

# **AFRICAN SOCIAL SCIENTISTS REFLECTIONS PART 2**

**LAW, THE SOCIAL SCIENCES AND THE CRISIS OF  
RELEVANCE**

**A PERSONAL ACCOUNT**

**BY PROFESSOR DANI W. NABUDERE**

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## Preamble

As the 21<sup>st</sup> Century approached, there were various multi-faceted efforts geared towards critical review of development in Africa. The spirit of this reflection was on Africa learning from the past, and seizing the opportunity to formulate a Vision for self-development and self-determination, in the new Millennium. In this spirit of Africa taking ownership and responsibility for her development, there was ambition and optimism expressed in the common question “Can Africa claim the 21<sup>st</sup> Century?”. Some of the initiatives that addressed this question were the Millennium Renaissance Program, the Omega Plan, and the emergence of the African Union. Africans took the onset of the new Millennium seriously, and people from all walks of life such as leaders, politicians and scholars reflected on the prospects for Africa in the 21<sup>st</sup> Century.

In line with this spirit, the Heinrich Böll Foundation, Regional Office for the Horn of Africa, organized a meeting in Addis Ababa in December 1999. This was in addition to other efforts such as the Art Exhibitions, ‘Women Defining Their Millennium’, and ‘Drumming for Peace for the Millennium’.

The meeting, ‘**African Social Scientists Reflections**’, was one where Social Scientists and politicians in Africa met to critically examine whether the social science heritage is of any relevance to the Africa of the 21<sup>st</sup> Century. The Heinrich Böll Foundation wanted to be involved in this Reflection, and supported this meeting. This reflective thinking is closely linked to the modelling of the Foundation based on Heinrich Boell (whom the Foundation is named after), call to citizens to meddle in politics. Further, the Foundation strives to stimulate socio-political reform by acting as a forum for debate, both on fundamental issues and those of current interest.

The Foundation was glad to host and be part of the process of Reflection, and hopes that the publications will serve to stimulate and enhance discussions in Africa, particularly among those who wanted to participate and were unable to, for various reasons. Since all of the contributions were significant and can stand on their own, they will be published in a series titled ‘Reflections’, as

- 1) **Part I-**        *Anthropology in Post-Independence Africa: End of an Era and the Problem of Self-Redefinition* by **Professor Archie Mafeje.**
- 2) **Part II-**     *Law, The Social Sciences and the Crisis of Relevance: A Personal Account* by **Professor Dani Wadada Nabudere.**
- 3) **Part III-**    *The Study of African Politics: A Critical Appreciation of a Heritage* by **Professor Peter Anyang Nyong’o.**

I would like to extend our deep appreciation to Prof. Archie Mafeje who did the academic and copy editing of the papers submitted by presenters. The spirit of the participation at the meeting is captured in the background of the Introduction by Prof. Mafeje, which mainly contains extracts of the over 200 page-report of the proceedings of the meeting.

Prof. Mafeje is a well-known African scholar who has taught in a number of African universities as well as European and American universities. He now lives in Cairo where he pursues his interest in African social science research.

Many thanks to Prof. Dani Nabudere, currently Executive Director of the independent Afrika Study Centre in Mbale, Uganda, where he is also attached to the Islamic University of Uganda as Professor Emeritus in the Department of Political Science, who is one of our contributors.

Special thanks to Prof. Anyang Nyong'o, for his inception of the idea of '**African Social Scientists Meeting**'. Prof. Nyong'o is a renowned African scholar who has taught in universities in Kenya and the U.S.A and who is currently a Member of Parliament in the Kenya National Assembly and a Fellow of the African Academy of Sciences (AAS).

**Aseghedech Ghirmazion**  
*Heinrich Böll Foundation*  
*Regional Office, East and Horn of Africa*

## Preface

### **African Scholarship: The Heritage and the Next Millennium**

As the 21<sup>st</sup> Century draws nigh, there are many issues worth reflecting on with regard to social science scholarship in Africa. Some of the leading lights in the African social science scene have already left us, a person like Claude Ake. Others may have been sucked into the practical world of politics, and may not easily retrace their steps back to full time academia. But while they are with us, and while their memories are still fresh in fusing scholarship with practice, it may be useful to provide them with the opportunity to reflect on certain important issues and put them down on paper. Some have been involved in institution building in various places and may, from that vintage point, see how the knowledge that social science gives them becomes handy in building institutions.

More important, however, is the importance of bringing all these people together and asking ourselves one central question: **was it really worth it, this social science thing?** Where has it taken us to, where has it taken Africa? Which way is it likely to take us— and Africa—in the next millennium? Do we have anything to say to Africa in terms of culture, ideology, knowledge, development, values and the future from what we know, and from what we have learnt? In other words, is our social science heritage of any use to Africa of the 21<sup>st</sup> Century? Are we relevant to the next millennium? What are we handing over to this millennium?

A group of us came together some time ago in a small seminar in Addis Ababa and reflected on these issues. The seminar provided us the opportunity to go back to our own involvement in the social sciences and to reflect on what shaped our ideas and contributions to the advancement of knowledge. The series of publications that have followed from this discourse will provide several volumes that should be **a collection of some valued “wisdom” for those who can go a little bit farther.**

In any social science endeavour, a lot depends on the kind of questions we pose, how we conceive the problem. **Were we always asking the right questions?**

We cannot deny that political science, for example, was brought to us from western scholarship. In large part, the political theory tradition from Oxford and Cambridge laid the philosophical underpinnings of political science, perfected in the writings of Mazrui. The Committee for the Study of New Nations of the USA in the 1950s/60s gave us a sociological and empirical bend to the

study of politics. With scholarships and research grants, numerous books and articles followed, almost eclipsing the inclination towards political theory that was the heritage from the British.

The onslaught of Marxism from the late sixties until the fall of the Berlin Wall put Political Science in a precarious situation. The gravitation of all and sundry towards political economy resulted in a mix bag of things. As everybody insisted that they were now studying things that were **more closer to reality**, so did we get statements that were at times made from mere assertions and at other times so refreshing that they led to new avenues of asking even more complex questions. The major achievement of Marxism is that it made scholars aware that there were no simple answers to complex questions, even though so called vulgar Marxism tried to offer simple explanations to very complex problems. Perhaps more basic was the old adage that if appearances coincided with reality, science would be unnecessary.

The question that, on reflection, we need to ask ourselves is: whatever methodology and school of thought we were coming from, were we always asking ourselves the right questions? Surely an answer is as good as the question it is responding to. If we did not go very far in advancing knowledge about African politics, then we need to examine the kinds of questions we were posing. If we now want to produce more knowledge about African politics, we need to stop, reflect and pose the kinds of questions that will produce the knowledge we are so thirsty for.

The same concern will be expressed in the fields of anthropology, economics, sociology, jurisprudence and history. All these are disciplines that have rubbed shoulders over the last forty years as African scholarship struggles to explain what has been happening in the continent and the past and future of its peoples.

The reflections in the series of publications that will ensue from this project are journeys into the past. Mine for example, is the completion of an essay I have always wanted to complete since 1978. Mike Chege will recognize some of the issues and questions when it finally sees daylight; he is responsible for those discussions we had then. I may even borrow from some of the writings we did together.

P. Anyang' Nyong'o



## **Introduction**

### **Background**

The idea of organising a workshop for Intellectual Reflections by senior African scholars was first originated by Peter Anyang' Nyong'o in Nairobi in 1999 in consultation with Archie Mafeje. Anyang' Nyong'o believed that it would be a great loss if the senior generation of African scholars were to exit, without leaving behind a written testament about their intellectual legacy and what they individually consider to be their contribution in their respective disciplines. The idea itself was an excellent one but the mechanics for its implementation were not that easy. First, the category of "senior African scholars" proved not to be self-evident as some scholars fell in-between generations. Second, who was to decide which ones deserved the honour. Professional jealousies and academic deference or elitism were bound to play a role in the selection process. Third, although in reality it was not too difficult to think of some distinguished African scholars, in practice if all were invited, they would probably be too many and spread across too many disciplines to guarantee coherence in the deliberations. Eventually, it became expedient to limit the envisaged workshop initially to the social sciences and to no more than twelve identified participants. This was done with the supposition that similar workshops would be organised for other groups, including those who have distinguished themselves in the humanities such as literature, history, and philosophy. Finally, there was the perennial question of who would take enough interest in the supposed African gurus or icons to finance such workshops. It was a very pleasant surprise and a felicitous coincidence to discover that the Heinrich Böll Foundation Regional Office for the Horn of Africa would not be averse to financing such an endeavour. This certainly paved the way for future collaboration.

As a sequel to these developments the Heinrich Böll Foundation organised what came to be known as the African Social Scientists Reflections meeting at the International Livestock Research Institute (ILRI) in Addis Ababa on 15-18 December 1999. The attendance was less than the organisers had envisaged. It had been hoped that all the social sciences would be represented, including at least one recognised specialist on Feminist Studies. Six participants attended:

Professor Peter Anyang' Nyong'o (political scientist)

Professor Andreas Eshete (philosopher)

Professor Archie Mafeje (anthropologist/sociologist)

Dr Thandika Mkandawire (economist)

Professor Dani W. Nabudere (lawyer)

Ms Zenebework Tadesse (observer by choice)

Those present were not discouraged by the less than expected number of participants and were determined to make full use of the opportunity as a starting point. Indeed, the meeting lasted for six full sessions over three days. The first session was devoted to working out a timetable. Peter Anyang' Nyong'o also took the opportunity to make some opening remarks. He reiterated the idea behind the meeting and emphasised the point that the main criterion for selection of participants was generation and contribution to the social sciences.

He indicated that such a contribution by individuals could be judged only by the extent to which they have been able to play a role in the indigenisation of the social sciences in Africa and in the deconstruction of Eurocentrism. He saw good prospects for interdisciplinarity in forging a new self-identity in Africa and in debunking imposed identities and forms of knowledge. Some points of clarification were raised and some elaborations made on Anyang's introductory remarks but no substantive disagreements emerged.

The rest of the session was reserved for reading the only three available papers for each of which a discussant had been assigned. It is worth noting here that all three papers were not written specifically for the "Reflections". Although written papers are better than no papers at all, they often divert the discussion away from the set topic of the workshop and authors often find it difficult either because of lack of time or the force of their own mental-sets to come around to the specific requirements of the task in hand. It is no doubt a bad habit that organisers should guard against in order to avoid disappointment.

## Substantive Discussions

The second session started off with a presentation of a paper entitled “**Africa in the New Millennium: Towards a Post-Traditional Renaissance**” by Dani Nabudere. The author pointed out that the paper was written for a seminar on **Development and Globalisation** that was held somewhere in Scandinavia. In that context the paper covered a wide range of issues, starting from small village communities and women’s survival groups to “globalisation”. Appropriately enough, Nabudere’s proposed slogan was “Act locally, think globally”. Implicit in this epigram was the belief that it was local struggles in the villages that can guarantee African rebirth/resurgence/renaissance and ensure a rejection of neo-traditionalism that had been instituted by the colonial state. However, Nabudere warned that this should not be seen in isolation but in solidarity with other local groups elsewhere in the world. The argument here seemed to be that if the driving force towards globalisation is domination, then globalised resistance based on “global consciousness” is its antithesis. Then, it became a question how this view could be reconciled with Nabudere’s rejection of universalism in favour of “Africanity” or African self-identity.

In his advocacy of local groups as being the best hope for democracy and the future in Africa, Nabudere presented a very negative view of the African state and called for its “dismantlement”. He had no difficulty in pointing out that the African post-colonial has been a disaster politically, economically, and socially. In the circumstances neither development nor democracy has been achieved, he contended. In his view, this created the necessary grounds for a new “social contract” from below. Apart from the village communities and self-help groups, he did not specify what other forces the “below” includes or does not include e.g. traditional monarchs and chiefs who might be part of the “neo-traditionalism” to which he is strongly opposed. It seemed that in his modality “village community”/“global solidarity” Nabudere had omitted the national level and thus failed to address properly the National Question.

In debunking “nation-building” and the concept of the “nation-state” Nabudere was inclined to treat the state as necessarily antithetical to “democracy”. Whether this was inspired by theories of the “withering away” of the state, the current political trends in Europe, or the failure of the African state, it proved to be a very contentious supposition or proposition. Parallel to this, Nabudere excluded the national bourgeoisie or what he dismissively referred to as the “territorial bourgeoisie” from the “social contract” that was supposed to usher genuine democracy in Africa. In real terms, without the state and the national bourgeoisie or local capitalists, it seemed that in his paradigm Nabudere was

headed towards an unconscious creation of a palpable socio-political void in African societies. Although he referred to the case of the Somali Republic that has survived precisely because it relied on the traditional gerontocracy and local communities and to the revival of the kingdom of Buganda in Uganda and its self-globalisation to bolster his argument and to demonstrate the feasibility of what he calls “post-traditional” democracies, these might yet prove to be transient political episodes in time of a crisis and not the inauguration of a democratic developmental state in Africa. Diffuse local structures are no substitute for over-arching governmental structures in the process of development. Perhaps inadvertently, he acknowledged this point when he showed how the Ogoni, Ijo, and other groups in the Niger delta obliged the Nigerian government to do what they could not by themselves, namely, more equitable distribution of national oil revenues. But then he vitiated this insight by concluding that: “They show that a small ethnic group of ½ million people can have more impact on global capital than states”. This is a non-sequitor and is contrary to actual reality. The fact that African states are keener to make concessions to global capital than to protect their national interests does not mean that states in general lack the potential capacity to do so. It simply depends on the type of state one is talking about, as is implicit in some of Nabudere’s critical comments on the African state.

Commenting directly on the heritage of the social sciences in Africa, Nabudere referred to two diametrically opposed orientations. He characterised one of these as Eurocentric and subservient to European social science and the other as Afrocentric in that it is steeped in African roots and is committed to emancipating social science knowledge from the past. This came over as part of his intellectual trajectory for the 21<sup>st</sup> century in Africa. In this connection he made some scathing remarks about what Achille Mbembe tried to do during his tenure as Executive Secretary of CODESSRIA. He saw Mbembe’s intellectual agenda as a return not so much to Eurocentricity but as a return to “Western-centricity” in which Europe is combined with North America and which is aimed at making social science epiphenomenal or metaphysical under the aegis of postmodernism. To this, Nabudere objected most strenuously and urged African intellectuals to start where they are, namely, in the African villages. This tallies with Nabudere’s earlier view that the African renaissance will begin in the African villages. It also denotes his notion of “liberating research”. He complained that social sciences in Africa had not played their role in helping people liberate themselves. This was a surprising *volte-face* because in his initial discussion of the social sciences in Africa he had claimed that there was a tendency that was an antithesis of Eurocentric social science and had “Pan-Africanist roots” and that its role was to emancipate social science knowledge

from the past and to deal with the objective conditions in Africa. What could have been more serviceable? In addition, he talked proudly of their debates at Dar es Salaam University. Were they irrelevant and a waste of time? Apparently not, as will be seen in Nabudere's subsequent contribution to the "Reflections" entitled "**Law, the Social Sciences, and the Crisis of Relevance**".

There were many other points which Nabudere raised, including the role of the World Bank in Africa, the implications and the future of the "Washington Consensus", the global economy and prospects for the 21<sup>st</sup> millennium in Africa, and so on. But what proved most controversial are his views on (i) the significance of African village communities and self-help groups in the global context; (ii) the dismissal of the African state in favour of local communities in the period of reconstruction in Africa; (iii) failure to reconcile the need for a democratic developmental state in Africa with the emergence of the so-called "post-traditional" reconstructions in the villages; and (iv) the question of whether or not African social science has made any contribution in the development of the continent.

On the first issue Nabudere was accused of romanticising the village communities and of over-estimating their capacity to bring about radical national transformation. Instead of limiting himself to the dismantlement of the African state and celebration of local democracy, he was challenged to say precisely what it would take to create a "democratic developmental state" in Africa that would accept responsibility for all and ward off the deleterious effects of globalisation. In other words, what was his conception of the National Question in Africa in the present historical juncture? It was felt that this question was pertinent because the community groups from the developed countries e.g. the Scandinavian countries he saw as allies were protected and at times funded by their own governments. This is not true of African community groups. Instead, unlike the former, they are faced with the simple question of survival. Under the circumstances the moral and political injunction was that we should not celebrate life-long struggles for survival and exonerate African states from their social responsibilities.

On the second issue it was argued that under the present conditions in the world there is no way we could dissociate social democracy from a democratic state that accepts responsibility for social development. It was maintained that the latter task was too huge to be expected of under-capitalised and socially deprived village communities and groups. The obvious implication is that in our circumstances development "from below" can only mean democratic participation in national or sub-regional development and reconstruction. At the moment there is a lack of a clear theoretical perspective how this could be

brought about or how a democratic developmental state could be realised. One thing certain is that the progressive petit-bourgeoisie and patriotic bourgeoisie will inevitably play a critical role in its construction. This is a hypothesis, which engaged social science researchers might have to revisit afresh, instead of being guided by presuppositions.

On the third issue even though there was a revulsion against any form of social and political romanticism, conceptually it is possible to reconcile development “from below” with a permeable “democratic developmental state”. These are two sides of the same coin and can only realise themselves through instituted forms of exchange. As the World Bank has come to realise, anti-state development perspectives are of no avail. The weaker the civil society, the greater the need for state inputs and solicitude. The logic of all this is well known to Dani Nabudere, as a committed socialist. Or is this no longer applicable?

On the fourth issue as to whether or not African social sciences have made any contribution to the liberation of the continent, this is one of the questions, which the “Reflections” were meant to answer. But *prima facie* it can be said that the contesters such as were found in organisations such as CODESRIA, SAPEM, AAPS, IDEP, and some university campuses in the first ten years or more after Independence made a historically important intellectual contribution. Furthermore, it can also be said that, although this might not have led to the liberation of the African people, these representations put on the nationalist agenda some important questions. Out of necessity, the outside world had to come to terms with some of these, no matter how grudgingly. This intellectual trend seems to be continuing against all odds. After reading Nabudere’s representations, nobody can be in doubt about the veracity of this assertion.

However, there are signs that the trend itself is ripe for auto-critique. Dani Nabudere’s paper provoked a great deal of discussion which, while not on the topic of the seminar, showed that critical African intellectuals are at the crossroads and have to rethink the political suppositions of the nationalist movement. Even those who think that it failed still have to contend with the problem of what constitutes authentic representations. This has nationalistic connotations that force those concerned to assert what they think are desirable new identities in the wake of the failure of the nationalist movement against globalisation and Northern universalistic claims. On the other hand, there are those who think that, seen in a historical perspective, the nationalist movement did not fail but got confronted at some stage with problems that it either could not have anticipated or did not have the intellectual and political tools to deal

with them. This being case, those who so think believe that there is no going back and that the only way forward is to identify these shortcomings and see how they could be rectified. This might be a beginning of a broader meta-nationalism that has a better appreciation of internal negative forces as well as the threat of globalisation than the nationalism of the 1960s and 1970s. African dictatorships might not be an aberration but a result of a combination of internal and external factors that go beyond individual petty dictators. The intensity with which these issues were debated at the workshop by a small group of African intellectuals shows that the Africans might be down but they are not defeated. When it came to their continent and its reconstitution for the future, the participants simply could not stop talking, which is an indication that they do not have enough opportunities to exchange views until they reach some consensus or get to know the complexities of their common desire. Till this is achieved, they will not be able to acquire the necessary cohesiveness to act as effective advocates of social and political transformation.

The second day saw the presentation of Thandika Mkandawire's paper entitled "**African Intellectuals and Nationalists**" that was written for a conference in Australia. The presentation was very concise and to the point. In summary it could be said that the paper was written in defence of the nationalist movement in Africa and the role of African intellectuals in its evolution. Mkandawire argued that there has been an undue concentration on the failures of the nationalist movement and less on its achievements. In his view this is equally true of the African leaders. He believes that immediately after independence African leaders made significant progress in development by investing in education for all, by improving healthcare facilities and infrastructure, and by making a serious drive towards import-substitution. Given this kind of endeavor, he believes that they cannot be accused of having sought high office only for personal gain. This is all true but what became an issue is subsequent failures. It is possible that because of their belief in themselves and in their cause the first generation of African leaders found it difficult to surrender power. Their ensuing desire to stay in power obliged them to find illegitimate ways of clinging to power. This included abuse of power that detracted from their original nationalist goals. This was a destructive and perverse response for which they must be held accountable, despite Mkandawire's justified demand for mitigation. Irrespective of their initial achievements, African leaders and their governments are indictable for having created a negative model for political self-reproduction. Those who came after them, including the military, found a ready-made model for self-aggrandisement that did not need any pretence about development. The African citizens are now enduring the effects of this legacy.

Arguing a case in mitigation Mkandawire contended that African intellectuals thought the same about development as their political leaders and that they endorsed the national project that comprised nation-building, economic and social development, democratization, and regional cooperation. While this is true, it can be pointed out that it did not commit African intellectuals to the same power mongering as their “presidents for life”. Instead, they got disaffected and started to express views that were critical of the behaviour of their governments. Hence, African governments in general became anti-intellectual. It was not out of any cynicism or belief that they could do without intellectuals, as Mkandawire is inclined to think. It was a straightforward political reaction to a potential social threat. In so far as this is true, Mkandawire might have gained by not identifying the nationalist movement as a dynamic social phenomenon with its particular leaders who are by definition more finite. It has to be acknowledged that leaders at a given historical moment are an important index of their movements but at the same time they are not their embodiment. The nationalist movement in Africa has not failed. It continues to usher different historical phases which bring about the atrophy of its erstwhile leaders. Critical African intellectuals, unlike their atrophied political persecutors, are an organic part of the dynamic nationalist movement on the continent. To be so, they do not have to be beholden to existing authoritarian African regimes nor do they have to be seen pottering in the mud. Their job is to create through the critical intellect socially and politically relevant ideas.

Even though he castigated African intellectuals for not be organic enough, he seemed to hold a strong brief for them, especially against their foreign detractors. He argued that African intellectuals do not only exist but are also a force to reckon with. He protested that the fact that there is no written sociology of them does not mean that they do not exist. He referred in particular to the work of CODESRIA and the phases through which it went during his stewardship. The record was so positive that he takes pride in it. But he seems to suggest that even so they did not become part of the nationalist movement. The veracity of Mkandawire’s claim is seriously in doubt. In fact, it is arguable that it is the nationalist fervor that kept the African intellectuals in organizations such as CODESRIA, SAPEM, and AAPS buoyant. It is the same that has exposed them to accusations of being subjective or ideological, as if there are anywhere in the world intellectual representations that have no underlying value-premise. Organic African intellectuals have been in the forefront of the struggle for “democratization” in Africa since its inception in the late 1980s, which is a struggle for a “second independence” or a new Pan-Africanism. The fact that



these struggles have not yet come to fruition does not invalidate the observable fact. The struggle is relatively young and, contrary to Mkandawire's suggestion in his presentation; it was never part of the nationalist agenda at independence because it was assumed then that the overthrow of colonial imposition would automatically bring *uhuru*.

In addition to its prescriptions, the nationalist agenda also had prohibitions. Mkandawire referred to these as taboo topics. Among these was any acknowledgement of tribal and ethnic claims. These were believed to be incompatible with national unity and hence the adoption of a one-party system on pragmatic grounds. Mkandawire wondered how the so-called national unity could be achieved in the face of cultural and linguistic diversity. He found it ironical that, if achieved, the same unity could militate against regional cooperation or Pan-Africanism. This harked back to Nabudere's pre-occupation with local identities and organizational structures. It seemed as if we had moved from the earlier nationalist obsession with the state to a new obsession with ethnicity as the essence of democratic pluralism. As will be seen, regarding the latter, Mkandawire objected most strongly to the treatment of the "state" and "ethnicity" as dialectical opposites. This approach was viewed with skepticism by several members of the group. Mkandawire himself was not convinced that ethnic identities were necessarily the building blocks of a democratic developmental state in Africa. This issue was debated further after Mkandawire's presentation that dealt largely with African intellectuals rather than African *social scientists*.

During the discussion Mkandawire's view about the African intellectuals were strongly challenged. In particular members of the group found his contention that African intellectuals were alienated from the nationalists unwarranted. Numerous cases were cited to show that African intellectuals had always been inspired by nationalist struggles and that these gave justification for their claim to an independent identity. Mkandawire did no more than quibble about minor details. In fact, his was a hard line to hoe because he was talking not to Australians but to the very subjects of the process whose personal histories are known to him. There was even a suggestion that the nationalist representations of African intellectuals were so persistent that they have had an impact on research and development programmes abroad. Reference was made to the book that Mkandawire himself helped to edit, *Our Continent, Our Future* (1999) which had a devastating effect on the so-called Washington Consensus. It would have been very unnatural for Mkandawire not to acknowledge such a great feat by militant African scholars. However, even such a concession did not stop the participants from piling it on Mkandawire by asking, for instance, how would

he characterize the intellectual representations of African scholars who worked under the auspices of CODESRIA, AAPS, SAPEM, and OSSREA. The point was made and Mkandawire could not respond in kind. Nonetheless, there was a plea that Afrocentrism or the deconstruction of Eurocentrism should not be construed as an absolute rejection of the influence of European thinking on African scholars but rather as a rejection of assumed European intellectual hegemony. Nabudere in particular insisted that this was an intrinsic part of the process of globalisation. None of the participants was willing to accept globalisation as a felicitous happening. This might also be a nationalistic reaction against the threat of globalisation, which is not a matter of ignoring it but rather of resisting it instead in order to guarantee self-autonomy or a multi-polar global system.

After the lively and sustained exchange on African intellectuals, the debate reverted to the question of “development” and “democracy”. At stake was the perennial issue of whether development was a necessary condition for democracy or the other way round. After moving back and forth for about one-third of the whole session, the participants gradually came to the conclusion that the two were not mutually exclusive, as is implied by the idea of a “democratic developmental state”. In turn, the latter concept provoked a return to the earlier debate about the necessity or the dispensability of the state. The majority view was that under the present circumstances in Africa and globally the state was a necessary major player. Mkandawire was most insistent on this point, despite the fact that in his presentation he blamed African intellectuals for concentrating too much on the state. The ultimate question put to those who shared this position was who is going to bring about the institutionalisation of the desired form of state in Africa. No ready-made answers could be given to this question and consequently the participants retreated into anecdotes and personal dialogues or bantering among themselves as if to release tension. It is apparent that African scholars are not sure of the agency of their proclaimed African renaissance or democratic developmental state. They have the conviction but not the requisite sociological knowledge or wisdom. The burden for research in this area might yet fall on the African social scientists themselves. After all, the guiding principle is that men and women can only raise such questions as can be answered.

Finally, a special appeal was made to Mkandawire that he should continue from where they left off in *Our continent, Our Future*. It was felt that it is not enough for African economists to deconstruct the World Bank paradigm, *without offering an alternative for future development in Africa or an African economic perspective for the 21<sup>st</sup> century*. Indeed, Mkandawire told a number of stories

which showed that neo-classical theory was at sixes and sevens, if not totally bankrupt, and that the new generation of economists were able to show this, without meaning to and to the embarrassment of the World Bank gurus. This is just what the participants wanted to hear from a seasoned African economist and, accordingly, demanded a written record of this legacy by someone who has been through it all. Whether this is a burden or an honour, it was left to Mkandawire to decide. In the meantime, we are all waiting with anticipation.

The next submission was by Peter Nyang' Nyong'o in a paper entitled **The Study of African Politics**. According to the author, the paper had gone through various stages. Originally, it was intended to be part of an introductory text on African politics way back in 1978 but events overtook him and his collaborator, Mike Chege. This partly explains the fact that the paper was very much dated. This notwithstanding, Anyang' assured the participants that, while he did not intend to produce a new text, he had every intention of developing the paper further. To this end, he proposed to divide the paper into four parts. Part I reviews the contributions of other social scientists to the study of politics, particularly anthropology, sociology, and "American sources". Part II is concerned with "recent theories" on politics, especially "dependency" theory and political economy. Part III, called "The Present as History", concentrated on the state of the arts. "What is it that we are now doing in studying politics?" This involved a discussion of governance, democracy, and the state. Part III, which had not been written yet but designated as "The Future as History in the Making", was meant to answer the question: "What is African politics likely to be like in the next millennium?"

Against this background, Anyang' started off by discussing the influence of anthropology on the study of African politics. In his view what was most striking and enduring was the classification of African societies into those that had a state (centralized) and those that were Stateless ("acephalous"). This dichotomy was supposed to have certain implications for the study of politics and for the future political development in Africa. Whereas Anyang' inferred that one of the implications for the former was that "acephalous" societies were not amenable to the study of politics, he did not consider the implications for the latter. For instance, did centralized traditional states in Africa predispose the post-colonial states towards authoritarianism? Or *vice versa* can the "acephalous" be used as a model for egalitarianism at the local level in a way that is reminiscent of Nabudere's model? Among other things, this would mean that, if there was "tribal equilibrium" as anthropologists were inclined to believe, it did not connote the same thing. In passing Anyang' had observed that the anthropologists were not

interested in analysing internal or external contradictions. A more dynamic approach to African politics would have to investigate these in a historical perspective so as to illuminate the present, instead of limiting itself to “tribalism” or “ethnicity”.

The next topic Anyang’ introduced was “American sources”. This referred specifically to American “behaviouralism” which is supposed to have overthrown both British political philosophy and structural-functionalism as espoused by Talcott Parsons and Max Weber (Max Weber might have influenced Parsons but he was no structural-functionalist, as is shown by his ideal-type constructs such as “charismatic leader”, “traditional leader”, and “modern bureaucracy”). The latter aside, Anyang’s main target was Systems Analysis as advocated by David Easton (1965). Easton’s behaviouralism became very influential, especially in East Africa, as is shown by the earlier work of such writers Goran Hyden, Martin Doornbos, and others. Nevertheless, it is debatable whether it overthrew structural-functionalism or even British speculative or interpretative political philosophy that was stoutly maintained by Ali Mazrui throughout, despite its gross under-representation in Africa. In the mid-1960s when James Coleman was in East Africa, he managed to establish some form of neo-structural-functionalism, which was in effect a return to the anthropological tradition of looking at politics from the point of view of existing institutions and structures and not from the point of view of competitive incumbency. This is where tradition is supposed to shape the emerging new structures. This is best exemplified by the volume entitled *Government and Rural Development in East Africa: Essays on political penetration* edited by L. Cliffe, J. S. Coleman, and Martin Doornbos (1966). In addition, behaviouralism was in competition with modernisation theories in Africa (David Apter had joined the club as far back as 1961; see his *The Political Kingdom in Uganda*) that made individual behaviour contingent on *value-orientation*. It transpires, therefore, that Anyang’s suppositions or assertions about the influence of the various sources he alludes to on the growth of political science in Africa need further investigation.

Anyang’ makes an interesting supposition that behaviouralism in the social sciences in general was instigated by the American desire to provide a bank of knowledge on the “new nations” that was serviceable to American imperialism. This claim, plausible as it is, would be very difficult to verify. But to validate his case, Anyang’ referred the participants to the programmes of the Committee on the Comparative Study of New Nations that was officially sponsored in America. Interestingly enough, to back up his hypothesis, he refers to the Latin Americans who, unlike the Africans, were “not impressed with behaviouralism” but instead detected its imperialist underpinnings. In his view,

this claim finds confirmation in Raul Prebisch's work that inaugurated the "dependency" theory in Latin America, which found its highest edification in the writings of Gunder Frank. Here, it is obvious that Anyang' is laying the ground for the theoretical negations of behaviouralism *a la Americana*. Indeed, in the early 1970s the *dependencia* theory took the centre stage in development theory in Africa. Although it was not limited to political science, it had a great impact on political scientists with leftist leanings. Among these may be mentioned Colin Leys who worked on Kenya, Bonnie Campbell who worked on Cote d'Ivoire, and Claude Ake who worked within a general Pan-Africanist framework. However, as Anyang' pointed out, it was Walter Rodney, the historian from the University of Dar es Salaam who popularized the *independencia* theory in Africa in his best seller, *How Europe Underdeveloped Africa* (1971). What does this tell us about the bulk of African political scientists? Anyang' was disturbingly silent on the latter.

