"NULLA POENA SINE LEGE"

- WITH EMPHASIS ON CRIMINAL RETROSPECTIVE LEGISLATION.

A DISSERTATION IN PARTIAL FULFILMENT FOR THE AWARD OF THE DEGREE OF BACHELOR OF LAWS

BY

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PREFACE

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I should not forget to mention that he provided me with moral encouragement at a time when life seemed bleak to me.

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For any errors or omissions, the responsibility remains mine.

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CHAPTER ONE

INTRODUCTION:

This study sets out to examine the nature and extent of application of Section 77(4) and Sub-section 8 respectively of the Kenya Constitution. It should be of note that the Constitution is the supreme law of the land and any other law that conflicts with it is void to its very inconsistency.[1] The section under study embodies what is known in law as the principle of legality and retrospective legislation. Perhaps a Caveat needs to be added that whereas the legality rule does include retrospective legislation as one of its major components, yet for the purposes of this study, criminal retrospective legislation will be given a separate and special emphasis. Why? Because the Kenya Constitution only talks about the barring of criminal retrospective legislation.

The dissertation is divided into three major Chapters and a conclusion. Chapter One lays out broadly the scope of the principle of legality. Preliminary issues, viz. definitional aspects of the principle are discussed. Chapter Two takes every component of the legality rule by itself, and a critical appraisal made thereof. At this stage the substantive law is tackled quoting authorities. The concept of legality and retrospective criminal legislation is thereby criticised from its own standpoint.

In Chapter Three criminal retrospective legislation has been critically studied. The stadpoint taken while looking at the law is that law should be studied in its social and economic context. So, I am proceeding from the premise that a material indicia should be attached to the study of legal

science and philosophy. Sir James Wicks, C.J., has similarly spelt out the role of law in terms of material development and needs of the 'wananchi'.[2] (A detailed quotation is warranted).

The policy of the Kenya Government at Independence was to eliminate the customary criminal law as being uncertain, ill-defined and discriminatory.[3] This was constitutionally guaranteed by making it unconstitutional to punish any person for an offence not defined by written law.[4] This point will also be developed in Chapter Three.

The principle of legality is composed of three ingredients. namely that criminal law specifies the various offences which are liable to punishment and measures applicable to offences. Therefore, the Court may not impose penalties other than those prescribed by the law, hence a bar to retrospective criminal legislation by the Constitution. Secondly, there should be no legislation by analogy. Lastly, nobody shall be punished twice for the same offence. The legality rule is enshrined in the Constitution to secure protection of the law. The implication of such a measure is that abuses and arbitrary actions take place when the powers of the Courts are restricted only by their own conception of what is right and wrong. The fact that S.77 has been inserted in a Chapter dealing with the individual confirms that the principle of legality aims at protecting individuals from such arbitrary actions as they might be exposed to, should it not be provided that the written law is the only source of the criminal law.

Chapter Three also develops generally the theme of criminal rectrospective legislation: acritique.

The dissertation is then concluded by some recommendations for reform of the current law on Criminal retrospective legislation

PRINCIPLE OF LEGALITY, determined

Whereas lawmen, viz. the Judge, the Magistrate, the Prosecuting Attorney, the private practitioner, the law teacher, the law student not to mention the Parliamentarian directly involved in the application or maintainance of the principle[5] of legality, it is of concern to learn and note that the meaning of this principle is less known and has for a long time been dubbed theoritical. Despite the fact that the principle has received tremendous applause from the aforementioned lot, it has been ignored very much in practice. One cannot talk of legality rule without mentioning the phase: the rule of law. The rule of law has been looked upon by many people as an abstract concept. (But, I will come to this point later.)

The principle of legality expresses the idea that criminal law should consist of clear, unequivocal, preferably statutory rules of conduct and no-one should be subjected to the sanctions of the criminal law unless he has broken one of these known rules. Thus, the principle means that no-one should be punished unless he has broken the law.[6]

The principle thus prohibits (i) retrospective imposition of criminality; (ii) the extension by analogy of a criminal rule to cover a case not obviously falling within it; and (iii) the formation of criminal laws in excessively wide and vague terms. The rule has not found universal acceptance at all times and in all legal systems;[7] as will be seen later in this study. S.77(4) of the Constitution states: (and I quote):

> "No person shall be held to be guilty of a criminal offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed."

Sub-section 8 however states:

"No person shall be convicted of a criminal offence unless that offence is defined, and the penalty thereof is prescribed in a written law; provided that nothing in this Sub-section shall prevent a Court from punishing any person for contempt notwithstanding that the act or omission in a written law and the penalty therefor is not prescribed."

From the provisions of Sub-section 4, we note that the Constitution confirms the bar to criminal retrospective legislation. In a country like the United Kingdom however, where this doctrine of legality originated, even civil law is subject to the concept of legality. None-the-less, legality rule has been applied rigidly in U.K. to criminal law only.

On the rule of law, we note that it forms the basis of a legal system. And without the maintainance of the rule of law the society will be threatened by anarchy and tyranny. The rule of law is important for the individual since through it his rights are protected. The meaning of the rule has been given differently by various administrative and constitutional law scholars.[8]

Let us look at retrospective legislation more seriously. And straight away, I will refer to the case of GREY MATTAKA and others v. REPUBLIC.[9] This is a case on criminal retrespective legislation. It is an East African Court of Appeal from Tanzania[10] sitting at Dar-es-Salam before Sir William Duffus, President; Spry, Vice-President of the Court of Appeal and Lutta, J.A. Appeal was heard from the High Court of Tanzania before Georges; C.J. (as he then was)

The aspect of criminal retrospective legislation became crucial at trial and was discussed by his lordship. It is in this regard that the decision by George C.J. becomes particularly useful. He discusses about the application and maintainance and more particularly the meaning of retrospective legislation.

Briefly the facts were as follows: Four of the six appellants were convicted of treason contrary to S.39 of the Tanzanian penal code and sentenced to life imprisonment by the trial judge the Chief Justice. The other accused persons were found guilty of misprison contrary to S.41 (b) of the penal code and each sentanced to ten years imprisonment. (The Kenyan penal code makes a similar provision, as regards penalty, on the offence of treason and misprison) - Cap.63 of the Laws of Kenya.

The particulars of the charge against the first four accused persons were:

> "... In March 1968 and on diverse other days thereafter and between that month and 30th October 1969, being then, to wit on the said several days, persons under allegiance to the United Republic of Tanzania, in the United Republic of Tanzania and elsewhere formed an intention to cause to be effected the following act, that is to say, the death of the President and manifested such intention by publishing any writing or by an overt act or deed."

It became clear as a matter of fact that at the time the events occured between 1968 and 1969 the law relating to treasons in Tanzania - the penal code (Sections 39 and 41) never made it an offence in clear and unequivocal terms such conduct of the accused persons. But then these Sections, along with other sections of the law relating to treason, were amended by the written laws

(Miscellaneous Amendments) Act No.: 2 of 1970. So that the 1970 Act was retrospective legislation making unlawful an act which took place between 1968 and 1969 and which conduct when it took place was never spelt out expressly as a punishable offence under any written criminal law.

Although the appeal was allowed, the Court never dealt with retrospective nature of the amendment Act. However, the Court of Appeal acted on the assumption that in Tanzania, retrospective legislation is not disturbing especially as the case arose in Tanzania. Both the Interim Constitution (Consequential, Transitional and Temporary Provision) Act, 1965 Act No.: 45 of 1965 and The Interim Constitution (Amendment) Act, 1968 Act No.: 36 of 1968 do not make any express reference to the principle of legality. Such a state of affairs becomes clear when one realises that the Tanzanian Constitution has not incorporated a justiciable Bill of Rights. Unlike her Kenyan counterpart which protects the fundemental rights and freedom of the individual, the Tanzanian only talks of what the Government and the party will do to the people.[11] Such a unique feature in the Interim Constitution of Tanzania explains why the principle of legality is never expressly enshrined in the Constitution. This is why the issue of retrospective legislation never bothered the Court.

Retrospective criminal legislation is not prohibited in Tanzania by the Constitution. Grey v. Mattaka supra. should not receive serious attention from researchers. One might wish to ask: If a case of similar nature was to face the Kenyan Courts, how should it be decided? It is with the prime objective of answering this question that I have decided to give this Tanzanian case that much attention. In Kenya with its Constitutional provision of S.77 (4) prohibiting criminal retrospective legislation a statute such as the Tanzania Amendment Act of 1970 would be both objectionable and defeated by the express provisions of the Constitution. It would seem that there is very little case law if not none at all or retrospective criminal legislation in Kenya.

