

THE ROLE OF AGENCY IN THE KENYAN ECONOMY:
A CRITICAL ANALYSIS THEREOF WITH SPECIAL
REFERENCE TO BATA SHOE COMPANY (K) LTD.

A Dissertation submitted in partial
fulfilment of the requirements for the
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(i)

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(ii)

RESEARCH QUESTIONNAIRE

1. Give a historical outline of the origin, development and present day structure of Bata Shoe Company.
2. What are your future prospects, especially in relation to expansion, priorities and any related handicaps?
3. Who is in Bata Shoe Company? Is the share holding limited by guarantee or by shares?
4. How many employees does the company have? Do they have a Trade Union? If yes, how is the relationship between the management of the company and the Union leadership?
5. How is the management of Bata Shoe Company? How many directors?
6. What role does your public relations department play?
7. How do you train your personnel that are recruited locally?
8. What is your relationship with other Bata Shoe Company plants outside Kenya, especially the mother body? Does the management make any decisions without prior consultation with the mother body? Why?
9. Give statistics as to the nature of the products and the sales.
10. How many retail outlets (agents) do you have? And what are the terms of their agency?
11. Do you produce goods for the home market only or even for export too? If the latter is the case, which states are your chief importers and why?
12. What is the mode of payment to your Agents?
13. What is your source of raw materials?
14. Where do you buy your machinery from, including the spare-parts?
15. What is the standard and quality of your products vis-a-vis imported goods and other local manufacturers?

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16. Do you have any special class of consumers for which you focus your efforts of production? Why?
17. Are there any payment problems from agents?
18. Do you have any import or export problems?
19. If you have an export market, do you engage in any exclusive production of goods for the Kenyan market?
20. Who are your Bankers? Why?
21. What are your contributions to the spirit of national development in the country? Why?

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S T A T U T E S

KENYAN ACTS

1. The Constitution of Kenya, Act No. 5 of 1969.
2. The Foreign Investment Protection Act: Cap 518.
3. The Prevention of Corruption Act: Cap 65.

FOREIGN ACTS

1. The Factors Act of the United Kingdom (1889).
2. The Prevention of Corruption Ordinance of the U.K. (1906).

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THE ROLE OF AGENCY IN THE KENYAN
ECONOMY: A CRITICAL ANALYSIS THEREOF

INTRODUCTION

International commercial patterns have from time immemorial been twofold, viz, the exploiters or commercial imperialists on one side and the exploited on the other. These trends have been a common characteristic of human history and have been changing names and faces from time to time: namely, from colonialists to neo-colonialists; imperialists to developed nations etc. Even the former colonies on the attainment of their "flag" independence have in an attempt to show that their apparent independence ganged up to form what constitutes what is now called "The Third World". The truth is that they are still exploited whether they are called "The Third World" or "Developing Nations", they stand in a permanently disadvantaged position in their relations with the so-called "developed" countries. They are victims of the most ruthless exploitation and underdevelopment.¹

These differences in the level and patterns of development cannot be understood without making an investigative inquiry into the operations of multi-national corporations which are the persistent and

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consistent instruments of exploitation and consequently, underdevelopment. We have to demystify their paternal role in our development process by showing that as a matter of fact, their role is not to develop Kenya, but to develop the metropolises or the so-called donor countries.

Kenya features prominently on the list of the states that are victims of imperialist domination and exploitation. The ruling class would like to paint a picture of a country flowing with milk and honey whenever they make public pronouncements. They call it a shining symbol of commercial success on the African continent. Those who say these things are the ones who collude with international imperialism. They are its agents. Imperialism needs agents to facilitate and maintain their exploitation of the workers of Kenya and other exploited nations. These agents are necessary for masking their brutal exploitation. The plain truth is that these compradors on the local scene are mere tools of exploitation. They are the elite force that struggles to maintain the status quo.² The actual eaters live outside Kenya, in fact outside Africa.³ It is high time we unveiled their masks and saw, or even knew what role multi-national corporations play in the mechanisms of imperialism. Similarly, we have a duty to understand what role agency plays in our economy.⁴ The role of

agents as benefactors to the people of Kenya must be dymistified.

In the multilateral phase of imperialism and its numerous forms and faces, besides the production itself, the chief vehicle for the circulation and distribution of goods from developed (manufacturing) to underdeveloped economies (markets) is through the multinational firms and their appendages. Where the market forces yield reasonable returns, the multinational firms extend wings of their factories and industries to such market areas. Such is the case with Bata Shoe Company, whose operations and successful exploits are to be critically viewed in this treatise. From the beginning, we have to note that the hypothesis is based on the postulate that the transformation of the Kenyan economy has resulted in a dependent state. The dependency is expressly manifest in three major roles performed: the export of agricultural and other "cheap" raw materials; the provision of investment outlets for foreign capital;⁵ and the provision of capital for foreign industrial products. The latter two roles of dependency on international capital are what this study demonstrates. One of the ways of looking at these is through examination of circulation and distribution of industrial products and how law governs the process.

Also to be examined are the relations of production and forces of production. This will involve largely the factual data of the operations of the case study and its relations with international capital.

NOTES

1. For the theory of underdevelopment, see Walter Rodney: *How Europe Underdeveloped Africa*; Colin Leys: *Underdevelopment in Kenya*.
2. Rodney, op.cit.
3. Ngugi wa Thiong'o: *The National Struggle to Survive*, where he writes: "...social cannibalism which has reduced over three-quarters of mankind to beggary, poverty and death, not because they don't work, but because their wealth goes to feed, clothe and shelter a few idle classes in America, Europe and Japan".
4. See Colin Leys (*Underdevelopment in Kenya*) and NCKK - *Who Controls Industry in Kenya*.
5. Cap 518 *Foreign Investment Protection Act*.

CHAPTER ONE

WHAT IS AGENCY?

Agency is an important branch of commerce. Its importance has been highlighted by Lowe, a prominent bourgeois scholar who says:

*Any study of modern commercial law must start with agency because it lies at the very heart of the subject and because without it, modern commerce would not exist.*¹

Like in any other branch of the law, no definitions are conclusive or exhaustive. Osborn's concise Law Dictionary defines an agent simply as a person employed to act on behalf of another. Many textbook writers have come up with different definitions of an agent, but in the final analysis, one finds that in fact they talk about one and the same thing. Fridman defines agency as

*the relationship that exists between two persons when one called the agent is considered in law to represent the other called the principal in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or disposition of property.*²

Fridman calls this definition a brief and tentative description of agency. One has, however, to note that the representations and actions on behalf of another are only so when they affect the latter's legal position, that is, his rights against and liabilities towards other people (commercially). It has to be noted too that such relations are strictly commercial and not social or other non-legal relations. Thus in simple and clear terms, an agency is the employment of another person to execute or discharge some legal obligation or achieve some legal result.

The important aspect of agency is the consent of the parties and the authority of the agent. Lowe defines agency as:

*...a relationship which arises whenever one person (an agent) acts on behalf of another person (principal) and the person so acting has the power to affect the principal's legal position with regard to a third party.*³

Legally therefore, an agent brings his principal into relationship with a third party and can thus make contracts and dispose of the goods on his behalf either by consent (express) or apparent authority. The Editors of Bowstead state that agency is

the relationship that exists between persons, one of whom expressly or impliedly consents that the other

*should represent him or act on his behalf, and the other of whom similarly consents to represent the former or so to act.*⁴

The term agent has often, in both normal and commercial usage, been used and abused in a manner which has resulted in much confusion. Some people have described agents as representatives of others. This is of course erroneous since two unequal persons (A & P) cannot interchange their positions under any circumstances. As a matter of fact, a representative is not always an agent. An agent cannot be equal to a servant either, though there are times when their duties and responsibilities overlap. Even courts have been at great pains to distinguish between a servant and an agent. In R-V- NEGUS⁵, the House Of Lords held that for the purposes of the crime of embezzlement, an agent is incapable of being guilty since he only acts for the principal who bears liability for his actions. Even a servant could be discharged and his master charged under the principal ~~of~~^{le} vicarious liability, but on rare occasions.⁶ In an early English case of HAYMAN-V-FLEWKER⁷, Willes J held that "the term 'agent' doesn't include a mere servant or caretaker or one who has possession of goods for carriage, safe custody or otherwise, as an independent contracting party; but

only persons whose employment corresponds to that of some known kind of commercial agent..."

