ANALYSEN UND BERICHTE

A False Start - Law and Development in the Context of a Colonial Legacy

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"Colonialism has had its faults, but it also has had its virtues. I speak from some knowledge on the subject. I have visited twelve countries which at one time or another have passed through the status of British colonialism ...
The common law, the Parliament, the English language, freedom of speech, assembly, press and religion - these are the institutions which are the proud legacy of the British people in lands throughout the world."

Richard M. Nixon (1958)

"Who does not know that the victors keep their property and add to it that of the vanquished, whereas the vanquished lose all at once, their persons and their property?"

Xenophon (± 370 BC)

I. Colonial Rule

1.1 Law in a Social Context

There is a curious dichotomy today between on the one hand a fast production of laws all around the world and on the other hand the apparent irrelevance of law in many countries. Taking a closer look, however, we can see a connection between legal fetishism and legal irrelevance: both point to the negligence of the context within which law has to function. Law is seen as a product. Legal fetishism may be regarded as overproduction; legal irrelevance points to a lack of interest in the consumption of legal products.

In this paper we see law not as a product, as a given set of rules and given procedures for their enforcement and for dispute settlement, but rather as a process. Law is not a noun but a verb. We reject the idea that law might be abstracted from its social context and seen as

an entity controlling that context. The decisions people make are not only influenced by law but also by rivalry, social, religious or economic coercion, various types of inducement and collaboration. All such behaviour may also affect the law.

Thus, law-declaring, law-enforcing and dispute settlement form only part of the regularization of society.[1] Other types of activities may result in the reconstruction or even unmaking of law. Law does not cause social change, it is merely part of such a process. This view implies that we reject instrumentalism. The term instrumentalism may be used for the belief that there is a certain causality between legislation and the social order. You need price control, you make an Act and thus you get price control. Reality, however, does not take that type of manipulation. Rather, legal systems themselves tend to be subject to various forms and degrees of manipulation. (Lawyers, by the way, specialize in such manipulation in their clients' interests.) In certain situations laws may even become largely irrelevant (non-law). Constitutional guarantees for the realization of human rights often fall into this category.

This paper discusses the colonial context of law in the so-called developing countries. In the present chapter we shall examine the nature of colonial rule while paying specific attention to its political, social and economic aspects. Chapter 2 deals with the legal implications of colonial rule. In chapter 3 the colonial legal heritage will be traced in present manifestations of law and public policy. Here, we focus on Africa. Finally, some conclusions are drawn.

1.2 Political Domination

Colonialism implied the extension of administration by a (European) state to some far away territory elsewhere. It was based on conquest while resting on two pillars: maintenance of law and order and extraction of revenue out of the local economy.[2]

Law, in a normative sense, attempts to bind power, both in its formation and in its execution, to at least a regularized way of dispute settlement. Conquest, however, just takes the form of imposing power on the vanquished. The "law" which follows conquest is the law of the victor. As Xenophon put it in the classical Greek context: "It is a universal and eternal law that in a city taken during a war everything, including persons and property, belongs to the victor."[3]

1 *Falk Moore, S.*, Law as Process, An Anthropological Approach, London 1983.
2 *Killingray, D.*, The Maintenance of Law and Order in Colonial Africa, in: African Affairs 1986 (July), pp. 411-437 (411).
3 *Whittaker, C.R.*, Classical Slavery, London 1987, p. 8.

But colonialism was a humane type of conquest, was it? Well there were, of course, different degrees and ways of colonial exploitation. Not everywhere did colonial tyranny go as far as the Dutch "cultuurstelsel" in "East India" or the "cultures forcées" in French Central Africa, not to mention "red" (rubber) slavery in the Belgian Congo. Perhaps one could even follow Kenneth Kaunda in his exclamation "if, by some way of providence, Zambia was a nation that had to be colonized then thank God is was by the British".[4] But there was one common factor: unfree labour.[5] The colonial subjects, whether peasants, plantation workers or workers in the mines, were not regarded as a free and independent citizenry, in the full possession of their human rights. They were "other", "natives", not regarded as subjects (individuals) in a universal legal system, but rather as objects of a civilizing mission. The Enlightenment project "with its claims to exclusive nationality, to universality, comprehensiveness and consistency", as Fitzpatrick has put it, "can only relate to those excluded from the project through slavery or semi-slavery by saying that they are of a qualitatively different nature, or simply, of nature".[6] A striking example of the way in which the colonized were placed beyond the liberal concept of universal freedom and equality provides the Dutch government's Second Police Action in 1948. For the Indonesian population human rights such as freedom of speech, assembly and association were severely restricted at the same moment when this government actively promoted the adoption of the Universal Declaration of Human Rights by the United Nations.[7] Actually, this combination of liberalism and democratic thinking with exclusivism is in line with the origins of liberal and democratic ideas in the classical slave societies.

Oppression could take both direct and more indirect forms. German and Belgian colonialism, for example, used rather crude ways of dealing with resistance, including corporal punishment of individuals as well as group punishment. The British "indirect rule" and the French "l'association" were based on the incorporation of local chiefs in colonial administration. As one expert in "Native administration" put it: "Order is today largely secured by the system by which the native community polices itself, in the sense that only the major types of crime are dealt with by the Government Police Force, which has usually a very small establishment, the great majority of offenders or breaches of law being dealt with through the agency of Native Authority Policy or Tribal Messengers".[8] Naturally, the

4 *Kaunda, K.D.*, A Humanist in Africa - Letters to Colin Morris, 1960.

5 *Rex, J.*, Racism and the Structure of Colonial Societies, in: *R. Ross* (ed.), Racism and Colonialism, 1982, pp. 199-218.

6 *Fitzpatrick, P.*, The Desperate Vacuum: Imperialism and Law in the Experience of Enlightenment, in: *A. Arty* (ed.), Post-Modern Law - Enlightenment, Revolution and the Death of Man, 1990, pp. 90-107 (97).

7 *Benda-Beckmann, K. von*, Western Law and Legal Perceptions in the Third World, in: *J. Berting et al.* (eds.), Human Rights in a Pluralist World - Individuals and Collectivities, 1990, pp. 225-236 (225).

8 quoted in *Killingray*, cf. fn. 2, p. 416.

definition of breaches of law as well as the delimitation between major and minor offenses was the responsibility of the colonial government.

1.3 Social Stratification

Primarily the colonial social pyramid was of a racist nature. First came the officers of the "colonial service": the Governor(-General), his District Commissioners and their assistants. They tried to convey an image of complete cultural superiority. Thus, even in a thinly spread administration law and order often could be maintained by simply "calling the bluff".[9]

After the representatives of queen, king or president came the white settlers. In countries with substantial settler communities public policy was geared to the well-being of the settler section.[10] Non-white settlers, such as the Asians in Africa, were relegated to secondary positions in public-political life.

Through education, mainly at mission schools, a local intelligentsia was created. There were clear limits, however, to the advancement of these people in colonial society. In the British case, where racism was of an open and notoriously arrogant nature, this was self-evident. But the French policy of "assimilation" had its practical limits, too. It should first be understood that this "assimilation" was based on an unshakable French belief in the supremacy of their own culture. It meant the application of French legal and other procedures to indigenous subjects who, in this manner, could be more easily exploited. As for personal assimilation, the number of "natives" who were fully regarded as French nowhere exceeded a very tiny portion of the population. "Thus, by the outbreak of World War II, the French concept of assimilation, however venerated in principle, had succeeded only in producing a very narrow elite capable of living with and understandig French culture".[11] Nonetheless, this local elite, already alienated from the rural masses, became the leadership of the anti-colonial movement. When, after 1945, a new service industry developed of bureaucrats they could move from their teaching jobs into the lower levels of administration. After independence they formed the new political class to which Raymond Dumont referred in his "L'Afrique noire est mal partie".[12]

9 *Killingray*, cf. fn. 2, p. 414.
10 *Bennet, N.R.*, Africa and Europe: From Roman Times to National Independence, 1984, p. 123.
11 *Bennet*, cf. fn. 10, p. 112.
12 *Dumont, R.*, L'Afrique noire est mal partie, 1962.