Nonetheless, he saw Political Economy as another important source in the development of political science in Africa. While approving of Political Economy as a useful general framework within which to work, he accused it of being reductionist in that in its concern about the economic base and the political superstructure it forgot about the "actors". He commended the so-called Dar School for having made a detailed study of the "bureaucratic bourgeoisie" in the East African countries. But even in this case, he contended, the emphasis was on the "dominant" classes and not so much on the "dominated" classes. As a corrective to this, he referred to the Kenyan Debate towards the end of the 1970s (see *Review of African Political Economy*, 20, 1981) in which they sought to find out what the various categories of actors were actually doing. According to him, this helped them to comprehend class-formation not in terms of only two major classes (the classical dual model). For all he could see, Anyang' believes that during the period in hand African politics became a study of authoritarianism. Unhappily, this assertion does not tally with Anyang's other claim that from "1968 to the 1980s very little was written on African politics". If so, how did "authoritarianism" become a major pre-occupation?

It is quite conceivable that Anyang's estimation is uninformed and, therefore, unjustified. The period between 1968 and 1975 was dominated largely by the *dependencia* theory, which did not have politics as its field of reference. It could be said that the period between 1975 and 1985 was dominated by political economy, which did not make any distinction among the disciplines. However, from 1986 onwards **democracy** became the major pre-occupation among African social scientists. Although the debate was open to all, the political scientists predominated by far. Reference could be made to well-known African political scientists such as Claude Ake, Mamndani, Ibbo Mandaza, Nzongola,

Tandon, Molutsi, Sithole, Nnoli, Jinadu, Jibrin Ibrahim, Founou, and Peter Anyang' himself. This could have been a prelude to the democratization movement that reached its climax in 1990. If these representations are considered "very little", then what about the period thereafter in which the debate on **ethnicity** became almost an obsession among political scientists of all generations. Virtually, all the political scientists enumerated above engaged vigorously in that debate throughout the 1990s. But, in addition, there was a whole crew of younger African political scientists, most of whom participated in the multi-national project on **Ethnicity in Africa** sponsored by CODESRIA and coordinated by Nnoli. Their exact composition, numbers, and their individual contributions are readily available in CODESRIA, which is now headed by one of their leading lights, Adebayo Olukoshi. There is, therefore, absolutely no justification for Anyang' to have ignored all this wealth and to limit his references on African political scientists to only four members of the old guard. It is also worth noting that Anyang's systematic review of the growth of African political science stopped where *dependencia* and political economy ended i.e. the mid-1970s. Thereafter, he broke out into an unsystematic discussion of a variety of interesting topics about African politics. For somebody who is actively involved in politics, this is perfectly understandable. But it might not be what was expected, as the discussion that followed his presentation will show.

The first question that was raised after Anyang' had rested his case was on the anthropological connection in the development of political science. Was the anthropological heritage facilitative or detrimental? Immediately, Anyang' could not say "yes" or "no" because he had not considered in any depth the negative impact its designating categories might have had on the conceptualisation of the questions that political science sought to answer. He was clear on the question of invention of "tribalism" and graciously deferred to the "Dean of tribalism", namely, Archie Mafeje whose seminal paper on the subject that was published in 1971 led to a turn-about in the thinking of African social scientists about the bogey of tribalism. The same was not true of the question of "ethnicity" that has been with us for the last twenty years. Democratic "pluralism" presages that "ethnic" identities be recognised. But the fissiparous tendencies to which this leads have proved bothersome. "Ethnicity" is definitely not a colonial invention but that of the African nationalists in retreat. Although not referring to this specific point, in the course of the discussion Anyang' made a very pertinent observation, namely, that the post-colonial state was not solely a colonial invention but that of the African nationalists as well. It is conceivable that "ethnicity" is indeed a creation of beleaguered African leaders or presidents for life. But then this thesis is contrary to the presuppositions of

those who consider recognition of such local identities as a necessary condition for democratic pluralism. Any political scientist, let alone a practicing politician, would be hard put to deny this moral claim. This granted, what would be the social and philosophical limits to such claims? Could some of these claims be spurious or simply anti-revolutionary? This question could have provided grounds for a hot debate between Anyang' and Nabudere who was the designated discussant but during the discussion they were interested in complementing each other than on crossing swords. Thus, everybody kept skirting around the issue of ethnicity in Africa. Was it a matter of interpretation or a substantive issue? Was it a question of expediency or a matter of principle? The issue became so intractable that the philosopher participant from, significantly enough, Ethiopia suggested that the issue should be dealt with "from case to case". Philosophically understood, this meant that the issue could not be theoretically clarified and could only be dealt with substantively. Interestingly enough, the same speaker at another critical moment surmised that the phenomenon might be transient, given the fact that in another few decades the majority of the African population will live in the urban areas where local identities will matter less. As would be expected of any philosopher, this was a perfectly logical inference but does not exhaust the field of discourse. Ethnicity is not a rural phenomenon. It is only invoked in the rural constituencies by national leaders who are usually based in the urban areas. As a matter of fact, it manifests itself most strongly in African central bureaucracies where contestation for power is most concentrated.

Although Anyang' in his presentation gave the impression that anthropologists were concerned only with tribes and their equilibrium, this is not entirely true because they had carried their mischief to the urban areas. They found "tribal associations" in virtually every African city. This is so much so that one of them, Max Gluckman, objected to their tribal fixation and declared that "when an African comes to town, he is urbanized" and that "an African miner is a miner like any other miner in the world". These were very brave pronouncements but they did not change the anthropological paradigm. Nevertheless, even within that paradigm there were some very beautiful urban studies that became classics in their own right. Among these may be mentioned E. P. Epstein's *Politics in an Urban African Community* (1958) and Mitchell's famous *Kalela Dance* (1956). These were intellectually inspired and intellectually inspiring studies by the *avant-garde* British anthropologists but they could not comprehend the behaviour of Africans, except in the tribal metaphor, irrespective of the context. Thus, their texts were mistaken in conception but not in ethnography detail. In other words, there is every possibility of deconstructing them, without denying their ethnographic relevance in a social historical perspective. This is

thoroughly consistent because at some point in the discussions there was a complaint that while African political scientists insisted on Afrocentrism, they seemed to be ethnographically innocent, unlike the anthropologists. Accordingly, the participants emphasised the necessity of an ethnographic grasp in the study of African politics. The question is no longer who are these people you are talking about but rather what are they about. In other words, the *Kalela dance* by the Kalenjin-speakers is not just a dance but a statement that could be understood otherwise i.e. decoded. Such great attention to ethnographic detail could explain the apparent incoherence of African social formations and the authorship of current authoritarianism in Africa, without assuming an original sin.

From the point of view of political science, this takes us further away from political economy and drives us towards some form of particularism. Indeed, some participants complained not so much about the universalist pretensions of political economy but more about its leveling effect where distinctions among various forms of existence and being are reduced to a “common denominator”. Interestingly enough, from an academic point of view, some felt that not only does this lead to superficiality but also to the disappearance of disciplinary boundaries. This was an interesting *volte-face* on the part of those who so spoke because in another context they are known advocates of interdisciplinarity and in the discussions in the workshop they were dabbling in all sorts of subjects. This points to the need to outline the legacy of the various social science disciplines so as to be able to see more clearly their weaknesses and strengths and their undeniable lines of convergence. Although this seemed to be a contradiction in terms, after some exchange of views the participants agreed that the fault lied not in political economy but in the indolence of those who used this approach. It was argued that, as the work of classical economists such as Ricardo demonstrates, political economy is not incompatible with detailed and painstaking studies. This was an interesting resolution of the problem. But it did not solve the problem of the disciplines in that ideography is what is supposed to distinguish the social sciences from the humanities. In the meantime, there is evidence of growing convergence between the humanities and the social sciences e.g. anthropology and social history, cultural anthropology and literary criticism, and possibly economics and social philosophy, as will be seen in the next section. Finally, it was pointed out that political economy was not necessarily radical. Nonetheless, those who claimed so did not carry this point to its logical conclusion by declaring that political economy is positivist, as Marx did in his *Critique of the Political Economy*. The relevance of this would be that those African social scientists who chose to use this approach combined it with neo-Marxism which, ostensibly, would be anti-empiricist and openly normative e.g. against exploitation or poverty. It is apparent that African social scientists have a number of theoretical and



methodological issues to clarify for themselves. Perhaps, this is why the organizers decided to invite at least one philosopher.

Appropriately enough, the following day started off with a presentation by Andreas Eshete. His was an oral presentation in the absence of a written text. Nevertheless, he honoured his brief, as is shown by his opening remarks: “In general I will speak on how philosophy, in particular social and political philosophy, influenced the social sciences. The idea being that this might be useful ..... to the exercise that we are undertaking here”. In a very systematic and consistent manner, as it behoves a philosopher, he sought to show first of all how there was a shift in philosophy from an obsession with the “epistemic” which gives priority to conceptual issues to a concern with substantive issues. He attributes this *gestalt* shift to the impact of social movements such as the anti-Vietnam war movement and the civil rights movement in the United States, and to factors that were internal to philosophy itself. According to him, this shift in perspective was inaugurated by John Rawles’ seminal work, *Theory of Justice* (1951). He credits Rawles for having tackled headlong substantive issues in philosophy for the first time. This as it may, there is some doubt about the critical effect of the social movements cited because he anticipated them by a good ten years. Irrespective of the possible disjuncture in chronology, what emerges is that Rawles reinstated “contractarianism” as against the utilitarianism of the 19<sup>th</sup> century. This idea was certainly going to have a great appeal to Nabudere, who in his presentation advocated a “new social contract” in Africa. This would be compatible for, according to Eshete; Rawles was not very Catholic with respect to methodology and thus borrowed freely from other disciplines such as the social sciences, choice theory, and history.

In both theory and methodology Eshete found a definite affinity between Rawles and Sen. To justify his case, he referred the participants to Sen’s *Developmental Freedom*, which was based appropriately enough on his address to the World Bank. Like Rawles, Sen is credited for having evolved a concept of justice that should inform social development or existence. In Eshete’s view this echoes back to the classical economists who were concerned not only with economics but also with social issues. He warned his listeners that they would be surprised to learn that Adam Smith believed that economic development depended on historical and cultural contingencies. While he upheld the principle of sensitivity to difference, Eshete resisted the idea of dividing the world into “localism” versus “cosmopolitanism” and described the belief that “there are only local stories to tell” as “anti-theoretical”. While he would not commit himself to universalism, he maintained that all societies have the same problems and that the only difference is that the developed countries do not recognise this. They are, therefore, impervious to the fact that by helping underdeveloped countries

to solve their problems, they are by the same token solving their own problems. This is what the theory of justice would predicate. But this would be at variance with *actually existing* imperialism. The theory of justice might be able to re-define the terms of reference but it cannot guarantee their translation into practice. This is not a philosophical question but a political one. In practice how does one get the developed and underdeveloped countries to identify with one another? For the time being, it must be acknowledged that, if universalism exists, it exists in *contradiction*. This poses a very serious dilemma for intellectuals in the Third World. “International justice” is a perfectly logical construct but one that is very difficult to realize in practice. As Eshete hypothetically asked, if national resources are constitutionally recognised as common property, why cannot the same apply to world resources? We all live on the same globe and suffer equally the consequences of development in any part of the world. In Eshete’s view, this renders any rules of exclusion illogical and irrational. He believes that it is important to make this apparent to the developed countries. But, from all appearances, it seems that enlightened self-interest is harder to administer than the quest for relative advantage. Eshete asked rhetorically: “What exactly are the obligations of the well-advantaged to the rest”. He wanted to know whether this should be seen as a matter of charity, as an obligation to humanity, or a matter of justice. To those who are on the receiving-end, the answer is self-evident.

Interestingly enough, when it came to the discussion, the questions raised were mainly technical and not social philosophical. For instance, quite a number of participants sought an evaluation of the representations of known black pretenders such as Mudimbe, Apiah, Cornell West, and Sergut Berhan. First, Eshete noted that he tried to talk not so much about the influence of philosophy on the social sciences but rather about the impact and relevance of the new social and political philosophy. Having said so, he pointed out that this tends “to exclude a great many African and African-American philosophers”. He cautioned that this does not mean that they do not address public issues but that they do so “sometimes naively, sometimes not so naively, *but as activists*”. To illustrate his point, he used Edward Said (perhaps, unjustifiably since he is not a philosopher) as an example. He observed that Edward Said draws a lot from philosophy in his work “but where philosophy has a bearing on his work, it is on his work on culture –not on the Palestinian issue. “On the Palestinian issue he speaks much the same way that Chomsky would be talking about journalists – he speaks as a public intellectual not as an academic”, he elaborated. Edward Said’s representations notwithstanding, in the course of the discussion it transpired that Africans and African-Americans who have philosophical pretensions have a better market value as public intellectuals rather than as academics. It seemed that this

was one explanation why they did not feature in the new social/political philosophy and did not engage in the debate on the theory of justice.

The next point of interest was the post-modernists, be it in an ambivalent way or outright skepticism. If there were still any lingering doubts about the post-modernist philosophers Eshete was more than willing to disillusion those concerned. Contrasting them with the philosophers of justice such as Rawles and Sen, he stated quite unequivocally: “Post-modernists are people who are skeptics about the very project of justifying anything. They are confident that any project of justification can be shown to rest ultimately on considerations of interest, on contingent things. Ethical justifications, rational justifications, or writing, conversation on anything like that they think are epiphenomenal. “So most of the stories they tell are negative stories about how everything can be unmasked.....Of course, one can see for instance why it is that people from the Third World would be drawn to that unmasking because there is a great deal to be unmasked”, he concludes. It appears, therefore, that the project of the post-modernists is deconstruction, without reconstruction. As of now, Eshete informed the participants, post-modernism has been naturalized by Americans and is of no consequence in its native France. However, this did not exhaust the discussion on post-modernism for, as Eshete himself acknowledges, the most interesting and striking work inspired by post-modernists is in anthropology. As is known, writers such as Rorty, Fabian, and Escobar contributed greatly to what came to be known as “critical anthropology” or “reflexive anthropology”. Although championed by Northerners, this had a bearing on anthropology in Africa where anthropology loomed large among the social sciences and where there was the greatest pressure to “decolonise” anthropology. This means that for those who propose to use anthropological antecedents, there is a compelling need to rethink their theoretical connotations. This also applies with equal force to those who see local communities and “traditional” institutions and forms of social organisation as the probable source of social democracy in Africa. As had been pointed out “cultural diversity” is not without problems and so is the so-called “dialogue between cultures” at the global level. It would appear, therefore, that even in the case of post-modernists a point has been reached where critique of critique has to be seriously contemplated. Eshete pointedly accused the post-modernists of partiality, if not nihilism. Nobody seemed to disagree.

The next and the last oral presentation was given by Archie Mafeje. It was a straightforward account of how anthropology developed as a discipline, its impact on Africa, and of how Africans reacted. In accordance with the terms of reference of the workshop, Mafeje also gave an account of the role he played as an African anthropologist. His main thesis was that anthropology is a child of

imperialism. Not only did it play a critical role in the subjugation of Third World peoples but also was premised on *alterity* i.e. it was based on the epistemology of subjects and objects. This being the case, anthropology was bound to be plunged into a deep crisis by contemporary struggles against colonialism. It had to adjust or die a natural death. In the meantime, the few practising African anthropologists were called upon to lead the way in the deconstruction of colonial anthropology. With a few exceptions, they were not able or willing to do this as a matter of course. Instead, it was some rebellious groups in the North who took the initiative. This did not suffice because they themselves could not dispense with the problem of alterity. Eventually, they gave up the ghost and retreated to where they hailed from or into exoteric subjects, interdisciplinarity, and African studies. This seems to have dissipated colonial anthropology altogether.

For the African anthropologists, Mafeje reported, the decision had already been made for them by their governments after independence. The nationalist governments that were committed to “nation-building” simply banned anthropologists as peddlers of “tribalism”. Consequently, most African anthropologists went underground for a long thirty years. When they emerged in 1991 at a special seminar in Dakar, they seemed totally lost and disoriented. According to Mafeje, who is one of the African anthropologists who did not go underground; this confirmed what he had suspected. He was, therefore, interested in pushing the African anthropologists to justify themselves. To a very large extent, this was all in vain. In the meantime, he continued with his own deconstruction of anthropology that started in 1971 when he published his article, *The Ideology of Tribalism*. This was followed by other works, including *The Theory and Ethnography of the Interlacustrine Social Formations* (“interlacustrine” was the original term used by anthropologists for the Great Lakes region) and *Anthropology and Independent Africans: Suicide or End of an Era*. The upshot of all this was the assimilation of anthropology into social history while emphasising the importance of the study of ethnography in all the social sciences in Africa.

A few questions were put to Mafeje. One of them was whether he found any value in Vansina’s work in relation to his. He answered in the affirmative and argued that a dynamic study of ethnography serves social historical reconstruction. This would manifest itself as a combination of oral or ethnographic texts and “oral tradition” in Vansina’s sense. One of the implications of this is that writing of history is not the monopoly of professional historians. People also write their own history that becomes a justification for contemporary social claims. This is where social history meets ethnography, he concluded. This explanation served as a response to another question as to

how one would reconstruct traditional anthropology, if indeed it has atrophied as a discipline. Anthropology becomes social history, without abandoning its methods and techniques for studying ethnography. Yet, another question was raised in relation to Chiek Anta Diop's work. The reply was that what Mafeje was proposing is in principle the same, except for designation of units of analysis. He believes that Diop's unit of analysis was too wide to be conceptually encapsulating and verifiable. As was pointed out by one of the delineation of units of social analysis cannot help being somewhat arbitrary. But the interesting thing is that once established such conceptual units create new identities that are capable of perpetuating themselves. This is what the invention of "tribes" in Africa is all about. Whether we like it or not, colonial governments and colonial anthropologists created new identities in Africa that are now part of contemporary social reality. This would suggest that there is a constant interaction between chroniclers and their subjects, irrespective of the truth or falsehood of what is being told. The growth of "nationalities" and now "ethnic federalism" in Ethiopia was cited as a supreme example of this. In passing it was noted that indeed African governments are also playing an active role in shaping the development of social sciences, as is demonstrated not only by the banning of anthropology but also by the banning of sociology in both Cote d'Ivoire and Senegal and of political science in Malawi – all for political reasons. This brought to a close the discussion on Mafeje's presentation as well as of all the substantive discussions in the workshop.

## Closing Remarks and Conclusions

It was left to Peter Anyang' Nyong'o, the originator of the project, to make the closing remarks. He reported that a few proposals had been made. One was to give the participants up to March 2000 to produce their final drafts. Second, it had been suggested that a website be open so as to facilitate the posting of the texts and exchange not only among those present but also with those who had been invited but could not attend. In addition, he nursed the idea that those who had not been invited might be able to contribute to the discourse on their own accord. In his view, this meant that, apart from the posting of the papers, the participants would have to have a good write-up that would take off from the one or two pages that went out earlier as a concept paper. He felt that there was a need to rework the latter so that those in attendance knew exactly what the project is all about. He surmised that this would help those who visit the website to understand that the papers presented at the Reflections workshop were "not just collected from all over the place but were produced as a result of a particular concern". With due respect, the idea of a special website was rejected as too expensive and unnecessary. The participants were convinced that alternative means could be found with the assistance of the Heinrich Böll Foundation.

As far as the final product was concerned, he saw two possibilities. One was supposed that each of the participants would write a paper of about fifty pages and that these would be put together in a book form. The other possibility would be to let the participants "feel free to write their contributions as they felt, as the spirit moved them". In this case their contributions could be as long as possible, as short as possible, or whatever but in all instances as solid as possible. In his view, the second option would mean the contributions would be produced as individual monographs – some small and some big – but all self-contained.

In response to Anyang' suggestion divergent views emerged. There were those who cherished the idea of writing just as they pleased. There were those who felt that by so doing their colleagues would open the door to cuckooland. They argued that, as a matter of principle and discipline, the contributors should adhere to the original idea of a sustained review of the growth of individual social science disciplines in Africa accompanied by an auto-critique since any intellectual heritage has its own virtues and lapses. Auto-critique was considered essential so as to guard against any form of intellectual narcissism. Pursuant to this line of reasoning, it was suggested that the review of the growth of the disciplines should not be seen simply as a narrative but also as an exercise in provocation i.e. it should have a cutting edge. Some felt that there was a moral imperative that those who initiated the Reflections project should have the

necessary confidence to expose themselves to criticism by others, which is the surest way of provoking a debate. Great pressure was exerted on the economist to write an account of the development of economics in Africa that went beyond the “Washington consensus” and which indicated the prospects for the 21<sup>st</sup> century. Likewise, the philosopher was invited to write a piece on the contribution of African philosophers to the development of social sciences in Africa. He declined, surprisingly, on the grounds that he was not very familiar with the work of African philosophers. However, he was willing to write a contribution on the impact of philosophy (meaning social and political philosophy) in general on the social sciences. It had been hoped that Zenebework Tadesse would write a piece on the development of feminist studies in Africa and her contribution. But this remained unconfirmed.

After much digression and reminiscing it was more or less agreed that the original idea would be the guiding principle for writing or rewriting the papers. Some felt that the deadline was perhaps too close and unrealistic. But the Heinrich Böll Foundation representative found the proposed deadline convenient for her purposes. As a compromise, it was suggested that, instead of thinking of a compiled volume, the papers could be published as a series according to their availability. Although this suggestion was not strongly contested, there was a feeling that a “unified voice” would have had the right impact. It was also regretted that some disciplines such as history were not represented. Regarding procedure, it was agreed that: (i) all substantive papers would be commissioned and drafts would be circulated to all participants for comments; (ii) Archie Mafeje would act as academic editor for all the papers, taking into account the comments by individual participants; and (iii) once published the papers would serve as a basis for a more inclusive workshop, as was originally envisaged. Finally, it was understood that the Reflections project would last for two years. But the participants could not agree how often they would meet per year. This was partly because they could not vouch for their own adherence to the proposed deadline and projected date of publication of the initial batch of papers. Above all, they did not have a working budget since this could not be guaranteed in advance.

The workshop was considered a great success, in spite of the low attendance. The organizers were satisfied that where things did not work out the way they wanted it was not because of lack of effort. The determination to canvass more support for the project remained, despite the practical difficulties and sensibilities mentioned at the beginning of this introduction. Out of expediency, the idea of publishing the papers in a series as they become available has been adopted. The first in the series will be Archie Mafeje’s paper entitled **Anthropology in Post-independence Africa: End of an Era and the Problem of Self-definition.**

# Law, The Social Sciences and the Crisis of Relevance

## A Personal Account

### Introduction

The crisis of the social sciences and their loss of relevance as single disciplines have a history of their own. The roots however lie in the original constitution of what. The constitution of the modern *episteme* dates back to the end of the eighteenth and the beginnings of the nineteenth centuries. This period marks two great discontinuities in the *episteme* of Western culture [Foucault 1970, 1994].

The first, which gave way to the modern episteme, was the Classical Age, which ran through the second half of the seventeenth up to the middle of the eighteenth centuries. The second begins towards the end of the eighteenth and the beginnings of the nineteenth centuries, which he calls the ‘modern age’. The first period is marked by the prevalence of coherence between the theory of representation and the theories of language, of natural orders, and of wealth and value. In the second period, language as the spontaneous *tabula*, the primary grid of things, ‘an indispensable link between representation and things’ emerges and takes control in the “order of things”.

From now onwards ‘a profound historicity penetrates into the heart of things’, isolates and defines them in their own coherence. It ‘imposes upon them the forms of order implied by the continuity of time’ which it also defines to begin with ‘modern time’. During this period, the theory of representation, which ruled in the first phase of western episteme, disappears as the universal foundation of all the possible orders [Foucault, 1970, 1994: pp. xxii-xxiii].

In the new episteme, a number of efforts are made to classify the domains of knowledge on the basis of mathematics. These efforts enabled the establishment of hierarchy to provide a progression towards the more complex and the less exact situations. It also enabled the reflection on empirical methods of induction and a formal justification, the endeavour to purify, formalize, and possibly mathematicize the domain of economics, biology, and finally linguistics itself. Foucault adds:

“In the counterpoint to these attempts to reconstitute a unified epistemological field, we find at regular intervals the affirmation of the impossibility: this was thought to be due either to the irreducible specificity of life (...) or the particular character of the ‘human sciences’, which were supposedly resistant to all methodological reduction (...). This double affirmation ... of being able to formalize the empirical, perhaps we



should recognize the ground plan of the profound event which towards the eighteenth century, detaches the possibility of the synthesis from the space of representation. It is this event that places formalization, or mathematicization, at the very heart of any modern scientific project; it is this event, too that explains why all hasty mathematicization or naïve formalization of the empirical seems like ‘precritical’ dogmatism and a return to the platitudes of Ideology [Ibid: 246].

Therefore, Foucault adds, the first thing to observe is that the ‘human sciences’ did not inherit a certain domain. Instead it was allowed ‘to lie fallow’ and this imposed on them the task of elaborating ‘positive methods’ and with concepts that had, at last, become scientific. The eighteenth century did not hand down to them, in the name of man or human nature, a space, circumscribed on the outside, but still empty, which it was then their role to cover and analyse. It had no philosophy, no political or moral option, no empirical science of any kind, no observation of the human body, no analysis of sensation, imagination, or the passion it had ever encountered. These appeared when man constituted himself in Western culture as both that which must be conceived of and that which is to be known [Ibid: 344-5].

“What explains the difficulty of the ‘human sciences’, their precariousness, their uncertainty as sciences, their dangerous familiarity with philosophy, their ill-defined reliance upon other domains of knowledge, their perpetually secondary and derived character, and also their claim to universality, is not, as is often stated, the extreme density of their object; it is not the metaphysical status or the ineradicable transcendence of this man they speak of, but rather the complexity of the epistemological configuration in which they find themselves placed, their constant relation to three dimensions that give them their space” [Ibid: 348].

In trying to trace the crisis of the dilemma in which the ‘human sciences’ found themselves in through my own experience as a consumer and propagator of the social sciences, I shall relate the development of my own intellectual growth through these western paradigms and their underlying episteme and show how, in response, I utilised them to engage in political and social discourse as well as in political and social action within society and the community at large. The idea here will be to discover to what extent social theory was a reliable agent in the evolution of my own thought and action. The idea will also be to find out whether such knowledge was the basis of the discourse and action through my initial discipline of law in which I was educated and practised as a barrister-at-law and advocate of the High Court.

As Foucault has pointed out above, the epistemological field that was elaborated by the social and human sciences in their struggle for existence and relevance evolved and took shape over time. As they emerged, they served the purpose

for which they were intended and elaborated and they changed shape to fit themselves with the environment in which they found themselves. They increasingly took on an ideological content because in fact they had no any scientific basis. They turned out to be the ideological expression of the interests of the dominant classes in society nationally and globally. They highlighted certain ideas while at the same time obscuring others which expressed the views and aspirations of the dominated classes and societies. In the end, their relevance was challenged by the struggles that were put up by the classes most adversely affected by their articulation. We begin our journey with the way law emerged as a discipline and how it served those interests that created them and challenged by those who were disadvantaged by them.

## Law as Theory and Ideology

In the field of law and the evolution of the legal system, the nineteenth century was also of significance in laying down the parameters within which Western jurisprudence evolved. The emerging dominant social forces began to articulate those ideas that were deemed necessary in order to promote the new order which need its own certainties and frame works. In the later centuries, different kinds of interpretations as what the proper ‘province of law’ was emerged and as it progressed the very basis of the discipline was exposed as ideology of vested interests.

### i) English Legal Positivism

As part of the emergence of the new episteme, a positivist empirist atmosphere developed in which certain new ideas were claimed to be sacrosanct in the face of old, opposing ideas and ideologies. It was in this context that the early legal theorists began to articulate what later became the dominant legal ideology that guided and intervened to direct social relations.

John Austin, in the Anglo-Saxon jurisprudence was the first to lay down a positivist legal ideology that counterpoised itself to the natural law paradigm, which served the interests of the feudal ruling classes. In his now classical work: *The Province of Jurisprudence Determined*, Austin represented the new religious utilitarian forces which had interest in developing capitalism as a new mode of production against the old feudal production and social relations. He developed a legal theory and philosophy called “Legal Positivism” which, according to Hart, “like most terms was used as a missile in intellectual battles”. Austin and, to some extent, Bentham insisted on the need to distinguish “firmly and with Maximum clarity *law as it is from law as it ought to be*” [Hart, 1958: 593].

The intellectual battles waged here in this theoretical formulation was that between the new “positivists” and natural law proponents like Sir William Blackstone who in his “commentaries” argued the need for continuity between the “laws of God” which were superior to all human laws and the human laws which should not contradict them. This was because all laws “derive their force from that Divine origin”. To this Austin retorted:

“Now, he may mean that all human laws ought to conform to the Divine laws. If this be his meaning, I assent to it without hesitation... Perhaps, again, he means that human lawgivers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard, because if they do not, God will punish them. This also I entirely assent... But the meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: that no human law which conflicts with the Divine law is obligatory or binding; in other words, that no human law which conflicts with the Divine law is a law....” [Quoted in Hart: Ibid: 249-50].

To this Austin could not assent, because it blurred the distinction between “*law as it is and law as it ought to be*”. Hart argues that this insistence by Austin is too general and it is a “mistake, whatever our standard of what ought to be, whatever the text by which we regulate our approbation or disapprobation”. He argued that Austin’s examples are confusion between law as it is and law as morality would require it to be.

For Austin, the fundamental principle of morality was God’s Commands to which utility was an “index”. Besides this, there was the actual accepted morality of a social group or what he called “positive morality”. Bentham in postulating this distinction did not do so in reference to God, but only by reference to the principles of utility. His characterization of the new legal order was: “*obey punctually; censure freely*”.

Whatever be Austin’s “mistakes”, in his condemnation of natural law thinkers of the earlier period who had blurred this distinction, his affirmation was total and categoric. It had confidence of the new order. Although Hart points out that the separation between morals and law was “superficial and wrong” because it “blinds men to the true nature of law and its roots in social life”, he nevertheless observes that after Austin had expounded his theory, “it dominated English jurisprudence and constituted part of the framework of most of those curiously English and perhaps unsatisfactory production – the omnibus surveys of the whole field of jurisprudence” [Hart, *Ibid*: 594-600].

But why? Hart comes to his senses when he recognizes that the significance of what Austin was trying to theorise lay in “two simple things”. The first was that in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and secondly, in converse could follow from the mere fact that a rule was morally desirable that it was a rule of law.

Hart, accepts that both Bentham and Austin agreed that by explicit legal provisions, moral principles might at different points of time be brought into a legal system and form part of its rules. They had also agreed that courts might be legally bound to decide on a matter in accordance with what they thought just and best. Austin differed and argued that even then the restraints on the supreme legislative power could not have the force of law, but only remained merely a political or moral check.

