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'THE PROPRIETY OF PRIVATE LEGAL
PRACTICE IN NATIONAL
DEVELOPMENT IN KENYA' REPROSPECT
AND PROSPECT

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A Dissertation Submitted in Partial
Fulfilment of the Requirements
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NAIROBI. SEPTEMBER, 1982

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OPENING QUOTATIONS

" The legal profession is a public profession. Lawyers are public servants. They are stewards of all the legal rights and obligations of all the citizens. It is incumbent on stewards, if they are to be faithful to their trust, to render an accounting from time to time "

REGINALD HEBER SMITH.

" It is certainly not our task to build up the future in advance and to settle all the problems for all the time; but it is just as certainly our task to criticise the existing world as ruthlessly, in the sense that we must not be afraid of our conclusions and equally unafraid of coming into conflict with the prevailing powers "

KARL MARX.

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DENNIS S. MBECHI MBOROKI

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INTRODUCTION

National Development is not a phenomenon which can be achieved by the efforts of a single discipline. It is our submission that for national development to be realised there must be an inter-disciplinary approach. It is within this framework that we shall examine the contribution of the legal profession towards the achievement of these ends. In this paper we shall examine the contribution of the private legal profession and not the public legal profession. The private legal profession consists of members whom are individually referred to as advocates.

When I first decided to write on the propriety of private legal practice in Kenya, I had noticed that there was a lot of literature on legal Education and on Law and Development. We are aware of the Interrelationship which exists between these issues. However, my attention will be focused on the role of the Legal Profession. Indeed, the question of private legal practice has taken new dimensions as it was evidenced in the recent parliamentary debate on The Magistrates' Court Jurisdiction (Amendment) Bill 1981. We are also of the opinion that Kenya, like several other Independent African States, should be engaged in a re-examination process of all inherited institutions to see whether such colonial institutions are compatible with her post - Independent policies. Therefore, a re-examination of the legal profession is compatible with our desire to consolidate our national Independence.

The central thesis which we advance in this Dissertation is that the role of the legal profession is to a great extent determined by the country's political socio-economic system.

We submit that the state, law, politics, art, religion, and ideology and the institutions which support them such as government, courts, political parties, culture, the church and theory, are superstructural and are determined by the economic basis of the society, by which we mean the production process and the relations of production. In developing this thesis we shall reject the positivist approach and adopt the exposition made by Karl Marx in his often quoted preface to A Contribution to a critique of political economy, which should be of interest to lawyers because Marx was writing both as a lawyer and a political economist. Marx asserted that:

" I was led by my studies to the conclusion that legal relations as well as forms of state could neither be understood by themselves, nor explained by the so-called general progress of the human mind, but that they were rooted in the material conditions of life which are summed up by Hegel after the fashion of the English and French of the eighteenth century under the name "Civil Society": the anatomy of that society is to be sought in the political economy..... The general conclusion at which I arrived and which, once reached, continued to serve as the leading thread in my studies, may be briefly summed as follows: In the social production of their existence, Men inevitably enter into definite relations, which are Independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitute the economic structures of society, the real foundations, on which arises a legal and political superstructure and to which correspond definite forms of, social consciousness "

We would like to enter a caveat here because Marx's thesis has been taken by dogmatic Marxists to mean that economic production and reproduction are the only determinants of history. This is untrue. *Indeed, Engels, Marx's* collaborator, later qualified and *warned against* dogmatist vulgarization of Marx's thesis in a letter to block in 1890. After stating that the economic production and reproduction were the ultimate determinants of history, he explained that:

" If somebody twists this into saying that the economic element is the only determining one, he transforms that proposition into a meaningless, abstract, senseless phrase. The economic situation is the basis, but various elements of the superstructure - political forms of the class struggle and its results, to wit, constitutions established by the victorious class after a successful battle, etc: juridical forms, and even the reflexes of all these actual struggles in the brains of the participants, political, juristic, philosophical theories, religious views and their further development into systems of dogma also exercise their influence upon the course of the historical struggles and in many cases preponderate in determining their forms "

MARX, K. and ENGELS F. selected works in
3 Volumes, Vol. 3. MOSCOW: Progress
Publishers (1973) P 487.

This thesis advanced by Marx and to which we shall rely on a great deal will come out clearly when we examine the role of the legal profession in Colonial and neo-Colonial Kenya.

The other theme which we shall develop is that the legal profession needs a fundamental shake up if it is to discharge its responsibilities to the society. We shall advance the view that every lawyer, in whatever capacity he acts, must be patriotic, a true lover of his country and its people.

CHAPTER ONE

THE CONCEPT OF NATIONAL DEVELOPMENT.

Every Nation strives after Development, which is an objective many people take for granted. In a paper of this nature which examines the propriety of one of the leading institutions in National Development of Kenya, it is imperative that we lift the veil behind the concept of development and lay the facts bare.

Development is a most elusive concept and is highly contentious irrespective of the discipline in which it is defined. We shall attempt in this paper to have an exposition of various views on the concept of development. We shall develop a critique of these definitions of the concept of development and adopt a working definition for the purposes of this dissertation. There is no consensus to what is meant by development; whether it is mere industrialisation or more meaningful satisfaction of the basic human needs.

Definitions on the concept of development fall into camps. There is the classical definition of the concept of development propounded by bourgeois economists which sees development in purely economic terms. This bourgeois classical definition of the concept of development seeks to justify and perpetuate the capitalist mode of production. On the other hand,

there are definitions which see development not only in quantitative changes but also qualitative changes as well. These scholars reject the bourgeois definition and see development in terms of what one scholar has called "Humanistic notions of development" 2.

Robert Seidman, a prominent bourgeois scholar in law and Development, has the following to say on development:

" By developmentwe mean the process whereby the entire economy is monetized and integrated with a high degree of specialisation and exchange together with associated political, social and other changes" 3

When one examines this definition, one notices that by development it is meant capitalist development. This is because a capitalist society is based upon the economic phenomenon of exchange of commodities. Buying and selling. It, therefore, follows logically that once the economy is monetised and integrated, the political, social and other institutions have to change to give effect to this economic phenomenon. This exposition of the concept of Development sees development purely on quantitative terms and not on qualitative terms. This definition cannot be accepted in exploited societies like Kenya because whereas the economy is completely monetized the bulk of the people live under conditions of abject poverty, ignorance and are victims of other untold miseries which co-exist with capitalism. We reject Prof. Seidman's definition for the purpose of this paper.

An international conference on law and Development

addressed itself to the concept of development. The research committee on law and development which confined itself to the least developed countries (LDCS) had the following to say on development:

" We agreed that 'development' includes efforts by the LDCS (less developed countries) to secure some of the material, social and cultural conditions that prevail in materially wealthier societies. But we do not limit the term to such efforts; we also use it to refer to attempts to enrich and deepen cultural traditions of the LDCS (SIC) the unique benefits of these traditions to wider groups within society and to seek new and original paths for the realisation of a better life for the people of these countries. This "development" in the broad sense here means the activities through which the L D C S seek to realise their own values and secure the goals they define for themselves."4

This report was compiled by lawyers and social scientists from nine nations who were said to have had substantial experience in research on law in developing countries. With due respect to their experiences when one looks at the substance of the definition it assumes that the development path of the ex-colonies (now neo-colonies) will follow the same pattern as that of the western imperialist powers. This definition, therefore, calls for further and deeper integration into the international capitalist system. It is this international capitalist system to which were one junior partners which has been the cause of our development. In case one has doubts as to where Kenya stands in the international economic order, a senior lecturer in the University of Nairobi dispels the doubts clearly by putting it in the following manner;

" Kenya's modern history is the history of domination of our country by imperialism. The essence of imperialism in Kenya is the total domination of our country by financed capital which capital is owned by industrial financial groups based in the countries in the enemy camp. These groups own the means of production in our country, exploit our people and monopolise our market "5

This definition of development by the research advisory committee was based on a priori assumptions which are detrimental to the exploited countries. We submit that there is no research, however, distinctive which is value neutral. This is so because valuations enter into social analysis, not only when conclusions are drawn but already in theoretical framework to establish what is objectively true.