LEGISLATION BY ANALOGY

The second meaning of the principle of legality is also found under Sub-section 4. Here, legislation by analogy is prohibited as being contrary to the principle of legality. Just to explain abit: In cases where the criminal code makes no direct reference to particular forms of crime, punishment is applied in accordance with those articles or sections of the criminal code which dealt with crimes most closely approximating, in gravity and in kind, to the crimes actually committed; such will be legislation by analogy which is objectionable. Let me illustrate by a House of Lords decision. This is the decision in SHAW v. D.P.P.[12]

The accused here was charged with an offence of conspiracy to corrupt public morals. Such an offence never existed in the statute books. Accordingly to a dissenting judgment by Lord Reid the only offence known to the law was conspiracy or agreeing or acting in concert to do an unlawful act. When the case came before the trial judge, conspiracy was extended by analogy to cover what he decided to call conspiracy to corrupt public morals. In other words the judge was extending conspiracy known to law to cover "conspiracy to corrupt public morals" an act which was innocent or not legislated upon. And so the accused was convicted of such an offence and the judgment was actually upheld by the House of Lords. So this was almost a death blow to the principle of legality which prohibits the extension by analogy of a criminal rule to cover a case not obviously falling within it.

In Tanzania, the concept of the common law crime has been used to find people guilty of, for example; 'public mischief' in giving false information to a police officer.[13]

It has been argued that the principle of legality has not found universal acceptance at all times and in all legal systems. The chief objection, as Hall observes, being that its strict application is a charter of immunity for rogues ingenuous enough to steer through the inevitable loopholes and gaps in any strictly defined, stricly applied set of rules. In the words of a dictum of Spinoza, "He who tries to determine everything by the law will ferment crime rather than lessen it." Nevertheless, the principle of legality has traditionally been regarded as fundamental in English criminal law, where all crimes, with the exception of conspiracy and sedition, have been exactly defined and, at any rate, ever since the Eighteenth Century, have rarely been expanded except by the express provisions of the statute.

In Kenya, the penal code is the statute setting out criminal offences. The Criminal procedure coder (Cap.75) encompasses the procedural aspects of criminal law of Kenya. In other words the "C.P.C." provides for the procedure of enforcing the offences under the penal code. Our criminal law "albeit" its enactment by the Kenyan Parliament, is substantially derived from its English common law counterpart. And so the criminal law of Kenya, when all is said and done, is essentially the English common law. This even the more reason why the principle of legality in Kenya should find its interpretation from England especially when there is a total dearth of local sources on the law.

The principle of legality has not found strict adherence either in England or in Kenya. There is nothing more dangerous than the common axiom: "the spirit of the laws is to be considered." To adopt this is to give way to the torrent of opinions.... "The spirit of the laws will then be the result of the good, or bad logic of the judge; and this will depend on his good or bad digestion; on the violence of his passion; on the rank and condition of the accused, or on his connections with the judge and on all those little circumstances, which change the appearance of objects in the fluctuating mind of man." These words from Becarria: Essay on Crimes and punishments (1775), P. 14 explain aptly why the principle

of legality should be upheld. The law should be applied as it "is" rather than as "ought" to be. So far any student of jurisprudence must be able to grasp what the protagonists of the rule consider law to be. Beccaria would definitely like the "good English system" to be preserved by resort to well defined laws.

You remember Beccaria is defining law in terms of the "sovereign" and therefore he goes all the way out to define explicitly this animal "sovereign" so that law becomes the sovereign itself. This is the time in Europe when the feudal lords entrench their economic prowess in order to crush any attempts by the church to assert its political and economic supremecy in the feudal state. Natural law is therefore explained to be the 'sovereign' by Beccariaso that the interests of the ruling class are protected.[14] As will be seen this argument of Beccaria will form the corner stone on which other positivist jurists like John Austin, Jeremy Bentham will build their definations of law.

Concluding the definition of the principle of legality, I will now consider its third aspect, viz; the formulation of criminal laws in excessively wide and vague terms. This aspect of the principle of legality in incorporated by S.77 (8) of the Constitution.

However, when looking at S.77 (8) which is a bar towards making criminal laws in excessively wide and vague terms, we should not loose sight of the proviso to this section which says that in cases of contempt of Court, the sitting Magistrate or Judge is given a discretion to frame laws with which to charge and convict the accused. This proviso is already an inroad to the principle of legality itself. It implies that Magistrates will be applying laws known to themselves only and which have not been defined beforehand. The Constitution is therefore taking by one hand what it has given by the other hand! But note should be taken that the discretion has to be judicially exercised.

In the already cited case of Shaw v. D.P.P. a case which deals with Public Mischief but where Viscount Simonds, in Court of Appeal made the following interesting remarks:

> "... Need I say, my Lords, that I am no advocate of the right of Judges to create new criminal offences? I will repeat well known words "Amongst many other points of happiness" and freedom which our Majesty's subjects have enjoyed there is none which they have accounted more deer and precious than this, to be guided and governed by certain rules of law which giveth both to the head and members that which right belongeth to them and not by any arbitrary or uncertain form of government."

These words emphasise the necessity for certainty although it is not a case on contempt. It deals with public mischief which is however defined by Kenyan law. (Personal emphasis).

> "... On the other hand, in the sphere of criminal law I entertain no doubt that there remains in the Courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safty and order but also the moral welfare of the state, and that it is their duty to guard it against attacks which may be more insidious because they are novel and unprepared for. When Lord Mansfield, speaking long after the star chamber had been abolished, said (R v. DELAVAL (1763) 3 BURR. 1434, 1439) that the Court of King's Bench was the "Custos morum" of the people and had the superintendency of the offences "contra bonos mores", he was asserting, as I now assert, that there is in the Court a residual power, where no statute has yet intervened to supersede the common law, to

superintend those offences which are prejudicial to the public welfare or morals. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused." Whereas this might be true of Britain it has less efficacy in Kenya where the legislature has numerous handicaps (my own comment). 'But gaps remain and will always remain since no-one can forsee every way in which the wickedness of man only disrupt the order of society."

RETROSPECTIVE JUDGMENT

I will now consider in some details a case reported in a text book on criminal law 3rd edition by Colin Howard; unfortunately I could not get neither the name nor the citation of this very important case. The names of the parties are hypothetical but the author maintains it's a real case.

The element of social value in recklessness means that to some extent it is impossible for D when he commits the conducts charged as reckless to know whether he is in fact being reckless, for social value is a subjective assessment, not an objective fact. Therefore the disregard of a risk can be known to be unjustified only when a Court subsequently says so. Recklessness shares this characteristic of retrospective judgment on an act with negligence.

The inclusion of an element of moral judgment in the concept of recklessness, or inconspiracy (as we saw in Shaw v. D.P.P. supra) means that to some extent it's by definition impossible for D to know at the time when he is about to disregard a given risk whether his conduct will be criminal until a Court has subsequently decided that he ought not to have disregarded it. Till then no-one can know whether his disregard was criminal or not.

This is not the same thing as saying that no-one's conduct can ever be certainly known to be criminal until he has been convicted. If the question is whether D has intentionally murdered V it is theoritically possible to arrive at the answer by the discovery of enough relevant facts. In particulars so far as the law is concerned, either D intended to kill or he did not. The complexities of human psychology and the uncertainties of evidence may make it difficult in any given case to decide what the facts actually were; but this is a practical, not a theoritical problem. In such a situation the law requires the ascertainment of facts which are difficult to discover; it does not, as it does in recklessness, require the ascertainment of a moral judgment which cannot be in existence at the relevant time because it has not then been made.

To the extent that the concept of recklessness in this way renders it impossible for D to know his criminal responsibility at the time when he commits the offence charged it is objectionable because it conflicts with the principle of legality in the form in which that principle requires that the criminal law be ascertainable by those subject to it. This objection to recklessness, however, can reasonably be regarded as unimportant. The value of the concept of recklessness is that it furnishes an acceptable basis of responsibility for conduct which it is socially advantageous to regard as criminal but which cannot without distortion be accomodated within the concept of intention. The disadvantage that the recklessness of conduct cannot be certainly ascertained in advance is as a practical matter a small price to pay for the corresponding quality of flexibility which enables the law to adapt itself more satisfactorily than formely to the complicated process of human thought.

