

THE STATUS OF THE VAGRANCY ACT IN INDEPENDENT KENYA.

- A Study of A Constitutional Dilemma In A Neo-Colonial Economy.

A Dissertation Submitted in partial fulfilment of the Requirements for the Bachelor of Laws Degree, University of Nairobi.

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N A I R O B I

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LIST OF ABBREVIATIONS:

BOOKS AND PERIODICALS

Leys	<u>Underdevelopment in Kenya</u>
De Smith	<u>The New Commonwealth and Its Constitutions</u> <u>(1964)</u>
E.A. L.J.	East African Law Journal
E.A.S.	East African Standard.
Guy & McAuslan	<u>Public Law And Political Change in Kenya.</u>
Hegel & Marx	<u>The Open Society and Its Enemies.</u>
Lenin	<u>The state And Revolution.</u>
Lloyd	<u>Introduction To Jurisprudence</u>

C A S E S

E.A.L.R.	Eastern Africa Law Reports
K.B.	Kings Bench
K.L.R.	Kenya Law Reports.

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The Penal Code - Cap 63, Laws of Kenya
Vagrancy Regulations 1898
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I N T R O D U C T I O N :

"The position has returned to that of the bad old days when people had to carry their identification with them at all times. The provisions of the vagrancy Act may be justifiable but the present manner of its enforcement, it is submitted, clearly is not".¹

This dissertation is about the Kenyan vagrancy Act of 1968. Its theory and practice. The Kenya constitution contains a Bill of Rights (2) entrenching certain fundamental rights and freedoms of the individual. The constitution guarantees the freedom of movement to all citizens.⁽³⁾ But it appears that the Act has in both theory and practice undermined some of those rights and freedoms. Indeed, there is a question whether the Act itself is not unconstitutional.

The stated intention of the Act was the suppression of vagrancy and the care and rehabilitation of beggars.⁴ That such intention was socially desirable cannot be gainsaid, but what is clear now is that the working of the Act raises questions about its fairness and constitutionality. However well-intentioned the legislators were, it appears that the success or failure of the Act depends on its application. Its proper enforcement depends on the interpretation of the Key term "Vagrant". The Act itself contains a definition of the term, but it is obviously unsatisfactory,⁽⁵⁾ yet the courts have made no efforts to establish guidelines for the interpretation of the word.

The effect of S.3 of the Act which gives powers to the police to arrest without warrant any person who is "apparently a vagrant" is tantamount in practice to conferring powers on the police ultimately to determine who is and who is not a "vagrant". As^a result the police enjoy legal immunity in applying the section despite the fact that they unlawfully infringe people's freedom of movement

and association.

The intention of this dissertation therefore is to examine the constitutionality of the vagrancy Act in relation to certain entrenched constitutional rights and freedoms of the individual referred to earlier. The constitution clearly and expressly guarantees freedom of movement to every citizen of Kenya. But it appears that the vagrancy Act limits this freedom only to he who at any given time can satisfy a particular police officer that he has a fixed abode and a lawful means of subsistence to provide him with the necessities for his maintenance. whether people's constitutional right of movement should be subject to such economic qualifications is what this dissertation attempts to question.

It may be useful to indicate the writer's approach here. The paper traverses two distinct periods. First, the colonial era in which we shall try to discover why the free movement of natives was restricted. Second, we shall see ^{how} ~~why~~ the post-colonial Kenya government ^{has} ~~has~~ retained such a discriminatory statute. The aim of tracing the origin of the statute is to avoid the superficiality of analysing legal rules in isolation as divorced from the socio-economic history of the society.

The whole dissertation is segmented into three chapters and a conclusion - In the first chapter, we shall try to show the essence of the restriction of the freedom of movement in pre-Independent Kenya. Chapter two attempts to point out some relevant sections of the Kenya constitution which purport to enshrine the Kenya Bill of Rights. As will be seen, it is more of a Bill of exceptions than Rights. However, despite the many exceptions to the substantive right, the freedom of movement and association remains a fundamental right. Chapter three commits itself to a comprehensive discussion of the Act itself, in an attempt to "demystify" it.

An inescapable conclusion is that the unconstitutionality in its application is no accident. It is the foreseeable consequence of poor draftsmanship. The obvious faults in the draftsmanship cannot be claimed to be in keeping with the "good intentions" of the Act. It is this contradiction that calls for a research into the Act. As professor Seidman has rightly stated:

"The task of the lawyer concerned with legislation is to predict that Specific legislation will achieve its intended objectives"(6)

It is submitted that the vagrancy Act has failed in this respect, and that is why we intend to raise some alternative suggestions in the conclusions.

This study is not exhaustive, but it is hoped that it will help provoke more research into this otherwise neglected area of Kenya's legal history. It is regretted that in some respects, the dissertation is wanting. This is mainly a result of the difficulties encountered in obtaining access to the relevant Materials (7)

CHAPTER ONE

FREEDOM OF MOVEMENT IN PRE-INDEPENDENT KENYA.A. The origin of the Concept of Human Rights

No constitution can justifiably claim the creation of human rights, for this is a natural law concept pre-dating man's first covenant with God¹ Since that time the concept has gone through various stages of development. It has been propagated by Greek Sophists and the Stoics, upheld by the Jews during and after their enslavement in Egypt and more recently, incorporated in most Constitutions.

One general problem raised by the concept of human rights is this: to what extent should the constitution or any other legislation interfere with individual freedom? Or conversely, to what extent should individual freedom be tolerated to interfere with government policy? It has been argued that once individuals elect a sovereign, their rights as individuals cease and one thereby surrendered to the Sovereign.⁽²⁾

This view is no longer accepted, and was challenged and re-stated by John Locke.⁽³⁾ He argued that the individual does not yield all his freedoms and rights to the sovereign when he accepts government. He only surrenders the power to preserve order and enforce the law of nature. Man retains for himself the right to life, liberty and property and that government is duty-bound to protect these. Failure to do so means that the government has lost its validity.

Most constitutions of today appear to have adopted Locke's view of government, thereby recognizing the sanctity of human rights and individual liberties. Recovering from years of British Imperialism and oppression, the Americans manifested their yearning for recognition of individual freedom and liberty in the preamble to their constitution, that:

"We the people of the United States, In ORDER TO FORM a more perfect Union, establish justice, insure democratic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves and ourprospenty, ordamand and establish this constitution for the United States of America" (4) (emphasis mine)

This preamble clearly declares that power vests in the people to protect their liberty.

A little over a decade later (5) the French, who had just liberated themselves from the yoke of an oppressive Monarchy, recognized the need for a constitutional guarantee of the protection of human rights. In its preamble, the French Constitution stated:-

"The French people hereby solemnly proclaims its (SIC) attachment to the rights of man and the principles of national sovereignty...." (6).

The French Constitution recognized human rights. It begins with a declaration that the community shall be based on the equality and solidanty of the peoples composing it (7). Article 2, then declares that France is a Republic and shall ensure the equality of all citizens before the law. The Republic's Motto is "Liberty, equality and fraternity". Another interesting part is article 3 which vests national sovereignty in the people and declares that no section of the people, nor any individual, may attribute to themselves or himself the exercise thereof.