The second part of the definition of the research advisory committee which talks of " activities through which the LDCS seek to realise their own values and secure goals they define for themselves" would seem to encompass some socialist activities in these countries. One feels that this second part was not well explained and was put into the definition merely to camouflage the essence of the definition which calls for further integration into the capitalist system. All in all, this definition justifies capitalism, imperialism and neo-colonialism and is, therefore inimical to the welfare of the people of under developed countries.

So much for the bourgeois exposition of the concept of development. Leading development economists and exponents of marxist political economy have refuted the bourgeois definition. These scholars in analysing the concept of development have injected into this phenomenon some notions of equity. They have advanced the view that growth of per capita incomes or the rate of national growth are false -

indicators of development if not accompanied by the achievement of economic and social justice. Therefore, whatever is inimical to the achievement of social and economic justice in any country is undermining national development of that country. According to Todaro a leading development economist:

" Development in essence must represent the entire gamut of changes by which the entire social system, turned to diverse basic needs and desires of the individual and social groups within the system, moves away from a condition of widely perceived as unsatisfactory, and towards a situation or conditions of life regarded as materially and spiritually 'better' !6

Kay, among many other serious development economists, has in his classic analysis of the concept of development and underdevelopment stressed the fact that even "..... national sovereignty can have no real meaning unless it is joined by the idea of development as progress towards a social and economic equality" (Emphasis Mine)7

The views of these development economists favour a will meaning of the concept of development of development - we welcome this. The late Walter Rodney, an exponent of Marxist - leninist political economy and a revolutionary in his own right, exposes the superficiality of definitions or explanations given by bourgeois scholars on the phenomenon of development. He propounds the view that an essential element of the concept is left out. In a leading locus classicus he has the following to say:

" No mention is made of the exploitation of the majority which underlay all development prior to socialism. No mention is made of the

fact that the factors and relations of production combine to form a distinctive system or mode of production, varying from one historical epoch to another . No mention is made of imperialism as a logical phase of capitalism.

In contrast, any approach which tries to base itself on socialist and revolutionary principles must certainly introduce into the discussion and at the earliest possible point the concept of the class, imperialism and socialism, as well as the role of the workers and oppressed peoples
However, one has at least to recognise the full human and social dimensions of development" (Emphasis Mine) 8

Walter Rodney who was a committed Marxist and revolutionary is interpreting Marx on the stages of human development as understood in Marxist political economy. These stages are: communalism, foundalism, capitalism and communism. Socialism has been described as a transitional stage prior to communism.

These are the two views on the concept of development as understood in bourgeois and marxist political economy. In this paper national development will be taken in its social-economic sense and in relation to the basic needs of every member of the society. National development which is a multi-dimensional process must be geared towards many aspects within the nation. National development must, indeed, refer to quantitative and qualitative changes of the entire society. These activities include economic, social and cultural; all of which affect the welfare of the citizens. Every nation must strive to establish the conditions, (political, social,

economic and cultural) under which man's legitimate aspirations and dignity may be realised. It is within this context of national development that the maintenance of the constitutional structure are vital and are, indeed, a prerequisite to national development. The administration of justice is part and parcel of national development. The former dean of the faculty of Law at the University of Ethiopia commented on the importance of the administration of justice in the following words;

" The effective administration of justice is not a luxury which can wait upon other aspects of development: It is as important as hospitals, roads and schools. Effective administration of justice is important for three basic reasons: first, because it is a man's right: second: because without it the society can be undermined: third, because it is an indispensable tool for the development and reform of social institutions " (Emphasis Mine) 9

To come nearer home, the former Attorney-General, James Boro Karugu had the following to say on the importance of the maintenance of our constitutional structure and other legal institutions:

" The test of the well-being of our society therefore shall be that the rule of law shall prevail, that we be guided by principles and principles alone and preservation of our public institutions as they are, so that personal vengeance has no place in our society, that the humblest man has his right to be protected by the state so that no one shall be persecuted or have his liberty taken away

or be embarrassed for his thoughts or opinion,
or because someone dislikes him, unless he is
subversive or he has committed a specific crime
known to the laws of our country " (Emphasis Mine) 10

We could have discussed more aspects of national development but because this paper is purposely for examining the legal profession in private practice, we have highlighted some aspects to which lawyers are specially dedicated.

We stress and maintain that under a government of laws the lives, the fortunes, and the freedom of the people are wholly dependent upon the enforcement of their constitutional rights by an "independent" judiciary and bar. We agree with the views expressed by a Kenyan scholar that the first duty of the members of the bar " Is to speak honestly and fearlessly against any development however that remote that may appear to tarnish the image of justice or whittle down the democratic ideals which this country has been trying to evolve since independence " (Emphasis Mine) "

In this paper, we reject the concept of development as expounded in bourgeois economic theory and adopt a broad definition which encompasses the re-organization and re-orientation of the entire economic and social system so as to serve the basic needs of every member of the society. All in all, national development covers political, economic, social and cultural development of citizens in a country. It must include quantitative and qualitative aspects.

CHAPTER TWO

THE LEGAL PROFESSION IN COLONIAL KENYA; A STUDY IN JURISPRUDENCE OF IMPERIALISM

INTRODUCTORY REMARKS.

We cannot undertake a comprehensive examination of the private legal profession in Colonial Kenya without having a brief analysis of the institutional framework under which it functioned. It is within this context that we look at the colonial political Economy and the legal system under which the legal profession discharges its functions.

A. COLONIAL POLITICAL ECONOMY.

The Kenyan Colonial state was a creation of British Imperialism. The colonial state was established to meet the aims and objectives of British Imperialism. The colonial state had first and foremost to meet British economic needs. It was for this purpose that the British Imperialists used legal and extra-legal means to destroy the existing pre-capitalist relations of production and impose capitalist relations of production. Kenya's colonial roles have been summed up by Willy Mutunga as follows:

" Kenya had monopoly capitalism imposed from without our traditional economy which was at that time essentially at the pre-capitalist stage was subjected to a new function and lost the traditional character. British Imperialism wanted Kenya to supply British industries with raw materials serve as market for British manufactured goods and she had to serve as an area of investment of British finance capital"(Emphasis added)'

In essence, the colonial state was established to foster the exploitation of Kenya's natural and human resources for the benefit of the British bourgeois state. The colonial state had to maintain law and order to ensure that these aims were realised. The policies formulated by the British bourgeois state had to be implemented.

As a logical consequence, the colonial regime arose together with a new colonial law for subjecting Kenyans under British domination and protecting and perpetuating colonial domination. All institutions in colonial Kenya had to work towards the realisation of these ends. A classic explanation of the role of law in colonial Kenya has been given by Ghai and MCAUSLAN as follows:

" The role of public law in the colonial era, when looked at through the eyes of the colonised, provides one of the best examples there is of the operation of law as expounded by adherents of the Austinian theory of law orders backed by threats! ' the gunman situation writ large'. these phrases most adequately describe what is more usually but less accurately called the reception of the English common law. Law was second only to weapons of war in establishment of colonial rule "2

This was the situation brought by imperialist relations of production under which the legal profession had to work.

