

THE JUDICIAL ATTITUDES TOWARDS
GOVERNMENT POLICY IN THE
CONTROL OF ADMINISTRATIVE
ACTION IN KENYA.

(A DISSERTATION PAPER SUBMITTED
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BY

P. N. KAMUNDI

NAIROBI

April, 1977.

We in the judiciary have sought, without sacrifice of principle, to remain independent though not isolated, impartial but not indifferent, positive but not inflexible. T.GEORGES, C.J.(High Court of Tanzania), 1970.

DEDICATED

To fellow law students who have to find meaning in meaningless cases.

Yeah! my buddy!!

P R E F A C E

It is argued by Marxist philosophers that the social function of the law is to secure the interests of the dominant class in the society. It is conceded that this analysis contain an element of truth. But not the whole truth: for even in those capitalist societies upon which the Marxist contention is based, a genuine desire to help the ordinary person (ie, a person who cannot be properly regarded as a member of the dominant social group) cannot be doubted. Nowhere does the law bar its gates to poor plaintiffs. Indeed, in the case of Ridge V. Baldwin¹, where a police officer had been wrongfully dismissed, it was held that the dismissal was unlawful because the principles of natural justice had not been heeded. Surely, if the only object of the law is to secure the interests of the dominant class, the court would have held for the watch committee. However, it could be argued that although the law does in some instances help the ordinary person, its primary concern is for the interests of the bourgeoisie.

I am not in this paper concerned with the arguments and counter - arguments on the social function of the law. I am not even wholly in agreement with the Marxist analysis of the law. But I confess having relied on this analysis. I have, for example, based my contentions on the basis of administrative law principles on what may be regarded as typical Marxist theorising. My contention, following the Marxist analysis of the law is that, the principles of administrative law may be explained on the courts' desire to preserve property rights. Upon this footing, I have argued that the court's attitude to government policies in England, taking into account the fact that its members come from the dominant social class, is understandably a sympathetic one. I have also extended this contention by observing that the Kenyan judiciary in the colonial era, behaved towards the colonial policies in a manner similar to that of the English courts. That is all what I speak of in chapter one of this paper.

In the Second chapter, I introduce the government policy. I argue that the policy is justifiable because it seeks to end the injustice perpetrated by the colonial regime. I also argue that there appears to be certain legal hurdles to the implementation of the policy. But of these legal barriers, I submit they are more apparent than real. My argument here adumbrates the criticism I level in the subsequent chapter on the restrictive and unrealistic attitude of the judiciary towards the government policy.

Before closing the chapter, I further tender the submission that the government policy is implemented in many cases by administrative authorities. And that these administrative authorities closely identify with government ministries, a fact which should be considered before invalidating their actions.

Finally, in chapter three, I make a critical analysis of the attitudes towards the government policy. Among other things I contend that, there is an apparent lack of interest in the element of public interest in the policy; which I attribute to the court's desire to preserve the colonial status quo. I also submit that the desire to preserve the colonial status quo makes the court adopt restrictive and inaccurate constructions of the provisions of the law. Finally, I contend that the court's attitude towards the government policy may create tension between the judiciary and the government, for whereas the court may regard its decisions as honest declarations of the law as it is, the government may take exception to consistent frustration of its policy. If it does so, the court may stand to lose public confidence, and its legitimacy may be undermined.

In the conclusion, we review and emphasis the contentions made in the preceding chapters.

I will say a few more things about the paper. First, about the subject. The subject of this paper is an examination of judicial attitudes towards the government policy. To this I reiterate the adage: "Not even the devil knows the mind of man." ~~Such~~ ^{An} attitude is an expression of a mental state, it is not always easy to discover its factual basis. My interpretation of the court's attitude may be criticised by some people or welcomed by others. I am not sure which group would be correct; my critics or my supporters. But here I state that my views are entirely based on the understanding of the facts upon which the policy was based, and the reasoning of the court when considering the applicability of that policy.

Secondly, I regret to state that my views in this paper do not seem to be based on any authority. The fact is ^{there} is ^{there} a little, if any documentation of judicial attitudes towards government policy.

Thirdly, it may be noted that the first two chapters of this paper, especially the first chapter, on the face of it do not seem to relate to the subject of judicial attitudes towards the policy. This, we suggest, is only because they are mainly introductory in character.

Lastly I wish to extend my sincere thanks to the persons:

Mr. George K. Rukwaro,

My supervisor, for his selfless advice and encouragement; and for patiently correcting the numerous mistakes I made. To him should not, however, be attributed the mistakes, grammatical or conceptual, which appear in the paper.

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Peter N. Kamundi

April, 1977.

THE JUDICIAL ATTITUDES TOWARDS
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A B B R E V I A T I O N S

A.C.	Appeal Cases.
All E.R.	All England Reports.
A.W.S.	African Writer Series.
Ch.	Chancery Law Reports.
E.A.	East African Law Reports.
E.A.L.B.	East African Literature Bureau.
E.A.L.J.	East African Law Journal.
E.A.L.R.	East African Law Review.
L.N.	Legal Notice.
K	Kenya.
K.L.R.	Kenya Law Reports.
N.A.D.	National Assembly Debates (Kenya).
O-in-C	Order in Council.
O.U.P.	Oxford University Press.
W.L.R.	Weekly Law Reports.

CHAPTER ONE

THE PREMISE OF ADMINISTRATIVE LAW

When, at the close of the last century, Britain extended her colonial rule¹ to Kenya², it was found necessary to establish in the new appendage to the empire, the English legal machinery. The reasons necessitating this move on the part of colonial government will, so far as they are material to our investigation, be discussed later. At the moment, they need not detain us. However, it may be pointed out that, the establishment of English law took two forms. On the one hand, there was a wholesale importation of substantive legal rules and concepts. On the other hand, a judicial system to apply, execute and enforce the substantive law was set up.

During the colonial era, Kenya had a dual court system. The Native Tribunals served only the Africans. The subject matter of their jurisdiction derived mainly from customary law. To a considerably lesser extent they applied statutory law. Little, if any, control was exercised by these courts over administrative action. In fact, since they were directly supervised by administrative officers, the Native Tribunals were better fashioned to complement rather than control administrative action. For that, they fall outside the scope of this discussion.³

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1. The expression 'colonial rule' means all that period of Kenya's dependence status: from 1895 when a Protectorate was declared by Britain over what today is Kenya to December 12, 1963.
 2. By 1920 Kenya, (excluding a ten miles coastal strip which formed part of the dominions of the Sultan of Zanzibar) was called the East African Protectorate. The 1920 Kenya (Annexation) O-in-C changed this name to Kenya Colony. The whole of Kenya was called "The Kenya Colony and Protectorate". 'Protectorate' stood for the ten mile coastal strip. The sultan relinquished his claim over the coastal strip and on Independence the use of 'colony and Protectorate' was dropped.
 3. A further reason for regarding the Native Tribunals as outside the scope of this paper is that they were abolished and the two court systems obtaining in the colonial regime united under the Magistrate Courts Act, 1967.

©
The Supreme Court is now described as the High Court. The powers of the High Court derive from the Constitution, S. 60 (1) of which provides:

"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 as may be conferred on it by this Constitution or any other law".⁴

The High Court's power to review administrative action derives from that part ^{of} S. 60 which reads, "any other jurisdiction ^(a) as may be conferred on it by ... any other law". S. 3 of the Judicature Act, admits the application by Kenyan Courts of "the Substance of the common law". In England, the Supreme Court of Judicature has an inherent jurisdiction to review the decisions (or acts based on such decisions) of inferior bodies, such as Subordinate Courts or administrative authorities. The jurisdiction too is described as inherent because it derives from the principles of the common law rather than Statutory Provisions. It is argued that S. 3 of the Judicature Act, vide S. 60 of the Constitution, empowers the High Court to review administrative action.

However, our concern in this paper is not judicial review qua judicial review. We are rather more concerned with the relationship between the judiciary and the government policy, as it appears when the former exercise its control over administrative action. We cannot therefore be content with a mere examination of ^{the} historical context of administrative law, rather, we intend to examine the socio-economic premise upon which that law is founded.

The examination proceeds in two parts. The first part speaks of the English law. The second part considers the extent to which the premise of English law is duplicated in the Kenyan law.

4 SEE The Kenya Independence Constitution, S. 171 (1) and The Kenya Constitution, Act No. 5 of 1969, S. 60.

© The Supreme Court was the centre of the other court system and usually applied statutory law over non-indigenous races, i.e., the Europeans and the Asians.

(a) Act No.16 of 1967.

(a)

THE ENGLISH LAW

The most fundamental principle underlying the English administrative law is that, the Courts must safeguard private property against interferences by Government. Nor, the principle proceeds to state, is the individual to be deprived or threatened deprivation of his personal liberty. The role of the courts is thus envisaged as that of sentry, always guarding an individual's personal and property rights. A prominent common law jurist has in fact submitted that once the concept of law discards the protection of the individual as its function, it is courting disaster, for this is an invitation for ~~dictatorship~~ and oppression.⁵

The protection of private property has always been central to English administrative law. In the much cited case of Cooper V. Wandsworth Board of Works,⁶ Willes, J. betrays a deep concern for the security of an individual's proprietary rights when he says,

"I apprehend a tribunal which is by law invested with a power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity to be heard ..."⁷

The case arose from the pulling down and demolishing the plaintiff's house. The plaintiff claimed damages for trespass. It was argued in defence that the plaintiff had failed to give seven days notice of his intention to build as he was required to do under the provisions of the Metropolis Local Management Act.

Consequently, the defence proceeded, where a person has defaulted (as the plaintiff in this case) in giving such notice, the council in exercise of the powers conferred to it under the Act, is entitled to pull down or demolish any house ~~erected~~^{erected} by such person. Therefore, it was submitted, the plaintiff's action for trespass should fail for want of merit in law.