1.4 Economic Exploitation

The economic penetration of colonialism was characterized by the following factors:

a) Confiscation of land. Even where distinctions were made between Crown land and Native trust land (and/or Native reserves), there were in fact no limits to economic control from the colonial centre. The urge to verify "customary law" resulted in the legalization of adversarial tenancy systems by registering contentious feudal practices. Besides, land titles were given as rewards to cooperants, while dissidents were punished by robbing them of their titles.[13] The general tendency was towards an individualization of titles together with a narrowing of duties.

b) Relocation of population. People were generally regarded as not more than a labour commodity that could be shifted back and forth. In case of insurrection villages could be burnt and their inhabitants forcibly removed.

c) Taxation. Head and poll or hut taxes imposed a duty to pay which enforced at least a partial commercialization of agriculture and/or migration of wage-labour. By giving the male "head" the duty to pay he was converted into a patriarchal leader with powers to control production by "his" family as well as movement and distribution.

d) Commercialization. Colonialism created export-oriented enclaves in the midst of subsistence economies. Generally, subsistence production became totally subservient to the needs of export-oriented production.
Intervention in traditional subsistence economies usually takes one of two different modes. In the first one, productivity is increased by commercializing the traditional crop in order to serve a market located outside the region. An example is the commercialization of Sago in the Indonesian Moluccas.[14] The second form of commercialization attempts at replacing the subsistence crop with another staple food commodity whose surpluses would be more easily marketable. One might think here of the substitution of maize for cassava (manioc) in East and Central Africa. In both cases food security tends to be severely undermined. Commercialization increases vulnerability to drought and other natural hazards while decreasing access and destroying mechanisms for secondary distribution. The benefits of commercialization did not usually go to the local population; it was the drawbacks that affected them most.

13 *Smith, D.C.*, Did Colonialism Capture the Peasantry - A Case Study of the Kagera District, Tanzania, 1989.

14 *Benda-Beckmann*, cf. fn. 7, pp. 157-199.

e) Product substitution. Imports from the colonial centre were generally favoured to local products. A system of licensing laws and sales rights further contributed to the marginalization of traditional systems of production and distribution.

Colonialism as a political, social and economic system also used law as a means to achieve its ends. The following chapter is devoted to the legal implications of colonial rule.

II. Legal Subordination

2.1 The Legislative Process

Colonialism built a legal pyramid in which the "natives" found themselves right at the bottom. Legislation would usually come from the "Crown". It could take many different legal forms such as, in the British case, Orders in Council, Charters, Letters Patent, Proclamations, Governor's Commissions, Warrants and Instruction to Governors. In the latter a further distinction was made between Royal Instructions under the Royal Sign, Manual and Signet and Royal Instructions by dispatch or telegramme. Local legislative bodies were created only in those countries which, as a "native" once put it, "did not have the blessing of the mosquito" and hence had attracted a white settler community. If such a settler parliament passed a bill, the Governor could assent, refuse assent or "reserve the bill for Her Majesty's pleasure". An interesting case, requiring an interpretation of the Colonial Laws Validity Act, occured when the Govenror gave his assent in contradiction with an earlier ruling of the Crown. When it contradicted a Royal Instruction, it was still valid, but in cases of a prescription in Letter Patent of in Order in Council, the Governor's assent was void.[15]

Obviously, the law resulting from such procedural prescriptions is rather far-removed from ordinary people. They are bound to feel "that the law, like the peace of God, passeth understanding".[16] One is, indeed, reminded of the Roman Emperor Caligula who had his laws and decrees posted so high above the ground that nobody could read them.

Most people, however, lived in "outlying areas", far removed from the colonial local centre. They were subjected to the rules of their chief, king or elders. They had what they called customary law. Colonial rule absolutized the power of the traditional functionaires. In societies with democratic an egalitarian traditions, checks and balances and sanctions against abuse of power were replaced by "traditional" authoritarianism. Listen, for example,

15 *Roberts-Wray*, The Authority of the Limited Kingdom in Dependent Territories, in: *J.N.D. Anderson* (ed.), Changing Law in Developing Countries, 1963, p. 14.

16 *Rosenn, K.*, The Jeito: Brazil's Institutional By-Pass of the Formal Legal System and its Development Implications, in: American Journal of Comparative Law 1971, p. 541.

to these words by a District Commissioner in Uganda in 1913: "Opigi and his headmen must be supported at all costs at this present stage, or they will be unable to control their people. No decision by them should be reversed, if possible, even at the risk of occasional injustice. A little oppression even need not be a bad thing."[17]

Multatuli's Max Havelaar amply illustrates the collaboration of colonial officials and local chiefs in corruption, forced labour and authoritarian rule in Dutch East India.[18] The transformation of traditional chiefs into authoritarian rulers provides an illustration of what Fanon has called "double alienation". First their systems of government, their customs and even their chiefs were taken away from the local population and then returned to them in a form adjusted to the needs of colonial authoritarian rule but with the pretence that these were their authentic traditional institutions. "So, with colonialism, existing social relations were taken, reconstituted in terms of its imperatives and then, as it were, given back to the people as their own. In this, history was denied - the colonized were to be brought into History - and 'custom' created instead".[19] In such processes of double alienation lie the roots for "indigenous authoritarianism" (African Socialism, Zambian Humanism, etc.) after independence. To attain and perfect this double alienation, the prevailing laws had to be either subordinated or substituted. The changes which took place altered both the nature and functions of law. In the next few sections we shall look at these changes in a little more detail.

2.2 *Rules and Roles*

Pre-colonial rules and roles in many African communities were flexible and their construction and application were influenced by consensus and adjustment to the contextual factors. Even the powers of the chief or king alleged to have been "absolute" were not absolute in relation to traditionally accepted ways of life. These accepted ways of life or doing things were themselves not rational.[20] As Beatie has shown in relation to the inter-judicial system in East and Central Africa, judicial roles and rules in this region were very informal and flexible.[21] The reason for flexibility was the need to adjust law to the context and avoid legal concepts becoming abstract self-serving entities. Another reason as explained by Elias[22] in connection with Basuto law was the inseparability of law in Basuto jurisprudence

17 quoted by *Killingray*,, cf. fn. 2, p. 419.

18 *Multatuli (E. Douwes Dekker)*, Max Havelaar, of De Koffiy-Veilingen der Nederlansche Handelmaatschappiy, 1860.

19 *Fitzpatrick*, cf. fn. 6, p. 100.

20 *Elias, T.O.*, The Nature of African Customary Law, 1962, p. 99.

21 *Beatie, J.H.M.*, Informal Judicial Activity in Bunyoro, in: *E. Cotran, N.N. Rubin* (eds.), Readings in African Law, London 1970, p. 35.

22 *Elias*, cf. fn. 20, p. 67.

from "morality, reasonableness and justice" among people. Hence legal rules and roles were centered around human beings and their feelings and not concentrated in commodities and legal institutions.