HISTORICAL DEVELOPMENTS:
THE ORIGIN OF THE PRINCIPLE OF LEGALITY
IN KENYA LAW: BILL OF RIGHTS:

The human rights embodied in the Bill of Rights has its origin in English common law which was taken to be a system of giving effect to individual natural rights. It existed in order to secure individual interests not merly against agression by other individuals, but even more against arbitrary invasion by state or society. This leads us to the conclusion that bills of rights were declarations of the common law.[16]

The earliest legislations on the rights of man was the Magna Carta which stated that "no man shall ... ... be taken or imprisoned except by the lawful judgment by the law of the land."[17]

This was followed by the Bill oi rights bill in 1680 which guaranteed freedoms of life and liberty to everyman.[18]

In 1789 France declared the rights of man and the citizen which established 'interalia' that "no man should be punished but by virtue of law promulgated before the offence and legally applied."[19] The United States Bill of Rights of 1791 stated 'interalia' that the accused shall enjoy a speedy, public trial by an impartial Judge.[20]

These principles together with others were embodied into the United Nations Universal declaration of human rights. On 10th December 1948 the General Assembly of U.N.O. adopted a universal declaration of human rights, some of the principles constitute either general principles of law or represent elementary considerations of humanity. They were in turn adopted by the European convention on human rights and this became the basis for the Bills of Rights in Commonwealth countries.

In Commonwealth Africa, Ghana led the way by incorporating a Bill of Rights in her independent Constitution. She was followed by Nigeria. The suggestion for insertion of class guaranteeing fundemental rights in the constitution of Nigeria was prompted by the allegations that certain sections of the community were denied some of these rights due to political rivalries. It had been omitted in the 1956 Constitution. There was a crises and a conference had to be called to review the situation and it was decided that a Bill of Rights be included in the Constitution which was done in 1958. They relied on the provisions of the European convention on human rights and were almost copied word for word from the convention.

The rights consisted of 'interalia' rights not to be subjected to retroactive penal legislation, not to be subjected to a penalty behaviour than that in force at the time of the commission of the offence, not to be subjected to double jeopardy and not to be convicted of an offence unless it is defined and the penalty thereof prescribed in a written law. The foregoing are the ingredients of the principle of legality.

The Bill of Rights in Kenya was first enacted by an Order in Council of 1963.[21] During the conference on the Constitution in 1962, the Secretary of State proposed that the Constitution should contain a Bill of Rights composing a series of provisions guaranteeing the fundamental rights and freedom of the individual and providing a right of recourse to the Courts for the purpose of seeing that these rights are not infringed. It was decided that the Kenya Bill should be based on the Bill of Rights set out in the Uganda Constitution Order in Council since it was the most up to date.[22] The Uganda Bill had been modelled on the Nigerian scheme. They are identical and their terms are entrenched in a similar way.

These rights are not enacted strictly, as they can be derogated from. The circumstances under which the rights can be derogated from are during emergency. Secondly, in peace time they can be derogated from by any law that is reasonably justifiable in a democratic society in the interests of defence, public safety, public order, morality, wealth or for the purpose of protecting the rights of others. Thus it is seen that these rights are given by one hand and taken away by the other hand.[23]

CHAPTER TWO

"RETROSPECTIVE," meaning of:

A statute is to be deemed to be retrospective (The word is somewhat ambiguous, see: ALLEN v. GOLD REEFS OF WEST AFRICA[1]) which takes away or impairs any vested right acquired under existing laws, or creates a new disability in respect to transactions or considerations already past. But a statute "is not properly called a retrospective statute because a part of the requisites for its action from a time antecedent to its passing."[2]

In LAURI v. RENAD[3] Lindley L.J. said:

> "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction. And the same rule involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

There are many cases upon the general doctrine whether an Act of Parliament may be read retrospectively or not and there are many cases upon the meaning of particular statutes. But the general law was concisely stated by Lord Hatherley in his judgment in PARDO v. BINGHAM[4] where he said:

> "The question is ... ... secondly, whether on general principles the statute ought in this particular section to be held to operate retrospectively, the general rule of law undoubtedly being, that except there be a clear indication either from the subject matter or from the

> wording of the statute, the statute is not to receive a retrospective construction ... ... Infact, we must look at the general scope and preview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was the legislature contemplated."

Revenue Acts often made to take effect as from a day before their passing. But extremely plain language would be needed to render penal an act done before their passing.

A retrospective statute is different from an 'ex-post facto' statute. Blackstone[5] describes 'expost facto' laws as those by which after an action indifferent in itself is committed, the legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it.

Acts of indemnity are, however, also expost facto laws so far as they take away civil rights of action as are statutory pardons for criminal liability, and indemnities for acts done in exercise of martial law.[6]

> "Every 'expost facto' law, ... said Chase J. in the American case of CALDER v. BULL[7] must necessarily be retrospective, but every retrospective law is not an expost facto law. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive; it is a good general rule that a law should have no retrospect, but in cases which the laws may justly and for the benefit of the community and also of individuals relate to a time antecedent to their commencement: as statutes

of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law 'expost facto' within the prohibition, (The prohibition referred to is contained in the Constitution of the United States of America, Article 1, S.9, prohibiting the passing of 'expost facto' laws), that mollifies the rigour of the criminal law, but only those that create or aggrevate the crime, or increase the punishment or change the rules of evidence for the purpose of conviction ... ... There is a great and apparent difference between making an unlawful act lawful and the making of an innocent action criminal and punishing it as a crime."

"It is obviously competent for the legislature, in its widom, to make the provisions of an Act of Parliament retrospective."[8] "No-one denies, said Lushingtom in The IRONSIDES[9], the competency of the legislature to ~~apss~~ pass retrospective laws if they think fit. The French code contains a positive provision that laws are not to have any retrospective operation, 'La loi ne dispose que pour l'avenir, elle n'a point d'effet retroactif,'[10] and many times they have done so."

Philosophical writers[11] have, it is true, denied that any legislature ought to have such a power, and it is indisputable that to exercise it under ordinary circumstances must work great justice. But "before giving such a construction to an Act of Parliament one would require that it should either appear very clearly in the terms of the Act or arise by necessity and distinct interpretation."[12]

And perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right: In Smidt v. Ritz[13] Strong C.J. said:

> "That the legislature had demonstrated an intention to enact retrospectively to a certain extent is not sufficient to warrent a retroactive operation carried beyond the meaning of the terms used strictly construed ... ... It is said that to restrict the latter part of the amending clause ... ... is to attribute to it a very insignificant modicum of relief; the answer must be that it is the very intent of this rule of interpretation, designed to prevent injustice resulting from interference with rights of property except in cases where the unmistakeable language of the legislature demands an 'expost facto' construction."

If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. Some of the many authorities for this proposition are: MAIN v. STARK[14a], GILLMORE v. SHOOTER on the statute of frauds[14b], MOON v. DURDEN[14c]. In GARDNER v. LUCAS[15] Lord O'haggan said:

> "Unless there is some declared intention of the legislature - clear and unequivocal - or unless there are some circumstances rendering it inevitable that we should take the other views, we are to presure that an Act is prospective, and not retrospective."

This is a presumption which can be rebutted. In REID v. REID supra Bowen L.J. said at pages 402 and 408 that:

> "The particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well known maxim 'omnis nova constitutio futuris temporibus, formam impo nere debet non praeteritis.'"[16]

That is except in special case, the new law ought to be construed so as to interfere as little as possible with vested rights.

It seems to me that even in construing an Act which is to a certain extent retrospective, we ought, nevertheless, to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is necessary and logical corollary of the general proposition that you ought to give a larger retrospective power to ascertain, even in an Act which is to some extent inteded to be retrospective then you can plainly see the legislature meant.[17]

It being, then, the general rule of law that statutes are not to operate retrospectively, we have now to consider under what circumstances this general rule has been departed from, and to examine the grounds, so far as they can be ascertained, for such departure. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation. the Courts will give it such operation. In QUIN v. PRAIRIDALE supra, S.4 of the summary jurisdiction (Married Women) Act, 1895 was held to be retrospectively operative, largely on the expression in it 'shall have been". 'Baron Parke' said Lord Mutherly in PARDO v. BINGHAM supra "did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed and said that the question in each case was whether the legislature had sufficiently expressed that intention."

A postponement clause in an Act has been sometimes said to be an indication against the presumption that a retrospective intent is not to be inferred. In Re Athlumnery Wright J. said:

> "one exception to the general rule has sometimes been suggested, viz., that where, as here, i.e. S. 23 of the Bankruptcy Act, 1890, the commencement of the operation of an Act is suspended for a time, this is an indication that no further restriction upon retrospective operations is intended."

But this exception seems never to have been suggested except in relation to enactments such as Statutes of limitation, and even in relation to these it is questioned in MOON v. DURDEN supra.

