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EDITORIAL

THE LAWS OF THE CONSTITUTION

Freedom and independence are the perennial pursuits of the human being. Throughout the long history of human society people have ceaselessly struggled to free themselves from the fetters of nature and society. All the struggles that constitute the great epics of the history of mankind have been struggles to defend and to realise freedom. The history of the Zimbabwean people until recently had been one intense struggle to realise independence and freedom from foreign domination and racist subjugation. Our recent struggles have not only increased in real terms our personal freedom and the freedoms available to the masses of the people, but they have also enriched our spiritual and cultural love for the dignity and freedom of men. It is against this, our historical inheritance of love for the dignity and freedom of man, that this issue of the *Zimbabwe Law Review* and the scientific researches behind it have been put together. In other words, this special issue of the *Zimbabwe Law Review* yet again evokes and stimulates our desire as a nation to build a truly free and democratic society.

Lawyers are not and should not be mere technicians of the law. The Constitution is the fundamental thesis expressing the principles upon which our nation, or any nation, is built. The Constitution expresses all our values and therefore constitutes a measure of the level of our freedom and humanity. Its criticism is the criticism of the standards of its values. Lawyers play their part in making and advising on legal aspects of both the substance and the technical standards of constitutions. In order to do a better job of this or to express the democratic yearnings of the people, our lawyers must possess a high level of critical values to assist society as a whole to create more and better freedoms for the well-being and property of the people. These freedoms to be enshrined in the Constitution of the land.

We hope that in this issue, as Zimbabwe prepares to make its own new Constitution after 1990, that the researches and critical visions on constitutionalism made here by the various authors from various scientific and ideological vantage points will assist our people and our leaders in charting and further broadening the road of freedom and independence in the drafting of our own, new and sovereign Zimbabwe Constitution as we march forward towards the year 2000.

Issue Editors
1. INTRODUCTION

Following the conclusion of the February-March 1988 "queue-voting" elections which the Moi regime imposed on the Kenyan masses it emerged that the overwhelming majority rejected this by abstaining from participation¹ (a form of hidden or silent class struggle). The press in Zimbabwe gave very little coverage of this fact. Of the little press coverage that there was of this historic but primordial and tragic "exercise in African democracy", as some Kenyan leaders and even the managers of imperialist capital such as Lonrho,² regarded it, two examples stood out. In an editorial in The Herald of April 7, 1988 entitled "One Party Democracy" the farcical elections were hailed as marking an epitome of the development of progressive constitutionalism of the one-party statism in Africa. By inference this was to say that the "queue voting" is a shining example for countries such as Zimbabwe to emulate. The other comment was in direct contradiction to The Herald view. An observer wrote in the new trade union organ, "The Worker," of May 1988 that the Kenyan "queue-voting" system was an exercise in neo-colonial fascist politics that do not represent the aspirations of the Kenyan masses or the masses in any part of Africa. These two contradictory assessments express definite differences of different class positions in interpreting historical events.

Indeed, the rejection of the secret-ballot and its replacement with primitive "queue-voting" and the on-going debate that Constitutional changes will be

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¹ An overwhelming majority of qualified voters did not bother to register as voters and of the minority who registered an overwhelming majority did not vote either in the preliminary elections or in the general elections. In short, those who are in Parliament who also constitute Cabinet went in by the choice of an overwhelming minority. They are not the representative of the masses.

² The deputy chairman of Lonrho (E.A.) Ltd, Mr Mark too made a public statement that queue-voting is an "open-air democracy" and called on the scrapping of secret-ballot by law, see Weekly Review April 29, 1988, p.5.
effected to legalise and institutionalise this departure from the most elementary process in internationally recognised and practised electoral procedure, summarises the systematic manipulation and perversion of civilised constitutional practice in Kenya. The objective is to ensure the unchallenged hold and use of political power in the hands of an unrepresentative but compliant petty-bourgeois and comprador bourgeois who superintend the continued imperialist hold on Kenyan society.

What it confirms is what Professors Chomsky and Herman of the U.S.A. so correctly pointed out: that imperialism led by the U.S.A. subverts democratic constitutional practices and denies the observance of human rights in neo-colonies as a necessary condition for continued plunder or what capitalists call creating “favourable investment climates.” As Marx, quoting T.J. Duming, put it: “with adequate profit, capital is very bold. A certain 10 per cent will ensure its employment everywhere; 20 per cent will produce eagerness; 50 percent positive audacity; 100 per cent will make it ready to trample on all human laws, 300 per cent and there is not a crime at which it will scruple, nor a risk it will not run, even to the chance of its owner being hanged.”

Thus, constitutional theory and practice are born out of political processes that are conditioned, shaped and directed by economic interests which in a class society assume definite class characteristics. Put another way, class interests lead to class political struggles whose victories are recorded in the legal superstructure, more openly in public law, particularly in constitutional law and practice.

A neo-colony like Kenya reveals both a continuity and change since the colonial era; but more of a continuity than change. This is particularly so in political and constitutional theory and practice. It is precisely because of its neo-colonial reality that Kenya has for a long time been viewed by intellectuals and some persons who speak for imperialism, either consciously or unconsciously, as a model of “democracy” in Africa. Margaret Thatcher, the British Prime Minister’s recent lavish praise of the Kenyan leadership is a graphic example. This is what she said:

(Kenya has) . . . strong and decisive leadership within a constitutional framework . . . where others have faltered, Kenya has continued to grow stronger and more prosperous. We admire your country’s peace and stability and policies which recognise the worth of individual

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3 See, the Weekly Review of April 22, 1988, where the editorial and the lead story discusses the matter and where the minister for National Guidance Mr. Jonjiru and his deputy, Mr. S. Nassir strongly urged that it was a forgone party position to make queue-voting not only a national but also an African and international voting system.


5 Karl Marx, Capital, Progress Publishers, Moscow, 1984.
effort and personal endeavour and an economy in which private
ownership and private industry have been encouraged" (see Sunday
Mail, Harare, January 10, 1988 p.11.)

A study of constitutionalism, constitutional changes and class power politics in Kenya, as elsewhere, require that we recognise and assess the changes and developments that take place at four levels: one, in actual formal changes to the Constitution; two, indirect changes to the Constitution through other legislative activities that draw their legal legitimacy from the Constitution and are meant to give "flesh" to the usual skeletal provisions or principles in the Constitution; third, changes in practice which find legal expression in judicial decisions and judicial behaviour in general; and four, in general state practices and those of the citizens that are extra-legal or are capable of legal expression but are not articulated at the formal legal level because of the "general political atmosphere."

The sterility of the general idealist/bourgeois studies of law in general and constitutional law in particular arise from their failure or inability to encompass at least the four levels identified above that relate to theory and practice in the sphere of real life. In fact a study that encompass the four levels still requires to be cast in an historical and social context, in the sense that an appreciation of the material conditions and class struggles within the prevailing historical phase should be given primacy.

From this standpoint, this contribution attempts to make it clear that in Kenya, constitutional law has been used as an effective weapon in the hands of the ruling classes and their sponsors and collaborators, to narrow the arena of mass political involvement in democratic processes at the economic, social and cultural levels. It has also been used as a tool for repression against political opposition and resistance to neo-colonial fascism. It has, therefore, so far been an effective weapon, but its continuity, given the contradictions it has created, cannot be guaranteed. In other words, no amount of use of legalised repressive measures can stop the revolutionary awakening and involvement of the Kenyan popular masses directed to changing the society. Although colonial legal machinery and practice was inherited almost intact and has been adjusted and strengthened to suppress the national democratic and class struggles that naturally intensify under neo-colonial conditions, the reality in the last decade or so shows that the people have the initiative to struggle till final victory.

For example, the laws of treason and sedition which the colonialists designed and used with the intention of strangling the struggle for national liberation and independence in the 1950s and early 1960s have been used, as is shown below, with fidelity since 1963 by the independent governments to protect neo-colonialism and imperialist interests. But, the same period has shown that the people of Kenya have bravely engaged in liberatory "treasonous" and "seditious" political activities which go beyond mere denunciation of the regime.

To the extent that Constitutional provisions relating to the protection of
freedom of conscience and thought, secure protection of law, freedom of assembly and association, protection of personal liberty, protection against arbitrary search and entry, protection of freedom of movement and other related modern “rights” exist in the Constitution, the various areas of criminal law and procedures that relate to public law areas such as treason, sedition or subversion, have actually been used to give repressive content and practice to all these constitutional provisions.