B. THE COLONIAL LEGAL SYSTEM.

" The evolution of Kenyan legal profession has always been influenced by the plurality of races, the social development of each race and the political system being established at time "3

The East African order in colonial 1897⁴ and the regulations made thereunder established a triple system of courts. These consisted of, first the colonial or English system of High court, later the supreme court, and the courts of appeal above it, which exercised a general supervisory jurisdiction over the whole system, and the subordinate courts, staffed by administrative officers and applying English type of law and procedure. The second was the muslim system at the Coastal strip applying Muslim Law and some English Law.

The third was the Native tribunals system staffed by Africans, who were either traditional court⁵ holders or nominees of the Colonial Government. The Native tribunal system was supposed to apply the different customary laws of the various tribes in Kenya.

In spite of the overlapping of personnel and the law which was applied, the three systems were distinct. In essence the colonial society was a de jure and de facto a segregated system. It should be noted that the Muslim and the African legal systems did not require lawyers with English type of legal training. These three legal systems were established by the British imperialists because, first, the British wanted to exploit Kenya under the existing institutions. Secondly, the colonial order wanted to keep Africans from the influence of other types of laws, and especially from English procedural law because it was convinced that the Africans could not understand it. The British took a paternalistic approach. However, in keeping with their "self-appointed" mission of "Civilising" Africans they had to retain a general supervisory control to make sure that the courts were used as agents of Modernization. The view

that the Africans could not comprehend the British system and motion of justice was propounded by one Cherry Lander, among other imperialists. In 1950's Lander asserted:

" There is no doubt the East African does not understand British justice. He quite likes to go to prison where he is well fed, his clothes are free, he has no worries and he does not do much work. There is no stigma attached and I have heard the returned wrongdoer boasting of what good time he had in the "hoteli" "na Kingi George" as they still call it. The laws of perjury mean nothing to him and the importance of being a central figure brings him so much prestige "7

The Colonial legal system, therefore, reflected the ideology of the ruling class. This is in keeping with the view that the ideal of the ruling class in every epoch the ruling ideas.⁸

C. THE COLONIAL LEGAL PROFESSION

(I) STRUCTURE AND COMPOSITION

The legal profession in Kenya and, indeed, the whole of the Commonwealth is based on the English Model.⁹ It is part of the British Colonial Legacy. Therefore, it is imperative for historical continuity to say something about the English Legal Profession and especially its structure. The salient feature of the structure of the Legal Profession at common law is the division into Barristers and Solicitors.¹⁰ The barrister alone has the right of audience in the Superior Courts. Barristers are specialists in advocacy. The solicitors deal

with office work and clients have direct access to them. It is outside the scope of this paper to look at the propriety of such a division. However, it should be noted that this division of the legal profession into barristers and solicitors was adopted in Kenya. In Kenya the legal profession was fused, an advocate performing the functions of both barristers and solicitors.

The legal profession in colonial Kenya was a Euro-Asian profession. It was concentrated around the big urban centres as the clientele was alien. Luckham notes this point which he writes:

" The legal profession in Kenya was from the beginning dominated by a small number of expatriate lawyers working for British settlers and business concerns specialising in routine solicitors work rather than advocacy in courts and bureaucratically organized in medium sized law firms: with a penumbra of individual Indian practitioners serving the numerous Asian business concerns which dominated small scale entrepreneurial activity in the economy " "

The remoteness of the legal profession to the Africans has been stressed by Ghai and MC AUSIAN who in a clear exposition of the composition of the legal profession say:

" The legal profession consisted wholly of non-Africans and belonged to the small comparatively wealthy men-African elite of Kenya. Its main work was to service the legal needs of this community, and thus it congregated in the main centres of men-African population, principally Mombasa and Nairobi. Its

English Education, and the type of law that it applied, emphasised its remoteness from the African population and their legal problems. There was consequently every incentive to emphasise the Englishness of the profession and none to associate it with Africans, with whom there was neither general, social nor professional contact "12

(Emphasis added)

In a nutshell, the colonial legal profession was a creation of the colonial mode of production and was part and parcel of the colonial set up.

(II) ROLE OF THE LEGAL PROFESSION IN KENYAN COLONIAL STATE.

We need to look at the traditional functions of a lawyer at common law and evaluate the same vis-a-vis the colonial legal profession. We have identified four main activities of a lawyer at common law. At common law the lawyer may be agent for litigation or may be counselor or adviser. The oldest is the adviser's function of advising as to how to conduct legal transactions and how to bring and defend proceedings. As to the functions of advising upon the law, a sound lawyer is needed to guide those engaged in enterprise and entering upon undertakings. The lawyer in playing an advisory role has a function of forestalling controversy, preventing needless resort to courts and keeping enterprises and undertakings to the straight paths of the law. The fourth function which is, in fact, a corollary to the other functions, is that the legal profession has a special responsibility to remind those in power of the propriety of the maintenance of the Rule of Law and other democratic institutions. In essence, lawyers should not collaborate with any authority which violates democratic principles. It is within this premise that at common law, it is argued, that a free and independent legal profession is an essential prerequisite to the maintenance of the Rule of law and protection of human rights.

It should be noted that by the Rule of Law we do not only mean the observance of the rules laid down by the rulers whatever the merits, but we mean the Rule of Law as a dynamic concept, " which should not be employed only to safeguard and advance the civil and political rights of the individual in a free society but also to establish social, economic, educational and cultural conditions under which the legitimate aspirations and dignity may be realised "13

These traditional functions of the members of the legal profession are based on a capitalist mode of production. This is so because, as Friedman, has written,

" the lawyer in the western world (capitalist world) has been a defender of established order and of vested interests. Since, in a society dominated by Commerce and Industry the individual and Corporate owners of property and of business enterorises have been the lawyers' principal clients, his role has been generally more important in the realm of private rather than public law. It is private law that has - (particularly in the common law world) been until recently the most important part of the legal profession. " 14

In colonial Kenya the legal profession which was Euro-Asian advised, defended and was an agent of litigation for a very small community, mainly the European settlers and partly Indian businessmen. This is because the colonial society was stratified on racial basis. A vivid picture of the colonial society has been described by Donald Rothchild as follows:

" Kenya's colonial society was racially compartmentalised and functionally stratified, ie, mal-integrated. A three tier social and economic structure was discernible; the Europeans held the most prominent places in the public and private sectors of the economy, the Asians predominated in the middle level positions as artisans, Clerks, Professionals, Merchants and Tradesmen and the Africans filled out the picture by performing unskilled tasks in the farms and in the homes and factories. The country was a somewhat artificial entity held together substantially by a colonial bureaucracy backed up by British military power " 15

It becomes self-evident that in such a society the members of the legal profession assisted in the consolidation of the capitalist mode of production, of settler interests as well as the Asian traders interests. From the African point of view the legal profession contributed to the extration of surplus value from Kenya to Britain. The contribution of the legal profession in the commercial sphere has been summarised by my colleague in the Faculty of Law as follows:

" The colonial legal profession contributed to underdevelopment in Kenya. They assisted in the extration of surplus value, exploitation of resources from the colonial country to the metropolis. They were always in the forefront of consolidation of the capitalist mode of production " 16

We now look at the contribution of legal profession in the administration of justice, especially criminal justice. It should be noted that it is in the administration of justice that the

legal profession has special responsibilities. We stressed earlier that in Colonial Kenya there was a dual system of justice, one for Europeans and Asian races and the other for the Africans. The first was closely patterned on the English legal system that emphasised legal representation as usual in the adversary system. Legal representation was not allowed in the Native tribunals. This was implemented by the Native Tribunals Ordinance 1930 17

The reason given was paternalistic. That the Advocates could impede the administration of justice by undue technicalities and procedure. 18

Therefore, because of the structure of the colonial society and the policies behind it, the benefits of the legal profession in the administration of justice accrued to the immigrant communities and not to the natives who were the majority.