Where a statute is passed for the purposes of supplying an obvious omission in a former statute or as Parke, J. (afterwards Baron Parke) said in R. v. DURSLEY[19], "To explain a former statute the subsequent statute has relation back to the time when the prior Act was passed." Thus in A-G v. POUGETT[20] it appeared that by a Customs Act of 1873 a duty was imposed upon hides of 9s. 4d., but the Act omitted to state that it was to be 9s. 4d. per cwt., and to remedy this omission another Customs Act was passed later in the same year. Between the passing of these two acts some hides were exported and it was contended that they were not liable to pay the duty 9s. 4d. per cwt., but Thomson C.B. in giving judgment for the A-G said:

> "The duty in this instance was infact imposed by the first Act, but the gross mistake of the omission of the weight for which the sum expressed was to have been payable occasioned the amendment made by the subsequent Act, but that had reference to the former statute as soon as it was passed, and they must be taken together as if they were one and the same Act."

If a statute is passed for the purpose of protecting the public against some evil or abuse, it may be allowed to operate retrospectively although by such operation it will deprive some person or persons of a vested right. Thus in R. v. VINE[21], it was held that S. 14 of the Wine and Beer house Amendment Act, 1870, which enacted that "every person convicted of a felony shall be for ever disqualified from selling spirits by retail" applied to a person who after having been so convicted had obtained a licence to sell spirits and was actually holding it at the time the Act came into force. The intention of the Act was construed to be to protect the public from having Inns kept by persons of bad character, although this might have a retrospective effect. It must, however, be observed that Lush J. dissented from the judgment of the majority of the Court.

Sometimes a statute although not intended to be retrospective will infact have a retrospective operation. For instance, if two persons enter into a contract, and afterwards a statute is passed, which as Cockbarn C.J. said in DUKE OF DEVONSHIRE v. BANOV[22] "engrafts an enactment upon existing contracts."

I would like to submit that most of the authorities so far relied on are foreign simply because I failed to get local statutes and cases in point. However, such foreign authorities help alot to explain the law. Although my topic should be confirmed to retrospective criminal laws, I have widened the scope so as to highlight the concept of even civil retrospective legislation. This does not imply that I have not kept in mind clearly that my subject is retrospective criminal laws as the chapters following will, in deed, indicate.

RETROSPECTIVE ACTS

Parliament has power to make an Act apply from a date earlier than the date on which the Act itself was passed by Parliament. An Act of this kind is known as a retrospective Act. Parliament has from time to time exercised the power to make an Act of this kind.

The commonest cause of the making of an Act of Parliament of this kind is the desire to treat something as having been done properly when actually it had not been done properly. An Act having that effect is known as a validating Act.

Parliament has power not only to make an Act operate from any date that it choses but it has power to take away existing rights. It can even set aside the result of litigation, so that someone who has been successful can have the benefit of the Court order taken away from him and the Court order itself set aside by the statute.[23]

The Parliament of the state of Victoria imposed a penalty for something done before the Act came into force! In 1935 that Parliament passed an Act creating a board to control the marketing of eggs. The appointment and constitution of that board were found to be invalid. It was held to be invalid by the Victorian Supreme Court in EGG & EGG PULP MARKETING BOARD v. CARTER BROS (unreported but referred to in TAYLOR v. ANTIS[24]) and a Parliament then passed a validating Act. Prior to the passing of the Act, and at a time when the purported board was invalidly constituted and invalidly appointed, the board published regulations which created offences. After the validating Act came into force a person was convicted of an offence against the regulations even although that offence was committed at a time when the board itself was invalidly constituted and invalidly appointed. The validating Act provided that:

"It is hereby declared that the board is and has always been validly constituted ... ... and that the appointment of the said board and any elections of members thereof are and always have been valid."
(Marketing of Primary Product (Validation) Act 1939 S.34).

The effect of validating the original appointment of the board in that way was to validate what the board had done, and the person was accordingly convicted of the offence against regulations which were plainly invalid at the time that he committed the offence. (TAYLOR v. ANTIS supra)

That was a case of a validating Act incidentally operating to make something an offence which was not an offence at the time that it was done. If such an Act were to be passed in Kenya it will be contrary to S. 77 (4) of the Constitution and therefore null and void as per S. 3 of the same.

Clear words are needed to make an Act operate retrospectivley especially in civil law. However, the Kenyan Constitution is very clear on criminal legislation. Therefore even with clear words such an Act will be objectionable and contrary to the Constitution. But this hard and fast rule is difficult to honour in practice.

IS RETROSPECTIVE LEGISLATION INHERENTLY BAD? OR NOT BAD?

It is clear that our Constitution bars criminal retrospective legislation. First, the law provides that ignorance of the law is no defence (per penal code). It is in a bid to strike a balance that the principle of legality receives acceptance under our law.

That is to say, if everyone is presumed to know the law then the law itself should be ascertainable.[25] I would suggest that criminal retrospective legislation is not inherently bad. Although the Constitution sets the standard, laws just express the minimum standard and loopholes are bound to arise in criminal statutes. The human mind is not perfect and the legislature cannot forsee all the forms of conduct of the citizens. Therefore in enacting a statute only that which is capable of attainment is going to be legislated against. In this regard, the Parliament might enact a retrospective act to cover previous conduct only after such a conduct has come to its notice. Now, with such cases of retrospective criminal acts arising it would be helpful to analyse the advantages of retrospective legislation.

The State relies on revenue and other levies for its existence. For example the Kenya Government obtains alot of revenue in the form of taxation. The State therefore passes statutes which offer sanctions against those tax evaders and also against tax avoidance. It is in the area of taxation laws that retrospective legislation feature alot. The laws are passed to combat tax evasion and net those who have dogged taxes. I submit that retrospective legislation in this field becomes useful since taxes can be recovered and hence sustenance of economic development.

It has been often stated in major treatise on criminal law that the purpose of criminal legislation is to protect the state of 'public interest'. If this 'noble' objective is to be attained then any act which threatens the State institutions must be warded off. Therefore criminal retrospective legislation as an aspect of criminal law can be used for that purpose. Criminal legislation has been frequently evoked in the political sphere. During the Nazi Germany wars several atrocities were committed by the Hitler regime, which forms of conduct were legal since the then facist regime authorised them in its laws. After the fall

of Hitler a new form of 'democratic' government came into being in Germany and it now passed new laws which condemned the Hitler laws and acts 'lawfully' committed during the Hitler regime were now declared illegal and punishable. The new Government passed criminal statutes with retrospective effect, setting out the previous acts as offences against the State and punishable. In one case a man was arrested and charged with an offence. He had participated in the war. Here a retrospective eriminal ststute was used to punish the accused for conducts which by the time they were done were never spelt out in the statute as offences.

But at least we should demistify the myth of natural laws. It was argued that natural law did not permit the Nazi laws. It was argued for law to exist the 'ought' aspect must be there. That is to say, laws passed by the State must conform to certain moral standards before they can qualify as law. And that since the Hitler laws never fulfilled these requirements therefore they were not law. At least one sees an attempt by these Western European jurists to bring in fine distinctions between 'fascism' and other civilised forms of imperial states. They want to explain that fascism is not actually a brand of imperialism. This I submit is ingenious but erroneous, since fascism is simply a product of commodity exchange economy or capitalism.

Another interesting case in point and one which is even much nearer home, is the Amin regime in Uganda. During his reign several atrocious acts were committed. Brutal murders were committed against political opponents and very many 'innocent' people were eliminated by the so called 'State Research Bureau'. Those found guilty of various offences under the Amin laws were eliminated. After eight (8) years of dictatorship the Amin government fell, an elected government took control of Uganda under the leadership of President Obote. We should note that Amin had abrogated the 1966 Constitution and its laws and ruled

by decrees instead. These decrees according to Western jurispreudence are valid. Hans Kelsen's theory of 'Grund norm ean' apply, hence the decrees beome 'grund norm.' It can be argued that the 'coup' had uprooted the old laws, are replaced with a new 'grund norm'. But that is neither here nor there.

However, with a newly elected government the Constitution has been revived and all other laws beome operative. Some members of the Amin regime like Major Bob Astles, Amin's personel advisor, have been arrested and charged with various offences for their previous conducts. Suppose, retrospective acts were to be passed to penalise those members of the Amin regime, would such laws be justified considering that the accused or Amin's Government did several bad things and acts of 'immoralities'? If such retrospective acts were never passed by the Obote Government would there be an alternative method of punishing those war criminals during the Nazi and Amin regimes? Perhaps not.

Therefore, retrospective criminal legislation would be the only legal measure available to bringing those criminals to book by declaring those previous acts which were never considered unlawful by the time they were committed, otherwise unlawful.