Both the American and the French constitutions reveal the honourable recognition accorded to individual rights and freedoms. This supports the proposition that in the original social contract which created governemnt, the individual never surrendered all his rights to the sovereign, he retained some fundamental freedoms.

On the 26th June, 1945 the world community, assembled as the United Nations, signed a charter to guarantee protection of human rights to the future generations.

The General assembly formulated a Universal declaration of human rights which elaborated on the respect for the rights of man and fundamental liberties. By its charter the United Nations reaffirmed faith in fundamental human rights, dignity and worth of the human person, in the equal rights of men and women.(8) All members pledged themselves to take joint and separate action in Co-operation with the organization for the achievement of Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religions.(9) The aim was to guarantee protection of and respect for human rights. Hardly 3 years later, the European convention on human rights made a similar declaration to guarantee human rights.

The foregoing discussion of human rights and freedoms at international level will, it is hoped, provide a backdrop for an examination of Kenya's vagrancy Act, which is the subject of this dissertation. But the Act concerns only one aspect of human rights, namely freedom of movement.

B. The Colonial Policy on Native Movement

Hardly two years after the official declaration of a protectorate over what is now Kenya, (10) the commissioner, Sir Charles Elliot armed himself with powers of preventive detention and restriction of movement. Barely three years after the declaration, (11) the vagrancy Regulations 1898 were applied. This latter ordinance provided for the arrest and detention of any person found asking for alms or wandering about without any employment or visible means of subsistence. The Native Passes Regulations 1900 was also passed to regulate the Movement of natives within the Protectorate. This enabled the commissioner to make such general necessary or desirable ^{rules} for controlling the movements of natives travelling into, out of or within the limits of the protectorate.(12)

During his period as Commissioner, Sir Elliot Strongly

encouraged Immigration of white settlers, an exercise which had far-reaching repercussions for the native population. All "crown lands" (13) in the protectorate of Kenya were vested in the Commissioner and Consul-General for the time being and such other trustees as might be appointed, to be held in trust for Her Majesty. The Commissioner was empowered to make grants or leases of these lands on such terms and conditions as he thought fit, subject to the directions of the Secretary of State. (14) In 1902 the Commissioner promulgated the crown Lands Ordinance which provided for outright sales of land and leases of 99 years duration, and European Settlement in Kenya commenced with vigour the following year.

This Ordinance defined "Public Lands" as "unoccupied land" such definition disregarded the presence of the local residents. In the eyes of Colonial property law, natives could not own title to land. The application of this ordinance naturally resulted in the displacement of many natives. The British Settlers conveniently disregarded the inconvenience caused to the native. This attitude of absolute disregard of the interests and rights of natives was expressed in the case of Ol Ole Njogo and others V.A.G ¹⁵ IN WHICH THE COURT, QUOTING with approval a Botswana (then Bechuanaland) case (16) emphasised that:-

"The idea that there may be an established system of law to which a man owes obedience and that at any moment he may be deprived of the protection of that law is an idea not easily accepted by English Lawyers. It is made less difficult if one remembers that the protectorate is over a country in which a few dominant civilized men have to control a great multitude of the semi-barbarous".

This pronouncement was amplifying the official view on land occupation and native displacement. Simply stated: the economic interests of a "civilized" people had to be served whatever socio-economic inconvenience this caused the "semi-barbarous". such promising conditions induced European settlers to migrate to Kenya.

The immediate problem the settlers faced was labour shortage. The natives had no incentive to work, They could comfortably live without a monetary income. The Settlers (most of whom were not very wealthy), (17) therefore, pressed government to apply financial, administrative and legislative pressures on the natives to induce them to work on the farms. The Hut tax ordinance 1901 was therefore no accident, its intention was to compel natives to look for wage employment to raise the tax, and of course the only immediate place one could earn money was on the settler's farm. Supplementing this ordinance was the master and servants ordinance 1906, (18) which imposed prison terms or fine for negligent work on the farms. This desperate move to force natives to work on the farms was also symbolised in the short-lived "Ainsworth circular" of 1919, which empowered administrative officials to get Africans- women and children included - out of reserves to work on European farms.

White settlement created all sorts of difficulties for the Africans. The policy of land alienation led to the creation of native reserves, where the land was inadequate for the expanding population. By 1930 there was already created a landless class in Maragoli, Kiambu and Fort Hall. In his evidence to a labour commission as early as 1912, a witness from Kapenguria stated:-

" I came to Mombasa because. . . there is nothing at home . . . there at home the people die of hunger." (19)

The native Authority ordinance 1912 was enforced more than ever before mainly to increase the power of chiefs in collecting hut tax and controlling the overpopulated reserves. The Chiefs were empowered to issue orders regulating the movement of natives from the jurisdiction of one headman to that of another. The chiefs were also authorised to recruit their subjects into "Her Majesty's Service" as carrier corps during the wars.

One result of all these measures was that life became intolerable for the African in the reserve.

Consequently, most natives ultimately left the reserves primarily to escape from the despotic chiefs, evade hut tax and reduce the landlessness problem. In their struggle for mere survival, some africans went to live as squatters on the farms of settlers in exchange for labour. Here they could get a plot to till, an income of 4 shillings per month and a ration of posho. Ofcourse they would have escaped the compulsory military service since settlers protected thier squatters from conscription.

Although some africans found refuge on settlers farms, quite a larger number moved to the towns, particularly Nairobi and Mombasa. Mombasa was reputed for higher pay. By 1925, there were already many up-country natives in Mombasa. A 1921 census revealed that there were more than 27,000 Africans living in Mombasa town. (20) No doubt some of these had been attracted there by fantasy stories about liberty, adventure and sophistication in the towns.

In creating reseves, the colonial government had intended to handle africans as commodities. They had aimed at crowding natives in reserves so that they could pick them for employment in towns or farms only when they needed their services. Naturally, under such intolerable conditions, the employer had the upper hand in dictating the terms of the contract.

This economic strategy failed. The African did not submissively play into the hands of the whites as the Administration would have wished. If the African had learnt anything from living in the reserves, it was the economics of survival. That explains why even before the First World War, the African could walk all the way from Nyanza to Mombasa, about 5000 miles, to sell his labour in the best market possible. As sadler admitted in 1908:

"The upcountry natives one beginning to get sufficiently intelligent to understand the advantage of selling their labour in the best market, and as prices one higher on the coast, there is an inclination to work there in preference to up country." 21

It is clear from this that the Africans were not so helpless in the labour market. They retained a considerable initiative and independence of action. Once out of the reserves, the africans offered their labour in the best market available.