The presiding judges unanimously rejected the defendant's contention, holding that the powers conferred to board were,

"subject to the qualification that no man is to be deprived of his property without having an opportunity of being heard"⁸ (the italics are mine)

5 EDMUND LAW AND CIVILISATION (Public Affairs Press, Washington D. C., 1959) p. 304

6 Cooper V. Wandsworth Board of Works (1863) 14 C.B. (N. S.) 180

7 Infra, per WILLES, J

8 Infra, per ERLE, J.

From the dicta of their lordships in Cooper's case, it is clear that the primary function of the audi alteram partem rule, is protection property. There are occasions however when the courts feel disinclined to protect the individual's property rights. In such cases, since the courts deviate from their normal function, they simply refuse to acknowledge that the individual has a right to be heard. Their argument is, since the individual does not stand to suffer any proprietary interest, there is no need for granting him a hearing. This point is vividly illustrated by the case of Nakkuda Ali V. Jayaratne,⁹ the facts of which were as hereunder.

The plaintiff was a textile trader in Ceylon. He applied for the renewal of his trade licence. The renewal was refused on the allegation that the plaintiff's firm falsified pay-in slips when banking coupons under the scheme of control. The controller (of Trade) in fact wrote to the plaintiff offering him an opportunity of explaining the allegation, personally or through his lawyer. The Supreme Court of Ceylon dismissed the plaintiff's action for an order of certiorari, holding (inter alia) that the plaintiff had in fact been granted an hearing. The Privy Council on appeal from the Supreme Court's decision held that, the controller had not been ~~determining~~^{determining} a question, but withdrawing a licence. Consequently, it held, the plaintiff was not entitled to a hearing.

The Privy Council's holding in the case of Nakkuda Ali subsequently found a companion in the case of R V. Metropolitan Police Commissioner.¹⁰ In the latter case, the licencing committee revoked a taxi-driver's licence. The taxi-driver was given a hearing, but was not allowed to call a witness to controvert police evidence. Lord Goddard, C. J., in a language reminiscent of Lord Radcliffe's in THE Nakkuda Ali's Case, categorically denied that the taxi-driver's property rights had been infringed. He argued that a licence to operate taxi services is a 'privelege' and not a right.[@]

9 (1951) A. C. 66

10 (1953) 2 All E.R. 717

@ Infra., p. 720.

The cases of Nakkuda Ali and Metropolitan Police Commissioner stand out prominently as the few and isolated instances when English Courts have indicated some reluctance to hearken to the individual's assistance when his property rights are threatened by administrative action. To the conservative common law jurists, the courts' attitude in such cases as these is lamentable. Indeed, Prof. H. W. R. Wade in a most expressively entitled article, "The Twilight of Natural Justice"¹¹ has levelled a fiery onslaught on the Privy Council's decision in Nakkuda Ali's Case. It is however submitted that the fears of the common law jurist are without justification: for it is to be observed that in both the Nakkuda Ali's case and the Metropolitan Police Commissioner's Case, the Courts decided on policy grounds. ^(a) Nakkuda Ali V. Jayaratne, for instance, was based on war-time legislation, which only in very exceptional and limited circumstances are ^{the Courts} willing to frustrate.

11 (1951) 67 Law Quarterly Review 103

(a) The expression 'policy' in this context means, public interest or public convenience.

Any anxiety the conservative jurist had, regarding the court's aberrations vis-a-vis the protection of the individual's proprietary interests, was finally dispelled by the House of Lord's holding in the case of Ridge V. Baldwin.¹² In that case, Reid L. J. in the tradition of this more militant predecessors, finally put the issue beyond dispute. He stated that:

"A man shall not be deprived of his property right, or membership of a profession or social body, or club ... unless and until he is told the reason for such deprivation ;:." 13

The court's vigil over property rights has not been subsequently relaxed. Lord Denning, W. R., quoting with approbation the dicta of their Lordships in Ridge V. Baldwin has remarked as follows:

"The speeches in Ridge V. Baldwin show that an administrative body may in proper cases be bound to give a person an opportunity of being heard. It all depends on whether he has a right or interest, or I would add, some legitimate expectation which it would not be fair to deprive him without a hearing of what he has to say".¹⁴

One can make an endless list where the same or similar views have been expressed. But such an effort would be wasted, for it has been sufficiently demonstrated that the English courts have erected themselves the guardians of the individual's property rights.

The issue is, why have the courts consistently guarded the individual's proprietary interests? The answer to this question, as it is submitted, lies in the mode of production upon which the laws are based.

12 (1964) A. C. 40

13 Ibid, per Reid, L. J.

14 Schmidt V. Secretary for Home Affairs (1969) 2 W. L. R. 337, at p. 350

Western jurisprudential ^{thinking} is based on the protection of the individual. Its protagonists contend that this is the only climate under which a person can realize his legitimate expectations¹⁵. But the Marxist and the Neo-marxist legal and other social thinkers are not, either impressed, or convinced by this reassuring. They regard such thinking as sheer romanticism and a bizarre attempt to conceal the real purpose of law under ^{the} capitalist system. They contend that the law is established to coerce, in the interests of the bourgeoisie ruling class, the aspirations of the workers and the peasants.

We submit that this paper can ill afford the luxury of ideological debates. We, however, share the Marxist view that law is conditioned on the mode of production¹⁶. Under that framework the English courts' preoccupation with private ownership of property becomes capable of a ready explanation. Since capitalism is based on individual ownership of property, it would be inconceivable for the courts to permit anything that threatens this cardinal concept. Hence it can be argued, in the cases of Cooper V. Wandsworth, Ridge V. Baldwin and other such cases, the courts merely proclaim the economic premise of the law.

It would seem that English courts in most cases overlook the public benefit accruing from administrative action.¹⁷

15 EDMUND P.D., LAW AND CIVILISATION, OP. Cit.

16 This view finds support from both Western and Marxist jurists. The two, however, differ on the nature and contents of the relationship between the mode of production and the law.

17 SEE the cases of Roberts V. Hapwood (1925) A.C. 578, Prescott V. Birmingham Corp (1955) Ch. 210; Padfield v Minister for Agric, (1968) A.C. 997.

NB In the event of national crises, this attitude is considerably altered - SEE Nakkuda Ali, op.cit, Caltona Ltd. v Comm. for works (1943) 2 All E.R. 560.

In Cooper V. Wandsworth the court seem to have ignored the town planning policy. Perhaps, the best case that illustrate the point is that of Roberts V. Hapwood.¹⁸ In that case a scheme to raise the wages of the council's employees and to uniformalise such wages between the sexes was described by a no less person than Lord Atkinson, J. as based on "accentric principles of socialist philanthropy" and "feminist ambition".¹⁹ His lordships' ^{views} were subsequently endorsed in the case of Prescot V. Birmingham Corporation,²⁰ where the council had undertaken to provide free bus services to the aged.

Under Marxist theorising the law is used by the bourgeoisie to consolidate its control over the means of production. Understandably, in Cooper's case the council had to remind the defendant board that, private ownership of property is sacred. In Robert V. Hapwood, the authority entertained a very dangerous idea. The worker should receive the bare minimum, otherwise he will cease to work. In summary it can be stated that the courts are very hostile to anything that threatens the socio-economic set-up.

Yet it will be noted that in both Robert V. Hapwood and Prescott V. Birmingham Corporation, the administrative actions were challenged on the ground that they were not in the public interest. The argument was, the taxpayer would suffer if such schemes are allowed.

The logic employed in these arguments is highly questionable. In Robert V. Hapwood for example, it is reasonable to suppose that the increase in wages would improve employer - employee relations. This could result in an increase in efficiency, to the benefit of the taxpayer. The Prescott case also could be explained on similar reasoning: the goodwill of those who benefit from the scheme would be an asset to the council. Thus to the extent that ideas ^{challenging} ~~challenging~~ the socio-economic set-up are introduced, public benefit is going to be found wanting in administrative action.

18 (1925) A. C. 578

19 Infra, at p. 594

20 (1955) Ch. 210

Personal Liberty is also jealously guarded by the English courts. The Law Reports abound with cases where the courts have expressed the view that it is their sacred duty to guard personal liberty. Among the staunchest advocates and defenders of the individual's personal liberty, /of Lord Atkin stands far above his colleagues. In his judgement in the case of Liversidge V. Anderson²¹ he sarcastically, but forcibly, remonstrated with his brother judges in words which I can not do better than quote verbatim:

"I view with apprehension the attitude of judges who on a mere construction when they come face to face with a claim involving the liberty of the subject, show themselves to be more executive minded than the executive". 22

Judicial pronouncements in the same vein have been subsequently expressed. There is no need to dwell on the matter any further.

It was earlier noted that the individual forms the basis of Capitalism. It is undesirable, indeed inimical to the bourgeoisie to restrict the individual's personal liberty. The individual must always be at liberty so that the bourgeoisie can exploit his labour. A non-working (for example detained) person is a loss and a burdensome unit in the whole capitalist structure. This is how Lord Atkin's views on personal liberty should be understood. It can indeed be pointed out that for all the law's concern about personal liberty, one can not help regarding it as a blind to the fact that the real interest in the individual is his worth in the labour market. One is minded to consider the remarks of a prominent English Philosopher, John Locke, who saw the individual qua individual as having proprietary interest in himself. John Locke stoutly maintained, "Whatever a man has mixed with his labour and joined it with something that is his own, becomes his".

We submit that the judge's function in capitalist states is to preserve the status quo, namely, to perpetuate the bourgeoisie control of the means of production. The judge in fact is not only an appointee of the bourgeoisie, but he is also a member of that class. English judges for instance are appointed after a distinguished (and we may add, profitable) career at the bar. Naturally, such a person would have accumulated a substantial amount of money. At the bench he would also be drawing a lucrative salary.

21 (1942) A.C., 206

22 Infra, p 224

It is therefore submitted that since the judge identifies with the bourgeoisie it is only logical that he should jealously guard the principles which ensure the continued dominance of that class.

That then is the premise upon which English administrative law is based. In the second part of this chapter we are going to examine the extent to which that premise has been incorporated in the Kenyan law.

(b)

THE KENYAN LAW

The view was expressed above and, is hereby restated that, the mode of production determines the content and the method of administration of the law.