Indeed with his firmness and certainty, Austin was declared by his followers to have delivered the law “from the dead body of morality that still clung to it”. Even Maine, in his *Ancient Law*, who was critical of Austin on many issues of

his work, did not question his doctrine on this essential issue. Later jurists such as Green, Gray, and Holmes agreed that Austin's insistence on the distinction had "enabled the understanding of law *as a means of social control* to get off to a fruitful new start". They welcomed it both as self-evident and as illuminating – "revealing tautology" [Ibid: 251-2]. Hart quotes Gray who wrote *The Nature and Sources of the Law*, at the turn of the last century as saying:

"The great gain in its fundamental conceptions which jurisprudence made during the last century was the recognition of the truth that the Law of a state is not an ideal, but something which actually exists... [I]t is not that which ought to be, but that which is. To fix this definitely in the Common Law, is the feat that Austin accomplished" [Quoted Ibid: 252].

Thus we come to the conclusion that the utilitarian conception of the Law, as a break from the past, was a categorical statement that law is what the Sovereign in the name of Parliament said it to be. It was a command of the Sovereign. It no longer could be said to be valid on the grounds that it accorded with divine or "natural-law". It was law expressing the "positive morality" of the bourgeoisie. It was a starting philosophical and ideological statement. It was not ideal, nor preferred. *Law was because it was*. The fact that the affirmation was a tautology did not matter. It was a useful and "revealing" tautology – an emancipating statement and a step forward from the Old Order.

Maine had hit the same point in a different context in his own treatise on ancient law he had noted that the movement of the "progressive societies" had been uniform in one respect: it was a movement from family dependence to the growth of the individual obligation in its place. In a famous dictum he concluded: "we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract" [Maine, 1917: 99-100].

In similar manner, Max Weber observed that subjection to the special law was initially a strictly personal quality, or status in Maine's usage, a 'privilege' which was acquitted by usurpation or grant and thus it was a monopoly of its possessors who, by virtue of that fact, became 'comrades in law, according to ethnic, religious, or political characteristics of the component groups'. In his view, the increasing integration of all individuals and all "fact-situations" which capitalism had made possible had led to "legal equality" to be achieved "by two great rationalizing forces". These were first the extension of the market economy and secondly, by bureaucratisation of the activities of "organs of the consensual communities". These had replaced the particularistic mode of creating law, which was based upon private power or the privilege granted to monopolistically closed social organizations by the Sovereign [Shils, 1954]. With the new order, this had come to an end.

## ii) German Historism

This overwhelming ideological push that characterized Legal Positivism prevailed even in areas where other legal philosophies emerged. This happened in those areas where capitalism had taken more time to become systemised. For instance, in Germany because of the relative under development of capitalism, Savigny in his *System of Modern Roman Law*, a translation of which was first published in 1867 by the American Bar Society had argued somewhat a different theory. In his book Savigny put forward what has been called the Historical School of jurisprudence in which he propounded the relevance of “positive law” which lay in the “general consciousness of the people”.

According to Savigny, there is a “people’s law” (*Volksrecht*) which was the product of their lived experience reflecting “the spirit of a people living and working in common in all the individuals. It was this “peoples law” that gave birth to the positive law. It was the consciousness of individuals not by accident, but rather by “necessarily one and the same”. He wrote:

“Since therefore we acknowledge an invisible origin of positive law we must as to that origin, renounce documentary proof; but this defect is common to our and every other view of that origin, since we discover all people who have presented themselves within the limits of authentic history an already existing positive law of which the original generation must lie beyond those limits” [Savigny, 1867].

According to Savigny, such original positive law had its proof in the universal, uniform recognition of possible law and in the feeling of “inner necessity with which its conception is accompanied”. This feeling expressed itself “most definitely in the primeval assertion of the divine origin of law or statutes – a more manifest opposition to the idea of its arising from accident. Its arising from the human will was not to be conceived. He added:

“A second proof lies in the analogy of other peculiarities of peoples which have in like manner an origin invisible and reaching beyond authentic history, for example, social life and above all speech. In this is found the same independence of accident and free individual choice, the same generation from the activity of the spirit of the people working in common in each individual; in speech too from its sensible nature, all this is more evident and recognisable in law” [Ibid].

Far from being abstract in nature, it was to be found in the living intuition of the institutions of law in their organic connection, so that when occasion arose for it to be conceived in its logical form, this had first to be formed by a scientific procedure from that of total intuition. In this view, the origin of positive law is the establishing force of such a law. Its constant preservation is effected by tradition, which is conditioned by ever-gradual change of generations. Savigny

for this reason recognised the importance of *customary law* through which the invisible thing becomes operative in external act when it steps forth in usage, manners, customs – in the uniformity of continuing and, therefore, lasting manner of action. Customary law in this concept is the “badge and not a ground of origin of positive law”.

This expression of faith in people’s law by Savigny reflected a general trend of the time, which manifested itself in the Romantic Movement that was a response to the rapid change of industrialisation. The movement was a reaction against the scientific rational spirit of the enlightenment that dominated European thinking in the eighteenth century. The movement appeared in the early nineteenth century and had a powerful influence on Jurisprudence and legal theory.

But despite the romanticism, the new age had caught on with Germany as well and the spirit of rationality and positivism was reflected in the demand for codification of German law at a time when a demand for German unification also picked up pace. Local customary law influenced by received Roman law ideas led to a sophisticated civil law code for the modern German nation, which was adapted in 1896 and became effective in 1900. From then onwards, Austin’s dictum also applied here despite the historical difference and this reflected the confidence of the German bourgeoisie against the old order.

Norbert Elias has said of this development in his important book: *The Civilizing Process*, that whereas in France and Britain, the concept “civilization” was widely used to play down particularities in order to emphasize what was common to all human beings, in Germany, on the other hand, the preferred concept was “*Kultur*” or culture which emphasized national differences and the particular identity of groups. Hence their stress on culture, tradition, language as aspects of identity [Elias, 1994:7]. He adds:

“Whereas the concept civilization has a function of giving expression to the continuously expansionist tendency of colonizing groups, the concept *Kultur* mirrors the self-consciousness of a nation which had constantly to seek out and constitute its boundaries anew, in a political as well as a spiritual sense, and again and again to ask itself: “what really is our identity?” [Ibid:]

The two philosophical approaches to the understanding of law in England and Germany influenced the developments in other countries. So that although legal positivism became the dominant philosophical school, elements in the historical school could be discerned in their common law arguments, while in Germany, the rise of the market economy meant the adoption of positivist positions and vice-versa.

### iii) The Marxist Challenge

Karl Marx and his collaborator Frederick Engels saw matters differently. According to Marx, law could not apply to all human beings equally. Equality before the law, or what Max Weber called “Legal Equality”, was in fact an ideology of the ruling class – the bourgeoisie. For him the idea of ruling classes were *in every epoch*, the “ruling ideas” of that epoch which meant that the class, which was the ruling material force of society, was at the same time its ruling intellectual force.

Hart was saying the same thing albeit in an obscure way when, in criticising John Austin’s legal positive, pointed out that the distinction that Austin made between law as it is and law as it ought to be was “superficial and wrong” on the ground that it “blinds men to the true nature of law and its roots in social life.” This is too broad and obscured the class character of law as Marx saw it, but he was nevertheless pointing to the same issue.

For Marx and Engels the institution of the state that operationalised the law was itself a class institution. In his *Origins of the Family, Private Property and the State*, Engels had traced the development of the state from the family to the emergence of private property. He had pointed out that the state had never existed from eternity. Indeed there were Societies, which had managed without it and the notion of state power. He concluded.

“At the definite stage of economic development, which necessarily involved the cleavages of society into classes, the state became a necessity because of this cleavage. We are now rapidly approaching a stage in the development of the production at which the existence of these classes has not only ceased to be a necessity but becomes a positive hindrance to production. They will fall as inevitably as they once arose. The state will inevitably fall with them. The society which organizes production a new on the basis of free and equal association of the producers will put the whole machinery where it will belong-into the museum of antiquities, next to the spinning wheel and the bronze axe.” [Engels, 19...]

Marx and Engels in the *German Ideology* pointed to the fact that the modern state was a product of modern private property, which the bourgeoisie had captured by means of taxation and through the national debt whose existence had become dependent on commercial credit, which they extend to it.

“Through the emancipation of private property from the community, the state had become a separate entity, besides and outside civil society; but it is nothing more than the form of organization which the bourgeoisie necessarily adopt both for internal and external purpose for the mutual guarantee of their property and interests.” [Marx and Engels, 1947]



In this way, the two saw the development of the civil law as having grown simultaneously with private property out of the disintegration of the natural community. In this civil law, existing property relations and their relevant legal form were declared to be the result of the general will, and this illusion further led to the development of private property. That is why Marx and Engels referred to ideology as “false consciousness” of a class, but with a functional basis in capitalist society which promoted private property: “Hence the illusion that law is based on the will, and indeed on the will divorced from its real basis- on free will. Similarly the theory of law is in its turn reduced to actual laws” [Marx & Engels: I bid]. Here Marx and Engels were referring to “free will” in the context of the “will” of the bourgeois Sovereign-namely the collective will of the bourgeoisie as a class represented by the “Sovereign”

The ideological forms, which has been summarized above, constitutes the real basis upon which law as part of the social sciences, was entrenched in the service of the modern market and bourgeois state. The understanding of this ideological background which was called Jurisprudence is crucial to the understanding of how law was crafted to serve these interests and how it finally came to act as a social control mechanism, which along with education, helped to constitute national culture based on capitalist production.

It was in the course of the development of these ideologies that capitalism extended beyond the European national boundaries to colonise non-European communities and societies that now became subjugated to the same ideologies. Law, which sometimes took the form of “customary law”, served the same objective: the interests of the imperialist bourgeoisie as a social force.

## Reception of Law in African Colonies

The operationalisation of bourgeois law its legal systems were not restricted to the metropolitan centres. It was exported, imposed and adapted to service the interests the bourgeoisie had acquired in the newly acquired territories. Robert Seidman [1968-69,] has pointed out that because of the cast of the English legal culture which coloured many Anglophonic African countries it had become accepted that the residual law of Africa was English law. He pointed out that this was not by accident, but the result of calculated colonial policy, which resulted in the export of these systems to the colonies.

The apologists of these claims, according to Seidman, made three benefits, which they said accrued to the African countries by adopting such a system. The first was that the beneficial provisions of the Welfare State that existed in Great Britain could ameliorate the “harshness” of the unrealised expectations of rapid economic development and the contract law. The second argument was that politically English law embodied fundamental democratic rights, which the colonies could benefit from. Thirdly it was claimed that common law, methodologically expressed a “pragmatic temper” that allowed it to accommodate changing circumstances of time and place.

Yet the claims of the apologists were not borne out by the historical facts of how English law was “received” in the African colonies. The reception statues on the face of it included English “common law”, the doctrines of equity and Statutes of general application. Under the Gold Coast Supreme Court Ordinance of 1867, the first such law in British African Colonies, stipulated that:

“The common law, the doctrines of equity, and the statues of general application which were in force in England at the date where the colony received a local legislature, that is to say on the 24<sup>th</sup> day of July, 1870, Shall be in force in the jurisdiction of the courts”

In East Africa, the reception of English laws was by way the 1899 Order-in-Council- the ‘order’ being made ostensibly in the name of the Sovereign (the King/Queen of the United Kingdom and Ireland) on the advice of the privy council. In Uganda and the East Africa protectorate, the Order-in-Council of 1902 replaced the 1889 order with a proviso granting the newly created high court jurisdiction to be exercised “so far as circumstances, the Indian Civil Procedure, Criminal Procedure and Penal Codes” permitted.

Although at first no mention was made about the “general application of English law” in the Order, this was rectified by an Amendment in 1911 which stated that

the reception was in “substance” to apply to common law, the doctrines of equity and the Statutes of general application in England” as of that date. As we shall see below, this formulation permitted a broader interpretation than the West African Orders, but although this possibility existed a narrow rigid interpretation was applied in all cases to reflect the precedents arrived at by the courts in England just as it was done in West Africa.

The legal documentation, which exported English law, also created the Supreme Courts in every colonial territory whose jurisdictions were limited to non-Africans except with respect to criminal law, which applied to every one. The manner in which English law was exported also depended on whether there were English settlers in a colony or whether it was acquired by conquest or acquired cession.

In the colonies with an English settler population, English law applied to the settlers as part of their “birthright of Englishmen”. On the contrary, in conquered or ceded territories, the British crown had power to alter the law as it applied to the natives as it saw fit. The consequence was that the received law was a truncated version of English law as the “basic” or “general” law applicable to all the colonies.

Three interlinked institutions facilitated this process of exportation of English law. These were the Privy Council, the Colonial Office and the Colonial Administrators. The Colonial Office acted through the Privy Council, which advised the King/Queen on issues of the colonies. It also directed the colonial administrators to adopt a particular law in the colony. Although each of these institutions were subject to different norms of decision-making, different pressures and even different ideologies, there was nevertheless a remarkable congruence of their decision-making and actions which indicated a coherence of all colonial laws and their application.

Their actions converged on essential issues of the function of the received law. The most important of these functions was the *maintenance of the law and order*. The other was dispute settlement based in a regime of decision-making, which emphasized adherence to precedent over creativity in law making and dispute settlement. In the function of maintaining law and order, the colonial legal order departed from the so-called fundamental democratic rights, contrary to what the apologist of the system.

There was a difference in the way the maintenance of law and order was handled in England and in the colonies. In England criminal law played a minor role since most of the structures of legal and social control were built within the

mechanism of legitimisation of the political order and bureaucratic rationalization of administration. In the colonies, on the other hand, reliance on the criminal law was predominant. This was consistent with the colonial policy of tutelage, coercion and penalization of small common offences. This explains why after independence, the structure of law and order remained intact the army, the police, and the prison services. These institutions continued to regard their central functions as that of maintaining law and order in confrontation with civil society and the rural communities.

Although English law recognised “customary law” within the African communities, its criminal legal role was removed. All crimes were dealt with in the same courts as those handling cases of the Englishmen. Thus the only occasion where there was “equality before the law” was when a native and an Englishman committed a crime.

To put at its service “African customary law”, the colonialists devised a system of indirect rule. Lord Lugard in his *Dual Mandate in British Colonial Africa* points out that the “traditional policy” of the British government on “native labour” and its objective was to prohibit compulsory labour for private employment. However, some form of compulsory labour for public works was “encouraged” through the native chiefs and headmen who were required to mobilise their ‘natives’ to perform “paid labour” for not less than sixty days in a year. Natives were also “advised” that they should seek “outside” employment in their own interest in order to pay taxes when they were not engaged in work in their own “reserves”[Lugard; [1965; 216].

The resort to “Customary law” was well accepted by all colonial powers. In a study of how the French adopted “customary law” in Senegal against the Banjal communities, Francis Snyder has observed:

“Customary law” was an ideology with real practical effects; it marked a specific phase in the development of capitalism (in Senegal). At the same time it embodied the partial dissolution and transformation of Banjal conception and their subordination to legal ideologies and social relations through the state.” [Snyder,1981]

Snyder traces the adoption and use of “Customary law” among the Banjal to the emergence of petty commodity production in which there emerged a radical distinction between “the master of the land” and “user”. Whereas under traditional Banjal practice, a “master of the land” or *maitre du sol, maitre de la terre* was the recognized descendant of the original ancestors who had first settled in the area, and who derived his authority to allocate land, settle disputes, and conduct agricultural rituals from the fact that his ancestors had first concluded a pact with the local spirit of the earth.

On the other hand French conception of land relations, equated the powers of the “master of the land “ with European feudal practice and colonial French writings about Africa. According to Snyder the colonial stereotype considered African land holding in terms of European notions of Sovereignty and ultimate rights to land- often confounding the two and frequently ascribing both to individuals and groups entitled to receive prestations from rural communities [Ibid: 151].

It was under these misconceptions that the French colonial power, early in their rule, used this ideology to justify their claims to control African Lands through the theory of *domaine eminent* and the doctrine of state Succession through conquest. The reinterpretation of the traditional practice now held that authority over land derived originally from the Creator (God) and that this authority was then “delegated” to the local earth spirits and the later to the ‘priest-kings’. Under this invented “customary law”, the French accepted the invented ‘priest-king’ as the “local sovereigns’ with political and ritual powers. This included the power to authorise the clearing of land within their respective zones, but retaining their residual rights.

Armed with “collected” ‘customary laws, which were codified, the French colonial power began to push the expansion of commodity production. The colonial power relied on the interpreter- ‘*chef de province traditional*’ who was also heir to a substantial area of land north of the Casamance River. He turned out also to be a forceful opponent of the colonial decree, which was intended to promote the development of private property in the rural areas permitting administrative recognition of (constatation) of individual ‘customary’ interests in land as well as creating a register for their cadasteration.

With these powers the interpreter using his experience simplified the rules and concepts for administrative convenience. This simplified schedule, assumed the uniformity of Jola customs. This rigidification through assumed uniformity of local customary practice did not take account of the dynamic changes or the diversity of norms and practices that took place in this period amongst the Banjal. The invented “customary law” became a reified form of law that suited standard – uniform – colonial interests of petty commodity production.

The legal form that emerged both under colonial law and under ‘customary law’ embodied and masked conflicts, which arose from changes in rural conditions. During the latter colonial period under which these developments took place, the employment of rural labour and the production of new commodities presupposed some definition of social relations which could only

be obtained through the colonial state and the relevant colonial institutions. The creation of 'customary law' therefore served to give a legal claim to land and to insert the small commodity producer together with his kin, in new relations of production as rich peasants. It also served to marginalize the poor peasantry. Snyder has correctly observed:

“As applied by the colonial state, the (new) concept ‘master of the land’ expressed an attempt to transcend the separation of necessary and surplus labour by providing a legal basis, backed by the state, for the extraction of rent through commodity exchange. ‘Customary law’ was an ideology with real practical effect. Founded upon confusion between the rain priest and the earth priest, it stemmed from colonial ideology that viewed earth priest as having proprietary interests in land. It assumed its full importance in connection with commodity production. This conception was the ideological basis for an alliance, mediated through the state, between rain priest and his kin and a new fluid ‘class’. In turn, the class alliance fostered an expression of this colonial competition as a central aspect of Banjai ‘customary law’” [Ibid].

In the British colonies, the modern system administering general law was presided over by British or expatriates judges and magistrates and had jurisdiction over both Africans and non-Africans in civil and criminal cases. The “native courts”, on the other hand, had jurisdiction over Africans and in some cases only over the particular tribe to which the “customary law” applied. Their jurisdiction was restricted to civil cases, and also only in a limited way. They were presided over by traditional chiefs or elders appointed or approved by the British administration.

At the beginning, the two systems operated independently. The “native courts” had an appellate structure up to the district level. Towards the end of the colonial period, however, the High Courts in East Africa were granted appellate jurisdiction over “native courts”, which in a way linked the two systems, but one being in an inferior jurisdictional position to the other. Later, the traditional system was gradually cleared of the elders and traditional chiefs. Professional young lawyers trained in the British Common law system took over the native courts in the post-colonial period. They acted as lay magistrates. This resulted in what Coltran and Rubin later called “the Anglicisation of procedure” [Coltran & Rubin, 1970: XXI]. The traditional courts continued to apply “customary law”, but their resemblance to traditional justice systems disappeared. Johanna Stevens who has carried out a literature review of *Traditional and Informal Justice Systems in Africa, South Asia, and the Caribbean* has noted:

“Whereas courts continued to apply customary law, their resemblance to the traditional justice system greatly diminished. This process of integration and formalisation became complete after independence when most African States abolished native courts and transferred original jurisdiction of the customary law to the magistrates courts” [Stevens, 1998: 16].

This was particularly the case in Uganda and Kenya where steps were taken to incorporate any surviving customary criminal offences into penal code. Before that under the colonial system, the penal code was based on the British system. Other African States simply abolished customary offences and the judicial system on which they were based and adopted the Penal Code to be the sole criminal law of the country [Coltran & Rubin, 1970: XXV]. In Uganda too, despite the attempt to integrate customary law into the penal code, the Colonial Code overwhelmed the customary elements, so that for all practical practices, customary law had been overthrown by the colonial penal Code.

It is important to note here that although customary systems of justice were allowed to exist side by side with the “general” modern system, most customary laws, which were applied, were static, rigid, or ossified. It did not have the flexibility and sensitivity of the traditional system because the former was “received” in such a way that it was “fixed” in time. On the other hand, whereas the traditional system was relatively more dynamic and flexible in that it had recourse to other traditional institutional and procedural structures such as the extended family and the use of ritual. The “customary law” applied by the courts were in effect not traditional, but “neo-traditional” in concept and application, whereas the other more traditional aspects adjusted and adapted increasingly in a “post-traditional” way to serve peoples’ aspirations.

These continued to be practised within the communities and later became recognised as a basis for a more culture sensitive approach to the understanding of law. Thus, although the post-colonial states did not recognise customary criminal law, a number of criminal offences punishable under the criminal (penal) code, except murder and rape, were brought informally before customary courts and informal systems of justice. The reason for this was that these systems were considered suitable for these kinds of offences. Apart from the other reasons that have accounted for the revival of the traditional systems which we referred to at the beginning, it would appear that the traditional laws and systems of justice have their own relevance under existing conditions. We will revert to this matter below.

The crafting of ‘customary law’, which we have analysed, above, and its rigidification and uniformisation helps to explain why ‘received’ colonial law could not respond to the changing needs of the African social scene. To achieve its purpose, law had to be clear, certain, and definite. This is why we see, as Seidman has noted, the tendency by the British colonial lawyers to resist the modification of English precedents in favour of local peculiarities.

Seidman blames this on the fact that the colonial judges and magistrates were non-African. But in our view, it did not matter what ‘race’ the judges were so long as they accepted the colonial ideology, took the class point of view of the imperialist classes, and accepted the legal logic, which all the courts adopted. In fact many of the African judges who later came to the bench were trained in England in the conservative Inns of Courts in which I was trained myself. This is because it was the accepted colonial practice to apply the common law and doctrines of equity on the basis of the current English precedents, without any significant change to allow for special circumstances in each colony. It also included accepting ideological doctrines such as the “rule of law”, “independence of the judiciary”, as well as the acceptance of the need for the maintenance of “law and order” as sacrosanct.

Seidman himself gives two reasons, which compelled this unification of the received English law in the colonies and the dominions. The first reason was what Seidman calls, “the ideological forces at work” which sprung up during this period. These ideological forces reflected the increasing competition against British trade in the world markets after 1870s, which had brought British trade to a halt. There was a call for “imperial unity” whose practical effect was to create exclusive British loading areas, free from competition from Europe and the United States. The Imperial Federation League was formed in 1894 to foster the idea of an imperial Federation. Seidman notes:

“The for unity throughout the empire was reflected in a variety of, none perhaps more striking than the steady stream of pamphlets, memorandum, letters and the like from the Colonial office. For example, one would have thought that the form of the prison system, of all colonial restitutions might well be left to local option. It was not so. The colonial office tried desperately to impose uniform system of penology upon the entire empire....”[*Ibid*: 111]

This, adds Seidman, also facilitated the bureaucratic standardization and bureaucratic efficiency and rationalization of the imperial administration. In fact the Supreme Court of New South Wales had in the case of *Trimble V. Hill* ruled in a wagering (or betting) contract case that courts do take cognisance of local conditions in such cases. The decision was overruled by the Judicial committee of the Privy Council which in their Judgment Stated: “in their view it is of the uttermost importance that all parts of the empire where English law prevails, the interpretation of law by the Courts should be nearly as possible the same.” Indeed, the push to uniformity was encouraged by the use of uniform statutes enacted in Britain or in the colonies by order of the colonial Governors, as well as by laws drafted in the Colonial office.



The Second reason for the uniform application of English law in all the colonies was that the British Parliament, sitting in London, was looked upon as an Imperial Parliament legislating for the whole empire, including the colonies. Although, later the Imperial statutes went out favour, the habit of uniform application remained.

There were two areas where received colonial law was especially applied uniformly throughout the empire without question. This was in the area of land law and family law. The reasons for this rigidity were the argument that English law was pragmatic and flexible in application, and yet this turned out to be the area where conservatism in application was most noticeable. As we have seen in the case of Senegal under French colonial rule, there was a rigid application of 'customary law' to promote petty commodity production on land by applying the European concept of the imperial sovereign to the traditional African land system. The same happened in British African Colonies as well where a rigid understanding and application of "customary law" was applied in addition to the actual seizures of land, which were said to be Crown Lands.

Although it was argued that British the reception of English law promoted the amelioration of harsh economic conditions existing in the colonies, colonial policy deliberated excluded the enforcement of Welfare state legislation in the colonies, despite claims by the apologists of the system that English law was inherently democratic in that it was based on the rule of law. Seidman notes that the social welfare laws were not imported to the African Colonies to ameliorate social and economic ills either application of restrictive dates, or the restrictive construction and interpretation of the catchall phrase "of general application". He also argues rather unconvincingly that the non-application of this legislation was due to the 'failure' to supply administration personnel to enforce the laws, the narrow conception of suitability and the operation of the adversary system:

"The rigidity of the common law in the colonies and the exclusion of English Welfare legislation was largely accomplished by the judiciary. The colonial administrative authorities, supported by the colonial office, were primarily responsible for the exclusion of political liberties from the received English law, and the use of new sorts of law designed to increase the potential exploitation of the Africans by Englishmen, especially in East Africa" [p114]

Even the old claim that all "free born Englishmen" carried with them their English law as a birthright was circumscribed in the new colonies by colonial administrators. This claim had been made and, to some extent, practised in the old colonial settlements. This claim included some notion of the rule of law, at least as far as it-prohibited imprisonment without charge or retrial. In the new

colonies, this understanding was ignored. For instance, the East African Order-in-Council of 1902 provided that:

“When it is shown by evidence on the oath to the satisfaction of the commissioner that any person is conducting himself so as to be dangerous to peace and good order in East Africa, or is endeavouring to excite enmity between the people of east Africa and her Majesty, or is intriguing against her Majesty’s power and authority in East Africa, the commissioner may, if he thinks fit—order—that person to be deported to such place as the commissioner shall direct’.

The Commissioners decision in this respect was final and not subject to appeal. In England deportation operated only against aliens; in the colonies it applied to the natives and also to Englishmen as well. The Bill of Attainder, as they were called, which were forbidden in England since the Bill of Rights of 1688, was used exclusively against Africans. It was under these Bills that the Omukana of Buyoro-Kitira Empire and The Asantahene of Ghana were incarcerated and deported from their countries. Later the same laws were used against nationalists such as Jomo Kenyatta of Kenya and his colleagues.

There were also pieces of legislation, which proscribed the importation and possession of prohibited books and periodicals. Others proscribed nationalist organisations, including religious sects, which had any import of political messages such as the Jehovah’s witnesses and a traditional African religious-cum-Christian sects called *Dini Ya Msambwa* (Religion of the Ancestors) in Kenya and Uganda. Furthermore, local legislation passed by the Legislative Councils in the colonies introduced laws, which were designed to coerce Africans to work on European plantations and enterprises and to prohibit them from growing certain cash crops for export or for internal markets, which competed against the European settler enterprises and production.

Under similar laws, land was appropriated from Africans and given to the Europeans settlers, while other lands such as forests, lakes and mountains were declared to be “Crown Lands”. Africans were thrown into dry ‘native reserves’ or ‘trust lands’ where they could grown subsistence crops to subsidise law wages paid to the workers in the settler plantations or mines. These reserves were in actual fact labour reservoirs for European enterprises where family labour was collectively exploited through subsidies to the settler and urban sectors.

Master and Servant laws were passed which laid down conditions for the workers in the enterprises and in the homes of European settlers. These laws prohibited African domestic workers from leaving the employment of their masters without proper discharge by the master. Under Pass Laws, Africans were registered and given passes or *kipande* (as in Kenya), which regulated labour influx into the

urban areas and European settler plantations. These passes were also used for security checks and controls of Africans in urban areas and during their movement around the country.

On the other hand, as we have already noted, welfare legislation such as unemployment insurance, Old Age Care, Factory Acts, Workmen's Compensation Acts and laws made to protect women and children from certain types of employment which were applicable in the metropolitan countries, were not applied in the colonies. Seidman concludes:

“In sum, whatever may have been `democratic' component of English law, was explicitly excised during the its transportation overseas. The reasons are apparent. In East and West Africa, the imperatives of Empire as perceived by the colonial rulers required authoritarian government in order to maintain the control of a `few dominant civilised men' over `a great multitude of the semi-barbarous' (natives). In East Africa, in addition, the all but insatiable demands of settler enterprise for cheap African labour required the involvement of a whole set of compulsions, applied through state power guided by law. What efforts the colonial government did make to protect Africans from excessive exploitation were limited to ensuring their bare existence. English law may have been (for) the general application in the colonies; but it was a peculiar form of law that had excised from its corpus any of the democratic forms or economic protections which are claimed to be the brightest jewels in the British legal crown” [Ibid: 116].

Thus, we can conclude from the above that the colonial legal theory served its role as the legal ideology of the dominant social classes of the metropolitan powers for the exploitation of the colonial peoples and their resources. Law was here what John Austin had said it to be. Law had to be obeyed as it was since it was a command of the Sovereign. It could not be challenged on any moral ground, which was separated from its content, particularly the morals of the colonised. Any customary practice that was considered “repugnant and against good conscience” was declared illegal. The accepted law was made in the metropolitan countries and exported to the colonies in different administrative and legal forms to service the interests of those it was designed to protect—namely, to expand capitalist production to the disadvantage of the colonised. That is why they were excluded from cash crop production wherever there were European settler communities. Where Africans were permitted to grow cash crops such as in Uganda and, to some extent Tanganyika, they were paid low prices without any price guarantees.

## Law and Society in the New Nations

The reception of English law in the African colonies was not expurgated when the African countries attained their independence. Purely in terms of law, there was a clear transfer of political power to the African nationalists through hastily arranged constitutional conferences at which the constitutions of these countries were *negotiated* and *agreed* before independence. Equally ‘democratic’ elections were hastily organised to put in place the first African government to which instruments of power were handed over before such power could be transferred.

### i) The Character of the postcolonial state

But there was something deeper in these negotiations. The deeper levels concerned the preservation of colonial interests in the economy, and in the social and cultural systems that had been put in place by the European powers. Old and new unequal colonial treaties were preserved and encrusted in the new constitution. The old colonial oppressive institutions such as the military and the police as well as oppressive laws such as detentions laws were persevered and continued. The new political class needed these powers for their ‘nation-building’ project. The culture of “maintenance of law and order” was reinforced with the new black police, army and security officers- in order to maintain the *status quo*. The *status quo* included the social relations created by colonial capitalism, which weighed heavily against the interest of the majority of Africans. British, French and Belgian companies, banks and transportation and shipment monopolies remained active in the new states. The new small African middle class struggled to acquire shares, directorship and jobs in these colonial monopolies and new ones that entered the territories.

Even though later in the late 1960’s efforts were made to “rationalize” some of these companies and banks, the metropolitan bourgeoisie who were protected by principles of international law, were able to protect what they had. Even with the nationalisation, the colonial companies were able to remain behind and manage the new parastatal enterprises through equity holdings, management contracts, licence/technology agreements as well as marketing arrangements. Through these new mechanisms of control, they were able to exploit the weakness of the African political elite in the economy. As we see below in a later section, these ‘gain’ were soon reversed under the “Washington Consensus” when the structural adjustment programmes sponsored by the Bretton Woods institutions were propelled by the US led globalisation process.

With the passage of time, it became increasingly clear that the political transition had merely created neo-colonial states, which had all the “trappings of national

sovereignty but nothing in substance since their economies continued to be controlled and exploited by the metropolitan companies and the new US, European and Japanese transitional corporations and banks that began to take advantage of the ‘new nations’.