In Germany therefore the Court found the accused guilty despite his arguments that his conduct was never unlawful at the time done si the Nazi laws permitted such practices. It was argued for the State that the major objective of criminal law is protection of public or state and the dangers of retrospective criminal legislation would not pose greater a danger than the atrocious acts of the war criminals. But again, one might wish to ask: Which one should take precedence, the Constitution which bars criminal retrospective legislation or the statute embodying such retrospective provision? This question becomes quite appropriate in a country like Kenya where the rule of law is said to exist.

In Kenya of course, criminal retrospective legislation is inherently bad, it can be argued. For such an argument to hold the sanctity of the constitution ought to be stressed. Further, it is no mean point that the inalienable individual human rights as contained in Part V of Kenya Constitution should not be violated. Individual liberty and freedom should not be interfered with unreasonably. S.77 sub-section 4 read together with sub-section 8 of the same provides a ban to criminal retrospective legislation at all costs. In which case the individual right to freedom and liberty becomes prominent and sanctified as long as the individual's conduct is not sanctioned as illegal by any written statute. Again reference should be made to S.3 (1) of the Kenya Constitution which stresses the supreme nature of the constitution and any law should be read subject to the constitution and if any such law is contrary to the constitution then the latter shall prevail and former void to its very inconsistency.

It follows logically that any criminal retrospective legislation should be void a b initio becuse to hold them as valid would be going contrary to the spirit and letter of S. 77 (4) and S. 77 (8). As long as the Constitutional provision still remains unamended it will hold unless the procedure of amended as found under S.47 of the same is followed by the Parliement. To allow retrospective criminal legisletions would be unconstitutional and I think that the constitutional provisions are more important then the statute.

However, one might wish to talk of the Tanzanian case. In Tanzania there is no bill of rights cushioned in a document and therefore the question of a ban to criminal legislation does not arise. I should hasten to add that the Rule of Law is very much these in Tanzania despite this talk of negatively worded bill of rights. Let me spend a few minutes on discussing the major counterpart (Tanzanian model of Rule of Law). In Tanzania the Government and the party has affirmed and stated in so many words what it is going to do to the toiling onessey. Moreover, as has

been argued by the Tanzanian leader himself, the Government and party should have more powers and that even the law should play the role of leading Tanzania to Socialism. This can only be achieved if instead of attaching more importance to individual rights, the law was used to better the standard of living of the community as a whole like bringing rural health to a higher level, education, etc.. For these Socialist objectives to be attained, therefore the law should play its part by clothing the Government with powers to carry out these development programmes. In other words if an individual does an act which the Government thinks is contrary to the Social economic role of the party and state then an Act can be passed to encompass such a conduct even though at the time of conduct there was no offence out lawing the conduct. In this way community interests is being stressed at the expense of individual rights. This is the case in Republic v. Mattaka where the Parliement decided to amend the Treason Act and in its amended form not only was it worded to include the previous conduct of Mattaka as a treasonable act but it also took effect on an earlier date thereby also including Mattaka's conduct within. According to the Tanzanian Socialist policy, retrospective criminal legislation beomes very essential in road to Socialism. In which case the party and the Government is more vital then the individuel.

What about the position in Kenya where the individual's rights are enshrined in the Constitution?

FOOTNOTES

CHAPTER ONE

1. See generally S.3 of Act No.: 5 of 1969 - The Kenya Constitution.

2. This point is made clear in his speech at the opening of the Workshop on Socio-legal Research at the Kenya Institute of Administration, 10 June 1974. His Lordship had this to say:

> "Mr. Chairman of the Law Society of Kenya, Dean Munoru, ladies and gentlemen. It is encouraging to me as a lawyer ... ... to discuss matters which are of such importance to our profession. It was at one time widely held opinion that you trained a lawyer by teaching him or her, a great many rules. That is, you attempted only to train him in the rather narrow and technical aspects of his trade. Today it is recognised that educating a lawyer requires much more. In addition to his basic and essential technical skills, the lawyer must possess a well developed view of society as a whole. The reasons for adopting this approach require little explanation. The lawyer cannot keep himself apart from the social context which the law operates; the profession cannot function in isolation. This is particularly true in the struggle against underdevelopment. ... ... A significant part of his equipment will be an appreciation of the contributions which the social sciences can make to his understanding of legal phenomena ... "
> - Socio-legal Research methadology papers No.: 6, 1974 Vol. 1 collected by Prof. U.U. Uche, pages 14 - 15.

3. See Parliamentary debates on the Kenya Independence Constitution. Specific references were not available in the library.

4. S. 77 (8) supra.

5. But what is a principle? In law it means a general guiding rule and does not include specific directions, which vary according to the subject matter.
- M'Creagh V. Frearson (1922) W.N. 37, per Shearman, J.; at pp. 37, 38.

6. This definition is given by Robert Martin, in his 'Personal Freedom and the law in Tanzania' at p. 136 para 1.

7. See the E. German and Soviet laws.

8. For example Dicey's definition has received a barrage of criticisms by sceptics from 'Third World Countries'. At a congress of jurists mostly from Europe, held in Athens in 1955 the emphasis was on the individual. At a congress of jurists with substantial attendance from Asia, held in New Delhi 1959, which other than upholding the idea of individualism also advanced social, economic, educational, and cultural conditions. In 1961, the Law of Lagos, an African definition of the rule was adopted.
- African Conference on the Rule of Law, Report, International Commission of Jurists, Geneva, 1961.
- For Dicey see 'The Law of the Constitution 187 - 8, 193; 195 - 6 (10th edition 1959).

9. 1971 E.A.C.A. 495.

10. The word 'Tanzania' is used here to include both mainland Tanganyika and Zanzibar.

11. The judgment of Georges C.J. touches on this question.

12. (1962) A.C. 220.

13. R. v. Patel, High Court of Tanganyika at Dar-es-Saleam, Miscellaneous Criminal Case No.: 4 of 1944; Hasham Hamir Juma v. R. (1934) I:T.L.R. (R) 195.

14. This point is developed generally by P.H. Mihyo. - The Development of Legal philosophy.

15. See also Williams - Criminal Law: The General part (2nd edition) Ch. 12.

16. Roscoe Pound: The spirit of the common law (Boston Marshall Jones Co. 1921) p. 196.

17. Article 37 of the Magna Carta 1215. Bayrey DH: "Public Liberties in the New State" (University of Denver Rand Mcrally & Co, Chicago). p. 231.

18. Brownlee: Basic Documents on human rights.

19. Brownlee: op. cit. Article 8 p. 8.

20. Brownlee: op. cit. Article VI p. 11.

21. Kenya Order in Council 1963 LN 245.

22. Uganda Constitution Order in Council 1962: LN 54 of 1962 (U).

23. Derogation Sections: S.77 (8) See also Y.P. Ghai & McAuslan pp. 425 - 430.

CHAPTER TWO

1. (1900) 1 Ch. 656, 673 per Lindley L.J.

2. R. v. St. Mary, Whitechapel (Inhabitants) (1848) 12 Q.B. 120, 127 per Lord Denman C.J.; where it was held that S. 2 of the poor Removal Act, 1846, prevented the removal after its commencement of a panper widow, proceedings for whose removal had been begun, but had not been completed before the Act was passed. Cf. R. v. Christchurch (Inhabitants) supra; Master Ladies Tailors Organisation v. Minister of Labour (1950) 2 ALL E.R. 525. cf. Re.: a solicitor's Clerk (1957) 1 W.L.R. 1219 (D.C.) where it was held that past grounds for disciplinary order was effective through enabling Act not retrospective because the effect of the order was in future through the reason of making it was in the past.

3. (1892) 3 ch. 402, 421 see also Re.: Snowden Colliery Co. Ltd.; South Eastern Coalfields Extension Co. v. The Co. (1925) 94 L.J. ch. 305 (C.A.).

4. (1870) L.R. 4 ch. App. 735, 739, 740. Also see: Re.: Chapman (1896) 1 ch. 323, 327, per Kekewich J.

5. Comm. Vol. 1, p. 46.

6. Phillips v. Eyre (1870) L.R. 6 Q.B. 1.

7. (1798) 3 Dallas (U.S.) 386, 391.

8. Smith v. Callander (1901) A.C. 297, 305, per Lord Ashbourne.

9. (1862) 31 L.J.P.M. & A. 129, 131.

10. Code Civil, Art. 2.

11. See Sedgwick p. 160.

12. Smith v. Callander, supra at p. 305.

13. (1901) 31 Canada 602, 605, 606 cf. Reid v. Reid (1886) 31 Ch. D. 402.

14a. (1890) 15 App. Cas. 384, 387 per Lord Selbourne.

14b. (1678) 2 Mod. 310.

14c. (1848) Ex. 22, on the Gaming Acts.

