality, and ultimately limits his law-making capacity.

In a most general sense, the judge is seen as an umpire, neutral and impartial. His duty is to receive evidence from the litigants, and use such evidence to decide the case before him. He may intervene only to supplement the formal authority, and even then there are limits to his discretion in establishing rules of law. He may neither restrict the scope of the general principles of law, explicitly or implicitly sanctioned, nor may he lay down detailed regulations governing the exercise of given rights.[12] How far the interpretation will go, is a matter that will depend on the accepted traditions as to the binding force of precedent,

the character of the enacted law, and the wider or narrower liberty of judicial interpretation. It is important to note that few judges accept that their role is creative. Most of them prefer to believe that they are limited by the binding force of precedent. For our purpose, whether or not they are actually limited by precedent is irreleant. It is enough that they warn themselves of the dangers of refusing to obey an established precedent.

c) THE JUDGES' EXPERIENCE

Experience will, of course, play a major role is making a judge adhere to his proper role. Just as knowledge and experience guide the legislature, a judge's knowledge and experience of the law, will guide and limit him when he decides to be creative. He will learn that he has to legislate within the limits of his competence. The limits for the judge, as he learns through experience, are very narrow. He legislates only within gaps, filling the open spaces in the law. How far he may go without travelling beyond the walls of the interstices, cannot be staked out for him upon a chart. He must learn it for himself, as he gains the sense of fitness and proportion, that comes with years of habitude in the practice of the art.[13] Even within the gaps, restrictions, not easy to define, but felt, however impalpable they may be, hedge and circumscribe his action. These restrictions are established by the traditions of the centuries, by the examples of other judges, his predecessors and his colleagues, by the collective judgement of the profession, and by the duty of

adherence to the prevailing spirit of the law.[14]

Therefore, an experienced judiciary need not worry the citizenry that it may be over creative. Experience automatically establishes the necessary checks and balances.

d) POLICY CONSIDERATIONS

Judges, we have noted, are political officials, at least to the extent that attracts the doctrine of political responsibility. All law is the outworking of the basic policy considerations of society, and the decision of individual cases merely their concretisation. Hence, judges are supposed to follow the general wave of the public, so that every judicial decision they make reflects the interests of society. Though, as we noted earlier, judges may not be the proper persons to deliberate over the matters of public policy, nevertheless, being subject to the doctrine of political responsibility, they may assist the politicians in formulating the general framework of a policy. In this respect, judges will see to it that their judicial decisions do not abrogate the policy of the executive, or that policy which is in the public interest. This restraint will serve as limitation on judicial outspokenness. Same rules guide judges as do legislatures, in respect of the end to be attained, since it is a question, in each case, of satisfying, as best possible, justice and social utility by an appropriate rule. The executive policy, aimed at satisfying the general need, will then serve as a restraint on the judiciary, where its decisions would abrogate the social desires and appear very revolutionary.

e) PARTNERSHIP

Finally, arguments concerning the respective roles of the court, and the legislature fail to take into account the possibility of a fruitful partnership, and interraction between the two. When judges make law, they should be regarded to act as deputy to the appropriate legislature, enacting the law that they suppose the legislature would enact if seized of the problem. I would underline the fact that, courts and legislatures, are in the law business together, and should be continually at work on the legal fabric of our society. Seen against the partnership background, there should be no problem of the judiciary being over creative. The legislature, as a concerned partner, will of course, provide the necessary control and limitations. In Kenya, for instance, through the Law Reform Commission, the judiciary, the Legislature and the public at large, can intimate the kind of law urgently needed. In some cases, the court can initiate the institutional and status of change, and leave to the legislature to elaborate the change. In the Kenyan case, of Virginia Edith Wamboi Otieno V. Joash Ochieng Ougo and Omolo Siranga[15] (commonly known as the S.M. Otieno Case), the court of Appeal without attempting to make the needed law, was of the view that there was a need for each of the ethnic communities in Kenya, to have a burial law. The matter was left to the legislature to consider. At the moment the legislature has not enacted any law to this effect, but the Law Reform Commission is already drafting the proposal.[16] This is a clear example of how courts can provide an initiative, without involving itself. The concept of Partnership in law-making thus, can provide limitation on judicial law-making.

C H A P T E R F O U R

JUDICIAL ACTIVISM: KENYA'S POST-INDEPENDENCE EXPERIENCE

4:1 STRUCTURE AND JURISDICTION OF THE KENYA COURTS

a) HISTORICAL PROFILE

The present day structure and jurisdiction of the Kenya courts, trace their root to the colonial era. Of course, before the advent of Colonialism, there existed traditional modes of settling disputes. Each ethnic group in Africa, had its own distinctive body of customary laws, and, depending on the political organization of the group, two modes of settling disputes emerged. There were societies with the institution of chieftaincy, or societies without the institution of chieftaincy.[1] In the former, there were formal systems of dispute settlement, while in the latter societies, there existed quasi-formal structures at village levels. Kenya largely fell in the category of the societies without the institutions of chieftaincy. In these traditional societies, and depending on their political organizations, conciliation and mediation were the two most popular forms of settling disputes. A distinction could be drawn between these two forms of settlement, on the basis of the degree of participation by a third party, in the determination of disputes. In the case of conciliation, the disputants themselves achieved agreement with little participation by a third party. In the case of mediation,

participation by a third party was an important feature. But, the two forms share a fundamental similarity, in that both presuppose the disputants themselves to be the principal decision makers.[2] Even in the case of mediation, the role of the mediator is not that of a judge. He merely assists the disputants in formulating a solution acceptable to both sides. But since mediation involves a third party as a decision maker, it is closer to the judicial determination of conflicts. Whether or not there existed the institution of chieftaincy, conciliation and mediation were still the main ways of resolving conflicts.

The establishment of British rule in Kenya, was accompanied by the introduction of English law. The General Acts of Berlin and Brussels Conferences, had imposed obligations on the signatory powers, to establish systems of justice in their African possessions. However, in establishing a system of judicial administration, the question of the profitability of the colonial venture had to be considered, for the primary motive of the colonial venture was economic.[3] An expensive procedure of judicial administration was, therefore, avoided, as it would negatively affect the margins of profitability.

The legal foundation of the present day Kenya's court system was laid down by the promulgation of various laws during the colonial period. This system of courts has a long ancestry, for it grew out of agreements made with, and control asserted over the dominions of the Sultan of Zanzibar,[4] who, in 1891, gave the Imperial British East Africa Company, all the powers and authority

to which he was entitled on the mainland. The Zanzibar order in Council of 1884, laid down the foundation of earlier courts, called Consular Courts, to exercise jurisdiction in East Africa. For the purposes of this study, it suffices to note that the various courts which existed before independence,[5] by whichever names they were called, were meant to serve and further the interests of the colonial authority. These courts were mainly administrative in character, and, in most cases, they were extension of the administrative hand of the colonial authority. There existed a dual system of courts, one for the Africans, the other for the colonial settler. Thus, justice was administered on a racial basis.

In 1963, when Kenya attained independence, changes were institut in the organization of the courts. One of the first steps taken by the new government, was to abolish the dual system in the administrat of justice. A unified and integrated court system was established. This period of reform culminated in the enactment of three interrelated Acts in 1967: the Kadhi's Courts Act,[6] the Judicature Act,[7] and the Magistrate's Courts Act,[8] which established the present structure of the courts.

b) AUTHORITY OF THE COURTS AND THEIR BASIS OF JURISDICTION

The authority of the courts and their basis of jurisdiction, have their root in the constitution. The Kenya Constitution has established three kinds of courts:

1. The Court of Appeal[9]
2. The High Court[10]
3. Other (Subordinate) Courts. Here the constitution has empowered Parliament to establish "other courts" whenever it feels right to do so.[11]

1. THE HIGH COURT

This is the most influencial court in Kenya. It is established by the constitution,[12] which gives it unlimited jurisdiction in civil and criminal matters. This means that the High Court can try any crime, no matter how grave it is, and also hear any civil suit, no matter the value of its subject matter. The Human Rights provisions of the constitution, depend for their enforcement, on the High Court.[13] The High Court is the constitutional court, and is the protector of the private interests founded upon the guaranteed rights. The High Court, enjoying as it does, full jurisdiction in respect of all justiciable claims, is thus, the bastion of constitutionalism in the Kenyan political order. The jurisprudence emanating from the decisions of this court, therefore, takes signal importance in this study.

2. COURT OF APPEAL FOR KENYA

The Kenya Court of Appeal was constitutionally established, afte the dissolution of the former court of Appeal for East Africa in 1977.[14] Its jurisdiction is appellate only, and it is also the highest court in Kenya. The judges of the court consist of the

Chief Justice, and such other judges of Appeal (being not less than two) as may be determined by an act of Parliament.[15] When the odd number of judges sit to hear appeals, their decision is arrived at by a majority vote.

3. OTHER COURTS

These are established under Section 65(1) of the constitution, and are to be supervised by the High Court.[16]

Apart from these courts, there are also specialised tribunals.[17] The object of establishing these tribunals, and other quasi-judicial bodies, is to achieve speedy settlement of disputes, since these tribunals are specialised in the matters they deal in.

c) APPOINTMENT OF JUDGES AND THEIR TENURE OF OFFICE

Up till the 1988 amendment[18] of the constitution, there existed ample strictures in the appointment of judges. These strictures still remain with regard to the professional[19] guidelines for appointments. The current position is that the Chief Justice is to be appointed by the President (just as before), but the President has got added discretion to appoint and dismiss judges at pleasure, without resorting to a tribunal to enquire into the soundness of their removal. However, the Judicial Service Commission is to advise the President on the appointment of puisne judges.[20] The effect of the 1988 constitutional amendment, is that it gives the chief executive an open hand, in appointing and firing judicial servants.

The effect of this on the judiciary, is yet to become clear; however, it is not hard to predict: in the mind of a judge, is planted the permanent fear, that his job can be terminated any time, since he holds it at the will of the President. This may compromise his role of dispensing justice without fear or favour.

With regard to the judges' tenure of service, they may vacate office when they attain such age as may be prescribed by Parliament, and, accordingly, the statutory retirement age is seventy-four years. However, not withstanding that he has attained that age, a judge of the High Court may continue in office, for as long as may be necessar to enable him to deliver judgement, or to do any other thing in relation to proceedings that were commenced before him before he attained that age.[22]

d) THE JUDICIARY AND THE SOURCES OF KENYA LAW

The sources of the law of Kenya are clearly set out in Section 3 of the Judicature Act[23] of 1967, and states that the jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with:

1. The Constitution

Section 3 of the constitution declares the constitution to be the supreme law of the land, and says that whatever law shall come into conflict with the constitution, shall be declared null and void. It provides at the same time, that the constitution may be amended, but only following the procedure laid down in section 47.[24] The High Court is also the consitutional court and is responsible for

interpreting the constitution. It thus means that, the court can declare a statute null and void if it contradicts the constitution. In all matters, the court rely first, on the constitution since it is also the basis of validity for all other laws, which derive their authority from the constitution.