The relationship of agency thus revolves around the question of consent. Must the consent be from the Agent, the Principal or both? The American Restatement of the law in its definition of Agency stresses the question of consent as a fundamental aspect of any relation that purports to be an agency relationship. It states:

*...the relationship which results from the manifestation of consent, by one person to another, that the other shall act on his behalf and subject to his control, and consent by the other so to act.*⁸

Many court decisions have also tended to highlight the question of consent in such a relationship. In POLE-V-LEASK⁹, Lord Cramworth stated:

No one can become an agent of another person except by will of that other person.

And in GARNAZ CO. INC.-V-H.M.F. FAURE AND FAIRCLOUGH LTD¹⁰, Lord Pearson said:

The relationship of principal and agent can only be established by the consent of the principal and the agent...

But he went on to say:

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If they have agreed to what in law amounts to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it.

Thus, even where the parties (A & P) purport to disclaim their relationship on account of lack of consent, the court can imply such consent, depending on the circumstances and therefore create what is in law called apparent or constructive consent. This gives the courts the power to imply and uphold an agency relationship, even where A & P disclaim it and this greatly erodes away the question of the freedom to contract for whenever the court implies such consent and enforces a deal in favour of one of the parties, the rational judgement that can be made about the decision is that the said court has exercised some undue influence on one of the parties.

Much as Agency is important to commercial law, legislators have not given it much attention in this country. Up to-date, there is no specific statute to govern agency operations in commerce. Court decisions often simply follow decisions reached in English courts. Even Britain, from where our laws have been imported does not have a statute on this important subject.

Kenya's statutory definition of Agency can however be traced back to the Factors Act of England (1889).

52(1) of the Factors Act defines a merchantile Agent in the following terms:

where a merchantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business of a merchantile agent, shall subject to the provisions of this act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

This long-worded definition does not however say much about the definition of Agency. Besides the common definition that an Agent acts for another in the ordinary course of business, the act also protects persons who deal in good faith with merchantile Agents. Where the purported Agent is not acting in the ordinary course of business, the acts cannot be said to be binding on the principal because the agent will be said

to be exceeding his duty as an Agent; acting without authority or to be on a frolic of his own.

The only attempt at the definition of Agency in Kenyan law is in the Prevention of Corruption Act¹¹ which is a reproduction of the prevention of corruption Act of 1906 of the U.K. § 52 of the same specifically defines an Agent as to include "any person employed or acting for another", and that the expression principal includes an employer. This in effect amounts to the conventional definition of Agency as a relationship where one party called the Agent acts for another called the Principal and by so acting, he affects the Principal's legal relations with third parties.

AUTHORITY OF AN AGENT

The most important and central feature of Agency relationship is the power of the Agent to affect his Principal's relationship with third parties. This power flows out of authority. One cannot effectively and authoritatively talk about Agency without the mention of the Agent's authority. Fridman has observed that the question of authority is the fundamental concept of Agency relationship for it is because of this that the Agent affects the Principal's legal liabilities and powers.¹² Anything which the Agent

does within his power binds the principal. In the case of HEWITT-V-BONUIN¹³, Mackinnon L.J. gave an example of what constitutes authorities with this analogy:

If A suffers damage by the wrongful act of B, and seeks to say that C is liable for that damage, he must establish that in doing the act, B acted as the Agent of or Servant of C. If he says that he was his Agent, he must further show that C authorised or apparently authorised the act,...

The authority of an Agent can take several forms depending on the nature of the Agency, the conduct of the Principal and many other factors. There are certain circumstances when the Agent may have power to affect the legal relations between his Principal and third parties, even if he does not have the authority of the principal. And as it has been noted earlier, one does not cease to be an Agent whenever he does an act which is not authorised. One should also venture into the distinction between authority and power. The distinction has been clearly stated by Professor Gobin as:

Authority differs from power: Authority is a fact; power is a legal relation. Authority is conduct of the Principal, including either oral or written communication to the Agent; power is neither conduct

nor a document. Authority may create power, but not always; power may be created by Authority, but may also be created by other operative facts. Authority denotes merely the factual relationship between Principal and Agent; Power denotes the concept of possible future changes in the legal relations of the Principal with other persons...

Consequently, the Agent's power to affect the legal relations of his Principal may arise from:

- a) Actual Authority: Express or implied.
- b) Apparent Authority
- c) Usual Authority

Actual Authority is the authority actually manifested by the Principal to the Agent. It may be either express or implied. It is sometimes termed as real authority.

In the case of FREEMAN AND LOCKYER-V-BUCKHURST PARK PROPERTIES (MANGAL) LTD ¹⁴, Diplock L.J. said that:

An 'actual' authority is a legal relationship between Principal and Agent created by a consequential agreement to which they alone are parties. Its scope is to be ascertained by applying Ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, and the course of business between the parties.

Actual authority is express when it is specifically created and limited by the terms of the agreement and implied when its inference is drawn from the nature of the business which the Agent is employed to transact. The Agent's implied authority extends to all subordinate acts which are incidental to and necessary for the exercise of his express authority.

Apparent authority is also known as ostensible authority. It is the Agency which arises from the Principal's conduct. The Principal may by his conduct allow the Agent to appear to have authority or to have a greater authority than he actually has. Normally, the Agent in fact has no authority but appears to third parties to have it as a result of a representation to the said third parties by the Principal. Under such circumstances, the Principal is estopped from denying the Agent's authority to act on his behalf, hence Agency by estoppel.¹⁵

Usual authority means authority which a person normally possesses in certain circumstances to act on behalf of another person, whether or not he is actually authorised so to act. The authority here is limited to the usual course of business¹⁶.

Another important aspect of Agency is the doctrine of ratification. There are certain circumstances when

the Agent has no authority to act for the Principal but purports to conclude a contract on the Principal's behalf. The Principal may on hearing of it, ratify the Agent's contract thereby adopting it and binding himself on to it¹⁷. The three legal ingredients of ratification are:

1. The Agent, whose act is sought to be ratified must have purported to act for the Principal; the Principal must be a definite or identified or identifiable being, whether natural or artificial.
2. At the time the act was done, the Agent must have had a competent Principal.
3. At the time of ratification, the Principal must be legally capable of doing the act himself so as to have the capacity to ratify.

One has to note that the effect of ratification does not authorise the Agent to perform other unauthorised acts in the future.

Also important to note is the Agency by operation of law. This type of Agency arises where there is no consent to the person acting as an Agent, yet for some reasons of policy, the law treats one person as the Agent of the other. Such Agency may arise under The English Married Women's Property Act (1898) which allows

a woman to pledge her husband's credit.¹⁸ It may also cover the Agency of necessity as in the cases of sinking ships or ship-wreckages.

In his dispatch of his agency duties, it is important to note that, much as the authority can be implied or the ~~an~~ authorised acts ratified, disregard of instructions by the Agent may lead to liability amounting to the full value of the goods lost as the result of it. In STEARINE CO.-V-HEINTZMANN¹⁹ part of the Agent's instructions were not to part with the possession of the goods until they had been paid for. He was held liable to pay his Principal the full amount of the goods.

The question of Agency and the Agent's authority should be looked at in the light of Master/Servant relations, arguments to the contrary notwithstanding. The legal rules meant to regulate their relationship guard the interests of the Principal more than the Agent's that is where the importance of the question of authority lies: the Agent cannot be heard to deny the Principal's title to the goods. He cannot make any profits without the knowledge and consent of his Principal and he cannot at any one time allow his personal interests to conflict with those of the Principal. He must hand over all profits, including the bribes.²⁰ The Agent must therefore make sure he serves the interests of the Principal.

FOOTNOTES

1. Robert Lowe: *Commercial Law* P.1
2. Fridman: *The Law of Agency* (3rd Ed) P.8
3. Ibid. P.1
4. Bowstead on Agency (13th Ed) 1968 Article 1.
5. (1873) L.R. 2C.C.R. 34
6. On the question of Vicarious liability, See:
○ Lloyd-V-Grace, Smith & Co. [1912] A.C. 716; and
George Bwanika and Another-V-Uganda [1957] E.A. 279
which held that the Master has a fictitious control
over the behaviour of his Servant.
7. (1863) 13 C.B.N.S. 519, 527.
8. American Restatement of the Law: 1958(1)
9. (1860) 29 L.J. CH 889
10. [1967] 2 ALL ER 353, 358
11. Cap 65
12. Ibid. P.2
13. [1940] IKB 188; 191
14. [1964] 1 ALL ER 630; 644

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15. See Habib Devji-V-Tarmohamed and Another
[1960] EA 1022, and Edmund Schulter and Co.
(Uganda) Ltd-V-Patel [1969] EA 259.
16. McDonnell-V-Kimani [1967] E.A. 702
17. See Cornwall & Co-V-Rafiki [1924]
10 KLR 78 & Devji's case (supra).
18. See Nanyuki General Trading Stores-V-Mrs Peterson
15 EACA 28
19. (1864) 17 C.B (N.S) 56
20. See Mutunga: *Agency Law and Sale of Goods*
and Reading-V-A-G [1951] A.C. 507.