Colonial administrators failed to understand the social and political importance of flexibility. They found it incompatible with coercion and repression which were the quickest means of using the legal system to attain the colonial goals of exploitation. Hence the need to weaken these informal, seemingly lengthy and winding systems of arbitration based on peer groups, kinship circles, neighbourhood councils and courts, village tribunals etc. as was noted by Beatie among the Banyoro of Uganda[23] and by Schapera among the Tswana[24]. The same value systems seem to have equally influenced judicial systems among the Duer, Ibo and Kikuyu.[25]

Colonialism could not destroy these systems without creating a vacuum due to the fact that alternative systems of a European nature could succeed only in a completely Europeanized production and distribution structure. Such a transformation was not only unattainable but inconsistent with the colonial mission. A process of subordination was therefore necessary. Through indirect rule, a limited set of customary laws and practices were retained, provided of course they were not "repugnant" to or in conflict with the principles of colonial justice. But the substance in which these procedures were exercised changed. Statutory rules were passed to define how customary rules and roles would operate. The chiefs' councils which traditionally exercised appellate jurisdiction as apex organisations of otherwise autonomous judicial bodies were given unified supervisory jurisdiction as control organs and not as apex organisations. Judicial roles were assigned to chiefs' councils with ultimate jurisdiction at community level but appellate power lying with the district commissioners. Customary tribunals included expert and non-expert community members. Colonial "native" courts were institutionalized with adjudicators at the top, assessors at the middle, litigants and administrators at the bottom and community members as listeners or spectators. The spectators had no way of influencing the main actors of the judicial process. By elevating rules and roles above the community customs, customary law and the people were completely subordinated. Law and the judicial process, while retaining their traditional roots, were completely removed from the grassroots. In order to strengthen the process of subordination, customary rules were codified. This was aimed at making customary law more predictable and precise. As we shall see below, this was not necessarily in the interests of the colonized communities.

23 *Beatie, J.H.M.*, Informal Judicial Activity in Bunyoro, in: Journal of African Administration, Vol. 9 (4), 1957, pp. 188-195 (188).

24 *Schapera, I.*, A Handbook of Tswana Law and Custom, 1938, p. 283; *Elias*, cf. fn. 20, p. 57.

25 *Elias*, cf. fn. 20, p. 118.

2.3 *Precision and Predictability*

In most traditional customary law systems in Africa, settlement of disputes in court was an act of last resort. Tribunals and circles were the most effective institutions of dispute handling. Taking the Tswana as an example here, they regarded settlement of disputes in court as an unfortunate result of failure to agree.[26] In some societies, for instance among the Wakikuyu, Wakamba and Wathenaka of Kenya, the chiefs' courts were only used when the issues involved were so grievous that the chief had to intervene or where the people were so outraged by the wrong committed that they wanted to exercise instant justice. In some cases the alleged offender had a right to seek asylum in the chief's court pending trial. Such a system of voluntary remand in custody or asylum pending trial was common in many other societies of Africa.[27]

Such systems did not demand unified or codified procedures and rules because of their flexibility and because the judicial system was relativistic and decentralized. This does not in any way imply that customary or traditional legal systems did not have their legislative mechanisms. A system of decrees by chiefs or their councils, proclamations and declarations by tribunals and courts, judicial review by appellate councils and even judicial reform commissions existed.[28] Their distinctive features, however, were first the concept of legal relativism based on the probability of many interpretations and the need to reach a compromise rather than an award. Secondly, they avoided being universalistic and self-serving institutions. While they had their own procedures on *ratio decidendi* and *stare decisis*, precedents existed as guides which could form a basis of departure and not as terminal determinants of existing legal rationality.

The processes of colonial realignment of customary laws and their subordination entailed a few substantive changes in the letter and spirit of customary laws. First, they were institutionally subordinated and tied to the values of the colonizers. Their application was made permissive. They could apply only at the will of the colonial state and if they were not offensive to the European values of equity and natural justice. The second important change was that they were invisibilized. In West Africa it was specifically decided in *Bonsi v. Adjena* (1940)[29] and subsequently enshrined in the Supreme Court Rules that customary law, if relied on in any proceedings, had to be proved as matter of fact. In West Africa a series of cases confirming this position were decided. A few examples include *Ademolla II*

26 *Schapera*, cf. fn. 24.

27 *Elias*, cf. fn. 20, p. 216.

28 *Allott, A.N.*, Native Tribunals in the Gold Coast 1844-1927: Prolegomena to a Study of Native Courts in Ghana, in: Journal of African Law 1957, p. 163; *Danquah, J.B.*, Akan Laws and Customs, 1928; *Elias*, cf. fn. 20, p. 191-207.

29 Bonsi v. Adjena (1940), 6 WACA 214.

v. Thomas[30], a 1946 Nigerian case, and the famous case of *Angu v. Attah* (1916)[31] in Ghana.

In East Africa, subordination and invisibilization were attained more through the enforcement of the repugnancy clause. In a Malawian case of *Limbani v. R.* (1946)[32], a "native court" found that Limbani was guilty of adultery and that in Nyasa customary law adultery was a criminal offence. Basing itself on European values, the court refused to accept the finding. In other words, even where the local court was sure that under its customs a certain wrong was a criminal offence, it still had to prove this as a point of fact and state courts had option to accept or reject the finding. But in some cases even where the rule offended or went contrary to European values, European courts accepted rules in order to strengthen alliances with the chriefs and groups in power. This was clear in the case of *Kigisi v. Lukiko of Buganda* (1943)[33]. The appellant married the mother of the King of Buganda and the Buganda parliament brought action against him. The mother of the king was a widow and had consented to the marriage. By European values this was definitely normal. The Buganda parliament alleged it was against Buganda customary law and it was a criminal offence. Because here customary laws would be against European values of natural justice, one would expect that it were overruled by the European court. On the contrary, however, the latter held that in such situations, there was no need to depart from the findings of the "native court".

Similarly, it was easy for European courts to side with African courts where the former wanted a certain type of rule to disappear or to be changed. An example here is the Nigerian case of *Ometa v. Numa* (1945)[34] where the Privy Council refused to overturn a decision of a native court only because it was against the continuation of certain forms of tribal land tenure. A similar situation arose in East Africa in *Kajubi v. Kabali* (1944)[35]. The Buganda parliament in this case applied a modified rule of customary land law. Because the modification was in favour of new relations of land ownership, the East African Court of Appeal was quick to point out that it was not good for it to interfere with the finding of the lower court. More interesting was the refusal of European courts to invoke the so-called "repugnancy clause" against rules they categorized as "barbarous" if they wanted those rules to be used in their favour. In the famous Nigerian case of *Eleko v. Officer Administering the Government of Nigeria* (1931)[36], the colonial court was considering the customs used to remove a chief. Because they wanted the chief in this case to be removed, they

30 Ademolla II v. Thomas (1946), 12 WACA 81.
31 Angu v. Attah (1916), PC 43.
32 Limbani v. R. (1946), 6 Nyasaland L.R. 6.
33 Kigizi v. Lukiko of Buganda (1943), 6 U.L.R. 113.
34 Ometa v. Numa (1945), 11 NLR 18 (PC).
35 Kajubi v. Kabali (1944), 11 EACA 34.
36 Eleko v. Officer Administering the Government of Nigeria (1931), All E.R. 44; (1931) A.C. 662.

supported the customary practice of banishing chiefs. Although they considered it against principles of natural justice, they accepted this "barbarous" practice on the ground that it was recognized by the community. The judge said,

> "... the more barbarous customs of earlier days (eg, to kill, and not to banish, a deposed chief) may under the influence of civilization become milder without losing their essential character of custom. It would, however, appear to be necessary to show that in their milder form they are still recognized in the native community as custom, so as in that form to regulate the relations of the native community *inter se*. In other words, the court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to 'natural justice, equity and good conscience'. *It is the assent of the native community that gives custom its validity and therefore barbarous or mild, it must be shown to be recognized by the native community whose conduct it is supposed to regulate*." (Emphases ours.)