2. Legislation

Second in the hierarchy of Kenya law is the legislated or enacted law. Here we have specific acts of Parliament of the United Kingdom, such as The Foreign Tribunals Evidence Act 1856, The Admiralty Offences (Colonial) Act 1849, The Conveyancing (Scotland) Act 1874, Section 51. Acts of the Parliament of Kenya, such as the Evidence Act (Cap 80), the Registered Lands Act, (Cap 300). Then applied acts of the Parliament of India, such as the Indian Transfer of Property Act (I.T.P.A.).

In Kenya, the legislative function is vested in the Parliament of Kenya.[25] The judiciary has got no legislative powers, and it has to rely on the Parliament to enact a law, on which it can base its judicial decisions. Parliament of Kenya is Supreme, and therefore it can make, amend or repeal any law, including the constitution.

3. Third in the hierarchy are substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897,[26] and the procedure and practice observed in courts of justice in England at that date.[27]

Thus the courts can also look to the principles and procedures found in the common law, since they form part of our law. But the common law, doctrines of equity and statutes of general application, shall apply so far as the circumstances of Kenya and its inhabitants permit, and subject to such qualifications as these circumstances may render necessary.[28] This affords our courts opportunity to be creative, by adapting the received law to the local circumstances.[29]

Subsidiary legislation also form part of the Kenya law.

Finally, the High Court, the Court of Appeal and all subordinate courts, are to be guided by African Customary Law[30] in civil cases in which one or more of the parties is subject to it, or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.[31]

Islamic law[32] is a very limited source of Kenyan law. It applies in Kadhi's courts, when all parties are moslems, but it applies only to matters relating to personal status, marriage, divorce or inheritance.[33]

These are the sources of Kenyan law. It is among these sources of law, that the judge must found the basis of his judicial decision. In this study the question as to whether these sources of law are comprehensive enough to cover every situation, and whether they are valid all the time, will be recurrent.

4:2 DETERMINING THE JURISPRUDENCE OF THE KENYAN COURTS: A STUDY OF KENYA'S CASELAW

a) PRE-INDEPENDENCE EXPERIENCE

THE JUDICIARY IN PRE-INDEPENDENT KENYA

Although J.B. Ojwang observes that, apart from any considerations of expediency, it is arguable Britain would, in any case, have set up judiciary as part of the inseparable trappings of her civilization,[34] I think it is safe to add that, at least in the short run, British interest in her African colonies or protectorates was purely economic. She had very little interest in establishing a judiciary like the one she cherished at home. At the very onset of colonialism, one of the most daunting problems to the British imperialist, was the setting up of a judicial structure, that could uniformly apply across the country. Here was a heterogeneous Kenyan population, with a myriad of customs, traditions and life styles, and not hitherto familiar with the British mode of administering justice.[35] The colonial authority believed that working through traditional institutions, they would control the indigenous population better. Secondly, they considered it in order, setting up a different forum for dispute resolution for Africans, which was less technical and more down to earth, and which the African, who was perceived to be of low intellect, could understand.[36] In the area of family law, for instance, a separate procedure of marriage was established for the Africans under

the African Christian Marriage and Divorce Ordinance, 1931, to provide a simple way of celebrating marriages by African Christians.[37] What emerged, thus, was a dual system of courts, the English system of the High Court and the Court of Appeal above it, manned by judges, along with the subordinate courts staffed by administrative officers, and applying English law and procedure, and applicable to settlers. On the other hand were the native tribunals system, staffed by the Africans, who were themselves colonial nominees, and administrative officers applying primarily customary law, and a common sense approximation of the English type of law and procedure. The muslim system operated at the coast, staffed by Arab officials applying both muslim and English type law.[38] In 1930, the Native Tribunals Ordinance[39] was enacted, and it sought to establish a modified African legal system in which administration played a prominent part. Under the ordinance, the Provincial Commissioners were empowered to establish, by warrant, such tribunals in their provinces as they thought fit.[40] The executive and the judiciary were, therefore, merged into one. As the dominant political force, the British now found it extremely helpful to make use of the courts, to maintain the political, economic and social status quo. Laws were enacted, but applied inappropriately, to satisfy the colonial needs. Thus, in Koinange Mbiyu V. R,[40A] Governor had been given power to designate areas of land on which coffee could be grown in the colony of Kenya. The Governor, instead, used this power to designate areas where Africans could not grow coffee. Mbiyu was convicted and charged as an African growing coffee in prohibited area.

Mbiyu in his defence argued that the power was given to the governor to control coffee growing areas, and not to control people. Thus the colonial authority interpreted rules to satisfy their economic needs, for they knew that, allowed to grow coffee, Africans would know the economic value of coffee, and would hence take opportunity to improve their living conditions.

This system, which stressed administrative expediency, operated well into the 1950s and beyond. It gave the administration the power to create any sort of tribunals they wanted, and to use them as they saw fit. Most of these tribunals were short lived, and within that short time, fundamental alterations in composition, procedure ... would have occurred.[41]

In modern legal - political philosophy, separation of powers has grown in prominence, as the hallmark of the rule of law, constitutionalism and democracy, which precepts are the antithesis of autocracy and arbitrary rule. While it is true that democracy refers to popular elections, and separation of powers may not necessarily, be an aspect of democracy, the spirit of democracy, in my opinion, entails the concept of sepration of powers. Even in countries like Britain, where separation of powers has not been a salient feature of the country's unwritten constitution, restraint on the various governmental organs and institutions, born of a long tradition have, for centuries, made Great Britain one of the foremost democracies in the world. The same Great Britain, however, in her pursuit for economic gains, found it expedient to discard all forms of controlled government in her colonies.

The idea of separation of powers, which is a pre-condition for the creation of an active judiciary, was therefore, a myth in colonial Kenya. The system was simply a monolithic, bureaucratic edifice, singularly irreconciliable with the idea of popular political participation. There was a single column of power, with the governor at its apex.[42]

Judges in colonial Kenya were appointed under the East African Order in Council of 1897.[43] To be eligible for appointment, a person had to be a member of the Bar of England, Scotland or Ireland, of not less than three years standing.[44] This qualification was much lower than that prevailing in England, where, as a matter of established tradition, judges were appointed from distinguished barristers of long standing.[45] The English judges, who presided over the colonial courts, were therefore, of "second class", for the best naturally stayed at home. The colonial judiciary was further characterized by a common tenure, applying also to ordinary civil servants. The judges held office at the pleasure of the crown, and were dismissible by the governor on the direction of the Secretary of State, without any investigatory ceremony.[46] Professor Seidman notes that "Judges did not even wear the mask of independence. The D.O. as an administrative official, prepared the case for the prosecution, then climbed behind the bench and heard it as a magistrate."[47]

Under such circumstances, activism on the part of the judges was not possible. Hardly can we expect any creative manipulation of law

if, on the same person, were placed the roles of a judge, prosecutor, jurist and jailer. Judicial law-making requires judicial independence which itself presupposes the absence of prejudice, bias and interest in the case before the judge. Judicial legislation envisages a free mind, free from all other interests, but that before it.

That the colonialists interests took precedence over any considerations for an independent arbitration process, in which one would expect to find creative manipulation of the law, is best illustrated by the decision in Ol le Njogo V. Att. Gen.[48] In an agreement between Masai leaders and the colonialists in 1904, the Masai were induced to vacate their land for British Settlement. The masai were to be settled in Laikipia, and the agreement was to subsist "so long as the masai as a race shall exist", and that Europeans and other settlers "shall not take up land in the settlement of the masai." As settler demands for land increased, the masai were approached again, and induced to sign another agreement in 1911, to move from Laikipia to Ngong. In carrying out the exercise, a lot of masai property was destroyed. The plaintiffs, on behalf of the masai forced to move in 1911, brought an action for breach of the 1904 agreement on the ground that the agreement was a contract and still subsisting, the 1911 agreement having not been made with the masai who were capable of binding the tribe; and also a claim for damages for destruction and confiscation of property. The Crown argued in defence that the courts had no jurisdiction, as the two agreements were treaties and not contracts, and hence the alleged destruction and confiscation were acts of state, and neither was therefore within the jurisdiction of a municipal court.

This agreement was upheld up to the court of Appeal. The highest court said that the masai were a sovereign people, and thus the agreements were treaties, which could only be enforced either diplomatically, through international law, or by the masai waging war.

The absurdity of the decision is that the courts closed their eyes to the futility of the masai attempting to get back their land. Instead, the court chose to hide behind the smoke screen of the international law concept of sovereignty, which was of no legal or practical value to the masai. this was a clear opportunity for the court tobe creative, and thus make the law serve the local expectations of the people. The court instead, applied justice according to British standards, forgeting the peculiar case for the African. The same attitude had earlier on been adopted by the court, in R.V. Amkeyo,[4] which held a customary marriage to be a "wife purchase", and hence not valid as per English standards.

The 1940s and 1950s saw the increasing struggle for independence. To secure their political and social status quo, the colonial authority again resorted to the use of courts.[50] It is during this period that Jomo Kenyatta and others were arrested and charged with managing an unlawful society[51] (the mau mau). The colonial court decided to see Kenyatta and his colleagues, not as nationalists fighting for political independence, but as thugs and rouges, bent on creating disturbance and despodency in an otherwise peaceful country. Kenyatta and colleagues, therefore, qualified to be called criminals. Their appeal to the Privy Council[52] was rejected, and all, except one were sentenced to seven years imprisonment, with hard labour, and all declared restricted persons. By insisting

that their activity was criminal and not political, the prisoners were denied a chance to argue out their case without prejudice. The trial was so unfair, and Pheroze Nowrojee has described it as an exercise in injustice.[53] That the colonial court was interested in preserving colonial dominance is clear in the fact that the accused were tried by a special court, and the trial Magistrate Thacker, had been specially selected for the trial, having retired as a High Court judge, and is said to have been given a secret award of £20,000 after giving a guilty verdict.[54]

Among the very few cases in Colonial East Africa, where the court modified a received law in the light of the local circumstances is Nyali Ltd. V. Att. Gen. of Kenya.[55] In this case, the court of Appeal, applying a legislative provision of the Kenya protectorate held that the common law rule requiring a grant of a franchise of pontage to be by charter or letters patent, should be modified so that an implied grant under an agreement would be sufficient. Denning L.J., as he then was, said,

> "In those far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications ... The task of making these qualifications is entrusted to the judges of those lands ... It is a great task which calls for all their wisdom"

In Namatovu V. Kironde Bakery Ltd.[56], East African judges had occasion to respond to the Denning call, above. There was an action arising from a fatal accident, and brought under the law Reform (miscellaneous provision) Act, 1953. It was shown in evidence that the deceased had left six sons, five daughters and three widows,

one was married under christian rites, and therefore, under the law of Uganda she was the legal wife. The other two mere married to the deceased by custom. However, the point of law here rested on the status of the three widows. Would the two customary wives, be included, along with the statutory wife, in a claim under the above Act, intended to benefit only statutory wives? Deciding in favour of all the wives, Sheridan J. said,

> "It might have been argued, as this is a purely statutory remedy, that only the legal wife could be considered... But as against that it could be illogical to include "illegitimate children" and exclude their mothers. If necessary there could be invoked the provision of section 15(2) of the Uganda order in Council of 1902, which enforces the application of statute law (the Law Reform (Miscellaneous provision) Act, 1953 of part 2, which reproduces the Fatal Accidents Act of 1846 - to take into account, so far as the circumstances of the protectorate and its inhabitants render necessary."[57]

Here, we see a deliberate attempt by the court, to take into account the local conditions, thereby adapting received statute to these conditions, and thus extended it to benefit the wife married under traditional law, where polygamy is given recognition, and is practised. Holding the way it did, the court had departed from the old precedents in R V. Amkeyo[58] and R V. Abdulrahman[59] (bearing in mind the dates of these cases), where judges refused or failed to recognise and appreciate the social customs prevalent in these countries, and give decisions which reflect the social set-up existing in these colonies.