During the colonial era the record on human rights of the colonial regime was dismissal and distressing. We pointed out earlier that the legal profession has a special duty to Monitor human rights trends and to speak out against any attempts to whittle down these rights. An examination of the attitude of the legal profession to emergency regulations provides an illuminating experience. During the emergency a motion was tabled in the then legislative council to abrogate procedural safeguards provided in criminal trials.

The substance of the motion as tabled by Blundell was as follows:

"..... Mr. Deputy Speaker,
I beg to move - That this council is of the opinion that the process of justice on capital charges arising from emergency regulations must be greatly accelerated

and simplified and requests government to introduce emergency procedure whereby trial and punishment in such cases may be seen to be both swift and effective " LEGCO.
Debates vol 57. 8 October 1953 Col 67

Humphrey Slade (who was then a prominent member of the bar) spoke in favour of the regulations. Slade made it clear that he was speaking as a lawyer in support of the above mentioned motion. Slade had the following to say:

" Sir, on this motion I speak as a lawyer with the very greatest possible pride in the profession, the greatest possible pride in the tradition of British justice, but as a lawyer, I do recognise this, the law is the handmaiden of society, and not the Mistress of society, and to serve society, and they must be adopted to those needs, we must always I think in considering the law and what is required of law, distinguish between the substance and the form "

Humphrey Slade, after expounding his school of jurisprudence, went on and said:

" I would suggest again that the government consider something in the nature of a layman's court, a layman's court administering natural justice, because in this country we have plenty of just Men and Women who are not trained lawyers. They may need a lawyer at their elbow to advise them, but the people are there, competent and entitled to share, people of all races, and there is this advantage, that in creating a layman's court you do

relieve them of the inhibitions which come from a lawyer's training That is the case for bringing laymen into the picture and lawyer's further into the background " 19

What Humprey Slade is saying is prima facie impressive. He has a case for the establishment of "laymens courts" but what was in issue was the abrogation of criminal procedural safeguards to enable the courts to try 'quickly' charges arising from emergency regulations. This was tantamount to introducing summary trials. To this extent we denounce Slade's submissions as an apologia for the repressive colonial regime policies. There was failure of the legal profession to stand up in the defence of the principles to which their profession is dedicated.

In spite of this dismal record on the failure of the members of the legal profession to stand up in defence of human rights, we would like to single out the efforts of a few members of the legal profession. There were a few Europeans and Asian lawyers who stood up in the defence of human rights and defended their clients zealously within the bounds of the law. It should be noted that it does not matter how competent a lawyer is, if the underlying legal situation is ²⁰unsound, the results will be unsound. However, the impact will have been felt by the system. Therefore to this extent no lawyer should abdicate his professional responsibilities because he knows he will lose the case, especially where the case has political undertones.

In the colonial period we have in mind efforts by lawyers like C.B. Madan (now judge of appeal) who led the Kamba communal protest against the colonial government in 1939 when the Kamba were ordered to sell their cattle to reduce soil erosion in Yatta Plateau. The order was as a result lifted. Madan who was also a member of the legislative council spoke in favour of the maintenance of the basic procedural safeguards during criminal trials during emergency. In contrast to Humprey Slade's

'Colonial' contribution, C.B. Madan had the following to say:

" Sir, Is and it would be quite easy to lose our heads, and also to lose sight of the essential principles involved in a matter of this kind. Whatever system we may devise, what we have to ensure, and I think what matters than anything else, is the preservation of the liberty of the subject has to be preserved consistently with the administration of justice to miscreants. If we were to introduce methods or a system of administration of justice which would lose sight of that fact, I think we would be descending to the same levels as the gangsters themselves " ²¹

We cannot also forget the defence team led by Dennis Nowell Pritt, QC which defended Kenyatta and his Colleagues at the infamous Kapenguria trial.²² A Colleague of Mine²³ in the faculty of law told me that he has regard for the English lawyer who sued the Colonial government on behalf of the Masai in the celebrated case of Ole Jogo - V.A.G²⁴ Efforts of lawyer like Markhan Singh who fought unjust colonial legislation and to whom the present Trade union movement in Kenya is indebted must be commended.²⁵

These lawyers were few but are indicators that the legal profession, can be the temple of justice, constitutionalism and the Rule of Law even in antagonist socio-economic context. The legal profession can play a dual role, either revolutionary or reactionary.

The efforts of these few lawyers was not decisive because of the unsound legal system under which they operated. D.N. Pritt, Q.C, who championed the cause of human dignity in many British Colonies summed up the problems faced by such dedicated lawyers in the colonies as follows:

" Perhaps the greatest of all the difficulties and defects of the advocates in private practice is the difficulty of their standing up and fighting for their clients on equal terms against the public prosecutors. These latter, even if they were not very competent, have many advantages. They are part of the ruling class establishment. They are on friendly terms with the white judges and magistrates who belong to the same colonial service as they do and they grow confidently accustomed to having these judges and magistrates accepting their arguments and evidence of their witnesses "26

Therefore, apart from the contribution of a few lawyers the colonial legal profession generally did not play any role as the watchdog of the Rule of Law. It remained throughout the colonial period as part and parcel of the ruling elite divorced from the African population. The overall assessment of the legal profession in colonial times was analysed by the current Chairman of the Law society of Kenya as follows:

" I think I would say that the law society is only emerging from a long period of doemancy. When it was set up in the early years of this Century, and even when it was established by statue in 1949, the leadership apparently failed to fathom the whole effect and purpose of the society. They (the leaders of the society) tended to treat it as a trade union for the protection of the rights of the members so that during the troubled period like the emergency when there were great violations of the rights of the citizens, the law society never stood up to pose a challenge to the colonial

authority or administration. "

There is no evidence that, for example, they stood up in defence of liberty during such period as the trial of Jomo Kenyatta. Subsequently, when this country was negotiating independence from the British Master, the law society did not, in my view, play a significant role and it was only in the last few years that the society had began reshaping its outlook and become more and more conscious of the objects for which it was established.

One cannot therefore say that the law society has asserted itself effectively as a champion of Constitutionalism and the Rule of Law " 27

It should be noted that the law society is a statutory body¹⁸ which was established in 1949. An advocate with a practising certificate is required to be a member of the law society. Therefore, all advocates in private sector are members of the Law society. The most important objects of the law society are, inter alia:

- (a) To maintain and improve the standards of conduct and learning of the legal profession in Kenya;
- (b) To facilitate the acquisition of knowledge by members of the legal profession and others;
- (c) To assist the government and the courts in all matters affecting legislation and administration of law in Kenya;
- (d) To represent, protect and assist members of the legal profession in respect of conditions of practice and otherwise;
- (e) To protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law.

When one looks at these objects of the law society, one comes to the conclusion that the legal profession in colonial Kenya did not fathom its objects, and if it did, did not discharge them as envisaged by the parliamentary enactment. It is undoubtedly competent for us to submit that the colonial legal profession, from the African point of view contributed to economic, social, political and constitutional underdevelopment of Kenya. Indeed, a study of the colonial legal profession is a study of how the British imperialists underdeveloped Kenya.