CHAPTER TWO

AGENCY AND ITS INTERNATIONAL DIMENSIONS: THE FACILITATION
OF INTERNATIONAL COMMERCE

The capitalist system is essentially an international system. If it cannot operate internationally, it will break down completely.

HENRY GRANDY (1942)

U.S. ASS. SECRETARY OF STATE

HISTORY

The sources of the current law of Agency are primarily the common law, and partly the principles of Equity and Merchantile law. In the medieval period, instances of Agency did occur. Here, Agency law is said to have been at its infancy. There were instances of Kings and prelates empowering Agents to borrow money in their names. The early appointments of attorneys were for this purpose. Maitland¹ observes that the law was manifestly in the clergy during the reign of Edward I where he gives an example of an Abbot being sued for the price of goods purchased by a monk for use at the convent.

The medieval community remained satisfied with a rudimentary concept of Agency until in the later centuries

when merchantile necessity went beyond this and imposed liability on a master for the acts of his apprentices and Agents. From the seventeenth century onwards, following the development of commercial life in various aspects, such as the growth of trading companies, the law of Agency grew in importance and extension. Merchants like Marco Polo emerged, making journeys to distant places in search of trade and merchandise. Eventually, Agency emerged as a separate concept, distinct from the relationship of masters and servants. This historical onward move explains the steady move from medieval commerce to the current highly developed transnational and imperialist commercial mechanisms whose primary feature is its imperialism and exploitation of poorer and less developed nation states. Agency is the midwife to their material exploitation.

COMMERCE

A man has only one pair of hands with which to work, and only one mouth with which to speak. He cannot be in more than one place at the same time. As times change, man's needs also expand, especially in commercial circles. The failure to satisfy one's needs and desires by oneself has given ^{rise} to Agents whose principal work is to act on behalf of others. For more production, wider

markets, more fairs (in distant places), extra hands are necessary for attaining any reasonable heights. In simpler terms, Agents play more or less a role of servants to their Principals.² The development of man and his society is therefore a development by man of his productive forces together with the corresponding production relations and socio-economic organisation. As shall be analysed later, man's entirely selfish and ageless needs have been responsible for the current numerous socio-politico-economic inequalities that now plague the entire human race. This is why we have some people (Agents) acting on behalf of others (principals) in all aspects of life. In its remote sense, Agency can be reduced to superior/subordinate relationship which does not govern only individual persons but also the relationship between nation states.

Increasingly, smaller states have inevitably found themselves running errands for the bigger ones with their relationship reducing the former into the latter's underdog. In the final analysis, we find that as a matter of fact and practice, the role of an Agent is not limited to commercial transactions. It spreads to cover socio-political aspects too. Heads of diplomatic missions to foreign states are agents of their countries to the said states. The question of Agency therefore goes over

and above the horizon of commerce and has now become manifested in any form of representative capacity. For the purposes of this discussion, however, more concentration will be focused on the role of Agency in commercial circles, where it is often used as an instrument for fraud, exploitation and underdevelopment of some states by others; some social classes by others. suffice it to mention the common developmental trend which has created class alliances whose socio-economic and political result has been the total subjugation and domination of some classes by others. For instance the role of Agency for foreigners in the running of their industrial firms and the distribution of their industrial goods is manned exclusively by the comprador bourgeoisie. Consequently, this social class has its base in foreign alliance to which it fulfills the role of an Agent.

This new form of Agency does not, however, bring class struggles to an end, it instead intensifies them. These class struggles are often defined by bourgeois scholars as political and class struggles. The truth is that every political struggle is a class struggle. In the words of Fredrich Engels:

*In modern history...all political struggles are class struggles.*³

Bourgeois scholars, in their unscientific analysis of

society do not want to admit that all political struggles are class struggles; they often hide under a canopy of loose and meaningless terms and phrases like 'political disturbance', 'political unrest', 'political discontent' and so on.

With the said class divisions and endless struggles, access to the ownership of the means of production becomes impossible for the overwhelming majority of wage-earners and salaried personnel. Such ownership becomes a monopoly in the hands of one social class which possesses and controls both capital and capital reserves. Where the class that controls such capital is foreign based, there are always ready agents in the state of operation. These are the ones known as the Comprador Bourgeoisie whose operation is not only mercenary in form, but also mechanistic, fraudulent and malicious. They are used by imperialism as tools of operation and exploitation to the entire populace of their own states. This development has in turn moulded class alliances in the entire capitalist world. The interests of the Japanese, American and Western European Bourgeoisie is reflected in and represented by the comprador bourgeoisie in any other given state.

Human societies have become used to respect of the law; they have also learned to adhere to such laws so zealously and slavishly that they hardly rise to question

the legality and justice of some acts perpetrated under cover of the law. Few people within the ranks of the leadership are ready to question the legality and reasonableness of a law that facilitates wanton exploitation and oppression at their midst. On the whole, revolutionary pessimism reigns. One cannot for instance, purport to argue that a law that allows foreigners to repatriate the entire bulk of profits made through their investment is either legal or reasonable.⁴ I am in agreement with Willy Mutunga when he states that laws in this country are used as vehicles of exploitation.⁵ The law of Agency does exactly that. Under the umbrella of Agency, many foreign firms are making a steady inroad in Kenya's economy. Companies like Lonrho, Brook Bond (K) Ltd., Bata Shoe Co., and many others have this as their common intention.

Arguments to the contrary notwithstanding, we have to note that the essence of Agency is an important one. Bourgeois commerce and its numerous forms and phases would ground to a halt if there was no Agency. The fundamental aspect of capitalist commercial law is that goods are produced for their exchange value and they must reach the ultimate consumer. This in turn enables the industrialist to appropriate, capitalise and accumulate the surplus value.⁶ Agents are there to play a middleman role. Inter-nation trade would come to a standstill if

the manufacturers, after the last stage of production of any commodity in their factories and industries, closed down the said factories and went to sell the products before returning to resume the production process. The need for a wider market, and the continuous capitalist expansion make the producer as of necessity need Agents to make contracts on his behalf. My own view about Agency is that it is the inevitable cornerstone of commerce, and international trade owes its successful operation to it (Agency). It will, I believe, continue to play this role at greater levels as commercial relations expand day by day, and as long as there is imperialistic domination in commercial circles.

IMPERIALISM

*The days of small nations have long passed away;
the day of empires has come.*

CHAMBERLAIN (1902)

In order to save the 40 million inhabitants of the United Kingdom from a bloody civil war, we colonial statesmen must acquire new lands to settle surplus population, to provide new markets for the goods produced by them in factories and mines. The empire as I have always said, is a bread and butter question. If you want to avoid

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civil war, you must become imperialists.

CECIL RHODES (1895)

Commercial needs as we understand them today, which hinge on the distribution and exchange of goods and services were unknown to early societies who lived under subsistence economies. They have emerged from advanced specialization and industrial revolution which took place in Europe in the sixteenth and seventeenth centuries. The essence has been that one person or group of persons produces more than they need; consequently, he has to exchange some of his produce with what he does not have or with money to buy what he does not have or produce.

At the dawn of the industrial revolution, and throughout most of the 19th Century, political economists generally assumed that the development of capitalism would be cosmopolitan and that this would make national frontiers and politics obsolete. But at the turn of the 19th Century, as the industrial Revolution spread, and the development of capitalism became increasingly uneven and competitive, capitalism was nationalised. The spread of capitalism started assuming dangerous proportions as every industrialising nation wanted a corresponding commercial empire to facilitate the development of its capital. Germans, British, French

and Belgians were the most notorious in the game. A significant thing to note about the internationalisation of trade in the past two centuries was that Europeans took the initiative of going to other parts of the world. What was therefore called international commerce (trade) was nothing but the extension of European interests overseas. Concerned with the question of the rapid fall of profits, which would in turn maim their position of commercial supremacy, exponents of imperialism had to take up a new phase by radically changing the organic composition of the world market. Investment in areas of cheap labour and abundant market was resorted to. Trips and expeditions throughout the world were made.⁷

Amongst the major factors that precipitated imperialism was commerce. It was primarily because of commerce. The desire for the mass distribution of goods from the mass production to convert abundant concentration of capital led imperialists to places like Africa. Africa realized sharp and violent rivalries on her soil between French and British capitalists in the Niger delta; the Portuguese and Belgians in the Congo; the Germans, British and Portuguese in East Africa and many other parts of the world that were so affected. Historical evidence has proved that it was because of these escalating commercial rivalries within the ranks of imperialists that Bismarck, the chief architect of the nineteenth century imperialism

and the then Chancellor of Germany, called for a conference to divide up the areas of exploitation.⁸ This had the consequence of turning the so called world market into an imperialist market. This conference pacified, but did not end commercial rivalries and as it later happened, the continued struggle, scramble and dissatisfaction caused two major wars amongst the exponents of imperialism in 1914 and 1939.