So far, we have seen how the colonial authority used the courts to serve and further its own economic interests.

On most occasions, the judiciary was an extension of the executive's administrative hand. Under these circumstances, and apart from some rare occasions when courts were creative, it is arguable that courts in the colonial period never had any real creative role, which could enhance the development of law. It is, therefore, safe, to suggest that judicial passivity was the rule in pre-independence Kenya.

The British, however, would not use the judiciary to achieve her (Britain's) needs forever. In 1960s, the struggle for independence reached its peak, and the British use of law to subject the natives into succumbing to submissiveness, was inevitably coming to an end. In 1963, thus, the colonialists had to give up the reigns of power.

b) POST-INDEPENDENCE EXPERIENCE

THE GROWTH AND EXPANSION OF THE EXECUTIVE AND PRESIDENTIAL POWERS FROM 1963-1989 AND THE RESULTING IMPACT ON JUDICIAL LAW-MAKING

By the 1960s, the British had already acquired a lot of agricultural, industrial and other settler interests in Kenya. But, as the struggle for independence reached its peak in the 1960s, Her Majesty gave up the territory, and in 1963, the country achieved its independence.

However, the British was worried over her acquired interests. Was a black government going to secure these interests; were the remaining settlers guaranteed security; what about the numerous and enormous commercial, industrial and agricultural concerns? The greatest concern, for the British, then became a desire to control incoming black government.[60]

While some western scholars have argued that, it was the free choice of Britain's former colonies to become independent on the basis of the Westminster model constitution,[61] it is clear that the British wanted to use the Kenyan independence constitution to protect her own continuing interests, even as she quit. The independence constitution was, therefore, a bargain between the incoming black rulers, and the outgoing colonial masters. What emerged out of the 1962 constitution Conference in London, was a most rigid constitution, whose main philosophy, it appeared, was that power was evil and ought to be carefully limited.[62] The colonial master had used the judiciary most immensely, in her exploitative mission. Ironically, she was now, once more, to use the constitution to create a judiciary which would preserve the fruits of her (British) exploitation.

Under section 17 of the constitution, "a supreme court" was established. Unlike the U.S. supreme court (which has wide powers of judicial Review, with all-embracing powers on constitutional interpretation), the supreme court was given powers to interpret the constitution, only where there was a dispute as to National Assembly membership, or where fundamental rights provisions were concerned.[63] These, apparently, were the main areas of interest for the colonialist.

The constitution then made provisions, intended to insulate the supreme court from political influence and executive control. Under section 184,[64] a judicial Service Commission was set up, as an

independent body dealing with judicial appointment, discipline and dismissal.[65] Fortifying the British interests further was the fact that the court was at the time staffed by English judges, a situation which was to continue well into the 70s and 80s, in what was later to be called the High Court. When it came, particularly to the interpretation of fundamental rights provisions, the court used its powers in a very aggressive manner. In Wadhwa V. City Council of Nairobi,[66] the plaintiffs were non-citizen stall-holders in a city market. After a decision by the council to Africanise the market, the plaintiffs were served with notices to quit their stalls. In challenging the council's stated policy of allocating stalls only to "Kenyan citizens of African origin", as being discriminatory, and therefore, unconstitutional, the plaintiffs prayed the court to declare the quit notices null and void. Finding for the plaintiffs, Harris J., held the resolution of the council discriminatory within the meaning of section 26(2)[67] of the independence constitution, which secured the right against racial, or any other form of discrimination. The court applied the same reasoning in Dent V. Kiambu Liquor Licensing Court.[68] That a strict interpretation of the independence constitution would render the city authorities' and the liquor court's actions unconstitutional is correct. But the court forgot to take into account the new circumstances of the independent Kenya. It forgot that it was genuine government policy to Africanise some sectors of the economy. The court forgot that the struggle for independence was an attempt to liberate indigenous Kenyans from the shackles of colonial servitude, and more important, economic bondage. This, however,

was the intention of the colonial master: to preserve the interests of colonialism even after independence.

From the foregoing, it becomes clear that the new government was soon to realise how futile it was going to be, trying to achieve any meaningful development in the independent Kenya, with the rigid constitutional provisions. What followed was a deliberate effort to amend the constitution, and creat a workable government.

The first amendment[69] increased the powers of the executive. The presidency was created, and the incumbent was to be Head of State, Head of Government and Commander-in-Chief of the Armed Forces of the Republic.[70] Among other things, the second amendment[71] increased the executive powers in relation to the judiciary. The chief executive now, did not have to consult with the regions in the appointment of the Chief Justice.[72] The process of removal of judges from office was simplified slightly, with the president now having the power to instigate an enquiry into the conduct of a judge, by setting up a tribunal for the purpose.[73] This process of constitutional amendments continued, with most of them strengthening the office of the chief executive, so that upto 1968 there were a total of ten amendments to the original constitution. Several other amendments took place, with the effect of either strengthening the office of the executive, or weakening the judiciary. For instance, the 1986 constitutional amendment removed the security of tenure for Attorney General and Controller and Auditor-General. Both offices are now held at the pleasure of the President, without any investigatory ceremony being carried out before their removal from office.

To date, twenty-four[74] constitutional amendments have been effected, with most of them having fundamental impact on the judiciary. The most far reaching one is the 1988 constitutional amendment, which, among other things, removed the security of tenure of judges.

The amendments immediately after independence were necessary for a workable government. Soon afterwards, however, the trend shifted into a deliberate attempt to strengthen the institution of presidency. Whereas the very first amendments had been targeted at giving the executive a stronger voice in the overall decision making, a desirable phenomenon then, amendments in the second half of the 1960s and beyond concentrated on strenghtening the President's Office, in the face of increasing internal governmental opposition.[75]

The comulative effect of all these amendments, to the judiciary, is that it erodes the judicial independence, which is a condition precedent in order to expect an activist judiciary.

c) JUDICIAL INDEPENDENCE AND EXECUTIVE EXPEDIENCY

The independence of the judiciary is a necessary requirement for the creation of an active judiciary. However, in most countries, this judicial independence has to be weighed against executive interests. It is in the light of this, that such constitutional amendments with fundamental implication should be understood. One of the commonest features in many of the emergent nations, including Kenya, is that they find themselves caught up in a host of social contradictions. These social contradictions make the role of the

leaders of those countries a very difficult one, and especially when one finds that a politically stable nation has to be built out of a predominantly poor, ignorant and ethnically divided population. To safeguard political stability in such countries, and therefore, encourage economic growth, a judiciary which is purely divorced from the politics of the day seems to be a luxurious institution to have. Accordingly therefore, contemporary judges serving in these countries are, no doubt, faced with the problem of administering justice according to the relevant law of the land on one hand, and that of satisfying the interests of the executive on the other. In sum, the judges have to be politically or ideologically committed, so that every decision they give may reflect the aspirations of the people as a whole. Picho Ali, one of the supporters of those who would like to see a politically or ideologically oriented judiciary, has observed that,

> "... Ideological committment of the judiciary is not a theoretical and intellectual problem in jurisprudence but a practical necessity in nation-building"[76]

This idea of ideological committment of the judiciary may, in the end compromise the independence of the judiciary. In most developing countries, the executive branch of government is already so powerful, and adhering to the ideological committment of the judiciary, may compromise the liberty of the individual, and this may result in lack of trust and confidence in the judiciary.[77] The Matovu case[78] in Uganda illustrates a judiciary which is willing to bow too much to the whims of the executive, at the expense of the

liberty of the individual. Matovu, then in detention, applied for a writ of habeas corpus, under which he challenged the legality of the emergency regulations of 1966, made by the then Obote government, after an unconstitutional abrogation of the independence constitution of 1962. Matovu's argument was that because the abrogation of the independence constitution was unlawful, and the constitution illegal, any government under the latter constitution was illegal, and therefore could not make lawful emergency regulations under which he was detained.

Justice Udo Udoma heard the case, and held that the 1966 constitution was valid. The learned judge based his argument on the ground that there had been an effective revolution, and consequently, held that the detention was lawful. Clearly, in reaching his decision the judge was influenced by political considerations, and, accordingly, he had taken a realistic line in deciding that a successful political revolution had taken place which entailed a legal revolution.

Although criticisms have been levelled against this decision, an important question remains: what have judges to do when faced with the whims of the executive, to whom they owe their appointments and remuneration? I do not intend to discuss this, but clearly the answer is not an easy one.

Independence of the judiciary is clearly a relevant concept in determining the nature and extent of judicial activism. In those countries where judges are guaranteed a large measure of independence in their judicial function, they may make judicial innovations without necessarily

anticipating harrassment from those with the executive power.[79] Where there is executive interference, judges have little or no scope to pronounce new rules, and hence this fact imposes a limi to judicial law-making.

In Kenya, the twenty-four constitutional amendments, which have been effected since independence (while they may not all ha to do with the judiciary) have affected the judiciary most, by robbing it of its inherent independence. The years after indepe have thus seen a relatively weaker judiciary, than that envisage by the independence constitution. Whether this weakness is a reality or a myth, is an issue to be determined in the next sect

d) POST-INDEPENDENCE CASELAW: EMERGING JURISPRUDENCE

ENFORCEMENT OF PROPERTY RIGHTS

Section 75 of the constitution guarantees the protecion of private property, and every person has a direct access to the Hi Court, for the determination of his or her rights over his prope

i) LICENSING

Section 82(1) of the constitution states that no law shall any provision that is discriminatory either of itself, or in its effect. The protection of this section was evoked in Fernandes Kericho liquor licensing court.[81] In this case the appellant had applied for a renewal of a liquor licence. The application was rejected, on the ground that the appellant was not a citizen of Kenya. The appellant sought a reversal of this decision. The High Court allowed the appeal, holding that non-citizenship coul

not have been contemplated as a disqualification for granting a liquor licence. Then in Shah Vershi Dershi and Co. Ltd. V. The transport licensing Board,[82] the applicant company which had been denied renewal of some of its transport licenses, applied for an order of certiorari, to remove into the High Court, and quash the refusal on the grounds, inter - alia, that the respondent had failed to exercise its discretion properly, and that its decision was discriminatory as being against Kenya citizens of Asian origin, within the meaning of section 82 of the constitution.[83] In accepting the argument, Simpson J., said,

> "The main reason for refusing the licences ... was removal of imbalances existing at the moment between Kenya citizens. The Board, accordingly, treated the applicant in a discriminatory manner in contravention of section 82 of the constitution."[84]