Encouraged by this "free enterprise" opportunity, natives moved in larger numbers from the reserves to the farms and towns. This soon created a Surplus of labour both on the farms and in the towns. The economic power therefore shifted back to the employer, placing him in the position to dictate the labour law and to control native movement. This is the very economic imbalance the natives had tried to avoid by leaving the reserves. The first exercise of this economic power was-through the resident labourers ordinance 1925 which conferred on the settler a greater degree of control over his labourer. There were criminal penalties for offences in relation to work, limit on property to be owned by a squatter, and an increase in working days. The impact of the change was felt when, in 1927, charges were brought against 1,261 labourers under the resident Native labourers ordinance of whom 1050 were convicted. (22)

This made the Highland farm labourers more to the towns to swell up the number of the unemployed. They failed to understand that their freedom of contract was long gone. The Native passes Regulations 1900 were once more rigidly enforced. By these regulations, it was mandatory for each native coming to town to carry a pass (Kipande). This was not just an Identity Card. In the Highlands it was a system of control. Employers in need of labour would often refuse to sign the Kipande of their labourers, forcing them to remain on the farm. The right to move was therefore at the mercy of the employer. Despite this, many natives, particularly from the reserves, found their way to the towns:

The result of this rush to towns was an increase in the number of redundant africans. In 1920, it was noted that there were about 20,000 unemployed natives in Nairobi alone. (23) The Nairobi Municipal labour officer estimated that one quartes of the male population were unemployed, the majority of whom were "plain bad hats, potential thieves and often actual vagabonds who ate and lived with their friends". (24)

Neither the Municipal council nor the Government bothered to get accomodation for their employees. Lack of housing resulted in appalling Sanitary conditions. There had been instances where 47 people occupied a single house built for one family. (25) An African residential area could have only 24 latrine buckets for at least 1,000 people. (26) The Government disclaimed its duty to house the native servants on grounds that the natives were, after all, in their own country. (27) The Problem became a cute as the population grew. With all these redundant natives whom conditions forced to raise money for such necessities as food, dowry and taxes, (28) there were cases of theft, house breaking and an increasing number of assaults upon Europeans, especially women. This was of a particular concern to the racially conscious whites.

It would have been too expensive for the municipal council to provide sanitation and housing for all these Africans. Instead, it was thought more economic simply to control the influx of natives by pass laws. The purpose was explained by a D.O., 29 in 1933 that:

"It seems only right that it should be understood that the town is a non-native area in which there is no place for the redundant native, who neither works nor serves his or her people, but forms the class from which professional agitators, slum landlords, liquor sellers and other undersirable classes spring. The exclusion of these redundant natives is in the interests of natives and non natives alike." 30

The Europeans had at last realised that whereas it would be an economic strategy to accumulate unemployed natives

from whom they could choose cheap labourers, the venture was not worth the social and health risks incurred. It was equally clear to the unemployed African that the "free enterprise" days of freedom of contract and choice of masters were over. A policy was adopted and upheld till today, that the unemployed African had no place in town.

C. The Measures for control.

The colonial Government had never intended to make the towns a haven for promoting racial intercourse or harmony. The towns were created to serve the rural and settler economy. Nairobi, apart from being the administrative centre, served the distribution of commercial facilities for the Highlands, the development of transport, and as a recreation resort for the Highland farmer. Mombasa's role was almost similar. It was to deal with the export - Import trade and serve as a holiday resort for upcountry settlers.

With urban centres meant for European comfort only, it is clear that the colonial government could not tolerate idle natives in the town. Both de facto and de jure, racial discrimination was the official policy. The presence of the African in the towns was therefore looked upon as a nuisance, unless he was "gainfully" engaged in serving the needs of non African communities. As early as 1915, the deputy Government had made this very clear:-

"It is only proper that the townships, which were primarily established for occupation by non-natives, should be reserved for those who should properly reside there, and that the residence therein of natives should be confined as far as possible to those whose employment or legitimate business requires them so to reside." 31

This attitude had not only an administrative backing but also legal force. There were already enough ordinances to deal with the "Idle natives" in the city. The vagrancy Act, , Native pass regulations supplemented by the municipal byelaws provided an adequate machinery for dealing with the idle African in the towns and repatriate him to the

reserve where he was needed more. (32)

Apart from the vagrancy Act, the native pass laws required every adult native to have a pass allowing him to leave his locality. There were conditions under which the pass was to be issued. A sub-Commissioner, collector or assistant collector could at his discretion give persons wishing to leave the district for the purpose of seeking work or selling produce to pay that tax, free passes. For any other purpose, a pass was to be issued on payment of ~~four~~ Annas after the collector or his assistant felt satisfied with the reasons for leaving the district.

The Nairobi Municipality byelaws had also addressed themselves to this issue. It was an offence for a native;

" To remain in the municipality for more than 36 hours excluding Sundays and public holidays without employment. Theonus of proof where of lay on such native, ~~unless~~ he had obtained from the " Town clerk or other person authorised on his behlaf, a resident's or visitors pass." 33

Under this byelaw, the accused had the bunden of proving his innocence, a procedure contrary to the Evidence Act (34). At one time it was ground for an appeal in RV AWQd/o Wako³⁵ in which the court set aside the conviction on the grounds that it has contrary to the Indian Evidence Act to put the bunden of proof on the accused. The issue of whether that law was contrary to the common law doctrines of natural justice was neither discussed nor raised. However, in an obiter Dictum, the learned judge had occasion to remark:

" It is no doubt dangerous to have large numbers of unemployed natives of either sex within the municipality. 36

For whites, to preserve their racialistic social " dignity" and enhance their economic and political stability, the town was to be rid of all the "undesirables." The stringency of the vagrancy ordinance was increased for "security" reasons. For the purpose of the ordinance,

a vagrant was anyone:

" Wandering about or without leave of the owner (Sic) . . . lodging in any verandah, outhouse or shed or unoccupied building or in any cart, vehicle or other receptacle and not having any visible means of subsistence."37

This law gave the police wide power, particularly those of making arrests without warrant. Vagrants were to be put to any work available, with a sanction of imprisonment if the work was not accepted. But if no work was found, he was to be returned to the reserve, with an order for his chief to keep him there. The vagrancy ordinance was therefore a statutory control for both economic and administrative expediency designed to ensure that Africans in the town were there only for convenience.

In 1926. the Nairobi town clerk and the Commissioner of Police approved a new set of Municipal rules. Under S. 3(2) (a) of these rules, the African was to seek permission to reside in almost any privately owned place within the Municipal boundaries. Wandering or loitering in a roadway without "Valid excuse" during the night was an offence, as was being in any part of the municipality for more than 7 days without being able to furnish proof of employment. There was therefore a series of laws partially dealing with the issue of the " undesirables".

To compile a comprehensive programme and recommendations on how best the municipality could get rid of unwanted Africans out of Nairobi, a local government Commission on urban reform was set up in 1927. It is interesting to note that the Chairman was one Mr. Justice Feetham, former town clerk of Johannesburg in South Africa.

The Commission did not address itself to any problems that might be peculiar to the Kenyan local circumstances. All it did was to recommend that the "Native (urban areas) Act 1923 of the Union of South Africa" be included in the Kenya local government legislation.

The Nairobi municipal council wholly adopted this South African legislation.