This paper discusses the subject by looking into: how the veil of democratic constitutional practice in Kenya was recently lifted by internal and external struggles to allow the ugly skeletons of the repressive system to come out of the cupboard; how the judicial system has been perverted and used as the chief state institution of legalised coercion and terror; the muzzling and use of parliament as an institution private accumulators use to propagate their repressive ideas and, where possible, to enact some of their anti-people interests into laws; the role of the executive and party in superintending over the other organs of state and building alliances with external imperialist supporters and beneficiaries of neo-colonialism. In this exercise the people’s resistance and struggles will be highlighted so as to bring out the role being played by the progressive forces for change that are still weak but which eventually will emerge victorious. It is here that the hope for democratic constitutional legal order in Kenya lie.

HOW THE VEIL WAS LIFTED:
CONSTITUTIONALISM OF REPRESSION BECOMES PUBLIC IN LIBERAL BOURGEOIS CIRCLES

The use of the Constitution and other laws in general to champion repressive political aims so as to preserve the prevailing neo-colonial economy is as old as Kenya’s independence. However, it was not until July, 1987, that the pro-Western liberal human rights organisation, Amnesty International, produced a fairly accurate, although not fully comprehensive, Report; Kenya Torture, Political Detention and Unfair Trials. The significance of AI’s Report lies not so much in its revelation of what has not been known, but rather in the fact that the organisation, which is known for its anti-socialist stand, found it necessary and appropriate to write and publish a full report on a country that is dear to the Western imperialist circles, particularly Britain and the USA. The Report is also significant in that the organisation found it difficult to continue ignoring reporting comprehensively on matters that have become international public knowledge through the efforts of various solidarity organisations assisted by Kenyans forced into political exile by the repression. The solidarity committees include the committee for the Release of Political Prisoners in Kenya (London), the Kenya Human Rights Committee (New York), the Kenya Solidarity Group (Oslo) and others. The organisation (AI) had previously only concentrated on “adopting” individuals and political prisoners as prisoners of conscience.

6 Chap.5, Constitution of Kenya.
The Amnesty International Report covered areas of political "disappearances" — similar to those of Pinochet's Chile, Duvalier's Haiti, Marco's Philippines and the like — torture and ill-treatment of political prisoners, deaths in police custody, political trials, detention without trial, inhuman prison conditions, etc. All these acts of state fascism against its own people are carried out within and, in many respects, against the letter and spirit of fundamental rights provided for in Chapter five of the Kenyan Constitution.

Since the Report was published the state has denied most of the acts despite incontrovertible evidence by the victims themselves; where it has admitted some acts the claim has been that they are "legal" and, therefore, proper.

The claim that whatever atrocities the state engaged in is "legal" and hence proper, is a direct carry-over from colonial practices. For example, it has criminalised political struggles by subverting the Criminal Code provisions on treason, sedition and subversion the same way as the colonial regime did. In 1960 for example, the colonial authorities claimed and the courts held as subversion and sedition public statements by a nationalist who had accused the colonialists with having perpetrated undemocratic activities, including holding on to political power without the consent of the people.8

In the same fashion the Kenyan courts have labelled as 'subversive' patriotic Kenyans charged with sedition allegedly for being in possession of publicly distributed pamphlets detailing corruption of the political leaders, including the President of the Republic.9 Similarly, in the 1950s the colonial courts accepted framed-up charges and perjured "evidence" of state paid agents against Kenyatta and four others for "managing Mau-mau"10 11. Kenyatta certainly was not doing this as he was opposed to armed revolutionary struggle — and when in 1958 these victims of colonial political and legal injustice charged that they were "political prisoners" and not criminals, the colonial regime vigorously denied this.11 In the 1970s and 1980s the neo-colonial Kenyan regime is also engaged in denying "political prisoner" status for the hundreds who are languishing in jails as "criminals" when their real crime is opposing and resisting neo-colonialism, 'civilian' dictatorship and the imperialist stranghold on the economy. The AI Report's characterisation of the so-called "criminals" as "political prisoners" is, therefore, significant politically, constitutionally and in legal theory in general.

As already inferred, above, before 1987 when the Amnesty International Report was published constitutional repression in Kenya had already received international exposure. The publication in the journal, Race and Class (London,

U.K.) of an entire special issue on the "politics of repression" detailing the perversion of the legal institutions and laws for immediate illegitimate political ends;\(^\text{12}\) the publication of the book *Independent Kenya*\(^\text{13}\) in 1982 (originally circulated as *Cheche Kenya* in Kenya as an underground paper of a political resistance group) detailing the economic ruin, corruption of political leaders and use of state organs for private capital accumulation; the publication of *Law as a Tool of Repression* by the Committee for the Release of Political Prisoners in Kenya (London)\(^\text{14}\) and numerous academic contributions provided the background to the Amnesty International Report. Of the academic contributions those of the late 1970s and early 1980s provided revelation of the immediate contradictions and increased illegitimate use of law by the state to protect and promote certain personal class interests of individuals in the ruling classes.

Three contributions by the present author,\(^\text{15}\) those by G.K. Kuria (later detained) and J.B. Ojwang\(^\text{16}\) and a few others \(^\text{17}\) had clearly established this tendency.

The details of how and why the neo-colonial State in Kenya became so aggressive in the use of law and legal institutions to carry out its political objectives or those of sections of the ruling classes will be made clear in the parts of the paper that follow below. The point being made here is that "independence" from direct colonial rule produced in Kenya consciousness that readily assumed that the political leadership that replaces the colonial state administration was bound to use the law in promoting democratic practices. Such consciousness clouded clear analysis of the reality in a neo-colonial situation. The reason is of course, that imperialist and neo-colonial ideas are dominant in societies since imperialism and neo-colonialism control the production and distribution of knowledge or ideas consumed in most of the former colonial African States. This partly explains why it took so long for the world to realise the repressive nature


\(^{13}\) *Independent Kenya: (Cheche Kenya)* by anonymous Kenyan patriots, (London ZED Press, 1982).

\(^{14}\) *Law as a Tool of Repression*, (London), 1983.


of the Kenyan State until the insanity of the state increased manyfold following the August 1, 1982 military coup attempt.

The 1980s, therefore, saw the lifting of the veil that for so long kept Kenya's reality hidden from most of the World. Kenya's political struggles have always reflected themselves in repressive laws and constitutional practices. The immediate political impact of the exposure in the 1980s of the neo-colonial regime's brutality against its own people include a temporary split in the camp of the imperialist supporters of the regime and some rebukes of the regime from its main supporters who nonetheless assured it of continued support provided it "moderates" its repression. The "Iron Lady" Thatcher's loving imperialist praises cited above illustrate the point.

A Newsletter of the Kenyan Anti-Imperialist Front (one of the resistance national liberation movements in Kenya) reported how in late 1987 President Moi was forced to cut short his official trip to the U.S.A. because of mass protests against his regime's human rights violations, and that he was forced to abandon scheduled official visits to Norway and Sweden at the last minute fearing massive mass demonstrations that were planned by human rights activists in those countries. The same Newsletter analysed why the British Prime Minister had to pay a special visit to Kenya, that is, to re-assure the regime of continued Tory government support since Kenya has provided Britain with military bases since 1963 and a haven for British monopolies.

What is significant historically is that no longer will "the West" be under the unchallenged sway of those whose economic and political interests dictate that they white-wash the fascism of the neo-colonial regime in Kenya. The combination of internal struggles for democracy and economic self-determination of the working people in Kenya and the support of progressive forces internationally have helped to lift the veil of repression and to show the nature of bitter class and national struggles in Kenya and the role law plays in such struggles.

THE PERVERSION OF THE LEGAL PROCESS AND JUDICIARY, OR THE PRACTICE OF CONSTITUTIONAL JUDICIAL TERRORISM

The idealist legal realism that has extended the sphere of bourgeois legal philosophies in the 19th and 20th centuries, beyond natural law and positivism has generally established the role played by judicial and other non-parliamentary state institutions in the making of law. The English contributors to bourgeois legal realism have tended to stress the "elitist" and "political" aspects of the

17a Kenya Anti-Imperialist Front, Newsletter No.8, Nairobi, April 1988, entitled: "1988: The Year for Heightening, Deepening and Broadening Mass Revolutionary Involvement".


judges' roles. A lot of writing has also been done on the "law creating role" of judges in Africa, as well as the role of judges in defending or collaborating in unconstitutional acts of states during alleged "public emergency" conditions.