This refusal to apply the repugnancy clause even in situations where rules were alleged to be "barbarous", was not due to the recognition or acceptability of these rules to the local communities but to the dominant interests served by the colonial judicial systems. That is why in the East African rules of evidence, African marriages celebrated under customary laws were not recognized as marriages under which communication between spouses could not be made bases of evidence in criminal prosecutions on grounds of privilege. The argument in *Amkeyo v. R.* (1921)[37] was that such marriages were not marriages as known in civilized society. The institution of bride price was referred to as "wife-purchase" even though these customs were not only accepted but rooted in their history and culture.

The following lessons can be drawn from these developments. First, the rules of ascertainment of customary law transferred the power of interpretation from the local communities to the colonial courts and administrative institutions. Secondly, the colonial governments gave themselves a leeway to select in which situations to recognize and use customary law rules to introduce new relations of power and production. Third, by requiring customary law to be specifically pleaded as a fact, they made customary law an issue of fact and paved the way for its ultimate erosion and disappearance.

2.4 The Role of Sanctions

Colonial relations were not intended and did not pretend to be cordial and accomodative. They were directly conflictual, coercive and exclusive of any elements which were antagonistic to their survival. Legal subordination could therefore not be built on the founda-

37 Amkeyo v. R. (1921), EACA 12.

tions of harmony, complementarity, relativism, etc. which characterised methods of social control and rehabilitation in many indigenous systems. Although there is no room for generalizations on these aspects, records show that systems of sanctions in African traditional systems were based on religious or what the colonial anthropologists referred to as "magical" methods of social control, withdrawal of recognition and support, boycott and ostracism and ridicule of the offenders.[38] Most of these sanctions were both psychological and economic and their effectiveness depended on the way society was organized. The extended family, community belonging, mutual aid and support, collectivity and complementarity along which society's production and distribution were organized provided room for these sanctions to be effective as deterrent and punitive measures.[39]

Withdrawal of social affection, acceptability and recognition in such a system based on sharing, caring and interlocking family, personal and community production and distribution relations were more effective than solitary confinement, monetary fines or temporary loss of liberty. Rules were obeyed not because of fear of supernatural powers or spiritual visitation as Major Orde-Brown once commmented[40]. It was much more the fear that existence which depended on social solidarity, mutual aid and community belonging was threatened and that wounds once inflicted by or upon society by deviation from the norm would take long to heal. The most significant feature of sanctions in this respect is that they were imposed by the community as a whole and the community took responsibility for making them effective. The system did not depend on constables or officers of justice to carry out the punishment. The enforcement of decrees was a community function.

In the case of serious crimes such as witchcraft, grievous assault, murder and treason, harsher systems of punishment existed. Among the Haya of North-West Tanzania physical torture through use of strings tied tightly around the head or bending a middle finger backwards, or tying hands backwards were used to extract confessions.[41] Alleged witches were subjected to ordeals through which culpability was determined. Among the Banyoro, hard core criminals were usually put in wooden stocks and their movements restricted for a whole day or a night, a practice noted among the Haya, Sukuma and Baganda in East Africa.[42] Mutilation, executions, banishment, temporary exile and reparations for damage to individuals or communities were common in all African societies.[43]

38 *Elias*, cf. fn. 20, p. 64-65.

39 *Culdwick, A.T.*, Good out of Africa, 1945, p. 30.

40 *Orde-Brown*, British Justice and the African, in: Journal of Royal African Society 32 (April 1933), pp. 148-159 (151-152).

41 *Cory, H. / Hartnoll, M.*, Customary Law of the Haya Tribe, 1945, pp. 236-238.

42 ibd.; *Cory, H.*, Sukuma Law and Customs, 1953, p. 10.

43 *Elias*, cf. fn. 20, p. 73-74; *Meek, C.K.*, Law and Authority in a Nigerian Tribe, 1937, p. 323; *Rattray, R.S.*, Ashanti Law and Constitution, 1929, p. 378.

One has to note, however, that specific processes were important in the imposition and execution of sanctions. Offences were treated as being against society and this made society eager to see to it that justice was carried out. Society had to be in agreement that objectively an offence had been committed in order to be part and parcel of the enforcement mechanism. Hence offences had to be accepted as such by the broad community, otherwise enforcement was impossible. Interdependence was necessary to support such a system. Otherwise psychological, social and economic sanctions would fail to work. For example, if status and recognition were not crucial in a community, they could not be withdrawn or if withdrawn they could not have the desired effect of helplessness and hopelessness on the offender. Among the Nandi, being disowned was considered a very severe punishment[44], while among many Ashantis, death was preferred to disgrace[45]. Another crucial factor was that of collective responsibility on the part of society in the enforcement of sanctions. Blood and kinship ties were not a barrier to the enforcement of sanctions among relatives. Social solidarity was the driving force. Finally, it was on very rare occasions that an individual was removed from society as a punishment. Banishment, exile and execution were mainly for crimes which were considered outrageous. Normally a person was punished while residing in society. Probation, rehabilitation and punishment were all carried out simultaneously.

Colonialism did not find value in continuing such systems. The reasons for this were many. First, such a system was regarded as backward and primitive. Secondly, it demanded a decentralized structure in which the culture and norms of the society would have a role in law enforcement. With all the pretences of indirect rule in many African colonies, decentralization of power and control were not conducive to effective colonization. Third, social and psychological sanctions were not going to help in the process of commoditization. Fines payable in monetary currency were necessary not only to accelerate the demand for cash and cash earning activities among colonial subjects but also to make them contribute to the funds necessary to run the machinery of their own oppression. Correction and rehabilitation based within the communities was not conducive to the colonial needs of prison labour for purposes of public works and prisons as institutions for the integration of offenders by coercion and humiliation into the power structure of the colonial state. However, the introduction of fines and severance from the community as a way of punishment changed the whole concept of crime and punishment. Instead of being instruments of repentance, social cohesion and retribution, they had a cleansing effect, operating as quasi-licenses for previous wrongs and by being fulfilled, they had the effect of remedying a wrong. In African legal systems both the wrongdoer and the community took long to forget about wrongs, issues could be heard over and over again, without necessarily leading to retrial or repayment of reparations. The aim in all cases was reconciliation, deterrence and

44 *Snell, G.S.*, Nandi Customary Law, 1954, p. 84.
45 *Rattray*, cf. fn. 43, p. 372.

rehabilitation without unnecessary hardships on the part of the wrongdoers or the community. The indirect licensing of crime and the requirement that after punishment is imposed the crime should be forgotten greatly undermined the objectives and functions of law in traditional society.

III. European Law in an African World

In colonial processes of double alienation lie the roots of indigenous authoritarianism as this manifested itself after independence. A living testimony is His Excellency the Life President of Malawi who appears in public as an old-fashioned British gentleman adorned with a Chief's stick and a flywhisk. Here, at last, is the native Governor. One would be mistaken, however, to think that his power rested on respect for tradition in general and for the Chief in particular. His one-party rule is based on the oppressive mechanisms of the modern state including a "special branch" of secret police.

Another example of double alienation was Tanzania's Ujamaa policy which forcibly removed people from their villages in their own "Ujamaa" (familyhood) tradition.

Even the term "native" is not yet out of use. A striking example is the Tanzanian case of the *Mulbadaw Village Council and Others versus National Agricultural and Food Corporation (NAFCO)*.[46] The people of Mulbadaw, who are primarily Barbaig herdsmen, live together as one community. When the country began its "rural transformation policy" in 1967 Mulbadaw became an "Ujamaa village". It was officially registered under the Village and Ujamaa Village Establishment and Registration Act of 1975. (This Act has been repealed by the 1982 Local Authorities Act.)