The vagrancy ordinance was therefore supplemented by this municipal byelaw, conferring on the municipality powers to remove any African who shall "Wander or loiter in any street or public place within the municipality of Nairobi between 6:30 p.m and 6:30 a.m." and that any African would need a permit to stay in town for more than 36 hours without employment. The Police was authorized to arrest without warrant such native that fails to get employment within this time limit. 38

The colonial government had lived up to its objectives. It had aimed at achieving economic prosperity, enjoyment of social prestige and maintenance of political stability. It was irrelevant what inconvenience these caused the African. This disregard of a fundamental human right of freedom of movement continued throughout the colonial regime. This was odd since Britain was herself a party to the 1950 European Convention of Human Rights and Fundamental Freedoms. (39) The convention's terms made it possible for the party states to extend its application to all or any of the territories for whose international relations they were responsible. Thus from 1953 Britain was under an international obligation to respect human rights not only in the United Kingdom but also in Kenya. However, the convention did not automatically become part of the law of Kenya. This was due to the common law doctrine that a treaty does not affect the domestic law unless the local legislature expressly incorporates it. The result was that Kenya remained without a justiciable bill of rights until 1960.

At Independence, the Government inherited a system torn apart by a racial and economic discrimination as manifested in the vagrancy Act and the city council byelaws. The freedom of movement was subject to one's racial or economic status. The attitude the incoming Government was bound to adopt towards such discriminatory laws depended on

what political and economic system the Government would adopt. The system would then dictate which colonial Institutions were to be preserved. This we shall have occasion to examine in chapter Two as we discuss the post-Independence Bill of rights.

CHAPTER TWO

THE BILL OF RIGHTS AND FREEDOM OF
MOVEMENT IN POST-INDEPENDENT KENYA.

A The Post Colonial Government.

At Independence, two measures were taken in an attempt to reconcile stability and democracy. First, the Government powers were decentralized and its powers divided between a central administration and regional authorities. Second, a Constitution was established with a Bill of Rights (1) which was to be the supreme law over all other laws and executive action.

It is with this second safeguard - that of democracy - that we are more concerned. Whether this Bill of Rights was workable in the then political set up was of a more immediate concern. Was it not unrealistic to expect the whole colonial system to change overnight towards greater liberationism by merely inserting a Bill of Rights in the constitution?

It must be remembered that Kenya became Independent when tribal suspicion and apathy were rife. In North Eastern Province was looming a war of succession while at the Coast were attempts by the coastal group (MWAMBAO) to dissociate themselves from the Kenya government. At national level, there was a potentially serious economic situation originating from the problem of landlessness.

These problems, aggravated by the sudden change of ideology by the politicians (2) had one significant result: Public order had to be maintained at the expense of human rights. The new regime had taken the same stand as the outgoing colonial administration. The executive, judiciary and legislature accepted it as a government policy on which national "stability" depended. Unfortunately, the result has been that all the three organs of government have aimed at preserving an unfettered administration at the

expense of human rights.

Despite the constitutional guarantee of the freedoms of movement and association, the urban centres were still no place for the idle native. They were places for only those whose services were required there. The vagrancy Act therefore still maintained its place in Independent Kenya.

The colonial vagrancy Acts raised no constitutional problems as to their validity, since there was no Bill of Rights protecting the freedoms of movement and association. But the vagrancy Act 1968 has a test of validity to pass, it has to conform to the Constitution, a departure from which renders it void to the extent of the inconsistency. (3)

B. The Bill of Rights

The Bill of Rights (4) neither creates nor purports to enact rights de novo. It simply declares and guarantees protection of already existing rights. This can be inferred from the negative phraseology in which most of the provisions are couched. For instance, a declaration that "No person shall be deprived of his personal liberty. . . ." (5) Surely presupposes an already existing right, for it would be illogical talk of depriving one of what one does not already have.

In Including the Bill of Rights in the Kenya Constitution, the authors must have been influenced by the common law doctrine that personal liberty is a birthright. But whereas the Bill of Rights recognizes some rights as a birthright, It would be unrealistic to assume that the rights are absolute, unless one means to advocate anarchy. Rights must be curtailed if they threaten to infringe the rights of others. After all, Individual rights and freedom cannot be tolerated to an extent which would undermine national security, stability or development.

The Important task confronting any draftsman of the Bill therefore is where to draw the line between individual rights and executive power. This is a problem because whereas the executive should not abuse human rights,

at the same time no individual should be permitted to frustrate National aspirations. This problem is as ~~areal~~ to Kenya as any other country with a bill of rights. The extent of Individual freedom vis-a-vis state power is yet to be satisfactorily settled.

The issue therefore is not whether there is a bill of rights, but the acceptable derogation from the substantive right. In the Kenya bill of rights, it appears that derogations have been carried just too far. Every substantive right is subject to so many exceptions that there is a question as to whether chapter V is a Bill of Rights or exceptions. The "rights" appear less effective when one notices that most of them can be "legally" taken away by such subjective exceptions as "provided it is justifiable in a democratic society" or "in interests of the public." Even when these phrases are explained, a question of who in this content is the public is bound to arise. Regrettably, writers and courts have treated this issue lightly. Professor de Smith has misleadingly argued that it is very hard to see how a law can itself be both reasonably required and not reasonably justifiable.(6) It is more unfortunate that this view has been entertained closer home in the celebrated Kenyan Case of Kioko v Attorney General.(7) In this case, the appellant, who was found a vagrant by the lower court and ordered to be repatriated, appealed to the High Court against conviction. He challenged the constitutionality of the Act, arguing that the Act denies one the fundamental right of movement. The High Court held that the Act was constitutional for it applies to a class of person who could upset public order. It was unfortunate- that Ainley C.J (as he then was) relied upon de Smith's view holding that:

" Very special facts indeed would be required to lead the court to say that though a law was reasonably required in the interests of our society, it was not reasonably justifiable in a democratic society.

With respect, both the learned Chief Justice and professor de Smith must have misdirected themselves on a point of fact.

The real problem is not just whether the law is required or not, but in whose interest it is required. A law can be passed in the interests of a minority class if that particular class is the dominant class. Such class can afford to impose its personal convictions on the ruled, even without the consent or interest of the latter. The learned gentleman must have been arguing from the false premise that law and justice are always compatible, and therefore there is no unjust law. There is a fallacy in such a contention. As Hegel and Marx observed:

"The history of all hitherto existing society is a history of class struggle. History is propelled and the fate of men determined by the war of classes and not by the war of nations." (8)

Even Lenin in his definition of "Peace and Order" observed:

"The state is an organ of class domination, an organ for the oppression of one class by another, its aim is the creation of an "Order" which legalizes and perpetuates this oppression." 9

It therefore appears clear that the structure of the Kenyan Bill of Rights is no accident. A look at Chapter V of the constitution arouses suspicion as to the sincerity of the drafters. But two main weaknesses deserve notice. First, except for section 75, all through the bill - from section 70 to 86 - the exceptions seem to outweigh the substantive rights that ultimately there is a doubt as to whether any right has been guaranteed at all. It is interesting to contrast section 72 and section 75. Section 72, whose substantive right is the "protection of right to personal liberty" carries more than ten express exceptions. However, ~~one~~ ⁷⁵ section ⁷⁵ which appears to maintain rigidly its substantive right of "protection from deprivation of ~~an~~ property" creates an impression that the Bill was meant to serve the interests of the propertied class.

