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NOTES ON THE RULE OF LAW AND JUSTICE AND THE CONSTITUTIONAL
PROPRIETY OF SOME RECENT DEVELOPMENTS IN THE KENYAN GOVERNMENT

by

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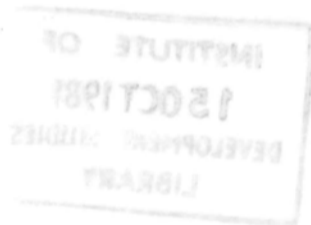
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ABSTRACT

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This paper briefly examines the legal and governmental issues arising from the recent revelation of Rift Valley Province police ngoroko activities, the subsequent warning by the Attorney-General to such "subversive" elements, and the constitutionality of the recent appointment and functioning of the Attorney-General as acting Minister for Commerce and Industry. These are discussed in the context of adherence to the popular politico-legal doctrines and practice of the Rule of Law and Justice and Separation of Powers and the shaping of public opinion thereon.

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Introduction

It is quite idiomatic at the moment to say that a large section of the Kenyan society has become extremely corrupt. The reasons for this unwholesome reality may be numerous, perhaps the most decisive being the natural contradictions in the so-called 'mixed' capitalist political economy that has failed to respond adequately to the moral, social, economic, as well as political will and needs of Wananchi.

On the civil plane, this unwholesome situation has given birth to, among other things, authoritarian institutions in the form of private as well as State supported and/or condoned vigilante groups. Thus ngorokoism as a political concept signifying repressive and generally unconstitutional political institutions and processes has become part of our vocabulary. It is hardly an exaggeration to say that such social order if not checked in its infancy can easily deteriorate into proportions akin to Nazism, Fascism, or McCarthyism in recent European and United States of American social-political order. If within such a context the Attorney-General, Mr. Charles Njonjo, comes out in public - as he has done - to warn the "subversive" elements, it is only natural and reasonable for Wananchi and the various categories of visitors in Kenya to rally behind him and the new administration, provided, of course, that some positive action is being taken to redress the inequities so far suffered by the populace. This indeed is the very essence of the now popular nyayoist political order.

In joining the Government and the Attorney-General in applauding promises for anticipated reforms, however, it would be patently wrong to fail to provide constructive criticism or appraisal of the measures adopted to ameliorate the system. Eclectic criticism as such is an invaluable and healthy tool for a participatory democratic system especially in a developing political economy. In a commendable attitude, in fact, the Attorney-General himself recently invited and encouraged this in his London interview where he is reported to have said that if he has taken or takes an unpopular action, he is sure he will be criticised.¹ It is in this spirit that it becomes imperative to evaluate the circumstances in which the Attorney-General-cum-acting Minister for Commerce and Industry issued the warning to ngorokos and the broader fundamental issues of constitutional nature which arise therefrom.

1. Daily Nation, December 20, 1978, p.1.

In this short paper, therefore, an attempt is made to provide:

- a) a brief review of the circumstances which led to the warning given by the Attorney-General to ngorokos,
- b) a critical constitutional appraisal of the propriety of a situation in which, within the latter and spirit of the Kenyan Constitution, an attorney-general while in that capacity also assumes a cabinet ministerial portfolio concerned with matters such as commerce and industry, and, lastly
- c) an analytical justification for the position that it is not in the best interest of impartial administration of justice for an attorney-general, as the chief lawperson, to get involved in the mainstream of politics. This latter particularly if it goes to the extent that he is moved to threaten some sections of the public with the possible use of armed security forces to command their obedience to the State and general civic order.