Problems started when the government-owned NAFCO was granted Canadian financial assistance to establish wheat farms in Tanzania. It chose low-lying land in the Rift valley: the Kartesh area. This land is rich enough to sustain wheat growing on an extensive basis but its thinness would reduce it to a dust bowl.

NAFCO alienated lands around Kartesh belonging to Mulbadaw village. It did not use the land acquisition procedures of the Land Acquisition Act of 1967 which provides for acquisition of land held under customary tenure. These provisions demand proper procedures (including demonstration of the "public purpose" of acquisition) as well as compensation and an offer of alternative land to the victims of acquisition.

46 Muldabaw Village Council and Others v. National Agricultural and Food Corporation (NAFCO), Civil Appeal No. 3 (1985), Appeal Court of Tanzania.

In bypassing the Land Acquisition Act NAFCO first denied a collective title to the land by the Village Council. This argument implies that the villagers were required to prove their customary titles individually. In line with the Land Ordinance of 1925 (sic!) this means that each and every one of them has to prove that she or he is a "native". A "native", according to this specimen of colonial law, is an African, which excludes Somalis. Now unfortunately for them the Barbaig people look like Somalis. On the basis of their appearance, the Tanzania Appeal Court denied them a "native" identity while not giving them the opportunity to produce evidence to the contrary.

This astonishing case now enables us to summarize the consequences of a false start in development in terms of its legal consequences. The legal system became:

a) Alien. Through an individualisation of rights and liabilities together with a depersonalization of the legal system and separation of substantive rights from procedures, as rooted in the communities, there is a huge gap now between law and culture.

b) Inaccessible. The new law relies on professional jurists not involved in the dispute. It demands a lot of paper work as well as payment of money. Indeed, if it were not for the legal aid offered to them by university lawyers, the people of Mulbadaw village could never have brought their case to court.

c) Constructed. A universal legal system is based on the construction of rules. Its application is of the "if ... then" type, as opposed to the "as ... therefore" approach of traditional modes of dispute settlement.[47] The question is always whether there is a consensus in society that can live with the fiction. If not, the enforcement mechanism will become oppressive or the law will remain a dead letter.

What then was the legal heritage of colonialism at the time of independence? There was a legal system of administration which was not only technical but alien, a system of law-making highly dependent on the skills of legal draftsmen and a system of dispute settlement that was rather inaccessible to the rural and urban masses. At the same time the new local elite that had come to power possessed a remarkable confidence in the effectiveness of the inherited system of law-making, administration and dispute settlement. Thus, independence was generally not followed by a movement for legal reform but rather by a euphoria of new laws, aiming at rapid change. Politicians with their economic experts devised new policies, and it was up to the legal experts to incorporate these in the form of bills and decrees.

47 *Benda-Beckmann, F. von*, Property and Social Continuity: Continuity and Change in the Maintenance of Property Relationships through Time in Minangkabau, West Sumatra, 1979.

As was amply demonstrated in the previous chapter, colonialism was not set up as a system for nation-building and development. The new legislation, however, did aim at these objectives, but the law which was thus produced usually was not effective. Development was and generally still is hindered by a very technical, bureaucratic and alien legal system, while the role of law in development is both underestimated and overestimated. It is underestimated in the neglect of traditional law as a manifestation of communal search for security. It is overestimated in the sense that modern state law is regarded as a principal - if not exclusive - instrument of social change.

We shall now look at the systematic background of modern manifestations of the colonial legal legacy.

3.1 Independence with "Continuity"

Most colonies gained independence at the beginning of a new world order. That order began taking shape in the late fifties when international capitalism became so integrated that free trade broke the traditional boundaries of colonial domain. The rise of multinational enterprises with interlocking transnational capital and power structures made irrelevant the need for one colonial power to foot the costs of otherwise shared benefits of colonial exploitation. With the Treaty of Rome in 1957 and the rise of multilateralism in Europe, it was crystal clear that international relations of trade and investment were going to abandon structures based on formal colonialism. The rise of the US as a new economic power without colonies seemed to show that accumulation on a global scale did not require territorial monopoly of dominated economies. The successful rebellions in China in 1949 and Cuba in 1959 were clear testimony that prolonged confluctual paradigms of global domination were going to expand the size of the communist bloc. Besides, colonization by association and partnership was beginning to bear fruit in Latin America and South East Asia, areas which had severed political colonial links with former colonizers for decades. The direct "domination" paradigm of colonialism was quickly losing viability, attraction and touch with reality.

These developments had two principal implications for Africa. First, the decolonization and future development profile of Africa had to be as peaceful as possible and to continue rather than destroy the colonial order. Secondly, development strategies had to open up Africa for further linkage and subordination and avoid delinkage or insulation from the main currents of the emerging world order based on collective domination by the advanced countries and association, alliance and partnership between them and the newly independent countries. Such partnership could succeed faster of norms and institutions of power, production, distribution and consciousness were similar in both spheres and if the culture and organisational structures were related. In the early sixties therefore, a process of

modernisation began whose goal was to uplift the norms and institutions of African countries to the level where they could operate in harmony with those of dominant western systems. This demand for modernisation created room for the continuation of double alienation. This alienation has been characterized by the increased professionalisation of law and judicial processes, excessive faith in the use of law to stimulate new social relations, the prevalence of the ideology of developmentalism and state intervention, and overreliance on western models of human and natural resources development.

3.2 Modernisation and Professionalisation

Alienation and deprivation always have the potential to create false demands and distorted needs. Just like restrictions on drinking tend to make drinks attractive to adolescents or give them an impression that drinking is a sign of maturity, many deprived people normally find their needs reactive to the system of their deprivation. During the colonial period, colonial agents, settlers and privileged groups used their political power to allocate to themselves the best services, amenities and incomes. The colonized found themselves at the bottom of the distribution pyramid. This had the impact of linking deprivation on the one hand with access to the best facilities and amenities on the other. At independence it was almost unquestionable that the independent governments should undo what the *ancien regimes* had done. A demand was unmistakable that independence should provide access to what Seidman has called "all the good things which western civilization has produced"[48]. We shall see the impact of this later when we discuss law and developmentalism.

In the case of legal services, colonialism limited the access of local people to legal services and the legal profession. The colonial court system was a highly segmented one with European and African systems of adjudication and appeals. Most of the courts in which customary laws applied were not allowed to operate with the help of advocates, their procedures were simplified and their appeals led to administrative tribunals or authorities.[49] The main objectives of this system were first, to make the decisions of lower courts as weak as possible in order to justify their decisions being subjected to review by administrative action (district commissioners or the governor in council). Secondly, by limiting the participation of lawyers in African courts it was easy to accelerate the development of adversary systems of property ownership which operated in favour of powerful clans and groups with whom the colonial system was allied. But third and perhaps most important, the irrelevance of advocates in African courts reduced the need for Africans to train as lawyers.

48 *Seidman, R.B.*, Law and Economic Development in Independent English-speaking Sub-Saharan Africa, in: *T.W. Hutchinson et al.* (eds.), Africa and Law, 1968, pp. 3-74 (22).

49 *Allott, A.N.*, Judicial and Legal Systems in Africa, 1962.