In fact the ‘new nations’ turned out to be no more than “imagined Communities”. According to Benedict Anderson, nationalism, nationality, and nation-ness are “cultural artefacts” of a particular kind:

“To understand them properly we need to consider carefully how they have come to constitute carefully how they have come into historical being, in what was the meanings have changed over time, and why, today, they command such profound emotional legitimacy”[Anderson, 1983:4]

Anderson quotes Ernest Gellner approvingly when Gellner rules that ‘nationalism’ is not the awaking of nations to self consciousness”. On the contrary, Gellner argues, nationalism “*invents* nations where they did not exist”. However Anderson dispenses that notion of ‘fabrication’ and ‘falsity’, which the term *invents*, connotes. In his view the more appropriate terminology is “imagining” and “creation”

There is however a sense in which the African nation is such an *invention* as Gellner argues. Today we refer to its boundaries as “artificial”, although some argue that all boundaries have the character of artificially. But the sense in which Gellner looks at the African state is its relative invention in that it is *culturally* an anomaly. He argues that there is a link between nationalism, imperialism and decolonisation. In the case of Africa, nationalism was of a special type because the African nationalisms exemplify the opposite extreme of the earlier European forms. African nationalism neither perpetuated nor invented a local high culture, nor did it elevate an erstwhile African folk culture into a new, politically sanctioned literate culture, as European nations had done. Instead, African ‘nations’ persist in using an alien European high culture. He adds:

“Sub-Saharan Africa is one of the best and certainly the most extensive, testing grounds for the attribution of great power to the principle of nationalism, which requires ethnic and political boundaries to converge. Sub-Saharan political boundaries defy this principle almost without exception. Black Africa has inherited from the colonial period a set of frontiers drawn up in total disregard and generally without the skeletal knowledge, of cultural or ethnic borders” [Gellner, 1983: 81]

Despite the inheritance of European high cultures in form of official languages, Gellner nevertheless acknowledged that there have been few challenges to the anomalies. In this he thinks African nationalism is a force to reckon after all,

but ends the sentence with a question mark. This guarded statement is well taken because the failure to the challenge of the post-colonial state far from being strength of African nationalism is a sign of the success of European colonialism, which succeeded in totally subordinating African communities to its colonial project. Indeed Gellner he points to the dilemma and poses the question as to a possible future "cultural self-transformation involved in modernization." [Ibid: p83]

Crawford Young traces the origins of the crisis of the African post-colonial state within the characteristics of the colonial state. He too regards the territorial ambiguity of the colonial state as having paradoxically proved one of the most enduring impacts of the colonial rule. He states that it became the structure of legitimation of the African nationalist petty bourgeoisies. He also notes that at the time when Africa became colonised, the imperial powers were well structured with a well-developed professional bureaucracy with a permanent military force, which they did not have in the earlier colonisations. Finally the colonialists in the developing their 'nation-building' project, which the African petty bourgeois elite took over, had a more comprehensive cultural component in its ideologies and administration, which insisted on the inferiority of the African people. The socialisation impact of this racist ideology affected the attitudes of the elites towards their own populations [Young, 1985: 6-8].

To this extent the *Economist* in its 14<sup>th</sup> of April 2000 issue entitled: "Africa: the Hopeless Continent" were to a great extent correct in their analysis, except that they too, like all European analyses about Africa, then became subjective in some of their conclusions. In the article the author argued that the most damaging aspect of European Imperial rule in Africa was not been political or even economic but *psychological*.

The author noted that European colonial rule in Africa had just a couple of generations or less to entrench itself. But that this was long enough to undermine African societies, institutions and values. However, according to the author, it was not long enough to replace these institutions and values with new ways of life or establish new systems of government". He added that in the event colonialism undermined Africa's self-confidence" without creating the basis for a new one. In a more contemporary assessment of the African post-colonial state the author was right in coming to the following conclusion:

"African nations were not forged by ethnicity, nationalism and war. They were simply bequeathed by departing imperial powers who left highly decentralised, authoritarian states to a tiny group of western-educated African who rushed in and took over. Some of these states, such as Congo, were established by Europeans as business to be milked for profit. Their successors continued the practice" [*Economist*, May 14<sup>th</sup>, 2000]

The article continues that the African nationalist elite, which rushed in to take over this colonially, created state and ‘nation’ did not deconstruct the colonial institutions and reconstitute a new African national state. They merely proclaimed national unity and denounced tribalism. But they soon found, like the imperial powers before them, that ‘manipulating tribal affiliations was essential to preserving (their) power’. They even went further to personalise power through patronage and clientism. By so doing they undermined rather than boosted national institutions. The author comes to the crux of the matter when it observes:

“The African ruler finds himself trapped. He wants power and control; but the outside world (of globalised capital-DWN) makes demands about democracy, human rights and good governance, which weakens his position and could cost him his job. If he cannot use the treasury as his private bank account and the police as his private army, he tries to create alternative sources of wealth and power. This is why more and more African rulers are turning their countries into shell states” [Ibid].

The success of the European rulers in undermining the confidence of African elites educated in western culture also reflected the relative confidence of the European ruling classes in their belief of their cultural, biological and technological superiority over other races, particularly the African one. From this standpoint, Africa was seen in much more negative terms than had been in earlier centuries [Young, 1988:6-8]. This did not, however, stop the colonialists from appropriating some of the African traditions and customs for their own purposes of colonial rule and oppression in the form of *neo-traditionalism* and ‘customary law’, as we have already noted.

The neo-colonial character of the African post-colonial state was therefore widely accepted by some of the more radical nationalist petty bourgeois elites such as Kwame Nkrumah, and Oginga Odinga who coined a fitting title to his autobiography about Kenya’s political and economic transformation in the catch phrase: “Not Yet Uhuru”.

These developments and events of this period were important in my own intellectual development in that it influenced my own understanding of the political process immediately after independence. My education and training and political development took place in the two periods-the colonial and the post-colonial. Two years before Uganda attained its independence, I was admitted for training as a professional barrister in the Inns of Court in London. At the same time, I was also admitted to the University of London for the undergraduate degree of Bachelor of Laws.

Before I go into the detail of my legal training and practice as well as my role as a law teacher, I would like to refer to the political and constitutional debate that took place in the culture magazine called *Transition*, which was then published in Kampala, Uganda in the 1960's. This magazine contributed greatly to the debates of the period about the character of the post-colonial state, its culture and ideological basis. This debate also brought to light the kind of ideological orientation I had developed during the period of my training, which was in opposition to the official line of the profession and legal discourse.

The incident that provoked the debates in question was the political changes that had occurred in Uganda in 1966. In that year Milton Obote who was then the Prime Minister of Uganda, staged a palace *coup d'état*, which overthrew the independence constitution of 1962 and the president who had been elected under a constitutional amendment in 1963 to allow for election by parliament of the President (Kabaka Mutesa of Buganda) as a titular, ceremonial head of state. Uganda had become independent in 1962.

In 1966 a conflict arose between Obote and Mutesa. Under the constitution Buganda enjoyed a federal status within a unitary system of government. The conflict led to Obote using a faction of the army to occupy the Kabaka's palace resulting in the president fleeing in exile. Obote abolished the office President, enacted an interim Republican Constitution that also abolished the traditional rulers and the federal status for Buganda. In 1967 a new Republican constitution was promulgated by parliament, which confirmed the constitutional and political changes.

In the aftermath of these developments Obote embarked in what came to be known as "Movement to the left Strategy", which moved the policies of the government to the left of the centre to radical nationalism. Under the new strategy, British economic interests were threatened with nationalisation, while efforts were also made to move the country into a one-party state.

The role of the judiciary was considered vital in pushing the "new order" forward. A constitutional case had been brought before the courts to question the legal basis of the new constitution in the case of *Matovu Vs. Attorney General* in 1967. Basing itself on the *grundnorm* rule propounded by an Austrian International jurist by the name of Hans Kelsen in his book *What is Justice*, the judges had ruled against Matovu by upholding the changes that had taken place as a "successful revolution in law". Kelsen's theory was based on normative formal logical analysis of law.

Following this decision there were debates, which, were provoked by a young Soviet trained lawyer, by the name Picho Ali. Picho Ali in his article entitled



“Ideological Commitment and the Judiciary” had argued that there should be a “harmonious dialectical connection” between the political objectives of independent Uganda and the Judiciary. He advocated for the principle of what he called “Ideological Parity” between the law and the political order. According to him the normative school of jurisprudence was wrong in insisting on the application of legal norms in isolation of the political aims. This was wrong because as we have seen, the judges in the Matovu case, using the normative theory of *grundnorm*, had ruled in favour of the changes that occurred and which had “ushered in the new order”. But this argument formed the central tenet in Picho’s critique for he argued:

“The principle of ideological parity is an attempt, with special reference to Uganda, to show the need to maintain and develop the harmonious inter-relations between law and political order after the achievement of independence. Uganda has embarked upon the problem of re-examination of all the institutions inherited from the colonial regime. Law is one such important element of our society, which requires exhaustive re-examination” [Ali, P [1968: 47]

It is important to recall that two other events involving the courts had occurred during this period. The first was the trial of two mercenaries who entered Uganda illegally from the Congo. The other was the trial of twenty Ugandans who had been charged with the crime of treason following the change that had occurred in 1966 as a result of the “revolution”.

One of the mercenaries by the name of Swinton had been sentenced to a maximum sentence of two years for having violated the Immigration Act. This sentence was however, nullified by an expatriate judge of the high court on appeal who instead ordered that the mercenary be deported to the country of their origin.

In the second case, a High court judge, Justice Goudie, before whom the twenty accused persons were brought, had advised counsel for the state not to charge all the accused persons jointly since it would be difficult to discharge the burden of proof of guilt on each of them with the joint trial. The state counsel later applied to the court for leave to withdraw the charges, pending further investigation.

Picho Ali in both of these cases argued that the expatriate judges had been influenced by the normative judicial doctrines according to which “the law should be interpreted exactly in the way it is written without being guided by the aims and objectives for which such a law is supposed to serve.” In the case of the treason charges, Picho Ali, argued rather wrongly, that the judge, had

dismissed the charge on the ground that the twenty accused persons were “too many to plan to overthrow the government”, implying that only a few people could have to do so! In fact the Judge had not discharged the accused, as we have seen, but merely advised state counsel on the matter and upon which advice the state prosecutor had applied to the court to withdraw the charges himself having accepted the advice of the judge

In his argument Picho Ali had touched on the issue of the reception of law from the former colonial powers. He had on the basis of the implications of the divergent political objectives between the old and new order, called for a re-examination of laws:

“This reception must be a selective process in order to conform with the aspirations and ideological orientation of the new state. It should be acknowledged that the aims and objectives of the British colonial regime in Uganda and those of the new Republic of Uganda, which has emerged after the achievement of independence, run diametrically counter to one and other. It is this divergence of aims and objectives of the two political orders that has necessitated the selective re-examination of the laws enacted by the British regime” [Ibid:48]

Picho Ali also raised the issue of the role of ideology in legal decisions. Ali argued that ideology was the sum total of political, philosophical and economic ideas of a certain social class or group of social classes:

“In our case the term “people” of Uganda comprises a group of social classes – the peasant, workers (both manual and mental workers), etc. They have fundamental attitudes of mind in relation to politics, economics, etc. The science and art of politics should serve the main aims of consolidating our independence; of struggling against colonialism in whatever manifestations it may present itself; and for African Unity” [Ibid: 49].

It is interesting to note that Picho Ali fails to mention the bourgeoisie— whether *comprador* or petty bourgeoisie in the social classes that partly comprises what he calls “people of Uganda”. This itself reveals an ideological bias. He also did not bring out the material conditions in which the peasants and the workers existed in the economy, which could constitute the basis for an ideology reflected in the post-colonial state of Uganda. Instead Picho Ali spoke of them having “fundamental attitudes of mind in relation to politics, economics, etc with the petty bourgeoisie and the emergent comprador bourgeoisie within the state. He did not indicate how these divergent class interests were reflected in the ideology and what this ideology was. He also did not deal adequately with the implications of imperialism and neo-colonialism in Uganda and how these dominant forces were reflected in the Uganda state.

Although I was trained in the profession of British barrister and a member of the Bar as advocate of the High Court, in my contribution to the debate I challenged the mystifications that Picho Ali's article had created. I argued that Picho Ali has not correctly appraised the role of the judiciary in Uganda as well as the basis for the demand for the independence of the judiciary and its implications. I challenged his understanding of Kelsen's "Pure Theory of Law" and the interest it served as "a science of law". He could therefore not have shown how his theory of ideological parity would have "injected" a new and positive content to the doctrine of independence of the judiciary. Picho Ali had argued:

"Independence of the judiciary should not place the judges in a position whereby they are looked upon as Gods. Ideological parity gives a qualitative new content to the independence of the judiciary in the sense that the judiciary accepts the aims and objectives of our state as the guiding stars in its work of administering justice" [Ibid: 49].

My contribution challenged the whole notion that a judiciary could be independent of the ideology that constituted the state and the interests behind the state. I also argued that his contribution had in fact raised more questions than it had sought to answer. Although I agreed with the main thrust that law must reflect the ideology of a given society, my main interest was to define what kind of society existed in independent Uganda, I said:

"After everything is said, I think we ought to agree – and I here agree with Picho – that there is no such thing as the independence of the judiciary anywhere. The judiciary has always been created by the politics of the economic base and not *vice-versa*. So it is always pointless to talk about the judiciary sitting in judgement of the economic base and its politics and hence its ideology. To say the judiciary (should) be at par with the ideology of an independent Uganda is therefore to beg these questions: What is the ideology of an independent Uganda? Who has stated and propounded it? What is its economic base? Why is the judiciary still colonial-oriented in spite of such ideology (if any)?" [Nabudere, 1968: 20].

In understanding whether or not there had been a fundamental restructuring of the state in Uganda after independence, I referred to the 1967 Republican Constitution and pointed out that the whole edifice on which its political, judicial, executive institutions were based sprung from it. Nothing that had happened in the 1966 constitutional crisis or the "revolution" had affected it. On the contrary the 1967 constitution, which embodied the results of the "Revolution", had merely reproduced those constitutional conditions. There was no any ideological *raison d'être* of the 1967 Revolution, "if ideology is to be viewed in its fundamental terms".

Instead if one were to closely examine the new constitution one would find that the Old Order had been preserved and even consolidated. Article 115 had preserved existing laws (which included colonial laws, many of which were still on the Statute books). Articles 116 and 117 had preserved existing public offices, including the armed forces and the police. Articles 119-122 had preserved former rights and privileges of the British Sovereign, which were now bestowed on the President of the Republic. Article 126 had preserved the *Mailo* Land system, which had deprived the peasants of their lands in Buganda and given it to the collaborators with the British in the colonisation of Uganda.

In challenging Picho Ali's understanding of the legal system in Uganda, I was conscious of my role as an Advocate of the Uganda High Court and the Eastern Africa Court of Appeal. I was conscious of the fact that when standing at the Bar, my role was to argue to the best of my ability the law as it was and not as it ought to be. But as a lawyer who was *conscious* of the oppressive character of this system, I was compelled to take an *ideological* stand against the ideology of the dominant classes in Uganda and the world at large. To that extent there was a "relative autonomy" of the state structures because I was able to take political positions, just like the judges could do so in their 'independent' role as the judiciary.

This I did by taking up cases of the underprivileged and oppressed as well publicly demonstrating my political support for their causes. In that sense I was able to use law in defence of the interests of the oppressed classes wherever this was possible. In doing this, I was inclined to the more "orthodox" Marxist-Leninist positions in the understanding of the role of law in society and what "justice" meant in such a system.

In my reply to Picho Ali, I therefore focussed on why I believed that the legal and judicial system in Uganda was "at par" with the ideology of the capitalist class and their economic base. I pointed to the fact that Parliament of independent Uganda had in their legislative role reinforced certain colonial laws, and I referred specifically to the amendments to the Penal Code which legalized the hanging of robbers, who had incidentally increased since the "Revolution" and hence necessitating tougher laws against them.

I challenged Picho Ali's castigation of the expatriate judges and rebuffed his support for the Ugandan Chief Magistrate who had given a stiff sentence to the mercenaries. In so doing, I was not concerned with the substance of the issues involved in those cases. My interest was in the objective role that was played by the expatriate judges and the Chief Magistrate in the legal system as a whole, and not their judgments in isolated cases or their 'racial' origin. I stated:

“I see nothing objectively wrong with an expatriate judge taking a different point of view from that of a Uganda magistrate. The colour and the origin of the two are to me irrelevant. Equally I see no ideological commitment of the type Picho wants us to believe in the Ugandan magistrate sentencing the alleged mercenary to a stiffer prison sentence than the expatriate judge. Is it not the same Ugandan magistrate who daily (“ideologically”?) sentences scores of unemployed youths, or to put it more legally “Rouges and Vagabonds” to prison terms for alleged loitering around town unlawfully’ when the same Ugandan magistrate knows (or should know) that there is nothing these “rogues and vagabonds” can do about it and in fact that they are not such “Rogues and Vagabonds” because it is no fault of theirs that jobs cannot be found around the city. Of course I’m not blaming the Ugandan magistrate personally for doing his job because all this is very legal and objectively “correct” and in accordance/ with the ideology of the economic base of our country today” [Ibid]

To me the ideological commitment I was expounding here was of a different kind. It was a *social and political commitment* to the struggles of the peasantry and the working class in Uganda. Picho Ali was calling for an ideological commitment of the judiciary to a “political order” which was obscure, but which was in reality the political order of the property-owning classes on a world class, which included the Ugandan property-owning petty bourgeoisie. In his analysis, he had confused the interests of these two blocks of classes under the general idea of “the Uganda people”. For this reason, I was challenging the a “revolution” which in my view perpetuated the myth of an independent judiciary except that it demanded that the judges be committed to the “Revolution” and the “Political Order” which was nonetheless, the political order of the bourgeoisie in Uganda: I stated:

“It (the Republican constitution) leaves intact a police force which is more vicious against the people than the colonialists. And what’s more, it preserves the capitalist mode of production and particularly preserves laws protecting the interests of capital ruling class of the Western countries (e.g. The Foreign Investment (Protection) Act, Cap.160, and treaties of unequal mutual benefit (Article 125)” [Ibid.].

This debate was joined by two mainstream lawyers who argued the case for an independent judiciary against the ideological view of Picho Ali. One of the leading Ugandan advocates, John W. Kazzora, upheld Professor Hans Kelsen’s “Pure Theory of Law”. Quoting Kelsen’s Chapter on the theory in his book *What is Justice*, Kazzora argued that Kelsen’s “positive law” which was the object of the “Pure Theory of Law” was an order by which human conduct was regulated in a specific way. Kelsen in the said chapter had written:

“The Pure Theory of Law is a theory of positive law, not a representation of all phenomena which go under the name of law. It seeks to discover the nature of law itself, to determine its structure and its typical forms, independent of changing content, which it exhibits at different times and among different peoples. In this manner it

derives the fundamental principles by means of which any legal order can be comprehended. As a theory, its sole purpose is to know its subject. It answers the question of what the law is, not what it ought to be. The latter question is one of politics, while the pure theory of law is Science” [Kelsen, 1946: 267].

According to Kelsen, to free the concept of law from that of justice was difficult because these two concepts were constantly confused both in political thought and in general tendency, the effect to deal with law and justice as two different problems falls under suspicion of dismissing the requirement that law should be just:

“But the Pure Theory of Law declares its incompetence to answer either the question of what constitutes justice. The Pure Theory of Law – a science – cannot answer these questions because they cannot be answered scientifically” [Ibid: 267].

Thus the ground was laid through this “science” to require the separation of law making to the political arena and the role of decision-making as to what is just to the arena of the judiciary, hence the demand that this arena be independent of other organs of the state, including the legislature. Kazzora therefore attacked Picho Ali’s attempt to import “political ideology” in the administration of justice. In his opinion, there was already in existence harmony between law and political order. Parliament enacts our laws, the executive administers them, and our courts are enjoined to interpret them in accordance with the spirit and intent of Parliament. He conceded that there was room to modernise all our institutions in the country:

“While a good case could be made that a modest attempt should be made to Ugandanise the High Court Bench, I reject Mr. Picho Ali’s contention that the judiciary should be a ‘revolutionary institution and not a body interpreting laws in the exact manner as if the colonial regime is...in full power in Uganda’. The Courts are in duty bound to interpret the law of the land without fear or favour: in so doing they are guided and are bound by rules of the constitution which I hope Mr. Picho Ali knows some thing about” [Kazzora, 1968].

In Kazzora’s view, the achievement of independence did not and could not have altered the concept of justice as an ideal because justice, as the Roman jurist Justinian had said – “is the firm and continuous desire to render to every man that which is his due”. Kazzora concluded:

“The principle of ideological parity may be valid in the context of Soviet jurisprudence but it would be undesirable to introduce it in Uganda where English common law still reigns” [Ibid].

That was a clean normative approach to law, which Kelsen had propounded, which Kazzora defended. In short, Picho, Kazzora and myself agreed that ideology was part of law making. The only difference was whether such ideology should be applied in the administration of justice.

Abu Mayanja, a leading lawyer in Uganda and, at one time, an Attorney General in the government of Uganda had also joined the debate. His main interest was the issue of the independence of the judiciary, which he argued, should be retained. Mayanja was then a member of Parliament, and he said that he agreed there should be harmonious relationship between law and the political order and that to this end a new state like Uganda which has just freed itself from colonial rule must re-examine the legal system and set of laws it inherited from former colonial masters to make them serve more efficiently its purposes and policies as an independent sovereign state, which he had called for time and again in the National Assembly. But Mayanja cautioned:

“This does not imply, however that there must be any change in the concept of the function of the Judiciary as such in an independent state to what it was in the colonial era nor in the relationships between judiciary and Executive, nor again in the principles which guide the application of legal principles to a particular set of facts. It simply means that the new state must make new laws or adapt existing laws to its purposes, policies and objectives” [Mayanja, 1968].

Mayanja argued that the Uganda Parliament could pass any law it desired. The political party in power had an overwhelming majority in Parliament than, say, the Republican Party in the USA at the time or the Conservative Party in Britain:

“The interesting point, is that far from wanting to change the out-moded colonial laws, the Government of Uganda seems to be quiet happy in retaining them and utilising them, *especially those laws designed by the Colonial regime to suppress freedom of association and expression*. The recent Statutory Instrument made by the Minister of Internal Affairs under the Police Act, whereby no one can hold a meeting of more than 25 persons anywhere in Uganda except Buganda, which is under a State of emergency anyway – without Police permission, is a case in point” [Ibid: emphasis added].

Mayanja said that Picho Ali would have been on a former ground, “without involving himself in high-faluting philosophical disquisitions” if he had called for the Africanisation of the Judiciary. There were an adequate number of qualified lawyers in Uganda who were fit to be on the High Court Bench, including the Chief Magistrate who sentenced the mercenaries to stiff sentences. He had sixteen years experience in the judiciary. Indeed it was understood that recommendations had been made to the Judicial Service Commission to appoint Africans to the Bench. Mayanja fatefully added:

“I do not believe the rumour circulating in legal circles for the past year or so that the Judicial Service Commission has made a number of recommendations in this direction, but that the appointments have for one reason or another, mostly tribal considerations, not been confirmed. But what *is* holding up the appointment of Ugandan Africans to the High Court” [Ibid].

Mayanja added that he had no doubt that present expatriate judges were ideologically committed to serving independent Uganda. They could not be accused of harbouring colonialist or neo-colonialist sympathies. If, as Picho Ali had argued, judges should be committed ideologically, Mayanja rubbed in the point that he wanted to know what was the ideology of the ruling Uganda Peoples Congress to which the judges could be committed. If there was any such ideology, he said, he could not understand what ideological bond existed between Mahandra Mehta, M.P. and his labourers in the Sugar Plantations, which he owned “some of whom are also members or supporters of the UPC”.

These pointed remarks on the issue of tribal considerations influencing the retention of expatriate judges and attacks on lack of ideology of the ruling party and their retention of colonial laws landed Abu Mayanja in trouble. The following year, he was arrested under the State of Emergency and detained without trial under one of the colonial laws, which had been retained by independent Uganda. In 1969, a State of Emergency was extended countrywide and the author of this article, then Chairman of the Uganda-Vietnam Solidarity Committee, was also arrested and detained without trial for one year in the maximum-security prison at Luzira near Kampala for alleged “subversive activities”.

With these developments, it became clear that Uganda was still “under the reign” of the English Common Law. It was these laws, which the British imported in Uganda as ‘received’ colonial laws. These laws went with the ideology of the independence of the Judiciary, which was intended to protect the interests of the property owning classes against the labouring and peasant classes. Mehta was an industrialist who was a member of the UPC-the ruling party. Like Mayanja said, the received laws could not have defended the interests of Mehta and those of his workers. It was a law that benefited Mehta and his class most, against the interests of “the people of Uganda”, which Picho Ali sought to obscure. It also became clear that to defend the oppressed classes entailed a confrontation with the law because of the fact that the laws of independent Uganda were neo-colonial and not tailored to defend the interests of the people of Uganda.



## The Heritage of the Post-Colonial State

Any attempt to craft new legal systems had to take account of the fact that the received legal system of law and the administration of justice were already structured in a rigid and inflexible system. The legal training for the new countries had to take into account the received colonial professionalism that was already part of the state system and certain concepts such as the “independence of the judiciary”, the professionalism of the “Bench” and the “Bar” all carried inbuilt and embedded ideological underpinnings of the colonial order and the world capitalist system which they served.

Max Weber in his study of law in his book: *Economy and Society* pointed out that the training of lawyers from whom the Bar and the Bench were recruited had its origin in the “guild like English method” of law training. The four Inns Court were a guild like structure, which originally was dominated by the clergy “for whom this activity constituted a major source of income”. The entry of the upper classes into the training slowly displaced the clergy and this process in itself also became the basis for the monopolisation of judicial positions by this class through the Inns of Court:

“ A new aristocracy of legal honoraries came into being, consisting of counsels, sergeants, and barristers, i.e. of those admitted to represent, and plead for, litigants before the royal courts... The handling of the case lay in the hands of ‘attorneys’ or ‘solicitors’, a class of business people, neither organised in guilds nor possessing the legal education provided by the guilds; they were the intermediaries between the party and the ‘barristers’ to prepare the ‘brief’ or status causae so that the barrister could present it before the court” [Shils, 1982].

The practising barristers lived together in a communal fashion in the corporate and closed guilds. The judges were exclusively chosen from among them and continued to share the communal life with them. The functions of the “Bar” and the “Bench” were two interrelated activities of the corporate guild, which later developed into an exclusive professional field, mainly from the nobility where admission was regulated by the guilds themselves. The “call to the Bar” conferred the right to plead, for the rest training was purely practical. Lectures at the Inns were introduced as a result of the competitiveness in the profession introduced by the new class.

The development of the law and legal concepts as well as legal practice was not rational. The systematic and comprehensive development of the whole body of the law was prevented by the craft-like specialisation of the lawyers, which also prevented the rationalisation of law. The legal concepts were formed and constructed in relation to the material at hand and the “concretely experiencable

events of everyday life” which were extended as need arose. Weber observes:

“They are not ‘general concepts’ which would be formed by abstraction from concreteness or by logical interpretation of meaning or generalization and subsumption; nor were these concepts apt to be used in syllogistically applicable rooms. In the purely empirical conduct of legal practice and legal training one always moves from the particular to general propositions in order to be able subsequently to deduce from them the norms for new particular cases. The reasoning is tied to the word, the word which is turned around, interpreted, and stretched in order to adopt it to varying needs, and, to the extent that one has to go beyond, recourse is had to ‘analogies’ or technical ‘fictions’” [Ibid].

This approach was necessary to the pecuniary interests of the corporate members which was brought to bear and to strongly influence the process, “not only of stabilizing the official law and of adapting it to changing needs in any exclusively empirical way but also of preventing its rationalization through legislation or legal science”:

“The lawyers’ material interests are threatened by every interference menaces that situation in which the adaption of the scheme of contracts and actions to both the formal norms and the needs of the interested parties is left exclusively to the legal practitioners. The English lawyers, for example, were largely successful in preventing both a systematic and rational type of law making and a rational legal education, such as exists in the continental universities; the relation between ‘bar’ and ‘bench’ is still fundamentally different in the English-speaking countries from what it is on the Continent. In particular the interpretation of newly made laws lay, and still lies, in the hands of judges who have come from the bar” [Ibid].

This evolution of the legal system has influenced the way laws are made by the British Parliament, which has to take special care and pains with a very new legislation to exclude all the possible “constructions” by the lawyers and judges. This interpretation is in many times contrary to the intentions of the legislative.

Max Weber noted that this tendency in the British system was “partly caused by economic considerations, and partly by the result of the traditionalism of the legal profession” which has had “the most far-reaching practical consequence”. Max Weber gives the example of land titles in England to demonstrate his point. He observes that the absence of a system of registration of land titles and, consequently the absence of a rationally organised system of real estate credit, was largely due to the lawyers’ economic interests with regard to the fees they charged for the title examination which they called “searches” that had in every legal transaction made because of the uncertainty of all land titles. It also had a deep influence upon the distribution of land ownership in England [Ibid].

Max Weber concluded that the development of capitalism in England had two features and both had helped to support the development of the capitalistic system. The first was the legal training, which was in the hands of lawyers – “a group which is active in the service of property, and particularly, capitalistic, private interests and which has to gain its livelihood from them”. The second was closely connected to the administration of justice at the central courts in London and its extreme costliness amounted “almost to a denial of access to the courts for those with inadequate means”.

The right to interpret and “construct” the meaning behind the laws made by Parliament was at the back of the claim for the independence of the judiciary. This element is brought out clearly by Terence Johnson in his study of Imperialism and the professions. In his view, the argument that the professions which exist in the West were a moderating factor in the excesses of economic individualism as well as tempering the impersonalising effects of bureaucratic organisation by upholding the values associated with individual responsibility were false. This argument in his view was based on the notion that professionalism provided an occupational basis for corporate identity and that the profession was armed only with the authority of expertise. On this basis the professionals claimed to have humanised the formal hierarchies of the big public and private corporations.

In his opinion this rosy view of the professions had been transmitted, without too great a violation of the underlying thesis, to the former colonial world. Here it was generally assumed that the emergence and expansion of the professional occupations was the necessary condition for economic growth in the new countries.

“Social scientists who have written about the ‘elite’ in the third world have then effectively identified in professionalism – a set of occupational values and standards, a primary agent of development. In so doing they have made a number of assumptions about the nature of professing as such” [Johnson, 1973].

Johnson questions the idea of elevating professionalism into a cultural universal which assumes that once we have identified a third world ‘elite’ as ‘Western educated’ and professionally employed, then we somehow know what their values are thus implying that professions everywhere share a common set of values by virtue of practising certain skills, or that a unified professional culture has been transmitted from a single metropolitan source to be adopted without modification within a wide variety of receiving cultures. In his view:

“Rather, the third world professions have undergone a process of historical development which differs fundamentally from that experienced by such occupations

in the industrial world. In particular, the professions in those underdeveloped countries, which now make up the British Commonwealth emerged and are embodied in social structures and power relations, which differ significantly from those prevailing in the metropolitan country. These differences are largely to be explained by the nature of colonialism, especially, in the relationship of the professions to the colonial administration and the post-colonial state”[Ibid].

Johnson argues that under colonialism, various forms of institutionalised occupational controls were generated, the most important of which was the system of corporate patronage. Corporate patronage was the reverse of professionalism in the sense that it is the client – a powerful corporate client – who regulates the profession rather than the members of the occupation itself. We will see that this is particularly true of the legal profession in the former colonies in Africa.