The work of bourgeois oriented conservative judges who are not competent and thorough in their work and who undermine general public security in special circumstances have also been examined. The present author has also suggested that the role judges play should be judged in the context of the overall social structures and laws they operate under and their class ideology, since these reveal clearly that the courts and judges are either champions of class dictatorship of minority exploiting classes (under capitalism) or they serve the interests of the majority masses (under national democratic revolutionary conditions and more so under socialism).

Whatever merits or demerits these studies may have, what is common to them is that they underline the importance of the judicial organs and branches of state power, in the overall behaviour of the state in the promotion of or in undermining the democratic processes. In Kenya, the courts, hence judges, magistrates and prosecutors have contributed and continue to contribute significantly to the erosion of democratic constitutional rights. This has been achieved by first selecting those who run the judicial process on the basis of their bourgeois class consciousness and hence their adherence to protection of neo-colonial and imperialist interests. Secondly, substantive and procedural laws have been systematically designed or manipulated to enable easy and speedy convictions for those identified by political leaders as a threat to their entrenched exploitative class interests and privileges. Thirdly, the overall political posture of the political leadership in the daily conduct of state affairs, reflected in state policies, public speeches, general official propaganda and personal autocratic behaviour of leaders provide the general "political climate" within which the already amenable operators of the judicial institutions operate in and from which they draw inspiration.

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21 W.E. Condlin, "The Role of Third World Courts During Alleged Emergencies", in Marasinghe and Condlin, supra, 69.


For the last twenty-five years since Kenyan independence, the judges in the High Court, Court of Appeal, the senior magistrates and senior prosecutors in Kenya have been drawn mainly from foreigners, especially the British, or from Kenyans of European and Asian origin whose intellectual and professional ability is questionable and who therefore feel obliged to please those who have appointed them in order to keep their contracts renewed or their "citizenship" reaffirmed.\textsuperscript{24} This has been denounced by a British judge\textsuperscript{24a} and Kenyan academics.\textsuperscript{24b} They become easy tools of repression.

The Kenyan Constitution provides that the Chief Justice is appointed by the President without any requirement for consultation or advise from anyone or any institution.\textsuperscript{25} All the High Court as well as Court of Appeal judges are appointed by the President with "advice" of the Judicial Service Commission.\textsuperscript{26} The Judicial Service Commission itself has no member who is independent: it consists of the Chief Justice and the Attorney General, both Presidential appointees,\textsuperscript{27} two judges of the High Court, who are appointed by the President, and Chairman of the Public Service Commission — also a Presidential appointee.\textsuperscript{28} The powers of firing judges is equally vested in the President. Since the writing of this article in July 1988, KANU (the ruling party) pressurised Parliament to amend, in a matter of hours, sections 61, 62, 69, 72 and 106 of the Constitution thus vesting in the President more direct powers of firing judges without recourse to any institutional inquiry, as well as allowing those suspected of committing capital offences to be detained for 14 days instead of 24 hours before producing them before courts of law. The matter has raised great opposition in the legal profession as well as in the Churches, see \textit{Weekly Review}, August 5, 1988. A tribunal consisting of the Chairman of the Public Service Commission (a Presidential appointee) and two other persons chosen by this chairman is supposed to "advise" the President whenever the removal of a Chief Justice is under consideration. The other judges can be fired for "inability to perform" or for "Misbehaviour," both terms not defined in any law. The magistrates are appointed and can be fired by the Judicial Service Commission which is an executive body and basically under the control of the President.

In reality then the judicial organs are occupied by "all the President's men and women." This has considerable constitutional and political implications on how they perceive and carry out their role vis-a-vis the political demands of the ruling class. They have no popular base among the masses — but so also is the Party and the Presidency!

\textsuperscript{24} See Kuria and Ojwang, \textit{supra}, footnote 16.
\textsuperscript{24a} Lord Devlin, "Judges and Law Makers" (1976) \textit{39 M.L.R.} 1–16 at p.8
\textsuperscript{24b} Note 24, above.
\textsuperscript{25} Section 61(1) of the Constitution of Kenya.
\textsuperscript{26} Section 61(2) of the Constitution of Kenya.
\textsuperscript{27} Sections 61 and 109 of the Constitution of Kenya.
\textsuperscript{28} Section 106 of the Constitution.
Before we examine examples of how the courts have degenerated (or, rather, retained the degeneration of the colonial judiciary inspite of the constitutional provision which entrusts the judiciary with the duty of ensuring "secure protection of law.") into institutions of judicial—political terrorism, we need to point out yet another area which has contributed to the present unwholesome reality. This is the legislative perversion of the law of evidence in criminal procedure and the fidelity of the courts to such perversion since the colonial era.

One particular example is the law on "confessions" by accused persons. This area is important precisely because hundreds of Kenyans have been herded into jails on the basis of alleged "confessions." In 1952 and 1953 the colonial settlers pressurised the colonial legislature to relax the rules governing the admissibility of confessions extracted by police officers from those accused of participating in the war for national liberation.

The rules of court were accordingly changed to facilitate colonial political expediency as opposed to proper administration of criminal justice. Thus, bourgeois standards in the law were made to degenerate to meet colonial demands.

Even with this perversion of the rules governing procedural justice it still remained the law that confessions were not admissible as evidence for purposes of conviction if they were proved to have been made under conditions of inducement, threat or promise of some advantage by a person in authority. This remains the theoretical position today under Section 26 of the Kenya Evidence Act. The practice of the courts, both courts martial and ordinary in Kenya in politically motivated cases has been a departure from the clear legal provisions.

More importantly, there is open readiness on the part of the judges and magistrates to convict on alleged confessions even where the accused have retracted and shown that the confessions were concocted or that they were forced to confess under intimidation or that they were tortured. Many have appeared in court semi-conscious with wounds received from the interrogators as the Amnesty International Report shows. The courts have not bothered to inquire into such injustices by holding "trials within trials" as required by the law. Where such "trials within trials" have been held to ascertain the circumstances under which the alleged confessions were exacted, the process has been a mere farce meant to hoodwink the public. The burden of proof is on the prosecution to show that the alleged confessions are freely given but the courts have made it an exclusive burden on the part of the accused to prove the contrary. This is illegal and the courts know or should know it. The rules that should be followed where


30 Chapter 80, Laws of Kenya.
the accused retracts an alleged confession before the court are clearly put by Professor Morris as follows:

"where the accused at his (her) trial repudiates, or retracts, his (her) confession, or maintains that it was not voluntary, then, before the confession may be admitted, the court must conduct "a trial within a trial" in the absence of the assessors and decide, upon the evidence on both sides, whether the confession should be admitted."31

Most convictions in cases before and after the coup attempt in 1982 have relied to a great extent on retracted alleged confessions by the accused, without proper inquiry being made by the judges to ascertain the truth. It was highly contemptuous of the people's intelligence for the British Government, through Sir Leonard Allison, the then British High Commissioner to Kenya, to have come out with statements which were erroneous and out of order in 1982 that the court martial were fair and democratic.32 Imperialism has never lost an opportunity to encourage fascism in Kenya where it ultimately serves their interest. Thus, the British High Commissioner's remarks can only be interpreted for what they are: an uninformed but conscious imperialist cavaliering in protection of its agents for exploitation and repression. The British Government should have understood very clearly that court martial under Kenyan law are expected to deal with trials before them in the same way as the civil courts, particularly in the manner they admit evidence produced before them. This is clearly set out under section 93(1) of the Armed Forces Act:33

"The rules as to the admissibility of evidence to be observed in proceedings before courts martial shall be the same as those observed in civil courts..."

Yet another area where colonialism restricted expansion of certain bourgeois democratic processes in the courts which was inherited by the neo-colonialists in Kenya has to do with the absence of a jury system in criminal trials. Not that jurors do magic in transforming iniquitous contents of substantive and procedural law to good laws but they mitigate certain excesses.

Assessors are used in criminal trials in the Kenyan High Court only.34 Assessors are required to sit through proceedings in cases they are assigned and at the end of the proceedings, the judge asks them to deliver their individual opinion orally in court. They may, however, consult each other before delivering their opinions.35 Assessors' opinions, however, do not bind the judge.36 They have little impact.