CHAPTER THREE

THE LEGAL PROFESSION IN INDEPENDENT KENYA; AN
EXPOSITION OF THE POLITICAL ECONOMY OF DEPENDENT
CAPITALISM

A. INTRODUCTORY REMARKS

We stressed earlier that the type of prevailing political economic system will be important in determining the role of lawyers in any given society. In essence, therefore, the whole question of the legal profession cannot be competently be discussed outside the whole context of whole problem of state and law. This is so because at any given time law is nothing but an expression of the major influential groups in society. To understand the legal profession, we reiterate, one must look at the material base which shapes the nature and content of law. It is in accordance with this theoretical framework that we now examine the impact of independence on the colonial political economy and then proceed to look at the legal profession in independent Kenya.

B. TRANSITION FROM COLONIALISM TO INDEPENDENCE

The advent of independence was itself a decisive achievement in the struggle for self-determination in Kenya. However, it is submitted that the advent of independence did not change the then existing property relations but ushered in a period of neo-colonialism which has been defined as:-

" The survival of the colonial system in spite of the formal recognition of independence in emerging countries which became victims of an indirect and subtle form of domination by political, economic, social, military or technical means "1

DR. Wadada Nabudene, in a classic exposition of the historic situation, summarises the effect of transition from colonialism to independence on the colonial political economy as follows:-

" A class structure created by colonial capitalist production helped the monopoly capitalist to set up neo-colonial states with a section of the petty bourgeoisie, and 'comprador bourgeoisie' as their governing representatives; monopoly capitalism ensured that these bourgeoisie had to rely on international monopoly capital to sustain themselves both economically and politically. This strategy gave the bourgeoisie a semblance of independence, and relying on populism to maintain support from small producers and workers, these classes played their true role as agents of monopoly capitalism "2

The advent of independence meant continuity rather than discontinuity of the colonial political economy. Formal political control was transferred to an African "ruling" class which was itself a creation of the colonial mode of production. This class of Africans to whom 'power' was transferred has been described by Ngugi Wa Thiong'o as a comprador bourgeoisie. Ngugi describes it as follows:-

"..... a comprador bourgeoisie is, by the very economic base, a dependent class, a parastic class in the Kupe sense. It is in essence, a Mnyapala class, a handsomely paid supervisor for the smooth operation of foreign economic interests. Its political inspiration and guidance comes from outside the country. This economic and political dependency is clearly reflected in its imitative culture.... For this class as Franz Fanon once put it, has

an extreme incurable wish for permanent identification with the culture of the imperialist bourgeoisie " 3

The independent Kenya government, in its much talked about policy paper on African Socialism and its application to planning in Kenya⁴, publicly declared itself committed to African Socialism. However, when one lifts the veil of the contents of the paper, one comes to an irresistible and justifiable conclusion that, in fact, the paper outlines a capitalist path of development or underdeveloped as some would have it. Therefore, the Kenyan government pursues a capitalist path of development under the cloak of African Socialism which is, in essence, nothing but petty bourgeois populism.

It should be noted that the Kenya capitalism is a dependent capitalism. It is a junior partner in the international capitalist system. The hallmarks of dependent capitalism have been summarised by Richard Sandbrook as follows:-

" The generic elements of such a strategy are the following, a conception of development as at least in the short run, maximizing production rather than ensuring social equality, a decision that development in this sense can best be stimulated by the prod of profit motive and the associated institution of private property; a considerable reliance upon foreign capital and expertise to modernise the economy;; and the official encouragement of indigenous entrepreneurship in both urban and rural areas.....

Kenya's economic dependence derives

in part from its reliance upon the inflow of foreign resources both capital and skilled personnel from advanced capitalist countries.

This dependence is accentuated by concentration of Kenya's trade with a few industrialised states, a trade in which Kenya supplies mainly primary products "5

We submit that the salient features of dependent capitalism is reliance on external finance capital which it has been said is such a decisive, force in all economic and in all international relations, that it is capable of subjecting, and actually does subject, to itself even states enjoying the fullest political independence "6

This is what constistutes in all ex-colonies or neo-colonies what has been rightly called the national question.⁷ When experts in political economy talk of 'disengagement' they, inter alia, mean dislocation of the ex-colonies from the trappings of international finance capital. It is within this context of the political economy of dependent capitalism that the legal profession discharges its duty. We are of the view that any study of any institution which excludes an examination of the political economic context under which that institution operates defies all attempts at rationalisation.

C. THE LEGAL PROFESSION IN INDEPENDENT KENYA

(i) THE LEGAL SYSTEM:

As a corollary of the continuation of the colonial political economy in independent Kenya, the then existing legal system was not only relevant but also indispensable to the incoming African government.

However, some of the glaring anomalies of the colonial legal system had to be reformed. The dual system of administration of justice which was the cornerstone of colonial legal system was abolished. This was effected by the enactment of the following statutes, the magistrate's court Act⁸, the Kadhis courts Act⁹, and the judicature Act.¹⁰

These statutes established the present structure of court in Kenya. The magistrate's courts Act is notable for having abolished the former African courts which applied customary law to cases which only African were parties. Now all the courts have jurisdiction over all persons in Kenya irrespective of race and there is no restriction on legal representation so that advocates have right of audience before all courts. We submit that the panel of elders established under the Magistrates' Jurisdiction (Amendment) Bill 1981 to which advocates are not supposed to appear are not courts.

However, the Kenya legal system is basically based on the common law Tradition. Some of the prominent features of the common law legal system as identified by Karl Llewellyn¹¹ are: inter alia, the adversary system and the existence of an independent legal profession. The adversary system is the cornerstone of the bourgeois administration of justice. This contention is borne out by the judicature Act which established the hierarchy of legal Norms in which the High Court and all subordinate courts exercise their jurisdiction in conformity with.

Therefore, we can comfortably conclude that the present Kenya legal system is based on the English model.

(ii) THE LEGAL PROFESSION

The foregoing arguments in respect of the colonial legal

system apply with equal validity to the legal profession. The then non-indigenous legal profession found itself welcome by the independent government. Indeed, the legal profession was indispensable to the maintenance of the inherited colonial structures. The indispensability of the legal profession to the maintenance of the inherited mode of production was emphasised by Professor Gower, L.C.B, one of the early writers on the legal profession in ex-colonies. In his book where Gower discusses the economic legacy, (one of the legacies of the colonial rule), has this to say about the role of the legal profession:-

" The lesson for the legal profession seems clear. Competent lawyers are needed, first to draw up the often extremely complicated legal agreements when a joint enterprise is launched, and, second, as house counsel or otherwise, to keep public or semi-public corporations on the right course. They are also needed to guide the indigenous businessmen and to help him to make the best use of the organization framework which the law provides. They are needed to help to adapt to African conditions the English style company, partnership, and co-operative, and to evolve new types of organization which may be suited to local conditions and ideas. Property lawyers are needed to help the African entrepreneur to make effective use of his resources so as to raise capital and obtain credit " 12

This is the classic role of the legal profession in all countries which have a capitalist mode of production. Therefore, the colonial legal profession was still needed in independent Kenya because the socio-economic context had not changed.

It was noted in our previous discussion that the colonial legal profession was not indigenous. It was a Euro-Asian affair. Indeed, at independence Kenya had only six African lawyers.¹³

The first African lawyer qualified in 1954 having surmounted the colonial stumbling - blocks on the pretext that he was going to London to study economics.

The advent of independence meant that African had to be offered legal training facilities. As the wind of change had started blowing over Africa in the 1960's, a faculty of law was established in the University College Dar es Salaam in 1961. In 1963 the Kenya School of Law was established. In 1970 the faculty of Law was established in the University of Nairobi. The independence era has seen more entry of indigenous lawyers into the legal profession. At present the indigenous members of the legal profession constitute a numerical majority.