Another method used by the colonial systems to keep Africans out of the legal profession was the exclusion of advocates from certain types of litigation, especially in marriage and land cases. In East Africa it was not until in the 1940s that issues of land occupied by Africans could be entertained with help of advocates. By excluding advocates, most cases involving Africans were unrepresented and because the magistrates were trained in the legal tradition, a lot of injustices prevailed.[50] This exclusion of Africans and the miscarriage of justice that accompanied it created an artificial demand for professional legal services after independence. In Tanzania for example, the ruling party donated its own building to house the law faculty which was the first university faculty to be established in Tanzania. In order to produce its own lawyers the government hastened to enter into agreement with the University of London which agreed to train and produce lawyers in Tanzania within a maximum period of three years. Dar es Salaam quickly became a centre for producing lawyers for the whole of East Africa.

It is important to note here that for East Africa the demand for legal services was generated by the colonial segregation of African court systems but also that, in curing this imbalance, the importation of faculty from the University of London to Dar es Salaam was deemed necessary. As most of the teachers who were part of this programme have pointed out, they had little if any experiences of Africa or African systems; they came out of England because they believed the law there had lost touch with the realities of life and practice but on arrival in Dar es Salaam, they had no other law but this one to rely on. Most of them felt out of place or as one of them put it, they felt trapped.[51] They felt themselves victims of modernisation just in the same way as their students but the latter reacted by putting up a fierce resistance to what they considered as irrelevant education and cultural infiltration.[52]

Most of these institutional links were common in Africa. In some West African universities faculties of law did not start until late in the seventies. Usually, law students were sent to the UK. In most of Southern Africa, law schools are very young. Until recently lawyers were made either in South Africa or in England. Legal training tends to be about the law of England or American laws. At postgraduate level, some room is given to general training in African law. Therefore through training, African lawyers have become exposed only to the western models and the proliferation of legal education and services has been more reactive to colonial legacies than in response to an ascertained market for such services.

50 *Ghai, Y.P.*, Law and Lawyers in Kenya and Tanzania: Some Political Economy Considerations, in: *C.J. Dias et al.* (eds.), Lawyers in the Third World: Comparative and Developmental Perspectives, 1981, pp. 144-176 (153).

51 *Twining, W.*, The Camel in the Zoo, in: *Shivji, I.G.* (ed.), Limits of Legal Radicalism, 1986, pp. 22-23.

52 *Paliwala, A.*, Personal and Political Influences in Legal Education in 1971 and 1972, in: *Shivji*, cf. fn. 51, pp. 48-62 (51-53).

Another factor which has facilitated a wholesale adoption of colonial and western laws is the reception process. Under the numerous reception and adaptation of laws clauses, very old English and Indian statutes have been adopted in former British colonies. Some countries have made wholesale adoptions of the English Companies Act of 1948, some corporation laws of England of the 1920s and Indian laws of evidence and contract, passed when India was still a colony. Most of the reception clauses adopt the common law of England only up to the date of commencement of colonization. This seems absurd but the reason is that during the colonial period, colonial governments did not apply all the common law principles to the "natives" especially where they carried rights. Hence it is queer that the reception laws make the pre-1900 common law of England part of the binding law of most Commonwealth countries although these laws have been overruled by subsequent common law decisions in England. Through the reception laws, English common law principles applicable as far back as 1874 apply to Ghana, while for Nigeria it is 1900, for Tanzania 1922; but generally in all former colonies, the English principles of law and equity are applicable if they do not conflict with any statutory law even if they may be falling outside the ambit of the reception clause.[53]

Due to technological advantages such as availability and the traditions of *stare decisis* and *ratio decidendi*, English cases are very attractive to practitioners in countries constrained by lack of records, inadequacy of printing facilities and short of judgments. The tendency by magistrates in many cases is to make judgments using the logic of English cases without necessarily citing them either as sources or authorities.

A third factor which has accelerated the need for professionalisation was the preservation of English and French as languages of the court in intermediate and higher judicial bodies. In Africa principles of drafting are taught in foreign languages, laws are drafted in these languages and legal interpretation can only be in these languages. This has created the need for special skills in legal drafting, a market for interpreters in court while knowledge of English, French or Portuguese is necessary for participation in adjudication as assessor or legal representative of a litigant. This has technicalised proceedings in court and further limited the ability of certain groups to have access to justice or to participate in dispensing it.

Criminal and civil procedure laws have now been modified and re-written. But most of them have been upgraded to the standards of either English or French law. The standards of proof have been adjusted to the standards applicable in "civilised" societies. Only in a few instances, such as marriage and divorce, are "universal" standards abandoned in order to accomodate traditional systems of reconciling and pacifying married couples. The retention of complicated civil and criminal procedures based on adversarial systems of litigation has

53 *Allott, A.N.*, Essays in African Law with Special Reference to the Law of Ghana, 1960, pp. 21-22.

further stimulated the demand for professional legal services while at the same time pushing many groups out of access to justice.[54]

Another factor which has contributed towards further professionalisation in the modernisation process is the ideology of national security. Due to authoritarianism and coercive political regimes, most ruling elites see the legal profession as a threat. In the early seventies and throughout the eighties, programmes have been undertaken to socialise and integrate lawyers within the ideological framework of ruling groups. Populist regimes such as in Tanzania and Zambia have introduced political education as a way of changing the ideological outlook of lawyers while other regimes, especially in Kenya, Uganda, Nigeria and Gambia, have tried to use apprenticeship to inculcate nationalist and western values and ideology among fresh law graduates. These socialisation efforts were generally unsuccessful because the actual orientation of lawyers was more effectively picked from law schools and law courts. The culture of respect for gowns, neckties, wigs and attachment of value to individual rights, private property, authority, etc., could not be inculcated through short periods of internship or apprenticeship. It was cemented through legal training and practice.

Accompanying internships and apprenticeship is the strict control of entry into the legal profession. Through intensive screening, admission to the bar has been tightly controlled especially in East and Southern Africa. While apprenticeship and internship are used to prevent lawyers from adopting alternative approaches to law and human rights[55], the gatekeeping and screening of aspirants to the bar is calculated to keep the number of practising lawyers very small.[56]

We would like to sum up on this issue by pointing out that legal education in most African countries has been an instrument of universalization of legal culture and undermining African value systems.[57] In this respect even radical faculties of law in Africa such as Legon in Ghana and the one in Dar es Salaam have created a society-conscious group of lawyers who have managed to attack the imported legal ideology and practice but have ended up serving within its framework, thereby strengthening it.[58] Secondly, it has been noted that where political leaders tried to change the society and its outlook as in Ghana during

54 *Dias, C.J. / Paul, J.C.N.*, Lawyers, Legal Professions, Modernisation and Development, in: *Dias et al.* (eds.), cf. fn. 50, p. 17.

55 *Odenyo, A.O.*, Professionalism and Change: The Emergent Kenyan Lawyer, in: *Dias et al.* (eds.), cf. fn. 50, p. 183.

56 *Ghai*, cf. fn. 50, pp. 164-170; *Rwelamira, M.R.K.*, The Tanzanian Legal Profession, in: *Dias et al.* (eds.), cf. fn. 50, p. 217.

57 *Rwelamira*, cf. fn. 56, p. 217.

58 *Luckham, R.*, The Ghana Legal Profession: The Natural History of a Research Project, in: *Luckham* (ed.), Law and Social Enquiry: Case Studies of Research, 1981, pp. 110-114; *Shivji, I.G.*, Within and Beyond Legal Radicalism, in: *Shivji* (ed.), cf. fn. 51, p. 130.