32 See, an exclusive interview in, Sunday Nation (Nairobi), 11, 1982 at p.5.
33 Chapter 199, Laws of Kenya.
34 Section 262, Criminal Procedure Code, Chap.75, Laws of Kenya.
35 Section 322(4) of the Criminal Procedure Code, supra.
36 Ibid, sec.322(2).
The Kenyan judicial system does not use the *amici curiae* or the ‘friends of court briefs’ system. Expert voluntary advice to the courts in matters of law and facts in cases involving major policy implications of public concern are used in many jurisdictions.

They assist unrepresented accused and are a help to the courts where incompetent legal counsel are involved in litigation. In Kenya where there is hardly any accessible public legal assistance to the indigent, the institution of *amicus curiae* would play a significant role not only in directing the courts and public opinion to various ways of democratic approaches to judicial process but would actually assist the unrepresented. If the system had existed a lot of the mass herding of victims of political repression into prisons as “criminals” would have been checked, albeit to a limited extent since the system as a whole is rotten to the core and can only be cured by revolutionary surgery.

Even where legislative as well as case law authorities exist to provide safeguards against judicial terrorism, the amenable judiciary has consistently interpreted these to the disadvantage of those whose alleged offences are politically motivated. A good example here is the law of bail. The Constitution makes it clear that every person charged with a criminal offence “...shall be given adequate time and facilities for the preparation of his (her) defence” (Section 77(2)(c)). It further states that:

> "... If any person arrested or detained is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him (her), he (she) shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he (she) appears at a later date for trial or for proceedings preliminary to the trial.”

(Section 72(5))

In Kenya, then, bail is formally a constitutional right and not merely a common law privilege. This constitutional position is reinforced by the Criminal Procedure Act and the Police Act. Section 123 of the Criminal Procedure Code states that:

> "(1) When any person, other than a person accused of murder or treason, is arrested or detained without warrant by an officer in charge

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37 In 1973 the Legal Advice Centre was opened in Nairobi by Volunteer lawyers (Practitioners, academics and students) and a few librarians. It operated until 1983 when the Public Law Institute was started as a public interest litigation institution as well as a legal advice centre to co-ordinate and expand the work of the 1973 L.A.C. This, however, remains a voluntary organisation essentially supported by churches, the Law Society of Kenya and philanthropic imperialist capital.

38 Chapter 75, *Laws of Kenya*.

of a police station, or appears or is brought before a court, and is prepared at any time while in custody of such officer or at any stage of the proceedings before such court to give bail, such person may be admitted to bail:

Provided that such officer or court may, instead of taking bail from such person, release him on his executing a bond without sureties for his appearance...

(2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.

(3) Notwithstanding anything contained in subsection (1) of this section, the High Court may in any case direct that any person be admitted to bail or that the bail required by the subordinate court or police officer be reduced.

The Police Act, at sections 22-24, repeat the above requirements and make it clear that there should be no fee exacted on any bail or bond issued or taken by police officers.

The above constitutional and legislative provisions contain the elements required for the provision of bail pending trial and is supported by an authoritative judicial decision for East Africa. The Kenyan courts however, have made their own expediency rules to allow them to deny bail applications in political cases and most judgements hardly refer to constitutional, legislative or case law authorities. The case of Willy Mutunga v. R. which involved a charge of ‘sedition’ but which was to be dropped and replaced by the more direct political coercive process of detention without trial is a case in point. In fact in this case the defence lawyers assisted by Willy Mutunga’s colleagues in the Faculty of Law at the University of Nairobi had done thorough research on the question on bail. Although these were presented and argued in court, the High Court seemed to have closed its ears and the court’s judgement never referred to these clear authorities. Note should be taken here of the fact that the proceedings in court in Kenya are recorded manually by judges and magistrates and they hardly use modern recording machines which can more fully record the actual words and or arguments advanced in courts. This primitive system allows the judges a lot of room to falsify court proceedings and to tailor them to meet their preferred conclusions. Instead, Justice Sachdeva, the trial judge, took the occasion to prejudge the issues before trial by stating that he denied the bail application because, “courts do not operate in a vacuum and cannot be oblivious of the fact that some subservice elements have unfortunately crept into the University and the state cannot simply ignore them”.

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40 Panju v R (1973) E.A. 284.
41 See Note 9, above.
Bail is particularly important in the context of Kenya's Constitutional provisions and theory regarding the presumption of innocence until guilt is proven. Its denial in Kenya in recent political cases demonstrates a definite shift in favour of judicial arbitrariness and tyranny as it leads to punishment of those suspected of having committed offences before the suspicions have been subjected to judicial test. In this way the courts contribute towards a system of custodial torture meant to break-down the victim and to lead to their offering “confessions” of guilt so that they may avoid a prolonged stay in custody. This is particularly so since the courts hardly reduce the punishments in proportion to the time spent in custody before judgement is delivered.

Uncertainty in and of the law has also acted as a weapon in the hands of the zealous judiciary in Kenya to use against their real class opponents and those who are regarded as class enemies of imperialism and neo-colonialism. East Africa follows the English common law system and the doctrines of precedent and stare decisis theoretically and in isolated practical areas form part of the law identification and application process. In Kenya, however, since the break-down of the East African Community in 1975 at the instigation of the irrational Kenyan leaders, no law reports or circulation of higher courts' decisions existed for a long time. The East African Law Reports which were produced by the East African Literature Bureau ceased publication and only the incomplete record of judicial decisions by the Court of Appeal and the High Court published in the Kenyan High Court Digest remained in existence for a brief moment and then these two were discontinued. Since the 1970s the reality is that the law became as precise or imprecise as the memory knowledge or lack of memory knowledge of the judges and magistrates. Guess-work, instinct, recollections and a few cyclostyled and circulated judgements remained to guide the lawyers, prosecutors and judges.

Only in the last few years has the Nairobi Law Monthly (a private venture, which in the circumstances is very useful) partially filled this sad gap in the law — but not as an authoritative source. It is only in 1982 that the Kenyan Law Reports made its first appearance and it covered only cases for the 1976–1977 period. It has since appeared irregularly. This is, of course, a serious indictment on the part of the entire legal profession which has found it convenient to feed on misery and ignorance of the working people. The state bears the overall responsibility for it supervises and protects the greedy legal vultures and other more exploitative strata of capitalists.

For purposes of the present analysis what should be noted is the fact that the uncertainty in case law authorities has been used against the political opponents or alleged opponents of the present socio-political establishment. In the absence of authoritative judicial records the judicial machinery became much more pliant.

42 Section 77(1) of the Constitution of Kenya.
and this allowed all sorts of incompetent members of the judiciary to become tools of the fascist political leadership.

The inescapable conclusion to be drawn from what has been said of the perversion of the judicial processes is that such a system is well tailored by the politics of the hegemony of the neo-colonial fascist regime to carry out judicial murders and judicial-political imprisonment and incarceration of "opponents" of the system.

It also shows the judiciary as a lethal organ of state power which, depending on the class character of the state of which it is an organic part, is easily used to promote either justice or injustice. The Kenyan courts promote the latter and the people resist. This is the constitutional reality.

We proceed to examine the dynamics of the operation of other organs of political power and how they have affected the content, procedure and operation of the law and the behaviour of the courts as well.

**USING THE COURTS, THE RULING PARTY (KANU) AND PARLIAMENT AS INSTRUMENTS OF STATE FOR POLITICAL REPRESSION**

As a young university lecturer in Constitutional Law and Government in the early 1980s in my country, Kenya, I often expressed my amazement before my students to the fact that idealists, (mainly bourgeois statesmen and intellectuals) are still able to preach the obvious nonsense to the effect that laws made by political parliaments composed of members especially chosen by political parties and enforced by judges chosen by political leaders (the executive) could be anything but political! It was only much later that I came to understand how ideas, political ideologies or philosophies, do not simply die or fail to grip society simply because they have been disproved or shown to be false by some other clearer and more scientific idea, political ideology or philosophy. Herman Klenner has quite ably explained this seeming paradox in the life of ideas. It is said that customs or habits die hard but ideas die even harder still, particularly when the material conditions of life and the classes that control those material conditions and ideas find these obsolete ideas useful in serving their class interests.

