Law in Independent Africa: Some Reflections on the Role of Legal Ideology

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The topic "Law in Independent Africa: Some Reflections . . . " will strictly be some reflections in the sense that some of the things I am going to say are fairly tentative and really open to discussion. I have not really thought them through too thoroughly. Also, of course, what I say will not be applicable to all African countries. Africa is a vast continent and I cannot claim to be familiar with the whole continent. But what I'm going to say is applicable to some parts of Africa, particularly sub-Saharan Africa, and particularly the area of Africa I come from—East Africa.

Before I start talking on the topic itself, I would like to make some general theoretical points which will guide my reflections and also to make explicit certain theoretical guidelines which I will use in trying to understand and reflect on the development of law in post-independence Africa.

The first point is that I see law as having three major characteristics. I call these characteristics instrumental, political, and ideological. By the instrumental characteristic of law, I am referring to the use of law as an instrument to procure, secure, and regulate the interests of a dominant social group or social class—that is, the use of law to maintain these interests without any mediating processes and without necessarily reflecting the struggles within the society. By the political characteristic of law, I mean law as an outcome of class struggles within society, where law embodies certain successes, certain compromises, of the struggles of the people at large. Even in this form, law ultimately serves dominant interests, but the form it takes is essentially political; in this form law does embody certain partial successes of the struggling classes. By the ideological characteristic, I wish to highlight two aspects of law. The first is that law disguises or masks real relations,[1] in some cases distorting real relations. Here legal ideology plays the typical ideological role of engendering false consciousness. The second is the extent to which law or legal ideology is part of the general social consciousness of the people in the society, in other words, the whole question of legal hegemony in the Gramscian[2] sense. The extent to which legal ideology or law plays a hegemonic role in society is also placed under the ideological characteristic of law.

It seems to me important to recall at this point that in developed capitalist countries legal ideology occupies a central ideological space. In the United States legal ideology is very important. It is the thrust of general ideological domination. This is important to keep in mind because the situation in Africa is different.

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1. By real relations I refer to relations existing in society. Law disguises or masks them in the sense that it diverts attention from the reality of the relations.

2. Antonio Gramsci (1891–1937), Italian political theorist and co-founder of the Italian Communist Party, developed the concept that certain ideas dominate thought in a society.

The other theoretical point I would like to make is that I see the development of law going hand-in-hand with the development of the state. In other words, the development of law in Africa has to be situated in the context of the development of the state. Ultimately, the most important characteristic of all law is the fact that it is backed by the organized violence of the state. Of course, this violence is mediated through various processes and institutions, but its ultimate line with state violence is its defining characteristic. A state and its laws, therefore, cannot be separated. These are my theoretical points of departure for reflecting on law in Africa.

Another point that is obvious but still has to be made is that when you are talking about Africa—whether you are talking about economics, law, or culture in Africa—you have to begin with colonialism. Colonialism was and continues to be a profound experience for the people of Africa. One cannot really understand contemporary Africa without understanding its origins in colonialism.

This is specifically so with law and the state in Africa. Its genesis lies in colonialism, because law and the state in Africa, or in many countries in Africa, did not emerge as a result of internal struggles in the society. African society was invaded by foreign powers. These foreign powers, to serve their own interests, established the state and law. The colonial state was essentially a foreign state, not an organ which developed through internal struggles within Africa. In fact, it was a representative symbol of foreign domination. This was also the case with law.

During much of the colonial period, law, to a large extent, exhibited its instrumental character. It was there to achieve very definite aims and interests of the colonial state. There was very little political or ideological character about colonial law. For example, in Tanganyika,[3] one of the important immediate aims of the colonial state was to introduce and establish commodity exchange in order to integrate the colonial into the metropolitan economy. The pre-colonial economy, to a very large extent, was not a commodity exchange economy. Colonialism introduced commodity exchange. So you needed law to establish, as well as to regulate, commodity exchange. Similarly, in the field of labor, labor was not for hire. Much of the peasant labor was tied to land and used on land. Land was owned by the peasants and there was no labor for hire. This too had to be established and regulated by the colonial state.