In the colonies therefore, professionalism never developed, although it would not be true to say that professionalism transmitted through educational institutions and reinforced by the direct influence of the metropolitan professional associations, has been unimportant. But in this case Johnson has to admit that even here, as Max Weber demonstrated, legal professionalism was itself a product of the dominant economic interests and those of the lawyers rather than the occupational values as such. That is why, as he himself correctly observes, the culture of professionalism was always in tension with the realities of the colonial power structure “which was functionally inimical to the development of professionalism as a form of occupational control. He adds:

“What was transmitted to the colonial territories was in many instances ‘outward forms of professionalism’. What did take hold was the rhetoric of professionalism; the ideology of the independent professions... [Ibid].

To make matters worse, in Africa the British applied a ‘colour bar’ to certain professions such as medicine. Africans were barred from the profession. Nevertheless a fully developed system of corporate patronage did emerge in the form of clientele to the colonial state itself, which was the employer of most professions. Lawyers, especially High Court judges, were at first served as senior administrative officers, who on reaching a certain experience and age were “retired” to the bench. The legal service was fully integrated into the colonial administration.

But of importance was the fact that some Africans who trained as lawyers, especially barristers, became linked to the political movement for independence. This was due to their peculiar position where they were called upon to defend political ‘agitators’ in the courts. This also meant that with independence many

of them joined the political parties and were part of the nationalist movement, although this link was later weakened. The majority however continued to serve in the 'profession', which had been imported, to the colony with all its "outward trappings" such as wigs and gowns.

## Legal Education in the New 'Nations'

The struggle for independence was indeed a struggle between two opposite forces: imperialism (colonialism) and "the people". In both camps there were contradictions. On the one hand, in the imperialist camp, there was a contradiction, albeit a non-antagonistic one, between the Old imperialist European powers and the United States of America, which sought the role of a hegemonic superpower, now confronted by the socialist world led by the USSR and the old European imperialist powers who still coveted their former colonies.

On the side of the people, there were also a non-antagonistic, but a times antagonistic contradictions between the petty bourgeoisie and the emergent comprador bourgeoisie who wanted to take over the roles formerly occupied by the colonial administrators and capitalist business interests, on the one hand, and the workers and the poor peasantry still suffering under the agonies of the colonial political economy, on the other.

On the imperialist side, the new hegemonic superpower sought to create an open international atmosphere in which it would expand its own finance capital through its new and old transnational corporations in spaces formerly dominated by the old European imperial companies. For this reason, it insisted on a multilateral trading and financial system as against the old bilateral imperialist order [Nabudere, 1977]. For this reason, the US was in favour of the decolonisation process, which would give it markets and outlets for its investments in African minerals and raw materials.

The nationalist petty-bourgeoisie therefore looked upon the US as a liberating influence against their European metropolitan powers. Under these conditions, the emergence of new 'nations' received a favourable reception in US circles, which at the same time was hostile to the radical, socialist oriented nationalist petty bourgeoisie whom it accused of "soviet" or "communist leanings". They were seen as destabilising forces in a sea of instability that characterised a "crisis of expectations" immediately after independence.

It is these new developments, which necessitated the articulation of the "modernisation theories", which were seen as a counter-weight to the communist "infiltration". Samuel Huntington's *Political Order In Changing Society* published in 1968 sought to show these trends, which were emerging in the new states. According to him "political decay" was being occasioned by a state of unrest, violence, corruption and military coups. What mattered therefore was not rapid economic growth, but stability of the "political order". This was a new US neo-colonial thrust in place of the Old European concern for the

maintenance of “law and order” which was uppermost in the functions of the Colonial State. Now US sponsored neo-colonialism was the maintenance of “political order” faced with the communist threat.

The nationalist petty-bourgeoisie was persuaded by modernisation theories, which they thought would support their “nation-building” project. This project was an Old agenda of European colonial powers, especially the British, who believed in the slow and “orderly” transference of power to the colonies as part of “nation-building”. This project started with the “second colonial occupation” immediately after the Second World War [Low & Lonsdale, 1976]. Moreover, the colonial powers had identified the ‘moderate’ nationalist petty bourgeoisie as worth “negotiating with” in the creation of this neo-colonial project.

The establishment of new African ‘nations’ needed the creation of an appropriate legal order. This could not be done without the creation of institutional framework. This framework was the University or the Law School. Tanganyika took a leading role in the discussions that took place in East Africa about the need to establish legal education in the country. In fact this discussion centred on a report that had been commissioned about legal education in East Africa and this arose out of a conference held in London on the future of law in Africa at a time when the nationalist petty bourgeoisie were busy negotiating for political independence [Alott, 1960]. This revealed the importance the colonialists attached to role of law in the new ‘nations’ they were helping to shape.

As a result of these deliberations and arising from the realisation that legal education in Africa was lacking, it was decided to set up a committee under Lord Denning, who was then the Master of the Rolls and also a master of the Lincoln’s Inn, one of the British four Inns of Court. This committee recommended the setting up of local facilities in Africa for the training of the legal profession. This was followed by the Lockwood report on higher education in East Africa, which recommended the establishment of the Faculty of Law in Dar es Salaam, Tanganyika from October 1961. This faculty was part of the University College- a constituent part of the University of East Africa, which was linked to the University of London. Tanganyika became independent that year.

In his inaugural address of the University College, on 25<sup>th</sup> October 1961, Mwalimu Julius K. Nyerere, then Chief Minister of Tanganyika and “Fellow of the College” expressed the national aspirations behind the establishment of the College in these words:

“[T]his College has been started in a rush....This was a political decision. An independent country depending on charity for all its higher education opportunities

is a great psychological danger. But the decision to start the first Faculty in 1961, and to proceed as rapidly as possible thereafter was also an educational decision [meant to increase opportunities for University education for citizens]. We are in the process of building up a Tanganyika nation. [I]f we are to build a study sense of nationhood, we must nurture our educated citizens [who] must have an African-Oriented education. That is, an education which is not only given in Africa but also directed at meeting the present needs of Africa. For our present plans must be directed at reaching the village... [Nyerere, 1967: 130-131].

This speech was given on the launching of the Faculty of Law as the first faculty of the University College of East Africa based in Tanganyika. It was a call for a society conscious graduate ready to orient him/herself to the needs of Africa and its people as well as creating a graduate who was prepared to work in the community (in the village). It implied a decolonisation of the educational system and state administration.

However, despite these aspirations and declarations, it was not at all easy to create the institutions that would re-orient the cultural parameters of the East African society from the deeply entrenched colonial political, economic, and social relations built within East Africa. These were economic power relations, which were bound to have a big impact on whatever reform policies were devised by the new governments.

To be sure, Nyerere's aspirations could only be marginally incorporated within the legislation that established the University College of Dar es salaam. Article 3 (2) (a) and (b) of the Statute provided:

“The aim of the College shall be:-

- (a) to provide in Tanganyika a place of learning, education and research of a quality required and expected of a University institution of the highest standard and to maintain therein the respect for scholarship and for academic freedom which such institutions require;
- (b) to contribute to the intellectual life of East Africa, to act as a focal point for the cultural development and to be a centre of study and research particularly in matters pertaining to the interests of the people of East Africa”.

The “parent” legislation – The University of East Africa Act, in Section 5 (1)(a) provided:

“[T]o assist in the preservation, transmission and increase of knowledge and the stimulation of the intellectual life and cultural development of East Africa, to preserve academic freedom and, in particular, the right of a University, or University College, to determine who may teach, what may be taught and who may be admitted to study therein”.



These legal strictures reflected a *status quo*, which had to be “preserved” even before the “increase of knowledge” could be “transmitted” for whatever purpose was currently needed in the post-colonial order of East Africa. There was also stipulated the preservation of “academic freedom” which was never known in East Africa, even under colonial educational conditions. This was a clear transference of colonial values and norms to the new elite, which was to emerge in East Africa. The Makerere University, which had existed up to this point, was a colonially directed institution where there was little academic freedom. To be sure, the governor of the protectorate was University’s Vice-Chancellor – a position that was passed on to the post-colonial presidents. Thus, the “academic freedom” talked of here, just like the concept of the “independence of the judiciary” was more an ideological expression of the dominant academia in the United Kingdom, its Commonwealth and that of the United States, which began to feature in the horizon.

What were the needs of Tanganyika and what type of lawyer was really required? We will see that, these questions were answered according to dominant political orientation and ideology at the time. In the first phase (1961-1964), the main need of the state was to train “competent lawyers” in the country. The first need was therefore to provide the state the required personnel as state attorneys and magistrates. This implies an emphasis on the teaching of public law.

The first problem was “where to find then dons”. This recruitment of academia could only for the time being be done from Britain, its Commonwealth or the USA because these were the countries where English common law was practiced or understood. Only a sprinkling of East African lawyers could at this time be considered. It is true that most of the recruits were from the generation dedicated to the “nation-building” project, which had already been inspired in the “Second Colonial Occupation” which according to Low and Lonsdale, was a form of “innovatory paternalism” which was aimed at bringing about “development” in the former colonies [Lows & Lonsdale, 1976: 12-13].

The curriculum, which was adopted in this phase, also reflected the “material conditions”, which, *inter alia*, included the need for state attorneys and magistrates to prosecute criminals and administer “justice”. Nyerere in his speech to the Tanganyika Legislative Council in 1960 had pointed out, in the correct ideology of the time that “[T]he first Faculty or one of the first of our new University College, when it is established is going to be the Law Faculty *to train lawyers locally* not only for Tanganyika but for the rest of East Africa”. In the inaugural speech referred to earlier, he had spoken of the “national philosophy” of building “a united, democratic, and free country [that] believes in the equality of all its citizens before the law” and with “an independent

judiciary dispensing justice without fear or favour”.

Thus, the “preservation, transmission and increase of knowledge and the stimulation of intellectual life and cultural development in East Africa was concerned with African value Systems invented to service the colonial economy and politics. It was at best a reified, ossified and rigidified concept drawn from African customary practice to promote European legal culture in Africa. Prof. Akilagpa Sawyer, a Ghanaian lawyer, then a lecturer on customary law at the Faculty, invited me to attend a seminar at the University College. During the discussions on the subject, it was not quiet clear to me what role this “law” could play in a University course or indeed in the development of law in the region.

One of the Deans of the Faculty of Law, Prof. Joe L. Kanywanyi, who taught Commercial and Insurance Law, in the second phase, had this to say of this approach:

“[A]lthough there was a clear effort to teach law in the East African context, this ‘context’ tended to be legalistically conceived. The general approach, reflecting naturally the staff’s academic backgrounds and a specialist ‘craft’ mentality, was that of teaching abstract legal concepts, principles and doctrines envisaged by or relevant to the respective courses syllabuses. Of course, this was done with help of relevant text books, legal journals and judicial precedents”[reflecting those legal systems]. [Kanywanyi, 1989: 15].

Thus although there were some “superficial historical backdrops”, a resort to “political independence” and “African-Oriented education” as ideological conveniences, this level of approach was still weak, reflecting the weakness of the nationalist ideology and agenda. Apart from the ‘nation-building’ project for ‘development’ and ‘national unity’, which were already on the ground, as we have noted under the ‘second colonial occupation’ the teaching of law in the Faculty, served the real purpose for which it was established. Those aspects of the “national agenda” concern were in fact the maintenance of “law and order” functions, which naturally reflected themselves in the demand for more state attorneys and magistrates for the new ‘nation’.

It should be noted, however, that this period also saw a general concern for “relevance” of law to the socio-economic needs of “new nations” or “new societies”. This approach was reinforced by the American legal theories in this field at this period, very much influenced by the “American Legal Realism” and the “Law in Action” Schools drawn from William James’ philosophy of pragmatism. Some US and Canadian jurists reflected these concerns in their writings.

For example, Cecil A. Wright, Dean of the School of Law, University of Toronto, suggested that there were three main objectives of a University School of Law. The first was that legal education had to impart *qualities* which should be found in legal practitioners; secondly, legal education had to produce a lawyer who was trained “not merely” in the work of solving problems of individual clients, “but of the society in which he lives”, and thirdly, legal education should act as a centre of research, criticism, and “contribution to the better understanding of the laws by which societies are held together” [Harno, 1953: 122-25]

Discussions on the goals of legal education also featured within East Africa itself at this time. Professor James C.N. Paul, an American law professor, and the first Dean of the Faculty of Law in Haile Sellasie I University in Addis Ababa, argued that the “goals” of legal education in Ethiopia were: first, to prepare men and women for professional legal service either to the private or public sectors – a graduate who was well equipped to perform legal tasks without a wasteful, dull, unnecessary period of apprenticeship. In his words:

“The graduate should be prepared to plead in the courts; to be a competent, rigorous judge; to be a responsible prosecutor; to counsel an agency; to negotiate and compromise for clients, without sacrificing interests or policies deemed of the essence – to consummate transactions, not frustrate them; to write legal documents – contracts, laws, memorandums and judgements – without indulging in rhetoric or irrelevancies; to research a problem without fuzzing the issues or wasting time. The graduate we want must disdain the undergraduate fashion of moralizing, generalizing and sloganizing; he must learn that hard problems are not solved by loose talk – a lesson not easily learnt in Universities today; he must be a lawyer aware of the limitations of law, aware of the gaps between law in the books and what is done in fact (and be) prepared to live with strange frustrating hiatus between the modern, imported “rules” and traditional views, (as well as being) prepared to help bridge the gap(s)” (between them) [Paul, 1968: 16-24].

The second goal, Paul adds, is to prepare graduates equipped intellectually to serve more effectively as *agents of change* – “since the process of development surely entails dislocation, sacrifice and commitment, notably by those few lucky enough to get parchments from Universities”. Paul agreed that this role was more difficult to define and “more debatable”. He added: “[T]here are those who might view it as unattainable and incompatible or injuriously competitive with the first”. On his part, Paul argued it was “complementary and necessary”.

However, as a “corollary to the two goals, Paul began to come out more clearly as to the true import of the two goals. He said that the programmes of the law schools must be “small in volume” and must be characterised by “eliteness in selection of students, in spirit and impact”. The reason was that in most Sub-

Saharan Africa “we cannot realistically, as a matter of economics and wise policy, provide degree training for all legal positions which will exist and which might in theory call for a lawyer with ‘complete legal education’. For this reason a vast number of “lawyering jobs” in some countries may have to be filled by men with rudimentary technical training coupled with experience” [Ibid].

The corollary in fact presents a dilemma for legal education in the post-colonial state, which continued to bedevil official policy in the East African countries. If indeed the lawyer in Ethiopia, according to Paul, had not only to staff the courts and provide legal services “in the traditional sense”, but also to be “agents of change” in the vital process of “rational development”, what exactly were the resource to equip him to do this?

What power and resources did he have to bring about change? Paul refers to Ethiopian’s Five Year Development Plan, which had certain roles for a lawyer; land reform laws and other legislation to spur agricultural development, investment and banking arrangements, various kinds of new welfare legislation; and expanded efficient revenue system:

“Development means expanded economic activity, and that means an increasing amount of contractual negotiations between business concerns; the drafting of charters of organisations for all sorts of enterprises. Modernization inevitably entails specialized legislation and administration, careful drafting of laws and regulations. And the doing of all these things calls for the use of special skills which only come through intensive, disciplined legal training. As so many of the meaningful texts on ‘development’ so graphically teach, ‘development’, no matter how defined, simply does not come without human resources to provide the skills” [Ibid].

This quotation from Paul demonstrates that there is in fact no real distinction between the first and the second goals in as much as the training and functional needs of a lawyer are concerned. The role as change agents involves use of skills, which Paul outlines in the first goal. They involve mainly technical skills. Land reform law, social welfare legislation, investment arrangements and contracts, all imply policy decisions made between those who are in a position to demand policy formulation and change. It means the lawyers skills of pleading, writing judgements, prosecuting, counselling, negotiating, drafting, etc, are all technical skills which can be exploited by those who are able to influence decisions and policies in the state institutions. This is their *professional* role.

There is therefore a very weak link between the skills of a lawyer and the day to day problems of the peasants scattered in little settlements and villages throughout the country, whose lives are mainly in the “traditional sector”, but

which is exploited to service the “modern urban sector”. Here the skilled lawyer is only called upon to “be aware of the limitations of law” and the “gaps” which exist between modern law and tradition and to be prepared to “live with strange frustrating hiatus” as Paul called it. It is not clear, how in these circumstances, a professional lawyer can “help to bridge the gap” between the two situations which in fact represent two diametrically opposed contradictions between the exploiter and the exploited. Here the real question is what power and resources does the lawyer, as a “change agent” have to bridge such gaps, in such a frustrating and strange dichotomy created by colonialism and imperialism.

Paul gives an indication of how the gaps between the traditional and the modern can be bridged. For him it is by the cultures, customs and habits of the rural people adapting to themselves to ‘imported’ norms and methods “*and vice-versa*”. This to me does not amount to lawyers being deeply involved in the work of “revolutionising his society”. It simply means the lawyer doing what he is told to do by the dominant forces that be. In short, the post-colonial lawyer is expected to do what John Austin said he should do: to apply law as it is and not as it should be.

Nevertheless, these dilemmas agonised those who at this time were trying to create legal training systems. Ideology of the dominant metropolitan classes played a crucial role, but also the weak ideology or lack of ideology by the nationalist petty bourgeois strata of post-colonial society informed the way the post-colonial state was structured in which the setting up of legal training institutions and Universities took shape. This influenced the way the Law School and Faculty of Law in Nairobi, Kampala and Dar es Salaam came to be structured including the manner the curricula and syllabi were organised and the teaching undertaken.

Professor Twining served as a Senior Lecturer in the Faculty of Law at University College, Dar es Salaam from 1961 and 1965 and during the same period he was a member of the Kenya Council of Legal Education from 1962-65. He was in a position to describe the educational philosophies and ethics that informed the establishment and structuring of the University College in Tanganyika and the Kenya Law School in Nairobi, Kenya.

In his view, the most striking difference between the School and the Faculty was to be found in the respective educational philosophies and ethos, which sometimes was expressed superficially in describing the approaches in Nairobi as “practical” and that in Dar es salaam as “academic”. However, the truth was to be found more by looking at the actual differences in approach.

According to him, students in Nairobi, “almost exclusively” concentrated on those areas of law with which advocates have regularly come into contact “in the past”. This, to him, was not surprising but adds, “from viewpoint of society as a whole it is much more than the top of the iceberg”. Customary law, conflicts of laws, traditional African modes of disputes settlement and the administration of justice in the lower courts were touched on lightly, “if at all”. In this respect, less emphasis was placed on them than in Dar es Salaam. On the other hand, both the subject matter and the methods of study of the traditions of professional training in England had been “closely adhered to” in the Kenya Law School.

At the Faculty of Law in Dar es Salaam, the approach diverged in several respects. *Firstly*, there had been a determined attempt “to resist pressures to sacrifice the conventional objectives of a University education”. According to the educational philosophy of the Faculty spelt out in *A Guide for Schools*, the Faculty of Law lecturers had been appointed, syllabuses planned and methods of teaching devised, with a single important consideration in mind: the fact that the lawyer in East Africa has to be much more than a competent legal technician:

“With the coming of independence, the manifold problems that beset developing countries have to be faced, and in doing this great changes will have to be made in the framework of society. Lawyers have a vital role to play in these developments, for upon them will fall a major share of the work of putting into practice the principles and the ideas of their colleagues in the fields of politics, economics, and science, and ensuring that the resultant system works fairly and efficiently. Legal education must take into account of these facts, and see that students are made aware of and prepared for their future role. Legal education for Eastern African lawyers must, therefore, entail more than the accumulation of knowledge about rules of law – to know much law is not necessarily to be a good lawyer, although it is the foundation upon which most legal education must rest. The good lawyer is the one who knows also something of the society in which the law operates and the process by which law may change and be changed by that society. Thus we teach law, as it exists in East Africa today, but we do not stop there; we use this law as a firm base upon which future developments may be considered. In the way we hope to be able to produce lawyers who will have thoroughly mastered the techniques of the law: how to search out all the relevant authorities on a particular point and marshal them into a coherent form; how to read a case in order to understand it fully; how to analyse and interpret a statute; and how to put across one’s point of view in speech and writing. But over and above all this, they will have studied that law against the social and economic background of East African jurisdiction, and will be in a good position to offer useful contributions to discussions on the problem of the law that ought to be in East Africa” [pp 16-17].

The second difference between Nairobi and Dar es Salaam was that although many of the subjects studied bore the same names, “the subject-matter and manner of approach is radically different”. In the Faculty the approach was comparative. The East African Law and Foreign Laws were examined and compared. Customary law was given as much attention as the general law.

The law and the courts with which the great mass of the people came into contact most regularly were studied in much detail as upper reaches of the system “where the law is largely imported”. They were studied critically in the historical context of the societies that were undergoing rapid change in the political, economic, and legal fields.

Twining noticed in this approach in Dar es Salaam “a certain amount of American influence”. This was due to the fact that several members of the Faculty had studied in the North American Universities in which there was a reaction against some aspects of English legal traditions which had on the whole successfully survived attack in England “and which they consider to be unsuited to modern East African conditions”.

There was therefore a tendency to use mimeographed materials in which the American “case method” of American Legal Realism were used. Here the teaching of law, with little or no reference to its social and economic background, the use of nutshell approach to legal doctrines and, where interdisciplinary work was concerned, the emphasis on philosophy and formalized history of institutions and doctrines rather than on sociology and economics, were resisted.

There were also significant contrasts between Nairobi and Dar es Salaam in other respects. In Dar es Salaam there was a rejection of the symbolic trapping quadrangles, maniples, High Tables and High Masters for which some African Universities such as Makerere were famed. At first these symbolic trappings were imitated, but according to Twining, some of the habits such as the wearing gowns at dinner and at lectures and the waiting on students at meals were reversed early in the institution. The High Table died a natural death and gowns were only retained for ceremonies and festive occasions. For meals, teachers and students shared a Cafeteria self-service system.

On the other hand, the Kenya Law School, according to Twining, appeared to be heading in a different direction:

“[T]he desire to foster in Kenya the traditions and ethos of English Bar appears to prompt initiation of the ceremonial and club land aspects of the Inns of Court. Within a short period of Dar es Salaam rustification of gowns, gowns were introduced in Nairobi. There is talk of dinners and benchers and even of an Inn of Court. There is a firm faith that the English tradition of transmitting gentlemanly values by osmosis can be planted in Nairobi. The view has been expressed that the articulated clerk system will somehow help to preserve the independence of the legal profession” [Twining, 1966: 136-9].

Prof. Twining went beyond the descriptions of the Dar es Salaam as “academic” and that of Nairobi as “practical” to unearth the differences in teaching of law and the cultural forces behind them. On the one hand, there was a radical (American) concern with the relation of lawyers to societies in revolution; on the other hand, the English-oriented traditionalist approach was concerned with the guild aspects of the legal profession and its insistence on the independence of the profession. Twining noted that despite the differences, the two approaches had developed “almost entirely by non-Africans”.

“As the east Africans take over, they will find that the expatriates have left them a legacy of differing points of view and ways of doing things. It will not be long before the merits of each approach can be fairly tested by the quality of the products” [Ibid].

By 1973, these positions had consolidated themselves so that when I myself joined the Faculty of Law of the University of Dar es salaam, the American Legal Realist approach had played itself out. The injection of a new radical socialist approach began to filter through to all the Eastern African Universities, as debates became sharper and more pointed. But we shall revert to this below.

One thing, which seems to come out, clearly from this experience in the first phase was the consensus, which had emerged to the effect that law should be studied within a wider socio-economic environment. Most of the American and Canadian lawyer advocated that law students should be exposed to the other social sciences. Paul, speaking of Ethiopia, for instance, pointed out that lawyers of public law must be aware of the problems of “political planning” as part of Constitution-making. Jurists must be part of that process and they must therefore “have the perspective of comparative political systems and experience, a social science orientation to problems, a knowledge of federalism and problems of initiating public administration in traditional societies” [Ibid].

He too, like Twining, did not agree with the dichotomy between “academic” and “practical” subjects: “There is no such dichotomy in the real world of law; and it dilutes legal education to make the distinction”. Therefore legal training “must include interdisciplinary work in law and economics, law and human behaviour” [Ibid].

It is not surprising that the Faculty of Law in Dar es Salaam was the first to take the challenge. According to Prof. Kanywanyi already referred to, after the student unrest in 1966 which resisted national service policy of the government, there was a two pronged endeavour which was mounted first to address the issue of the curriculum development in all the faculties, and secondly the need to examine the more general value-contents of the teaching and training approaches.



According to him, there emerged a general consensus that the Faculty and department curricula were wanting in one very important respect.

“They did not provide sufficiently for the study of, nor posit, the various disciplines and related subjects in the context of East Africa’s, and particularly, Tanzania’s socio-economic development, aspirations, concerns and current problems” [Ibid: 20].

The abstract approach, which was at the same time political, was condemned. The solution was said to lie in adopting inter-disciplinary “common course” that would be taught to all students in the University College. This also proved problematic, and rather “lodge-podge, *ad hoc* political, economic, cultural and archaeological-historical topics were chosen at random to which ministers and invited outside speakers contributed”. It was moreover a non-examinable course, which proved unpopular with the students.

It was in this context that the Faculty of Law set the pace by introducing a compulsory, examinable subject on “East African Society and Economic problems”. This touched on topics such as: the Introduction to East African Problems and Social Analysis. Social Evolution and the Pre-colonial History of East Africa. The Rise of Capitalism in Europe; The Colonial Situation; The Changing International Environment; Nationalism and Political Independence; East Africa and the Third World; Resources and Development Planning; and Case studies in East African Development.

Prof. Kanywanyi points out that with this new course it was believed and hoped that the exposure of the Law Students to such broader issues in their first year of legal studies “would give them the requisite political orientation and general theoretical foundations from which the socio-economic content of the more technical legal and semi-legal subjects could be grasped or, at any rate, appreciated” [Kanywanyi, 1989: 22]. But it turned out that even this new wider approach was itself not comprehensive enough and this led to the demand to break new ground.

## Law and the Social Sciences: The Crisis of Relevance

The introduction of the social sciences in the teaching of law at Dar es Salaam University, on which we shall focus in this section, created its own problems of relevance. But this crisis of relevance did not lie merely in the way the teaching methods were introduced in the East Africa African universities. The crisis was part and parcel of a worldwide movement, which questioned and problematised existing social science knowledge and the way they were put by particular sections of society to their advantage and to the disadvantage of others. Such knowledge could not be said to be universal if it did not serve the universal interests of humanity as a whole. The crisis was therefore basically an epistemological crisis of the modern paradigm.

### i. “Expressive” Revolutions

The crisis in the social sciences, and even in the natural sciences, seems to have reached their peak in the period 1960-1970s. This is a period, which Parsons has called the “expressive revolutions of the 1960s” [Parsons, 1978: 300-24]. This revolution, according to Parsons, was a revolution in consciousness amongst the young, “in numerous parts of the world” which centred on such themes as liberation and love [Robertson, 1992: 9].

It was also a period in which the concept ‘global’ began to assume a particular significance. According to the *Oxford Dictionary of New Words* it is this period, which produced this concept, a period in which there was growing awareness about the environment. The dictionary defines “global consciousness” as “receptiveness to (and understanding), of cultures other than one’s own, often as part of an appreciation of world socio-economic and ecological issues” [1991: 133]. It goes further to point out that this growing “global consciousness” drew “on the fashion for consciousness-raising in the sixties”.

Robertson who examined these developments through the discipline of sociology found it difficult to define the parameters of the discipline invaded, as it were, with these new developments. This period also produced a ‘paradigm shift’ in the area of natural sciences. Fritjof Capra, took note of these developments when he wrote an interesting book around this time entitled: *The Turning Point: Science, Society and the Rising Culture*. In this book, Capra observed that during the 1970s, there was “a dramatic change of concepts and ideas” in physics which had emerged in the three decades of the Century, and which were still being elaborated. He added:

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“The new concepts in physics have brought about a profound change in our world views; from the mechanistic conception of Descartes and Newton to a holistic and ecological view, a view which I have found to be similar to the views of mystics of all ages and traditions” [Capra, 1983: xvii].

Capra also added that the Sixties and Seventies had generated a whole series of social movements “that all seem to go in the same direction, emphasizing different aspects of the new vision of reality”. Although these movements were still operating separately and had not yet recognized how their intentions interrelated, there was a clear commonality, which had to be investigated.

A change also occurred in the 1970s in the field of philosophy and the contribution of John Rawls has to be specifically acknowledged. His main work: *A Theory of Justice* [1951], although dealing with issues of international justice, at the same time also focussed on socio-economic concerns, as observed by the editors of the *Oxford Dictionary of New Words* of the period referred to above. These concerns were about the duties and responsibilities of those who had accumulated wealth to the rest of humanity. Rawls argued that this question was one of justice and not of charity on the part of individuals concerned. This raised the issue of whether humanity as a whole was entitled to an equal share of the world’s resources, which were seen as being in the arena of individual property rights. Although Rawlings tried to widen the understanding of such individual rights, his theory of justice had serious flaws “if substantive individual freedoms are taken to be important” [Sen, A, 1999: 56, 78, 86].

There were also external and internal pressures, which forced the pace of the discourse. The external pressures arose from the emergent social and civil rights movements in the United States, but which spread throughout the world. Indeed, these external pressures were raising issues internal to all the humanities and social sciences. The Civil Rights Movement in the US raised issues of political and social rights, and so did the Women liberation movement. There was also the movement of the youth, the students, the workers and the Third World peoples fighting against imperialist domination, especially against colonial powers as well as US involvement in Vietnam. There were also peace movements, which cut across these issues. The Ecological Movement raised whole category of concerns regarding human survival and its existence on the globe or Mother Earth.

The internal pressures to the humanities including philosophy, were basically concerned with the problematisation of the Western episteme. These were methodological concerns questioning the extent to which the social sciences

could tackle substantive issues of human existence. It was a questioning of the extent to which the social sciences could follow the methodologies of the natural sciences in order for their work to be recognised as being scientific when the natural science paradigms were themselves being questioned, as we have seen above. These concerns produced conditions for a “paradigmatic shift” in which the social sciences and the humanities found themselves at this time. The destination of the “shift” was not clear at the time and it remains the concern of the post-modern era.

It is in these movements that my own intellectual development was fashioned. In the years 1960 to 1963, I was a student at Lincoln’s Inn, one of the four English Inns of Court in London. Here Law was taught very much in the English positivism tradition based on John Austin’s normative legal philosophy. Although I also studied a law degree at the University of London as an external student side by side, this did not very much widen my social perspectives.

As an aspiring Barrister, I had to “eat dinners” and drink Portuguese port-wine four times a term for which I was charged a “guinea” each time. After the dinners, we were given long speeches from the Masters of the Inn as part of the professional training in the art of advocacy and the legal method. Most of the Masters of the Inns of Court were conservative guild-like Barristers and Judges of the British Bar and Bench. Their main concern was to protect and preserve the traditions of their profession, which was very much based in the protection of their economic and social status as well as that of the propertied classes, as Max Weber had correctly characterised them. At the same time, there were some liberal and “Laborite” Barristers and Judges who were Masters’ such as the famous Lord Denning.

Lord Denning was called the Master of the Rolls, a Court of the English legal system, which specialised in the interpretation of documentation. He often lectured to us during the official lectures at the Council for Legal Education, which coordinated legal training for all the four Inns of Court. Although Lord Denning espoused some form of social concerns, this concern was very much circumscribed within the mainstream English legalism.

In these very guild-like and craft conditions, I found that the only opportunity which was available for me to widen my understanding of society was within the social movements of the time. I was elected one of the Representatives of the Inns of Court to the National Union of the Students of Great Britain and Northern Ireland as well as international conferences. These social movements and gatherings gave me an opening to the revolutionary debates in the Student Movement at the different Annual Conferences of the time (1960-63). I was

also elected President of the Uganda Association, which was an organisation of Uganda Students and citizens living in the UK and at the same time, I was President of the East African Students Association in London.