The Ndegwa Commission (10) Identified the unrealistic construction of the Kenyan Bill of Rights to the common man,

and recommended the establishment of the institution of an Ombudsman if these rights were to be more meaningful and better protected. The official government response was unfortunate. It rejected the recommendation outright, arguing that the office was unnecessary in our parliamentary democracy where the government and its servants can be sued or that the matter can be raised in parliament by means of a parliamentary ^{es} quation. (11)

The bill contains ambiguities that could be fittingly accounted for in two different ways. One proposition is that except for S.75, the Bill of Rights in the Kenya constitution was a half-hearted measure. It can be argued further that as a result of the excessive exceptions, One cannot be sure of the extent or even existence of a right until the court so pronounces. In such uncertainty one is left in the dark as to whether a particular executive action is Ultra vires the constitution or "reasonably justifiable . . ." This in effect means that until the court so declares, one can hardly ascertain his right. Such conclusion however, sounds abit exaggerated and too national, and of course, repugnant to the natural law right of human dignity.

An alternative proposition is that the section purporting to guarantee the right should be read first and then the exceptions counted out accordingly. What remains of the substantive right is then to be construed as the right the constitution intended to confer.

Section 72 is straight forward and it is likely to arouse no problems. By its construction, the section appears exhaustive. Therefore, since the exceptions are soclearly enumerated, in ascertaining the limit of the right, one simply has to see whether it falls within the ten exception enumerated. If any executive action fails to be justifiable under either of the ten exceptions, then that action is ultra vires the constitution, and the affected party is entitled to a remedy in court.

Section 80 guarantees the freedoms of assembly and association provided the rights are not exercised to infringe the rights of others. The only exceptions to this right are those in the interests of defence, public safety, order, morality, or health. Even where the above conditions are satisfied, no one will be denied the right of association if such restraint would appear reasonably unjustified in a democratic society. (13)

Freedom of movement is guaranteed protection by section 81 of the constitution. No citizen shall be deprived of his freedom of movement within and out of Kenya except under the conditions stated in S. 81 (3). The constitutional guarantee shall however, not be invoked where one is lawfully detained or his movement restricted by order of court pending an investigation. It is also no contravention of this section if the freedom is denied by authority of law, provided that law makes provision for such restriction which must be in the interests of defence, public safety or public order. It is also intra vires the constitution if the law so made makes provisions to persons generally or any class of persons provided such law is reasonably required in the interests of defence, public safety, order, morality, health or the protection or control of nomadic peoples. This is not enough. That law purporting to restrict movement must satisfy yet another condition. It must be reasonably justifiable in a democratic society. The exceptions enumerated in subsections (d) to (g) are clear and arouse no constitutional difficulty. (14)

By now, it must have been made clear that despite the many exceptions to the substantive right, there remains at least something worth the name- Bill of Rights. Freedom of movement and association is guaranteed, and the only conditions under which the individual can be denied that freedom are clearly enumerated. Interpreted in the light of section 3 of the constitution, any Act purporting to deny the citizen either of these freedoms must satisfy the conditions set out in sections 72, 80 and 81 otherwise

the purported restriction is void and the Act Unconstitutional. The legal consequence therefore is that the citizen whose right has been so infringed can seek redress in a court of law. Therefore, the test of validity of any Act of parliament purporting to deny a citizen of his or her rights of movement and association must be construed in accordance with the exceptions in the Constitution.

That is the constitutional guarantee. To what extent it can be upheld mainly depends on both the political and economic system of the Kenya society. As we shall see in Chapter III, the intension of the Act was to cater for the poor and disabled and afford them a more respectable means of livelihood.

Surely it was a naïve assumption that a boughwise parliament could committedly cater for the interest of the poor and disabled as if Kenya is a welfare state. Regrettably, this is the impression the government created to the parliamentarians and so the Bill successfully sealed through.

The wording and administration of the vagrancy Act of 1968 has proved the government's half-hearted attitude towards the betterment of the lives of the disabled. In the next chapter, we shall have occasion to examine this half-heartedness as we demystify the vagrancy Act itself.

CHAPTER THREE

THE DEMYSTIFICATION OF THE VAGRANCY ACT:A. Aims Of The Act.

The Bill was presented as a statute full of social benefits to the disabled members of the community. Introducing it, Mr. Matano (1) explained that since Independence the Government had been anxious to deal effectively and in a humane way with the problem of street beggars. He explained further that both the city council and the Government had been worried of this problem. It had long been felt by the Government that a Special provision be made for the disabled beggar who was unable to maintain himself otherwise than by vagrancy. The vagrancy Act already in force applied to vagrants in general, making no distinction between the able-bodied vagrant and the disabled beggar. The Minister emphasised that the only aim of the bill was to make special provisions for the disabled beggar and "it was not intended to alter the law relating to the able bodied vagrant" (2) (emphasis mine)

It appears that the Minister failed to see the need for a change in the provisions relating to the able-bodied vagrant. It is this misconception that has rendered the application of this Act unconstitutional. The provisions in the Colonial vagrancy Acts, were enacted when there was no Bill of Rights in Kenya. At Independence, protection of the freedom of movement and association was guaranteed every Kenyan regardless of race, sex, place of origin or local connection. (3) It is therefore illogical for the Minister to argue (by inference) that the able-bodied vagrant be denied his constitutional right as was the case in colonial times. The Minister failed to interpret the colonial vagrancy Acts in their socio-economic context. Indeed some sections of the Act have proved Ultra vires the constitution.

It is submitted that the Minister's statement was made Per incuriam, as it were, Kenya's Bill of Rights and the economic history of the Colonial vagrancy laws.

This Bill was however supported, evidently without appreciating its constitutional implications, particularly its infringement of some fundamental freedoms. It is interesting to note that at one stage of the debate, a Government Minister protested against an M.P. who questioned the constitutionality of such an Act. The Minister argued that it is irrelevant for one to refer to the constitution when infact the debate is "strictly on the vagrancy Bill." (4) At the time, it appeared that all the ministry sought was a mandate (through the Act) to take beggars to rehabilitation centres. It sounded so humane, and so the Act was passed on such an understanding, but with a very close similarity to the previous colonial Acts. However, our immediate concern is whether this was the proper statute to achieve the stated aims.

B. Ambiguities In Drafting

Problem

The constitutional^A raised by the Act has its assence in the fact that S. 2 fails to define unambiguously who is a vagrant. As will be discussed later, (5) the ultimate result is that the power of deciding who is and who is not a vagrant lies with the Police. Before a Police officer decides whether a particular individual is "apparently a vagrant" he must be certain of who a vagrant is. Now, how does the Act define a "Vagrant"? S.2 states:

"Vagrant" means-

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

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- (b) Any person having no fixed abode and not giving a satisfactory account of himself, and for purposes of this paragraph, any person lodging in or about any varandah, sidewalk, passage, outhouse, shed, warehouse, store, shop or unoccupied building or in the open air or in or about any cart or vehicle, shall be deemed to be a person having no fixed abode; or
- (c) any person wandering abroad, or placing himself in any public place, to beg or gatheralus, or
- (d) any person offering, pretending or professing to tell fortunes, or using any subtle craft, means or ldevice by palmistry or otherwise to deceive or impose upon any person."