The conceptual and theoretical framework that underlie the theses developed in this essay revolve around the doctrines of the Rule of Law and Justice² and the Separation of Powers which, admittedly, are Western developed bourgeois politico-legal ideals upon which the Kenyan Constitution and formal governmental structure are predicated. In common to these doctrines is the belief that true justice and fidelity to accepted and publicised laws are best served whenever there is a clear distinction in theory and practice between the judicial, executive, and legislative arms of the government.³

In Kenya, the judiciary, with the attorney-general as its administrative head, is the primary judicial organ of the government. It must therefore be removed as far as possible from the executive and legislative arms of the Government - excepting, of course, legislative drafting - if the achievement and maintenance of high moral and legal standards are to be attained. Failure to maintain such a system both in form and fact may lead to conflicts of interest and allegiance both of official and/or personal nature, be they intentional or unintentional.

2. The traditionally accepted concept is that of the Rule of Law. We find this to be a catch-all concept since honest jurists are agreed that law is not necessarily justice. To exclude social orders such as that which obtain in South Africa in which the 'rule of law' could in its majesty claim to exist, we have here adopted a more restrictive term by adding the concept of justice to that of law.

3. See affirmation of this view in the Act of Athens of 18th June, 1955 and the Declaration of Delhi of 10th January 1959, both being views adopted at international fora of jurists under the aegis of the International Commission of Jurists; as for the interpretation of independence of the judiciary which flows from the Separation of Powers, the European Court of Human Rights has stated that an independent judiciary is one which is "independent both of the executive and of the parties to the case" (emphasis added), Eur. Court H.R., "Heumeister" Case, judgement of 27th June 1968, Series A: Judgements and Decisions, p. 44.

2. The Factual Basis of the Warning by the Attorney-General to "Subversive Elements".

The available evidence which remain uncontroverted - although not yet judicially determined - indicates that a special commando or paramilitary unit of the Kenya Police force, while ostensibly entrusted with the task of combating cattle rustling (stock theft) in the Rift Valley Province,⁴ was actually engaged in vigilante exercises with the full knowledge of the former government administration. They were trained to carry out, among other things, Political assassinations. The Attorney-General, Mr. Charles Njonjo, who revealed this after the change in administration, has in fact alleged that the present President, Vice-President and Minister for Finance, and himself were recently made the targets of this group.⁵

It may be re-called that the leader of this ngoroko group, Mr. Joseph Mungai, a former Assistant Commissioner of Police, was heavily implicated in the assassination of J.M. Kariuki in 1975. J.M. Kariuki was a radical bourgeois who broke ranks with his colleagues within the ruling class.

It is rather ironical that some of those who are now initiating and conducting the investigations and hopefully possible prosecution of Mr. Mungai and his group were among the leaders in ^{the} former administration who condoned his activities by omitting to act on the Parliamentary Recommendations on the J.M. Kariuki affair in 1975.⁶ In pure theory of law (and politics!), of course, it is quite accepted in international jurisprudence for those who may be protected and cloathed with malafide or bonafide legalism by one government to become traitors and subversive elements in a new government. It is proper, however, to qualify this by observing that the assertion is regarded generally as confineable to situations where governmental succession is achieved through a revolution,⁷ or, more in moderntimes, through a military putsch.

4. See letter from Mungai to the Permanent Secretary in the Office of the President, reproduced in the Weekly Review, Nov.17, 1978, p. 7.

5. Weekly Review, Supra, pp. 5-6; The Standard, Dec. 18, 1978, p. 1.

6. See Report of The Select Committee On the Disappearance and Murder of the Late Member for Nyandarua North, The Hon. J.M. Kariuki, M.P.(1975) at Chapter V.

7. see the classical exposition of this in H. Kelsen General Theory of Law and State (Princeton, Princeton Univ. Press, 1961 Ed.) at see also the appreciation of this in Uganda v. Commissioner of Prisons, Ex. parte Matovu. (11) (Habeas Corpus) (1966) E.A. 514, at 535-539.