What follows in this section demonstrates that not only do the courts, the ruling Party, (KANU), and Parliament in Kenya play political roles because this they must do, but that they play undemocratic political roles that are repressive against the working masses and the sections of the intelligentsia that articulate democratic and progressive ideas. The motive behind the repressive and un-

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44 H. Klenner, "Philosophies of Law-Their Diversity, Contradictions and Compatibility", *Law and Legislation in the GDR* Vol. 2 (1978) 5–13; at p.11 Klenner says, "... a disproved philosophy of law does not become inefficient just as a result of disproving".
democratic practises is to secure and safeguard class interests or perceived class interests of the local ruling class and their imperialist allies and masters. Occasionally, the ruling class also uses repressive practises against sections of its own camp, that is to deal with internal contradictions of the class in power. These two levels of repression must be distinguished. The former expresses antagonistic class contradictions and is hence more decisive historically while the latter expresses non-antagonistic class contradictions.

The dialectics of the Kenyan political life demonstrates quite clearly and patently how a populist bourgeois mass membership party can isolate itself from the masses who numerically dominate in it and then make it serve as an instrument of oppressing the very masses while continuing, rhetorically, to claim that it is a “people’s party”.

The party in this case becomes “a necessary evil” to the leadership who must use it to give a semblance of being a “democratically elected leadership”. Colin Leys described KANU as a “... loose Party of patrons, not a mass organisation...” Of course this is true, however, it is more than that. It is a party of exploiter and oppressor class patrons serving the interest of imperialism and neo-colonialism.

What is also easily observable is the unity and struggle of interests which manifest themselves among the different factions of the ruling comprador bourgeoisie and reactionary sections of the petty-bourgeoisie, as they fight out the main contradiction between themselves on the one hand and the patriotic forces and the masses on the other hand. The political and constitutional battles that have been fought out in Kenya, therefore, represent the minor contradictions among the oppressor classes as well as the main historic contradictions between the people and anti-imperialist forces on the one hand and the alliance of local rulers and foreign imperialist interests on the other hand.

Immediately following the declaration of independence on December 12, 1963 it became clear that the historic contradiction between the colonisers and the colonised, which culminated in the victory of the colonised over the colonisers at the political level, was no longer the major or main historical contradiction in Kenya politics. That contradiction by its very specific nature contained economic (material) causes but it was more apparent on the surface as being merely political. Now that political power nominally and legally had been transferred to the Kenyans, the hitherto foreshadowed class contradictions inherent under capitalism reasserted themselves as the main social contradictions upon which politics was to be based. Of course, the continued imperialist control of the economy under neo-colonialism means that anti-imperialist national struggles continue and embrace all classes with the working class, the poor peasantry and the progressive middle classes (including the intelligentsia) playing the leading role.

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KANU which stood as the "radical" national liberation party/movement before independence became the ruling party in 1963. The other smaller, former national liberation parties/movements which were "moderate" and/or sympathetic to colonial capitalism such as Kenya African Democratic Union (KADU) which was led by, among others, Daniel Arap Moi (now President of a united KANU and the Republic) became opposition parties at independence. However, they were quick to identify that the majority leadership in KANU may have used radical rhetoric before but were now revealing their adherence to the capitalist "free enterprise" system. They were correct in this assessment.46

With some push from imperialist forces and their own self interest to join in "grabbing the fruits of independence" — as Kenyatta was to repeatedly and proudly mention — they joined ranks with the reactionary majority in the KANU leadership. Kenya then became a de facto one-party state when it constitutionally became a republic in 1964.47

This decisive move to the right in Kenyan politics was paralleled by a counter force of a smaller group within KANU who started moving more to the left. In other words, the right-wing revolution in KANU, talking relatively, was faced and was henceforth to contend with left wing progressive rebel tendency inside KANU itself.

Cognisant of the 'radical' image of KANU and how it was necessary to retain this 'popular' image in order to retain mass support while the movement to right-wing neocolonialism was being consolidated, the imperialist forces, mainly from the USA and Britain, worked quickly to advise and help the transformed KANU to deal with radical opposition resolutely and violently. 'Radical' talk within KANU’s mainstream was henceforth only an appropriate ideological camouflage.

It is in this context that one of the leading intellectuals of the working class cause, Pio Gama Pinto, was assassinated on February 24, 1965. The same month, the revolutionary magazine, Revolution in Africa was banned and another, Pan Africa, was banned in April of the same year. On June 5, 1965 Kenyatta publicly denounced communism and dubbed it "imperialist". Meanwhile, Parliament’s Sessional Committee issued the USA drafted document: "African Socialism and Its Application to Planning in Kenya." This was the main camouflage. In fact the recent book, purportedly written by President Moi48 clearly draws its demagoguery from this bible of capitalism. The point is that imperialism actively collaborated with the Kenyan ruling classes in the use of KANU and Parliament

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to help dress the capitalist wolf in a 'socialist' sheep-skin. Assassination of political opponents and the suppression of the press which advocated and disseminated progressive ideas were started immediately after independence and they have continued to this day — only at a higher level.

As the then ambassador of the USA to Kenya, William Attwood, who chronicled most of these political manoeuvres in his book, The Reds and the Blacks (banned in Kenya) says: the Americans’ help fed fuel to the 1965–1966 political crisis which saw, among other things, that the trade union which was regarded as radical was banned; the military arms which had been ordered from the Soviet Union rejected for being 'old'; the Lumumba Institute (Party School) in Nairobi was closed; and mass expulsion of diplomats from socialist countries — China, Czechoslovakia; the Soviet Union, Hungary was effected.

The final nail in the coffin was the purging of the ‘opposition left’ from the Party at a Conference in Limuru.

Changes were then made to the national as well as Party constitutions and also to the standing orders of the National Assembly with the aim of making it difficult for the socialist oriented party, Kenya People’s Union (KPU), formed by those forced out of KANU, to operate. As Ooko-Ombaka put it:

Thus faced with the first major challenge to his rule in the formation of KPU, a socialist oriented opposition party, the Kenyatta government marshalled parliamentary and party support to amend the constitution and the standing orders of the National Assembly and party regulations to head the challenge. The constitutional amendments such as one requiring members of Parliament (MPs) who changed party allegiance in favour of KPU to lose their seats, the so-called ‘turncoat rule’, was rushed through parliament by suspending the standing orders with the sole purpose of stopping defection to KPU ranks. Similarly, KPU was denied the designation of an official opposition party by an amendment of standing orders to provide that no party with less than the number of MPs KPU had, could be an official opposition party.

Thus, multi-pronged attack in the form of adjustments on the laws regulating political Parties and Parliament, two of the most important political institutions in any modern class society, was effected so as to help give protection to reactionary political objectives and to fight off alleged “communist threats” from the progressive opposition. Henceforth, the spectre of communism, Marxism

52 Ooko-Ombaka, note 17, op.cit, 396.
and Marxism–Leninism has always haunted and haunts the bourgeoisie and their lackeys in Kenya.

In 1968 another constitutional amendment was made to ensure that those wishing to contest parliamentary seats as ‘independents’ — that is, those not formally members of organised political parties, — could not participate in elections. This was yet another use of the legal machinery to close legal doors to those not willing to be under the “dictatorship of silence” demanded in KANU. In the same year local government elections were rigged en masse by disqualifying all the KPU candidates on the pretext that they did not properly fill the nomination papers, while the KANU candidates, equally literate and/or illiterate, all filled in their forms correctly! The political significance of this is that henceforth the practice of ‘free and fair elections’ established by the bourgeois standards are to be buried in Kenya, despite the clear legal rules that exist on paper providing for bourgeois democratic practises. The bourgeoisie and the bourgeois state follow their law where it promotes their class dictatorship but unashamedly and openly violate or ignore those that restrain their objectives.

This phenomenon was clearly captured by Karl Marx in a different context. Frederick Engels had made similar observations.