S. 3. then gives a Police Officer powers to arrest without warrant any person who is " apparently a vagrant". The issue here is; to what type of persons does S.3 refer? Since the definitions in S.2 are exhaustine, it would appear that the police simply has to observe whether a particular individual falls within the four stated categories, if so, then S. 3 can be invoked.

The provision in S 2(a) raises a number of issues. In the first place, it seems to place the police in the position in effect to decide for people what are the necessities for their maintenance. To most people, "necessities for maintenance" means; food, lodging and clothing, but a particular police officer might have his own standands. The fact that a person has no work and no money does not per se make him a vagrant. If a person is unemployed and in possession of no money but lives with and is kept by a relative or friend, then that person could be said to have "lawfull means of subsistence", Ipsso facto, not a vagrant. Further, the proviso that prostitution shall not be deemed to be lawful employment creates ambiguties, since the Act does not define who a prostitute is. This gives the police a burden to prove the uncertain.

An alternative definition of vagrancy is that given in paragraph (b) of the Act, whose ingredients are, lack of a fixed abode and failure to give a satisfactory

account of oneself. The Act does not qualify the quality of the abode. Therefore, except for persons lodging in the places expressly enumerated in S.2(b) all other forms of residence can be deemed fixed abode. Certainly, people living in shanties and slums have a fixed abode. A police officer should not therefore take it upon himself to decide what quality of a house constitutes a fixed abode because had the statute intended to state the quality of the "abode" then it should have said so expressly.

What is "a Satisfactory account" is open to endless interpretation. The term is too vague to have any meaning in law. However, parliament must have intended to make it complementary to paragraph (a) to mean; furnishing the police with a satisfactory evidence of a lawful means of subsistence and a fixed abode.

In its attempt to give an alternative description of a vagrant, paragraph (c) creates an impression of a beggar. For an understanding of the paragraph, we may refer to the definition of beggar. The Act in S.2 defines the word "Beggar" as:

" a vagrant who, whether by reason of physical or mental disability is unable to maintain himself otherwise than by vagrancy, and in respect of whom no person has shown himself willing and able to maintain him."

It would appear that mere mendicacy does not make one a beggar. Physical and mental disability must be established as the cause of the inability to maintain himself. If one is not disabled, either physically or mentally, but pursues mendicacy, then he is a vagrant and not a beggar. He must also be unable to maintain himself otherwise than by vagrancy. But since vagrancy does not maintain anyone, this must have been intended to refer to illegal employment and it is therefore clear that a person who has never begged but by reason of infirmity cannot support himself other than by scavenging or stealing is a vagrant.

One who offers, pretends or professes to tell fortune, uses subtle Craft, means or device by palmistry or otherwise is also a vagrant.(6) This definition definitely includes fortune tellers, with doctors and astrologers. (6a) It would appear that it is immaterial whether the astrologer has an executive office or simply displays himself in the streets.

These four descriptions are all the Act exhaustively offers the police as a guide on who is an " apparent vagrant". It is clear that in its attempt to define a vagrant S.2 fails to come out with a clear definition of who a vagrant actually is. Obviously if the Act so fails, then S.3 is bound to give rise to problems when it grants the police the powers to arrest without ^{warrant} anybody who is apparently a vagrant. It is this ambiguity which has in effect, led to such administrative problems as have raised the question whether the Act itself is constitutional.

C. Problems In Administrations.

To establish whether one is an apparent vagrant, the police is supposed to consider some particular phrases. Unfortunately the phrases are not adequately explained in the Act.

1. " Enough Income to provide with the necessities for maintenance".

In practice, the statute seems to give the police the power to decide for people, how much is enough for one's maintenance. To establish whether one has enough income to provide him with the necessities of maintenance the police search the person to establish how much money he has on him at the Material time. The idea of people accounting to the police at anytime how much money they have is clearly unconstitutional.(7) Except with his own consent, no person shall be subjected to the search of his person or property.(8) In practice, the police never seek consent of the party to be searched.

The problem created by paragraph (a) is in ascertaining. How much is enough and whether the means of subsistence must be from a particular constant source. Such issues arose in RV Osman, (9) a case in which the police raised an argument that a dependant with one shilling in his pocket cannot claim to have enough to provide for necessities for his maintenance, by whatever standards. Obviously, such an argument carries two fallacies; in the first place, it presupposes that a dependant does not have a lawful means of subsistence, and that lawful means of subsistence means an income from one's own salary. Secondly, it purports to set a minimum amount each person must carry in his pocket at any time in question. This is illogical, for parliament never intended to say so and had it said so, this would have been unconstitutional.(10)

2. "Fixed abode" and "satisfactory account of himself"

It is difficult to ascertain what the Act intended to mean by "a Satisfactory account" or "fixed abode". As a result, even the courts have failed to give any clearer definition of how much is satisfactory. Such issues arose in the case of RV Nyambura Ndungu.(11) ^{Nyambura} was found in Victoria street at 10.p.m. allegedly having no fixed abode and not giving a satisfactory account of herself. When she was brought before the court, she was informed of the charges against her and invited to reply to it. She is recorded as saying "No work. No money. From Nyeri, 27 years of age." The magistrate then found her a vagrant. One question such a finding raises is; how much account is satisfactory?

On revision of Nyambura's case, the High Court attempted to lay guidelines which we shall discuss later. However, of our immediate concern is the ratio decidendi that the fact that a person has no work and has no money does not satisfy the definition of vagrant.

Despite this, the police have exploited the ambiguity in para.(b) to make indiscriminate swoops all over the town at anytime they deem fit. (12) In such swoops, no time is given to the suspect to give an account of himself.

In some cases, the police interpret lack of "fixed abode/ to include "uncertainty of where one is going to." In R V John s/o Odongo..(13) the accused who hailed from Siaya was arrested in Kakamega when he stopped at a police station to enquire the route to Kaimosi. He had claimed to be "lost" and the police charged him with vagrancy. Such an arrest of course is not only unconstitutional but grossly unreasonable. But this should be attributed to the ambiguity of S.2 which, as read with S.3 ends up vesting to the police the power of not only arresting an apparent vagrant, but determining, according to their own criteria, who a vagrant is.

D. PROCEDURE: .

The Act raises procedural problems. Vagrancy itself is not a criminal offence. The only offences it creates are escape from lawful custody, ill treatment of beggars in centres or breach of orders made under the Act. (14) However, the Criminal procedure code is applied in vagrancy cases, (15) and this raises constitutional contradictions. Despite the constitutional guarantee of presumption^x that the alleged vagrant is a vagrant already and therefore he has to prove his innocence. Apart from this constitutional derogation, the prosecution is expected to prove its case beyond reasonable doubt. If, as we have seen earlier, S.2. completely fails to furnish a clear definition of a vagrant, how then can the prosecution prove beyond reasonable doubt an offence which the Act has failed to define beyond doubt.