From these organisations, I found myself involved in the Pan-Africanist and Nkrumahist Movements in the United Kingdom. Nkrumah donated a house to accommodate all African Students organisations in the UK who were organised under the Committee for African Organisations. The struggle for African independence was coordinated here and I found myself involved with Lord Fenner Brockway's Movement for Colonial Freedom, which gave support to the struggle of the Colonial peoples of the British Empire for independence.

These movements became "globalised" in the sense that it was no longer possible to support just one cause without empathising with the other similar causes. So I found myself caught up in student movements, anti-colonial movements and Civil Rights as well as student peace movements. The peace movements were very much influenced by socialist and Marxist organisations so I found I had to take positions on political issues of international dimensions. I decided to become a Marxist and a member of the British Communist Party. This raised my social responsibility in society, which could no longer be restricted to African, let alone Ugandan, issues alone. Apart from editing and circulating pamphlets and newsletters on African issues, I was also required to sell the British workers newspaper-*The Daily Worker* at underground stations. This raised my political consciousness to global issues and activism.

It is here that I found myself deeply involved in organising and participating in demonstrations when Patrice Lumumba of the Congo was assassinated. I also took active part in anti-Vietnam War demonstrations in London, a matter which influenced my future activism when I returned to Uganda in 1968 after my qualification as a Barrister in 1963. One of the things I did on return to Uganda was to set up a Uganda-Vietnam Solidarity Committee in support of the people of Vietnam against US imperialism.

In Uganda, I joined a legal practice in the Chambers of Binaisa, Lubowa and Ibingira, Advocates. All these three Barristers were taken up in the nationalist Movement of the Uganda People's Congress (UPC) led by Apollo Milton Obote, of which I was also a member. They were all ministers in the first independence government. In their absence, I was employed as an Advocate of the High Court of Uganda and the Eastern African Court of Appeal, joining a senior partner in the firm by the name Chris Mboijana, who had also returned from England, after completing his legal education in India.

I soon found myself involved in student and the youth wing activities of the UPC. In 1965 I was expelled from the party for challenging the Party Leadership about internal party democracy. I moved to set up my own legal Chambers in Mbale, Eastern Uganda, which was my “home town”. My movement was however motivated by the fact that the people of Mbale had given me a scholarship that enabled me to go to England to study law. I therefore felt the need to serve the local community as a way of paying back for the privilege I had received from them.

In Mbale, I became very active in defending peasant cases as well as political cases in Uganda and elsewhere in East Africa. It was here that I also formed and became Chairman of the Uganda-Vietnam Solidarity Committee. I took an active role in local issues such as those affecting street children and demonstrated in support of their causes. It was then very unusual for an Advocate to be seen in the streets demonstrating against the government. But this was the spirit of the time. I also established cells and study groups with the late Natolo Masaba for the study of Marxism and pan-Africanism. In addition, I participated in evening adult education classes as a teacher and a learner in the Extra-Muriel Department of the Makerere University under the dynamic leaderships of Lalage Bown. Chango Macho, with whom we worked closely in London during the student days and from whom I learnt a lot about pan-Africanism, later took over the Department and under him, we continued these evening classes together. It was during this phase that I got involved in the debates already referred to above about the social system in Uganda and the role of the judiciary in Independent Uganda.

I represented organisations and individuals in political cases throughout East Africa. In 1964, I was invited by the Revolutionary Government of Zanzibar to advise them whether they should join the Union with the mainland Tanganyika. In 1967 I was invited to defend the arrested youth wingers of the Kenya Peoples Union-KPU, which was formed by the late Odinga Odinga after he broke off from the Kenya African National Union-KANU. In 1969, I was invited to defend a student- a member of the University Students Revolutionary Front-USARF who had been arrested for keeping in captivity a US citizen whom the organisation had wrongfully arrested for being a ‘CIA agent’.

In time, I myself was arrested by the Uganda government at the end of 1969 for “engaging in subversive activities” and accused of organising the Uganda-Vietnam Solidarity Committee which the regime regarded as a “subversive organisation”. The organisation was banned and I was detained for one year in high security prison. All these developments took place because of my role as a socially conscious Barrister, but who went beyond the structures of law and

society “as it is” to challenge issues of social justice and self-determination of peoples that characterised this period.

## ii. Law and Society Movement

What came to influence the teaching of law in East Africa also sprung from these wider conditions of the post-war period in which, as we have already noted, the US became an active power in the promotion of western culture. This took the form of US cultural influence, which accompanied its imperial role. One of the mainstream movements, which tried to give a ‘modern’ face to law, was the US Law and Society Movement. This movement accorded well with the role of the US as new leading imperial power. According to David M. Trubek, this Movement and the ‘Law and Development’ Movement were “a sort of export branch of imperial legal culture” [Trubek, 1990: 616].

The Movement is responsible for bringing the idea of “society as a system” which originated in structural functionalism, into modern American legal thought. The notion of ‘society as a system’ was premised upon the idea that society is an interdependent set of elements. It was based on two key ideas: social integration and functional necessity, which existed because each of the elements had a specific function.

In fact the Movement sought to uphold the central trends of the Enlightenment based on Reason as a directive force in social life at a time when the foundations of this episteme were under challenge. Specifically, the movement tried to uphold 19<sup>th</sup> Century American legal thought which found its legitimacy on the doctrine whose foundations had been undermined by American Legal Realism already referred to. It did this by objectifying law.

In the 1950s and 1960s the ‘necessitarian’ faction of the Movement tried to transform the ‘systematicity’ ideas into a set of analytical statements, which were used to justify the existing institutional arrangements in the American society as “objectively necessary”. One of the ways in which the Movement “objectified” law was by looking at society as an object like the solar system with invariant relationships and determinate regularities. It was an objectivist epistemology that looked at the social sciences as a ‘neutral’ technique and methodologies, which could be used to observe the regularities, that governed the operations of the objects in a “scientific” manner. By doing this, the proponents of the Movement embraced the positivistic notion of the social sciences which was widespread in the 1950s and 1960s and which was increasingly challenged by the feminist and anti-racist movements.

To accord with the needs of liberalism, the Law and Society Movement tried to disengage law from politics since it was considered to be a scholarly project. This approach was intended to carry out their research programme where methods of positive science would be applied to the study of both society and law. In this context, the legal process theorists offered neutral procedures, which they considered to be the answer to the study of law and society, which was promised on objective knowledge produced by a positive science of society. In the words of Trubek:

“Positive science, like procedure answers the question of normative thought by evading it. If society were a system obeying objective laws, and if positive science could identify those laws and unearth the social policies that were consistent with them, then policy formation would once again be grounded on a neutral and objective basis. While the idea of a positive science of society seems to us one of the most problematic features of the original understanding (of the movement) it may have seemed particularly attractive to the lawyers of the Imperial epoch [Trubek, 1990: 614/5].

This was because in this period (1960s) American legal academics encouraged by massive grants from private foundations and government agencies, were motivated to study the role of law in Third World ‘development’ as a ‘law and development’ effort. The idea was to find out how the received laws and codes into these countries from Europe could be used for development and “progress” of Third World societies. According to Trubek:

“Law and development scholars assumed that the adoption and implementation of these (often imported) modern laws marked development and progress. And they treated as a ‘problem’ the fact that social relations in Third World countries did not conform to these newly enacted norms. This equation of legal standards with progress and the definition of non-compliance as a problem, led these scholars to spend considerable amount of time thinking about how we could develop away to measure – and thus – increase the ‘penetration’ of so called modern law” [Ibid].

Thus positive science looked at the reality of the non-applicability of imported laws to Third World ‘development’ as a central *problem* for its concern. But since the ‘problem’ could not disappear by a mere ‘measurement’ of the ‘gaps’, the methodology itself got into difficulties. According to Trubek, the “Law and society scholars began to learn that it takes more than a study to close the gap between promise and fulfilment in American life” [Ibid].



## The ‘Reception’ of US ‘Law-in-Development’ in East Africa

As we have already indicated above, the post-war period, which saw the African countries achieving their political independence, was also a period of US penetration into Africa. The Law and Society Movement and the Law-in-Development approach, which was part of that movement, was the method of penetration in the teaching of law and its use as a “technique” for “development”. Its links to the “modernisation” theory are clear because this theory was used at the principle *political* instrument of US imperialism in the Third World countries as articulated by Huntington. Its economic counterpart was “development” theory and this was best brought out by W. W. Rostow in his *Stages of Growth: An Anti-Communist Manifesto* [1960]. In short these American “approaches” were informed by the politics of “containment of communism” in Third World countries and therefore constituted part of its ideological package in the new ‘nations’ of Africa.

The specific method of penetration in the teaching of law required a new class of *comprador* petty bourgeoisie who espoused the American approach as opposed to the old British colonial approach. In East Africa, this concretely took the form of ‘law-in-development’, which was devised as a course for the future lawyers of the new ‘nations’. As John Mbirizi, who examines law teaching in this period observed: “The Law-in-Development movement was, in short, an attempt to produce a development lawyer who, like other American development scholars of the day, was to go to the Third World to help foster development, but this time through law [Mbirizi, 1986: 64].

The entry point was the University College of Dar es Salaam, as we have seen. Here the ground had been opened by the Lookwood Report on High Education in East Africa, which recommended the establishment of a Faculty of Law at Dar es Salaam in 1961. The new Tanganyika Government adopted this recommendation and began to implement it. Time was ripe for what Mbirizi has called “the American legal education missionaries” to come in and import their own version of legal ideology in the new University. Sponsoring foundations and institutions supported this drive by financing and staffing the programme. Rockefeller, the Maxwell Centre at Syracuse, the Staffing of African Institutions for Legal Education and Research – SAILER, the American Program for Cooperation in Africa Legal Education and Research and other agencies sponsored by the state were all active in pushing the programme.

The main idea behind the American approach to legal education in Africa was that it was considered to be superior to the earlier British approach. The teaching materials comprised casebook studies with extracts from the different social

science disciplines unlike the British textbook, precedents and nutshell approaches. But the case study method used by the Americans had the disadvantage of being misunderstood by students. In any case, they were not contextual.

One of the “them dons” who became the Godfather of the ‘Law-In-Development’ in East Africa was Robert Seidman. In the review of his teaching experience in this period, Seidman, pointed out that his approach had been “to think of the subject matter in terms that might serve *their purposes*”, and these “purposes” revolved around issues of “poverty and vulnerability”. He pointed out that the “problems” that law and development had to solve did not fall within the legal order, but revolved around “social difficulties” which were created by poverty and vulnerability of communities and individuals in them.

But the question arose - how can law address “problems” which do not arise from its own discipline. Seidman was of the view that realising the fact could do this that in Africa poverty and vulnerability “result from a set of institutions inherited from the colonial era”. The answer therefore lay in “massive institutional change” [Seidman, 1986: 53]. This approach was also necessitated by the fact that since all schools of social science looked to the legal order to make concrete their policy proposals to solve social problems. Law was therefore obliged to play a role although there were limits.

Seidman argued that social problems arose “because of the activity of people”. The principle problem for law and development was therefore to study how and why people acted as they did in the face of a rule of law, which prescribed their behaviours. In this sense:

“The legal order affects behaviour by changing the arena of constraints and resources within which the laws’ address act – that is, choose. It does that in a variety of ways, in the end all depending upon the behaviour of various state officials. Unless constrained officials will exercise discretion in favour not of the poor and dispossessed, but in favour of those with power and privileges. The necessities of development in favour of the poor requires clothing officials with the very power that, unless curbed, they will likely use to defect development in the sense I use the terms here” [Ibid].

Here was the crux of the *real* problem, which Seidman could not solve and provide answers to. The vital questions were: Why did officials exercise their “discretion” in favour of those with power and privilege against the interests of the poor and dispossessed? To what extent could law “curb” the *power* of the officials which law itself granted to them? This is because Seidman recognised that in order for the officials to be able to exercise their “discretion” in favour of the poor, they had first to be “clothed” with the power. Seidman wanted the same law to curb that very power. The real question was why it necessary to

grant the power to them in the first place? Indeed Seidman went further to recognise that of all officials: “those involved in the law creating process” had the “greatest discretion” and “unless constrained, they too will use their discretion to create laws that favour not the poor but those who already have power and privilege” [Ibid].

These questions turned out to be the real dilemma for the law and development movement. It became a double dilemma. How do you curb the power and discretion of the lawyers so that they too can curb the power of the other officials, especially those involved in the law making process, not to exercise their discretion in favour rich, the powerful and privileged? Indeed, it would appear that the double dilemma arose because the movement did not pose the real questions: How could law curb the power of those who were powerful and who had influence over the state officials?

Seidman’s answer to these questions raised more problems for the ‘law-in-development’ movement because his answer was circular and tautological. In his view, power and privilege arose from existing institutions. Those with power favoured incremental change (or no change at all). Hence the need for “massive institutional change”. But Seidman did not consider the fact that those without power also wanted “incremental change” for which there was need for “massive institutional change”. The question was how could the same officials serve the powerful and the poor in the incremental changes which both desired. These formulations of Seidman obscured the *class issue*, which was implied in the analysis, and prescriptive solutions he was offering.

Having failed to raise these questions, which could not in fact be solved by law, Seidman and his school resorted to a hodgepodge of prescriptive solutions, which in their view could address the developmental needs of the poor. These prescriptions again revolved around the need to make laws, which could transform economic institutions and behaviour of the ‘addressees’ (including the powerful!). These laws could, according to Seidman, ensure “conforming behaviour” on the part of officials who exercise their discretion in favour of the poor and ensuring that the law making institutions “create laws that favour the interests of the poor”. These activities would constitute the law and development research agenda. In his words:

“Teaching law and development therefore requires that we teach law students how to achieve these objectives in actual conditions of development. Because no body has a very clear understanding about how to do that, lawyers in the real world must constantly undertake investigations about how to accomplish those objectives in concrete situations. *Teaching law and development requires therefore not that we teach students a body of knowledge, but that we teach them how to make practical investigations*

*into concrete problems, to the end that they learn to design and draft laws that will solve the specific problems in the light of the four objectives stated [Ibid-emphasis added].*

This approach basically turned a law student not into a legal craftsman as such, but into an investigative lawyer with skills to learn about society. This is why the social sciences disciplines were introduced in the ‘law-in-development’ approaches. Lawyers were in addition to be taught a ‘variety of frameworks that makes research possible’, methodologies for conceptualising problems, simple systems models of analysis of decisions making institutions, as well as economic concepts, etc in which a combination would be made of text materials, lectures and case studies.

These it should be said were technical methodologies for discovering “social problems” which, moreover, were posing the wrong questions. This is why the “Post-Imperial Age” lawyers argued that the Law and Society Movement’s “original understanding” and their “bold” pronouncements and commitments of the 1960s were “largely symbolic”. Many of their ideas and “gap studies” were never implemented as the liberal coalition also collapsed. The “Post-Imperial Era” lawyers instead put forward a non-hegemonic “counter vision” which also did not generate a new understanding or even generate a new ‘paradigm’, as we shall see later.

This was not surprising. According to Friedman, social theories of law at this time started from the basic assumption that economy and society make law. This understanding accorded well the view, which looked at the United States as a “pluralist democracy”, a point of view that was “popular in the 1950s”. Under this understanding, it was held that there was no single social group, which was dominant in the US. There was no clear majority, indeed every group, including the industrial and financial monopolists, were considered to be a minority, which “bargained” with the other groups for their interests. What resulted was some kind of compromise. “No one gets exactly what one wants, and no one is entirely left out”, so the popular bourgeois myth went [Friedman, 1975: 178]. The law-in-development movement seemed to have been part of this dominant opinion, which obscured the class nature of US society.

However, Friedman who wrote *Legal System: A Social Science Perspective* in 1975, noted that “of late”, political scientists had begun to look at the world “with a jaundiced eye”. He notes that beginning with the work of C. Wright Mills on the *Power Elite* [1956], which was taken as a classic statement from the left on the class character of the US society, the neutrality of law began to be challenged. Law was now not seen as impartial, timeless, classless and

value-free. Law was now seen as a reflection of the distribution of power and social forces, which existed in society.

Friedman explained that special theories, which had upheld the pluralist view, had looked at the legal system as emerging from “market-like activities” in which people traded for their interests as they traded for goods in the market. The political process was seen as blind to these activities. In the words of Friedman:

“A man who fights to feather his nest with a certain amount of force makes the same impact on the law as one who spends the same force fighting for relief of the hungry masses, struggling to save forests from the lumber barons, or battling to improve the teaching of science in the schools” [Ibid: 149].

But this idealist understanding was counteracted by the view that power was unequally exercised. The law could not but reflect and sustain that distribution. Law discriminated and reflected the existing social structure. Firstly, the rules themselves, “the official face of the law”, were by no means totally impartial “even when (they were) impartially applied”. This put into question the so-called independence of the judiciary or the neutrality of legal institutions or officials, which was then upheld. In the new understanding, law came out of the struggle for power and the dominant opinion moulded them.

Rules of contract and commercial law were innocent on the surface and seemed to the average person to be “mere justice and common sense”, but that justice and common sense were those of Western Society, its economy, and its dominant population. Indeed in every area of law – land law, family law and the law of torts – all supported the society, which had framed the rules and put them to work. “To suppose anything else would contradict what we know about the social origin of law. On the whole, it is reasonable to suppose that justice is not as blind and classless as it pretends; it squints in one direction” [Friedman, 1975: 181]. Friedman adds:

“One of the most striking facts about modern legal systems is the vast chasm between what they say, what they profess as ideals, and the way they actually work. There are many reasons why this is so. One is that it is functional for the elite if the system *appears* to be classless and just. A certain amount of hypocrisy is twice useful. The double standard works for the benefit of those on top; at the same time, it hides reality from the rest of society. The law,” writes Edgar Z. Friedenberg, is “essential designed” to impose “miscarriage[s] of justice” on ordinary people-but without admitting that fact. “Weaker members of society are not forbidden access to [law]-which would destroy the integrative power of the myth of ‘equal justice under the law-but they find it far more unwieldy in their defense than in the hands of their attackers” [Friedman, 1975: 180-86].

Thus, it can be seen that the 'law-in-development' movement had by the mid-1970s also produced a radical point of view as to the role of law in society. This was reflected in the debates that took place in the University of Dar es Salaam beginning mid-1970s in which I found myself involved. What emerged was what came to be called the Dar es Salaam School and this school began to take aboard Marxist-Leninist understanding of law and state in teaching of Law at the University. This new shift had great impact on the teaching of the social sciences in the whole University.

## The Dar Es Salaam School

The crisis in the ‘Law and Development’ approach which influenced the framing of socio-economic’ issues in the University teaching, was countermanded by a new ideological offensive which was Marxist and neo-Marxist in approach. Already the parameters for the change had been set by the 1968-attempted revision of the curriculum. According to Professor Kanywanyi, the revision had sought to produce an all-round student, not a sociologist or economists as such, but “a thinker, all-round and knowledgeable lawyer who was an agent of change for a “revolutionary East Africa”. The Faculty of Law Brochure, which was prepared in March 1968, spoke of the need for a critical and fundamental evaluation of the inherited system of law and justice. This was necessary not only to ensure their suitability to the changed and changing political, social, and economic conditions, but, more positively, to develop the students into “fitting agents for the revolutionary transformation of society upon which the governments of East Africa are so firmly set”.

The question, which therefore remained to be answered, was how such a revolutionary transformation was to take place. The revised curriculum did not meet those needs and instead of indicating the way forward, it opened itself to being manipulated into the *status quo ante*. What began to mark new departures was the emergence of militant student movements following the “socialist” *Ujaama* Arusha Declaration which called for the nationalisation of industry. This produced an atmosphere for a militant, socialist-oriented student body whose publication *Cheche* (spark) mobilised students towards a more progressive student body. This occurred at a time of the “expressive revolutions” we have referred to above, in which my own intellectual and ideological orientation to a Marxist-Leninist mould took shape.

In this period, the ruling party, Tanganyika African National Union (TANU) Youth League and the University Student African Revolutionary Front (USARE) led by Yoweri K. Museveni, who later became President of Uganda (1986-2001), began to organise “ideological classes”. These classes held in the evenings or on Sundays added to the socialist oriented student body, which began to exert pressure for a more progressive curriculum.

In this period too, the radicalised Mwalimu Julius K. Nyerere also began to make new demands on the University. The University of Dar es Salaam Act 1970 which established a new University of Dar es Salaam out of the old University College laid down the objectives and functions of the University as being the preservation, transmission and enhancement of knowledge for the benefit of the people of Tanzania. This was to be “in accordance with the

principles of socialism accepted by the people of Tanzania”. According to Nyerere in his inaugural address, the aim of the University had to take into account this purpose which must determine the subjects taught, the content of the courses, the method of teaching and the manner in which the University was organised and its relation with the community at large.

During this period various Faculty Seminars involving students and teachers were held which emphasised the need for the teaching of political economy in general. In the Faculty of Law, this was reflected in the demand for the teaching of the political economy of law and the state in all legal subjects and not restricted to “Development Studies” [Kanywanyi, 1986: 33-34]. According to Prof. Kanywanyi, what now mattered was not so much the formal phraseology of the course syllabuses but, rather, the approach adopted in the *actual rendition* of their contents. This rendition very much depended on “the politico-ideological orientation of the individual teachers of the respective subjects, not on how the course syllabuses were phrased” [Ibid: 32]

It was in this atmosphere that I joined the Faculty in 1973 as Senior Lecturer. I began by teaching subjects such as contract and torts, but in 1974 the Faculty Board decided that I teach jurisprudence, which was made a compulsory subject for all Third-Year Students. At the same time, I took on a course previously taught by Peter Mutharika called Legal Aspects of International Trade and Investment. In addition, I supervised students doing postgraduate students and later became Chairman of the Post-Graduate Students Committee and a representative of the Faculty of Law on the Higher Degrees Committee of the University. At one time, I was also a member of the Senate.

I came to the University of Dar es Salaam at a critical time in the evolution of attempts to develop a multidisciplinary approach to the teaching of law. As we have already noted, the ‘law-in-development’ had emphasised the teaching of law in the “context” of East Africa. This approach had informed the teaching of jurisprudence before I came to the Faculty. In that period, jurisprudence was taught as a half-subject divided into two parts: A and B. The syllabus covered the teaching legal theory in the context of developing the legal system in Africa, and this was approached by an eclectic study of the interaction between law and other social sciences disciplines such as anthropology, sociology, political theory, ethics and positivist analytical philosophy.

Compared to the traditional Austinian British approach, this method of teaching law was “progressive” except that it did not give the student a coherent understanding of the processes at work in the world and how these affected Africa. It is true that already in this period some liberal progressive jurists such



as Professor Twining had infused a socio-economic understanding of law, but this remained within the law-in-development mould. Moreover, there was an attempt also to develop research in “African Customary Law” with an anthropological bias. This, however, remained within the neo-traditional confines that the colonialists had put African traditions to their use.

My entry into the teaching of Legal Aspects of International Trade and Investment as well as Jurisprudence raised the issue of political economy of imperialism. Without an understanding of the theory of imperialism, one could not explain the policies and rules that governed the operations and activities of the Multilateral institutions such as the International Monetary Fund, the International Bank for Reconstruction and Development as well as the General Agreement on Trade and Tariffs (GATT). So a political economy of imperialism was vital to the teaching of many of these legal subjects.

The case study method used by Mutharika proved inadequate and the infusion of political economy enlarged the arena for the proper understanding of international economic relations. It also enabled me to develop my own understanding of the subjects, which continued to expand with my resort to other social science disciplines and the humanities in the context of historical materialism. The number of books I wrote in this period and the debate that surrounded them will be discussed in the next section.

Marxism became a very important tool for grappling with the issues of law and state which social science disciplines such as political science and international relations theory, especially ‘realist’ theories, tended to obscure. Marxist theory of law and state enabled the historical and ideological understanding of the role of the state and social classes in the development of law. I broadened the area covered by jurisprudence to cover a history of philosophy, the theory of knowledge and methodologies, schools and theoretical trends in jurisprudence including the Marxist theory of law, state and socialist legality. I also taught ‘law and development’ theory which was tackled to explain its weaknesses which we now tried to overcome. It was retained as a basis for a comparative analysis of the different trends in jurisprudence in order to expose students to the different schools of legal thought. But I avoided an eclectic approach, by subjecting these different approaches to a critique from a Marxist angle. I therefore taught law from a committed Marxist-Leninist standpoint in order to expose its ideological role in the various schools. The objective was not merely to create a technically ‘learned friend’ kind of lawyer, but one who was committed to the socialist *political* transformation of East African society. I wanted my kind of lawyer to be an active agent in such a *political* transformation

and not a mere legal craftsman discharging the role of serving the state, which was weighed against the people of East Africa.

It could therefore correctly be said that my approach was ‘biased’. However, I challenge anyone who can claim to be ‘scientifically neutral’ when it comes to his economic and social interest. As we have shown throughout this work, even the claim to judicial independence was itself ideologically determined by a bourgeois class interest both economic and professional. The law-in-development school soon came to this conclusion as well, as we saw above.

The teaching of law conceived both the “high theory” and “law order” dimensions. High theory covered the nature and the functions of the law under each epoch covered by the different schools; the concept of the legal system and its implications, the relationship between law and morality and the mystifications about law being neutral of any morality. It also included an understanding of the differences between law and other forms of social control mechanisms, justice and epistemology as well as the basis of the law in all systems [Twining, 1974].

The ‘low order’ issues concerned the teaching of law to deal with issues of legal practice and the workings of the law, including professional practice and etiquette. Most of the ‘low order’ teaching took place in the study of the different subjects within the discipline, the methods of practical research and techniques of interpretation of statutes and precedents.

Although it was sometimes argued that my approach tended to put too much emphasis on philosophy and historical roots of the different schools, my own view is that this depth of understanding of the philosophical, ideological and historical roots of law and the state was necessary for a proper placement of the post-colonial order in a wider global context. The student could better grasp the specific techniques and methodologies of comprehending socio-economic reality in which were taught in the different subjects in this broad background.

I abandoned the teaching of customary law because I regarded it as a mystification and distortion of African traditions and cultures, being a colonial crafted set of do’s and don’ts based on abstracted notions of social relations. To treat it as a subject proper for a legal course was to raise it to a respected level it did not deserve. However, I retained as a topic for research by post-graduate students. Later I myself showed more interest in the actual on going, dynamic cultural practices of the people through which people resisted the colonial and post-colonial impositions which I later defined as *post-traditional* as opposed to the neo-traditionalist mode which neo colonialism promoted.

Professor Joe Kanywanyi, who was Dean of the Faculty during the period under review, observed the significance of the new approach in these terms:

“Within the (new) Jurisprudence framework, law, the state institution and their historical evolution, the relation to social class formations, struggles, social revolutions, major social and legal reforms, etc, would be probed in earnest. The various major jurisprudential schools and their historical socio-economic foundations, including those of their ascendancy, sustenance and/or decline would also feature prominently in the course. Case studies of East African and other Third World country instances of the ideas of these ‘schools’, in both theory and practice, would be among the challenges to the candidates to test both their general theoretical understanding of the relevant syllabus subject-matter to reason critically on them in the light of the various researched practical politico-legal experiences. It is expected that both in the process of doing the course and at the end of it all one should be able to appreciate the ‘unity of opposites’ of the law in terms of *social relations classes and class struggles and alliances as well as the role of law and state therein*” [Kanywanyi, 1986: 34-35].

Two of my former students who did the course in Jurisprudence under my supervision for their Masters Degree in Law, M.C. Mukoyogo and R.W. Tenga had the following to say after twenty-five years of the Faculty of Law:

“Professor Nabudere’s influence was immense during the time he was at the Faculty. The change in the curriculum to reflect radical politics is largely attributed to him. At the level of post-graduate training a more formal outline was introduced for research topics” [Mukoyogo & Tenga, 1986: 167].

They add that the methodology in social legal research, which I taught as part of jurisprudence during my time, was abandoned after I left. T h e s e topics included: law as part of the natural order; law as an ideological tool in society; custom and tradition as law; crisis in legal theory; and law and legality in socialist society. They add:

“Thus both at the undergraduate level and the post-graduate level the Marxist critique gained a hegemonic position in the Faculty’s curriculum. The teaching method taken to be basic in the Faculty, that is, the Historical and Socio-Economic Method, became actually the Marxist Method” [Ibid: 168]

They quote from the external examiners reports for the period which, according to them, were “generally kind” to me. Akilagpa Sawyer is reported to have written in his report that:

“What was striking was the fact that even the weakest students showed some acquaintance with the concepts of political economy, though except for the top papers, there was certainly in their application the concrete situation of East Africa. This was particularly the case with jurisprudence” [Ibid]

The methods of teaching, which developed in Dar es Salaam, were also passed on to the Faculty of Law in Makerere University through my students who did their Masters Degree in Law at Dar es Salaam. Three of these former students, F.K. Jjuko (later to become Dean of the Faculty and Professor in Law), David Mbirizi, and, and J.A.S. Musisi became lecturers in Makerere after Dar es Salaam in 1980. They brought about what Mbirizi has described as “something of a theoretical explosion” at the Faculty of Law in the proposed changes to the teaching of law at Makerere.

The ‘explosion’ was over whether the Faculty of Law, especially the Commercial Law Department, should utilise the law-in-development approach, which was developed in the University of Dar es Salaam. Two schools of thought were in contention. The first advocated a legalistic approach under which law was to be taught as it was without interference from the other social science disciplines.

The other school of thought advocated the adoption of the Dar es Salaam approach. This school was supported by the fact that a Commission, which was appointed by the Government, had advocated something similar. The Commission had produced a report after the name of its Chairman – *The Gower Report* [1967] – in which they recommended that legal subjects were to be taught in terms of political and social history, and their social and economic environment. The Government *White Paper* had broadly accepted this approach and the proposed tentative syllabus, which embodied an element of law-in-development approach, was incorporated. Such topics as Modern African History and Politics, current socio-economic problems, social and political change in Uganda and methods of economic and political change were spelt out [Government of Uganda, 1969]. The Faculty failed to implement these recommendations.

In the event, the law-in-development approach took shape in teaching of law in the Department of Commercial Law. And even here what actually emerged in the process of the actual teaching was a rejection of the American Pragmatic philosophical approach inherent in the law-in-development school. Instead the political economy approach and methodology was adopted [Mbirizi, 1986: 73-74]. This approach, according to Mbirizi, rejected the notion of the “balancing” of law and the other social sciences, which were applied eclectically.

Instead the political economy approach was preferred because it integrated the other social sciences as an integral part of the legal material. According to Mbirizi, under the political economy approach:

“A legal concept would be described, then traced historically, and its meaning under changing socio-economic conditions unearthed. The purpose was, as in all sciences, to seek the “law” and forces that govern the movement of the concept. The socio-economic circumstances were, as much as possible, seen in their interconnection and unity and not in separate compartments. In this way, law was seen as part of the dynamic socio-economic circumstances restored. The other social sciences, we reiterate were made use of as integral parts of the matter being discussed, not as separate matters or sciences” [Ibid].

In Kenya too, one of my former students, Willy Mutunga, whom I taught law at Dar es salaam at this time, also returned to the Nairobi University and introduced the political economy approach in the teaching of commercial law. He succeeded so much that this approach created a division in the Faculty about teaching methods. There were several strikes organised by the students on wider political issues, which led to the University being closed down and Dr. Mutunga being arrested and detained under Kenyan detention laws. On his release he became an activist in the areas of constitutional and human rights. At the moment, he is Director of the Kenya Human Rights Commission. Another Kenyan student of mine Dr. Ooki Ombaka set up a Public Law Institute, which raised issues of constitutional accountability. He was later elected Member of Parliament and is chairperson of the Constitutional Review Commission set up by civil society.