Towards the end of the nineteenth century capitalism emerged in the form of transnational corporations (TNC). A transnational corporation can be defined as a business enterprise with headquarters in one country and activities in several countries. By 1945, Transnational activities became more voracious and fierce with forces of competition reaching a more advanced level, even within the same states, but occasionally talking of capitalist unity when faced with a common enemy. Monopolistic and capitalistic associations, cartels, syndicates and trusts first divided the home market among themselves and obtained more or less complete possession of the industry of their own country. As the export of capital through Transnationals, and as their foreign and colonial connections and "spheres of influence" of the big monopolistic associations expanded in all ways, things 'naturally' precipitated into what the writer calls

international agreement amongst these associations for the formation of international cartels. Sometimes, however, these cartels evolved out of fierce competition where some smaller ones were consumed and subsumed by the bigger ones as a consequence. These internationals cannot function and reap enough profits from foreign nations without setting up satellites in such nations to act as their commercial agents. The said agents have the legal power to act like the principals themselves.

This discussion raises the question of foreign principals and their local agents and its legal implications. Does the act of an agent in Kenya bind a principal based in the UK or US? This brings up the question of conflict of laws. The law of agency is not clear on the effect of a foreign character of a principal upon the personal liability of an agent acting for him in a foreign state. For instance what responsibility does TINY ROWLANDS of Lonrho have towards the civil and criminal trespasses of his merchantile agents in states of operation other than Britain where the company is based?

There is a general presumption that the agent assumes personal liability and does not have anything to create privity of contract between his foreign principal and the local third party. In an old English case of *ELBINGER-V-CLAYE*⁹, Blackburn J. said:

Where a foreigner has instructed English merchants to act for him, I take it that the usage of trade established for many years has been that it is understood that the foreign constituent has not authorised him to pledge his credit...or to establish privity of contract between him and the home supplier.

In effect therefore, Blackburn's view is that the foreign principal bears no liability to his agent's trespass. As a matter of fact, this argument of the learned judge wears away the principal/agent relationship in that such relationship in a strict sense empowers the agent to create privity between his principal and third parties. My opinion is that such interpretation would not be acceptable as a proper legal position in Kenya. Such an interpretation, if upheld, would be a tragedy in a country like Kenya where multi-nationals have a free hand in its economy. Foreign based principals should shoulder the follies of their local agents. Blackburn J's holding has not had any precedent backing it. In a decision that followed a few years later, in the case of *WATTEAU-V-FENWICK*¹⁰ an Australian based principal was held fully responsible for the acts of his London based agent. The same rule was extended to the case of *MILLER, GIBB-V-SMITH & TYRER*¹¹ where it was held that though local

agents are loath to make themselves personally responsible for foreign principals, and since the agent's acts are for the benefit of the principal, the law would not let that latter get away with it.

One should, however, understand that though English law applies in Kenya via the Judicature Act, these decisions, however authoritative, cannot be taken as representative of the clear legal position in Kenya. In the landmark case of DODHIA-V-NATIONAL GRINDLAYS BANK /1970/ EA 198, it was established by the Court of Appeal for East Africa that neither the High Court nor the Court of Appeal is bound by any English decision and that the Court of Appeal is free to debut from its own past decisions whenever it wishes to do so. However, the question here is more complicated because neither Britain where Kenya laws trace their roots back to, nor Kenya itself have any statute specifically governing Agency; proper understanding of the same will only be adequately done through case law; though it should be maintained that the applicability and acceptability of such decisions as authorities will depend on their reasonableness.

As has been noted already, the successful unleashing of the industrial revolution enabled profitable experimentation and developmetts which set in motion a new system wth new raw materials. Agency law developed

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as a result. The essence of this branch of the law is generally to protect the principal's property in goods during the process of distribution. The obligations and duties of the principal and agent reinforce this point. The agent must inter alia, perform his duties diligently to ensure effective maximisation of profits. The size of the enterprise, whatever its nature and its technical aid always harbours monopolistic tendencies. While there is nothing to stop the principal from ^{employing} developing the services of more than one agent, the agent cannot, without express agreement to the contrary, serve more than one principal for he is not supposed to allow the interests of his principal to conflict with his own or other people's.

Ole Lando, writing on Agency has observed:

*The commercial agent is an independent person permanently engaged in soliciting orders and concluding contracts with third parties on behalf of and in the name of the principal. Representation is the sole occupation of a commercial agent and he must never allow his interests to conflict with those of the principal, or make contracts in his own name.*¹²

It is thus the agent's duty to safeguard the principal's interest, including the goodwill. He must use reasonable diligence and care in the execution of his duties. He

must make an effort to sell the principal's goods. In the words of Mutunga:¹³

...he must disclose all material particulars so that the principal can decide whether or not he will allow the Agent to act. He must hand over secret profits, and even bribes.

This reduces the agent to no less than an underdog and a money-generating tool to the principal. These safeguards enable the principal's property to expand limitlessly. The result is the increased investment of capital which in turn gives rise to increasing demand for new enterprises and consequently an increased demand for new agents. This has precipitated the world-wide search for raw materials to sustain the expanding industries and fashion the equally expanding markets adequately. As Mutunga has observed in one of his writings on commercial law, "capitalism has taken up a strict observance of the Marxist doctrine of dialectics, it is always on the move towards its impending doom". To this endless spread of commerce (imperialism), Marx and Engels have observed:

*The need for a constantly expanding market chase the Bourgeois over the whole surface of the globe.*¹⁴

It is from such perspectives that the influence of concentration on the formation of large industrial

monopolies in a whole sphere of industry stands out with crystal clarity. Lenin has observed:

*The rise of monopolies, as the result of concentration of production is a general and fundamental law of the present stage of the development of capitalism.*¹⁵

The current development of commercial operations have come to a state where people in one society toil and moil, but the proceeds are taken by the agents for repatriation to their principals in the metropole. This makes the role of the agents and the comprador bourgeoisie dangerous enemies of the exploited societies since they are used as instruments of the same. At this stage, I have to note that at no one time do the interests of the multinational corporations coincide with those of Kenya's or any other exploited country's economic needs, for originating from foreign economies, they cannot pretend to have Kenya's interests at heart. Important to note is that these corporations operate in a well protected atmosphere and through their links with the state functionaries, they are assured of a stable future.¹⁶

In the words of Lenin:

The development of capitalism has arrived at a stage when, although commodity production still 'reigns' and continues to be regarded as the basis of economic life, it has in reality been undermined and the bulk of the profits go to the 'geniutes' of financial manipulation

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*and their emisaries all over the world...the latest phase of capitalist development has resulted from the formation of all powerful monopolies.*¹⁷

KENYA'S ECONOMY (UNDERDEVELOPMENT)

Sales operations in the United States and Management of the fourteen (Uniliver) plants are directed from Lever House on New York's fashionable park Avenue. You look at this tall striking glass-and-steel structure and you wonder how many hours of unpaid black labour and how many tons of underpriced palm oil and peanuts and cocoa and coffee it cost to build it.

W. ALTHEUS HUNTON (*Decision in Africa*)

Colonialism and neo-colonialism is not merely a system of exploitation, but one whose essential purpose is to repatriate profits to the "mother-country". Diligent agents were necessary to carry out this "honourable" task. In talking about under-development as stigmatised by commerce, one has to understand, ab initio, that development and underdevelopment are not only comparative terms, but that they also have a dialectical relationship, one to the other for the two help produce each other by interaction. When trade between Europe and Africa became truly international, their relationship

became one of the transfer of wealth from Africa to Europe. Underdevelopment with which the Third World is pre-occupied is a product of capitalist, imperialist and colonialist exploitation. A powerful and efficient system of Agency has evolved out of these activities to facilitate the malicious commercial machinations of imperialists.