The court in these cases,[85] adhered to the strict interpretation of the constitution. The emerging jurisprudence is positivist. The court disregarded policy considerations which were certainty behind the acts of the licensing Boards.

ii) LAND

Section 27 and 28 of the Registered Lands Act (herein referred to as R.L.A.)[86] protects the private interest in land, and is to the effect that, on a first registration, the registered persons takes the land without any encumbrances, and without being subject to any other interests, even if the first registration was effected through fraud.[87] These two sections have caused a lot of problems

and confusion, especially in the light of the African institution of customary trusts. These two sections have been used by fraudulent land owners, as vehicles of fraud, and instruments of deprivation. According to the African institution of customary trust, a father of several sons could register the name of his first born son on the piece of land he held. The intention behind this registration was normally, that the registered person, being the eldest, would keep in trust that land for himself and the other beneficiaries, the younger sons. In the period since independence to late 1970s, these "trustees" have appropriated the lands for themselves, claiming in defence thereof the protection afforded by sections 27 and 28 of the R.L.A. In most cases of this period, the court upheld such claims, and rejected the institution of African customary trust. Thus in Selah Obiero V. Opiyo,[88] the plaintiff was registered under R.L.A. as a proprietor of a piece of land, and no encumbrances were noted on the register. She sued for possession of the land, claiming damages for tresspass against the four defendants, and an injunction to restrain them from continuing or repeating the acts of tresspass complained of. The defendants admitted that they were in possession, and claimed to be the owners under customary law, and to have cultivated it from time immemorial. They further alleged that the plaintiff's registration was obtained by fraud. Giving judgement to the plaintiff, Bennet J., said, inter-alia, that customary rights as pertains to land had been extinguished when the plaintiff became the registered proprietor;

that section 28 of the R.L.A. confers upon a registered proprietor a tittle "free from all other interests and claims whatsoever," subject to the leases, charges and encumbrances shown in the register, and such overriding interests are not required to be noted in the register. Further, he said that "had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any other person under customary law, nothing could have been easier for it than to say so."[89]

This rude, barbaric injustice, was carried into Esiroyo V Esiroyo,[90] a case of a father evicting his sons from land, and claiming damages for tresspass. The learned judge Kneller, in his guarded wisdom, said that, "this matter is taken out of the perview of customary law by the provisions of cap. 300."[91]

Such a warped conception was to be extended to its limits in a 1977 case of Bellinda Murai V. Amos Wainaina,[92] where Law and Porter J. J. A. were of the opinion that once land is registered, not only are customary rights and interests extinguished, but customary law is also austed by common law and statute.[93]

In all these cases the court showed a strictly positivist jurisprudence. The court even forgot that the received English rules, were supposed to be applied with the local conditions in mind. In some of these cases, there were, of course, dissenting minority opinions. Such dissenting views bore some fruit, for instance in Edward Sammuel Limuli V. Marko Savai,[94] where the court, applying natural law principles, expressed the opinion that judges and other legal personalities are not robbots, but

reasonable human beings. They must reason and look over and above what is written in statute books, for they have a higher duty of protecting the society against injustice.

It must be noted that though other judges have recognised customary law rights,[95] the area is still a battle ground. Even the legislature has not offered an adequate solution,[96] and sections 27 and 28 of the R.L.A. still remain.

It is clear, however, that in all these cases of property, the court has been applying the law in a very narrow and restricted sense, adhering solidly to the constitutional provisions. The court has shown a protectivist spirit, in their approach to the safeguard or private property. In the area of licensing, the spirit seen in the judicial decisions is that an enactment could not take away private rights of property without compensation, unless the intention is expressed in clear and unambiguous terms. J. B. Ojwang and Otieno-Odek submit that this remains, to date,[97] the approach of the Kenyan courts, on questions touching on the right to private property.[98]

THE ENFORCEMENT OF THE RIGHT TO LIBERTY

1. DETENTION LAWS

Section 72 of the constitution provides for the protection of the right to liberty. Section 83(1), on the other hand, provides for the curtailment of such right, if one is detained under the provisions of the Public Security Act.[99] The Public Security

(Detained and Restricted Persons) Regulations made under section 4(2) (a) and (b) of the Public Security Act, provide that if the Minister is satisfied that it is necessary for the preservation of public security to exercise control beyond that afforded by a restrictive order over any person, he may order him to be detained in a place of detention.[100] Where detention order is made in respect of any person, that person shall be deemed to be in lawful custody.[101]

The jurisdiction of the High Court to review acts of detention is based on section 84(1) of the constitution, and is to the effect that "... if any person alleges that any of the provisions of sections 70 - 83 (inclusive), has been, is being, or is likely to be contravened in relation to him (or, in the case of a person detained, if any other person alleges such contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matters which is lawfully available, that person (or any other person) may apply to the High Court for redress.[102]

Sub-section (2) of section 84 empowers the High Court "... to make such orders, issue writs and give such directions as it may consider appropriate, for the purpose of enforcing, or securing the enforcement of any of the provisions of sections 70 - 83 (inclusive).

In addition, the High Court has inherent jurisdiction to determine whether an action is lawful or not, and to grant such suitable relief as it deems fit. The basis of this review is

the common law, which applies to Kenya by virtue of the judicature Act.[103] The court can then award any of the orders, including mandamus, prohibition, certiorari, declaration and Habeas Corpus subjiciendum. The latter is most commonly used by an aggrieved party, being a prerogative process for securing the liberty of a subject by affording an effective release from unlawful or unjustifiable detention.[104]

Where an application is made to court, the determination of the merits of such an application takes precedence over all other matters, since it is the liberty of the individual which is at stake. The executive is called upon to produce the person, or show lawful detention.[105]

JUDICIAL RESPONSE

The judicial response in relation to the Corpus Juris pertaining to detention is best illustrated by the case of Ooko V. Republic.[106] Patrick Paddy Ooko was detained by virtue of regulations made under public security (Detained and Restricted Persons) Regulations, L. N. No. 212 of 1966. He sought a declaration that his detention was unlawful because the detention order had referred to him by a name that was not his - Patrick Peter Ooko. He also challenged the order on the ground that the Minister had failed to comply with section 27[107] of the constitution, which required that the detainee be furnished with a detailed explanation of the decision to detain. The late Mr. Justice Rudd easily disposed of the first ground, saying that Patrick Paddy Ooko, was in fact, the person the detention order was intended to apply to.

As to the second ground, he said:

> "There could well be a great deal of substance in such a submission, if no written statement at all of the grounds of the detention had ever been given. In this case there was a statement of grounds, though not in sufficient detail. In such a case the plaintiff's remedy is to apply to this court, and that this court on such an application can order further and better particular of the grounds for detention, and is not bound to order that the detained person be released from detention."[107A]

The judge then ordered the defendant to supply the plaintiff with the details complained about within ten days. This order was duly complied with, and the judge then gave a second judgement in which he dismissed the plaintiff's case. He confined himself to procedural technicalities, and maintained that it was not the legitimate duty of the court to pry into the merits of the case, thus holding to the declaratory theory of the role of the courts. He said:

> "The grounds stated, if true,‡ could legally justify his detention. The truth of these grounds and the question of necessity or otherwise of his continued detention are (not matters for) this court."[107B]

The question which arises, is whether the requirements of section 27 are mere procedural declaratory statement, or binding and mandatory constitutional requirement? In my opinion, if the requirements are aimed at protecting the guaranteed rights, then they must be mandatory. That the court in the Ooko case took them

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‡Emphasis is that of J. B. Ojwang

to be merely declaratory, is a mockery of the constitutional document, and a clear testimony of the court's impotence in the face of executive values. By asserting impotence to question the merits of the detention, the court took a pathetically passive view of its role.[108]

In Raila Odinga V. Republic,[109] the facts were that Raila Odinga was arrested as he was leaving his office. His advocate filed an application, seeking certain orders.

1. An order in the nature of Habeas Corpus, to the Commissioner of Police, and the Director of Criminal Investigation Department (C.I.D.) to have the body of Odinga produced before the court, at such time as the judge may direct.

2. An order that the Commissioner of Police and the Director of C.I.D. do appear in person, or by their authorised agents, having with them the original of any warrant or detention order to show cause why Raila should not be released.

On the date of hearing the application, the D.P.P. announced that a detention order had been made against the applicant and produced it for the judge to read. The defence counsel then requested that he look at the order, and be allowed to argue the matter further, saying that that was not the end of the matter. Both requests were rejected, the judge saying,

> "Mr. Khaminwa would not go far as to say that I could examine the validity of the detention order itself, and there is no doubt in my mind that I cannot ... whatever step is now to be taken, would be based upon entirely different parameters, so different as to be another application for which this application would be a poor basis ... I do not see the point of allowing further argument in the matter since the issue has been taken out of the hands of the court."[110]

From the study of detention cases, the emerging jurisprudence is that the court generally tends to disclaim jurisdiction. Whenever there is executive interest in the case before it, the court shows a great deal of reluctance, and the rights of the individual are left insecure. It is hard to reconcile this approach of the court, when it comes to cases in which the executive is interested, with section 60 of the constitution which gives the High Court unlimited jurisdiction in civil and criminal matters. It is even harder to reconcile the court's approach with the decision in Miller V. Miller,[111] where the Court of Appeal held that the jurisdiction of the court can only be expressly ousted by a provision in the constitution.

II. PASSPORTS

A leading scholar has defined passport as an international document, which carries the authority of the head of state in the country of provenance, requesting his foreign peers to allow the bearer to move without let or hindrance.[112] This would appear to suggest that a passport is not a right to any citizen, since the head of state can withdraw his authority from that

document, thus rendering it useless. Indeed, judicial practice has supported the assertion that a passport is not a right,[113] in spite of the fact that section 81 of the constitution sageguards the "right to move freely ... and the right to leave Kenya." In Mwau V. Att. Gen,[114] the court of Appeal held that the "issue and withdrawal of passports is the prerogative of the president, and it is open to the responsible minister to decide on each application, whether or not to make a request in respect of the application.[115] Thus the right to travel abroad is subject to the security of the state. Where one's travel abroad may cause insecurity to the state, in the opinion of the minister, then passport ceases to be a right.

III. ELECTION LAWS

The High Court has held that it has no jurisdiction to hear and determine grievances arising out of the K.A.N.U. Nomination rules. In Mathew Ondeyo Nyaribari V. David Onyancha and Anothor,[116] the plaintiff was an unsuccessful candidate in the KANU nominations held on 22nd February 1988, at the West Mugirango constituency. He filed a suit against Onyancha the "winner", as the first defendant, and the local District Commissioner as the second. The Plaintiff, inter-alia, argued that contrary to KANU Nomination rules, registers were not verified and were not used at the polling stations for the nomination exercise; that from the results, those who voted at the nomination exceeded registered

voters, and that the results announced were contrary to those certified by accredited agents. The plaintiff, among other things prayed that the "election" of the defendant be set aside. In dismissing the application, the court said,

> "Bearing in mind Rule 31(111) of KANU Nominations Rules which ousts the jurisdiction of this court from disputes on KANU Nomination ... and having considered the authorities dealing with court's attitude to the internal management of societies ... In the instant case, no proprietary rights were claimed to have been affected by irregularities complained of. This suit is hereby struck out as prayed for by the defendant, with costs."[117]

The court treated KANU just like any other society or domestic body. The court apparently, was not disturbed by the fact that KANU is quite different from other domestic bodies, given its wide ranging powers of decision over who does, or does not participate in the country's political leadership, and thus the court did not consider placing KANU under the microscopic lenses of the High Court. The court did not consider the probability that the only avenue for redress is the party president, may appear unconstitutional to the extent that it derogates from the unlimited jurisdiction of the High Court,[118] and is against the basic rules of natural justice, that requires that no man should be a judge in his own cause.