As the political assault on the anti-imperialist patriotic forces was intensifying in 1968–69, manifestations of internal contradictions within the rightwing forces were also evident. Whereas political assassination had started in 1965 with the cold-blooded murder of Pio Gama Pinto, in 1969 the right-wing forces, then galvanised closely around President Kenyatta and eager to use ethnic sentiments to divide the people, directed their bullets at Tom Mboya. Mboya had since the 1950s been the main promoter of the US imperialist interests in Kenya in the labour movement and organised political institutions: The Afl, CIO and CIA became his chief backers. Strategically, murdering him in 1969 was meant to divert attention from the real culprits since given the political hostility between the KANU government and the opposition Party, KPU, it was projected that the public would assume that it was the work of the opposition “communists”. One is reminded of the famous trials of Communists like Georgi Dimitrov by the Nazi fascist regime in Germany in 1933–1934 because they allegedly set the Reichstag on fire when the truth was that the fire was organised and executed by the bourgeois Nazi–fascist regime itself. The popular riots that followed Mboya’s assassination, however, showed that the public was not fooled. He was assassinated by his own colleagues on the political right for he was seen to be the possible heir to the then ageing Kenyatta. The timing was, however, calculated, as already stated, to implicate the patriotic anti-imperialist forces.

The year 1969 marked a turning point in Kenyan politics in more ways than one. In that year, apart from Tom Mboya's assassination, agents provocateurs threw stones at a Presidential motorcade in Kisumu which was then seen as the main centre of opposition. Not only were the innocent on-lookers unnecessarily massacred on the spot by the Presidential guard, the event was used as a pretext to ban KPU and to detain without trial, all its leaders and main supporters from all over the country. Kenya henceforth became a de facto one-party state without the people's consent. Subsequently attempts to register other parties were denied until 1982 when the intensifying pressures to form a socialist oriented political party led KANU and the government to use Parliament to enact a Constitutional amendment as well as an amendment in the election laws to declare Kenya a de jure one-party state.56

Between 1969 and 1982 many open as well as hidden manifestations of political struggles, which for reasons of space, will only be just summarised, took place.

Now that no legal opposition party existed following the banning of KPU in 1969, the social class contradictions in society increasingly found articulation within small 'rebel' factions within KANU's own ranks and among the University of Nairobi students including, between 1979 and 1982, a very small group of radical young lecturers57

Underground political pamphleteering also increased. Writers such as Ngugi wa Thiongo broke ranks with the mainstream and became more and more radical and combative in their works.58 State repression accordingly increased.

Opposition within KANU that characterised the 1964–1966 era resurfaced at a different level in the 1970s and 1980s. The first such critical opposition within the Party after 1969 was first spearheaded by J.M. Kariuki a member of Parliament, who was brutally murdered in 1975 by State Security officers, according to the findings of a subsequent Parliamentary Select Committee of Inquiry.59 In fact, most of the police officers implicated in the murder who were recommended for prosecution by the Parliamentary Committee were later promoted. Those who since then followed this new and creative line of patriotic resistance by exposing corruption and illegalities within the Party and Govern-

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58 The political combativeness, if not artistic finesse, of Ngugi's post 1975 works such as Petals of Blood, Devil on the Cross, I will Mary When I Want, Detained, and The Trial of Dedan Kimathi can be easily distinguished from his pre–1975 works such as A Grain of Wheat, Weep Not Child, and The River Between.

59 Anyang-Njongo, op. cit., pp. 32–33.
ment include Martin Shikuku (detained, released then ousted in the rigged queue-voting of 1988), George Anyona (detained without trial under Kenyatta in 1977 and under Moi in 1982), Koigi-wa-Wamwere (detained by Kenyatta and later by Moi and now in exile), M.J. Seroney Waruru Kanja (imprisoned in 1981 in a framed-up charge but now turned traitor to the masses and recently (1988) made a Minister in Moi’s government), Mwashengu wa Mwachofi (ousted in the rigged queue-voting of 1988), Abuya Abuya (ousted in the rigged queue-voting of 1988), James Orengo (exiled and returned, now in private business), Chelagat Mutai (exiled then turned traitor to the masses, now back in the fold), Kimani wa Wanyoike (ousted in the rigged queue-voting of 1988), Charles Rubia (ousted in the rigged queue-voting of 1988), Masinde Muliro (the only known ‘critic’ who fought bravely to win a Parliamentary seat in the queue-voting of 1988) and a few others.

Also following the unconstitutional banning of KPU in 1969, KANU became increasingly terroristic and authoritarian. It started using “clearance” of all those wishing to contest any elections, civic and Parliamentary, as a method for screening and excluding not only former KPU members and sympathisers from participation in elections, but also its own members and even officials — sometimes those holding party “life-membership cards” — who are viewed to be critical of the growing fascism of the state and Party. Elections in Kenya increasingly became farcical — a process of allowing specially KANU appointed cronies to challenge each other for leadership seats.

KANU also started asserting, contrary to the Constitutional structure of the country, that it is “above” parliament and government. This became particularly dangerous in the 1987–88 period when the party machinery demanded that even remarks made by members of Parliament in Parliament could be censured by the Party. The Party which was suffocating Parliamentary freedom in the 1970s had by the 1980s strangled Parliamentary sovereignty. Thus we see a process where the Party in power “overthrows” its own Parliament by making it less than a rubber-stamp while retaining it for public relations exercises.

A populist move was made in 1974 to change the Constitution and make Kiswahili the language of the National Assembly. This created such a farce in

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60 See his personal account and analysis in, Loigi Wa Wamwere, Conscience on Trial: Why I was Detained, Notes of a Political Prisoner in Kenya (Trenton, New Jersey, Africa World Press, Inc., 1988).

61 See my analysis of Waruru Kenja’s judicial persecution in 1981 in Gutto, op. cit., note,15.


Parliamentary Debates that by 1975 another amendment was effected to make Kiswahili and English the official languages of Parliament. This narrow nationalism, as opposed to real desire to promote an obvious national lingua franca into the realm of official language of state, failed.

As stated above, not only Parliament and the Party were used in the Post-1969 period as instruments of political repression and protection of neo-colonial and imperialist interests the courts played a major role. Here again judicial political ammunition was directed not only at opposition within KANU and the ruling clique in general (intra class struggles) but, and more importantly, also against those considered to be “communist” or “Marxist” class enemies. The courts are also used to shield criminal and civil illegalities of members of the ruling class. I shall only cite representative samples.

A newspaper report by Edward Rihnaa in the Daily Nation (Nairobi) of Wednesday, October 27, 1982 regarding a University student (now in exile) who was subsequently sentenced by the courts for six years provides a graphic illustration of how the courts are used against alleged “Marxists”:

“A Nairobi University student charged with sedition yesterday said the two lawyers who had withdrawn from his case had violated natural justice.

David Fredrick Onyango Oloo has denied writing, publishing and possessing a seditious publications, A Plea to Comrades. On Monday, defence lawyer R.O. Kwach withdrew from the case, saying he was surprised that Oloo had pleaded “not guilty”. On October 15, Mr C.P. Onono had withdrawn from the case. Oloo also blamed the prosecution of using the lawyers, a police officer and other people to convince him to plead “guilty” to a lesser charge of sedition.

Oloo, now unrepresented, made the claim during the hearing of his case before senior resident magistrate, Joyce Aluoch. Oloo, a social science student, said in an unsworn statement that he did not see why the prosecution should take a short-cut by inducing him to plead guilty.

“Apart from pleading guilty to the charges, I have been threatened that if I don’t plead guilty, I will be sentenced to a maximum jail term,” Oloo said, adding he wanted his case to be heard and that he be given a fair trial.

Oloo also blamed the prosecution for down grading the charges when he pleaded “not guilty”. He said the charges had been upgraded or downgraded on five different occasions since the case was fixed for hearing.

He said A Plea to Comrades was not a seditious publication and that he had no seditious intentions. “My intention in drafting the

unfinished article was that as a student of social science, I have analysed issues,” he said. Oloo told a packed court that every individual was free to discuss or analyse any issue without being victimised. “I fail to understand how I can be considered to be raising disaffection, promoting feelings of ill-will or trying to overthrow the Government”, he added.

He said it was high time that someone with a legal background should tell the people what was meant by “sedition”. “It seems that all kinds of value-judgment distorted by ulterior motives can be used by almost anybody to call anything whatsoever ‘sedition’”, he said.

“Where is the demarcation point where somebody says here is where constructive criticism stops and this is where the sedition begins?” he asked. Oloo (23) said the prosecution could prove things only by way of miracles.

He said the case against him was not very accurate in certain aspects. He said some prosecution witnesses had proved to be highly unreliable.