(iii) CLIENTELE OF THE LEGAL PROFESSION

It was shown in the preceding chapter that the clientele of the legal profession was divided along ethnic lines in colonial Kenya. The advent of independence has not changed the ethnic division. I visited a number of law firms in Nairobi and my observations were that the ethnic considerations are still crucial. Asian lawyers have Asian clients (traders and small corporations) African lawyers, African clients (traders and essentially criminal work). On the other hand, European lawyers have European clients (Transnational corporations operating in Kenya and resident Europeans in Kenya)

There are, of course, exceptions, e.g lawyers who concentrate on criminal cases have largely African Clientele, and African lawyers who have political connections draw clients from all ethnic groups, including large business concerns. My observations have been corroborated by professor Yash P. Ghai who in a recent publication has the following to say on the clientele of the legal profession in independent Kenya:

" Within the private legal profession there is a clear hierarchy. European firms tend to monopolise the top end of the work - that of large firms, transnational corporations, banks and insurance companies and parastatals. They are organised as partnerships of considerable size (about 15 lawyers in one chamber) and are able to offer specialised services to their clients. They are able to smooth the operations for their clients because, it is alleged, they get more privileged hearing from government offices. The important interface between foreign capital and the local state and domestic capital, which is crucial to an understanding of Kenya's political economy, is mediated by European lawyers. (many of the Europeans have taken out Kenya citizenship, and a few have employed the token Africa lawyer)

Asian practice has remained unchanged, serving the middle commercial sector, and still dependent largely on Asian business enterprise. They have captured some new African business, but are still excluded from large firms. To secure large firms and multinational corporations as their clients remains their wish, as indeed of the African lawyer. Like the run of Asian lawyers, the African practitioner has to engage in general practice, operating through small one or two person offices. While two or three African firms have achieved some eminence and are modelled on the large scale, bureaucratised firms, they are still excluded from lucrative financial and commercial contracts and complain much about it " 14

Therefore, the most lucrative practice of law which, inter alia, includes offering legal services to the Banks, Insurance firms, companies, industries and well placed

members of the society is generally done by non-indigenous members of the legal profession.

The legal profession transacts its business mainly in large towns. However, due to the entry of more Africans into the legal profession and the competitive nature of legal work in large towns, there has been what one of my colleagues referred to as "urban rural migration of lawyers"¹⁵. For example, in Meru there was only one Asian lawyer in 1963. But now there are twelve African lawyers. The majority of these lawyers had opened offices in Nairobi but had to wind up because they could not stand the competitive nature of the profession. This finding on 'urban rural migration of lawyers' is also supported by Yash P. Ghai - Ghai says this on the issue:

" For many African lawyers, the competition from established profession is strong, and they have to seek new avenues. The search for a new base has taken young African lawyers to smaller towns, where they have tapped new work, handling land transactions, loans from Banks or financial parastatals, wills and criminal defence.

There has been a steady growth in the private legal profession. The profession has exploited the possibilities offered by the market economy fuelled by government interventions and subsidies. The lip service by the government to individual incentives and private initiative fits well with the ethos of the profession.....

It can present itself as an important and loyal partner of government and the business community. This despite certain tensions and competition within the profession, it is a group well satisfied with its economic position "17

When I talked to one of my colleagues who is writing a paper on the magistrate's court jurisdiction (amendment)

Bill 1981, he was of the view the recently passed Bill will have adverse effects on lawyers in small urban centres who were relying heavily on land transactions.

D. DEVELOPMENT OR UNDERDEVELOPMENT?

From a purely economic point of view lawyers do not engage in material production. However, they play a fundamental crucial role in the mobilisation and redistribution of the surplus created by production. Lawyers service the basic institutions like companies and banks, just to mention a few, through which the capitalist maximizes his profits. This from an orthodox concept of economics is per se development.

The number of lawyers I talked to, many of whom were African lawyers, were of the view that they had contributed a lot to indigenous accumulation of capital. They were of the opinion that by participating in incorporation of companies, meeting day to day legal needs of African traders they were, indeed partners in progress. The view expressed by African lawyers was corroborated by research papers by scholars which have shown that in spite of continued domination of Kenya by international bourgeoisie, an indigenous propertied class has been steadily growing since the attainment of independence.²⁰

In fact, an officer in the Registrar of companies department, disclosed to me that the bulk of companies incorporated in Kenya excluding transnational corporations subsidiaries, are incorporated by African lawyers.

The African lawyers have helped to build a petty-bourgeois class to which they also belong. They have contributed to indigenous accumulation — only shared by this class and therefore, from our wide working definition of 'development' this would not qualify to be development.

On the other hand, it was clear that the legal work of all the multi-national corporations incorporated in Kenya is done by European firms, mainly Hamilton, Harrison & Mathews and Kaplan & Stratton. It is an open secret that these companies which these European firms service qualify for profit export rights under the Foreign Investments Protection Act.²¹ Therefore, on this score, we come to a well deserved conclusion that these European law firms contribute to Kenya's underdevelopment because they facilitate the transfer of surplus value from Kenya to various western capitalist countries which are Kenya's trading partners.

The other area which we identified as part and parcel of national development is the administration of justice. This is a special responsibility of the legal profession to champion. The importance of persons accused of criminal offences having the advantage of counsel to assist them cannot be doubted. This principle receives constitutional protection as a fundamental right of the individual under the Kenyan constitution which stipulates:-

" Every person who is charged with a criminal offence shall be permitted to defend himself before the court in person or by a legal representative of his own choice "22

In keeping with the capitalist mode of production the constitutional right to counsel does not guarantee free representation under the Kenyan government. All the people I interviewed and those who gave written answers to the questionnaire were of the opinion that the legal profession has played a crucial role in the administration of justice. I also observed during the fourth term clinical programme that in both civil and criminal cases the advocates played a very important role in assisting their clients and the courts in the determination of the legal issues. On this aspect no distinction can be drawn between indigenous and non-indigenous lawyers. They have all promoted the administration of justice

within the parameters of the existing laws.

We submit that the Rule of Law requires lawyers of competence and integrity and who are available and do in fact represent the whole community regardless of racial, religions, political, geographical or other considerations. Therefore, every lawyer must feel able to make the best case for his client without fear of state intervention or loss of income, status or reputation. A number of lawyers indicated to me that they were hesitant to take cases which they considered to have political undertones. They were hesitant when approached by their clients to institute private prosecutions which are allowed under the Kenyan constitution²³ and which if encouraged can curb some police brutality and other injustices perpetrated by the administration.

The fears expressed by members of the legal profession are not based on flimsy or speculative grounds. A senior Nairobi advocate disclosed to me how he had a number of parastatal corporations removed from his firm because he had taken what were considered hostile cases against the state. This clearly indicates that in Kenya the government is in a position to influence the private legal profession. In a well made exposition Ghai has the following to say vis - a - vis the private legal profession.

" Kenya has opted for the model of the private profession as servicing the needs of the economy, so that even its own commercial and industrial work is handled by private lawyers. Since the volume of government work is expanding and since the economy is still an administered economy, the government is nevertheless able influence the private profession in important ways. It is able to direct work through parastatal sector to

particular firms. It is able to influence the larger business firms in their choice of legal representation "24

Therefore, even in the administration of justice a few hurdles well have to be surmounted. However, this is an earlier where the contribution of the legal profession has been shared by the majority of Kenyan Citizens. This we concede is a positive contribution to national development by members of the legal profession. There is a case for the legal profession to assert itself more in the administration of justice.

The other important aspect which we stressed in our discussion on the concept of development was the role of the legal profession to constantly remind the executive of the propriety of the Rule of Law and other democratic institutions. This is the function which determines whether the legal profession has a sense of calling and commitment to public service. A Kenyan Resident magistrate in an article published in one of our local newspapers was of the view that it was the role of the legal profession.