The institutionalisation of the large-scale corporations as the typical unit of production in advanced capitalist economies has had momentous implications for the process of development in the still underdeveloped lands. The resulting competitive model has determined the growth of oligopoly in the developed capitalist countries and a corresponding 'permanent' underdevelopment in the upcoming nations. This relationship of the so-called developed and underdeveloped nations has been exposed as a bare reality whose solutions should be sought immediately. Parroux has observed:

*The conflict between the exigencies of political and territorial organisation of the social life of peoples and the exigencies of multinational administration of the large scale industries is a continuing reality (which the under-developed Natives seem to have no solution to).*¹⁸

With the development of large-scale capitalist monopolies in the leading capitalist countries, the capitalists of

these countries lost interest in developmental investment in the less developed countries because such investment threatened their established monopolistic positions. Consequently, investment in underdeveloped countries by the 'hardly' developed countries acquired a specific character; namely, it went chiefly into the exploitation of natural resources to be utilised as raw materials in their home industries and into developing food production in the underdeveloped countries to feed the populations of the exploiting countries. It also went into developing the economic infrastructures needed to maintain economic relations with the underdeveloped states. This can be explained by a survey in the multinational activities in Kenya and other such states. The actual investment of capital by these corporations is on a very small scale.

Japan will not transfer the whole of its Motor industry into Kenya because this would limit its profit maximisation, neither can Daimler Benz of Germany do the same. This explains why these heavy industries back home must deal through agents such as D.T. Dobie, General Motors, Datsun and other agencies to sell their goods in foreign countries. At best, multinational investors manufacture simple items like cooking oil, soap, tooth-paste and others. They often set up assembling plants for Radios, cooking implements and other industrial goods. These are products whose comparative industrial and

monetary value is insignificant.

Cases of Agency of taste transfer have of late occurred. Under this scheme, multinationals are not keen on the investment of capital per se; trends like the 19th Century British investment in North American Railways and other such investment are changing. Investments are becoming overwhelmingly sector. One finds specific firms producing the same sort of goods abroad as those at home. This is to serve as import substitution. Such are cases in Leyland, General Motors, Firestone, etc. This is largely precipitated by competition among monopolies in the same market area. Thus the total manufacturing and assembly of industrial goods are aimed at the process of monopolising markets. This is a joint venture between multinational corporations and the comprador bourgeoisie who hold limited shares or simply serve as agents for political convenience to guarantee a monopoly of local markets by ensuring a restricted competition from other firms. These local agents occupy high managerial and directorship posts. These local plants often produce goods for export to other states too. For instance Britain exports Landrovers and Range Rover vehicles from its Leyland plant at Thika to Kenya's neighbouring states like Uganda, Rwanda and Burundi.

In the final analysis, we find that a country like Kenya where a factory like Bata Shoe company is based,

in fact serves as an agent of the foreign principal whenever she presides over the export transaction of Bata products. The commission she (Kenya) gets is the apparent provision of labour to the indigenous populace, and the granting of equity and goodwill shares extended to the country's leading capitalist politicians and opportunists. Profits made by foreign capital are exported back home. These 'great' capitalist powers have often supported feudal and primitive dictatorial orligarchies in the underdeveloped countries as their instruments for the maintenance of their economic and political influence. Such forms and means of survival, I believe, lead to an argument that there is a systematic attempt to consolidate capitalism by means of fascism and other authoritarian experiments in the Third World. The western involvement in Zaire and their continued support for the fascist regime of Mobutu and his misrule is one of the examples that are legion. These tyrants, as a matter of fact, act as agents of and instruments for the underdevelopment process. The writer is in agreement with Nkrumah when he writes that Balkanisation of Africa has created a superstructure that makes it impossible for individual nations to cope with the bargaining power of the international corporations which, by means of interlocking directorships, cross-shareholding and other devices effectively act on a pan-African scale.¹⁹ Karl Marx must have had such agent-

collaborators in mind when he exclaimed:

If free traders cannot understand how one nation can grow rich at the expense of another, we need not wonder since these gentlemen also refuse to understand how within a country one class can enrich itself at the expense of another.

Plagiarise

This semi-blind class of exploiters forms a strata of society in Kenya which Mutunga has described as the "comprador bourgeoisie".²⁰ This class has assisted or acted as agents of the dominance of finance capital in Kenya. The comprador bourgeoisie in Kenya especially, is unpatriotic and has its base in the dominance of finance capital. It is a layer which thrives on its connivance with imperialism. They see foreign domination as inevitable since their class interests are intertwined with capitalist interests. Their rewards are great and they will, and must, along with imperialism fight against the liberation of the Kenyan people to preserve and maintain their role of agency in Kenya, a great deal of these comprador elements comes from the national minority communities (Europeans, Asians and Arabs). Even where the indigenous communities (Africans) are concerned, one cannot conceive of an African transformation towards structural change and economic independence. Agents they will remain. In the words of R.H. Green:

African private capitalism is, and is probably increasingly becoming peripheral and dependent on foreign capitalism.

As it were, there is a connivance between the foreigners and their local patrons, and agents, whose ultimate goal is one, namely, to exploit and underdevelop the mass of the people of this country (Kenya). As Greene has fused the two brands of capitalism, the writer would further argue that there is nothing like African capitalism; capitalism is international and homogenous; whether African or European, it serves the same purpose, namely the maintenance of imperialism and its exploitative machinations which has agents in all exploited nations.

The whole question of Kenya's economy is therefore tied and dependent on capital from imperialism. A look at the legal protection accorded to multinational in their modus operandi makes this allegation more authentic. The operation of multinational corporations and any other form of property ownership finds its legitimacy in the supreme law of the land, viz, the constitution of the republic of Kenya. 53 of the said constitution declares any law that conflicts with its provisions void. It follows therefore that until the constitution itself is made more autochthonous to scrap

its capitalist reflections, no legal machinery can purport to deprive the multinationals and other propertied classes of this country off their property. S75 of the constitution which stresses the sancity of property ownership states inter alia, that adequate and prompt compensation should be made whenever one's property is interfered with. This means that if the Government has to take over the capital controlled by foreigners, it will be putting its meagre finances at stake. Whether this is true or otherwise, this is the purely legal position as of now. A notorious legislation passed in 1964 (The Foreign Investment Protection Act) has given effect and sanctity to foreign domination and exploitation. S2 of this Act seeks to protect benefits or property and any other profits from an investment in an approved enterprise. The definition of foreign nationals who the act purports to protect is a very wide one; it states:

persons who are not citizens of Kenya and includes a body corporate which wasn't incorporated in Kenya.

This gives multinational corporations their legal personality in Kenyan law, consequently they have been bestowed with the freedom of exploitation and the right to appoint local agents and partners. S7 makes it legal for the investors (exploiters) to repatriate their profits to the metropole. The section states:

Notwithstanding the provisions of any other law for the time being in force, the holder of a certificate may, in respect of the approved enterprise to which such certificate relates, transfer out of Kenya in the approved foreign currency and at the prevailing official rate of exchange:

- a) any profits after taxation of his investment of foreign assets*
- b) capital specified*
- c) The principal and interest of any loan specified in the certificate.*

The provision outlaws any interference by any other statute in the process of repatriation of capital. Besides, the talk of transferring capital after taxation is a sham since there have been cases of massive frauds in the exercise. The whole truth is that the laws of this country, ranging from the constitution as the supreme law of the land and other statutes are no less than vehicles of exploitation. We have to understand ab initio, that any study of law or purporting to do so that excludes its socio-economic and political context will only amount to what Rene Dumont²¹ has termed a false start. Whatever analysis that may be extended to the Kenyan legal system, the fundamental aspect is that the bulk of the laws accommodate and facilitate foreign domination and exploitation. The

legal foundations of rampant primitive accumulation of property in the earlier colonial times can be traced in the land and agricultural laws and regulations of the time. Such laws which champion the interests of the few apply to date. It is by looking at and analysing the laws in their historical context like this that will enable us to understand the roots and trends of exploitation in our society. The state has remained a bonapartist (pacifist) functionary in the game.

The law has ensured at all times that the ownership of the means of production remains in the hands of the privileged few, mainly foreigners; the role of distribution of products therefore is fulfilled by the comprador bourgeoisie who are agents of imperialism, this in turn breeds and perpetuates neo-colonialism. All the forces of production and relations of production lead to an inevitable conclusion that Kenya is a neo-colonial state.

FOOTNOTES

1. *History of English Law*, P.567
2. Fridman maintains that there is a fundamental difference between servant/master and agent/principal relationship.
3. Marx and Engels: *Selected Works Vol.II* P.394
4. Cap 518 *Laws of Kenya*
5. Interview with *The Anvil*, 28th December, 1977
6. See Ernest Mandel: *The Marxist Economic Theory*.
7. Mandel: *ibid.*
8. For more reading on the scramble for and ^{partition of} ~~acquisition~~ Africa, see Semakula Kiwanuka: *From Colonialism to Independence*.
9. (1873) LR 8 QB 313, 317.
10. [1893] 1QB 346
11. [1917] 2 KB 141
12. *The Commercial Agent in European Law*, J.B.L. 1965 P. 179.
13. *Agency Law and the Sale of Goods*.