The jurisprudence emerging from decisions on election law closely resembles that emerging from decisions on detention law. In both cases, the High Court has claimed lack of jurisdiction.

BURIAL LAW

This is an area predominantly governed by the customary laws of the various ethnic groups in Kenya. The single, most controversial case under this sub heading, is the famous Virginia Edith Wamboi Otieno V. Joash Ochieng Ougo and Omolo Siranga[119] In summary the facts of this case are as follows: Silvanus Melea Otieno,[120] a legal practitioner based in Nairobi, died on 20th of December, 1986, aged 55 years. The family, meaning the clan and the family in the nuclear sense - attempted to make arrangements for the burial. But it later turned out that the widow of the deceased, Virginia Edith Wamboi Otieno[121] and her nuclear family, could not agree with the deceased's brother and the representative of the rural home clan, on the rights relating to, and the place of burial. Several unsuccessful attempts to reconcile the two groups failed. Consequently, the widow filed a suit in the High Court at Nairobi, praying for a declaration that she was entitled to claim her hushand's body, and burry it at a place of her choice, which was on their farm at Upper Matasia, Ngong, near Nairobi. She also asked for an interim order restraining the defendants from removing the body from Nairobi city mortuary. Both her prayers were granted[122] by Mr. Justice Shields, who also rejected a counter - injunction application by defendants. This was the beginning of a four-month lengthy legal battle which finally ended at the Court of Appeal.

The most important issue, in both the High Court and the Court of Appeal, was which party to give the body for burial, and under

which law. On the one hand, was the clan's argument that the deceased was subject to the Luo customary law at the time of his death, and that the appropriate burial place was at his ancestral home in Siaya district. On the other hand, was the widow's argument that the deceased, having married under the christian faith, had, in other respects attained that stage of culture and development, as to make it just or reasonable to suppose that his whole life, should be regulated in accordance with English laws and procedures, in which case the widow should be granted the body.

Upholding the customary law argument with regard to the deceased the court of Appeal observed:

> "At present there is no way in which an African citizen of Kenya can divest himself of the association with the tribe of his father if those customs are patrilineal. It is thus clear that Mr. Otieno having been born and bred a luo remained a member of the luo tribe and subject to the customary law of the luo people."[123]

Faced with the problem of conflict of laws, the Court of Appeal settled on the luo customary law. The court considered the place of customary law and common law in our legal system at great length. In their concluding remarks, the three judges of the Court of Appeal stated thus:

> "Under section 3(2) of the Judicature Act, the courts of the country must be guided by African customary law provided such law is not repugnant to justice and morality or inconsistent with any written law. The courts comply with that provision in proper circumstances. This court had occasion to ... caution that the common law and its applicability must be tempered and adjusted to the circumstances and views generally held in Kenya"[124]

The court thus decided that the deceased had to be buried in his ancestral home at Nyalgunga sub-location in Siaya district, in accordance with the luo customary laws.

The decision in this case raises an important consideration for this study. Did the Court of Appeal decide in favour of the customary law because it was the most appropriate legal path, or there were some considerations, apart from legal issues, which persuaded the court to reach that decision? This is an issue which, without doubt, brings conflicting reactions from lawyers, judges and scholars alike. S. C. Wanjala[125] submits that in all circumstanc the courts made a proper choice, while Okech-Owiti[126] is not enthusiastic about the courts choice of law. He submits that both trial and Appeal Courts, were very clear on the results they wanted to achieve - namely, to have the body of the deceased buried in Nyalgunga, his ancestral home. The legal path to Nyalgunga, adds Owiti, was however, not easy, and, indeed, was, strewn with many legal debris. The court's attempt to sweep them (the legal debris) aside was, in his view, unfortunately not so successful.

That the view of the court was not well received by everybody is shown by calls from several quarters of the Republic,[127] for legislation on matters relating to burial in Kenya. Even in their judgement at the conclusion of the epic battle over S. M. Otieno's burial place, the three man court of Appeal bench expressed a wish for legislation in the following terms:

> "It does appear to us that in the course of time Parliament may have to consider legislating separately for burial matters covering a deceased wishes and the position of his widow and so

> enabling courts to deal with cases related to burials expeditiously."[128]

The court, at the same time, suggested that at the moment there is no such a need for legislation.

Does the expressed opinion of the court as to legislation, suggest that even the Court of Appeal was not satisfied with the decision it had reached? Ought the court not have made the necessary law at the opportune time, instead of leaving the job for the legislature to do, which would take several years?[129]

The court's decision in this case, however, serves two important roles in this study. Firstly, it reiterates the provisions articulated in section 3(2) of the Judicature Act, that the court must apply the received law, in a manner which reflects the habits and life styles of the Kenyan people. In opting for the customary law of the luo people, the court emphasized that the bulk of the Kenyan community are still governed by customary law, when it comes to death and burial matters. In so doing, the court was being creative, innovating, and responding to the Lord Denning call, in Nyali Ltd. V. Att. Gen,[130] which required judges in the British colonies, to adapt the common law to the conditions of life in the colonies.

Secondly, the court also reiterated its traditional role of possessing no legislative powers, when it referred the matter to Parliament. In my submission, whether the court reached this decision because of policy considerations is irrelevant. The solution of problems raised in this case requires serious analysis

of the socio-economic conditions within the relevant community, in order to discover the socio-natural causes of the contradictions which produce the controversies. Legal tools alone, may not be enough for solution of such problems. As a scholar has suggested, it may well be that in the final analysis, the court is inadequate as an arbiter because the problems are deeply rooted in the social fabric of the society, and only a general re-organization can be of enduring effect.[131]

CONCLUSION

My analysis of the Kenyan caselaw brings me to these conclusions:

Firstly, that there are cases with overwhelming executive interests, and in such cases, the courts appear to be saying that it is not part of the judicial function to challenge the policy of the executive. The decisions rendered in the detention, election and passport cases attest to this assertion. In all these cases, the emerging jurisprudence is that there are questions of policy, over which the constitutional guardian is the executive, and for those questions, the court tends to disclaim competence, preferring to confine itself to technicalities, thus letting the official (bureaucratic) position prevail.[132]

J. B. Ojwang and Otieno-Odek submit that in the area of human rights legislation, there are incorporated broad qualifications, the burden of which is that the guaranteed rights may be derogated from, where derogation is dictated by the demands of public health,

public morality, public order and public safety.[133] Thus these moral claims, claim an upper hand over the private interests. The two learned friends suggest that naturally, there will be no clearcut, legalistic test, that the interpreting authority can use in such a situation. Interpretation must then be guided by such principles of construction, as may be considered appropriate and realistic, as a matter of sheer policy.[134] In all these matters of executive policy, Kenyan courts have consistently adhered to the positive law, and have not allowed room for activist tendencies in interpretation.

Secondly, there are cases where there is less, or no executive interests, especially on the protection to right of property. A consistent body of caselaw shows that whenever a claim is based on property rights, either an appeal will be allowed, or an order favouring the individual will be made.

Thirdly, there are other matters, notably those involving customary law, where the High Court has not followed a consistent path. At times, the restraint approach has been preferred. At times, an expansive activist approach has been preferred.

Finally, I would like to suggest that, because of what judges ma feel is their responsibility in a developing country like ours, and because of the manner of their appointment into office, especially the Chief Justice, the judges are subject to the principle of politic responsibility. This would suggest, to use Professor Ojwang's words that once the ultimate point of legislation is reached, any conflict in interest, remaining between the individual and the public domain, is a political one, which excludes judicial solution.[135]

Thus perceived, the doctrine of political responsibility, operates in Kenya to distract the court from activist path.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

In the light of the discussions in the preceding chapters, I would like to make some concluding remarks. I have tried to discuss the nature of, and the scope for judicial activism, in Kenya and in other jurisdictions.

I have also discussed various opinions, on whether activist tendencies would be appropriate in our courts. I have also reiterated that there is no ultimate opinion on the matter, for only speculative assertions have emerged from courts, scholars, lawyers and jurists. In some jurisdictions, for instance, in Great Britain, some courts reveal activist tendencies in their judicial decisions, while at the same time some judges in Great Britain do not readily accept that they make law. This chapter contains my personal opinion, as to whether our courts (especially Kenyan courts), should assume a legislative role.

Judicial innovation tends to strain the confidence of those who dislike the innovation, while judicial caution tends to estrange the confidence of those who regard the law as imprisoning them in the past (for instance, when the law outlived its usefulness, and does not respond to the present realities of life). This is a dilemma for any legal system, and is illustrated by the disagreement between Lord Simonds and Lord Denning in Magor and St. Mellons Rural District Council V. Newport Corporation,[1]

where Lord Denning said that they (judges) sit in court to carry out the intention of Parliament and of ministers, and they do this better by filling in the gaps, and making sense of the enactment.[2] Lord Simonds, however, believed that the duty of the court is merely to interpret the words used. This is so even where the words used are ambiguous, for the court does not posses the power, or the duty to travel outside the words on a voyage of discovery.[3] What Lord Denning asserts here, is simply that for law to remain the accepted yardstick of sanctity in a changing society, the law must also change correspondingly. In my opinion, the contention that judges do not make law, but only declare it, should be seen as a hollow view. Of course, judges declare the law, but they do not function purely mechanically. We cannot deny a creative element in their judicial activities. What is not permitted for judges is that they should establish the law independently of an existing legal system, institution or norm. But they can declare what can be logically inferred from the raison d'etre of a legal system, institution or norm.[4] In the latter case, the lacuna in the intent of the legislature, or the parties, can be filled, and this helps in the development of the law. In chapter 2, we saw how, by filling in the gaps, courts in the selected jurisdictions, are actively creating new legal rules. We also observed, that despite the principle of legality, which requires that any time a person is taken to court and charged with a criminal offence, there must be a written law which declares the offence criminal, common law courts have created new criminal offences, and have justified their actions

on the ground that courts are custodians of justice, and are duty-bound to apply established principles, to new combinations of circumstances.[5] Such a development is not inconsistent with a constitution that is unwritten - like the British one. However, in Kenya, the constitution is clear on this matter, and the courts cannot create criminal offences.[6] Thus, we cannot benefit from the House of Lord's decision in Shaw V. D.P.P.,[7] which is a testimony that (English) courts have power to depart from statutory regulations of criminal law, and may create new criminal offences, where non previously existed.