As matters stand at the present, an extradition request has been filed in the Kenya High Court for an order to the Sudanese Government, where Mr. Mungai has fled as a fugitive refugee and requested an asylum, to hand him over to the Kenyan authorities so that he can face the "criminal" charges preferred against him.⁸ Whether or not the Sudanese authorities will honour the Kenyan request will depend on whether they (the Sudanese) are convinced that the actions the Kenyan Government is likely to take to punish Mungai are not motivated with political considerations and are purely of non-political criminal nature. Both general, customary, and treaty sources of international law prohibit States from extraditing persons sought for political offences or refugees who are likely to be persecuted by the requesting States.⁹ In legal jargon, the principles of non-refoulement or non-extradition which also draw legitimacy from the general principles of international law of human rights dictate against the extradition of political offenders.¹⁰ The Sudanese authorities are, of course, not legally bound to provide permanent asylum to Mr. Mungai.

It is the foregoing circumstances, among others that led the Hon. Attorney-General-cum-acting Minister for Commerce and Industry, on 30th November, 1978 to sound a warning to those indulging in subversive activities. He said:

/ To the "subversive elements" / Security forces are watching and listening to you.....

/ And to the President / Your Excellency, I am sure you are aware that 99.99 per cent of Kenyans are following the Constitution and your nyayo (footsteps)

"You are moving fast and with determination to dig deep and root out corruption which has seeped through the very fabric of the Kenyan society.....

"Allow me to reiterate what I have always maintained, that Kenya belongs to all of us. We all belong to one Kenya ---- where I am proud to say the rule of law will prevail.....

8. Weekly Review, supra., p. 5.

9. A recent scholarly treatment of this is in Grahl-Madsen, A. Territorial Asylum (Uppsala, Swedish Institute of International Law, 1978), pp. 42-79.

10. see generally, United Nations Declaration on Territorial Asylum, (1967), U.N. G.A. Res. 2312 (XXII), particularly Art. 3(1).

"It is only in such a climate, where the rule of law reigns supreme, that industries such as this one /the Kenya Tobacco Processing Plant at Thika_/ can thrive.....¹¹

It is this foregoing message and the circumstances upon which it was made which form the center-piece of the following critical analysis of some aspects of constitutional development and practice in Kenya as defined briefly in section 1, above.

3. Powers of an Attorney-General and the Constitutionality of an Attorney-General Concurrently Holding a Cabinet Ministerial Office: the critical test for the ultra-vires principle.

The Kenya Constitution provides explicitly that the attorney-general's office is an "office in the public service".¹² By letter, therefore, an attorney-general is a senior civil servant and not a cabinet minister -- quite contrary to conventional wisdom and, to a considerable extent, practice in Kenya. An attorney-general is also the principal legal adviser to the government¹³ as well as being the principal public prosecutor.¹⁴ Constitutionally, therefore, administrative aspects of the judicial administration of law and justice rests with the attorney-general. This is an enormous responsibility as it is supposed to cover a third of a governmental machinery according to the traditional tripartite division of a government into the judiciary, legislature, and executive.

For purposes of executing the role of principal public prosecutor, an attorney-general is bestowed with certain unlimited powers under Article 26, subsections (3) and (4) of the Constitution. These include the power to institute, undertake or discontinue criminal proceedings, including directing the Commissioner of Police to investigate any matters and give a report. In invoking these powers, particularly those of discontinuing a criminal

11. Daily Nation, 1/12/1978 at p. 36.
12. Constitution of Kenya Act 1969 (Act No. 5 of 1969), Article 26(1).
13. Ibid., Art. 26(2)
14. By virtue of duties under Art. 26(3).

proceeding (nolle prosequi) and interrupting investigations that may lead to an indictment, the margin of appreciation bestowed on an attorney-general must be exercised in good faith and in the public interest. An attorney-general ought not to interfere unduly or pre-empt the judicial process.