14. Marx and Engels: *The Communist Manifesto*.
15. Lenin V.I.: *Imperialism: The Highest Stage of Capitalism*;
Moscow 1916.
16. On the Issue of Multinationals in Kenya, see
Foreign Firms, edited by Raphael Kaplinisky.
17. Lenin V.I.: Ibid.
18. Perroux: *Essays on the political Economy of Africa*,
Edited by J. Saul and G. Arrighi, P. 106
19. Neo-colonialism: The Highest Stage of Imperialism.
20. Mutunga: *Commercial Law and Development*, published in
international Journal of Sociology and Law,
1980 (8) P. 1 - 17.
21. Rene Dumont: *False Start in Africa*: London 1966.

CHAPTER THREE

A CASE STUDY ON BATA SHOE COMPANY (K) LTD

Bata Shoe Company was one of the first and most successful investments of non-British companies to be established in Kenya colony (as it then was) before the second world war of 1939. The company's history can be traced back to Czechoslovakia where it was started between 1914 and 1918 by Thomas Bata Snr. The insecurity that came with the outbreak of the second world war, especially the menacing approach to Czechoslovakia by the Nazis caused Bata to move the headquarters of his newly incorporated company to Toronto in Canada in 1939. It has since then extended its operations to Europe, Africa, Asia and the Americas.

Bata shoe company set up a branch in Kenya in 1935 at Mombasa. At its establishment, it was meant to be a marketing branch to the service of the East African Region. Its history at the coastal region of Kenya was short-lived as Bata Shoe Company had to be moved up-country to a more safe location at Limuru on the outbreak of the second world war. This was the same time Bata Shoe Company (international) moved its headquarters to Toronto. Its early engagement in Kenya involved the production of

tanned leather; the manufacture of leather and rubber shoes; and the export of raw hides to Europe. From the outset, production was aimed at serving the local market, especially low-cost consumers.

Bata started intensive shoe manufacturing in 1955 when the first manufacturing machinery was set up. Its rapid expansion was primarily due to their support by the government of the day which clamped down on the importation of Indian leather by strict and severe tariffs. Artisan shoe making was at the same time encouraged to absorb the excess capacity of Bata's tanning plant to ensure that all its production potential was expanded with a corresponding ready absorption sector, this would in turn ensure good fiscal returns for Bata.

Bata Shoe Company obtains its raw materials both locally and from foreign markets. The main materials applied in the manufacture of Bata products include leather, rubber, textile products and industrial chemicals. The leather used is tanned within the Bata plant at Limuru. Bata Shoe Company obtains hides and skins from the Kenya Meat Commission and other independent slaughter-houses and local dealers. There is a contract for the supply of this commodity between Kenya Meat Commission and Bata Shoe Company. Limited quantities of hides and skins used to be bought from Tanzania before the closure of the Kenya/Tanzania border in 1977. Equally important in the procession of Bata products

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is rubber. Both natural rubber and synthetic rubber are imported. Most of the natural rubber is imported from Bata Shoe Company's own plantations in West Africa, especially Nigeria. Other sources of raw or natural rubber are British plantations in Malaysia, Singapore and Sri Lanka (Ceylon). The purchase from these far-east countries is done through British brokers and agents.

It is important to note that more than sixty per cent of the rubber used in Bata is synthetic rubber. Synthetic rubber is an oil product. The explanation given by the Bata Shoe Company management is that unlike natural rubber, which depends on factors like rain, and other climatic conditions, synthetic rubber depends on the production of crude oil which is more steady and dependable. It is also preferred because it can be duplicated easily. It is also said to be cheaper and with a more stable price than natural rubber. It is interesting to note that while our research realised that the said synthetic rubber can be cheaply and conveniently obtained from Eastern European countries such as Poland, Hungary, Yugoslavia, East Germany, etc, the Company "irresistably" purchases the same product at inflated prices from USA, Britain, Holland and West Germany. The reason here is clear, namely, Kenya's ties with imperialist states and the fact that the investors themselves are from these states, and also the fact that

some of the raw materials come from their subsidiaries abroad. This further goes to prove and give authenticity to the argument that commerce is something more than a mere appropriation of profits since it has to follow clear channels into areas with a similar political orientation.

Industrial chemicals such as lime, salt, sulphuric acid, etc. are obtained locally since overseas companies that manufacture them have subsidiaries in Kenya. They are, however, sometimes obtained from overseas when local producers cannot meet the demands. Such local plants include DUP and ICI. Other materials employed in the industry's undertaking include canvas and laces which are obtained from local textiles. The machinery used by Bata is purchased from West Germany. This is done in tune with recommendations of the Bata complex's engineering division based in Toronto - Canada. Other suppliers of machinery and spare-parts include Italy, whose cheaper prices and better designs are said to be overtaking West Germany's supply. Taiwan, South Korea, Britain and Spain also provide some machinery and spares in smaller qualities.

PRODUCTION:

Bata Shoe Company produces a wide range of products. These include leather, rubber and canvas shoes, suitcases and bags. Like any other multi-national firm, Bata Shoe

Company has sought with time to advance its manufacturing techniques and raise labour productivity. The company's Memorandum of Association arrogates it the power to deal in as many aspects of local manufacture as possible. There is a steady movement from labour intensive to capital intensive production. In pursuance to this, the Company has embarked on the employment of skilled personnel who are lured from other sectors of employment by the reasonable remuneration offered. In most cases, however, the workers are recruited and trained locally (on the job). Such are machine operators who are first engaged as apprentices before they become fully employed by Bata Shoe Company; stitchers are also trained internally and set to better their skills on the job. Artisans from colleges of technology and the polytechnic are also recruited. There is a management training programme within the organisation where recruits from high schools are trained. Others are sent to courses in institutions like the polytechnic. Bata Shoe Company (international) organises courses for its companies' top management personnel in countries such as Canada, Nigeria and France.

Bata headquarters in Toronto operates as a service company to the plants all over the world. The company operates in countries such as India, France, West Germany, Sri Lanka, South Korea, South Africa, Nigeria, Malawi, etc.

The service company fulfils an advisory role and mans the training programmes. It has to be noted that there is no special relationship between Bata subsidiary companies apart from their common ties with the central body in Toronto. Important management decisions made by the subsidiaries have to be in consultation with the mother body. For instance, when Bata (K) Ltd decided to construct an extension of the company at Voi, Bata Shoe Company (Canada)'s consent had to be sought.

When Bata Shoe Company was established in 1940, its primary aim was to produce goods for local consumption only. As the factory developed, with the accompanying expansion of production, Bata resorted to the production of goods both for local and export markets. The chief non-Kenyan markets include Rwanda, Burundi, and Malawi. The Tanzanian market collapsed with the collapse of the East African Community which was attended by the closure of the Kenya-Tanzania border. The nature of production has become increasingly dual, namely, the production of goods for the local market and those for the foreign markets which are said to be of a higher quality to withstand the stiff competition from other sources.

On the local market, it is an altruism that Bata products are inferior to imported ones. A senior management official explained this as a reflection of the

problem of underdevelopment in third world countries, especially as pertains to skilled manpower, and also the fact that the primary projection of their production is meant to feed the poor people who cannot afford expensive products. Our contention is that this explanation is erroneous and misleading as we believe Bata as an industrial enterprise has a moral duty to manufacture goods of good quality without 'ifs' and 'buts'. Some of the consumers we interviewed complained that sometimes rubber shoes from Bata tear out within a month's use. It is equally important to note that Bata admits to be producing products specifically for the export market which are of higher quality and that much as we appreciate this, there is nothing that stops Bata from extending this better quality to the local market. This can be interpreted as neo-colonial arrogance, that is, thinking that the neo-colonial subjects still play the role of second-bestness and hence the idea of separate production and quality.