15. (1878) 3 App. Cas. 582, 601.

16. 2 Inst. 292, adopted in Urquhart v. Urquhart (1853) 1 Macq. H.L. 658, 662, Lord Cranworth. See MacMillan v. Dent (1907) 1 ch. 107, 124, Flethcher Moulton L.J. on the copyright Acts.

17. R. v. Ipswich Union (1877) 2 Q.B.D. 269, 270, where Cockburn C.J. stated that statutes changing the law are presumably intended to apply to a state of facts coming into existence after this commencement of the statute.

18. (1898) 2 Q.B. 547, 552.

19. (1882) 3 B & Ad. 465, 469.

20. (1816) 2 Price 381, 392.

21. (1875) L.R. 10 Q.B. 195.

22. 1877 2 Q.B.D. 286, 289.

23. Jenkins v. Tileman Ltd. (1967) N.Z.L.R. 484 at pp. 490 - 1.

24. (1940) V.L.R. 300.

25. Personal Freedom and Law in Tanzania by Robert Martin.

26. Archbold - Criminal Law & Procedure 39th Edition where this point is developed generally. See also Smith and Hogan on Criminal Law.

EFFECT OF THE PRINCIPLE ON THE CUSTOMARY LAW

The principle of legality which has the Kenyan Constitution as its basis provides the rigid rule that criminal law should be written and well defined before it can be of any valid effect. And in response to this call the Kenyan legislature passed or enacted the penal code (Cap. 63 of Kenya Laws) which codifies the criminal law. Certain aspects of criminal law are also contained in the Criminal Procedure Code, and other regulations like the Traffic Ordinance, the Corruption Act, etc.. However the other minor legislations should not be seen as setting out Criminal offences proper. Instead its the penal code which sets out the various offences (criminal) under the Kenya Law and the corresponding punishments. The procedure code sets out the process of carrying out the provisions of the penal code.

The history of the Kenyan penal code, like all other legislations available in this Country, owes its origin to the U.K., the obvious is that Kenya was a colony of Britain and the penal code was laequatted to the colonised as a legacy by the mother country. The criminal law right from the time Kenya became a protectorate was basically foreign in origin. And it became the policy of the Colonial Government that it was the common law which was to apply. The English Criminal law first appeared under the disguise of Indian penal code at initial stages of colonisation (ref. periods 1897 - 19) It was not only the criminal aspect of law that Indian Statutes were used as models in all British colonies. The English law had proved successful in India and therefore the Indian Statutes - (which were in actual fact codified English common law, doctrines of equity, statutes of general application) proved ready tools in the hands of British colonial administrators in Kenya.

In fact it was spelt out in the East African Order in Council that in all criminal cases the Courts would apply the Indian penal codes. The natives and the whites were both to be governed by the Indian penal code and it was expressly stated that customary criminal law would not apply. This trend had to continue for some time until the Indian penal code was replaced by a Kenyan statute. The Kenyan legislature after Independence, passed its own criminal code - The penal code (Cap. 63) - which was substantially, in form and purpose, derived from the British common law. In actual fact this Act codifies all aspects of English Criminal Law. It also provides that where it's silent, recourse will be made of the English Common law doctrins of equity and statutes of general application. Therefore the position has hardly changed and the Indian penal code has merely been revived but now with a new name: "Kenyan Penal Code".

Again, as usual, customary law will only apply in civil cases and not in criminal cases - see MCA 1967 and Jud. Act, 1967. In this vein customary criminal law is considered to be non-existent. The criminal law as contained in the penal code has gone without substantial amendment since 1897 or to be less cynical since 1963 (for roughly 17 years). I would recommend a repeat of the law so that customary law should apply. First the constitutional provision dealing with the principle of legality should be liberalised so that criminal offences need not be written and strictly defamed. In this way customary criminal law will be given the force of legal validity. Secondly, legislations like the Magistrate's Courts' Act which tend to limit the application of customary law generally should be replaced.

Our Criminal law has wrongly assumed that the various Kenyan communities had their criminal customary law. And the enacted law has even made the position even more confusing since certain wrongs which were considered by Africans as Civil wrongs have been treated by the code as criminal in nature; whereas what Africans regard as criminal have some times been totally ignored or disregarded by the legislators. Here an example can be given of adultery. Adultery among the Africans was never a criminal offence but now it falls as a criminal wrong and the 1976 Marriage Bill proceeded on the erroneous assumption that adultery was a crime. On the other hand, certain offences found in the penal code such as bigamy were unkown to Africans. Further certain socially accepted behavious amongst the Africans have been designated criminal and punishable, such a situation becomes quite absurd. (Here reference can be made to witchcraft).

The penal code and other legislation have been found to be adequate thus overlooking the customary criminal law. The argument for disregarding customary criminal law is that there is a pluraty of tribes in the African society such as Kenya. And each tribe has got what it considers to be crimes say for example; in a country like Kenya, the Luos have their crimes, the Kikuyus have their crimes etc.. This leads to lack of unanidity in African crimes about a particular offence and therefore if customary law is incorporated discermination will result: This view is quite superficial since it gives the reality that there are crimes which all tribes regard as criminal wrongs and there is no reason why they should not be incorporated. So it becomes important to note that coming with the institution of English Court structure the English jurisprudence itself (the way justice is seen) i.e. classification of moneys into Civil and Criminal wrongs e.g. by treating some wrongs as criminal the native Courts are kept our of some aspects of law. Under customary law there is no distinction between civil and criminal wrong - see J.H. Dribung "The African Conception of Law", (1934) J I L C p. 230.

For example under Indian penal code, adultery was a criminal wrong but under customary law adultery was a civil wrong for which compensation was paid. - see R v. Ferjulla Desai (1904) 1 E.A.L.R. 79; R. v. Hassan Ali 1906 E.A.L.R.4; R. v. Baruti (1906) 2 E.A.L.R.; Jaka v. Magato (1906) 1 E.A.L.R.63.

Another crime under Indian penal code is enticement. Under customary law enticement was a civil wrong. The codification of law leads to certain civil wrongs in customary law being seen as crimes.

In R. v. Fundi and another 8 E.A.L.R. 2 a bajuni in Lamu Island lived with a bajuni lady. Lamu is a Muslim town, however the degree of adherence to the Muslim faith will vary with individuals. The Kadhi convicted these people because they had committed a crime under Islamic law called fornication. Instead of the Kadhi finding out whether Bajuni's were governed by Bajuni customary law the High Court said that it is only the penal code which can create offences and conviction was quashed. Although this is illustatical it has the rationale that the principle of defining offences strictly in a code has created disaster to our Customary law. The attempt to define the law in fine language has meant the inclusion of civil customary wrongs under the criminal sphere of English law.

CHAPTER THREE

PRINCIPLE OF LEGALITY,

A concept of criminal justice.

We should start by having an insight into what is meant by criminal jsutice. In the administration of criminal jusitce we meet rights asserted in the character of human rights and also rights asserted in the name of fairness and natural justice. Perhaps the most widely accepted example of a human right would be the right not to be subjected to torture. More numerous however, are the procedural rights based on fairness and natural justice, concepts which have traditionally found their expression in such principles as 'nulla polna sine lege', the presumption of innocence etc.. Thus we speak of rights to be charged only under a previously declared law.

The principle therefore becomes a procedural right whose strict application ensures that criminal justice is accorded to an accused person or the individual as such. The nature of its claim is that no individual should be liable to be treated in certain ways. The context of the administration of criminal justice assumes, then, that the state or its agents wish to exercise power of legislation over an individual in the name of crime contreated in certain ways (his liberties and immunities) and to be accorded certain facilities (his claim).

It should be noted however that a balance should be striked between the application of the principle of legality and the attainment of goals or objects of criminal law generally. The more appropriate question to be asked therefore is: If the principle of legality is followed strictly, assuming that such a move is possible, what will be the effect of that on the theory and practice of criminal law? Actually, the practical object of punishment through criminal legislation is 'crime control'. Offence are set out in statute books so that 'law and order' can be achieved. Now if the state and its agents are going to exercise

this power of criminal legislation to achieve its prime objective of crime control, the constitution of Kenya through S. 77 (4) and sub-section 8, says individual rights must be respected. But recognition of rights may in some instances reduce the efficiency of crime control. However, the whole point of rights is the respec for them is thought worth while on principle: they promote values which are believed to be worth preserving in a civilised society. And once a certain claim is accepted as a right, that should mean that it should not be sacrificed merely for the expectation of an extra increment in crime control.[1]

A question might be posed at this stage: To what length for example, should this hallowed principle of fairness be carried? The 'nulla poena' principle plainly rules out retroactive criminal legislation, but does it rule out offences which are phrased so vaguely as to give people little guidance on the ambit of the criminal sanction? Of course yes. S. 77(8) of the Kenya Constitution provides a bar to offences which are vaguely worded. However, the practical success of S. 77 (8) is watered down by the constitution itself for we note that the constitution is vaguely worded.[2]

What does recognition of something as a right as per our constitution imply? It implies that the right cannot be taken away merely because it would be for the benefit of a majority in society to do so (since individual rights only make sense if they hold good against society or state), or merely because it would improve crime control to do so. It also implies that any proposal to curtail the right should be closely scrutinized. In this connection we must notice the insiduous threat to rights which is sometimes mounted on grounds of 'practical necessity'.