Britain's interest in Kenya was chiefly commercial. The agricultural potential of Kenya captivated the early European explorers²³ as well as the local colonial officials²⁴. The result: large numbers of settlers of European extraction flooded into the country, and acquired large tracts of land in the 'white' Highlands.

The imperialists maintained that Britain was largely motivated by humanitarian considerations. She wished, it was argued, to end slavery and civilise the primitive and 'savage' inhabitants of East Africa.

This view is no longer tenable in the light of British colonial rule. In fact one can be excused for expressing the view that the humanitarian theories were but a mere cloak to disguise or give spurious justification to the economic and political objectives and strategies that were the core of British imperialism.²⁵

In this paper it is submitted that Kenya represented, as a colonised territory, a productive base for the international capitalist enterprise, based at London (or Britain, if you like). It was necessary to put the means of production securely in the hands of the local agents of the international capitalists. Hence laws were promulgated or enacted to achieve this end.

The process of consolidating the means of production in the hands of the local agents of the metropolitan capitalism took the form of the enactment of a welter of legislation. Among the earliest such legislation was the Crown Lands Ordinance, 1902.

23 THOMPSON J., THROUGH MASAILAND: A JOURNEY OF EXPLORATION.

24 WOLFF R., BRITAIN AND KENYA (O.U.P.) P. 51

25 WOLFF R., SUPRA, P. 47.

OF MARIANA

This ordinance did two things. First, it laid down an elaborate procedure for the granting of property rights to European settlers.²⁶ Secondly, the definition of crown lands as:

"All public lands in East Africa which were subject to the control of her Majesty by Vitue of any Treaty, Convention or Agreement or of her Majesty's protectorate ..."²⁷

meant that, the Africans already settled on those lands would be divested of any rights ~~in those lands~~. The law recognised all the rights as now being vested in the Crown.

The view was reaffirmed by the definition of "crown lands" ~~under the 1915 Crown Lands Ordinance~~. Lands ~~were~~ directly occupied by or reserved by the Governor for the use and support of the members of the native tribes, were also expressly provided as part of the crown lands.²⁸

To make the maximum profits on these lands, an ~~array of~~ ^{array of} enactments to assit the settler in exploiting local labour, were passed. These laws secured a steady and sufficient labour flow from the 'native' reserves to European farms.²⁹

The judiciary played an active role in the implementation of these laws.³⁰ This is not surprising since the interests of its members were identical with those of the ruling class.³¹ In regard to ownership of land, it suffered no moral qualms on dispossessing a whole tribe of its land.³² Nor did it fail to enterpret, the law in such a way as to completely deny any ~~rights in~~ ^{rights in} ~~the idea of~~ ancestral lands.³³ Further, it loudly proclaimed racial discrimination.³⁴

There were other ways of consolidating the local bourgeoisie's control of the means of production. Foreign ideas were forced down the throats of indigen@ous peoples.

26 SS. 4 - 8 of 1902 Crown Lands Ordinance.

27 EAST AFRICA O-in-C, 1902, S. 2

28 Crown Lands Ordinance 1915, S. 2

29 SEE for example the Native Registration Ordinance, Master and Servant Ordinance 1906, Native passes Regulations 1900, Resident Native Ordinance 1918, etc.

30 OLE NTOGO V. A. G. (1914) 5 E. A. L. R. 70, WAINAINA V. MURITO (1923) 9(2) K. L. R. 102, COMM. FOR LOCAL GOV. V. KADERBHAI (1930) 12 K.L.R. 12

31 The Colonial Government was virtually controlled by the European settlers. The settlers therefore formed the dominant class.

32 OLE NTOGO, Op. Cit., note 30

33 WAINAINA, Op. Cit., note 30

34 KADERBHAI'S Case, note 30, Supra.

Indigeneous institutions, such as marriage, were scornfully branded as primitive. When Hamilton, C.J. in R.V. Amkeyo³⁵ refused to recognise an African marriage he accurately expressed the sentiments of the other Colonialists on indigeneous institutions. These institutions had to be laughed ^{at} so that the 'native' could be compelled to emulate his master. In this way, English law with all its individualistic tendencies would not find resistance from the 'natives'.

The local colonial settlers impeded the full implementation of the principles of English law. To insist on the liberty of the individual would be inimical to the interests of the settlers. Since agriculture was undercapitalised and inefficiently managed, cheap labour was necessary. As cheap labour was not voluntarily forthcoming in sufficient numbers, forced labour was often resorted to.³⁶ To this, the courts turned a blind eye.

But whereas the full operation of English legal principles was not forthcoming to natives, the local colonial bourgeoisie insisted on their application to them. It is upon this premise that the Kenyan administrative law developed.

The English concepts which were reviewed earlier applied in full vigour. The European could for instance avail himself 'of a trial' by a jury.³⁷

The protection of property rights seems to have ignored the race of the plaintiff. In the case of Singh v. Municipal Council of Nairobi,³⁸ an Indian rickshaw operator successfully brought an action against the defendant's revocation of his licences. Subsequently in the case of Sheik Brothers v Control of Hotel's Authority³⁹ the supreme court held the authority had acted ultra vires its powers in altering the accommodation available for monthly residents, from 85% to 100% in that case Bourke, C.J. observe that:

"..... the occupation of all available space in the hall by residents on monthly terms must mean a Financial loss to the business." (italics are mine)⁴⁰

35 (1917) 7 K.C.R. 14, at p. 16.

36 Van Zaranburg R.M.A., Colonial Capitalism and Labour in Kenya, pp 104 - 164

37 Criminal Procedure code (cap. 27 laws of Kenya 1948) S. 222 (now repealed).

38 (1946) 22(1) K. C. R. 8

39 (1949) 23(2) K. C. R. 1

40 Infra, per Borke, J., p. 3

These cases are however inconclusive as to whether the court considered the race of the litigants. In the first case, being only two, they are inadequate as a basis of an objective inference. Secondly, it would appear that in both cases the plaintiffs did not threaten the local colonial bourgeoisie. This point can be verified against the decision in Commissioner for Local Government and Settlement V. Kaderbhai⁴¹, where it was held an Asian could not bid for a certain piece of land.

It can also be argued that the court was more concerned with protecting the concept of private ownership of property than with the ethnic background of the plaintiff.

There were numerous other cases expressing the court's protective sentiments towards private ownership of property.⁴² There is no need for reviewing them here. But one could attempt to explain further why the court was not particular about racial background of the plaintiffs. It will be observed in the Law Reports that the Kenyan High Court ~~rely~~^{relies} heavily upon English decisions. It will be recalled that English Courts regard private ownership of property as sacred. Inevitably, such an attitude is reproduced by the Kenyan judiciary. Further, one cannot fail to observe that in the cases, the colonial bourgeoisie ~~was~~^{was} never directly threatened. One would therefore be within his rights to suggest that, should the circumstances stipulated in the last remark have arisen, the court would have appropriately reacted.

In the post-colonial era, the Kenyan judiciary has indicated a greater disposition to protect individual liberty. This is the only valid distinction that can be made between judicial review of administrative action in the colonial and, in the post-colonial eras.

41 Op. Cit. note 30

42 SEE Kenya Aluminium Works V. Minister for Agriculture (1961) E. A. 248 (C. A.), Murigan and sons V. T. A. T. (1959) E.A. 1(K), etc.

In such cases as Changalal V. Kericho U. D. C.⁴³, Fernades V. Kericho L. L. C.⁴⁴ Chite V. E. A. C.⁴⁵ and Hardware & Ironmongery V. A. G.⁴⁶ one observes not only the court's concern for private ownership of property, but also the great influence exercised by English case law on the evolution of the Kenyan administrative law. In all those cases English decisions are reverently quoted. It is submitted that to the extent that the Kenyan administrative law is a duplicate of the English law ~~rests~~ the premises upon which the English law ^{rests} has been wholly incorporated in the Kenyan law.

Finally, it could be pointed out that, like its English counterpart, the Kenyan judiciary, in its enthusiasm to protect private ownership of property, seems to have consistently ignored the element of public benefit in administrative action. Town planning schemes,⁴⁷ licencing policies⁴⁸ and other such activities have been brushed aside. The justification which the court has advanced for its conduct is that the administrative authority did not act within its powers. While it is conceded that the court's approach offers reparation to those individuals who are injured or threatened injury by administrative action, yet it is submitted that the protection of the individual should be carefully balanced against the benefits accruing to the public.

43 (1965) E. A. 370 (K)

44 (1968) E. A. 640 (K)

45 (1970) E.A. 487 (K)

46 (1972) E. A. 271 (K)

47 Changalal V. Kericho U. D. C., Op.Cit

48 Hardware & Ironmongery, Fernades V. Kericho L. L. C. op. cit.

In summary, we contended above that the English administrative law is based on the individual's personal or proprietary interests. The explanation to this characteristic, it was submitted, is to be found in the mode of production obtaining in England. Further, we contended that the Kenyan administrative law is a duplication of the English law BUT during the colonial era, the mode of production militated against the full application of the English principles (For example, forced labour which was a common practice, was never seriously opposed by the Kenyan judiciary). Finally it was contended that today the Kenyan law stands on exactly the same position as the English law. It can therefore be argued that the premise of administrative law in Kenya is the same as in England.

C H A P T E R T W O

THE GOVERNMENT POLICY STATED

(a) The definition and contents of the Government Policy.

The expression 'Government Policy' is very difficult to define. It may denote the object or objects of a particular legislative instrument. On a broader perspective, it may refer to the plan or course of action which the government intends to pursue to achieve certain aims or objects. In the latter sense the expression 'Government Policy' denotes the total sum of the government policies in the former sense. Hence, when we speak of the government's economic policy, what we mean is, the aggregate of all the policies which define (by way of legislation) the various aims of the government in the different areas of its economy.

In this paper, government policy is used in both senses. But greater emphasis is laid upon ~~other~~ ^{the} government's economic policy than upon other categories. The approach is mainly dictated by the subject-matter of the investigation. There are far more instances when the judiciary has decided cases involving the economic policy than has been the case with regard to other aspects of the government policy. Secondly and most important, it is with regard to the economic policy that administrative action is most noticeable, probably because it affects everybody in the country.