Nkrumah's time and in Tanzania during Nyerere's time, it was quickly discovered that lawyers were not ready to accept such changes especially where these undermined hegemony in controlling power and distributive mechanisms. Therefore attempts to deprofessionalise through participatory and decentralized judicial systems or to simplify and detechnicalise procedures in court were stiffly resisted.[59]

A third observation is that irrespective of the ideology professed by various regimes, training and practice in court have been uniformly influenced by western values. Kenya and Gambia on the one extreme professed private enterprise and individualistic values. Tanzania, Zambia and Ghana professed the ideology of collectivism and egalitarianism. In both sets of countries legal education and practice remained tied to the English legal ideology. All invariably played down African values and institutions and none attempted to reform the system in order to make it more participatory and receptive to the needs of the poor or the limitations of infrastructure and culture.[60] It is true, as Luckham has observed, that because decolonization has been regarded from the point of view of changing the sovereign without altering the superstructure, African countries were destined to remain dominated by western legal culture.[61]

3.3 Law and Developmentalism

Critique of modernisation theories is not new in African political economy. It was more intense in the early sixties when African governments and donors from both East and West were engaged in the further opening up of Africa to models of growth drawn from other continents. During that time some development analysists were already becoming critical of these processes. Rhodes for example saw the ideology of nationalism and the continuation of modernisation processes as a contradiction in terms. He regarded nationalism as a hidden pretext for conservatism and development along a path charted by colonialism.[62] During the same period, Bodenheimer warned that the ideology of developmentalism was not pro-African but was mainly a strategy for the preservation of dependence and neo-colonialism.[63] Similar views were expressed by Bernstein[64] and O'Brien[65] as both viewed deve-

59 *Luckham*, cf. fn. 58, pp. 122-130; *Du Bow, F.L.*, Justice for the People: Law and Politics in the Lower Courts of Tanzania, Berkeley Ph.D. thesis, 1973, pp. 72-88.

60 *Luckham*, cf. fn. 58, pp. 287-336; *Du Bow*, cf. fn. 59.

61 *Luckham*, cf. fn. 58, p. 295.

62 *Rhodes, R.I.*, The Disguised Conservatism in Evolutionary Development Theory, in: Science and Society 32 (4), 1968, pp. 383-412.

63 *Bodenheimer, S.J.*, The Ideology of Developmentalism, in: Berkeley Journal of Sociology 15 (1970), pp. 95-137.

64 *Bernstein, H.*, Modernisation Theory and the Sociology of Development, in: Journal of Development Studies 7 (2), 1971, pp. 141-160.

lopmentalism and modernisation theories as obstacles to development and democracy in Africa because already at that time they were being used to abolish political opposition, suppress popular dissent, promote centralisation of power and render useless grassroot bodies of popular participation such as consumer protection organisations, independent producer organisations and local authorities.

Specific case studies such as the one on Nigeria by Melson and Wolpe[66] showed that modernisation was being used to perpetuate clientilism and concentration of power in the hands of cliques, thereby perpetuating authoritarianism, deprivation and anti-developmentalist tendencies. Similar observations were made by Marshall[67], Kilson[68] and Kofi[69] on Ghana. The crisis of African sociological thinking about development generally has been a concern for quite some time. Apart from marginalization and political and economic clientilism which were characterising development processes in the early seventies[70], some evidence was already emerging that most development strategies alleged to be new were in actual fact an unbroken continuation of colonial development strategies.[71] While in French-speaking countries colonial models were emulated with a sense of pride and achievement[72], in former British colonies the imitations were more sophisticated and disguised[73].

In many countries, however, modernisation theories and practices had similar tendencies. First, development strategies were affected substantially by cold war alignments and alliances. Each country chose a path dictated by a superpower ally as the best path suited to development, unity and stability. In East Africa the impact of the cold war was more pronounced as pro-Eastern bloc countries looked at pro-Western countries as "man-eats-man"-societies (Tanzania's view of Kenya) while the latter saw the former as "man-eats-nothing"

65 *O'Brien, R.C.*, Unemployment, the Family and Class Formation in Africa, in: Manpower and Unemployment Research in Africa 6 (2), 1973, pp. 47-59.

66 *Melson, R. / Wolpe, H.*, Nigeria: Modernisation and the Politics of Communalism, 1972.

67 *Marshall, J.M.*, The Political Economy of Dependency - Ghana 1945-1966, M.A. thesis, Institute of Social Studies, The Hague, 1972.

68 *Kilson, M.*, Elite Cleavages in African Politics: The Case of Ghana, in: Journal of International Affairs 24 (1), 1970, pp. 75-83.

69 *Kofi, T.A.*, The Elites and Underdevelopment in Africa: The Case of Ghana, in: Berkeley Journal of Sociology 17 (3), 1972, pp. 97-115.

70 *Lemarchand, R.*, Political Clientelism and Ethnicity: Competing Solidarities in Nation-Building, in: American Political Science Review 66 (1972).

71 *Magubane, B.*, The Crisis in African Sociology, in: East African Journal 5 (12), 1958, pp. 21-40.

72 *Copans, J.*, Pour une histoire et une sociologie d'études Africaines, in: CEA 43 (1971), pp. 422-447; *Copans, J.*, Economies et luttes politiques de l'Afrique noire contemporaine, in: L'Homme 12 (3), 1972, pp. 119-131; *Meillassoux, C.*, From Reproduction to Production, in: Economy and Society 1 (1), 1972, pp. 93-105; *Augé, M.*, Sousdéveloppement et développement: terrain d'étude et objets d'action en Afrique francophone, in: Africa 42 (2), 1972, pp. 213-233.

73 *Asad, T.*, Anthropology and the Colonial Encounter, 1973.

societies. The common thing about them was that all were dependent and were implementing models copied from other people - West or East and not necessarily best.

Cold war rivalries gave very little room to the African countries either to ascertain the actual causes of their underdevelopment or even to look for solutions to this problem from their own perspectives and institutions. The western models held out the magic of growth through market mechanisms. This magic was projected as being smooth and painless and likely to succeed faster with external financial and technological stimulus. The Eastern bloc held out a model of the magic of mass mobilization based on ideological and information manipulation. This model was projected as requiring mental, moral and material sacrifices which would be rewarded by state accumulation and the emergence of a greater nation. African governments chose from these models which one to follow without realizing that the western model presumed a lot of infrastructural, structural and cultural factors which were absent in Africa and that the Eastern model was a myth and already cracking in the East itself.

In the implementation of these modernisation strategies, a few false assumptions were made. Both the African socialist and the capitalist regimes saw African history as a problem and their duty became to bury and not to praise it. Secondly, they assumed that the African people were tired of their history, desperate and eager to leave it behind, and that what they needed was a western or eastern kiss of life. Thirdly, it was assumed their needs were simple and their culture irrelevant and that through acculturalisation, institution building and external aid, they would quickly be converted either into individualistic capitalist entrepreneurs or selfless heroes of socialism. Fourth, as has been pointed out by Hetlne[74], modernisation became identical to westernisation or de-Africanisation generally.

In the processes of transformation African systems, institutions and culture were abandoned and as Ekeh has argued, "the possibility of the autonomy of African social, political and economic structures has been denied *a priori*"[75]. African norms of organising agriculture, livestock rearing, medicine, production, education, organisation and environmental control were rejected in most cases as being antiquated and irrelevant to development. As Ekeh concludes, in the development process culture has been put into an enclave "where it is forced to change by capture by the forces of modernity" and that "rather than being domesticated by traditional culture, industrial civilization with its enormous international strength displaces and captures indigenous culture"[76]. In rural transformation, human resources

74 *Hetlne, B.*, The Development of Development Theory, in: Acta Sociologica 3 (4), 1983, pp. 246-266 (250).

75 *Ekeh, P.*, Development Theory and the African Predicament, in: Africa Development XI (4), 1986, pp. 1-40 (6).