" Not only in Kenya but also in every country both in the conduct of their practice and public life to help ensure the existence of a responsible legislature elected by democratic processes and an independent adequately remunerated judiciary and to be always vigilant in the protection of civil liberties and human rights " 25

We agree. This aspect of the role of the legal profession falls within the objects of the law society of Kenya Act which stipulates, inter alia, that it is the duty of the law society:

" To protect and assist the public in Kenya in all matters touching, ancillary of incidental to the law " 26

The legal profession had not come out since independence in defence of these principles. For example, when the Public Security Act when legalised preventive detention was passed no comments were forthcoming from the legal profession. It is common knowledge that preventive detention is a serious invasion of personal liberty. The current Chairman of the Law Society has condemned it as going against the 'social contract theory' on which all governments are supposed to be based. Muthoga says this on preventive detention:-

" Detention without trial is a breach of understanding between the governors and the governed that governmental powers will be exercised with certain measures In a society which makes any pretensions at all being democratic, any person who has or is thought to have committed a crime can be dealt with by normal law, of the land " 28

The legal profession has not through the law society spoken against unlawful arbitrary 'orders' by cabinet Ministers, high ranking government officials in the administration and other sub-organs of the executive. A telling example, is the infamous "order to shoot" issued to policing by the then Attorney-General and now member of parliament for Kikuyu Constituency and Minister for Constitutional Affairs, Mr. Charles Njonjo. This 'order-to-shoot' abrogated one of the most deeply rooted and jealously guarded principles of criminal law - presumption of innocence. The presumption of innocence principle is guaranteed by our constitution which stipulates that:

" Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty " 30

This 'order' was unconstitutional and amounted to an incitement of the police to commit crimes. This 'order' was discussed by people who had the scantiest knowledge of law and eventually the Attorney-General, J.B. Karugu (as he then was) responded in parliament and denounced the order as a derogation from the criminal procedural safeguards.³¹ The question which arises here is that when the debate on the "order to shoot" was still going on the law society denounced its statutory birth right and took refuge in silence. The law society was the most suitable institution to have put the 'order to shoot' in the proper perspective. This is strong evidence that the law society lacks public orientation.

Incidents of this nature are many including the notorious judgement of justice Harris (as he then was) in Republic versus Sundstrom (unreported). The law society issue a statement on this judgement where the judge departed from the traditional principles of sentencing. The judgement was discussed by the general public and the then Attorney-General issued a statement to the effect that he had not been satisfied that justice was done nor seen to be done. The law society which is supposed to be the watchdog of civil liberties and human rights never issued a statement.

The legal profession has since independence continued with the colonial "consumptionist" or "bread-and-butter" approach to issues. The members of the legal profession have, as the preceding analysis shows preoccupied themselves with matters relating to their own welfare and have forgotten that the legal profession is a public profession. This posture undermines the concept of national development and it is one of the areas where the legal profession has a dismal and distressing record.

The absence of sense of calling or commitment to the public service on the Kenyan legal profession has been spelt out by Amos Odenyo in a paper written within the paradigms of the 'ideal type' of bourgeois occupational sociology as follows:

" The history of the Kenyan legal profession does not show much sense of calling or commitment to public service. Its fierce push for self-regulation from its beginning in the colonial era to the present day shows that it has concerned itself more with its own welfare than with service to the public. The first remuneration committee formed under the law society of Kenya Act 1949 is known have specified rates below which lawyers were forbidden to serve, but said nothing about the maximum rates the lawyers could charge for their services. The lawyer quickly made a practice of treating specified rates as their minimum and of bargaining for the highest possible a client could pay

.....

As if this was not enough, the same Act stipulated that a member of the public who felt mistreated by a lawyer could appear before the disciplinary committee but only at stiff fee to be used for furthering the goals of the society. It would appear that the more the legal profession succeeded in regulating its own affairs, the less importance it placed on service to the public and sense of calling " 32

The current leadership of the law society appears to be aware that the law society has been neglecting very crucial areas within its domain. It has disclosed that plans are

underway to establish Duty Advocates schemes and expanding its activities in legal aid.³³ we would agree with the Chairman of the law society when he says that the obligation to provide services to the poor rests squarely on the government.³⁴

However, in the absences of such a government scheme, members of the legal profession must demonstrate their sense of calling by a more active participation in providing legal aid services.

To the extent that the members of the legal profession have failed in their obligation to make the general public more and more aware of their rights they can be said to have contributed to the underdevelopment of Kenya. The development of the consciousness of a people is part and parcel of national development unless people are aware of their legal rights they cannot assert them.

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CHAPTER FOUR

A CASE FOR REFORM

" When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength But to get him out is only the first step, The next is either to kill him, or to tame him and make him a useful animal "

OLIVER DENDELL HOLMES, 10 HARVARD LAW REVIEW (1897)
457 P 469. (EMPHASIS MINE)

A. INTRODUCTORY REMARKS

We have examined the legal profession in colonial and post-colonial Kenya, and yet our task would not be complete if we do not make recommendations on how some of the shortcomings of the legal profession may be remedied. When I talked to one of my colleagues about the reforms he would like to see in the legal profession he was of the view that what was in issue was not reform but instead the whole socio-economic structure be overhauled so as to give effect to human dignity and self-respect for all. He was of the opinion that bourgeois reforms should not be encouraged because they give a longer lease of life to the capitalist system which is historically doomed to collapse.

We agreed with him that the whole question was structural and that socialism is the only rational choice which can ensure human dignity and respect for all. However, in our opinion, reforms even which they are bourgeois are in themselves a positive measure and should be encouraged. This does not mean abandoning the revolutionary cause. "Goods" should be delivered to the living. Let us not fall prey to this blind dogmatism.

The suggestions made in this paper are made within the context of the existing political socio-economic structures. They are also made within the general understanding that in developing countries the lawyer must be something more than a practising professional man. As one Resident magistrate has pointed out:

" The lawyer should not content himself with conduct of his private practice. He cannot remain a stranger to important developments in economic and social affairs of the country. He should take an active part in the process of Kenya's development by inspiring and promoting economic development and social justice. His skills and knowledge are not to be employed solely for the benefit of clients but should be regarded as held in trust for society "1

This view was echoed by the President of Kenya in a recent address to the law society of Kenya.² The majority of lawyers whom I talked to were of the opinion that what was needed in Kenya was reform and not Nationalization of the profession. A few suggested the nationalization of the legal profession which would give way to the establishment of a government legal corporation. This corporation, they submitted, would provide legal services to those industries and companies which are under government control and also serve the private sector. They were of the opinion that the profits made by the corporation would be retained by the government and be used by the whole 'society'. These were in the minority and even non-lawyers were opposed to nationalization of the profession.

Those who opposed nationalization of the profession in Kenya pointed out that other similar government institutions like parastatal organizations were doing very badly. This they said, was clear evidence that the Nationalization of the profession would lead to mediocre legal services to the detriment

of Kenyans. This would expose lawyers to manipulation by the central government.

A student of law at the University of Dar-se-Salaam³ told me that even in Tanzania where there is a government legal corporation there is still private practice of law. It should be noted that Tanzania is committed to building a socialist society.

The absurdity of the arguments of the exponents of nationalization within the existing Kenyan political economic system has been summed up by one of my colleagues as follows:

" I am strongly opposed to the abolition of private legal practice. Such a move will be one of subtle forms of control of market forces to the strangulation of the profession by the state power. The fallacy in the arguments of the exponents of abolition is the presumption that the state is value neutral. The identification and indiscriminate attack on one profession as the exploiter is absurd. If societal arrangements were such that there was equitable access to the litigation process, then such abolition would be alright and the state would have to provide legal aid on a free basis. However, in contemporary political economy one cannot tell what ends the public legal advocacy could be driven to do "4

We are of the opinion that under the existing Kenyan political economy it would be anomalous to abolish private practice of law. We submit that what is needed is not nationalization but a re-orientation of the legal profession.