While on this latter point, we may divert a little and say that the proper interpretation of Article 26 of the Constitution does not and ought not allow for blanket condoning of large scale 'whitecollar' economic crimes. The Attorney-General is reported to have said in his London interview, when questioned on issues relating to material advantages acquired through corruption, that, "/i_/t will be difficult to get people to repay money. In certain cases we shall have to count our losses and look forward. We do not think of 'seizing peoples' assets."¹⁵ /Emphasis added/

Whereas it is true that in some cases - depending on the merits of the particular cases - the public may count its losses and look ahead, the assertion regarding the policy of non-seizure of property ought not apply to property acquired through criminal malfeasance. Neither positive general principles in statutes of limitation nor rules of African customary laws forbid or foreclose restitution of public property acquired illegally. The institutionalisation of inequities have negative influence over the judicial process and one hopes that it is not the Kenya Government policy to implement this blanket pardon. At least such a policy ought not to come from the Attorney-General.

It would be incorrect not to mention here that upon the determination of the judicial process a president may, through the exercise of the constitutional power of prerogative of mercy, intervene and either pardon a convicted criminal or commute a sentence.¹⁶ As such, it is the presidency as the ultimate seat of formal justice that ought to decide on whether or not the "whitecollar" criminals who have so far taken the masses for a ride ought to be pardoned. But this can be done legally only after the judicial process has taken its impartial course and the status of these suspected criminals formally established by law. It is then that claims of adherence to the Rule of Law and Justice may be seen to be legitimate.

15. Daily Nation, December 20, 1978, p.1.

16. Article 27 of the Constitution.

The duties of an attorney-general as a senior civil servant is not limited to being the principal legal adviser to the government and principal public prosecutor. In addition to these, an attorney-general is a member of the Judicial Service Commission and also head of the judiciary.¹⁷

In these latter capacities, an attorney-general participates in advising the President in the choice of High Court judges, and also in the appointment, dismissal and disciplining of magistrates (lower court judges). The dispensing of these roles obviously require a very high degree of separation from politics since the impartiality and independence of the members of the bench become adulterated ipso facto whenever their appointors and supervisors are the active currents in the political mainstream. We shall return to this point shortly. For now, we shall proceed to analyse the constitutionality of an attorney-general, while expending the constitutional duties reviewed above, also acts as a cabinet minister in charge of commerce and industry. It has already been noted that the attorney-general's speech (quoted above) was made in such a capacity.

Whenever a new president is elected, the Constitution provides that the incumbent cabinet is automatically dissolved.¹⁸ This is to provide the new president an opportunity to chose his/her own team to help in running the government. When Hon. arap Moi was declared elected on October 10, and sworn in on October 14, 1978, as the new President, the powers he exercised in naming the ministers was therefore not those limited to mere "reshuffling" of the cabinet but rather a more primary one. The fact that he retained all those who constituted the Cabinet during Mzee Kenyatta's reign was partly reflective of Hon. arap Moi's satisfaction with their performance and partly for pragmatic reasons of continuity in consideration of the short period left before the next general elections.

18. Ibid. Art. 16.

The only post, conventionally regarded as a "cabinet" post, which did not go this natural automatic devolution was that of the Attorney-General. This is partly because an attorney-general is a civil servant, as has been outlined.

The division of duties within the Constitution also indicates that an attorney-general does not belong to the ranks of "ministers" nor is an attorney-general eligible for performing the functions of a ministry by way of acting. Even more fundamental is the incompatibility of the powers and roles of an attorney-general with those of a minister.

Chapter II, Part I of the Constitution describes the functions of the office of the President, vice-president, ministers and the cabinet. The President has powers to appoint ministers but only "from the members of the National Assembly" _____ elected or nominated. It is to be argued here that an attorney-general does not fit into the proper description of an ordinary "member of the National Assembly". It is true that the Attorney-General sits in parliament but this is by virtue of his being an attorney-general and not because he is either an elected or a nominated member. He is an ex-officio member who is not entitled to vote on any question before the National Assembly.¹⁹ Should an attorney-general vote in parliament _____ and we ought to construe this to include canvassing for votes _____ he would not only be acting ultra-vires the Constitution but will be committing an explicit constitutional offence which applies to anyone who votes in the National Assembly without being an elected or nominated member thereof.²⁰

It must be understood from this inability of an attorney-general to vote in Parliament that he can not in that capacity share in the collective responsibility which other members of the cabinet have to the national assembly.²¹

The Attorney-General does not only/^{not} share in the forgoing essential functions of ordinary members of the National Assembly, he is also not liable to vacate his ex-officio seat in the Assembly for committing various constitutional offences to which the ordinary members of the Assembly are subject.²² In other words, he has a special and privileged position in the Assembly while having limited roles therein.