An example of this is the argument that since the limitations of language make it impossible to define the boundaries of criminality with any precision, it is sometimes practically necessary to resort to widely drawn offences. The precise (limitations of language) may be correct, but the conclusion does not follow from it. The necessity is contingent, not absolute. There is in fact a choice between the enactment of a few specific offences, accepting that there will be a temporary loss of crime control if novel forms of activity sprang up which could only be penalised through the enactment of further offences, and the enactment of widely drawn offences.[3]

There remains the difficult question of when and on what criteria it should be permissible to curtail or even to take away a right. Whilst recognising something as a right means that it cannot be curtailed merely to achieve an increase in crime control, it does not mean that it can never be taken away. Yet if there is a case for curtailing a particular right certainly in the context of criminal process, that case will inevitably be founded upon the magnitude and social protection may be eroded when those demands reach an urgent and high level. In order to decide whether in a particular type of case its justifiable to curtail a right, it will therefore be necessary to assess the social benefits which are claimed to result from its curtail in crime control is worth the sacrifice of the right.[4]

FOOTNOTES

1. This account of the rights approach borrows from Prof. R.M. Dworkin's essay "Taking rights seriously", reprinted in his collection 'Taking rights seriously' (London, 1977), p.p. 184 - 205. Dworkin calls it the anti utilitarian concept of right: Whereas antilitarian might determine whether a right should be recognised by calculating the overall social benefit of doing so. This concept of a right entails that it should be recognized even if its recognition is to the overall detriment of a majority in society, since the essence of a right is that it protects the individual from certain demands of the majority.

2. S. 121 (1) of the penal code is vague. It spells out what type of conducts amounts to contempt of court but still room is left under the constitution for Court discretion to decide whether a conduct is contemptious.

3. A lucid appreciation of this point is to be found in the report of the Law Commission which led to the provisions of part II of the Criminal Law Act 1977: see Law Com. No.: 76, Conspiracy and Criminal Laws Reform (1976), para 1.8..

4. Dworkin Supra.

LEGALITY & RETROSPECTIVE LEGISLATION
A demystification

In this chapter I will be making a number of submissions on the theory of criminal retrospective legislation whilst appreciating at the same time the vitality of legality one must of course look at my points in their ideal context, that is in Plato's view of a perfect world[1]. It is common knowledge that before one can speak or write anything like a dissertation, he must be physically and materially fit and to put it humorously he should eat, sleep and clothe. This philosophy, of universal study, by Marx struck a ground for a scientific study of human problems for the first time; thus demistifying the so called Hegelian idealist philosophy of studying the universe by invoking human mind.[2] What I am simply saying is that with materialist philosophy, the material conditions of life explains other superstructures like state law, history and natural sciences ofcourse, the economic base alone, as Karl Marx rightly observes is not the sole determinant since these resultants do help the economic base. Marxists as opposed to burgeoi scholars explain that one cannot know before he sees.

Therefore, the essence of Marxist philosophy is three fold, one; materialism, two; the doctrine of surplus-value as a cornerstone of Marx's economic theory, three; the revolution which more and more clearly reveals the struggle of classes as the basis and the driving force of all development. I do not intend to review the whole doctrine of Marxism, but I submit that for us to scientifically understand law or any other superstructure an appreciation of those preliminary points is required. But what is this term law?

'Law' is seen by Marxist philosophy or science as the expression of the will of a dominant class. That is to say pegging our analysis to the fundamental rules of Marxism: any class conscious society or state starting from slave owner to socialist state has got its own laws. Though this does not meen that laws of one state cannot pass to another historically determined state (but this is a point I will develop later). 'What is a law?' asked Lenin, and replied: 'The expression of the will of the classes which have emerged victorious and hold the power of the state.'[3] In order that the will of a class may become binding upon all, it must be expressed in terms of laws. Without rules of law, supported by the full coercive power of the state, the will of a ruling class cannot become dominant and universally binding. "'A will', to quote again from Lenin, 'if it is the will of the state it must be expressed in the form of a law established by the state otherwise the word 'will' is an empty sound."[4] It therefore follows that according to Marxist-Leninist philosophy of legality law is inextricably linked with the state. So, a study will be made of the Kenyan state through its various stages of development. This, I hope, will help us understand the kind of Kenyan legality. But before we study the Kenyan context a brief explanation is required of the Marxist-Leninist theory of law and state.

It is argued by Marxist scholars and by Marx himself that in the very early stages of human development i.e. in pre-slave owner society the state does not exist and neither does the law. But when society develops and with it private ownership, commodity production and related commodity exchange appears. The society then becomes divided into classes of economically powerful and the less economically powerful. With the rise of classes a conflict of interests between the haves and the have nots inevitably emerges. Those who are economically powerful therefore organise themselves

into a state, which state would harmonise the relations of conflicting classes. Thus the state is a product of class strata in a society. The state therefore will use several institutions to bring 'peace and order' (of course peace and order of the ruling class). It is therefore just logical to find that the slave owner society had its own laws, the feudal society also had its own laws and the bourgeoi capitalist society like wise had its own laws. The socielist state also passes socialist laws since class struggle is still on. But we must be able to determine that 'socialist laws are essentially, passed to protect the interest of the ruling proletariet which class comprises the majority. It is of course admitted that some burgeoi laws will be adopted by the socialist state since its just practically impossible to bring total change at once. The need for law disappears in a communist state since there are no antagonistic classes at this stage. However, I still have a feeling that just as its not possible under socialism to discard some bourgeoi laws immediately, therefor the communist state would still have some laws.'[5] But the basic point to be noted is that once the state has withered away its counterpart law also disappears. So Marxist theory of law and state law has two basic elements: one, law is a historically determined social phenomenon; second, law is a product of human society at a particular stage of development. This temporary stage is a stage in which human classes is curved into societies. One further point is that all political economies which glorifies private ownership of property, viz, slave-owner, feudalism, capitalism, have got a basic characteristic cutting across them: that is their laws are exploitative of the majority and therefore these laws protect the economic interests of the ruling class.

Now, therefore, it becomes necessary to understand the Kenyan political economy to understand Kenyan law. But I will start by quoting extensively from Lenin on the state, in the doctrine of the state, in the theory of the state,

Lenin reveals in his study that the theory of the state means the struggle between different classes, a struggle which is reflected or expressed in a conflict of views on the state, in the estimate of the role and significance of the state. Now I will quote:

> "To approach this question as scientifically as possible we must cast at least a fleeting glance on the history of the state, its energence and development. The most reliable thing in a question of social science, and one that is most necessary in order really to acquire the habit of approaching this question correctly and not allowing oneself to get lost in the mass of detail or in the immense variety of conflicting opinion - the most important thing if one is to approach this question scientifically is not to forget the underlying historical connection to examine every question from the standpoint of how the given phenomenon arose in history and what were the principal stages in its development, and, from the standpoint of its development, to examine what it has become today."[6]

I am going to look at the Kenyan political economy against the above context. I shall, however, not be understood to say that Lenin's or the Marxist concept is a panacea. It should be applied with caution since Lenin delivered this lecture in 1919 just two years after the successful proletariat Revolution in Russia. But because Lenin was a great theoritician and practitioner who not only added to Marxist literature but applied it to Russia, he was not only good to U.S.S.R. in 1919 but even to Kenya today.

Kenya became a British protectorate in 1895. The British imperial Government expected the colony to play two basic economic roles: one, to act as a market for British manufactured goods, (dumping ground); second, to get as a source of raw materials for the booming oversees industries (you remember this was the peak of industrial explosion in Europe and hence shortage of raw materials).[7] With the establishment of a colonial government, there was an importation of the so called common law into Kenya.[8] Throughout the colonial period, the colonial government passed laws to reflect their economic interests, laws which were exploitative and racial in nature. The common law was reshaped to fit the needs of the colonial government, In fact at one time, the African community was denied the the colonial law. As 'independence' approached, however, the common law tended to 'reappear'. But that is neither here nor there: What is more important is that colonial laws were used to silence the natidlists who were fighting for independence. But the colonial law was not too harsh for one category of nationalists but even more harsh for another group. There was a group who only tough for minor reforms of the colonial laws as a tool for imperialism, as likely to be a tool for protecting the multinational firms was vigorously annihilated. It was seen as even a major threat and people like Gama Pinto, Bildad Kaggia Singh were brutally murdered in cold blood.