If you read the early legislation of the colonial state you can see that the immediate aim is patently and obviously to create labor for sale, to create labor power as a commodity. This was done in various ways. In Kenya it was done largely through the method of land alienation.[4] You want free labor; there is no free labor. Labor is working on land, on its means of production, so you take away land in order to create free labor. That is what was done in Kenya—land alienation.

In Tanganyika, there wasn't much land alienation. The primary method used to create labor was taxation.[5] The tax legislation of this period was not so much to raise

3. Tanzania comprises the former countries of Zanzibar and Tanganyika. The reference to Tanganyika here is a reference to the mainland.

4. See Y.P. Ghai & J.P.W.B. McAuslan, Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present 80–84 (1970).

5. J. Iliffe, A Modern History of Tanganyika 133–34 (1979).

revenue—although of course it did raise revenue—but its explicit aim was to create labor. To be able to pay a tax you need cash, and there are two ways you can get cash. You either grow a cash crop on your land, in which case you are serving the colonial interest in cash crop production, or you leave your land and go to work in the mines, on the plantations, building roads, etc., to get cash to pay tax and thus also serve a colonial interest, this time as a laborer rather than as a peasant.

The labor so created was governed by a classical piece of legislation called the Master and Native Servants Ordinance.[6] This ordinance regulated the creation of labor and its migration from rural to employment areas, and supervised its conditions generally. Once again, it is worthy of note that such a law has very largely an instrumental character.

Even in terms of the adjudicatory process, in terms of the organization of the court system, the instrumental character of law cannot be missed. You do not have separation, at least in the court system in colonial times, between the personnel of the executive and that of the judiciary. At lower levels the head of the executive, the district commissioner in a particular geographical area, is also a magistrate. In other words, legal issues here are not seen as justiciable issues involving rights and freedoms of citizens to be adjudicated upon by an impartial organ. Rather they are seen as administrative issues, that is administrative regulations to be administered and effected by an administrative officer. By the same token, we have labor officers who are charged with regulating labor and enforcing labor laws. But at the same time they have also magisterial powers, judicial powers to settle disputes arising from those laws—once again illustrating a very thin line between matters judicial and matters administrative.

While the instrumental character of law is dominant and the political and ideological aspects are subordinate, legal ideology does not play a hegemonic role. First of all, as I pointed out earlier, law and the state are foreign. They are not part of the tradition of the people. They are seen as foreign. Therefore they do not occupy an important place in the consciousness of the people. So legal ideology fails to gain a hegemonic role in these circumstances. Even where, as in some cases, the colonial state allows the operation of customary law—which was the law hitherto regulating relations among the people—it is essentially co-opted to legitimize the rule of the colonial state. It partakes of the instrumental character of law. Let me illustrate this with a couple of examples.

Take the system of land tenure. The very first "act of state," so to speak, after colonial invasion is to declare all land as public land, meaning that all land belongs to the state. Thus, everyone occupying land technically becomes a squatter. Then a system of leasehold is created.[7] In Tanganyika we had a system of what is called right of occupancy.[8] It is a title to land for a definite duration of time. Rights of occupancy

6. An Ordinance to Regulate the Relations Between Employers and Native Servants and to Control the Engagement of Natives for Service Within or Without the Territory, January 1, 1924, 78 LAWS OF TANGANYIKA 1042 (1947).

7. *See, e.g.*, An Ordinance to Define and Regulate the Tenure of Land Within the Territory, January 26, 1923, 113 LAWS OF TANGANYIKA 1486 (1947).

8. *Id.* at § 7, 1486.

were given to foreign companies owning plantations. Creation of a plantation economy was an important political and economic goal of the state. So where land is alienated from peasants (now squatters!), it is given to foreign companies under the right of occupancy, say a lease of some 99 years.