Bata's production has been expanding with years in an area where there has been lack of effective competition, with the Government supporting the establishment against foreign merchants. There is, however, a limited competition from Tiger Shoe Company. This notwithstanding, Bata remains in a pre-dominant position in terms of production on the local market for both shoes and tanned

leather. The company produces about 10 million pairs of shoes annually and only a small fraction of this is exported. Competition from Tiger shoes Company, however formidable, is likely to have little or no impact on Bata, bearing in mind that the latter is part of a network of multinational capital operating in Kenya and no less than thirty other different countries. In terms of quality, however, our survey from a handful of 'average' consumers indicated a bias for Tiger Shoes which were described by one consumer as being of 'superb quality'. With the passing of time and as Tiger Shoe Company attracts international finance and expands, Bata might in the near future have an uphill task of tackling in terms of competition. When Tiger Shoe Company was established in 1972 with its five directors being former senior management personnel of Bata, some workers also moved with them. Most of them were, however, lured back by more attractive remuneration from the multi-national. Records indicate¹ that Bata was hostile to Tiger Shoe Company from the outset. For instance, it tried to prevent Tiger Shoe Company from obtaining imported supplies of eyelets and other machinery for shoe manufacture. Bata could only grant Tiger the use of her licence to import eyelets, following negotiations at the highest governmental levels. With the government

1. See Swainson: *The Development of Corporate Capitalism in Kenya.*

emphasis to support indigenous owned industrial enterprises, it is foreseeable that Tiger Shoe Company will do quite well in the near future. One of the directors of Tiger Shoe Company indicated to us that their future prospects in terms of expansion and competition vis-a-vis Bata is a healthy one since their company has attracted and won the sympathy of many financiers.

MANAGEMENT:

Bata Shoe Company engages the services of about 2,300 workers. This number includes both skilled and unskilled personnel. The employees are organised under a trade union which is an affiliate to Kenya Shoe and Leather Workers Union, which is in turn an affiliate to COTU. The Union's operations are closely controlled by the factory management which strongly supports it (the Union). In our interview, a Union official indicated to us that the factory's success has been largely dependent on the close relationship and co-operation between the Union and the management. The good relationship (so-called) can probably be attributed partially to the fact that Bata is located in a small non-industrial town, making it possible to have little or no influence from other industrial workers and other Unions of workers. This harmonious relationship between Bata and its employees, creating a climate of

industrial peace, has served as a stigma to increased production and the consequent maximisation of profits. It has to be noted that for the past five years, Bata's net profit has been in the range of £10.5 million annually.

Like any other multinational corporation operating in Kenya and other exploited countries, Bata has built certain alliances, both political and commercial, to guard its position of dominance and exploitation. The strategy used to cement such alliances, (both political and economic), has been the issue of goodwill shares to prominent people in the Bata Shoe Company operations and the leading members of the petty-bourgeoisie ruling clique. These include ministers, chief state executives and leading local industrialists. Reference can be made to the case of CRUTTWELL-V-LYE 17 Ves 335 where Lord Eldon defined goodwill as:

"...every affirmative advantage, as contrasted with negative advantage, that has been acquired in carrying on the business whether connected with the premises of the business, or its name or style, and everything connected with or carrying with it the benefit of the business..."

This is Bata's aim in allotting the said goodwill shares, namely, for political protection. Most of them have been allotted 2,000 shares of £1 each. This is in fact a

constructive "corrupt gift" to the men in the political saddle to protect multinationals to enable them to facilitate their domination and exploitation of Kenya unabated. Among these goodwill shareholders are Daniel T.A. Moi, Njenga Karume, G.G. Kariuki, Njoroge Mungai, Kenneth Matiba, W.O. Omamo, James Osogo and other senior government officials. Some influential businessmen and local industrialists hold preference shares in the same company (Bata Shoe Company). These include Z.K. Gakunju, Philip Gacoka, B.M. Gecaga, Geoffrey Kariithi, W. Murathe, S. Waruhiu and many others.

The nine top shareholders of Bata Shoe Company are foreigners. This goes to emphasise the argument advanced earlier that stressed the issue of foreign domination in Kenya, which is an embodiment of Kenya's neo-colonial status. Our research has also shown that the directors of Bata are also the directors or chairmen of such other operations like Standard Bank (K) Ltd, which is a jointly owned bank by South African and British capitalists, Kenya Charity Sweepstake, Kenya commercial Bank, Block Hotels and other similar institutions that reflect imperialist dominance and exploitation. The Chairman-cum-director of Bata, Sir Ernest Vasey, a former minister in pre-independence Kenya, is a business executive and director of 30 different companies operating in Kenya.

Of the six directors of Bata Shoe Company, Messrs Ernest A. Vasey, Dunstan Alfred Omari, Bolslav Joseph Strom, James Maina Wanjigi, Humphrey Slade and Marius Kennel, only two are Africans, one being an estranged Tanzanian capitalist.

The Company banks its proceeds in the Standard Bank (K) Ltd, which holds several mortgage debentures of the Company. It is Bata's chief local creditor. The Bank holds a floating charge on the assets of the Company which dates back to 1942. The charge hovers over assets of the company whatsoever and wheresoever, both present and future, including outstanding, uncalled capital and the company's goodwill. The charge also emphasises the fact that the company has no power to create any mortgage or charge on its assets without the debenture holders' prior consent. The company, however, has access to full-time overdraft facilities of unspecified sums of money from the said Bank. The company's Advocates, Kaplan and Stratton and Company Advocates is a British legal firm operating in Kenya. This is an unambiguous indication that there is an alliance of foreign capital in Kenya.

An important political observation to make from the lots and ranks of shareholders in Bata Shoe Company, which should not be seen as an isolated case is the fact that it

goes to demystify the apparent and apprehended political squabbles and contradictions that seem to be exposed to the common man. The truth is that when it comes to the question of serving foreign capital, the loyalty of the bourgeoisie solidifies into a common front and any such intra-bourgeois contradictions which appear with a lot of intensity and hostility on the face of it are a mere sham. The adversaries have a common course of exploitation which should be seen as clear and uncontradictory.

DISTRIBUTION OF GOODS

When Bata started its production, and in fact up to quite recently, they also operated as sole distributors of their products all over the country. In the 1960's, Bata set up a comprehensive business service designed to assist all its wholesale and retail dealers. The company would select wholesalers or retailers and advise them throughout the entire selling process on book-keeping, display, salesmanship etc. Bata was in fact the owner of these shops. In mid 1970's, a Government regulation was issued requiring all foreign manufacturers to distribute their goods through citizen owned retail and wholesale operations. All Bata shops were to be taken over by Kenya citizens. Bata was thus forced to change its tactics of operation. The regulation notwithstanding therefore, Bata

have continued with their loan and training assistance scheme to these shops since they are interested in seeing *how their products are distributed. The company runs* training courses for managers, accountants and keeps a close watch over the way in which their products are distributed. The painting, furnishing and other general decorations to Bata shops are undertaken by the company. The business is also carried out in the company's name with the retailers called "Appointed Retailers".

Per se, there is no express agency agreement between Bata and these wholesalers and retailers. There is, however, a formal contractual agreement for them to sell Bata products. An agency agreement can however be implied from the conduct of the parties. Our survey in the operations of Bata shops within Nairobi led us to the inevitable conclusion that they are Bata's agents. We learnt that some of the employees of these shops are in fact employees of Bata Shoe Company, and that they are accountable to the company and not the appointed retailers. Such employees, we learnt, could be transferred to other Bata shops around the country by the company's personnel department. These employees look at themselves and the appointed retailer as agents of Bata Shoe Company. In one case from a shop in the city centre, we came across a shop attendant who did not know who the 'appointed' retailer was

and that to the best of his knowledge, Bata Shoe Company owned the shop in which he worked and he doubted whether the person named the appointed retailer ever existed. He was in charge of all shop operations and handed over all the money from the sales to Bata Shoe Company, who in turn supplied their products to the shop. Another shop manager who was reluctant to give us any information about their business operations demanded a written consent from Bata, being his employers, before doing so. He feared intimidation if he did so unilaterally.

It is undoubtedly clear that Bata Shoe Company engages in retail business contrary to a clear Government regulation not to do so. Agreements reached and signed between Bata and the retailers are not standard form because some retailers are not keen to operate as full-time Bata functionaries. Whatever the case, however, one thing is clear, namely, non-Bata products are not allowed to be sold in these shops. Though the agreement between the said retailers and the company is silent on the issue of selling non-Bata products, the shop managers we interviewed made it clear to us that Bata can withhold the supply of its products to any shop that breaches this implied term.

Mrs. Michuki, one of the Bata retailers we interviewed, who is also one of the directors of Tiger Shoe Company (a local rival to Bata), revealed to us that as a matter of

fact, Bata engages in retail trade but through agents. She pointed out that when she had tried to stock shoes and other products other than those manufactured by Bata, the latter wrote to her, indicating that it was a breach of contract and confidence to engage in such businesses and that Bata was ready to cut off its supply of shoes to her shop if she did not desist from that. The letter of intimidation also made it clear that Bata can cut off her annual bonus. Such bonus is given to all Bata retail dealers. She had no choice but to open another shop within town where she could sell shoes of her own choice without prejudicing the interests of Bata. Mrs. Michuki, who was well aware of the government regulation prohibiting foreign manufacturers from engaging in retail trade, wondered why the Government passes regulations which it does not follow up to see implemented. In her opinion, Bata was still a retail trader and in fact its retail income through "undisclosed" agents² have grown by leaps and bounds since the passing of the said regulation.