In the Sessional paper, Number 10 of 1965, Kenya produced what can be crudely called its economic policy. The document is to a large extent vague and confused. It represents a bare skeleton of the main policy considerations — implying a need for a more elaborate definition of its contents before it can be implemented.

The sessional paper places a strong emphasis on "rapid economic growth"¹. The various ways of achieving this end are briefly examined. Nationalisation of the means of production is rejected except where it is necessary in the public interest.²

1 Sessional Paper, (No 10 of 1965) p. 2; para. (1)

2 Infra, para. 75

The justification for the rejection is, nationalisation would be detrimental to rapid economic development. It would stifle individual initiative³ as well as tie down the government's scarce resources and time, which would be better employed in promoting the infrastructure for economic development than purchasing private properties.⁴

It seems to me however, that, the rejection of nationalisation was motivated by considerations other than those furnished above. The national bourgeoisie feared that nationalisation would inhabit rather than assist them in their long cherished dream to replace the foreigners in commercial and other economic enterprises.⁵ It is however, to be observed that the motives of the policy-making national bourgeoisie are beside the issue here.

The alternative to nationalisation in the opinion of the early post-colonial leaders - an opinion which still persists - is 'controlled' private ownership.⁶ Control, it is argued, curbs the dissettling effect of competitive practices in private enterprises.⁷ Further, the government control of private enterprise, it is contended, would, through licencing schemes, make it possible for the government to restrict "certain types" of trades to citizens only, with a deliberate bias to African applicants.⁸

Thus the Sessional Paper introduces the policy of Africanisation. Under this policy the Trade Licencing Act⁹, and the Immigration Act, all of 1967, were enacted. The Trade Licencing Act stipulated, interalia, at providing "means and ways to speed up the Africanisation of the economy."¹⁰ The Immigration Act contained similar stipulations.

It was earlier observed that the sessional Paper is a confused and vague document. It speaks of 'rapid economic growth', 'Africanisation', 'public interests', etc. Yet no definitions are offered for these terms. Such expressions as used in the document may ^{be} defined ~~in~~ in many ways. They do not have precise meanings. The expression 'economic development' may mean either an increase in the output, a more favourable ^{balance} ~~balance~~ of trade; or the betterment of the subjects' standard of living. 'Africanisation' which seems simple to define lays no demarcation between citizen and non-citizen Africans.

3 Supra, para 74

8 Infra para. 84

4 Supra, para. 33

9 ACT No. 33 of 1967

5 Infra, para 74

10 Mr. Mwai Kibaki, Minister for commerce and industry, N.A.D. 1967, Vol. 13 col. 1609.

6 Supra, para. 34

7 Infra, para. 35

We submit that, despite the generality of language, it is perfectly possible to infer the general purpose of the economic policy advocated by the document. First, one discerns an intention to remove economic resources from non-citizens and the transfer of those resources to citizens. Secondly, it seems the African citizens are to be given priority over the others in the allocation of the resources.

(b) THE BASIS OF THE POLICY

It was argued in the last chapter that the colonial regime pursued a policy of consolidating the means of production in the hands of the local colonial bourgeoisie. Asians for instance virtually controlled the country's internal commerce and trade.¹¹ In the words of prominent Kenyan author and law teacher, Dr. O.K. Mutungi,

"Kenya acquired her independence only to discover that virtually the whole of her economic life was dominated by non-citizens. Even where citizens played an active role in trade and commerce, they were, without exception of Asian and European origin who were (and still are) negligible."¹²

There is an element of exaggeration in Dr. Mutungi's submission. It is not absolutely correct that the only citizen who played an 'active' role in commerce were "without exception," Europeans and Asians. A few Africans ~~owned~~ ^{owned} sizeable business concerns.¹³ But it can not be seriously disputed that Asian and Europeans capital over whelmingly controlled the economy.

It is therefore natural and, indeed, logical that the national leaders should seek to redistribute the economic resources. The socio-economic structure inherited from the colonial regime had to be dismantled. A few individuals, often non-citizens, could not be allowed to dominate the country's economy while millions of others had nothing. To use a popular slogan - everyone was entitled to a share of the national cake.

In the colonial regime, the African was simply a 'labourer'. He had the lowest income. ~~If~~ social justice was to be achieved among the citizens he had to be treated preferentially. His standard of living had to be improved.¹⁴

11 It should be pointed out that the Asians only dominated the 'domestic' commerce as most export and import business was under the control of large European, or mixed European and Asian Companies.

12 Dr. O.K. Mutungi, Business associations and Africanisation of Commerce in Kenya. (New Haven, conn., 1974) p. 3

13 Oginga Odinga, Not yet Uhuru (A.W.S. 1968).

14 Sess. Paper, op. cit; para. 80; The Kenya Development Plan 1964/1970 (Government Printer, Nairobi) p. 42.

Hence the government policy of Africanisation.

However, it was argued if the policy of Africanisation was applied indiscriminately on non-citizen (and some citizen non-African) business enterprises, it would disrupt the economy¹⁵ because few Africans had the capital and skills to run the businesses efficiently.¹⁶ Thus only those Africans who had the money to run the businesses were to be considered in the taking over of the non-citizens businesses.

It is submitted that this argument was motivated by reasons other than a desire to avert economic disruption. Indeed, the argument seems to equate the ownership of capital with efficiency. It is contended that Africanisation meant no more than the take-over of businesses owned by foreigners by a certain section of the African Community, viz, the national bourgeoisie. As it has been argued the governments intention was,

"to replace the colonial ethnic caste system with the modern class system of economic competition"¹⁷

Further, it can be argued that the constitutional guarantee of equality would lose meaning if some of the citizens were permitted to take all the economic resources for themselves. The Europeans and the Asians owned most of the country's resources. The Africans had to get a share of these resources if they were to be equal to them.

It is also argued that, it is inconsistent with independence status to have a country's economy controlled by non-citizens. National security on the one hand may be endangered. Besides, the Majority community in its struggle for independence was seeking "self-fulfilment and greater control over its destiny"¹⁸

It is unnecessary to review all the arguments in support of the government policy. Suffice it to state that the Kenya government policy contained certain benefits for the hitherto ignored majority community - Africans.¹⁹

15 Sess. Paper, op cit. para. 60

16 N.A.D. Op. cit. cols. 1613 - 1614.

17 Prof. Ali Mazrui, "Black capitalism and Race Relations in East Africa and in U.S.A.," The Social science Annual Conference Report 1969, vol. 4 p. 1545.

18 Rothchild, Racial Bargaining in Independent Kenya (Oxf. University press, London 1973).

19 See N.A.D., opcit. Cols. 1609 - 1939; 1751 - 1973.

(c) THE LEGAL IMPLICATIONS OF THE POLICY.

As was stated above, the government policy inevitably involved the removal of property interests from some people (mainly non-citizens) and the transfer of those interest to others (usually citizens of African origin). A vivid illustration of this phenomenon is provided by the Settlement Schemes in the former White Highlands. Under those schemes, large numbers of Africans were settled in those areas hitherto reserved for European settlement.²⁰

There are two legal aspects to the government policy. Firstly there is the problem of discrimination; mainly on the ground of race and to a lesser extent on the ground of citizenship. Secondly there is the issue of the government's interference with private ownership of property. With regard to discrimination S. 82 of the Kenya Constitution²¹ provides:

" (1) Subject to Subsections (4) (5) and (8) of this section, no law shall make any provision that is discriminatory either in itself or in its effect"

" (2) Subject to Subsections (6), (8) and (9) of this section, no person shall be treated in a discriminatory manner by virtue of any written law or in the performance of any public office or public authority".

The expression 'discriminatory' is defined under subs. (3) of the same section to mean:

"affording different treatment to different persons attributable wholly or mainly to their respective descriptions by (inter alia) race ... colour ..."

Subsections (1) and (2) read with the definitional subsection (3)

Prima Facie operate to invalidate any government act (legislative or administrative) which is, inter alia, racially discriminatory. This impression disappears when the provisions of subsections (4) (a) and (d), and (6)(a) are considered. Subsection (4) so far as material reads,

"Subsection (1) of this section shall not apply to any law that makes provision -

(a) with regard to persons who are not citizens of Kenya.

20 Kenya (land) O-in-C, L. N. 1830 of 1961; Agriculture (Amendment) Act, No. 47 of 1960.

21 The expression 'Kenya Constitution' refer to the Kenya Constitution contained in Act number 5 of 1969

- (d) Whereby persons of any description as is mentioned in subsection (3) of this section may be accorded any privilege or advantage which having regard to its nature and special circumstances pertaining to those persons or persons of any other such description, is reasonably justifiable in a democratic society".

And the relevant paragraph of the subs. (6) reads:

"Subsection (2) of this section shall not apply to-

- (a) anything under the express or implied authority of a law made under subsection (4) of this section".

It seems to me that there are certain circumstances where the constitution allows the government to pursue discriminatory policies. If it is shown that the policy has complied with the provisions of subs. (4)(a), distinction of individuals on the ground of nationality or citizenship can be made. Discrimination between citizens inter se, it can also be argued, is impliedly permitted under subs. (4)(d) provided it can be shown that it is "reasonably justifiable in a democratic society".

Unfortunately subs. (4) offers us little assistance since our object ~~is~~ is not the formulation of policy per se, but mainly the implementation of that policy by administrative authorities. If however it can be established that the provisions of subs. (6)(a) apply, then it can be argued that the implementation of a discriminatory policy (whether on the ground of citizenship or race) is not inconsistent with the Constitution.