What happens to the peasants? The peasant's relation to land is still governed by customary law. But technically, as a result of all land being declared state land, they are squatters. They do not have a title to land. At the same time, for two reasons—first, that you cannot really enforce a large massive alienation, and second, that you are interested in implementing peasant production—you allow the peasants to continue living on that land to continue producing what they are producing. To facilitate this arrangement, a legal fiction is created in Tanganyika, the fiction of "deemed right of occupancy." Peasants do not have any title to land; they do not have a certificate of right of occupancy. But they have a deemed right of occupancy. When you want to alienate land, you call them squatters and throw them out because they do not have a title to land. So long as you do not want their land but only their cash crops, you continue with your convenient legal fiction of the deemed right of occupancy, while on the ground the relations are regulated by customary law. That is the extent to which you allow the operation of customary law. The way I see it, here customary law is being co-opted in the ultimate interest of the colonial state.

Let me cite another example. During much of the colonial period, interpersonal relationships—marriage, succession, and so on—were governed by customary law. These relationships were allowed to be regulated by customary law with an overall proviso that such customary law shall not be repugnant to justice, morality, and good sense.[9] Now what do justice, morality, and good sense mean? They are the justice, morality, and good sense of the colonial power. Once you found any customary law which was not in your interest you could declare it as nonapplicable on the ground that it offended justice, morality, or good sense. But so long as it served your interest, it continued to operate. Once again we are witnessing a kind of co-optation of customary law.

Another important point to note is the way law was enforced through the court system. During colonial times the court system was essentially racial. We had what were known as "native" courts.[10] Native courts were supposed to apply customary law and be presided over by chiefs. So the appearance was one of leaving the community as it was, undisturbed, with customary law, chiefs, and so on, intact. But the reality, as I have argued, is different. The so-called customary law is a co-opted one; it exists in a truncated form. The so-called chiefs are either appointed or approved by the colonial state. They are thus not true representatives of the community the way they used to be. So the community system appears to go on when in reality it is manipulated to serve overall colonial interests.

9. An Ordinance Relating to Native Courts, April 12, 1929, 73 LAWS OF TANGANYIKA § 13, 1008 (1947).
10. An Ordinance Relating to Native Courts, April 12, 1929, 73 LAWS OF TANGANYIKA 1008 (1947).

The development of the state and law after independence, and that is the period I come to now, does exhibit a number of continuities with the colonial system. Yet these similarities came about through different processes and for different reasons.

In the first phase of development immediately after independence, there are attempts to reorganize and transform the state. For a short period, this reorganization takes place essentially in the image of Western democracy. You have the establishment of institutions like parliament, representative organs, an independent judiciary, and so on. Tanganyika achieved independence in 1961. Our first parliament was based not on universal suffrage but on various property and educational qualifications; although Western democracy is imitated, it is done in a fairly restricted form.

But these developments do not last very long. It does not last very long because this type of organization of the state does not have a social-material base. The country does not have a strong bourgeoisie, a strong capitalist class, to sustain a liberal political superstructure. So very soon you find that the system gives way to a military dictatorship or to the development of some form of an authoritarian civilian regime.

I would suggest that there are two important processes that take place during this period, particularly in the development of the state, which have very profound effects on the development of law. First, within the state's three major branches, legislative, judicial, and executive, concentration of power lies in the executive-military branch, while representative organs of the state, like parliament, political parties, even the judiciary, become politically insignificant. This comes about through a number of processes involving social struggles into which I need not go.