19. Ibid. Arts. 31 and 36

20. Ibid., Art. 55

21. Ibid. Art. 17

22. Ibid. Art. 39

We have already seen that the President has Constitutional powers of appointing ministers from among elected or nominated members of the National Assembly. The President has also powers to assign any duties to a minister, including those of acting for other ministers whenever they are not able to perform their roles.²³ As a civil servant who is neither an ordinary nominated nor an elected member of the National Assembly and who also has overall responsibility over the judiciary, an attorney-general is Constitutionally ineligible for appointment as a minister or an acting minister. The recent appointment and functioning of the Hon. Attorney-General as acting Minister for Commerce and Industry was therefore unconstitutional. In addition it has had a more significant theoretical implication of obliterating the division or separation of powers of the Government into the judiciary, the legislature, and the executive. And since the Rule of Law and Justice hinges on the clear separation of powers both in theory and practice, it must be concluded that it, too, has suffered in this recent development.

Further it should be noted here that once one is appointed to be in charge of a ministry, the appointee is Constitutionally bound to "exercise general direction and control over that department".²⁴ A ministerial post is not a sinecure position as it entails both legislative and administrative duties. From this it can be seen that an attorney-general who is Constitutionally limited in his/her legislative activities in the National Assembly is functionally not able to carry out the full duties of a minister without contravening the Constitution.

We now turn and look briefly at what the public opinion may be on the role of the Attorney-General in Kenya's Governmental administration. We hasten to point out however that a scientifically acceptable comprehensive survey of public opinion is outside the scope and purpose of this paper. It suffices here to look at the recent review in the Weekly Review which focused on the politics of transition from the Kenyatta to the Moi administrations.

In assessing the role of certain powerful persons who helped steer the country into the very commendable smooth transition, the Weekly Review²⁵ had this to say of the Hon. Attorney-General:

23. Ibid. Art. 18

24. Ibid. Art. 22(1).

25. Weekly Review, Oct. 13, 1978, p.7.

Njonjo has been a major centre of power for the past decade and more of Kenya's history. In a country where there is a great deal of laxity in many matters of public life, the chief lawman often becomes a very powerful person by virtue of the many secrets he gets to know about men in positions of leadership. Used shrewdly, this knowledge provides its possessor with a lot of political muscle, and those who know Njonjo say that over the past few months, he has quietly used his immense power to steer the constitutional processes of the country in the direction of smooth transition. Njonjo it was who two years ago, frustrated the anti-Moi move which emanated from a number of leaders, including cabinet ministers, in an attempt to change the Kenya constitution to bar the vice president from succeeding the president. Njonjo has of late been acting as the chief interpreter of the Kenya constitution and his views have prevailed in a number of issues where politicians have tended to show division. Njonjo's commitment to Moi goes back longer than Kibaki's or any other cabinet member's. For this commitment to Moi, Njonjo was for a long time hated by many Kikuyu leaders, especially those from the Kiambu area, who considered him as some kind of traitor.

Njonjo is not an elected MP and clearly has no wish to get involved in popular politics. But then he does not need to. Anyone who has watched his role in the process of transition in Kenya during the past month and a half could not help but be struck by the central position which he has occupied in the country's political scheme of things, a position which is unlikely to be diminished by the rise of anyone else in the cabinet. /all emphases added_/

The foregoing passages point at the various conclusions the ordinary observers have of the roles the Attorney-General has so far been seen to perform in the country. It can easily be seen from this and the analysis in the early parts of this paper that the Attorney-General has gone deep into the political mainstream, a fact which easily explains why he may have been tempted to make the "threat" which we have interpreted to be coloured more with political than juridical overtones.