With the coming of independence, piecemeal reforms were made with 'ordinance' being replaced with 'Act', otherwise, Kenya continued to serve the same two roles of being an exporter of raw materials and importer of manufactured. But a slight change did occur (if you would wish to call it so); several countries joined Britain in looting the Kenya economy. Countries of western Europe like West Germany, France becoming 'trading partners' of Kenya not to mention North America. But the political leaders who led the country to independence did start acquiring properties in land and other commercial ventures.

Also the Asian community who had come in 1890's to help build the railway turned to business ventures and now we see them as a force of capital owning class. Then there are the rural poor and industrial workers found in the major cities of Kenya, not to speak of millions of unemployed.[9a] This analysis of economic classes obtaining in Kenya leaves us with a few discerible stratus. We have the petite burgeoi who run the government, the multinational firms and then last the masses who are oppressed.

The Kenyan economy is therefore run and controlled by the multinational firms but through their agents who are the politicians.[9b] The politicians ensures that there is stability for maximisation of profit value for the multinational firms. Laws are also passed to protect the interests of the Asian business community and lastly those who possess the political power. It therefore follows that aspects of law like criminal retrospective legislation under the present 'state' are neocolonial in nature and echoes a phenomena of imperialism. It becomes very important therefore to visualise the kind of legality the Kenyan constitution envisages. It is a bourgeoi legality if you might wish to call it so.

FOOTNOTES

1. This point is generally developed by Plato in his book 'The Republic'.

2. Expanded by Marx and Engels in, 'The Holy Family, Moscow', 1956, p.163.

3. V.I. Lenin's ideas, The State, Democracy and Legality in the U.S.S.R. - edited by V. Chkhikvadze, p.265.

4. Ibid; p. 265.

5. Lenin considers this not only inevitable but proper - K. Marx, F Engels, V. I. Lenin on Historical Materialism A Collection - ref. An article by

6(1). Lenin entitled 'The State'. A lecture Delivered at the Sverdlov University, July 11, 1979.

6(2). Ibid.

7. Ghai & McAuslain in 'Public laws and Political Change in Kenya - Introduction.'

8. Ibid Chapter 1.

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6. Ibid.

7. Ghai & McAuslain in 'Public laws and Political Change in Kenya - Intorduction.'

8. Ibid; Chapter 1.

9a. See - A speech by Hon. Mwai Kibaki while addressing the press club where he underscored the important role and indispensability of multinational firms in Kenyan economy! - reported in the Daily Nation issue of Wednesday 15th April 1981. Examples of firms: Delmonte, B.A.T., Lonrho etc..

9b. See a text titled: Who controls Industry in Kenya. - Report of a working party (Nairobi). East African Publishing House (1968) 279 p.11ms. 22cm. The working party ... was set up under the auspicies of the Department of Christian education and Training of the National Christian Council of Kenya.

Addendum: Footnotes to: Legality - A Demistification

Fredrick Engles, Juristic Socialism (Extract) (Die Nene Zeit), 1887, pp 49 - 62.

The world outlook of the middle Ages was substantially theological ... This theological welding was not only in ideas, it existed in reality, not only in the pope, its monarchistic centre, but above all in the feudally and hierarchically oranised Church, which, owning about a third of the land in every country, occupied a position of tremendous power in the deudal organisation. The Church with its feudal land ownership was the real link between the different countries; the feudal organisation of the Church gave a religious consecration to the secular feudal state system. Besides, the clergy was the only educated class. It was therefore natural that the Church dogma was the starting point and basis of all thought. Jurisprudence, natuaral science, philosophy, everything was dealt with according to whether ita content agreed or disagreed with the doctrines of the Church.

But in the womb of feudalism the power of the burgerisie was developing. A new class appeared in opposition to the big landowners. The city burgers were first and foremost and exclusively producers of and traders in commodities, while the feudal mode of production was based substantially on self-consumption of the product produced within a limited circle, partly by the producers and partly by the feudal lord. The Catholic world outlook, fashioned on the pattern of feudalism, was no longer adequate for this new class and its conditions of production and exchange. The flag of religion waved for the last time in England in the 17th Century and hardly fifity years later appeared undisguised in France the new world outlook which was to become the classical outlook of burgerisie, the juristic world outlook.

It was a secularisation of the theological outlook. Human right took the place of dogma of divine right. The State took the place of the Church. The economic and social conditions, which had formerly been imagined to have been created by the Church, were now considered as founded on law and created by the State. Because commodity exchange on a social scale and its full development, particularly through advance and credit, producers complicated mutual contract relations and therefore demands generally applicable rules that can be given only by the community.

But the bourgeoisie produced its negative double, the proletariat, and with it a new class struggle which broke out before the burgeoisie ahd completed the conquest of political power ... ... And this proletarian world outlook is now spreeding over the world ... .

CONCLUSION

I hope that this dessertation is clear enough and short enough to make a detailed summary unnecessary. Let me say that in Chapters one, two and three time was spent in stating the [1] nature and extent of application of Section 77 sub-section 4 and 8 of the Kenya Constitution. The section encompasses the princple of legality and Retrospective Criminal legislation. The last part of the discourse was devoted to criticisms thereof. The method of argument I have followed assumes that anyone who raises, or is willing to debate a legal issue, accepts the view that the actual institutions of any society are open to criticism. I submit that our society is sick and that is why prescription is necessary.[1]

FOOTNOTES:

1 See: Recommendations.

RECOMMENDATIONS

A close look at the above study unveals that the majority of black Kenyans are economically impoverished whereas wealth rests in the hands of the minority. A revolutionization of the economy is therefore in dire need so that the means of production or capital can be controlled by the peasants and the workers. This clearly means that with the majority controlling the state, the laws will reflect their interests. The shackles of colonialism and imperialism can only be overthrown by a revolution from below. This might mark the emergence of a socialist state.

My recommendation is on the lines of the U.S.S.R. method. It can be recalled that Lenin led the Russian Revolution in 1917; during which the workers through their venguard (Bolshevik party) overthrew the explotive feudalist system. And then a socialist state was set up during which laws were passed to throw the rich 'Kulaks' (landlords) out of the large tracts of land and these means of production like industries and land fell under the control of the workers. The basic legislation in Socialist Russia is the U.S.S.R. constitution just like we have the Kenyan Constitution here. It embodies under section 1 the general provisions. The place of the fundamentals in the system of Soviet criminal legislation is determined by the fact that, as stated in Article 2 of the fundamentals of Soviet Criminal legislation,[1] they established the principles and general provisions, in particular, the criminal codes of the Union Republics, on the drafts of which intensive work is now in progress. The new fundanentals preserve those provisions of Soviet criminal laws which have proven their worth in practice. These general provisions should be seen against the general purpose of socialist law. In a sociolist state law's first and foremost role is to educate the masses on the new socialist state so that they

can be reminded of why the revolution was carried. Here the basics of Marxist-Leninist theory of law and state and other related studies are imparted to the people through the law. Internal problems if not cheeked by laws can undermine the revolution therefore the law should be used to reeducate the people. Secondly, the revolution is not complete until and unless external threat from imperialist forces is defeated. The law therefore becomes useful in warding off external threat from outside.

Section 1 of Article 6 deals with the operation of the law in time.[2] The problem of time is time is treated in conformity with the principle of non recognition of the retroactive force of a more severe law. The fundamentals specify the retractive precedence of a more lenient law.

FOOTNOTES

1. Article 2. Criminal Legislation of the U.S.S.R. and the Union Republics Criminal Legislation of the U.S.S.R. and the Union Republic shall consist of the present fundementals, which define the principles and lay down the general provisions of the criminal legislation of the U.S.S.R. and the Union Republics; of all Union laws which determine responsibility for individual crimes, and of the criminal codes of the union Republics. All Union criminal codes shall determine the responsibility for crimes against the state and for military crimes and, whenever necessary also for other crimes aimed against the interests of the U.S.S.R.

2. Article 6: The operation of a criminal law in Time: The criminality and punishability of an act shall be determined by the law in force at the time of the commission of the act. A law eleminating the punishability of an act or mitigating a punishment shall have retroactive force, that is, it shall also apply to acts committed before its promulgation. A law establishing the punishability of an act or increasing a punishment shall have no retroactive force.