The discussion in chapter 2 then brings me to the conclusion that, the nature of, and the scope for judicial creativity, will be regulated, among other things, by the constitution of the particular country, the established norms and traditions, doctrines and concepts (such as I discussed in chapter 1), which are cherished by the particular jurisdiction. In our case, the constitution limits the scope for judicial activism, with regard to criminal offences.

In chapter 3, I discussed the democratic character of judicial law-making. I observed that there are several factors which limit the courts in their creative exercise. The doctrine of Parliamentary supremacy is just one of such factors. These limiting mechanisms, inherent in the judicial process, ensure that judges do not over-step their bounds. In my opinion judicial legislation, properly carried out, does not violate democratic ideals. I, therefore, submit that in the Kenyan practice of democracy, judicial creativity

would not be inconsistent with democratic ideals. Rather, it would enhance the development of the law.

The courts are supposed to apply the law as they find it, and should be allowed to function without bias and without fear or intimidation. To deny courts the opportunity to innovate, is the same as saying that the law is entirely determinate, clear and unambiguous. Judge Jerome Frank has said that judges are simply living oracles of law. They are simply speaking oracles of law. They no more make or invent law than Columbus made or invented America.[8] This view, I think, is misleading. Anybody who knows anything about law, knows that it has an open texture,[9] and judges not only apply it, but they also interpret it in the light of some notions. In this process of interpretation, are involved issues of principle and policy (as I have discussed in chapter 2) which ultimately involve political choices. In the Kenyan political economy, no doubt, Kenyan courts must, occasionally, resort to arguments based on principle or policy in justifying their judicial decisions. This would not mean diverting from democratic ideals.

Arguments based on policy justify a political decision by showing that the decision arrived at secures some collective goal of the community as a whole. Arguments based on principle justify a political decision by showing that the decision respects or secures individual or group right.[10] In employing grounds of policy or principle, the courts will obviously be applying the law in a much wider sense, thus making sense out of the enactment.

In some cases, it is not always possible for the courts to "discover" the intention of the legislature. That words are not an adequate instrument for declaring the intention of Parliament, has been recognised by some members of Parliament. Mr. Shikuku, when commenting on Statute law (Miscellaneous Amendments), (No. 14 of 1974) Bills, said that words used in Parliament may have quite a different result from that envisaged by the members. He observed,

> "Sir, as we all know statute law (Miscellaneous Amendments) Bills are some of the most dangerous Bills. They may look harmless as it is merely a question of deleting and inserting words but you may find whatever you are inserting around your neck. Nevertheless, we should know that most of us ... never went to ... school of law. When it is a question of deleting, probably we do not understand what we are doing. We might be deleting what is good and inserting in place thereof what is dangerous."[11]

Shikuku is saying that words used in Parliament may have a differen meaning when they reach the court. Actually, what members of Parliament may say in their work as law-makers may not be what the courts will say when they are faced with the problem of interpretation. This weakness affords the court an ideal opportuni to play the role of a deputy legislature, and the court fulfils this role, when it interpretes legislative language, thereby giving it intelligible meaning. This in my opinion, would not be inconsistent with principles of democracy.

It should also be noted that even after Parliament has seen the problem, it nonetheless does not adequately provide all the details required to cover the problem. What Parliament does,

instead, is to provide a general outline and leave the gaps to be filled by the courts.[12] When the court plays such gap-filling role, it would appear that the court does not merely ascertain what Parliament intended to do, but it also acts as a law-making institution.

The suggestion by judge Newbold that judges have to be conservative in order to defend individual rights and freedoms, and that the judiciary is not elected and has no place in politics,[13] in my submission, cannot be accepted without considerable restraint. As long as the process of judging involves making choices between competing claims, then the resolution of the conflict in question is a political function, and thus judges have to adhere to the concept of political responsibility. If it is true, as is suggested it is, that in deciding cases, judges may have recourse to principles and policies, then the question arises as to what ought to be contained in these principles and policies. I would like to suggest that where these principles and policies are not clearly formulated, and made certain, personal opinions and ideologies of the judge, will form the basis of judicial decision.

In chapter 4, I analysed the Kenyan caselaw, starting from the colonial times to the present. From such study, I have observed that the jurisprudence emerging from judicial decisions of our courts, is not consistent. At times the courts have shown an obviously activist approach in their resolving of conflicts. At times courts have shown considerable restraint.

The influence of the executive organ of the government, is apparent in the resolution of some sensitive cases. Caselaw reveals that when it comes to disputes involving the liberty of the individual, election disputes and passport disputes, the High Court has tended to claim lack of jurisdiction. It would appear, therefore, that for such cases in which the executive's interests are manifest, resolution thereof if a political one, which excludes judicial intervention. In the area of property rights, Kenyan courts have shown a consistent approach. Caselaw reveals that, where an individual's property is affected, either an appeal would be allowed, or a decision favouring the individual would be reached. In other matters, for example, the area of customary law, courts have revealed an inconsistent approach which at times becomes a restraint approach, and at other times becomes an expansive activist approach. This may be so because of conflicts and uncertainty which is so much part of our customary law.

Following the trend which has emerged from the study of caselaw, it would appear that the judiciary is, at times, in a dilemma regarding which approach to take before reaching a particular decision. In the area of customary law, for instance, one who alleges the existence of a customary law or fact, must prove it in evidence, before it can be admitted as such law or fact. Normally, this requires time, patience and intelligence on the part of the court, because it is an exhausting and cumbersome process. The court will normally accept the view of the person

who establishes the existence of such customary law or fact. Since there are as many versions of the Kenyan customary law as there are tribes in Kenya (and sometimes clans) it would not be surprising to find that the approach by courts with regard to customary law is inconsistent. To get rid of this inconsistency, I suggest that the Kenyan customary law be codified into statutes, and made certain. As it is, it is a labyrinth in which even the most conscientious court cannot easily find its way through, and this accounts for the inconsistency.

As to the "lack-of-competence" claim by the courts, with regard to conflicts in which the executive's interests are manifest, I would like to draw the attention of our courts to section 60 (1) of the constitution, which gives the High Court unlimited original jurisdiction in civil and criminal matters. The claim by the High Court that it lacks the jurisdiction to hear and determine some categories of conflicts, is arguable, has no legal foundation. I suggest that the High Court revises its attitude towards the "lack-of-competence" approach.

Having reviewed what I have discussed in the four chapters, I would like to conclude this dissertation by making an appeal to the Kenyan judiciary. Personally, I would prefer an activist judiciary The time in which we are living today are so full of changes. These changes must be reflected in our laws. This means that our law must constantly be brought to vigorous testing and revision, so as to bring it to date with the changing society. Where Parliament does not have time to revise the law,

the courts must do the same themselves. An activist judiciary would require a flexible constitution. With twenty-four amendments effected since independence, it is arguable that the Kenyan constitution is not rigid. That being so, activism on the part of our courts will not be so hard to achieve to the greatest degree for, all the Parliament would have to do is to amend the constitution in such a way that judges are allowed greater creative role.
We noted earlier that Kenyan courts cannot creat criminal offences because this would be unconstitutional. (Thus, when a citizen was charged with "undermining the authority" of a Provincial Commissioner by refusing to offer the P.C. a lift in the citizen's private car,[14] or when some citizens were arrested and charged with failure to attend Jamhuri Day celebrations,[15] courts acquitted the concerned citizens on the ground that there were no crime committed, and there could be no such crimes within the meaning of S. 77(8) of the constitution, or S. 132 of the Penol Code). But in Great Britain, with unwritten constitution courts are free to creat criminal offences. I suggest that our constitution be amended, to empower courts to create criminal offences whenever they feel it just and equitable to do so. Courts are the custodians of justice and morality in society, and they would be failing in their duty if they did not have the power to create or modify criminal rules.

For us in Kenya to have a vigorous and dynamic polity, we need a vigorous and dynamic law. The judiciary must be responsible for the development of such vigorous and dynamic law. No system of law is self-sustaining. The law must move as fast as the world moves. As Kenyans move towards economic and technological developme

Kenyan law and Kenyan society must not be hampered by the inflexibility of the common law. Instead, both must grow together, to meet the challenges of the ever changing world.

At this stage, I want to emphasize that law directs the whole of human destiny. We in Kenya must re-define the place of law in human destiny as we approach the twenty-first century. We can now allow the inadequacy of the law to keep on imprisoning us in the past. When a law needs to be changed, and the judiciary is the most immediately available resource for change, let the judiciary change it. The judiciary will be instrumental in maintaining, where need be reaffirming, and hopefully explaining the place of law in the destiny of the Kenyan people. It must have the capacity to perform these onerous functions. As Kenyans enter into the new century, Kenyans will need a law which is independent of the colonial servitudes, a law which is imaginative, a law which is reflective of the local conditions of life, and a law which anticipates that the conditions of life in the twenty-first century, may not necessarily be the same with the conditions of life today.

The judiciary must, necessarily, be of the same character as the law it applies. We shall owe most to those judges who hold to the twenty-first century economic and social philosophy.

FOOTNOTES

CHAPTER ONE

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24. Sir Charles Newbold, "The Role of a Judge as policy maker" East African Law Review V. 2 (1969) p. 13

25. F.K.H. Maher, Cases and Materials on Legislation (2nd ed. Lawbook Co. Ltd, Australia, 1971).

26. J.C. Gray, The Nature and Sources of Law (2nd ed. Boston: Beacon Press, 1963) p. 125 at 172.

27. J.W. Harris, Supra, P. 146.

28. A.L. Goodhert, "Determining the ratio decidendi of a case," in Essays in Jurisprudence and the Common Law. (Cambridge, 1931) Chap. 1.

29. (1584) 3 C.O. Rep. 79.

30. (1950) 2 All. E.R. 1226 at 1236.

31. (1952) A.C. 189 at 191.

32. (1975) A.C. 591 at 629.

33. (1955) 1 ALL. E.R. 646.

34. A.L. Goodhard, Supra (28) p. 1.

35. Ibid, Chapter 1.

36. A House of Lords Statement, read by Lord Gardinar, L.C. on 26th July, 1966, reproduced in (1966) 2 ALL. E.R. p. 77.

37. (1947) A.C. 443 at 409.

38. (1945) CH.D. p. 123.

39. L.L. Jaffe, English and American Judges as Law Makers (Clarendon, Oxford, 1969) Preface.

40. 100 Ohio St. 348 at 352; 126 NE 300(1919).

41. 89 Ohio, 15 AM at 533 (1825).

42. 100 Ohio St. 348 at 352 - Supra.

43. Supra.

44. B.N. Cardozo, The Nature of Judicial Process (new Haven London Yale, 1921) Lecture 4.

45. (1973) A.C. 127.

46. E.M. Borchard, Convicting the innocent (London, Oxford, 1932) Introductory chapter

*This doctrine is virtually unknown outside the United States.

47. R. Dworkin, Supra (22),

48. Great Northern Railway V. Sunburst Oil and Refinery Co. 287, U.S. 358 (1932).

49. J. Locke, Second Treatise of Civil Government (Bobbs - Merril Co N.Y. 1952) Chap XII, para 143.

50. A.V. Dicey, An Introduction to the Study of the Law of Constitution (10th ed. 1959) p. 202.

51. J.B. Ojwang & G.K. Kuria, "The Rule of Law in General and Kenyan Perspective" (1975-77) 7 - 9 Zambia Law Journal, p. 112.