The Company has a Government licenced transport network distributing goods all over the country to their appointed retailers. Bata effectively controls the distribution of its products to all centres of operation. It does not

2. It is important to note that there is nothing like 'undisclosed' agents at law. We however have undisclosed principals.

engage any independent transporters for these jobs. Thus the Bata shops, be they in Nairobi, Bungoma or Vanga, receive their shoes and other products through Bata's own hands. This is part of the production and distribution policies of the company. This also makes it convenient for the appointed retailers to concentrate on monetary returns instead of worrying about the supply of goods whenever they are sold out. We learnt from some of the Bata shops that in most cases, the company supplies goods to these shops and gets paid after they have been sold. Thus they do not buy the goods to sell them but they receive them, sell them and then account for the sales. This operation is not any different from the principal/agent relationship where the principal hands over goods to the agent who accounts to him after selling them. The bonus paid to the retailers at the end of the company's fiscal year can be construed to be a form of commission normally given to agents in an ordinary agency relationship. The company has the power to revoke the licence of an appointed retailer if it is learnt that such a retailer is operating against the company's interests such as receiving products from rival manufacturers or where the agent does not promptly and accurately pay back the money after selling the products supplied to him. By analogy, the principal has authority to dismiss his agent when such a commercial anomaly occurs. This explains why Mrs. Michuki (discussed above) had to set up an alternative shop to sell products from Tiger

Shoe Company and those imported from abroad.

The general policy in the company's dealings as appertains to the question of selling imported products is that such products must be imported from other Bata subsidiaries abroad. Such imports can, however, only be done through Bata Shoe Company (K) Ltd after establishing that such products (mainly shoes) can make good sales, and further, that it is not economically viable to launch the production of such products locally.

An important thing to note about all these facts is that Bata Shoe Company is an example of a company engaged in the manufacture of goods; which closely controls the distribution of her products instead of letting it be determined by the Government and other private traders. The practice saves the retail traders both the inconvenience of having to travel to Bata factory for the products, especially if this is to be done at their own expense. This also saves them from a probable swindle from unscrupulous wholesale traders and transporters whose get-rich-quickly endeavours would reduce the volume of their annual bonus. Besides, Bata being a multimillion and multi-national company, it is better placed to operate a transportation and supply network to its retailers because they are likely to be faced by numerous mechanical problems in cases of self-transportation, and financial problems in

case of hiring independent transporters. With the current ever soaring inflation, such a practice as pursued by Bata is the best way of ensuring reasonable returns in their business transactions. Even where the Company may be running into financial problems, it is better placed to overcome them because the company has vast credit facilities and besides, since it controls the production and distribution of the products, it can inflate the prices of the goods to meet the charges, something a retail trader cannot do.

The case of Bata is also one clear example of a multinational corporation that is using local traders as a cloak for evasion of compliance to a Government regulation viz, the requirement to hand over retail business to local traders. To the contrary, the company has turned around to use them as agents but in a disguised form. It also uses its employees who masquerade as businessmen. We know they are being used. (| | | |)

Bata also engages in the business of direct supply of shoes and other products to several organisations and institutions. This is mainly sportswear to schools and colleges; boots and canvas shoes to the armed forces, the police and other allied institutions.

CONCLUSION

The case of Bata has shown clearly that current commercial dictates and realities have developed ahead of the law as we know it. The law of agency as we find it in text books, law journals and statutes, cannot be adhered to in an orthodox manner when it comes to commerce. In the Bata case, the relationship which appears purely contractual and without a mention of agency, has strong indications of agency relationship. Rules of law cannot be analysed independent of the socio-economic realities, because law does not operate in a vacuum. An agency relationship can be implied from the conduct of the parties. In the words of Lord Pearson in the case of GARNAC CO. INCORPORATION-V-H.M.F. FAURE AND FAIRCLOUGH LTD /1967/ 2 ALL ER 353 at P.358:

The relationship of principal and agent can only be established by the consent of the principal and agent... if they have agreed to what in law amounts to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it, there will still be an agency relationship.

In an old case of POLE-V-LEASK,¹ Sir John Romilly M.R. stated:

The common divisions of the modes by which agency may be constituted is threefold: it is either by writing

or it is by parole or it is by mere employment.

In the case of Bata, therefore, the agency relationship will be construed from the contract of employment. Rather than adhere to orthodox legal rules pertaining to agency, Bata, like any other capitalist institution has been out for the maximisation of profits by its tight control of production and distribution of its products. This has been coupled with a calculated move to thin out direct competition. It has also shown that rules and regulations passed by the government to control the activities of multinationals in Kenya are never followed up to be seen in effect. This can be explained by Bata's careful and successful operation of a clandestine retail business all over the country, in spite of a Government regulation prohibiting that. It further shows the laxity of the Government in enforcing rules and regulations that it passes whether for commercial or other purposes. Suffice it to mention that Bata being a multi-national corporation, it has the capacity to get away with anything as the case is in many exploited countries.²

An agency relationship should not be seen in purely legalistic and mechanistic perspectives. We have shown in Chapter Two (above) that an agent does not necessarily have to be engaged in commercial and monetary transactions. In the case of Kenya, we have clearly argued that we have

agents of foreign domination and imperialism whose interest are tuned with those of western capital as their principals

An important fact to mention, that has developed from our research is the question of economic independence vis-a-vis foreign investment and consequently, foreign domination. It is an altruism that political independence can neither be complete nor meaningful without economic emancipation. Economic independence is a priority economic goal and should rank highest in the priorities of young nations. In the words of R.H. Green:

*Economic independence can be formulated as a situation in which national institutions have the right, capacity and power to take and implement decisions affecting the national economy and its component units, without a de jure or de facto power being held by foreign individuals, enterprises, interest groups or Governments.*³

Taking this as a fairly objective view of what it is to be economically independent, the situation in Kenya is the complete opposite. Kenya is a shining example of successful attempts by imperialists to colonise and Balkanise Africa. From the study on Bata, a fact has been established that such corporations which are subsidiaries of major industrial installations in Western Europe and North America operate on terms and conditions that are

the anti-thesis of the economic independency theory. For instance, policies related to the expansion and profit utilisation of Bata Shoe Company products are formulated in Toronto (Canada). Bata is just one of the multi-nationals, and not the biggest either, operating in Kenya. The major ones like Lonrho, Uniliver, Firestone, etc. could be doing much more.

Increased national participation in critical sectors of national economies, at present controlled by foreign enterprises is undoubtedly a desirable objective for any state that purports to be independent and respects its said independence. This should however be distinguished from the question of individual greed and accumulation of wealth at the expense of national interests. In Kenya, the inability to acquire economic independence can be explained by the established civil servant elite, petty-bourgeois politicians and merchants who are integrally dependent on a foreign controlled large-scale production, trade and finance sector. They will fight to the last man in defence of their selfish interests and the maintenance of the status quo. It is our understanding and appreciation that in a world that has become highly interdependent, and that is becoming even more and more so everyday, no country can afford to deny itself the benefits of international trade, joint ventures and partial investments. It is only within this framework of

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interdependence that each country can assure itself of a fair share of the fruits of modern developments in science and technology. Such an approach, taken objectively and fairly, will stimulate economic growth in the developing countries, mainly in Africa, Asia and South America. This would be a better alternative to the current activities which have left most of these countries mortgaged by their leaders' avarice. A change of such economies from capitalism to socialism will be a sound remedy to the current situation where a country which appears developed is found to be owning a very dismal percentage of the economy that makes up for her apparent wealth. In the words of J.K. Nyerere:

*...a capitalist economy means a foreign owned economy...
the only way in which national control of the economy
can be achieved is through economic institutions of
socialism.⁴*

Kenya's political economy has its roots and reflections in imperialism and its domination. The only way Kenyans can benefit from their independence is by rejecting the role of agency played at the hands of foreign capital. A change in the socio-economic and political structure,, which has been the stigma for the transformation of the country's status from a colonial to a neo-colonial one, will be a welcome relief.

FOOTNOTES

1. POLE-V-LEASK: (1860) 28 Beav 562 at P.579.
2. Another such example is the recent Delmont case from Thika.
3. Economic Independence and Economic Co-Operation, a paper published in *Economic Independence in Africa*, edited by D.P. Ghai, P.46.
4. J.K. Nyerere: *Economic Socialism/Uhuru na Ujamaa*, (Dar-es-Salaam 1968) P.264.