Senior State Counsel Sureta Chana, prosecuting, admitted in her final submissions that there were some minor discrepancies in the prosecution case. She said the prosecution had proved the case beyond reasonable doubt.

Earlier, before the close of the prosecution case, Oloo said he had admitted in a cautionary statement to Supt. Githire, attached to Kenya Railways, that he wrote A Plea to Comrades because he felt that a student should be conscious of what was going on in the country.

“They should learn to speak their minds on controversial issues,” he said.

...Judgement was reserved until November 1. Oloo was remanded in custody until then.”

Oloo’s case represents the neo-colonial state’s repressive response to progressive intellectualism that was beginning to strengthen within the University students and lecturers in the late 1970s and early 1980s.

Both the students’ unions and the Academic Staff Union directed their main lines of intellectual battles in fighting for improvements in their economic and social conditions while exposing corruption and authoritarianism of the regime as well as engaging in international issues of opposition to imperialism, apartheid and Zionist fascism in South Africa and Palestine. Practically every year, scores of students got and still get expelled from the Universities for engaging in these democratic activities. The staff, however, became frightened and complacent
particularly after the mass detentions and imprisonments of 1981–1982 and forced exile of some of those who were actively involved.

It is now an established fact that whenever such anti-imperialist and anti-neocolonial advocates are arrested and brought before the courts; convictions are assured. This has been the case since 1972. The latest involving students was at the end of 1987. Normally charges are brought under Sedition (sec 57 of the Penal Code). In a few cases those regarded as radical are denied judicial protection whenever they wish to mobilise the legal system to expose the slanderous accusations. An example is the case in which the present writer and others sued a proprietor/editor of a right-wing local weekly The Weekly Review, for having alleged that they were "Marxists" who were engaged in secret storage of military arms at the University for purposes of overthrowing the government.66

Such allegations are generally quickly acted on by the state. In this particular case the passports of the lecturers were withdrawn, hence effectively limiting their freedom of movement and liberty. Two of the lecturers named were subsequently detained, one of them only after a framed-up charge of "sedition" brought against him was dropped,67 and the other (Mukaru Nganga) has since been detained twice (1982 and 1986). Maina-wa-Kinyatti, a university lecturer was also arrested and imprisoned in 1982 after a trumped-up charge was brought against him. He has been subjected to extreme forms of psychological and physical torture in jail and has been "adopted" by Amnesty International for several years.

It is to be noted that the war waged against neocolonialism and imperialism by patriotic and anti-imperialist intellectuals is regarded as 'seditious' by the local ruling class forces who ally with and depend on imperialism.

The legal methods used to incarcerate Patriotic democrats are varied: Some are detained straightaway, others are charged but when it is regarded that their trials in open courts would embarrass the government the state enters nolle prosequi, withdraws the charges and then detains them; some are imprisoned by the courts through the perversion of the judicial process. Whichever way is used, what is important is that all are made political prisoners merely because of their opposition to neo-colonial capitalism and state repression. In one way or another the courts get involved either to hear challenges to detention orders or to hear or refuse to hear civil and political cases. The behaviour of the courts is dynamic but consistent in its repression of progressives.

The political order also punishes lawyers who take up cases to defend progressives or to represent them in civil cases even when the lawyer is well known for being committed to the bourgeois system and its legal order. John

67 See case of question of denial of bail, note 9, supra.
Khaminwa detained in 1982 for having been counsel for George Anyona and Oginga Odinga is the classic example. Mr Khaminwa also defended a local bureaucratic bourgeois who was involved in personal conflicts with the President and was being improperly retired from public service through an alleged unlimited Presidential Prerogative power similar to those of the feudal depots. Gibson Kamau Kuria, a university lecturer and legal practitioner who is patriotic and critical, but who cannot be said to be Marxist, was detained in 1987 following allegations that he was involved in a conspiracy with members of a resistance movement in exile in Harare. In reality his real "crime" was his outspoken defence of bourgeois democratic, and sometimes feudal, rights. Since 1982 he emerged as one of the leading defenders of personal liberty of detainees and also a defender of emergent national capitalists whose businesses are under constant attack by the other fractions of comprador bourgeoisie, led by President Moi.

State political and legal terrorist activities against lawyers is, of course, in service of class interests. It promotes the weakening of the judicial avenues for democratic resistance. It contributes to the perversion of democratic constitutionalism and therefore creates conditions which leave no room for manouvre, except the revolutionary path.

As already indicated, right-wing opponents of the regime also became prey of the institution of the use of law for political ends. However, from a class point of view it is always imperative that such intra-class factional contradictions be distinguished from the struggles that represent the irreconcilable class forces. A resolution of the former does not require total social transformation while a resolution of the latter is impossible without violent social revolution. Whether such social revolutionary violence involves real physical armed struggle or not depends on the peculiarities of each revolutionary situation, but the violence to entrenched class interests is unavoidable and necessary. Law cannot escape such revolutionary violent transformation.

The mobilisation of the legal machinery against factional groups within the ruling circles have numerous examples. These include the then legally unsuccessful attempt to oust Moi's mentor, "Sir" Charles Njonjo, from political leadership in 1981 through the Muthemba treason trial case. Njonjo was

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69 See Ooko-Ombaka, supra, p.420.
71 Since his release from detention early 1988 he has fierlessly written and given press conferences on and taken up court cases dealing with the defence of civil and political rights.
subsequently pushed out politically in 1983. Other cases are those of Murithi;\textsuperscript{73} that of John Harun Mwau involving the issue of whether or not the denial of a passport is or is not an infringement of the rights to liberty of movement;\textsuperscript{74} that of Mr. Kikuyu, an MP who was charged with sedition for merely suggesting that President Moi might be one day replaced by some other politician as the President of the Republic;\textsuperscript{75} and, most recently, that of a former minister who after being thrown out of Parliament and the Executive was quickly arrested and charged with allegedly participating in “an illegal charity walk”.\textsuperscript{76}

In the factional struggles within the ruling circles, extra-judicial but legal measures are also used to “destroy” the opponents. For example, the plight of the Sansora Group of Companies based in Kisii and owned by the now discarded former close mentor of President Moi, Mr Simon Nyachae, which are now collapsing because they are denied import licences to enable them to import the necessary materials they need to manufacture finished products.\textsuperscript{77} This latter case illustrates how personal and political rivalry among the comprador bourgeoisie can be so fiercely fought out that nationally oriented business can be destroyed while imperialist interests that are dominant continue to thrive and grow stronger.

The object of the use of judicial and other forms of legal repression against the ‘opposition’ within the ruling circles is sometimes because the ruling clique cannot in some cases differentiate between antagonistic and non-antagonistic class contradictions. Many times however, it is to ensure that followers of the autocratic leadership are fully and undeviatingly compliant and loyal. Political survival, therefore, requires almost a negation of the self. In broader terms such internal contradictions within the camp of the enemies of the working people provide favourable conditions for the people’s democratic struggles in that they weaken forces of neo-colonialism and imperialism. A divided enemy is easier to fight and defeat than a united one.

The judiciary and the law have also been used to cover and protect agents of monopoly capital and the military personnel of imperialist countries with military bases in Kenya whenever they are charged with criminal offences. The protection of Del Monte (U.S.A.) against charges of criminal gross negligence when the dogs guarding its pineapple plantations killed and devoured innocent children\textsuperscript{78} and the courts’ freeing of a murderous US Marine who committed

\textsuperscript{73} Note 70, above.

\textsuperscript{74} Weekly Review, June 3, p.7, July 8, p.19, July 15, p.9.

\textsuperscript{75} R. v. Jonesmus Mwazia Kikuyu (Unreported) see in Ooko-Ombaka, supra, pp.403–404.

\textsuperscript{76} Weekly Review, July 8, p.19.

\textsuperscript{77} Weekly Review, July 8, 1988 p.27.

cold blooded murder in Mombasa\footnote{The \textit{F.J. Sundstom Case} (1980) (unreported). This was a murder case in which the convicted felon (a U.S. Marine in the Battle Ship \textit{U.S. La Salle}) was sentenced by the High Court only to a requirement that he posts a bond of K.St 500 and to be of good behaviour while in the USA. In a subsequent parliamentary debate, the then new Attorney-general (who assumed office after the case was decided and who was later forced to resign), Mr. J. Karugu, said that... "I am not satisfied that justice was done and I am not satisfied that justice was seen to be done..."} are good examples. Both cases evoked public outcry and are historical landmarks in educating the masses about the subordination of patriotic nationalism and life of the citizens to the interests of imperialist masters. Thus to the masses the victims of imperialist aggression are transformed into the people's martyrs to be avenged through revolution.