There are two recent decisions of the High Court dealing with s. 82 of the Constitution. In the first one, Wadhwa V. City Council of Nairobi,²² Harris, J. stated that,

"The effect of this paragraph (subs.(6)(a)), read together with paragraph (a) of subs. (4) would appear to be that no law can be invalidated under s. 26 (1) (i.e. s. 82 (1)) so far as it, makes provision with regard to persons who are not citizens of Kenya, and that no act or thing done can be invalidated under s. 26(2) (i.e. s. 82 (2) if it is expressly or by necessary implication authorised to be done by any such statutory provision".²³

22 (1968) E. A. 406 (K)

23 Infra p. 414

Although this dictum was not referred to in the second case, Devshi V. Transport Licencing Board,²⁴ Simpson, J. seemed to share Harris', J. view in Wadhwa's case. Mr. Simpson, J. was of the opinion that,

"while subs. (1) prohibits legislation with a discriminatory effect, subs (4)(a) expressly excludes from such prohibition a provision

'with respect to persons who are not citizens of Kenya'".²⁵

The dictum of the other judge in Devshi's case, Mr. Chanan Singh, J. seems to be slightly inaccurate. He states that,

"The first of these subsections (i.e. S. 82(1)) avoids a law which is discriminatory and the second (i.e. S. 82(2)) prohibits treatment of a person in a discriminatory manner"²⁶

It may be observed that Mr. Chanan Singh, J. makes no reference to those circumstances under which discrimination is allowed by the constitution. He, for example, seems to be unaware of the provisions of subsections (4) and (6) of s. 82. Further, the second part of his statement is much too general to pretend to be an accurate statement of the true legal position.

It is submitted that the opinions of both Simpson, J. and Harris, J. indicate that the government may formulate and implement policies 'discriminating' between citizens and non-citizens. But it is also to be noted that, although in Wadhwa's and in Devshi's cases the issue was primarily whether discrimination between citizens is permissible, the learned judges cautiously avoided the point (We shall have occasion to comment upon this matter in the next chapter) Notwithstanding the learned judges' conduct, we submit that discrimination between citizens is permissible under subs. (4) where,

"... having regard to its nature and special circumstances of those persons or persons of any other such description, is reasonably justifiable in a democratic society" (the Italics are mine)

We express the view that the discrimination between citizens of African origin on the one hand, and others who do ^{not} fall under such description on the other, is 'reasonably justifiable in a democratic society' in the Kenyan context. The intention behind such discrimination is not simply to afford privileges to the Africans; which privileges would give them an advantage over the members of the other racial communities.²⁷

24 (1971) E. A. 289 (K)

25 Infra, p. 304

26 Supra, p. 300

27 Bayne p., "Administrative Authorities and Government Policy", 2 East African Law Review, pp. 351 - 352.

Such discrimination attempts to uniformalise the economic standing of the different (ethnic) classes of citizens. We submit therefore that discrimination between citizens should be viewed as including more than a differentiation on the ground of the individual's racial background.

It may here be stated in passing that Dr. Mutungi's views²⁸ with regard to subs. (4) of s. 82 of the constitution are to be preferred to those of Mr. Smith.²⁹ The latter argues that subs (3) of s. 82 ~~implies~~^{implies} authorises discrimination on the ground of citizenship. He contends that the definitional use of the word 'means' instead of 'includes' in the subsection, exhaustively catalogues the grounds for actionable discrimination. Since 'citizenship' does not appear in subs. (3), he submits that discrimination upon this ground would not be unlawful.³⁰ To Mr. Smith, subs. (4) is merely "for the avoidance of doubt, ex abundanti cantella!"³¹ The subsection, he further contends, permits the government "to discriminate by race or citizenship, as for instance between citizen and non-citizen Africans on the one hand, and citizen and non-citizen Europeans on the other"³².

It is submitted that Mr. Smith's view is misconcieved because discrimination by 'race' is expressly outlawed under subs. (3). Besides, there would have no need for subs. (4) if subs. (3) already permitted discrimination on the ground of citizenship. Further, Mr. Smith seems to have overlooked the distinction in subsections (1) and (2) between 'legislative' and 'administrative' discrimination.

Even where the government policy has cleared the hurdle of discrimination, it has yet to satisfy the courts that it does not interfere with private ownership of property.

28 Prof. Mutungi, op. cit. pp 11 - 13.

29 Smith, "Employment, Self-employment and the Non-citizen", 1970 East African Law Journal, pp 174 - 178.

30 Infra, p. 175

31 Infra, p. 176

32 Ibid.

Private property receives a strong support by the Constitution. S. 75 provides inter alia that, any compulsory acquisition of private property must be in the public interest;³³ and any person whose property has been compulsorily acquired must receive "full and prompt compensation".³⁴

There are no instances where it has been contended that the provisions of S. 75 had been impugned. But the Kenyan Courts seem to express the basic idea that private ownership of property is sacred.³⁵ In fact when one reads the decisions of Wadhwa's case, Devshi V T. L. B, etc, one discovers that there is a basic assumption that the government policy in those cases represented an unlawful interference with private property. As we shall have occasion to comment later, this view by the courts has considerably bottlenecked the implementation of the government policy. Meanwhile we shall deal with the machinery of the administration of the government policy.

(d) THE ADMINISTRATION OF THE POLICY.

There are two agencies of implementing the government policy. These are, the civil service and administrative tribunals. The civil service, especially through the provincial administration, 'sell' government policy to the 'wananchi'.³⁶ It exercises an administrative function in this respect. Therefore prima facie the civil service falls outside the scope of this discussion. But in some cases, members of the civil service constitute the administrative tribunals. Trade licences are for instance granted by/licencing officers who must be a 'public servant'.³⁷ A liquor Licencing Court is composed of a District Commissioner,³⁸ one person from a local authority³⁹ and between three to seven residents of the licencing area.⁴⁰

33 Subs. (1) (a)

34 Subs. (1) (c)

35 The idea derives from English jurisprudence, see our arguments in the first chapter.

36 Ghai. Y. P. and McAuslan, Public Law and Political Change in Kenya (O. U. P., 1970) p. 261; The Daily Nation, August 19, 1968 - Mr E. Mahihu, then the P. C. for Eastern Province, explaining the government policy to traders in Embu Town.

37 Trade Licencing Act, p. 6(2)

38 Liquor Licencing Act (cap. 121) s. 4(1) (a)

39 Ibid s. 4(1) (b)

40 Ibid s. 4(1) (c)

The D. C., who is the president of the Licencing Court is an appointee of the Permanent Secretary of the relevant Ministry.⁴¹ When so constituted as administrative tribunals, the civil servants exercise judicial or quasi-judicial functions. Their decisions then become subject to judicial review. Mr. Bayne⁴² argues that there are two situations where an administrative authority may consider the government policy. The first is where it receives instructions from some government source. He submits, citing with approval the view of Windeyer, J. in the case of R V. Anderson, Ex Parte Air-Ipec that,⁴⁴

"It is difficult to see that a Ministry, Official would be justified in departing from the government policy where it is clearly expressed by a Minister."⁴⁵

He proceeds to point out that his submission is limited to those cases where the function exercised is 'administrative' rather than 'judicial'.⁴⁶

It is to be noted that in the Kenyan context the Minister exercises great control over administrative tribunals. This is probably because they are mostly staffed with civil servants. It is therefore all the more easier to envisage a Minister giving instructions to the administrative authorities as to the implementation of the government policy. In fact, the practice of giving instructions to the authorities exist. In a circular to the Nairobi City Council from the Ministry of Local Government, the former was asked.,

"to adopt a deliberate policy of making those stalls occupied by non-citizens vacant for occupation by Africans".⁴⁷

Secondly, Mr Bayne argues that, an authority may "declare that it will exercise its powers in accordance with the government policy".⁴⁸ Where the authority is exercising a judicial or quasi-judicial function, the court is entitled to consider whether or not the government policy is a "relevant consideration".⁴⁹ With regard to the government policy in Kenya, he observes that, "preference for African traders is a policy directly related to the effort of the Government to re-direct the economy and as such should not be treated as an extraneous consideration".⁵⁰

We agree with Mr. Bayne's remarks. It is however unfortunate the judiciary does not ~~share~~^{share} these views. It regards the government policy as an insult to the sanctity of private property.

41 L. N. 539/1957 42 Bayne P., op. cit. p. 343

43 Infra, p. 345 44 (1965) 113 C. L. R. 177, 204

45 Bayne, op. cit. 346

46 East African Standard, December 7, 1966

47 Bayne P. Review of Administrative Action in East Africa: cases, Materials and Comments, (unpublished) pp. 55 - 56.

48 Bayne, "Administrative Authorities and Government Policy", op. cit. p. 348

49 Infra, p. 349 50 Infra, p. 350

JUDICIAL ATTITUDES TO THE POLICY.

(a) A theoretical framework of the judicial attitude*

The traditional justification for the Courts' review of administrative action is expressed in the general principle of Ultra Vires. Of this principle Prof. Wade remarks:

"The notion of unlimited power has no place in the (English administrative law) system.

.....
It follows then that any act outside defined limits (of the powers of an administrative authority) is unjustified in law, which can have no legal validity".¹

This general principle however, does not tell us the social aims of judicial review. It does not tell us, for example, what the principles of administrative law seek to protect. Hence we need to look elsewhere for the conceptual foundation of the general principle.

Marxist and Neo-Marxist thinkers submit that the function of law in capitalist societies is to preserve the Status Quo. The courts merely supervise the enforcement of the law. Naturally, since the basis of capitalist production is private control of the means of production, the law is particularly insistent on the protection of private property. This submission finds support in a great number of English cases.² Indeed, the courts hardly fail to betray great anxiety for the security of property interest, when reviewing administrative action.³ If, for instance, an administrative authority exercises its powers in such a manner as to as much as threaten or adversely affect proprietary interest, the courts are prompt in registering their disapproval, provided their attention is drawn to such exercise of power.⁴ Hence it can be argued that to the extent that the courts disapprove of interferences with property, they protect the interests of the class that owns the property, i.e., the bourgeoisie.

* This section is introductory.

1 Wade H. W. R., Administrative Law, op. cit., p. 50

2 SEE Chapter One, above.

3 SEE for instance the judgements of Willes and Reid L. JJ. in the cases of Cooper V. Wandsworth and Ridge V. Baldwin, respectively.