76 ibd., p. 25.

development and urban planning, law and public policy have played a big role in preserving this phenomenon.

IV. Concluding Observations

In expressing concern about Africa's predicament comparisons are often made between "before independence" and today. Thus, figures on food production are often presented with references not to twentyfive or thirty years ago but to the time before independence and so many years later. Why is this done? Why should explicit reference be made to independence without further clarification? Obviously there is an implicit suggestion: Something went basically wrong with independence.

In this paper we have first of all shown that something went wrong long before independence. Although it is generally recognised that colonialism was not all that good, its thoroughly negative impact upon the social, political, economic and legal structures of developing countries still tends to be underestimated. The legal heritage, for one, is often mentioned as one of the positive effects of colonisation, as Nixon's words in the first motto of this paper illustrate. We have argued, however, that it is exactly this legal legacy which must be regarded as a major constraint to people-centered development. In the field of law and development we may indeed speak of a false start, not with independence but long before.

What did go wrong with independence was the uncritical absorption of the colonial legal legacy. Post-colonial law generally has been as alien, inaccessible and constructed as the legal systems on which it was based. But the effects were even worse. Colonialism, in a way, was rather limited in its ambitions, however, detrimental colonial ways of "maintaining law and order" and extracting surpluses may have been. Thus, it never aimed at "development". It is the combination of legal instrumentalism with developmentalism that has produced such disastrous effects in the lives of people. Some of these effects can be found in the spheres of rural transformation, human resources development and urban planning.

The post-colonial project is still widely seen as a problem of economic structure. How to increase productivity, that is the question. Our analysis has demonstrated that there is a different project which would require at least a similar degree of attention: the making of public policy and law. The priority today is in the creation and strengthening of viable and authentic public institutions related to real processes taking place in society rather than in the production of numerous laws and decrees. It is time, perhaps, to put the long forgotten issue of legal reform on the development agenda once again. Our analysis has shown that

this project would have to be primarily an exercise not in law-making but rather in the unmaking of state law.

Particularly in Africa the unmaking of state policy and law has an essential part to play in decolonizing administrative and judicial processes. A few examples of how the post-independence policy has been an uninterrupted continuation of colonial laws and policy have been given in chapter 3. It can be observed that colonial laws and policy put the African people at the lowest stratum of society by using land, business and urban development laws. Through land laws, land occupied by Africans was subjected to insecure tenure and was made susceptible to confiscation or revocation of title. This in turn affected the value of African land for purposes of credit. Business license laws supplemented land laws by restricting business icenses to groups which lived in secured areas. Industrial licenses could be given only to individuals with leases or rights of occupancy. Group tenure and insecure tenancy disqualified Africans from getting industrial licenses or licenses for large-scale and wholesale business.

These two sets of laws kept Africans out of property and finance markets as well as from industrial and large-scale commercial activites. Urban planning laws compounded this problem first by preventing the construction of certain types of structures in industrial or commercial areas and then by creating three types of housing estates - low density, medium density and high density areas. While the separation between industrial and commercial areas from the rest completely segregated non-industrial and non-commercial groups, the estate system completely preserved and reproduced a racial structure desired by colonialism as discussed in chapter 1.

Post-colonial leadership has retained these laws and policies and further strengthened them through modernization initiatives. As a result the majority of Africans have remained either in the informal sector or in low turnover retail trade and due to licensing and urban planning laws, areas occupied by the African people have remained high-density, poorly serviced and incapable of being developed due to the lack of security and low value that characterise group and contentious customary tenure. In such a situation it is not the making of new and more state laws that will alter the situation. It is the unmaking and rationalization of existing laws that has to be done first.

Public laws and policies about the involvement of public servants in economic activity provide another example. Colonial laws bared senior servants from taking leadership roles in social and political movements or private enterprises. They were also barred from investing or playing active roles in business activities. The colonial state preserved this policy in order to make the native population leaderless and to make public servants highly dependent on the state for roles and means of living. Because the public servants were the only group which was sophisticated enough to challenge the system politically they were

trained to be apolitical. After independence the same policies have been continued. In countries where populism was advocated "leadership conditions" were passed without acknowledging that these were direct carbon copies of the leadership regulations of the forties. What was done to make the people leaderless under colonialism was introduced for similar objectives under what was often said to be socialism. The only difference is that during colonialism the elite became politically dependent on the State for favours and patronage while after independence the elite became economically independent on the state for livelihood through legal mechanisms such as excessively big allowances and privileges and illegal means such as bribery, embezzlement and other forms of corruption.

Once again the ills of this system have not been cured by the public trials, inquisitions or preventive detention. It is not the economic crime and anti-sabotage legislation or anti-corruption laws that will remove problems of corruption. Corruption is the misuse of office. It is the unmaking of those public laws and policies which have created all sorts of public office while facilitating social parasitism on the part of the public service that will provide a solution both in the short and long term.

The last example of where history has to be prevented from repeating itself is a recent case of public policy statement. In 1989, a labour minister of one of Africa's newest members of the Organization of African Unity was addressing his country's Labour Advisory Board. He gave an address on the absorption of unemployed urban labour into the rural sector. A plan was presented on how the unemployed would be moved into labour camps which would have hospitals, schools, water facilities and small-scale enterprises. The minister announced a programme of resettling them. The speech was written by his assistant who had joined his ministry four months before the speech. Six months after the speech was delivered, an identical speech was found in the national archives. There were only two differences. The first was that the speech in the archives had been delivered in 1936 by a colonial Secretary of Labour. The second major difference was that the amounts of money in the 1936 speech were much lower than those in the 1989 speech. Otherwise even the places of commas were the same.

Africa was colonized after a long period of colonial research, called discovery. Between 1860 when the "discoverers" appeared on the African scene and 1960 when most African countries gained independence, a century of "double alienation" was experienced. A rediscovery of how much damage was caused between "discovery" and independence and between independence and today is essential. Policies which have made the administrative and judicial processes alien, inaccessible to the people and caricatural constructs of other civilizations have to be re-examined. The unmaking of a substantial part of existing state policies and laws we consider to be a necessary condition for starting authentic process of new institution-building.

ABSTRACTS

A False Start: Law and Development in the Context of a Colonial Legacy

By *Bas de Gaay Fortman* and *Paschal Mihyo*

The article reflects upon the development of law in former colonies in Africa both during the period of colonialism and after independence had been reached. Law is seen and analyzed as part of a social process, and in this perspective the impact of political and economic colonial strategies upon the structures and institutions of pre-existing African laws is described, focussing on the legislative process, the function of norms in African communities, the settlement of disputes and the role of sanctions. The article then turns to criticize the way in which post-independence societies made use of relicts of the colonial legal system, regarding law as a major instrument of social change and neglecting elements of traditional law. It defines the legal legacy of colonisation as a major constraint to people-centered development in the post-independence period, and thus as a "false start" rooted in structures long before independence.
Consequently, the authors call for an unmaking of existing state policies and laws in specific legislative areas.

Niger: The New Constitution of the Third Republic

By *Volker Lohse*

In spite of social tensions due to the country's poor economic and financial situation and due to a massacre among the Tuareg in the north, the West African Republic of Niger has made a courageous step forward towards democratization by substituting the state of emergency of the Second Republic with the new Third Republic. The new Constitution (Constitution de la IIIe République) which has been accepted by the referendum of December 26, 1992 is the new foundation for more participation of the citizens, the multi-party system and the rule of law.
The new constitution is partly modelled after the French constitution of the Fifth Republic. It follows, however, an independent path, e.g., with the distribution of executive powers among the president, the prime minister and the cabinet and by strengthening of the judiciary and including a bill of rights.