Apart from providing an indicator of what interpretations some important institutions have of the overall role of the Attorney-General in Kenyan politics, the reference in the Weekly Review to the fact that the Attorney-General has acted as the chief interpreter of the Kenyan Constitution needs some clarification.

Whereas it is true an attorney-general as a person may become a legal publicist of outstanding repute who is respected by many and whose interpretation of the Constitution may be persuasive, it is highly unconstitutional and improper for an attorney-general to act and be seen as the ultimate legitimate interpreter of the Constitution. As chief legal adviser to the government, the government should and is, of course, bound to accept an attorney-general's opinion of the law. But such interpretations of the law, including the Constitution, as may be given by an attorney-general have no legal standing and are not binding on everyone.

The Constitution although not explicit in general terms makes it quite clear that the High Court is the chief and only authoritative interpreter of the constitution and other substantial questions of law.²⁶ Binding interpretation of the Constitution is a judicial act and not an administrative undertaking falling within the office of the Attorney-General. The Attorney-General is head of the judiciary but his powers are constitutionally limited to administrative matters. It is the courts of law that must independently decide on questions of law in order that the independence of the judiciary may become a practical reality.

We shall conclude this paper by briefly examining the implications of the foregoing governmental and constitutional developments for the impartial administration of law and justice in Kenya.

4. Some Concluding Remarks.

The foregoing analysis has, hopefully, shown that an attorney-general is and should be first and foremost a law person and not a barrel-of-a-gun person or a person of muscle. This is not to deny that the government as a whole is not an organization with coercive attributes. That the incumbent attorney-general found it fit to warn potential lawbreakers with the possible use of armed security forces as a medium of punishment is, to use an understatement, unfortunately inappropriate and not keeping in line with the Constitution. Coming from the Attorney-General, such expressed state of mind may and does engender in the public a negative image of the government and generally impair possible adherence to the rule of law and justice as ideals of the society.

From the juridical standpoint it is clear that the Constitution, which jurisprudentially ought to be expressing the basic norms of this society, can not be interpreted to allow an attorney-general to assume other executive duties of State which may lead to either intentional or unintentional conflicts of interests within the structure of separation of powers. Should the constitution as it stands to-day permit interpretations which leads to flouting of the basic principle of separation of powers, then an amendment would be highly recommended to disallow such interpretation. The independence of the judiciary which is at the very core of the principles of Rule of Law and Justice and Separation of Powers require this so as to avoid conditions conducive to the abuse of power.

Reading the foregoing analysis, progressive socialist minds will be quick to point out that this is no more than liberal democratic idealism since the constitution being an expression of power relations within the political economy can only reflect the low level of responsiveness to socio-economic and political

26. Article 67 of the Constitution.

needs of the people as the economy has so far done. Such conceptualisation may be correct. This essay is however not concerned with the more fundamental question as to the social legitimacy of the Constitution and the economic base from which it is derived and which it protects and promotes. We are here limited to the issue of governmental fidelity to agreed to laws and principles which underlie the political system and ideology it has declared to follow.

The capitalist liberal democratic world in the metropolis has provided examples where the executive has found it tempting, quite in contradiction to the publicised political philosophy, to embrace the judicial branches of their governments so as to make braking of the rules of the game easier. President Kennedy made his brother the attorney-general of the United States of North America. Nixon wedged himself with confidant lawmen which led the United States of North America to flinch in the face of Watergate Scandal.

Kenya can easily avoid setting herself a trap that may lead to serious injuries in terms of breakdown in law and justice and possible supremacy of the rule by "security" forces. An essential ingredient in making law supreme is to keep the head of the judiciary as far removed from the mainstream of politics as possible and with practical commitment to the Constitution.