4 Cooper V. Wandsworth, op. cit.

This point is further illustrated by the courts' hostility to any ideas which threaten the capitalist mode of production. The derisive tone of Lord Atkinson's judgement in the case of Roberts v. Hapwood⁵ is an instance in point. His Lordship describes a scheme to increase the wages of a council's employees as motivated by "eccentric principles of socialist philanthropy" and "feminist ambition".⁶ The suggestion is, philanthropy qua philanthropy, is not the business of the law. And when such philanthropic ideas are based on socialism, they become 'eccentric'! The truth of the matter, it seems to us, lies in the fact that, socialist ideas represent an attack on the very foundation of capitalist production and, ipso facto, threaten the status quo.

It is proper here to comment briefly on war-time legislation, for the latter prima facie derogate from the sanctity of property rights. Surprisingly, the courts readily enforce such legislation.⁷ Indeed there is dicta to the effect the courts must not inhibit the implementation of the legislation. Lord Reid in Ridge V. Baldwin⁸ for instance, remarks:

"It seems to me a reasonable and almost inevitable inference from the circumstances in which defence regulations were made and from their subject-matter that at least in many cases the intention must have been to exclude the principles of natural justice".⁹

In other words, it is suggested that, the courts are in certain circumstances justified in departing from those principles which safeguard property interests. It is submitted that the departure is capable of a simple explanation. War threatens the state: and hence, the capitalist superstructures upon which it is based. War-time legislation seeks to provide sufficient measures for dealing with the emergency. To restrict its application would be prolonging insecurity, to the detriment of the bourgeoisie's commercial activities. Thus we should see in the courts' attitude to war-time legislation a relaxation rather than a complete abandonment of their role as supervisors of the Status Quo.

Drop this case!

5 (1925) A. C. 578

6 Per Atkinson, L. J. Infra.

7 See Nakkuda Ali V. Jayaratne; Carltona Ltd V. Comm. of Works; Woollet V. Minister of Agric., op. cit.

8 (1964) A. C. 40

9 Infra.

It was argued above that the Kenyan Courts depend on their English counter-parts for jurisprudential guidance.¹⁰ This phenomenon is quite prevalent in administrative law. English decisions are lavishly cited to reserve or clarify difficult legal points.¹¹ Inevitably, the courts' attitudes to administrative action closely resemble the English Courts! In other words, administrative action is regarded as an interference with private ownership of property.

Unfortunately, whereas the role of the Courts in England as a preserver of the status quo is not much questioned, the same is not true in Kenyan context. The explanation for this is to be found in the colonial background of law in Kenya. Whereas during the colonial regime the courts were not challenged in their role of safeguarding the property interest of the local colonial bourgeoisie, today insistence on the protection of property can only be read as indicative of a desire for

"preserving the (colonial) status quo, and thus to a large extent perpetuating the unfairness and injustice of the colonial system"¹²

As will be argued later, the Kenyan Courts have, in fact, adopted attitudes which are only consistent with a desire to preserve the colonial status quo. The courts deliberately disregard the colonial economic organisation upon which the government policy is based. The defects inherent in the colonial socio-economic organisation are regarded as sacred and inviolable. It is submitted that such attitudes may create misunderstanding between the judiciary and the government, which would be unfortunate for the former's impartial administration justice. Since the government policy purports to contain this object it is submitted that the judiciary should adopt an attitude that would least impede its implementation.

10 SEE Chapter One, above.

11 for example, in the case of Kenya Aluminium and Industrial Works Ltd V. Minister for Agriculture, in attempt to reserve the issue as to when the Minister should have regard to some government policy, no less than four English cases were cited.

12 Ghai and McAuslam, op. cit., p. 422

(b) DISREGARD OF THE POLICY'S COLONIAL BACKGROUND.

By 'colonial background' we mean, the racial cum economic inequalities inherited from the colonial regime. Economic opportunity in the colonial state were rarely afforded to the members of the African community. Hence the independent government formulated a policy giving them more attention vis-a-vis other categories of citizens.

The issue as to whether such policy could be validly implemented first arose in the case of Wadhwa v. City Council of Nairobi¹³ The facts of the case were briefly as hereunder. Sometime in 1966, the defendant Council's Housing and social Services Committee passed some ~~social~~ resolutions providing, inter alia, that,

"(2) This committee reiterates the Council's policy of Africanisation of commerce in accordance with the government policy, and

"(3) That, so as to accelerate the Africanisation of the city market the present stand-holders who are non-African be given three months notice to terminate their tenancies with the council and that officers be authorised to invite applications from suitable Africans for the tenancies of such stalls."¹⁴

These resolutions were subsequently ratified by the council.¹⁵

In pursuance of the Africanisation policy as stated in the resolutions the council served notices upon the plaintiffs requiring them to quit and deliver possession of their respective stalls on or before October 31st 1967.¹⁶

It was found ~~that~~ as a fact that, all the plaintiff were at the material time "citizens of the United Kingdom and Colonies"¹⁷ of Asian origin. They had prior to December 12, 1965 submitted applications for registration as Kenya citizens, but the processing of those applications had not been completed at the ~~time~~ ^{time} when they received the quit notices.¹⁸

The plaintiffs prayed the High Court to make declarations to the effect that: firstly, the council's policy and resolutions were void; secondly, the ~~implementation~~ ^{implementation} of the same would be unlawful; and thirdly, the notices to quit ~~were~~ void.

13 (1968) E.A. 406

18 Supra, p. 408

14 Infra; pp 407 - 408

15 Ibid .

16 Ibid.

17 Infra; p. 409

Further, they sought injunctive relief to restrain the council from ejecting them from their premises in respect of which the quit notices had been served.¹⁹

Holding for the plaintiffs, Mr. Harris, J.²⁰ reasoned that the implementation of the policy contained:

"an enhanced element of discrimination in favour of those persons who come within the definition of 'Kenya citizens of African origin' as against those who do not."²¹

Further he reasoned that the policy:

"Fell within the definition of 'discriminatory' in s. 26 (3) by reason of the preference shown in favour of those persons who in the resolution are termed 'Africans', whatever that word may mean, as against those who are termed 'non-Africans.'²²

Implicitly, the learned judge's reasoning suggests that the issue raised by the government policy of Africanisation is racial discrimination, pure and simple. This suggestion was inevitable if he was to hold in favour of the plaintiffs who were, in fact, not only non-Africans but also non-citizens.²³ The remarks of Mr. P Bayne²⁴ however, present the policy in yet another light which, it is submitted, the learned judge overlooked.

20 Mr. Harris, J. is a non-African. This fact may probably account for his hostility to the policy of 'Africanisation'.

21 (1968) E.A. 406, at pp. 413 - 414

22 Ibid.

23 Supra; p. 409

24 Bauny P., "Administrative Authorities and Government Policy", 2 E.A. L.R. p.

26 Ibid., p. 411
27 Ibid., p. 412
28 Ibid., p. 413
29 Ibid., p. 414
30 Ibid., p. 415
31 Ibid., p. 416
32 Ibid., p. 417

The learned author contends:

"It may be accepted that an authority may not act on an 'extraneous political' consideration, but in the East African context, criteria which look to citizenship or ethnic background will have an underlying economic basis."²⁵ (the italics are mine).

The 'underlying economic-basis' alluded to by the learned author is none other than the removal of the economic disparities between different classes of citizens.²⁶ To the extent that the learned judge in Wadhwa's case seems to have been ignorant of this aspect of the government policy, it submitted that his decision rests on a very unrealistic premise.

The government policy was yet in another case²⁷ held to be "trying to run against the law"²⁸ and "contrary to the 'public interest' appearing in S. 7 of the (Transport Licencing) Act"²⁹. In that case, Devshi & Co Ltd V. Transport Licencing Board, the appellant a limited Company,³⁰ applied for an order of certiorari to remove into the High Court and quash a decision of the Transport Licencing Board 'revoking' five of the applicants, 'B' licences and restricting the area of operation of seven others.

The applicant sought the relief on several grounds. But only two of these, that is to say, the third and the fifth are material to our discussion. These provided that,

"3. The Board took into consideration the provisions of reg. 15 of the Transport Licencing Regulations as amend by the Transport Licencing (Amendment) Regulations, 1968 which is ultra vires the Act and the constitution.

"5. The Board's decision reflected discrimination against Kenya citizens of Asian origin thus violating fundamental rights under the constitution".³¹

Mr. Chanansingh,³² J. held,

"The Act itself defines 'public interest' and this means the Board is to have regard to the interests of the entire population of Kenya including citizens and non-citizens. No preference for one class over the other is indicated. Regulation 15(3) on the other hand lays down that the board is to have regard to citizenship. There is a clear conflict here

The regulation in case of a conflict must give way to the Act."³³

26 Infra, p 351 25 infra; p. 350 28 infra, p. 296, per Chanan Singh J.
 27 Shah Vershi Devshi V. Transport Licencing Borad (1971) E.A. 289.
 29 Infra, p. 306, per Simpson, J. 31 Supra. p. 203
 30 The Company was a wholly Asian owned concern. 33 (1971) E.A. 289, at p. 295.
 32 Mr. Chanan Singh, J. is himself an Asian and would normally be reluctant to allow a policy discriminating against racial communities.

In other words, the learned judge argues that one should only look at the actual provisions of the law. In his own words he states:

"I am not concerned with the wrongness or the rightness of the policy: I am only concerned with the law as it is worded and as I understand the words."³⁴

Two points may be raised on the learned judge's remarks. First, it is clear that he is indifferent to substance of the government policy. By his own admission, he is "not concerned with wrongness or the rightness of the policy." It may be noted that Mr. Chanan Singh, J can hardly be heard to contend that he is not aware of the 'rightness' of the government policy. He just simply does not care either way; that is, whether such policy is wrong or right. Upon this background the second point may be raised: that the learned judge deliberately ignores what Mr Bayne³⁵ describes as "the underlying economic basis" of the policy. Moreover, in contending that only "the law as it is worded" should be considered, he overlooks the fact that the law has its origin in the colonial state,³⁶ the policies of which are in direct conflict with those of the independent government.