The attempt to apply the criminal procedure Code has also been frustrated by the problem of language. A person charged should be informed as soon as reasonably practicable, in a language that he understands, (emphasis mine) of the nature of the offence charged. (16)

X of Innocence, the Courts Start with the presumption

In the first place, there is neither a vernacular nor Kiswahili term for "vagrant." Therefore, people charged of vagrancy when translated into their vernacular, or Kiswahili. The Kiswahili term used is "Uhasikini" which actually means poverty and not vagrancy.

What the Act intended to mean by "home" is unclear, as a result S 4 (1) c has proved misleading. The court is empowered to repatriate the vagrant to the "district in which his home is situated". Whether "home" in this context refers to place of origin or residence is not clear. The court faced such problem in R V Simiyu. (17) For over 20 years, the vagrant's parents had lived with him in Mombasa without ever visiting their original home in Kitale where they had a farm. The court was to decide whether the vagrant's home was in Kitale or Mombasa. It was held that for the purposes of S.4 (1) c, the Man's home district is Kitale. It is submitted that this decision must have been made per incuriam the High Court decision in Nzia Maindi V. R (18), a case in which it was ruled that the court must consider the inconvenience and hardship which repatriation would cause the vagrant if he was repatriated to a place he least knows about.

E. Repercussions of The Uncertainties;

We have seen the humanitarian reasons for which the Act was meant. It was in contemplation of this that S 3 9 to 14 of the Act were included, establishing rehabilitation centres and comprehensively providing for their management. In practice, this is a dead letter. Throughout the republic, there are no such ^{Centres} countries, (18) leaving the courts with only two alternatives: either to repatriate every vagrant or detain him.

It has been argued that the Act will help curtail the prostitutes from soliciting in the street. Unfortunately it extends to restrict even wives from going out AT THEIR OWN WILL.

fail to appreciate the nature of the offence

Almost every evening in town, there is a police swoop, allegedly aimed at vagrants and prostitutes. On such occasions, the only evidence the police asks for is an identity Card indicating place of work. The police have usually interpreted lack of an Identity Card to mean that the woman in question is either a vagrant or a prostitute. This is unreasonable in Kenya's Registration System whereby only employed women are registered. The result~~s~~ has been that unemployed women are likely to be scooped up as prostitutes.

CONCLUSIONS

One point which has emerged from this dissertation is that vagrancy laws have, since 1898, (1) been applied to entrench the position of the politically and economically dominant classes in the Kenyan Society. This has been done at the expense of the economically disadvantaged, and in contravention of Chapter V of the Constitution which sets up certain minimum standards of a just society.

We have seen that the European settlers, the then dominant class, applied vagrancy laws to help them achieve their economic and political stability at the expense of the natives. It has also been argued that whereas at Independence a Bill of Rights protecting fundamental rights was introduced in the constitution, a class of dominant natives inherited the political role of the outgoing colonial regime. It is equally clear that this class of dominant natives demanded the same socio-economic privilege formerly enjoyed by the white settler.

Vagrancy laws in colonial times were for administrative convenience and they derived their validity from the fact that there was no Bill of Rights. However, the present Act cannot avail itself of such defence so long as Kenya retains a Bill of Rights which guarantees the freedoms of movement and association. (2) If the Act aimed at giving some social benefits to the disabled as well as disadvantaged members of the community, then it has failed to do so. In practice, it is a law against the poor and unemployed. Unemployment is a problem in Kenya and the Government cannot afford to give every Kenyan a job. It is therefore unreasonable for the legislature to pass a law that in effect denies people from the rural areas an opportunity of looking for employment anywhere in the country, for this is discrimination on grounds of origin and local connection. (3)

We have seen that various reasons render the Act difficult to administer. It is unreasonable for the Act to be enforced when there are no rehabilitation centres in which the vagrants can be taken. It is unconstitutional to detain vagrants in prisons while vagrancy itself is not declared a criminal offence. Surely, the Act has not lived up to its aims, and its purpose must therefore be re-defined. In such re-definition the term "vagrant" must be more strictly and rigorously defined. This is necessary because the police have completely failed to distinguish "apparent vagrancy" from "apparent poverty" and this is because the Act itself fails to do so. As a result, the whole purpose of the Act has been defeated.

Ultimately, the only excuse for retaining the statute has been that it helps to deal with idlers, rogues and vagabonds. Surely if Parliament intended to deal with such class of people, then Ss 182 and 183 of the penal Code provide more than adequate machinery for doing so. It was completely unnecessary to pass another Act which, apart from unsuccessfully addressing itself to the self same people covered by Ss 182 and 183 of the Penal Code, stretches to unconstitutional limits, thereby infringing fundamental rights of many citizens.

Whereas the statute might have been necessary in the colonial times, it is submitted that the Act has outlived its usefulness in Independent Kenya. Since the legislative has all constitutional powers to enact, amend or repeal any law, (4) there is a need to exercise these powers in respect of the vagrancy Act. A complete repeal of this Act is long overdue. The Penal code adequately covers what the whole vagrancy Act unsuccessfully purports to deal with.

FOOTNOTES

APPENDIX:INTRODUCTION

1. Le Pelley, P. 199
2. Chapter V - Kenya Constitution.
3. Kenya Constitution S. 80 and S. 81.
4. This is Indicated in the Introductions to both the bill and the Act.
5. Vagrancy Act, S.2
6. Seidman R, Paper No. 3
7. Attempts to trace some Important High court decisions on vagrancy proved unfruitful, neither do the District Magistrates record any facts for their finding.

CHAPTER ONE

1. God gave man a Superior status of Freedom which man, as of right, enjoys because of his unique mental and moral development. - Holy Bible- Genesis chapters 1 and 2.
2. Lloyd, Pp 79-80 and 332.
3. OP Cit, Pp 102- 105.
4. Preamble to constitution of the United States of America.
5. 1789- year of French Revolution, when the first French Republic was founded and the Constitution drawn.
6. Preamble to the French Constitution.
7. Article 1 of the French Constitution.
8. Preamble to the United Nations Charter.
9. Article 55 and 56 of the United Nations Charter.
10. Protectorate declared on 15th June 1895.