The concentration of power in the executive-military branch makes it the arena of power struggles among different factions of the ruling class. The judiciary and the parliament play a minimal role in this regard. Therefore they do not command any political clout or significance. Changes in the government, to be cynical, alternate between some form of a military dictatorship and some form of an authoritarian civilian regime. In this political process, and this is the second important point I want to stress, the people are not involved. In the relation between the state and the civil society, the organizational capacity of the people is, over a period of time, suppressed and ultimately weakened. Regardless of whether the organizations are trade unions, political parties, cooperatives, students' unions, and so on, these organizations eventually are destroyed and usurped by the state.[11] This statism is important in the development of a totalitarian regime.

The effect of this on the development of law is very significant. Once again, for different reasons and through different processes, law comes to assume an instrumentalist character. The political and ideological characteristics of post-colonial law are further undermined. But you also have laws prohibiting this or that organization; you have laws restricting this or that freedom. You have laws establishing state institutions and, more often than not, bestowing them with limitless powers. The central notion of law here is one of giving power rather than one of entrenching

11. On the state's exertion of control over trade unions in Tanganyika following independence, *see* I.G. SHIVJI, CLASS STRUGGLES IN TANZANIA 128 (1976).

freedoms or rights of citizens. A plethora of widely worded enabling legislation exists to allow state organs and institutions to exercise power against citizens; disabling legislation, legislation disabling the state from moving against citizens' rights, is rare. Generally, the central notion of post-colonial law does not revolve around rights, rather it revolves around the concept of power.

That brings us to the question of legal hegemony. It seems to me that in a developed bourgeois system three main things underlie the hegemonic role of legal ideology. On a political level, it is the existence of political processes through representative organs. At an ideological level it is the core conception of rights and freedoms. Thirdly, of course, is the fact that the whole legal system has evolved within that society and therefore is part of that tradition. Thus, legal ideology becomes part of people's consciousness. Not only does it occupy a central space in the dominant ruling ideology, but it also has a certain amount of consensus from the ruled.

In the African situation, the necessary conditions are lacking at all these levels. As I have already shown, political processes involving representation are marginalized; in its origin the law is foreign. The result is twofold. Legal ideology does not occupy an important space in the ruling ideology. Factions of the ruling class and various groups fighting for power do not conduct their struggle in terms of legal ideology. The ideology of discourse is not legal. Similarly, in the consciousness of the people, legal ideology has very little place. People talk about justice, but justice is not related to law. The connection between law and justice is ruptured in the African situation. You find people saying "this is unjust," "that is unfair," but the notion of unjust or unfair is unrelated to any concept that the acts in question are illegal. Therefore, the notion of justice and the notion of law are separated. Legal ideology, in other words, does not enjoy the hegemony that it does in bourgeois countries, precisely because the necessary underlying conditions for it either do not exist or have been eroded. In fact, in ideological terms, in the last two or so decades of independence, the notion that occupies a central space is the ideology of what I call developmentalism. Thus, economics occupies the central ideological space—not law or politics. It is in the name of developmentalism that the ruling class rationalizes and legitimizes its rule—not in the name of law or politics.

Finally, the marginal role of legal ideology is reflected in the organization and powers of courts. What has happened over a period of time is that the jurisdiction of various adjudicative organs, like courts, has been restricted and, particularly in politically sensitive areas, the judicial institutions have been ousted in favor of administrative-executive organs. As a matter of fact, courts hardly ever are involved in adjudicating questions relating to division of power within the state, since more often than not there is very little litigation on the constitution. The constitution here is essentially a political manifesto rather than a legal document. Since the constitution does not contain a justiciable bill of rights and the parliament is not really a representative organ, there is very little that can be challenged as unconstitutional. In terms of both its composition and its powers, the parliament is controlled by the

executive. Hence, neither the parliament nor the judiciary act in any significant way as arbiters of power. This pushes political and legal ideologies to the background.

Let me end by saying that some of the things I have said may be changing. Many things that have existed in the last two and a half decades in Africa are being questioned. The present economic crisis is exploding the ideological myths of developmentalism. This may create the ground for a recapturing of the political process by the people, and perhaps then legal ideology may play a different role.