In yet another case, Fernades V. Kericho Liquor Licencing Court,³⁷ Mr. Chanan Singh, J. shelters behind strict legalism in denying the applicability of the government policy. In that case, Mr. Fernades, an Asian non-citizen, applied for, and was refused a renewal of his liquor licence on the ground that he was not a Kenyan citizen. The licencing court on an appeal from its decision contended that its refusal to renew the applicant's licence was justified under A. 16(a) of the Act.³⁸

That section provides that:

"A licencing Court may refuse to renew an existing licence only when such court is satisfied that -

(a) the licensee is not a fit and proper person to hold a licence"

34 Infra; p. 296

35 Mr. Bayne, "Administrative Authorities etc", op cit.

36 The Transport Licencing Act (cap 404) for example was passed in 1938.

37 (1968) E.A. 640

38 liquor Licencing Act (cap 121)

38 Infra; p

In other words the Licencing Court was arguing that, Kenya Citizenship is a material factor when considering whether or not "the licensee is not a fit and proper person to hold a licence".

The learned judge was unimpressed by the argument. He rejected it: reasoning that the expression "fit and proper person" referred only to the 'personal' qualities rather than the applicant's national status, and that non-citizenship was "no disqualification for the purpose of liquor licencing law".³⁹ His reasoning proceeded from the premise that, the use of the word 'only' in the introductory part of s. 16 suggested an exhaustive list of disqualifications for the renewal of liquor licences.

While it is conceded that indeed the section exhausts the disqualifications for refusal to renew liquor licences, it is also submitted that there is nothing in the wording of s. 16(a) that connotes the restrictive construction attributed to it by the learned judge. Indeed, there is nothing to suggest that a non-citizen can not be regarded as falling under what para. (a) of s. 16 describes as "not fit and proper person to hold a licence". It all depends on whether the economic assumptions underlying the policy of discriminating on the ground of citizenship are considered.⁴⁰ *Mr. Singh was not interested in these economic assumptions.*

It is to be noted that colonial policies mostly benefited non-citizens who still continue to control and ~~manage~~^{manage} large business enterprises. Admitting that the economic advantage which non-citizens enjoy over the citizens has its origin in the injustice and unfairness of the colonial regime, it is arguable that there is a moral justification for ending such advantage. To the extent that the judiciary does not, as in the case of Fernades v. Kericho L.L.C., countenance such moral justification, it is submitted that its attitude to the government policy is indefensible.

39 Infra., p. 642

40 for an analysis of these economic justifications of the policy, see chapter two, section (b)

(c) PROTECTING PROPERTY AND PRESERVING THE STATUS QUO

The idea of equality is entrenched in the Constitution. Mr. Harris, J.
in Wadhwa's⁴¹ Case remarks:

"It is to be observed that the section (s. 14) is declaratory of the rights of the individual as a human person without reference to any matter of nationality, citizenship or domicile".⁴²

If my reading of Mr. Harris' remark is correct, he submits that prima facie discrimination based on either "nationality, citizenship or domicile" is tantamount to a denial of the individual's humanity. Put in other words, his contention is that all individuals are inherently equal.

Mr. Harris' observation leaves little room for disagreement or criticism.⁴³ But it is to be observed that the section only objects to the denial of equal treatment to individuals as 'human' persons. It does not speak of the 'property' rights of the individual, it speaks of only his 'human' rights. Unless it is contended that property rights are subsumed under human rights, this section can not be used as the basis of protecting proprietary interest. The section is however important in that it serves as the basis of judicial preservation of the status quo: whereby those individuals or groups of individuals who were favoured by the policies of the colonial state continue to enjoy a relative advantage (especially in economic matters) over those others who were not so favoured.

The most obvious examples of a desire to preserve the 'colonial' status quo are to be found in the judgements of Chanan Singh, J.⁴⁴ which have been considered above. Although his brother judges are less unequivocal there is a lot to indicate such an attitude in their judgements.

41 op. cit.

42 Infra., p. 410

43 However, leaving aside the observations legal context we would respectfully point out to the learned judge that to treat unequals as equal is as objectionable as it is illogical. Mr. Harris, J. we submit should have been informed that a criterion which looks to citizenship has in Kenya an underlying economic basis --- to paraphrase the words of Mr. Bayne, op. cit.

44 See the cases of Fernades V. Kericho L.L.C. and Deushi V. T. L. B., op. cit.

After finding that,

"...the imbalances existing at moment between Kenya citizens' the Chairman (of the Transport Licencing Board) is referring to Kenya Citizens of African origin on the one hand and Kenya citizens of non-African origin on the other";⁴⁵

Mr. Simpson, J.⁴⁶ proceeds to argue that:

"The Board is not empowered by reg. 15 or by any other regulation to have regard to whether members and employees of the company are African or non-African nor in my opinion can the expression 'public interest' appearing in s.7 of the Act be construed as permitting such discrimination".⁴⁷

Like Chanan Singh, J., Simpson, J. looks no further than at the actual provisions of the law. Hence since the law originates from colonial legislation he finds that it is incompatible with the government policy Africanisation. The fact of restricting oneself to the actual provisions of the law in itself indicates in the Kenya context, at best a disapproval of, and at worst an opposition to a change of in the status quo.

This opposition to the change in the colonial status quo is probably even better illustrated in the carefully reasoned judgement of Mr. Harris, J. in Wadhwa's Case.⁴⁸ He submits that,

"The formulation of a policy and the passing of a resolution as distinct from the implementation of one or the other, are primarily intellectual exercises rather than physical overt acts and it is not clear that prima facie either could be said to be unlawful per se by virtue of s. 26(2) which is designed to prohibit actual 'treatment' of any person in a discriminatory manner".⁴⁹

He therefore concludes that the defendant council's policy and resolutions,

"although capable of being implemented in an unlawful manner",
were not in themselves unlawful.⁵⁰

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Prima facie, the dicta of the learned judge suggest a broad-minded outlook towards the government policy. But on a closer analysis of his judgement, this prima facie impression disappears; and there remains only a subtly disguised contempt for the government policy.

45 Devshi V. T. L. B. , op. cit., p. 306

46 Mr. Simpson as the name indicates is, like Mr. Harris and Mr. Singh, a non- African.

47 Ibid., note 45 Supra.

48 op. cit.

49 Infra., p. 414

50 Ibid.

Whereas he describes the formulation of policy flatteringly as an "intellectual" exercise, and "not ... prima facie ... unlawful per se", he proceeds to state that it is "being implemented in an unlawful manner" because it conflicts with s. 26(2) of Kenya (independence) Constitution.⁵¹

In other words Mr. Harris, J. is stating that, the government policy may have its merits, BUT the manner in which it is implemented divests it of those merits: that is, the policy-makers should have been better advised on the mode of implementing the government policy.

We discern in Mr. Harris' attitude a desire to preserve the property interest of the 'colonial' bourgeoisie. After noting that the plaintiffs in Wadhwa's case⁵² were not Kenya citizens,⁵³ he goes out of his way to suggest that they had in fact been discriminated against on the ground that they were non-Africans.⁵⁴ Whereas we concede that there is ample evidence for the contention that the council contemplated some racial discrimination in allotting business premises,⁵⁵ we find no justification for equating the plaintiffs with citizen non-Africans. There is no suggestion whatsoever that any citizen non-African had been victimised by the council's policy.⁵⁶ All the evidence point to the fact that the council singled the plaintiffs for eviction from its stalls because they were non-citizens. Mr. Harris, J. however finds justification for classifying citizen and non-citizen Africans together. The only conceivable basis for such classification can only be a desire to safeguard the property rights which commonly vest in the members of those two groups.

The question is, having regard to all the circumstance, is it conceivable that the court in the cases reviewed above should have arrived at different conclusions? This question can be answered in either the affirmative or in the negative. The affirmative answer would be that the provisions of the law limited the application of the government policy. In other words, the court's hand was tied down by the law: it could do nothing to assist in the implementation of the policy government. This is the kind of reasoning that seeks to preserve the socio-economic organisation as it is, and it has been sufficiently discussed above.

51 Ibid

52 op. cit.

53 Infra, p. 409

54 Infra pp. 414 - 415

55 In fact, that was the object of the policy as stated in the resolutions. See note 14, Supra.

56 NB. All the plaintiffs were non-citizens.

The negative answer to the question is that which seeks to find ways and means of assisting the implementation of the government policy within the context of the provisions of the law. It can be more appropriately described as a positive attitude towards the government policy. Such attitude is variously instanced in English law, and specific cases can only be cited by way of illustration. Particular attention is drawn to the war-time cases* of Nakkida Ali V. Jayaratne⁵⁷, Carltona Ltd V. Commissioner of works⁵⁸, Woollet V. Minister for Agriculture⁵⁹ and many other such cases. In all those cases English courts indicate a great reluctance to construe the words of war-time legislation in such manner as to defeat its object.⁶⁰

However, one needs look no farther than in Kenyan case-law to find authority for the proposition that matters of great national importance should be avoided by the courts in only very exceptional circumstances. In the case of Kenya Aluminium and Industrial Works Ltd V. Minister for Agriculture,⁶¹

Sir Alistair Forbes, V. + P. cited the following passage from the trial judge's judgement:

"I think that before deciding to relax the policy, having regard to the possible implications and repercussions in Kenya and Tanganyika of such a step, the Minister would be justified in demanding that an exceptional case should be made out ...to justify a departure from that policy must I think be exceptional grounds';

and said,

"I am quite unable to say the learned judge was wrong in taking this view of the matter. Indeed, I would respectfully agree that the importance of policy to the public interest was such that very cogent grounds indeed must be adduced to justify departure from it".⁶²

The policy the trial judge and Sir Alistair allude to is, a policy to protect the wheat industry in the countries mentioned. One can therefore argue that, if protecting the wheat industry is of such "importance ... to the public interest", a policy to end social and economic inequalities is even of greater significance.⁶³

57 (1951) A. C. 66

58 (1943) 2 All E. R. 560

59 (1955) 1 Q. B. 103

60 See Section (a) of this chapter.

61 (1961) E. A. 248

62 Infra pp. 253 - 254

63 The Court however regards it almost as an irrelevant consideration. SEE, for example, Mr. Chanan Singh, J. in the case of Fernades V. Kericho L.L.C. op. cit.