52. I.C.J. reports (1960) at p. 306.

53. J.B. Ojwang and G.K. Kuria (51) Supra.

54. Sir Charles Newbold, "The Role of a judge as policy maker" East African Law Report

V. 2 (1969) p. 131

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1. F.L. Morrison, Courts and the Political process in England (Sage Publications Ltd, St. Georges, House 144 Hutton Garden, London E C1N & E R, 1973) Chap. 1.

2. See Walter Murphy, The Framework of Judicial Power (Chicago: Univ. of Chicago press, 1964) pp 31 - 36.

3. F.L. Morrison, Supra (1) p. 28.

4. J. Frank, Courts on Trial: Myth and Reality in American Justic (Princeton, New Jersey, Princeton Univ. press, 1950) p. 6.

5. Ibid.

6. The Constitution of Kenya, Chapter IV S. 60(1).

7. Ibid.

8. Ibid, S. 60(2).

9. Ibid S. 60(2).

10. J. Frank, Supra (4) p. 3.

11. Ibid.

12. This belief reigned before the division of government into three organs of the legislative, executive and the judiciary. See John Locke, A second Treatise on government. (Laslett ed; Cambridge: Cambridge Univ. Press, 1964) p. 382.

13. R. Pound, "New Philosophies of Law"
27 Havard Law Report, 731, 733.

14. T.A. Aguda, "The role of the judge with special reference to civil liberties" (being the text of a speech delivered to the workshop of law teachers of Eastern Africa held in Nairobi - June 10 - 29, 1974). Found in Sociological research Methodology papers Nairobi, 1974, Vol. 2 p. 755 collected by U.U. Uche.

15. C.K. Allen, Law in the making (6th ed., London Oxford Univ. press, 1958) chap. 1.

16. (1715) 11 C.O. Rep. 936; 77 E.R. 1271.

17. (1868) L.R. 3 H.L. 330.

18. (1932) A.C. 562.

19. (1964) A.C. 465.

20. C.J. Radcliffe, The Law and its Compass (Evanston, 111.: Northwestern Univ. press, 1960) (Rosenthal lectures, 1960) p. 14.

21. J.C. Gray, The nature and sources of Law (2nd ed., Boston: Beacon press, 1963) S. 602.

22. J. Brown, "Law and Evolution" Vol. 29 1919-1920, Yale Law Journal, p. 394.

23. Ibid.

24. B.N. Cardozo, The nature of judicial process (New Haven & London, Yale, 1921) Lecture III.

25. Ihering's contribution to the theory of jurisprudence was in his advancement of the concept of "purpose" as being the end of law. He suggested that law is only a part of human conduct or will. It can be used to further the best interests of the society, and at the same time to repress bad conduct. According to him the problem of society lies in reconciling conflicting purposes of the individuals against those of society, and in doing this law is employed. Thus he defines law as the sum of the conditions of social life as secured by the power of the state through means of external compulsions. For further reading, please see Lord Lloyd of Hampstead, Introduction to Jurisprudence (4th ed., Stevens & Sons, London 1979) p. 587.

26. This is a theory or a belief that events, and developments, are due to the purpose or design that is served by them, as opposed to the mechanistic theory of the universe. In the context of this essay, it means that the judge must always have in mind that his duty aims at serving a purpose. He is to apply the law in such a way that serves the purpose.

27. A distinguished English judge, who, until his retirement not long ago, and, as evidenced by the many cases over which he deliberated, has been a great critic of judicial passivity. Textbook writers have also acknowledged him to be one of the most open minded judges of this century.

28. At the end of second year, every student of law, according to the academic calender of the University of Nairobi, gets attached to any court. The aim is to allow the student to have a practical experience of what actually takes place in the courts, as against the theory of classroom work. I did my clinical programme at the Kisumu law courts.

29. L. L. Jaffe, English and American judges as law-makers (Clarendon, Oxford, 1969) p. 1 - 3.

30. Ibid.

31. Ibid, p. 16, para. 1.

32. The final report of the committee on Supreme Court practice and procedure; Conl. A.8878 pend. 642 (1953).

33. In both developed and developing nations, rapid changes are taking place in the material and social conditions of society. Legislatures, in most cases, do not have enough time to cope with these rapid changes. They find in their hands more pressing issues, most of which are of internatioal character, leaving very little time for deliberating on domestic affairs. In Kenya, for instance, because of the demand on the time of a Parliamentarian (who may, besides being an M.P., be called upon to serve the society in some other capacities), the total number of days Parliament sits, in actual sense, may only approximate a quarter of the total number of days in a year.

34. T.A. Aguda, Supra (14).

35. (1942) A.C. at 206.

36. (1942) A.C. at 244.

37. L.L. Jaffe, Supra (29) at p. 4.

38. J. Dugard, "Law Order and Liberty in South Africa" Vol. 89(1972) South African Law Journal at p. 249.

39. 43 Congresional Record, Dec. 8, 1908, Pt. 1 p. 21. Note also that it was because of such views, he held that Holmes was appointed Chief Justice by the President.

40. For further reading see Blackstone, William, Commentaries on the Law of England Vol. 1 (a reprint of the first edition with Supplement). (Dawsons of Pall mall, London, 1966) at p. 69.

41. Supra (39).

42. See B.N. Cardozo, Supra (24) p. 10, and R. Pound, An Introduction to the Philosophy of Law. (New Haven and London, Yale University press, 1965): wherein, Cardozo asserts that he takes "Judge-made law as one of the existing realities of life," and Pound asserts that jurists and judges are to measure "all situations by an idealized form of a social order of the time and place, and are to shape the law as to make it maintain and further this idea of the social status quo."

43. (1962) A.C. 220.

44. For comprehensive analysis, see Stevens, "The Role of a final Appeal Court in a democracy: the House of Lords today" (1965) 28 MLR, 509.

45. C.J. Radcliffe, Supra (20).

46. Patrick, "The Swiss Code"
XI Continental legal History Siries, p. 238, sec 5.

47. The maxim is a latin expression meaning there is no punishment without law.

48. Constitution of Kenya S. 77(8).

49. Migiro - Judicial Lawmaking. LL.B. Dissertation (1975).

50. (1962) A.C. 220.

51. Ibid.

52. J. Austin, The Province of Jurisprudence Determined.
(Weidenfed & Nicolson, London, 1964) Lectures 1, 5-6.

53. R. Dworkin, "Hard Cases"
Vol. 88 part 2 1975,
Havard Law Review p. 1057.

54. J. Gardiner, Public Law and Public Policy
(Praeger Publishers, New York,
London, 1977), p. 142.

55. Ibid.

56. Observation of Marshall, C.J., in U.S. Vs. Fisher
(1804) 2 Cranch, 358 at 390.

57. T.A. Aguda, Supra (14).

58. Ibid.

CHAPTER THREE

1. L.L. Jaffe, English and American judges as Law-makers (Clarendon, Oxford, 1969) pp. 14, 31.

2. Ibid.

3. B.O. Nwabueze, Constitutionalism in the Emergent States (London, 1973) pp. 11 - 12.

4. Sir Charles Newbold, "The Role of a Judge as a Policy Maker." East African Law Report V. 2 (1969) p. 131, for instance.

5. Virginial Edith Wamboi Otieno V. Joash Ochieng Ougo and Omolo Siranga Civil Appeal Case (Kenya) No. 131 of 1987.

6. L.L. Jaffe, Supra, note 1 p. 34.

7. Ibid.

8. A.V. Dicey, An introduction to the study of the Law of Constitution (10th ed, 1959) p. 202.

9. W. Friedman, "Limits to Judicial Law-making". Discussed in H.L.A. Hart, The Concept of Law (Oxford, Clarendon press, 1961) p. 66. In Kenya, a Bill becomes a law after it is read three times in the National Assembly. During first reading there is no debate on it. Debate takes place during second and third readings. Then the M.P.s analyse the principles in the Bill and its main objects. Details of the Bill are left to a committee, or the N.A. itself as a Committee.

After this stage it is referred back to the N.A. for the third reading. At this stage only minor amendments are allowed and after it is read for the third time, it goes to the President for his assent. After this it becomes law of Kenya, binding on all people of Kenya.

10. H.L.A. Hart, Ibid.

11. Quoted by Henry J. Abraham in his book, The Judicial process (London, 1948) at p. 270.

12. B.N. Cardozo, The Nature of Judicial Process (New Haven & London, Yale, 1921) Lecture 4.

13. L.L. Jaffe, Supra, note 1, chapter II.

14. Ibid.

15. Supra, note 5.

16. I noted with interest, at the Law Reform Commission Office, the argument which supported the proposition that it is only the politicians who know what the public needs. It was suggested that the judiciary does not possess the instruments which can enable it to measure the social needs. That all it possesses is (inadequate) evidence upon which it cannot purpot to make a general rule valid for all Kenyans.

CHAPTER FOUR

1. B.N. Thuranira, The Structure and Jurisdiction of the Kenyan Courts, and the Quest for Justice, LL.B. Dissertation (1986) p.1.
2. G. Schubert and D.J. Danelski, Comparative Judicial behaviour (Oxford Univ. press, London 1969, Toronto) p. 34.
3. J.B. Ojwang, "The administration of Justice in rural areas." 'Law and Rural Development in East Africa.' Compiled by H.W. O. Okoth - Ogendo (A collection of papers and discussion on reports presented to a seminar on Law and Rural Development in East Africa at Kisumu, 18th - 22nd July, 1977) unpublished.
4. Y.P. Ghai and J.P.W.B. McAuslan, Public Law and Political Change in Kenya (1970) p. 126.
5. For a detailed study of the evolution of Kenyan courts, see Ibid, chapter 9.
6. The Kadhi's Courts Act (Cap 11 of the Laws of Kenya).
7. The Judicature Act (Cap 8 Laws of Kenya).
8. The Magistrate's Courts Act (Cap 10 Laws of Kenya).
9. The Constitution of Kenya S. 64(1).
10. Ibid s. 60(1).
11. Ibid s. 65(1).
12. Ibid s. 60(1).
13. Ibid s. 84.

14. After the break up of the East African Community in 1977, there followed a break in judicial co-operation also, which had existed in the form of an East African Court of Appeal. After the break up of the community in 1977, Kenya established the Kenya Court of Appeal.

15. The Constitution of Kenya s. 64(2).

16. Ibid s. 65(2).

17. E.g. The Rent Tribunal, which handles disputes between landlords and tenants concerning dwelling houses, the Business Premises Rent Tribunal, established under the Land-Lord and Tenant (Shops, Hotels and Catering establishment) Act, handles disputes between landlords and tenants in respect of the protected business premises. The industrial court, established under the Trade Disputes Act hears disputes between employers and employees. The military tribunal established under the Armed Forces Act.

18. Todate, 24 amendments in all have been effected, 10 of them taking place between 1963 and 1968 and 14 taking place between 1969 and 1988.