Thus the Ruling Party, Parliament and the Courts are used collectively, alternatively or individually as organised social class institutions that are mobilised or not mobilised in the interest of neo-colonialism and imperialism and for political repression \textit{necessary} to keep the people chained to conditions of exploitation, oppression and inequality. Where these class institutions appear to be in conflict, these should not be interpreted as constituting the so-called "checks and balances" as bourgeois constitutionalists and political scientists are often quick to point out. Similarly they do not necessarily and always represent irreconcilable class contradictions.

**A FEW WORDS ON THE EXECUTIVE AND CONCLUDING REMARKS**

In an undemocratic political order such as obtains in Kenya since 1963, the executive arm of the state has a dominating influence on the behaviour of all legal organs: the Party, the Judiciary and Parliament. This occurs irrespective of claims by the executive, as Moi did, that the Party is supreme.\footnote{President Moi declared on Kenyatta Day (20 October 1979) that KANU is above the law and is supreme over all state organs --- see, \textit{Weekly Review}, 26 October, 1979, p.8.} In fact, even if the Party or the Judiciary or Parliament were supreme this would not change the \textit{class character of the state} which they form.

Neo-colonialism as a historical category marking a definite phase in the readjustments that imperialism is forced to make in the wake of victorious national liberation forces against imperialist colonialism, has shown the tendency to create repressive and militaristic regimes --- Phillipines, South Korea, Haiti, Nicaragua (before the 1979 Sandinista revolution), Uganda under Idi Amin and Obote, Malawi, Zaire, Sudan, are examples. Under these conditions, legal, social and political organisations inside and outside the state have organic links and complement each other in protecting the class interests of the local bourgeoisie and those of monopoly capital against the ever worsening economy and social condition of the popular masses. Laws which these ruling forces of oppression make and enforce, often blended with extra-legal measures, are lethal arsenals
against forces of democracy and the masses. But, the wheel of history marches on and can not be stopped by these forces of moribund capitalism.

The executive power of the state in Kenya is indeed deliberately concentrated in the Presidency but, as we have seen, it operates by providing the political climate and direction for other organs of state, including the Party. It decides on the personnel in government, including intelligence and security forces, the police, the judiciary and the civil (public) service. It also controls the Party in the sense that it decides on which party may function legally and when existing party functionaries should have or not have civil protection and protection of law as well as what positions they may occupy in high positions in government — which under the existing conditions is a lucrative avenue for private accumulation. It controls Parliament in the same manner as it does the Party and, in addition, decides on the implementation or non-implementation of parliamentary decisions and laws. It also decides on which parliamentarians should occupy or not occupy high executive positions in government such as ministerial and assistant ministerial positions. These are useful positions for the bourgeoisie for plundering and looting of public resources for capital accumulation.

On many occasions the executive has acted extra-legally and contrary to the established laws. For example in 1979, the then Attorney General, “Sir” Charles Njonjo (who was the President’s mentor until he was thrown out in 1983 when it became apparent that he was planning to usurp Presidential powers through unconstitutional means) threatened the public that the government was ready to use military power to deal with opposition.81

Again, early in 1980, the same “Sir” Charles Njonjo, a darling of British imperialists, had issued an unconstitutional order for the police to shoot to kill suspected armed robbers seen as a danger to the propertied, and not to arrest them and have them tried in courts of law; he was supported in this obviously fascist decision by President Moi.82

Only recently one of the lower ranks within the executive hierarchy, a Provincial commissioner, was denied a lift by a private motorist in Nakuru and the citizen was arrested and tried with an unknown crime and was actually convicted.

So much has the autocratic presidency in Kenya developed since the process was started by Kenyatta that to-day President Moi openly states that he wants all his subordinates and all citizens to simple sing choruses to his fauta nyayo (following footsteps) “philosophy” and not to question why or where he is

82 In early 1980, Attorney General, Charles Njonjo, in a reply to a Parliamentary question had stated clearly that the “Police have my authority to shoot to kill (suspected robbers)” and President Moi on 25th May 1980 said of armed robbers: “I am saying they should be killed”.
leading them. This "culture of sheep" has been imposed and has actually caught on among many sycophants, including university professors, who to-day wear badges with Moi's bust, as if Moi were some great leader of the working class, like Kim II Sung. The bourgeoisie can appropriate anything and convert it to serve their interest.

By way of conclusion it can be said that this contribution has attempted to summarise a long, brutal and dynamic constitutional history of Kenya since 1963. This has been and is essentially a history of the role of law and state in a neo-colony, dominated by and serving the interests of imperialism and the minority local puppet ruling class. It shows that although law and politics are analytically separable they are in reality organically interrelated and mutually reinforcing. Politics gives law its shape and motion. It also shows that however irrational and stupid a system may appear to be, it is ultimately shaped for the intended promotion of definite historical and class interests. The conclusion then is that the system cannot be reformed by mere changes in personnel or legal redistribution of powers to various organs of the state but rather by a major revolutionary surgery that uproots the material interests behind the fascism as well as revolutionaryising the state machinery in the interest of the people and genuine democracy.

The struggle in Kenya is a political and economic struggle for democracy and national self-determination. This is an anti-imperialist democratic struggle whose victory will create conditions for further social movement into high levels of civilisation — that of real socialism. Already the hitherto conservative mass institutions and organisations, like the churches, have added force to the continuing progressive student politics. The professions, such as the legal profession are awakening and openly showing that they can contribute to the demands for democratic ideals.

The organised churches have for example opposed queue-voting. This led to the banning of their magazine, Beyond, in March 1988.83

They have opposed torture and murders by state agents and are addressing the material deprivation of the masses. Liberation theology is in creation in Kenya. Underground liberation forces seem to be gaining strength. The future of Kenya seems, therefore, to indicate that the intensification of class and national contradictions, unavoidable under neo-colonialism, will eventually lead to the only way they can be resolved — that of victory by and for the working people. The forces that appear weak to-day are the future of Kenya. No amount of terror, legalised or not, seem to be capable of stopping the tide. The historical lessons to be learnt from Kenya are therefore many. The most important being that

83 Beyond: The Christian Leadership Magazine, Vol.4, No.4, March 1988 on Election Special. In the editorial the paper truthfully concluded that "It must be concluded that elections by queuing were not fair. Consequently democracy in Kenya has slipped a step downward, putting the country on to the path of self-destruction which many Africa countries have followed..."
capitalist development in neo-colonial conditions of necessity depend on and require international monopoly capital support. International monopoly capital also needs and depends on the plunder it is able to extract from the neo-colony. The social inequalities and material deprivation of the masses which results, translates itself into fierce class struggles which although national in character are part and parcel of the global struggle between labour and capital. In short, in Kenya the path of development chosen in 1963 meant a class choice: a choice of the side of a handful few with the people against the political leadership and their imperialist allies. This is the historical reality in Samora Machel's statement that prefaces this contribution. Laws and constitutions become reflections of these contradictions and act as weapons in the hands of the handful few against the people. The Kenyan masses have learnt in the last 25 years since independence that the capitalist path only means continued starvation, unemployment, poverty and all sorts of cultural, social and economic ills with law and politics as the active forces to maintain worsening life conditions. This is what draws the masses into real class-based struggles for democratic changes.

These are the main lessons we learn about the role of constitutions and politics in this neo-colonial state and the future of neo-colonialism in general. As Lin Piao once put it:

Dialectical and historical materialism teaches us that what is important primarily is not that which at the given moment seems to be durable and yet is already beginning to die away, but that which is arising and developing, even though at the given moment it may not appear to be durable, for only that which is arising and developing is invincible.

Why can the apparently weak newborn forces always triumph over the decadent forces which appear so powerful? The reason is that truth is on their side and that the masses are on their side, while the reactionary classes are always divorced from the masses and set themselves against the masses.84

Yes, the Kenyan ruling class and its state machinery which relies on imperialism to maintain power is against the masses and against democracy. It is essentially very weak although at the moment it appears very powerful to a casual observer. It will fall and it is only then that constitutionalism for the masses and by the masses will be realised. Law will then be liberated.

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