The two former students, now politically active Professors in their own right, also refer to the problems which are inherent in the historical and philosophical approaches, which they also regard as having been given a lot of time. They regret that not enough time was left to the treatment of the concrete problems of East Africa. However, this aspect was handled more through course research in which students were required to pick a concrete East African situation for investigation within one of the “schools” of jurisprudence and method. Prof. R.W.Tenga, for instance, took a lot of interest in ‘custom as law’ issues in which he did extensive research in African societies of Tanzania. Nevertheless both agreed that “Liberation Jurisprudence” which I begun at Dar es Salaam must continue to be on the teaching agenda at the University.

The products of this approach in the Universities of East Africa became active in politics of their countries. Some became human rights activists in their countries. They were also appreciated in their legal circles. In Uganda, the government departments who employed these qualified lawyers such as the Attorney General Chambers, the Judiciary, parastatal organisations as well as those in private practice appreciated these society conscious lawyers. According to Maburizi: “It appeared that Commercial Law was producing lawyers knowledgeable in the law and useful in the all-demanding development process of their country” [Ibid: 77].

I have personally had occasion to meet some of the lawyers who were students at the Law Faculties of Law in the Eastern African Universities during this period, and even after, and most appreciated the radical approach adopted in the teaching of law. The same appreciation was reflected in the remarks from students who studied the social sciences during their time during this period. Even those who were hostile to the Marxist approach also said they had gained looking at law from that ideological standpoint. In fact I remember that during my days in Dar es Salaam, one of my best students from Uganda was a rabid anti-Marxist. But he performed well because I required him to grapple with the issues raised by Marx and Lenin on law and by doing this, he became more conversant with the other side of looking at society, although he retained his rather liberal frame of mind. He became better in reasoning against Marxism.

My own textbooks: *The Political Economy of Imperialism* [1977] and *Imperialism and Revolution in Uganda* [1980] found use in the Department as required reading for the political economy aspect. Prof. Jjuko made these books compulsory reading texts and no student could avoid this requirement. The National Resistance Army (1981-1985) fighters also found use for the Uganda book, which they used as reading and discussion material. It was also used in the NRM Political Education School of the National Resistance Movement. A Captain in the NRA who spoke to me personally described the Uganda book a “political catechism” for most soldiers in the NRA. These books were also used in other social science departments such as history, economics and political science at Makerere University and other Universities in Africa and other parts of the world.

### **i. The Dar es Salaam Debate**

One of the beneficial side effects of adopting a radical Marxist approach to the teaching of law and the social sciences was that it resulted in a vibrant debate that encompassed every one at the University of Dar es Salaam and society at larger. These debates were mainly between the so-called “Orthodox” Marxists and the neo-Marxists that dominated the Campus at the time.

I was regarded as the leader of the “Orthodox” camp, while Issa Shivji, who was also teaching law and who was targeted in the debate by our camp was seen as the leader of the neo-Marxist camp. In this debate, I was supported by Prof. Yash Tandon of the Department of Political Science, Omwony Ojwok of the Faculty of Law and the Dean of the Faculty, Prof. Joe Kanywanyi, as well as a large number of students who constituted the majority at the Campus.

The main ideological and theoretical lines between the two sides clearly demarked the contested areas in the debates. Since these areas also covered the

theoretical issues, which were touched on in the political economy approach in the classes, many students found they had to take political sides as well. In my opinion, the debate raised the ideological education, which previously was taken as an extra-mural activity to a public arena for the whole University.

The debate also went beyond the confines of the University into the public domain. The public at large in Dar es Salaam also took part in the debates through the pages of the *Daily News*, the main government newspaper. The appearance of my book on the political economy of imperialism drew a lot of debate in the *Daily News*, which necessitated the editor of the paper in an editorial to call a halt. The editor argued that the main thing was not to talk about the world but to change it! That call showed that the debate had achieved its purpose. This purpose was to draw attention to the need for a revolutionary transformation of East African society. Some members of the public came to the Campus to attend these debates, which were continued in public meetings and Seminars at the University.

The debate broke out early 1976 and went on for the whole year. The papers produced in the course of the debate were later edited by Prof. Yash Tandon and published by Tanzania Publishing House in 1982 under the title: *University of Dar es Salaam Debate on Class, State and Imperialism* [1982].

The debate was provoked by a paper I wrote critiquing Prof. Issa Shivji's book entitled: *The Class Struggle in Tanzania* which had appeared that year. My paper was entitled: "Imperialism, State, Class and Race: A critique of Issa Shivji's *Class Struggle in Tanzania*" [Tandon, 1982: 55-67]. By the time I wrote this critique, I had completed writing a draft of my own manuscript on imperialism which was later published by the Tanzania Publishing House and Zed Press, London under the title: *The Political Economy of Imperialism* [1977]. A comment had been made on the manuscript by an Indian visiting scholar by the name R. Banaji – a leading Trotskyite scholar. This was in March 1976. My reply to the comment came out in April. However, these papers were not widely circulated and did not draw much attention, except another comment on the manuscript by Mahmood Mamdani and H. Bhagat, which came out in July and was published as part of the debate. The debate ended in April 1978 with my paper entitled "Is Imperialism Progressive".

My critique of Shivji's book came out in August 1976. Before this Mamdani and Bhagat had written some comments on his book, but this also did not draw any response. It was 'friendly' piece, which did not generate heat. My critique however provoked immediate response from Karim Hirji, a cohort of Issa Shivji. From then on the debate was sustained through September, October, November

then moved into the new year with reviews and comments on my book on the political economy imperialism which had now come out during 1977. Prof. Yash Tandon who edited the debate and who himself took part in a postscript to the debate:

“There are times in the history of the development of ideas when suddenly, as it would appear, intellectual representatives of oppressed classes spurt forth a ‘hundred flowers’ of contending ideas vying to be the genuine expression of the position and the strategy and tactics of the oppressed and exploited classes. With the writings of Marx and Engels, along with other prolific writers such as Proudhon and Dühring, Europe went through this experience in the latter half of the nineteenth century. Russia went through this phase towards the turn of the century... Nothing of comparable magnitude has shaken the African continent yet. But something of similar nature, if perhaps not magnitude, did happen during the decade of the 1970s in Tanzania, concentrating at the University of Dar es Salaam” [Tandon, 1983].

But why did the debate attain such a magnitude or develop into an “uproar” as one of Shivji’s supporters called it? Omwony Ojwok, who summarised this debate, argued that the debate had raised many theoretical issues of proletarian ideology, which had a direct bearing on the revolutionary struggle of the working class and oppressive people’s of Africa and the world over. In the process many issues had been clarified: “Once we understand that without a revolutionary theory there is no revolutionary movement, we shall be able to appreciate and to understand the importance of the debate”. He added. What were then the issues in the debate?

My critique of Shivji’s book was that his thesis reflected a continuation of theoretical errors, which earlier commentators had compounded in friendly comments about his paper on “The Silent Class Struggle”. The argument was that these errors were part and parcel of the ‘dependency school’ theorists who did not understand the theory of imperialism as propounded by Lenin. I argued that these erroneous ideological and theoretical positions had come to East Africa through neo-Marxist and neo-Trotskyist scholars imported from Europe to the University of Dar es Salaam, particularly after 1967. Saul, one of these neo-Marxists Scholars in commenting on Shivji’s earlier paper work had raised the question: “Who is the immediate enemy” in Tanzania? This implied a dualistic understanding of imperialism and the way it manifested it self in Tanzania.

I felt that Shivji had responded to this question by narrowing his analysis, which he had adopted in the “Silent Class Struggle” with all its weaknesses. His answer was that the “immediate enemy” in Tanzania was the state bureaucrats who earned a certain level of salaries. These are the people Shivji had called “the



ruling class” in his new book! Moreover, we argued that Shivji’s analysis and fragmentation of finance capital into “Merchant Capital” and “bureaucratic capital” introduced racist analysis into Marxist theory. This “segmentation” of finance capitals into “fractions” of capitals tended to result in the creation of artificial, theoretically constructed “social classes” which further divided the people into fractions and factions which in turn made it impossible for a United Front against imperialism to emerge. I concluded:

“We conclude therefore that Shivji’s book is very bad. Since it claims to be a Marxist thesis, it puts Marxist-Leninist scholarship – if one may use that term – in an extremely bad light. Indeed it makes a beginner in Marxism extremely flabbergasted with the text. The text is abstracted from the real movement of history, and concepts are therefore unclear and misleading. It also gives an incorrect position on Tanzania, which even Marxist-Leninists not knowledgeable about the Tanzanian situation would find difficult to understand. A scientific exposition about society requires analysis, based on historical materialism, of the movement of history as a whole. The particular movement can then be analysed within this context. Failure to do this leads us into a dualistic view of society, and introduces idealist conceptions, which can only lead us back into darkness... [Nabudere, 1982: 66].

This refutation was part and parcel of the struggle against bourgeois scholarship, which was dominant at the University, especially the law-in-development approach. Ours was an attempt to raise the Marxist-Leninist approach to a dominant position because we felt that without this, there could be no cadre able to bring about in the revolutionary transformation of East African society as the law governing the University had lain down. We therefore argued that the Marxist materialist-based conception was the only available tool to us to bring about fundamental and revolutionary changes in a colonial society. We therefore argued: “It is for this reason that we take great exception to the way Shivji analyses Tanzanian situation. By introducing the idealist world outlook we are pushed back into the lap of bourgeois obscurantism... which we must reject” [Ibid].

This debate was joined by several academics of the left including Mamdani, Hirji, Tandon, Omwony-Ojok as well as students on both sides of the debate. My own students in the post-graduate and undergraduate courses took an active part, including Takyiwaa Manuh (later to become Professor of law at the University of Ghana), Sipula Sibanje who became a political activist in Zambia, Sam Magara, who later became a Commander in the National Resistance Army under Yoweri Museveni, Augustus Kayonga, who became one of the leaders of the Uganda National Liberation Front (Anti-Dictatorship), and built armed struggle bases in Tooro against Obote’s neo-colonial regime between 1980-1983, and is now a Resident District Commissioner in the same district.

It is interesting to note that despite the fact that Shivji's book and mine were at the centre of the debate, Shivji never at any time came out to clarify his position or respond to the issues raised in the debate. He merely relied on his cohorts and supporters to defend him, exhibiting rather arrogant and haughty attitude to the debate and to the issues. This was also not a responsible academic approach

Around the same period, Mahmood Mamdani, brought out two books on Uganda in which he reproduced Shivji thesis on Uganda, except that instead of a "bureaucratic bourgeoisie" in Tanzania, he referred to the Uganda counterpart of this "ruling class" as the "bureaucratic petty bourgeoisie" [Mamdani, 1978]. He also failed to get a deeper understanding of Aminism. Our response to his first book was my own book entitled: *Imperialism and Revolution in Uganda* [1980] in which I established the economic basis of the military dictatorship with a strategy of fighting it and advancing the general democratic struggle. I also wrote a two-volume book on *Imperialism In East Africa* [1981] – the first volume tracing how imperialism was introduced in East Africa through the two phases of *bilateral* and *multilateral* imperialism, concepts which I had developed in the work on the political economy of imperialism. The second volume dealt with regional integration in East Africa and how this had failed [Nabudere, 1981].

I also collected a number of papers, which I wrote at different times at Annual Conferences of the African Association of Political Science, of which I was elected President in 1985. These papers were published as *Essays on the Theory and Practice of Imperialism* by Onyx Press, London appeared in 1979. These essays dealt with different issues connected with the operation of the international economic institutions, which manifested imperialism in the Contemporary World. They examined the World Economic Order – the Old and the New, as well as the Lome Conventions under which Europe maintained its neo-colonial hold on the African, Caribbean and Pacific countries. The collected papers also analysed the activities of the transnational corporations and banks and their impact on the economies of Third World countries. There was also a special paper where I presented a theoretic outline of the thesis in the main work on the Political Economy of Imperialism.

One of the important essays in the book entitled "Imperialism in the Contemporary World" critiqued bourgeois social sciences in their understanding of imperialism and the national question in Africa. It raised the issue of education and culture in the still economically oppressed African countries and questioned the concept of "new nations" applied to them. I argued that no national culture could exist in those conditions and that until the national question was resolved no such national culture could develop.

In our view, the resolution of the national question depended on the peasantry regaining their rights to land and its products, as well as being able to exercise their democratic rights in a society in which they had equal rights and duties. Only then could a truly international culture of all peoples emerge in which the totality of human history and endeavour was recognised. I ended by arguing that the liberation of South Africa was a key to further development in the liberation struggle on the continent for without it Africa would for ever remain enslaved to the western capitalist world which benefited from its vast natural and labour resources.

I later wrote *The Rise and Fall of Money Capital* in 1990 as a reflection on the developments that were dominating the world scene and which were referred to generally as globalisation process. In the book I examined the dominant role, which financial markets had come to play in the evolving world capitalist system. I noted that money capital which had hitherto been looked upon as a secondary factor in production, had now come to the fore demanding the biggest share of the total product than ever before. I predicted that this dominance of finance capital in its speculative aspect was bound to lead to a collapse of the financial markets, which in turn would lead to the collapse of the entire capitalist system.

I also agreed with the observations, then current of the increasing weakening of the nation state. I argued that this weakening of the state was raising the social and political responsibility of the individual to society. I called this individual, a *societal individual*, who should enjoy sovereign freedom. I pointed out that there was emerging a new world order, not as Bush would like it to be, but one which is leading to the emergence of both localised and world institutions based on the principles of universal equality of all peoples. These developments pointing to a new world order are calling for revolutionary transformations in each nation and countries leading to a re-arrangement of social, economic and political relations in the territorial units so reorganised.

There were therefore pressures and demands for revolutionary change in the world economy and political order, which was dominated by a few super-powers to a world in which there was equality for all. Therefore, I argued, the emergence of this new order will lead *uninterruptedly* to the recognition of the universal equality of peoples and the diverse cultures of peoples. The continued existence of the nation-state is, therefore, a necessary evil, which must give way to a new order of peoples.

In another publication which came out of the same material which I used to write the *Rise and Fall* entitled: *The Crash of International Finance Capital*

*and Its Impact on the Third World*, I tried to relate these developments in the global economy to the Third World Countries. This analysis also confirmed the increasing negation of the mechanisms, which were used by the nation-state for ‘national development’. Globalisation had come to take the form of structural adjustment programmes which were imposed by the Bretton Woods institutions on Third World as ‘national policy’, but which in fact worked against the nation-state in these countries. This showed that the political elite in these countries were incapable of defending their national gains against international finance capital.

## **ii. Theory-what about practice?**

These ideological and theoretical struggles were soon reflected in the actual political struggles that emerged in this period. At the end of 1978, the Uganda Army under “Field Marshall” Idi Amin Dada invaded Tanzanian territory and tried to annex the Kagera Salient. Ugandans, who were exiled in Tanzania from the Amin dictatorship, including the participants in the debate, were organisationally disunited and could not contribute effectively to the struggle to repulse his forces and overthrow his regime.

Acting on the ideas of the need to develop a united front against the dictatorship, I, Yash Tandon, Omwony Ojwok and Edward Rugumayo who was exiled in Zambia, as well as Prof. Tarsis Kabwegere and others who were exiled in Kenya, decided to work towards the establishment of such a united front against the dictatorship. We established a Committee for Democratic Unity in Dar es Salaam which approached all Uganda exile groups – both armed groups and non-armed to form such a united front. We managed through the Nairobi office under Professor Tarsis Kabwegyere to reach to 22 such organisations.

This move was opposed by Milton Obote, former president of Uganda, who now in exile in Tanzania. He wanted such organisation to be formed under the fighting forces, which were under his command. Yoweri Museveni who was heading an organisation called the Front for National Salvation – FRONASA, also opposed our move. He too insisted that the fighting groups should first form the front which would then co-opt unarmed groups which were to serve on the diplomatic front on behalf of the fighting groups’ “united front”. Our committee called for *political unity* of all organised groups, which were to be organised in democratic united front. Up to that point, Obote, Museveni and other armed groups had been negotiating for the formation of their own front for over two months, but they had failed because each of the groups wanted control over the others.

It was interesting that the other side to the Dar es Salaam debate in the person of Mahmood Mamdani and the Changombe Group decided to support the militarists – a position they maintained until they were used and thrown out by the military groups. The Tanzania government accepted our strategy of creating a broad united front of all Ugandans in exile. They authorised and funded the holding of the Conference, which was later called the **Moshi Unity Conference** in March 1979. This resulted on the formation of the Uganda National Liberation Front – UNLF, with which Tanzania collaborated in the war against Amin.

I was elected Secretary for Political & Diplomatic Commission and put in charge of mobilisation of the people once we had returned home. Within three weeks, the Amin regime was defeated and chased out of Uganda with his army by the combined forces of the Tanzania Peoples Defence Forces-TPDF and the Ugandan armed groups, which were organised under the UNLF in a Military Commission. I became a Minister of Justice and then Minister of Culture, Community Development & Rehabilitation under the short-lived regime of Prof. Yusufu Lule and that of Godfrey Binaisa.

This government was overthrown by the combination of the militarist groups of Obote (through Paulo Muwanga) and Yoweri Museveni, who formed a **Military Commission** to organise elections, which were rigged by Obote supporters in his favour in December 1980. This led to a civil war, which was initiated by Yoweri Museveni who had been vice-president of the Military Commission, but who had lost the elections to UPC. The civil war raged on from 1981 to 1985 when Obote's regime was overthrown by his own military forces once more.

Museveni's National Resistance Movement/Army-NRM/A took advantage of the confusion and went back into action after a one-year lull in the civil war. President Daniel Moi of Kenya sponsored the Nairobi Peace Talks between the Tito Okello Military Council and the NRM/A. In the meantime, the NRM/A used the talks to consolidate their position on the ground and eventually took over the government by overthrowing the Military Council. The NRM/A claimed they had fought to restore democracy, which they said they would do within four years. Instead militarism took over, and instead of restoring pluralist democracy, the NRM/A installed a monolithic one-party state under the name "No Party Democracy" or "Movement Political System". This "system" suspended the activities of all political parties, calling them sectarian and divisive. This undemocratic dispensation was approved and supported of the "donor community" on the pretext that Uganda should be given an opportunity to recover from her 'terrible past'. Baroness Linda Chalker, the British Conservative minister became the darling of the regime and its promoter internationally.

When the Military Commission took power, political leaders who did not support the *coup d'état* of 1980 including myself dubbed “the Gang of Four” – Dani Nabudere, Edward Rugumayo, Yash Tandon, and Omwony-Ojok, formed the Uganda National Liberation front-Anti-Dictatorship (UNLF A-D) in 1980. We also established a Marxist-Leninist party called Uganda Peoples Revolutionary Party – UPRP to develop cadres in Marxist-Leninist ideology and political activism to contribute to the changing of Ugandan society on the basis of an anti-imperialist internationalist ideology.

However, as our work in developing bases for armed struggle developed, especially after 1985-1989, it became apparent to us that the world situation had fundamentally changed. The collapse of the Soviet Union and the Eastern European “socialist states”, including the changes that had occurred in China after the death of Mao Zedong had created a new situation. World capitalism became triumphant and claimed the “End of History” in the words of Fukuyama.

In 1989, we agreed that the new situation indicated that the world was moving from a bipolar to a multi-polar world. In this new situation the socialist world had weakened and this called for a change of strategy on the part of the masses in the Third World. We also agreed that the multi-plurality of political forces, which were emerging after the collapse of the bipolar world, would regroup to challenge the capitalist unipolar world led by the United States.

In response to this situation, we called for dialogue between our organisation and other political forces in Uganda to stem the disintegration of the national democratic movement in the face of triumphant imperialism. We also recognised the need to work with other political forces on the basis of equality and coordinate our work with any group willing to do so on general or specific areas of co-operation in the struggle against neo-colonialism. We argued that this was the only dynamic function of building a *United Front* on the basis of equality of all anti-imperialist forces.

We therefore decided that the old form of organisation based on the Vanguard Party to “lead” other social classes against bourgeois dictatorship no longer held. In 1992 we decided to dissolve the UNLF (A-D) and the UPRP to enable our members to take new positions based on the above principles. The members decided to “root” into the communities where they came from or where they were, or join existing or new political formations in order to develop in them a broad-view of the evolving global space. Such a strategy was intended to strengthen the democratic space in an otherwise disintegrating world, which was being propelled by new global economic force of exploitation and new forms of domination. We recognised that this new strategy of imperialism was

also generating new democratic alliances against it, which we had to take advantage of.

Despite these forces of disintegration we also noted the continuation of the human spirit of struggle which was manifesting itself in local-single issues such as the ecology, human rights, women's rights, cultural rights, ethnicity, etc. These, we concluded, were manifesting a new spirit of grassroots democratic empowerment, which should be supported as part of the re-arrangement of the anti-imperialist struggle to bring about new forms of state formation against neo-colonialism. We therefore realised that a globalised awareness of the commonality of the human condition had arisen which could lead to bigger struggles in the future. It was therefore agreed that apart from "rooting" in the communities, we should also engage in "tapping" the strengths from these emergent political, social and economic forces on a global scale which were struggling for SURVIVAL against globalised imperialism.

We therefore, developed the concept "tap-rooting" to reflect this reality in the emerging world situation. The concept captured the call for the strengthening of communities at grassroots level and the collaboration of these disparate organisations and forces on a global scale. This is also what was emerging in the concepts such as the LOCAL AND THE GLOBAL in the alternative mass movement visions since the 'reflective' revolutions of the 1960s. This emergent global awareness had coined a new slogan: THINK LOCALLY AND ACT GLOBALLY. This coalition of loose political forces on global scale was to confront the ideology of the "Washington Consensus" which was forcing all the Third World states to "liberalise" and "privatise" and obey the "market forces". Under this neo-colonial drive all national state enterprises were sold back to the monopolies at the price of a song. This new alliance has taken the form of anti-globalisation protests throughout the world against the World Trade Organisation-WTO- such as the protests in Seattle, USA, in 1999 and elsewhere in the world.

It was in this context that, I embarked on grassroots activity aimed at implementing the above strategy. This was based on an understanding of the social process and the struggles that were under way especially after the continent wide crisis that struck the continent in 1985. These developments compelled us to change course and focus on the local and the global simultaneously. I decided to undertake an action-oriented research project, which would investigate what was actually happening on the continent at the grassroots level. The project was entitled: "The Grassroots Movements in Africa" which proposed to investigate grassroots activity on the whole continent. The sponsor was Africa in Transition Trust (AIT) headed by Prof. Yash Tandon, who was then operating from Zimbabwe. AIT was to administer the project while I was to be the Project Chief investigator and Director of Research.

The donor was the Heinrich Böll Foundation then headquartered in Köln, Germany. The real support to the project was in the person of Konrad Melchers who was then a member of the Board of the Foundation. The donor was of the view that research-covering continent would be unmanageable. They therefore proposed that we first carry out the research in two regions of the continent as a start. We therefore agreed to carry out research in Eastern and Southern African regions.

In Eastern Africa, I decided that the research was to be carried out in Uganda, Kenya, Tanzania and Rwanda. However, civil war broke out in Rwanda and we therefore decided to skip it. In Southern Africa I decided to do research in five countries. These were South Africa, Zimbabwe, Zambia, Lesotho and Namibia. It proved difficult to get a country researcher for Namibia since many of those approached were either taken on by the new government or were involved in more lucrative NGO activities. I therefore decided to shift the research to Botswana, but even here, the researcher decided to leave the country for a course overseas and Botswana had also to be abandoned. In the end a researcher in Swaziland emerged and we decided in Swaziland.

With the exception of Tanzania, Zambia and South Africa, which had each two-country researchers, the rest of the countries were covered by a single researcher. The methodology was interdisciplinary and the techniques of research, which were agreed at a brainstorm workshop, were to be both quantitative and qualitative. The qualitative aspects covered the in-depth interviews with selected organisations that revealed a level of a qualitative transformation in the organisation towards a more democratic, culture conscious and self-reliant approach. Through this methodology we were to investigate the underlying factors behind this transformative factor.

After the reports were filed, a meeting had to be organised in each county where the researchers were to report back to the groups investigated what the findings were. The idea was to enable a dialogical relationship to develop between the researchers and the researched groups and communities, extending the research relationship that had emerged through the qualitative methodology. The groups were then to decide what further action they wanted as a follow-up to the research

It had also been envisaged that after the country meeting, a regional meeting would be organised which would enable the groups and the researchers to develop a regional perspective and programme of action. This was to be followed up by a meeting of the two regions to enable a continent wide dialogue to emerge, which could result in a grassroots pan-African agenda for political and



social transformation against neo-colonial structures of power. This was to be a process of *self-empowerment* by the masses reclaiming their power.

By 1993, I moved from Denmark where I was in exile to Zimbabwe to undertake this research. Here in Denmark, I had been enriched myself by the experiences of a Danish Folk High School tradition. This approach to adult learning emphasised peoples' enlightenment through learning processes mediated through the Mother Tongue. This outcrop of European Romantic Movement had some positive implications for grassroots organisations and democratisation in Africa. After co-ordinating the research in Zimbabwe, I moved back to Uganda, where I began to co-ordinate the activities of the research in East Africa. The Southern African part was left to Prof. Yash Tandon to handle from Zimbabwe.

In East Africa, I managed to organise country meetings in the three East African countries as well as the regional meeting to enable the groups to develop an action programme. The Southern African countries were unable to properly organise country meetings, which would have led to a regional meeting. Meetings were held in Zambia, Zimbabwe and South Africa where Lesotho and Swaziland were invited. But no regional conference proper was held.

However, some follow-up action programme was agreed in Zambia, which was funded by the Heinrich Böll Foundation. The organiser of the programme proved unreliable and the programme had to be abandoned. In East Africa, efforts were made to create a regional programme, but this too failed due to lack of funding. This may have been the result of the changes, which took place in the Foundation at this time, which, in our view, were negative to these efforts. It seems that neo-liberal ideology was also having impact here.

In Uganda however, some developments continued to emerge from the research. The country meeting resulted in the establishment of a co-ordinating network called the Uganda Grassroots Initiatives Network-UGIN, which embarked on expanding the membership by encouraging further action-oriented grassroots research. Members who were researched on undertook to carry out similar research on other groups in their localities and then recommend their recruitment as members of UGIN. Originally the members were ten, however by 1999 membership had grown to fifty-five through this process of continuing research.

At the same time in 1994 I decided to set up a grassroots resource centre to support these emergent organisations in grassroots capacity building. This centre did not emerge directly from the earlier research as such. It was proposed as a separate project before the completion of the research. It was funded by the

same Foundation for three years, on a declining yearly basis. The organisation was called *Yiga Ng'okola* [Learn As You Work] Resource Centre, and as the name indicated, it was to promote knowledge through work experiences, encouraging the exchange of knowledge through exchange visits between groups and communities as part of the process of cross-cultural learning and understanding. The underlying philosophy was that people have knowledge and these indigenous knowledge systems can be tapped to bring about transformation.

The new Board of the Foundation was rather sceptical about the possibilities of success of the project and was inclined to withdraw support from it. However an evaluation report of the project by German evaluators concluded that the project had been successful in promoting activities through “*cultural animation*” which was new in the area. The original support to the Centre declined by 50% each year, the idea being that by the end of the three-year period, the Centre would have become self-reliant. The evaluators thought this was too presumptuous and optimistic.

Although the Foundation ended its support to the Centre in mid-1997, the Centre was able to survive and grow on the basis of the support it received from its members who were mainly women’s organisations. The activities were expanded according to the needs of the members and, in time, came to include training at the Centre as well as holding seminars and workshops in the villages where the groups carried out their activities. The seminars dealt with themes, which were requested by the groups themselves through their General Assembly. Eventually the Centre was transformed into an Institute called *Yiga Ng'okola* Folk Institute with the same objectives.

The most important achievements of the organisation have been the democratisation process it set in motion. The organisation was first established as a Resource Centre, but at the time it was not clear to me what its structure should be although provision was made for a General Assembly. The immediate support given to it by women’s organisations increasingly made it necessary to propel the organisation in a democratic direction. Participation of the rural communities was impossible without democratisation and dialogue being the basis of the organisation. Consequently the Institute is now run by the General Assembly, which elects the Governing Council, which in turn appoints the Co-ordinator and Programme Officers.

As the promoter and founder of the organisation, I acted as the Chairman of the General Assembly and Governing Council as well as Executive Director of the Centre. As the organisation got better structured the rural groups began to have

impact by bringing the Assembly under their control by electing the Chairperson. Later they also elected the Governing Council and its chairperson. By the end of 2000, the member groups had managed to take over the Institute on a democratic basis. I was able to hand-over to a woman Co-ordinator who had assisted in the training of the groups. My position in the Institute now is that of Patron and member of the Governing Council.

This process has been a learning process for the women's groups and me since this has been an experiential reality. It represents a change of course from the top-down mainstream approaches, which my earlier conception of organisation was to a more bottom-to-bottom approach. This new approach has also revealed the weaknesses of the 'evolutionist', 'developmentalist', 'modernisationist' and 'revolutionist' social sciences. The new approach has also revealed the existence of a wealth of knowledge and strategies existing in the grassroots communities. The evidence, which we gathered in the research and the organisational activities, revealed vibrant "informal" activities, which were increasingly becoming a counterweight to the formal state sector activities. Even the mainstream, Bretton Woods institutions such as the World Bank began to take note of them.

Culture and spirituality based on African religions has been a major factor in the promotion of these activities. For instance, evidence, which was found in almost all the countries, revealed how the people were able to raise financial resources through *burial societies* and self-help 'merrily-go-round' credit extensions. These societies whose roots are in African spirituality were able to modify these cultural heritages to take account of the needs of the mining workers conditions under colonial capitalism. Burial societies in South Africa, Lesotho, Swaziland, Tanzania and Uganda were now used for mobilising financial resources not only for burials, but also for business activities of the members.

This is why in my new book: *Africa In the New Millennium: Towards A Post-Traditional Renaissance* [Nabudere, 2001] I began to pay attention to this phenomenon by recognising it as a force in an African renaissance. In doing so, I developed a new concept, which I called *post-traditionalism* which explained the use of Africa culture, spirituality and tradition as tools for resistance and survival of the peasant communities in a rapidly globalising world. This approach is in sharp contrast to *neo-traditionalism*, which the colonialists crafted as "African Customary Law" to advance exploitative social relations in the rural communities. Post traditionalism has broken through the ranks of received legal traditions by asserting itself in the face of the post-colonial crisis of the state.

## Law, Culture and the New Paradigms

These developments in fact reflected a wider concern not only in the social sciences but also in the field of the philosophy of law. As we have already noted, the law and society movement in the United States had already split into new groupings, some of which questioned the very basis of law in a class divided society. The new “post-imperialist” jurists by the mid-1970s were also recognising a change in the world situation, which the “expressive revolutions” had made possible. They noted that the developments in law and politics had overtaken the naïve equation of “neutral”, objective social and legal science with progressive politics of the time. In the legal academy a competing academic project called ‘law and economics’ had arisen. Despite its weaknesses, this project proved more successful in merging law and politics than the hitherto hesitant law and society movement, which in fact had tried to separate the two.

In the world of national politics, the liberal coalition had collapsed and bourgeois liberal self-confidence had been sapped by these new political challenges. The law and society ideas, which propelled the liberal agenda, were no longer hegemonic. Trubek noted:

“As the power of Imperial legal culture has waned, new ways of thinking about law have become possible. As a result we can speak of an emerging ‘counter-vision’. This counter-vision, though, has not led to a new ‘understanding’, let alone generated a new ‘paradigm’. It is more the rejection of prevailing ideas from the Imperial Age than an alternative conceptualisation of law, society, and scholarship. Nevertheless, it could be a starting point” [Trubek, 1990: 618].