B. RECOMMENDATIONS

Members of the legal profession should strive to create greater awareness on the people of their legal rights. Every Kenyan needs to understand his country's legal system and the philosophy of law behind it. It is often said, and rightly so, that the most effective bulwark for constitutionalism, Rule of Law and human rights is public opinion. Unless legal consciousness is aroused among the ignorant and largely illiterate members of our society this cannot be achieved. It is consciousness and legal awareness that can bear pressure for respect and adherence to human rights. The cases of Sundstrom and that of the 'order-to-shoot' already alluded to in our previous discussions are classic examples of how easily susceptible the establishment can be made to bow to public pressure. In the former case the expatriate judge had to leave the bench because he had lost credibility in the eyes of the public whereas in the latter the 'order' was denounced by James Karugu (the then Attorney-General) as a derogation from the Constitutional guarantees of fundamental rights and freedoms.

The Law society should participate in this exercise vigorously by utilising the public media and the law under graduates during vacations. This is more so especially in a one party system like the Kenyan one which is becoming a "Commandist" institution within which personalised presidential powers are exercised.

It is gratifying to note that, the current leadership of the Law society has realised this. The Chairman has made it clear that the society has established an information and education committee to work out a programme for mass education of people's legal rights under the law and the constitution. The proposed Public Law Institute which is being launched by the law society and the national christian council of Kenya (NCCCK) is a commitment to this cause.

The proposed public law instistute would understate public matters which have tended to be ignored. These include environmental pollution and the abuse of executive powers. The instistute would in a nutshell be a protector of human rights. Whether this instistute will stand the test of history or not remains to be seen.

As a corollary of the foregoing the legal profession should take an active role in legal aid and Law reform. Legal aid in form of pauper briefs is allowed but not mandatory to any member of the profession. It seems that most advocates are very busy trying to make money that they have ignored it. This attitude should be discouraged. Even with the establishment of the Law Reform Commission, members of the legal profession should not hesitate to point out Laws which are not consonant with current motions of justice. Lawyers should identify themselves more with the developmental aspects of the society and yet at the same time carry the dignity of the legal profession to facilitate respect for the law.

We would like to highlight a few things in respect of the administration of justice. The legal profession should encourage settlement of cases before they are taken to court. It was my observation during fourth term clinical programme that the numerous misconceived civil cases which were brought to court could have been solved through settlements by advocates. It has been pointed out by the former chief Justice of Uganda that;

" An advocate is not a conveyor belt upon which his clients should dump their problems for him to convey to the court for sorting: he should go to the court only as a resort" 6

This should be viewed within the context that members of the bar are officers of the court and should assist it in the dispensation of justice.

We call for a re-examination of the provisions of the Advocates Act⁸ which takes a Trade union approach to remuneration of advocates. The Act makes it an offence for advocates to charge below the prescribed limits. Undercutting is not allowed. However, the advocates I talked to disclosed to me that undercutting was prevalent. The Advocates Act controls the fees within a professional context to ensure adequate returns. If the Advocates Act was adhered to strictly, it would mean that the entry of more lawyers into the profession would not affect the legal fees payable according to the principles of supply and demand. There should be no limits whether minimum or maximum to which the advocates should charge. It is important to note that this is the only such legislation in Kenya. We are aware that this would also occasion some problems. Nevertheless, it is a lesser evil. We recommend that these provisions be repealed.

The legal profession has also a role to play in the training and recruitment of new lawyers. The older members could provide the young undergraduates with guidance so that they can become better lawyers in future. They can do so by engaging Law students during the vacations.

We would recommend that non-Africans or non-Citizens lawyers should not be allowed to practice in Kenya. This is because most of the legal work in this country is done by non-indigenous lawyers representing multinational corporations, much work can be done by African lawyers. The government should intervene and make it clear that these multinationals must use local expertise where it exists. Their legal work should be done by African lawyers. Kenya is primarily a black man's country and where the interests of the locals and foreigners come into conflict the interests of the former should prevail. B. Kangwana informs me that this is a problematic area because multi-nationals would retain their home lawyers. We agree with him that the problem is more complex than it sounds. However, we are of the opinion that an attempt should be made to ensure

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that African lawyers do their legal work.

There is no profession which can exist without strict adherence to professional ethics. Members of the legal profession should be men of high moral integrity, civic spirit and sense of social responsibility. We are not saying that the Kenyan legal profession is not composed of men of who have high regard to professional ethics. Even the best needs improvement. For example, there are increasing cases of the Advocates misappropriation of their clients' money. The Chairman of the law society is of the view that the legal profession's image has been tarnished by a hostile and unkindly press. While his arguments has some merits, we propound the view that there is a strong case for the law society to be more vigilant in enforcing professional ethics. We also reject the view that Advocates professional misconduct is due to the fact that there are too many advocates without enough work to do. We do not subscribe to the view that there is a deluge of lawyers in Kenya.

We appreciate that some of the above suggestions can only be achieved through the introduction of a more liberal form of legal education. Christopher Mulei is correct when he says that in preparing young people for the legal profession,

" Let them be made to understand that education should not continue to be a passport to exploitation and domination of society but rather a tool in the service of their fellow human beings "11

CONCLUSION

One golden thread is noticeable from our analysis of the legal profession in colonial and independent Kenya, that the role of the legal profession is generally determined by the

economic base by which we mean the production process and the relations of production. We posited that in colonial Kenya the profession was part and parcel of the colonial ruling class and helped in the consolidation of its rule. In independent Kenya, the legal profession has continued to be a bulwark of the status quo. This is so because the transition from colonialism to independence did not change the colonial institutions.

However, it is also noticeable that even though the role of the legal profession is to a great extent determined by the society's ethos, the legal profession is not faced with a *fait accompli*. The legal profession has a measure of independence and can determine for itself certain goals. We noted that in colonial era there were a few outstanding lawyers who championed the cause of civil liberties and human rights under hostile socio-economic system. In independent Kenya we also have lawyers though not many, who have championed the cause of their clients without fear of state intervention, loss of income or status or reputation. One of my colleagues hailed the law firm of Khaminwa & Khaminwa Advocates for setting a good example in defending the so-called controversial politicians and instituting civil proceedings against the state of 'Controversial' matters. The classic case being that of Mwangi Stephen Murrithi versus Attorney - General¹² which raised a point of law of exceptional public importance under the constitution.

An executive member¹³ of the Law society disclosed to me that the African group of lawyers in the Law society has very liberal ideas but was of the opinion that their suggestions were treated as 'treasonable' by the ruling class and as departing from the traditional functions of a lawyer by what he called well established "colonial Lawyers"

in Kenya. This is an indication that the members of the legal profession can also determine what ideals they should strive for notwithstanding the existence of political economic system.

It is observable from our exposition of the legal profession in colonial and post-colonial Kenya that the legal profession plays a crucially important role in facilitating the workability of any political socio-economic system. To whom the benefits accrue depends on the country's mode of production. It is, therefore, a justifiable finding that the legal profession is a well placed institution in national development of any country. One cannot abolish it without serious repercussions. In this respect we agree with Friedman that:

" That the active and enlightened role of the lawyer in the complex process of social engineering is an indispensable and vital aspect of mankind's increasingly urgent and precarious struggle for civilised survival " ¹⁴

(Emphasis Mine)