19. The Constitution of Kenya s. 61(3).

20. Ibid s. 61(2).

21. Ibid s. 62(1).

22. Ibid s. 62(2).

23. The Judicature Act, Cap. 8.

24. You can familiarize youself with the procedure by reading section 47 of the constitution.

25. The Constitution of Kenya, s. 30.

26. The date 12th August, 1897 is important because on that day, Kenya is deemed to have received the English law as it stood on that day. This is purely an accident of history. The English settlers wherever they went took with them the English law. Then after they are fully established they pick on a particular day and make it the reception date.

27. Supra, note 23 s. 3(1)(c).

28. Supra, note 23.

29. The 12th August 1897 is important because the English statute is applicable to Kenya in the form in which it was at the date when it was received in Kenya. If it is subsequently amended or repealed in England these do not affect Kenya. It is only the Kenya Parliament which can amend or repeal these statutes.

30. Supra, note 23.

31. Ibid.

32. Mainly applies to moslems and some coastal tribes. It is a very limited source of Kenya Law.

33. Supra, note 30.

34. See G. Kamau Kuria & J.B. Ojwang, "Judges and the Rule of Law in the Framework of Politics: The Kenya case," (1979) Public Law, 254-281.

35. K. Ogeto, A tottering Judiciary? Towards Salvaging the Kenyan Judiciary from the Quagmire of Executive Expediency LL.B. Dissertation, 1989 p. 57.

36. Ibid.

37. See G.K. Kuria "Christianity and Family Law in Kenya" (East African Law Journal, Vol. XII No. 1, 1976) p. 60.

38. G.N. Longo, A re-examination of Judicial independence in Kenya, LL.B. Dissertation (1987) p. 12.

39. See the 1930 legislative Council Debates (government Printers, 1939) p. 55.

40. Y.P. Ghai and J.P.W.B. McAuslan, Supra, note 4 p. 49.

40A. (1921) Vol. 24 Kenya Law Report p. 530.

41. Ibid, p. 150.

42. G.K. Kuria & J.B. Ojwang, Supra, note 34.

43. East African Order in Council of 1897 s. 7(5).

44. Y.P. Ghai & Mc Auslan, Supra Note 40, p.8.

45. Ibid.

46. See Anon, "Courts and judges in colonial Territories" - Tenure of office 1954 C.L.J. 2 - 7.

47. Seidman, The State, Law and Development (New York, St. Martins press, 1928) p. 207.

48. (1914) 5 E.A.L.R. 70.

49. (1917) 7 E.A.L.R. p. 14.

50. Supra, note 40 p. 139.

51. See generally, R.V. Kenyatta and Others: Montagu Slater (The Trial of Jomo Kenyatta, Heinmann, 1966).

52. Under the then English law, every person in a colony had a right to petition the Privy Council to appeal if he could make out a case. There were several grounds for appeal - lack of jurisdiction, objection to admission of inadmissible evidence or lack of evidence to support conviction.

53. See The Weekly Review, Oct. 10(1981) p. 8.

54. Charles Douglas Home, Evelyn Baring, (Collins, 1978).

55. Nyali Ltd. V. Att. General (K) (1955)1 ALL. E.R. 646.

56. Namatovu V. Kironde Bakery Ltd, in the H.C. of Uganda, case No. 132 of 1961 (unreported).

57. Ibid.

58. Supra, note 49.

59. (1963) E.A. 188.

60. See generally, chapter 9 of Y.P. Ghai & McAuslan, Supra, note (40).

61. See S.A. De Smith, for instance, Constitutionalism in the Commonwealth today, (1962) 4 Mal L. R. 205 of p. 208.

62. J.B. Ojwang, Executive powers in independent Kenya (LL.M. thesis 1976) p. 20.

63. The Kenya independence constitution, chapter II section 28.

64. Ibid s. 184.

65. Ibid s. 184(2).

66. (1968) E.A. 406(K).

67. Now dealt with in section 82 of the constitution.

68. (1968) E.A. 80(k).

69. (Kenya Constitutional (Amendment) Act (No. 28 of 1964).

70. New s. 33 of the constitution introduced by the Act.

71. Kenya Constitutional (Amendment) No. 2, Act No. 38 of 1964.

72. C.F. Old position chapter 11 Head sc. 3.

73. Ibid.

74. To date 24 amendments in all have been effected, 10 of them taking place between 1963 - 68, and 12 of them taking place between 1963 - 86, 2 between 1987 - 89. For a discussion of these amendments between 1963 - 86, see Joy Mudavadi, Rigid and Flexible constitutions: A consideration of Theory in the light of the Kenyan experience, LL.B. Dissertation, University of Nairobi, (1987).

75. In 1966, for instance, after the famous Limuru conference Oginga Odinga, Kenya's first Vice President, quit KANU and government to form his own political party. Kenya Peoples Union (K.P.U.). Soon a stream of defection from the ruling KANU followed. By mid April, 28 members of Parliament and senators, and 13 prominent trade unionists had defected, to join K.P.U. An impending disaster with the defecting M.P.s

organizing to pass a vote of no confidence in the KANU government looked imminent. President Kenyatta's increased power kept the looming tide at bay, for on the 28th April, the President surmmoned Parliament which, under his influence saw an amendment - 5th amendment (1966) (no. 2) Act No. 17 of 1966 - requiring dissident members to recontest their seats in by-elections - being passed, premised on the argument that such M.P.s no longer represented those who elected them. See further the financial magazine (now proscribed) March 1988.

76. Picho Ali, "Ideological commitment of the judiciary", Transition No. 36 1968 at p. 49.
Also discussed in W.B. Harvey, An introduction to the legal system in East Africa (East Africa, 1975) at p. 760.

77. The Kenyan public did not react kindly towards these constitutional amendments. For instance, the Law Society of Kenya, the National Council of Churches of Kenya, and other groups, expressed the opinion that these amendments were aimed at compromising the independence of the judiciary.

78. In the matter of application by Michael Matovu (1966) E.A. 514.

79. L.L. Jaffe, English and American judges as Law-makers (Clarendon, Oxford, 1969) pp. 59 - 62.

80. The Constitution of Kenya S. 75.

81. (1970) E.A. 530.

82. (1970) E.A. 631.

83. Supra, note 82, S. 82.

84. Ibid.

85. Wadhwa V. City Council of Nairobi (1968) E.A. 406 (K).

86. The Registered Lands Act, Cap 300 of the Laws of Kenya.

87. Ibid ss. 27 and 28.

88. (1972) E.A. 227.

89. Ibid at p. 228.

90. (1973) E.A. 88.

91. Ibid.

92. Civil Application, No. 469 of 1977 (Unreported).

93. Ibid.

94. Civil Appeal No. (222) of 1976.

95. Eg. ibid.

96. Parliament enacted the Magistrate's (Amendment) Jurisdiction Act (1981), which only removes the magistrate's powers and vests them on a pannel of elders. This has itself proved so inadequate and the problems of sections 27 and 29 are still with us.

97. In this context, "todate" means upto 1987. But since there has been no case which has shown a different approach, "todate" may be extended to include the date of the writing of this dissertation.

98. J.B. Ojwang and J.A. Otieno-Odek, "The Judiciary in sensitive areas of public law: Emerging approaches to Human Rights litigation in Kenya." N.I.L.R. 1988 Vol. XXXV - Issue 1 (Martins Nijhoff Publishers) p. 49.

99. Cap. 57, Laws of Kenya.

100. Regulation 6(1).

101. Ibid.

102. The Constitution of Kenya s. 84(1).

103. The Judicature Act (Cap 3) s. 3(1).

104. The Habeas Corpus remedy, has, however, proved totally unuseful in Kenya in detention matters.

105. Unfortunately in Kenya, the term "lawful detention," it would appear, is not amenable to judicial interpretation. The courts in Kenya have presumed all detentions by the executive to be valid, and have refused to examine their legality.

106. Ooko V. R, (unreported) H.C. Civil case No. 1159 of 1966. Discussed in J.B. Ojwang, Executive powers in independent Kenya's constitutional context, LL.M Dissertation (1976).

107. Now s. 83(2) a.

107A Supra, note 106.

107B Ibid.

108. See also Civil Application No. 53 of 1987 (unreported).

109. Raila Odinga V. R, Misc. cri. Appli. No. 374 of 1988 (H.C. unreported).

110. Ibid.

111. C.A. Civil Appeal No. 12 1988 unreported.

112. J.B. Ojwang & Otieno-Odek Supra, Note 100, at p. 35.

113. Mwau V. Att. Gen (Noted in 10 Commonwealth Law Bulletin, no. 3 (1984) pp. 1108 - 1109.

114. Ibid.

115. Ibid.

116. Civil case No. 1523 of 1988.

117. Ibid.

118. Supra, note 116, s. 60.

119. Civil Appeal No. 31 of 1987 (unreported) at p. 26.

120. For detailed geneology see Appendix A of Supra, note 118 at p. 181.

121. See Appendix B, Ibid at p. 186.

122. Judgement delivered on December 30, 1986.

123. The Kenya's Unique Burial saga (Nation Newspapers publications, Nairobi 1987) p. 174.

124. Ibid, p. 176.

125. Mr. S.C. Wanjala is a lecturer at the Law faculty, University of Nairobi. His views are expressed in J.B. Ojwang & J.N.K. Mugambi, The S.M. Otieno Case. Death and Burial in Modern Kenya (Nairobi University press, 1989) at p. 112.

126. Okech-Owiti, ibid, at p. 18.

127. For instance, in January 1987, the Chairman of the National Council of Women of Kenya called for the introduction of "a law that defines the rights of surviving spouses and the next of kin with regard to burials - see the Daily Nation, 17th January 1987, p. 24.

128. Virginial Edith Wamboi Otieno V. Joash Ochieng Ougo and Omolo Siranga, Civil Appeal No. 31 of 1987 (unreported) p. 26.

129. To date, no such law has been enacted.

130. Nyali Ltd. V. Att. Gen, Supra, note 55.

131. Supra, note 132, p. 26.

132. Supra, note 118.

133. Ibid.

134. Ibid.

135. Ibid.

CHAPTER FIVE

1. (1950) 2 All E.R. 1226 at 1236.
2. Ibid.
3. (1952) A.C. 189 at 191.
4. Judge Tanaka, speaking the majority view in the South West African Case, (1966) 1 C.J. Rep. 227.
5. Shaw V. D.P.P. (1962) A.C. 220.
6. The Constitution of Kenya, s. 77(8).
7. Supra, note 5.
8. J. Frank, Courts on Trial: Myth and Reality in American Justice (Princeton, New Jersey, Princeton Univ. press, 1950) p. 6.
9. H.L.A. Hart, The Concpt of Law (Oxford, Clarendon press, 1961) chapter 1.
10. R. Dworkin, "Hard Cases", 1975 Vol. 88, H.L.R. at 1057.
11. See Kenya Parliamentary Hansard, of 27/3/74.
12. See Anon, "some cause of uncertainty in statute", American Bar Association Journal, 36 A.B.A. 321 (1950).
13. Sir Charles Newbold, "The Role of a Judge as a Policy Maker," E.A.L.R. Vol. 2 (1969) p. 131.

14. See the Nairobi Law Monthly, June/July, 1988 p. 33.

15. See the Daily Nation 16th Dec. 1989.

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