11. 1898.
12. Native Passes Regulations 1900- Regulation No 12 of 1900.
13. These were loosely defined as: All public lands within the East African Protectorate which for the time being are subject to the control of Her Majesty by virtue of any treaty, convention, agreement or of Her Majesty's protectorate and all lands which have been or may hereafter be acquired by Her Majesty under the Land Acquisition Act 1894 or otherwise howsoever.
14. East African (Lands) order in council 1901, section 1
15. 5 E.A.L.R. 70 at P 97
16. R V Earl of Crewe ex parte Sekgome (1910) 2 K B 576 at P 609-610.
17. Except for a few dominant settlers as Lord Delamere, most of the other settlers were inexperienced poor ex-soldiers, penniless whites and coloured from Southern Africa who lacked capital.
18. Regulation No.8
19. Mombasa labour Commission 1912-13 at P 184.
20. Mombasa Annual reports 1921 P.2.
21. Sadler to Sec of State in correspondence relating to affairs in East African protectorate, C m d 4122 of 1908 at P. 26
22. Furedi F., at P 187.
23. Estimate by the Chief Native Commissioner, Ainsworth see E.A.S 22.5.1920.
" Report of the General purposes committee of the Nairobi Municipal Council.
24. E.A.S. 15.3.1937
25. Rhodes House, Mss Afr. S 633
Corydon 5/1 memorandum to the Native Location of Nairobi.
26. Annual Medical Department Reports 1947 P 22-29 and 1948 at P 23.
27. K.N.A.Labour 9. 1707. 70. 257.
Extract from minutes of meeting with P.C. 11.8.1930

28. With Introduction of monetary economy, dowry began to be paid in cash and the people in the rural areas looked upon these in the urban areas to meet such expenses as taxes, food and dowry on their behalf.
29. Douglas Brummage - D.O. Nairobi, and formerly a Municipal Affairs Officer.
30. Nairobi Municipality Archives, File headed - Native Location Memorandum on Native Affairs by Brummage, Municipal Affairs Officer M.D. about 1930.
31. M.H. Moore - Deputy Governor, Mombasa.
In co. 533/405/17010 - Moore to passfield, 22.1.1915.
32. Migration from the reserves to the Urban area had created labour shortage in the former. For discussion of this, see - Van Zavenenburg R.N.A, "Primitive colonial accumulation".
33. Nairobi Municipality (Amendment) Byelaws 1944-
Byelaw no. 212.
34. The Indian Evidence Act (then applied in Kenya).
35. 21 (2) K.L.R. 57 cr. Revision case no. 223 of 1945.
36. Ibid. at P. 59.
37. Regulation no. 2 of 1898 replaced by Reg. no. 3 of 1900.
38. N.C.A. File - Native employment Bureau scheme" 8.1. 1930 and 28.1. 1930.
39. The Convention guaranteed. " The right to life, freedom from torture or inhuman or degrading treatment or punishment, freedom from slavery or servitude, right to liberty and Security of person, the right to a fair trial, freedom from retroactive legislation, right to respect for private and family life, the right to freedom of thought, conscience and

religion, the right to freedom of expression, of peaceful assembly and association, to marry, found a family, and freedom from discrimination in the enjoyment of these rights.

CHAPTER :T W O

1. The Kenya constitution, chapter V.
2. Most leading politicians in Kenya seem to have changed their views on the eve of Independence: Contrast Kenyatta's views during histrial (Slater M, P. 240- 241) and his ~~s~~taddress to the settlers in (E.A.S. 13. 8. 1963)

Also Gichuru, Mboya and Muliro, on land ownership. (see colin Leys P. 57). For an explanation on this change of attitude see- Blundell, M., chapters 13 and 15.

3. The Kenya constitution , S.3.
4. Op. Cit. chapter V.
5. Op cit. S. 72 (1)
6. De Smith S., P. 194.
7. Crown Appeal 633/1967
8. Hegel and Marx, P. 112.
9. Lenin V.I, P. II
10. Report of the Commission of Inquiry (Public service structune and Remmuneration Commission) 1970-71
Chapter V
Recommendation No. 50-54.
11. Sessional Paper No. 5 of 1974
Paragraph 107 at P. 17.
12. It would appear that the test here is purely subjective.
13. Kenya constitution, S. 80 (2) d.
14. These are; Imposition of restrictions on the acquisition or use by any person of land or other property in Kenya,

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Restriction of movement to public Officers,
Removal of a person in Kenya for trial in other
country or imposition of restriction to one under an
obligation provided this is justifiable in a democra-
tic society.

CHAPTER THREE

1. Assistant Minister for Home Affairs (as he then was)
2. Republic of Kenya, National Volume 16, col 3239,
20/11/68, Assembly Debates.
3. Kenya constitution , S . 70.
4. S. Oloitiptip - Assistant Minister for Commerce and
Industry (as he then was)
See- Republic of Kenya,
National Volume 16,col
3304, 21/1168.
5. Page 23-29
6. Vagrancy Act, S. (d).
- 6a. It is interesting to note that astrologers rent
offices in the city and main towns of the Republic,
and advertise in the local press.
7. The Kenya constitution S. 76 (1)
8. There are 4 exceptions to the general rules (see S.
76 (2) and none of these is any close vagrancy.
9. Unreported, District Magistrates court at Vihiga,
Criminal case no 425 of 1976.
10. Contra. S. 76 (1).
11. (1962) E.A. 579.
- 12, See Sunday Nation June, 13 1976 page 1.
13. Unreported, District Magistrates Court at Vihiga,

Criminal case no 364 of 1976.

14. See: Vagrancy Act S 8, S, 10 (3) S. 12 and S. 14(3).
15. Op. cit. S. 4 (2) and S. 5 (2).
16. Kenya Constitution S. 77 (2) b.
17. Unreported, District Magistrate's court at Hamisi, Criminal case no 402 of 1976.
18. (1963) E.A. 322.
19. One such scheme, "mji wa Huruma" was set up in Kariobangi Nairobi as a rehabilitation centre. Now the plot belongs to Individual landlords.

C O N C L U S I O N S :

1. 1898- The first vagrancy Ordinance in Kenya (then British East African Protectorate).
2. The Kenya Constitution S. 80 and S. 81.
3. Op. cit. S. 70.
4. Op. cit. S. 30.

B I B L I O G R A P H YB O O K S:

- Blundel H., So Rough A Wind (Weidenfield and Nicolson, London, 1964)
- Colin Leys, Underdevelopment In Kenya. Economy of Neocolonialism 1964-1971 (Heinemann, London(1975).
- De Smith S., The New Commonwealth And its constitutions (Stevens, London 1964).
- Guy and McAuslan, Public Law And Political Change In Kenya (Oxford 1970).
- Hegel and Marx The open Society And Its Enemies Vol 2.
- Lenin V.I., The State And Revolution (Foreign Languages publishing House, Moscow).
- Lord Lloyd, Introduction To Jurisprudence (3rd Ed. Stevens, London, 1972
- Ogot B.A., Hadith Vol 5 (East African Literature Bureau, Nairobi, 1975).
- Slater M., The Trial of Jomo Kenyatta (2nd Ed. London, Secker and warburg, 1955)
- Van Zwanenberg, Primitive Colonial Accumulation' D. Phil Sussex, (1971

A R T I C L E S.

- Furedi F., "The Kikuyu squatters in the Rift Valley: 1918-1929, Hadith Vol V.
- Le Pelley, P. "Vagrancy And The Law in Kenya" 5 E A L J 1969, P. 195.
- Rukwaro, G.K., "Redress of Grievences: The Case for an ombudsman in Kenya", IX EALJ NO.I (1973)
- Seidman R., "Research In African Law And the Processes of change", Occassional paper No. 3, African studies centre, U.C.L.A.(1967).

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