* By war-time cases is meant cases arising from or connected with war-time legislation

Further the judges in the cases under consideration should have been guided by the words of Sir Charles Newbold⁶⁴ who has stated that,

"where under the constitution a duty is cast upon the courts to give decisions in matters which are primarily political, the judges should ever bear in mind that, unlike the executive, they are not responsible to the community for their political action, and they should as little as possible interfere with the Acts of the executive so long as those are not contrary to the basic rules of natural justice and are reasonably justifiable"⁶⁵
(my italics)

It is submitted the government policy can hardly be said to be "contrary to the basic rules of natural justice", and that it is not "reasonably justifiable".⁶⁶ But it appears the court's attitude towards that policy suggest the contrary. Such attitude is therefore respectfully criticised.

In conclusion to this chapter we shall briefly turn our attention to the probable consequences of the judicial attitudes towards the government policy. That is, how is the government likely to react to these attitudes?

(d) THE GOVERNMENT'S REACTION TO THE JUDICIAL ATTITUDE

In introduction we again draw attention to the advice offered to the judiciary by Sir Charles Newbold in the exceptional circumstances should the judiciary frustrate government action. We reinforce Sir Charles Newbold's advice with that of the former Chief Justice of Tanzania, Mr. T. Georges who advised the Tanzanian judiciary.

64 Sir Charles Newbold was at the time of writing his article "The Role of the Judge as a Policy Maker", 2 East African Law Review p. 128 The president of the E. A. Court of Appeal.

65 Infra., p. 131

66 A possible argument that can be advanced in support of the government policy may be based on the provisions of s. 82(6)(a) of the constitution. It could for instance in Fernades' case, have been argued that s. 16(a) of the liquor licencing Act "impliedly" authorise discrimination on the ground of citizenship.

"to remain independent though not isolated, impartial but not indifferent, positive but not inflexible". 67

Strangely enough, any criticisms which the government may have felt to be merited by the decisions in the cases of Wadhwa V. The City Council of Nairobi, Fernades V. Kericho. Liquor Licencing Court and Shah Vershi Devshi V. Transport Licencing Board, have never been made a public issue. On the face of it, it would appear that the national bourgeoisie has endorsed the views contained in these decisions. It is most probable that the national bourgeoisie has been sufficiently convinced by those decisions that the judiciary has its best interests at heart, and that the attitudes adopted by the judiciary towards its policies have been dictated, by actual state of the Kenya Law. Indeed, the very fact of basing these decisions on the Constitution, a document held in the highest esteem by the national bourgeoisie, is in itself sufficient to negative mala fide on the part of the judiciary.

It is, however, suggested that there may be some dissatisfaction with the court's attitudes towards the policy. Indeed, it is hardly conceivable that, the national bourgeoisie which so emphatically argued that only when Kenya citizens participate fully in the economic life of the country,

"can it be truly said that Kenya's political independence is followed by economic independence". 68 (my italics)

would be reconciled with the decisions which nullify the realization of that object.

We apprehend some unpleasant repercussions from the judicial attitude to the economic policy of the Kenya government. The evidence from some commonwealth jurisdictions indicates that if tension exists between the judiciary and the ruling group, the latter is prompt in taking steps to safeguard its interests. We cite by way of example the cases of Rv. Liyanange⁶⁹ and Awoonor-Williams V. Gbedemah.⁷⁰ In both those cases the ruling class (i.e. the government) exercised its legislative powers to negative the effect of the decisions, hence causing embarrassment to the judiciary.

67 Mr. T. Georges, "Independent Judiciary", Law and its Administration in a one-party State, Edited by James R. W. and Kassam F. M. (E. A. L. B. Nairobi 1973) p. 62

68 Mr. Jomo Kenyatta, the Prime Minister, in The Kenya Development Plan 1964/1970 op. cit., p. (iii)

69 (1963) N. L. R. 313 (Ceylon)

70 Ghana Const. S. C. 1/1969; digested in (1970) C. C. 18, S. C.

We submit therefore that it would be most unfortunate for the judiciary if it forced the Kenya government to resort to such means: for this would undermine public confidence in the former.®

Reference was made earlier in paper to the fact that the judiciary during the colonial era, played a great role in consolidating the means of production in the hands of the local colonial bourgeoisie.⁷¹ In other words the judiciary closely identified itself with the policies of the colonial regime. As was submitted, the judiciary was merely an aspect of colonial administration. The Africans - later to the national bourgeoisie who replaced the colonial bourgeoisie who regarded the function of the judiciary as the implementation, rather than the criticism or disapproval of the government policy. Thus on independence the national bourgeoisie expected it to continue in the performance of this function. Therefore, when the judiciary suddenly turned critic to the government policy, the national bourgeoisie was very probably reminded of the role the judiciary played in colonial exploitation.

Even if the national bourgeoisie did not come to such realisation, there is every likelihood that it will do so. And when does, the judiciary will be in for a rough time.

71 Kenya Aluminium Case, op. cit

® It is to be noted that the Kenyan judiciary is still looking for legitimacy in the new independent state after its oppressive role in colonial state.

C O N C L U S I O N

If one accepts the function of law to be the protection of the individual's personal and proprietary interests, per se, then one has little to be surprised with ~~in~~ the Kenya judiciary's attitudes towards the government policy. But one may note that, property rights in capitalist societies are, in the final analysis, the monopoly of a few individuals. Hence in those societies, protection of the individual means the preservation of his privileged position in his social context. Under such analysis, one may find himself dissatisfied with the judicial attitudes towards the policy and consequently attack it upon a number of grounds. @

Firstly, the judicial attitude towards the policy indicates a desire to preserve the (colonial) status quo. It may be noted that the judiciary was intensively employed by the colonial regime to consolidate and protect the property interest of the local colonial bourgeoisie.¹ The courts desire to preserve the (colonial) status quo finds expression in a narrow and legalistic interpretation of the law. Witness for instance Mr. Chanan Singh's, J. reasoning in the case of Fernades V. Kericho Liquor Licencing Court.² To the extent that the judiciary desire to preserve the colonial socio-economic organisation, it can be argued that it assists in the preservation of the injustice and unfairness of the colonial system.

Secondly and consequent upon the desire to preserve the status quo, the judicial attitude impedes social and economic progress. The effect of the courts' decisions in the policy cases³ is that the policy is incapable of implementation. In fact, the court goes to great lengths to prove that the law itself, and not its views, is responsible for rendering the implementation of the policy ^{impossible}. In fact, there is an implicit admission that the court is not impressed either by the substance or the urgency of the policy (The allusion here is to Mr. Chanan Singh's J. admission that he was "not concerned with the rightness or the wrongness of the policy but with the law as it is worded ..."⁴)

1 See Ghai and McAuslan, Public Law and Political Change, op. cit. Ch. 3 for a general survey of agrarian administration; and the case of Kenya Aluminium op. cit

2 Op. cit

3 NB. The allusion is to the cases decided on the Kenya government policy as expressed in Ch. 2 of this paper.

4 Devshi V. T. L. B., op. cit., page 296

@ It may however be conceded that Kenya is not a truly capitalist state. But its philosophical (or rather its ideological) orientation is to a considerable extent derived from the West.

Thirdly, judicial attitude ignores the national importance of the policy. This is not surprising if it's accepted that it desires to preserve the colonial status. But even aside from that desire, it would have been thought that the substance of the policy spoke loudly of its merits, and that judiciary would assist in its implementation. The contention that judicial resourcefulness saves the situation where public interest is threatened is reiterated here. In times of crisis the judiciary is known to find implied authority to do certain acts, which in normal circumstances, it would have ruled Ultra Vires⁵. It is possible that had the judicial attitude to the policy been otherwise, it would have availed itself of the implied authority which, it is argued, can be found in the law.

Fourthly, because it was indifferent to the policy, the judiciary was not particularly minded to construe the provisions of the law widely. Instead, its construction of the law is strict and legalistic, and it is not necessarily accurate. For instance, discrimination, whether on citizenship or ethnic background, is so narrowly considered that the provisions of s. 82(3) of the constitution receive only perfunctory consideration. That section prohibits discriminatory treatment only when it is "Wholly or mainly" attributable to such descriptions as "race", "place of local origin" etc. Since the policy has an underlying economic basis, it is arguable that, discrimination on racial or national status grounds, is mainly attributable to relative economic levels in the Society. In other words, the policy does not discriminate on race qua race, or citizenship⁶. Thus the court by its narrow construction of the law deny implementation to the policy.

Brief mention may be made of the relationship between English jurisprudence with regard to administrative law, and judicial attitude to policy in Kenya. In England the law (and the courts) serves a fully developed and homogenous bourgeoisie. Thus it sympathises with government policy when national issues are concerned: for the capitalist superstructure is threatened with insecurity.⁷ But in Kenya the bourgeoisie is not homogenous.⁸

5 Liversidge V. Anderson, op. cit.

6 The observation is limited to the Kenyan context.

7 SEE cases on war-time legislation.

8 Three sub-classes are discernible: the 'national' bourgeoisie, the citizen 'colonial' bourgeoisie and the non-citizen 'colonial' bourgeoisie.

The policies of the government reflect the interest of only one of the sub-classes.⁹ Hence it is arguable that being brought up in the English tradition the Kenyan court find itself at a loss. On the one hand property rights should be protected. On the other, the dominant sub-class policy, though incidentally reflecting its interests, has a lot to say in the public interest.¹⁰ It is therefore concluded that refusal to enforce such a policy may be indicative of a desire to protect property: a sentiment derived from English jurisprudence.

This paper concludes therefore that unless the judiciary is prepared to adopt a more positive attitude towards the policy, friction may be generated between it and the government. And in that event the judiciary will be the loser.

9 The 'national' bourgeoisie, i.e., the Africans.

10 The Africans being ignored by the Colonial State were quite entitled to improve their standard of living, and the fact that the ordinary 'Mwananchi' racially identifies with the 'national' bourgeoisie, may be of benefit to the former.

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