But as a starting point, certain new ideas that constituted this emergent counter-vision began to be spelt out. The new lawyers now saw law as a ‘fragile, contradictory, fragmentary, and dispersed’ phenomenon. Unlike the Imperial legal culture, which looked at law from an objectivist approach, which could point to a ‘correct’ answer to legal and social questions, the counter-vision accepted “discursivity” and the fact that scholarship was an arena of struggle in which various visions competed. Trubek added:

“Where Imperial lawyers saw clean distinctions between law and society, knowledge and politics, an authoritative normative tradition and (some times) recalcitrant social structures, those who embrace the counter-vision blur these distinctions, recognise contradiction, and seek to cope with a complex and contradictory situation” [Ibid].

In recognising that law was fragile, the counter-vision came to doubt the independent power of law to reshape social arrangements. The instead saw a fragility in all spheres including social life itself. Laws were no longer clear-

cut, so that although law could be seen as a command of the sovereign, it was now recognised that it was difficult to know what the sovereign wanted. More importantly, the resistance to messages encoded in law was often incredibly powerful which were expressed in interpretive struggles, outright denial and even avoidance of law.

The contradictory, multi-vocal and normative tradition also revealed that the sovereign very often spoke with “a forked tongue” and this had forced many lawyers to recognise its contradictory nature. This is why the Critical Legal Studies tradition, which also emerged in this period, seized an opportunity for radical scholarship and practice in the academy and politics.

The fragmentation of the legal field was seen as part of the post-modernist vision, which saw law as a series of fragments, which were deployed through a wide range of localised processes or practices. It was no longer seen as an orderly and structured sets of rules. Lawyers began to pay attention to what anthropologists called “practice theory”- a body of thought that saw culture as bits and pieces of myth, metaphor, and ideas, which were deployed in moments of practice. This understanding fell in well with the new jurists understanding of the phenomenology of legal decision-making.

Finally, according to Trubek, where Imperial Jurists saw law as powerful, univocal and ultimately coherent a unified system made up of hierarchy of constitutional norms, statutory rules, judicial interpretations, and common law principles, (‘law as law’), the new lawyers began to conceive law as dispersed throughout social life. He observed:

“We see this view in the notion of law as ideology, now a major subject for investigation by law and society scholars. When we conceive of law as ideology, we understand that law may affect social life not by the imposition of a transformative will, but by reinforcing widely held notions of what is possible or imaginable. Law as ideology is not necessarily just on the books or in ‘action’, it is everywhere in social life where action is imagined or not imagined, taken or not taken. The view of law as ‘dispersed’, reframes the question of the power of law. If law reflects and reinforces ideologies that emanate from many sources, then it may not be a powerful tool to change society – as the Imperial Jurists imagined – but may rather leave a powerful grip *on society*” [Trubek, 1990: 621].

Trubek finally concludes that if law is ideological, neither unified or structured, and if our legal culture is a series of fragments whose significance is determined through multiple, often low level, and frequently *local practices* of interpretation and decision, then *attention must naturally turn “to the many sites and moments of practice, and the opportunities for transformative action they provide”* [Ibid. Emphasis added].

This contribution by post-modernist legal thought opened up opportunities for recognition of “the other” arenas of legal conception and practice as subjects and not object. Foucault’s observation that “power is everywhere” came home to roost. This is why the demand by the new lawyers of the need for ‘discurvity’ became relevant. This view of the social discipline, argues Trubek, starts with the recognition that social knowledge does not mirror an objective reality that is ‘out there’. Instead part of the processes through which social life relations are formed and reformed have themselves to be negotiated. The understanding of social science as a discursive practice began to influence the social discipline and to enter into the thinking of some law and society lawyers:

“To embrace discurvity is to recognise that social life is network of relation invested with differentials of power. These relationships are constituted linguistically (or ‘discursively’); the very concepts we used to describe and explain society contribute to the constitution of social relations. As a result, we cannot separate our studies and understanding of social life from social life; we cannot detach ourselves and our knowledge from society in the way astronomers separate themselves from the solar system. It follows that when we construct an account of society, we do not simply mirror social relations, but rather contribute either to their reproduction or transformation” [Trubek, 1990: 615].

This ‘deconstruction’ of law as a ‘science’ fell in well with the developments in the other fields of social sciences. It also influenced our thinking as Marxist lawyers. Our own theory we had developed in the Dar es Salaam debate also called for ‘deconstruction’ compelling us to identify the actual “sites” of the struggle of the different social forces. It called for the need to decentre and disperse ourselves in these ‘sites’ and to take account of the actual struggles and help to develop a connecting link between them and ourselves.

It was indeed an attempt to grapple with the need to develop a new paradigm for the conceptualisation of reality. Marxist historical and dialectical materialism had to come down to earth to explain these struggles, which were under way. It could no longer hang in the air. This is what Cabral had called “the practice of freedom” which involves the active participation by all the people in their own liberation and development.

For instance, in the field of law, mainstream positivist jurisprudence has now acknowledged that modern formal law cannot function under certain conditions and in a number of countries in Africa, Asia, and the Pacific, it is now increasingly recognised that traditional, post-traditional and non-formal methods of the administration of justice are called for. Most of the research carried out on these systems has come from the non-governmental organisations interested in law and legal processes, but has begun to attract attention by the mainstream legal institutions.

This research has shown that the traditional and formal systems of law and justice are not compatible. It has also come to be recognised that formal western systems of justice are not only impossible in certain social settings, but also do not provide the types of solutions such as restorative justice “appropriate to poor people living in ‘face-to-face’ communities”. The reason for this is that these formal systems do not take into account the shared values (political, cultural, religious, and gender values), a shared history, low class differentiation and a common language in rural areas. The Penal Reform International, an international non-governmental organisation working on reform of penal systems, has called for the study and application of these systems in rural communities in Africa, Asia and Latin America [Stevens, J: 1998].

What has been expounded up to now already reveals that there is a movement from the Old paradigm to a new paradigm. This paradigm will be informed by the dethroning of the Eurocentric worldview, which through the Enlightenment had in turn had dethroned earlier civilisations and their non-linear paradigms. Now there is a growing recognition of the fact that a new civilisation demands that all cultures have equal importance to humanity and that one culture readily learns from other cultures.

This multiculturalism must inform the emergence of a new universal humanist paradigm, which draws its knowledge from other knowledge’s, which are represented by the different cultures in a discursive, dialogical relationship. Such a new civilisation cannot exist unless it creates conditions for the synthesising of knowledge drawn from all sources. This in turn cannot happen until there is recognition of the equality of all peoples and the abolition of monopoly private property, which exploits communities and the environment on which we all depend.

Amartya Sen has correctly argued that development must be seen as a process of the expansion of real freedoms that people enjoy. He adds that focussing on human freedoms in this way contrasts with the narrower views of development such as the identifying development with gross national product, or with the rise in national incomes, or with industrialisation, or with technological advance, or with social modernisation. For him, although these are important *means* for expanding the freedoms, they do not constitute development in themselves. There are other more important determinants such as social and economic arrangements and facilities, which include education and health, care, as well as political and civil rights:

“If freedom is what development advances, then there is a major argument for concentrating on that overarching objective, rather than on some particular means, or

some special chosen list of instruments. Viewing development in terms of substantive freedoms directs attention to the ends that make development important, rather than merely to some of the means that, inter alia, play a prominent part in the process” [Sen, A, 1999:3].

This then points to the importance of linking economic development to the political freedoms of people. If we place emphasis on economic development, modernisation and even economic globalisation, we shall be playing down the most important values in human existence, namely freedom. It is the freedom which people enjoy that can make it possible for them to decide the means which they will use to achieve development and not vice-versa. This implies the right of the people to deconstruct and the post-colonial state in order to reconstitute their own state systems that can advance their interests.

As Kwesi Prah has pointed out, language and mother tongue are fundamental requirements in this process of self-empowerment: “Language dialectically encodes and decodes, it constructs and deconstructs. Reality is its object and *Homo sapiens* its subject”. Prah adds that development must be reflected in all areas of human activity. Its manifestation in the economy must be in parallel be reflected in other facets of social life, language included:

“If development is in the end a cultural phenomenon, science and technological advancement in the material culture of society represents an important yardstick for the estimation of progress. Too often, in the experience of contemporary Africa and many other areas of the Third World, the adoption of innovative technological and scientific inputs have been undertaken without sufficient recognition of the need for the adaptation process to relate meaningfully with indigenous practices and usage’s, language included. Technology has been borrowed without an eye to the need to integrate such technologies into existent levels and forms of indigenous culture. The need to build on what exists and is known or understood by local peoples is overloaded. Such borrowed science and technological culture therefore stands outside the technological base of indigenous culture, a foreign element, and becomes often manifested as consumptive items which cannot be maintained or sustained or creatively understood” [Prah, 1995: 18].

This approach implies the adoption of a new research agenda in the new millennium, which can be part of the process of building a new paradigm. This should constitute the basis of an African Renaissance, which should embark on this task, not by re-inventing the wheel, but by adopting and adapting what is new and useful to the cultural milieu of the African people, including languages. This is a reclaiming of the African cultural heritage which colonialism had sought to degrade and annihilate. A scholar who seeks to be part of this reclaiming must himself seek to be part of the process of liberation of the African masses through the practice of freedom.



According to Cabral, to be meaningful to the African people, the act of liberation must at the same time be a ‘practice of freedom’. This practice requires a radical dialect of mass participation and democracy ‘whose objective must be at least the following development of a popular culture and of all positive indigenous cultural values’. It means:

“Development of a national culture based upon the history and the achievements of the struggle itself; constant promotion of the political and moral awareness of the people ... to the cause of independence, of justice, and of progress; development of a technical, technological, and scientific culture ... on the basis of a critical assimilation of man’s achievements in the domain of art, science, literature....” [Cabral, 1973:55].

Thus, the practice of freedom means a ‘return to the source’ in an ever dynamic cultural revival in which ‘return’ constitutes the dialectic, internal to the African liberation struggle, which leads to the undoing of colonialism and post-colonialism in a process of self-emancipation by the people. It is only in this process that the ‘productive forces’ can also be freed. By ‘productive forces’, Cabral refers to the totality of cultural resources ‘that constitutes a people in the open-ended process of its historical becoming’ [Serequeberhan, 1994:110].

For Cabral, having a ‘theory’ involves a ‘return to the source’ in the sense of developing an ideology of ‘knowing what you want in your condition’, and to know what you want in ones condition is to have a concrete theoretic understanding of one’s lived historical situation. Serequeberhan adds in conclusion:

“For both Fanon and Cabral, then, theory, properly speaking, is always the concrete hermeneutics or interpretation of the needs and requirements of a specific historicity. Their theoretic labors are focused on an engaged hermeneutics of their lived situation. This knowledge, furthermore, arises from and is grounded in the exigencies specific to a particular history at a particular moment of its self-unfolding ... Indeed, this is what it means to triumph over colonialism or neo-colonialism: *to reinstitute the world of the colonized beyond the residues of conquest*” [Serequeberhan, 1994: 112-3, emphasis added].

This is the context in which we the present generation of African intellectuals must define our role in this lived historical experience of the African people. The scholar who works in these conditions which requires a reclaiming of the African heritage has ‘to generate knowledge which can humanize the world’. It must also help destroy those forces that help in the dehumanization of the world in general and African people in particular.

The African scholar who engages in such a research to develop a theory and ideology of liberation in the present lived historical experience and promote the practice of freedom, must be participant in the discussion of that lived experience and if necessary take part in the action to change the negative relationships which Africans continue to suffer from. Terry Kershaw has correctly noted:

“Therefore being an Afrocentric scholar obligates the researcher to be an activist and a scholar working in the interest of improving life chances for people of (Africa and) African descent and, in general, for all the people in similar situations” [Kershaw, 1998:41].

These approaches points to a new paradigm in which all-social theories build on the actual lived experiences of people through their history and culture. This approach also points to a new civilisation in which Africa can position itself as an equal member of the global community.

## **From African Studies to the Study of African Civilizations**

One of the fundamental scars that Europe, through its evolutionist social sciences, inflicted on Africa was the degrading of the African societies in the course of European colonisation. Africa was said not to have any history. Its religions were looked upon as being satanic and evil; its cultures were regarded as barbaric and the people themselves were called primitive. This was intended to destroy Africa's self-image and self-confidence in order to make it easier for the colonisers to dominate the continent and exploit its human and natural resources.

Fragmented Eurocentric social sciences cannot therefore be the basis for the understanding of African societies and peoples. Africa cannot be studied and researched in isolation of its bearings. Because of the colonial dislocation of their societies, African intellectuals must first reconstitute their societies holistically from colonial and post-colonial constructions and this cannot be done without discovering the basis of these societies and communities. This holistic approach is the study of African civilisations, their specific characteristics, their achievements and their contribution to the evolution of a global human history and culture. Only when Africa has rediscovered itself in this way, can it then tackle the other problems, which can fit it in the twenty-first century.

The struggle for a new paradigm by implication therefore demands that Africa must rediscover their memory and situate themselves in the emerging world as an equal partner in the global community. By first reconstituting itself on the basis of its civilisations, can African virtues and values be part of the synthesis in a global civilizational dialogue that the UN Secretary-General has called for in the twenty-first century. Such dialogue must be aimed at removing the historical distortions that European hegemonism brought about in placing earlier civilisations at the bottom of the evolution of human cultures and civilisations.

In denying that black Africa had any links with Egypt and that Ancient Egypt had any influence over Greece, the modern Europeans tried to reverse the flow of history. Europe committed the biggest historical fraud of all time when they tried to hide themselves behind the claim to Greek heritage as well as linking it to Judeo-Christian past without them even having a clear understanding of the origins of religion. Instead they resorted to using the race factor to uplift themselves on the stolen legacy of the Africans, which they claimed was Greek. All Africans must resist this historic fraud by reasserting the authenticity of their civilisations.

Indeed, as Bernal has noted, the race factor was the bedrock upon which Eurocentrism was built which specifically came with the rise of European imperialism. It was theoretically constructed at the University of Göttingen in Germany. King George II of England and the Elector of Hanover founded this University in 1743 as a cultural bridge between Britain and Germany. It is here that the first academic work in human racial classification took place which, according to Bernal, 'naturally put Whites, or to use his new term, Caucasians, at the head of the hierarchy'. The first academic work on the races, written in the 1770s by Johann Friedrich Blumenbach, a professor at Göttingen, was used as a 'scientific' basis for the creation of the 'Aryan Model' which tried to displace the 'Ancient Model' of history as understood by early European writers and which placed Africa in ascendancy of world civilisations [Bernal, 1987: 22-38].

Ali Mazrui, an African scholar, has argued that some recognition should be accorded to Africans in the creation of Egyptian civilization. According to him:

"But it is at any rate time that it was more openly conceded not only that ancient Egypt made a contribution to the Greek miracle, but also that she in turn had been influenced by the Africa which was to the south of her. To grant all this is, in a sense, to universalise the Greek heritage. It is to break the European monopoly of identification with ancient Greece [Clarke, 1990: 4].

Quite apart from the fact that such a concession would be historically fraudulent, mainstream Western historians, including the Classists, have never conceded Mazrui's modest request. Indeed their response to Martin Bernal's equally modest attempt to present a 'Revised Ancient Model' more than twenty years since Mazrui's appeal has, if anything, been more than hostile [Bernal, 1991; Lefkowitz & Rogers, 1996, Howe, S [1998].

In a more forthright way, Cheik Anta Diop had challenged the Aryan Model confrontally and asserted the linkage between Africa and Egypt as a single civilization:

"Ancient Egypt was a Negro civilization. The history of Black Africa will remain suspended in air and cannot be written correctly until African historians dare to connect it with the history of Egypt. In particular the study of languages, institutions, and so forth, cannot be treated properly; in a word, it will be impossible to build African humanities, a body of African social human sciences, so long as that relationship does not appear legitimate... Imagine, if you can, the uncomfortable position of a western historian who was to write the history of Europe without referring to Greco-Latin Antiquity and try to pass off as a scientific approach" [Diop, 1974:xiv].

Diop himself has been persistent in this challenge and his efforts like those of his African-American contemporaries have begun to pay off as more and more African intellectuals take up the call. His work has however been belittled as ‘shoddy’ and scholars whose own knowledge of history is culture coded and Eurocentric have even called Diop a ‘crank’ [Hughes, 1993].

While we agree that Diop’s work has some flaws, his tremendous effort at correcting the historical record has to be acknowledged as original. Such acknowledgement should not only recognize his work as only one of a political significance, although it is, but foremost as a path breaker in the search for a true world history that places Africa’s contribution to world civilization in its correct perspective. Our role as African scholars is to continue the work, which Diop initiated and perfect it rather than pointing to its flaws for purposes of undermining it. Even Stephen Howe, who pours so much scorn on Diop’s work, acknowledges this contribution when he states:

“In 1973. Diop lamented that ‘the conditions for a true scientific discourse between Africa and Europe do not yet exist in the very delicate domain of the human sciences. He was right, and he would still be right in 1990’ [Howe, 1998: 190].

But having said *this* he immediately goes to the attack by arguing that Diop’s own work and that of his “vulgarizes and propagandists for a racialized cultural essentialism” has made that situation worse, not better. His objective, like that of the other critics of Diop and Bernal, is to demolish their attempt to establish a history that has relevance to the Africans. He argues at different parts of his book that he considers Greek contribution ‘superior’ to the African-Egyptian one because of its “usefulness to us” [*Ibid*: p.128, Italics added]. But the ‘us’ here is not neutral and value-free. It refers to a particular group of people, namely Europeans and westerners in general, for elsewhere in the book he states:

“More significantly and damaging still, in so far as we are primarily interested in the broad spheres of moral, social, legal and political philosophy- and pretty evidently almost everyone involved in the controversy *is* so concerned, rather than being preoccupied with more abstract ontological or epistemological questions- it is no means evident that what ancient Egyptian thought has anything whatever to tell us. It presupposes an intensely hierarchical society, based on slavery and on certain persons being divine while others are rightness. It has nothing to say about democracy, equality, liberty, individual rights, the distribution of wealth and power (sic!); let alone issues of race, gender, class, ethnicity or ecology (!)-any of the questions, which mainly preoccupy modern societies and those who seek to, philosophize about them. Its presuppositions might be of value only to people who are keen to re-establish theocratic and authoritarian polities: but then, that is precisely what some Afrocentrists so evidently dream of. When Molefi Asante seeks to summarize what he believes the world owes to ancient Africa, the only specifically political or social entry on his list

is 'the concept of monarchies and divine -kingships' ... If, by this logic, we wish to celebrate and revive the Divine Right of Kings, we should emphasize our African heritage. And if not, not"! [Ibid: 207].

This passage purporting to be a 'scientific' critique of Afrocentrism is in fact propaganda. If anything, it gives strength to the Afrocentrists who, "for us", also find need to re-examine Africa's history and heritage which does not consist merely of theocracies, monarchies and divine kings! Moreover the fact that ancient Greece, in its idealized Athenian form of 'democracy', from which Howe seems to owe so much satisfaction, was based on a system of slavery – a system in which slaves and women as well as foreigners had no 'individual rights'!

This fact however did not stop the Europeans from claiming their heritage from the Greeks. Quite the contrary, Howe wants the entire world, including Africans, to express gratitude to the Greeks in so far as they passed on to Europe ideas of democracy, regardless of the fact that it was a 'democracy' based on slavery and near-slave status for women! Western liberal democracy is not universal, despite all attempts being made to impose it everywhere under the guise of the "Washington Consensus". There is resistance to it in political Islam and from other non-western societies. Today, as we have shown above, many societies in the South or so-called Third and Fourth Worlds, have found western democracy to be a system under which the west imposes new forms of slave (debt) bondage on the majority of the non-European peoples.

Perhaps, it will surprise Howe that Baganda, Batoro, Banyoro of Uganda and many other African communities are resorting to monarchism, and other forms of traditional authority, which were their heritages before colonialism. They are doing this without the academic advice from Diop! This is not because they want to restore 'divine kingships' (which never existed in most of them), but because they want to get rid of post-colonial authoritarianism, despotism and European-inspired post-colonial dictatorships in Africa. To do this, they resort to their, cultures and traditions, albeit in a post-traditional form. Linda James Myers has put the matter squarely:

"Our purpose in supporting the resurgence of the deep structures of African culture is not for the replication of ancient surface structure culture in modern times. Even if possible, that would be unnecessary, and likely, unbeneficial. For example, ancient Egyptians taught a deification process whereby man or woman could achieve everlasting peace and happiness, called the Egyptian Mystery System [James, 1954]. We do not, however, need to go through the form and ritual of the Mystery System itself to benefit from its teachings. Indeed the conceptual system that we would be seeking to achieve would preclude that, because its basic premise is to allow the outward form to change freely while focusing on its source, inward spirit that is unchanging. One that is accomplished we will have ensured that outward materiality will 'take shape'

consistent with underlying spirit in a manner far superior to anything a segmented conceptual system could fathom” [Myers, 1998:8]

This must be adequate to answer Howe’s misunderstandings of the real basis of the Afrocentric turn. But despite these detractions, the intellectual struggle for an African identity and spiritual resurgence based on its civilization has moved a step farther from where Diop and others began. The struggle has moved from what Jacob Carruthers has described as ‘the old scrappers’ who, without any special training, ‘took whatever data were available and squeezed enough truth from them as circumstances allowed’ to the second generation, which Carruthers has called, ‘the Negro intellectuals’.

These he regards as being ‘completely enthralled to European historiography’. Their main argument is that Blacks had only a share in the building of the Egyptian civilization along with other races. The third generation, which Carruthers calls, ‘the extension of the old scrappers’, have, on the other hand, ‘developed the multidisciplinary skills to take command of the facts of the African past which is a necessary element for the foundation of African historiography’ [Carruthers, 1984:30]. We should build on this third generation of researchers to throw more light on Africa’s past and its great civilization.

Martin Bernal has identified himself with the second group in the propagation of his ‘Revised Ancient Model’ because he finds it easier to place himself in the spectrum of black scholars than within the ‘academic orthodoxy’. Despite his moderation, the orthodox Western historians and Egyptian ‘classicists’ have nevertheless attacked his Model and his theories because they see them as reinforcing the African search for identity, as we have seen above. Bernal sees the battle between the second and third groups as likely to continue for a long time. However, he sees the earlier disintegration of the extreme Aryan Model and the introduction of externalism and relativism into ancient history as having ‘subversive effects on the *status quo* as a whole’ and hence their resistance to his Model. He adds:

“However, the fundamental reason I am convinced that the Revised Ancient Model will succeed in the relatively near future is simply that within liberal academic circles the political and intellectual underpinnings of the Aryan Model have largely disappeared” [Bernal, 1984:437].

Bernal’s prediction is perhaps borne out by the recent appearance of Samuel Huntington’s 1989 article in the *International Affairs Journal* and his 1996 book on the *Clash of Civilizations*. In these publications, Huntington has noted the decline of Western Civilization and the resurgence of non-European

indigenous cultures. He acknowledges that culture ‘almost always follows power’ and that as the erosion of western cultures deepens, indigenous, historically rooted mores, languages, beliefs, and institutions (will) re-assert themselves’. It is in this atmosphere that he acknowledges Africa to be a civilization with a question mark! [Huntington, 1996:19, 45,91].

Other western scholars have taken a somewhat similar position to that being advanced by Bernal [Burket, 1992; Springborg, 1992]. Burket acknowledges that cultural predominance remained in East and that it was only later that the Greeks were able to develop their own distinctive forms of culture [Burket, 1992:128]. Patricia Springborg advances views similar to those of Bernal. She argues that the Greek heritage owes much to Egypt from where the Greeks derived not only their ideas about philosophy, but also history and theories of government. She also, like James and Marx, agrees that Plato’s Republic was based on Egyptian models.

According to her, Plato, like Homer, Hesiod, Herodotus, and a host of other Greek writers, accepted that Greece’s origins lay east and south, symbolized in the mythical founder-figure of Danaus, the Egyptian and Cadmus, the Phoenician. But these truths haunted Europe during the late Renaissance and the pre-existence of these non-European systems were denied, concealed or fabricated in ‘alternative’ myths of origin and the mythical demonised figure of ‘oriental despotism’ and ‘African primitiveness’. These myths, according to her, ‘haunted all modern western thought and it was against this background that idealized forms of freedom and democracy ‘defined themselves’ [Springborg, 1992: 94-115].

But as Ivan Sertima has warned despite the contribution that has been made by Bernal as a popular scholar, ‘there is not always a popular way in which a serious scholar can bring about a fundamental re-thinking in his field’ [Sertima, 1989:6]. The collorary to this is that it is through the actual struggles of the African people for the recognition of their heritage that is crucial to any meaningful recognition of their heritages.

However, these acknowledgements by Huntington and many other Western scholars must be taken advantage of by African intellectuals and ordinary people to further broaden their work in the writing of a true African history as part of a new world history. Diop warned that no world history could be written without the Africans participating in this work. To be effective however this work must, in our view, draw its inspiration and strength from the ongoing struggles of the African people through their cultural heritages, which we have referred to as post-traditionalism. Diop’s own work is evidence of



how an academic struggle can be rooted in the struggle of African people for their freedom and be made to bear fruit.

Diop's work began with the student struggles in Paris to 'restore the collective national African identity' in which the 'culture concept' played a significant role. He continued this struggle on his return to Africa, and it was in the course of that struggle that he was able to develop his outstanding research in this field. This work must continue with more and more African intellectuals drawing from his efforts as well as from the rich cultural heritage of the African people throughout the continent and the Diaspora. As Fidel Castro was recently quoted in the British newspaper, *The Guardian* of July 22, 1999: "Culture will be the weapon (of struggle) of the twenty-first century". African scholars must take heed and embark on the work of defending their cultural heritage that has been so much maligned by a Eurocentric culturally coded scholarship.

To be meaningful and sound, this research effort has to draw from the actual struggles of the ordinary African people throughout the centuries who have fought hard battles both culturally and intellectually to preserve their cultures, traditions, religions and history. We have not to look too far to see this African civilizational heritage, but the ground where we live from which we have been alienated. By restoring the old wisdom of Africa, we shall be creating an 'effective history' in which 'the past and the present are constantly merged in the experience of understanding' [Chan, 1984]. It is 'an attempt to come to grips' with the "problem of how one humanizes the exercise of authority and inequalities of social power" which to this day "remains with us whatever we may think of his solutions" [Schwartz, 1985:70, Karenga, 1989:371].

We therefore do not have to go very far to rediscover our civilizational heritage. It is all there for us to embrace and from it regain our confidence as Africans. We have to rediscover Africa's 'power-knowledge' and its epistemological basis that lies in the annals of peoples' knowledge, their memories and libraries. These are there for us to investigate and bring to the fore in the struggle for the resurgence of Africa in the twenty-first century. Only when this work is done can the African people regain their human dignity which modern Europe tried to deny them through racist enslavement and colonial plunder and only then can a global inter-civilizational and intercultural dialogue be meaningful for all world's peoples

As we noted above, Samir Amin has observed that the greatest contribution that ancient Egyptians ever made to the whole world was their introduction of *the concept of eternal life and immanent moral justice*, which opened the way for a humanist universalism. He argues that elsewhere, including pre-Hellenistic

Greece, the status of what later came to be called ‘the soul’ and the fate of human beings after death ‘remain (ed) uncertain and vague’. This Egyptian discovery later became the basis of the invention of ‘immortal soul’ as well as the idea of ‘individual rewards and punishments’ founded on a universal morality ‘that scrutinizes the motives and intentions of human actions’. It is also compatible with all forms of religious beliefs, pantheist as well as enlightened beliefs such as Hinduism [Amin, p: 17-8]. This means that any new Universalist civilization of the future has already the basis in African prior knowledge of immanent justice and the immortal soul upon which we must build as we retrace our lost history. Thinking along these lines W.E.B. Du Bois had argued in his now classical contribution, *The Souls of the Black Folk*:

“Above our modern socialism, and out of the worship of the mass, must persist and evolve that higher individualism which the centres of culture must protect; *there must come a loftier respect for the sovereign human soul that seeks to know itself and the world about it; that seeks a freedom for expansion and self-development; that will love and hate and labor in its own way, untrammelled alike by the old and the new.* Such souls aforesaid have inspired and guided worlds, and if we be not wholly bewitched by our Rhine-gold, they shall again. *Herein the longing of black men must have respect: the rich and bitter depth of their experience, the unknown treasures of their inner life, the strange rendings of nature they have seen, may give the world new points of view and make their loving, living, and doing precious to all human hearts.* And to themselves in these the days that try their souls, the chance to soar in the dim blue air above the smoke is their finer spirits boon and guerdon for what they lose on earth by being black” [Du Bois, 1994: pp.66-67. Emphasis added].

Many African scholars-both on the African continent and in the Diaspora-have joined this challenge and are making a vital contribution to recapturing the lost knowledge, which is crucial for an African renaissance and rejuvenation in the twenty-first century. Ki-Zerbo in his contribution to the UNESCO-sponsored study of the General History of Africa has added weight to the attempt to correct the distorted view of African history by reminding us that Africa’s role in the history of the world has yet to be tested and fully told. He has stated:

“In a nutshell, material civilization originated in the tropical latitudes of Africa and Asia in prehistoric times, and then shifted to the more northerly latitudes of Europe where, as a result of its enhanced technology and the amassing of capital, its performance has been outstanding. Only history can tell whether the transformation of this worldwide system will start in its hinterland in the West or be brought about by the peoples on its periphery, in the same way as the fate of the Roman Empire was sealed by the barbarians. Whatever the outcome, the prehistory of Africa is the story of how an advanced species of ape evolved into Man and how Man, as the driving force behind all progress, put a stamp on nature.” [Ki-Zerbo, 1990: 320.]

The task for the telling and testing of this history has to be undertaken by Africans themselves, but in a manner that does not exclude other contributions

for this is a joint human responsibility; to reconstruct a true history of the world, with Africa being its cradle. This by implication means the dethroning of a Eurocentric world history that has distorted the course of world history and the rewriting of a true world history in which African contribution to civilization is told. This, most importantly, must be the basis of an African post-traditional renaissance, a renaissance that draws deeply on the lived historical experiences of the African people as a whole and their cultures.

## Conclusion

This chapter was intended to review the role that law has played in my intellectual development, and the way I had recourse to other social sciences and ideologies to understand the world and act to change it. The review has shown that the emergence of the humanities and their compartmentalisation into social sciences imitating the natural sciences is a phenomenon of the late European Enlightenment, which in response to religious intolerance took on a reactionary scientific world new based on evolutionist conceptions of history.

Such a rigidified unilinear and scientific social sciences were bound to come into collision with the dynamics of a living society. The survey has shown how the attempt to use law as an instrument for the change of society to conform to a particular world view and existing social relations came in conflict with the living forces who through their own means have up a resistance and struggle against the imposed relations and structures of power.

This resistance has been a cultural resistance right from the rise of the European Christian crusades against the religious of the Old World. The resistance has been carried on through these cultural and spiritual tools, which manifested themselves into an anti-imperialist, anti-colonialist movement. This movement is now forcing a rebirth of African civilisations as the basis on which an African renaissance can take place as part of the re-emergence of the Africa as an equal partner in the family of humanity.

In this re-emergence of Africa in new clothing, African scholarship which draws its foundation from the African civilisation, can then enter into dialogue with other forms of knowledge to form the totality of knowledge of the whole humanity in which each culture and civilisation is recognised for its contribution. This will be a pluralist universalism in which Eurocentric approach will be incorporated as a particular and not a universal contribution.

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